"Right First Time"

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Senior President of Tribunals Designate

Introduction

1. This is my third address to the Council's Annual Conference as "Shadow" Senior President Designate. It is exciting, but a little daunting, that this time I may be about to emerge from the shadows. The role of Senior President may become a statutory reality, if as we hope the Tribunals, Courts and Enforcement Bill is in the Government's legislative programme to be announced tomorrow. We will need to be ready to respond. For a moment – but I suspect only a brief moment - Tribunals will be centre-stage on the political scene. We have a unique opportunity to take part in the process of creating the legal machinery needed to give reality to the bold aspirations of the Leggatt report and the White Paper.

2. The title of this talk is taken from the White Paper, and will provide the theme fo this afternoon's discussion. The idea is that Tribunals are not just the means of correcting matters when things going wrong, but helping to get them right first time. As the White Paper puts it, we are just one part of "an end to end process" – in which "all the participants in the system have a duty to make it work better". "'Right first time" means a better result for the individual, less work for appeal mechanisms and lower cost for departments".

3. The authors of the White Paper were thinking mainly of the relationship of the tribunals and the administrative decision-makers. But we need to look at the scene it more broadly. It is a play that has many actors at many different levels. It starts with individuals who need better to understand their rights and obligations. Then there are the decision-makers, not just in the public sector, but employers, landlords, and so on - anyone with power to make decisions affecting our everyday lives. And then those involved in correction and review procedures machinery: internal reviewers, statutory adjudicators, ombudsmen, tribunals at first-tier and upper levels, and the courts all the way up to the House of Lords and (in some cases) the ECJ. No doubt each of these actors has an important role, but most of them are symbols of failure. And the higher you go, the greater the failure. (Most cases that get as far as the Court of Appeal are beyond saving.) The ideal play has only one act – the original decision.

4. Another important player will be the new AJTC – no longer concerned just with the tribunal stage, but with a statutory duty to oversee the whole of the administrative justice system, including decision-making within departments. At this point I would like to pay tribute to the work of the Council on Tribunals, and its secretariat, and to the inspirational leadership of Tony Newton. I have been very fortunate over the last two years to be allowed to participate regularly in its meetings and conferences. I have developed a great respect for the expertise and commitment of its members and staff. It offers the most comprehensive and authoritative source of information on tribunal affairs, and an invaluable agency for monitoring of our performance. I see the new AJTC is an important partner for the Tribunals judiciary and the Tribunals service in the transition to the new system. Among other things, I hope it will continue to act as a counterweight to the pressures for efficiency and economy. It must always be ready to remind us that our primary purpose is to deliver justice, and that everything else is secondary.

"The Adjudication Gap"

5. The intentions of the White Paper are admirable, but they are not new. Ever since I have been involved, I have dim recollections of reviews and papers and pilot studies and calls-to-action on roughly the same lines. What is less clear is what happened to the all. I asked Martin Partington, with the help of the Law Commission, to as my research adviser, to review the literature, and extract some lessons for future action. His paper is available to the conference. As I expected, there are plenty of sources.

6. One of the most recent is a report by a DWP steering group under Sir Leonard Peach on decision-making in respect of disability living allowance and incapacity benefit. He reported earlier this year, and the Departmental response is awaited. There are some valuable recommendations which I hope can be implemented. The background to that report was a 2003 National Audit Office report "Getting it right – putting it right" (another snappy title), reviewing the effect of the changes made by the Social Security Act 1998.

7. I am not going to spend time on the detail. One statistic illustrates the scale of the problem. A recent sample of Disability Living Allowance and Attendance Allowance cases revealed that over 70% of instances where the tribunal overturned the decision the reason was that the appellant had provided additional oral evidence at the hearing that was not available to the decision maker. If such

figures are at all typical, there is great potential for review procedures, internal or external, to pre-empt the need for a full appeal.

8. I would like to draw attention to an illuminating paper which forms and Appendix to the report (since published separately). It is is paper submitted on behalf of the appeal tribunal judiciary, under the title “the Adjudication Gap” – that is, the gap between decision-makers and tribunals in the field of social security The depressing view is that the gap has been widening. In the words of the paper:

> “The gap is unrelated to the tribunal’s constitutional independence. It is a divergence of approach which arises from long term trends within DWP to downgrade adjudication and to withdraw from participation in the ‘statutory machinery for deciding claims to benefit.’”

9. The paper traces the history of decision-making in the DWP and its predecessors over 50 years: from “insurance officers” and later “adjudication officers”, with their own independent ethos, reaching its high water mark in the mid 1980s, followed by a gradual downgrading of the decision-makers’ role, as the process of “adjudication” was seen as “inimical to good administration, instead of a partner to it”, and decision-making became “the mere processing of data complied from a lengthy claim form”. Finally the Social Security Act 1998 abolished the adjudication officers, and decision-making was transferred nominally to the Secretary of State, but in practice exercised by a new body of departmental “decision-makers”.

10. At the same time, the Department started to withdraw from regular participation in the tribunal process. Again, I quote:

> “It had been routine for local offices to have appeals officers who checked decisions under appeal; revised them if need be and attended the hearing to explain and, if need be, defend the decision. They were able to relay information and advice back to the decision makers thus improving the quality of decision-making generally.”

Gradually this picture has changed, though without any overt ministerial authority:

> “… presenting officers gradually abandoned attendance at local tribunal hearings so their decisions were no longer open to this kind of scrutiny… The appeals officer no longer asks on receipt of an appeal: ‘Can I defend this decision before my local tribunal?’ or ‘Do I need further evidence?’… No realistic assessment is made, Instead a submission is written by someone

who may never have seen a tribunal hearing. The writer's job is then complete and the file closed until a tribunal decision notice lands on someone else's desk a couple of months later…"

11. At the heart of the problem is the increasing complexity of the legislation, often the result of a misplaced wish to introduce greater objectivity. So for example the simple test whether there is "good cause" for backdating a late claim was replaced by "complex set of rules" which lacked flexibility and resulted in many injustices. Similarly the DWP introduced an "All Work test" for Incapacity benefit thinking that "an 'objective' answer could be supplied to the question whether a claimant satisfie any of the 112 descriptors which comprised the test."

Case-management and Feedback

12. I have no doubt of the contribution that tribunals can make to solving these problems, and to improving decision-making processes within departments, both by efficient case-management of individual cases, and by effective feedback arrangements.

13. First case-management. In April, along with Paul Stockton, I visited Australia to take part in an international conference on tribunals in Canberra. The visit gave us the chance to see at first hand the work of various tribunals, at both federal and state level. Direct lessons from such comparisons can often be misleading, because of the very different social, geographical and legal contexts. However, I was particularly impressed by the work of the "conference registrars" at the headquarters of the (federal) Administrative Appeals Tribunal in Sydney. Two points struck me: first, the conference registrars were not judges; they were relatively junior – young and enthusiastic lawyers who saw this as a valuable step on the path to a judicial career; and, secondly, each registrar took continuing personal responsibility for each case from its arrival at the Tribunal until transfer to a tribunal judge for formal hearing and decision.

14. The job of the conference registrars is to establish direct contact with the parties, usually at a personal meeting, to discuss and define the issues in dispute, identify further evidence to be gathered, and explore whether the matter can be settled. This provides an excellent opportunity for the parties to evaluate the core evidence at an early stage. Last year, 78% of the 7,500 applications handled by the Tribunal were disposed of without a formal decision on the merits.

15. There are lessons for us here. The key features seem to be personal contact with someone who understands the issues, and continuity of contact. I have heard

people here talk of “cradle to grave” handling. That seems rather morbid, painting a depressing picture of a graveyard to which all cases are eventually consigned. I prefer to think of cradle to maturity. What matters is the confidence which comes from continuing contact with an identifiable person or team. Whether or not we adopt the same model, I am sure that we need to devote more of our judicial and administrative resources to active case-management. There have been various pilot schemes to encourage “early dispute resolution” (EDR) (current studies in the ETS and Appeal tribunals), and we need to build on this experience. But EDR should be seen not just as an optional add-on, or a one-off intervention. It should become an ordinary part of the process of case-management from initial decision to final disposal. There should be no adjudication gap.

16. Secondly, feedback. A tribunal’s primary mechanism to provide feedback is through judgments in individual cases. This may be particularly useful in the early days of a new jurisdiction. For example, the first important case in the Financial Services and Markets Tribunal case provided an opportunity for the Tribunal to comment on the way in which the FSA had investigated facts (in that case the alleged mis-selling of endowment policies by Legal & General).[1] Following this advice, and in response to concerns from the regulated bodies, the FSA commissioned a review of its enforcement processes.[2] The Tribunal was in fact invited to contribute directly to the review but it declined to do so in order not to compromise its perceived independence from the FSA. There raises a tricky issue to which I shall return.

17. More general feedback can be provided through the annual reports of the tribunals. Currently, only the President of the Appeals Service is under a statutory duty to provide feedback on departmental decision-making, through an annual report to the Secretary of State for Work and Pensions. (Judge Harris, the current President, will be speaking further this afternoon.) Other presidents use their reports for more informal comments informally. However, as Judge Harris has commented, reports of this kind are of little use unless the Department has effective machinery in place for responding to the points made. The Tribunals, Courts and Enforcement Bill, as at present drafted, is less prescriptive. Clause 6 requires the Senior President’s duty to make an annual report to the Lord Chancellor covering such matters as the Senior President wishes to bring to the

[1] Legal and General Assurance Society Limited v Financial Service Authority
[2] A four month review was led by David Strachan, director of retail firms, advised by Michael Brindle QC and David Pritchard, retired Chairman of Lloyds TSB.

Lord Chancellor's attention, and matters which the Lord Chancellor asks him to cover. We need to give more thought to the contents of this report, and how to ensure that it is not an end in itself, but a basis for a constructive exchange with departments and other agencies. I see an important aspect as bringing attention to problems caused by the legislation itself, and making recommendations for change. I hope that in due course we can establish machinery for giving effect to such changes quickly and efficiently.

18. I have already spoken of concerns that such exchanges could threaten the perceived independence of tribunals. Personally I am not too troubled, provide the process is transparent and even-handed. I see no objection to tribunal representatives attending training events for departmental decision-makers, provided they are willing to do the same for similar events for those advising claimants. Regular user-group meetings can improve understanding between all interested parties. I am sure that the new AJTC will be willing to act as an objective and independent mediator.

The upper tribunal and beyond

19. I want to say something briefly about onward appeals. Authoritative and realistic guidance on general points of law or practice from the higher courts can make a useful contribution to the process of getting things right first time. But where should it stop?

20. I will start with a parable. Mr Z owned a listed building. He built a swimming-pool in one of the outhouses, which was not itself of architectural interest but was included in the listing. He wanted to know if he could take advantage of the special VAT rules for works in listed buildings. The inspector said yes; but he appealed and the VAT tribunal said no. Customs appealed to the High Court who said yes; he appealed to the Court of Appeal who said no (by a majority); they appealed to the House of Lords, who said yes again by a majority. As far as I know it stopped there – though since VAT is a European tax it might have been referred to the ECJ.

21. What was the point of all those appeals? I don't know what they cost, or who paid; but they must have cost a lot more than the swimming-pool. Why was it so important that it needed to be considered at 5 levels. And who is to say that the House of Lords decision was any better or more informed than that of the VAT tribunal. It is hard to believe that there are enough people building swimming-pools in the outhouses of listed buildings for this to be a major concern of national

fiscal policy. Surely a simple question of whether VAT is payable on a swimming pool should be capable of a speedier and cheaper solution. And if the concern was that the law was unclear for future cases, there should be a simpler mechanism for amending it.

22. The new tribunal system is designed to provide two levels of appeal from the original decision-maker: one as of right, on fact and law; and a second, with permission, on points of law only. With one qualification, that seems to me a fair and proportionate. The one qualification is that the appeal to the upper tribunal should include points of general principle, not limited to law. Provision of guidance on factual issues of general application in specialist fields is a very important part of the role of an upper tribunal. For example, one of the primary functions of the old IAT was to decide "country guidance" cases, which helped to to ensure consistency of approach by adjudicators deciding individual asylum claims. That valuable function was thrown into confusion by a short-sighted reform (since reversed) which, in the interests of streamlining, confined their role to issues of law. We must not make that mistake in the new Act.

23. Another mistake I want to avoid is in respect of onward appeals to the Court of Appeal. There will still be the possibility of appeal on points of law, with permission, to the Court of Appeal and thence to the House of Lords. But if the Upper Tier is doing is job properly onward appeals should be exceptional, and confined to points of general importance. Surprisingly (to me) this has not been the traditional view of the CA in respect of appeals from the EAT. All the appeal is from the EAT, the CA`seems to have taken the view that its job is simply a repeat version of that of the EAT. This approach was criticised recently by Buxton LJ.[3] He said:

> "the assumption that we in effect repeat the exercise already performed by the expert EAT of reviewing he decision of the ET tends in practice to impose on this court an exercise that is inappropriate both in its nature and in its extent".

24. I respectfully agree. I hope the that the Act will make clear that appeal to the Court of Appeal will be exceptional, subject to the "second appeal" criteria that currently apply to appeals from the courts – permission should be granted only on points of general importance or for other "compelling circumstances".

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[3] *Gover v Propertycare Ltd* [2006] 3 AllER 69, 72.

25. Finally, a heretical thought. Do we really need two further levels of appeal? Again, if the Upper Tier is doing its job properly, it is difficult to see the role of the House of Lords (or the new Supreme Court), except possibly on issues of significance outside the specialist field (for example, human rights). And if a case is sufficiently important to need further judicial examination, should it not go straight to the top – without stopping at the Court of Appeal? This is not the place to develop this idea. But I hope that in the preparation for the opening of new Supreme Court in three years time, more thought will be given than hitherto to the rather basic question - what the Supreme Court is for? It is an expensive luxury, and in our field most of the cost is borne by the taxpayer (whether through the costs of the department involved, or legal aid). I can think of many other ways in which we could spend that money, not least in paying for the legal assistance needed to ensure that cases of significance are properly argued at the upper tier levels. We might also wonder why we use our finest legal brains for sorting out retrospectively the problems created by muddled legislation, rather than in trying to improve the legislation in the first place.

26. I say no more. But in your discussions you might like to give some thought to this issue. How much help in practice, in getting things right first time, or even second time, comes from the CA or the HL? How could it be improved.

Conclusion

27. This has been a brief and selective introduction to a complex subject. I am grateful to the CoT for making it the subject of this conference. The timing is ideal. With the Tribunal Service now in place, and the prospect of a Tribunals Act to provide a coherent legal structure, we have no excuse for letting things drift from study to study. I look forward to hearing the results of the discussion groups this afternoon, and for practical proposals for putting these ideas into action.

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