

## Ombudsman's Determination

Applicant	Mr E
Scheme	The Firefighters' Pension Scheme 1992 (the <b>1992 Scheme</b> )
Respondent	Warwickshire Fire and Rescue Service (the <b>Fire and Rescue Service</b> )

### Complaint Summary

1. Mr E's complaint concerns an overpayment of pension, amounting to £9,964, that the Fire and Rescue Service is seeking to recover following its decision to abate his pension. Specifically:-
  - The Fire and Rescue Service had a duty of care to alert him at the outset that his pension would be abated.

### Summary of the Ombudsman's Determination and reasons

2. I do not consider that the Fire and Rescue Service had an additional duty of care towards Mr E, other than the requirement to make factually correct information available to him. This is supported by relevant case law.
3. The complaint is upheld to the extent that the Fire and Rescue Service did not follow a reasonable process when exercising discretion under "rule K4" and making its decision to abate Mr E's pension. My Directions are set out in paragraph 113 below.

### Detailed Determination

#### Material facts

4. Mr E served as a firefighter in the Fire and Rescue Service for over 30 years. He was in pensionable service in the 1992 Scheme during that employment.
5. Warwickshire County Council is the Fire Authority (the **Authority**) for the Fire and Rescue Service.
6. Rule K4: "Withdrawal of pension during service as a regular firefighter", of the Firemen's Pension Scheme Order 1992, provides that:

“The fire authority by whom a pension is payable may, in their discretion, withdraw the whole or any part of the pension for any period during which the person entitled to it is serving as a regular firefighter in any brigade”.

7. The Firefighters’ Pension Scheme (Amendment) (No.2) (England) Order 2013 SI 2013/1392 (the **2013 Order**) which came into effect from 25 September 2009, states:

“12. In Part K (revision and withdrawal of awards)—

...

(c) for rule K4 (withdrawal of pension during service as a regular firefighter) substitute—

**“Withdrawal of pension whilst employed by a fire and rescue authority**

K4. The fire and rescue authority by whom a pension is payable may, in their discretion, withdraw the whole or any part of the pension, except a pension under Part C (awards on death—spouses and civil partners), for any period during which the person entitled to it is employed by any fire and rescue authority in **whatever capacity** [emphasis added in bold]”.

...

14. In Part LA (Firefighters’ Pension Fund)—

...

“(9) Where an authority exercises its discretion not to withdraw the payment in whole or in part of any pension under rule K4 (withdrawal of pension whilst employed by a fire and rescue authority), the authority shall in the financial year in which payment is not withdrawn, transfer into the FPF an amount equal to the amount of pension paid during that financial year to that person which could have been abated or withdrawn”.

8. In September 2009, the Ministry of Housing, Communities and Local Government, formerly the Communities and Local Government (**CLG**), issued Circular FPSC 10/2009, (the **Circular**), in respect of the 1992 Scheme. This clarified the CLG’s position on the implication of re-employing retired firefighters.

9. Section 1.5: Amendment to the [1992 Scheme] and the [New Firefighters’ Pension Scheme], NFPS, of the Circular states:

“...CLG are proposing the following amendments to the [1992 Scheme] and the NFPS:

Amendment to Rule K4 of [the 1992 Scheme] to provide that a fire and rescue authority may withdraw the whole or any part of the pension for any period during which the person is employed in any capacity by any fire and rescue

authority [**FRAs**]. This will bring Rule K4 into line with Part 9, Rule 3(3) of the NFPS”.

10. Section 1.6 of the Circular states:

“Whilst both [the 1992 Scheme] and the NFPS rules on pension reduction (abatement) are framed in a way that gives FRAs discretion over the application of abatement, CLG would expect *in-service* abatement to be applied to both [the 1992 Scheme] and NFPS pensions and for this to be reflected in an authority’s general abatement policy. In addition, CLG would also expect FRAs to formulate policy in [regard] to *inter-service* abatement having regards to HM Treasury’s minimum standard. If an authority decides not to apply abatement, the cost of any pension will not be met by the pension fund account”.

11. The Fire and Rescue Service’s “Re-Engagement Following Retirement Service Order” (the **Service Order**), dated February 2012, describes the policy and procedure adopted by the Fire and Rescue Service on the re-employment of a Firefighter following retirement. Section 1.2: Abatement, explains that:

“Abatement is the process whereby a member’s pension can be reduced or stopped if a member retires and then returns to work and their earnings on re-employment (including pension) exceed their earnings before they retired.

Government policy, set by HM Treasury, requires public sector pensions to be abated in certain circumstances when a public servant is re-employed following retirement. The purpose of abatement is to protect public funds. It limits the remuneration payable at any one time in respect of a particular job preventing both the cost of pay and pension falling to the public purse; it ensures that those who receive early pensions have that taken into account should they seek re-employment within the public sector and it generally protects public funds from abuse.

There are two forms of abatement. In-service abatement occurs where re-employment is in a post covered by the same scheme which is paying the individual’s pension. This would cover cases that would fall under Rule K4 of the [1992 Scheme] where a FRA responsible for paying a pension can reduce it, or withdraw it altogether, during any time where a retired member is re-employed as a regular firefighter. Under Part 9, rule 3 of the NFPS 2006, a FRA responsible for paying a pension can reduce it, or withdraw it altogether, during any time where a retired member is re-employed in any capacity by any FRA.

In addition to in-service abatement, government policy requires the abatement of public sector pensions in cases where retired public servants are re-employed to any employing public sector organisation without going through an open competition. This form of abatement is termed as Inter-service abatement and its application is required up to the point where the public

servant reaches the normal pension age of the scheme that is paying their pension. Prior to re-employment the person declares the source of the pension and either the pension is reduced by the paying authority or pay is reduced by the new employer”.

12. Section 2.1: policy, states that:

“FRAs are under no obligation to re-employ firefighters who have retired and WFRS policy is that there is no automatic re-engagement of pensioners. **If through a competitive process a pensioner is re-employed; in line with “the Firefighters Pension Scheme 1992 – Abatement of Pension on the Re-employment of a Firefighter Circular FPSC 10/2009”, WFRS will enact the following procedures:** [emphasis added in bold].

- Retirement will constitute a break in service so that active members of the FPS will be terminated and no further pensionable service in the scheme can be accrued.
- Abate a member’s pension where the cumulative pension in payment and the salary received on re-employment exceeds the level of earnings received directly prior to their retirement”.

13. Section 2.1 warns that “the financial implications” of re-employment following retirement are a matter for the individual. Independent financial advice should be sought in all cases. (Section 2.1 is set out in Appendix A).

14. In October 2014, Mr E retired from his role as Crew Commander with the Fire and Rescue Service and drew his pension.

15. The Service Order was made available in the “Document Library” published on the Fire and Rescue Service’s internal website. Mr E had access to this during his employment. Thereafter, it would have been available to him on request.

16. In August 2017, Mr E was re-employed by Warwickshire County Council as a Community Support Officer in its Community Fire and Safety Support Service. The role was not advertised externally.

17. Mr E has said that he was approached by the Fire and Rescue Service’s Group Commander and asked to take on the role. The Group Commander then stated he would need to “clarify things” with Human Resources (**HR**). Mr E says that he assumed from this that the matter of pensions was brought to the HR Manager’s attention. He was told that there was no need for an interview, as his experience and service history meant that he suited the role perfectly; the job was his if he wanted it.

18. At the time of his re-employment, Mr E has said that he did not have any communication with the HR Manager concerning his pension. He also said that the HR Manager was aware that he was a retired fire fighter. Given her position, he considers that she would likely have been aware of any pensions he would be due or was receiving.

19. Mr E's contract (the **Contract**) indicated that the purpose of his role was to undertake a specific piece of work or project that was time limited or linked to specific funding. It would cease at the end of the stated period, or, if earlier, when the task had been completed, or when funding had been removed.
20. The Contract indicated that it would end on 28 February 2018. The hours of work would be 37 hours per week; the starting salary £22,658.
21. The Contract included the terms of employment for "Green Book" Staff. The Contract was subsequently extended for two months.
22. The "Green Book" covers the pay and conditions for local authority employees and non-local authority staff.
23. Section 12: pension arrangements, of the terms of employment, signposted Mr E to further information on the Local Government Pension Scheme (**LGPS**) published on the Fire and Rescue Service's website.
24. The terms of employment did not include any reference to the possibility that pension may be abated or withdrawn on re-employment by a public sector organisation. It also did not include any reference to the Service Order.
25. Mr E's access to the Fire and Rescue Service's internal website was reinstated following his re-employment. Mr E said he assumed at the time that there were "no issues", as none had been advised to him. So he had no reason to check the Fire and Rescue Service's internal website.
26. The Service Order was later updated. The relevant sections of the July 2018 version are set out in Appendix B below.
27. The Fire and Rescue Service advised that the officer, who would have sent any circulars concerning changes to the abatement rules, is no longer an employee of the Authority. Due to the passage of time, it is unable to access any correspondence that the officer would have issued to employees.
28. On 28 March 2018, the Fire and Rescue Service's pension section (the **Pension Section**) wrote to Mr E (the **March Letter**). It said it had been brought to its attention that Mr E had started a new role, which was pensionable in the LGPS. As he was in receipt of a pension in respect of the 1992 Scheme, his pension was "subject to abatement".
29. The Pension Section advised Mr E that his pension and salary combined exceeded his pre-retirement salary. Consequently, his pension would be suspended from 1 August 2017. Since he had received salary and pension, in respect of the period from 1 August 2017 to 31 March 2018, he had been overpaid by £9,964. It also advised it would issue an invoice in due course.

30. On 1 June 2018, Mr E contacted the HR Manager. He referred to information he had requested in respect of the period of his re-employment. He advised that this was still outstanding. He said he had also requested copies of his contracts of employment.
31. Mr E said he had been “treated appallingly” by the Fire and Rescue Service. He had received hardly any support and had been “let down and abandoned”.
32. On 4 June 2018, the HR Manager requested details of the overpayment from the Pension Section.
33. In the intervening period, Mr E’s adviser (the **Adviser**) contacted the HR Manager. He stated that the matter was causing Mr E significant ongoing distress. He also stated that Mr E understood that his new salary and pension could not exceed the salary in respect of his post on retirement.
34. The Adviser stated that Mr E’s P60 showed that he earned £14,895 in the 2017/18 tax year. Mr E’s pension amounted to £16,249. Consequently, Mr E’s total income was £31,144, which was lower than his salary on the date of retirement.
35. On 11 June 2018, the Pension Section provided draft wording to the HR Manager to include in her response to the Adviser. Broadly, it explained that the general abatement rule was that any salary on re-employment could not be more than the aggregate of the salary at retirement and the rate of pension. It also explained that abatement was not applied annually; it reflected how the individual was paid.
36. The Pension Section included a copy of its calculation of the overpayment. It said that the 2013 Order, clarified that pension should be abated where an individual is employed in any capacity by a Fire and Rescue Authority.
37. The Pension Section explained that any individual who was re-employed by a Fire and Rescue Authority, or a sponsoring employer, would be subject to abatement. It also explained that a local authority was a sponsoring employer. So, it was likely that abatement should apply in Mr E’s case.
38. On 29 August 2018, the Authority wrote to Mr E enclosing an invoice for £9,964. It confirmed it would accept the amount in instalments and proposed payments of £276 per month over a period of 36 months.
39. On the same day, Mr E wrote to the Early Resolution Team at The Pensions Ombudsman’s Office (**TPO’s Office**) (the **August Letter**). He explained that he had been re-employed by the Fire and Rescue Service in a civilian role, under a six month temporary contract. His monthly salary amounted to £1,888 (gross). Consequently, he had expected to earn a total of £11,329 in respect of that contract.
40. Mr E advised that his line manager had asked him if he would be interested in “signing up” for a further six months. When he received the March Letter, he was “totally bemused.” So, he contacted the Pension Section straightaway for an explanation.

41. Mr E said that was the “first time” he had been made aware that his current salary plus his pension payments could not exceed his previous salary. Had this been brought to his attention, he would not have signed up to a new contract. He resigned straightaway when he was notified of the position.
42. Mr E pointed out that the Fire and Rescue Service would have re-employed other members of the 1992 Scheme who were also drawing their pension. He questioned why abatement had not been discussed and brought to his attention at the outset, “as a duty of care.”
43. On 22 October 2018, Mr E complained under Stage One of the Internal Dispute Resolution Procedure (**IDRP**). He enclosed a copy of the August Letter.
44. On 4 December 2018, the Area Commander met with Mr E to discuss his complaint.
45. On 13 December 2018, the Area Commander issued a response under Stage One of the IDRP. He acknowledged that Mr E had been approached by the Group Commander to take on the role he was re-employed in. He also acknowledged that Mr E said he had not been aware of “abatement rules” at the time of his re-employment.
46. The Area Commander noted that Mr E considered the Fire and Rescue Service had failed in its duty of care to him. Specifically, it should have made the potential repercussions of his re-employment, and the impact on his pension, clear to him at the outset.
47. The Area Commander also noted that Mr E had stated he had not previously seen the Service Order. He highlighted that this warned that the Fire and Rescue Service “could and will not provide financial advice to any individual”.
48. The Area Commander stated that, based on the information Mr E had provided, and taking into account the “regulations,” he was unable to waive the overpayment. He did not uphold Mr E’s complaint.
49. During the Fire and Rescue Service’s subsequent exchanges with Mr E in February 2019, it was highlighted to Mr E that he was earning a salary commensurate with his role “at full time hours.” It explained that Mr E was also receiving a pension. Consequently, he had exceeded the total salary for his previous role as Crew Commander.
50. The Fire and Rescue Service advised that Mr E’s pension should have been suspended during the period in question.
51. The Fire and Rescue Service explained that reference to Mr E “earning more” than he did previously, did not mean “in any 12 month period”. It referred to “an ongoing, month by month payment”. It said that, while his role was temporary, his earnings had exceeded the amount he was able to earn while receiving his pension.

52. On 27 February 2019, Mr E made an application under Stage Two of the IDR. The Fire and Rescue Service's records do not indicate that his application was received.
53. On 11 April 2019, the Fire and Rescue Service wrote to Mr E. The Fire and Rescue Service asked Mr E to confirm whether he wanted to move forward with a repayment plan, similar to the one it had proposed. Mr E was warned that, in the absence of an agreed repayment plan, the matter would be referred to its debt recovery team. It explained that this would be on the basis that he had not invoked Stage Two of the IDR.
54. On 31 October 2019, Mr E referred his complaint to TPO's Office.
55. On 30 December 2019, the Fire and Rescue Service's legal department notified Mr E that it had been instructed to recover monies in respect of an outstanding invoice. Mr E was subsequently notified that no action would be taken to recover the overpayment pending the outcome of his complaint.
56. On 20 February 2020, TPO's Office received a formal response to Mr E's complaint.
57. The Fire and Rescue Service has clarified that Mr E's pension remained in payment during his period of re-employment.
58. During the investigation, TPO's Office asked the Fire and Rescue Service to provide a copy of any contemporaneous document(s) that detailed the process in respect of the decision to abate Mr E's pension. TPO's Office was informed that the Fire and Rescue Service's former Pensions Officer identified Mr E's case in March 2018. The former Pensions Officer confirmed to the Fire and Rescue Service that the decision was based on the application of the relevant rules.
59. **Mr E's position**
  - He is not aware of any other re-employed firefighters whose pension has been abated.
  - He questions the Fire and Rescue Service's assertion that he was in receipt of a pension when he should not have been. There is no reason why he should not have received a pension. He is not liable for the overpayment; it should be written off.
  - Abatement was not mentioned to him at any time during his employment, or at the time of his re-employment.
  - Since he was not offered an interview, he did not have the opportunity to ask any questions at the time. If it had been brought to his attention, that taking on the role would put his pension at risk, he would not have considered it. He wishes to emphasise this point.



- His Contract was extended at the request of the Group Commander, to carry out a specific task. The role was never intended to be permanent. The HR Manager was aware that he was in receipt of a pension.
- His earnings from the role did not exceed his earnings before he retired. His pension statements and payslips confirmed this.
- Section 1.6 of the Circular indicates that the Fire and Rescue Service may decide not to apply abatement. It is unclear under what circumstances abatement would not be applied.
- The Fire and Rescue Service has re-employed several members who are drawing their pension. The issue of abatement is not something that should be overlooked when offering employment.
- The matter has caused him financial concerns. It has also significantly impacted his mental wellbeing and that of his family. He was sent a demand for payment for thousands of pounds that he does not consider he should have to pay back. This has caused him distress over the past 18 months, the ongoing uncertainty has compounded the issue.
- Whether or not he is in a financial position to repay the money, should not be a consideration in the circumstances. The fact remains: the matter of abatement was known to those organising his employment at the time. However, it was never mentioned to him, spoken of, or confirmed in any communication specifically tailored to him.

#### **60. The Fire and Rescue Service's position**

- Government policy is that pension should be abated where there is discretion to do so. Paragraph 1.6 of the Circular clarified that the government expected in service abatement to be applied and be reflected in the Fire and Rescue Service's general abatement policy.
- The Service Order makes the position on abatement clear. It also makes clear that the Fire and Rescue Service does not assume any responsibility for offering financial advice to individuals who are re-employed.
- Mr E could have discovered the position by making reasonable enquiries at the time of his re-employment. The information would have been available to him from Pension Services, via the Fire and Rescue Service section of the intranet. It would also have been available from online sources.
- Pensioners are expected to notify the Pension Section on re-employment. In the case of the 2006 Scheme, notification is explicitly required.

- There is a degree of separation between the Pension Section, as the administering authority for the pension schemes, and the Fire and Rescue Service, as the employer. There is no common "IT" system that automatically notifies the Pension Section when a pensioner is offered re-employment.
- The Fire and Rescue Service is a small fire service. At the time of Mr E's re-employment, recruitment administration was handled by a centralised team in HR, which is based at the Fire and Rescue Service's office in Warwick. HR would not have had automatic access to information on employees. This is held separately by the Pension Section.
- Where re-employment of a pensioner is at "Fire HQ", the Local HR Manager may become aware of it. In such cases, the Local HR Manager would, as a matter of good practice, remind the employee to consider the abatement rules. In Mr E's case, he was not re-employed at HQ. The HR manager at HQ was under the impression that Mr E's re-employment was temporary and part-time. She was not aware that abatement may apply.
- It is not always possible for the Fire and Rescue Service to remind re-employed pensioners individually of the abatement rules. For this reason, the Service Order makes clear that the Fire and Rescue Service takes no responsibility for providing financial advice to re-employed pensioners.
- Notwithstanding this, the Fire and Rescue Service does not accept that it has a duty of care to Mr E to alert him to the abatement rules. Courts are reluctant to imply a duty of care on employers to protect an employee's economic well-being.
- The Fire and Rescue Service's position is supported by *University of Nottingham v Eyelett and others* 1999, and *Crossley v Faithful and Gould Ltd* 2004.
- The Fire and Rescue Service does not have any duty to advise Mr E in respect of statutory provisions. This is supported by *Scally v Southern health and social services board* 1991.
- It is relatively common for retired firefighters to be re-employed by the Fire and Rescue Service. Consequently, abatement is a topic that is frequently and openly discussed within the Fire and Rescue Service.
- The Fire and Rescue Service considers that it acted reasonably and in good faith. It also considers that it acted promptly on discovering the overpayment.
- There was not an excessive delay between the date of Mr E's re-employment in August 2017 and the date he was contacted by the Pension Section in March 2018. He was notified that his pension had been abated as soon as it was reasonably practicable to do so.

- Recovery of the overpayment is not time barred by the Limitation Act 1980 (the **Limitation Act**).
- Where pension should be abated, the Fire and Rescue Service has an obligation to seek recovery of any overpayment as a debt.
- Mr E's dispute is that he was not made aware of the possibility that his pension would be abated. Mr E had the opportunity to make representations to the Fire and Rescue Service concerning his financial position at the time he appointed his Adviser. It does not appear that Mr E has provided any financial information to the Fire and Rescue Service in connection with his case. Mr E had a further opportunity to make representations during Stage One of the IDRPs.
- Mr E did not submit any evidence to support that he had materially changed his financial position. Nor did he submit evidence to support that any alleged injustice to him outweighed the injustice to the Fire and Rescue Service, by extension the taxpayers of Warwickshire, in denying restitution.
- Mr E does not appear to have raised estoppel or any other defences to recovery. For the avoidance of doubt, the Fire and Rescue Service does not accept that any other defences apply in this case.
- The offer of a 36 month repayment plan is in line with the Fire and Rescue Service's corporate debt policy. If Mr E considers that he is unable to meet this commitment, the Fire and Rescue Service may request a financial assessment to agree a more affordable plan.
- The Fire and Rescue Service does not have a record of any correspondence relating to Mr E's application under Stage Two of the IDRPs. The Fire and Rescue Service was open to considering an application but it noted that TPO's Office had accepted Mr E's complaint for investigation.
- The HR Manager promptly contacted the Pensions Section following the enquiry from Mr E's Adviser in June 2018.
- The Fire and Rescue Service considered Mr E's complaint under the IDRPs within a reasonable timeframe, taking into account Mr E's submissions. Had Mr E invoked Stage Two of the IDRPs, the application would likely have been considered in Spring 2019.
- The Fire and Rescue Service also provided its formal response to TPO's Office within a reasonable timescale.
- Mr E has been aware since 20 January 2020, that no action will be taken to recover the overpayment until TPO's Office has completed its investigation. So, it

is unclear to the Fire and Rescue Service that he has suffered any distress and inconvenience in the intervening period.

61. A Preliminary Decision was issued on 21 September 2021. The parties made further representation in response to the Preliminary Decision.

### **Conclusions**

62. The 2013 Order amends the Firefighters' Pension Scheme 1992 to substitute a new "rule K4". This extends the Fire and Rescue Service's power to abate pension when a pensioner takes up employment in any role with an authority. The parties do not dispute this. I am satisfied on reviewing the evidence that the regulations permit the Fire and Rescue Service to abate Mr E's pension.
63. In the exchanges between the parties, Mr E questioned whether the Fire and Rescue Service correctly applied its abatement policy in his case. In particular, whether any abatement calculation should be based on a 12 month period. I note that Mr E did not dispute the figures quoted in respect of the sum of his salary and his pension when compared with his final salary.
64. Mr E's complaint raised a number of issues: (i) whether the Fire and Rescue Service impliedly accepted a duty of care to alert him to the possibility that his pension would be abated; (ii) his reliance on the Fire and Rescue Service complying with that duty; and (iii) the reasonableness of the procedure the Fire and Rescue Service adopted when making the decision to exercise discretion and abate his pension. Lastly, whether he has a legal defence against recovery of the overpayment. I will consider each issue in turn.

### ***Implied duty of good faith and case law***

65. The Fire and Rescue Service accepted that it has a duty to make pensions information available to Mr E and although it recognises that it is good practice to advise re-employed staff of abatement, that does not mean that it is obliged to specifically highlight it. It has cited *University of Nottingham v Eyelett and others* 1999, *Crossley v Faithful and Gould Ltd* 2004; and *Scally v Southern health and social services board* 1991, in support of its argument
66. At the time of Mr E's re-employment he was in receipt of his pension. He submits that the Fire and Rescue Service had a duty of care to make him aware of its abatement rule. His position is that he could not reasonably have been expected to be aware of the possibility that his pension would be abated unless it was drawn to his attention.
67. Mr E's pay and conditions were covered by the "Green Book". It is unlikely that he individually negotiated his employment terms and conditions. The legislation in respect of abatement was certainly not negotiated with Mr E.
68. The employer's implied duty of good faith is well established in pensions law. The duty, borrowed from employment law, was first applied in *Imperial Group Pension Trust v Imperial Tobacco* [1991] IRLR 66. Paragraph 35 of the judgment states:

“In every contract of employment there is an implied term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.

69. In *Scally v Southern Heath & South Services Board* [1992] the House of Lords held that in limited circumstances there can be an implied duty on an employer to inform an employee about a contractual right. This would occur when all the following apply:-
- I. The terms of the contract have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference.
  - II. A term of the contract makes available to the employee a valuable right contingent upon action being taken to avail themselves of its benefit.
  - III. The employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to their attention.
70. The Courts have not extended the principle in *Scally* to a wider duty on the part of the employer to take care of the economic well-being of staff. The limited application of *Scally* has been recorded in a number of cases.
71. In *University of Nottingham v Eyett* [1999] ICR 721, Judge Hart stated that *Scally* did not apply on the facts of that case. He commented that the implied duty of mutual trust and confidence did not include a positive obligation on an employer to advise on how best to exercise valuable rights under the employment contract.
72. In *Outram v Academy Plastics* [2000] IRLR 499, the court ruled that there was no general implied duty on an employer to provide information and/or advice to an employee about a pension scheme in order to prevent economic loss.
73. In *Crossley v Faithful & Gould Holding Ltd* [2004] ICR 1615, the Court of Appeal held that there was no standard obligation implied by law as a term of all contracts of employment which required an employer to take reasonable care for the economic well-being of his employee.
74. The following cases also considered the findings in “*Scally*,” and the employer’s obligation to make information available. They are a material consideration in the outcome of Mr E’s complaint:-
- In *Andrew v Kings College NHS Foundation Trust* [2014] All ER (D) 310, the Employment Appeal Tribunal held that the employer’s implied duty under *Scally* was not to ensure that the information is actually successfully received by the employee. Rather, to ensure that the employer takes reasonable steps to bring the relevant information to the employee’s attention.
  - In *Corsham v Police and Crime Commissioner for Essex* [2019] EWHC 1776 (Ch), the court found that the *Scally* implied duty was not engaged. It also found that the police were guilty of negligent mis-statement in informing retiring officers that their

lump sums would be tax-free, despite knowing that the officers' immediate re-employment would have adverse tax consequences.

75. On reviewing the evidence in this case, I do not find there are grounds on which to conclude that the Fire and Rescue Service acted negligently in failing to warn Mr E that abatement might apply. There is insufficient evidence to satisfy the scope of alleged duty voluntarily assumed.
76. On balance, I find that the Fire and Rescue Service's position is supported by case law. Any alleged employer's duty is restricted to informing Mr E of his options under the pension scheme to enable him to make an informed decision. While the Fire and Rescue Service had a duty to make factually correct information available to him, it was not required to ensure that he received it.
77. The Fire and Rescue Service has submitted that the Service Order was available on the Fire and Rescue Service's internal website. The version of the Service Order in force at the time of Mr E's employment was still in place at the time he was re-employed. It covers the issue of abatement. It makes clear that the financial implications of re-employment following retirement are the concern of the individual. Furthermore, that the Fire and Rescue Service "cannot and will not provide financial advice to any individual."
78. I note that the revised Service Order is available in the "Document Library," which is accessible to all members of the Fire and Rescue Service.
79. It would have been open to Mr E to request access to the Service Order after leaving employment. While I appreciate that he had no reason to check the internal website following his re-employment, I do not consider that this materially changes the outcome in the circumstances.
80. In the absence of an additional duty of care, the Fire and Rescue Service did not have a duty to ensure that Mr E had accessed the Service Order during his period of employment, or re-employment.
81. The evidence does raise issues concerning the Fire and Rescue Service's handling of Mr E's re-employment. Particularly, as it indicates that it applied a blanket policy in respect of abatement.
82. I note the HR Manager at HQ was not aware that abatement could be applied to short term and part time employment. This raises the question of whether the HR Manager would have discussed abatement with Mr E had she been aware of the correct position.
83. I sympathise with Mr E and the very difficult position he now finds himself in. While it does not change the outcome, it is arguable that the Fire and Rescue Service should have put in place appropriate procedures to bring the matter of abatement to Mr E's attention. Namely, a mechanism that established at the outset the pension status of a pensioner on re-employment. Particularly, in light of Section 2.1 of the Service Order.

84. The Fire and Rescue Service submits that Mr E's pension should have been suspended during the period of his re-employment. It is open to question whether Mr E should have been invited to declare the source of his pension. This could potentially have identified at the outset that he was in receipt of a pension from the 1992 Scheme.
85. In response to the Preliminary Decision, the Fire and Rescue Service has said that it recognises that abatement would be considered, at the point of re-employment as a matter of good practice. It has confirmed that, in light of Mr E's case, the administrators of the 1992 Scheme have taken steps to raise awareness of the pension implications of re-employment for retired firefighters. While I acknowledge that there is no legal obligation on the administrators to do so, I consider this to be an appropriate course of action.

### ***The decision-making process***

86. Where a body connected to a pension scheme has discretion, I will consider whether its discretionary powers have been applied in a manner consistent with the scheme rules or regulations and whether a correct process was followed in arriving at the decision. I will also consider whether the particular merits of the individual's case were taken into account, where the applicable rules or regulations of the scheme in question permit this. I would adopt a similar approach when reviewing complaints where the decision had financial implications for the employer.
87. Under the contract of employment the employer must act fairly and in good faith. It must not act in such a way as to seriously damage the relationship of trust and confidence which exists between an employer and an employee.
88. It is reasonable for a public sector organisation to have regard to any established and/or published policies, including guidance from government departments. However, it should not be completely fettered or blinkered to the extent that an exception cannot be made by it, unless the applicable scheme regulations expressly require this. I find that rule K4 does not. In *British Oxygen Co v Minister of Technology* [1970] 3 All ER 165, the House of Lords upheld the application of a policy whereby grants for certain eligible equipment were refused for items that cost less than £25. However, in reaching this decision it concluded that there can be no objection to the policy "*provided the authority is always willing to listen to anyone with something new to say...*"
89. The Fire and Rescue Service has clarified that the decision, to abate Mr E's pension, was based on the Pension Section's interpretation of the relevant statutory provisions.
90. In response to the Preliminary Decision, the Fire and Rescue Service stated that the 1992 Scheme is an unfunded pension arrangement paid for by general taxation. The Fire and Rescue Service has a fiduciary duty to taxpayers: this informed the 2009 Circular. And, in turn, the relevant Service Order, which it considered at Stage One of the IDRPs.

91. The evidence supports the view that a blanket policy was applied to abate Mr E's pension. I consider this to be a procedural error. There is no evidence to suggest that the particular merits of Mr E's case were considered at the time. There is also no evidence that Mr E was given an opportunity to make any representations as to why his pension should not be abated.
92. The Fire and Rescue Service should have invited Mr E to provide details of any exceptional factors why his pension should not be abated. Having reviewed the evidence, I find that the Fire and Rescue Service did not follow a correct decision-making process in this case.

***Legal defences against recovery of an overpayment***

93. I acknowledge that Mr E has not raised any defences against recovery.
94. The most common defence against recovery of an overpayment is referred to as "change of position". Namely, the applicant has changed his position such that it would be unjust to require him to repay the overpayment either in whole or in part.
95. Broadly, the applicant must on the balance of probabilities show that because of the overpayment, which he received in good faith, he detrimentally changed his position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible. If these elements are satisfied, I may direct that some or all of the overpayments may be kept by the applicant.
96. The most obvious example of a detrimental change of circumstances is the expenditure of money by the applicant. Not all expenditure will count for the purpose of a change of position defence. As a general rule, paying off a debt will not count as a detrimental change of circumstances because the debt would have to be repaid at some point. Funding everyday living expenses, that give rise to a higher standard of living, can be considered. Where the overpayment consists of a series of payments, the change of position defence may succeed on the basis of increased outgoings.
97. Mr E's reaction when he was notified that he had been overpaid, and his subsequent exchanges with the Fire and Rescue Service, indicates that he was unaware of its policy on abatement. I find that the good faith test is satisfied. However, there is insufficient evidence on which to make a finding of a detrimental change of position in this case. It is open to Mr E to demonstrate that, on the balance of probabilities, he would not have suffered a detrimental change of circumstances but for the receipt of the overpayment.
98. There are other defences to the recovery of an overpayment; for example, estoppel and contract. These arise less often in pension cases but will be considered if the circumstances of the case suggest that it is appropriate.
99. Estoppel is a legal principle whereby a party can be prevented from departing from statements or promises they have previously made to another party. In cases where an individual has been overpaid pension benefits, estoppel by representation or



estoppel by convention might arise. For estoppel by representation, Mr E must be able to demonstrate:

- a clear and unequivocal representation or promise by the Fire and Rescue Service on which it was reasonably foreseeable that he would act;
- an action on his part which was reasonably taken in reliance on the representation;
- that he will suffer detriment if the Fire and Rescue Service is not held to the representation; and
- it would be unconscionable (extremely or shockingly unfair) for the Fire and Rescue Service to be allowed to go back on the representation.

100. The evidence does not support the existence of a “clear representation” that would enable Mr E to successfully argue that the Fire and Rescue Service is estopped from recovering the overpayment. There is nothing in the evidence to indicate that he was notified that his pension would not be abated on his re-employment. The “clear” representation criterion is therefore not satisfied.

101. For estoppel by convention to arise, both parties must have proceeded based on an assumption of facts or law which was incorrect. The assumption must have been expressly shared between the parties; either in words or in conduct from which the necessary sharing can be inferred. The party alleging the estoppel must be able to show detrimental reliance on the assumption; such that it would be unjust or unconscionable for the other party to assert the true factual or legal position. The evidence does not support the view of a shared assumption that Mr E’s pension would not be abated on his re-employment.

102. Similarly, I have not been able to identify the necessary elements for a contract to exist. Namely, offer, acceptance, consideration, and the intention to enter into legal relations. Contract law is based on the concept of reciprocity. A promisee cannot enforce a promise unless he has given “consideration”. That is, something in exchange for it. There is nothing in the evidence that suggests that Mr E gave any consideration. Nor can I find any evidence that the Fire and Rescue Service intended to enter into legal relations with Mr E to provide him with an unabated pension on his re-employment.

103. The Limitation Act sets time limits in respect of different classes of action. Where the action is brought outside the applicable time limit, it provides a defence to the claim. For the purposes of the Limitation Act, time started running from the date that the overpayment first occurred and subsequently upon each further overpayment occurring (section 5 of the Limitation Act). However, the limitation period can be postponed where there has been fraud, concealment or mistake (section 32 of the Limitation Act). In such cases, the limitation period is six years from the date the Fire and Rescue Service discovered the fraud, concealment or mistake or could do so

with reasonable diligence. In this case, the overpayment is the result of the late application of the Fire and Rescue Service's abatement policy.

104. In the most recent case of *Webber v Department for Education* [2016] EWHC 2519 (Ch), the High Court held that the applicable cut-off date for the purposes of the Limitation Act was the date when Teachers' Pensions brought its claim during the course of the Pensions Ombudsman's complaints procedure. That date was identified as being the receipt by the Pensions Ombudsman of Teachers' Pensions' response to Mr Webber's complaint.
105. The Fire and Rescue Service's claim was made on 20 February 2020, within the six year period, so Mr E does not have a defence under the Limitation Act. In the absence of any other defence to recovery, the Fire and Rescue Service can recover the overpayment because it has made its claim within the required limitation period.

### ***Review of decision***

106. In light of my findings (see paragraph 92 above), the Fire and Rescue Service shall reconsider its decision to abate Mr E's pension.
107. Mr E shall first be given the opportunity to consider whether he has any legal defences against recovery of the overpayment and to make any necessary representations to support his case.
108. Should the Fire and Rescue Service make the same decision, having gone through a correct discretionary process, it shall give Mr E an opportunity to demonstrate whether recovery of any overpayment, that is legally recoverable, would cause him undue hardship. The repayment plan should be at least equal to the period over which the overpayment occurred and should not exceed any statutory time limits on the recovery of money under the 1992 Scheme Regulations.
109. The Fire and Rescue Service's decision-making process should have resulted in a decision which applied the Regulations and explained the basis for the decision correctly. Instead, Mr E had to pursue a claim with my Office to achieve that result. He will now suffer the inconvenience of further uncertainty surrounding the overpayment while the Fire and Rescue Service makes its decision afresh.
110. Mr E has suffered serious distress and inconvenience in relation to this matter; this is an unfortunate set of circumstances. I am mindful that the overpayment cannot be attributed to maladministration on the part of the Fire and Rescue Service.
111. Mr E is entitled to an award for non-financial injustice to the extent that he has sustained significant non-financial injustice as a direct consequence of the Fire and Rescue Service's failure to follow a correct decision-making process. The Fire and Rescue Service shall pay Mr E £500, to remedy that injustice.
112. I partly uphold the complaint.

**Directions**

113. Within 28 days of the date of the Determination, the Fire and Rescue Service shall:

- I. pay Mr E £500, in recognition of the significant distress and inconvenience it has caused him;
- I. invite Mr E to make representations to the Fire and Rescue Service on whether he has any legal defences against recovery of the overpayment and to make any necessary representations to support his case;
- III. within a further 28 days of receiving Mr E's representations, review the decision that was made in his case, taking into consideration its discretionary powers in the 2013 Order. It shall also take into consideration its abatement policy, as set out in the Service Order, relevant guidance, contained in the Circular, and the representations made by Mr E;
- IV. make a new decision on whether to exercise discretion under regulation K4 and withdraw Mr E's pension, in respect of the period he was employed by a fire and rescue authority;
- V. notify Mr E of that decision and explain how it was reached; and
- VI. should it exercise its discretion to withdraw Mr E's pension, in whole or in part, the repayment plan should be at least equal to the period over which the overpayment occurred and should not exceed any statutory time limits on the recovery of money under the 1992 Scheme Regulations.

Anthony Arter

Pensions Ombudsman  
25 November 2021

## Appendix A

### **“WARWICKSHIRE FIRE AND RESCUE SERVICE**

#### **INFORMATION DELIVERY SYSTEM**

#### **SERVICE ORDER NO: 02.01.80**

...

### **2.1 POLICY APPLICATION**

FRA's are under no obligation to re-employ firefighters who have retired and WFRS policy is that there is no automatic re-engagement of pensioners.

If through a competitive process a pensioner is re-employed; in line with “the Firefighters Pension Scheme 1992 – Abatement of Pension on the Re-employment of a Firefighter Circular FPSC 10/2009”, WFRS will enact the following procedures:

- Retirement will constitute a break in service so that active members of the FPS will be terminated and no further pensionable service in the scheme can be accrued.
- Abate a member's pension where the cumulative pension in payment and the salary received on re-employment exceeds the level of earnings received directly prior to their retirement.
- If any re-employed pensioner was employed subject to uniformed terms and conditions, i.e. back to their previous role, they may be eligible to join the New Firefighters Pension Scheme (NFPS) provided that their role includes a requirement to engage in firefighting or attendance at other emergencies.
- If access to the NFPS is not possible, then consideration would be given on whether the person was eligible to join the Local Government Pension Scheme (LGPS).
- The substantive pay at the last day of service comprised of all permanent elements of pensionable pay, expressed as an annual rate will be the level of earnings used for the comparison.
- Abatement will continue until the person retires permanently.

The process to be followed by an individual would be:

- Anyone seeking to take their pension and then be re-employed would first need to have formally resigned and accepted their pension, then have a break in service of at least one month before being re-employed.
- Individuals would need to apply for a post that was advertised by WFRS and comply with the requirements above in order to be eligible for selection.
- There is no restriction on applications for Green Book posts from former Grey Book employees, provided that the post has been advertised externally and has therefore been available for the general public to see.
- WFRS will impose restrictions on former Grey Book employees (who are in receipt of a pension from the FPS or NFPS) applying for another Grey Book role. Only those roles which are deemed to be hard to fill will be open to former Grey Book employees. Examples of hard to fill roles may be those in a highly specialist area or where a post is offered on reduced hours to accommodate a flexible working request.
- In all cases, those applying for employment following retirement must meet the requirements of the post and undergo the full selection process. In addition, WFRS will take into consideration the conduct of the individual whilst in employment. This will include reference to their absence record and performance.

**NB** The financial implications of re-employment following retirement are the concern of the individual and independent financial advice should be sought in all cases. WFRS cannot and will not provide financial advice to any individual”.

## **Appendix B**

### **Warwickshire Fire and Rescue Service**

#### **Information Delivery System**

#### **Re-Engagement Following Retirement Service Order**

“ ...

##### **1.1 Policy Introduction**

Members of the Firefighters' Pension Scheme (FPS) receive special treatment under the Registered Pension Schemes (Prescribed Schemes and Occupations) Regulations 2005 (SI 2005 No. 3451) which allows them to retain a right to payment of a pension from age 50, i.e. before reaching the statutory normal minimum pension age, which is age 55.

Increased longevity and general improvements in health and well-being inevitably mean that many firefighters may wish to remain in the Fire and Rescue Service. The rules of the FPS and NFPS do not prevent a firefighter remaining in employment after the normal pension/retirement age specified in the relevant schemes but a member cannot access benefits before he/she retires.

WFRS is under no obligation to re-employ firefighters who have retired. Nor have the rules of the FPS and the NFPS been amended to provide for “flexible retirement” (apart from the NFPS provision which allows for member-initiated early retirement from age 55).

Pensions are intended to provide income in retirement. Therefore where a retired firefighter is re-employed in any capacity by WFRS, we will abate the member's pension to the point where the aggregate of the pension in payment and the salary received on re-employment, does not exceed the level of earnings directly prior to their retirement. The substantive pay at the last day of service comprised of all permanent elements of pensionable pay, expressed as an annual rate, will be the level of earnings used for the comparison.

##### **1.2 Abatement**

Abatement is the process whereby a member's pension can be reduced or stopped if a member retires and then returns to work and their earnings on re-employment (including pension) exceed their earnings before they retired.

Government policy, set by HM Treasury, requires public sector pensions to be abated in certain circumstances when a public servant is re-employed following retirement. The purpose of abatement is to protect public funds. It limits the remuneration payable at any one time in respect of a particular job preventing both the cost of pay and pension falling to the public purse; it ensures that those who receive early pensions have that taken into account should they seek re-employment within the public sector and it generally protects public funds from abuse.

There are two forms of abatement. In-service abatement occurs where re-employment is in a post covered by the same scheme which is paying the individual's pension. This would cover cases that would fall under Rule K4 of the FPS 1992 where a FRA responsible for paying a pension can reduce it, or withdraw it altogether, during any time where a retired member is re-employed as a regular firefighter. This would still apply in cases where the retired member was re-employed with another FRA. Different groups of employees within a FRA may belong to different pension schemes and it is possible, therefore, that a retired member of the FPS could be re-employed by a FRA in a post covered by, say, the Local Government Pension Scheme. Under Part 9, rule 3 of the NFPS 2006, a FRA responsible for paying a pension can reduce it, or withdraw it altogether, during any time where a retired member is re-employed in any capacity by any FRA.

In addition to in-service abatement, government policy requires the abatement of public sector pensions in cases where retired public servants are re-employed to any employing public sector organisation without going through an open competition. This form of abatement is termed as Inter-service abatement and its application is required up to the point where the public servant reaches the normal pension age of the scheme that is paying their pension. Prior to re-employment the person declares the source of the pension and either the pension is reduced by the paying authority or pay is reduced by the new employer.

...

## **2.1 Policy Application**

FRAs are under no obligation to re-employ firefighters who have retired and WFRS policy is that there is no automatic re-engagement of pensioners.

If through a competitive process a pensioner is re-employed; in line with "the Firefighters Pension Scheme 1992 – Abatement of Pension on the Re-employment of a Firefighter Circular FPSC 10/2009", WFRS will enact the following procedures:

- Retirement will constitute a break in service so that active members of the FPS will be terminated and no further pensionable service in the scheme can be accrued.
- Abate a member's pension where the cumulative pension in payment and the salary received on re-employment exceeds the level of earnings received directly prior to their retirement.
- If any re-employed pensioner was employed subject to uniformed terms and conditions, i.e. back to their previous role, they may be eligible to join the New Firefighters Pension Scheme (NFPS) provided that their role includes a requirement to engage in firefighting or attendance at other emergencies.
- If access to the NFPS is not possible, then consideration would be given on whether the person was eligible to join the Local Government Pension Scheme (LGPS).

- The substantive pay at the last day of service comprised of all **permanent** elements of pensionable pay, expressed as an annual rate will be the level of earnings used for the comparison.
- Abatement will continue until the person retires permanently.

The process to be followed by an individual would be:

- Anyone seeking to take their pension and then be re-employed would first need to have formally resigned and accepted their pension, then have a break in service of at least one month before being re-employed.
- Individuals would need to apply for a post that was advertised by WFRS and comply with the requirements above in order to be eligible for selection.
- There is no restriction on applications for Green Book posts from former Grey Book employees, provided that the post has been advertised externally and has therefore been available for the general public to see.
- WFRS will impose restrictions on former Grey Book employees (who are in receipt of a pension from the FPS or NFPS) applying for another Grey Book role. Only those roles which are deemed to be hard to fill will be open to former Grey Book employees. Examples of hard to fill roles may be those in a highly specialist area or where a post is offered on reduced hours to accommodate a flexible working request.
- In all cases, those applying for employment following retirement must meet the requirements of the post and undergo the full selection process. In addition, WFRS will take into consideration the conduct of the individual whilst in employment. This will include reference to their absence record and performance.

**Note:** The financial implications of re-employment following retirement are the concern of the individual and independent financial advice should be sought in all cases. WFRS cannot and will not provide financial advice to any individual”.