The Bar Tribunals and Adjudication Service Newsletter 5

This is the fifth edition in our series of newsletters for the Bar Tribunals and Adjudication Service panel members. The newsletters are circulated at regular quarterly intervals and address either cutting-edge development in regulatory law or matters that require greater explanation than the guidance currently provided for you by BTAS.

The BTAS team values your feedback and if you require additional information on a topic, or identify an issue of particular importance, then please let us know and we will endeavor to include it in future. Please respond to info@tbtas.org.uk

Please also provide us with comments on this edition, for which we are indebted to Naina Patel, Blackstone Chambers.

This newsletter focuses upon the Human Rights Act 1998, and in particular considers the role of bias in the decision-making of disciplinary hearings and the right to a reasoned decision from Tribunals.

Public Law Obligations and the Human Rights Act 1998

Obligations to ensure that disciplinary hearings are free of bias as well as to ensure that Tribunals provide reasoned decisions may arise under both general principles of public law as well as under the Human Rights Act 1998 (ñthe HRA 1998ò).

The HRA 1998 applies to *"a public authority"* as defined in section 6(3) to include both tribunals and persons exercising functions of a public nature. A Disciplinary Tribunal seems likely to fall within this definition, particularly given the elucidation in section 21(1) of the HRA 1998 that a tribunal means *"any tribunal in which legal proceedings may be brought"*. As a result, a Tribunal is likely to be subject to the obligations under Article 6(1) of the European Convention on Human Rights to ensure that it determines civil rights and obligations fairly. This includes ensuring that a tribunal is independent and impartial and that the hearing it conducts is fair. It also includes providing a reasoned judgment in appropriate circumstances.

This was certainly the view taken in the recent decision of *R (Leathley, Mehey and Hayes) v (1) Visitors to the Inns of Court and (2) Bar Standards Board* [2013] EWHC 3097, where Lord Justice Moses expressly recognised the relevance of Article 6 ECHR to Disciplinary Tribunals. At paragraph 37 he noted:

> *"COIC's functions in vetting those eligible were of great importance. They established and maintained standards for appointment designed to fulfil the requirements of Art. 6 of the European Convention on Human Rights. There was no dispute that Art. 6 applied to disciplinary hearings in relation to barristers. Art. 6(1) of the Convention requires the disciplinary tribunals and the Visitors' panels to be established by law and to be independent. Their composition must comply with the rules by which they are composed (Gurov v Moldavia (2006) 36455/02, 11 July 2006, DMD Group v Slovakia (2010) App 19334/03, Volkov v Ukraine (2013) App 21722/11. Independence requires guarantees against outside pressure, in relation to appointment and term of office, and requires the appearance of independence (Bryan v United Kingdom (1996) 21 EHRR 342* [37]).ò

The Judge went on to find that there was no breach of the Disciplinary Tribunals Regulations and the VisitorsôRules in the instant case, and the rules themselves complied with Article 6 (at paragraphs 39-40).[1]

General principles of public law are likely to produce the same result. The common law has long recognised that the principles of natural justice impose on public bodies a duty to act fairly, and regulation rE144 of the Disciplinary Tribunal Regulations makes clear that these principles apply to Disciplinary Tribunals. Although the content of the duty varies with circumstance, it includes a duty not to be a judge in your own cause (*R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet (No.2)* [2000] 1 AC 119) as well as to ensure that justice is not only done but seen to be done (*R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256). It also imposes a duty on judicial and quasi-judicial tribunals to give reasons for their decisions (*R v Civil Service Appeal Board Ex p Cunningham* [1991] 4 All ER 310 and *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531).

[1] See also *Russell v Bar Standards Board* (23 May 2013) at paragraphs 111 and 116-120.

Bias in Decision-Making

The central question in cases concerning bias under Article 6 ECHR is whether a tribunal is sufficiently independent and impartial. In *Russell v Bar Standards Board* (23 May 2013), Mr Justice Wyn Williams considered the case of *Findlay v United Kingdom* (1997) 24 EHRR 221 which concerned a complaint that a court martial had not been an independent and impartial tribunal. The Judge explained *Findlay* at paragraph 106 in the following terms:

> *"A court would be "impartial" if it was subjectively free of personal prejudice or bias and also impartial from an objective viewpoint in that there were sufficient guarantees to exclude any legitimate doubt about its impartiality. In the view of the court, the concepts of independence and objective impartiality were closely linked and would, normally, be considered together."*

The central questions in cases of bias at common law are not dissimilar. There are three main types of bias here:[2]

- Where a decision-maker is a party to a matter or has a direct interest (pecuniary or otherwise) in its outcome in common with a party, he or she is **presumed** to be tainted by actual bias and is automatically disqualified from hearing a case, absent a waiver from the party affected (*Davidson v Scottish Ministers* [2004] UKHL 34 at paragraph 6 and *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet (No.2)* [2000] 1 AC 119 at 132G-133C).

- Where a decision-maker can be proven to be influenced by partiality or prejudice or actually prejudice, this will vitiate any decision by **actual** bias they take so again they are disqualified (*R v Gough* [1993] AC 646, 661G and *In Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 at paragraph 38).

- Where a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, there will be

[2] Although see the recent discussion in *R (Kaur) v Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168 at paragraph 44 querying the distinction between presumed and actual bias.

apparent bias (*Porter v Magill* [2002] 2 AC 357 at paragraph 103). As Mr Justice Burnett explained in *Leathey v BSB* (20 January 2012) at paragraph 9*, "the fair-minded observer is neither unduly sensitive nor suspicious yet he is not complacent. He is assumed to have taken the trouble to acquire knowledge of all relevant information before coming to a conclusion: see Helow v Secretary of State for the Home Department [2008] 1 WLR 2416, per Lord Hope of Craighead between paragraph 1 and 3".*

Applying these principles to the constitution of Disciplinary Tribunals, the following are the sorts of factors that might give rise to findings of bias:

- A member of a Tribunal remaining a member of the Professional Conduct Committee (presumed bias as in *In Re P (A Barrister)* [2005] 1 WLR 3019). This is now reflected in regulation rE136 of the Disciplinary Tribunals Regulations and demonstrated by Clause 27(VIII) of the COIC Appointments Protocol 2013;

- A member of a Tribunal having been a member of the Professional Conduct Committee very recently (apparent bias as in *Joseph Lennox Holmes v Royal College of Veterinary Surgeons* [2011] UKPC 48). This is again reflected in Clause 27(VIII) of the Appointments Protocol 2013;

- A member of a Tribunal having previously sat as a member of a tribunal with Counsel for one of the parties before the Tribunal (apparent bias as in *Lawal v Northern Spirit Ltd* [2003] UKHL 35); and

- A member of a Tribunal having publicly stated views in relation to an individual or issue involved in a hearing (apparent bias as in *Davidson v Scottish Ministers* [2004] UKHL 34).

Giving Reasoned Decisions

The central question in cases concerning the duty to give reasons under Article 6 ECHR is unlikely to be dissimilar to that at common law (*English v Emery Reimbold and Strick* [2002] 1 WLR 2409). In essence, this requires the parties to be left in no doubt as to why they have won or lost (*Battista v Bassano* [2007] EWCA Civ 370). It does not necessarily extend to providing reasons for every determination of fact turning on credibility (*Gupta v General Medical Council* [2001] UKPC 61; [2002] 1 WLR 1691). In the context of professional regulatory proceedings, Wall LJ suggested asking the following questions (in *Phipps v GMC* [2006] EWCA Civ 396 at paragraph 85):

> *"Is what we have decided clear? Have we explained our decision and how we have arrived at it in such a way that the parties before us can clearly understand why they have won or why they have lost?"*

These principles are reflected in rule rE155 of the Disciplinary Tribunals Regulations which require a Disciplinary Tribunal to record in writing its findings on each charge or application and its reasons. The case law provides the following guidance with which to supplement that rule:

- Reasons should generally state a decision-makerôs material findings of fact and, where disputed, the evidential basis for those findings (*R (Bushell) v Newcastle Upon Tyne Licensing Justices* [2004] EWHC 446 at paragraph 41);

- Reasons should demonstrate that the decision-maker grappled with the main arguments advanced by each party and provide an explanation for the conclusion reached (*Re Poyser* [1964] 2 QB 467 and *R (Bahrami) v Immigration Appeal Tribunal* [2003] EWHC 1453 at paragraph 8);

- The standard of reasons required is likely to be particularly exacting where allegations of dishonesty are concerned (*Shaw v Logue* [2014] EWHC 5 (Admin); and

- Provided these key functions are performed, the reasons need not necessarily be lengthy, provided they are clear and intelligible.

Conclusion

Whether or not the questions are approached through the lens of the HRA 1998 or through the common law, the basic principles require that Tribunal members ask themselves similar questions: am I an independent and impartial judge in this matter, in both actual and apparent terms, and can the parties understand why I and my fellow Tribunal members have reached the decision to which we have come?