Making Appeals Work – First Edition (October 2016)

Representative Evidence

evidence from representative…

SK v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0141 (AAC) – CE/3642/2013 held:

"3. I would add one point, which was raised by the representative in the application for permission to appeal, but which I did not deal with when granting permission. Whilst I am able to decide the case without reference to this point (upon which I have not had the benefit of argument) it may assist first-tier tribunals if I make some brief remarks about it.

4. The representative said that he had wished to give evidence on behalf of the appellant, but was told by the Tribunal Judge that he could only ask his client questions or make a submission.

5. The evidence which he wanted to give was, in general terms, evidence concerning the matters with which his organisation had felt it necessary to assist the appellant.

6. The FTT [*First-tier Tribunal*] would have been entitled to hear his evidence. There is nothing to prevent a representative from giving factual evidence of matters within their knowledge. The informality of a tribunal hearing in comparison with a hearing in court, together with the preponderance of representation being by those who may be knowledgeable concerning benefit issues but not necessarily legally qualified, leads to some inevitable blurring of the distinction between representative and witness. The investigative role of the tribunal may also lead it, in certain cases, to find out whether a representative is in a position to give useful evidence. It is of course a matter for the FTT to assess the weight of such evidence, and it should do so with the evidence of a representative in the way that it weighs any evidence. [*My insert*]

7. As has been said by Mr Commissioner Jacobs (as he then was), in *CDLA/2462/2003*:

> *"The tribunal must take care to distinguish evidence from representation so that the former's provenance is known and can be the subject of questioning by the tribunal and other parties. But, subject to the practicalities of the way in which the taking of evidence is handled, there is no objection in principle to the same person acting in different capacities as a witness and as a representative. Nor is there any reason in principle why the probative value of evidence should depend upon whether or not it came from representative."*

8. Whilst that decision was made when tribunal procedure was covered by the Social Security and Child Support (Decisions and Appeals) Regulations 1999, the remarks are equally applicable under the Tribunal Procedure (First-Tier Tribunal) (SEC) Rules 2008. important in the context of those rules is rule 15 (2)

The Tribunal may-

(a) admit evidence whether or not-

(i) the evidence would be admissible in a civil trial in the United Kingdom;

9. Any decision to exclude evidence will be subject to the overriding objective as set out in rule 2, which is to enable the tribunal to deal with cases fairly and justly. The main consideration under that provision will be whether or not the evidence is relevant.

10. As to the relevance of such evidence it may be that in some cases the lengths to which an organisation, no doubt without open ended resources, will go to assist a client will be powerful evidence as to their personal limitations, but the representative will need to be careful not to stray from factual matters; the opinion of the representative as to the extent of an appellant's limitations is unlikely to be relevant evidence.

11. These matters do not prevent the tribunal from controlling the proceedings by curtailing evidence where it is likely to be irrelevant or repetitive, but a refusal to hear evidence simply because the representative is the source of that evidence is likely to amount to a material error of law."

Judge of the Upper Tribunal P A Gray 20.3.2014

representative's evidence

CDLA/2462/2003 held:

"6. The first matter relates to evidence given by a representative. The claimant was represented at the hearing before the tribunal (but not before me) by her social worker. He sought to give evidence of her condition and disablement from his own knowledge. The chairman's statement of the reasons for the tribunal's decision records that:

"The role of a representative is to represent and not to give evidence. The social worker representative at the hearing… was in the difficult position that, part way through the hearing he wished to give evidence as opposed to make representations. Whilst the tribunal allowed him to do so it is important for a representative to ensure that if evidence is to be given it is not done whilst in the role of a representative. ... Having allowed the evidence to be given, the Tribunal regret that it cannot give any significant weight to it."

7. I consider these remarks first on general principle and then on the terms of the relevant legislation.

8. Tribunals operate less formally than courts. They do not operate rights of audience. They allow, of course, professional legal representation. But they also allow lay representation and assistance from anyone whom the claimant wishes to assist in presenting a case to a tribunal. Given that breadth of representation, it is inevitable that the roles of representative and witness cannot be separated in the way that they would be in a court. The same person may wish to put the claimant's case and give evidence in support of that case. The tribunal must take care to distinguish evidence from representation so that the former's provenance is known and can be the subject of questioning by the tribunal and other parties. But, subject to the practicalities of the way in which the taking of evidence is handled, there is no objection in principle to the same person acting in different capacities as a witness and as a representative. Nor is there any reason in principle why the probative value of evidence should depend upon whether or not it came from a representative.

9. These principles are reflected in the relevant legislation, which is contained in the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

9.1 The claimant was a party to the proceedings. See the definition in regulation 1(2), which refers to sections 13 and 14 of the Social Security Act 1998. Section 14(3)(b) is the key provision, as it covers claimants.

9.2 As a party to the proceedings, she was "entitled to be present and be heard at an oral hearing." See regulation 49(7).

9.3 As someone who had the right to be heard, she was entitled to 'be represented by another person whether having professional qualifications or not.' See regulation 49(8).

9.4 And "for the purposes of the proceedings at the hearing" that representative has "all the rights and powers to which the person whom he represents is entitled." See regulation 49(8) again.

9.5 Finally, a person who has the right to be heard 'may address the tribunal' and 'may give evidence'. See regulation 49(11).

10. So, the claimant was entitled to give evidence. She was also entitled to be represented. Her representative had the same rights and powers as she had. That included the right to be heard. And that triggered the right to give evidence.

11. The comments that I have quoted in paragraph 6 seem to me to convey a rather ambivalent attitude towards the representative who wanted to give evidence of his own knowledge. He was doing no more than exercise the rights he had both on general principle and under the express provisions of regulation 49. It is correct that the role of a representative is to represent and not to give evidence. But that distinction properly refers to the capacity in which a person acts and the function that the person performs. It does not refer to the person involved, who may act in different capacities and perform different functions. It is also correct that the giving of evidence and making of representations should be kept as distinct as is realistic. But there is no reason for a tribunal to consider that the representative who wants to give evidence is, practicalities apart, in a "difficult position". Nor is it for the tribunal to "allow" a representative to give evidence. It has no power to prevent it, although the chairman has control of procedure and, through that, the power to control the way in which the evidence is given.

12. There is nothing in the statement of reasons to suggest that the tribunal assessed the representative's evidence inappropriately or irrationally. But comments like those that I have quoted are capable of being read as creating the impression that the tribunal heard the representative's evidence reluctantly and may not have assessed it dispassionately.

13. I emphasise that I am concerned here with a representative who wanted to give evidence from his own knowledge. I am not concerned with the different circumstance of a representative who wants to make a statement of the claimant's evidence to the appeal tribunal. Some tribunals refuse a representative the chance to do this. They insist on hearing the evidence from the claimant, allowing the representative to supplement the tribunal's questions to ensure that all the evidence is elicited from the claimant. That is a matter that is within the chairman's control of the procedure under regulation 49(1). Nothing I have written affects the use of that power by chairman to control the way that the claimant's own evidence is presented."

Commissioner Edward Jacobs 18.9.2003

evidence from representative

CDLA/1138/03 held:

"3. Tribunals, unlike the mainstream courts, are not bound by rules about the admissibility of evidence. The representative here suggested he should not have submitted his evidence in the form of what he called a 'witness statement'; but there was no need for him to criticise himself. He was clearly trying to highlight the distinction between giving the claimant's evidence at the hearing and giving his own evidence based on observation.

5. Tribunals are right (though they have a discretion) not generally to permit representatives to give the claimant's evidence. Claimants should normally give their evidence themselves so that they can be questioned about it and their demeanour observed. Appeals based on representatives not having been allowed to give the claimant's evidence will not generally be well received.

6. But there is nothing inherently "unsatisfactory" about a representative giving his own evidence, at least where he is present at the hearing to be questioned on it. If he is not going to be present, it will be a more risky strategy. But it is a matter of the weight to be given to it, not its admissibility.

7. It may be that this tribunal had formed an adverse view of this representative (I am sure he will forgive me for raising this, it is only an illustration), whether in the course of this hearing or over a succession of other appeals, and this led them to give little weight to his independent observation. This can sometimes be a legitimate view to form, and consistently unreliable representatives probably have little idea how much of a disservice they can do to their clients. But where this is the case, tribunals should indicate why they have, rightly or wrongly, formed their view. They should not try to avoid doing so by raising what look like admissibility points.

8. If a representative is accepted as reliable, his evidence must be dealt with. That does not mean it must be accepted at face value: a tribunal can still form the view that even though eg a claimant stopped often, it was not really necessary for her to do so in the light of the rest of the evidence, and so forth. But it must deal with the representative's evidence as it deals with any other, and explain its acceptance or rejection as part of the weighing exercise.

9. A reliable representative's evidence may also be useful [is] in local factual matters like distances and times. There is no point in excluding evidence which may be of some help in what can otherwise be a morass of speculation and guesswork in relation to such matters.

10. So this tribunal erred in categorising the representative's evidence as unsatisfactory in and of itself because of its source. It was in the context a rather venial sin, because the tribunal went on to give reasons (and I express no view on whether they were right or wrong) for not relying on it if it had been accepted. But it was a mistake."

Note: This decision has no paragraph 4.

Commissioner Christine Fellner 8.7.2003

evidence from representative

CDLA/1490/2006 held:

"8. … A representative who has observed the claimant's condition is entitled to give evidence of what he has seen and heard, although of course the tribunal, in the exercise of its discretion to control the conduct of the hearing, may require the claimant to deal with the relevant matters in evidence first if the claimant is present, and may restrict the extent to which the representative gives evidence about matters which the claimant's own evidence has already covered".

Commissioner Charles Turnbull 6.9.2006

evidence from representative

JMcG-v-Department for Social Development (DLA) – [2011] NICom 238 – C29/11-12 (DLA) held:

"17. Specifically, by regulation 49(7)(a) of the Social Security (Decisions and Appeals) Regulations (Northern Ireland) 1999 ("the Decisions and Appeals Regulations"), any party to tribunal proceedings shall be entitled to be present and be heard. By regulation 49(8) of the Decisions and Appeals Regulations a person who has the right to be heard at a hearing may be accompanied and may be represented by another person whether having professional qualifications or not and, for the purposes of the proceedings at the hearing, any such representative shall have all the rights and powers to which the person whom he represents is entitled. By regulation 49(11) of the Decisions and Appeals Regulations, any person entitled to be heard at an oral hearing may address the tribunal, may give evidence, may call witnesses and may put questions directly to any other person called as a witness.

18. Applying the equivalent legislation then still in force in Great Britain, Commissioner Jacobs in CDLA/2642/2003 at paragraph 10 summarised the effect of these provisions succinctly as:

> "10. So, the claimant was entitled to give evidence. She was also entitled to be represented. Her representative had the same rights and powers as she had. That included the right to be heard. And that triggered the right to give evidence."

19. In that case Commissioner Jacobs was dealing with a particular situation, where he was concerned with a representative who sought to give evidence from his own knowledge as a social worker. He was not dealing with the different circumstance of a representative who wants to make a statement of the claimant's evidence to the appeal tribunal, based on the appellant's instructions but in the absence of the appellant.

20. In specific circumstances, the scope for a tribunal to consider evidence from a representative without personal knowledge may be more restricted, such as in R(SB)10/86 where a presenting officer sought to give evidence of prices of items in local shops without corroboration. There it was held, at paragraph 5, that no tribunal should accept contested statements from a representative without supporting evidence.

This in turn was consistent with the approach of the GB Chief Commissioner in R(I)13/74 at paragraph 9 where he completely disregarded allegations of fact made by a representative except to the extent that they were supported by some evidence. However, these cases must now be read in the light of regulation 49 of the Decisions and Appeals Regulations, and the resulting right of a representative to give evidence. This right had not been expressly stated in the previous Regulations governing tribunal procedure."

Commissioner O Stockman 8.12.2011