

## *Ombudsman v JR*

When LA for JR under threat, may want to consider alternatives. Ombudsman decisions themselves amenable to JR. Ombudsmen are free, claimants don't need a lawyer, in a landscape in which government appears only to be prepared to fund legal advice for itself, that's of increasing significance.

Although there are some disadvantages to using the Ombudsman, there are also advantages, which are considered below.

Considering Parliamentary and Health Service Ombudsman and LGO. Set up by statute:

- Parliamentary Commissioner Act 1967
- Health Services Commissioner Act 1993
- Local Government Act 1974

Powers to investigate maladministration, service failure, injustice

Can also now co-operate to do combined investigations if a complaint raises an issue that falls across more than one jurisdiction.

### *Similarities to JR*

- Both concerned with administrative acts and failures
- Both discretionary – both in terms of investigations and remedies
- Both subject to time limits – promptly and in any event within 3 months JR, usually 12 months for ombudsman, although can extend for good reason
- Both expect the public authority concerned to have had an opportunity to respond to concerns, ombudsman will usually expect claimant to exhaust any complaints procedure, unlike admin court on JR.

### *Differences from JR*

Things that ombudsman can't do

- Only admin court can make a binding ruling on a point of law, ombudsmen largely confined to maladministration
- Much slower process, no power to grant interim remedy
- Investigations are generally not public, unless there's a report, and hearings are almost unknown. Over 23,000 enquiries and of those, parliamentary ombudsman looked closely at 4,732 enquiries, 3,552 no case to answer, 759 put right quickly without need for formal investigation, 421 accepted formal investigation. Conducted 410 formal investigations, 60% upheld, 20% partly upheld, and 20% not upheld.

Things ombudsman can do

- Procedure is free and designed to be used without a lawyer
- Ombudsman has power to investigate that courts do not have, which means they may be able to find things out that are beyond the reach of the courts, they can conduct thorough examination of public authority's files and go beyond what would be available to an admin court under duty of candour
- Remedies different from JR – what does client want? Circumstances in which financial compensation can be awarded very limited – ombudsman awards not

generally large but can award quite large financial packages (check ombudsman guidance) with the aim of putting claimant in the position they would have been in if maladministration had not occurred.

- Decisions generally not binding, but can deal with systemic problems, in a way the courts generally can't – for example working with local authorities in HB delay cases
- There are some things an ombudsman can investigate that would be beyond the reach of the courts – eg delays in benefits system – no duty of care see *Murdoch v Department for Work and Pensions [2010] EWHC 1988 (QB)* (30 July 2010), *Jones v Department Of Employment [1989] QB1*, negligent decision making also not generally actionable on basis of common law duty of care.

#### Example

- In late 2007 and early 2008 PLP received instructions in cases where bankruptcy proceedings had been threatened or initiated by local authorities against particularly vulnerable individuals where alternative means of recovery, such as agreeing a charging order on the debtor's property had been rejected by the local authority without good reason. Bankruptcy is a particularly draconian remedy for the debtor, not only because of the consequences for the individual's employment prospects and access to credit, but also because the procedure is so expensive. A debt of as little as £750, the statutory minimum below which bankruptcy proceedings cannot be brought, can turn into a debt of tens of thousands of pounds once the fees of the trustee in bankruptcy are factored in.
- PLP sent letters before claim on behalf of the debtors arguing that the decisions to petition for bankruptcy were taken without consideration of relevant considerations such as the personal circumstances of the debtors, and whether alternative methods of debt recovery might be more appropriate than bankruptcy, and also that bankruptcy was disproportionate in the circumstances of the particular case. In each case, following our threat to bring judicial review proceedings, the local authority reconsidered its decision to seek a bankruptcy order, and agreed to recover the debt another way. None of the cases came to court, and the law remained uncertain.
- Then on 31 March 2008, the Local Government Ombudsman issued a report<sup>1</sup> against Wolverhampton City Council. The report concluded that Wolverhampton had been guilty of maladministration in a number of ways in deciding to make a homeowner bankrupt for council tax arrears. This decision was swiftly followed by another report of the LGO dated 10 July 2008<sup>2</sup>, which reached similar conclusions on similar facts against the London Borough of Camden.

#### *Maladministration*

No definition but guidance:

<http://www.lgo.org.uk/guide-for-advisers/maladministration-service-failure/>

#### *Crossman catalogue*

Bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness

PCA and HSC - Principles of Good Administration

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<sup>1</sup> Complaint number 06/B/16600

<sup>2</sup> Complaint number 07/A/12661

<http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-of-good-administration/1>

LGO – Good Administrative practice

1. Failure to follow code, policy or procedure to the detriment of an individual or class of people
2. Delay in discharging legal duty or honouring commitment that causes detriment
3. Failing to provide adequate information
4. Failure to provide reasons
5. Failure to gather adequate information, or providing misleading information
6. Discrimination
7. Conflicts of interest or personal bias
8. Inflexible application of discretion
9. Failure to provide adequate redress or an apology
10. Failure to deliver a service

“Parliament did not define ‘maladministration’. It deliberately left it up to the ombudsman himself to interpret the word as best he could; and do it by building up a body of case law on the subject.” Denning MR *R v Local Commissioner ex p Bradford MCC* [1979] 1 QB 287

*Investigation process*

- Complaint. Complaints about government departments only, made through MP
- Initial screening
- Internal statement of complaint
- Written response from public body
- Consideration of preliminary determination
- Request for internal records
- Interview of complainant
- Further information from decision maker
- (HSC cases only) advice from clinical assessors
- Consideration of evidence
- Provisional view that investigation will not proceed/LGO only – local settlement/draft report
- Final report

*Remedies*

Basic principle - Restoring claimant to position would have been in had maladministration not occurred

LGO – Remedies: Guidance on Good Practice

Action or process-based remedies –

Practical action, eg carrying out repairs to a claimant’s house, assess benefit entitlement

*Direct redress remedies*

Complainant given or awarded something to make up for loss or expense, eg compensation. Basic principle is to put claimant in position would have been in if maladministration not occurred. *R (Emptyage) v FSCS* gives further guidance.

If loss to claimant can't be readily quantified, ombudsman can consider what the cost acting without maladministration would have been to the authority – “lost value” – eg complaint against local authority where they had failed to assess needs of child with learning disabilities, resulting in child being cared for at home – had to pay compensation of slightly less than the cost of an effective and appropriate care service.

Good Practice Guide recognises claimants may need to be compensated for expenses that they would not otherwise have incurred, including legal costs.

Indirect redress remedies –

Recommending payment acknowledging stress, distress, anxiety, frustration, worry, uncertainty, inconvenience and outrage etc – eg failure to stop bullying of looked after child in residential care, child was assaulted, abused and possessions taken over 4 months - £4,000 compensation for “lost childhood”.

Recommendations for systemic change

- Acknowledgment of responsibility
- Apology

Parliamentary Ombudsman 2011-2

Where something had gone wrong 591 apologies, 531 compensation payments, 404 wider remedies, 204 actions to put things right.

*Ombudsmen and the Administrative Court*

Courts generally deferential to specialist expertise, respect Ombudsman's definition of maladministration and injustice. JR challenges difficult.

See however recent case of *R (Emptage) v Financial Services Compensation Scheme* in which decision to compensate claimant by considerably less than full amount of her loss was overturned by Admin Court which laid down principles in relation to the proper approach to the assessment of compensation. Case going to CA.

Courts have held that on review, looking at whether reasons adequate, whether principle conclusions stated, whether principle factual disputes resolved with explanation – see *R (Atwood) v Health Service Commissioner* [2008] EWCH 2315 (Admin)

Local authorities generally expected to follow ombudsman's findings, if don't accept expected to challenge by JR – see *R v Local Commissioner ex p Eastleigh BC* [1988] 1 QBD 855

Parliamentary Ombudsman – government departments not expected to challenge by JR, expected to provide explanation to parliament if they want to challenge Ombudsman's findings. – see *SSWP v Bradley* [2008] EWCA Civ 38 [2008] 3 WLR 1059 But subject to rationality.

Recommendations are not binding, but expected to be followed. Decision not to follow recommendation is itself subject to challenge by JR.