



Ombudsman's Determination

| | |
|-------------|---|
| Applicants | Mr H & Mr N (the Applicants) |
| Scheme | Firefighters' Pension Scheme (the Scheme) |
| Respondents | Rhondda Cynon Taff (RCT) South Wales Fire & Rescue Service (SWFRS) |

Complaint Summary

The Applicants have complained that they were not informed by either RCT or SWFRS that if they retired from their employment as a Wholetime Duty Firefighter (**WDF**), taking advantage of their protected pension age (**PPA**), undertaking other linked employment within 30 days of retirement would invalidate their PPA.

As a result, their ongoing or subsequent employment as Retained Duty Firefighters (**RDF**) forfeited their entitlement to a PPA, and the pension payments received up until age 55, were deemed unauthorised payments, and subject to unauthorised payment tax charges.

Summary of the Ombudsman's Determination and reasons

The complaint brought by Mr N is upheld against SWFRS because it misinformed him of his entitlement to tax free cash.

The complaint brought by Mr H is upheld because SWFRS failed to act with reasonable care and skill when informing him of his pension entitlement.

Detailed Determination

Background to PPA

1. From 6 April 2006, under provisions of the Finance Act 2004 (**the 2004 Act**), an individual who accesses pension benefits prior to reaching the statutory normal minimum pension age is liable to an unauthorised payment tax charge, unless they are in ill-health.
2. On 5 April 2010, the normal minimum pension age was increased from age 50 to age 55. However, if a member had an unqualified right, as at 6 April 2006, to take a pension before normal minimum pension age, they become entitled to a PPA and could retire prior to the normal minimum pension age without the tax consequences of the 2004 Act.
3. This right to a PPA comes with various restrictions. Of relevance here is the requirement that the member must cease all employment with the employer at the time they take their benefits. If they remain in employment, they will lose the PPA entitlement and any pension paid until normal minimum pension age is reached is classed as an unauthorised payment.
4. The individual may retain the benefit of the PPA if they have a break in employment of at least one month and the re-employment is materially different.

Material facts

5. On 15 January 2013, HMRC wrote to SWFRS reminding it of its obligation to disclose any unauthorised payments made to members of the Scheme. This letter made reference to individuals with a PPA retiring prior to age 55 and said:

“In the case of regular fire fighters also employed as retained fire fighters both employments have to cease on retirement from being a regular fire fighter in order to retain the protected pension age and take benefits before age 55.”
6. The letter confirmed that failure to cease any linked employment would result in any pension payments or lump sum benefits paid being classed as unauthorised payments.
7. This letter was provided to this Office by RCT on the understanding that RCT had received it from SWFRS.
8. Below, I outline the circumstances of each Applicant's retirement.

Mr H

9. Mr H was employed as a WDF from 4 August 1978. As a result of his membership of the 1992 Firefighters Pension Scheme and his period of service, he was entitled to retire at the age of 50.
10. On 18 September 2013, Mr H had an interview for employment as a RDF.

11. On 20 September 2013, when aged 54, Mr H contacted the Human Resources department of SWFRS to inform it that he wished to retire on 30 October 2013.
12. On 23 September 2013, SWFRS wrote to Mr H informing him of his pension entitlement in a pre-retirement pension estimate. Included in this was the following information:

“By commuting a quarter of your pension you will be in breach of your personal allowance please see attached figures below outlining the maximum you can commute without going over your personal allowance. If you wish to commute an alternative amount please contact me.”

“Calculation factor for maximum commutation without incurring any tax liability...”
13. The letter provided Mr H with the option of commuting the maximum pension entitlement without incurring a tax liability or a quarter of his pension, but in doing so, he would incur a 55% tax liability. The letter made no reference to the rules relating to PPA.
14. On 25 September 2013, SWFRS requested a RDF contract be completed by Mr H.
15. On 7 October 2013, Mr H commenced his duties as a RDF.
16. On 31 October 2013, Mr H retired from his employment from SWFRS as a WDF.
17. On 6 November 2013, Mr H's RDF employment with SWFRS was formalised in writing.

Mr N

18. Mr N was employed as a WDF from April 1984. As a result of his membership of the 1992 Firefighters Pension Scheme and period of service he was entitled to retire from the age of 50.
19. On 17 April 2012, Mr N was employed as a RDF.
20. On 8 October 2013, Mr N informed SWFRS' HR department of his intention to retire and gave notice as of 16 October 2013.
21. On 24 October 2013, SWFRS issued a pre-retirement pension estimate to Mr N containing the same information, as set out in paragraph 12 above.
22. On 16 November 2013, Mr N retired from his WDF contract but continued employment as a RDF.
23. On 8 November 2013, HMRC wrote to SWFRS again, highlighting the issues raised in the January 2013 letter and inviting it to provide reports relating to any unauthorised payment made. In the event of an unauthorised payment occurring, there would be an unauthorised payment charge applied to the members' pensions and a Scheme Sanction Charge to be paid by SWFRS.

24. On review, SWFRS identified the Applicants as having lost their PPA and, as a result, any pension or lump sum paid to them, prior to age 55, was deemed an unauthorised payment and subject to a 55% tax charge.
25. In December 2013, SWFRS met with the Applicants and informed them of the situation.
26. In the following months SWFRS sought tax and legal advice and liaised with HMRC. HMRC maintained that the payments were unauthorised and would be subject to a tax charge.
27. On 11 May 2015, SWFRS Finance, Audit & Performance Management Committee met and concluded that the liability for the unauthorised payment tax charges should be paid by the members.
28. On 15 May 2015, this decision was communicated to the Applicants.
29. On 16 July 2015, SWFRS paid the outstanding Scheme Sanction Charge to HMRC.
30. In June 2016, the Fire Brigades Union complained to SWFRS on behalf of the Applicants.
31. The matter was considered further by SWFRS but the decision not to meet the members' tax liability remained the same. This was confirmed on 1 November 2016. No further right of appeal was provided.
32. On 11 July 2019, Justice Morgan issued a judgment in the case of Corsham & Ors v Essex & Ors [2019] EWHC 1776 (Ch) (**the judgment**), in relation to an appeal of a previous Determination that I issued. This related to a similar breach of PPA rules for members of the Police Pension Scheme. That Judgment upheld the appeal and determined that the Police Authority in question was responsible for the tax liability incurred by the members.

Summary of the Applicants' position

33. The Department for Communities and Local Government (**DCLG**) released FPS Guidance Note 1/2010 – Protected Pension Age – Implications for Re-employment of FPS Pensions from 6 April 2010 (**the 2010 Guidance**), which explained how this issued could be avoided. The 2010 Guidance was intended to inform employers and should have been acted upon or used to inform employees of the situation. SWFRS had failed to act on this guidance.
34. I had previously ruled, in the case of Cherry (PO-7096), that the employer of an individual with a PPA should inform the member about the possible adverse tax consequences of re-employment following the payment of pension benefits. In this respect the employer had a duty of care towards the employee. Whilst the employer was not required to provide tax or pension advice, providing the information within the 2010 Guidance would not have been advice.
35. On the basis of Cherry, SWFRS should agree to pay the tax liability that had arisen.

36. Other fire authorities had reached settlements with members in similar circumstances.
37. The information regarding PPA is now being provided to members retiring and should have been provided when the Applicants retired.
38. It is clear from HMRC's letter, dated 15 January 2013, that SWFRS and RCT were aware of this situation long before the Applicants retired. Had this information been acted upon, the Applicants would not now be in this situation.
39. It has been custom and practice for SWFRS to re-employ retired firefighters for some time, it should have been aware of this risk and mitigated it to avoid detriment to the employee. It is SWFRS that benefits hugely from RDF with previous WDF experience, and it should look after its employees' interests. SWFRS is not a small employer and has thousands of staff.
40. The information and rules regarding PPA are difficult to find and extremely complex. It is not reasonable to have expected the Applicants to know of them.
41. SWFRS was acting disgracefully towards loyal and dedicated employees.
42. SWFRS had managed to reduce its tax liability but left the Applicants without support.
43. Specific to Mr H, he says he had been actively encouraged to re-engage as a RDF and was discouraged from taking a break when attending the interview on the basis that his skills were needed and SWFRS would have to pay for retraining if he took a break. He believed he was doing the community a service by working as a RDF, using his vast firefighting experience, and was encouraged to do so.

Summary of SWFRS' position

44. SWFRS is the Scheme Manager, not the owner of the Scheme. Responsibility for the Scheme falls to the Welsh Ministers.
45. The Welsh Government ought reasonably to have informed SWFRS and RCT on tax issues such as this through the existing mechanisms, but the 2010 Guidance was never provided to SWFRS.
46. HMRC's position is that it is the individual's personal responsibility to understand the tax implications of their actions and the source documents are technically complex.
47. Membership of the Fire Brigades Union (**the FBU**) among SWFRS' employees is 98%. The FBU has mechanisms for the distribution of information to its members, including circulars and its website. Thus, the information was readily available to 98% of its members. The Fire Brigades Union Circular 2010HOC0158SS (**the FBU Circular**), dated 9 March 2010, shows the Applicants should have been made aware of the issue complained of by the FBU.
48. It is administratively and financially impractical for SWFRS to introduce a 'failsafe' mechanism to stop these circumstances coming about.

49. SWFRS has no record of HMRC's letter, dated 15 January 2013, being received and it bears none of the typical signs that it was received, such as a date stamp. The letter, dated 8 November 2013, is clearly date stamped as having been received.
50. SWFRS highlighted the Pensions Ombudsman's determination PO-7511, and the judgment in the case of Scally v Southern Health Board (1992), to show it had no liability where members could reasonably be expected to be aware of PPA implications by other means.
51. Further, SWFRS highlighted the judgments in the name of Crossley v Faithful and Gould Holdings Ltd [2004], and Andrews v Kings College NHS Foundation Trust [2014]. These cases show that there is "no general implied duty on an employer to take reasonable care of an employee's economic well-being" and an employer is not under a duty to "do everything possible or take steps which were not unreasonable".
52. The case put forward by Mr H to support his claim (PO-7096), was different in that there was no offer of retirement and re-engagement made to him. Mr H merely resigned from one of the two contracts he was employed under. Thus the liability claimed, stemming from PO-7096, does not exist.
53. It is not a proper use of public funds to pay the Applicants' tax bills, as it was not responsible for them.
54. RCT, as the administrator, has a far greater responsibility in this matter than the Authority.
55. In response to the Judgment, SWFRS added:
 - The Judgment differs from the circumstances here on a number of points, in particular, it relates to the re-employment of police officers, either before the decision to retire was taken or immediately thereafter. In the case of the Applicants, there was no re-employment, the Applicants merely remained employed through their RDF contract.
 - Additionally, the Judgment refers to the "settled practice" of the police forces of re-employing members after retirement. There is no such practice in the case of SWFRS and re-employment and abatement provisions have only been used on two occasions in the last 14 years. They were actively discouraged by earlier Fire Authorities.
 - Finally, the police forces in the Judgment encouraged retirement and re-employment to retain expertise at a reduced cost. That is not the case here.
 - SWFRS disputes that the Judgment has similarities to the circumstances of these complaints.

Summary of RCT's position

56. As the outsourced administrator, it provides the relevant information for the annual HMRC Event Report to SWFRS, which then provides it to HMRC. Correspondence from HMRC is sent on to it by SWFRS.
57. The HMRC letter, dated 8 November 2013, had been forwarded to RCT by SWFRS and it had highlighted to SWFRS the need to identify any members who may have lost their PPA to be included in the HMRC Event Report. It was at this point that SWFRS identified the Applicants.
58. On reviewing the situation, RCT had identified the earlier letter, dated 15 January 2013, addressed to SWFRS from HMRC. This letter specifically explained the implications in the event of retirement if both RDF and WDF posts were held, and that both employments must stop.
59. RCT only maintains records of firefighters who are contributing to the Scheme and so could not have been aware that the three members held retained RDF posts as well as WDF posts.
60. Both RCT and SWFRS receive updates on the Scheme from the Welsh Government and, before 2013, the DCLG. None of the circulars have mentioned the loss of PPA so it was unaware of the implications.

Conclusions

61. There is no dispute that a tax liability has arisen and that there is a requirement that it be paid. However, the Applicants complain that either, RCT, or SWFRS, was obliged or ought to have informed them, of the tax consequences of retiring from their WFD contract while continuing in RDF employment. Had they been informed they would have taken action to mitigate the tax liability that has arisen.
62. Before addressing SWFRS' position and possible liability, in the case of RCT there was clearly reason for it to know of the risk of loss of the PPA by way of the letter, sent by HMRC on 15 January 2013 to SWFRS, and apparently forwarded on to RCT. However, as I understand it, RCT had no way to know of the Applicant's contractual situation and so, it cannot have communicated the fact that the PPA would be invalidated by continuing the RDF contract. I find that RCT is not responsible for informing the Applicants of the tax liability that subsequently arose.
63. With regard to SWFRS, the situation is different. SWFRS should have been aware of the Applicants' employment situation and the tax implications of the PPA rules being breached, either by way of the letter from HMRC, dated 15 January 2013, and if not explicitly by that letter, then by its general obligation to know the relevant legislation.
64. SWFRS has argued that there is no evidence that the January 2013 letter was received by it and it had not received any wider guidance relating to the PPA rules. It highlights that the letter from HMRC was not date stamped as received by SWFRS. Its position is that at the point that the Applicants' retired, it was not aware of the

circumstances of when PPA would be lost. It only became aware when the letter, dated 8 November 2013, was received.

65. I do not accept the argument that there is no evidence that the letter was received by SWFRS. It was addressed to SWFRS specifically, and without having been received by SWFRS, I cannot see how it could have then been passed to RCT. SWFRS is responsible for providing reports to HMRC and should have sought to understand the implications of this letter, particularly, as it highlights the Scheme Sanction Charge which SWFRS would be liable to pay.
66. However, regardless of whether the January 2013 letter was received by SWFRS, it has a general obligation to know relevant law.
67. The Firefighters' Pension Scheme is treated as a split scheme under The Registered Pension Schemes (Splitting of Schemes) Regulations 2006, and divided into sub-schemes, of which SWFRS is listed as one. It does not appear that SWFRS was specifically appointed as the Administrator of the sub-scheme for the purposes of the 2004 Finance Act. But SWFRS has nevertheless been treated as such by HMRC, as it was liable for the Scheme Sanction Charge and the deduction of other pension tax liabilities.
68. On the understanding that SWFRS was the Scheme Administrator, I find that regardless of the receipt of the January 2013 letter, it should have been aware of the tax consequences of breaching the rules relating to the PPA. It had a duty to notify HMRC of such breaches and there were serious tax consequences for the rules being breached. Additionally, information was issued by HMRC and the Home Office relating to these changes; there is no justification for SWFRS to say it was unaware of the circumstances in which the PPA would be breached or the implications of such a breach.
69. I note that SWFRS has argued that irrespective of the knowledge it had or ought to have had, the Applicants were made aware of the implications through the FBU, which had issued an announcement on this issue in a circular dated March 2010. I do not agree that this circular implies the Applicants knew or ought to have known of the implications of taking pension benefits whilst still under a RDF contract. I would consider the contents of the circular to be of niche interest to FBU members, and I would not expect typical members to have read the Circular at the time it was issued, unless they were actively in the process of taking benefits. The Applicants were more than two years away from retirement, and I do not think it can be reasonable to say that when they came to retire, and without any indication of the risk of an unauthorised payment being made that time, they should be expected to have searched historical FBU Circulars for this specific information.
70. I am satisfied that SWFRS knew of the Applicants' employment situation as their employer, and if it did not know, then it ought to have known, the implications of their employment in the event of exercising their right to a PPA.

71. In the Judgment, Justice Morgan highlights that the applicants in that case were informed of the availability of a tax-free lump sum at retirement, when in fact, because of their reemployment and the loss of PPA, the tax-free lump sum would be an unauthorised payment and taxed as such. Justice Morgan concluded that the employers in that case ought to have been aware of the implications of the 2004 Act, the fact that re-employment without a break would invalidate the PPA, and therefore that the reference to a tax-free lump sum amounted to negligent misstatement.
72. At this point I must make a distinction between Mr H and Mr N. Mr H was not appointed as an RDF until after he had received the pre-retirement pension estimate which referred to tax free cash. Therefore, at the point the quote was issued to Mr H, it was correct. I will consider Mr H's circumstances further in paragraphs 75 – 79; 81 and 85 below.
73. For Mr N, he received a pre-retirement pension estimate which referred to tax-free cash whilst he was under contract as an RDF. Unless SWFRS had reason to think the RDF employment was going to end, which it did not, reference to tax-free cash at the point of retirement, was materially wrong, and SWFRS ought to have known that it was wrong. I consider it was reasonable for Mr N to rely on the letter received to understand that a tax-free lump sum would be payable and it was foreseeable that this information would be relied upon.
74. As per Justice Morgan's application of the law of negligent misstatement, as SWFRS knew of the concurrent employment and ought to have known of the implications of concurrent employment in the context of the 2004 Act, I find that it was responsible for providing accurate information, which it failed to do. This misstatement gave rise to a financial loss for Mr N, which was foreseeable, and SWFRS is liable for the financial losses that have arisen.
75. With regard to Mr H, his circumstances are different. At the time the pre-retirement pension estimate was issued, on 23 September 2013, he was not formally an RDF. He had undertaken an interview five days before the quote was issued, and a contract was offered to him two days after receiving the quote. But he did not begin his RDF work until 7 October 2013, and did not sign the contract until 6 November 2013. This means the pre-retirement pension estimate was accurate at the point that it was issued to Mr H and there was no negligent misstatement.
76. However, given that SWFRS ought to have known the tax implications, I consider this should have been a consideration at the point of offering Mr H the RDF contract. SWFRS was prepared to inform Mr H of the tax implications of accepting maximum commutation of his pension and so, it clearly was not averse to providing Mr H with relevant tax information and ways in which to mitigate it. I consider this principle ought also to have been extended to individuals who were at risk of breaching the rules on PPA and I understand that this information is now provided to other members at the point of retirement.

77. I also note that Mr H was encouraged to ensure a continuity of service to avoid the need for retraining at a later date, placing an additional expectation that relevant information such as information concerning the PPA would have been taken into account and provided.
78. Given SWFRS' actions in the lead up to Mr H's retirement and RDF employment, I consider it was reasonable for it to have provided Mr H with sufficient information concerning the tax consequences to make an informed decision on whether to accept RDF employment, or to retire at that point.
79. This would seem a particularly reasonable step given that SWFRS ought to have known it would incur a Scheme Sanction Charge because of Mr H's circumstances. It should have looked at ways to avoid this by raising the possible risk with Mr H. Had it done so, and taking account of the severity of the unauthorised payment tax charge, Mr H would no doubt have taken steps to avoid the PPA rules being breached.
80. In respect of Mr N's complaint, I uphold the complaint against SWFRS on the basis that the content of the pre-retirement pension estimate issued constitutes negligent misstatement.
81. In respect of Mr H's complaint, I uphold it on the basis that SWFRS failed in its basic duty to act with reasonable care and skill in the process of informing him of relevant information at the point of accepting the RDF contract.
82. The failures on the part of SWFRS will no doubt have caused the Applicants severe distress and inconvenience. They have been deprived of the enjoyment of their full pension entitlement for many years and these circumstances will have caused severe worry and loss of expectation. I consider this warrants a severe distress and inconvenience award.

Directions

83. In respect of both Applicants, SWFRS shall calculate the total tax liability that arose between the ages of 50 and 55, in respect of the breach of HMRC rules pertaining to PPA, including any interest due to HMRC, and pay this to the Applicants, or directly to HMRC on behalf of the Applicants, within 28 days of the date of this Determination.
84. In recognition of the severe distress and inconvenience caused, SWFRS shall pay the Applicants £2,000 each within 28 days of this Determination.

Anthony Arter

Pensions Ombudsman
27 March 2020