

# The FOS – an example of good practice?



In its July 2004 white paper on consolidating the tribunal system, *Transforming public services: complaints, redress and tribunals*, the Department for Constitutional Affairs offered the Financial Ombudsman Service (FOS) as an example of how the reformed tribunal service might work.<sup>1</sup> In this article, **Val Reid**, policy officer at the Advice Services Alliance (ASA), asks whether the FOS is a model which the new tribunal system should follow.

## Resolving disputes through compromise?

The FOS deals with disputes between two parties to a contractual relationship. In over half of their cases, FOS staff negotiate a resolution through guided mediation. This usually involves some compromise between the parties; complainants accept a lower level of compensation than they would have liked in return for a free dispute resolution service, which is quicker, more accessible and less stressful than going to court.<sup>2</sup>

This is essentially different from most of the complaints handled by the tribunal system. Apart from the Employment Tribunal Service, most tribunals deal with disputes between an individual and the state. These depend on asserting individual rights (to a state benefit, for example) and ascertaining the correct information on which a decision should be based. Such disputes are rarely amenable to compromise (see the Social Security Commissioners, 13 January 2004, CSDLA/606/03 for scathing criticism of a social security tribunal's attempt to broker a compromise in a dispute about disability living allowance). State agencies cannot offer to bend or break their own rules, nor should individuals feel under pressure to accept half their invalidity benefit or agree to asylum for just a few months.

Can the FOS system of guided mediation be replicated in this very different context, and would it produce fair and just outcomes?

## Accountability Internal quality

During the last year, around 12,000 initial complaints to the FOS were 'resolved' before being taken on as cases because relatively junior FOS staff in the Customer Contact Division told the complainant that the offer of redress made by the firm was 'reasonable'. Over half of the cases taken on by the FOS reached a settlement through guided mediation.<sup>3</sup> However, the only advice most complainants receive about whether the settlement is reasonable is from FOS staff, so

complainants are heavily dependent on the knowledge and integrity of those staff in order to make an informed decision about whether to settle. Concerns have also been raised by consumer groups about the fact that FOS staff are set targets for the number of cases resolved, and are paid incentives if those targets are met. Does this encourage FOS staff to exert pressure on consumers to agree to proposed settlements?<sup>4</sup>

## External review

There is no external review of FOS settlements or adjudication decisions. There is an independent assessor, but he will only consider the process, not the content, of a decision. Unlike the court or tribunal system, there is no public accountability or transparency to the FOS process. Anonymous case studies are published monthly to illustrate trends in complaints and FOS decisions, but individual decisions are not amenable to appeal, review or external challenge.

## Public interest – naming and shaming

The FOS does not name and shame firms with high numbers of complaints or firms against which a significant proportion of complaints are upheld. The FOS dispute resolution process is entirely confidential. Where codes of practice have been breached, disciplinary matters are dealt with by the Financial Services Authority. Is this a sufficient safeguard for consumers, when the FOS process itself is not publicly accountable? And would this be appropriate in disputes between citizen and state, where it is in the public interest that poorly performing government departments are exposed and better decision-making encouraged?

## External incentives for avoiding disputes

The FOS is funded partly by an annual levy on all the firms which it covers, but three-quarters of its funds come from case fees paid by firms with more than two complaints. There is, therefore, a financial

incentive on firms to avoid FOS case fees by dealing with complaints promptly and making reasonable settlements with dissatisfied users. This seems to be an important element of the 'eco-system' within which the FOS operates and it is unlikely that a tribunal service would work so well without the same mindset, motivated by the same financial incentives.

## Conclusion

The FOS is highly visible and widely praised, but there are legitimate questions to be asked about the accountability and the transparency of the FOS system. There are also further questions to be asked about whether this system is transferable to tribunals. The current tribunal systems have evolved for a reason: in the types of cases they deal with there is a need for transparency, expertise, independence and accountability. FOS staff offer expertise in different financial specialisms but to replicate this in an integrated tribunal system would be resource-hungry, and would not produce the cost savings which are anticipated in the tribunal reform proposals. Transparency and accountability are not features of the FOS and to sacrifice these in return for a cheaper, speedier system risks undermining the integrity of tribunals.

- 1 Available at: [www.dca.gov.uk/pubs/adminjust/transformfull.pdf](http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf).
- 2 See September 2004 *Legal Action* 10 for an overview of how the FOS operates.
- 3 FOS users can choose whether to accept a guided mediation settlement, or to ask for an adjudication. If they are unhappy with the adjudicator's decision, they can request an ombudsman decision or choose to take their case to the courts.
- 4 The FOS commissioned an 'independent' review of the FOS in 2004 from Elaine Kempson et al of Bristol University – *Fair and reasonable: an assessment of the Financial Ombudsman Service*. Kempson found the case-handling process 'robust and fit for purpose' and compliant with 'principles of due and fair process'. However, questions can be asked about whether the report itself is 'robust and fit for purpose'. Firstly, its main aim was to 'provide an analytical description of the FOS, in order to raise awareness and understanding of the organisation's work among its stakeholders ...'. Secondly, Kempson interviewed FOS staff, observed the process, and audited closed files from 72 (out of over 100,000) cases; she did not include external peer review of the quality of advice and decision-making, nor any independent research into the views and experiences of users or firms. The review is available at: [www.financial-ombudsman.org.uk/publications/pdf/kempson-report-04.pdf](http://www.financial-ombudsman.org.uk/publications/pdf/kempson-report-04.pdf)

# The case for oral hearings



In May 2005, the Council on Tribunals issued a consultation paper, *The use and value of oral hearings in the administrative justice system* in response to the government's white paper on consolidating the tribunal system.<sup>1</sup> (See June 2005 *Legal Action* 5.) Adam Griffith, a policy officer at the Advice Services Alliance (ASA), outlines ASA's concerns about the council's proposals.<sup>2</sup>

The council asks a total of 22 questions about oral hearings and their alternatives. It asks, for example, whether oral hearings are more or less 'user-friendly', time-consuming, legalistic and daunting; whether they increase the cost and time spent in determining a dispute; whether they are more 'effective' in various ways; what the advantages and disadvantages of 'adversarial procedures' are; whether tribunals should be more 'inquisitorial' and what the effects of this would be. Only at the end does it ask what the relevant principles should be for deciding when an oral hearing is needed.

We consider that there are clear issues of principle in favour of oral hearings, and clear evidence to demonstrate the importance of these matters in the key tribunals dealing with social welfare law. Approaching the matter in this way avoids the risk of following a Department for Constitutional Affairs' agenda that seems to be ultimately concerned with controlling, if not reducing, the costs of the tribunal system.

## Issues of principle

Article 6(1) of the European Convention on Human Rights provides that, in the determination of their civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. We should assume that people are entitled to an oral hearing to resolve a dispute of any substance between themselves and the state. At the very least, appellants must have an opportunity to be heard, a chance to understand the process and confidence in the fairness of the process as a whole.<sup>3</sup>

## The evidence

In two of the largest parts of the administrative justice system we have very clear evidence about the different outcomes from oral and paper hearings, and the reasons for this.

In the case of welfare benefits appeals, the latest statistics confirm a long-standing difference between the results of oral and paper hearings. In the quarter ending December 2004, 53 per cent of oral hearings were decided in favour of the appellant, as

compared with 22 per cent of paper hearings. The statistics show that the attendance of the appellant (and to a lesser extent the appellant's representative) has a decisive impact on the result of the hearing.<sup>4</sup>

The latest report by the President of Appeal Tribunals highlights, as did previous reports, the reasons given by tribunal chairs for allowing appeals.<sup>5</sup> In the latest sample of successful cases:

- The tribunal received additional evidence in 63 per cent of cases;
- The tribunal formed different views of the same evidence in 37 per cent of cases;
- The tribunal accepted evidence that the decision-maker was not willing to accept in 23 per cent of cases;
- The tribunal formed a different view of the medical evidence in 22 per cent of cases; and
- The tribunal found that the medical evidence underestimated the severity of the appellant's disability in 25 per cent of cases.

The report emphasises, above all other factors, the importance of the appellant's evidence in establishing the facts of the case. This was particularly important in appeals involving medical evidence. The report notes a tendency among decision-makers to disregard evidence received from the appellant, a readiness to accept medical testimony without comparing it to the evidence provided by the appellant, and an increasing disparity between the decision-maker's and the tribunal's views of the medical evidence obtained.

In the case of immigration appeals, almost identical findings were made by a Home Office-sponsored study of the differences between oral and paper hearings in family visitor appeals.<sup>6</sup> Between October 2000 and September 2001, 73 per cent of oral appeals were allowed as compared with 38 per cent of paper appeals.

The ability of the appellant's sponsor to attend the appeal and present evidence in person was found to be the most influential factor in explaining this difference. The adjudicator's finding about the sponsor's credibility was paramount. The sponsor could overshadow concerns raised by the Entry Clearance Officer in the reasons for

refusal. The sponsor could shed new light on the original evidence or produce new evidence: 'The adjudicators considered that the presence of the sponsor enabled them to see the broader picture, to clarify any vague or ambiguous points and to have the arguments in the appellant's favour brought to their attention more persuasively.'<sup>7</sup> The report concludes that the ability of the sponsor to attend the hearing 'is an essential feature of the appellate process. It ensures that the process is perceived to be fair, open and independent'.<sup>8</sup>

## Conclusion

In our opinion, these findings confirm that the principle that appellants should be entitled to an oral hearing is fully justified, and is one that should be defended at all costs. Only an oral hearing seems to provide the opportunity for appellants to counter the arguments raised against them properly, and to counteract the disinclination by decision-makers to accept the truth and validity of what they are saying. Oral hearings enable the tribunal to hear and understand what the appellant is saying, and to ensure that the process 'is perceived to be fair, open and independent'.

- 1 Available at: [www.council-on-tribunals.gov.uk/files/oralhearings.pdf](http://www.council-on-tribunals.gov.uk/files/oralhearings.pdf).
- 2 The ASA's response to the consultation paper can be found at: [www.asauk.org.uk](http://www.asauk.org.uk).
- 3 See the comments by Hazel Genn at the council's seminar on this issue at: [www.council-on-tribunals.gov.uk](http://www.council-on-tribunals.gov.uk).
- 4 See the *Quarterly Appeal Tribunal Statistics* at: [www.dwp.gov.uk/asd/qat.asp](http://www.dwp.gov.uk/asd/qat.asp).
- 5 *President's report: report by the President of Appeal Tribunals on the standards of decision-making by the secretary of state, 2004-2005* at: [www.appeals-service.gov.uk](http://www.appeals-service.gov.uk).
- 6 Verity Gelsthorpe et al, *Family visitor appeals: an evaluation of the decision to appeal and disparities in success rates by appeal type*, Home Office Online Report 26/03, June 2003 at: [www.homeoffice.gov.uk/rds/pdfs2/rdsolr2603.pdf](http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr2603.pdf).
- 7 See note 6, p50.
- 8 See note 6, p13.