

# Tribunal Justice – a Quiet Revolution

Being the Presidential Address of

**The Right Hon Lord Justice Carnwath**



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# Tribunal Justice – a Quiet Revolution\*

The Right Hon Lord Justice Carnwath

It is a great honour to join the list of distinguished presidents of this venerable club. Although I have not had access to the records of all their presidential addresses, I am fairly confident that none of them have been directed to the subject upon which I propose to speak this morning. Tribunals are not normally seen as one of the more glamorous areas of legal practice. Indeed, as law students, you may never have had to consider the issue of how justice is administered outside the conventional structure of the courts. There is no doubt however that tribunals represent one of the most important pillars of the system of justice in this country. At the last count, there were some 70 different administrative tribunals in England and Wales alone, which between them handle nearly 1 million cases a year. It is fair to say that more people bring a case before a tribunal than go to any other part of the justice system.

One reason for the relative neglect of this area of the justice system is that it is not easy to find a common theme or characteristic which is shared by all tribunals. They have grown up, largely over the last century, to meet the needs arising from particular statutory regimes, mainly connected with welfare or regulation. Earlier examples, dating from the 17<sup>th</sup> Century, were concerned with tax or excise duties. The Commissioners of Customs and Excise were given powers to determine disputes over such matters. These were criticised by legal commentators at the time as a serious breach of the

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\* Presidential Address to the Holdsworth Club delivered in the School of Law of the University of Birmingham, on Friday 25 February 2005.

principle that decisions on legal rights or obligations were the exclusive province of the courts. Dr Johnson went further. His Dictionary defined "excise" as -

"... a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom the excise is paid."<sup>1</sup>

In spite of those criticisms, their successors, the General and Special Commissioners of Income Tax, still exist, operating in all material respects as independent specialist tribunals in relation to appeals on tax matters. In more recent times a multitude of tribunals has been created dealing with such diverse issues as Social Security, Property Rights, Employment, Immigration, Mental Health and many other subjects. Wade and Forsyth's Administrative Law has a comprehensive list of tribunals<sup>2</sup> with statistics of the cases they hear. By far the most important in terms of volume is the so-called "Appeals Service", which deals with Social Security appeals and decided over 270,000 cases in 2002/3. Other important tribunals are the Employment Tribunals (100,000 cases a year); Immigration Adjudicators (90,000 cases); Mental Health Tribunals (10,000 cases). At the other end of the scale are a number of tribunals which appear never to have sat in recent times and perhaps never at all. For example there is (at least in theory) an Antarctic Act Tribunal, which has the function of deciding appeals against the Secretary of State where a permit for an Antarctic expedition is revoked or suspended. However it seems that to date no such claim has arisen, and the Tribunal has never met.

Most of these tribunals are concerned with claims by the citizen against the state, either claims or benefits of some kind, or appeals against regulatory decisions of some kind. However that is not true of all of them. Employment tribunals of course are concerned for the most part with disputes between private individuals and organisations. Leasehold Valuation Tribunals are concerned with disputes between lessees and lessors over service charges

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<sup>1</sup> See Wade and Forsyth Administrative Law 9<sup>th</sup> Edition p 907.

<sup>2</sup> P 951. The Table is taken from the Council on Tribunals Annual Report for 2002/3

or the valuation of properties for the purpose of enfranchisement. Also, many are administered by local authorities, rather than central government – for example, Admission Appeal Panels for schools (66,000 cases) or Parking Adjudicators (35,000).

It would be wrong to think of tribunals as concerned with small-scale disputes. Individual cases relating to social security may concern only a few hundred pounds, but they may carry much wider implications when spread across the whole system. On the other hand, cases before the Tax or VAT Tribunal can raise issues as complex as anything in the High Court, and the amounts involved may run into many millions of pounds. Similarly the regulatory functions of tribunals may range from local issues such as the disqualification of local bus operator (before the Transport Tribunal) to for example issues of national importance such as the appeal to the Financial Services and Markets Act against a fine of over £1m imposed by the Financial Services Authority for alleged mis-selling of policies.<sup>3</sup>

What then is the hallmark of a tribunal, which distinguishes it from the ordinary courts? To my mind there are two main factors. First, there is the specialist expertise and experience of the members. Although most tribunals are presided over by a lawyer (in some cases a serving judge), he or she will normally be sitting with non-lawyers who either have specialised expertise (perhaps medical) or laymen or women with specialised experience. For example, in employment tribunals the chairman will sit with lay representatives drawn from people with experience of both sides of industry.

The other important characteristic is the flexibility which enables the tribunal to develop and vary its procedures to suit the particular characteristics of the jurisdiction, and the needs of its users, be they unrepresented individuals or sophisticated City institutions.

By this time you will be wondering why I have chosen this esoteric area of the law as a subject for my presidential address. The answer is simple. Shortly after I agreed to be your president for the year, I was asked to take on

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<sup>3</sup> Times 24.1.05

another presidency – the role of Senior President Designate of Tribunals. The background to this is a review carried out by Sir Andrew Leggatt, a former Lord Justice, who reported in March 2001 under the title “Tribunals for Users - one System one Service.” He and his team had been asked by the former Lord Chancellor, Lord Irvine, to review all aspects of the tribunal system, to ensure among other matters that they provide

“fair, timely and proportionate and effective arrangements for handling disputes and that “tribunals overall constitute a coherent structure for the delivery of administrative justice”.

He saw a need for radical change. He observed that:-

“The present collection of tribunals has grown up in an almost entirely haphazard way. Individual tribunals were set up, and usually administered by departments, as they developed new statutory schemes and procedures. The result is a collection of tribunals, mostly administered by departments, with wide variations of practice and approach, and almost no coherence. The current arrangements seem to us to have been developed to meet the needs and convenience of the departments and other bodies which run tribunals, rather than the needs of the user.”

One notes the repetition, in more polite language, of Dr Johnson’s complaint of tribunals being run by the very organisations whose decisions are under attack. He recommended that the tribunals should be rationalised and brought together in a coherent tribunal system, to be administered by a new executive agency reporting to the DCA: a Tribunal Service, in parallel with the new Court Service which has been set up to administer the courts. A key feature would be independence from the Departments whose decisions were under scrutiny. He made a number of detailed recommendations for improvements to such matters as administration, routes of appeal and procedures.

Those recommendations were broadly accepted by the Government which issued a White Paper in July 2004, "Transforming Public Services: Complaints, Redress and Tribunal". That set out a programme for a first phase of implementation bringing together the 10 largest tribunals administered by central Government, over a period from 2006-8. Thereafter . By 2008 the remaining tribunals would be subject to transfer as agreed thereafter (unless no doubt they fell into the category which Sir Andrew Leggatt described as "moribund"). The White Paper also adopted Sir Andrew's proposal that there should be a Senior President of Tribunals who would work closely with the Chief Executive of the new Tribunals Service. The Senior President would be a Lord Justice who would have general responsibility for maintaining judicial standards and independence. However the White Paper was not content simply to preserve the existing procedures. It proposed a "radical approach". The new organisation would be expected to innovate, to -

"re-engineer processes radically so that just solutions can be found without formal hearings at all".

The Unified Tribunal System would be transformed

"into a new type of organisation which will not only provide formal hearings in authoritative rulings where these are needed but will have as well a mission to resolve disputes fairly and informally either by itself or in partnership with the decision-making department, other institutions and the advice sector."<sup>4</sup>

This is an ambitious project but work is already well under way. I was appointed as Senior President designate in July. A Chief Executive was appointed in September, and a shadow team within the Department has been working for some months on the administrative arrangements and negotiations with other departments necessary to ensure the transfer of the principal tribunals within the timescale envisaged by the White Paper, or possibly sooner. Legislation was announced in the Queen's Speech to create

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<sup>4</sup> White Paper para 4.20

the legislative structure for the new service, which if all goes to plan should be in force by the end of this year or shortly thereafter.

This is not the occasion to dwell on the complex administrative and legal arrangements which will need to be made. It is to be hoped that by the time the current generation of university students is in practice the new service will be a well-established part of the legal scene. I would however like to mention two particular issues which may be of rather more general interest. They are: first the routes of appeal, secondly and perhaps most importantly - service to the customer.

### **Routes of appeal**

Administrative lawyers are of course very familiar with cases involving tribunals. For example the great case of *Anisminic v Foreign Compensation Commission*,<sup>5</sup> which laid the foundations of modern administrative law, was a case concerning the jurisdiction of one of the tribunals which will be brought within the new service (although it is not at present a very lively jurisdiction). However by the time they come to the attention of academics, they are likely to have arrived at the Court of Appeal or the House of Lords, and little attention is given to the route by which they got there. It has long been recognised however that the current structure of appeal routes from first instance tribunals is as haphazard as the unstructured growth of the tribunals themselves.

Some statutes provide for an appeal from the Tribunal to a specialised appeal body, such as the Social Security Commissioners in the case of the Appeals Service. Others provide for an appeal direct to the High Court (as in the case of the Commons Commissioners) or the Court of Appeal (as in the case of the Lands Tribunal). Others provide no specific route of appeal at all, in which case Judicial Review by the High Court will be available on points of law.

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<sup>5</sup> [1969] 2AC 147 A claim against a fund established to compensate people whose property was confiscated by Egyptian authorities after the Suez crisis,

In 1988 Lord Justice Woolf gave a paper under the vivid but accurate title “A Hotchpotch Of Appeals – The Need For A Blender”.<sup>6</sup> (The Law Commission expressed a similar view and made recommendations for a more logical system.<sup>7</sup>) The decision of the House of Lords in *Anisminic* made it virtually impossible for the legislature to exclude the jurisdiction of the High Court. The most recent attempt by Parliament, in relation to the powers of the new Immigration Tribunal, gave rise to such a protest in Parliament that the Government was forced to modify its proposals. In some case these arrangements result in there being a quite unnecessary series of opportunities for a disappointed litigant to re-open his case at least on points of law, if the has the energy and financial ability to do so. Tax provides the worst examples. For example a decision by the VAT Inspector may be subject to an appeal to the VAT Tribunal from which there may be an appeal to the High Court and then to the Court of Appeal and then to the House of Lords, and even possibly a reference to the European Court of Justice, since VAT is a Europe-wide tax. It is true that the right to appeal to the Court of Appeal or to the House of Lords in such cases is strictly limited to points of general importance. However, issues of VAT law often do have wide significance even though the particular point may seem relatively trivial. For example in a recent case which went to the House of Lords the issue was whether works for the construction of a swimming pool in the outhouse of a listed building were zero-rated for VAT purposes as they would have been if they had been within the listed building itself. Some might have said that the answer is of no great policy significance provided it is clear one way or the other. However it was considered at no less than five levels. The VAT Inspector decided that it was not zero-rated. He was reversed by the VAT Tribunal which was reversed by the High Court which was reversed by the Court of Appeal (by a majority) which was reversed by the House of Lords again by a majority). Happily no-one thought it necessary to refer to it to the European Court.<sup>8</sup> The reports of the case do not reveal what was the total cost of the litigation as compared to the cost of the swimming pool.

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<sup>6</sup> Civil Justice Quarterly, January 1988 planning permission 44-52.

<sup>7</sup> Administrative Law: Judicial Review and Statutory Appeals Law Com No 226.

<sup>8</sup> *Zielinski v Customs and Excise* [2004] UKHL



Under the White Paper proposals the intention is that there will be simply two tiers within the new tribunals structure. A first tier and an upper tier. For the generality of cases the initial hearing will be in the lower tier and there will be provision for appeal with leave to the upper tier. Permission to appeal from the upper tier to the Court of Appeal will only be given for cases raising points of general importance. As an exception to this general rule, it will also be possible for particular categories of case to have their first hearing at the upper tier level, if the complexity or importance justifies it (for example particularly complex tax cases), in which case the first right of appeal will be to the Court of Appeal. The intention is that the Act will provide a flexible framework within which the detailed arrangements can be made for replacing the present appeal routes by stages as the various tribunals are brought within the new service. It is also intended that it should provide considerable flexibility to allow for the deployment of the tribunal judiciary and indeed where appropriate the court judiciary in the upper or lower tiers as justified by the nature of the case.

One of the important functions of the Senior President will be to oversee the arrangements whereby this will be achieved. It should also be emphasised that while there will be a single structure, it will allow for the creation of separate divisions or perhaps “chambers” related to particular subject matter. For example the Employment Appeal Tribunals will although administered within the new system will maintain their distinct identity and practices.

### **Service to the public**

One of the main lessons of Leggatt is that we still have a lot to learn about how we can best serve the public. That was one of the basic tenets of his 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.”

A more sceptical view was put by Professor Wade in discussing the development of tribunals. He contrasted them with the “elaborate, slow and costly” court system, under which “the public wants the best possible article and is prepared to pay for it”:

“But in administering social services the aim is different. The object is not the best article at any price, but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply, for the benefit of the public purse as well as for that of the claimant... The whole system is based on compromise, and it is from the dilemma of weighing quality against convenience that many of the problems arise.”<sup>9</sup>

I would be very reluctant to accept that convenience to the user need be the enemy of quality. But there appears to be remarkably little empirical research to support either view. Some answers may be found in a slim document published by the Council on Tribunals.<sup>10</sup> The authors start by quoting that paragraph from Leggatt, and seek to test it by reviewing available research evidence. Their conclusions are at best mildly discouraging. In relation to some important tribunals (such as tax, valuation, and criminal injuries) there is little if any published research on the perceptions of users. On others, the results are mixed. On complexity, they tell us:

“Almost all the research touches 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.”

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<sup>9</sup> Wade and Forsyth *Administrative Law* 9th<sup>th</sup> Ed p 907-8. The authors acknowledge, however, the countervailing advantage of expertise, which applies especially where there is a continuous flow of claims of a particular class.

<sup>10</sup> *Tribunal Users' Experiences, Perceptions and Expectations: a Literature Review*, by Michael Adler and Jackie Gulland, University of Edinburgh (Nov 2003)

On informality of hearings, the messages are equivocal. One study suggests that users are concerned by the level of formality, but makes the point that “appellants often confuse formality with the fact that tribunals are bound by legislation...” Another (relating to the Leasehold Valuation Tribunal) records complaints that the process is too informal, and that efforts by the tribunal to help unrepresented parties can be seen as bias against those who are legally represented.

On the value of electronic access, they question the relevance of the limited research done for the Leggatt review, because it was based on a small number of interviews with users of eight tribunals, only one of which (the Parking Appeals Service) enables users to access it by means of IT. There is glimmer of light, however, because users of that particular service report favourably. Their view of the fairness of the system was enhanced by being able to see on a computer screen all the documents available to the adjudicator. This is clearly an aspect which needs more work.

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. Valuable work has of course been done within individual tribunals to address this problem. 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.

### **Conclusion**

I hope I have been able to open some of your eyes to a vitally important part of our legal system, which if the reforms achieve their purpose, will have an even more important and expanding part to play in the legal world in which you will be practising. It will be a quiet revolution – at least that is how I would like it to be. But in its own way it could do more for the purpose of practical justice in this country, than many of the new statutes which come flooding out of the legislature each year. So watch this space!

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