CAN TRIBUNALS DELIVER JUSTICE IN THE ABSENCE OF REPRESENTATION?

Michael Adler*

INTRODUCTION

A few years ago, when the DCA (as it then was) set out its proposals for the reform of tribunals in the White Paper on *Transforming Public Services: Complaints, Redress and Tribunals* 1, I criticised the government for its opposition to representation at tribunals. 2 Although the White Paper accepted that ‘some people will always need a lot of help, perhaps because of learning difficulties or physical disability or language problems’ and that ‘others will need some degree of help until tribunals are successfully made more responsive’, it aimed to create a situation where individuals who are in dispute with the state and / or taking a case to a tribunal will be able to present their case without the help of a representative. 3 In contrast to this view, I argued 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, and that representation — by a lawyer or, more appropriately in the majority of cases, by an expert lay representative — will still be required in the foreseeable future, and that resources for this will have to be found. 4

At the time, the effects of representation on tribunal outcomes appeared to be well-established. In research conducted for the Lord Chancellor’s Department in the late 1980s 5, Hazel and Yvette Genn had established that having a representative (although not necessarily a legal representative) increased the probability that litigants would be successful from 30 per cent to 48 per cent in Social Security Appeal Tribunals, from 20 per cent to 38 per cent in

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2 In the UK, most disputes between the citizen and the state are heard at a tribunal rather than in a court. They were established during the twentieth century and the growth of tribunals parallels the development of the welfare state, i.e. the growth of tax-raising powers, the public provision of benefits and services, and the regulation of more and more areas of economic and social activity. However, some disputes between citizens and the state, e.g. disputes between parents and local authorities over the assumption of parental rights are still heard by the courts and some disputes between private parties, e.g. disputes between employers and employees, are heard by tribunals.


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.

The White Paper noted that in 2002/3, the UK spent about £200m per annum through legal aid on representation at tribunals (mainly on asylum and immigration, mental health and ‘welfare benefits’ cases) and considered that this was about right. It argued that the extent to which individuals can and should be represented at public expense depends on the nature, complexity and seriousness of their case, what needs to be done and the individual’s own capabilities, and asserted that full-scale legal representation at the taxpayer’s expense in every administrative dispute or tribunal case would be ‘disproportionate and unreasonable’. It is hard to take exception to this general statement but there clearly is a case for looking at the way in which public expenditure on legal representation could be used to ensure that it is used in cases where it is clearly needed. Thus, in light of the recent establishment of a two-tier Tribunals Service, in which appeals to the second-tier or Upper Tribunal will require leave and be restricted to points of law, there is a strong case for arguing that representation, at public expense, by a lawyer or a lay expert, should be available to those who appeal to the Upper Tribunal.

That said, I have now come to the conclusion that the position that I previously adopted was mistaken and is in need of revision. The issue is not so much the complexity of the law as the mode of dispute resolution that tribunals should adopt. In order to develop this argument, I shall first describe two contrasting modes of dispute resolution, i.e. those adopted by the civil courts and by ombudsmen, noting that representation is essential in most court cases but irrelevant in most ombudsman procedures. I shall then describe, on the basis of research that I have recently carried out, in particular telephone interviews with 869 applicants / appellants at four tribunals and observation of 64 tribunal hearings, the mode of dispute resolution adopted by tribunals, compare it with that adopted by courts and ombudsmen, and consider the implications of this comparison for representation in tribunals.

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6 Under Section 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Immigration Adjudicators and the Immigration Appeal Tribunal were merged into the single tier Asylum and Immigration Tribunal (AIT).

7 Under Section 1 of the Employment Rights (Dispute Resolution) Act 1998, industrial tribunals were renamed employment tribunals.

8 White Paper, Para. 10.4.

9 White Paper, Para. 10.5. Representation is also provided by citizens’ advice bureaux, who receive a block-grant from the Department of Trade and Industry (DTI), local authority or voluntary-sector advice and information centres, law centres, trade unions etc.

10 White Paper, Para. 10.3.

11 Ombudsmen investigate complaints relating to maladministration in decision making by government departments, other public bodies, local authorities and regulated private sector organisations. Complainants are normally expected to have exhausted the internal complaints procedure before taking their complaint to an ombudsman.
MODES OF DISPUTE RESOLUTION ADOPTED BY CIVIL COURTS AND OMBUDSMEN

Dispute resolution in the Civil Courts

In general, courts are best suited to hearing disputes between individual parties. The functions of the court are to make a judgment (‘on the balance of probabilities’) in favour of one of the parties and, in appropriate cases, to grant that party a remedy. In the UK, and other common law jurisdictions, most cases are dealt with using an adversarial procedure. This involves each party putting its own case and subjecting the case put forward by the other party to rigorous scrutiny. The judge, who typically does not take a very active part in the proceedings, then decides whose case is the stronger. Where the two parties are equally placed (evenly matched), in particular where they are both legally represented, this makes a great deal of sense. However, where the two parties are not equally placed, e.g. where one but not the other is legally represented, and/or where one has much more experience than the other, it will be less appropriate. In his famous and much-cited article, Marc Galanter explains why the ‘haves’ often come out ahead in terms of the very uneven nature of contests between ‘one shotters’ and ‘repeat players’.¹² In some cases, like those involving ‘small claims’, court procedures have been adjusted to take account of the fact that the parties are typically not legally represented. This involves the judge taking a more active role in questioning the parties and indicating what evidence they would need to bring if their case is to succeed.

The defining characteristics of courts are summarised in Chart 1 below:

<table>
<thead>
<tr>
<th>Characteristic Features of Courts</th>
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</thead>
<tbody>
<tr>
<td>Jurisdiction</td>
</tr>
<tr>
<td>Oral hearings</td>
</tr>
<tr>
<td>Decision-makers</td>
</tr>
<tr>
<td>Representation</td>
</tr>
<tr>
<td>Availability of legal aid</td>
</tr>
<tr>
<td>Mode of dispute resolution</td>
</tr>
<tr>
<td>Evidence</td>
</tr>
<tr>
<td>Style</td>
</tr>
<tr>
<td>Standard of proof</td>
</tr>
<tr>
<td>Charge for raising an action</td>
</tr>
<tr>
<td>Costs</td>
</tr>
<tr>
<td>Expenses paid</td>
</tr>
</tbody>
</table>

Dispute resolution by Ombudsmen

Although there are now numerous private sector ombudsmen, who hear complaints against regulated private sector organisations, ombudsmen were first introduced into the public sector to hear complaints against central government departments. Their remit was specifically to deal with cases of ‘maladministration that give rise to injustice’. Thus, they were neither concerned with the legality nor with the merits of administrative decisions but, rather, with the manner in which these decisions are reached. Those who allege that maladministration has taken place are normally expected to have exhausted the internal complaints procedures. When they have done so, an ombudsman may determine whether maladministration has taken place and, if so, whether it has given risen to injustice. The ombudsman takes charge of the case and adopts the role of an investigator. Thus, he or she can ask to see files and other documentary sources and can ask questions of the complainer and the organisation against which the complaint has been made. In contrast to the adversarial approach found in the courts, ombudsmen typically adopt an inquisitorial approach, in which they take a much more active role than judges do in seeking to determine the facts of the case and assessing the claims of the parties.

The defining characteristics of ombudsmen are summarised in Chart 2 below:

<table>
<thead>
<tr>
<th>Characteristic Features of Ombudsmen</th>
</tr>
</thead>
<tbody>
<tr>
<td>jurisdiction</td>
</tr>
<tr>
<td>oral hearings</td>
</tr>
<tr>
<td>decision-makers</td>
</tr>
<tr>
<td>representation</td>
</tr>
<tr>
<td>availability of legal aid</td>
</tr>
<tr>
<td>mode of dispute resolution</td>
</tr>
<tr>
<td>evidence</td>
</tr>
<tr>
<td>style</td>
</tr>
<tr>
<td>standard of proof</td>
</tr>
<tr>
<td>charge for making a complaint</td>
</tr>
<tr>
<td>costs</td>
</tr>
<tr>
<td>expenses paid</td>
</tr>
</tbody>
</table>

The adversarial mode of dispute resolution found in the civil courts attaches a great deal of importance to representation but the inquisitorial mode of dispute resolution adopted by ombudsmen does not. This is because, in adversarial proceedings, because the parties decide how to present their own cases and challenge the other side, an unrepresented party is likely to be at a disadvantage compared to a party who is represented. By contrast, in inquisitorial proceedings, the investigator, rather than the parties in dispute, determines how the case is constructed. Thus, while an unrepresented party litigant is typically at a considerable disadvantage in a court action, there is no need for representation in ombudsmen proceedings and it would make no sense at all for complainants to be represented.
MODES OF DISPUTE RESOLUTION IN TRIBUNALS

Although some 70 tribunals currently fall under the jurisdiction of the Council on Tribunals\(^\text{13}\), most of them, including the largest, have either been or are about to be taken into the new Tribunals Service\(^\text{14}\). While courts hear, in the main, private law disputes, i.e. disputes between private parties, tribunals hear, in the main, public law disputes, i.e. disputes between citizens and the state. However, there are some exceptions, for example, courts hear disputes between parents and local authorities over the assumption of parental rights while disputes between employers and employees are heard by Employment Tribunals. In the case of public law disputes, tribunal cases are typically appeals against administrative decisions. What is at issue is the legality and, in some cases, the merits of that decision.

Tribunals typically are less formal than courts. Instead of being heard in open court by judges in wigs and gowns, the parties sit around the table and cases are determined by panels comprising a legally-qualified chairman sitting together with one or two non-legal members who usually have some specialised knowledge of the issue in dispute\(^\text{15}\). The applicants (in the case of party vs. party disputes) or appellants (in the case of citizen vs. state disputes) may or may not be represented but, if they are, they are just as likely to be represented by a lay representative, such as a welfare rights officer or a Citizen’s Advice Bureau representative, as by a lawyer. This is because, with a few exceptions\(^\text{16}\), legal aid is not available for representation at tribunals. Tribunals tend to be more interventionist than courts, especially with unrepresented users, but are clearly less inquisitorial than ombudsmen. We develop below what we mean by interventionist.

The defining characteristics of tribunals are summarised in Chart 3 below:

\(^{13}\) Under the Tribunals, Courts and Enforcement Bill 2007, the Council on Tribunals will become the Administrative Justice and Tribunals Council with a wider remit to review and promote the entire system of administrative justice.

\(^{14}\) The Tribunals Service, which is an executive agency of the Ministry of Justice (MoJ), currently provides independent administrative support to 27 central government tribunals. Individual tribunal jurisdictions doing similar work are being brought together into a simplified two tier system, comprising a First Tier Tribunal, organised into five Chambers, and an Upper Tribunal, organised into three Chambers. The Employment Tribunal and the Employment Appeal Tribunal will be separate from the First Tier and Upper Tribunal, although there will be close links between them. The future of the Asylum and Immigration Tribunal is still undecided but the Government is considering bringing it into the unified structure.

\(^{15}\) Some tribunals, e.g. Employment Tribunals and Asylum and Immigration Tribunals, are less informal.

\(^{16}\) The main exceptions are Asylum and Immigration Tribunals, Mental Health Review Tribunals (and Mental Health Scotland Tribunals) and, in Scotland only, Employment Tribunals.
Chart 3: Characteristic Features of Tribunals

<table>
<thead>
<tr>
<th>Feature</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>jurisdiction</td>
<td>relatively specialised, although their common features are being promoted by the new, unitary Tribunals Service</td>
</tr>
<tr>
<td>oral hearings</td>
<td>yes — although some tribunals decide cases on the written submissions (paper hearings)</td>
</tr>
<tr>
<td>decision-makers</td>
<td>legally qualified chairman, often sitting with one or two ‘expert’ members</td>
</tr>
<tr>
<td>representation</td>
<td>lay representation is more common than representation by lawyers in some tribunals</td>
</tr>
<tr>
<td>availability of legal aid</td>
<td>no – with a few exceptions</td>
</tr>
<tr>
<td>mode of dispute resolution</td>
<td>mixed — more interventionist than courts but less inquisitorial than ombudsmen.</td>
</tr>
<tr>
<td>evidence</td>
<td>tribunal may ask parties for evidence to support their case, rules of evidence less strict than those in courts</td>
</tr>
<tr>
<td>style</td>
<td>relatively informal</td>
</tr>
<tr>
<td>standard/onus of proof</td>
<td>not prescribed</td>
</tr>
<tr>
<td>charge for appealing</td>
<td>no</td>
</tr>
<tr>
<td>costs awarded</td>
<td>no</td>
</tr>
<tr>
<td>expenses paid</td>
<td>parties do not incur expenses</td>
</tr>
</tbody>
</table>

Charts 1-3 represent attempts to generalise across courts, ombudsmen and tribunals and there is clearly a fair amount of variation within each category. Thus, some courts (the higher courts) are more ‘court-like’ than others; some tribunals (particularly those that hear party vs. party disputes) resemble courts while others (in particular those which emphasise ‘paper hearings’) have some of the characteristics of ombudsmen; some ombudsmen (like the Financial Services Ombudsman) do hold hearings and, where they do so, resemble courts or tribunals. However, I think it is clear that, if courts and ombudsmen represent two poles on a continuum, tribunals are somewhere in the middle. Exactly where they lie is both unclear and extremely relevant to the question this paper seeks to address.

Since the publication of the Franks Report in 195717, one of whose main recommendations was that tribunals constituted part of the machinery of adjudication rather than the machinery of administration, tribunals have become increasingly like courts. As Harlow and Rawlings point out, ‘tribunals have been ‘remade in the image of the ordinary courts.18 They cite, as examples, the fact that, following the recommendations of the Franks Committee, legally-qualified chairmen have replaced lay chairmen, more ‘orderly’ procedures have been introduced, the public have, with the permission of the parties, been admitted to tribunal hearings (although few actually attend), the right to legal representation has been accepted, the ‘blanket ban’ on the provision of legal aid has been lifted, tribunals have been encouraged to give full reasons for their decisions, and systems of precedent have been developed. In short, by applying the principles of ‘openness, fairness and impartiality’ that Franks espoused, tribunals have become more and more like courts.

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17 Report of the Franks Committee on Tribunals and Enquiries (1957), Cmnd. 218, London: HMSO.
Recent developments will continue this trend and the reforms that were outlined in the White Paper on *Transforming Public Services: Complaints, Redress and Tribunals* \(^{19}\) and given effect in the *Courts, Tribunals and Enforcement Bill 2007* \(^{20}\), will give it further impetus. Of particular significance are moves to strengthen the independence of tribunals by severing their ties with their ‘sponsoring departments’, raising the status of the tribunals by unifying them under a Senior President; introducing a precedent-setting second-tier or Upper Tribunal, giving the Upper Tribunal the power to determine applications for judicial review, and renaming tribunal chairmen ‘tribunal judges’. However, it is clear that there are still important differences between courts and tribunals. Tribunals are less formal than the civil courts, legal representation, and thus the use of legal language, is less common, many party litigants who appear are unrepresented, much of the representation (for those who are represented) is undertaken by lay representatives, and tribunal chairmen and members are not only more interventionist than judges in the civil courts but are encouraged to conduct hearings in a ‘responsive’ and ‘enabling’ manner.

It is the central argument of this paper that, if tribunals are allowed to become more like civil courts, adopting a passive stance and using an adversarial approach, unrepresented litigants will be seriously disadvantaged but, if they become more like ombudsmen, intervening more often and adopting a more inquisitorial approach, unrepresented litigants will not be disadvantaged. If this happens, it should be possible to achieve justice in the absence of representation.

**DATA SOURCES**

In attempting to explore the possibility that justice can be achieved without representation, I have been carrying out research on the experiences of unrepresented litigants in five tribunals — Criminal Injury Compensation Appeals Panels, Employment Tribunals, Social Security Appeals Tribunals, Special Educational Needs and Disability Tribunals (England), and Additional Support Needs Tribunals (Scotland). This recently completed research aims to assess the effects of representation on tribunal procedure and the ways in which some tribunal chairmen and members compensate for its absence, and to determine what can be done to make it easier for litigants to represent themselves. It involved a telephone survey of 869 ‘tribunal users’, observation of 64 tribunal hearings, and post-hearing interviews with tribunal users, chairmen and members, and with the President and Chief Executive of the five tribunals in the study. Because of its focus on unrepresented litigants, efforts were made to ensure that the telephone survey and the observations of tribunal hearings both contained similar numbers of represented and unrepresented litigants.

The research set out to compare the experiences of litigants who handled their application (in employment cases) or their appeal (in other cases) without any help with those who obtained pre-hearing advice but were not represented at the tribunal hearing and those who were represented (by various types of representative); to establish how each of the three groups of litigants prepared for their tribunal, what their expectations were and how their experiences matched their expectations; and to identify the effects of socio-economic and other variables on how litigants handled their hearing.

\(^{19}\) See note 2 above.

\(^{20}\) The Bill was given its Second Reading in the House of Commons on 5\(^{th}\) March 2007 and should become law within the current parliamentary session.
The overall aims of the research were:

- to assess the effects on tribunal procedure of representation and the ways in which tribunal chairmen and members compensate for its absence;
- to determine what can be done to make tribunals more ‘user-friendly’ and to make it easier for party litigants to represent themselves;
- to assess whether justice can be achieved in the absence of representation, and, if so, how tribunal procedures will need to change to make this possible.

In this paper, I draw selectively on the telephone survey of ‘tribunal users’ and our observation of tribunal hearings in presenting some key research findings relating to tribunal outcomes and tribunals procedures to support my argument that the wider availability of pre-hearing advice and an active and enabling approach by tribunal chairs and members should make it possible to achieve justice in the absence of representation.

TRIBUNAL OUTCOMES

Using the telephone survey, we first consider (in Tables 1 and 2) the outcomes of tribunal hearings.

Table 1: Outcomes in Different Tribunals

<table>
<thead>
<tr>
<th>Type of Hearing</th>
<th>wholly successful</th>
<th>partially successful</th>
<th>unsuccessful</th>
<th>number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Injuries Compensation (CICAP)</td>
<td>44%</td>
<td>29%</td>
<td>27%</td>
<td>80</td>
</tr>
<tr>
<td>Employment (ET)</td>
<td>51%</td>
<td>16%</td>
<td>33%</td>
<td>345</td>
</tr>
<tr>
<td>Social Security (SSCST)</td>
<td>59%</td>
<td>11%</td>
<td>30%</td>
<td>390</td>
</tr>
<tr>
<td>Special Educational Needs (SENDIST)</td>
<td>50%</td>
<td>21%</td>
<td>29%</td>
<td>48</td>
</tr>
<tr>
<td>Additional Support Needs (ASNT)</td>
<td>33%</td>
<td>0%</td>
<td>67%</td>
<td>6</td>
</tr>
<tr>
<td>total</td>
<td>54%</td>
<td>15%</td>
<td>31%</td>
<td>869</td>
</tr>
</tbody>
</table>

Table 2: Success rates for applicants in Employment Tribunals, where the employer was and was not represented

<table>
<thead>
<tr>
<th>Type of Hearing (Employment Tribunals only)</th>
<th>wholly successful</th>
<th>partially successful</th>
<th>unsuccessful</th>
<th>number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>employer represented</td>
<td>36%</td>
<td>15%</td>
<td>49%</td>
<td>178</td>
</tr>
<tr>
<td>employer not represented</td>
<td>71%</td>
<td>17%</td>
<td>12%</td>
<td>146</td>
</tr>
<tr>
<td>total</td>
<td>52%</td>
<td>16%</td>
<td>33%</td>
<td>324*</td>
</tr>
</tbody>
</table>

* Some respondents could not recall whether the other side was represented and have been excluded from the analysis.
Table 1 indicates that a surprisingly large percentage of appeals were successful. Overall, 54 per cent of tribunal cases were reported to have been ‘wholly successful’, and another 15 per cent ‘partially successful’. This compares with 31 per cent of appeals that were reported to have been ‘unsuccessful’.21

Looking first at the tribunal cases that were reported to have been ‘wholly successful’, the success rate was highest for social security appeals (59 per cent of which were reported to have been ‘wholly successful’) and lowest for criminal injuries compensation appeals (44 per cent of which were reported to have been ‘wholly successful’. Although the extremely small number of ASNT appeals in the survey means that it is unsafe to generalise from the very low success rate, it should be noted that the figure (33 per cent) is in line with the figure reported in the ASNT’s latest Annual Report.22

If employment cases are divided into those where the employer was and was not represented (there were 180 of the former and 144 of the latter where the outcome was known when the applicant was interviewed), some more substantial differences become apparent. Where the employer was not represented, 68 per cent of employees were reported to have been ‘wholly successful’ but, where the employer was represented, the success rate was substantially less (37 per cent).

The effects of representation and pre-hearing advice on ‘wholly successful’ outcomes are set out in Tables 3 and 4:

Table 3: ‘Wholly successful outcomes’ for represented and unrepresented applicants / appellants

<table>
<thead>
<tr>
<th>Type of Hearing</th>
<th>represented</th>
<th>not represented</th>
<th>number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>pre-hearing advice</td>
<td>no pre-hearing advice</td>
<td></td>
</tr>
<tr>
<td>Criminal Injuries Compensation (CICAP)</td>
<td>50%</td>
<td>45%</td>
<td>36%</td>
</tr>
<tr>
<td>Employment (ET)</td>
<td>48%</td>
<td>53%</td>
<td>55%</td>
</tr>
<tr>
<td>Social Security (SSCST)</td>
<td>66%</td>
<td>62%</td>
<td>47%</td>
</tr>
<tr>
<td>Special Educational Needs (SENDIST)</td>
<td>53%</td>
<td>50%</td>
<td>25%</td>
</tr>
<tr>
<td>Additional Support Needs (ASNT)</td>
<td>33%</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>total</td>
<td>56%</td>
<td>55%</td>
<td>48%</td>
</tr>
</tbody>
</table>

21 These figures are comparable to those reported in Hazel Genn’s recent research on the experiences of ethnic minorities in three tribunals. In criminal injuries compensation appeals, the success rate was 55%; in social security appeals, it was 57%; and in special educational; needs appeals, it was 79%. See Genn et al. (2006), Tribunals for Diverse Users, DCA Research Series 1/06, London: Department of Constitutional Affairs, pp. 250-251.

22 In 2007-2008, there were 18 oral hearings and the parent’s appeal was upheld in 5 cases. This corresponds to a ‘success rate’ of 28%. See Third Annual Report of the President of the Additional Support Needs Tribunals for Scotland, 2007/2008, accessed at http://www.asntscotland.gov.uk/asnts/files/annual%20report%202007%20to%202008.pdf
Table 3 indicates that 56 per cent of hearings in which the applicant/appellant was represented were described as ‘wholly successful’. This compares with 55 per cent in which the applicant/appellant was not represented but had received advice before the hearing and 48 per cent in which the applicant/appellant was not represented and had not been given any pre-hearing advice. It follows that those who received advice beforehand but represented themselves at the hearing did almost as well on this measure of success as those who had a representative. Those who represented themselves at the hearing without getting any pre-hearing advice did less well but the differences were not all that striking.

Those who were represented did *somewhat better* than those who were not represented but had received advice before the hearing in three of the four tribunals. In Criminal Injuries Compensation Appeals Panels, the margin was 5 per cent, in Social Security and Child Support Tribunals it was 4 per cent and in Special Educational Needs and Disability Tribunals it was 3 per cent. However those who were represented did *considerably better* than those who were not represented and had not received any pre-hearing advice. In Criminal Injuries Compensation Appeals Panels, the margin was 14 per cent, in Social Security and Child Support Tribunals it was 19 per cent and in Special Educational Needs and Disability Tribunals it was 28 per cent.

The success rates in Employment Tribunals did not conform to this pattern. Those who were represented actually did *less well* than those who were not represented, whether or not they had received pre-hearing advice. Applicants who were represented were successful in 48 per cent of cases, compared with 53 per cent of cases where they were not represented but had received advice before the hearing and 55 per cent of cases where they were not represented and had not received any pre-hearing advice. In an attempt to explore these findings in more detail, cases were divided into those where the employer was and was not represented.

**Table 4: Wholly successful outcomes’ for represented and unrepresented applicants in employment cases where the employer was and was not present**

<table>
<thead>
<tr>
<th>Type of Hearing (Employment Tribunals only)</th>
<th>represented</th>
<th>not represented</th>
<th>number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>employer represented</td>
<td>37%</td>
<td>30%</td>
<td>44%</td>
</tr>
<tr>
<td>employer represented</td>
<td>37%</td>
<td>30%</td>
<td>44%</td>
</tr>
<tr>
<td>employer not represented</td>
<td>68%</td>
<td>72%</td>
<td>71%</td>
</tr>
<tr>
<td>employer not represented</td>
<td>68%</td>
<td>72%</td>
<td>71%</td>
</tr>
<tr>
<td>total</td>
<td>47%</td>
<td>53%</td>
<td>57%</td>
</tr>
</tbody>
</table>

* The number of cases is less than Table 3 because some respondents could not recall whether the other side was represented and were excluded from the analysis.

Table 4 indicates that, where the employer was represented, represented applicants did better (37 per cent successful) than unrepresented employees who received pre-hearing advice (30 per cent successful) but, surprisingly, they did less well than unrepresented employees who had not received any pre-hearing advice (44 per cent successful). Where the employer was not represented, the applicants’ success rates were much higher. 68 per cent of represented applicants were successful, less than for unrepresented applicants who had obtained advice before the hearing (72 per cent successful) and for unrepresented employees who had not obtained any pre-hearing advice (71 per cent successful). Equating ‘success’ with those cases
in which applicants claimed to have been ‘wholly successful’, it is difficult to explain why unrepresented applicants in Employment Tribunals, particularly those who had not obtained any pre-hearing advice, should have done so well.

Looking next at the tribunal cases that were reported to have been ‘wholly or partially successful’, the success rate was highest for criminal injury compensation appeal panels (83 per cent of which were reported to have been ‘wholly or partially successful’) and lowest for employment tribunals (67 per cent of which were reported to have been ‘wholly or partially successful’. However, the success rates for social security appeal tribunals (70 per cent) and special educational needs and disability tribunals (71 per cent) were very similar.

If employment cases are divided into those where the employer was and was not represented, some more substantial differences become apparent. Where the employer was not represented, 89 per cent of employees were reported to have been ‘wholly successful but, where the employer was represented, the success rate was substantially less (52 per cent).

The effects of representation and pre-hearing advice on ‘wholly or partially successful’ outcomes are set out in Tables 5 and 6:

### Table 5: ‘Wholly or partially successful outcomes’ for represented and unrepresented applicants / appellants

<table>
<thead>
<tr>
<th>Type of Hearing</th>
<th>represented</th>
<th>not represented</th>
<th>number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>pre-hearing advice</td>
<td>no pre-hearing advice</td>
</tr>
<tr>
<td></td>
<td></td>
<td>82%</td>
<td>70%</td>
</tr>
<tr>
<td>Criminal Injuries Compensation (CICAP)</td>
<td>82%</td>
<td>70%</td>
<td>64%</td>
</tr>
<tr>
<td>Employment (ET)</td>
<td>69%</td>
<td>64%</td>
<td>69%</td>
</tr>
<tr>
<td>Social Security (SSCST)</td>
<td>73%</td>
<td>74%</td>
<td>63%</td>
</tr>
<tr>
<td>Special Educational Needs (SENDIST)</td>
<td>71%</td>
<td>80%</td>
<td>50%</td>
</tr>
<tr>
<td>Additional Support Needs (ASNT)</td>
<td>33%</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>total</td>
<td>72%</td>
<td>68%</td>
<td>65%</td>
</tr>
</tbody>
</table>

Table 5 indicates that 72 per cent of hearings in which the applicant / appellant was represented were described as ‘wholly or partially successful’. This compares with 68 per cent in which the applicant / appellant was not represented but had received advice before the hearing and 65 per cent in which the applicant / appellant was not represented and had not been given any pre-hearing advice.

Those who were represented did significantly better than those who were not represented and had received advice before the hearing in Criminal Injuries Compensation Appeals Panels, where the difference in success rates was 12 per cent (82 per cent versus 70 per cent). They did somewhat better in Employment Tribunals where the margin was 5 per cent. However, they did no better in social security appeals and in actually did worse in Special Educational
Needs and Disability Tribunals, where the margin was -9 per cent (71 per cent versus 80 per cent). However, those who were represented did substantially better than those who were not represented and had not received any pre-hearing advice in three of the four tribunals, in Special Educational Needs and Disability Tribunals, where the margin was -20 per cent (71 per cent versus 50 per cent), in Criminal Injuries Compensation Appeals Panels, where the margin was 18 per cent (82 per cent versus 64 per cent) and in Social Security Appeal Tribunals, where the margin was 10 per cent (73 per cent versus 63 per cent). The only exception was Employment Tribunals, where those who were not represented and had received any pre-hearing advice did just as well as those who were represented (69 per cent of both groups were successful).

Dividing employment cases into those where the employer was and was not represented again reveals some substantial differences in success rates.

Table 6: ‘Wholly or partially successful outcomes’ for represented and unrepresented applicants in employment cases where the employer was and was not present

<table>
<thead>
<tr>
<th>Type of Hearing (Employment Tribunals only)</th>
<th>represented</th>
<th>not represented</th>
<th>number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>employer represented</td>
<td>55%</td>
<td>40%</td>
<td>56%</td>
</tr>
<tr>
<td>employer not represented</td>
<td>93%</td>
<td>85%</td>
<td>85%</td>
</tr>
<tr>
<td>total</td>
<td>68%</td>
<td>65%</td>
<td>71%</td>
</tr>
</tbody>
</table>

* The number of cases is less than Table 5 because some respondents could not recall whether the other side was represented and were excluded from the analysis.

Table 6 indicates that, where the employer was represented, represented applicants did better (55 per cent successful) than unrepresented employees who received pre-hearing advice (40 per cent successful). However, rather surprisingly, these unrepresented employees did less well than those who had not received any pre-hearing advice (56 per cent successful). Where the employer was not represented, applicants’ success rates were very much higher. 93 per cent of represented applicants were successful, somewhat more than the two groups of unrepresented applicants, i.e. those who had obtained advice before the hearing and those who had not obtained any pre-hearing advice (both 85 per cent successful). Defining ‘success’ more broadly in terms of those cases in which applicants claimed to have been ‘wholly or partially successful’ does not make it any easier to explain why unrepresented applicants in employment cases, particularly those who had not obtained any pre-hearing advice, should have done so well. Thus, whichever way ‘success’ is defined, the relationship between representation, advice and outcomes in the employment cases in our sample is the opposite of what common sense and previous would have been led to expect.
TRIBUNAL PROCEDURES

Levels of Activism

We now turn to the data derived from our observation of tribunal hearings, which can be used to describe the roles of the chair and members of the tribunals. Their activism was assessed on a 1-4 scale where: 1= very active, 2= fairly active, 3= fairly inactive, 4= very inactive.

It will be seen from Table 7 that Tribunal Chairs were, on the whole, very active, much more so than Tribunal Members.

Table 7: Activism Scores for Tribunal Chairs and Tribunal Members

<table>
<thead>
<tr>
<th>Activism Score</th>
<th>Chair</th>
<th>Member 1</th>
<th>Member 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 (very active)</td>
<td>42</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>3 (fairly active)</td>
<td>18</td>
<td>24</td>
<td>13</td>
</tr>
<tr>
<td>2 (fairly inactive)</td>
<td>4</td>
<td>16</td>
<td>18</td>
</tr>
<tr>
<td>1 (very inactive)</td>
<td>0</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>not applicable*</td>
<td>6</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td>total</td>
<td>64</td>
<td>64</td>
<td>64</td>
</tr>
</tbody>
</table>

* because the tribunal comprised the Tribunal Chair sitting alone or the Tribunal Chair sitting with only one Tribunal Member.

An activism indicator was calculated, based on the assessed activism of the tribunal chair and members. If any of the panel members was recorded as having activism levels of 1 or 2, the activism of the hearing was recorded as ‘high’, otherwise it was labelled as ‘low’. However, this resulted in all but two hearings being labelled as high activism hearings. The classification of hearings was then repeated, labelling the activism of hearings as ‘high’ only when one or more of the panel members had a recorded activism level of 1. Using this measure, Table 8 records the activism levels of the different types of tribunal.

Table 8: Level of Activism of different types of tribunal

<table>
<thead>
<tr>
<th>activism level (number/%)</th>
<th>CICAP</th>
<th>ET</th>
<th>SENDIST</th>
<th>ASNT</th>
<th>SSCST</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td>high</td>
<td>14</td>
<td>8</td>
<td>6</td>
<td>4</td>
<td>5</td>
<td>48</td>
</tr>
<tr>
<td>(number/%)</td>
<td>77.8%</td>
<td>61.5%</td>
<td>75.0%</td>
<td>100.0%</td>
<td>76.2%</td>
<td>75%</td>
</tr>
<tr>
<td>low</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>5</td>
<td>16</td>
</tr>
<tr>
<td>(number/%)</td>
<td>22.2%</td>
<td>38.5%</td>
<td>25.0%</td>
<td>0.0%</td>
<td>23.8%</td>
<td>25%</td>
</tr>
<tr>
<td>total</td>
<td>18</td>
<td>13</td>
<td>8</td>
<td>4</td>
<td>21</td>
<td>64</td>
</tr>
<tr>
<td>(number/%)</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Table 8 indicates that tribunals were very active – 48 of the 64 tribunal hearings were characterised by a high level of activism compared to 16 which were characterised by a low level of activism. All the ASNT hearings were very active (although it should be noted that only four hearings were observed). On the other hand, employment tribunals were characterised by a somewhat lower level of activism than other tribunals.

Table 9 explores the relationship between representation and activism.
Table 9: Effect of Representation on the level of activism in tribunal hearings

| activism level | represented |  |  |  |
|----------------|-------------|----------------|----------------|
|                | yes | no | total |  |
| high (number/%) | 28  | 20  | 48    |  |
|                | 77.8% | 71.4% | 75.0% |  |
| low (number/%)  | 8    | 8   | 16    |  |
|                | 22.2% | 28.6% | 25.0% |  |
| total (number/%)| 36   | 28  | 64    |  |
|                | 100% | 100% | 100%  |  |

Table 9 suggests, perhaps surprisingly, that tribunals are slightly more likely to be very active when the appellant is represented.

Conduct of Tribunal Hearings

In Table 10, we summarise what our data tell us about the general conduct of tribunal hearings.

Table 10: Percentage of hearings in which specified procedures were observed

<table>
<thead>
<tr>
<th>tribunal procedure</th>
<th>percentage of hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chair introduced him/herself and the other Tribunal Members.</td>
<td>92%</td>
</tr>
<tr>
<td>Applicant / appellant or their representative was asked if they had any more to say.</td>
<td>82%</td>
</tr>
<tr>
<td>Applicant / appellant or their representative was given an opportunity to sum up.</td>
<td>79%</td>
</tr>
<tr>
<td>Chair introduced everyone else.</td>
<td>78%</td>
</tr>
<tr>
<td>Chair referred to the independence of the tribunal.</td>
<td>62%</td>
</tr>
<tr>
<td>Chair outlined the procedures that would be adopted in the hearing.</td>
<td>60%</td>
</tr>
<tr>
<td>Chair pointed out what issues seemed to be in dispute.</td>
<td>58%</td>
</tr>
<tr>
<td>Chair outlined the powers and duties of the tribunal.</td>
<td>53%</td>
</tr>
<tr>
<td>Chair indicated what the applicant / appellant needed to do for the case to succeed.</td>
<td>30%</td>
</tr>
<tr>
<td>Applicant / appellant, or their representative, was invited to outline their case at the outset</td>
<td>24%</td>
</tr>
<tr>
<td>Chair stated what he/she understood the applicant’s / appellants case to be.</td>
<td>24%</td>
</tr>
<tr>
<td>Chair summarised the written submissions.</td>
<td>10%</td>
</tr>
<tr>
<td>Chair required all questions to be put through him/her.</td>
<td>2%</td>
</tr>
</tbody>
</table>

It is evident that most Tribunal Chairs presided over the hearings in a helpful and enabling manner. At the beginning of the hearing, 92% of Tribunal Chairs introduced themselves and the other Tribunal Members and 78% introduced everyone else. At the end of the hearing, 82% of applicants / appellants, or their representatives, were asked if they had any more to say and 79% were given an opportunity to sum up. 62% of tribunal chairs referred to the independence of the tribunal, 60% outlined the procedures that would be adopted in the hearing, 58% pointed out what issues seemed to be in dispute and 50% outlined the powers...
and duties of the tribunal. To the extent that these behaviours are thought to constitute ‘good practice’, a majority of tribunals conformed to these standards but, it is important to note, a significant minority of tribunals did not and there is considerable scope for improvement. Much smaller percentages indicated what the applicant/appellant needed to do for the case to succeed (30%), invited applicants/appellants (or their representatives) to outline their case at the outset (24%) or state what they understood their case to be (24%). It was very unusual for the Tribunal Chair to summarise the written submissions (10%) or to require all questions to be put through him/her (2%).

Tribunal Chairs and Members behaved differently in a number of ways when the appellant was and was not represented. The most important differences (in Table 11) have been highlighted.

**Table 11: Percentage of hearings involving represented and unrepresented cases where specified procedures were observed**

<table>
<thead>
<tr>
<th>Tribunal procedure</th>
<th>represented</th>
<th>no</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chair introduced him/herself and the other tribunal members.</td>
<td>86%</td>
<td>100%</td>
</tr>
<tr>
<td>Chair introduced everyone else.</td>
<td>75%</td>
<td>82%</td>
</tr>
<tr>
<td>Applicant/appellant or their representative was asked if they had any more to say.</td>
<td>81%</td>
<td>82%</td>
</tr>
<tr>
<td>Applicant/appellant or their representative was given an opportunity to sum up.</td>
<td>86%</td>
<td>74%</td>
</tr>
<tr>
<td>Chair introduced everyone else.</td>
<td>75%</td>
<td>82%</td>
</tr>
<tr>
<td>Chair referred to the independence of the tribunal.</td>
<td>53%</td>
<td>74%</td>
</tr>
<tr>
<td>Chair outlined the procedures that would be adopted in the hearing.</td>
<td>45%</td>
<td>82%</td>
</tr>
<tr>
<td>Chair pointed out what issues seemed to be in dispute.</td>
<td>44%</td>
<td>75%</td>
</tr>
<tr>
<td>Chair outlined the powers and duties of the tribunal.</td>
<td>50%</td>
<td>56%</td>
</tr>
<tr>
<td>Chair indicated what the applicant/appellant needed to do for the case to succeed.</td>
<td>28%</td>
<td>32%</td>
</tr>
<tr>
<td>Applicant/appellant or their representative was invited to outline their case at the outset.</td>
<td>28%</td>
<td>19%</td>
</tr>
<tr>
<td>Chair summarised what he/she understood the applicant’s/appellant’s case to be.</td>
<td>29%</td>
<td>18%</td>
</tr>
<tr>
<td>Chair summarised the written submissions.</td>
<td>14%</td>
<td>4%</td>
</tr>
<tr>
<td>Chair required all questions to be put through him/her.</td>
<td>0%</td>
<td>4%</td>
</tr>
</tbody>
</table>

Where the applicant/appellant was unrepresented, the chair was more likely to introduce him/herself and the members (100% vs. 86%). He/she was much more likely to refer to the independence of the tribunal (74% vs. 53%) and very much more likely to outline the procedures (82% vs. 45%) and point out what appears to be in dispute (75% vs. 44%). In other respects, the differences in the ways tribunals dealt with represented and unrepresented applicants/appellants were less significant.
The Tribunal’s Enabling Role

We now look in more detail at the extent to which tribunal chairs adopted an enabling role. A summative measure, based on the following eight variables, was used: The question numbers refer to questions in the post-observation questionnaire.

1. Did the chairman introduce him/herself and the other tribunal members? (Q1)
2. Did the chairman introduce everyone else? (Q2)
3. Did the chairman refer to the independence of the tribunal? (Q3)
4. Did the chairman outline the powers and duties of the tribunal? (Q4)
5. Did the chairman outline the procedure that would be adopted in the hearing? (Q5)
6. Did the chairman summarise the written submissions? (Q6)
7. Did the chairman point out what issues seemed to be in dispute? (Q7)
8. Was the appellant, or their representative, asked if they had anything more to say? (Q28)

An enabling score, ranging from 0 to 8, was calculated. Each component is weighted equally and refers to one of the eight questions answered with a ‘yes’. The overall distribution of this measure of the extent to which tribunal chairs adopted an enabling role in the observed hearings is shown in Table 12 below.

Table 12: Enabling scores for tribunal hearings (on a 0-8 scale)

<table>
<thead>
<tr>
<th>Enabling Score</th>
<th>frequency</th>
<th>percentage</th>
<th>cumulative percentage</th>
<th>reverse cumulative percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>0</td>
<td>0%</td>
<td>0%</td>
<td>99.9%</td>
</tr>
<tr>
<td>1</td>
<td>3</td>
<td>4.8%</td>
<td>4.8%</td>
<td>99.9%</td>
</tr>
<tr>
<td>2</td>
<td>5</td>
<td>7.9%</td>
<td>12.7%</td>
<td>95.1%</td>
</tr>
<tr>
<td>3</td>
<td>5</td>
<td>7.9%</td>
<td>20.6%</td>
<td>87.2%</td>
</tr>
<tr>
<td>4</td>
<td>15</td>
<td>23.8%</td>
<td>44.4%</td>
<td>79.3%</td>
</tr>
<tr>
<td>5</td>
<td>6</td>
<td>9.5%</td>
<td>53.9%</td>
<td>55.5%</td>
</tr>
<tr>
<td>6</td>
<td>12</td>
<td>19.0%</td>
<td>72.9%</td>
<td>46.0%</td>
</tr>
<tr>
<td>7</td>
<td>15</td>
<td>23.8%</td>
<td>96.7%</td>
<td>27.0%</td>
</tr>
<tr>
<td>8</td>
<td>2</td>
<td>3.2%</td>
<td>99.9%</td>
<td>3.2%</td>
</tr>
<tr>
<td>sub-total</td>
<td>63</td>
<td>100%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>missing</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>total</td>
<td>64</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

76.1% of tribunal hearings had enabling scores from 4-7, indicating that most tribunals adopted, to a greater or lesser extent, an enabling approach. However, a minority of tribunals (20.6%) had scores of 0-3 and did not adopt an enabling approach. 53.9% of tribunal hearings had enabling scores of 5 or less while 55.5% had scores of 5 or more.

Figure 1 and Table 13 distinguish between tribunals where the applicant / appellant was represented and those where he / she was not:
Figure 1: Distribution of enabling scores in cases where the applicant / appellant was and was not represented

Table 13: Enabling Scores for hearings at which the applicant / appellant was and was not represented.

<table>
<thead>
<tr>
<th>Enabling Score</th>
<th>represented</th>
<th></th>
<th></th>
<th>unrepresented</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>number</td>
<td>cumulative percentage</td>
<td>number</td>
<td>reverse cumulative percentage</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>0</td>
<td>0%</td>
<td>0</td>
<td>100.0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>3</td>
<td>8.3%</td>
<td>0</td>
<td>100.0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>19.4%</td>
<td>1</td>
<td>100.0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>3</td>
<td>27.8%</td>
<td>2</td>
<td>96.3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>8</td>
<td>50.0%</td>
<td>7</td>
<td>88.9%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>5</td>
<td>63.8%</td>
<td>1</td>
<td>63.0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>8</td>
<td>86.1%</td>
<td>4</td>
<td>59.3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>4</td>
<td>97.2%</td>
<td>11</td>
<td>44.4%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>1</td>
<td>100.0%</td>
<td>1</td>
<td>3.7%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>total</td>
<td>36</td>
<td></td>
<td>27</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
63.8% of hearings in which applicants / appellants were represented had enabling scores of 5 or less while 59.3% of hearings in which applicants / appellants represented themselves had enabling scores of 6 or more. As before, these two cumulative totals are highlighted in the table. Thus, tribunals appeared to be more enabling towards applicants / appellants who were not represented.

In Figure 2, these results are represented using boxplots, which are especially useful when comparing two or more sets of data.23

**Figure 2: Boxplots of the distribution of enabling scores for hearings at which the applicant / appellant was and was not represented**

In Table 14, we look at the enabling scores of tribunal chairs by tribunal type:

**Table 14: Enabling scores for different tribunals.**

<table>
<thead>
<tr>
<th>tribunal</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>number</th>
</tr>
</thead>
<tbody>
<tr>
<td>CICAP</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>10</td>
<td>1</td>
<td>18</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ET</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td></td>
<td>12</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SENDIST</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td></td>
<td>8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ASNT</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td></td>
<td></td>
<td>4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SS</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>9</td>
<td>3</td>
<td>2</td>
<td>21</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>all</td>
<td>0</td>
<td>3</td>
<td>5</td>
<td>6</td>
<td>17</td>
<td>11</td>
<td>16</td>
<td>4</td>
<td>63</td>
<td></td>
</tr>
</tbody>
</table>

---

23 A boxplot, or box and whisker diagram, provides a simple graphical summary of a set of data. It shows a measure of central location (the median), two measures of dispersion (the range and inter-quartile range), the skewness (from the orientation of the median relative to the quartiles) and potential outliers (marked individually).
Table 14 suggests that criminal injuries compensation appeal panels and special educational needs tribunals are rather more enabling to applicants/appellants while employment tribunals and, to a lesser extent, social security tribunals are less so.

In Figure 3, these results are again represented using boxplots.

**Figure 3: Boxplots of the distribution of enabling scores for hearings at which the applicant/appellant was and was not represented**

![Boxplot Graph]

It is important, for the purposes of the argument in this paper, to characterise the extent to which tribunal hearings embody inquisitorial and adversarial modes of dispute resolution.

**Modes of Dispute Resolution**

Hearings were classified as inquisitorial when the tribunal had a high activity level, i.e. when one or more of the panel members had a recorded activity level of 1 (see Table 8) and when the panel cross-questioned the appellant or the appellant’s representative (Q20 in the post-observation questionnaire). The results are set out in Table 15.
Table 15: Inquisitorial nature of different tribunals.

<table>
<thead>
<tr>
<th>mode of dispute resolution</th>
<th>type of tribunal</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CICAP</td>
<td>ET</td>
</tr>
<tr>
<td>inquisitorial</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>(number/%)</td>
<td>66.7%</td>
<td>53.8%</td>
</tr>
<tr>
<td>not inquisitorial</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>(number/%)</td>
<td>33.3%</td>
<td>46.2%</td>
</tr>
<tr>
<td>total</td>
<td>18</td>
<td>13</td>
</tr>
<tr>
<td>(number/%)</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

On this measure, about two thirds of tribunal hearings can be characterised as inquisitorial. There were few differences between tribunals although the data suggest that Employment Tribunals were somewhat less inquisitorial than the other tribunals.

Table 16 explores the relationship between representation and the inquisitorial characteristics of tribunal hearings.

Table 16: Effect of representation on the inquisitorial nature of tribunal hearings.

<table>
<thead>
<tr>
<th>mode of dispute resolution</th>
<th>Represented</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>inquisitorial</td>
<td>24</td>
<td>17</td>
</tr>
<tr>
<td>(number/%)</td>
<td>66.7%</td>
<td>60.7%</td>
</tr>
<tr>
<td>not inquisitorial</td>
<td>12</td>
<td>11</td>
</tr>
<tr>
<td>(number/%)</td>
<td>33.3%</td>
<td>39.3%</td>
</tr>
<tr>
<td>total</td>
<td>36</td>
<td>27</td>
</tr>
<tr>
<td>(number/%)</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

The table indicates that tribunals are not, as one might have assumed, more likely to adopt an inquisitorial mode of dispute resolution with unrepresented applicants/appellants. On the contrary, they are slightly less likely to do so.

In assessing the extent to which hearings could be classified as adversarial, only those hearings at which the other side was present were included. The ‘other side’ was present in 43 out of 64 hearings but data was missing in two cases. Thus, the classification was based on 41 hearings. A summative measure, based on the observer’s responses to six further questions in the post-hearing questionnaire, was used to determine the extent to which the tribunal used adversarial methods.

1. Was the appellant or their representative invited to outline the case at the outset? (Q17)
2. Was the appellant or their representative able to outline their case without interruption? (Q18)
3. Did the appellant’s representative put questions to the appellant? (Q21)
4. Did the other side cross-question either the appellant or their representative? (Q22 or Q23)
5. Did the appellant or the appellant’s representative cross-question the other side? (Q24 or Q25)
6. Was the appellant or their representative, given an opportunity to sum up? (Q29).
An adversarial score, ranging from 0-6, was calculated for each hearing. The distribution of this measure of the extent to which tribunals adopted an adversarial mode of dispute resolution is shown in Table 17 and Figure 4 below.

**Table 17: Adversarial Nature of different tribunals.**

<table>
<thead>
<tr>
<th>tribunal</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td>CICAP</td>
<td>0</td>
<td>1</td>
<td>8</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>ET</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>SENDIST</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>ASNT</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>SSCST</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>All</td>
<td>1</td>
<td>3</td>
<td>12</td>
<td>10</td>
<td>11</td>
<td>4</td>
<td>0</td>
<td>41</td>
</tr>
</tbody>
</table>

**Figure 4: Boxplots of the distribution of adversarial scores for different tribunals.**

Table 17 and Figure 4 suggest that Employment Tribunal (ET) and ASNT tribunal hearings are the most adversarial and SSCST tribunal hearings the least so. However, in the case of ASNT and SSCST tribunals, the number of hearings on which these conclusions are based (n=4 in both cases) is very small and inferences should be treated with great caution.

Table 18 and Figure 5 explore the relationship between representation and the adversarial characteristics of tribunal hearings.
Table 18: Effect of Representation on the extent of adversarialism in tribunal hearings.

<table>
<thead>
<tr>
<th>Adversarialism Score</th>
<th>represented</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>1</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>4</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>5</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>6</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>total</td>
<td>24</td>
<td>15</td>
</tr>
</tbody>
</table>

Figure 5: Boxplots of the distribution of adversarial scores in hearings at which the applicant / appellant was and was not represented.

As expected, for hearings where the other side is present (or represented), these findings suggest that hearings in which the applicant / appellant was represented tend to be more adversarial than those where the appellant was not represented.
Looking at the 41 cases where ‘the other side’ was present or represented, it is clear that some hearings were predominantly inquisitorial while others were predominantly adversarial. However, a third group displayed a mixture of inquisitorial and adversarial characteristics.\(^\text{24}\)

For this sub-set of cases, an ‘assisted adversarialism score’ was calculated on a 1-3 scale as follows:

1. Did the chairman indicate what the appellant (or the parties) needed to do for the case to succeed? (Q11)
2. Did the tribunal assist the appellant in cross-questioning the other side? (Q26)
3. Did the chairman summarise what he/she understood the appellant’s case to be? (Q30)

This score measured the extent to which the tribunal assisted the adversarial process. All 43 cases at which the other side was present (or represented) were included.

**Table 19: Extent to which different tribunals assisted the adversarial process**

<table>
<thead>
<tr>
<th>tribunal</th>
<th>‘assisted adversarial’ score</th>
<th>number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>CICAP</td>
<td>10</td>
<td>5</td>
</tr>
<tr>
<td>ET</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>SENDIST</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>ASNT</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>SSCST</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>All</td>
<td>19</td>
<td>11</td>
</tr>
</tbody>
</table>

Table 19 suggests that SENDIST hearings are the only ones that score high on the ‘assisted adversarial’ measure, i.e. they were the only tribunal that actively assisted the adversarial process. In the few SSCST hearings where the other side was present, the tribunals did not assist the adversarial process at all.

Table 20 explores the relationship between representation and the extent to which tribunals assisted the adversarial process.

\(^{24}\) The size of the three groups depends on where, on the 0-6 scale, the binary split between ‘adversarial’ and ‘on-adversarial’ hearings is made. Counting hearings with scores of 4-6 are as ‘adversarial’ and those with scores of 0-3 as ‘non-adversarial’, 12 of the 41 hearings were predominantly inquisitorial, 10 were predominantly adversarial while 15 displayed a mixture of inquisitorial and adversarial characteristics. 4 of the hearings displayed neither inquisitorial nor adversarial characteristics.
Table 20: Effect of representation on the extent to which tribunals assisted the adversarial process.

<table>
<thead>
<tr>
<th>‘assisted adversarial’ score</th>
<th>represented</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>0 (number/%)</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>48.0% 38.9% 44.2%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 (number/%)</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>16.0% 38.9% 25.6%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 (number/%)</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>24.0% 16.7% 20.9%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 (number/%)</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>12.0% 5.6% 9.3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>total</td>
<td>25</td>
<td>18</td>
</tr>
<tr>
<td>100.0% 100.0% 100.0%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

INTERPRETING THE FINDINGS

The key finding, which calls out for an explanation, is that, with the exception of employment tribunals, those who received pre-hearing advice but represented themselves at their hearing did almost as well, across the board, in terms of outcomes as those who were represented. Again with the exception of employment tribunals, those who represented themselves at the hearing without getting any advice beforehand did much less well in terms of outcomes. The effects of representation and pre-hearing advice on the outcomes of Employment Tribunals did not fit this model and were quite perverse, in that unrepresented applicants who received no advice before the hearing did better than those who received pre-hearing advice and, in some cases, better even than those who were represented. These findings cannot be brushed away on the grounds that they were based on a small and unrepresentative sample of cases since this is manifestly not the case.

Three possible explanations for this are that:

1. most tribunals take an active role in the proceedings although, in the case of unrepresented applicants / appellants, they did not appear to compensate for the fact that they were representing themselves by taking a more active role in these cases.

2. most tribunals chairs adopted an enabling approach and were somewhat more enabling towards applicants / appellants who were not represented

3. most tribunals used inquisitorial methods, although elements of the adversarial procedure were frequently encountered when the ‘other side’ was present. This was particularly noticeable in party vs. party tribunals, e.g. employment tribunals.

They are not more inquisitorial but, where the other side is present (or represented) although hearings are more adversarial. However, tribunals do not appear to assist the adversarial process by helping the unrepresented applicant / appellant more that his / her represented counterpart. It follows that the tribunals’ general approach, rather than any special attempt to compensate unrepresented appellants, is what appears to help them most.
The fact that the outcomes for those who represented themselves, particularly if they had received pre-hearing advice, compared so favourably with those who were represented at their hearing can, in my view, be attributed to the active, interventionist and enabling procedures that many tribunals now adopt. It is not so much because tribunals compensate the unrepresented appellant for not having a representative but more because of the ways in which many tribunals deal with the generality of cases that come before them. In significant ways, tribunals have become more like ombudsmen than (traditional) courts. Of course, nothing is perfect and there is still considerable room for improvement but, on the basis of my research, I would now say that the unrepresented applicant/appellant who receives good pre-hearing advice is just as likely to achieve a favourable outcome as his/her represented counterpart. If tribunals deliver justice for represented applicants/appellants, they likewise do so for those who are not represented. Perhaps the White Paper was right after all.

This is not to deny that many complex cases benefit from representation or that those who are represented value the representation they receive. The evidence that they do so is clear and unmistakable. Those who were represented valued this for a variety of reasons (that included providing technical or legal knowledge, giving moral support, speaking for the applicant/appellant and providing general support), which differed from one tribunal to another, and a significant minority (but not a majority) of unrepresented applicants/appellants said that they would have preferred to be represented. Although these findings need to be taken seriously, they do not, in my view, constitute an unassailable case for making legal aid in tribunal proceedings more widely available. Further improvements to tribunal procedures may be a more appropriate way of enhancing justice for tribunal applicants/appellants.

CONCLUSION

The question of the best way to promote justice in tribunals really boils down to the relative efficacy of structure and agency. My conclusion is that, in this case, structural change, i.e. change in the ways in which tribunals perform their functions as mechanisms of dispute resolution, is a more effective way of promoting justice than encouraging agency, e.g. by providing representation to enable individuals to present their cases more effectively. Recent changes in the ways in which tribunals deal with cases have been in the right direction and need to be encouraged and promoted.

25 The debate surrounding the influence of structure and agency on social action and social change is one of the central concerns of sociology. Among recent contributors to this debate are Giddens, Anthony (1984) The Constitution of Society, Cambridge Polity Press and Bourdieu, Pierre (1990), The Logic of Practice, Cambridge Polity Press..
REFERENCES


