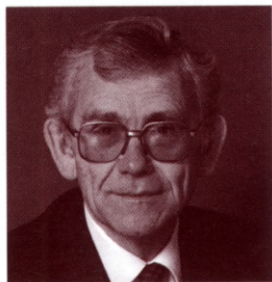


# Courts, tribunals and ombudsmen – II

by Julian Farrand QC



Julian Farrand QC

In this second and final part of his article, Julian Farrand, Pensions Ombudsman, examines the question of courts versus the Pensions Ombudsman, drawing on his (sometimes unfortunate) personal experiences with appeals against the Ombudsman's determinations.

That the Pensions Ombudsman might well be feared as a wolf in sheep's clothing emerges clearly from his original statutory functions and powers: in relation to personal and occupational pension schemes, the Ombudsman 'may investigate and determine (1) any complaint ... that [the complainant] has sustained injustice in consequence of maladministration [and/or] (2) any dispute of fact or law' (see the *Pension Schemes Act 1993* ('PSA 1993'), s. 146, elaborately extended by the *Pensions Act 1995*, s. 157 as recommended by the Pension Law Review (PLR) Committee).

It may be worth noting that almost all my cases are treated as complaints within (1) rather than disputes within (2), although in practice the determination of a complaint will almost always incidentally call for the determination of a dispute. This renders the supervision of the Council on Tribunals a little unclear, since it is specifically confined to disputes within (2) (see *Social Security Act 1990*, s. 12(2)). It should also be noted that the word 'may' must confer a discretion to decline a case. Further, the vital words 'injustice' and 'maladministration' are left undefined. All of this drafting is derived from the Parliamentary and Local Commissioners' legislation, so that reference should be made for guiding precedents to two or three judicial decisions relating to them (e.g. *Re Fletcher's Application* [1970] 2 All ER 527 CA as to discretion not to investigate; *R v Local Commissioner for Administration ex parte Bradford CC* [1979] 1 QB 287 CA as to 'maladministration' having an 'open-ended' meaning and as to formulating complaints for complainants; and *R v Commissioner for Local Administration ex parte Eastleigh Borough Council* [1988] 3 All ER 151 CA as to 'injustice' being a broad concept covering expense and inconvenience and as to an ombudsman's report being neither a statute nor a judgment and not intended to undergo microscopic and legalistic analysis).

In the course of an investigation, the Pensions Ombudsman is specifically subject to a number of procedural provisions and rules PSA 1993, s. 149 and 1995 Rules). These are similar to those governing tribunals, requiring opportunities to comment on allegations and putting (some may think) an undue emphasis on oral hearings. However, apart from these provisions and rules:

'... the procedure for conducting such an investigation shall be such as the Pensions Ombudsman considers appropriate in the circumstances of the case; and he may, in particular, obtain information from such persons and in such manner, and make such inquiries, as he thinks fit.' (PSA 1993, s. 149(4))

This makes it perfectly plain that the Pensions Ombudsman's role is not purely adversarial but, additionally, *inquisitorial*. Indeed, non-co-operation with his investigations, without lawful excuse, can be punished as if contempt of court PSA 1993, s. 150). The Pensions Ombudsman, to assist him in any investigation, can also obtain advice from any person who in his opinion is qualified to give it (*ibid*).

## DIRECTIONS

The crucial difference compared with the Public Ombudsmen is that their investigations merely lead to recommendations. The Pensions Ombudsman, on the other hand, has teeth. These are supplied by the PSA 1993, s. 151 (as amended in 1995) by virtue of which his directions are not only binding and enforceable but appear virtually unlimited as to monetary amounts or, indeed, anything else:

'Where the Pensions Ombudsman makes a determination ... **he may direct** any person responsible for the management of the scheme ... to take, or refrain from taking, **such steps as he may specify** ...'.

To a non-lawyer, these words no doubt appear to be pretty plain English for a statutory provision. They are taken, with added emphasis, from the PSA 1993, s. 151(2) as amended by the *Pensions Act 1995*, s. 157(10). The 'steps' are not restricted by any reference to legal 'fancy dancing' (cf. Deputy Prime Minister John Prescott's instructions to his lawyers in regard to settling the bus pensioners' dispute without litigation).

A lawyer will also note not only the omission of any statutory definition of 'steps' limiting or enlarging its ordinary meaning, but also the absence of any explanation or restriction of the sort expressly applied *pre-determination*:

'(2) For the purposes of any such investigation the Pensions Ombudsman shall have **the same powers as the court** in respect of

the attendance and examination of witnesses (including the administration of oaths and affirmations and the examination of witnesses abroad) and in respect of the production of documents.

(3) No person shall be compelled for the purposes of any such investigation to give any evidence or produce any document which he could not be compelled to give or produce **in civil proceedings before the court** ...

(8) In this section 'the court' means –

(a) in England and Wales, a county court;

(b) in Scotland, the sheriff.'

These references to what the courts can do are in the preceding section (PSA 1993, s. 150, emphasis supplied) and *not* reiterated as to 'steps'.

A lawyer might additionally appreciate a comparison with discrimination, sexual or racial: not actionable at common law, but by statute they 'may be made the subject of civil proceedings in like manner as any other claim in tort' (*Sex Discrimination Act 1975* ('SDA 1975'), s. 66(1) and *Race Relations Act 1976* ('RRA 1976'), s. 57(1)). Jurisdiction was conferred on industrial tribunals (as employment tribunals were then known) to order a respondent to pay compensation 'of an amount corresponding to any damages he could have been ordered by a county court ... to pay to the complainant' (SDA 1975, s. 65(1)(b) and RRA 1976, s. 56(1)(b)). Then in the county court 'all such remedies shall be obtainable ... as ... would be obtainable in the High Court' (s. 66(2) and 57(2) respectively). The PSA 1993 contains no cross-references, restrictive or otherwise, to what could be ordered or obtained in the courts. The Ombudsman's 'steps' were left unhobbled.

Discrimination is comparable with the Pensions Ombudsman's principal concern – 'injustice in consequence of maladministration' – in that at common law it was not justiciable, so that, statute apart, there were *no* orders, or 'steps', that a court could direct as a remedy.

*'Investigation of maladministration ... is not the normal function of a court. Maladministration as such does not give rise to a cause of action in law. In this respect [the Pensions Ombudsman] is acting in a manner similar to that of so-called 'ombudsmen' under other statutes, for example the Parliamentary Commissioner for Administration or the Local Commissioners for Administration.'*

(per Carnwath J in *Miller v Stapleton* [1996] 2 All ER 449 at p.462; see also per Schieman J in *R v Knowsley MBC ex parte Maguire* (1992) 90 LGR 653 at p. 664, quoted on p. 3 of Part I of this article, *Amicus Curiae*, Issue 26, April 2000). Nor does the PSA 1993 refer to 'injustice in consequence of maladministration' as being 'any other claim in tort' (cf. the discrimination statutes): thus pensions wrongdoing is obviously enough strictly *sui generis* (i.e. of its own kind).

As Lightman J rather lately appreciated, the PSA 1993:

*'... is social legislation designed to improve the legal protection available to members of schemes in two ways: (a) it affords a cheap summary and informal alternative to proceedings in the ordinary courts; and (b) it affords recourse whenever injustice has been caused by maladministration whether or not the maladministration constitutes a civil wrong and accordingly whether or not there is an available remedy*

*in private law.*' (*Westminster City Council v Haywood* (No. 2), 20 December 1999, transcript para.18)

He added his own view that 'the 1993 Act does something less than create new private rights and duties' (*loc. cit.*, emphasis added), evidently considering that this does not necessarily follow from the provision of redress for 'reprehensible conduct' where there was and is none otherwise. This 'reprehensible conduct' (aka 'maladministration') did not, he thought, really involve novel duties and liabilities 'since standards have always been expected of those who manage schemes (still *loc. cit.*). Incidentally it may be thought instructive to compare and contrast the enlightened attitude exhibited in this case with that displayed by (the same) Lightman J in *Observation V* below.

It follows, on the face of it, that the Pensions Ombudsman, having investigated the alleged maladministration, has a statutory power to direct 'steps' regardless of what the courts could or would do. He is free to think instead of the sort of steps that other statutory ombudsmen recommend, after all their statutes are patently precedents for the drafting of his (see *Parliamentary Commissioner Act 1967*, s. 5(1)(a) and *Local Government Act 1974*, s. 26(1)). The difference, significant more in principle than in practice, is that they merely make recommendations whereas his direction as to 'steps' are final, binding, enforceable and appealable on points of law (see PSA 1993, s. 151 as amended by *Pensions Act 1995*, s. 157).

Originally the suggestion was proffered that such steps must be implicitly limited to redressing the injustice complained about as caused by maladministration (see 'Pensions Ombudsman v Courts – a curious case', a PL lecture published in *Pension Lawyer* No. 63, March 1995 at p. 3, but adding, in effect, that they might be required to be taken by persons not responsible for causing the maladministration). Subsequently this suggestion seemed to be enthusiastically endorsed by Lord Justice Millet:

#### PROCEDURE AND POWER

*'... the procedure for conducting such an investigation shall be such as the Pensions Ombudsman considers appropriate in the circumstances of the case; and he may, in particular, obtain information from such persons and in such manner, and make such inquiries, as he thinks fit.'* (*Pension Schemes Act 1993*, s. 149(4)):

*... For the purposes of any such investigation the Pensions Ombudsman shall have **the same powers as the court** in respect of the attendance and examination of witnesses (including the administration of oaths and affirmations and the examination of witnesses abroad) and in respect of the production of documents.'* (s. 150, emphasis added)

*'Although not stated in terms, it is implicit that the steps in question must be calculated to provide an appropriate remedy for the injustice sustained by the complainant.'* (*Westminster City Council v Haywood* [1998] Ch 377 CA at p. 410)

However, the idea of restricting steps to redressing injustice has now been undermined by amendments enabling the Ombudsman to investigate certain complaints of maladministration even though no injustice whatsoever was alleged – i.e. employers v trustees (or managers) or vice versa (see *Pensions Act 1995*, s. 157(2) amending *Pensions Schemes Act*,

s. 146(1)(b)). The power to direct steps remains available to the Ombudsman without any restriction being indicated.

Another suggested limitation might be that, in so far as the steps are enforceable 'in a county court as if it were a judgment or order of that court', it follows that county court jurisdictional limits apply (see PSA 1993, s. 151(5)(a)). That would, however, only be true for England and Wales (plus, as it happens, Northern Ireland). In Scotland, in contrast, enforcement is 'by the sheriff, as if it were a judgment or order of the sheriff and whether or not the sheriff could himself have granted such judgment or order' (see s. 151(5)(b); emphasis added to clarifying words inserted, presumably, by a different – Scottish – Parliamentary draftsman). However, this suggested limitation has never been argued, even in relation to enforcement. One explanation may be that any steps directed would still be binding so as to found a cause of action in the High Court.

### STEPS

'Where the Pensions Ombudsman makes a determination ... **he may direct** any person responsible for the management of the scheme ... to take, or refrain from taking, **such steps as he may specify** ...'. (Pensions Schemes Act 1993, s. 151(2) as amended by the Pensions Act 1995, s. 157(10), emphasis added)

A genuine limitation on the apparently unlimited power of the Pensions Ombudsman as to the steps he directs unarguably is that he must not be thought 'perverse' in the familiar *Wednesbury* sense (see the seminal passages reproduced in *Edge v Pensions Ombudsman* [1999] 4 All ER 546 at pp. 568–9 CA). Essentially, the test to justify judicial interference should be: 'was the step so unreasonable that no reasonable Ombudsman could ever have directed it?' Apart from this long-stop control, the choice of steps to direct would properly appear untrammelled.

### JEALOUS JUDICIARY?

However, Her Majesty's judges have looked upon 'such steps as he may specify' with displeasure. Witness the following half-dozen or so observations on appeals (ostensibly on points of law) against determinations of the Pensions Ombudsman, quoted in chronological order:

**I** 'The distress and inconvenience for which the ombudsman awarded £750 appears to be nothing more than the natural result of the disagreement between the trustees and Mr Stapleton as to the effect of the so-called 'guarantee.' If that had been dealt with by a court, and if Mr Stapleton's position had been upheld, he would not have been awarded anything for the inconvenience and anxiety inevitably involved in litigation. The courts have taken the view that that is not a proper head of compensation, even where a cause of action is established. There is no reason why a complainant should be better off because a dispute happens to be litigated before the ombudsman rather than before a court.'

This was said by Carnwath J in *Miller v Stapleton* [1996] 2 All ER 449 (at p. 465) and illustrates a common attitude. Despite his own earlier recognition of the similarity of the Pensions Ombudsman to the public ombudsmen rather than the courts (at p. 462), no judicial (or other) notice was taken of their practice in recommending 'consolatory' or 'botheration' awards. As to this practice, the Parliamentary Ombudsman's Select Committee has given its approval, observing:

'We see no relevance in the lack of legal entitlement to the question of appropriate redress ... The obligations of equity remain.' (para. 36, First Report, 'Maladministration and Redress', Session 1994–95).

And as to being better off with ombudsmen in preference to the courts, see per Rose LJ in *R v Insurance Ombudsman ex parte Aegon Life Assurance Ltd* [1995] LRLR 101 at pp. 105–6 (quoted in Part I of this article, *Amicus Curiae*, Issue 26, April 2000, p. 7, para. (10)).

**II** 'But there is in my judgment a gap in the reasoning of the decision between the conclusion of maladministration and the compensation directed. Compensation for negligent misrepresentation (to which the Pensions Ombudsman equated the maladministration) should put the plaintiff in the same position as if the informant had performed his duty and provided correct information – not put him in the position in which he would have been if the incorrect information had been correct. That basic principle is illustrated in the numerous recent cases on negligent property valuations and explains the distinction between 'no transaction' and 'successful transaction' situations drawn in those cases ...'

Robert Walker J (as he then was) had differed from Carnwath J as to the Ombudsman's power to compensate for distress and inconvenience, contrary to legal principle applied in the courts, but was unable to resist applying legal principle to limit the rest of the directions. This pronouncement was 'in *Westminster City Council v Haywood* [1998] Ch 377 (at p. 394), decided in 1996 but reversed by the Court of Appeal in 1997 on a peculiar point of jurisdiction (since itself reversed by Statutory Instrument 1997/308, reg. 9) leaving open not only compensating for distress but also the quoted statement of principle. Some may think this a legalistic principle inconsistent with the basic simplicity of 'such steps as he may specify'.

**III** 'Parliament has given very little assistance in defining precisely what kind of orders it is intended that the Ombudsman should be allowed to make, and in particular how far he is entitled to impose financial penalties going beyond those which would otherwise be applicable under the general law ...'

Although the Ombudsman's powers of investigation are specifically made retrospective by the Act, I have serious doubts as to whether this extends to his power to make compensatory awards, in relation to matters which did not give rise to a legal liability at the time they took place. It would require clear words to create such retrospective liability, and I do not find such words in the Act.'

Carnwath J again in *Duffield v Pensions Ombudsman* [1996] OPLR 149 (at pp. 154 and 158) citing himself. Although noting, in effect, that there is no statutory definition of 'steps' so that there are no express limitations on those which can be directed, he preferred to look for and find an absence of express extensions. In contrast, Lightman J has very recently recognised retrospectivity as to both potential liability and actual jurisdiction, saying: 'To find in social legislation of this character a form of retrospective protection against maladministration causing injustice is scarcely something which on grounds of fairness and reasonableness could not be expected of the legislature.' (in *Westminster City Council v Haywood* (No. 2), 20 December 1999, transcript para.19; *Duffield* was not referred to).

**IV** 'My own view, in the different context of a complaint against an employer in respect of maladministration causing injustice to members in

participation in a transaction involving the improper payment out of sums which in large measure found their way, as they were from the outset intended to do, into the employer's hands, is that it would not be permissible for the Pensions Ombudsman to require the employer to refund the sums it received unless the court would be in a position to make such an order.'

Despite gratuitously imposing this limitation, Knox J actually upheld the directed refund in *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 (quoted at p. 898). The imposition was made notwithstanding the fact, which he had noted, that 'there is no express limitation on the steps which the Pensions Ombudsman can direct to be taken or refrained from' (at p. 896) – so the steps directed could, he held, benefit non-complainants. He also supported compensation for distress, etc., but nonetheless could not swallow the possibility otherwise of the relief available from the Ombudsman being different from – better than? – that available from the courts.

**V** 'I find it difficult to believe that Parliament intended that the Ombudsman's jurisdiction to grant relief in respect of maladministration should extend to tort claims of this nature and to overriding defences of limitation to such claims and that the respondent to the complaint should be deprived of the substantive and procedural safeguards of a trial before a judge. It is however unnecessary to decide this question in this case. I have only to decide whether the alleged tort was committed.'

Here Lightman J helpfully illuminated the depths of instinctive judicial prejudice against alternative – and therefore competitive? – dispute (or complaint) resolution in *NHS Pensions Agency v Pensions Ombudsman (Re Beechinor)* [1997] OPLR 99 (at para. 1). Then blissfully ignorant, apparently, of the time-limits and procedural requirements in fact provided (see SI 1995/1053 and SI 1996/2475, reg. 5), his Lordship proceeded to reclassify the issue into court-bound litigation terms and then, ultimately, to decide it on a finding of fact (i.e. no breach of duty of care). Readers, if not judges, should appreciate that appeals only lie on points of law.

However, as to 'such steps as he may specify', Lightman J. particularly observed:

'... if and so far as the Ombudsman can give damages for tort, a single sum could only be awarded representing the damages suffered at the date of the commission of the tort.' (at para. 8)

This limitation seems significantly adrift from the straightforward language of the statute, particularly in the context of 'pensions' (i.e. essentially periodical payments).

**VI** 'In a case in which the maladministration complained of consists of an alleged breach of trust, the Pensions Ombudsman has no power to direct remedial steps to be taken which are not steps that a court of law could properly have directed to be taken.'

Sir Richard Scott's only stated justification for this pronounced limitation was that he agreed with Knox J (i.e. in IV above: see *Edge v Pensions Ombudsman* [1998] Ch 512 at p. 520). The Court of Appeal, loyally upholding him, did not actually renounce this limitation, although they did not explicitly renounce it either (at [1999] 4 All ER 546). Instead, that court reached conclusions regarding what *cannot* have been the intention of Parliament as to who would be bound by the Ombudsman's determinations (at p. 579) so as to pronounce, somewhat non-consequentially (at p. 580):

'We do not hold that, in the strict sense, there was an absence of jurisdiction to entertain the complaint: rather, that the Ombudsman, in the exercise of his discretion, should have declined to do so.'

Observations (by myself) as to the serious unacceptability of this belated, and out-dated, advice may be found in *Pensions Management Institute News* (September 1999). More significantly, the relevant minister (Jeff Rooker) has stated in a written answer:

'In order to ensure that the Pensions Ombudsman can continue to deal with the range of cases he had dealt with before the *Edge* decision, changes are required to the procedures under which he conducts his investigations.' (*Hansard*, House of Commons, 21 December 1999)

These required changes, clarifying Parliament's intentions, have been introduced in the Child Support, Pensions and Social Security Bill (2000).

**VII** 'It was common ground before me that the ombudsman has power to award damages for distress; the appellant reserving the right to argue that he does not in a higher court ...'

The second point taken was that the award was disproportionate and unreasonably high. As to this, there is no doubt that the proper level of an award of compensation for distress must be a matter of law.'

Hart J was responsible for this rather astonishing assertion in *Swansea City and County v Johnson* [1999] 1 All ER 863 (at p. 877). Bearing in mind that the courts do not award compensation for distress (hence the reservation for a higher court), much less for distress caused by maladministration (which is not justiciable), how could there conceivably be any law on the proper level? Unless his lordship meant, which he patently did not, that the test was *Wednesbury* unreasonableness (see postscript below).

## JUDICIAL ROLE?

The Pensions Ombudsman enjoys, by virtue of statute, an unlimited power to direct the taking (or not taking) of 'such steps as he may specify'. The courts dislike this power and have sought to limit it by reference to their own powers (but *not*, at least as yet, by reference to 'perversity' in the administrative law sense). The limitations thus attempted may seem of extremely doubtful legitimacy in the light of House of Lords' guidelines:

'... it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based upon the separation of powers: Parliament makes the laws, the judiciary interprets them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or lacuna in the existing law ... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.'

Lord Diplock said this in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 (at p. 541) where the Court of Appeal had purported to limit an unlimited immunity (in relation to trade disputes) but was unanimously reversed. Incidentally, no assistance as to Parliament's relevant intentions regarding the Pensions Ombudsman can be discerned from *Hansard* (i.e. under the

principle in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593).

So, are the words ‘such steps as he may specify’ plain and unambiguous? As a leading text book explained:

‘... when the question is whether Parliament did or did not intend a particular result, the ‘intention of Parliament’ is what the statutory words mean to the normal speaker of English. The fact that a judge feels confident that, had the situation before him been put to them, the members of the Parliament in which the statute was passed would have voted for a different meaning or for additional words is immaterial.’ (Cross, *Statutory Interpretation*, 3rd ed., 1995, by Professor John Bell and Sir George Engle).

The legitimate and responsible attitude for judges to adopt towards deliberately different dispute (or complaint) resolution by ‘non-courts’, such as the Pensions Ombudsman, was exemplified by Lord Chief Justice Goddard in relation to the legislation establishing rent tribunals:

‘... it is clearly the intention of the Act and of these regulations that the tribunal may proceed and give a decision without hearing either party unless a party states that he wishes to be heard. Obviously, therefore, Parliament intended the procedure of these tribunals to be of the most informal nature. No court can proceed to hear a case without having some evidence before it, nor can it give any judgment affecting a person’s rights to property unless that person not only is before the court, but also has an opportunity of cross-examining the other party. Parliament, however, has said that the ordinary procedures to which lawyers are accustomed shall not apply to these cases.’ (in *R v Brighton and Area Rent Tribunal ex parte Marine Parade Estates (1936) Ltd* [1950] 1 All ER 946 at p. 949).

Despite his evident distaste for these inferior tribunals, Lord Chief Justice Goddard did not seek to super impose upon them any judicial limitations not to be found within the relevant legislation. Similarly it is submitted, respectfully of course, that judges hearing pensions appeals should suppress professional pride and prejudice, abandon invidious comparisons and simply allow the Ombudsman to do what the statute says – ‘**he may direct ... such steps as he may specify**’ (see p. 4 above). So long as the Ombudsman’s choreography avoids *Wednesbury* unreasonableness, he should be supported, not restricted, as the person preferred by Parliament – instead of the courts – to resolve pensions complaints.

## POSTSCRIPT

As to *Wednesbury* unreasonableness, in *Edge* ([1999] 4 All ER 546 at p. 568–9) Chadwick LJ thought it ‘worth calling to mind the seminal passages in the judgment of Lord Greene, Master of the Rolls, in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 ... at pp. 228–231.’ He then quoted at length before referring to it being ‘not without significance’ to compare the reason for choosing pension scheme trustees with the following passage:

‘It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with.’

All this leads to two observations. First, the respect this Chancery judge showed for *Wednesbury* may be thought unduly dated. Thus recently in the House of Lords Lord Cooke was less respectful (in *R v Chief Constable of Sussex ex parte International*

*Traders Ferry Ltd* [1998] 3 WLR 1260 at pp. 1288–89):

‘It seems to me unfortunate that *Wednesbury* and some *Wednesbury* phrases have become established incantations in the courts of the UK and beyond. *Wednesbury* ... an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene MR twice uses the tautologous formula “so unreasonable that no reasonable authority could ever have come to it”. Yet judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory warnings. When, in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, the precise meaning of “unreasonably” in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision was one which a reasonable authority could reach.’


The application of such a simple, non-legalistic test in judging the steps he directs should cause no concern for the Pensions Ombudsman.

The second observation is that the judiciary ought to recognise more often that, like the local authority in *Wednesbury* (and unlike trustees or the courts), the Pensions Ombudsman is the office-holder entrusted by Parliament with his powers in respect of pension schemes. His exercise of those powers should not, therefore, be subject to their interference. Happily there is now a nice illustration.

In *Legal & General Assurance Society Ltd v Pensions Ombudsman* (judgment 3 November 1999; (1999) 95 (46)) one issue was the time limit for bringing a complaint. Primarily this is three years but:

‘Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed ... the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further time as he considers reasonable.’ (*Personal and Occupational Pension Scheme (Pensions Ombudsman) Regulations 1996*, reg. 5(3))

My office and I had accepted for investigation an otherwise out-of-time complaint. Was this *Wednesbury* unreasonableness on my part? Mr Justice Lightman outlined the facts and, with uncharacteristic hesitation, held (transcript para.19):

‘I do not think that the ... complaint was brought within a further reasonable period, but I hesitate to hold that no sensible PO acting with due appreciation of his responsibilities would have held the period reasonable. **Accordingly whilst I consider that the PO’s decision is on the margins of rationality, with some hesitation I have concluded that I cannot disturb his decision on this ground.**’ (Emphasis added for the benefit of the judiciary generally!) 

**Dr Julian Farrand QC LLD**

*Solicitor, The Pensions Ombudsman*

This article was the basis for a lecture given to the Institute of Advanced Legal Studies on 24 February 2000.