

Ombudsman's Determination

Applicant	Mr Charles Hutley-Savage
Scheme	Local Government Pension Scheme (the Scheme)
Respondent(s)	Surrey Heath Borough Council (the Council)

Complaint Summary

Mr Hutley-Savage has complained that the Council have refused him an Injury Allowance.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against the Council as the evidence does not support the claim that Mr Hutley-Savage's reason for resigning was because of his back injury.

The Local Government (Discretionary Payments) Regulations 1996

1. As relevant regulation 34 ('Loss of employment through permanent incapacity') says:

"If-

(a) as a result of anything he was required to do in carrying out his work a person who is employed in a relevant employment-

(i) sustains an injury; or

(ii) contracts a disease; and

(b) he ceases to be employed in that or any other relevant employment as a result of an incapacity which is likely to be permanent and was caused by the injury or disease,

he shall be entitled to an annual allowance not exceeding 85 per cent of his annual rate of remuneration in respect of the employment when he ceased to be employed."

Material Facts

2. Mr Hutley-Savage was a Corporate Property Surveyor for the Council.
3. On 14 March 2007 he was suspended on full pay pending an investigation. The investigation concluded that there was a case to answer and the hearing was scheduled for 8 August.
4. Prior to the hearing Mr Hutley-Savage requested access to his work files, which was granted – though Mr Hutley-Savage says not adequately. At the time the Council was undergoing a reorganisation. The office where Mr Hutley-Savage worked was moving to a new location. Consequently Mr Hutley-Savage's files had been crated in preparation for the move.
5. So that Mr Hutley-Savage could access the files without having to visit the office his crates were transferred offsite (to the Camberley Theatre), but because the site was not secure overnight the crates were placed in a locked boiler room.
6. Mr Hutley-Savage visited the site on 3 August. He was accompanied by his staff representative and a Council Auditor.
7. Mr Hutley-Savage injured his back moving a crate with the assistance of the staff representative. The Council say Mr Hutley-Savage did not follow the instructions of the Auditor that if he wanted to check the contents of a particular crate he should ask and then together it would be move to an adjacent room. Mr Hutley-Savage denies this.

8. On 13 August Mr Hutley-Savage submitted a completed Doctor's Certificate (stating that he should refrain from work for a further 7 days) and advised that his Doctor had requested physiotherapy treatment for his injured back.
9. On 17 August the Council wrote to Mr Hutley-Savage to clarify aspects regarding the hearing process. Among other things the Council confirmed that due to his deferment the hearing had been reconvened for week commencing 10 September.
10. On 24 August Mr Hutley-Savage emailed his staff representative:
 - in his desperation he had contacted ACAS who had informed him that 6 months on suspension was completely wrong;
 - he was concerned about answering questions (at the hearing) so long after the matter being investigated;
 - referred to negative things coming his way ("on top of Divorce") and an email that had been circulated about "A" (who was suspended at the same time as Mr Hutley-Savage) and his fear that he be associated with "A" in anyway;
 - requested information to aid his recollection of events for the hearing.
11. The next day Mr Hutley-Savage wrote to the Council advising that he was due to start physiotherapy on 18 September. He referred to the "sacking hearing" and said he wanted the hearing over as soon as possible and at the end of the letter talked about self-certification and asked for confirmation of "what will be classed my first day back" (in the office).
12. On 29 August Mr Hutley-Savage was seen by Dr Drury (Occupational Health Physician) to establish whether he was fit to attend the hearing. Dr Drury gave his opinion that Mr Hutley-Savage was fit for that purpose and additionally said:

"He has been appropriately treated by his general practitioner and I have advised him to seek private physiotherapy...However, [Mr Hutley-Savage] is mobile and on examination I could detect no evidence that he has a serious underlying back problem.

He will make a full recovery from his back problem..."
13. On 30 August Mr Hutley-Savage wrote again to the Council enclosing a Doctor's Certificate stating that he should refrain from work for a further 10 days. He said his Doctor had contacted the hospital to try to bring forward his physiotherapy, had looked at the pain he had been feeling since the accident in his right hernia wound and the top part of his leg and had told him he must rest and do no lifting. Mr Hutley-Savage said he wanted to get fit and pain free as soon as possible.
14. Further emails on 30 and 31 August to his staff representative indicate that Mr Hutley-Savage was in pain but also that he was working on his defence case.

15. On 5 September, Mr Hutley-Savage emailed the Council requesting that the hearing be deferred for a week as he had an appointment with his Doctor on the 10th and to enable him to properly prepare his case (his staff representative had arranged for Mr Hutley-Savage to view his office files and papers on 6 and 7 September and after then Mr Hutley-Savage would decide which witnesses he wanted to call). In the same email he said:

“You may be aware that my solicitor has sent to [KW] yesterday a “Without Prejudice” letter seeking a compromise agreement. A deferral would also facilitate any negotiations.”
16. On 7 September Mr Hutley-Savage’s solicitor sent a confirmatory email to the Council that Mr Hutley-Savage would resign that day (the solicitor says that Mr Hutley-Savage had already handed in his notice) and confirmed the agreement for his resignation. A Compromise Agreement was to be entered into with certain conditions, including no mention to any prospective employer or Mr Hutley-Savage’s professional body of the circumstances surrounding the termination of his employment or the disciplinary proceedings. It also said that any personal injury known at the date of the agreement was to be excluded.
17. The subsequent Compromise Agreement recorded that Mr Hutley-Savage’s employment with the Council was terminated by reason of resignation. Listed under ‘SETTLEMENT OF CLAIMS’ the Agreement said in respect of personal injury:

“9.1.14 for damages or compensation for personal injury of any kind of which the Employee has or ought reasonably to have knowledge of at the date of this Agreement; but excluding any claim the Employee may have in respect of personal injury suffered in the course of his employment (other than a claim for personal injury compromised in this clause 9) and in respect of accrued pension rights the Employee has under the Local Government.”
18. Later Mr Hutley-Savage was awarded an industrial injury benefit due to his back injury and in 2010 he was involved in a serious car accident, which among other things further damaged his back.
19. In May 2011 he successfully applied for the early release of his deferred pension on grounds of ill health. But an appeal for his pension to be backdated to August 2007 failed. Dr Fraser, the independent registered medical practitioner, who had certified that Mr Hutley-Savage satisfied the criteria for the release of his pension, gave a subsequent opinion that it would not have been possible to state that Mr Hutley-Savage was permanently incapacitated in August 2007. Dr Fraser was also of the opinion that the 2010 accident had contributed to Mr Hutley-Savage permanent incapacity.

20. In July 2013 Mr Hutley-Savage applied for an Injury Allowance. In support of his claim he submitted a report from Dr Nadeem dated 20 June 2013, in which Dr Nadeem attributed Mr Hutley-Savage's permanent incapacity to the 2007 back injury.
21. The Council turned down Mr Hutley-Savage's claim on the grounds that:
- he was suspended from work at the time he injured his back and consequently he could not have been doing anything that he was required to do in carrying out that role when he visited Camberley Theatre to view his files;
 - but even if it had been connected with work the Council could argue that Mr Hutley-Savage had failed to follow the instruction of his employer by attempting to move a crate only with the assistance of his staff representative;
 - his employment was terminated by reason of his resignation as noted in the Compromise Agreement and there was no mention that it was precipitated by the back injury;
 - in short he resigned because of the impending disciplinary proceedings and not because of his back injury;
 - in January 2008, he had notified the Council that his decision to resign followed advice of his staff representative that he could be sacked;
 - while it was not denied that Mr Hutley-Savage had injured his back on 3 August 2007 it was not admitted that the back injury was the sole substantive causative factor in his present day permanent incapacity:
 - Mr Hutley-Savage had a pre-existing bi-lateral hernia weakness;
 - in his medical report of 30 August 2007 Dr Drury had concluded that Mr Hutley-Savage would make a full recovery from the back injury;
 - Mr Hutley-Savage in a letter of the same date had relayed that his GP had attributed his pain to "possible tearing in my stitches or tendons in my healed wound" left by the hernia operation in 2002;
 - in 2010 he had been involved in a car accident which had caused further injury to his back.
22. Mr Hutley-Savage's appeal was similarly unsuccessful. The appointed person for the Council concluded that Mr Hutley-Savage did not qualify for an Injury Allowance as the injury he sustained was not as a result of anything he was required to do in carrying out his work and he did not cease employment as a result of a permanent incapacity caused by the injury:
- while Mr Hutley-Savage was signed off sick by his GP following the injury that did not satisfy the requirement to demonstrate that he had sustained the injury as a

result of work he was required to do, nor the second requirement relating to ceasing employment as a consequence of the injury;

- leading up to his resignation and the Compromise Agreement neither Mr Hutley-Savage nor his solicitors indicated that he was resigning because of his back injury;
- Mr Hutley-Savage had been sent a copy of the sickness policy (6 months full pay and six months half pay) in early August and therefore was aware there was no need for him to resign immediately;
- consequently there was no evidence that Mr Hutley-Savage had resigned because he was unable to work, rather it was fair to state he resigned due to the impending disciplinary hearing;
- apart from establishing that Mr Hutley-Savage was fit to attend the scheduled disciplinary hearing the Council had not investigated any other medical issues in relation to his Injury Allowance claim as there had been no need to do so.

23. In a letter to our service (dated 30 November 2013) Mr Hutley-Savage said that he resigned because of his injured back and only afterwards was told (by the Council) that he would have to sign a Compromise Agreement.

Summary of Mr Hutley-Savage's position

24. Mr Hutley-Savage, among other things, says:

- in August 2007 it was not in the Council's mind to consider his injury at work as they were focused on the hearing;
- he resigned in September 2007 as he could not carry on in his job and felt so depressed by the injury and that he knew he could not work again;
- prior to the injury his intention had been to attend the hearing and then go back to work;
- he had nothing to do with the Compromise Agreement, it was a standard Council process and his Solicitor agreed it on her own;
- he has not been able to work since the injury and medical reports confirm this;
- quotes from the Compromise Agreement, hearing dates and his resignation should not be considered as they have nothing to do with the fact that under the regulations he satisfies the criteria for an Injury Allowance;
- Dr Nadeem's medical report supports his claim;

- Dr Drury's opinion that he would make a full recovery from his back problem was not what he had been asked for his opinion own – it was whether he could attend the hearing;
- he is receiving Industrial Injury Disablement Benefit and both Disability Living Allowances (Mobility and Care).

Summary of the Council's position

25. The Council say:

- Mr Hutley-Savage ceased his employment because of the impending disciplinary proceedings and not his back injury;
- he was not carrying out work required by the Council when he injured his back;
- as neither limb of Regulation 34 was satisfied they decided not to award Mr Hutley-Savage an Injury Allowance;
- Dr Nadeem's report was not taken into account as it was not considered relevant;
- Mr Hutley-Savage has not been unfairly treated or suffered any injustice.

Conclusions

26. Mr Hutley-Savage says that he is in constant pain and encourages me to take into account the detail of his injury. I mean no lack of sympathy by not going into medical detail. But the key point is that to qualify for an Injury Allowance Mr Hutley-Savage must have (on the balance of probability) sustained the back injury as a result of anything to do with carrying out his work and ceased employment as a result of permanent incapacity caused by the back injury. (There was a change in 2011 which was intended to reflect a policy intention that "an injury allowance could be awarded where the development of either an injury or illness has come about through any work-related factors" but it is not relevant to Mr Hutley-Savage's case. And anyway, I do not think that it would have made any difference to his case if the 2011 changes had been in place.)
27. Putting to one side whether Mr Hutley-Savage sustained the back injury as a result of anything to do with carrying out his work the evidence suggests that the injury to his back was not the reason for his resignation at that time.
28. Mr Hutley-Savage's email of 24 August to his staff representative indicates how important the hearing was in his mind at the time (and he did not mention his health).
29. The next day (less than two weeks before the rescheduled hearing) Mr Hutley-Savage wrote to the Council. There is no indication that he was anticipating that he would never be fit to return to his duties.

30. Five days later (on the 30 August 2012) Mr Hutley-Savage wrote again to the Council enclosing a Doctor's Certificate stating that he should refrain from work for a further 10 days. He said that his Doctor has contacted the hospital to bring forward the physiotherapy, looked at the pain he has been feeling since the accident in his right hernia wound and the top part of his leg and told him he must rest and do no lifting. Mr Hutley-Savage goes on to say he wants to get fit and pain free as soon as possible. While he did express his concern about his back (and his hernia wound) it is clear that 7 days before the hearing he (and his GP) were still not thinking that it was a long term problem.
31. Several further emails to his staff representative (on 30 and 31 August) indicate that Mr Hutley-Savage was in pain but also that he was working on his defence case and concerned at rumours being spread about him suggesting his collusion with a contractor for financial gain.
32. Then on 5 September Mr Hutley-Savage asked for the hearing to be deferred for a week so he could see his GP on 10 September and properly prepare for the hearing. He then says that his solicitor had sent a "without prejudice" letter the day before seeking a Compromise Agreement and a "deferral of the Hearing would also facilitate any negotiations".
33. This appears to contradict Mr Hutley-Savage's comment to our service that after resigning he was told by the Council he would have to sign a Compromise Agreement. Whilst the wording and timing of the agreement were still to be finalised the evidence suggests that the impetus for it came from Mr Hutley-Savage's side. Mr Hutley-Savage says it was standard and that he did not ask for it. But he signed it, on advice, and I cannot go behind what it says.
34. On 7 September Mr Hutley-Savage's solicitor confirmed the agreement for Mr Hutley-Savage's resignation. The conditions included no mention to be made to any prospective employer or his professional body of the circumstances surrounding the termination of his employment or the disciplinary proceedings. It also says that any personal injury known at the date of the agreement was to be excluded.
35. This suggests that Mr Hutley-Savage was expecting, or at least hoping, to work again because he was concerned about prospective employers and his professional body hearing about the disciplinary proceedings (this does not preclude the fact that Mr Hutley-Savage might have had counterclaims) and that personal injury may have been in both sides' minds at the time given he had just suffered an injury to his back. The opportunity was there to insert some reference to the specific injury he had recently suffered, to provide that he was leaving in connection with that and to specifically waive and claims in relation to it – but these were not taken up/agreed. This may have been tactical but it leaves me short of evidence to substantiate Mr Hutley-Savage's claim that he left for that reason.

36. The Compromise Agreement refers to resignation as the reason for Mr Hutley-Savage leaving the Council. This cannot always be taken at face value because the point of the agreement is to resolve disputed issues during a parting of the ways. Nevertheless, the default position is clearly that this was the agreed reason at the time so it would need strong evidence to show otherwise. But as it turned out, the Compromise Agreement left open the possibility of a future personal injury claim suffered in the course of his employment (under 9.1.14), but under 4.1.4. Mr Hutley-Savage also made a warranty that he was not aware of any claims he may have against the Council through his employment.
37. The medical evidence available at the time that Mr Hutley-Savage resigned does not support that he was, or was then considered likely to be, permanently incapacitated by his back injury. With physiotherapy having not yet started, and in the light of the medical evidence that developed over time, it is difficult to see how any occupational health expert could have come to that conclusion at that specific point in time, without the benefit of hindsight.
38. As I do not find that Mr Hutley-Savage resigned because of his back injury I do not need to consider in detail whether the injury was sustained as a result of carrying out anything he was required to do as a Corporate Property Surveyor. However, I think it is highly likely that I would find against him on that point, and on the matter of the compromise agreement excluding his claim as well.
39. I therefore do not uphold Mr Hutley-Savage's complaint.

Tony King

Pensions Ombudsman
23 March 2015