

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mr Joseph Arrabali
Scheme	Firefighters' Pension Scheme and Firefighters' Compensation Scheme
Respondents	London Fire & Emergency Planning Authority

Subject

Mr Arrabali complains about the decision that he does not qualify for an injury benefit pension, saying that his injury should be regarded as received "in the exercise of his duties as a firefighter" as required under the terms of the relevant scheme.

The Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against London Fire and Emergency Planning Authority, because they have correctly concluded that the injury was not received in the exercise of his duties.

DETAILED DETERMINATION

Material Facts

1. Mr Arrabali was working as an officer for the London Fire and Emergency Planning Authority (**LFEPA**) on 22 October 2007, when he attended his fire station gym, with permission from the officer in charge. That was a normal activity to undertake, but his gym session was voluntary and he was not instructed to carry it out.
2. After the gym session, he went to the kitchen to get a drink. On opening a door, he lost his balance, and his right hand and forearm went through a glazed panel, severing nerves and tendons. He continues to suffer major functional impairment in his dominant right hand. His absence was recorded as a "due to service injury" for sick pay purposes, but that decision was expressly stated to have no bearing on whether it was permanent disablement or a qualifying injury under the Firefighters' Pension Scheme or the Firefighters' Compensation Scheme (together, the **Scheme**).
3. LFEPA decided on 29 September 2010 that he was incapacitated for his duties as a firefighter, and the incapacity was likely to be permanent but was not occasioned by a "qualifying injury" as defined in the Scheme. He was retired from service with effect from 21 December 2010.

Summary of Mr Arrabali's position

4. Mr Arrabali asserts that his condition is a qualifying injury, as defined in the Scheme, as the injury was received without his own default in the execution of his duties as a regular firefighter. At the time of the accident, he was at work, on station, and moving about in a normal and authorised way, at a time when he was ready, willing and able to respond to an emergency call. His employer encouraged him to take exercise to keep fit, and also stressed the importance of keeping adequately hydrated.

5. In arguing this, he has cited authorities from relevant case law, both when applying under the Scheme, and at each stage of the Scheme's internal dispute resolution procedure, but his application has not been upheld.
6. He has also argued before me that the criteria for determining "the execution of duties" must be similar to those which apply to whether a person is "in the course of employment" for determining vicarious liability in tort.

Summary of the respondent's position

7. LFEPA submits that Mr Arrabali's injury was not sustained in the exercise of his duties as a regular firefighter, which is a requirement if it were to amount to a qualifying injury for the purposes of the Scheme. An injury received at an event which is not part of a recognised fitness training programme does not qualify, and his journey to obtain water was not in the exercise of his duties as a regular firefighter. The employer too has cited authority from previous cases.
8. It agrees it is considered important that firefighters should keep hydrated, but the note referring to that relates to staff during operational incidents, as opposed to those who are inactive in fire stations.
9. It considers the contention, that determining "the execution of duties" must be similar to determining "in the course of employment" under vicarious liability, to be wholly incorrect.

Scheme rules

10. The Firefighters' Compensation Scheme (England) Order 2006 states, at Rule 7(1), that:

"... references in this Scheme to a qualifying injury are references to an injury received by a person, without his own default, in the exercise of his duties as a regular firefighter."

11. LFEPA has made reference to Rule A9 of the Firefighters' Pension Scheme, which applied before the Firefighters' Compensation Scheme was introduced on 1 April 2006, when it was removed. Rule A9(1) defined a qualifying injury as an injury received by a person without his or her default in the execution of his or her duties as a regular firefighter. Although this wording differs slightly from the present one, neither party contends that such a difference is material to the current dispute.

Case authorities

12. Various cases have been drawn to my attention, as precedents which provide authority for the submissions of each party. The main ones are Waldie v Glasgow Corporation (1954) (**Waldie**), Craythorn V Leicestershire CC (1988) (**Craythorn**) Dunford v Somerset CC (1994) (**Dunford**), Bradley v London Fire and Civil Defence Authority (1995) (**Bradley**), Stunt v Commissioner of Police for the Metropolis (2001) (**Stunt**), R (Merseyside Police Authority) v Gidlow (2004) (**Gidlow**), and R (Walker) v Inner London Crown Court (2008) (**Walker**).
13. In Waldie, a firefighter was incapacitated while playing badminton while on standby duty at his fire station. On appeal, it was decided by majority that he was not injured "in the execution of his duties". Firefighters were permitted to play badminton, and facilities were provided for them, but playing was wholly voluntary.
14. The court in Craythorn followed the decision in Waldie, finding it persuasive (though, as a Scottish case, not binding). Here a firefighter was injured during an informal game of cricket, which he and his colleagues were encouraged to play. Nonetheless, it was held that "execution of duty" did not relate to activities outside the fireman's contractual duties. He was not under a contractual duty to play cricket whilst on duty.
15. In Dunford, a fireman was seriously injured playing rugby for his fire service team. It was held that the game arose out of his employment, but

was not part of it. The fact that staff are encouraged to keep fit does not mean this activity was in execution of his duties. If a fireman was on duty when a match took place, he had to apply for "sports leave". So the match was not in the course of employment, and the injury was not a qualifying injury. It was agreed by all parties that an injury in games organised as physical training on the fire service's premises would have been a qualifying injury.

16. Bradley concerned a case of stress following a road accident sustained while travelling to work, where the stress was partly caused by the firefighter's job. As the medical referee had concluded that the disorder was a disease caused by stress at work, the court held it was not possible to conclude it was other than a qualifying injury. The road accident itself was found not to have occurred in the execution of duties, but that was not relevant. A disease or bodily condition may be an injury (as to which there was already case authority) and, since the referee concluded it was caused by work, it qualified.
17. Stunt was the case of a policeman, who suffered permanent depression, after a complaint against him. The police authority refused a pension, but the High Court held that an officer's duties include submitting to a complaints procedure. The Court of Appeal reversed this, finding that an award is not payable to an officer disabled through his reaction to disciplinary proceedings.
18. In Gidlow, a policeman suffered stress, following an allegation of inappropriate behaviour against him, and his dissatisfaction with the way his employer dealt with the grievance. (The definition of a qualifying injury for the police is not materially different to that for the fire service.) It was held that a psychological reaction to a complaint is not received in execution of duty, and a psychological reaction to circumstances on duty is not necessarily in execution of duty. Although the medical referee had

decided that the injury was received in execution of the employee's duty, on the facts he was wrong not to distinguish "on duty" from "in the execution of duty".

19. Finally, in Walker, a senior fire officer suffered a moderate depressive illness, in circumstances (assumed as fact for the purposes of the hearing) where he felt undermined by the way in which a complaint against him from a junior member of staff had been handled. It was held to be arguable that the officer was acting in the performance of his managerial duties when supplying information to, and receiving advice from, the more senior officer investigating the dispute.
20. These cases have in turn cited earlier ones, but I do not need to relate any detail of those.

Conclusions

21. The question I have to decide is a very narrow one. However, none of the most recent cases referred to by one party or the other resembles the present case, in either the nature of the injury suffered or the circumstances leading up to it. As such, they are of limited value as a precedent for the current application.
22. The cases closest on their facts to those of Mr Arrabali are the oldest ones, Waldie and Craythorn. In both of these, the firefighter was injured while engaged in voluntary activities, exercising himself during his work in the fire station. The court's conclusion, in both, was that the exercise was not carried out "in the exercise of his duties", or some similar phrase to the same effect.
23. Of the other authorities, the one closest to Mr Arrabali's case is in certain ways Dunford, where the officer sustained a physical injury in relation to sporting activities. However, the incident was outside working hours and off the employer's premises, unlike in the instant case, and it provides little

help in deciding what injuries at work would qualify as being in the exercise of an officer's duties. Although the court noted that an injury in games organised as physical training on the fire service's premises would have been a qualifying injury, which might call Waldie and Craythorn into question, that point was agreed by all parties for the purpose of the argument, and was not argued before the learned judge, and they were not the facts in Dunford's case. Nor indeed are they the facts in Mr Arrabali's, who had been training on his own, and was injured after he had finished.

24. So I do not accept the contention, made by LFEPA, that Dunford establishes that an injury received at an event which was not part of a recognised fitness training programme is not a qualifying injury, if it means it can never be one. That would be to read too much into the judgment. For example, if a firefighter was instructed to use the gym, though not as part of a specific programme, and was injured by a faulty machine while doing so, that injury might qualify. However, those are not the facts of this case, and so have no bearing on it.
25. The other three cases all relate to *psychological* conditions arising (arguably, and at least in part) from the duties of the employee. The central issue in such cases is often the extent to which the condition was caused by events at work, and in these three cases the role of the medical adviser was in question. That is not the issue here. Clearly, Mr Arrabali's condition arose from a particular incident, which caused him to be injured when he was previously fit, and there is no doubt about its time and place. He was at work, on LFEPA premises, in his employer's time. Nor is there any dispute about the evidence describing the medical condition.

26. The value of the more recent cases can be only in the light they shed on the meaning of the term “in the exercise of his duties”, and even on this they are of limited help. Gidlow makes it clear that the phrase does not mean the same as “on duty”, and that a person may be on duty, and conducting himself in a manner consistent with his post, but not acting in the exercise of his duties.
27. Mr Arrabali’s solicitor has argued that Walker is a more modern authority for construing the notion of regular duties fairly widely, as LFEPA (which was party to the case) conceded, in the light of the judgment, that the injury sustained did qualify. However, the activities in question there were those of a senior officer carrying out his managerial role, and the court needed only to decide that it was arguable he was acting in performance of this duty, so that the preliminary decision of the inferior court could be quashed and remitted for a further hearing. That does not help me decide whether Mr Arrabali’s very different activities actually were in the exercise of his duties.
28. Nor am I attracted by his further argument, that the test for deciding what is in the exercise of duties must be similar to that applying in cases of vicarious liability in tort, which is an entirely different field of law. The phrase used in vicarious liability is, as Mr Arrabali’s solicitor recognises, “in the course of employment”, on which I appreciate the courts have reflected considerably over the years.
29. In my opinion, “in the course of employment” is a term much closer to “on duty” than to “in the exercise of his duties”, terms between which, as I have noted, Gidlow makes a critical distinction. The facts of Gidlow are, as has been submitted on Mr Arrabali’s behalf, far removed indeed from the present case, but that applies to many authorities cited by both parties.
30. LFEPA has pointed out that in Bradley the learned judge stated that, having identified the injury or disease in question, the question to ask is whether

or not there is a causal connection between that injury or disease and the employment. It submits that the test is thus to see whether there is a causal connection between the injury and the claimant's duties as a regular firefighter. I find this a more compelling argument. In Bradley, the court had to decide whether the inferior court had asked the wrong question in considering the medical referee's opinion, and decided it had.

31. In view of this, I have to ask whether there is a causal connection between the injury to Mr Arrabali's hand, and the duties of his employment. Was his conduct in going from the gym to the kitchen, which resulted in the accident and the injury, one of his duties?
32. I do not doubt that it was permissible for him to train in the gym, and to seek a drink, and to walk to the kitchen to get it, but I do not consider that any of this conduct, even though expressly or implicitly authorised, can be categorised as carried out in the exercise of his duties as a firefighter. It was conduct that he carried out of his own volition, whilst on duty. Therefore, its outcome does not fulfil the definition of a qualifying injury.
33. Consequently, I do not decide the point in his favour.

TONY KING

Pensions Ombudsman

28 May 2013