

Work and Pensions Select Committee

Memorandum by the Administrative Justice and Tribunals Council on decision making and appeals in the benefits system

Introduction

1. This memorandum is submitted by the Administrative Justice and Tribunals Council (AJTC) in response to the Select Committee's call for written submissions to its inquiry into decision making and appeals in the benefits system.

Executive Summary

2. The key points that the AJTC wishes to make in response to the Committee's Inquiry include:
 - The need for a greater drive by the Department for Work and Pensions (DWP) to reduce the level of complexity in the benefit rules;
 - More could be done by the decision making Agencies to analyse systematically the outcomes of tribunal hearings in order to provide better guidance to decision makers;
 - Presenting Officers should attend tribunal hearings as a matter of course in order to assist the tribunals in the "amicus curiae" role and to provide a feedback link to decision makers;
 - The DWP should consider rolling out the Professionalism in Decision Making and Appeals training initiative across all its decision making Agencies;
 - Appeals should be lodged with the Tribunals Service rather than with the original decision making Agencies;
 - A uniform statutory time limit for responding to appeals should be introduced for the decision making Agencies;
 - Greater efforts are needed to reduce appeal delays and to provide meaningful information for tribunal users about how long appeals take to get to a hearing.

The role of the AJTC

3. The AJTC is an advisory Non-Departmental Public Body (NDPB) established by the Tribunals, Courts and Enforcement Act 2007 (TCE). The AJTC is the successor body to the Council on Tribunals (CoT), which was set up in 1958 following the publication of the Franks Report on Administrative Tribunals and Enquiries in 1957. The current AJTC Chairman is **Richard Thomas CBE**.
4. The TCE Act gave the AJTC a wider remit than that of the CoT, namely to:
 - keep the administrative justice system under review;
 - keep under review and report on the constitution and working of tribunals designated as being under its oversight;
 - keep under review and report on the constitution and working of statutory inquiries.
5. The Act defines "the administrative justice system" as

“.....the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including:

- (a) the procedures for making such decisions,
 - (b) the law under which such decisions are made, and
 - (c) the systems for resolving disputes and airing grievances in relation to such decisions.” [TCEA 2007, Schedule 7, para 14]
6. In acquiring a new general duty to keep the administrative justice system under review the AJTC thereby gained a new role in relation to first tier decision making across the administrative justice landscape, including in respect of social security decision making, which the former CoT did not have. The AJTC welcomes the Committee’s inquiry into this important policy area, which impacts on some of the most vulnerable members of society.
 7. The Committee is invited to note a draft AJTC paper attached, examining the landscape of administrative justice, which may help give a better perspective of the AJTC’s new role.
 8. One of the ways in which the AJTC oversees the decision making and appeals process is through attending appeal hearings to observe the proceedings in order to ensure that they are open, fair and impartial from the user’s perspective. This enables members to take a view of the effectiveness of tribunal systems, measured against the Framework of Standards for Tribunals developed by the CoT, a copy of which is attached.
 9. AJTC members provide feedback to tribunals as part of their discussions with the tribunal on the day of the hearing, which is followed up by a written feedback report. A copy of members’ reports is also sent to the judicial Head of the tribunal system. The AJTC also provides regular feedback from members’ visits to tribunals within the new unified system to the Senior President of Tribunals, Lord Justice Carnwath.
 10. Members regularly engage in discussions with policy and operational officials in the department and its Agencies on issues affecting tribunal users. They also meet frequently with the senior tribunal judiciary, formerly the President of the Appeals Service (now the President of the Social Entitlement Chamber of the First-tier Tribunal), and the regional Chairmen to discuss issues of common interest.

Further background

11. The Social Security Act 1998 imposed a statutory duty on the President of Appeal Tribunals to make an annual report, based on the cases coming before tribunals, on the standards of decision making achieved by the Secretary of State. Successive Presidents’ reports from 2000 to 2007 have raised broadly similar issues year on year, painting a picture of slow progress in raising standards across the department’s agencies.
12. In 2005 Sir Leonard Peach, a non-Executive Director of the Appeals Service, undertook a feasibility study of decision making and appeals in social security, the objective of which was to improve the quality of decision making and reduce the volume of appeals. The CoT had an initial meeting with Sir Leonard to provide evidence to his study and a subsequent meeting to discuss his draft Report to the Secretary of State. The findings from his study touched on matters such as the complexity of the legislation; a lack of understanding by claimants of claim forms and conditions of entitlement; lack of confidence in the reconsideration process and wide variations in practice in

its operation; claims targets imposing limits on the time spent on cases, leading to poor decision making; and failure to provide adequate explanations for decisions. Sir Leonard's report made a number of recommendations, which the CoT welcomed as a means of securing much needed improvement in the quality of decision making, ensuring that errors are corrected at the earliest opportunity, and thereby reducing the number of cases that need to go to appeal.

13. The AJTC has also had regard to reports by the department's Decision Making Standards Committee, which was established in 2003 in order to monitor decision making standards across DWP. The Committee reports to the Chief Executives of the decision making agencies, and as such, is perhaps not generally perceived to be as independent as the former Chief Adjudication Officer, whose office was abolished by the Social Security Act 1998.
14. The 1998 Act also requires the Secretary of State to report to Parliament, either annually or at such times or intervals as may be prescribed, on decision making standards. So far as the AJTC is aware the last report published by the Secretary of State related to the period 2002-03. The AJTC would welcome a commitment by the Secretary of State to report more frequently on decision making standards, ideally on an annual basis.
15. The AJTC's overarching objective in overseeing the administrative justice system is to focus first and foremost on the needs of users. In 2006 the CoT ran a series of Users Support Workshops in order to consult on the proposals in the White Paper "*Transforming Public Services: Complaints, Redress and Tribunals*". The workshops were attended by delegates from the organisations that provide support to tribunal users, with particular focus on those tribunals which were due to become part of the new Tribunals Service. The majority of delegates came from a welfare benefits background, reflecting the fact that the Appeals Service (as it then was) was by far the largest of all the tribunal systems under the CoT's supervision. The key messages from the workshops included:
 - Tribunal users need access to better information at each of the stages leading to an appeal hearing
 - The need for better and clearer explanations of the reasons for decisions at the initial decision making stage and more effective use of the provisions for reviewing and revising decisions
 - Decision makers, particularly within the DWP agencies, need to be more readily available to their customers and the advice agencies that support them
 - Pilot studies are needed to establish how best alternative forms of dispute resolution could be made to work within individual tribunal jurisdictions
 - Greater simplification across the board is desirable, from underlying policy and procedures, to the arrangements for tribunal hearings, and everything in between.

Decision making

16. Social security and child support appeals account for the largest of all the tribunal systems under the AJTC's oversight. In 2007/08 there were 229,123 appeals lodged, 165,264 of which went on to be decided by a tribunal. It is recognised that the number of appeals represents only a small proportion of

the total number of decisions made by the DWP Agencies. However, there is believed to be an unresolved issue about why some people might choose not to appeal an adverse decision, and whether they might in fact be successful if they did appeal.

17. From the AJTC's first hand observations of appeal hearings there appear to be three key factors which impact on the quality of initial decision making:
 - The complexity of the benefit rules
 - Lack of feedback from tribunal decisions
 - Training for decision makers.

Complexity of the rules

18. The undue complexity of the benefits system has an obvious impact, not only on the quality of decision making but also on customers' understanding of their legal rights and entitlements. This was particularly highlighted in the National Audit Office's report in 2005 "*Dealing with the complexity of the benefits system*". The complexity of the system derives not only from the rules for particular benefits but also as a result of the interaction between the conditions of entitlement for linked benefits and the complicated arrangements for review, revision and reconsideration of decisions, which are not fully understood even by decision makers themselves. The AJTC believes that the Department could do more to address the root causes of complexity in the system.

Lack of feedback from tribunal decisions

19. The system for providing feedback on decision making standards through the statutory report of the President of Appeal Tribunals has not been as effective as it might have been, largely due to the apparent lack of response on the part of the DWP to the recommendations made in his reports. This resulted in the same recommendations being repeated in successive reports, particularly with regard to the non-attendance of Presenting Officers at hearings and delays in cases coming to a hearing, which are mentioned below.
20. AJTC members' observations of appeal hearings highlight the fact that too many cases continue to be overturned on appeal that could potentially have been reviewed favourably by the initial decision making Agency. This is particularly prevalent in respect of medically-based benefits, that is, Disability Living Allowance (DLA), Attendance Allowance (AA) and the former Incapacity Benefit (IB) (now Employment and Support Allowance). The success rate for appeals in 2007/08 was around 45% across all benefits and is believed to be higher for DLA and AA.
21. Many of the cases observed by AJTC members were overturned on the basis of fresh evidence provided by the appellant on the day. If customers could be encouraged to provide such additional evidence to the Agencies, decisions could be revised favourably at an earlier stage, thereby removing the need for a tribunal hearing. It is thought that the pressure to meet key performance targets for deciding claims for benefit could lead to some initial decisions being taken on the basis of insufficient evidence. However, bearing in mind that there is an internal review stage between the initial decision and the appeal, it is not clear why more cases are not revised on review in the customer's favour. Some other decisions are overturned on appeal because tribunals take a different view of evidence to that taken by decision makers.

22. It is recognised that tribunal decisions do not create precedent that applies to other cases, as is the case for decisions of the Social Security and Child Support Commissioners (now the Upper Tribunal). However, the AJTC believes that more could be done to analyse systematically the outcome of tribunal hearings in order to provide better guidance to decision makers with a view to improving first-tier decision making across the board. This could also help in identifying areas of complexity which are seen as a particular cause of appeals, which could inform work towards greater simplification.
23. The attendance of Presenting Officers (POs) at appeal hearings would be an effective means of providing a direct line of feedback to decision makers, but for the fact that the incidence of attendance by POs at hearings has declined to around 23%¹, usually limited to hearings involving “complex” cases. Both the AJTC and successive Presidents of Appeal Tribunals have pointed out the benefits of having a Presenting Officer in attendance at hearings, both to the tribunal itself as an “amicus curiae” and to the Agencies as a useful source of direct feedback from tribunals to decision makers.
24. It would be helpful if the DWP were to establish an effective method by which the learning from the outcome of appeals gets back both to decision makers and policy makers so as to influence front line performance and improvement planning.

Training for decision makers

25. It goes without saying that decision makers should receive appropriate training according to their particular level of responsibility within the decision making hierarchy. We have taken a keen interest in an initiative piloted by the Pension, Disability and Carers Service (PDCS) in partnership with the University of Chester, aimed at improving initial decision making. Professionalism in Decision Making and Appeals (PIDMA) is a work based learning programme leading to accreditation and higher education awards for DLA/AA decision makers and their managers within PDCS. This not only equips decision makers more effectively to deal with more complex cases but also has the potential to reduce the numbers of cases that go to appeal. The PIDMA programme is being rolled out across decision makers in PDCS.
26. We recognise the significant investment costs incurred in introducing such an intensive training commitment but envisage that in the longer term the results will lead to better quality decision making, thereby resulting in reductions in the numbers of cases going to appeal. Whilst the cost benefits of PIDMA have not yet been fully ascertained in business terms we believe these will more than justify the initial cost investment.
27. PIDMA is an exciting development within PDCS, which appears to have clear potential to make real improvements in standards of decision making, not just within the PDCS and the other DWP Agencies but also in other areas of administrative justice. The AJTC has highlighted the PIDMA initiative in its electronic magazine ‘*Adjust*’ in order to bring it to the attention of a wider audience across the administrative justice landscape.

Appeals

28. As mentioned above, in the AJTC’s view too many appeals continue to get to an appeal hearing, which could have been reviewed favourably by the initial

¹ Source: Report by the President of Appeal Tribunals on Standards of Decision Making by the Secretary of State 2007/08

decision making Agency. Other unsatisfactory aspects of the appeals system include:

- Appeals continue to be lodged with the initial decision making agency rather than the Tribunals Service;
- Whilst there is a statutory time limit for appeals to be lodged by customers, there is no corresponding time limit for the DWP Agencies to respond to appeals;
- Appeals take too long to get to a hearing.

Lodgement of appeals

29. Social Security and Child Support Appeal Tribunals now sit within the Social Entitlement Chamber of the First-tier Tribunal and are administered by the Tribunals Service (TS). The move of the tribunals to the TS, which involved transferring responsibility for sponsorship of the system from the DWP to the Ministry of Justice, strengthened the perception of the independence of the tribunal. However, appeals continue to be lodged with the relevant DWP Agency that made the original decision. The DWP argues that it makes administrative sense for appeals to be lodged with the Agencies as they are required to carry out an internal review of the decision under appeal. Any decision that is subsequently revised results in the appeal lapsing and a fresh appeal right being given. If the Agency decides not to revise the appealed decision, a submission is prepared and forwarded with the appeal notice to the TS.
30. The AJTC believes that in a demonstrably independent appeals system appeals should be lodged with the appeal body, and not the Agency against whose decision an appeal is being lodged. This would place the management and control of appeals properly with the TS, which should have greater responsibility for case managing appeals from the outset, ensuring that they are processed more efficiently. It is unacceptable that the current practice should be allowed to continue for the sake of administrative convenience.

Time limit for responding to appeals

31. Responsibility for the procedure rules for the First-tier Tribunal lies with the Tribunal Procedure Committee (TPC), established under section 22 of the TCE Act. One of the members of the AJTC sits as a member of the TPC.
32. In developing the rules for the Social Entitlement Chamber the TPC was unable to reach agreement on the introduction of a universal time limit of 42 days for responding to appeals because the Department for Work and Pensions and Her Majesty's Revenue and Customs (in respect of tax credit claims) considered this to be impracticable for their decision makers. In each case the rules provides for a response to be submitted to the TS "*as soon as reasonably practicable after the decision maker received the notice of appeal*". The 42 day time limit applies in the other jurisdictions of the Social Entitlement Chamber.
33. The AJTC has strongly supported the introduction of a time limit for responding to appeals since it is inequitable that the rules should impose a time limit for customers to submit an appeal but no time limit for the Agencies to respond. Setting such a time limit would also be beneficial in helping to reduce delays in cases getting to a hearing.

34. Lord Justice Elias, the Chair of the TPC, has established a sub-group of the TPC to work with officials from both departments to consider how best to overcome the perceived difficulties of having a universal time limit in the rules and to report back on progress towards this. One of our members sits on this sub-group and is pressing for the early introduction of a time limit as near to 42 days as possible. The AJTC is keeping this issue under close scrutiny to ensure that progress is made.

Hearing delays

35. The AJTC believes strongly in the need for continued efforts to reduce the time it takes for an appeal to get to a hearing. However, this issue has become more problematic in recent times following the transfer of the tribunal to the unified structure. Previously, the DWP collected and published statistical data on the time taken for an appeal to get to hearing, that is, from the date of lodgement to the date of the actual hearing. Following the transfer to the new unified system the DWP ceased collecting any information relating to appeals.
36. The Tribunals Service now publishes statistical data for tribunals within the unified system, measured against its key performance indicators, which for social security and child support appeals is for 75% of cases to get to a hearing within 14 weeks of receipt of the appeal by TS. However, since appeals are lodged with the first tier Agencies the TS only becomes aware of an appeal when it receives the appeal submission from the Agency, which can be some considerable time after the appeal was originally lodged. The TS never learns of appeals that are subsequently lapsed by the DWP Agency, which makes it difficult to obtain statistical information about the overall numbers of appeals that are lapsed on review by the Agencies.
37. TS statistics concerning the time it takes for an appeal to get to a hearing only relate to the period from when the TS receives the notice of appeal along with the Agency's submission, which can be many months after the original date of lodgement. This makes it difficult, if not impossible, to give tribunal users any meaningful indication of the overall time it takes for an appeal to get to a hearing as neither DWP nor TS measures this. This has created an unhelpful gap in the recording of information about appeal waiting times which needs to be resolved urgently.
38. Moreover, whilst it may suit the TS's business needs to present details of its performance in the format 'x' % in 'y' days, this is not particularly helpful from the perspective of its customers who are more interested to know how long they will have to wait to get to a hearing.
39. The AJTC recognises the high pressure and volume of cases being managed within this system but believes that the most vulnerable in society deserve the highest standards. There are opportunities to improve the service whilst reducing the cost of decision making and appeals by addressing the issues mentioned above.