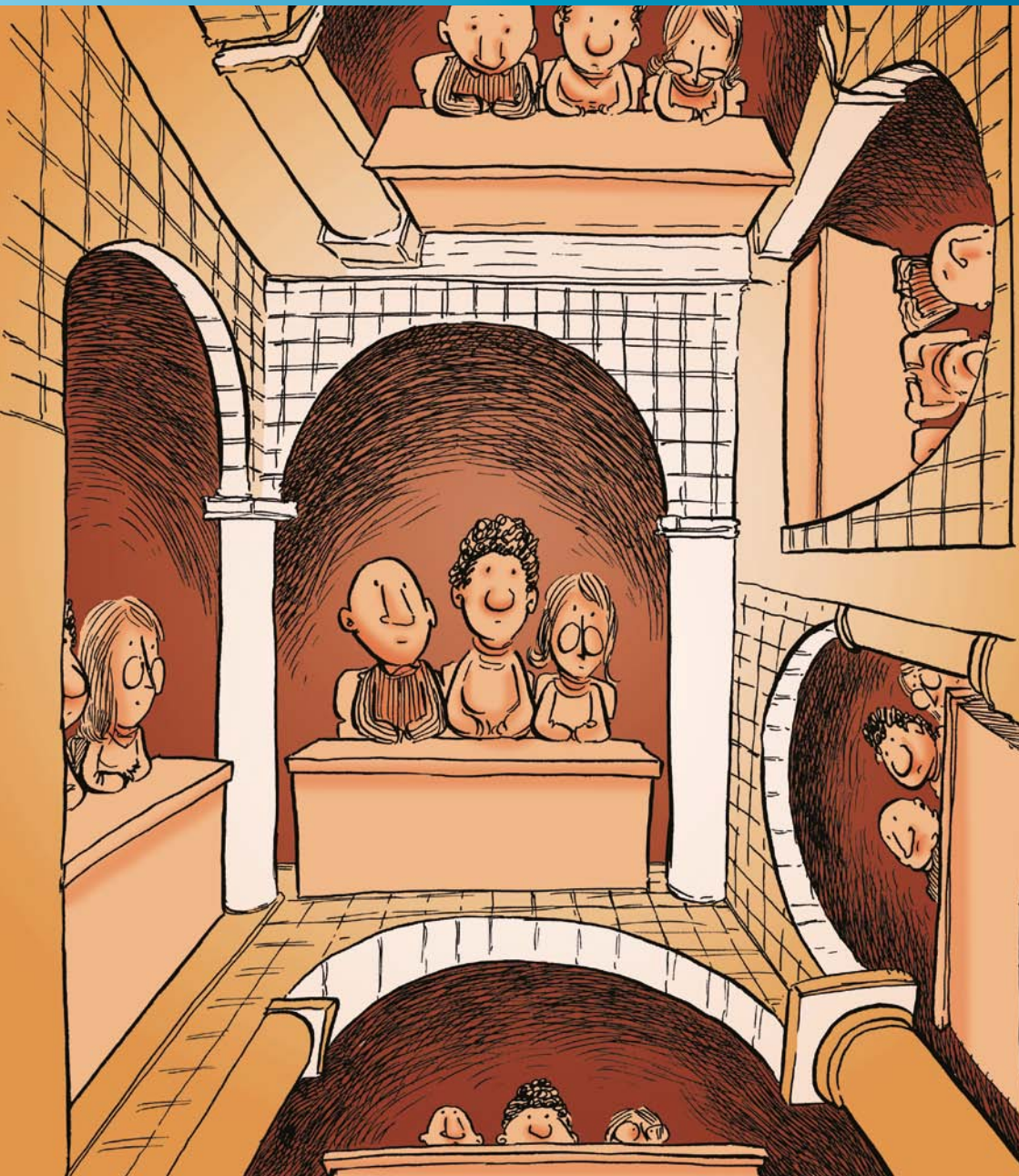
Short Guide 04

The ABC of Effective Procedural Applications

The Basics of Tribunal Representation

Edward Jacobs, Judge of the Upper Tribunal

Public Law Project



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Within this broad remit PLP has adopted three main objectives:

- increasing the accountability of public decision-makers;
- enhancing the quality of public decision-making;
- improving access to justice.

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Contents

The Basics of Tribunal Representation

or

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Introduction

Have you ever made an application to a tribunal and failed to get what you wanted? Have you ever wondered why? Have you ever thought about how you could have done better? If you have answered yes to any of those questions, this is for you.

I can't guarantee that you will succeed in getting what you want. I don't promise that it will be easy. But I do say that if you follow this advice, you will have the best chance you can of persuading the tribunal to give you what you want.

1 ABC?

What do you have to do? The answer can be summed up in five letters: Added Benefit and the Causes of any Delay and its Effects. These are the key factors to consider when making procedural applications.

When a tribunal decides a procedural application, they usually involve a balance: the additional benefit that what you want will bring against the causes and effects of the delay associated with it. The tribunal makes its decision by deciding where the balance lies. Is the price that will be paid in delay worth the benefit it will add to the proceedings? You enhance your chances of success by using ABCDE as a structure for developing and presenting your argument.

This doesn't apply to all procedural applications. It won't help you to obtain consent to withdraw your appeal. And it will be no use to you if you apply for costs. But it will work for many, if not most, of the applications you are likely to make.

Here is how to do it.

2 Know what the rules say

This is essential. It should be obvious, but lapses occur. Three years after the new tribunal system came into existence, there were lawyers who still did not know the rules. One firm of solicitors applied to the Upper Tribunal for an order of costs against the First-tier Tribunal, for which there is no power in the legislation. Another firm applied to the First-tier Tribunal under regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, which was revoked from 3 November 2008. It's not only solicitors. One counsel quoted a provision from the Mental Health Review Tribunal Rules 1983, which had been repealed from the same date.

3 Know what the rules mean

This is just as important, but more difficult.

Broadly speaking, the rules allow the tribunal to do anything it wants.

In particular, it can:

- set its own procedure – rule 5
- change its mind – rule 6
- overlook any failure to comply with the rules – rule 7
- decide what issues it will consider – rule 15(1)
- decide on the rules of evidence that will apply – rule 15(2).

This is your opportunity, but also your problem. You can ask for almost anything, but the tribunal is free to refuse. Provided, of course, that it does so judicially.

4 Know what you have to do

It is better to comply with your duties than have to seek indulgence later by asking the tribunal:

- to overlook a failure on your part; or
- to exercise its power for your benefit.

The parties and their representatives owe three duties:

- to co-operate – rule 2(4)
- to comply with time limits
- to file the necessary documents.

5 How to get what you want

Whatever you want, the techniques are the same:

- Never assume that you just have to ask for something.
- Don't just tell the tribunal what you want, persuade the tribunal that it is the fair and just thing to do.
- Understand how tribunals think. How else can you persuade them?
- Never presume that the tribunal will give you what you want. If you want an adjournment, attend anyway just in case the tribunal refuses. Staying away will not make it more likely that the tribunal will do what you have asked, and it may be detrimental if the tribunal decides to proceed in your absence. There may, of course, be occasions when you have no choice. You cannot attend if you are ill or listed in two different venues at the same time. But if you can attend, that is what you should do. And if you can't, make sure your client goes just in case the tribunal decides to proceed.
- Don't ignore your problems. Research shows that you reduce their impact if you admit to your difficulties before someone else spots them.
- Your reputation is of fundamental importance. If tribunals do not trust you, you will find it much more difficult to persuade them.
- Use the overriding objective. Let's look at how to do that.

6 The overriding objective

This is important for two reasons. First, it is the key factor that controls how the tribunal exercises its powers. Whatever you ask the tribunal to do must be consistent with this. Second, the terms of the objective provide you with a checklist for elements that you can and should deal with if you are making any procedural application.

Remember that the overriding consideration is that the tribunal must act fairly and justly. The other individual elements are only relevant is so far as they indicate what fairness and justice require in a particular case. If the individual elements are against you, you can always fall back on this overriding requirement.

It is worth reminding ourselves of what rule 2 says. Here it is with the key elements italicised:

Overriding objective and parties' obligation to co-operate with the Upper Tribunal

(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases *fairly* and *justly*.

(2) Dealing with a case fairly and justly includes–

(a) dealing with the case in ways which are *proportionate* to the *importance of the case*, the *complexity of the issues*, the *anticipated* costs and the *resources* of the parties;

(b) avoiding *unnecessary formality* and seeking *flexibility* in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to *participate fully* in the proceedings;

(d) using any *special expertise* of the Upper Tribunal effectively; and

(e) *avoiding delay*, so far as compatible with *proper consideration* of the issues.

(3) The Upper Tribunal must seek to give effect to the overriding objective when it–

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must–

(a) help the Upper Tribunal to further the overriding objective; and

(b) *co-operate* with the Upper Tribunal generally.

7 Here is an example of how to use the overriding objective to construct your application

Example

Assume that you are applying for an adjournment in an Employment and Support Allowance and Disability Living Allowance appeal in order to obtain a report from the claimant's GP.

These steps should lead you to develop the most persuasive case that you can. You do not have to present in the same order. These steps are about what to say, not how to say it. The content should dictate the best order in which to set out the elements of the arguments.

Begin by saying what you want. This sounds easy, but you may have to come back to this step after working through some of the steps. If you can't construct a case to get what you want, you'll need to rethink whether it is worth trying. You may need to revise what you are after or you may need to abandon the idea altogether.

Next, explain why the tribunal should allow it.

You do this by identifying the elements of the overriding objective that support your application. Important elements are that it will enhance your client's effective participation through proper consideration of the issues. If the issues are complex, so much the better. If they are outside the tribunal's expertise, all the more so.

Whatever the elements, it is not enough just to tell the tribunal what they are. You have to show and persuade the tribunal how the adjournment will have that effect. You do this by showing how the adjournment and the GP's evidence will add benefit to the proceedings. This added benefit should be a key part of your application.

Another aspect of persuasion is anticipating whether the tribunal will accept that what you want will add benefit. You know this from your experience of how tribunals have reacted in the past and what they have said about this sort of evidence in their reasons. You need to anticipate and allay the tribunal's concerns. The tribunal will have seen lots of letters from GPs and will know how little benefit they often add. You know the sort of letter I mean – strong on diagnosis and treatment, but weak on disability. You will have to overcome that objection by showing what the GP could usefully say and that the GP is likely to say it. Be as specific as you can about the benefit that will be added. Avoid generalised arguments; focus closely on the issues in dispute.

So far you have used the elements of the overriding objective to construct a case in your support. It is now time to think about the elements that can be used against you. The key concerns for the tribunal will be delay and co-operation. As before, you have to anticipate and deal with these issues.

You may be lucky that the delay is not your fault. Suppose you are representing a parent with care in a child support case and have applied for a direction that the non-resident parent produce financial evidence. If the non-resident parent has not been co-operating, you may be able to stop at this point. Any delay will be the fault of that parent, not your client. If you can't pass off the blame to someone else, read on.

You deal with delay by explaining why it occurred. In order to explain the delay satisfactorily, you will have to explain why you did not arrange for what you want sooner. And that raises the issue of co-operation with the tribunal. Be honest with the tribunal. If you are to blame, say so. You will earn the tribunal's respect and it may be willing to help you. Provided, of course, that you don't make a habit of it.

You deal with the effects of delay by minimising their impact. The delay may have consequences for the other party and for the operation of the tribunal system.

There may be no consequences for the other party. This will be the case in most social security appeals. Even if there is an overpayment in issue, the impact on the Secretary of State is likely to be minimal. And it is unusual for there to be a presenting officer present to object.

The tribunal is entitled to be concerned about the overall efficiency of the tribunal system. A delay in your case will cause a knock-on delay for other cases when it is relisted. And this will be exacerbated if you need another adjournment. Ultimately, it may be impossible to quantify this. But the tribunal will be concerned about adjournment statistics. This may be difficult to justify, but it is a fact of life that you must be aware of and deal with. One way to deal with this is to show that there will not be another adjournment. Another is to show a clear and precise benefit that will be added to the proceedings by the delay necessary to obtain the evidence. This brings us conveniently to the final stage: the tribunal's decision.

At the end of this process, the tribunal will have to decide between two competing sets of arguments: the benefit that will be added to the proceedings versus the delay and its effects. Which will prevail? That will depend on how well you have been able to construct the argument. The greater the benefit to be added, the stronger your overall case. The less satisfactory your explanation of the delay, the weaker your overall case.

So here is what your final argument might look like:

We ask for an adjournment to allow the claimant to obtain evidence from her GP. He has made an appointment to see the claimant next week and has promised to write a report for her immediately afterwards. We need this evidence because there is a dispute about her correct diagnosis, which in turn will affect the tribunal's assessment of her evidence about the difficulties she is experiencing. We accept that the claimant should have organised this before, but she did not appreciate its importance until she came to the CAB for advice. Unfortunately, we were not able to arrange an appointment to see her until last week, after which we had to contact the GP to see if he could provide the evidence she needs.

This contains all the elements that we have discussed. Here is how it might look if we include express reference to the relevant elements of the overriding objective:

We ask for an adjournment to allow the claimant to obtain evidence from her GP. He has made an appointment to see the claimant next week and has promised to write a report for her immediately afterwards. So, there is no need to worry about a further adjournment. We need this evidence because there is a dispute about her correct diagnosis, which in turn will affect the tribunal's assessment of her evidence about the difficulties she is experiencing. So, this evidence

is essential to allow her to participate fully in the proceedings and to allow you to undertake a proper consideration of the issues. The doctor on the panel won't be able to diagnose the claimant's condition. We accept that the claimant should have organised this before, but she did not appreciate its importance until she came to the CAB for advice. Unfortunately, we were not able to arrange an appointment to see her until last week, after which we had to contact the GP to see if he could provide the evidence she needs. So, you can see that we co-operated with the tribunal as soon as we were contacted. It's not fair to blame the claimant for not understanding what evidence she needed.

8 Here is another example

Assume that you are applying for the tribunal to accept a late SALT [speech and language therapy] report in a special educational needs appeal.

This is different from the first example. There, you had to deal with the delay that would result from your application. Here, you have to persuade the tribunal to overlook the delay that has occurred.

In this example, it is easier to show the benefit that will be added to the proceedings, because the evidence is there for the tribunal to see. A quick glance should be enough to show the tribunal whether or not it will be useful. Depending on the composition of the panel, it may not be possible for the tribunal to use its own expertise to compensate if this evidence is excluded.

You will have to explain the delay in obtaining the evidence, just as in the first example. But it may be more difficult to deal with the consequences of admitting the evidence. For a start, there is another party – the local authority – who will be affected. They have not seen the evidence. Their representative may need time to absorb it and may ask for an adjournment to obtain evidence to counter it. Then, there is the tribunal itself. In contrast to the social security example, there should be no knock-on effects of relisting. But the case may have been listed for hearing over a whole day or even longer, and relisting will lead to the waste of time and effort by the panel and the local authority's representatives. There may be an issue of costs.

Be careful what you say. Remember that arguments can be used by either party and can rebound against you later. So, if you argue that the consequences of an adjournment can be dealt with by an award of costs, remember that the local authority may use this argument against you later.

There is an important argument about discipline. If the tribunal allows in your late evidence, will it set a precedent for other cases and undermine the beneficial effect that a timetable has for ensuring that a hearing is effective. You can only answer

that by reference to the special circumstances of your case. You do that by showing why those circumstances make it fair and just to make an exception for this evidence on this occasion.

Here is what your final argument might look like:

We apologise to the local authority and to the panel for the late delivery of the SALT report. We passed it to the local authority and the tribunal service as soon as we received it. We admit to being partly to blame by instructing the expert at a fairly late stage before the hearing, but she failed to keep to the agreed timetable for meeting Sally. You will have been able to see from even a quick look at the evidence that it is of crucial importance to identifying Sally's educational needs. The local authority should not need to obtain its own evidence on SALT provision; our expert is independent and, like all experts, owes her duty to the tribunal. It is only right that Sally's needs should be identified on the best available evidence. Doing so will avoid the need for a review.

And here it is with some commentary.

We apologise to the local authority and to the panel for the late delivery of the SALT report. An apology always sets a good tone. We passed it to the local authority and the tribunal service as soon as we received it. So, we did co-operate. We admit to being partly to blame by instructing the expert at a fairly late stage before the hearing, but she failed to keep to the agreed timetable for meeting Sally. So, the delay was only partly within our control. You will have been able to see from even a quick look at the evidence that it is of crucial importance to identifying Sally's educational needs. So, you see how important this is for Sally. The local authority should not need to obtain its own evidence on SALT provision; our expert is independent and , like all experts, owes her duty to the tribunal. This is a dangerous argument, as it can be used against you in future. It is only right that Sally's needs should be identified on the best available evidence. Doing so will avoid the need for a review. So, there is no need for an adjournment and the associated delay and costs.

And unspoken is the suggestion that the tribunal can use its expertise and judge for itself whether the evidence is good enough to be allowed in without a reply.

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01 An Introduction to Public Law

02 Making an Effective Complaint to a Public Body

03 An Introduction to Judicial Review

04 The ABC of Effective Procedural Applications

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