

Ombudsman's Determination

Applicant	Mr Jamie Murdoch
Scheme	Firefighters' Compensation Scheme (the Scheme)
Respondent	Devon & Somerset Fire & Rescue Service (the Service)

Complaint Summary

Mr Murdoch complains that the Service has incorrectly refused him "sick pay" and an "ill-health pension" from the Scheme.

Summary of the Ombudsman's Determination and reasons

The complaint is not upheld against the Service. They have correctly concluded that Mr Murdoch's injury was not received in the exercise of his duties.

Detailed Determination

Jurisdiction

1. The issue of “sick pay”, raised by Mr Murdoch in this complaint - and previously considered by the Service under the Firefighters’ Pension Scheme’s (the **FPS**) internal dispute resolution procedure (**IDRP**) - is not something that I can consider. I understand that “sick pay” was paid by Mr Murdoch’s employer and that payment of it - and eligibility to receive it - did not have any connection with the Scheme or the FPS. The issues I can consider are restricted by the provisions in Part X of the Pension Schemes Act 1993. In accordance with those provisions, consideration of a complaint brought by an employee about their employer with no connection to an occupational or personal pension scheme does not fall within the scope of my jurisdiction. (This view has already been communicated by to Mr Murdoch via his representative.)

Relevant provisions governing the Scheme

2. The provisions governing the Scheme are contained in schedule I to The Firefighters’ Compensation Scheme (England) Order 2006 (the **Order**).
3. Injury awards, such as Mr Murdoch is claiming, are payable under the Scheme in accordance with the provisions of the Order. Part 2 of schedule 1 of the Order - entitled ‘Injury Awards and Duty-Related Compensation’ - sets out the circumstances where an injury award (which comprises a gratuity and an injury pension) is awarded under the Scheme. It says:

“This rule applies to a firefighter who has retired and is permanently disabled if the infirmity was occasioned by a qualifying injury.”
4. Part 1, rule 7 sets out the definition of “a qualifying injury” for the purposes of interpretation of the Order. It says:

“(1) Except in-

 - (a) rule 3 of Part 2 (compensation for death or permanent incapacity while on duty),
 - (b) rule 2 of Part 8 (special cases: award for or in relation to a volunteer firefighter), and
 - (c) paragraphs (2) and (3) of rule 1 of Part 10 (authorities responsible for payment of awards), and
 - (d) rule 3 of Part 10 (prevention of duplication),

references in this Scheme 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 regular or retained firefighter.”
5. Part 1, rule 7(5) says:

“For the purposes of this Scheme 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.”

6. Part 1, rule 8 sets the criteria for disablement that would qualify a firefighter for compensation.

- “(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) In determining whether a disablement is permanent, a fire and rescue authority shall have regard to whether the disablement will continue until the person's normal pension age.
- (3) Subject to paragraph (4), disablement means incapacity, occasioned by infirmity of mind or body, for the performance of duty...
- (4) 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.”

7. Part 1, rule 9(2) - entitled 'Death or infirmity resulting from qualifying injury' - says:

“...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...”

8. Part 6, rule 1 - entitled 'Determination of Questions and Appeals' - says:

- “(1) The question whether a person is entitled to any and if so what awards shall be determined in the first instance by the fire and rescue 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 any disablement has been occasioned by a qualifying injury,
- (b) the degree to which a person is disabled, or
- (c) any other issue wholly or partly of a medical nature,
- the authority shall obtain the written opinion of an independent qualified medical practitioner selected by them; and the opinion of the independent qualified medical practitioner shall be binding on the authority.”

Relevant guidance

9. In January 2007 the Service produced a document entitled 'A Guide to the Firefighters' Compensation Scheme 2006 for retained firefighters appointed before 6 April 2006' (the **Guide**).
10. Part 1 of the Guide deals with injury awards. The section entitled 'Determination of entitlement to award: The firefighter' says:

“It is the fire and rescue authority that make a decision as to entitlement to award, but they must first obtain a medical opinion to help them decide relevant medical issues.

...

The fire and rescue authority will first have to decide if an injury sustained by a firefighter falls within the definition of a “qualifying injury” for injury award purposes. Sometimes this can be decided without medical assistance. For example, if the firefighter is injured in a car accident whilst on holiday and not in the exercise of duty this would not be a qualifying injury. But most cases are not so clear-cut. The authority may need a medical opinion to help them with this question. The other questions which must be referred for a medical opinion to help establish entitlement to, and amount of, an injury award are –

- whether the firefighter has a permanent disablement (for the duties of his/her role)
- whether any disablement has been occasioned by a qualifying injury
- the degree to which a person is disabled (i.e. the degree to which earnings capacity has been affected by the qualifying injury)
- any other issue wholly or partly of a medical nature.

The person who provides the medical opinion must be an independent qualified medical practitioner (“IQMP”) selected by the authority...”

11. The National Joint Council for Local Authority Fire and Rescue Services’ ‘Scheme of Conditions of Service (Sixth Edition - 2004)’ (the **Grey Book**) says as follows in respect of sick leave:

“Sick leave

...

10. An employee on authorised sick leave shall be entitled to full pay for six months in any twelve-month period. Thereafter the fire and rescue authority may reduce pay by up to half for six months.

11. An employee on authorised sick leave as a result of an illness or injury arising out of authorised duty shall be entitled to full pay for twelve months. Thereafter the fire and rescue authority may reduce pay by up to half for six months.

...”

Material facts

12. Mr Murdoch became a retained firefighter on 19 April 1999. He was based at Wells Fire Station (**Wells FS**).
13. On 8 November 2010, Wells FS received a call just before 6.30am requesting attendance at a road traffic collision involving a motorcycle and another vehicle.
14. As a retained firefighter at Wells FS Mr Murdoch received the call but did not travel to Wells FS as he was about to go to work. However, Mr Murdoch subsequently made a few telephone calls - the outcome of which being that he learned that there had been a motorcycle crash, which was probably a fatality and that the fatality was probably his friend, Mr Baker.

15. At the same time, the Group Commander in charge of the incident had become aware that the fatality was a firefighter from Wells FS. The Group Commander decided, as a consequence, that as few of the Wells FS crew as possible should be involved. At 7.29am he asked the control centre to alert Wells FS again but only for a Land Rover with a driver to ferry back the original Wells FS crew.
16. Although, Mr Murdoch would not normally have attended (as he was at work), he attended Wells FS shortly after that time. He was the first person to arrive at Wells FS. As a consequence, he picked up the 'turn-out sheet', which set out the Group Commander's instructions (set out previously). Mr Murdoch, however, says that he misread the turn-out sheet as he started to assemble crew for a fire engine (rather than a Land Rover) as personnel began to arrive at Wells FS. Mr Murdoch says that he assembled a crew on the basis that a search of the area needed to be conducted.
17. The fully-crewed fire engine - including Mr Murdoch - arrived at the incident at 7.43am. The Group Commander subsequently told the driver to return to Wells FS and bring back the Land Rover. At 7.44am the control centre confirmed the instruction and asked the crew to call them from Wells FS upon their arrival. The crew acknowledged this instruction. However, no call was made. The control centre tried to call Wells FS at 7.51am but received no reply. They then contacted the crew by radio and asked them to turn on the mobile phone (which was, presumably, shared amongst the crew at Wells FS).
18. There seems to be a difference of opinion between the members of the crew as to what happened next. Some say that Mr Murdoch spoke to the control centre, however the Crew Manager has said that it was him. (There are also differing accounts of the timing of the call.) On that call the control centre told the recipient to come back to the incident in a Land Rover to pick-up other crew.
19. In any event, a Land Rover with full crew arrived back at the incident shortly afterwards and alighted.
20. Although accounts as to what happened at this stage also differ, Mr Murdoch says he approached the scene and it was obvious to him that it was Mr Baker's bike. As there was no activity at the scene he came to the conclusion that Mr Baker was dead. This was confirmed to him shortly afterwards (in person) by the Station Commander. Mr Murdoch also says that he saw a body being carried into an ambulance (although he acknowledges now that this may not have been Mr Baker, but the survivor of the incident). Mr Murdoch submits that he did not get involved with the incident and that, as such, he did not cross the cordon that had been set up there.
21. Although accounts also differ as to what happened subsequently, Mr Murdoch says that he volunteered to go with the police - in the first instance to show them where Mr Baker's partner and family lived, but then to deliver the tragic news himself. Mr Murdoch says that he broke the news to the family having been pressurised to do so by the police (although, again, this is disputed).

22. Mr Murdoch continued in service after 8 November 2010, but went off work on sickness absence in 2011. It is submitted that around July 2011 Mr Murdoch's health was deteriorating and he was suffering with flashbacks of the scene of the incident of 8 November 2010.
23. In early April 2012 Mr Murdoch's sick pay entitlement was reviewed. The sick pay provisions applicable to Mr Murdoch provided that he would be entitled to six months full pay followed by six months half pay or, if his absence was as a result of an injury on duty, twelve months full pay. It appears that the six-month period was approaching in April 2012, so the Service needed to consider Mr Murdoch's entitlement; specifically the question of whether his absence was as a result of an injury on duty.
24. Ahead of the review taking place it appears that Mr Murdoch was referred to Dr Collins, an occupational health specialist, who had conducted an initial assessment of him in December 2011. Dr Collins referred Mr Murdoch to a consultant psychiatrist, Dr Briscoe. Dr Briscoe conducted a medical assessment of Mr Murdoch on 31 January 2012. Subsequently, two further assessments were conducted by Dr Collins (in February 2012 and April 2012). Neither doctor was an independent qualified medical practitioner (**IQMP**) for the purposes of the Order.
25. A meeting was held on 10 May 2012, to make a decision about Mr Murdoch's injuries in relation to sick pay entitlement and, purportedly, entitlement to an injury award. A memo was produced by the Service shortly afterwards providing details of that meeting. The memo said as follows:

"An individual could be eligible for Injury Award (additional payment to Ill Health pension) if they (1) have suffered an Injury on Duty and (2) the injury has not been brought about, or contributed to, by the individual's own default.

Both criteria 1 and 2 above have a managerial and a medical side to it and the purpose of the meeting was to make some decisions mainly on criteria 1 to aid any future decisions in relation to contractual sick pay entitlement and entitlement to loss of earnings.

...

...it was decided that FF Murdoch does not have an Injury on Duty as there was no proximity to the incident and it was not in the execution of his duties."

26. The Service sent Mr Murdoch a letter on 14 May 2012, entitled 'Review of contractual sick pay entitlement', which said as follows:

"Following the recent Occupational Health reports indicating the origin of your current condition, a further investigation has taken place into the details of the situation which you indicate has caused your long term absence.

With the outcome of the investigation, the decision has been made [that] the situation is not classified as an Injury on Duty."

27. Mr Murdoch appealed this decision. On 14 January 2013, it was confirmed that Mr Murdoch's appeal would be dealt with under stage one of the FPS' IDRPs.
28. The stage 1 IDRPs meeting took place on 6 February 2013. It was agreed during that meeting that expert medical evidence was required. This was arranged for 8 May 2013. A medical report was produced on 22 May 2013, and a further meeting held on 29 May 2013 - attended by both representatives of the Service and Mr Murdoch (and his representative from the Fire Brigade Union (**FBU**)). The interim findings of the medical practitioner were delivered during this meeting.
29. After the meeting Mr Murdoch's FBU representative requested an appeal of the stage one decision (which, it seems, had not yet been published), which was to take place in July 2013. However, the meeting was subsequently postponed as the stage one IDRPs panel determined, after the meeting of 29 May 2013, that it was appropriate to seek further evidence to assist them in making a decision.
30. Mr Murdoch's FBU representative made further representations on 11 September 2013. At or around that time it was agreed that the Service would conduct "an independent desktop review" of the case to consider the following points raised by Mr Murdoch's FBU representative:
 - whether the IDRPs had been correctly undertaken in terms of the timescales and in the seeking of additional evidence;
 - whether Mr Murdoch should be considered as having a qualifying injury; and
 - whether Mr Murdoch had been diagnosed with Post Traumatic Stress Disorder (**PTSD**) as a result of an incident whilst on duty within the Service.
31. In reviewing the IDRPs report the desk-top review considered that Mr Murdoch had either misread the turn-out sheet or deliberately ignored the instruction and that consequently the IDRPs panel were entitled to conclude that the qualifying requirements of the "Injury on Duty" had not been satisfied. (The Service have submitted that the work of the desk-top review did not form part of the IDRPs.)
32. The Service's panel considering Mr Murdoch's stage one IDRPs application reported their findings on 4 October 2013. Their 'Outcome' was reported as follows:

"The panel has concluded that Jamie Murdoch was aware that he was not required at the incident but attended anyway.

Even if that were not the case, the injury was caused by his own default in that he misread the turn-out sheet calling for the Land Rover to attend with a driver. This was either accidental – in which case was due to negligence, or deliberate – in which case it was due to misconduct. On the balance of probabilities, we have concluded that this was more likely to be deliberate than accidental and that JM raised the issue of a search in order to justify the attendance.

Consequently, the injury cannot be attributed to...a "qualifying injury". Jamie Murdoch is, therefore, not entitled to enhanced sick pay provision or a compensation award."

33. Mr Murdoch's FBU representative appealed the decision of the stage one IDR panel. A document setting out Mr Murdoch's position accompanies this appeal. The copy I hold is entitled 'FF Jamie Murdoch III Health Appeal Meeting' and is not dated, but I understand the original was dated 25 February 2014.
34. The stage 2 IDR panel met on 24 April 2014.
35. I understand that the panel considered the paper from Mr Murdoch's FBU representative dated 25 February 2014, and, also, a paper from the Service explaining the process and what the stage two panel is required to consider, dated 24 April 2015.
36. Following-up from the meeting, the Service - specifically, the clerk to the IDR appeal panel - sent Mr Murdoch a letter (on 25 April 2014). This letter said that "The decision of the Appeals Panel...was to uphold the decision made at Stage 1 of the IDR that "the illness cannot be attributed to...a 'qualifying injury' for the purposes of the Firefighters Compensation Scheme."

Summary of Mr Murdoch's position

37. He is eligible to receive compensation from the Scheme as he has a 'qualifying injury'.
38. He did not receive his injury by his own default nor was it as a consequence of negligence or misconduct. He was on authorised duty on the day of the incident and was paid for his attendance.
39. It was not his responsibility to turn-out and crew the "appliance" (i.e. the fire engine) that was to be mobilised - that responsibility rested with the Officer in Charge (which was not him). He was not disciplined in connection with the incident, nor was any other uniformed employee.
40. With respect to mobilising the Land Rover, Mr Murdoch had no reason to misread the turn-out sheet; he always would have been in the Land Rover as he was the first to arrive at Wells FS and he was a driver. There was no instruction not to alight the Land Rover at the incident. Mr Murdoch did alight the Land Rover but he did not get involved with the incident as he did not cross the cordon.
41. As to the question of the permanence of his injury, Mr Murdoch submits that his injury is permanent. Two doctors have told him that he has PTSD whilst one has said that he has 'Adjustment Disorder'. Irrespective of which is correct, both of these conditions can be classed as permanent (although he acknowledges that the final decision would rest with an IQMP).

Summary of the Service's position

42. The Service submits that Mr Murdoch is not eligible to receive compensation from the Scheme as he does not have a 'qualifying injury'. The Service has already

acknowledged that Mr Murdoch is “disabled from performing his duties” as a firefighter and that this disablement is permanent.

43. In accordance with the Order an injury will be treated as “having been received without person’s default unless it is wholly or mainly due to his or her serious and culpable negligence or misconduct”. In Mr Murdoch’s circumstances, the desk-top review panel considered that Mr Murdoch had either misread the turn-out note or deliberately ignored the instruction in it. The first stage IDRPs panel found that, on the balance of probabilities, Mr Murdoch deliberately raised the issue of a search in order to justify his attendance at the scene of the incident (and thus deliberately ignored the turn-out instructions). Further, the crew (including Mr Murdoch) alighted from the Land Rover despite their being specific instructions that he should not have. It follows that his injury was not a ‘qualifying injury’ and, as such, he is not entitled to an injury award.
44. The question of what constitutes a ‘qualifying injury’ is not listed as a question requiring a written opinion of an IQMP under rule 1(2) of part 6 to schedule 1 of the Order. In accordance with rule 1(1) of part 6 the question of a person’s entitlement to any awards is to be determined by the Service. In any event, in the present case the Service considers that the injury Mr Murdoch suffered did not arise from the exercise of his duties as a firefighter; this is not a determination that an IQMP could make (i.e. the IQMP would not be able to make a determination on whether the injury was caused by Authorised Duty and has no power to do so”.

Conclusions

Background

45. By way of background, an Opinion was issued by a lawyer from the Pensions Ombudsman Service, Adam Summerfield, on 5 June 2015. He referred the case to me as he had concerns that the evidence provided by the Service in response to his Opinion supported a different conclusion from his. I reviewed the case and issued my Preliminary Decision in August 2015. The parties provided responses to my Preliminary Decision shortly afterwards. My Determination is set out below.

First instance decision – ‘qualifying injury’

46. Rule 1(1) of part 2 of schedule 1 of the Order provides that a firefighter will be eligible for an injury award if he is retired, is permanently disabled and if such infirmity was occasioned by a qualifying injury. It follows that Mr Murdoch will be entitled to an injury award if he is found to meet that description and, as such, it is that description against which he must be assessed by the Service.
47. A ‘qualifying injury’ is, in accordance with rule 7 of part 1, “an injury received by a person, without his own default, in the exercise of his duties as a regular or retained firefighter”. If Mr Murdoch does not have a ‘qualifying injury’ then he is not entitled to an injury award from the Scheme.

48. Mr Summerfield, in his Opinion on this case, found that the Service did not specifically consider the question of whether Mr Murdoch had suffered a 'qualifying injury' when they made their first instance decision. The memo recording the consultation meeting of 10 May 2012, shows that the decision was made on the basis of the test for sick pay (set out in the Grey Book, as set out above). That is, the Service determined that Mr Murdoch's absence did not constitute 'an injury arising out of authorised duty' because "there was no proximity to the incident and it was not in the execution of his duties".
49. Whilst I recognise that the Service did not specifically refer to whether Mr Murdoch had suffered a 'qualifying injury' (and thus did not set out the test at rule 1(1) of part 2 of schedule 1 of the Order and explain in the memo why he did not meet it), in considering whether he had suffered 'an injury arising out of authorised duty' for the purposes of the test for sick pay the Service had, effectively, considered whether Mr Murdoch had suffered a 'qualifying injury' in accordance with the Order. Their finding - that Mr Murdoch had no proximity to the incident and it was not in the execution of his duties - meant that Mr Murdoch could not satisfy the test in rule 7 of part 1 of the Order. That test provides that a 'qualifying injury' must have been sustained by Mr Murdoch "in the exercise of his duties as a...retained firefighter". If the firefighter does not satisfy that test he cannot have suffered a 'qualifying injury'. Given the first-instance finding that the injury was not suffered in the execution of Mr Murdoch's duties, it follows that - in the Service's view - he had not suffered a 'qualifying injury' and, as such, was not eligible for an injury award under rule 1(1) of part 2 of schedule 1 of the Order.

Seeking the opinion of an IQMP

50. Mr Summerfield, in his Opinion on this case, also found that the Service's reliance on "unqualified opinions and medical evidence" was in breach of rule 1(2) of part 6 of the Order. He found that, whilst he recognised that the Guide envisaged that there are circumstances in which deciding whether an injury is a 'qualifying injury' does not need the assistance of medical evidence (which seemed to be applicable in the present case), the Service were obliged to comply with the Order over and above their own Guide.
51. Rule 1(2) of part 6 of the Order provides that before deciding the question as to "whether any disablement has been occasioned by a qualifying injury" the relevant authority "shall obtain the written opinion" of an IQMP (and such opinion shall bind them). In Mr Murdoch's case the question as to whether "disablement has been occasioned by a qualifying injury" is a factual, rather than a medical, one. This is because the key question was whether Mr Murdoch received his injury without his own default and in the exercise of his duties as a retained firefighter (rule 7, part 1). This does not require recourse to medical evidence; it is a purely factual question relating to the events of 8 November 2010. It follows that if the Service did what was required of them in rule 1(2) of part 6 of the Order in Mr Murdoch's case and sought the evidence of an IQMP they would have suffered the expense of seeking the

IQMP's opinion (as well as the time this would take) and from it would have got an opinion which would not answer the key question.

52. So I find that, in the circumstances, the Service were entitled to make a finding that Mr Murdoch had not suffered a 'qualifying injury' without consulting an IQMP, even though - on the face of it - the failure to consult an IQMP was in breach of rule 1(2) of part 6 of the Order.

The Service's decision

53. The question I have to decide is a very narrow one. It is whether, on the facts of this particular case, Mr Murdoch received his injury without his own default and in the exercise of his duties as a retained firefighter. If it is found that the injury Mr Murdoch received was not received in the exercise of his duties as a retained firefighter then he will not have a 'qualifying injury'. Similarly, if it is found that such injury was received with his own default, then he will not have a 'qualifying injury'.
54. Having considered the evidence provided in this case in light of the specific circumstances, I share the Service's view that Mr Murdoch has not suffered a 'qualifying injury'. On 8 November 2010, Mr Murdoch was not, on the balance of probabilities, acting in the exercise of his duties as a retained firefighter. It is quite understandable that Mr Murdoch should have wished to attend the incident and even that he should have felt compelled to do so. However, the evidence provided points to the conclusion that was reached by the Service. As such I find the following, on the balance of probabilities; Mr Murdoch deliberately raised the issue of a search in order to justify his attendance at the scene of the incident (and thus, deliberately ignored the turn-out instructions); and that, the crew attending the incident in the Land Rover - including Mr Murdoch - were aware that they weren't required at the incident and, also, once they were at the scene of the incident, that they shouldn't have alighted (the Land Rover). Therefore, in acting in a manner that was contrary to specific instructions, Mr Murdoch was not acting in the exercise of his duties when he received his injury. Mr Murdoch does not, therefore, have a 'qualifying injury' as defined in the Order.
55. The fact that Mr Murdoch was paid for his attendance at the incident on 8 November 2010, and that, as a consequence of his attendance, he was not subject to any disciplinary process by the Service does not mean that he met the definition of 'qualifying injury' in the Order. The Service's reaction (or, as the case may be, lack of reaction) has no bearing on the question as to whether Mr Murdoch has suffered a 'qualifying injury', as that must be assessed by considering the specific requirements of the Order in light of the factual circumstances surrounding the incident (and not the Service's conduct in its aftermath).
56. I do not uphold Mr Murdoch's complaint.

PO-5463

Anthony Arter

Pensions Ombudsman
10 September 2015