

ADVOCACY IN

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Writing in 1726, Daniel Defoe described what he regarded as a 'perfect style of language' (*The Complete English Tradesman*, chapter 3). He might not have been thinking of professional advocacy in the 21st century when he did so, but his words ring true for modern advocates, in courts and tribunals alike. He imagined someone 'speaking to five hundred people, of all common and various capacities ...' and being 'understood by them all, ... in the same sense which the speaker intended to be understood'.

The task of an advocate in practice today is not quite as daunting as that. At its simplest, of course, it is to put forward the client's case as clearly and cogently as one can. A basic aim in every form of advocacy is to be understood by the court or tribunal before which one is appearing. And the best way to achieve that is to adopt a 'style of language' appealing to a judge, and equally to a lay member of a tribunal – straightforward, uncomplicated and easy to comprehend. Whatever the merit of the case may be, this much is always in the advocate's control.

THE CULTURE AND CHARACTER OF TRIBUNALS JUSTICE

In previous articles in this series the focus has been on advocacy in the courts. Much of what has been said applies equally to advocacy in the tribunals. The essentials are no different. But there are some further thoughts to add, which I hope will be useful to those who represent parties seeking justice before a tribunal.

I should begin by saying something about the tribunals themselves. Their organisation, traditions and style of justice are different from the courts'. Under the arrangements put in place by the Tribunals, Courts and Enforcement Act 2007, they handle a wide range of jurisdictions for which the courts do not provide. These many jurisdictions embrace immigration and asylum, employment, benefits, property, tax, valuation of various kinds, mental health, special educational needs and disability, war pensions and many other parts of our administrative law. Their structure is in two tiers, the First-tier Tribunal and Employment Tribunal comprising the lower; the Upper Tribunal and the Employment Appeal Tribunal the higher. Some tribunal jurisdictions, such as immigration and asylum, or benefits, involve disputes between an individual citizen and the state, in the form of a government department or a public body responsible for implementing a statutory scheme. Others, such as employment and property, are largely concerned with disputes between one private party and another.

The most effective approach to advocacy before a tribunal will vary with the particular jurisdiction, the type of case, the nature of the dispute, the circumstances in which the hearing takes place and the kind of evidence the tribunal

will need to hear, which will often be expert evidence of one kind or another. It will also depend on the mode of hearing. The tribunals have made widespread use of remote hearings during the Covid-19 pandemic, and these will undoubtedly have a continuing role in tribunals justice in the future.



Many of the litigants in the tribunals are unrepresented. Many are of limited means. Many have a disability or are vulnerable in some other way. Often, a judge will sit on a panel with lay members who will have expertise bearing on issues the tribunal has to decide. A large proportion of the tribunal judiciary are fee-paid – some of them barristers, who bring to the work their own legal knowledge and continuing experience of advocacy. The advocate's approach should be adapted to the composition of the tribunal, and sensitive to the difficulties faced by parties or witnesses who are at a disadvantage through vulnerability, disability or lack of representation. Members of the Bar who appear in the tribunals should keep in mind their own duty to ensure the proceedings are fairly conducted.

Some tribunal jurisdictions, such as the First-tier (Immigration and Asylum Chamber), take an adversarial approach, like a court. Others are more inquisitorial, the tribunal seeking to establish both law and fact by more active enquiry of the parties.

A distinct characteristic of tribunals justice, and one of its virtues, is that the procedure has always been relatively informal. Access to justice is paramount. It demands that all users of the tribunals find the process easy to follow, not frightening or alienating. Where the subject-matter itself is difficult for litigants, a user-friendly procedure is necessary. This emphasis on informality was praised by Master Brenda Hale in a lecture she gave to judiciary of the Upper Tribunal in October 2021, in which she considered whether tribunals should be more like courts, or courts more like tribunals (<https://www.judiciary.uk/wp-content/uploads/2021/11/Annual-Upper-Tribunal-Lecture-2021.pdf>). She mentioned three features of the tribunals that are worth preserving – their expertise, their flexibility and their accessibility. And in my view professional advocates who appear in the tribunals – both barristers and solicitors – share the responsibility for doing that with the judiciary.

THE TRIBUNALS

ADVOCACY IN THE TRIBUNALS – SOME SUGGESTIONS

With those thoughts in mind, I offer a few suggestions on advocacy in the tribunals. None of them should be surprising; I hope they all accord with common sense. They apply to advocacy throughout the tribunals' jurisdictions, adapted to the particular chamber in which the case is being heard. And they are relevant both to hearings in person before a tribunal judge or panel in a hearing room and to remote hearings as well.

PREPARE

Good advocacy depends on good preparation. And good preparation requires time and care. You should always know both the strengths and the weaknesses of your own case, and of the other side's. Knowing your own case requires a firm grasp of the evidence you are going to rely on, and the submissions you want to base on that evidence, and being ready to respond to questions from the judge or panel. Knowing the other side's case is to see the main points you are going to have to rebut, and to understand how that is to be done.

Proceedings in the tribunals may be somewhat less formal and often more inquisitorial, but they are not wholly different from the adversarial contest in a court. The tribunal will want to get to the heart of the case quickly, and with your help – especially if the other party is unrepresented and unfamiliar with the process. I remember my pupil supervisor – who was a brilliant advocate – warning me before one of my first appearances in the High Court not to 'over-prepare'. He was not encouraging me to be idle or complacent. He was reminding me that I should keep my mind agile enough to deal with the unexpected question from the bench, which might test the force of my case or reveal the judge's provisional view. That was sound advice. You can expect judges and panels to ask you probing questions, especially when the proceedings are more inquisitorial.

FIND THE DECISIVE ISSUES

Concentrate on the issues on which the case will turn. Usually there will only be a few – often only one or two. Successful advocates learn how to identify those issues and tackle them head-on. It is unwise to dodge issues that are difficult, or on which your own argument may be weak. A willingness to confront the awkward issues will be taken as a signal of confidence. If the tribunal is finding the facts, ask yourself what facts will need to be established for the issues to be decided. When making submissions, set out for the tribunal the main propositions supporting them. A good discipline, usually welcomed by a tribunal, is to arrange your argument in a logical series of numbered points – preferably five or six at most, not 15 or 16. Not only does this help the judge; it also helps you. If you do it, you

will be more likely to avoid missing out a significant part of your case, and less likely to repeat something you have already said.

KEEP IT SIMPLE

Careful preparation should not translate into a wordy or leaden performance. Prolonged advocacy wins no sympathy in the tribunals. Stick to your allocation of time. When questioning a witness, whether your own or the other side's in cross-examination, remember it is usually better to ask too little than too much. Work out before you start what you need to ask, but do not be bound by a script. When making submissions, spell out your argument in its essence before elaborating it. If you do this, you are more likely to hold the attention of the tribunal.

BE CLEAR

Use direct, everyday language in your questions to a witness, in your submissions, and in answering questions that come to you from the judge or panel. This always goes down well in the tribunals. I come back to what I said at the beginning. Strive for the 'perfect style of language' – easy to understand for the tribunal, your client, your opponent, the other side, the witnesses in the case, and anyone looking on. The tribunals and their users are entitled to expect the crisp and concise presentation of a case by a professional advocate. Obscure and legalistic language has no place in a tribunal hearing.

HELP THE TRIBUNAL

If I had only one suggestion to make, this would be it. Remember that the main audience for your advocacy is not the client behind you but the tribunal you are facing in front. Make the tribunal's job as easy as you can. Pace is important. Do not go too fast. Allow time for your best points to land. Give the judge and lay members a chance to get your submissions into the notebook or laptop. Resist any temptation to overstate your case. Answer the questions you get from the tribunal as directly as you can. Make sure it is not misled on the law. Think about what it has to do after the hearing, which is to give a reasoned decision in the light of what it has heard. Imagine yourself in that position, composing the critical three or four paragraphs in the tribunal's reasoning. How will they look in the light of your advocacy? What help would you expect to have had from the advocates before you?

ENJOY IT

Finally, as others have said in this series, you can relish the challenges of advocacy. If you manage that, you are more likely to do your job well. Learning your own 'perfect style of language' as an advocate in the tribunals should be enjoyable. Let it be. ■