

Accessibility, Fairness and Efficiency

The New Bases for Administrative Justice in Tribunals

On 3 November 2008, the Tribunals, Courts and Enforcement Act 2007 created a new tribunal structure. The implications of that have still to be worked out, or even fully appreciated.

In the months following 3 November, attention naturally focused on the new institutional arrangements for tribunals. The Act established, for the first time, a two tier structure consisting of the First-tier Tribunal (essentially a fact-finding tribunal) and the Upper Tribunal (essentially dealing with issues of law). As part of that structure, it created a coherent system of appeals from the First-tier Tribunal to the Upper Tribunal and then to the Court of Appeal (or Session). And through the Tribunal Procedure Committee it provided for consistent rules of procedure across all jurisdictions, ideally free from Departmental control. Together those features should allow a common approach to issues that arise across jurisdictions.

However, it was too easy to assume that tribunals would, and should, continue to operate as they did before. That was perhaps understandable in the months immediately following 3 November 2008. But there is no justification for those assumptions in the legislation. Quite the reverse. This must be appreciated if there is to be an appropriate approach to administrative justice in tribunals.

The key to this lies in the principles that are enshrined in the Act and by reference to which the new tribunals have to operate. These provide a basis for tribunals to develop a distinctive form of administrative justice suited, as Sir Andrew Leggatt recommended, to the needs of the users. The Act refers to three key principles: accessibility, fairness and efficiency. Those three principles form the core of the duties of the Senior President, the Tribunal Procedure Committee and the AJTC. They provide the skeleton on which the flesh of the overriding objective has been built in the rules of procedure. These principles are not separate. They may interrelate and be mutually supportive. Proceedings cannot, for example, be fair if parties do not have effective access and fairness may be compromised by inefficiencies in the system.

These are not the only principles mentioned in the Act, but the others can all be subsumed within those three core principles. More importantly, those core principles are wide enough to include the principles (such as natural justice) and philosophies (such as the enabling and inquisitorial approaches) on which tribunals operated before 3 November. And this in turn allows those principles to be developed to provide a distinctive approach that meets the needs of tribunal users.

Take fairness. The rules of the natural justice and the jurisprudence of Article 6 continue to apply as they did before. They set the minimum standard of procedural fairness that a tribunal must achieve if its decision is to be lawful. However, fairness is not so limited. Parties are now entitled to expect that, under the overriding objective, the tribunal will deal with their cases fairly and justly. Tribunals will have to develop the breadth of that duty. But this is not a matter of rights for the parties and duties for the tribunal. The parties are under a duty to co-

operate with the tribunal in furthering the overriding objective and generally. This provides the legal basis for tribunals to develop a framework of responsibilities for the parties and their representatives, backed by the powers to strike out or bar and, ultimately, by a reference to the Upper Tribunal for enforcement.

Developing a distinctive tribunal form of administrative justice will require openness to new ideas and imagination in the application of the overriding objective and the parties' duty to co-operate. There have been already been encouraging signs of this in the Upper Tribunal.

The Upper Tribunal has not allowed rigid distinctions between different forms of proceeding to hamper the proper disposal of related cases. There has been a joint panel to hear an appeal and a related judicial review application before the Tax and Chancery Chamber of the Upper Tribunal in *Reed Employment plc v the Commissioners for Her Majesty's Revenue and Customs*.

And the Upper Tribunal has recognised that rigid hierarchies must not be allowed to obstruct the most efficient way to handle cases. The new Immigration and Asylum Chamber of the Upper Tribunal has set up a panel of Senior Immigration Judges to decide applications for review and permission to appeal as judges of the First-tier Tribunal. It is interesting to note how Mr Justice Blake, the President of the Chamber, based the creation of this panel in the principles that underpin the 2007 Act. In his speech entitled **The Arrival of the Upper Tribunal Immigration and Asylum Chamber** on 11 February 2010, he said:

‘Senior Immigration Judges will be deciding the permission to appeal from the First-tier Tribunal as First-tier Tribunal judges and this is a demanding task as you will find out. The panel is a way to make most efficient use of specialist skills in order to fix the bar at the appropriate height at the outset.’

The success of the new system will ultimately depend on initiatives such as this and, perhaps more importantly, on decisions taken by judges exercising their powers creatively in individual cases.

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