nawra

national association of welfare rights advisers

Consultation Response

First-tier Tribunal (Social Entitlement Chamber) Rules 2008

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Response

Introduction

The National Association of Welfare Rights Advisers was established in 1992 and represents advisers from local authorities, the voluntary sector, trade unions, solicitors and other organisations providing legal advice on social security and tax credits.

Our membership has much experience in advising claimants on the current appeals and tribunal process as well as advocacy in front of tribunals.

We strive to to challenge, influence and improve welfare rights policy and legislation, as well as identifying and sharing good practise amongst our members.

The response to this consultation is informed by discussions on the Act, held at our conferences in Edinburgh in September 2007 and Birmingham in December 2007. NAWRA members have also been active participants in local discussion organised by The Tribunal Service. Our website too has been used to gather the views of the membership.

We also rely on our observations on and responses to previous consultation exercises on the Good Pre-Hearing Practice for Appeals Tribunals (September 2006) and the consultation exercise on Transforming tribunals: Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007 (February 2008).

The Rules

NAWRA welcomes the introduction of a set of rules applying throughout the chamber as this will clarify and standardise the process in a transparent manner. The draft rules recently published relating to the Health, Education and Social Care Chamber have also been examined and NAWRA is pleased to note the great similarities between the Rules.

Rule 4

We note that in Rule 4 the omission of the word "or" between 2(a) and 2(b) could lead to a lack of clarity that may not have been intended.

We further note that at 2(n) a power is created that allows a Tribunal to dismiss a party's case or part of a case if there appears to be no reasonable prospect of it succeeding. NAWRA has concerns that for un-represented appellants this could see their cases struck out, if they are unable to respond to any directions requiring further or better grounds to be made. With such appellants there is often an inequity of arms, and as such would suggest that Practice Guidance be issued on this Rule.

Rule 10

NAWRA welcomes the powers to reimburse reasonably incurred expenses. In our response to the Good Pre-Hearing Practice, we noted some of the difficulties experienced in obtaining for example medical evidence. In a sector in which financial legal assistance is very often unavailable this rule is welcomed.

Rule 13

Our opinion is that "or" needs to be inserted at the end of Rule 13 (1) (a).

Rule 15

NAWRA notes that under Rule 15(1), "sending or delivering" is not defined. We would be encouraged to see that notices of appeal can be made by fax or even email, as appears to be possible with documents to tribunals and the parties under Rule 13, once the appeal is lodged. Permitting such methods of delivery would further simplify and open access to the appeals process and to justice.

We have noted that the appeal is to be lodged with the respondent in social security and armed forces cases. NAWRA's view is that making an appeal to the Tribunal is more desirable and would increase claimant's confidence in the process.

Rule 17

It is our view that it is desirable to include a time limit within this rule which applies to social security cases and the other types of appeal within this Chamber. Whilst we appreciate that it

is unrealistic to see the same response as proscribed for asylum support cases, we see no reason why a general rule setting out a time for a response to be made should not be introduced. NAWRA would not object to some exceptions being allowed for unforeseen or exceptional circumstances.

Rules 18 and 27

NAWRA warmly welcomes the implication that oral hearings will be the norm in this Chamber. Our members have reported a large number of cases where appellants opt for "paper hearings", due to concerns about the formality of proceedings and a lack of understanding of the process. On seeking proper advice appellants are often too late to request an oral hearing their case already having disposed of, and are then faced with having to make application for setting aside or leave to appeal, on a weakened basis.

Rule 21

NAWRA is pleased to see that this rule strengthens a social security appeal tribunal's ability to request that witnesses attend. However we are concerned to note that there still do not appear to be any remedies for a Tribunal (or party) should such a summons be ignored. Anecdotal evidence from our members suggest that surprisingly DWP representatives may often refuse to attend a hearing despite repeated requests from Tribunals. This can result in a case requiring several hearings that result in adjournments and little progress made.

Rule 28

Rule 28(b)(ii) does not define 'urgent' or 'exceptional circumstances' in the context of waiving the 14 day notice required for hearings. Our members would seek some assurance form the Rules that decisions to reduce the statutory time limit will not be undertaken arbitrarily.

Rule 35

As the Rule is currently framed its our view that the Tribunal is able to set aside a final determination on its own volition and without application and without time limit. Its our view that, despite the provision in Rule 37(4), this is not desirable and could give rise to determinations being set aside where neither party have made application for this.

Rule 36

NAWRA is of the view that this Rule, as drafted, lacks clarity. We would welcome further clarification on a number of points including:

- Our members are concerned that the Tribunal considering whether to review and carrying out the review should be, as far as possible, the same Tribunal that made the original decision.
- If that proves to be impossible then the Tribunal should be of the same make-up as the original tribunal.
- Its unclear from the Rule whether a hearing is required when dealing with Rule 36 cases. Members have expressed a view that this is to be desired.
- NAWRA is unclear if a Tribunal can review a decision and amend or set aside, but outside the result that the party making the application seeks, and has stated in the application (36(4)(c).
- If such a situation arises is there a right of appeal against the decision?
- Its unclear as to what detail is required by (4)(c). Our concern is that unrepresented appellants could face additional difficulties in attempting to state this. We would welcome Practice Directions on this point.

Rule 37

NAWRA is concerned about the power found in 36(2)(b) which seemingly gives a Tribunal power to review a decision at anytime. We feel that this could create difficulties outside the Chamber (and the potential for an appearance of unfairness) should for example a Tribunal decide to review a determination that is a number of years old. Other decisions, for example relating to other entitlements, may have been enacted which depend on the original decision, and it may prove problematic to reconcile these.

NAWRA would suggest that a time limit be introduced, but that this be in the order of 6 years.

There is a lack of clarity about how the “own initiative rule” would apply. Could a party, outside the time limit found in Rule 36, make a late application -which is not permitted - and

so would be not admitted, yet alert the Tribunal to an error of law, which them goes on to decide to undertake such a review under its own initiative?

NAWRA considers that all the outcome of all reviews should be notified to all parties, including those undertaken on the initiative of the Tribunal. Its vital that the process is seen to be wholly transparent in order to ensure that justice is seen to be done.

Whilst welcoming the remedy within 37 as to setting aside or reversal, we are also concerned about a lack of challenge to such a review outside those confines.