

PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE PENSIONS OMBUDSMAN

Complainant : Mr M Bartlett
Scheme : The Firemen's Pension Scheme
Employer/ : Avon Fire Authority (the **Authority**)
Manager

THE COMPLAINT (dated 7 October 2002)

1. Mr Bartlett has complained of injustice as a consequence of maladministration on the part of the Authority in that, when considering his incapacity retirement, they;
 - 1.1. Delayed submitting medical evidence to the Board of Appeal,
 - 1.2. Did not consider all the available medical evidence,
 - 1.3. Insisted that they had to accept the opinion of the Medical Officer, and
 - 1.4. Refused to consider his complaint under the Internal Dispute Resolution (IDR) procedure.

MATERIAL FACTS

The Firemen's Pension Scheme Order 1992 (SI 1992/129)

2. Rule A9 provides,

“Qualifying injury

 - (1) Except in rule J4 [Part-time member of brigade], 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 firefighter.
 - (2) In rule J4...
 - (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.”

3. Rule B4 provides,

“Injury award

- (1) This rule applies to a firefighter who has retired and is permanently disabled if the infirmity was occasioned by a qualifying injury.
- (2) A person to whom this rule applies is entitled-
 - (a) to a gratuity, and
 - (b) subject to paragraphs (3) and (4), to an injury pension, both calculated in accordance with Part V of Schedule 2
- (3) Payment of an injury pension is subject to paragraph 4 of Part V of Schedule 2.
- (4) Where the person retired before becoming permanently disabled...”

4. Rule H1 provides,

“Determination by fire authority

- (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 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 the person's refusal..."

5. Rule H2 provides,

“Appeal to medical referee

(1) Where-

(a) an opinion of the kind mentioned in rule H1(2) has been obtained, and

(b) within 14 days of his being notified of the fire authority's decision on the issue the person concerned applies to them for a copy of the opinion,

the authority shall supply him with a copy.

(2) If he is dissatisfied with the opinion he may appeal against it to an independent person nominated by the Secretary of State as medical referee.

(3) A fire authority shall be bound by any decision on a medical issue duly given on an appeal under this rule.

(4) Further provisions as to appeals under this rule are contained in Part I of Schedule 9.”

6. Part I of Schedule 9 sets out the form an appeal should take and allows the authority to extend the period for an appeal where they think fit. On receiving notice of an appeal the fire authority are required to supply the Secretary of State with two copies of the notice of appeal and two copies of the opinion; one of which the Secretary of State is to supply for his nominated medical referee. The referee is required to interview the appellant at least once, having given due notice to the appellant and the authority of the time and place. The referee is required to provided both parties with a written statement of his decision on the relevant medical issues.

The Pensions Act 1995

7. Section 50 of The Pensions Act 1995 provides,

“Resolution of Disputes

(1) The trustees or managers of an occupational pension scheme must secure that such arrangements as are required by or under this section for the resolution of disagreements between

prescribed persons about matters in relation to the scheme are made and implemented.

- (2) The arrangements must –
- (a) provide for a person, on the application of a complainant of a prescribed description, to give a decision on such a disagreement, and
 - (b) require the trustees or managers, on the application of such a complainant following a decision given in accordance with paragraph (a), to reconsider the matter in question and confirm the decision or give a new decision in its place...”

The Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996

8. The Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996 define a ‘prescribed person’ as,

“For the purposes of section 50(1) of the Act... the prescribed persons are, on the one hand, the trustees or managers of the scheme and, on the other hand –

- (a) the active, deferred and pensioner members of the scheme;
 - (b) a widow, widower or surviving dependant of a deceased member of the scheme;
 - (c) prospective members of the scheme;
 - (d) persons who ceased to be within any of the categories... above within the six months immediately preceding the date of an application...; and
 - (e) where there is a disagreement which relates to a question whether a person... is such a person, the person so claiming.”
9. ‘A complainant of a prescribed description for the purposes of section 50(2) is defined as a person referred to in paragraph (1)(a) to (e) above.

Background

10. On 21 January 1999 Mr Bartlett was informed that the Authority’s Medical Officer had indicated that he was incapable of carrying out his duties because of permanent ill health. Mr Bartlett was told that he would be discharged on ill health grounds and

receive an award under the Rules of the Scheme. The effective date of his discharge was to be 16 April 1999. Mr Bartlett submitted an appeal against the decision on 1 February 1999. He said that Mr Birchall, an ENT Consultant to whom he had been referred by the Authority's Medical Officer, had said that his injury (hearing loss) had been caused by exposure to loud noise at work.

11. Mr Birchall wrote to Dr Dickson (then the Authority's Medical Officer) on 4 February 1999. He said,

“Please accept my apologies for the delay in issuing you with a report. [Mr Bartlett] is a 46 year old firefighter with diminished hearing which started at around the time he left the Royal Marines and gradually worsened during his 10 years in the Fire Service, during which time he was exposed to considerable amounts of noise, with very little ear protection...

...I would agree with Mr Coleman... that there is a good chance that his hearing loss... represents noise-induced loss. Normally when this is due to firing weapons, it is asymmetrical. However, I note that in the Royal Marines they are trained to fire from both shoulders and this would explain the asymmetry in this case. I think this being so, the problem certainly cannot have been helped by his considerable exposure to unprotected noise subsequently...”

12. Dr Dickson wrote to the Authority on 25 February 1999,

“...There are many potential reasons for progressive hearing loss, and it is by no means clear that Mr Bartlett's symptoms have been caused by noise exposure. Even if this was the case I do not have sufficient information to state that noise exposure during Brigade activity has been the likely cause or a significant contributor in his case. For this reason I have not recommended an industrial injuries award. If this matter was to be taken further referral could be made to Specialists – for example in London – as is being considered for another firefighter: the most specific information which could come out of such an assessment however would be a statement as to whether Mr Bartlett's hearing loss – and perhaps his other symptoms – was likely to have been a result of noise exposure. This would still not answer the question of when this exposure is likely to have taken place.”

13. On 20 April 1999 the Fire Authority Union (FBU) wrote to Mr Birchall asking if, in his opinion, Mr Bartlett had been exposed to unprotected noise in the last few years. They said that the Authority had interpreted his comments in his letter of 4 February

1999 as meaning that the damage to Mr Bartlett's hearing had been caused before he had joined the Authority. Mr Birchall responded on 27 April 1999 and said that, in his opinion, Mr Bartlett's hearing loss was noise-induced, had been initiated during his time in the Royal Marines and had been exacerbated by exposure to noise during his time in the Authority.

14. On 15 June 1999 Dr Harling, a Consultant Occupational Physician, (the Authority's current Medical Officer) wrote to the Authority,

“Thank you for asking me to consider the documentation in this mans' (*sic*) file in order to consider the cause of his hearing loss.

The question therefore is whether or not this mans' hearing loss is related to his work with the Avon Fire Brigade...

In order to make a determination as to whether or not an individual is suffering from noise induced hearing loss, and to apportion that loss between different period of employment, the following criteria must be met.

1. The individual has had a “sufficient” noise exposure...
2. The individual demonstrates an audiogram showing hearing loss due to a sensory neural cause. Further the audiogram should demonstrate a 4 khz dip and, if serial audiograms are available, should show deterioration in hearing consistent with the noise exposure.
3. No other cause of hearing loss is demonstrated.

...it is possible to determine, on the balance of probabilities, whether or not the individual suffers from noise induced hearing and thereby to portion such a loss between different periods of employment and or employers.

Prior to employment by the Avon Fire Brigade I believe this man spent a period of time with the Royal Marines and also worked in an engineering company. I have no information at all about the level and duration of noise exposure experienced by this man at any stage in his working life.

This man has been examined by an ENT surgeon and no specific cause for this mans' hearing loss has been determined.

This man does not show the typical features on audiometry consistent with noise induced hearing loss.

Accordingly, I am not able to say, on the balance of probabilities, that this man is suffering from noise induced hearing loss. I would be happy to reconsider this matter should you be able to provide any information at all about the level and duration of any noise exposure experienced by this man during his time with the Brigade...”

15. The Authority sent a copy of Mr Birchall’s letter of 27 April 1999 to Dr Harling. He confirmed that he had seen a number of reports from Mr Birchall but not that letter. Dr Harling stated,

“I have reconsidered my opinion in the light of the letter from Mr Burchall (*sic*) dated 27 April 1999. In this letter Mr Burchall clearly states his opinion but does not give any reasons for this. I, having considered all the information in this case, come to a different conclusion. I do not believe that there is sufficient information to conclude that, on the balance of probabilities, this man’s hearing loss was caused by noise exposure...”

16. Mr Bartlett was notified that it had been decided that he did not have a qualifying injury. He appealed against this decision in September 1999.

17. In September 1999 the Home Office issued Fire Service Circular 11/1999, which covered appeals under Rule H2. In this they said,

“The Home Office has identified a problem with the submission of earlier medical records and has concluded that in order for the Board to perform a full and effective review of the relevant medical question, the fire authority need to make available all relevant background medical records relating to the case. Existing procedures for handling medical records supplied to the Boards therefore, also need to amended to improve confidentiality.

It will now be necessary for the fire authority to arrange for the Boards to receive the following medical records for the appellant:

- (a) the complete General Practitioner (GP) record;
- (b) the complete Brigade Occupational Health (OH) record...;
- (c) original x-ray/scan films...
- (d) hospital/specialist records where appropriate...

...A copy of the records should be provided to the appellant, if he/she so requests...

Action to be taken by each fire authority

The procedure to be followed by each fire authority is as follows:

... (f) If the fire authority has already obtained and considered any background medical records as part of its consideration of the matter under Rule H1(2) and (3), these records should be sent by the BMA or OHU... direct to... Chairman, Regional Boards of (Fire Service) Medical Referees..."

18. Mr Bartlett's appeal was acknowledged by the Authority on 8 October 1999. He was told that they would contact the Home Office to register his appeal with the Board of Medical Referees and that all medical records and relevant information would have to be provided for the Board, which would be done through the offices of the Authority's Medical Officer. Mr Bartlett was also told that the appeal procedure could be somewhat drawn out and that he might not hear anything for some time. The Authority contacted the Home Office on 22 October 1999.
19. Dr Harling contacted the Authority on 28 October 1999 requesting authorisation from Mr Bartlett to obtain medical records. The Authority asked Dr Harling to contact Mr Bartlett directly. On 16 November 1999 the Authority sent Mr Bartlett a copy of a letter from the Home Office acknowledging receipt of his appeal documentation and said that Dr Harling would contact him for authorisation to obtain medical records.
20. On 9 December 1999 Mr Birchall wrote to Mr Bartlett, having received a copy of Dr Harling's letter of 15 June 1999 from him. Mr Birchall commented,

"It is not uncommon for clinicians who have not been fully trained in otology or audiology to adhere to rigid criteria, as expressed in his letter.

He does admit to being unable to comment on the amount of noise to which you have been exposed within your jobs, and certainly if I was to present your audiogram to any audiology or ENT trainee that I know, they would all advance the suggestion that this was due to noise-induced hearing loss. Indeed it appears almost classical in this regard.

I therefore have no hesitation in supporting my earlier diagnosis."
21. The FBU passed a copy of Mr Birchall's letter to the Authority, who in turn passed it to Dr Harling. The Authority asked if Dr Harling could respond to the letter and, if

he thought it appropriate, to contact Mr Birchall with a view to resolving the matter before the appeal. Dr Harling responded on 14 February 2000 disagreeing with Mr Birchall's conclusions. In Dr Harling's opinion, the pattern of hearing loss shown by Mr Bartlett was not typical of exposure to noise. He noted that Mr Bartlett's hearing loss was centred on 2 kilohertz and concluded from this that the likelihood was that it was not noise induced. Dr Harling asked for his letter to be copied to Mr Bartlett and Mr Birchall.

22. The FBU commissioned a report from a consultant ENT surgeon, Mr Griffiths, who issued his report on 25 April 2000. Mr Griffiths said that he had interviewed and examined Mr Bartlett and had read his GP's case notes. He acknowledged that he had been commissioned by the FBU and that they would be paying for the report. Mr Griffiths then went on to say that he understood that his duty was to help the court with matters which were within his expertise and that this overrode any obligation to the FBU. He explained that he had been a consultant ENT surgeon since 1978 and had over 20 years' medico-legal experience.
23. Mr Griffiths noted that Mr Bartlett showed unusual 2khz notching in both ears and a 6 khz notch in his right ear, with a 4 khz notch in his left ear. He commented that, other than exposure to noise, there did not appear to be any other etiological factor to explain the loss. Mr Griffiths said that, in the absence of any constitutional causation and given a history of noise exposure, he thought that, on the balance of probability, Mr Bartlett had a hearing loss as a result of noise exposure. Mr Griffiths commented that exposure to broad band noise resulted in a characteristic configuration of an audiogram beginning with a 4 khz notching but that more frequency specific noise exposure could result in loss at that particular frequency. Mr Griffiths gave the example of a frequency specific noise of 2 khz giving maximal hearing loss at 2 khz and suggested an example of frequency specific noise was a fire alarm. Mr Griffiths also said that, without knowledge of actual exposures to noise, it was difficult to apportion hearing loss to individual period of employment. He noted that Mr Bartlett had mentioned audiometry, which had been carried out when he left the Royal Marines, and thought that this would help to determine the amount of hearing loss which had occurred since Mr Bartlett had joined the Authority.

24. Dr Harling was asked to review Mr Griffiths' report and suggested that Mr Bartlett be asked to give authority for his audiogram to be obtained from the Royal Marines.
25. On 24 October 2000 Dr Harling notified Mr Bartlett that he had received copies of his medical records from the Ministry of Defence. He said that an audiogram had been done when Mr Bartlett had joined up in 1971 but not on discharge.
26. On 22 November 2000 the Authority wrote to the FBU,

“I write to formally advise that I am not able to consider your request to overturn the Brigade Medical Officer's opinion in respect of [Mr Bartlett].

The Brigade Medical Officer is a specialist in the field of occupational medicine and is commissioned to advise the Brigade on matters such as these.

Whilst appreciating you have an alternative interpretation of reports... Dr Harling still maintains his position and opinion. I, nor any other officer of this Brigade, is qualified to argue or overturn that view through our own interpretation.

The Pension Scheme is implicit in its communicating of routes and action in the event of difference of opinion or appeal... Any attempt to shortcut that route could and certainly would prejudice the fairness and impartiality of the Scheme for the future.

The FBU would surely not expect me, or other Chief Officers, to try to pre-empt or interfere with the appropriate Appeals Procedure set out in the... Regulations... are binding on all parties involved and exist to deal with situations where a firefighter is dissatisfied with the BMO's decision. [Mr Bartlett's] case will now proceed to be heard by the Board of Medical Referees...”

27. The FBU's response was that, in their opinion, the Rules required the decision as to whether an injury was a qualifying injury to be made by the fire authority. They said that they assumed that the Authority Medical Officer was acting as the medical practitioner selected by the authority as required by the Rules. The FBU also suggested that the Rules allowed the authority to consider more than one opinion. They then asked when the Authority had made the decision regarding Mr Bartlett's injury, what medical evidence they had considered and to be supplied with a copy of their decision in writing. The FBU also wrote to the Authority on 1 December 2000 saying they accepted what had been said about the appeals procedure but that they

had not reached that stage yet. The FBU said they were still at Rule H1, which required the Authority to make a decision with regard to Mr Bartlett's injury.

28. The Authority responded on 7 December 2000. They did not accept the FBU's position and referred them to the Commentary on the Firefighters' Pension Scheme, which is a document produced by the Home Office. This document is intended to help those who use the Scheme to understand its provisions. The Authority said that medical matters had always been referred to a Authority Medical Office as specialists in occupational medicine. This, they said, ensured consistency over many years and firefighters' rights were safeguarded by the right to appeal under Rule H2.

29. The Commentary states,

“It is for your fire authority to decide in the first place whether you... are entitled to any award... Whenever such an entitlement depends on a medical question your fire authority must refer the question to a medical practitioner.

...It may appoint any qualified person of its choosing, but it may well decide to refer medical questions under the FPS to its brigade medical officer, who may be an accredited specialist in occupational medicine.

It is helpful if medical practitioners are asked by the fire authority to consider (if possible) all of the firefighter's background medical records...”

30. On 1 January 2001 the FBU asked the Authority to supply them with the minutes of the CFA meeting and the evidence submitted by the Authority Medical Officer. The Authority responded on 4 January 2001 that, following discussions with the authority's Chair, a paper was to be submitted to the authority meeting due on 26 January 2001. Dr Harling was asked to review the medical evidence and on 5 February he wrote to the Authority confirming his opinion that there was no evidence to show that Mr Bartlett's hearing loss was noise induced. Dr Harling also enclosed a set of criteria for diagnosing noise induced hearing loss, which he said had been produced by a professor of audiological medicine and an occupational physician. Dr Harling said that the paper supported his view.

31. The Authority also approached the Home Office for their views on medical opinions on injury awards. The Home Office replied on 7 February 2001 that Rule H1 required the fire authority to obtain at least one medical opinion but that they did not appear to be bound by that opinion. The Home Office said that, in Mr Bartlett's case, they did not think that the Authority could ignore Dr Harling's opinion. They went on to say that the opinion of the second consultant would be of little relevance if he had been appointed by the FBU. The Home Office said that they thought that the Authority needed to consider Dr Harling's opinion and the reasons why it may not be consistent with the views of the consultant and should then come to a decision. They said that the Authority should then leave the matter to be resolved by an appeal board, if necessary, under Rule H2.
32. The Authority wrote to the FBU on 12 March 2001 enclosing copies of the letters from Dr Harling and the Home Office. They said that the letters supported the case being heard at appeal and that the Appeal should be held within the next three months. On 21 March 2001 the Authority wrote to Dr Harling asking him to arrange for the medical papers to be sent to the Board of Medical Referees. Dr Harling wrote to Mr Bartlett on 10 April 2001 asking him to sign a form authorising the release of his medical records, which Mr Bartlett signed and returned on 13 April 2001.
33. On 20 September 2001 the FBU wrote to the Authority asking why there had been a delay in submitting Mr Bartlett's appeal and who had made the decision to delay the appeal. The Authority responded that the medical records had not been sent to the Board because of attempts by the union to settle the matter locally.
34. Mr Bartlett contacted his MP in February 2002, who wrote to the Authority on his behalf. The Authority reiterated their response that the delay in submitting the papers had been because of attempts to resolve the matter locally but that they understood that an appeal had now been arranged for 15 March 2002. The Authority said that the papers had been sent to the Home Office in May 2001 and that they had been advised in September and then November 2001 that an appeal was imminent. The Authority said that they understood that the delay was caused by difficulty in finding a suitably qualified ENT specialist.

35. The Appeal was originally arranged for 5 February 2002 but was cancelled. On 26 February 2002 the Medical Boards Administrator sent Mr Bartlett Notification of Hearing for 5 April 2002. The FBU asked the Authority to provide them with copies of all the medical evidence submitted by them and a copy of their submission.
36. Mr Bartlett's appeal was again cancelled by the Board and eventually re-arranged for 21 June 2002. The appeal was determined in Mr Bartlett's favour and the Authority agreed to the payment of an injury allowance.
37. On 2 September 2002 Mr Bartlett submitted an application under stage one of the IDR procedure. He said that the 'nature of disagreement' was;
- 37.1. The Authority had misinterpreted the Rules of the Scheme by not considering all the medical evidence available to them,
- 37.2. The Authority had insisted on delegating all medical evidence to the Authority's Medical Officer and did not accept that the Rules require them to make a judgement,
- 37.3. The Authority had misapplied the Rules by delaying the submission of medical evidence to the Board of Appeal for an unacceptable period, and
- 37.4. The Authority had misled him and his representative regarding his right to bring a complaint under the IDR procedure regarding their original decision.
38. The Authority responded on 6 September 2002,

“Form IDR 1 is intended for use in connection with procedures set up under Section 50 of the Pensions Act 1995 to deal with the resolution of current disagreements arising under a pension scheme.

As I understand it, these procedures are designed to give an active Member of a pension scheme, or a pensioner member, a means of appealing against a decision made by the Fire Authority affecting that person's entitlement under the pension scheme. The purpose of any such appeal is to seek to persuade the Authority to change its decision...

So far as I am aware, there are no matters currently in dispute with the Authority as to your pension. Both your entitlement and the amount of any awards have now been agreed between us. There is nothing disclosed in your application, nor anything of which I am

otherwise aware, which is capable of being the subject of an appeal under this procedure. I must therefore treat your application as being invalid...”

39. The Authority said that the only matter which had given rise to a dispute had been the cause of Mr Bartlett’s hearing loss. They said that Mr Bartlett was aware of the reasons why this could only be resolved by an appeal under Rule H2. The Authority said that they accepted that the appeal procedure had taken an unacceptably long time, for which there were a number of reasons. They offered an apology if anything they had done or failed to do had caused the appeal to be delayed unnecessarily.
40. The Authority take the view that it should act upon the advice given by the medical adviser appointed by it for this purpose. They say that it is not a matter for them to review that source material upon which that opinion is based or for them to take a view upon the medical opinions obtained by or on behalf of the person retiring. The Authority say that, throughout the period of Mr Bartlett’s disagreement, they remained of the opinion that the difference between the parties was a medical issue, which had to be resolved by an appeal under Rule H2. It is the Authority’s opinion that, until the relevant medical opinion changed, they did not have the power to make an award under Rule B4.
41. The Authority say that, being a public body, they have must have lawful authority to make payments to third parties. They say that where in accordance with regulations the amount of payments varies, for example as a decision of the medical referee , whilst payments may be made retrospectively, there is no provision for the Authority to pay interest. The Authority also say that, under the Rules, its role is to make decisions as employer and it has no independent appellate function. It is their view that the Authority cannot make a decision on medical issues which runs counter to the advice obtained from the Brigade Medical Officer for either or both of the following reasons;
- This is what the Rules require; and/or
 - The decision would otherwise be irrational and therefore unlawful.
42. In support of this view, the Authority point out that the ‘decision maker’ at the Authority has no medical expertise of his own and is totally reliant upon the advice he

receives. They go on to say that it would be perverse (and therefore unlawful) for the decision maker to ignore the advice from the Authority's own medical adviser, who is the person they are required to consult under the Rules. They point out that any third party opinion will not have been sought by the Authority; is not advice from an adviser selected by the Authority for the purposes of Rule H1; is advice based on factors which are unknown to and unverified by the Authority; and is advice which the Authority's medical adviser disagrees with.

43. The Authority argue that an appeal under Rule H2 is against the medical opinion received under Rule H1 and not against the decision of the Authority. This, they believe, supports their view that they are unable to ignore the advice given by the Brigade's Medical Officer under Rule H1. They consider that the wording of Rule H2 would be inappropriate if the Authority's decision was not based on that opinion.
44. , The Authority point out that the report provided by Mr Griffiths was received after they had made a decision under Rule H1. They say that the Rules make no provision for consideration by the Authority of medical opinions received or to be used in support of an appeal already lodged under Rule H2. Further, they do not consider that the IDR procedure can be used to consider this issue. The Authority say that they could not have changed its decision under H1 and that this was made clear to Mr Bartlett's representatives. They go on to say that, had the Medical Officer's opinion changed, the Authority would have reconsidered the award before the H2 appeal, which, they say, would effectively have lapsed.
45. It is the Authority's view that only the Courts can make a final determination on the legal interpretation of the Rules. They consider that, even if their interpretation were subsequently found to be incorrect, this would not amount to maladministration on the part of the Authority.
46. The Authority accept that there was unnecessary delay in progressing Mr Bartlett's appeal but consider that, under the constraints of the Rules, they could only apologise for this.

CONCLUSIONS

47. There are three issues to be considered in Mr Bartlett's case;
- 47.1. Do the Fire Authority, and not their Medical Officer, have the responsibility to reach a decision regarding his eligibility for an injury award,
- 47.2. Did the Fire Authority unnecessarily delay the appeal procedure, and
- 47.3. Were they correct to refuse to consider Mr Bartlett's application under IDR.
48. With regard to the first question, I find that the responsibility to come to a decision regarding Mr Bartlett's eligibility for an injury award lies with the Fire Authority. Rule H1(1) requires the question as to whether a person is entitled to any and if so what awards to be determined in the first instance by the fire authority. Rule H1(2) requires the fire authority to obtain and consider the written opinion of at least one qualified medical practitioner selected by them in cases such as Mr Bartlett's. It does not transfer the responsibility for determining eligibility for an award to the medical practitioner. I accept that the decision maker may not have 'medical expertise' of his own. This is, of course, why he is required to obtain advice but it does not absolve him of the requirement to come to a decision. The Authority is required to obtain and consider the opinion of a medical practitioner not to accept it uncritically.
49. The Rules do not specify who may be approached for a medical opinion, other than that it must be a qualified medical practitioner. I see no reason why the Fire Authority should not approach their Medical Officer, as they did in this case. However, I see no reasonable justification for the Fire Authority to ignore other medical opinions made available to them, from whatever source. I disagree with the comment by the Home Office in their letter of 7 February 2001, that the opinion of Mr Griffiths was of little relevance because he had been approached by the FBU. Mr Griffiths made clear who was paying for his advice but sought to deliver a professional opinion relevant to the issue. That the opinion has been offered at the request of the member's representatives does not mean it should for that reason be ignored. The weight to be given to respective medical opinions is a matter for the Fire Authority as part of their due consideration of Mr Bartlett's entitlement. The Authority appear to be arguing that there should be a blanket ban on the consideration

of medical evidence from sources other than their own appointee. That cannot be right and such a course, if followed might lead to their decision being considered perverse if the alternative evidence available to them ought to have led a reasonable authority to the view that that their own adviser's opinion was incorrect. The Authority seem to me to be confusing *consideration* with *acceptance*. It would not be perverse or unlawful to 'ignore', ie not accept their adviser's opinion if the weight of alternative evidence was against it. However, I accept that Mr Griffith's report was put forward after the Authority had made its decision under Rule H1 and thus could not as a matter of fact have been taken into account in coming to that decision.

50. I observe in passing that the Regulations are slightly odd. Having imposed an obligation on the authority to make up their own mind albeit taking account of medical opinion, the Regulations then require that decision to be overturned purely because a different medical opinion is given on appeal. Thus at the appellate stage the medical view is all important whilst at the first stage it is merely a factor to be taken into consideration. Nevertheless, I do not consider this sufficient to allow the Authority to accept without question whatever opinion is expressed by their medical adviser.
51. I am satisfied, on the basis of the evidence provided for me, that the Fire Authority failed to reach a decision properly under Rule H1(1). Instead they improperly delegated the decision to Dr Harling. This amounts to maladministration on the part of the Authority. Mr Bartlett suffered injustice as a consequence because his eligibility for an injury award was not properly considered. This injustice was offset by the fact that he had the option to bring an appeal under Rule H2 .
52. The Fire Authority did cause unnecessary delay to the appeal. Mr Bartlett's appeal was submitted to the Home Office in October 1999 yet it was not until 21 March 2001 that the Authority asked Dr Harling to send off the medical papers. Mr Bartlett was not asked for authority to release his medical papers until April 2001. This is some seventeen months after Mr Bartlett's appeal had been submitted. I have disregarded the subsequent delays in arranging the appeal hearing because these were outside the control of the Authority. The Authority say that this delay was caused by attempts to settle the matter locally. What they mean is that they passed

representations from the FBU to Dr Harling to see if he would change his mind. That is not the process envisaged by the Regulations. It is also contrary to the argument put forward by the Authority regarding their lack of an appellate function. If they so firmly believed that, having made their decision under Rule H1, there was no scope for them to change that decision, there was no excuse for them not to proceed with the appeal under Rule H2.

53. I accept that during the delay the FBU continued to make representations to the Authority on behalf of Mr Bartlett thus perhaps encouraging the desire to give further in-house consideration rather than proceeding with the formal appeal. However, since the Authority considered that a decision had been reached under Rule H1, it would have been more appropriate for them to pass any such representations on to the appeal board. The delay should be seen as maladministration on their part. I am satisfied that Mr Bartlett suffered injustice as a consequence, notwithstanding the fact that he is now in receipt of his injury allowance. The additional time taken for his appeal to be heard added unnecessarily to the distress and inconvenience of the process. I have noted that they have apologised to Mr Bartlett but think that some more tangible action is needed to redress the injustice caused by the maladministration
54. The Fire Authority were also incorrect in their refusal to deal with Mr Bartlett's complaint under IDR. The IDR procedure is a statutory requirement under Section 50 of The Pension Schemes. The Rules may offer additional alternative avenues for the consideration of complaints, but these do not take precedence over Mr Bartlett's statutory rights. I agree that, by the time Mr Bartlett brought his complaint under IDR, the question of his eligibility for an injury award had been settled under Rule H2. However, there were other issues, which Mr Bartlett wished to have addressed, e.g. the Authority's interpretation of Rule H1(1) and the delay to his appeal. Section 50 refers to the resolution of disagreements about matters in relation to the scheme. This definition is wide enough to encompass the issues that Mr Bartlett had raised aside from his eligibility for a benefit. Whether the Authority consider that they could come to a different decision under IDR on these issues is irrelevant. They

cannot deny an individual his statutory rights simply because they consider themselves to have been in the right first time.

55. However, IDR was very unlikely to resolve the dispute, save perhaps at the second stage and I do myself act as a longstop. Whilst I find that the refusal to consider Mr Bartlett's complaint under IDR amounts to maladministration Authority Mr Bartlett has not suffered any injustice as a consequence.

PROPOSED DIRECTIONS

56. I now direct that, within 28 days of the date hereof, the Fire Authority shall pay Mr Bartlett the sum of £300 to redress the injustice which was caused by the delay and by the way the matter was originally dealt with.

DAVID LAVERICK
Pensions Ombudsman

18 June 2003