

Ombudsman's Determination

Applicant	Mr D
Scheme	Firefighters' Pension Scheme (the Scheme)
Respondents	Leicestershire Fire & Rescue Service (LFRS)

Outcome

1. I do not uphold Mr D's complaint and no further action is required by LFRS.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr D has complained that his pension should not have been abated. He says that the Transitional Provision introduced in 2013 applies to his pension benefits.

Background information, including submissions from the parties

4. Following re-employment, the regulations or rules governing a pension scheme, may contain provisions for the withdrawal of pension (in whole or in part) so that the combined salary and pension does not exceed the salary under the previous employment. This is known as abatement.
5. Mr D was employed by LFRS and is a member of the Scheme. In October 2009 Mr D retired as a regular firefighter. He then took up a new post as a Hydrant Maintenance Technician after successfully applying for the position in open competition.
6. At the time of taking up the new post, the regulations governing the Scheme, permitted abatement of pension during service as a regular firefighter.
7. On 25th September 2009, 'The Firefighters' Pension Scheme (Amendment) (No.2) (England) Order 2013' (**the No.2 Order**), came into effect giving fire and rescue authorities discretion to withdraw or reduce a pension in payment to any person employed by any fire and rescue authority.
8. On 30 September 2009, LFRS' pensions team informed Mr D in writing that due to his change in pay, his pension entitlement would be re-introduced at a lower level (from 5

October 2009) to that previously notified and the first instalment of his pension would be issued at the end of October.

9. On 28 August 2013, 'The Firefighters' Pension Scheme (Amendment) (No.3) (England) Order 2013' (**No.3 Order**), gave certain Scheme members the right to elect for protection if the No.2 Order placed them in a worse position than they would have been in had the abatement not been applied (**the Transitional Provision**).
10. After Mr D queried the abatement of his pension in June 2014, he was advised by LFRS that, as the new rules (the No.2 Order) allowed abatement to be applied retrospectively on re-employment in any post, they had the right to reduce his pension.
11. On 15 September 2014, Mr D made an election under the Transitional Provision but his application was not accepted on the basis that he had not suffered financial loss.
12. Mr D complained under Stage 1 of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). He argued that his pension should not have been abated, based on the legislation in place in October 2009, because he was not employed as a regular firefighter. LFRS rejected his complaint saying they had made the correct decision.
13. On 27 October 2014, the Appeals Committee (**the Committee**) considered Mr D's complaint under Stage 2 of the IDRP using written representations from Mr D and the LFRS. Mr D was informed in advance of the meeting that the LFRS's Head of Corporate Services/Solicitor and Monitoring Officer (**the Solicitor**), would also be attending to advise the Committee.
14. In agreeing not to uphold the complaint (on the basis of the arguments set out in the Solicitor's report), the Committee said that Mr D's position had not changed as his pension was already abated in 2009. Dissatisfied with their decision, Mr D complained to the Pensions Ombudsman Service.
15. LFRS say that they have accepted applications under the Transitional Provision but none of those applications are similar to Mr D's case. LFRS also say that they do not have a record of the members whose applications were accepted.

Adjudicator's Opinion

16. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by LFRS. In summary, the Adjudicator said that the abatement was applied correctly and that Mr D had not shown that he was in a worse off position.
17. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D provided his further comments many of which were not new.

18. Mr D did not agree that he had a fair chance to make his case at the Committee meeting. He says that whilst he was not present at the meeting, the Solicitor was and that Solicitor was also part of the team that decided to abate his pension.
19. On the issue of LFRS' abatement policy, Mr D says a portion of his Scheme pension relates to service transferred in from other schemes and abatement was not mentioned in the contract which he agreed to in good faith.
20. Mr D also says that he is the only LFRS employee that has been affected. He believes he has been treated unfairly and that LFRS have bypassed the Transitional Provision.
21. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr D for completeness.

Ombudsman's decision

22. Although Mr D was not allowed to attend the Committee meeting, he was given the same opportunity to make written representations in advance of the meeting. There is no evidence that his statement and supporting papers were not given proper consideration by the Committee.
23. Whilst Mr D says that abatement was not mentioned in the contract he signed, the No.2 Order gives the LFRS discretion to abate the whole or part of a member's pension retrospectively where a retired member is employed on or after 25 September 2009. Consequently, LFRS' decision to abate Mr D's pension was applied in accordance with the regulations governing the Scheme.
24. The Transitional Provision gave Mr D the right to elect (within 12 months of the No.3 Order coming into effect) that any amendments in the No.2 Order, which placed him in a worse position, should not apply to his pension. Mr D says that LFRS sidestepped the Transitional Provision. I do not believe that is right. As stated in the Adjudicator's Opinion, where the decision-maker is an employer, exercising a discretionary power under the rules of a pension scheme, it has an implied duty of good faith to its employees. However, the implied duty of good faith is not a fiduciary duty, meaning that an employer may take its own interests into account (and, indeed, to favour those).
25. LFRS' abatement policy in force in 2009 was that abatement would be applied to a pension payable under the Scheme (and the Local Government Pension Scheme) on re-employment in any capacity. LFRS' decision to abate Mr D's pension, given retrospective effect under the No.2 Order, is consistent with that policy.

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26. Therefore, I do not uphold Mr D's complaint.

Anthony Arter

Pensions Ombudsman

25 May 2016