INTERVENTION: A DELICATE FEAT OF BALANCE

In the summer 2011 issue, *Andrew Bano* considered the importance of tribunals being able to act 'inquisitorially'. Here, he considers further the meaning of this commonly used term.

THE TERM 'inquisitorial', as applied to tribunals, was originally used to mean that tribunals are not bound by many of the restrictions that apply to proceedings in the ordinary courts. Thus, in *Hubble*[1] the Divisional Court held that a tribunal was free to decide an appeal on a basis that had not been raised by either party. Tribunals are also not generally bound by exclusionary rules of evidence[2] unless the exclusion is necessary to protect some right, such as legal professional privilege.[3]

A power and a duty

But a power to act in a particular way will often imply a duty in law to do so. In carrying out the enabling role envisaged for tribunals by the Leggatt report, an inquisitorial approach may be necessary at each step of the proceedings: in identifying the issues that have to be decided, at the stage of case management, and at the hearing itself.

'Whether an issue is sufficiently apparent from the evidence will depend on the particular circumstances of each case.'

Identifying the issues

Sometimes the first stage is the most difficult. The Leggatt report referred (at para 7.4) to the need for tribunals to 'be alert for factual or legal aspects of the case which appellants may not bring out, adequately or at all, but which may have a bearing on possible outcomes'. Tribunals need to consider the public interest when deciding how far to act inquisitorially and a tribunal will normally have to consider a relevant point which is obviously apparent from the evidence.

However, there are limits to the extent to which tribunals must investigate issues that have not been raised by the parties. In *Mongan v Department of Social Development*[4] the Court of Appeal in Northern Ireland gave guidance on the extent of the tribunal's inquisitorial duty to investigate issues itself, which was approved by the Court of Appeal in England and Wales in *Hooper v Secretary of State for Work and Pensions*:[5]

> '[17] Whether an issue is sufficiently apparent from the evidence will depend on the particular circumstances of each case. Likewise, the question of how far the tribunal must go in exploring such an issue will depend on the specific facts of the case. The more obviously relevant an issue, the greater will be the need to investigate it. An extensive inquiry into the issue will not invariably be required. Indeed, a perfunctory examination of the issue may often suffice. It appears to us, however, that where a higher rate of benefit is claimed and the facts presented to the tribunal suggest that an appellant might well be entitled to a lower rate, it will normally be necessary to examine that issue, whether or not it has been raised by the appellant or her legal representatives.
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> '[18] In carrying out their inquisitorial function, the tribunal should have regard to whether the party has the benefit of legal representation. It need hardly be said that close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation. Where an appellant is legally represented the tribunal

is entitled to look to the legal representatives for elucidation of the issues that arise. But this does not relieve them of the obligation to enquire into potentially relevant matters. A poorly represented party should not be placed at any greater disadvantage than an unrepresented party.'

Conscious exercise of discretion

In social security cases, such as *Mongan*, the tribunal is permitted by statute not to consider any issue that is not raised by the appeal.[6] In *R(IB) 2/04* it was held that in such cases there must be a conscious exercise by the tribunal of its statutory discretion and an explanation in the reasons for the decision as to why the discretion was exercised in the way that it was.

If the tribunal intends to consider an issue that is not raised by the appeal in a way that may disadvantage the appellant, natural justice will require the tribunal to give the claimant warning of its intentions, so that the claimant can deal with the issue, or withdraw the appeal. The tribunal in *Hubble*, which decided to remove the claimant's entitlement to benefit without being asked to do so, would therefore nowadays be held to be under an obligation to warn the claimant of what it had in mind before allowing the appeal to proceed.

Implicit

Although the Tribunals, Courts and Enforcement Act 2007 (TCEA) does not expressly require tribunals to act inquisitorially, an inquisitorial approach is implicit both in the principles of tribunal justice set out in section 2 of the Act and in the way in which the Act requires the rule making powers conferred by the Act to be exercised. Section 22(4) of TCEA provides that the power to make tribunal procedure rules must be exercised with a view to securing the objectives set out in the subsection including, at paragraph (e), the requirement that 'the rules where appropriate confer on members of the First-tier Tribunal or Upper Tribunal responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently'. In order to ensure that tribunal members can comply with their responsibility for the speedy and efficient handling of proceedings, the case management powers conferred by the rules of procedure can almost always be exercised by the tribunal on its own initiative.

Equailty of arms

Case management powers are generally very flexible and provide the principal means for enabling tribunals to comply with their responsibility for ensuring that proceedings are conducted quickly and efficiently. But the powers given to tribunals by their rules of procedure may also play a valuable part in ensuring equality of arms. For example, in the War Pensions and Armed Forces Compensation Chamber, rule 24 of the procedure rules enables the tribunal to arrange and pay for an expert's report on a medical or technical question that arises in an appeal.

The expert nature of tribunals is one of the defining characteristics that distinguish tribunals from courts . . .

The expert nature of tribunals is one of the defining characteristics that distinguish tribunals from courts, where parties are generally expected to obtain and pay for any expert evidence that they need. However, there may be cases where the expertise of the tribunal needs to be supplemented by additional expert evidence, and in such cases a tribunal's ability to commission an expert's report ensures that an appellant who cannot afford to instruct an expert is not placed at a disadvantage.

Enabling role

As previous contributors to *Tribunals*[7] have pointed out, the ways in which a tribunal performs its inquisitorial role at a hearing will depend on all the circumstances. Leggatt

(para 7.4) identified the need for the tribunal to 'understand the point of view, as well as the case of, the citizen', and defined the enabling role as one of 'supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal's capacity to compensate for the appellant's lack of skills or knowledge'.

Statutory context

As we saw in the previous article in the summer 2011 issue, the statutory context of a dispute is important in determining the extent of the need for a tribunal to act inquisitorially. Tribunals recognise this instinctively, so that for example a social security tribunal will generally conduct a disability living allowance appeal very differently from an appeal involving a fraudulent overpayment. But there may be a myriad other factors to take into account, for example: the complexity of the issues; whether the appellant is represented and, if so, the skill of the representative; the appellant's own grasp of the relevant issues; and any obstacles, such as language difficulties, which appellants may have to overcome in presenting their case.

Too much or too little

The balance between too much and too little intervention is, as Leggatt recognised, a delicate one. But in the tribunal context, the principle of fairness, enshrined in the legislation passed in response to the Leggatt report as well as in domestic and ECHR law, generally requires the tribunal member to play an active role in the proceedings – a role in which human skills and legal knowledge may often both be needed in equal measure.

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[1] *R v Medical Appeal Tribunal (North Midland Region) ex parte Hubble* [1958] 2 QB 228.

[2] See the discussion in *Jacobs, Tribunal Practice and Procedure*, 2nd edition (Legal Action Group) at paras 10.40–10.58.

[3] See *LM v London Borough of Lewisham* [2009] UKUT 204 (AAC).

[4] [2005] NICA 16, R3/05 (DLA).

[5] [2007] EWHC 1319, R(IB) 4/07.

[6] Similar provisions apply in child support and war pensions and armed forces compensation cases.

[7] See, for example, the articles by Leslie Cuthbert and Julia O'Hara in the spring 2011 issue.

Tribunal reforms in the UK

A consultation on the Scottish Government's proposals for a new tribunals system opened in March 2012. Proposed is a single unified system for the devolved Scottish tribunals, internally organised according to case type and with clear rights of appeal to an Upper Tribunal. Important questions are raised for tribunal members in Scotland, including grounds of appeal, procedural rules, judicial leadership, judicial remuneration and cross-jurisdictional sitting.

It proposes to guarantee in statute the independence of the tribunals judiciary and to make new arrangements for appointments, tribunal processes and providing tribunals with the necessary administrative resources.

The tribunals to be transferred initially are the five currently administered by the Scottish Tribunals Service but the proposal is amenable to the future integration of further tribunals, although this is contingent on discussions between the Scottish Government and the Ministry of Justice. The consultation, which closes on 15 June 2012, can be found at *www.scotland.gov.uk/Publications/2012/03/8967*.

Readers may also wish to note that the Tribunal Presidents Group in Northern Ireland has discussed the proposals contained in the 2011 discussion paper and resolved to continue to highlight the requirement for commitment to definitive action to take matters forward. The discussion paper is available at *www.dojni.gov.uk/index/public-consultations*.