



ST JOHNS
BUILDINGS
BARRISTERS CHAMBERS

OMBUDSMAN'S JURISDICTION IN SEND TRIBUNAL COMPLAINTS:
R (MILBURN) v LOCAL GOVERNMENT AND SOCIAL CARE
OMBUDSMAN IN THE COURT OF APPEAL

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INTRODUCTION

In *R (Milburn) v Local Government and Social Care Ombudsman* [2023] EWCA Civ 207, the Court of Appeal upheld the decision of HHJ Sephton KC (sitting as a Deputy Judge of the High Court) that the Claimant's complaints regarding the local authority's conduct in an appeal before the First-Tier Tribunal (Special Educational Needs and Disability) fell within the remit of the Tribunal, and therefore fell outside of the Ombudsman's jurisdiction due to s.26(6) of the Local Government Act 1974.

There had been limited guidance on the interpretation of s.26(6)(a) of the 1974 Act as regards proceedings before the SENDIST, with the Court of Appeal having previously considered that issue in a different context in the matter of *R (ER) v Commissioner for Local Government Administration* [2014] EWCA Civ 1407 nearly 10 years ago. The Court of Appeal in *Milburn* provided further guidance, found that the scope of s.26(6) was wider than that contended for by the Claimant, and the appeal accordingly failed.

BACKGROUND

The Claimant was a young man with special educational needs. He appealed to the SENDIST in relation to the content of his Education Health and Care Plan, and the Tribunal broadly agreed that the provision specified in the Claimant's EHCP should be that proposed by his mother.

The Claimant subsequently sought to complain to the Ombudsman in relation to a range of matters related to his appeal before the SENDIST. The Ombudsman considered that two elements of the Claimant's complaint, namely the local authority's failure to seek the Claimant's views for the purposes of Section A of his EHCP and various aspects of the local authority's conduct during the appeal, were excluded from its jurisdiction by reason of s.26(6)(a) of the 1974 Act. That is because that section excludes matters in respect of which the Claimant had a "*right of appeal, reference or review to or before a Tribunal*".

The Claimant made an application for judicial review of that decision. The application was heard by HHJ Sephton KC, sitting as a Deputy High Court Judge, and he agreed with the Ombudsman on those issues.

The Claimant subsequently sought and was granted permission to appeal to the Court of Appeal. It was at that stage that Oldham MBC became involved as an Interested Party.

THE COURT OF APPEAL'S DECISION

The Court of Appeal (Moynan, Stuart-Smith and Laing LJ) upheld HHJ Sephton KC's decision. The Court considered the meaning and scope of s.26(6)(a) in some detail, and made reference to several individual phrases that had been used in previous cases to determine whether or not there was a sufficient connection between a complaint before the Ombudsman and matters that could be dealt with by the Tribunal. These included whether the matters were "*inextricably linked*", which was the phrase used in *ER* and by the Ombudsman, and whether the "*substance*" of the matters was the same, which was the wording used by HHJ Sephton KC.

The Court was guided by the observation of Lord Denning MR in *R v Local Commissioner for Administration for the North and East of England ex parte Bradford Metropolitan City Council* [1979] QB 287 that it was Parliament's intention that commissioners should not conduct an investigation which might trespass in any way on the jurisdiction of the courts or tribunals. It found that there was no error by the Ombudsman in referring to "*inextricable linkage*" between the appeal and the complaint, and considered that no individual phrase referred to during the course of the case should become a "*pseudo statutory touchstone*", but that they help to convey "*the closeness of the connection between the issues that were raised in the Tribunal [...] and the issues that it is now said should be considered by the Ombudsman*". The Court further found that the wording of s.26(6)(a) is not limited to originating processes or applications, but is "*wide enough to cover an issue of which the Tribunal has or may become seised in the course of its proceedings, however the issues may arise or be brought before the Tribunal for determination*".

Having made those findings in relation to the interpretation of s.26(6)(a), the Court went on to find the process of consulting with a child or young person in order to obtain their views, whilst not a matter that could form the basis of an originating application, was integral to any appeal to the Tribunal under s.51(2) of the Children and Families Act 2014, and a complaint to the Ombudsman regarding a failure to obtain those views therefore well within the exclusion at s.26(6) of the 1974 Act. As a matter in relation to which the Tribunal may become seised during proceedings, the complaints about the Council's conduct were also excluded. The appeal was therefore dismissed.

It is not unusual for children, young people and their families to seek to make a range of complaints arising out of the way in which local authorities handle issues relating to special educational needs. In closely examining the wording of s.26(6)(a) of the 1974 Act, the Court has provided helpful guidance as to when prospective complaints to the Ombudsman will be excluded by virtue of the subject matter of the complaint being closely connected to matters that can or may be considered by the Tribunal.

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