

Formality or Informality. A Case-Study of British National Insurance Local Tribunal Procedure and Practice

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Volume 23, Number 3, 1982

La protection de l'administré

URI: <https://id.erudit.org/iderudit/042510ar>

DOI: <https://doi.org/10.7202/042510ar>

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Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)

1918-8218 (digital)

[Explore this journal](#)

Cite this article

Brown, L. N. (1982). Formality or Informality. A Case-Study of British National Insurance Local Tribunal Procedure and Practice. *Les Cahiers de droit*, 23(3), 625–650. <https://doi.org/10.7202/042510ar>

Article abstract

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Formality or Informality A Case-Study of British National Insurance Local Tribunal Procedure and Practice

L. Neville BROWN *

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Preface

This paper is based upon my experience since September 1977 as a chairman (one of a panel of 8 chairmen) of the Birmingham Tribunal, serving a population of over 2 millions and consequently one of the busiest in the United Kingdom. Sittings at which I have presided have averaged two a month, so that I have now presided over approximately 100 sessions, each dealing normally with 6 or 7 cases in each List, i.e. a total of over 600 cases, which must constitute a representative sample of the work of a National Insurance Local Tribunal.

The duration of each sitting has varied from 2 to 3 (very rarely 4) hours, so that the average disposal time for a case is 20 to 30 minutes. But the average is misleading : cases where the claimant attends the hearing (with or

without representative) invariably take longer than those where there is no appearance. Most cases decided « on the dossier » are disposed of in 10 to 15 minutes (including time taken by the chairman for writing up the decision), whereas cases « with hearing » seldom take less than 25 minutes and frequently much more — one hour is not uncommon and perhaps one case in 50 may extend to 2 hours (I have never had a case go beyond 2½ hours). I must emphasise, however, that the papers will have been read beforehand by the three members of the Tribunal : as chairman I reckon to spend at least 2 hours reading through the cases listed for each hearing and framing a draft decision (often in the alternative) ¹.

It will be helpful to bear in mind this speed of disposition when considering the question of formality/informality.

Brief statistical note

National insurance local tribunals (of which there are some 180 in England, Wales and Scotland) deal with approximately 35 000 cases a year ². In the various local offices of the DHSS and DOE ³ between 25 and 30 million claims are received annually from members of the public and decided by local insurance officers. This means, in broad terms, that only one case in a thousand is appealed to a local tribunal. The figures also make clear how much the general population is enmeshed in the system of national insurance benefits. These benefits include : unemployment benefit, maternity benefit, widow's benefit, guardian's allowance, retirement pension, death grant, sick benefit, industrial injuries benefit, invalidity pension, child benefit — in short, all the vicissitudes and crises which arise from the human condition. Welfare (or "supplementary") benefits of a non-contributory nature, however, fall outside the national insurance scheme ⁴ and are the subject of a

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1. The form in which decisions are framed is discussed later in this paper. Their simplicity of structure means that they seldom need to be drafted in the alternative : only the addition (or deletion) of a negative is usually needed in those cases where my preliminary conclusion on the papers is modified either by the evidence or arguments adduced at the hearing or by the views of the other members of the tribunal. To the charge of pre-judging the case, where the decision is not drafted in the alternative, I would reply that advance reading of the papers inevitably leads to a provisional view but that the trained lawyer is able to suspend final judgment until the end of the hearing.
 2. The trend is markedly upwards, doubtless due to the high incidence of unemployment and claims consequent thereto. Thus, the total number of cases disposed of by tribunals in England, Wales and Scotland in 1973 was 29 477, but this had risen in 1979 (no later figures are available) to 39 404.
 3. Department of Health and Social Security (DHSS) ; Department of Employment (DOE).
 4. Historically, supplementary benefits are descended from the old poor law established in the reign of Elizabeth I, whereas national insurance originated in Lloyd George's *National Insurance Act 1911*.

different system of adjudication at the local level where appeals are heard by the Supplementary Benefits Appeal Tribunals: only at the second stage of appeal do the two systems coalesce — since 1979^{4a} appeals from Supplementary Benefits Appeal Tribunals, like those from national insurance local tribunals, go before the Social Security Commissioners, a panel of 10 headed by the Chief Commissioner and based principally in London⁵.

Outline of paper

This paper falls into two unequal parts. In the first and longer part, a full account is given of the British system of adjudication upon disputed claims for social security benefits (other than supplementary benefits). After explaining the ascending hierarchy of adjudicating agencies (insurance officer, local tribunal and Commissioner) the paper analyses the procedure for determining claims; it describes in sequence the initial decision by the insurance officer, the appeal to the local tribunal, and the further appeal to the Commissioner. Fullest consideration is reserved for the proceedings before the local tribunal. Part One will be completed by a reference to the special questions reserved to the Secretary of State (or statutory medical authorities) and to the availability of judicial review by the courts.

In Part Two, I discuss certain aspects of formality and informality in relation to the local tribunal. I view these aspects from the standpoint of my experience as a tribunal chairman, and my observations will draw upon the procedural background presented in Part One for the benefit of Quebec lawyers unfamiliar with the British system of social security adjudication.

1. Adjudication agencies

1.1. The Statutory Authorities

All claims are considered initially by the insurance officer, the first of the statutory authorities (as they are termed in the legislation). He may decide the claim himself or refer it to a local tribunal⁶. Any claimant who is dissatisfied with an insurance officer's decision may appeal to the second statutory authority, the local tribunal. Appeals against local tribunal decisions may be made by claimants or their associations or by insurance

4a. *Social Security Act 1979*, S.6: the appeal may be brought from a SBAT only on a point of law and with leave of the Commissioner.

5. The Commissioners disposed of 2 039 cases in 1973 and 2 571 cases in 1979.

6. For reasons prompting a reference, see below, 1.1.2.1.

officers to the final statutory authority, the Social Security Commissioners appointed by the Crown. Each of these authorities will now be considered in turn.

1.1.1. The Insurance Officer

Insurance Officers are appointed by the Secretary of State⁷ under section 97(1) of the Social Security Act 1975. This is the first of the 8 sections which appear under the heading "Adjudications by insurance officers, local tribunals and Commissioners" to be found in Part III of the Act: "Determination of Claims and Questions". Part III contains various groups of sections and, significantly, one of its other headings is "Adjudication by the Secretary of State". The contrast makes two important points clear, namely, that insurance officers are unequivocally associated with the other two statutory authorities (the local tribunals and the Commissioners) and that they are appointed to function, like the latter, quite independently of the Secretary of State, to whom, however, a limited number of matters are reserved for his exclusive decision.

The officers appointed as insurance officers⁸ are civil servants in the Department of Health & Social Security or in the Department of Employment (the latter deal with claims for unemployment benefit). The great majority are of the executive officer grade and work in the local offices of both Departments and in the large central offices of DHSS which are situated in the provinces (at North Fylde, Newcastle-upon-Tyne and Washington). Some of them are solely engaged on the determination of claims and questions as insurance officers. Others combine these duties with other administrative responsibilities so that they may well be engaged both on the administration and control of claims and on adjudication.

This close integration of the insurance officer's function with the general departmental organisation has caused some critics to underrate the extent to which the insurance officer achieves in practice that independence of judgment which is essential to his role in determining claims. A powerful instrument which helps guarantee and maintain the insurance officer's independence is the support and service provided for him by the office of the Chief Insurance Officer.

7. For the DHSS, by the Secretary of State for the Social Services; for the DOE, by the Secretary of State for Employment.

8. For the discussion of the insurance officer I am heavily indebted to a short article by "Prestataire" on Social Security Law in *The Law Society's Gazette*, 20th September 1978, p. 209.

The Chief Insurance Officer, who is appointed by the Secretary of State, has been described⁹ as the keeper of the statutory intention that primary social security decisions as to basic entitlement should be governed strictly by the rule of law. His functions are to see that there is adequate administrative backing for the many civil servants exercising insurance officer powers and to promote the proper application of the Acts and regulations to individual cases. He is normally a senior officer of DHSS with a wide knowledge and experience of the Department's activities in the social security field. As Ministers have on occasion expressly reminded the House of Commons, it does not lie with Ministers to direct the Chief Insurance Officer, in his capacity as insurance officer, as to the advice he may offer in relation to adjudication either on individual cases or on any class of case. He maintains an office, located in Southampton, staffed by civil servants, mostly from DHSS, who are themselves appointed insurance officers. He works also through the regional offices of the two Departments and the three central offices (mentioned above), in which there are groups of staff, known as the regional insurance officers' section, who are the source of day-to-day guidance for insurance officers in the field.

Guidance for insurance officers is one of the principal activities of the office of the Chief Insurance Officer: general guidance on the interpretation of the Acts and regulations and on case law is one element, help with individual cases of particular difficulty is another. Staff in this office at Southampton also prepare and submit to the Commissioners a written statement on every appeal that goes to them from a local tribunal, whether the appeal be made by an insurance officer or by or on behalf of a claimant.

1.1.2. Local tribunals

1.1.2.1. Organisation and membership

There are nearly 200 tribunals in the United Kingdom, each of which is serviced by one of the DHSS's local offices. Their function is two-fold. They hear appeals brought by claimants against insurance officers' decisions. They also decide cases referred to them by insurance officers; references are usually made where difficult questions of fact arise upon which a determination by a tribunal after a hearing is thought desirable; appeals outnumber references by about 20 to 1¹⁰.

9. By "Prestataire", *supra*, note 8. This and the following paragraph are taken from this source.

10. A reference may also be felt desirable by the insurance officer where allegations of maladministration have been made against the Department by the claimant.

Each tribunal consists of a chairman and two members, one drawn from a panel of persons representing employers and self-employed earners, and the other drawn from a panel representing employed earners. The chairman is appointed for the particular tribunal by the Secretary of State but is chosen from a panel drawn up by the Lord Chancellor. Contrary to the recommendations of the Franks Committee in 1957¹¹, the other members continue to be chosen by the Secretary of State who may end their appointment at any time.

There is no requirement that the chairman must be a lawyer but in practice he almost always is a barrister or solicitor (usually the latter). A legal chairman is thought desirable in order to cope with the highly complex law which tribunals apply and to ensure that the procedure followed meets the standards of fairness which the courts in their supervisory jurisdiction have set and which, of course, claimants are entitled to expect. The key role of the chairman in the conduct of the tribunal hearing will be referred to later.

The two lay members, despite their method of selection, are not expected to represent the interests of either the employee (that is, in most cases, the claimant) or the employer but are required to exercise the same impartiality as the chairman¹². Because of the way in which they are selected, they should bring into the tribunal a worldly experience of business and industry and a knowledge of life on the factory floor to complement the legal expertise of the chairman. Often, heavy reliance is placed on them by the chairman in fact finding.

Chairmen hold office in accordance with the terms of their letters of appointment — normally for a period of three years. Appointments are commonly renewed¹³. For some large cities and conurbations, several chairmen are needed for the one tribunal¹⁴, in which case they are invited, so far as practicable, to preside in turn: in other words, there is no policy of encouraging any degree of specialisation between chairmen — quite the reverse.

11. *Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd. 218, 1975, para. 409, recommendation (2):

Chairman of tribunals should be appointed by the Lord Chancellor... Members should be appointed by the Council on Tribunals.

12. OGUS and BARENDT, *The Law of Social Security*, London, 1978, p. 626 (referring to a speech of Lord Gardiner (then Lord Chancellor)).

13. For this and other detailed provisions about local tribunals, see *Social Security Act 1975*, Schedule 10.

14. Thus, the Birmingham local tribunal has currently 8 chairmen.

The tribunal is not properly constituted unless the chairman and two members have been duly summoned to attend and the chairman and at least one member are present throughout the hearing. The chairman normally sits with two members, but, if one lay member fails to attend, a case may be dealt with by the chairman and the member present, provided the claimant (or, in his absence, his representative) agrees.

Where the claimant is a woman, at least one member of the tribunal should be a woman if this can be arranged.¹⁵ In practice, however, because women lay members are in short supply and there are very few women chairmen, women claimants often have their cases decided by all-male tribunals, but the chairman has to note specifically in the report of the decision that an attempt has been made (unsuccessfully) to recruit a woman member for the hearing.

1.1.2.2. The tribunal clerk

Each tribunal has a clerk to take care of the clerical work and the administrative arrangements in connection with its hearings. Although an officer of the Department, he (or, more commonly, she) is primarily a servant of the tribunal but may carry out normal departmental duties when not working on tribunal matters.

The clerk is generally responsible for convening sittings of the tribunal, choosing members from the panel and arranging for the papers to be sent well in advance to the members. The clerk must also ensure that there are available at each hearing copies of the relevant Acts, regulations and Commissioners' decisions to which members and claimants or their representatives may need to refer: this "Tribunal Library", as it is termed, is quite an extensive collection, and an identical library is provided for the personal use of each chairman, at his office or home, for the duration of his appointment.

The clerk also summons those required to attend the hearing of their appeal and provides them with a set of the papers which will be before the tribunal. The clerk is responsible for paying claims for expenses from tribunal members and persons attending hearings and for notifying the tribunal's decisions. At the hearing, the clerk acts generally as usher, bringing in from the waiting room the claimant, his representative and any witnesses¹⁶.

15. "If practicable" is the language of the Act: see Schedule 10 (*supra*, note 13).

16. The influence of the clerk upon the character of the proceedings is discussed in 2.4.1, *infra*.

1.1.3. The Social Security Commissioners

Appeals from local tribunals lie, usually with leave, to the Commissioners in London. They were known as National Insurance Commissioners from 1946 to 1980; they were renamed Social Security Commissioners by the Social Security Act 1980. They constitute the third and final tier of the statutory authorities which adjudicate upon claims under the relevant Acts. They must be barristers or solicitors¹⁷ of 10 years' standing and are appointed by the Lord Chancellor on behalf of the Crown. Their appointment is "during good behaviour", in which respect they resemble members of the judiciary.

There is a Chief Social Security Commissioner and 9 other Commissioners. Any one of the 10 may sit singly to exercise their statutory jurisdiction. For cases of special difficulty a Tribunal of 3 Commissioners is usually convened¹⁸.

Although based in London, the Commissioners hold regular sittings in Cardiff and Edinburgh. Their jurisdiction extends to the whole of Great Britain.

The procedure before the Commissioners is not the main concern of this paper. Suffice it to say that only a minority of cases involve an actual hearing: most are decided on the papers. Very few procedural rules are prescribed by Act or regulation. This leaves the Commissioners free to devise, in large measure, their own procedure. According to a recently retired Chief Commissioner¹⁹, they have succeeded in meeting the recommendation of the Franks Committee for this type of adjudication: "the combination of a formal procedure with an informal atmosphere".

1.2. Procedure for determining claims

The procedure for determining claims will now be considered. The great majority of claims do not proceed beyond the first stage of adjudication by the insurance officer²⁰. For the purpose, however, of this paper we will be

17. SSA 1979, section 9 introduced the eligibility of solicitors.

18. For recent examples, see Decisions R(U) 6/80 and R(U) 5/81. In Decision R(I) 12/75, a Tribunal of Commissioners ruled that a Tribunal decision is to be preferred as a precedent over a conflicting decision of a single Commissioner; they also ruled that more weight should be given to a reported than to an unreported decision.

19. MICKLETHWAIT, *The National Insurance Commissioners*, The Hamlyn Lectures, 28th Series, 1976, p. 46. This book provides a unique study of the Commissioners, being based upon the author's 14 years as Chief Commissioner.

20. As already mentioned, perhaps one case in every thousand proceeds on appeal to a local tribunal. In 1979 the Commissioners disposed of 2 571 cases, whereas 39 404 appeals were disposed of by local tribunals: very approximately, it seems that about one case out of fifteen is appealed from the local tribunals to the Commissioners.

concentrating on the minority of claims that proceed by way of appeal to the local tribunal. Procedure before the tribunal will be fully examined. Of the even fewer cases that proceed on further appeal to the Commissioners, discussion will be brief.

1.2.1. Determination by Insurance Officer

The insurance officer decides the application of the claimant entirely on the documents sent to him by the claimant and branches of the Department concerned (whether DHSS or Department of Employment). He does not interview the claimant or witnesses, although on rare occasions (e.g. where fraud is suspected) he may have before him statements given by the claimant to an inspector of the Department. Where he finds it impossible to determine a complex case, he may refer it to the local tribunal for the initial decision²¹; but this procedure is very much the exception.

The insurance officer is required to decide the application, so far as practicable, within 14 days of its submission to him. This is often impossible where, in an unemployment benefit case, written evidence has to be obtained from the claimant's employer.

The case must be decided in accordance with Commissioners' decisions, but the officer is not bound to follow his own previous decision given on a prior claim. The claimant must be told in writing of the decision with its reasons and also of his right to appeal to a local tribunal.

1.2.2. Notice of Appeal

An appeal against an insurance officer's decision may be made by giving notice in writing, setting out the grounds of appeal, within 21 days after the date of the decision or within such further time as the chairman of the local tribunal may for good cause allow²².

Claimants frequently fail to appeal in time. Thus, they may be away on holiday when the insurance officer's decision is notified to their usual address. A late appeal, together with the statement of the grounds for extension of time (usually, in the simple form of a letter from the claimant), is submitted to the chairman at a next convenient sitting of the tribunal. He is asked by the clerk to record his decision on the application of the

21. Besides cases of complexity, a reference may be made to avoid the charge of the officer being judge in his own cause where the claimant is making allegations of maladministration against the Department.

22. *Social Security Act 1975*, section 100 (4).

extension of time upon the notice of appeal (i.e. upon the claimant's letter in most cases). The Commissioners have ruled that this decision is for the chairman alone; he need give no reasons, nor is there any right of appeal against it. But the chairman may reconsider his decision in the light of further representations or information.

My own practice as chairman is to be generous in allowing appeals out of time, provided some reasonable grounds are given for the delay²³. Otherwise, a claimant may be left with a sense of grievance that his claim has been dealt with by administrative fiat, for although the statutory provisions designate the insurance officer as "adjudicating" upon claims, and with a degree of independence within his Department, claimants commonly regard him as acting purely as an administrator: his decision is reached "in the office". For their "day in court", claimants look to the local tribunal.

1.2.3. Notice of the hearing

Reasonable notice of the time and place of the hearing must be given to the claimant and to any other person who may appear to the chairman of the tribunal to be interested²⁴. This is one of the duties of the clerk. Unless such notice has been given, the tribunal cannot proceed with the hearing of an appeal except with the consent of the claimant. If the claimant is a member of a union or association and states that he wishes the union to be notified, the local official of the union will also be informed of the date of the hearing.

1.2.4. Form LT2

Particulars of each case are sent to the tribunal members on Form LT2²⁵ together with copies of all relevant documents. It will be seen to fall into 6 parts or "boxes". Box 1 summarises the decision of the insurance officer against which the appeal is brought. Box 2 recites relevant provisions in Acts and Regulations. Box 3 refers to relevant reported decisions of the Commissioners. Box 4 gives the claimant's grounds of appeal. Box 5 gives a summary of the facts as found by the insurance officer. Box 6 gives the insurance officer's submission to the tribunal.

This written submission is in numbered paragraphs and can be of considerable length and will be backed by supporting documents. The

23. The criterion in the statute is "for good cause": see SSA s. 100(4).

24. This is done by use of Form LT6.

25. Form LT2 is used for all DHSS cases and some DOE cases. Other DOE cases (especially those involving disqualification from unemployment benefit on the grounds of losing employment through misconduct or of voluntarily leaving employment without just cause) make use of a somewhat different Form LT2A.

practice of making a written submission is not in fact required by any statute or regulation, although it is of great practical value for the conduct of appeals. The submission should add up to a comprehensive background to the case; that is, it should summarise the facts and evidence, contain references to the law relied upon either by the insurance officer or the claimant and rehearse argument relating to the decision under appeal, including comments on any contentions that the claimant may have made. Not the least of its functions is to provide the claimant and his representative with a clear statement of the case he has to meet, and it is invariably drafted with that object in mind. Its preparation will also necessarily have concentrated the mind of the insurance officer²⁶.

This practice of a written submission is of long standing and has much to commend it. It reflects the fact that the character of social security appeals is inquisitorial rather than adversarial. The duty of the insurance officer is to assist the tribunal reach a proper decision within the law; he must not aim simply to justify the decision given originally. Thus, he is expected to draw attention to any new evidence or new authority which may come to light and which, in his opinion, puts a different complexion on the case. In effect, the insurance officer is expected to be very much an *amicus curiae* in regard to the tribunal²⁷. In my experience, the great majority of insurance officers adopt this role.

If any written evidence is received by the insurance officer too late to be recorded on Form LT2, every effort is made to send a copy to the claimant in sufficient time before the hearing to enable him to consider it fully. Where time does not permit this, the additional evidence is supplied to the chairman at the hearing, then to be given to the claimant²⁸. The original documents will be available at the hearing for inspection by the tribunal and the claimant if requested. All documents submitted before or at the hearing should be (and are) treated as confidential.

If, in the opinion of the chairman, the documents included any medical advice or medical evidence which might be harmful to the claimant's health if disclosed to him, such advice or evidence is not included in the papers sent to the claimant. It would, however, normally be disclosed to a representative, except where the latter had a close personal relationship with the claimant.

26. The points made in this and the following paragraph are taken from "Prestataire", *supra*, note 8.

27. See *per* DIPLOCK L.J. In *R. v. Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 Q.B. 456 at 486.

28. The Chairman might think it only fair to allow the hearing to be adjourned to a later date if he considered that the claimant (or his representative) had been taken by surprise by new and important evidence.

Even if not disclosed to the claimant, the tribunal is not precluded from taking it into consideration in arriving at their decision.

1.2.5. Venue and accommodation

To emphasise the independence of the administrative tribunals from the Departments with which their functions are associated, the Franks Committee recommended that a tribunal should hold its sittings in premises separate from any government office.²⁹ This recommendation has been generally adopted for national insurance local tribunals. For example, the Birmingham tribunal meets on the fifth floor of a large office block in the city centre; the rest of the building is occupied by a variety of commercial and professional tenants. In other cities, if it is impossible to hold tribunals except in the Department's local office, every effort is made to keep the hearings away from the actual working areas of the office.

The premises of the Birmingham tribunal comprise a large hearing-room, a waiting-room, a small office (used by the insurance officer who is acting as presenting officer) and toilets. The centre of the hearing-room is filled by a large oblong table covered by a baize cloth. On the side of the table facing the door sits the chairman with a lay member on his right and left; the clerk sits at one end of the table; and facing the chairman across the table will sit the claimant, his representative (if any) and the presenting officer. Half a dozen chairs are ranged along the wall beside the door as provision for members of the public; more commonly, on these chairs will be found a relative, friend or neighbour of the claimant who has come to lend moral support, a DHSS officer gaining experience, or a law student wishing to observe an administrative tribunal in action; but for most hearings these chairs are empty.

Around the table, proceedings can be conducted in ordinary conversational tones; voices need not be raised, not are they, except (rarely) by a claimant seething with a sense of grievance or inflamed by alcohol after a too indulgent imbibing of Dutch courage. The acoustics of the room are assisted by double-glazing to keep out the hum of the great city and the noises of the central railway station immediately below.

In the event of a disturbance there are no stewards, ushers, or police on hand. On only one occasion did I feel it prudent to ask the Clerk to telephone for help from the nearest police-station; but by the time the police arrived, the recalcitrant (and unsuccessful) claimant had gone peaceably away in the company of one of the lay members³⁰ — and experienced union

29. *Franks Report, supra*, note 11, para. 66.

30. As good fortune had it, the case in question was the last on the list for that day.

official who had quelled many an incipient riot in the huge automobile plant where he worked in Birmingham.

1.2.6. Conduct of the hearing: the practice at Birmingham

All hearings are held in public, unless the chairman is of the opinion that intimate personal or financial circumstances may have to be disclosed or (which is rarely possible) that questions of public security are involved. The notice advising the claimant of the time and place of the hearing affords him an opportunity to apply for his case to be dealt with in private. Where such a request is made the clerk presents it to the chairman before the hearing begins. It is for the chairman alone to decide whether to accede to this request, guided by the circumstances mentioned above. Requests are seldom refused. In practice, however, it is unusual for members of the public to attend tribunal hearings: in my experience, the only occasion when several members of the press attended a hearing was when important test cases were being dealt with in which claimants of unemployment benefit had been disqualified because, in the view of the insurance officer, the stoppage of work was due to a trade dispute; the dispute had involved several hundred workers and attracted considerable publicity in the media.

Except as specially provided in the Acts and Regulations (and such provisions are very few), the procedure at the hearing is a matter for the chairman. The notes issued to chairmen by the DHSS offer as guidance the following passage from the Franks Report³¹:

The object to be aimed at in most tribunals is the combination of a formal procedure with an informal atmosphere. We see no reason why this cannot be achieved. On the one hand it means a manifestly sympathetic attitude on the part of the tribunal and the absence of the trappings of the Court, but on the other hand such prescription of procedure as makes the proceedings clear and orderly. A definite order of events at a tribunal hearing promotes clarity and regularity.

My own practice, once the claimant and his representative (if any) and the presenting officer of the Department have settled in their places opposite me³², is to introduce by name myself and the two lay members³³, to explain that the three of us compose the local tribunal and that the tribunal is completely independent of the government or the Department but that the

31. *Franks Report, supra*, note 11, para. 64.

32. Only about half the claimants actually appear at local tribunals, and this despite their entitlement to their travelling expenses and compensation for loss of earnings. Only some 20% of claimants are represented See BELL, COLLISON, TURNER and WEBBER (1974) 3 *Journal of Social Policy*, pp. 300-301.

33. Small name-plates are placed on the table opposite our places.

Department does have an officer present to put the departmental case and to ask the claimant questions. I then summarise simply the issue which has arisen between the claimant and the Department before inviting the claimant's representative or the claimant if unrepresented to tell us anything they wish regarding the matter. If a claimant rambles too much from the point or repeats to excess matters already fully set out in the papers before us, I try to bring him, as tactfully as possible, back to the point in issue.

When the claimant has had his say, I usually invite the presenting officer to put any questions he wishes to the claimant. I will then put any questions which I feel pertinent and invite questions also from my lay members. I tend to prefer restraining my own questions until the presenting officer has had an opportunity to question the claimant, since the officer will often anticipate questions in my own mind. In this way, although my function (and that of the tribunal) is undoubtedly inquisitorial, the claimant is not put off by a barrage of questions from the tribunal members: he *expects* to be questioned by the Department's officer but too much questioning by the tribunal can lead him to regard us as departmentally biased. Likewise, to emphasise the complete impartiality of myself as chairman, I often prefer questions to be put by my lay members rather than by me, and I may suggest certain questions to my colleagues before the hearing commences. Moreover, on matters of industrial behaviour on shop floor or at factory bench, I recognise that my lay colleagues are better able to put questions to the claimant in language which he will understand.

After questions have been put by the presenting officer and the tribunal, I invite the officer to make this submission. Often he merely reaffirms the submission in writing of the original insurance officer as set out on the Form LT2. It should be appreciated that it is extremely unusual for the presenting officer to be the same person as the insurance officer who made the decision against which the appeal is being brought. At the Birmingham tribunal, the DHSS has appointed an officer to serve as a permanent presenting officer before the tribunal on appeals relating to that Department. This is a welcome recognition that the presenting of the Department's case at the hearing requires a certain kind of expertise and the benefit of experience. On the other hand, the Department of Employment follows the opposite policy of not appointing a single presenting officer in unemployment benefit appeals but the Department simply deposes on of its officers to attend the tribunal to present its cases for that sitting. The general view of the Birmingham panel of chairmen is that the DHSS system of having a permanent presenting officer much assists the smooth functioning of the tribunal. The system is also for the benefit of claimants, since the experienced presenting officer fully appreciates that his function is not to act in the

capacity of an advocate for the Department. His duty is rather to ensure that all the relevant facts are before the tribunal, to refer the tribunal to all relevant decisions of the Commissioners and to assist the tribunal reach a correct decision in law on the facts of the case.

When the presenting officer has made his submission, I always give the claimant or his representative the opportunity of having the last word³⁴. I then thank the claimant^{34a}, his representative and the presenting officer for their help and ask them to withdraw whilst the tribunal considers its decision.

1.2.7. Witnesses and medical assessors

1.2.7.1. Witnesses

Although the procedure is commonly regarded as inquisitorial, the tribunal does not have the power to compel the attendance of any witness nor to require a witness to give evidence upon oath. The chairman is not consulted before the hearing about what evidence should be made available at the hearing; when he arrives at the hearing he will learn for the first time whether particular witnesses, e.g. an employer in a claim for unemployment benefit, have been invited by the insurance officer to attend. Either the claimant or the insurance officer can call such witnesses as they think fit, and the other side is then entitled to question the witness.

During the hearing the tribunal may decide that certain evidence should be obtained for the proper consideration of the case. The chairman may propose to the claimant or the insurance officer that one of them call witnesses to provide the evidence needed at an adjourned hearing³⁵. But he may only propose, not compel.

34. The tribunal may take into account questions which were not considered in the written submission of the insurance officer or raised orally by the presenting officer: SSA 1975, section 102. But it must then give the parties an opportunity to comment on such questions: R(U) 2/71; R(F) 1/72; R(I) 4/75.

34a. There is no obligation on the claimant to attend the hearing nor to be represented. But if neither he nor his representative attends, the printed note on Form LT6 warns the claimant that the tribunal may deal with the case in his absence (1) if he has given his prior consent, or (2) if he has not given a reasonable explanation for not attending, or (3) if the case has already been adjourned for at least one month because he did not attend the previous hearing.

35. But the chairman has no powers to enforce his suggestion, nor, if it be accepted, can any witness by compelled to attend.

1.2.7.2. Medical assessors

The tribunal has often to assess medical evidence. Sometimes it may adjourn in order that further medical evidence (e.g. from a consultant) be obtained, as explained in the previous paragraph. The chairman also is invested with a specific power to arrange for the tribunal to sit with a medical assessor if he considers that his medical knowledge would assist the tribunal in arriving at their decision³⁶.

The medical assessor is in no sense a witness and cannot be cross-examined; his function is to help the tribunal to understand the medical evidence before it³⁷. During the tribunal's private deliberation of their decision, he may be invited to join the tribunal in order to explain some medical aspect but should then withdraw.

1.2.8. Deliberation of the decision

The tribunal deliberates in private³⁸. At Birmingham the practice is for the clerk not to be required to vacate the room where he will be usually occupied with such clerical matters as processing expenses claims from claimants or witnesses. He does not, of course, take any part in the deliberation.

To commence the deliberation I usually invite one of the lay members to give his preliminary view. I then ask for the view of the other member. My own view is then given. I hope to achieve unanimity but do not press unduly if a member is determined to dissent. Dissenting decisions are rare (perhaps one case in forty) and the dissent is more often by the chairman who may feel bound in law to follow Commissioners' decisions whereas his lay colleagues are persuaded by what they see as the justice of the case or the merits of the claimant. If the tribunal has only two members and cannot agree, the chairman has a second or casting vote³⁹.

36. S.I. 1975/558, Regulation 11(4).

37. *Id.*, Regulation 11(5).

38. Decisions have been set aside on appeal to the Commissioner because the presenting officer had remained in the room while the tribunal was deliberating, even though there was no suggestion that he had influenced the result: OGUS and BARENDT, *supra*, note 12, p. 630, citing CSS 87/49, CU 331/49, CP 127/49. On the other hand, a member of the Council on Tribunals may stay for the deliberation if no party objects and the members of the tribunal agree: members are not likely to object to a member of the Council being present since this would fall within the visitorial function of the Council.

39. With the consent of the claimant or his representative an appeal may be heard by the chairman and one member.

1.2.9. Recording the decision on Form LT3

The tribunal is required to record its decision in writing⁴⁰. This is the duty of the chairman; he completes the Form LT3 and signs it on behalf of the tribunal.

After various preliminary matters of information, Box 1 sets out the Chairman's note of evidence presented; the observations of the claimant or his representative should also be included, but clearly distinguished from the other evidence; the submission of the insurance officer will also be noted. In Box 2 the chairman must record the tribunal's findings on questions of fact material to the decision. In Box 3 appears the full text of the tribunal's decision. Where the decision is not unanimous, the view of the dissenting member and the reasons for his dissent must be recorded. Finally, in Box 4 the grounds for the decision are stated, including a reference to reported decisions of the Commissioner which have been considered by the tribunal.

A copy of the completed LT3 must be sent to the claimant and the insurance officer as soon as possible after the hearing. This will be a typed copy of the handwritten form which the chairman has completed at the hearing. It is the general practice of chairmen (which I follow) to record the evidence directly in Box 1 as the case unfolds during the hearing. The rest of the form will be completed immediately after the deliberation has ended.

The completed LT3 is taken out by the clerk to the insurance officer who is waiting in his private office. The clerk also sees the claimant in the waiting-room and hands to him a printed notice of the decision⁴¹.

1.2.10. Appeal to the Commissioners

In order to reduce the number of merely frivolous appeals against decisions of local tribunals, the Social Security Act of 1980 introduced the requirement that an appeal to the Commissioners could only be brought with leave⁴². One of the recommendations of the Franks Committee was that there should be an automatic right of appeal from local tribunals, and not, as was the case prior to 1957, only with leave generally⁴³. The Act of 1980 thus puts the clock back.

40. *Social Security (Determination of Claims and Questions) Regulations 1975*, Regulation 12(2).

41. A copy of the Form LT3 giving the full decision must be sent to the claimant as soon as practicable: Form 28 advises the unsuccessful claimant that this will be done and of his right of appeal (usually by leave) to the Commissioner.

42. SSA 1980, section 15.

43. *Franks Report, supra*, note 11, para. 177.

The new rules impose the need for leave to appeal only where the tribunal is unanimous: if the tribunal is divided, appeal will lie as of right. The decision whether to grant leave rests with the chairman; he need not consult the other members. If the chairman refuses leave to appeal, the claimant or the insurance officer will have the right to appeal direct to a Commissioner for leave. Neither the chairman nor the Commissioner have to give reasons for their decision.

The new restriction on the right of appeal applies both to claimants and insurance officers alike. In practice, appeals by insurance officers are few and are brought only when it is considered that a point of principle is in issue; it is understood that appeals are only brought after consultation with the Chief Insurance Officer in Southampton. It is likely that under the new procedure leave to appeal would normally be given where the insurance officer could establish that a point of principle was involved.

In the more normal case where it is the claimant who seeks to appeal, he may make his application either orally at the hearing after the decision has been announced to him by the tribunal clerk or in writing within 28 days, this period beginning with the date when a copy of the record of the tribunal's decision was sent to him. If the application is made orally, the chairman must record his decision as to leave on the Form LT3 upon which he will already have recorded the proceedings of the tribunal in that case.

If the chairman refuses leave, the claimant has a period of 6 weeks in which to apply in writing to a Commissioner for leave to appeal⁴⁴. But the Commissioner does have power to consider a late application.

The written application for leave is required to give the grounds for the application. This applies whether the written application is to the tribunal chairman or to a Commissioner.

My own practice under the new system has been, in general, to refuse immediate oral applications for leave unless I felt that the tribunal (though unanimous) had had a real doubt whether we were correctly applying the law or that we had found ourselves bound by Commissioners' previous decisions which, though binding upon us, we felt to be unsatisfactory because of changed social or industrial circumstances or because of their uncertainty or ambiguity. My decision on a written application for leave will also, obviously, take account of the grounds raised in the application.

44. *Social Security (Determination of Claims and Questions) Miscellaneous Amendments Regulations 1980.*

1.3. Special questions

Certain questions (known as “special questions”) under the Acts are determined by either the Secretary of State or the statutory medical authorities and are excluded from the jurisdiction of the insurance officer, the local tribunal and the Commissioners. Such questions include⁴⁵:

- (a) whether a person is an earner and, if so, in which category of earners (employed or self-employed) he is to be included;
- (b) whether the contribution conditions for the benefit in question have been satisfied;
- (c) whether a person is or was employed in an insurable employment;
- (d) whether the accident or prescribed disease has resulted in loss of faculty (this question would be determined by a medical board or medical appeal tribunal).

There has been criticism⁴⁶ why some of these special questions (other than medical questions) should be determined by the Secretary of State rather than by the regular statutory authorities. For they involve questions of law and fact suitable for decision by a tribunal. The Secretary of State could always settle broader issues of policy (e.g. as to the categorisation of earners) by making regulations.

1.4. Judicial control by the Courts

It is well established that decisions of the statutory authorities may be reviewed by way of the prerogative orders. This is so even where their decision is termed “final” in the legislation. In addition, a statutory right of appeal on a point of law lies (a) to the High Court in respect of a determination of a special question by the Secretary of State^{46a} and (b) to the Court of Appeal from a decision of the Commissioners⁴⁷.

The right to apply for judicial review (usually the remedy sought is certiorari) is now not open to question. Nevertheless, the courts have

45. SSA 1975, sections 93 and 95 (as amended).

46. See OGUS and BARENDT, *supra*, note 12, p. 623.

46a. See *Global Plant Limited v. Secretary of State for Health and Social Security* [1971] 3 All E.R. 139 for an example of an appeal against such a determination, brought under *National Insurance Act 1965*, Section 65(1), now replaced by SSA 1975, section 94. In the event, Lord Widgery C.J. declined to set aside the determination.

47. The right of appeal from the Commissioners is new (SSA 1980, section 14): it is confined to questions of law and requires leave either of the Commissioner or of the appellate court. As Ogus and Barendt point out (*supra*, note 11, 2nd cumulative supplement, 1981, B56), the fact that appeals lie to the Court of Appeal reflects the high standing of the Commissioners.

generally been reluctant to intervene. In relation to Commissioners' decisions, the courts acknowledge that the Commissioners are experts within their jurisdiction. Roskill, L. J., has said that "there must be a clear error of law appearing on the face of the decision before the courts will interfere"⁴⁸. And in relation to decisions of the local tribunal, certiorari would not lie because the statutory right of appeal to the Commissioners offers an alternative remedy which (in accordance with general principle) must first be exhausted⁴⁹.

The most common ground of judicial review is error of law on the face of the record^{49a}. Other grounds are jurisdictional error and breach of the rules of natural justice⁵⁰.

2. Aspects of formality or informality in adjudication

2.1. Statutory provisions regarding formality

The Acts and Regulations provide relatively few procedural rules. For the most part, local tribunals are left free to follow such procedure as the individual chairman considers to be appropriate. Regard will be had, of course, to that Holy Trinity of principles which the Franks Report identified as openness, fairness and impartiality⁵¹. At the same time chairmen must

48. *R. v. National Insurance Commissioner, ex parte Michael* [1976] 1 All E.R. 566.

49. And this same argument now applies also to Commissioners' decisions in view of the new statutory right of appeal from such decisions to the Court of Appeal (see n. 47 *supra*). But the appeal from the Commissioners is restricted to a "point of law", whereas the appeal from the local tribunal is at large: an appeal on a point of law may well be more restricted in its scope than the application for certiorari, and hence it may not always be regarded as an alternative *effective* remedy which has first to be exhausted. I am indebted to my colleague George Applebey for drawing my attention to this point.

49a. "At one time it was thought that the High Court had no power to intervene with the decisions of Commissioners, but in 1957 it was held by this court that there was power by certiorari to quash a decision of the Commissioners for error of law on the face of the award. But, as I said at the time, 'they are so well versed in the law and deservedly held in such high regard that it will be rare that they fall into error such as to need correction: see *Reg. v. Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574m 585.' That forecast has proved right. Very seldom have any of their decisions been brought before the High Court. I have counted them. There have only been eight in the last 20 years, over the whole insurance field. This is the first on unemployment benefit, *R. v. National Insurance Commissioner, Ex parte Stratton, per Lord Denning, M.R.*, [1979] 2 W.L.R. 389 at 393.

50. For an authoritative discussion of the grounds of judicial review, see DE SMITH, *Judicial Review of Administrative Action*, 4th ed., edited J. M. Evans, London, Stevens and Sons, 1980.

51. *Franks Report, supra*, note 11, paras. 23–25.

balance those principles with the factors that justify adjudication by tribunal rather than by court — the need for speed, cheapness and efficiency.

Examples of statutory (or regulatory) provisions include :

- The rule (already cited) whereby the procedure at a local tribunal shall be such as the chairman shall determine⁵².
- The rule that a notice, stating the ground of appeal, must be given to the local office within 21 days of the insurance officer's decision⁵³.
- The claimant's right of representation by another person, whether having professional qualifications or not, and the right to call and question witnesses⁵⁴.
- The claimant's right to address the tribunal⁵⁵.
- The obligation of the tribunal to deliberate in private (only the clerk being permitted to be present)⁵⁶.

It will readily be seen that these statutory provisions provide no complete code of procedure.

2.2. Self-imposed rules and practices as to formality

Faced with so meagre a statutory regulation of procedure, the chairman of the local tribunal has an onerous responsibility to conduct appeals in a fair and orderly manner. How I approach this task in presiding in the Birmingham tribunal I have tried to indicate in Part One of this paper.

A chairman will be conscious that his tribunal's decisions and the process by which they are reached may be the subject of critical review and comment by a Commissioner in the event of an appeal — although Commissioners recognise the difficulties under which tribunals may labour in having to maintain reasonable expedition in the despatch of business. Chairmen may also expect their hearings to be attended from time to time by a member of the Council on Tribunals in the exercise of the Council's watchdog function.

In addition, it is the practice of senior regional officers of the DHSS to visit regularly each tribunal in their area and to satisfy themselves that the tribunal is functioning properly. The purpose of the visit is essentially to review the administrative arrangements for the tribunal's work as discharged by the clerk and to observe the manner in which the presenting officer is

52. S.I. 1975/558, Reg. 3(1).

53. SSA 1975, section 100 (4).

54. S.I. 1975/558, Reg. 11(2).

55. *Ibid.*

56. S.I. 1975/558, Reg. 3(2).

carrying out his functions. They do not attend in order to exert departmental pressure upon the tribunal chairmen or members: this would be quite contrary to the tribunal's independence. Nevertheless, chairmen and tribunal members may well feel themselves to be under scrutiny.

The extent of the self-imposed rules and practices may be exemplified when we go on to consider formality/informality in the stages before hearing and at the hearing.

2.3. Formality in the pre-hearing stage

As we have seen in Part One, the preliminary stage to a local tribunal hearing is the insurance officer's decision. The process of reaching this decision is a formal one in the sense that an insurance officer follows a well-established departmental routine; it is also formal in the sense that the insurance officer and the claimant deal with each other at arm's length, direct face to face contact being deliberately excluded by the practice of deciding the matter "upon the papers". This is an essential feature of the struggle by the insurance officer to appear as an "independent" adjudicator; but the claimant may often be left with the feeling that he has been dealing with a faceless bureaucrat. Hence, at the hearing an aggrieved claimant not infrequently will round fiercely upon the presenting officer in the belief that this is the person with whom he has been battling his case: in one instance before me the presenting officer was accused of having "hung up" on the irate claimant when he had tried to telephone the insurance officer at his office. As chairman I try to forestall trouble of this kind by alerting claimants at the start of the hearing to the fact that the presenting officer is very seldom the officer who has reached the original decision of the disputed claim.

Pre-hearing formalities will include, of course, the proper notification to the claimant, within the prescribed time limit, of the insurance officer's decision, and the lodging in due time of any appeal by the claimant. As already noted in Part One, neither the department nor the tribunal is formalistic about the form of the appeal (provided it is in writing) nor about the enumeration of the grounds of appeal; moreover, late appeals are commonly accepted, however meagre the explanation tendered for the delay.

2.4. Formality at the hearing

2.4.1. The clerk

Before a claimant actually comes before the members of the tribunal, his whole attitude to the tribunal will be affected by his first impressions of

the clerk whom he will meet on arrival at the tribunal's premises. In my four years at the Birmingham tribunal we have had a succession of three clerks and a like number of deputy clerks. All six have been women, most apparently in their early thirties (although I have never asked for confirmation of appearances); all have had a sympathetic manner and an evident concern for people and their problems. Their influence on proceedings of the tribunal has been very great: they have set the tone of sympathy, courtesy and informality.

2.4.2. The presenting officer

We have seen the somewhat ambivalent position which this officer occupies. His is not an easy role. On the one hand, he has to present the department's case and take the tribunal through the written decision of his departmental colleague, the insurance officer. On the other hand, he is to act as *amicus curiae* to assist the tribunal to apply the law. He has also to probe the evidence given by the claimant and his witnesses (if any). My own experience at Birmingham of the two presenting officers who have fulfilled this function on a permanent basis for the DHSS and of the score or more presenting officers who have presented cases for the DOE is that almost all succeed in striking the right note at our hearings. Most are ready to abandon the written submission on the Form LT2 and advise the acceptance of the appeal where (as it not uncommon) the claimant has produced new evidence at the hearing which supports his contentions or where (which is more rare) the claimant, his representative or the probings of the tribunal have revealed a flaw in the legal basis for the original decision.

Only a very few presenting officers have adopted before me an attitude of striving to "win" their cases, come what may. It is then incumbent on the chairman not to let his lay members be brow-beaten or harangued into feeling they must support the department. Fortunately, most lay members have enough worldly experience to see through advocacy which strives too hard: their sympathies rapidly switch to the claimant where the presenting officer appears to be behaving oppressively.

2.4.3. Representation

Much has been written already on the influence of representation upon tribunal decision-making⁵⁷. So far as concerns formality at the hearing, the

57. See especially FROST and HOWARD, *Representation and Administrative Tribunals* (1977); also the papers of D. C. M. YARDLEY and Lee BRIDGES included in the published proceedings of the 2nd Birmingham/Laval Colloquium on Comparative Administrative Law (May-September 1981).

presence of an *experienced* representative will help promote the orderly conduct of the case without prejudicing the proper degree of informality. The most experienced group of representatives appearing before local tribunals (at Birmingham or elsewhere) are certainly trade union officials. Next in terms of experience I would rate the members of various representation units (neighbourhood law centres, etc.); these members may or may not be lawyers. The least experienced professional representative will be a solicitor in private practice. There are always exceptions, but as a general rule a solicitor will seek to inject too much formality, rigidity and coldness into the proceedings. It is then for the chairman to resist the attempt to convert the informal and inquisitorial hearing into a court-like adversarial process.

Finally, my experience supports the conclusion of my colleague Lee Bridges and other researchers that the presence of experienced representatives, able to press home the claimant's submissions, increases markedly the likelihood of a claimant succeeding in his appeal.

2.5. Tribunal decisions : formal elements

As explained in Part One there is a formal requirement (by regulation) that the chairman record the findings of fact, the decision itself and the grounds for that decision on Form LT3. This ensures a degree of formality in the actual formulation of the decision and, as the French say, its *motivation*. Chairmen were given only in 1979 some confidential notes by the DHSS to guide them in the proper completion of Form LT3. Practice obviously varies greatly from tribunal to tribunal and even from chairman to chairman serving in the same tribunal.

Formality in the decision is also a reflection of the influence of the precedents established for the tribunal by the reported decisions of the Commissioners. Any relevant decision will be cited by the insurance officer in his written submission : it is common for 6 or more such decisions to be cited.

The chairman is expected to refer specifically to those which the tribunal found pertinent.

2.6. Post-hearing formality : leave to appeal to Commissioners

The claimant has to be notified of the tribunal's decision. If his claim has been disallowed, he also has to be told of his right to appeal to a Commissioner, but only with leave if the tribunal's decision was unanimous. These formal procedures have been described in Part One.

Conclusion

By way of tentative conclusion of this case-study I would adopt and endorse a recent observation of Professor Harry Street, himself a tribunal chairman of vast experience. He has written⁵⁸ :

Nowhere within the Welfare State is accessibility to the judicial process more critical than in this area (of social security benefits). Here is a class of litigant often unfamiliar with the legal process and lacking the financial means to pay to be represented at hearings. Nervous, inarticulate, over-awed, mistrustful of bureaucracy, impatient of legal forms — he is indeed a special case. The rules governing his rights to benefit often are extremely complex. Administrative efficiency in handling millions of claims demands rules that are precise, certain even if arbitrariness in cut-off points is the price to be paid. The Administration has a special task: first, to produce innumerable explanatory leaflets in language far removed from that of the regulations themselves which set out clearly for the uninitiated and uneducated persons precisely when he is entitled to a benefit, and how he goes about claiming it. Special care has to be taken about the adjudicative mechanism for this class of litigant. Not for him the remote august presence of the superior judge. He must be around the table with people, some of whom he sees as like himself, people to whom he can speak freely, who will be tolerant of his fumbling, discursive, often irrelevant, disorderly presentation of his case. Accessibility to justice in the land of welfare benefits is not merely helping the claimant; it is ensuring beforehand that there is a tribunal, an atmosphere, a procedure welcomingly receptive and comforting to him — the tribunal system must concentrate on its own accessibility here.

On formality at local tribunals, an acute Australian observer, J. A. Farmer, has remarked⁵⁹ :

Most tribunals do everything possible to make claimants feel at ease. In this respect proceedings are fairly informal though the decision-making process itself is very formal as far as tribunals generally go. This partly because of the emphasis which is put on the written case which is submitted by the insurance officer beforehand, partly because of the effect which the precedent decisions of the Commissioners have and partly because of the detail of the legal rules of the jurisdiction itself. The apparent casualness of the hearing itself has to some extent diverted attention away from this formality of decision.

This paper has tried to provide a background to formality/informality in the process of decision-making in the light of one chairman's personal experience of a local tribunal.

58. *Access to Justice and the Welfare State*, ed. M. Cappelletti, 1981.

59. J. A. FARMER, *Tribunals and Government*, London, 1974, p. 108.