

# Duties of a Representative

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## Theme

My theme is that there is no general system of regulation for representatives before appeal tribunals and the Commissioners, and that the standards for representatives are to be found in the decisions that the Commissioners have given on their powers and responsibilities.

## Introduction

Every Monday morning, each Commissioner receives a batch of applications for leave to appeal. It is not unusual for one of them to contain a complaint from a representative that goes something like this:

‘There has been a breach of natural justice or a serious procedural irregularity. The chairman did not allow me to present the case as I wished. The tribunal insisted on hearing evidence directly from the claimant before I was allowed to make a case. I was not allowed to remind my client of relevant evidence. The chairman interrupted me during the presentation of my argument.’

What do we have here? Are there chairmen who are inflexible, who can only run a tribunal in one way? Are there chairmen who are insensitive to the difficulties that claimants face and to the benefits that a representative can bring? Are there chairmen who are megalomaniacs who must have their own way?

The answer, of course, is: yes, we have chairmen who are all of those things. But they are a minority. Most chairmen are flexible in their approach, sensitive to the needs of claimants and to the advantages of representation, and just want to run a tribunal in a way that leads to the most effective and efficient despatch of the list.

What applications like this represent is, I believe, a symptom. A symptom of distrust of representatives by tribunals. Not necessarily a distrust by this particular tribunal of this particular representative. But a general distrust that affects the way that tribunals generally conduct their business.

I recently had a clear example of this distrust. In *CIB/1381/2004*, the tribunal refused to accept evidence of the distance a claimant walked to the Mosque on the ground that the representative had not produced evidence by way of maps to support it. Instead, it preferred the evidence of the Secretary of State’s medical adviser on the distance.

This distrust is for no one’s benefit – not the claimant’s, not the tribunal’s, and not the representative’s. Two Commissioners have recently commented on the effect of poor representation on the client and the representative. In *CDLA/1138/2003*, Miss Fellner remarked that

'consistently unreliable representatives probably have little idea how much of a disservice they can do to their clients' (paragraph 7).

And in *CI/1720/2001*, Mr Rowland wrote:

'It is wrong to mislead a tribunal, even when it is not actually dishonest. Mistakes can have adverse consequences for claimants. If the representative's version of the facts is different from the claimant's, there is a risk that the claimant's credibility will be undermined by the apparent inconsistency because it is likely to be thought that the representative was acting on instructions and that the claimant's own statements have been inconsistent. Also, once a representative has been found by a tribunal to be unreliable, he loses much of his effectiveness in other cases and it may take some time to re-establish a tribunal's confidence in him.' (Paragraph 9)

### **Who is a representative?**

There are no rules of audience before an appeal tribunal or a Commissioner. So anyone is a representative whom the claimant identifies as one. There is a broad spectrum ranging from a partner, friend or neighbour to a specialist silk. Not surprisingly, they are treated differently, according to what they have to offer and what can reasonably be expected of them. For my purpose, representatives are those who hold themselves out as being competent to present a case to a tribunal or a Commissioner. Competent in the law and in the presentation of a case, both orally and in writing.

This does not mean that those who do not hold themselves out have nothing to contribute. Nor does it mean that the role of representatives as I have defined them is limited to presentation of the case. Representatives may provide important moral support and comfort that allow the claimants to relax and give of their best. And the representatives may give evidence of their own knowledge (*CDLA/2462/2003*) – I have known representatives give evidence in their capacity as accountants or social workers.

My definition includes representatives of the Secretary of State and local authorities. They can leave something to be desired, but for the most part I will concentrate on those who represent claimants.

### **Why is regulation important?**

Whenever someone does something for anyone else, two issues arise: competence and integrity. If my plumber tells me that I need a new boiler, I want to know if he is competent to identify the problem and to carry out a repair. I also want to know if I can trust him when he says that the work needs doing.

If what the person does involves or affects someone else, like the Secretary of State or an appeal tribunal, an additional dimension is added to both competence and integrity.

Regulation ensures a minimum standard of knowledge and of skills, both initially and ongoing through continuing professional development. It also allows recourse if the standards are not attained. This protects the client, those others affected by the representatives' work, and the

representatives themselves – they can only benefit from high standards for themselves and for others who work in the same field.

### **The legislation**

There is only one legislative provision on representation: regulation 49(8) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. It gives rights to both the claimant and the representative.

It gives a *claimant* the right to appoint a representative. It does not guarantee that one will be available. Nor does it guarantee that funding will be available. Funding may be necessary in order to comply with article 6, but this is limited to the most complex of cases: *CJSA/5101/2001* (paragraph 7). This seems to me a fair and sensible balance. Direct funding is not the only way that equality of arms can be ensured. Others include free legal advice and representation and the enabling and inquisitorial approach to tribunal procedure. These are a background against which the need for funding has to be assessed.

Commissioners cannot allocate CLS funding but they can, and do, assist claimants to obtain that funding in appropriate cases. Two issues arise: the complexity of the issues and the significance of the case to others. Commissioners assist by giving directions setting out the complexity and importance of the issues on the appeal. In my experience, they are successful on the former. What is more difficult for a Commissioner to do is to show that the issues are relevant to a sufficiently large number of other cases.

Regulation 49(8) also gives the *representative* the rights and powers of the claimant for the purpose of proceedings at the hearing. Notice that there is no reference to duties and that the rights and powers are only conferred for the purposes of the hearing. These are only found in the decisions of the Commissioners.

### **Duties**

I come at last to the duties of representatives, as worked out in Commissioners' decisions.

#### *The duty to have authority to act*

This is surely necessary for the representative's own protection.

In my experience, this is more relevant to proceedings before the Commissioner than before tribunals. In a decade in tribunals, I saw only one case in which I was sure that the supposed representative had no authority from the claimant. Indeed, I was sure that the claimant had no knowledge of what the representative was doing. I also saw one squabble between solicitors when one left the other's firm and they argued over who represented which clients.

Before Commissioners, two issues arise.

The first issue is the scope of the representative's authority. The representative may have had authority before the tribunal, but was it a continuing authority that also covers appealing to a Commissioner. Some Commissioners are concerned that representatives may not have

continuing authority. Hence the importance of being able to show their mandate in order to pursue an application for leave to appeal.

The second issue is whether the claimant has given informed consent. I often wonder whether the claimant who has been partially successful before a tribunal has fully understood the risk of appealing to a Commissioner. A good representative will ensure that the claimant has given informed consent both for the claimant's benefit and for the representative's protection.

#### *The duty to attend*

This is certainly a duty to the claimant and a right as against the tribunal. But is it a duty to the tribunal?

The duty arises in the context of applications to postpone or adjourn when the person charged with the case is not available. This raises the question: who is the representative? Is it the individual charged with the case or is it the organisation that person works for? See *CSDLA/0071/1999*, in which the Commissioner dealt with a late application on the basis that the organisation and not just the individual welfare rights adviser was the representative.

The duty to attend finds expression in the context of natural justice and article 6. The issue is one for the judgment of the tribunal. In practice, Commissioners only intervene if the decision to continue with the hearing was perverse. They take a balanced approach that depends on the size of the representative's organisation and the reasons for unavailability. Representatives often present inadequate arguments to tribunals that emphasise their individual problems without dealing with the ability or otherwise of their organisation to provide alternative representation.

#### *The duty to put the strongest arguable case for the client*

This is a duty both to the client and to the tribunal. This raises issues of competence and control. The former can be difficult to assess. If the representative puts a weak case, how should the tribunal interpret that: as a sign of incompetence or as an indication that this is the best that can be done for the client?

This duty is effectively enforced in three ways.

First, the duty is enforced by an assumption of competence. In 16 years, I have only seen one representative who was not competent in the law – she was a menace to her client and a nuisance to the tribunal.

Commissioners support this assumption. And they work out the consequences in the context of section 12(8)(a) of the Social Security Act 1998. If the representative does not raise an issue, it does not arise on the appeal and the tribunal does not have to deal with it. But the approach pre-dates the 1998 Act. In *R(I) 6/69*, Commissioner Magnus wrote:

'How much assistance and encouragement is required will necessarily vary from case to case and claimant to claimant. Some unrepresented claimants are unable to express themselves clearly or unable to distinguish between what is relevant and what is irrelevant.' (Paragraph 7)

That recognises that the degree of intervention expected of a tribunal varies from case to case and that representation is a relevant factor. The relevance of representation has been made more explicit in other decisions. For example, in *CSIB/0160/2000*, Commissioner May said:

‘The claimant was represented and it was made quite clear to the tribunal which of the mental descriptors were in issue before them. I refer in that connection to the record of proceedings recorded at page 74 which sets out the mental health descriptors said to apply. In my view the tribunal as the claimant was represented was entitled to accept that the representative knew the case which is sought to be made and in particular which descriptors are sought to be established by the claimant. The tribunal applied the facts to the descriptors contended for. It was not necessary for them to explore descriptors which were not contended for by the representative.’ (Paragraph 6)

The Court of Appeal has refused to hear an appeal, even though leave was granted by the Commissioner, when the ground of appeal had not previously been raised (*Secretary of State for Work and Pensions v Hughes (A Minor)* [2004] EWCA Civ 16).

However, this is not an absolute rule. In the Northern Ireland Tribunal of Commissioners decision in *C 15/99-00(IS)(T)*, the Tribunal decided that the appeal tribunal should have considered an issue despite the fact that it was not identified by the Secretary of State’s presenting officer or by the claimant’s counsel (paragraph 24).

Second, tribunal can deal shortly with weak or hopeless arguments. Commissioners will support this in assessing the tribunal’s procedure and the adequacy of its reasons.

Third, it is possible to rebuke or deter the representative. I have been plain and blunt with a specialist representative who presented, as the only challenge to a tribunal’s decision, an argument on the validity of a decision that was not under appeal and was, indeed, not appealable (*CIB/0908/2003*). In *CSDLA/0201/2001*, the Commissioner was equally plain, if less blunt:

‘I therefore have to record the view that I expressed to Mr Little, namely that an experienced Welfare Rights Officer – and, of course, the responsibility was not his and I may say he seemed to me to have said everything that could be said in support of the application – should have appreciated the fatality to the case of said regulation 57(2)(c), which was indeed cited in the grounds but not elaborated, and probably, indeed also, that there was little or no chance of the appeal succeeding. Such applications really ought not to be presented to Commissioners, whose primary function is to consider substantial issues of law arising in the course of the administration of the social security system for the general guidance of tribunals and officers below.’

On the other hand, a representative who is clearly inexperienced in the field (a solicitor) got an explanation from me on the admissibility of evidence in an appeal by way of rehearing rather than a reprimand (*CIB/0047/2004* in paragraph 13).

#### *The duty to be polite*

The Employment Appeal Tribunal has decided that tribunals have to tolerate offensive representatives (*Bennett v Southwark London Borough Council* [2002] ICR 881). But

tribunals and Commissioners have two powers that they can use. The first is relevance. In the EAT case, the representative was putting a relevant argument offensively. If it had not been relevant, the tribunal could have stopped it on that ground. The second power is to limit time for representations at a hearing, so long as sufficient time is allowed for the argument to be put appropriately. A representative has no legitimate claim to spend the time available insulting the tribunal.

There is also the possibility of a power to control who is entitled to be a representative in a particular case. In *CSHC/0729/2003*, the Commissioner considered whether a local authority's welfare rights organisation was entitled to represent a claimant on an appeal against a decision by the same local authority. In the end, he found it permissible in that case. But the general issue of the existence of this power, for both tribunals and Commissioners, remains open.

#### *The duty to obtain evidence in time*

Representatives often try to put onto the tribunal the responsibility of obtaining relevant evidence. This may reflect the representative's lack of access to the necessary funds. But even if the tribunal is sympathetic, it has limited powers – section 20 of the Social Security Act 1998.

Another cause of difficulty for representatives may be their late appointment by the claimant which does not allow them time to obtain evidence. The issue here is: to what extent is the claimant's fault relevant?

If the representative is appointed in good time and acts promptly, Commissioners will allow an appropriate time for the evidence to be obtained. I saw a paradigm example of when time should have been allowed in *CDLA/2220/2001*:

- '9. The application in this case was a model of what a good application for an adjournment should be.
- '9.1 First, there was an obvious need for a report. There was a stark contrast between the medical findings of the examining medical practitioner and the claimant's own account of his disablement. The first tribunal had wanted more expert evidence and that had not been obtained.
- '9.2 Second, funding was in place. The tribunal's file shows that there had been a postponement to allow that funding to be obtained. It was not rational in the context of this case to allow a postponement so that funding can be obtained and then to refuse an adjournment to allow that funding to be used.
- '9.3 Third, a Consultant was named and must have agreed to act.
- '9.4 Fourth, the request was limited to a short and reasonable time of one month. That time limit showed that the representative was conscious of the delay and anxious to reduce further delay to the minimum.

'9.5 Finally, there was a reason for the delay in obtaining the report. The tribunal had previously tried to obtain one, but failed, and the legal services funding had only recently been approved.'

But if there is delay in seeking evidence (by the claimant or by the representative), no allowance is made. Fault is always relevant: see the decision of the Court of Appeal in *Carrarini*, reported as an appendix to *R(I) 13/65*.

However, tribunals cannot place unreasonable or unexpected burdens on representatives to produce evidence. In *CIB/1381/2004*, the tribunal refused to accept evidence of the distance a claimant walked to the Mosque on the ground that the representative had not produced evidence by way of maps to support it. It is unusual to expect corroborative evidence of that nature to be produced.

#### *The duty to adduce relevant oral evidence at the hearing*

Representatives are too willing to rely on the tribunal's inquisitorial approach and to raise the lack of evidence as an issue on appeal to a Commissioner. But that approach is a flexible one (*R(I) 6/69*). With a competent representative, the tribunal is entitled to rely on the assistance of the representative in obtaining relevant evidence.

This does not mean that all the tribunal's failings can be laid at the door of the representative. It may not be possible for the representative to anticipate what is in the minds of the panel members. In *CIB/1381/2004*, could the representative have anticipated that the tribunal would require corroborative evidence from a map? And what has occurred may only become clear after the event. In *CDLA/1444/2004*, it was only clear in retrospect that the tribunal had innocently misled the claimant into giving evidence relevant to the time of the hearing rather than the time of the decision.

It may be that some representatives lack experience or the training necessary to undertake this function. If they do, they should acquire it as Commissioners expect that representatives will make an appropriate contribution to the presentation of the case.

#### *The duty to work with the chairman's control of procedure*

It is in this that tribunals show their distrust of representatives who appear before them by the restrictions that the chairmen impose on the procedure. The chairmen rely on regulation 49(1). Commissioners support this. But what would happen in a court? Would the Court of Appeal allow a judge complete freedom over the order of proceedings or to refuse to allow counsel to open proceedings by setting out the claimant's case?

#### *The duty to be honest to the tribunal*

In all dealings with the tribunal, the representative must be honest. This duty has been applied to the representative's summary of the evidence (*CDLA/1720/2001*, cited above). In *CSDLA/0071/1999*, the same duty was applied to the representative's explanation of why the application for leave to appeal was late. The Commissioner said:

'It must be appreciated by representatives that they owe not only a duty to their clients but also to the judicial authorities such as the Commissioner to whom appeals and applications are presented. The Commissioner is entitled to rely on information being placed before him being accurate. Sadly such reliance was not possible in this case.' (Paragraph 23).

Obviously, this will also apply if the representative gives evidence. I have held that a representative may give evidence (*CDLA/2462/2003*). I notice that mine was not the only case in which the tribunal has tried to confine a representative to an exclusively representative role (see also *CDLA/1138/2003*, in which Miss Fellner gave directions on the admissibility of a representative's evidence).

### **Conclusion**

Some representatives are subject to regulation, others are not. Those that are regulated are subject to different forms. Barristers, including pupils, are subject to the Bar discipline. Solicitors are subject to the Law Society. I believe that this would cover work done on behalf of a firm by a welfare rights employee. Local authority welfare rights officers are subject to the control of their employers. But that leaves out many who regularly represent claimants before appeal tribunals and the Commissioners. So, the regulation is piecemeal and is not comprehensive.

Representatives have become increasingly professional in the way they work and in seeking a defined and recognised role in the tribunal's proceedings. One of the features of a profession is a form of regulation. The duties outlined above provide a minimum framework, but they cannot cover all aspects that are part of a system of regulation. For example: they cannot protect the claimant from the consequences of the representative's actions. Is it not time for tribunal representatives to establish an organisation that embraces all, regardless of their background or status, in order to ensure that those who profess to carry out the work of representation have attained an appropriate standard and perform to that standard?