

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Complainant : Mr M Wallis
Scheme : Firemen's Pension Scheme ("the Scheme")
Manager : Suffolk County Council ("the Scheme Manager")

THE COMPLAINT (dated 18 February 2002)

1 Mr Wallis complains the Scheme Manager's assessment of his degree of disability was incorrect resulting in a lesser pension being paid to him. He states that he has lost a lump sum of £4,880 and 64 months of pension of in the sum of £31,232 (representing 64 months), He also complains that the Scheme Manager failed to observe the time constraints of the internal dispute resolution procedure and that in consequence there was excessive delay in dealing with his complaint.

THE SCHEME

2 The Scheme is entitled the Firemen's Pension Scheme 1992. It is contained in Schedule 2 to the Firemen's Pension Scheme Order 1992 (No 129). The relevant rules for the purposes of this complaint are:

Qualifying injury

A9.—(1) Except in rule J4, references in this Scheme to a qualifying injury are references to an injury received by a person without his own default in the execution of his duties as a regular fire-fighter.

(2) In rule J4, unless the context otherwise requires, references to a qualifying injury are references to an injury received by a person without his own default in the exercise of his duties as a part-time member of a brigade.

(3) An injury shall be treated as having been received by a person without his default unless the injury is wholly or mainly due to his own serious and culpable negligence or misconduct.

Disablement

A10.—(1) References in this Scheme to a person's being permanently disabled are references to his being disabled at the

time when the question arises for decision and to his disablement being at that time likely to be permanent.

(2) Subject to paragraph (3), disablement means incapacity, occasioned by infirmity of mind or body, for the performance of duty, except that in relation to a child it means incapacity, so occasioned, to earn a living.

(3) Where it is necessary to determine the degree of a person's disablement, it shall be determined by reference to the degree to which his earning capacity has been affected as a result of a qualifying injury; if, as a result of such an injury, he is receiving in-patient treatment at a hospital he shall be treated as being totally disabled.

(4) Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the fire authority.

Death or infirmity resulting from injury

A11.—(1) A person shall be taken to have died from the effects of an injury if it appears that had he not suffered that injury he would not have died when he did.

(2) In the case of a person who has died or become permanently disabled, any infirmity of mind or body shall be taken to have been occasioned by an injury if the injury caused or substantially contributed to the infirmity or, as the case may be, the person's death.

Determination by Fire Authority

H1. -(1) The question whether a person is entitled to any award if so what awards shall be determined in the first instance by the fire authority

(2) Subject to paragraph 3, before deciding, for the purpose of determining that question or any other question arising under this Scheme-

- (a) whether a person has been disabled,
- (b) whether any disablement is likely to be permanent
- (c) whether any disablement has been occasioned by a qualifying injury,
- (d) the degree to which a person is disabled,
- (e) whether a person has become capable of performing the duties of a regular firefighter, or

(f) any other issue wholly or partly of a medical nature, the fire authority shall obtain and consider the written opinion of at least one qualified medical practitioner selected by them.

(3) If by reason of a person's refusal, or wilful or negligent failure to submit to medical examination by the practitioner selected by them the authority are unable to obtain the opinion mentioned in paragraph (2), they may

(a) on such other medical evidence as they think fit, or

(b) without medical evidence,

give such decision on the issue as they may in their discretion choose to give."

Appeal against the decision of the fire authority lies under Rule H2 to an independent person nominated by the Secretary of State as medical referee.

Rule H3 provides

"(1) Where a person claims that he is entitled to an award or to any payment in respect of an award and the fire authority-

(a) do not admit the claim at all, or

(b) do not admit the claim to its full extent,

the authority shall reconsider the case if he applies to them to do so."

An appeal against that decision lies to the Crown Court.

- 3 The Office of the Deputy Prime Minister has produced an Explanatory Memorandum on the Scheme and the remarks on Rule 10 are attached to this determination as a Schedule.

MATERIAL FACTS

- 4 Mr Wallis was a fireman employed by Suffolk County Council. He retired on medical grounds in June 1993. He had suffered a hearing loss. Initially the Occupational Health Consultant, Dr Astbury, had decided on 2 March 1993, following an examination of Mr Wallis in February, that the cause was not occupational noise exposure and not a qualifying injury. Mr Wallis appealed to the Secretary of State and as a result of that appeal he was awarded an injury pension and a gratuity for a "qualifying injury" and the matter was referred back to Dr Astbury to determine the degree of disablement under Rule A10. Rule A10(3) required him to assess this factor by reference to earning capacity. (The County Council has said that it understands the hearing loss was in the left ear only.)

- 5 The Certificate of Permanent Disablement (dated 10 October 1993) stated that Mr Wallis's disability was "25% or less (slight)". This is the category, (defined at paragraph 6 in the Schedule to this report), for those retiring on ill-health grounds "whose employment prospects are such that in an outside employment you could be expected to earn as much as, or more than, a fire-fighter..." The County Council has said that "no calculations appear on Mr Wallis's fire service file, or on the occupational health file."
- 6 When Mr Wallis was informed on 3 December of the result of his appeal (paragraph 4 above) he was alerted to his further rights of appeal. He responded on 13 December and asked detailed questions about the payment of arrears, but did not appeal. Mr Wallis has said that it was only after talking to retired colleagues that he realised that in his case the correct procedures had not been followed and that he had grounds for appeal. Mr Wallis maintains that he was "placed in the wrong band" and that this was because he was not offered an opportunity to discuss with Dr Astbury the kind of employment he could be expected to undertake in an outside job. The County Council has said that there is no evidence that correct procedures were not followed
- 7 On 12 August 1997 solicitors acting for Mr Wallis informed the County Council that proceedings involving the County Council and Mr Wallis had been settled out of court. The County Council's insurers had paid Mr Wallis the sum of £60,000 by way of damages.
- 8 Mr Wallis has commented that the review of his case should have taken place five years after the October 1993 assessment. On 25 January 2000 a report from the County Council's Careers Consultancy (prepared in advance of Mr Wallis's medical examination) stated that, given his disability, £10,000 - £12,000 per annum was the most he could expect to earn.
- 9 Mr Wallis was examined in February by a Dr Deacon and that examination was preceded by an audiometric assessment at Ipswich Hospital. In addition to the results

of his examination, Dr Deacon had the formal request from the Scheme Manager (dated 13 December 1999), the report of the Consultant ENT Surgeon, Mr Lord, dated 23 August 1993, and the report from Mr Hodges of the Careers Consultancy. Dr Deacon assessed degree of disability as 60% and, as a consequence, Mr Wallis's injury pension was increased and backdated to 1 October 1998. A cheque for £10,221.43 was sent to him on 13 February. Mr Wallis believes that the degree of disablement was derived from a direct comparison between the earnings he would have had as a fireman and his potential earnings in an outside job.

10 On 7 February Dr Deacon wrote to the County Council:

“Comparison of audiograms indicates that the noise induced hearing element of his impairment is largely unchanged from 1993... Although there has been some change in Mr Wallis's hearing impairment, the noise induced element for which he had to take retirement from Operational Fire Fighting duties is essentially unchanged and it may be anticipated that this will change only according to the expected deterioration with age. I therefore advise that there is no indication for undertaking a further assessment as the degree of disability can be expected to remain as presently calculated”.

11 On 5 June Mr Wallis wrote to the Scheme Manager stating that the result of Dr Deacon's examination showed that he should have a disability pension awarded on the basis of 60% disability instead of 25% and that it should be backdated to 1993. The reply detailed the history of the case and implied that there was no basis for backdating the February 2000 award to 1993 as at all times Mr Wallis had been notified of his rights of appeal but had not exercised them. The author referred Mr Wallis to the internal dispute resolution procedure (IDRP) and stated that the letter constituted a Stage 1 Response.

12 On 6 December 2000 Mr Wallis replied, invoking stage 2 of the IDRP and on 15 February the County Council told him that a decision would take from two to eight weeks. Mr Wallis chased progress on 24 April and 22 May. He telephoned on 19 June and was told that there were difficulties in assembling a panel. He forwarded information to the County Council in a letter of that date. The Scheme Manager acknowledged this in a letter of 9 July. Mr Wallis had heard nothing further when he

wrote again on 24 September complaining of the delay. He received a non-committal response on 5 October. Having heard nothing further Mr Wallis wrote to the Pensions Advisory Service (OPAS) on 14 February. He then complained to me and I accepted his complaint in default of a Stage 2 decision under the Scheme Manager's IDRPs.

- 13 I asked the County Council to comment on the complaint. In dealing with the difference between the 1993 and the 2000 assessments of disablement it said that in 1993 Mr Wallis's skills were more valuable than in 2000 when he had been out of the job market for seven years. The writer apologised for the delay in dealing with his complaint under the IDRPs.
- 14 For three years from the date of Mr Wallis's retirement the Scheme Manager overpaid Mr Wallis's pension. He now has to repay the overpayment of £6,457 in monthly instalments of £54. The County Council has said that the overpayment arose from an administrative error which led to the entering of an incorrect figure on the payroll system.
- 15 In relation to Mr Wallis's failure to appeal against the 1993 assessment the County Council has commented as follows:

“Under Rule H2(1) Mr Wallis could have requested a copy of the medical practitioner opinion. He could have taken advice on the opinion either from his trade union or his solicitor on the courses open to him. The rules are clear and well understood by Mr Wallis and his trade union. Indeed he had used the appeal procedure in respect of the original medical opinion that the injury was not a qualifying injury under the Scheme. In my submission there is a statutory procedure which allows for appeal within defined time limits. It would only be in cases where a scheme administrator deliberately misled a person as to their rights under the Scheme, that a failure to use the statutory appeal rights should be set aside under another statutory regime as that being now applied.

In any event there is no evidence either way that the decision in 1993 was manifestly incorrect or that an appeal would have been successful. Dr Deacon's opinion that the 'noise induced hearing element of his impairment is largely unchanged from 1993' only relates to the 'noise-induced element' which begs the question as

to whether his overall hearing had deteriorated given that only the left ear was affected by the qualifying injury. Dr Deacon makes no comment whatsoever on Mr Wallis's earning capacity in 1993, presumably because he was in no position to do so and Mr Wallis does not appear to have produced any evidence of his earning capacity in 1993."

- 16 Mr Wallis has commented that the lump sum paid to him on retirement was based upon a disability level of 25%. "A 60% disability increases this figure to 37.5% of average pensionable pay. He has also said that the reassessment of his disability should be backdated to June 1993 when he retired.

CONCLUSIONS

- 17 Dr Deacon opined that "the noise-induced hearing element of his impairment is largely unchanged from 1993". That raises the question of why the estimate of the disablement was 60% in 2000 and only 25% in 1993. The County Council has suggested that this is explicable in terms of the fact that Mr Wallis's employment skills were of greater value in 1993 than in 2000 after a seven-year absence from work. That may be so. However, I have found no evidence to indicate how the 25% disablement figure was arrived at in 1993. Certainly I have seen no input from any body such as the Careers Consultancy that could have taken account of Mr Wallis's employment prospects. There are no figures on file for the 1993 assessment. Whatever the case I have seen no evidence that in terms of his employment prospects Mr Wallis was only 25% disabled in 1993 rather than 60% as is the case now.
- 18 I have noted that following Dr Deacon's examination of Mr Wallis in 2000, the increased injury pension took effect from October 1 1998 ie when the examination should have taken place, five years after the original assessment. That was correct so far as it went. The argument for saying that Mr Wallis's disability was greater in 1998 or 2000 than in 1993 is unsupported by evidence.
- 19 The Scheme Manager has said that Mr Wallis was informed at every stage of his right of appeal and chose not to exercise it. That is a fact, but Mr Wallis had no basis for appealing until he learned the result of the reassessment in 2000.

- 20 Mr Wallis considers that the award should be backdated to the end of June when he retired. Had the October 1993 certificate of disablement been issued in March 1993, when it should have been, I have no doubt that Mr Wallis would have retired then and not later. In fact he did not retire until the end of June 1993 and I consider therefore that the award should be backdated to 1 July 1993.
- 21 Mr Wallis has also complained about the delay in dealing with his Stage 2 IDRPs appeal. Deducting the two-month period in which the appeal should have been determined, the delay was thirteen months. The delay was brought to an end not by a determination but by the complaint to me. I see no mitigating factor in this maladministration and I award Mr Wallis the sum of £250 for the time and trouble it has occasioned him.

DIRECTION

- 22 I direct that within 28 days of the date of this determination the Scheme Manager shall backdate Mr Wallis's injury pension to 1 July 1993, interest on the back payment to be calculated on a daily basis to the date of payment at the base rate for the time being quoted by the reference banks.
- 23 The Scheme Manager shall also within 28 days of the date of this determination pay Mr Wallis the sum of £250 (paragraph 18).

DAVID LAVERICK
Pensions Ombudsman

15 October 2003