The Pensions Ombudsman: Recent developments

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is the Pensions Ombudsman. He graduated in law from King's College London, and was then articulated in local government qualifying as a solicitor in 1970. David spent 20 years as the Director of the Local Government Ombudsman service for England, which he founded, and then six years as Chief Executive of a Special Health Authority determining appeals on behalf of the Secretary of State for Health, before taking up his current post in September 2001.

Abstract The recently appointed Ombudsman discusses the effect of a change in the holder of the post. He has recently determined that a collective agreement cannot overrule the provisions of a statutory scheme. Responsibility for decisions about ill-health retirements rest with trustees and not those advising them. Members should have an opportunity to comment on relevant information before key decisions are taken, and trustees should give reasons for their decisions. The Ombudsman is there to provide remedies beyond those available through litigation.

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Change of Ombudsman

Perhaps it is egocentric of me to point out that one recent development so far as the Pensions Ombudsman is concerned is that there has been a change in the person occupying that post. I took over from Julian Farrand in September last year.

In one sense, that ought not to be a matter of great moment. The decisions as to whether or not there has been maladministration in the way pension schemes have been administered ought not to depend on which individual takes the particular decision. That at any rate would, I imagine, be the view of those with an idealised view of English Law. I say 'idealised' because an academic lawyer recently commented that in seven of the eight cases where decisions of the Pensions Ombudsman have reached the Court of Appeal, the judge at first

instance has not had his judgment endorsed by the Court of Appeal. It does not follow that all those charged with reaching a decision on the same set of facts will in fact reach the same decision.

The Ombudsman is in various ways a different kind of institution from the Courts. Far from hiding behind the anonymity afforded by wigs and robes, I am expected to be a more open and recognisable figure. I am sure the hope of all Ombudsmen is that the public will feel able to empathise with them and trust them to look after their interests. I recall that one direct translation of the Scandinavian term Ombudsman is that of 'spokesman for the people'. Different spokesmen will speak in different ways and to different effect. Thus a change in the spokesman may have more implications than might at first sight appear.

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Certainly I have found no shortage of people who tell me that the change from Michael Platt, the first holder of the Office of Pensions Ombudsman, to Julian Farrand, my immediate predecessor, had near-seismic effect upon the pensions industry.

I will leave it for others to judge in due course what effect I, as the third holder of the office of Pensions Ombudsman, make upon the industry at large. The number of complaints dealt with by my predecessor increased very considerably during his time although, at the point where I took over, there were some indications that the growth of the caseload had slackened a little.

The Ombudsman's role

Achieving a 'broad brush' effect is not the main thrust of the efforts which I make. The work of the Ombudsman is essentially concerned with the detail of pensions administration in practice. I see only a small part of the overall picture and the view that I have is more than a little skewed.

If someone is happy with the way his or her pension entitlements are determined, calculated and paid, I will know nothing about it. Even if they are unhappy, but as a result of their own efforts or those of others on their behalf, the matter is sorted out (perhaps as a result of the IDR procedure which, incidentally, I think is far too prescriptive), then again I will know nothing about it.

Thus, I survey the pensions world with a view which is highly filtered by people who are dissatisfied with the way that world is operating. I am not presented with a representative sample of cases. I am presented with a sample selected by people who are sufficiently deeply dissatisfied to demonstrate the tenacity required to bring a complaint to me.

My prime task is to ensure that they — and the people about whom they complain — have those complaints fairly and justly determined.

Casework issues

Many of those complaints will not be about matters of great moment except for the person concerned. Some complaints will, however, raise matters of much greater significance. Although I, like my predecessors, do not regard my determinations as establishing binding precedents, there are undoubtedly times when the effect of what I decide as a result of investigating the complaint of one person will have much more wide-reaching implications for a scheme as a whole.

Thus I recently determined a complaint¹ about whether payments to reflect that maintenance engineering staff in a hospital were on call should be regarded as pensionable payments. Although my involvement came as a result of a complaint being made to me by one person who had been denied such entitlement, there are of course many other people who are affected by the way the relevant scheme should be interpreted.

An interesting point raised by that particular complaint is that there was agreement between the employer and the trade union concerned that such payments should *not* be regarded as pensionable. The scheme is, however, one established by statute and there is no power for employers and trades unions to vary the terms. If the terms of the scheme are to be varied this needs to be by way of Statutory Instrument made by the Secretary of State for Health. On the present wording of the scheme I held that, despite the intentions of the collective bargaining parties, the payments should be regarded as pensionable.

Decision making by trustees

In both public and private sector schemes a substantial part of my casework involves considerations of whether ill-health benefits should be awarded and if so of what kind. I can well understand the difficulties which members of schemes, and those involved in administering them, have in this area. There is no common definition of what constitutes ill health or incapacity. Those definitions will vary from scheme to scheme. Indeed, in companies which have acquired collections of schemes as a result of mergers and take-overs, the definition may well differ as between employees. An old-established employee from a previous scheme may be working alongside a new colleague and each may be subject to a quite different definition.

This may present a difficulty for the trustees and those advising them, who may consciously or subconsciously be seeking to judge such people against a more consistent definition.

The line between advice and decision-making tends to be obscured. Almost always the rules require a decision to be made by the trustees. The trustees, on the other hand, frequently give the impression that the decision lies not in their discretion but is effectively taken by doctors on their behalf. A decision may indeed be struck down as perverse if it goes against the weight of the medical evidence, but that is not the same as saying that a decision can or should only be made by the doctor concerned. Indeed, there are times when I wonder how wise it is to ask a doctor specifically to advise on whether a man meets the criteria for an ill-health pension. The better course may be to ask the doctor for information as to what the man's condition is, how that condition impacts upon his working abilities and what the likely future impact will be, and then for the trustees

themselves to apply that evidence to the criteria for payment of the pension.

The decision, which the trustees have to make, can be expected to have considerable impact upon the individual concerned. I am concerned that in many cases that individual does not know — is not allowed to know — the basis for that decision.

Good administrative practice in my view is to ensure that before the trustees meet to take their decision, the individual concerned should be able to see and comment upon the information that the trustees will be considering. I advocate that practice not only in the interests of the individual whose right to be able to contest at an effective time information which might seriously damage his future seems to me to be unarguable, but also in the interests of the trustees. By making such information available early, they are likely automatically to protect themselves against charges that they have taken account of erroneous facts or failed to take other relevant facts into account.

Similarly, good administrative practice requires that those who are affected by such decisions should be given the reasons for those decisions, at least in those cases where they are asked for such reasons. Since I first promulgated that thought I have been approached by solicitors who argue that this will present what are said to be great difficulties for trustees and those advising them. These difficulties are said to be:

- that the provision of reasons will expose the trustees to complaints from those who see flaws in that reasoning
- that it is often very difficult for those servicing the meetings to identify what the reasons actually are.

So far as the former objection is concerned I make three comments. The

first is 'good' — if the reasons are flawed it is right that this be exposed and that the matter is looked at again without the flaw.

The second comment is that the belief that a wall of silence is protecting the trustees from complaints is misplaced. The absence of reasons merely feeds those who subscribe to conspiracy theories and leads them to say 'there must be something to hide.'

My third comment is that to deny a member the reasons for a decision which affects him merely postpones but does not avoid the inevitable. If you choose not to tell the member what your reasons are, you do not have the same choice as to whether to tell me.

There may be some circumstances where it is legitimate not to provide reasons to some people about some decisions. For example, a member may complain that he has been treated unfairly by comparison with the way another member has been treated. The answer to that may be due to the special circumstances of that other member and it would not be right to reveal those special circumstances to the complainant. Again, however, I would wish to satisfy myself that such circumstances exist as claimed by a respondent.

The second of the objections is that it is often difficult to establish what the reasons were. I am sure that course organisers would be happy to provide courses in structured decision making and in how to record decisions.

The Ombudsman and the courts

I end by offering some comments upon recent decisions in the courts and with some thoughts on the interrelationship between the Ombudsman and the courts.

There is a right of appeal on a point of law against a decision of the Pensions Ombudsman and it is not unknown for this to be exercised, usually by a

respondent who is found to have caused injustice as a result of maladministration. Those exercising that right of appeal tend to seek to encourage the courts to take a fairly elastic view of what constitutes a point of law.

The Pensions Ombudsman is not strictly a party to such appeals, but is served with the papers and may seek to intervene. I intend to use that power to intervene more sparingly than has been the past practice. This is not simply as a reaction to the decision in *Moore (Wallisdown) v. Pensions Ombudsman and others*² where the judge overturned the basis on which costs had been awarded in cases where the Pensions Ombudsman had appeared. Previously the courts had with some consistency sought to require payment of costs from the Pensions Ombudsman only to the extent to which the Ombudsman's participation had prolonged the hearing before the court. In *Moore* the judge decided that if the decision went in favour of an appellant and against the arguments of the Ombudsman, then the Ombudsman should be required to pay the entire costs of the office. Even before that case had been heard, I had been reviewing the policy with my advisers because I felt uneasy in appearing before the court in a way which could very easily give the appearance that I was seeking to argue the case on behalf of one of the parties.

I do recognise that a potential consequence of my not appearing is that the legal arguments being put forward by the appellant may not be thoroughly tested and I have alerted the Chancery Division of the need to safeguard against this. I observe that in the more recent decision of *Uppingham School v. Shilcock*,³ the judge indicated that he would have had difficulty had the Pensions Ombudsman not briefed Counsel to appear.

While most of the litigation involving

the Pensions Ombudsman has arisen from appeals against these determinations, there is a possibility of action being taken by way of judicial review to resolve disputes about my procedure and jurisdiction. A recent example has been such an action brought by Britannic Assurance and associated companies to prevent my investigating their part in the loss of more than £2m from the Cheney Pension scheme. Lightman J held that although the insurance company was taking actions which might be characterised as acts of administration concerned with the Scheme, in taking those actions the insurance company was not itself a person concerned with the administration of the scheme.⁴ According to the judge:

‘the touchstone is whether he [the administrator] is engaged to act, or advise, in or about the trustees’ affairs in running the Scheme. ... It is of the essence for a person to be or act as an administrator that he shall have assumed an administrative role ... ‘on the trustees’ side’ in the administration of the Scheme’s affairs’.

The judge also decided that he had all the papers before him that were necessary in order to establish that there was no maladministration on behalf of Britannia and thus that there was no need for investigation by me.

Permission has now been given by the Court of Appeal to appeal against both aspects of this decision.

Perhaps my less participatory approach to appeals will lessen the conflict with the courts which seems to have been a feature of the Pensions Ombudsman’s office over recent years. The potential for conflict remains, however, given that there are times when the same set of facts may give rise to a claim on the one hand that someone has acted unlawfully, and on the other that the same person may have caused injustice as a result of

maladministration.

The courts have taken the view that for someone to have acted unlawfully does not necessarily mean there has been maladministration.⁵ They appear also, however, to take the view or come very close to taking the view that on the facts the courts are clear that the person concerned has acted lawfully (or perhaps more accurately has acted in a way which would not give rise to the courts seeking to provide any remedy for the person affected), then I should either determine that there has been no maladministration or should decline to investigate to find out whether there was.⁶

That does not seem to me to be a tenable position and is certainly not one I am willing to accept. In my view, Parliament introduced the Ombudsman system into this country in large part because of a belief that remedies needed to be provided for people in circumstances where such remedies were not available or were not being provided by the courts.

I see an endorsement of my understanding of Parliament’s view toward Ombudsmen in the Financial Services and Markets Act 2000, Section 228(2) of which provides

‘a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.’

My own legislation does not contain such a positive prompt to be fair and reasonable. Equally, however, my legislation does not contain a restriction, which the courts seem to read into it, that a complaint has to be determined only in accord with an outcome that could have been received had the action been brought before the courts, even if that outcome is not, in the Ombudsman’s opinion, fair and reasonable.

For the moment I look with some

envy at the wording of Section 228(2) and will not lose sight of the possibility when the time is right of seeking the insertion of some similar wording into the legislation governing the Pensions Ombudsman.

References

- 1 Thompson & North Tees Health Trust, 6th February, 2002.
- 2 [2002] 02 PBLR (16).
- 3 [2002] EWHC 642[ch].
- 4 [2002] EWHC 441 (Admin).
- 5 *City & County of Swansea v. Johnson* [1999] 17 PBLR (14); *Glossop and others v. Copnall and another* [2001] All ER(D) 92.
- 6 *Edge and others v. Pensions Ombudsman* [1999] 215 PLR CA; *Hillsdown Holdings plc v. Pensions Ombudsman* [1997] 1 All ER 1996; *Wakelin & Ord v. Read and another* [2000] 26 PBLR (21); but see obiter of Neuberger J in *Mock v. Pensions Ombudsman and another* [2000] 36 PBLR (8).