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Aims and scope

- 1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.
- 2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.
- 3 To provide a link between all those who serve on tribunals.
- 4 To provide readers with material in an interesting, lively and informative style.
- 5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

Tribunals is published three times a year by the Tribunals Committee of the Judicial Studies Board, although the views expressed are not necessarily those of the Board.

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EDITORIAL



The ramifications of last year's White Paper continue to be a talking point amongst the tribunals judiciary. Although you won't have spotted mention of it in the Queen's Speech, I think we can still expect a Courts and Tribunals Bill later this year, and the editorial board of this journal are preparing to dedicate an issue to its contents.

In the meantime, the implications of the reforms for the devolved jurisdictions of Wales, Scotland and Northern Ireland has provoked some interesting debate, and we have included three articles in this edition on the subject, on pages 7 to 14. Each of the three authors seems to believe that their jurisdiction would gain from reforms along the general lines set out in the White Paper, but in each case with the further benefits derived from the systems as they exist already, particularly in terms of flexibility and speed.

Our interview on page 19 and profile on page 16 have a 'social benefit' theme. The interview is with Kenny Mullan, one of the authors of the Northern Irish piece described above, and follows his recent appointment as the National Judicial Training Officer for the Appeals Service in May 2005. Our profile is of Gary Hickinbottom, the Chief Social Security and Child Support Commissioner, whose name also appears more than once in Lord Justice Carnwath's article (see page 5) as one of the key players in the establishment of the new Tribunals Service. We are delighted that Robert Carnwath has expressed himself willing to write a regular column in the journal, and to keep our readership up to date with his thinking as the foundations are laid for the judicial reforms laid out in the White Paper.

We are grateful to all of you who took part in the readership survey that was conducted at the end of last year. One message that came through loud and clear was that it is almost impossible for us to publish too many articles on the subjects that we term 'judgecraft', including such skills as decision-making and decision-

writing, assessing evidence and hearing unrepresented parties. This issue of the journal includes an article on note-taking by Nuala Brice, which I hope will hit the spot. Readers also like to see notes on cases that may have wider implications outside the originating tribunal, and on page 20 we include a description of *E and R v Sec of State for Home Dept*, which judgment discussed the circumstances in which new evidence may be applied to an appeal or review of a decision. It is possibly worth reiterating here that we would be delighted to hear from any readers of cases that you feel would be of general interest to our readership.

One of the questions in our questionnaire related to the frequency with which this journal appears. We are particularly keen to be able to produce timely articles analysing continuing reform in the whole area of administrative justice, and it has been agreed, therefore, that we should publish three issues over the next 12 months – this, the Summer 2005 issue, and in Autumn 2005 and Spring 2006. Sharp-eyed readers will notice that we have also taken the opportunity to modify the design of the front cover of the journal, in an effort to improve accessibility and show more clearly what is appearing inside.

We are also appointing some further members to the editorial board to add to the pool of expertise available in suggesting and commissioning articles. We are looking in particular for lay and specialist members of tribunals and individuals working within the advice sector, who are keen to allow others to benefit from their knowledge and experience. An advert for these new appointments is included on page 15, and I would urge anyone with an interest to apply.

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TAKE NOTE: THEY MAY *be* NEEDED

How long should a note of a hearing be? Which parts of the proceedings can be left out? Do other people have to be able to read them? NUALA BRICE addresses some common concerns.

Note-taking is one of those judicial skills that everyone is expected to know without being taught. But it gives rise to many questions, some of which are considered below. Although the answers are based on the practice in the VAT and Duties Tribunals, they could be of more general application.

Is there a legal necessity to take notes?

A tribunal chairman is acting in a judicial capacity and has a judicial duty to make notes of the proceedings, including the evidence, for the assistance of any appellate court.

If you are lucky enough to be provided with a transcript of the proceedings, then there is no need to take a note, although most chairmen do. If the proceedings are recorded, then the need to make notes of the evidence may not be so pressing. But there will be a need to record other events occurring during the proceedings. (In the VAT and Duties Tribunals, whether a transcript is to be provided is for the parties to decide as they have to pay for it, not the tribunal. Nor are proceedings recorded.)

What help are they?

Even if an onward appeal from the decision of a tribunal only lies on a point of law, the notes of evidence before the tribunal can be relevant if the findings of fact are questioned. Permissible grounds for questioning the findings of fact are where a party alleges: either that there was no evidence to support a particular finding of fact; or that the tribunal failed to make some relevant finding of fact; or that the tribunal misunderstood the evidence; or that a finding of fact by the tribunal was perverse in the sense that no tribunal, properly directed, could have made that finding on the evidence before it.

The requirements

Where an onward appeal lies to the High Court, the requirements about notes of evidence will be found in the Civil Procedure Rules. Part 52 contains a Practice Direction. Paragraph 5.6 of the Practice Direction describes the documents that must accompany a notice of appeal to the High Court. Paragraph 5.6(7) refers to ‘other documents which the appellant reasonably considers *necessary* to enable the appeal court to reach its decision on the hearing of the appeal’. The documents mentioned under heading 5.6(7) include at (c): ‘any relevant transcript or note of evidence’. Paragraph 5.15 provides that, when the evidence is relevant to the appeal, an official transcript of the relevant evidence must be obtained. Paragraph 5.16 provides that, if evidence relevant to the appeal was not officially recorded, a typed version of the judge’s notes of evidence must be obtained.

Thus, on the occasion of an appeal to the High Court from the decision of a tribunal, there is an obligation on the person appealing to provide the chairman’s notes of evidence. However, the obligation is restricted to notes of evidence relevant to the appeal – in other words, notes of evidence that may be reasonably *necessary* to enable the High Court to reach its decision. Notes of evidence will thus be required if the appeal to the High Court involves one of the permissible grounds for challenging the findings of facts.

The purpose

What about the overall purpose of note-taking? Are notes merely an aide-memoire for the chairman’s private purpose? The main purpose of note-taking is to

provide notes of the evidence that will be available to the appellate court if required. However, other important purposes are: to provide a comprehensive account of the hearing in case it is needed in the future (for example if an appellant claims not to have had a fair hearing); and to assist the chairman in writing his decision. Note-taking also aids concentration. A note that, say, a chairman informed an unrepresented appellant of the need for evidence rather than relying on simple assertions might be the only record that such a statement was made during the hearing.

How much?

As to whether the notes should be confined to the evidence or include all the proceedings, although the notes of evidence must be available for an onward appeal, the notebook should ideally record all the proceedings. For example, if there is a short adjournment to enable a party to consider late evidence, the fact of the adjournment and the length of it could be noted. Again, if there is an application during the course of the proceedings, the notebook may be the only record of the application being made and of the direction given.

Notes can be taken in shorthand or on computer or, indeed, in any other convenient way. They do not have to be taken in longhand in a blue notebook.

Who should take notes?

Should tribunal members as well as the chairman take notes? Paragraph 5.16 of the Practice Direction in the Civil Procedure Rules only refers to the 'judge's notes of evidence'. Although, therefore, it appears that there is no requirement for the notes of evidence made by a lay or wing tribunal member to be produced on appeal, it is highly advisable for all tribunal members to take notes. Some appellants to the High Court have asked for the notebooks of tribunal members as well as that of the chairman. If a specific direction is given, the notes

should be produced. In one case an appellant asked the High Court to direct production of the notebook of the tribunal member as well as that of the chairman. The High Court gave such a direction and so the member's notebook was produced. Apart from being a good aid to concentration and a record for the member to refer to when considering the draft written decision, the member's notes may complement those of the chairman especially when, for example, the chairman is himself asking questions or dealing with procedural points and cannot conveniently make a full note as well.

It is most useful for the chairman to make a note of the legal arguments of the parties and the authorities cited.

Recording timings

It is not obligatory to record timings (of, for example, the start and end of a witness's evidence) but it is regarded as good practice. Timings could record, say, a late start and the reasons for it. Also, in long appeals of, say, five days, some advocates when commenting on the evidence given earlier in the hearing refer to it by reference to the date and time it was given. So, if times have been recorded, it is easier to locate the notes of the evidence referred to.

Similarly, although it is not obligatory to record breaks in the proceedings – for example, short adjournments to consider applications made during the hearing or before giving a decision – it is best practice to do so. The notebook can also record the reasons for allowing or dismissing the application or appeal.

Legal argument

It is most useful for the chairman to make a note of the legal arguments of the parties and the authorities cited. In many cases there will be skeleton arguments and so the notebook need only refer to numbered paragraphs in the skeleton. Frequently, however, skeleton arguments are either not referred to at all or are departed from quite considerably and so the definitive record of the arguments should be in the notebook with appropriate references to the skeleton arguments where necessary.

It is also useful to record in the notebook those authorities actually cited at the hearing – frequently the skeleton argument will refer to many authorities that are not mentioned orally at all. Finally, when referring in your notebook to documents, this can most easily be done by cross-referencing to pages in the bundles of documents as the bundles are kept by the tribunal centre (at least until the time for appeal has passed).

Questions and answers

When taking notes of evidence, it is not necessary to record both the questions and the answers, so long as the evidence of the witness is fully recorded. Some chairmen find it helpful to record both as this maintains the flow of the proceedings. Others keep a very good note of what the witness says without the questions.

The notes of evidence do not need to record every word that is said. It is also useful to make a note when evidence in chief ends and cross-examination begins and when cross-examination ends and re-examination begins.

Legibility

Because notes can be recorded in shorthand or in a computer, they do not have to be legible to all but you must be able to read them and to provide a typed version of any notes of evidence that may be necessary for an onward appeal. Some chairmen write legal shorthand, which is, of course, acceptable.

Tense

It does not matter whether notes are in the past or present tense, as long as they adequately record the proceedings.

Interrupting the flow

Many chairmen feel concerned about what they should do when they are asking questions of the witnesses, and who should then take a note of the answers. The answer is that it is most helpful if the tribunal member or members could take a full note of questions asked of a witness by the chairman and the answers. Also, it is helpful if members could take a full note of any procedural matters or applications dealt with orally

by the chairman during the proceedings. If there is no member, then the chairman should make his own note even though this may slightly delay the proceedings. As to what is more important – to take a full and accurate note but to delay the proceedings or to take a note that does not interrupt the flow of the proceedings unduly, it is desirable to find a method of note-taking that is both full and accurate but that does not unduly interrupt the flow of the proceedings.

At the end of the hearing

If you are a part-time chairman and you have written your decision, it is good practice to return all the papers and your notebook to the tribunal centre. However, some chairmen prefer to keep their notebooks. The important thing is that the notebook should be available if there is any onward appeal.

Appeals

Do you have to produce your notebook to the parties before they appeal? The standing arrangements of the VAT and Duties Tribunals are that notebooks are not released until the notice of appeal to the High Court has been lodged. It is only then that a decision can be made as to whether the notes of evidence are relevant to that appeal in the light of the grounds of appeal and whether the notes will be necessary to enable the High Court to reach its decision.

And if you are asked to produce your notes, are you required to turn them into a typed version or at least into a form intelligible to others? There is no requirement to turn long-hand notes of the whole appeal into a typed version, or to verify a typed version of the notes of the whole appeal prepared by an appellant, if either of these would be unduly burdensome. However, it would be usual, if the appellant indicated specific passages that were both reasonably short and relevant to his appeal, either to have these passages typed or to offer to verify a typed version prepared by the appellant.

DR NUALA BRICE is a full-time chairman at the VAT and Duties Tribunals.



‘A CLEAR SINGLE VOICE’

In the first of a series of regular articles, ROBERT CARNWATH envisages how he will put into effect the reforms proposed by the White Paper, and in particular those directly affecting judicial office-holders.

I am delighted to be writing my first article for the *Tribunals* journal. One of the main challenges I face in my role as Senior President designate of tribunals is communicating with the thousands of panel members spread across different tribunal jurisdictions. I am particularly pleased, therefore, that Professor Hazel Genn has permitted me to become a regular contributor to this journal.

The last edition of the journal contained a synopsis of my speech to the annual conference of the Council on Tribunals (CoT) in November 2004. I said then that the White Paper *Transforming Public Services: Complaints, Redress and Tribunals* left it to us to work out together how to put into effect the judicial reforms it proposed. In this article, I would like to set out how I envisage doing this.

Tribunal Presidents Group

I also said at the CoT conference that I had inherited a very useful forum for coordinating this work, the Tribunal Presidents Group. The Group, originally set up by Henry Brooke LJ, comprises the presidents (or equivalents) for those tribunals that will initially constitute the Tribunals Service and provides an invaluable source of experience and expertise. I will continue to work with the Presidents Group but, in view of the range of issues to be resolved, I have also set up some smaller working groups to look at specific issues including:

- Legislation – a small group of tribunal presidents chaired by me is working with officials in the Department for Constitutional Affairs (DCA) in developing the draft Courts and Tribunals Bill, which will be the legislative vehicle for a number of the reforms.

- Training and appraisal – led by Mr Justice Sullivan and coordinating with the JSB’s Tribunals Committee to ensure greater consistency in the standards of training and appraisal across tribunals.
- Appointments and deployment – led by Mr Justice Hodge to look at the design of the new assignment system and the issues surrounding judicial terms and conditions.
- Information technology – led by Judge Hickinbottom, coordinating judicial input into the future IT strategy for the new organisation.
- Upper tier – again led by Judge Hickinbottom working with DCA officials in developing the new upper-tier tribunals.

There are also a number of issues that cut across the reform programme, including the proposed changes to the tax and mental health tribunals. I have asked the respective presidents (or in the case of mental health, the liaison judge) to keep the Tribunal Presidents Group and me informed of progress. I have also asked Colin Milne, President of the Employment Tribunals (Scotland), and Judge Hickinbottom to keep me informed of developments regarding what I loosely term the ‘cross-border’ issues affecting Scotland and Wales respectively.

Smaller tribunals

My thoughts, however, are not confined simply to the largest central government tribunals. Quite rightly, in my view, the White Paper (and the Leggatt Review before it) casts its net wider. I am pleased to say that DCA officials have a piece of work in train to determine at what point other smaller tribunals might transfer to the Tribunals Service and where the scope of the reforms should stop.

In this context, I am particularly thinking of whether local government tribunals should form part of the new service and how the recommendations put forward in the Law Commission report *Land, Valuation and Housing Tribunals: The Future* are to be taken forward.

As I hope would be evident from the above, in designing both the scope and the statutory framework of the new service, officials from DCA and the relevant parts of the judiciary are working very closely together on the shape of the future Tribunals Service. This, of course, extends to Peter Handcock, Chief Executive designate of the Tribunals Service, with whom I have forged a close working relationship.

Listening

As I mentioned at the beginning of this article, one of the key areas for me will be communication with you and your colleagues. Part of the rationale behind creating the post of Senior President was, to quote the White Paper, to provide 'a clear single voice able to speak for the tribunal judiciary collectively'. I see this as very much a two-way process and I would like to hear your views on the direction of the reform programme.

I have been keen, therefore, so far as my Court of Appeal responsibilities allow, to meet as many of you as possible,

preferably at cross-tribunal events such as the opening of the new Immigration Appellate Authority Hearing Centre in Gwent, in January 2005. We are also giving thought to the possibility of something more formal, such as judicial conferences in the summer. As well as contributing regularly to this journal, I will be writing articles in *Adjust*, CoT's new quarterly newsletter. The Tribunals Service website (www.tribunalservice.gov.uk), launched in April 2005, will also provide a means for providing information specifically for tribunal panel members.

New legislation

This year will be a very important one for all who are involved with tribunals. The Tribunals Service began its transitional year in April 2005 ahead of formal launch of the new agency in April 2006. And I hope that we will soon be discussing a Courts and Tribunals Bill that will be before Parliament. As I said at the CoT Conference, we have a unique opportunity to shape the delivery and development of the future tribunals system as we think it should be. I look forward to working with you to meet this challenge.

LORD JUSTICE CARNWATH is the Senior President designate of Tribunals.

ADJUST *with e-mail* NEWSLETTER

In January 2005, the Council on Tribunals launched *Adjust*, a quarterly 'e-zine' covering all aspects of the administrative justice world. The first issue was circulated by e-mail to the tribunal judiciary, ombudsmen, government officers, user groups and others with an interest in administrative justice. It had an initial circulation of around 1,000, which the Council hopes to expand over time.

Announcing the launch, the Council's Chairman, Lord Newton of Braintree, explained that the aim of the newsletter was to establish a channel of communication between the Council and the wider

administrative justice world, including the voluntary sector and user representative organisations. Its introduction – and the title given to it – follow the Government's July 2004 White Paper setting out its plans for reform of administrative justice, including the evolution of the Council into an Administrative Justice Council (AJC).

The April 2005 edition is now available from the Council's website at www.council-on-tribunals.gov.uk. The website also has a subscription facility for those who would like to receive *Adjust* direct to their e-mail inbox.



SCOTLAND

SEPARATE *or* TOGETHER

JOHN ELLIOT *says the priority for Scottish tribunals in the light of the administrative justice reforms is to avoid the creation of a two-speed system of tribunals within their jurisdiction.*

The effect of the White Paper *Transforming Public Services: Complaints, Regress and Tribunals*, published in July 2004 will, as we all know, have a profound effect on the operation of tribunals in England and Wales. Its effect on the operation of tribunals in Scotland, while equally profound, is much less certain.

Scottish tribunals fall into two main categories. The first comprises those that are part of a tribunal operating throughout Great Britain (referred to in this article as GB tribunals) and includes some tribunals with their own Scottish arm, such as the Employment Tribunal. The second consists of Scottish-only tribunals, which operate independently, such as the Scottish system of education appeals committees.

White Paper

The readers of this journal will be familiar with the substance of the White Paper. At its heart is the proposal to bring together the largest central government tribunals in a single Tribunals Service.

The administrative arm of this new organisation will be an executive agency as part of the Department for Constitutional Affairs. The judicial element will be reformed so that a Senior President of tribunals (Lord Justice Carnwath is the Senior President designate) will be put in place and there will be a unified system of deployment of those sitting in first-tier tribunals and another for those sitting in appellate tribunals.

The White Paper grapples with the proposal to resolve disputes at source rather than in tribunals. So, a fundamental element is the improvement of standards of first-tier decision-making. Further, there will be a new structure of appeals and reviews and a statutory tribunals

procedure committee, responsible for tribunal rules. The Council on Tribunals will evolve into an Administrative Justice Council.

Scottish law

It is important to reflect on these changes in order to understand what the effect will be of putting some of the White Paper proposals into practice north of the border. In Scotland, we have our own legal system. While it would be wrong to make too much of the differences between our respective laws, marked differences in areas such as intestate succession mean that the outcome of a social security case, for example, may be different in Scotland to a similar case in England or Wales. Thus, a Great Britain tribunal has to be sufficiently flexible to review the decisions of government departments against different legal requirements.

Scottish members

But there are many other issues that are equally important. For example, it is generally accepted that Scottish members should sit on Scottish tribunals. This need not be immutable – some English people can and do sit on tribunals in Scotland and indeed vice versa. But you will not be surprised that Scots are jealous of their position on judicial bodies in Scotland.

As mentioned already, some tribunals have Scottish (we don't like the word 'regional') divisions. For example, there is a Scottish arm of the employment tribunal system, with its own Scottish President. Generally, the Scottish end of a GB tribunal will have a different personality from its brethren in England and Wales, which has benefits in terms of its perception, smoothness of operation and the efficiency with which cases are

despatched. But the new Tribunals Service will thrive on inter-changeability of personnel, which is difficult to manage without risking losing some of that personality.

Scottish-only tribunals

Issues affecting the operation of GB tribunals in Scotland are not the only ones, however. Of at least as much moment to Scots is the operation of Scottish-only tribunals. As well as the education appeal committees mentioned above, these include children's hearings – our own unique system of child justice, where more than 14,000 cases are decided each year; the Lands Tribunal for Scotland; the Crofters' Commission; our own rent assessment committees; valuation appeal committees; a soon-to-be mental health tribunal and so on.

One concern relates to resources under the new system and whether Scottish-only tribunals will be worse off than the tribunals falling under the aegis of the new Tribunals Service. Such concerns may be expressed in terms of training, premises, judiciary and administrative personnel.

In relation to training, the Scottish Committee of the Council on Tribunals has always regarded with a mixture of awe and admiration the provision of tribunal training by the JSB in England and Wales. In our annual report for 2003/04 we said:

'We are still pressing the case for a national training resource in Scotland to mirror the tremendous work done by the JSB in England and Wales in developing training courses for, and cascading information to, tribunals . . . we firmly believe that there should be an equivalent service in Scotland to promote and coordinate local training. It is our view that the lack of a national training resource in Scotland is hindering the proper development of tribunals north of the border, particularly those who do not benefit from GB-wide resources.'

Scottish Tribunals Service

It seems clear that Scottish-only tribunals would benefit from the type of overall administration and judicial process that the Tribunals Service will bring. Taken

by themselves, however, they are not large enough to warrant the setting up of a separate Scottish Tribunals Service. There appear to be two possible solutions to this.

The first is to include them, along with the GB tribunals, as part of the new Tribunals Service, which should have its own Scottish branch. The second, and more radical, solution is to hive off all tribunals operating in Scotland into a devolved Scottish Tribunals Service. This would have a number of benefits, not least the creation of a clearly recognisable administrative justice appeal service for the citizen wanting to appeal. Other benefits would include the real and perceived independence of tribunals, improved use of resources and better job opportunities for judiciary and staff.

Two-speed system

Such an outcome may be unlikely, given the jealousies of funding and jurisdiction that exist between England, Wales and Scotland. We seem in Scotland, therefore, to have the prospect of a two-tier, two-speed tribunal system. In this case, GB tribunals will be streamlined, well-resourced and independent, whereas Scottish ones will be forever dependent on the sponsoring authority's goodwill and resourcing. Alternatively, GB tribunals will be monolithic and bureaucratic, whereas Scottish ones will be light on their feet and close to the citizen.

Conclusion

I finish my term as Chairman of the Scottish Committee of the Council on Tribunals mildly optimistic about the state of tribunals and their ability to deal properly and fairly with the grievances that citizens have against the state. It is clear that, more and more, tribunals are focusing on how to deliver good justice to individuals in a way that they understand and can connect with. I am sure that the Tribunals Service will continue to make improvements. We in Scotland have to ensure that we are not left behind.

JOHN ELLIOT is a partner at Lindsays WS Solicitors in Edinburgh. His period of office as Chairman of the Scottish Committee of the Council on Tribunals came to an end in May 2005.



WALES

AIM *is* REPATRIATION

CAROLYN KIRBY *considers how the Welsh Assembly can ensure a first-class system of administrative justice in Wales, when it does not have control over all the functions carried out in its jurisdiction.*

Significant changes are taking place in the tribunal service in England, but there are, as yet, no reciprocal plans in place for Wales. This article examines some of the issues that need to be addressed by the Welsh Assembly government in considering how to ensure that access to administrative justice for the people of Wales remains as robust as that available to people in England.

The reform of any part of the system of justice in Wales must include consideration of the extent to which that change helps to fulfil the aims encapsulated in the phrase 'Legal Wales', which include the repatriation to Wales of law-making functions and the development of a legal system tailored to the social and economic needs of Wales.

The changes proposed by the White Paper of July 2004 build on the proposals made in Sir Andrew Leggatt's report of March 2001. The confusion about the tribunal service in the eyes of the public, identified in that report, are as relevant in Wales as elsewhere. The White Paper goes beyond Leggatt's proposals of a single administrative system within the DCA covering all tribunals and seeks to extend the remit of that agency to cover all forms of dispute resolution and redress, whether between party and party or party and state.

Any mismatch between the service offered to the public by the Assembly and that offered in England will inevitably lead to confusion because of the number of components within the new Tribunals Service that do not have a devolved function. The challenge for the Assembly is to create an administrative justice system in Wales that delivers to the Welsh public a service as good as, if not better than, that being proposed in England while there are functions being carried out in Wales over which it has no control. A close corollary between

the administration in England and that devised by the Assembly will therefore be vital.

A Welsh Tribunals Service

The first issue for the Assembly is that some tribunals in Wales are fully devolved, some have a Welsh administrative function and some have no distinction at all between England and Wales. Any agency set up by the Assembly will not, therefore, have jurisdiction over all the tribunal services offered to the Welsh public. There may be some benefit in establishing whether those tribunals without a separate Welsh function wish to create one.

Despite the difficulties, there is a strong case for the establishment of a Welsh Tribunals Service along the lines of that being created in England. Apart from the benefit of providing a single point of entry for the public seeking to exercise their rights, the issues identified by the Leggatt report still apply. The tension of providing demand-led statutory judicial functions within budget-capped public service departments (as is currently the case for sponsored tribunals) would be resolved. Economies of scale and an improvement of standards in the administration are likely to follow from being part of one administrative agency. Funding for the service would be more clearly defined, which would benefit service providers and the Assembly auditors.

The size of a Tribunals Service in Wales and the numbers of people (both administrative and judicial) involved are such that there is scope to create a centre of excellence.

The importance of a critical mass to enable such a body to function effectively is, however, a significant issue in three key areas: the appointment of members, their training, and the facility to enable legally qualified

members (with suitable additional training) to sit on other tribunals (referred to in the White Paper as the ‘single judicial office’).

Appointments

There is a strong argument for all members of tribunals to continue to be appointed by a single body, the DCA and ultimately the Lord Chancellor, to ensure fairness and transparency in the appointment process and to maintain uniform criteria of merit. An issue for the Assembly is the extent to which it will be involved in that process in the selection of members to sit in Wales. This is closely tied in with the whole concept of ‘Legal Wales’ and the extent to which it is proposed that the devolution of administration of justice to Wales be developed.

Training

The issue of training might be assisted, up to a point, by the creation of a Welsh Tribunals Service. There is a core of skills common to all tribunal work that can be developed by attending courses run by the JSB, though these are necessarily generic in nature and address only the basic skills.

... smaller tribunals may find their best members being poached...

Specialist training is required in two forms: induction training for new members, covering the full range of topics and skills applicable to a particular tribunal; and refresher training for established members, covering new developments in the law or procedure and training on areas of weakness identified during individual appraisal. However, it is only in refresher training that there is likely to be the critical mass of tribunal members in Wales necessary to make the training course effective.

Single judicial office

The ‘single judicial office’ is both an opportunity and a threat to tribunals in Wales. On the one hand, cross-ticketing may be easier in a smaller judicial group and the work more attractive if there is an opportunity of further training in other spheres. There would also be benefits to each tribunal with their members bringing experience of other tribunals. On the other hand, smaller

tribunals may find their best members being poached by larger tribunals so that they are less available, and cross-ticketing is likely to apply between Wales and England so that Welsh members may similarly be poached by English tribunals (either their own or another tribunal) where the sitting pattern may be more attractive.

Welsh language

Overlying all this is the issue of the Welsh language and the duty of the Assembly to ensure that services in Wales, whether administrative or judicial, are available through Welsh. A single Welsh Tribunals Service would assist with monitoring that issue, but only in respect of the services offered through it. Tribunals without a Welsh administration but offering services in Wales are bound by the same statutory obligation.

There needs to be considerable liaison between agencies in England and Wales on this issue. The Lord Chancellor’s standing committee for the Welsh language (chaired by Mr Justice Roderick Evans) has already received an excellent paper on this topic written by Michael Bird and John Thomas of the Employment

Tribunal. This forms a solid platform on which to build.

The draft Mental Health Bill serves to illustrate the degree of thought required in ensuring that hearings and administrative arrangements are offered in Welsh in the appropriate cases. That Bill proposes the creation of an appeal tribunal covering England and Wales. Although the administration of that body is likely to be based in England, there would need to be arrangements in place for appeals to be heard (and administrative arrangements made) through the medium of Welsh where appropriate.

Further measures would need to be in place to ensure that members of the appeal tribunal were familiar with both systems. There is a parallel proposal in the White Paper that a single appeal body be created to deal with appeals from all tribunals. The same issue would arise as to the availability of hearings and administrative arrangements in Welsh.

Welsh tribunal practice

As the remit of some tribunals is enshrined within legislation that falls within the powers devolved to the Assembly, there is presumably scope within secondary legislation for giving legitimacy to different tribunal practice in Wales. Again, the draft Mental Health Bill illustrates this point, with its proposal that the medical member of the MHT be 'a person with a clinical background' as opposed to being defined currently as a consultant psychiatrist.

To avoid the erosion of standards inevitable with a new definition, if the Assembly passed legislation maintaining the definition as that of consultant psychiatrist for the MHT in Wales, that would presumably force the DCA to appoint in line with that criterion rather than the diluted English version.

Accommodation

A Tribunals Service in Wales would be well placed to deal with the issue of tribunal premises. Tribunals conduct hearings in a wide range of premises, some of questionable suitability. Some premises stand vacant for periods of time while other tribunals are operating from hired hotel rooms in the same town. Lord Justice Thomas wrote a detailed paper on the possibilities for rationalisation of use of court and tribunal premises during his period of office as the Presiding Judge of the Wales and Chester Circuit. His proposals are still awaiting the completion of a similar exercise being carried out in England.

Council on Tribunals

Lastly, the Assembly needs to consider the White Paper proposals in relation to the Council on Tribunals. The proposed replacement body, the Administrative Justice Council, will have a much wider and more pro-active remit. It will have a strategic thinking role right across the administrative justice sector and an enhanced role in commenting on legislation affecting (or likely to affect) tribunals. This latter role will embrace legislation passed by the Assembly, for instance as in the example above

relating to medical members of the MHT. There may be scope for the development of a Welsh Committee of the Administrative Justice Council along the lines of the present Scottish Committee of the Council on Tribunals.

The development of a Welsh Committee would depend, to an extent, on the Assembly's proposals for further devolution of administration of justice beyond the sphere of tribunals. As a demonstration of its considerable interest in the significant Welsh perspective, the Council on Tribunals is holding its first Welsh conference in Cardiff on 23 June 2005, where all of these issues will be debated further. There are indications that the First Minister, Rhodri Morgan, may decide to go out

to consultation on the issues raised in the White Paper. If so, the CoT conference will be ideally timed to make a major contribution to that discussion.

Conclusion

These comments necessarily deal only with the preliminary issues and in any

event are not exhaustive. Further dialogue is necessary with the DCA before the secondary issues can be identified and the extent of any additional funding from the government determined, in order for the Assembly to replicate the ambitious scheme proposed in England. Discussions are taking place between the Assembly and the DCA as the position in England in response to the White Paper becomes clearer. The Legal Wales initiative demands that the service proposed for Wales should not be a pale shadow of the service in England, but that it should be a robust service in its own right. It will require a great deal of organisation, cooperation and commitment of resources and funds to enable it to function effectively, but if the Welsh Assembly government is able to make that commitment, there is a significant opportunity to tailor this new service to the needs of the people of Wales.

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of time . . .*

CAROLYN KIRBY is Chairman of the Mental Health Review Tribunal for Wales. This is an abridged version of an article published in the *Wales Journal of Law and Policy* in 2005.

NORTHERN IRELAND PARITY *an* OBLIGATION

Although Northern Ireland is a separate legal jurisdiction, the tribunal reforms to the rest of the United Kingdom will have an impact on it. **CONALL MACLYNN** and **KENNY MULLAN** explain why.

Northern Ireland is a separate legal jurisdiction with its own court and tribunal systems, up to a Court of Appeal, although some tribunal systems, such as tax, cover the whole United Kingdom. Although Sir Andrew Leggatt's report was not specifically mandated to consider the operation of tribunals in Northern Ireland, and neither does the subsequent White Paper cover the jurisdiction, the Appeals Tribunals in Northern Ireland made detailed submissions at various stages leading to its publication, as there is a well-established tradition in Northern Ireland of adopting reforms in Great Britain.

This article concentrates on the implications of the reforms to the system of administrative justice contained in the White Paper for the Appeals Tribunals in Northern Ireland.

Independent

Franks concluded in his report in 1957 that appeals against the decisions of public authorities to tribunals should be judicial in character. That has been the fundamental principle of the development of appeal systems ever since. However, as the Leggatt Committee noted in its deliberations in 1999, in 1957 many eminent permanent secretaries opposed the idea of judicialisation of appeals, and that tendency continued despite the legislative changes that followed. This is reflected in the arrangements for procedural rule-making for tribunals. In the social security field, the Social Security and Child Support (Decisions and Appeals) Regulations are made

See page 19 for interview
with Kenny Mullan

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by the Department for Work and Pensions and its Northern Ireland equivalent.

The policy considerations grounding the regulations are exclusively those of the Secretary of State who is, of course, one of the parties to the appeal. Consequently, Leggatt concluded that, from the point of view of appellants, all appeals, to use a football analogy, are an away game. The Secretary of State decides how decisions are made, which decisions are appealable and all relevant time limits. Public consultation has at best been limited.

An independent administration of appeals divorced from the department whose decisions are in dispute must be the foundation on which the new appeals system is based. One measure of its success will be whether there is a continuing need for representation within the new procedural framework.

New Northern Ireland Tribunals Service

A new Tribunals Service in Northern Ireland must be set up, in parallel to that now established in England and Wales under the leadership of Peter Handcock.

As far as the Appeals Service is concerned, there is an obligation to maintain parity between the two social security systems enshrined in the Northern Ireland Act 1998, the legislation that followed the Good Friday Agreement. Alterations will be required in the social security decision-making structure in Great Britain and these must be replicated here, even if a final political settlement is not reached.

Procedure

Independence of administration will be underwritten by the establishment of a Tribunal Rules Committee, which will function in much the same way as the Rules Committees of the various courts. The departments whose decisions are challenged will be represented, together with appellant groups, members of the tribunal judiciary and the legal profession. The aim should be to achieve an even-handed balance between the need for expedition and a fair resolution of the dispute. Direct access by appellants to tribunals must be an essential part of the procedure.

Speedy resolution of disputes

When a decision is made, the official will know what evidence was considered, the legal rules applied and the reasons for the decision. We endorse the view that decision-making procedures must facilitate internal resolution of disputes. For tribunals to proceed speedily when an appeal is made, the decision-maker must provide written details of their decision quickly in the form of a submission. Powers to require a submission within a fixed period may be necessary. It will be the function of the new administration to provide a tribunal hearing as promptly as possible after the submission is received.

We believe that tribunal clerks should be active in assisting appellants to resolve the dispute and, where necessary, to prepare for the appeal.

Good submissions are fundamental to the efficiency of the appeal system. It is essential that the appellant and the tribunal understand fully in advance of the hearing what decision was made, the evidence on which it was based and how the legal rules were applied. This obviates the need for a lengthy explanation by an official at the hearing. In addition, tribunals depend in most instances on documentary evidence that does not have to be proved, again leading to shorter hearings.

Informality

The White Paper has suggested that some judicial powers might usefully be delegated to members of staff. We

believe that tribunal clerks should be active in assisting appellants to resolve the dispute and, where necessary, to prepare for the appeal. They should not, of course, act as an advocate for the appellant but rather help them to understand what the appeal is about and how tribunal procedures work. Such an oral explanation should enable the appellant to prepare for the hearing in a more focused way and to be less apprehensive about the appeal process. There will always be a need for representation, but such cases will be far fewer.

A representative from the department should attend all hearings. Such departmental officers should be authorised to have discussions with appellants and

to make fresh decisions so as to assist in the resolution of the dispute. Such officers should also assist appellants with their queries about their case. Similar procedures are already in place in income tax and allied appeals.

It is difficult for the hearing to be very informal, as the tribunal must observe fair hearing rules consistent with the Human Rights Act. However, good interpersonal skills are essential and must be a criteria for the appointment of tribunal judiciary. The maintenance and improvement of such skills will continue to be an important part of training.

Within the Appeals Service, we envisage that the President and the Regional Administrative Judges (currently Regional Chairmen) will provide guidance to administrators on procedural issues so as to progress the work of the tribunal consistent with high standards of judicial service to the public. Some appeals must be delayed from time to time due to outstanding appeals to the higher courts. Others must be expedited due to considerations of hardship or emergencies. Some appeals must be concentrated in certain geographical areas due to the distribution of departmental resources, population factors or local circumstances such as particular industries or employment patterns. For example,

most social security cases with a foreign element are concentrated in Newcastle upon Tyne and Appeal Tribunals in the North East have a special expertise in such cases. Mining-related appeals arise mainly near coalfields. The guidance on such matters should be based on good judicial practice alone.

Co-ordination with departments

The presidents, or Senior President, will provide a link to those departments whose decisions are challenged. The report of the president on the standard of decision-making in cases coming to hearing (including decision-making procedures, the content of submissions and the standard of departmental representation at hearings) will be an essential component in the operation of the system. The correction of the failings identified reduces the number of appeals.

Local service

There is a right of an appeal on a point of law in most tribunal systems and in our view, appeals should be heard by a Regional Administrative Judge who also sits at first instance. They will have the required expertise and, in addition, will provide a speedy local service in a region without the need to concentrate such services in capital cities.

In Northern Ireland, there is a tribunal presence in every large town. Social security appellants rarely have to travel more than 20 miles to a venue. It is essential to retain such local services to assist accessibility. We envisage that, with the amalgamation of tribunal administration and systems, it will be possible to retain and improve local services.

Value for money

It has been ascertained in Northern Ireland that an appeal hearing costs about £200 and the figure in Great Britain is similar. It has been calculated that a lifetime

award of Disability Living Allowance can equate to a damages award in excess of £200,000. There are therefore many tribunal cases where there are substantial values involved. Put in this context, there is no doubt that tribunal proceedings are very cheap indeed.

There will be further savings in the new administration, where it is envisaged that there will be one tribunal judiciary only with training for one or more systems as required.

In Northern Ireland, tribunal chairmen and members already hold a number of appointments in, for example social security, mental health and employment tribunals, and it would be more efficient were separate appointments not necessary. Fluctuations in appeal activity across all tribunals could then be managed through a ticketing system. Training facilities could also be centralised and shared.

Conclusion

As part of the political settlement in Northern Ireland, changes to the judicial system are under consideration and the final outcome will not be known for some time. However, as mentioned earlier, the Northern Ireland Act 1998 includes a requirement for single systems of social security, child support and pensions throughout the UK. Thus, the Northern

Ireland administration will have to respond to the reforms to the system of administrative justice as they touch on these areas, even if a final political settlement is not reached.

Broadly speaking, the benefits of any parallel Tribunals Service in Northern Ireland would be largely similar to those for the rest of the United Kingdom.

CONALL MACLYNN is President of Appeal Tribunals in Northern Ireland. KENNY MULLAN is a full-time chairman and National Judicial Training Officer.

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Tribunals journal

Applications are invited for membership of the editorial board for the JSB's *Tribunals journal*, in particular:

- An individual with knowledge of the advice sector.
- Lay and specialist members of tribunals.

Three issues of the journal will be published during 2005 with the aim of providing interesting, lively and informative analysis of the reforms currently under way in different areas of administrative justice. The journal also aims to promote high standards of adjudication in tribunal hearings, including a sensitivity among the tribunals judiciary to the needs of those appearing in front of them, and to encourage a sense of cohesion among tribunal members.

The JSB is now keen to expand the membership of its editorial board, with the intention of increasing the pool of knowledge and skills available there.

Successful candidates will have:

- Knowledge and experience of the broad field of administrative justice.
- An understanding of the needs and concerns of those appearing in front of tribunal hearings.
- The ability to contribute their own thoughts and experiences, with the aim of benefiting others.
- Good communication and interpersonal skills.
- Ideally, some writing experience.

Members of the editorial board are asked to attend three meetings a year at the JSB's London office.

Members of JSB committees who do not hold a full-time judicial or other public office are paid a daily fee (currently £150 + VAT if applicable) plus travel and subsistence expenses in accordance with normal public service rules for attending committee meetings and undertaking other JSB-related work.

The JSB is an independent body, sponsored by the Department for Constitutional Affairs. As well as being responsible for the training of all part-time and full-time judges in England and Wales, it has an advisory role in the training provided for chairmen and members of tribunals and for lay magistrates.

Further information about the appointments and an application form are available from Yolanda Parrish at the Judicial Studies Board, 9th Floor, Millbank Tower, Millbank, London SW1P 4QU (tel 020 7217 4777) or from the JSB's website (www.jsboard.co.uk). The closing date for the receipt of completed applications is 1 July 2005. Candidates who best meet the criteria for appointment may be invited to attend a selection interview in London on 26 July 2005.

The JSB is committed to providing equal opportunities for all, irrespective of age, disability, ethnicity, gender, marital status, religion, sexuality, transgender and working patterns.

GARY HICKINBOTTOM

When Judge Gary Hickinbottom was appointed Chief Social Security and Child Support Commissioner in September 2003 – after several years as the resident civil judge in Swansea – he took charge of a unique group of tribunal judges.



Of the two tiers of appeal from executive decisions on claims for welfare benefits, the first (a full re-hearing on facts and law) is to an Appeal Service tribunal. A further appeal is available from there to a Commissioner, on a point of law only and with leave. There are 17 full-time Commissioners of circuit judge status, based in London and Edinburgh.

The work can sometimes concern highly technical issues of statutory interpretation (current welfare statutory provisions amount to 14 lever-arch files), human rights and European Union law.

A Commissioner's work is largely paper-based – there are oral hearings in only about five per cent of cases – and the claimants are usually unrepresented, meaning Commissioners face the same difficulty as many other tribunals, that is of having to explain procedure and law to lay people in terms they can understand. The challenge is compounded by the complexity of the subject matter and often having to explain matters in writing without the benefit of a hearing.

Evolving role

Under his predecessor, Judge Michael Harris, the Commissioners developed case management techniques that resulted in a slashing of delays. The disposal time is now under half that of 2000. In the last year, Gary has sought to make the process even more efficient – but the sound base left by Judge Harris has, he says, enabled him to invest in more constructive and longer-term projects.

'In addition to deciding individual cases justly,' he says, 'it is part of the role of the Commissioners through their decisions to give guidance on issues of welfare law

of general application – I have encouraged Commissioners to develop this role.' He regularly sits as a Commissioner himself.

Training focus

Training for Commissioners and Deputies has to correspond with their highly specialised field. Their Training and Development Committee works closely with

representatives from the Appeals Service tribunals and is assisting in the training programme for Appeal Service tribunal chairmen on techniques of assessing evidence.

The Committee has also been involved in reviewing the mentoring and appraisal schemes for Deputy Commissioners. During the past year, Gary has introduced further initiatives to develop the potential of Deputy Commissioners, for example by extending the scope of their work to include the full range of benefit cases, oral hearings and applications for permission to appeal.

Tribunal reform programme

The proposed Courts and Tribunals Bill will assimilate the Commissioners' jurisdictions into a new upper-tier tribunal. Judge Hickinbottom is, however, confident that unification will not mean dilution of their valuable specialist knowledge.

'The Commissioners are very supportive of the proposed reforms,' he says.

He is closely involved with the reforms and leads three of the working groups established by Lord Justice Carnwath, examining IT in the new Tribunals Service, the structure of the upper-tier tribunals and cross-border issues.

'Although I miss court work, it is a good time to be Chief Commissioner. The opportunities of the reform programme to develop the role of second-tier tribunal judges present an exciting prospect. It is hard work – but I am looking forward to the challenges of the future.'

CARRY *on* TRAINING

In assessing training needs for tribunal members, the White Paper recognises that ‘existing members will need to undertake training as necessary throughout their careers’, a need to which the JSB has turned its attention with the introduction of a new Tribunals Advanced Skills Course (TASC). That course is a continuation to the successful Tribunal Skills Development Course and is designed as a ‘refresher’ for experienced chairmen.

Held for the first time in November 2004, the course is designed to address the needs of those who have significant experience of chairing tribunals but who want the opportunity to review, refine and further develop their tribunal skills.

Running for one day spread over two, the course is designed to reflect the process of a tribunal hearing in a new and fictitious tribunal – the Pavement Users’ Tribunal – the decisions of which have sufficient at

... delegates have the opportunity to exchange and reflect upon approaches to decision-writing through the examples of different jurisdictions.

stake for the proceedings to be complex. Delegates consider the case at both a directions and final hearing, at both stages examining their own practices at each stage of the process, with opportunity for discussion throughout.

The Pavement Users’ Tribunal is presented in the form of a video created specifically for the purpose of advanced skills training courses. The various sessions embrace topics including:

- Examples of good and bad practice within the role of chairman.
- Applying equal treatment principles.
- Assessing credibility, finding facts and evaluating evidence.

- Communication skills.
- Effective decision-writing.

The course also features sessions exploring case management and decision-writing, and delegates have the opportunity to exchange and reflect upon approaches to decision-writing through the examples of different jurisdictions.

The style of the course is varied and participatory, with ample opportunity for delegates to engage in discussion groups and syndicate exercises.

The course is now firmly established and will run on an annual basis, with the next course planned for November 2005.

It is chaired by Mr Justice Sullivan and its course director is Godfrey Cole.

Anyone wishing to make further inquiries about the JSB’s Tribunals Advanced Skills Course should e-mail tribunals@jsb.gsi.gov.uk.

THE PERFECT TRAINING DELEGATE ...



... always maintains concentration

THE FIVE STEPS

Does a flip-chart have a 'correct' side? How can individuals be stopped from dominating discussions in small groups? The Tribunals Training Handbook offers jargon-free tips for developing training courses.

The latest publication from the tribunal team at the Judicial Studies Board is the second edition of the *Tribunals Training Handbook*. Designed to complement the *Competence Framework for Chairmen and Members of Tribunals* and the *Framework of Standards for Training and Development in Tribunals*, it adds a third dimension for those with training responsibilities in their jurisdiction by giving guidance on how to research, prepare, present and evaluate the training they offer. And like the other JSB publications for tribunals, it has been the subject of wide consultation to ensure that the needs of its users will be met, which in turn means that any feedback from consumers would be welcomed.

The *Handbook* does not purport to cover every aspect of the training process, so does not address the substantive law needs of individual jurisdictions. Instead, it is written around the training cycle and the five chapters follow its order: analysing needs, setting aims and outcomes, design, delivery, and evaluation.

The *Handbook* is intended to be a resource, an easy-to-follow reference work, for the new course director as well as a support for those with experience. Responsibility for training rests, ultimately, in the course director, probably supported by a team, so the book offers guidance on how to plan and what to think about and anticipate when working on a new or continuing event.

The chapters follow a standard format with their key points at the beginning and illustrative examples of good practice in visible boxes within the text wherever possible. The intention is to encourage experimentation and understanding of a wide variety of training methods and training tools while ensuring that the trainer does

not fall into more common traps that can occur when innovating. The pitfall warning is phrased as neutrally as possible with the words 'BE AWARE . . .' and then goes on to suggest strategies to ensure that the planned procedure works.

The *Handbook* also tries to balance explanations as to why certain steps are essential, with guidance on how to complete them. To illustrate, the purpose of aims and outcomes are explained and how they fit into the training cycle, but that is supported by suggestions as to how they can be phrased so that the training sessions achieve their purpose. Again, there are specific suggestions for

the innocent on how best to use teaching aids.

The text is supported by a number of annexes – the information put there so as not to overload the busy reader. The first three of these annexes assist those who want to start afresh or who just want to check that

their training is going in the right direction, by advising on how to carry out a training needs analysis. The second three annexes develop some important in-course issues: the course planning checklist, choosing and designing case studies together with hints on how to run them, and a simple guide to PowerPoint. Annex 7 contains a sample evaluation questionnaire that has been used by the JSB and which reflects the advice in Chapter 5 of the text.

The writers have made every effort to avoid jargon and theory. The *Handbook* is for the trainer who is enthusiastic without necessarily wanting to know about, or having the time to find out about, the theory behind the practice. For those who do want to explore the theory further there is though a very brief insight into different learning styles in Annex 8, and for those with time a list of further reading.



A QUESTION *of* LEARNING

KENNY MULLAN *was appointed the National Judicial Training Officer for the Appeals Service in May 2005. Here, he talks about his thoughts on his new responsibilities.*

In his new role, Kenny Mullan is fortunate to have inherited what he himself describes as a ‘very coherent training regime’ within the Appeals Service. He has been a member of the Service since 1994 and was appointed as a full-time chairman in Northern Ireland in 1999. Of the 2,000 part-time members of the tribunal, 650 are lawyers. The largest group consists of medically qualified panel members, mainly GPs, who sit in some instances with disability-qualified panel members and assess claims for benefits such as disability living allowance, incapacity benefit and industrial injury disablement benefit.

One of the core skills for members is in questioning, of particular importance in a tribunal where a large proportion of appellants have no representation. ‘There is a great difference,’ Kenny points out, ‘in the way in which a GP will question a patient in their surgery, in order to make a diagnosis, and the way in which they question an appellant in order to determine whether the statutory tests for a type of benefit have been satisfied, on the balance of probability.’ Both methods of questioning can involve establishing intimate details, and interpersonal skills rate high in the list of core competences required by panel members.

But Kenny, a former senior lecturer at the University of Ulster specialising in medical law, is keen to emphasise that the word ‘training’ can be unduly restrictive. ‘The ways in which a tribunal member can learn go far beyond traditional residential courses of this kind. I prefer the phrase “learning, development and training”. We need to have an imaginative approach to the way in which our members can learn.’ Web-based distance learning is one of these. Other less formal techniques might include sitting in on hearings where a colleague has a particularly good approach to questioning.

The reasons why an individual needs to learn something can also, of course, vary. As in many other tribunals,



Kenny Mullan

the legislation under which the Appeals Service operates is considerable, complex and subject to frequent change. In 2002, it was agreed that appeals relating to the new tax credits should be heard by Appeals Service tribunals, and the law and procedure of those hearings was the subject of an extensive national training programme in 2003.

Kenny is proud of the way the tribunal demonstrated its flexibility in taking on this new jurisdiction.

But tribunal members may have other, more particular development needs, some of which may be identified during the course of their appraisal. This is particularly pertinent in the Appeals Service, which already operates appraisal systems for both its legal and medical members.

Kenny sees his main task within his new role as bringing together these different methods of learning, working closely with his colleagues responsible for the appraisal scheme, and presenting them to tribunal members as opportunities for their own self-development.

The Appeals Service has a scheme allowing members to train further and sit on panels hearing cases relating to different types of benefit. Cross-jurisdiction tickets, appraisal, learning and development and mentoring schemes – many of these are familiar themes. Kenny agrees. ‘I like to think that the Appeals Service is leading the way in many of the areas detailed in the White Paper.’

Kenny will continue to sit two days a week and to fulfil his continuing responsibilities in Northern Ireland one day a week. So will he be spending a lot of time in airports? He scorns the suggestion, pointing out that flights from Belfast to the UK can often be as short as 20 minutes.

He emphasises that he is starting from a ‘very strong base’. ‘The Appeals Service has been very lucky in those who have held this position in the past,’ he says, ‘particularly David Wall over the last five years.’ It looks as if their luck is holding.

A FAIR RESULT



GODFREY COLE *considers a case that heralds an important development in relation to appeals on a question of law.*

In *E v Secretary of State for the Home Department; R v Secretary of State for the Home Department* [2004] EWCA Civ 49, the Court of Appeal decided that when it is considering an appeal on a question of law, then such an appeal may be made on the basis of unfairness resulting from ‘misunderstanding or ignorance of an established and relevant fact’. The admission of new evidence in such cases is subject to the principles of *Ladd v Marshall* [1954] 1 WLR 1489, which it seems can now be departed from in exceptional circumstances, where the interests of justice so require.

To remind ourselves, the *Ladd v Marshall* principles are, first, that fresh evidence could not have been obtained with reasonable diligence for use at the trial or hearing. Second, that if presented it probably would have had an important influence on the result. And third, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of the party’s legal advisers still provides no excuse.

The Court of Appeal in ‘E’ commented as follows.

‘In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area.

‘First, there must have been a mistake as to an existing fact including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been “established” in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal’s reasoning.’

The decision is important because of the expectation of tribunals whose proceedings are informal, or who meet unrepresented appellants, that they are enabling of parties rather than adversarial.

To put it another way, the relevant Secretary of State or sponsoring department will share an interest in cooperating with the claimant and the tribunal to reach the correct result.

The decision in ‘E’ does hedge round the development of *Ladd v Marshall* with strict conditions so its application may not be frequent. That said, where, for example, an appellant has obtained very strong evidence too late that indicated the tribunal was wrong, then it might be applied to his advantage either through appeal or, if the tribunal has that power, through review.

THE PERFECT TRAINING DELEGATE . . .



. . . participates with enthusiasm



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