

Complaint Mismanagement by Ombudsmen – How It's Done and How to Minimise It

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Note from author: I have deliberately avoided the mention of specific ombudsmen and services. For the same reason, I have kept the examples general. However, everything that I have written is totally correct and alarmingly widespread in the UK. It is all based on dealings of various kinds with ombudsmen and on a thorough investigation of the media, and particularly the internet in its many facets.

Widespread dissatisfaction

There are all manner of ombudsmen in the UK, dealing with issues ranging from financial services and pensions to housing and health services. Although their rationale for existence is that of providing justice, public dissatisfaction is ever present. In some cases, this amounts to little more than being unhappy with a decision. But in extreme cases, there is evidence that ombudsmen are blatantly biased and work backwards from preconceived decisions.

How is this possible and what are the methods used by ombudsmen who, for whatever reason, are unfair and unreasonable? The aim of this article is to outline the nature of such administrative processes, identify their intrinsic weaknesses and how they are open to abuse. It is not the author's intention to point fingers at any particular ombudsman or service, but to demonstrate how complaints are mismanaged, often in a fairly extreme manner. The article will deal primarily with *how*, rather than with *who*.

As for why, that seems simple enough. Where there are large amounts of money or major vested interests involved, ombudsmen come under pressure to make decisions one way rather than the other, irrespective of the merits of the case. Whether this is the result of looking after one's friends or whether there is anything more sinister involved, is beyond the scope of this article. The essence of the problem is that, in reality, ombudsmen are in a position of complete power over the complainant.

Methods used by ombudsmen and their services – breaching the administrative laws

Ombudsmen are legally and morally obliged to abide by the administrative laws. These are basically common-sense rules of fair play in situations of administration and justice. They specify that administrators may not ignore important issues and evidence and must listen *fairly* to both sides. There is also a duty to investigate sufficiently and to ask the right questions. That is, ombudsmen are not allowed to deliberately avoid finding out the truth, what really happened and who is really liable and responsible for the matters on hand.

An overemphasis on relatively unimportant issues is also prohibited. Not surprisingly, administrative law prohibits "believing" mere statements or clear falsehoods from one

side, while ignoring hard evidence, facts or laws which would work in favour of the other side. Yet, such behaviour is by no means uncommon.

There are various other administrative laws in the same vein and biased ombudsmen inevitably breach them to a greater or lesser extent. Indeed, these laws are so well formulated and to the point, that if adhered to in spirit, decisions *will* be fair. This means that the deliberate abuse of these laws can be used as a methodology for rejecting valid complaints. In the worst cases of maladministration, one does get the impression that there are multiple and quite deliberate breaches.

For instance, any ombudsman will know that it is possible to reformulate and whittle down the original complaint into a couple of *straw men* that can then be shot down. In particular, the original complaint can be exaggerated, thus facilitating the defence that it was unreasonable to expect some person or organisation to do something. In reality, the complainant may have requested something far less demanding and in fact quite reasonable.

Even worse, there is literally *nothing* that cannot be ignored. The ability of an ombudsman in practice (not in law!) to pick and choose what issues to mention at all in a case, enables him to refuse even to acknowledge the existence of evidence, laws and facts that work in the “wrong” direction.

Furthermore, just because something is mentioned, does not mean that it is considered fairly and reasonably. In other words, in order for a decision to be correct, all elements of the case need not only to be taken into account, but done so appropriately. An ombudsman can, in effect, justify anything and everything on the basis that “it is reasonable to assume...”, even if it is entirely *unreasonable* in reality. This puts those on the receiving side of bias in a hopeless position.

In a nutshell, through the selection and presentation of material, it is possible to spin a case right through the gamut of possible decisions, from fully upholding a complaint to a complete rejection. This can be done irrespective of the merits of the case. These merits can be dealt with easily enough.

Pushing on a string

In such situations, complainants are entirely at the mercy of the ombudsman. There is simply no way that they can induce an ombudsman to be fair and reasonable if he is minded to be just the opposite. An ombudsman can write or say *almost* anything. In effect and in practice, there is only one rule – the document must have a certain specious credibility. The decision and its justification need to relate to the case and make some sort of sense to an outside party who does not know the full circumstances or legal framework and who is unable or unwilling to investigate. This means that, to all intents and purposes, ombudsmen have total power.

If the complainant vehemently protests that the basis for a provisional decision is totally flawed, which may mean legally, factually and logically, the ombudsman can simply find other arguments with which to finish off the job in a final decision. If a hearing is allowed, which is all too rare anyway, the decision is not made during the hearing, so that the seat of power remains fully with the ombudsman.

In such instances, complainants will also find that there is no meaningful communication with the ombudsmen. If correspondence is answered at all, this will be limited and evasive. The final decision will then be a *fait accompli* with no right of redress.

Judicial reviews - the only way to challenge ombudsmen – in theory

In principle, victims of unfair ombudsmen can take them to the administrative court. However, this means a David vs Goliath scenario of staggering dimensions. And even if the complainant wins, the court will only specify what was done wrong in the first place, but *not* state what the right decision should have been. Consequently, the ombudsman can make the same decision again, by carefully bypassing the issues raised by the court and inventing new arguments.

Furthermore, for private people, the cost of a review is almost inevitably prohibitive. Also, dealing with the barristers and lawyers that the ombudsmen services can easily afford, results in a level of stress and risk that few individuals will find worth attempting to cope with. Finally, the courts seem reluctant to award against the ombudsmen and their services.

Ineffectual internal controls

The checks that are generally built into the system, simply do not provide meaningful safeguards. Quality control officers at ombudsmen services tend only to deal properly with purely bureaucratic issues, such as complying with deadlines. Allegations of unfairness are fobbed off with standard defences.

Complaints that an issue has been ignored will be countered with the dubious logic that there is no obligation to consider everything. Of course, this is true in a sense, but not when something has been ignored with the express intention of obtaining the desired decision.

Even worse is the response when the complainant states that something is a fact. This will be countered with the message that “the ombudsman may not consider this to be a fact”. In effect, this means that facts can be dismissed as opinions and vice versa, depending on the direction in which the case is to be spun.

Likewise, if the ombudsman ignores, misuses or misinterprets a law, the response will be that “the interpretation and implementation of the law is a matter for the ombudsman to decide”.

In summary, evidence, facts, laws and logic can all be gaily abandoned. The only thing that is quite certain in this scenario is that the so-called quality controllers will not concede that there is ever any unfairness. In some instances, they will not even concede or rectify errors of fact or law.

What is the situation so bad?

The issues dealt with by the ombudsmen are serious ones, involving either considerable sums of money or matters of great concern to both parties. In such circumstances, those with power will inevitably bring pressure to bear on the ombudsmen to reject certain individual complaints or generally to keep the numbers down.

As explained above, the system is fundamentally flawed, in that there are no viable mechanisms to ensure that decisions are fair and reasonable. On the contrary, the administrative laws, which are the key to justice or injustice, can be breached with almost total impunity.

Another intrinsic problem would seem to be that ombudsmen are recruited on the basis of their experience in the industry in question. While this is logical on one level, it integrates an unhealthy degree of networking and old school ties into the process from the start. Such ombudsmen are tempted and probably likely to look after old friends. And they can do so at no cost to themselves.

Also, in some instances, they gain their skills on the wrong side of a regulatory environment. That is, their jobs may have entailed rejecting valid complaints in the first place. Consequently, more of the same can be expected in their new capacity.

What can be done?

This is the tough one. The powers that be seem to lack the will to take on this problem, despite its gravity and pervasiveness. Indeed, the prevailing situation may well be precisely what they want. After all, as things stand, they can mould both the complaints and the decisions into exactly the desired shape and form.

A number of internet sites are devoted to exposing the apparently rampant maladministration and misuse of public office, but the ombudsmen evidently carry on regardless. The media, for the most part, are extremely cautious and reticent in their coverage, so that this too, is unlikely to yield the necessary sea change. Somehow, a major scandal needs to break, of a magnitude that would compel those running the “system”, to change it. Failing such coverage, the prevailing situation will surely continue for the foreseeable future.

If, however, it is possible to change the system, some combination of the following could be implemented and would make all the difference:

- Bring in genuinely objective external controllers with no vested interests whatsoever. These would have to be people from right outside the system, and appointed from outside as well.
- Allow complainants to request a hearing at which the final decision is made. If the decision is made subsequently behind closed doors, we are back to square one.
- Ensure that decisions are genuinely contestable without resort to prohibitively costly and complex civil litigation.

Conclusions

Given the lack of any meaningful controls or even incentives to be fair, it is inevitable that the path of justice will not run smooth, to say the least. Indeed, the balance of power lies squarely in the hands of the large organisations, and not with the private citizens who call on the ombudsmen for help. If one considers all the issues discussed in this article, it is not surprising that many ombudsmen have neither the desire nor any compelling motivation keep to the rules. It is evident that major changes in the system are necessary in order to guide the ombudsmen firmly in the direction of being fair and reasonable, as is their legal obligation. Whether or not there is the political will to bring this about, remains to be seen.

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