

Ombudsman's Determination

Applicant	Mr H
Scheme	Firefighters' Pension Scheme (the Scheme)
Respondents	Hereford & Worcester Fire Authority (the Authority) Worcestershire County Council (the Council)

Outcome

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

Complaint summary

3. Mr H's complaint against the Authority and the Council is that he was given incorrect information in 2006, which led him to leave his job prior to the Scheme's "cut-off date" of 31 March 2006, in the belief that this would protect his right to retire at 60 which would otherwise be lost.

Background information, including submissions from the parties

4. In 1992, Mr H joined the Authority and became a member of the Scheme (hereafter, **the 1992 Section**).
5. In early 2006, Mr H had decided to make a trip to Australia, having gained permanent residency status there, to decide whether he wanted to settle there permanently.
6. In 2006, the Government was consulting on changes to the Scheme, which ultimately resulted in the introduction of the New Firefighters Pension Scheme 2006 (**the 2006 Section**). In early 2006 Mr H was aware of these proposed changes including proposals with the potential to affect his normal retirement age. At the time the Firefighters Pension Circular FPSC6, which was issued on 2 February 2006 by ODPM, the government department then responsible for impending changes to the Scheme Regulations, stated that for 1992 Section members, the deferred pension age of 60 would be 65 from April 2006.

7. On 2 February 2006, following some conversations about the Scheme with a representative of the Authority, the Authority wrote to Mr H stating as follows: -

“I refer to our telephone conversation and have checked the Regulations. Unfortunately, the information I gave you is incorrect. If you leave after 31 March 2006 and preserve your benefits, they will not become payable until your [sic] reach age 65.”
8. On 27 February 2006, Mr H wrote back to the Authority and stated as follows: -

“Please note, I tendered my resignation to the CFO of the fire authority on the 27 th[sic] February giving 4 weeks notice, to terminate on the 27 th[sic] March 2006.

As per your letter dated to me on the 2/2/06[sic], termination of employment is before the 31 st[sic] March 06, thus retaining my original pension benefits on the FPS.

At this point, I would wish to defer my pension, retaining and preserving my original scheme benefits. (prior to any proposed changes from April 1 06[sic] by OPDM).

If there is anything else I should know could you please forward to me. I will be on leave shortly and if it's urgent then you can e-mail...”
9. Shortly afterwards, the Authority wrote to Mr H and confirmed his right to take a deferred pension under the 1992 Section of the Scheme at age 60.
10. Mr H then went to Australia with his family, where he stayed for about three months.
11. On 25 January 2007 the 2006 Section was introduced with effect from 1 April 2006. The normal retirement age of the 2006 Section is 60. Contrary to the expectation created by the information current in February 2006, deferred members of the 1992 section retained a retirement age of 60.
12. In October 2007, after returning to the UK, Mr H rejoined the Authority and made enquiries about being re-instated into the 1992 Section, however he was informed that this was not possible. Therefore, he joined the 2006 Section instead.
13. In September 2008, Mr H wrote to the Authority, asking again to re-join the 1992 Section, after apparently discovering that someone with similar circumstances as him had been permitted to do so. However, the Authority informed him that this was not possible.
14. In August 2011, Mr H states that he learned that a colleague had asked a similar question about deferred pension benefits in the 1992 section, but received a different answer. Mr H states that it was this that prompted him to make enquiries about the information he had been given back in 2006.
15. In April 2013, Mr H wrote to the Authority to complain. The key points were: -

- He had been given incorrect information in 2006 which had an “enormous” influence on his decision about whether to take the trip to Australia. At the time, he felt he had no choice but to resign before the cut-off date, to preserve his right to a deferred pension at 60.
 - He later learned that a colleague had been given different information, and that he (Mr H) had received incorrect information. He says there was no need for him to resign, as career breaks were introduced later.
 - Had he not felt pressured into resigning, his benefits would be more valuable.
16. In February 2014, the Authority wrote to Mr H under stage one of its internal dispute resolution procedure (**IDRP**). The key points were: -
- It acknowledged it had taken a long time to investigate his complaint. This was because it needed to obtain the relevant information from the Council, and also clarify what information was available to the Authority in February 2006.
 - There was no career break policy in place at the time Mr H resigned that would have allowed him to take time off without affecting his pension benefits.
 - It had explained there was an ongoing consultation in 2006, and the information it had at the time indicated the retirement age under the 2006 Section would change. That information was correct at the time and given in good faith.
17. In July 2014, Mr H appealed the IDPR stage one decision. In August 2014, the Authority requested additional information about Mr H’s emigration planning, however this was not provided.
18. In July 2015 Mr H brought his complaint to this Office.
19. In February 2016, the Authority wrote to Mr H giving its decision at stage two IDRP. The key points were: -
- It was Mr H’s decision to resign and move to Australia and it was not triggered by any incorrect information the Authority gave him.
 - The information it gave him may have affected his date of his resignation, but the decision to resign had already been made.
 - The Authority had no plans to introduce career breaks; there was no guarantee that Mr H would have been granted one. Therefore, he resigned with the full knowledge of the impact it would have on his pension benefits.
 - Mr H’s letter of 27 February 2006 showed that he understood these changes were only proposed, not guaranteed.

- As the retirement age applicable to deferred members under the 2006 Section was no different to that for the 1992 section, Mr H would have been in the same position had he resigned after 1 April 2006.
 - Whilst the information in the February 2006 letter turned out to be incorrect in as much as it did not state that it was a proposed change, the Authority did not consider that Mr H had relied upon it when making the decision to resign.
20. In May 2016, the Authority wrote to this Office and objected to our jurisdiction over Mr H's complaint because it was outside the time limits for bringing a complaint. The key points were: -
- The event complained about took place in 2006. Mr H ought to have realised at or shortly after rejoining the Scheme in 2007 that the deferred pension under the 1992 Section was still 60 and had not been postponed to 65.
 - The advice given to a colleague in 2011 was given five years later than the letter sent to Mr H. The two situations were not comparable.
 - Mr H has been aware of the circumstances relating to his own case since 2007 and had ample opportunity to make a complaint if he believed he had been treated incorrectly.
 - Although the Scheme had accepted his IDR application out of time, that should not of itself be a reason for the Ombudsman to accept jurisdiction.

Adjudicator's Opinion

21. Mr H's complaint was considered by one of our Adjudicators, who concluded that no further action was required by the Authority or the Council. The Adjudicator's findings are summarised briefly below: -
- Mr H could not have known, in 2007 or 2008, that the information he had been given in 2006 was inaccurate. He only discovered that later, in 2011 or 2012; and, whilst Mr H had not brought his complaint within three years, his complaint was being investigated by the Authority during that time, so this Office was able to consider it.
 - When resigning, Mr H referred to proposed changes, indicating he understood, and accepted, that the change was not guaranteed. So, it was not reasonable for him to place reliance on the information when making an important financial and life decision.
 - The information came from a pension expert; however she had no more information than the average person about whether the proposed change would come into force.

- Mr H had already made plans to visit Australia, including gaining permanent resident status, and wanted to explore the possibility of living there with his family. There was no possibility of his taking a career break, and his wife had already been granted one. Therefore he had no option but to resign from his job, and would have done so even if the February 2006 letter had clarified that the change was only proposed and not guaranteed to come into force.
- The principal cause of Mr H's 1992 section pension accruals being limited was not the inaccurate information, but rather his decision to leave his job, which was in turn motivated by his desire to visit Australia, as part of his longer-term plan to emigrate there.
- As the retirement age under the Scheme did not change, Mr H still had the right to take a deferred pension at 60, so no loss had been suffered.
- The other losses Mr H had claimed were not the responsibility of the Authority or the Council, because it was his decision to leave his job that was the principal cause of his alleged losses, not the inaccurate information.
- There were shortcomings in the complaint handling process; but they were not significant, and the Authority's and Council's apologies were sufficient redress in the circumstances.
- The complaint could not be upheld against the Council, as it was not involved in the process that led to Mr H's complaint; it should not be upheld against the Authority, for the reasons previously stated.

22. The Authority and the Council accepted the Adjudicator's Opinion. However, Mr H did not, and the complaint was passed to me to consider. Mr H has provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, as summarised above, and I will therefore only respond to the key points made by Mr H, for completeness.

Ombudsman's decision

23. In his response dated 11 June 2017 to the Adjudicator's Opinion, Mr H stated that the Adjudicator had placed too much weight on the term 'proposed' and the fact that Mr H himself referred to the changes as 'proposed': -

"Any alteration to a regulation that is signalled as coming into force at some point in the future is commonly described as 'proposed' because until it comes into force it is still exactly that. This does NOT imply any belief that there is an expectation that a change or a retraction will take place before the implementation date. It was certainly not the case here, [the representative] had stated that she had 'checked the regulations'."

24. I do not believe it was reasonable for Mr H to place reliance on what he was told in the way he has argued. It is true that all legislation was, at one time, only “proposed”; however, it is not true that all proposed changes eventually become legislation. Mr H’s letter of 27 February 2006 demonstrates that he was aware that the change was only proposed. I accept that this does not imply a belief or an understanding that it would change prior to implementation. It was no more than a risk.
25. The representative was an expert, and arguably had a duty of care to Mr H in that she was required to provide him with accurate and up to date information regarding the Scheme and his benefits. However, she could not provide and there is no evidence that she agreed or claimed to provide, accurate information about pension legislation that did not yet exist. Specifically, there is no evidence that Mr H asked for an opinion about how likely the proposed changes were to go ahead and there is no indication that the representative accepted a responsibility to tell him that.
26. Mr H states he placed reliance on the representative’s statement, in particular that she had “checked the regulations”. Ordinarily, I would agree Mr H was entitled to rely on a statement about the effect of regulations; however, in this case, the circumstances were unusual because Mr H knew that changes were to be introduced by Regulations which were not yet in force. The representative did not know, and could not have known, that the changes which were then proposed would not come into force. Mr H further states: -
- “[The representative] should therefore not have made the judgement that the change was to take effect and communicated that to me in the clearest possible terms. Any lack of knowledge on her part does not absolve the Council or the Fire Authority of responsibility.”
27. I do not agree that the representative was expressing the clearest possible judgment that the change of retirement age would definitely come into force. The email is focussed on the effect of Mr H leaving service after a critical date. It is consistent with the guidance in circulation on that date and any draft regulations available would only have reflected the proposal as it then stood. The answer could be considered incomplete in that it does not draw attention to the fact that the proposals may eventually not be introduced, but it was not clearly incorrect. Absent any particular question against which to set the answer, the most reasonable interpretation of the email is not: if Mr H left the 1992 Section after March 2006 and preserved his benefits, they would not become payable until age 65. Rather, the most reasonable interpretation is: if Mr H left the 1992 Section after March 2006 and preserved his benefits, they would not become payable until 65, if the proposed change came into force.
28. In my view, it is significant that Mr H’s letter of 27 February 2006 used the phrase “any proposed changes” when the representative’s letter had not. He also referred to ODPM the government department which was in charge of making the changes. I therefore conclude that he was aware generally that the changes were not yet law. I consider that, on the balance of probabilities, if the representative had referred to

“proposed” changes, or ‘draft regulations’ it would not have changed Mr H’s actions because he would still have been faced with the need to make a decision in a situation of uncertainty where the only guidance was the proposal which was then current.

29. Mr H states: -

“The crucial issue from the letter was timing. It is correct to say that we had decided, at some point, to explore the opportunities that might be available to us in Australia. We had obtained visas and validated those visas from which point we had five years in which to move there if we wished. At the end of February 2006, when from my perspective the bombshell hit, we had no intention to emigrate. My wife had not made any arrangement with her employer.”

30. I agree that timing was an important issue. On the balance of probabilities, I consider that, because of what Mr H wanted to achieve, even if the email had drawn attention to the fact that the Regulations were still in draft and might change, he would still have left his job and the 1992 Section, with the result that he cannot now be reinstated. He has made it clear that he was determined to avoid waiting until 65 to take benefits from the 1992 section; this is the outcome he was focussed on avoiding. Given the state of the proposals as they stood in February 2006, it is difficult to see how he could have achieved certainty that he would keep his existing deferred benefit terms except by leaving the Scheme when he did.

31. Mr H now views the timing pressure as unnecessary. He has stated that there was no deadline, and he could have waited; he had five years in which to move to Australia if he wanted. However, to arrive at that view requires the application of perfect hindsight complete with the knowledge that in the event no change was made to deferred retirement age in the 1992 Section. He could never have had that knowledge. He could only ever have contemplated the chance that the change would not happen as planned. In February 2006, Mr H was faced with the need to make a decision about the impact of proposed legislation which was planned to take effect from 1 April 2006. I therefore do not agree that there was no deadline. He had to make a decision at that date armed with imperfect knowledge. Similarly, I cannot make my decision with the benefit of hindsight; I can only consider the options as they appeared based on the information that was available at the time.

32. I conclude that in February 2006, Mr H was likely to have resigned even if he had focussed on the residual uncertainty about the proposed changes. I do accept that aside from the 1 April deadline, he had flexibility about the timing of his emigration plans and they were still exploratory. But I also have to consider that, at the time, he had requested and been turned down for, a career break. I understand he discussed with his supervisor what other options there might be, but it appeared there were none. Mr H notes that the availability of career breaks became subject to a formal policy in 2007 and he understands that one of his colleagues got one in similar circumstances. He is confident that although he was turned down when he asked in

2006 he would have been able to obtain a break if he had had longer to negotiate. I accept that possibility. However, future changes to the career break policy would not have been apparent to him in 2006, so could not have affected the decision he had to make at that point when faced with a refusal.

33. I have considered carefully Mr H's comments about the delays in the complaint handling process. It is accepted this took longer than it should have, but I find Mr H's complaint was dealt with in a reasonable manner. When Mr H highlighted a halt in the progress, his concerns were addressed and he was provided with an apology. That halt was caused by maladministration, but it was addressed and I do not consider that the shortcomings in the process caused any significant distress and inconvenience which is identifiable distinctly from the disappointment inevitably caused by the outcome of the complaint. I therefore make no award for non-financial injustice. I disagree that the Authority's legal officer was clearly conducting a defence, rather than properly investigating the case. Moreover, I do not find in the Authority's questioning of this Office's jurisdiction, any evidence of an attempt to obstruct Mr H's complaint.
34. Mr H has argued that the Council rather than the Authority should be held responsible for any statements made by the writer of the 2006 email, because her role reported to the Council rather than the Authority. I record this point for completeness but make no finding because on the facts as I have found them I do not consider that her conduct can be considered to create liability for either respondent. Therefore, I do not uphold Mr H's complaint.

Karen Johnston

Deputy Pensions Ombudsman
26 July 2017