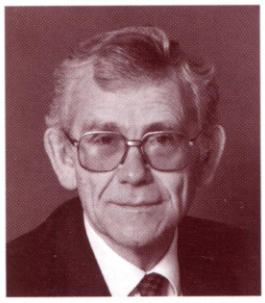
Courts, tribunals and ombudsmen – I

by Julian Farrand QC



Julian Farrand QC

Julian Farrand, the Pensions Ombudsman, considers the arguments for and against the different dispute resolution bodies. In Part I of his two-part article, he compares the roles and practice of tribunals and ombudsmen.

The title of this article not only lacks explanatory focus but also suggests an impossible scope of subject matter. The true intention, however, is to concentrate upon critical distinctions between three sorts of dispute resolution bodies. More precisely, however, what will be elaborated are: first (in Part I), competitive comparisons between tribunals and ombudsmen and secondly (in Part II, to follow in the next issue), perceived tensions between the courts and ombudsmen. Even more precisely, the former will include special reference to the creation of the original Pensions Ombudsman whilst the latter will be derived entirely from personal (and often unfortunate) experiences with appeals against determinations of the present Pensions Ombudsman.

TRIBUNALS V OMBUDSMEN

Origins

Ombudsmen schemes developed not just because of dissatisfaction with the authorities or industries to which they relate but basically because of the limitations on litigation in the courts. Not only was redress for injustice caused by maladministration wanting and wanted (see, e.g. per Schieman J in *R v Knowsley MBC ex parte Maguire* (1992) 90 LGR 653 at pp. 664–5: ' … the applicants' claims fail. They fail because we do not have in our law a general right to damages for maladministration.'), but there was also a wish 'to provide a quick, inexpensive and informal means of settling complaints and disputes ... especially where an individual or a small group of individuals ... find themselves in conflict with [bodies] who have large resources (per Robert Walker J in *Westminster CC v Haywood (and Pensions Ombudsman)* [1998] Ch 377 at p. 387 who added, however, that the Ombudsman's 'task in delivering rapid, unlegalistic justice, without cutting too many legal corners, is a dauntingly difficult one'). Thus the comment to a fairly recently-reported decision read:

'This case is a testament to the wisdom of the Occupational Pensions Board recommendation that cases involving pensions should not be dealt with by Chancery barristers and Chancery courts. The sheer length of this judgment, with the innumerable references to dog-Latin and obsolete and ancient case-law is a reminder of sledgehammers and nuts. The hope must be that the new Pensions Ombudsman (with tribunal powers) will not reinvent Chancery.' (*Mettoy Pension Trustees Ltd v Evans* [1990] PLR9 at 58 (Warner J))

So, speaking generally, the National Consumer Council (NCC) has explained:

'Ombudsmen schemes are a relatively new means of providing consumers with access to redress against a wide range of public and private organisations. They are intended to be an independent and accessible way for consumers to resolve disputes without needing the help of a lawyer or going to court.' (Report on Ombudsman Services, Consumers' Views of the Office of the Building Societies Ombudsmen and the Insurance Ombudsman Bureau, June 1993).

Tribunal systems had already developed for very similar reasons. According to the Franks Committee:

'... tribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject. It is no doubt because of these advantages that Parliament, once it has decided that certain decisions ought not to be made by normal executive or departmental processes, often entrusts them to tribunals rather than to the ordinary courts.' (Report of the Committee on Administrative Tribunals and Enquiries 1957 Cmnd 218).

As an example, rent tribunals were set up in response to a report recommending this because tenants had 'a great dread of ever going to court to get a decision' (Interdepartmental Committee on Rent Control, 1945 Cmd 6621).

The Franks Committee was not only concerned for consumers but added a still topical point (at para. 39):

'Moreover, if all decisions arising from new legislation were automatically vested in the ordinary courts the judiciary would by now have been grossly overburdened.'

Reference was made to evidence from the Permanent Secretary to the Lord Chancellor that, without tribunals, a large number of additional judges would have to be created, diluting the quality of the Bench, so ' ... I believe, with others, that the system of administrative tribunals as it has grown up in this country has positively contributed to the preservation of our ordinary judicial system.' Of course ombudsmen also, like other forms of alternative dispute resolution, similarly benefit the judiciary, as well as consumers, whilst incidentally avoiding legal aid.

Definitions

Since ombudsmen and tribunals exist for essentially similar reasons, do their names mean something different? Dictionary definitions appear of little assistance: according to the *Concise Oxford Dictionary of Current English* (9th ed., 1995) the word 'ombudsman' means 'an official appointed by a government to investigate individuals' complaints against public authorities etc. [Swedish, = legal representative]'. Although appropriate to the Parliamentary Commissioner for Administration and the Local Authorities and other public sector ombudsmen, this definition excludes the private sector ombudsmen schemes (not to mention hybrid schemes such as that for legal services or even pensions). In reality, the word 'ombudsman' carries no precise meaning and its use serves to disguise differences of substance and significance between the various schemes. The constitution, terms of reference and powers of each should be scrutinised with any assumptions of identity and consistency abandoned. Nevertheless, to combat misuse of the word 'ombudsman', the British and Irish Ombudsman Association has been established, its primary objects being to:

'(a) encourage, develop and safeguard the role ***and title*** *of Ombudsmen in both the public and private sectors;*

(b) define, publish and keep under review criteria for the recognition of Ombudsman offices by the Association (attached as Schedule 1);

(c) accord recognition to those persons or offices in the UK and the Republic of Ireland who satisfy the defined criteria for recognition;'

(Rules and Criteria approved at AGM, 14 May 1997; emphasis added).

ACCESSIBLE FOR CONSUMERS

'Ombudsmen schemes are a relatively new means of providing consumers with access to redress against a wide range of public and private organisations. They are intended to be an independent and accessible way for consumers to resolve disputes without needing the help of a lawyer or going to court.' (Report on Ombudsman Services, Consumers' Views of the Office of the Building Societies Ombudsmen and the Insurance Ombudsman Bureau, June 1993).

The schedule referred to first states that the core role of an ombudsman is to investigate and (in ordinary language) decide complaints and then proceeds:

'The term 'Ombudsman' should only be used if four key criteria are met. Those criteria are independence of the Ombudsman from those whom the Ombudsman has the power to investigate; effectiveness; fairness and public accountability.' (British and Irish Ombudsman Association, Rules and citeria, May 1997)

Some 22 schemes (including the Pensions Ombudsman) have satisfied the criteria and become 'voting' members of the Association. Unfortunately for English usage, not all of these voting members are actually called 'ombudsman' – there is not only the Parliamentary Commissioner for Administration (who does use the magic word) but also, for example, the Police Complaints Authority – but a number of schemes using the word 'ombudsman' have been held *not* to satisfy the criteria. Incidentally, as to criteria, the Council on Tribunals has recently stated:

'It is clear to us that, since tribunals are established to offer a form of redress, mostly in disputes between the citizen and the State, the principal hallmark of any tribunal is that it must be independent. Equally important, it must be perceived as such. That means that the tribunal should be enabled to reach decisions according to law without pressure either from the body or person whose decision is being appealed, or from anyone else.'

(Report on Tribunals, their Organisation and Independence, 1997 Cm 3744).

Accordingly, very many tribunals could certainly meet the key criteria and might, perhaps, think of joining the Ombudsman Association.

The word 'tribunal' is also imprecisely defined in the *Concise Oxford Dictionary*:

*'**1** Brit. a board appointed to adjudicate in some matter, esp. one appointed by the government to investigate a matter of public concern. **2** a court of justice. **3** a seat or bench for a judge or judges. **4 a** a place of judgement. **b** judicial authority (the tribunal of public opinion). [French tribunal or Latin tribunus ...].'*

Nor does the word enjoy any precise legal definition. 'The word is ambiguous, because it has not, like 'court', any ascertainable meaning in English law.' (per Fry LJ in *Royal Aquarium v Parkinson* [1892] 1 QB 431). But a tribunal may be a 'court', albeit an inferior one (see *Peach Grey & Co v Sommers* [1995] 2 All ER 513 per Rose LJ at pp. 519–520 as to contempt of court provisions covering an employment tribunal and/or a solicitors' disciplinary tribunal). Nevertheless there is now a Council on Tribunals with supervisory functions; these do not depend upon any statutory definition of 'tribunal' but instead there is a list of tribunals within the Council's jurisdiction (see now the *Tribunals and Enquiries Act* 1992 Schedule). Not only does the list leave out some tribunals so-called (especially domestic/disciplinary and arbitral tribunals) but it also includes a number that are not so-called, one example being the Pensions Ombudsman.

Pensions Ombudsman and/or Tribunal

The role was created with careful nomenclature by statute in 1990:

'For the purpose of conducting investigations in accordance with this Part or any corresponding legislation having effect in Northern Ireland there shall be a commissioner to be known as the Pensions Ombudsman.'

(see now *Pension Schemes Act* 1993, s. 145(1) consolidating provisions introduced by the *Social Security Act* 1990). The immediate impetus was a report by the Occupational Pensions Board (OPB) in 1989 (*Protecting Pensions – Safeguarding Benefits in a Changing Environment,* 1989 Cm 573) which recommended,

inter alia, 'The setting up of a body to adjudicate in disputes between the individual and a pension scheme or provider which could not be resolved ... ' in effect by explanation and conciliation (13.1). The OPB observed:

'respondents who saw such a need mainly refer to the fact that ultimately there was no recourse in a dispute except to the High Court, which was not a realistic possibility in most cases. Another point made was that an adjudicating body needed to be expert in pension matters in order to deal expeditiously with the pension problems.' (para 13.3)

TRIBUNALS' ADVANTAGES

'... tribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject. It is no doubt because of these advantages that Parliament, once it has decided that certain decisions ought not to be made by normal executive or departmental processes, often entrusts them to tribunals rather than to the ordinary courts.' (Report of the Committee on Administrative Tribunals and Enquiries 1957 Cmnd 218)

However, the OPB's recommendation was actually anti an ombudsman, dismissive of any arbitration procedure and strongly pro a pensions tribunal (see para. 13.11–13.17).

Nevertheless, fortunately for my employment prospects, the government's response was in favour of an ombudsman. In a speech to the Society of Pension Consultants on 7 November 1989, Mr Tony Newton, the minister concerned, said (see SPC News No 6):

'My view is that we should concentrate the new service on the types of problem that individuals, rather than schemes, can face. Disputes involving trustees, concerning large sums of money, are likely to end up in the courts in any case. That is not really our concern here. I believe therefore that the Ombudsman concept, which has become well-established and well-respected, is the right one. There are clear parallels with other Ombudsmen who adjudicate between individuals and large organisations. In the financial sector I am thinking particularly of the Banking and the Building Societies Ombudsmen. It is an adaptable concept that can be tailor-made to suit the particular characteristics of a certain situation, or industry.'

So the Social Security Bill was introduced to Parliament giving effect to this view, an amendment proposing *both* an Ombudsman *and* a tribunal being rejected by another relevant minister: (see Gillian Shephard, *Hansard,* 22 February 1990, Standing Committee G, col. 245 and 246).

Influential others were also opposed to an ombudsman. In particular the Council on Tribunals was at best critical: in its Annual Report for 1989–1990, it commented (para. 2.47 and 2.52) as follows:

*'**2.47** When we examined the provisions in the Bill relating to the Pensions Ombudsman, we found that, in addition to his function of investigating complaints –*

- he was to have the function of determining disputes of fact and law
- he could give directions in pursuit of the determinations
- the determinations were to be final and binding on those concerned
- determinations or directions would be enforceable in the County Court
- there would be appeals on points of law relating to determinations or directions
- procedural rules were contemplated for the conduct of the investigation of disputes.

We pointed out to the department that most of these features were characteristic of tribunals under our supervision, while none were to be found in existing statutory ombudsmen. What in effect had been created by the proposals in the Bill was, therefore, a tribunal in all but name, with certain additional functions of investigation of complaints characteristic of some true ombudsmen. We therefore took the view that the Pensions Ombudsman, when exercising his function of determining disputes of fact and law, should be subject to our supervision. We also urged the abandonment of the, in our view, misleading nomenclature of 'ombudsman', which in the circumstances could only be regarded as inappropriate and anomalous, and an attempt to persuade the public that what was being created was something other and more attractive than it was.

***2.52** For the foregoing reasons, we consider the Pensions Ombudsman to be a novel and anomalous constitutional innovation. While we welcome the fact that, in exercise of the function of dispute investigation, the Ombudsman will be a tribunal falling under our supervision, we believe that this misleadingly-named body should not be replicated elsewhere.'*

Thus it was no surprise that the very existence of a pensions ombudsman was critically re-examined in submissions to the Pension Law Review (PLR) Committee (set up in the wake of the Maxwell scandal). The Committee reported in 1993 and after recording that the Council on Tribunals had reiterated its criticism proceeded:

'The Ombudsman and tribunals

***4.13.40** For cases not resolved by OPAS we have considered three alternative forms of tribunal: the industrial tribunal, a new Pensions Tribunal and retention of the existing ombudsman system.*

***4.13.41** We do not consider that the industrial tribunal would be a suitable forum for individual pensions disputes. Pensions law is a specialist area and the resolution of individual pensions disputes requires a tribunal whose expertise is focused on that area. Moreover, a high proportion of disputes are between ex-employees and their former employers or between scheme members and an employer or pension scheme with which they have never had a direct relationship.*

***4.13.42** We have also considered whether to recommend that a tribunal be set up in place of the Pensions Ombudsman but we have not been persuaded by arguments in favour of a change of this sort. Whilst a tribunal is less formal than a court, creating a tribunal for pensions disputes would still involve some of the elements that lay people find daunting: oral evidence, and an adversarial procedure, in which the protagonists confront each other and ask questions whilst the tribunal listens to the evidence, as opposed to the inquisitorial approach used by the Ombudsman, who investigates the facts and then decides on the basis of them. The Ombudsman's office has only been in place for a short time, during which it has established a good working relationship with OPAS and has investigated a number of cases in considerable detail and with great persistence. We therefore prefer to see changes*

implemented not by replacing the Ombudsman with a Pensions Tribunal but by introducing a series of rather smaller changes in the operation of existing institutions.'

Accordingly, the PLR Committee concluded, happily so far as I am concerned, with the following recommendation:

*'**150** The Ombudsman should not be replaced by a tribunal. Instead the jurisdiction of the Ombudsman should be extended to include disputes between the employer and the trustees or among the trustees themselves.'*

This recommendation was accepted by the government (White Paper 1994) not only without reservation but with the encouraging addition:

'Means of extending the Pensions Ombudsman's jurisdiction to collective disputes are also being explored.'

The Council on Tribunals remained unenthusiastic. In its Annual Report for 1993–1994 it commented (para. 2.132):

'We agree that the Pensions Ombudsman's office has achieved much in its short existence. However, we emphatically disagree with the Report's statement that, whilst a tribunal is less formal than a court, the creation of a tribunal for pensions disputes would still involve some of the elements that lay people find daunting, notably oral evidence and an adversarial procedure. The giving of oral evidence which can be tested by questioning seems to us to be fundamental to resolving disputes of fact and law before any tribunal, including, we would say, the Pensions Ombudsman. But there is no reason why this should necessarily lead to an adversarial procedure. Many tribunals manage to combine adversarial and inquisitorial techniques. This is something that we encourage in suitable cases. The PLRC Report rightly stated that the procedures for resolving disputes needed to be fair, accessible, expeditious, inexpensive and easily understood. It seems to us that those are precisely the qualities which should characterise tribunals.'

The Council's somewhat ominous conclusion was (para. 2.136):

'We regret the decision not to establish a specialist pensions tribunal. However, we shall take a keen interest in the enhanced role of the Pensions Ombudsman.'

The PLR Committee's report led to a Pensions Bill and, almost inevitably, in Parliamentary debates the ombudsman's role came under renewed attack, opposition forces favouring the tribunal idea. The ministerial defence proved effective (although in certain initial respects he deceived the House):

***'Mr Arbuthnot:** The ombudsman is an experienced, highly-qualified and distinguished lawyer. He embodies the considerable expertise that we need in a difficult subject. He has great personal qualities, but he is also supported by an experienced team. The collective knowledge of the team reflects a vast array of expertise in different aspects of pension law. The ombudsman and his team may obtain advice from anyone who can help. He can refer any question of law to the High Court.*

The ombudsman offers a specialist service for resolving disputes in pension cases. He has the same powers as the courts to require information and to examine witnesses. During the short time that the office has existed, the ombudsman has proved to be a success. Not only the government, but the industry and those who have approached the ombudsman to resolve a dispute hold that view.' (Parliamentary Debates Official Report, Pensions Bill [Lords] – 20 June 1995).

In the result the ombudsman's role was not only triumphantly confirmed but significantly extended.

Interestingly, in its last (literally) report in 1997, the Occupational Pensions Board included this passage:

*'**Dispute resolution***

The attention of the Committee was drawn to what the Board had recommended on this subject in its 1989 Report. At that time the Board had concluded that a pensions tribunal would be the best means for dealing with disputes between scheme participants, employers, trustees and members. The Government had taken a different stance and in subsequent legislation had made provision for the appointment of a Pensions Ombudsman to take on this task. The Board, whilst recognising the good and influential work done by the Pensions Ombudsman, considered that his role was too narrow and continued to believe that there was a strong case for establishing a pensions tribunal system. In the Board's view, such a body might provide an effective method for resolving conflicts which fell outside the existing authority of the Pensions Ombudsman, for example, in the case of group conflicts or where there were disputes between trustees.'

CRITERIA

'The term 'Ombudsman' should only be used if four key criteria are met. Those criteria are independence of the Ombudsman from those whom the Ombudsman has the power to investigate; effectiveness; fairness and public accountability.' (British and Irish Ombudsman Association, Rules and Criteria, May 1997)

Comparisons

Semantically speaking, ombudsmen schemes and tribunal systems may be difficult to distinguish, especially since an 'ombudsman' might involve a committee of three or more persons, whilst many tribunals in fact consist of one person. But to weigh the merits, a traditional – not to say simplistic – start must be made. Accordingly, the contest is between three-member tribunals conducting hearings, more or less adversarially, and deciding on the basis of the parties' oral representations and evidence, against a one-person ombudsman heading a team of investigators considering more or less inquisitorially the parties' written representations and evidence and deciding in the light of all relevant and discoverable information. On this basis, certain points of substance may be submitted.

(1) The fact that an ombudsman scheme depends on the judgment of one person may be perceived as dangerous: some ombudsmen may not possess the wisdom of Solomon or even the patience of Job (while the wrath of Jehovah seems easier to achieve). With tribunals, not only are three heads better than one, but the wing members may import personal expertise and/or indirectly be representative of the parties, e.g. employers (typically a magistrate) or employees (typically a trades unionist). Against this however should be noted a growing tendency to dispense with lay members and to enable cases to be dealt with by a single tribunal member (see Council on Tribunals, *Annual Report 1998/99*, p. 2, expressing concern).

(2) An ombudsman will employ proactive professional assistants, qualified to research the facts and law, question

the parties and witnesses, discover documents, advise on detail and issues and draft submissions and provisional decisions. Tribunals have civil service clerks.

(3) An ombudsman's inquisitorial role extends beyond investigating the facts by questioning the parties to instructing independent experts and consultants such as doctors, surveyors or actuaries. Whilst a tribunal chairman and members may put questions at hearings going beyond what the parties submit, and call for further information or other documents, this is not properly inquisitorial. Indeed, a leading authority has pronounced:

'It is fundamental that the procedure before a tribunal, like that in a court of law, should be adversary (sic) and not inquisitorial. The tribunal should have both sides of the case presented to it and should judge between them, without itself having to conduct an inquiry of its own motion, enter into the controversy, and call for evidence for or against either party. If it allows itself to become involved in the investigation and argument, parties will quickly lose confidence in its impartiality, however fair minded it may be.' (Wade & Forsyth *Administrative Law,* 7th ed. at p. 931).

What this says about confidence in ombudsmen I hate to think, and at least one tribunal is instructed by statute to investigate (see *Financial Services Act* 1986, s. 98; also *Pension Schemes Act* 1993, s. 146(2)).

(4) Ombudsmen offer advisory services and attempt conciliation and mediation before finally resolving complaints and disputes by a determination. Tribunals do not.

(5) Ombudsmen comparatively rarely hold oral hearings, deciding instead 'off the papers'. One justification may be that otherwise 'the level playing field' between complainant and authorities/industry could become unbalanced by heavy legal representation. Tribunals almost always hold oral hearings, which may be seen as dauntingly court-like (e.g. Employment or Leasehold Valuation Tribunals). However, although submissions as to law or the implications of undisputed facts may be satisfactorily considered after exchange of written statements, disputed facts involving conflicting evidence may be impossible to resolve satisfactorily without oral testimony and cross-examination. Indeed tribunals may already be under a legal duty to give oral hearings (ibid., at p. 933) as also may be some ombudsmen by virtue of art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950): 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... '. Enshrined now in the *Human Rights Act* 1998, presumably this article will prove to be more prayed-in-aid by *non*-humans, such as *plc* employers and insurers (italics supplied).

(6) The ombudsman, both personally and through his staff, not only controls and directs proceedings from the outset and throughout, but also participates by virtue of his investigatory/inquisitorial role. Tribunals of three tend to be appointed ad hoc from a panel of members for already listed hearings, receiving the papers only shortly in advance. Opportunities for pre-trial review or other preparatory intervention are limited for a tribunal but may be undertaken, purportedly on its behalf, where there is a presidential system (supported in other respects by the Council on Tribunals: Report 1997 Cm 3744).

(7) One ombudsman with an efficient memory or cross-referencing system can ensure appropriate consistency in decision making. Various tribunals with different members may fail, inadvertently or deliberately, to achieve such consistency (hence the Council on Tribunals' support for presidential systems, see above).

(8) Ombudsmen embrace accountability to the public as well as to their own authorities or industry, especially through explanatory annual reports, but also by themselves reporting significant decisions (even if digested and anonymised). Tribunal hearings are open to the public in principle and certain of their decisions may be selected and reported by specialist journals; otherwise only a few produce annual reports.

(9) Ombudsmen enjoy a relationship with their authorities/industry which enables them to offer advice and exhortation as to standards and practice and to enter into a dialogue from time to time as to decision making; they may also feel it proper to 'blow the whistle' to regulators, etc. Tribunals do not.

(10) Ombudsmen dispense 'palm tree' justice. Or, as the British and Irish Ombudsman Association puts it:

'The Ombudsman should:

Be required to make reasoned decisions in accordance with what is fair in all the circumstances, having regard to principles of law, to good practice and to any inequitable conduct or maladministration.' (para. 3(e), sch. 1, Criteria).

This has been recognised judicially, apparently with approval:

' ... the public do not have to use the Ombudsman. They can instead sue insurers in the courts. If they go before the Ombudsman, because he is not limited to purely legal considerations, in many cases their prospects of success will be better. But they have the choice of forum. Likewise, for insurers, although there are the advantages of Bureau membership to which I have referred, membership is not obligatory. Those who choose to be members run a greater risk of an adverse decision if complaint is made to the Ombudsman than if the case were decided in the courts by reference to strictly legal principles. This follows from the Ombudsman's terms of reference which expressly contemplate decisions more favourable to complainants than the law would provide.' (per Rose LJ in *R v Insurance Ombudsman ex p. Aegon Life Assurance Limited* [1995] LRLR 101 at pp. 105–6)

Nevertheless, this satisfactory situation may still not be beyond challenge. In relation to substantially similar arbitration agreements, Scrutton LJ famously asserted:

'In my view to allow English citizens to agree to exclude this safeguard from the administration of the law [i.e. appeal to the courts on questions of law] is contrary to public policy. There must be no Alsatia in England where the King's writ does not run. It seems quite clear that no British Court would recognise or enforce an agreement of British citizens not to raise a defence of illegality by British law.' (*Czarnikow v Roth, Schmidt and Co* [1922] 2 KB 478 at p. 488)

Now statute has rescued arbitrators from the courts by providing that the parties to an arbitration can agree that their disputes are to be decided in accordance with 'equity clauses' (s. 46(1)(b) of the *Arbitration Act* 1996); this should also exclude any right of appeal to the courts on any question of law (see s. 69(1) of the 1996 Act). In stark contrast to arbitrators, if not to ombudsmen, tribunals must always apply legal rules and be subject to appeal on points of law (see s. 11 of the *Tribunals and Enquiries Act* 1992; as to judicial review of a tribunal which had erred in law, see e.g. *Anisminic Ltd v Foreign Compensation Commission No 2* [1969] 2 AC 147, also *R v Manchester Supplementary Benefits Appeal Tribunal ex p. Riley* [1979] 1 WLR 426).

(11) Ombudsmen's decisions may not be legally binding on either side, usually because they are merely unenforceable recommendations (as with the Parliamentary and Local Authority Ombudsmen) but also because there may be the escape route of a 'publicity option' (as with the Banking, Building Society and Legal Services Ombudsmen). More satisfactory for consumer complainants, an ombudsman's decisions may be made binding only on the respondent, i.e. the industry side (as with the insurance and personal investment authority ombudsmen). Compliance in practice and enforceability at law are different questions. Tribunals' decisions will bind all the parties, subject to any appeal.

(12) Ombudsmen's decisions generally are not subject to appeal to the courts although if public sector, *not* private contractual, they may be susceptible to judicial review (cf. *R v Insurance Ombudsman ex parte Aegon Life Assurance Limited* above). Tribunals' decisions will be subject to appeal on point of law and/or judicially reviewable.

Conclusions

These dozen points of comparison, albeit generalised and far from exhaustive, may suffice to demonstrate distinctions of substance between ombudsman schemes and tribunal systems which are not justifiable in principle, given their similar *raisons d'être*. So far as the contest is concerned, in my judgment it is a comfortable win on points for ombudsmen! And this seems to be a judgment that is extra-judicially supported.

Lord Woolf's *Report on Access to Justice* (1996) included three nearly relevant recommendations:

'296. *The retail sector should be encouraged to develop private ombudsman schemes to cover consumer complaints similar to those which now exist in relation to service industries: the government should facilitate this. (IRR 63)*

297. *The relationship between ombudsmen and the courts should be broadened, enabling issues to be referred by the ombudsman to the courts and the courts to the ombudsman with the consent of those involved. (IRR 64)*

298. *The discretion of the public ombudsmen to investigate issues involving maladministration which could be raised before the courts should be extended. (IRR 65)*

The report makes no recommendations whatsoever about tribunals.

Quite consistently, his lordship's foreword to the 'A–Z of Ombudsmen' (NCC 1997) began: 'In both public and private sectors, 'ombudsmania' should be rampant.' Obviously no 'ombosceptic' he concluded that foreword by saying:

'Clearly, there is great scope to expand both the numbers and role of Ombudsmen. But growth must go hand in hand with quality controls. That is why I commend the efforts of the British and Irish Ombudsman Association to set criteria for ombudsman schemes, and to identify and share good practice.'

This echoes the words of the Franks Committee, 40 years ago:

'128. Perhaps the most striking feature of tribunals is their variety, not only of function but also of procedure and constitution. It is no doubt right that bodies established to adjudicate on particular classes of case should be specially designed to fulfil their particular functions and should therefore vary widely in character. But the wide variations in procedure and constitution which now exist are much more the result of ad hoc decisions, political circumstance and historical accident than of the application of general and consistent principles. We think that there should be a standing body, the advice of which would be sought whenever it was proposed to establish a new type of tribunal and which would also keep under review the constitution and procedure of existing tribunals.'

Thus, the Council on Tribunals was created. One conclusion, perhaps not altogether inescapable, is that the Council and the Association should get their acts together: ombudsman schemes and tribunal systems should not be separated by semantics but co-ordinated in substance.

But is the Pensions Ombudsman an ombudsman or a wolf in sheep's clothing? The recent *Review of Civil Justice and Legal Aid* (a report to the Lord Chancellor by Sir Peter Middleton GCB, September 1997) included (at annex C.8):

'A number of private-sector ombudsmen, mostly covering the financial service industries, have also been established. Some of them are backed by statute. The main difference is that the decisions of private-sector ombudsmen are binding on the institutions that have joined the scheme. These schemes are therefore analogous to a kind of one-sided arbitration. Uniquely, the decisions of the Pensions Ombudsman, which is a statutory scheme, are binding on both parties. It is therefore ***tantamount to a court*** *..., and has been criticised by the Council on Tribunals for being a one-man tribunal.'* (emphasis added)

Interestingly, if not ironically, the present chairman of the Council on Tribunals is none other than Lord Newton of Braintree, 'aka' Tony Newton, Minister primarily responsible for the creation of a Pensions Ombudsman in preference to a tribunal.

This article will be continued in the next issue of Amicus Curiae (May 2000).

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