Tribunal justice – Building on Strength (Nov 2004)

by Lord Justice Carnwath, Senior President Designate

Introduction

I am very grateful to Lord Newton, and the Council on Tribunals, for giving me this opportunity at this conference to exchange some ideas with a uniquely informed audience.

Since my appointment as Senior President Designate in July, I have deliberately kept a low profile. Before raising my head above the parapet, I needed a period to learn about the existing Tribunal system and the proposed changes, and to begin to form my own views. I also wanted to wait until the new Chief Executive was in post, so that we could have a chance to compare our ideas before either of us went public. I say at once that I see this as only the beginning of a discussion, to which I hope you and all other tribunal members will feel free to contribute.

The importance of the tribunal system to the administration of the law cannot be over-emphasised. According to the Leggatt report there are 70 different administrative tribunals in England and Wales alone, which between them deal with nearly one million cases a year. As he said, more people bring a case before a tribunal than go to any other part of the justice system.

Such statistics do not do justice to the diversity of the issues before tribunals, or their relative importance to the public. They range, for example, from individual social security claims for a few tens of pounds, turning on simple factual issues; to major tax or rating cases, involving hundreds of millions of

pounds, with profound economic consequences, and raising legal and policy issues as complex as anything in the High Court.

The role of Senior President

Since my appointment was announced in July, people have been asking me three rather basic questions: What is a “Senior President”? What “tribunals”? Why you?

None is simple to answer.

On the last I cannot do more than state my credentials, such as they are. I say at once that I have never sat as a tribunal member. As a practising barrister, I was a user of the tribunal system, particularly before the Lands Tribunal and before the Special Commissioners of Tax. Also, much of my professional time at the Bar was on administrative and local government law, particularly appearing before local planning inquiries, which are tribunals in all but name. I also have some background in social security law, having conducted test cases in the High Court for bodies such as the Child Poverty Action Group.

More recently, I have been a reviewer (I hope sympathetic) of tribunal decisions of all kinds, formerly as a judge of the administrative court, and now in the Court of Appeal. It is intended that I should combine my role as Senior President with regular sitting in the Court of Appeal. In both capacities I have seen my fair share of unrepresented litigants. I have also been horrified by the cost of litigation in its traditional form.

I was Chairman of the Law Commission at the time of Sir Andrew Leggatt's review. As such I was able to contribute to the debate which preceded his report. I share his vision for a tribunal system which is "independent, coherent, professional, cost-effective and user-friendly." But I also share the aspiration of the White Paper, for a mission which looks beyond traditional court procedures, and embraces all available means for the fair and economic resolution of disputes.

What is the "Senior President"?

The White Paper did not contain a job specification for Senior President, although it set out some general aspirations. It was envisaged that he or she would be "strong and vigorous", and provide a "single clear voice able to speak for the tribunals judiciary collectively". In the immediate future the role would be "strategic, co-ordinating and directing judicial input" into the development of the new service. In the longer term, the new leadership would have responsibility for developing more radical approaches to dispute resolution.

To me that lack of detailed definition is a positive advantage. I like the idea of a job for which I can write my own job specification. But I am certainly not ready yet to write it. My ideas have developed in the course of my reading and discussions since my appointment, but I have lot more thinking to do.

What is already clear to me already, and I am very grateful for it, is that all the major tribunals have their own well-established Presidents (under whatever name), who are already providing "strong and vigorous" leadership. The last

thing they need is me treading “strongly and vigorously” on their toes. What I hope we can do together is to co-ordinate our efforts, and to build on the firm base which they and you all have created.

A useful forum already exists in the shape of the Tribunal Presidents’ Group (TPG), originally established by Brooke LJ to assist in the development of the White Paper proposals, and consisting of the Presidents of the main first phase tribunals. I intend to work with that group both collectively, and also by setting up smaller working groups to tackle particular issues.

I must emphasise that at present it is a “shadow” post only, which is likely to continue until 2006. The intention is that in due course, under the new Tribunals Bill, the Senior President will be given a distinct constitutional role, with its own statutory functions and responsibilities. The precise details remain to be settled, not least the relationship of the Senior President with the other pillars of the legal system in the post-Concordat world. There is much thinking still to be done.

Which tribunals?

This is more difficult. As I have said, Leggatt identified 70 tribunals in England and Wales. But he observed that only 20 hear more than 500 cases a year, and that many are defunct or “moribund”.[1] I suspect that no-one knows quite how many active tribunals there are. To some extent it depends on what you define as a tribunal, and what you mean by “active”. The White Paper (para

[1] The Council on Tribunals Annual Report 2003 lists 71 tribunals in England and Wales and 25 in Scotland (of which 27 and 8 respectively heard no cases in that year).

6.7, Appendix C) has a list of some 50 Central Government tribunals,[2] which are regarded as potentially within the scope of the new service, although some are on the Leggatt "moribund" list.

The immediate focus of attention in the White Paper for the first phase (up to 2008) is sensibly on the tribunals already administered by the DCA, and the five other largest tribunals. The Appeals Service Tribunal is by far the largest in numbers, handling over 200,000 cases a year in the field of social security. The present structure follows the merger of five separate jurisdictions under the Social Security Act 1998, a process which, like Leggatt, I regard as providing some valuable lessons for the present project.

Even within the first phase list, it is difficult to find a single common theme, whether of subject matter or of geographical extent. Some of the DCA tribunals are concerned with highly specialised security issues (for example, the Pathogens Access Appeals Commission). Even if they are to be administered as part of the new service, I do not see them as falling naturally within the remit of the Senior President.

Of the others, the majority might be loosely described as "administrative", in the sense that they are concerned with decisions made by government agencies of some form. But that description cannot of course be applied to one of the largest groups – the Employment Tribunals and Employment

[2] This list does not include the tribunals exercising jurisdiction in the housing field, which are currently the subject of a separate study by the Law Commission, and depending on its conclusions may come within the scope of the new service.

Appeal Tribunals – which are concerned with disputes mainly between private employers and employees. The Lands Tribunal has a foot in both camps. Its compensation and rating jurisdictions may perhaps be categorised as administrative. But it also has a significant share of private disputes, for example in relation to applications to modify restrictive covenants, and appeals from leasehold valuation tribunals.

Within the list we also find every possible variety of geographical reach. Some extend to the whole of the United Kingdom, including Northern Ireland; others to the whole of Great Britain. Some cover only England and Wales; and others only England. Such apparent anomalies no doubt have to be accepted as part of the fascination of our British constitution, but I see no reason why they need complicate matters unduly. I am sure we will be able to work in co-operation with tribunals throughout the UK, whether or not they are within the new service. If it means that I am a Senior President without a definable geographical jurisdiction, so what? So long as I, and more importantly the Chief Executive, know at any one time which tribunals are within our direct responsibility, we should be able to cope.

The second part of the Appendix C list exhibits an equally striking variety, ranging for example from the Aircraft and Shipbuilding Industries Arbitration Tribunal (“moribund” according to Leggatt) to the Sea Fish Licence Tribunal. Although the White Paper makes no immediate proposals for these tribunals (other than “to transfer as agreed”), I would like to start preliminary work a soon as possible. If we are to construct a truly comprehensive service, we

need to know which tribunals are still active, which are potential candidates for inclusion, what are their special problems, and what opportunities there are for amalgamation or joint working.

We also need to take account of the new tribunals which seem to be coming out of the Parliamentary mill with frightening regularity. Draft Bills currently before Parliament, or published in draft, include proposals for a Gambling Tribunal, a Pensions Regulator Tribunal, and a Charities Tribunal. (Perhaps happily for us, the proposal for a Hunting Tribunal did not survive last week's Parliamentary battles.)

What's in a name?

I believe in names. Indeed choosing a name is a good (but sometimes difficult) discipline, because it forces one to encapsulate a concept. I may be helpful to offer some preliminary and tentative thoughts.

In English law and practice, we often use different names without clear distinctions – for example, courts, tribunals, panels, commissioners and so on. There is no consistent pattern among the existing tribunals.

The White Paper sits on the fence on this (para 6.95). It calls for "a distinctive title which will rapidly be recognised by the public", and invites suggestions. But it then makes the task almost impossible by telling us to avoid the word "tribunal" (although it has been used throughout the White Paper), because

there is said to be evidence that the public find the word misleading or daunting.

I am afraid this is one aspect of the White Paper with which I disagree. Whether the public like it or not, and whatever we do to encourage more flexible methods of dispute-resolution, the heart of the new system will be a relatively formal structure for which the best English word is “tribunal”. I see no point in confusing that message. In any event, to my mind the hallmarks of a tribunal in this country, as compared to a court, are not just the specialised expertise and experience of its members, but also the flexibility to develop and vary its procedures to suit the particular needs of its users, whether they are individuals or sophisticated city institutions.

To me, the obvious name for the new service is “the Tribunal Service”, which will give it a clear identity distinct from the Court Service. If we want a generic name for the first tier tribunal, my tentative suggestion is the Administrative and Civil Tribunal (ACT). In practice, I expect we shall use simple descriptive names for the different divisions, such as Employment Tribunal, Tax Tribunal, Mental Health Tribunal, Lands Tribunal and so on (just as within the High Court we have the Administrative Court and the Commercial Court). (I hope at least that we can improve on names like the “Office of Social Security and Child Support Commissioners”, which is indigestible and inaccurate, and does not even have a pronounceable acronym.)

I would make two other points on this. First, we are not talking about a purely administrative body. Parallels with the Australian Administrative Appeal Tribunal may be misleading. As Leggatt emphasised, at the Federal level their constitution draws a strong boundary between the executive and the judicial functions; the appeal tribunal is treated as part of the executive (as indeed in some US models). At the state level, as in this country, those divisions are not so sharp. A closer parallel, for example, might be the Victoria Civil and Appeals Tribunal (VCAT), whose jurisdiction includes certain types of private party disputes in specialised areas. My preferred name switches the emphasis, to reflect the likely balance between the two elements.

Secondly, whatever general names we adopt, they are not straightjackets. There is no reason to try to squeeze all the existing jurisdictions into one tier or the other. The White Paper, I think wisely, rejects the "formal divisional structure" proposed by Leggatt. The aim, it says, is to create " a single unified and distinctive system" with "aspects of a federal structure"; but "the degree of autonomy of individual jurisdictions within the structure will be a matter for the unified organisation itself to determine, within a statutory framework and tested by a simple criterion: what is best for the users?"

Finally, I think it may help to avoid confusion between the two tiers of the new system, if we avoid using the same word for both. I would suggest that the upper tier should be identified specifically as a "court", to emphasise that it is functions are more formal and concerned principally with issues of law.[3] Its

[3] The EAT and the Transport Tribunal are defined by their statutes as "courts of record", although it may not be very clear precisely what that means in practice.

functions in general will be for the most part indistinguishable from those of the Administrative Court from which it will take some of its work, and from which some of its judges are likely to be seconded. Appeals from it will go to the Court of Appeal with permission, just as they do from the High Court. For all practical purposes it will be a Tribunal Appeal Court (TAC), and I think it may be clearer and simpler if we call it that.[4] What will be new is the possibility of developing the practices and procedures of a specialist review court to provide guidance and support to the lower tribunals.

Serving the user

Service to the user was one of the basic tenets of the Leggatt report:

> "It should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users received the help they need to prepare and present their cases."

I have been interested by a slim document published by the Council on Tribunals,[5] which seeks to test that statement by reference to available research evidence. Their conclusions are at best mildly discouraging.

For example on the issue of complexity, they tell us:

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[4] For the same reason, I would like to consider whether we should not reserve the name "judge" for the upper tier, and find some another word for the first level which better expresses the less formally "judicial" role envisaged by the White Paper.

[5] *Tribunal Users' Experiences, Perceptions and Expectations: a Literature Review*, by Michael Adler and Jackie Gulland, University of Edinburgh (Nov 2003)

> “Almost all the research reviewed discusses this issue. The general conclusion is that many appellants are confused by the appeal process and have little idea of what will happen at a tribunal hearing. In some cases they do not even realise that there will be a hearing and they are often confused by the paper work they are sent.”

They are also sceptical about the role of unassisted parties:

> “There is little research-based support for one of the central tenets of the Leggatt report, namely that ‘a combination of good quality information and advice, effective procedures, and well-conducted hearings, and competent well-trained tribunal members’ would make it possible for ‘the vast majority of appellants to put their case properly themselves’ i.e. without representation”.

Those conclusions are a salutary warning against complacency, but they do not surprise me over much. They are symptomatic of a fragmented tribunal system, in which there has been little opportunity for co-ordinated research and analysis.

Of course it worries me if appellants are confused by the appeal process. For most of them it will be a one-off experience, which they would much prefer to avoid. We can never make it easy, and we can never make it fun. What I hope we can do is to make sure that they have access to sources of information, which explain, as simply as possible, what the process involves, and what parties need to do to make the best of their cases. And we need to ensure

that this information is available to the parties and their advisers or helpers whenever they need it, in whatever form (whether paper or electronic) is best suited to the purpose.

Similarly, we might wish that all parties had the help of professional advocates to present their cases before every type of Tribunal. But in the real world it is not going to happen. Within the constraints of the system as it is, a well-informed and sympathetic tribunal, with specialised experience of similar cases, offers the best available means of arriving at a fair and principled result.

Valuable work has of course been done within individual tribunals to address these problems. But one of the advantages, I hope, of a combined system is that we can look at the issue in a systematic way, and build on the work that has been done, for the benefit of all.

Opportunities and challenges

I want to end by underlining the opportunity that has been given to everyone in this room to contribute to the development of the service. I welcome your ideas on all these issues.

For example, a key proposal of the White Paper is the creation of a single judicial office for tribunal members, with opportunities for assignment between jurisdictions. Potentially this proposal offers great benefits: both for the system as a whole, by the more efficient use of tribunal members to meet the varying needs of its users; and also for tribunal members, in terms of career

opportunities. However, as the White Paper also emphasises, it must not be at the expense of ensuring that those who sit in any jurisdiction have the necessary skills and specialist experience. So things are not going to change radically overnight. But in due course we should be able develop arrangements which will allow much greater flexibility in exchanges between different tribunals, and between the tribunals and the courts.

The White Paper leaves it to us to work out together how these ideas will be put into effect. We will need a lot more information about the way the tribunal judiciary, professional and lay, work at present, and how they could best be redeployed to meet identified needs. We also need to develop suitable training programmes to enable members to prepare themselves for other specialisms. I have already established two working groups within the TPG, under Henry Hodge and Jeremy Sullivan, to help in the collection of information and development of more detailed proposals, working closely with the Tribunals Committee of the JSB. But we depend on you for ideas.

So, there is the challenge. We have a unique opportunity to shape the delivery and development of the new system as we think it should be. Happily we will be starting from a position of strength. For the most part, I do not expect dramatic changes for tribunal members or tribunal users. It can be a quiet revolution, and it may not make the front pages of the Sun. But I would like to think that that this modest item in Tuesday's Queen's Speech will over the next few years do more for the cause of practical justice in this country than all the others put together.