

## TRIBUNALS AIN'T WHAT THEY USED TO BE

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For the last few years, I have been involved in a programme of research on the experiences of represented and unrepresented parties in tribunal hearings. My interest in representation was provoked by the publication in 2004 of the White Paper on tribunal reform.<sup>1</sup> Although the White Paper accepted that ‘some people would always need a lot of help, perhaps because of learning difficulties or physical disability or language problems’, it aimed to create a situation where the majority of individuals who are in dispute with their employer or the state would be able to present their case without a representative. In contrast to this view, I felt that, since it was unlikely that such a state of affairs could be achieved – while the law remains as complex as it currently is – in the short or medium term, that representation – by a lawyer or by a lay advocate – will still be required in the foreseeable future.

My reasons for believing this were that research and ‘experience’ seemed to have made it clear that having a representative (although not necessarily a legal representative) greatly increased the prospects of a successful tribunal outcome. Thus, Hazel Genn’s landmark study of representation in tribunals, which was published 20 years ago,<sup>2</sup> indicated that representation had a substantial impact on tribunal outcomes. Representation increased the chances of success from 30 per cent to 48 per cent in Social Security Appeal Tribunals, from 20 per cent to 38 per cent in Immigration Hearings, forerunners of the Asylum and Immigration Tribunal (AIT), from 20 per cent to 35 per cent in Mental Health Review Tribunals and from 30 per cent to 48 per cent in Industrial Tribunals, the predecessors of Employment Tribunals, where the employer was unrepresented. Thus, across the board, the ‘premiums’ associated with representation were 15-18 per cent.

I decided to investigate empirically whether these ‘premiums’ still applied and whether justice can be achieved if appellants / claimants are represent themselves. I selected tribunals in which there was an approximation to a ‘50:50 split’ between represented and unrepresented cases and set out to compare the experiences of three groups of appellants / claimants – those who handled their claim (in employment cases) or their appeal (in other cases) without any help, those who obtained advice beforehand but were not represented at the hearing, and those who were represented (by various types of representative). The tribunals comprised three *citizen vs. state* tribunals – Criminal Injuries Compensation Appeal Panels, Social Security and Child Support Tribunals, Special Educational Needs and Disability Tribunals<sup>3</sup> – and one *party vs. party* tribunal – Employment Tribunals. I also attempted to establish how each of the three groups prepared for their tribunal, what their expectations were and how their experiences matched their expectations; to identify the effects of socio-economic and other variables on how they handled their hearing; to analyse the effects of representation on tribunal procedure, and to determine what could be done to make it easier for parties to represent themselves. The research, which was funded by the ESRC, involved:

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<sup>1</sup> Secretary of State for Constitutional Affairs (2004), *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243).

<sup>2</sup> Genn, Hazel and Genn, Yvette (1989), *The Effectiveness of Representation in Tribunals*, London: Lord Chancellor’s Department.

<sup>3</sup> In England and Wales only. My research also included Additional Support Needs Tribunals in Scotland.

- a telephone survey of 869 tribunal appellants / claimants;
- observation of 64 tribunal hearings; and
- post-hearing interviews with appellants / claimants, tribunal chairmen and members, and with the President and Chief Executive of the tribunals in the study.

The telephone survey indicated, first, that overall ‘success rates’ are almost double what they were 20 years ago, and, secondly, that the ‘representation premium’ is considerably lower. For the sample as a whole, the ‘representation premium’ was only 5 per cent. In the two largest tribunals, Employment Tribunals and Social Security and Child Support Tribunals, it was 3 per cent and 6 per cent respectively and in Special Educational Needs and Disability Tribunals it was 0 per cent. Only in Criminal Injuries Compensation Appeal Panels, where it was 15 per cent, was it comparable to the ‘going rate’ 20 years ago.

An attempt was made to distinguish the ‘success rates’ of unrepresented appellants / claimants who had received pre-hearing advice from those who had not and the first group did significantly better. For the sample as a whole, the ‘representation premium’ was 4 per cent over those who had received pre-hearing advice and 7 per cent over those who had not. Thus, pre-hearing advice reduced the ‘representation premium’ by almost 50 per cent. In Criminal Injury Compensation appeals, it reduced it by 33 per cent. In Social Security and in Special Educational Needs and Disability Tribunals appeals, the success rates for those who represented themselves after receiving pre-hearing advice were actually higher than for those who were represented. In Employment cases, the ‘representation premiums’ of represented claimants over those claimants had received pre-hearing advice were 15 per cent where the employer present and / or represented and 8 per cent where the employer was neither present nor represented. However, those who represented themselves without receiving any pre-hearing advice did as well or better than those who represented themselves after receiving pre-hearing advice. One possible explanation for this unexpected finding is that those who had received pre-hearing advice but were not represented had weaker cases, and were not represented for that reason, while those did not receive any pre-hearing advice actually had stronger cases.<sup>4</sup>

The research has attempted to explain why the current premiums on representation are so much smaller than the premiums that existed 20 years ago and why the ‘success rates’ for those who represent themselves, particularly if they have received pre-hearing advice, compare so favourably with those who are represented at their hearing. It suggests that the *active, interventionist* and *enabling* ways in which many tribunals deal with the generality of cases that come before them make it much easier than it used to be for the unrepresented appellant / claimant.

- An *activism indictor* was calculated, based on the assessed activism of the tribunal chair and members. If any of the panel members was recorded as being ‘very active’, the activism of the hearing was recorded as ‘high’, otherwise it was recorded as ‘low’. 48 (75 per cent) of the 64 observed tribunal hearings were characterised by a high level of activism compared to 16 (25 per cent) that were characterised by a low level of activism. Rather surprisingly, tribunals were slightly more likely to be active when the appellant was represented.

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<sup>4</sup> It should be made clear that I do not have any empirical evidence to support this claim.

- An *interventionism measure* was calculated, based on whether members of the tribunal cross-questioned the appellant or the appellant's representative during the hearing. 56 (88 per cent) of the 64 hearings did so. This suggests that tribunals no longer leave it to the parties to present their own cases.
- An *enabling score*, ranging from 0 to 8, was calculated from eight indicators of whether or not tribunal chairs adopted an enabling role in the observed hearings. 76 per cent of tribunal hearings had enabling scores from 4-7, indicating that most tribunals now adopt an enabling approach. On the other hand, a minority of tribunals (21%) had scores of 0-3 and they do not adopt an enabling approach. Tribunals appear to be somewhat more enabling towards appellants / claimants who are not represented.

Many tribunals now use *inquisitorial* modes of dispute resolution and, where the parties use *adversarial* methods, the tribunals frequently came to the assistance of unrepresented appellants / claimants.

- Hearings were classified as *inquisitorial* if they were both 'active', i.e. if they had a high activism score, and interventionist. On this measure, 41 (64 per cent) of the hearings can be characterised as inquisitorial. Tribunals were not, as one might have assumed, more likely to adopt an inquisitorial mode of dispute resolution with unrepresented appellants / claimants. In fact, they were slightly less likely to do so.
- The fact that tribunals most hearings have inquisitorial features does not imply that they do not also have *adversarial* features. These were most apparent in the 43 cases where the 'other side' was present or represented. However, tribunals were less likely to assist the adversarial process by explaining to unrepresented appellants / claimants what they needed to do and assisting them to question the 'other side' than they were in the case of appellants / claimants who were represented.

These findings suggest that the main reason why the premiums on representation are so much smaller today than they were 20 years ago and why the 'success rates' for those who represent themselves, particularly if they have received pre-hearing advice, have improved relative to those who are represented is that the procedures that tribunals now adopt enable them to elicit the necessary information from unrepresented appellants / claimants. But., in order to take full advantage of the tribunals' *active, interventionist* and *enabling* approach, unrepresented appellants / claimants need to have been prepared and briefed before the hearing.

It is clear that tribunals have changed – in terms of the procedures they adopt, they are now less like courts and more like ombudsmen. When, in the past, they were more like courts, representation was all-important; now that they have come to resemble ombudsmen, it is no longer all that important. Perhaps the White Paper was not so unrealistic after all.