



Additional Support Needs Tribunals for Scotland

PRACTICE DIRECTION 1

Potential conflict of interest

This Direction is issued consequent to Paragraph 12 of Schedule 1 to the **Education (Additional Support for Learning) (Scotland) Act 2004** which provides that the President may give directions as to the practice and procedure to be followed by Tribunals in relation to any matter.

The President has taken steps to ensure that decisions taken by the Additional Support Needs Tribunals will conform to the rules of natural justice and fair hearing in respect of the allegiances of members by the following means:

1. Induction Training included guidance on the circumstances in which members should decline to sit on particular cases. The obligation is on the member to disclose any potential conflict.
2. The President is currently drafting a guidance note to reinforce this training.
3. The conveners are all skilled lawyers who can recognise any potential conflicts of interest and guide the members concerned.
4. Members have themselves already raised questions relating to their activities outside their role as Tribunal members to ensure there is no perception of bias.
5. The Inner House of the Court of Session has recently issued clear guidance in respect of a broadly analogous situation with regard to medical members of tribunals in the case of **The Secretary of State for Work and Pensions v Gillies** in a judgment issued on 28 November 2003. This decision was upheld on a subsequent appeal to the House of Lords which issued its opinion on 26 January 2006.
6. The appeal concerned the competence of a medical member of a tribunal where it was alleged that there was a reasonable apprehension that the medical member of a disability appeal tribunal was biased since she was also employed

on a sessional basis to carry out examinations on behalf of the Department for Work and Pensions through a sub-contracted medical services provider. She carried out between four and seven sessions per week in the relevant period. On her appointment by the Lord Chancellor the guidance given was that there was no impediment to a person who carried out such examinations also being appointed to sit on tribunals to hear appeals from decisions based on the same type of examination on the basis that the person appointed would have to exclude themselves from sitting on any tribunal where they had previously examined the appellant concerned or where the presence of that person on the tribunal would give rise to doubt about his or her impartiality or circumstances where it could give rise to the perception of prejudice in the administration of justice. Tribunal members are expected to comply with existing case law governing pecuniary or other interests in deciding whether to declare an interest in, or stand down from, a particular case.

7. The House of Lords held that the test to be applied was whether the fair-minded informed observer, having considered the facts, would conclude that there was a real apprehension that the tribunal was biased. The relevant question was whether the individual concerned would have a predisposition to favour the interests of [an organisation for whom they had or were carrying out work].
8. The reasoning in the Gillies decision supports the guidance given by the President that where a member is currently employed or has their services engaged by a Local Authority or a Health Board concerned with any particular reference then it is not appropriate for them to sit. The fact that there is an ongoing connection with another local authority or health board, will not, in itself, give rise to a perception of bias. Where in the past there has been such a connection it is a matter of degree and proximity as to whether this might give rise to an imputation of bias and guidance should be sought from the President or convener before sitting. It is, as the courts have established in a series of decisions, a matter of considering the facts and circumstances of each case but the President is satisfied that the guidance given is sufficiently robust to ensure that decisions of the Tribunals will not be at risk of being set aside on this ground on any subsequent appeal to the Court of Session.

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October 06