



HER MAJESTY'S COURTS AND TRIBUNALS SERVICE

FIRST-TIER TRIBUNAL

SOCIAL SECURITY ENTITLEMENT CHAMBER

EXETER

Monday 8th August, 2011

Applicant : Miss Julia Ross; and The British Broadcasting Corporation	Re. The Appeal of L
Respondent: Secretary of State for Work and Pensions	

Redacted version omitting only the identity the appellant

DECISION NOTICE

1. This decision concerns important principles of law as to whether any person or persons, by or for themselves, or representing an organisation, may attend a tribunal hearing, record proceedings and subsequently broadcast the whole of, or extracts from that hearing.
2. The matter arose because Miss Julia Ross of The British Broadcasting Corporation (“the BBC”) Radio 4 wrote to the Regional Judge for Wales and South West England Region in respect of which the essence of a request was put as follows:
3. “I would like...to request your permission record [sic] the Tribunal proceedings and/use the Tribunal’s official audio recording of her hearing.” The letter set out that the BBC Radio 4 was producing a documentary programme about people who are on Incapacity Benefits and that they were following through various people having disabilities through the various phases of assessment.
4. The letter also set out legal argument based on the decision of the House of Lords in the case of Attorney General v British Broadcasting Corporation [1981 Appeal Cases] (see paragraph 18 below). The essence of the argument was that in fact the Contempt of Court Act

1981 does *not* apply to proceedings before the Social Security and Child Support Tribunals.

5. I acknowledge the courtesy of Miss Ross in making her application in advance. Her approach is to be highly commended although more notice of the application would have been appreciated. I regret that neither the BBC nor the DWP were legally represented before me and I was therefore unable to hear detailed legal argument. It is important to note that the Appellant was happy to consent to the BBC's application.
6. At the hearing on Monday 8th August, 2011, L attended together with a friend. The hearing of the substantive appeal which Miss Ross, for the BBC wished to attend, concerned an appeal made by L against a decision made on behalf of the Secretary of State for Work and Pensions on 14th January 2011, that from and including 14th January, 2011 L was no longer assessed as having limited capability for work and that from that date she was longer entitled to Employment and Support Allowance.
7. Miss Ross attended from the BBC accompanied by Ms Sue English, also from the BBC. The Secretary of State for Work and Pensions did not attend and was not represented at the hearing.
8. Because the time allocated for the substantive appeal was 90 minutes as part of a routine list, a decision had to be made early on as to how the time should be allocated to the appeal of L.
9. I decided that the hearing of the appeal would be changed so as to allow proper time for the BBC's application to be considered. Both L and the Secretary of State were notified as to this in writing, and in addition both were supplied with a copy of the letter of application made by Miss Ross. At the hearing it transpired that L had not received the notification but had been informed by Miss Ross about the nature of the hearing on Monday. Thus a tribunal having made its decision on the application could, at a later date, consider the substantive appeal of L [see paragraph 52].
10. Over the years there has been financial provision for those unable to work due to incapacity, whether physical or mental incapacity or indeed a combination of them both. The benefit known colloquially as "sickness benefit" (more properly Invalidity Benefit) will be familiar to many .
11. The law was subsequently changed as a result of which Invalidity Benefit was replaced with Incapacity Benefit with effect from 13th

April,1995 - see Social Security (Incapacity for Work)(General) Regulations 1995 SI 1995 No 311] .

12. These statutory provisions introduced the concept of awarding points for the effects of physical and mental health disability. Various “points” were awarded for various “activities” and “descriptors.”
13. A further change then took place with the introduction of Employment Support Allowance from 27th October 2008. The activities and descriptors points awarded changed and the concept of “Limited Capability for Work” [see schedule 2] and Limited Capability for Work-Related Activity [see Schedule 3] .
14. From the 28th March 2011 there was a further change when different “activities” and “descriptors” points were introduced.
15. I accept that there is a legitimate public interest in these changes in the law and how it engages claimants, appellants, the Department for Work and Pensions and ATOS Healthcare which currently holds a commercial contract with the Department for Work and Pensions to conduct medical assessments on their behalf.
16. There is also a legitimate interest in the appeals system and the conduct of Tribunals. For example why is it that nearly 40% of appeals to tribunals, consisting of a Tribunal Judge and a doctor, [typically a general practitioner or consultant] are successful? There are estimates that over one million people are claiming these benefits – the total cost to H.M.Treasury ,and ultimately the taxpayer, is very considerable.
17. In 1981 the House of Lords, heard the case of :

The Attorney General v. British Broadcasting Corporation [1980] 3 AllER 161

The issue before the House of Lords was whether a local valuation court sitting at Andover was an “inferior court” within the meaning of the General Rate Act 1967 taking into account the provisions of the Rules of the Supreme Court [RSC Ord 52 r 1(2)(a)(iii)] (*Note the Contempt of Court Act 1981 was not applicable in this case*)

The Order provided :

(2) *Where contempt of court – (a) is committed with-*

*(i) any proceedings before a Divisional Court of the Queen's Bench Division, or
(ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court, or a breach of an undertaking to the court, or
(iii) proceedings in an inferior court...then... an order of committal may be made only by a Divisional Court of the Queen's Bench Division”*

18. If the valuation court was “an inferior Court”, then the statutory provisions would apply, as a result of which the BBC would have committed a contempt by broadcasting “...matters pending before the local valuation court at Andover”

19. Both the Divisional Court and subsequently the Court of Appeal decided that the valuation tribunal was an inferior court which, as a result of their decisions enjoyed the protection of the Divisional Court and in respect of which of which the 1967 Act applied to those proceedings such that the BBC would not be allowed to broadcast a programme concerning a religious group prior to the valuation hearing

20. The House of Lords allowed an appeal made by the BBC .The House of Lords decided that the valuation court was not an inferior court.

21. Viscount Dilhorne at page 166 j said:

“Parliament has on occasions enacted that a tribunal shall be a court. When it has refrained from doing so, save in the case of the Lands Tribunal, I am not prepared to hold that a tribunal it has created, no matter how much it resembles a court, is a court, and the jurisdiction of the Divisional court in relation to contempt only extends to courts”

22. And Lord Edmund-Davies at page 175 j

“ At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakable hallmark by which a “court” or “inferior court” may unerringly be identified .It is largely a matter of impression”

23. And in addition Lord Scarman at page 181j said

“I would identify a court in (or of) law i.e. a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of state. In this context judicial power is to be contrasted with legislative and executive (i.e. administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. Though the ubiquitous presence of the state makes itself felt in all sorts of situations never envisaged

when our law was in its formative stage, the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisably separate, function of government. Unless a body exercising judicial functions can be demonstrated to be part of this judicial system, it is not, in my judgment, a court of law.”

24. To re-iterate, the case of the Attorney-General –v- the British Broadcasting Corporation was *not* decided under the provisions of the 1981 Act.

25. Since the Contempt of Court 1981 Act, Parliament has enacted the Tribunals, Courts and Enforcement Act 2007 which provides for judicial independence. The old Social Security & Child Support Appeal Tribunal (SSAT) was abolished and a new tribunal, the First-Tier Tribunal, was created and the matters assigned to SSAT were allocated to the Social Entitlement Chamber of the new tribunal. Tribunals have been given greater roles, in relation to Child Support, Council Benefit and Housing benefit, Compensation Recovery, Disability Living Allowance and Attendance Allowance, Vaccine Damage Payments and other statutory benefits.

26. Under section 9 of the 2007 Act a Tribunal now has power to review a decision made by itself [subject to a small number of exceptions]

27. Since 1981 the Tribunal has the judicial power to refer cases directly to the European Court of Justice for references on any question concerning Community Law, the power to issue summonses requiring persons to attend a hearing or to produce documents.

28. I therefore conclude that the First-tier Tribunal is an “inferior court” within the meaning of the case of The Attorney-General –v- British Broadcasting Corporation because its constitution, guarantee of judicial independence, power to issue summonses, to effectively review its own decisions under section 9 of the 2007 Act, refer questions to the European Court, place it in an entirely different position from that of the local valuation court which was subject to the decision of the House of Lords. I therefore distinguish that case from the substantive case to be heard concerning the case of L.

29. This in effect means that I hold that the Contempt of Court Act 1981 does apply to the First-tier Tribunal.

30 .THE PRACTICAL EFFECTS OF THE CONTEMPT OF COURT ACT 1981 ON THE TRIBUNAL PROCEEDINGS

Section 4 provides :

- (1) *Subject to this section a person is not guilty of contempt of court under strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.*
- (2) *In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose...*

31. Section 9 of the Contempt of Court 1981 Act provides :

Use of tape recorders.

(1) Subject to subsection (4) below, it is a contempt of court—

(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;

(b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;

(c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).

(2) Leave under paragraph (a) of subsection (1) may be granted or refused at the discretion of the court, and if granted may be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave; and where leave has been granted the court may at the like discretion withdraw or amend it either generally or in relation to any particular part of the proceedings.

(3) Without prejudice to any other power to deal with an act of contempt under paragraph (a) of subsection (1), the court may order the instrument, or any recording made with it, or both, to be forfeited; and any object so forfeited shall (unless the court otherwise determines on application by a person appearing to be the owner) be sold or otherwise disposed of in such manner as the court may direct.

(4) This section does not apply to the making or use of sound recordings for purposes of official transcripts of proceedings.

32. Section 19 of the 1981 Act provides [in part]:

“ “court” includes any tribunal or body exercising the judicial power of the State, and “legal proceedings” shall be construed accordingly.”

33. The crux is the application of Section 9 of the 1981 Act. Can the BBC and or Miss Ross be permitted to bring into the Tribunal hearing its own recording equipment?

34. This is where I have a discretion under section 9(1)(a) but sub-paragraph 9(1)(b) effectively prevents broadcasting, and upon my reading of that sub-paragraph there is no discretion afforded to me. There is simply a strict prohibition on broadcasting. Section 2(1) specifically provides that:

“publication” includes any form of speech, writing, broadcast or other communication which is addressed to the public at large or any section of the public”

35. So, effectively, there is little point in granting leave to the BBC or Miss Ross leave to bring into the tribunal their own equipment because part of their purpose is to broadcast extracts of the appeal hearing.

36. The Tribunals are subject to statutory Rules. Those which are relevant here are the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 [SI 2008 No. 2685] as amended.

Rule 30 of the Rules provides provision for Public and private hearings:

*“30(1) Subject to the following paragraphs ,all hearings must be held in public.
(2) ...(concerns criminal injuries compensation cases)
(3) The Tribunal may give a direction that a hearing ,or part of it, is to be held in private.
(4) Where a hearing ,or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing of part of it.*

37, Rule 14 (1) provides, inter-alia that:

*“ the Tribunal may make an order prohibiting the disclosure or publication of

(a) specified documents or information relating to the proceedings; or
(b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.”*

38. In addition the Senior President of Tribunals has the power to issue Practice Statements as to procedures to be followed by a Tribunal. Of particular importance are the following provisions provided for in the Practice Statement 30th October 2008:

*“2. A record of the proceedings at a hearing must be made by the presiding member, or in the case of a Tribunal composed of only one member, by that member.
3. The record must be sufficient to indicate any evidence taken and submissions made and any procedural applications, and may be in such a medium as the member may determine...”*

39. For the majority of cases Tribunal Judges make a note in their own handwriting. However recording equipment, provided by HM Courts and Tribunals Service is available at some venues, including Exeter. It records on two CD discs simultaneously and at the end of the hearing the clerk must “fix” the discs so that the recording cannot be altered or edited in any way.

40. Whichever method is chosen, the appellant can be provided, at their request, and free of charge, a copy of the hand written record of proceedings or indeed the copy CD disc which was contained within the recording machine.

41. At the Directions hearing Miss Ross for the BBC sought the following which I have put in order of her desired preference:

42. The ability to bring into the Tribunal room BBC recording equipment and record the proceedings. This, it was argued, would be equipment of very high quality and enable the recordings to be of “broadcasting sound quality standard.” For the purposes of this Direction I am prepared to accept that the BBC would prefer to use their own equipment and that it would more than likely be far more sophisticated than the Tribunal’s own recording equipment for the purpose of broadcasting.

43. I asked whether, should I allow the BBC to bring into the Tribunal its own recording equipment, I would be allowed any form of control over the output that it was intended to broadcast. I asked whether the whole of the proceedings would be broadcast but I was not surprised to be told that that would be too long and that essentially they would have about 45 minutes for the whole programme leading to the obvious conclusion that any recording would be edited. In addition I was told that the BBC would be most unlikely to relinquish editorial control to myself. I gained the impression that editorial control by the BBC was a central philosophy of their organisation and jealously guarded – understandably so from their viewpoint.

44. Of course another possibility would be for the L to request the copy of the CD recording, if I were so to direct that the hearing were to be recorded by the Courts and Tribunals Service equipment. She could subsequently provide it to the BBC and the issue arises what the BBC could and would do with it. I consider it likely that they would wish to broadcast extracts from it.

45. Another possibility is that L could ask, in the case that the record of proceedings was made by the Judge in writing for a copy and then pass it to the BBC to use.

46. And finally in my view, as the hearings are generally heard in public there would exist the possibility of a person making a shorthand notes of the proceedings and then these being used for the basis of making a programme.

47. Throughout this hearing L was present. She is a university graduate, articulate, understood the purpose of the proceedings and was emphatic in wanting the substantive hearing, or parts of it, to be broadcast. I formed the view that she was willingly giving informed consent to the broadcast.

Conclusions

48. The Contempt of Court Act 1981 applies to the First-tier Tribunal.

49. Neither Miss Ross, the British Broadcasting Corporation nor anyone else may bring into the room any recording equipment or electronic devices such as mobile telephones which are capable of recording sound.

50. I am willing to provide a copy of my notes to L and or to the Secretary of State for Work and Pensions, but solely for the purposes of using them to pursue any further judicial proceedings they may wish to undertake.

51. Any person may attend the hearing and they are entitled to make their own notes of the proceedings.

52. Following the hearing, and following consultation with L by the clerk, L was informed that **the substantive hearing of the appeal would take place on Tuesday 16th August, 2011 at 11.00am at the Exeter Tribunal venue.**

Accordingly, the application is refused. The applicant may not bring or cause to be brought into the room in which the appeal is to be heard any mechanical recording device, nor otherwise make an audio or video recording of the hearing. Should a copy of the official recording of the hearing come into the possession of the Applicant by any means, neither she nor the BBC may publish it (including a radio broadcast) to the public or any part of the public.

Subject to any application by a party to the proceedings, the Applicant, as a member of the public may make a written note or drawing of the proceedings and may make use of such note or drawing for any lawful purpose.

Signed:	J Riley District Tribunal Judge	Date:	11 th August,2011 Exeter.
<i>Issued to the parties and Miss Julia Ross of the BBC on:</i>		11 th August 2011	