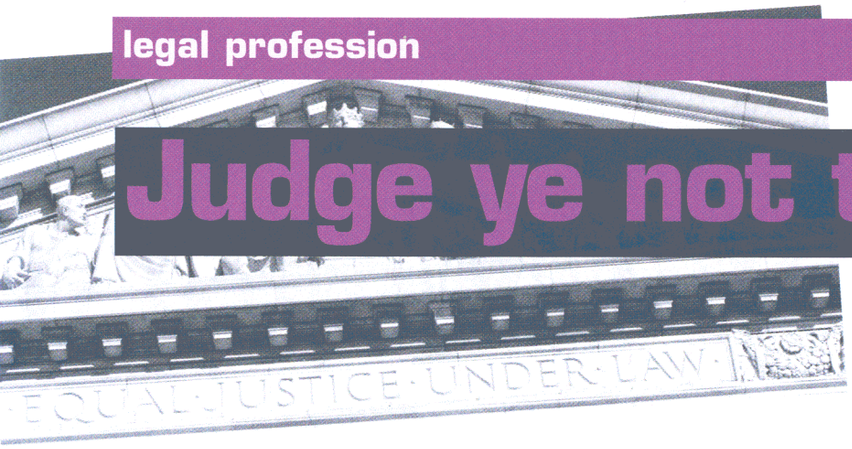

Judge ye not the judges

Oliver Hyams details the effects of *Gillies v Secretary of State for Work and Pensions*

IN *GILLIES V SECRETARY OF STATE FOR WORK AND PENSIONS* [2006] UKHL 2, the House of Lords has applied its earlier ruling in *Porter v Magill* [2001] UKHL 67 to the manner in which the appellant's entitlement to disability living allowance (DLA) was determined by a disability appeal tribunal. The medically qualified member of the disability appeal tribunal in question (the tribunal) was on a panel of doctors who gave advice to the Secretary of State on the eligibility of claimants for DLA. The appellant claimed that the tribunal's decision was as a result arrived at in breach of the rules of natural justice (or, as they are perhaps better described, the requirements of fairness).

The doctor in question, Dr Armstrong, had, for some nine years before the hearing by the tribunal, been providing on average four reports per month for the Benefits Agency as an examining medical practitioner (EMP) in DLA cases. From 1998 onwards, she had done so by providing the reports to a third party, Nestor Healthcare Group plc, which provided reports under a contract. Dr Armstrong also provided EMP reports in incapacity benefit cases. At the time of the appellant's appeal to the tribunal, Dr Armstrong was spending the majority of her working week either examining claimants and preparing reports on them for Nestor on behalf of the Benefits Agency, or sitting as a tribunal member hearing appeals relating to, among other things, DLA.

A tribunal of the Social Security Commissioners overturned the refusal by the tribunal of the appellant's application for DLA. This was on the basis that there was a reasonable apprehension that Dr Armstrong was biased. This decision was itself overturned by the First Division of the Court of Session, and it was against that decision that the appeal was pursued to the House of Lords.

Question of law or fact?

Given the House of Lords' willingness simply to apply its earlier ruling in *Porter v Magill*, one might have thought that the question whether the requirements of fairness were breached by Dr Armstrong's inclusion as a member of the tribunal was a question of fact rather than a question of law. However, their Lordships ruled that such a question is always a question of law (see para 4, per Lord Hope, with whose speech all other members of the Judicial Committee agreed). This was because "there can be only one correct answer to the question whether the tribunal was properly constituted", with the result that "to answer the question incorrectly is an error of law" (para 6).

Lord Hope commented that that was how the matter was dealt with in practice and referred to *Lawal v Northern Spirit Ltd* [2003] ICR 856, where the "question was raised whether there was a real possibility of unconscious bias on the part of the law member or lay members" of the Employment Appeal Tribunal (EAT) in favour of what was submitted by counsel who had previously sat as a part-time judge in the EAT.

The test

Lord Hope set out in para 17 the test to be applied in the circumstances: "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed... that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."

This sounds like the approach of a good judge rather than that of a member of the public. In any event, the House of Lords rejected the challenge of the appellant. This was because (para 18): "A fair-minded observer who had considered the facts properly would appreciate that professional detachment and the ability to exercise her own independent judgment on medical issues lay at the heart of her relationship with the Agency. He would also appreciate that she was just as capable of exercising those qualities when sitting as the medical member of a disability appeal tribunal."

Lord Hope made a number of other statements broadly to the same effect (in paras 20-25), including that: "One guiding principle is to be found in the concept of independence... That principle is, of course... not confined to cases where the judge is a party to the proceedings. It applies also to cases where he has even the slightest personal or pecuniary interest in their outcome."

Lord Rodger commented (para 33) that: "The position might have been different if there had been any reason to suppose that the members of the Nestor pool of doctors were a close-knit group sharing an esprit de corps."

A comment

A set of chambers may be said to be "a close-knit group sharing an esprit de corps". Yet part-time judges who are barristers do not (at least normally) refuse to hear a case in which a member of their chambers represents a party, even though barristers in sets of chambers share their costs and can be expected to take a more than passing interest in each other's work. At least in some cases, a part-time judge is likely to have a pecuniary interest in the case: where a fellow member of chambers appears for the claimant under a conditional fee agreement. However, given the approach taken by the House of Lords in *Gillies*, the judiciary's professionalism – noted most clearly by the EAT in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763, at para 46 – is likely to be regarded as justification for the continuation of the time-honoured practice of part-time judges hearing cases in which their chambers colleagues appear as advocates.

Oliver Hyams is a barrister practising from Devereux Chambers, London