

Ombudsman's Determination

Applicant	Mr S
Scheme	The New Firefighters' Pension Scheme (Wales) 2007 (modified section for retained firefighters) (the Modified Scheme)
Respondent	North Wales Fire & Rescue Service (the Authority)

Complaint Summary

Mr S is a retained firefighter and so he was eligible to join the Modified Scheme when it was brought into effect.

Mr S has complained that he returned the necessary forms in order to begin the process of enrolling in the Modified Scheme, but the Authority has subsequently not allowed him to do so.

Summary of the Ombudsman's Determination and reasons

The complaint shall be upheld against the Authority because Mr S submitted the necessary forms to join the Modified Scheme with sufficient time to be enrolled.

Detailed Determination

Material facts

1. Mr S is a Retained Duty System (**RDS**) Firefighter.
2. The Modified Scheme which was brought in by The Firefighters' Pension Scheme (Wales) (Amendment) Order 2014 (**the 2014 Order**), modified the Firefighters' Pension Scheme (Wales) Order 2007(**the 2007 Order**), and came into effect on 31 December 2014. This was intended to correct the position that between 1 July 2000 and 5 April 2006, RDS firefighters were not given the opportunity to join the then applicable Firefighters' Pension Scheme.
3. The 2007 Order was further amended by The Firefighters Compensation Scheme and Pension Scheme (Wales) (Amendment) Order 2015 (**the 2015 Order**), which came into effect on 31 March 2015.
4. Relevant sections of the 2014 and 2015 Orders are set out in the Appendix.
5. In January 2015, following the 2014 Order coming into effect, an information pack was sent to Mr S by the Authority. The pack outlined how the Modified Scheme worked, and it included an Expression of Interest form (**the Form**) for Mr S to sign and return if he was interested in joining the Modified Scheme.
6. The Form stated in bold at the top that it had to be completed and returned by 31 March 2015.
7. Mr S has confirmed that he received the Form in January 2015. He says he completed and returned it promptly. He says that his watch manager can verify that it was completed with other colleagues on a drill night but has provided no supporting evidence of this.
8. The Authority has no record of receiving the Form.
9. On 20 and 27 March 2015, the Authority issued reminders of the deadline to all RDS Firefighters by email and hardcopy. The update said that the Authority did not intend to accept any claims made after the deadline.
10. On 18 June 2015, Mr S says he realised his colleagues had received additional documentation regarding the Modified Scheme, but that he had not. He says he obtained a second copy of the Form, completed it, and sent it to the Authority promptly.
11. On 7 July 2015, the Authority received an undated copy of the Form from Mr S. The Authority says that by this time the deadline for Mr S to provisionally enrol as a member of the Modified Scheme, being 31 March 2015, had passed.
12. On 17 July 2015, the Authority wrote to Mr S and confirmed that it was no longer possible for him to provisionally enrol in the Modified Scheme.

13. At this point, Mr S raised a complaint. As part of this, he argued that other firefighters had been allowed to exercise an option to join the Modified Scheme, or change their mind about joining, after the deadline of 31 March 2015.
14. The Authority responded that a firefighter had only been allowed to opt into the Modified Scheme after the deadline where the original information pack had been sent to the wrong address. The Authority has confirmed that the other occasion raised by Mr S relates to where a firefighter had been provisionally enrolled by mistake. The firefighter therefore confirmed after the deadline that he did not want to join the Modified Scheme. The Authority has suggested that both these scenarios are different to Mr S', as he wanted to join the Modified Scheme despite the fact the deadline to do so has passed and he had received the relevant information before the deadline.
15. On 15 June 2018, an Adjudicator for my Office issued an Opinion on the basis that the case should not be upheld and in the absence of a response to the Opinion from Mr S within the Opinion's deadline, the Adjudicator communicated to the Authority that Mr S was not contesting the opinion and the case would be closed.
16. It has since become apparent that Mr S did not receive the original Opinion so it was resent on 24 July 2018. Our records show that the Adjudicator subsequently received a call confirming that Mr S wished to contest the opinion and the Adjudicator asked that he put his reasons in writing. Unfortunately, the Adjudicator left my Office shortly afterwards and the matter was not progressed until January 2020.

Summary of Mr S' position

17. Mr S has said:-
 - The Authority unfairly declined his application despite allowing other applications to be made after the closing date.
 - He was told that the Authority had not been through all of the applications and that it would be processing them up to September 2015.
 - The Authority reassured him not to worry as it had not reviewed all of the applications, but he was then told that they could not find his application.
 - He has served 35 years as a retained firefighter and so the offer was too good to ignore and he would not have missed this opportunity.
 - He had completed the Form in the presence of his watch manager on a drill night.

Summary of the Authority's position

18. The Authority has said:-

- The deadline of 31 March 2015 was not an arbitrary one but is set out under section 6C of the 2015 Order. The Authority highlights that it then had a deadline of 31 May 2015, to provide provisionally enrolled members of the Modified Scheme with an estimate of the contribution cost of joining. The various deadlines imposed by the legislation were to ensure that members would then be fully enrolled by 29 February 2016, the deadline for admittance to the Modified Scheme.
- Mr S' application was received on 7 July 2015, undated and outside the clear deadline, so he was not entitled to join the Modified Scheme.
- Under the Modified Scheme "guidelines", issued in respect of the 2014 Order, the Form had to be returned within two months, saying:

"if he/she fails to respond within 2 months (or a later date with the agreement of the FRA and as would be permitted under...), the opportunity to join the modified scheme will be lost."
- The Form was sent to Mr S' correct home address. If the address had been wrong, the Form would have been reissued with a revised deadline.
- The Authority had extended the original deadline to 7 April 2015 to take account of the potential delay caused by the Easter bank holiday.
- The updates in March 2015 clearly showed that the Authority would not accept claims outside of the deadline.
- The circumstances of the other members referred to by Mr S were materially different.
- The decision not to allow the Form to be submitted after the deadline was to ensure a consistent approach and to ensure the Stage one quotes/estimates of past service costs were issued by 31 May 2015, which were required in order to comply with the 2014 Order. The Authority notes that the 31 May 2015 deadline was later extended to 29 February 2016.
- Mrs S had made a number of calls on behalf of her husband beginning several weeks after the deadline. In the initial call, she had said that the Form had not been received despite the address being correct. It was explained to Mrs S that the deadline was intended to be applied consistently in order to be fair and equitable to all employees. Further, other individuals had been declined the opportunity to join the Modified Scheme because their Forms had been received after the deadline. The tight timescales were necessary to ensure the exercise was completed within the regulatory deadlines.

- Mr S subsequently responded to the Authority explaining that the Form had been received and returned through its internal mail system. The Authority explained that use of this mail system was not advisable, particularly where deadlines were involved because of its reliance on employees to collect and hand deliver post.
- There was no evidence that Mr S did not receive the original Form.

Conclusions

19. Regardless of the steps Mr S said he took to complete it, the Authority has consistently said that Mr S' Form was not received before 31 March 2015, and it was not until July 2015 that it had received any version of the Form. I do not think there is any value in analysing the disputed events prior to July 2015. For whatever reason, whether misdirected post or simple error, the Authority did not have a copy of Mr S' Form before that date and so if that deadline was correctly imposed then I would have to conclude that Mr S submitted the Form too late.
20. As a result, the main issue for me to determine is the applicability of the 31 March 2015 deadline, and if that was not a final deadline for submission, what was the last relevant date. The timeline and deadlines for this process were set out in the 2014 and 2015 Orders. These Orders amended The Firefighters' Pension Scheme (Wales) Order 2007, and set out several dates as deadlines for the necessary stages in the process.
21. The starting point for the process was set out in the 2014 Order, in Schedule 1, Part 11 Chapter 2, 5A (4):

“Within two months of the initial date, the authority must use reasonable endeavours to notify all those existing employees and former employees who may be entitled to join this Scheme as a special member that they may be so entitled.”
22. The initial date was 1 January 2015, and the Authority issued the Form to Mr S within two months of 1 January 2015.
23. The 2014 Order also refers to a deadline in Schedule 1, Part 11 Chapter 2, 5A (5):

“Within two months of receiving the notification in paragraph (4), or if no notification has been received, within four months of the initial date, a person may apply to the authority by which the person was employed in service falling within paragraph (2) above for a statement of the service...”
24. I consider that Mr S failed to meet the deadlines outlined in 5A (5). But irrespective of that, from 31 March 2015, the 2015 Order introduced Schedule 1, Part 11 Chapter 2, 6C (**rule 6C**), which altered the deadlines.

25. The Authority argues that the significance of the 31 March 2015 deadline that it wishes to apply stems from rule 6C. I consider it is the application of rule 6C which is determinative of Mr S' complaint. The relevant sections of rule 6C are set out in the Appendix below.

26. In applying rule 6C to Mr S' circumstances, he was considered to have automatically joined the Modified Scheme, as a provisionally enrolled member, as of 31 March 2015, unless one of the restrictions set out in rule 6C (3) applied to him on or before that date. Rule 6C (3) states:

“(3) A person cannot become a provisionally enrolled member if, on or before 31 March 2015, the person—

- (a) has become a special member of this Scheme;
- (b) has informed the authority that they do not want to elect to join this Scheme as a special member; or
- (c) has been notified by the authority that they are no longer eligible to join this Scheme as a special member.”

27. It seems that the Authority has interpreted the lack of receipt of the Form from Mr S, prior to 31 March 2015, as him informing it that he did not want to elect to join the Scheme. On that basis it has concluded that he could not become a provisionally enrolled member under Rule 6C (3)(b). That is the only justification under rule 6C that might apply to Mr S to prevent him from becoming a provisionally enrolled member.

28. I do not agree that in the absence of the Form being returned, the Authority should have excluded Mr S from being automatically classed as a provisionally enrolled member. The absence of a response cannot be used where the positive act of having “informed the authority” is required. Mr S did not inform the authority that he did not want to elect to join the Scheme and so rule 6C (3)(b) cannot apply.

29. Therefore, Mr S became a provisionally enrolled member of the Scheme through rule 6(C) 2(i) (see the Appendix), and the Authority was then required by rule 6(c) (4) (see the Appendix), to provide Mr S with a notice (**the Notice**) as described in rule 5A (13), which states:

“(13) Within four months of receiving an application under paragraph (5), the authority must give the applicant a notice setting out the period of service during the limited period which the applicant may purchase, the amount of special pension contributions payable in respect of the mandatory special period, the amount of special pension contribution payable in respect of the remainder of the applicant's service during the limited period, the pensionable pay and in appropriate cases the final pensionable pay which the authority have determined was paid during the limited period.”

30. Mr S did not receive the Notice described in rule 5A (13). Had he received the Notice, he would then have been subject to a final deadline to respond, as set out in rule 6C (5)(b) (see the Appendix), being 29 February 2016.

31. Mr S provided the Authority with an undated copy of the Form in July 2015. At that point he was told that it was too late for it to be processed, however that position is not consistent with the process and the deadlines that I have outlined.
32. I find that had the Authority applied the 2015 Order consistently, Mr S ought to have been classed as provisionally enrolled as of 31 March 2015. Having been provisionally enrolled, regardless of the delayed return of the Form, the Authority was then required, along with other information, to provide him with the Notice showing details of the cost and amount of service to be purchased. Had it done so Mr S would have had until 29 February 2016 to elect to pay the necessary additional contributions.
33. I find that the Authority failed to apply the 2015 Order correctly and wrongfully denied Mr S the opportunity to enrol in the Scheme regardless of any delay on his part to return the Form. To put matters right he should now be given the opportunity to pay the necessary contributions and join the Modified Scheme.
34. This matter, and the denial of his right to join the Modified Scheme, has caused Mr S significant distress and inconvenience. In respect of this, the Authority shall pay Mr S £500.

Directions

35. Within 28 days of the date of the Determination the Authority shall provide Mr S with the Notice that ought to have been provided to him under rule 5A(13) (see paragraph 29 above).
36. Mr S shall then be allowed up to three months from the date the Notice is issued to him to elect to join the Modified Scheme.
37. Should Mr S elect to join the Scheme, within three months of his decision, the Authority shall take the necessary steps to enrol Mr S and arrange any contribution payment schedules as required.
38. Within 14 days of the date of the Determination, the Authority shall also pay Mr S £500 for the distress and inconvenience caused.

Anthony Arter

Pensions Ombudsman
16 December 2020

Appendix

The Firefighters' Pension Scheme (Wales) Order 2007 (as amended by the 2014 and 2015 Orders)

39. Schedule 1, Part 11 Chapter 2, 6C:

“Election to purchase service: provisional enrolment

(1) Subject to paragraph (3), a person who satisfies the conditions in paragraph (2) of this rule joins this Scheme as a provisionally enrolled member on 31 March 2015.

(2) The conditions are that-

- (i) The person has been notified by the authority, that they may be entitled to join this Scheme as a special member, pursuant to rule 5A(4) of this Part; or

...

(3) A person cannot become a provisionally enrolled member if, on or before 31 March 2015, the person—

- (a) has become a special member of this Scheme;
- (b) has informed the authority that they do not want to elect to join this Scheme as a special member; or
- (c) has been notified by the authority that they are no longer eligible to join this Scheme as a special member.

(4) On or before 31 May 2015 the authority must give a provisionally enrolled member a notice as referred to under rule 5A(13) of this Part, unless the authority has already provided the person with such a notice.

(5) Subject to rule 6B(12) of this Part, if a provisionally enrolled member—

...

(b) does not give the authority written notice on or before 29 February 2016 of their election to pay mandatory special period pension contributions in respect of their service during the mandatory special period under rule 6A of this Part, the person ceases to be a provisionally enrolled member of this Scheme.”