# Benefits of early neutral EVALUATION

**Following a successful pilot exercise to assess whether some classes of appeal might be resolved fairly without a tribunal hearing, *Jeremy Bennett* is confident that the time will come when there is a central place for alternative dispute resolution in the modern judicial system.**

In the Summer 2006 issue of this journal, Michael Harris described the plans of the (then) Appeals Service to conduct a pilot exercise to try to find out whether some classes of appeal might be resolved fairly without a tribunal hearing. In that article, he described the difference between mediation in civil and family cases and his tribunal's chosen method of early neutral evaluation (ENE) – namely that the tribunal's aim was not to reach settlement, but to find the 'legally correct' answer to the dispute.

In fact, his start date for the pilot turned out to be a little optimistic, and it was not until early 2008 that the pilot got under way at four tribunal sites – Sutton, Bexleyheath, Cardiff and Bristol. It ran for a year and involved 2,000 cases.

### Ambit

The benefit chosen for the pilot exercise was disability living allowance (DLA). There were three main reasons for choosing this benefit. First, DLA formed the largest part of the tribunal's work at the inception of the project. Secondly, about half of the appeals relating to that benefit were allowed by the tribunal. Thirdly, the cost of convening the three-person panels used to resolve these disputes was relatively high.

### Neutral evaluation

As already mentioned, the form of alternative dispute resolution chosen was ENE and the aim of the exercise was to identify the correct level of award of benefit, rather than to negotiate a settlement or to mediate between the parties. There is no room for exercising discretion in awarding DLA; the statutory requirements have to be met for an award to be made.

ENE involves an independent person, in this case a judge, assessing the claims made by each side and giving an opinion on the likely outcome of the dispute. The expressed opinion is not binding and the parties decide whether or not to act upon it. Participation in the process requires both parties to be willing and able to give informed consent. The process adopted closely resembles the system used by the Financial Services Ombudsman, although there it is used to resolve very different types of disputes. It involves a dialogue with only one party – the one likely to lose.

### Endorsement

Such a scheme cannot be imposed on parties. Before the pilot started, time was taken to explain carefully what was proposed to welfare rights organisations such as the CAB and the Disability and Carers Service, the Departmental agency responsible for making DLA decisions and administering the benefit. Both groups gave their endorsement to the scheme. This was important because the evaluation of the appeal was being undertaken by a judge alone, albeit an experienced one. In contrast, the panel is made up of three people, and also includes a doctor and a member with expertise in disability.

### Appeals

Appeals against DLA decisions are lodged by appellants with the Department of Work and Pensions and not the tribunal itself. The Department prepares its response to the appeal and lodges it with the tribunal. Typically, three

months can elapse between the lodging of the appeal and the papers being lodged with the tribunal. At the time of the pilot exercise, waiting times for appeals of this kind to be heard by a tribunal were running at about 14 weeks.

#### Process

Under the pilot, upon registration of the appeal with the tribunal, the tribunal issued an introductory letter outlining the ENE process to the appellant – and, if known, his or her representative – and inviting them to opt into the process. The Department had committed itself to participate whenever the appellant elected to opt in.

If the appellant did agree to take part in the pilot, the judge received and previewed the appeal papers within two weeks of registration of the appeal. The judge's task was to establish whether the likely outcome of the appeal – namely, a specific award or no award – could be identified, based on the information in those papers. In cases where there was a clear outcome to the appeal, the judge spoke on the telephone to the party that would potentially lose.

#### Notifiying the parties

Thus, if the judge's opinion was that the appeal was bound to succeed, the judge would contact the Department, explain what in their opinion the likely outcome of a tribunal hearing would be, and their reasons for that opinion. It was then for the Department to decide whether to revise its decision in favour of the appellant. If it did, the appeal lapsed, although the revised decision brought with it new appeal rights. These were, however, rarely exercised.

If, however, the judge's opinion was that the appeal was bound to fail and the decision under appeal would be upheld, the judge would contact the appellant or – with the appellant's approval – his or her representative. While the conversation with the Department could be conducted frankly, with technical knowledge on both sides, conversations with appellants had to be conducted with more sensitivity. Care had to be taken in explaining the likely outcome of the appeal and why it seemed bound to fail, and the judge needed to ensure that the appellant understood what was being said and did not feel imposed upon.

In these cases, various options were offered to the appellant. These could include seeking further advice or obtaining the services of a representative. The value of attending a hearing to give oral evidence was explained, as well as the possibility of withdrawing the appeal if the appellant accepted, after receiving the explanation, that it was bound to fail. Care was taken to encourage appellants to take time to consider the judge's view, and to discuss it with their representative – in cases where there was one – or family, before deciding how to act upon the advice.

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#### Confidential

The process in either eventuality was confidential. The other party had no knowledge of contact being made with the potential losing party. Nor was the tribunal who subsequently heard any unresolved appeal made aware of contact being made with one of the parties. The judge who undertook the evaluation was excluded from any subsequent hearing.

#### Unclear

Where the outcome of the appeal was not clear, it automatically proceeded to a hearing. Having previewed the papers, the judge was in a position to issue case management directions to assist the tribunal hearing the case, and in this way reduced the number of hearings that needed to be adjourned by about nine per cent.

During the course of the pilot, details of all DLA cases (not just those subject to ENE) were analysed to form the basis of a quantitative evaluation of the project by a team of independent external evaluators. The evaluation team also conducted interviews with a representative selection of all those participating in the process. The official evaluation report was published in January 2010 and copies are available on the Ministry of Justice website.[1]

### Outcomes

In many ways the outcome of the pilot scheme was extremely positive. Over three-quarters of appellants who were informed about the scheme agreed to take part. In about a quarter of these cases the judge was able to identify the likely outcome and contact a party. Over 20 per cent of the cases that took part in the pilot were resolved without the need for a hearing, thus avoiding a potentially stressful hearing for the appellant and allowing a decision to be reached three months earlier than would have been the case if the appeal had proceeded to a hearing. Judicial contact was slightly higher with the Department than with the appellant and their representatives.

### Initial decision-makers

A particular bonus, and perhaps one we did not expect, was the willingness of the Department to take on board the judge's opinion and change their own decision. This happened in the overwhelming majority of cases where they were contacted. It is important to remember that they were under no obligation to accept the judge's view. A key factor in this may have been the arrangements (suggested incidentally by the Department itself) which meant that the judge contacted the line managers of the decision-makers, rather than the decision-makers themselves.

The judge's comments were used by Departmental managers for training decision-makers and improving performance. The Department regularly asks for greater feedback on the quality of their decision-making, and this project certainly provided it.

Another factor, and one which is easy to ignore, is the calibre of the four judges involved in the pilot. There needed to be confidence in and respect for their opinion. They needed to have the skills to quickly identify the cases where a clear outcome could be identified, and the communication skills to explain that view to the relevant party on the phone. Taking time on that aspect of the process was crucial to its success.

About five per cent of appellants withdrew their appeals as a result of contact with the judge, recognising that while they may not like the decision, it was not going to be changed on appeal – for instance, because the qualifying period had not been met.

The evaluation project showed that each of the constituent groups broadly supported the exercise and would have welcomed its extension. At a time of economic austerity, being able to demonstrate financial savings was crucial to the continuation of the scheme. These were not shown to be sufficient to warrant its immediate expansion. However, the goodwill generated by the pilot leaves those of us who were involved confident that there is a place for alternative dispute resolution in the modern judicial system, and that its time will come in the field of welfare benefits.

In the meantime, lessons have hopefully been learnt by the department about the need for a rigorous reconsideration process to ensure that unsupportable decisions are not placed before the tribunal.

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[1] *www.justice.gov.uk/publications/research.htm*