Social Entitlement – First Tier Challenges

Preparation for and representation at the Social Security and Child Support Tribunal

What does it do?
The Social Security and Child Support (SSCS) Tribunal deals with disputes about:

- Income Support
- Jobseeker's Allowance
- Incapacity Benefit;
- Employment Support Allowance
- Disability Living Allowance
- Attendance Allowance
- Retirement Pensions.
- Tax Credits
- Housing Benefit and Council Tax Benefit
- Statutory Sick Pay (SSP)
- Statutory Maternity Pay (SMP)
- Personal Independence Payment
- Universal Credit
- Compensation Recovery Scheme
- Road Traffic (NHS) charges
- Vaccine Damage
- Child Support

It is the biggest jurisdiction within the tribunal system in terms of appeals received. In 2011/12 the Social Security and Child Support Tribunal received 370,800 appeals. It is anticipated this will rise in 2013/14 to 700,000 in response to welfare benefits changes.

How does it do it?
There is no costs regime. This allows for unfettered access to justice for the poorest in society to secure their entitlement to social security benefits.

It has an enabling and inquisitorial function which lends itself to assisting the most challenged appellant to tell their story, either with our without representation.

In the main, there are no rules of evidence allowing for personal testimony and recollection to be appropriately considered and weighted.

It has the power to summon evidence eg. medical reports.

In Gillies-v-Secretary of State for Work and Pensions [2006], Baroness Hale said,

“Tribunals were once regarded with the deepest of suspicion but they are now an essential part of our justice system. They are mostly there to secure justice between citizen and state in a wide variety of contexts, the most numerically important of which is entitlement to the financial benefits provided by the welfare state. Since the Report of the Donoughmore Committee on Ministers' Powers (Cmd 4060, 1932), it has been recognised that tribunals can have important advantages over courts of law. These are 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject': see the Report of the Franks Committee on Administrative Tribunals and Enquiries (Cmnd 218, 1957, para 38).

The Report of Sir Andrew Leggatt's Review of Tribunals, Tribunals for Users, One System, One Service (2001, paras 1.11 to 1.13) suggests three tests of whether tribunals rather than courts should decide cases. The first is participation: that users should be able to prepare and present their own cases effectively. The third is the need for expertise in the area of law involved: users should not have to explain to the tribunal what the law is. The second is the need for special expertise in the subject matter of the dispute:

"Where the civil courts require expert opinion on the facts of the case, they generally rely on the evidence produced by the parties - increasingly jointly - or on a court-appointed assessor. Tribunals offer a different opportunity, by permitting decisions to be reached by a panel of people with a range of qualifications and expertise. … users clearly feel that the greater expertise makes for better decisions."

Expertise on the tribunal not only improves decision-making and reduces the need for outside expertise; it also thereby increases the accessibility and user-friendliness of the proceedings”

Who does it?

Dependent on which benefit is in dispute the First-Tier Tribunal will comprise of either a qualified legal member (Judge) sitting on his/her own, sitting with a medically qualified member or also sitting with a disability member.

Each of the members bring with them particular expertise to assist in the process of reaching a decision: the Judge understands the law underpinning entitlement to benefits; the medical member understands health conditions and their likely impact on the person; the disability member understands how ill-health impacts on the appellant’s mobility and ability to care for him/herself.

Each of the members can question the appellant to elicit appropriate evidence.

Preparation v Representation

First-Tier Tribunal representation is not publicly funded. Recommendations in the 2004 White Paper on *Transforming Public Services: Complaints, Redress and Tribunals*, accepted that *"some people will always need a lot of help, perhaps because of learning difficulties, physical difficulty or language problems*," but aimed to increase the responsiveness of tribunals to enable an appellant to present their case without the need for a representative.

At the time, the White Paper recommendations flew in the face of research in 1989 by Hazel Genn and Yvette Genn, *The Effect of Representation in Tribunals,* which found that the success rate of represented appellants at Social Security Tribunals was 18% higher than those who had no representation.

Research by Michael Adler in 2004, *Can Tribunals Deliver Justice in the Absence of Representation*, concluded the increasingly inquisitorial, enabling and interventionist role of the First-Tier Tribunal produced a surprisingly high success rate of 70% for social security appeals and reduced the differential to 10% for represented and unrepresented appellants. There was a negligible improvement of just one per cent in success rates for appellants who, although assisted in bringing their appeal, did not have representation at the tribunal hearing.

This suggests it is access to legal advice and assistance that has a greater impact on the outcome of a claimant's appeal. Representation is desirable and, in cases involving complex legislation, necessary, but it can be argued it is the earlier legal intervention which helps to secures justice for the social security claimant.

Identify the matter under appeal and its merit

An appealable decision and a winnable appeal are not always the same entity. Your client may believe that the decision on their benefit claim is wrong and decide to seek redress via the appeals procedure. He or she has an absolute right to do so if the decision is one against which an appeal can be lodged.

However, as an advocate or representative, you have a duty to advise your client not only on their legal right to appeal but on the merits of that appeal – the chances of success in pursuing the claim.

This is not always initially transparent. An appeal against a decision of an over-payment of benefit arising from non-disclosure of means may appear to have little or no merit until the matter of notification and calculation are considered in more detail.

Conversely, your client may have a number of health problems which give rise to a claim for out-of-work sickness benefits. However, whilst these are of concern to your client, in themselves they do not mean your client is not able to undertake work eg.

ill-health controlled by medication such as diabetes, high blood pressure or epilepsy may be concerning but is not a barrier to working.

Your client is entitled to pursue their appeal with or without your assistance but your considered advice can often divert the claim more fruitfully.

Pre-Tribunal consideration
It is not in any party's interest to withhold information or evidence for disclosure only to the tribunal hearing – if you can, aim to change the decision with the decision-maker. It can often be as simple as providing evidence of your client's *actual* means to reduce an overpayment and referring to the decision maker's duty to carry out a calculation on the information before it.

The decision cannot be changed …
This phrase will precede the decision maker's announcement that the decision under appeal will be forwarded to The Tribunals Service for consideration.

Notwithstanding that the decision can be revised any time before the hearing, your preparation for the hearing begins. You will receive the "bundle" – the response by the Secretary of State, Local Authority or Inland Revenue to your client's appeal.

The bundle will contain, usually, a record of the initial claim, any supporting evidence for the claim, a record of any medical assessments, if appropriate, the decision, the appeal and the (unsuccessful) reconsideration of the decision.

Follow the formula
In Edward Jacobs' *Tribunal Practice and Procedure,* chapter 9 outlines what is expected of representatives at the First-Tier Tribunal. It is sound advice and provides an effective checklist for first-time and experienced representatives.

Preparation
A representative must be fully prepared for a case. Edward Jacobs says this involves three distinct but related aspects:

- Marshalling the evidence and arguments in support of the client's case
- Planning how to respond to the strongest case the other party could present
- Anticipating the concerns that the tribunal might have

Judge Jacobs notes, "…*in the nature of things, the representative will not need to use all, or even much, of the preparation. But it is better to be prepared than unable to respond at the hearing*."

Evidence and Argument

The outcome, in the main, will be determined on evidence in support of the appeal eg. medical reports, evidence of means, proof of circumstances. Your client's credibility can contribute to the outcome but on its own may not be enough.

Always know what your client is going to say

It is not usual to work with witness statements at the First-Tier Tribunal and whilst this has its advantages, it can leave the representative having to respond to the appellant's change of heart, introduction of new (not necessarily helpful) evidence or reluctance to co-operate.

But never coach your client. The tribunal will know if you do.

Don't patronise your client. If it is a points-based entitlement such as Employment and Support Allowance, explain how they can pick up points. If they can be held to have known about an overpayment at the time is was made explain that condition and how the assumption of knowledge can be challenged.

Clients can be unpredictable but can also be resourceful.

Always know the law

You must understand the area of law, including case law, on which you are advocating. The judge certainly will and, most likely, so also will any presenting officer who attends.

A subscription to advice services providing updates on Upper Tribunal decisions is recommended. And check the decisions reported on the HMCTS website.

There is not time, or desire by any party, for lengthy lectures on the law. It should be sufficient to be able to refer to relevant legislation with an assumption that all parties are familiar with it.

If it is an argument that includes a new interpretation or relies on a more obscure regulation then it is useful to include its reference or provide a copy of the decision.

Confine your efforts to making the law relevant to the appeal.

Always provide a written submission

A written submission in advance of the hearing gives the parties the opportunity to understand why your client disagrees with the decision, what remedy is sought, what evidence supports this outcome and why it is supported in law.

An informal canvassing of tribunal judges supports the view that a submission should be no more than two pages long.

Submission on behalf of Mr Appellant

1. On 13/3/2012 a decision was made that Mr Appellant did not have limited capability for work. He has appealed against this decision.
2. Please find attached a copy of a letter dated 28/09/2012 from Mr Appellant's GP in which she confirms he 'has a long history of cervical neck pain and right-sided brachialgia with right arm pain which causes him significant functional limitation'.
3. A list of his medication is attached.
4. Mr Appellant has told us the following:
5. His ability to mobilise outdoors is limited due to pain in his neck and right shoulder. He cannot walk for more than 200 metres before stopping even if he takes it slowly.
6. He cannot sit for more than an hour or stand for more than 10 minutes, without experiencing significant discomfort in the neck and shoulder.
7. Although he is physically capable of raising his left arm, to do so causes him discomfort in his right shoulder.
8. He cannot transfer a light but bulky object requiring the use of both arms as this triggers pain in his right arm and shoulder.
9. We submit that the GP's opinion is consistent with Mr Appellant's own account of his situation relating to his physical health problems and ask that you consider awarding the following points in relation to these descriptors:-

   Activity 1(d) (mobilising) 6 points

   Activity 2(c) (sitting/standing) 6 points

   Activity 3 (c) (reaching) 6 points

   Activity 4 (c) (transferring) 6 points

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Planning your response

Have you considered how the other side will respond to your evidence or argument?

Will they argue the GP report on which you are rely was written six months after the decision was made and therefore does not reflect your client's condition at the time of the decision?

Will the Local Authority argue your client's late disclosure contributed to their error?

Does the other side have access to case law which supports their decision?

The reality of a social security tribunal hearing is that you must be able to think on your feet and respond either to questioning from the judge or on points raised by the other side. It is extremely useful to be able to refer, even in the most oblique terms, to common caselaw and/or guidance.

It is rare that a hearing will be adjourned for you to marshall your legal argument.

You may find that you have to consider amending what you are asking for in light of opposing legal argument.

Is your tribunal troubled?
Are there discrepancies in your case? Does your client's evidence contradict the medical examiner's findings? Is the GP's report vague? Has your client not been able to provide evidence of means for the whole of the overpayment period?

These questions need not be fatal to your case but they will certainly trouble your tribunal and raise concerns about the strength of your client's claim.

Do not hope they will not be noticed – there is not an inconspicuous elephant in the hearing room. Confront the weaknesses in your case. More often than not the law will support you but if you do not prepare in advance you may find yourself floundering under questioning.

Co-operation
In the hearing room there is a common theme – was the right decision made at the time or could a different decision have been reached. To be effective you must be able to persuade the tribunal that a different, advantageous decision can be substituted.

You do this by working to assist the tribunal reach that conclusion.

A hostile, non-compliant approach will not assist your client. The tribunal is not the barrier to the right decision – it is a potential vehicle to what you want to achieve.

Tribunal directions are almost always made in the interests of progressing the hearing. Make sure you understand what is expected of you and do it on time.

Listen and Learn
A tribunal hearing can be a useful experience to develop your advocacy skills whatever the outcome.

Listen to the judge's reasoning for not allowing your appeal.

You might not agree with the decision but you can learn where your case was weak, where you were not as persuasive as you thought you were.

Were you alert to your weaknesses?

And get to know your judges. Who holds particular expertise? Who do you need to work harder with?

Reputation – build it, keep it

Judge Jacobs refers to the importance of reputation.

Remember, it takes years to build and a second to destroy.

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