

## Ombudsman's Determination

Applicant	Mr S
Scheme	The Firefighters' Pension Scheme 1992 ( <b>the Scheme</b> ) The New Firefighters' Pension Scheme (Wales) ( <b>the Scheme</b> )
Respondents	Mid and West Wales Fire and Rescue Service ( <b>the Fire and Rescue Service</b> ) Mid and West Wales County Council ( <b>the Authority</b> )

## Outcome

1. I do not uphold Mr S' complaint and no further action is required by the Fire and Rescue Service or the Authority.

## Complaint summary

2. Mr S has complained that following a High Court judgement the Fire and Rescue Service has not agreed to recalculate the CETV he received in 2010 to include a training allowance as part of his pensionable pay. He does not think that his situation has been fairly considered and says he has been discriminated against.

## Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the key points. I acknowledge there were other exchanges of information between all the parties.
4. Mr S served as a firefighter in the Fire and Rescue Service. He was a member of the Scheme when it closed to future accrual in 2006 and he then joined The New Firefighters' Pension Scheme (Wales).
5. In January 2010, Mr S sent a letter to the Fire and Rescue Service in which he said:  
"I would like to confirm that I wish to opt out of the Scheme on the 4th February 2010. Please can you inform County Hall pension administration of this decision as it is my intention to transfer the post 88 benefits into a private pension scheme."

6. On 4 February 2010, Mr S transferred his post-88 pension benefits into a private pension scheme and became a deferred member of the Scheme with regard to his pre-88 benefits.
7. On 29 March 2019, the High Court issued a judgment<sup>1</sup> relating to the Fire and Rescue Service. As part of its decision the High Court held that the training allowance would be considered pensionable in circumstances where an employee was employed permanently in a training role.
8. On 18 September 2019, Mr S sent a letter to the Fire and Rescue Service's Human Resources (**HR**) department. He said he wished to raise a complaint with regard to the Fire and Rescue Service's application of the High Court's ruling on pensionable pay. He said in summary:-
  - According to the High Court ruling his CETV calculation from 2010 should have included his training allowance.
  - He was aware that the Fire and Rescue Service were redressing members back to 2013. The Fire and Rescue Service withheld his pre 1998 pension benefits until he retired in 2015. This meant he was within the relevant time period for redress following the High Court ruling.
  - It appeared that the final decision regarding how to redress members did not account for the differing circumstances relating to a member of staff who opted out of the Scheme.
  - The Fire and Rescue Service had negotiated with the Fire Brigades Union (**FBU**) without any information regarding his situation. The Fire and Rescue Service should have discussed the matter with him and his legal representative.
9. On 2 October 2019, HR sent Mr S a letter. It said in summary:-
  - The High Court judgment was specific to the cases of four individuals. The ruling determined that the training allowance should, in certain specified circumstances, be considered pensionable. However, it was for the Fire and Rescue Service to determine the wider application of the High Court ruling, including, amongst other things, the limitations on repayment.
  - The Fire and Rescue Service did not withhold his pre 1988 pension benefits. When he opted out of the Scheme and transferred his post 1988 accrual in 2010, his pre 1988 accrual became deferred in accordance with the Scheme Regulations.

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<sup>1</sup> *Booth & Others v Mid and West Wales Fire and Rescue Fire and Rescue Service* [2019] EWCH 790 (Ch)

- The value of his pension benefits was determined in 2010 at the point he opted out. This was outside the time limit for recovering sums set out under section 9<sup>2</sup> of the Limitation Act 1980.
  - The Fire and Rescue Service had considered all circumstances including past judgments such as *Norman v Cheshire Fire & Rescue Service*<sup>3</sup> (**Norman v Cheshire**) and the agreements reached for retrospective treatment in the application of those judgments. The Fire and Rescue Service was acting consistently in the use of the Limitation Act 1980.
  - The Fire and Rescue Service was fully aware of Mr S' situation. His situation was not unique and there were others who would be similarly affected. The Fire and Rescue Service had identified all persons in receipt of the allowances that were the subject of the High Court judgment and reviewed each individual's circumstances on their own specific merits.
  - Mr S was not a party to the High Court proceedings and so there was no obligation for the Fire and Rescue Service to discuss this with either Mr S or his legal representative. The implementation of the High Court's decision was for the Fire and Rescue Service to determine, and the agreement reached with the FBU was consistent with the retrospective application of similar judgements issued nationally. The Fire and Rescue Service was satisfied that it had dealt with Mr S' circumstances fairly and in accordance with the High Court's findings.
10. Mr S remained unhappy with the Fire and Rescue Service's response and asked that his complaint be considered further.
  11. On 15 July 2020, the Authority sent a letter to Mr S and said that the Authority's Investigating, Disciplinary and Disputes Committee had considered all his complaint points and the information he had supplied. Its response was the same as that provided in the letter of 2 October 2019.
  12. Following the complaint being referred to The Pensions Ombudsman, the Fire and Rescue Service and Mr S made further submissions.

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

13. The High Court judgment was not a collective action. It was only directly applicable to the named Claimants in relation to each of the respective allowances that formed the basis of their complaints. Mr S was not a party to the High Court proceedings, therefore there was no obligation to discuss this matter with him or any representative

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<sup>2</sup> Section 9, 'Time limits for actions for sums recoverable by statute', provides:

"(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

<sup>3</sup> *Norman v Cheshire Fire & Rescue Service* [2011] EWHC 3305 (QB)

acting for him. The manner of the implementation of the High Court's judgment was for the Fire and Rescue Service to determine in accordance with the ruling, relevant case law and the relevant Regulations.

14. Nevertheless, the Fire and Rescue Service considered whether it would be appropriate and fair to give wider retrospective application of the judgment in respect of those individuals who were, or had been, in receipt of the allowances in question, including the training allowance.
15. In carrying out this assessment the Fire and Rescue Service also considered the outcome of similar cases including Norman v Cheshire. It understood that the Limitations Act 1980 was relevant to the implementation of that judgment. An agreement was reached with the FBU as to how to fairly apply the decisions in the High Court case retrospectively to relevant employees of the Fire and Rescue Service. It was agreed that setting a limit of back payments due to members of the scheme to six years from the date of the High Court ruling in 2019 was fair, transparent, and appropriate.
16. Mr S opted out of the Scheme in 2010, the Fire and Rescue Service anticipated that Mr S would have undertaken financial advice at that time. The opt out documentation confirmed that those opting out knowingly give up the opportunity to participate in the Scheme which would provide a guaranteed package of benefits which are backed by law. Nevertheless, Mr S opted out of the Scheme. It is the Fire and Rescue Service's position that this opt-out must also limit any obligation on it to apply retrospective case law. The position was confirmed by the Local Government Association Firefighters' Pension Scheme Adviser who advised that members who had opted out should not have their CETV recalculated on the higher pay,
17. The Fire and Rescue Service did not consider that the date when Mr S' employment came to an end to be relevant. Mr S' CETV was calculated in 2010 when he opted out of the Scheme and transferred his post 1988 pension accrual. Mr S' pre 1988 accrual was deferred in accordance with the Scheme Regulations until retirement.
18. Mr S had not specified the grounds upon which he perceived the Fire and Rescue Service had discriminated against him. The Fire and Rescue Service was satisfied that no discrimination had occurred.

### **Mr S' position**

19. He was unable to do anything with his pre 1988 benefits, they were deferred and remained in the pension fund until his retirement date in 2015.
20. He received the training allowance afforded to his role up until his retirement in 2015. The High Court judgment deemed this to be pensionable. Yet he was not allowed to participate in any negotiation or allowed any representation regarding this court ruling. This was because he was not a member of the FBU at the time of the decision on retrospective awards. His case was not fairly negotiated.

21. He did not recall a form that stated he had knowingly given up benefits that would be backed by law or any retrospective case law.

## **Adjudicator's Opinion**

22. Mr S' complaint was considered by one of our Adjudicators who concluded that no further was required by the Fire and Rescue Service or the Authority. The Adjudicator's findings are set out in paragraphs 23 to 26 below.
23. Mr S opted out of the Scheme in 2010 and transferred his post-1988 benefits to a personal pension scheme. His pre-1988 benefits were deferred. The Fire and Rescue Service has not provided any documentation that specifically said that Mr S was giving up benefits backed by law or any retrospective case law. However, in the Adjudicator's opinion, Mr S should have been aware at the time that he opted out that he was giving up his benefits in the Scheme and that would put him in a different position to active members. It should also have been clear that if there were changes to the Scheme in the future these would not impact the benefits he transferred out.
24. The Fire and Rescue Service said that as Mr S was not a party to the High Court judgment there was no need to specifically discuss the outcome and apply it to his circumstances. In addition, it negotiated what it considered to be a fair way of applying the judgment with the FBU. In the Adjudicator's view the involvement of the FBU was to ensure the views of impacted firefighters were taken into consideration when deciding how redress should be applied. Mr S was not a member of the Scheme at the time of the High Court judgment and so in the Adjudicator's opinion it was not necessary for the Fire and Rescue Service to specifically discuss the outcome of the High Court judgement with him.
25. The Fire and Rescue Service applied the provisions of the Limitation Act 1980 to the award of the training allowance as a pensionable amount and the recovery of the additional contributions needed to support the award of the benefit. In the Adjudicator's opinion the decision to backdate the training allowance as pensionable for the six years prior to 2019 was reasonable and one that had been taken in consultation with the FBU. It was also in line with other previous decisions that required redress such as *Norman v Cheshire*. Mr S was not an active member of the Scheme in the six years prior to 2019 as he had transferred his pension benefits in 2010. Mr S' pre-1988 benefits were deferred and so had been accrued outside the redress period. In the Adjudicator's view, Mr S was not entitled to have his 2010 CETV recalculated.
26. Mr S said he had been discriminated against by the Fire and Rescue Service. Discrimination occurred when a person was treated less favourably than another in the same category. Mr S had not specified how he has been discriminated against. In the Adjudicator's view there was no indication that he had been treated differently from other former and deferred members of the Scheme who were in the same situation.

27. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr S.
- He still had funds in the Scheme at the time of the High Court judgment and this was not considered.
  - He was treated unfairly as the FBU would not represent him, so his position had not been put across to the Fire and Rescue Service.

### **Ombudsman's decision**

28. The High Court judgment referred specifically to whether training allowances should be considered as pensionable. Following the judgment the Fire and Rescue Service determined how the judgment should be implemented in accordance with the decision itself, relevant case law and the relevant Regulations. The Fire and Rescue Service decided that it would carry out a retrospective application of the judgment to training allowances that had been earned in the six years prior to the judgment in 2019. Mr S has not raised as an issue whether the six year period was appropriate, in accordance with Section 9 of the Limitation Act 1980, and I have not considered this any further.
29. The fact that Mr S had deferred funds in the Scheme at the time of the judgment does not mean that he should be included in the retrospective application of the judgment. Mr S transferred part of his pension benefits in 2010 and those that remained were deferred. Mr S did not have any pensionable service that fell within the scope of the retrospective application of the judgment. There was no evidence that Mr S' position (in general terms), was not considered by the Fire and Rescue Service in its discussions with the FBU. The decision of The Fire and Rescue Service to rely on the Limitation Act 1980 to limit the scope of the application of the judgment meant that Mr S did not have any relevant pensionable service. This was regardless of whether Mr S was still working for the Fire and Rescue Service at the time of the judgment.
30. I do not uphold Mr S' complaint.

**Dominic Harris**

Pensions Ombudsman

8 July 2024