

Ombudsman's Determination

Applicant	Mrs H
Scheme	Firefighters' Pension Scheme (FPS)
Respondents	Kent County Council (KCC), Kent Fire & Rescue Service (KFRS)

Outcome

1. I do not uphold Mrs H's complaint, and no further action is required by KCC or KFRS apart from the payment of lump sum compensation that KCC has already offered to Mrs H.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs H has complained that, KCC (the FPS administrator), and KFRS (the relevant fire authority), have refused to award her a spouse's pension following the death of her husband (**Mr H**) in 2014, despite letters from KCC to Mr H in 1998, stating that a spouse's pension would become payable on his death.

Background information, including submissions from the parties

4. Mr H was employed by Kent & Medway Fire & Rescue Authority as a retained (i.e. not regular or full-time) firefighter.
5. Shortly before Mr H had to retire on grounds of ill-health in March 1998, having been diagnosed with post-traumatic stress disorder contracted in the execution of his duties, KCC sent Mr H an estimate of the benefits that would be payable under the FPS. These benefits were stated to include a widow's annual pension of £7,169.43, which was equal to one half of Mr H's ill-health and injury pension.
6. The following month, KCC sent Mr H a letter to confirm the retirement benefits to which he was entitled under the FPS. The letter said "If you should pre-decease your spouse, for the first three months they would receive a short-term pension at the same rate of your pension, followed by a long-term pension at the rate of £7,169.43 per annum."

7. Sadly, Mr H died from cancer in March 2014. The following month KCC told Mrs H that she was not entitled to receive a spouse's pension. KCC's letter explained that:

“This is because Mr [H] was a retained firefighter who was not a member of the pension scheme but was awarded an ill health and injury pension because of an injury sustained in the execution of his duty. In this case the regulations only provide for a spouse's pension to be paid if the cause of death is related to the “qualifying injury”, which was Post Traumatic Stress Disorder. If it can be established that your husband's death was due to the effects of his injury, please contact me with the relevant medical evidence so your case can be reviewed.”
8. Mrs H complained that this information conflicted with the information given to her husband in 1998. When Mrs H unsuccessfully invoked the FPS's internal dispute resolution procedure, KFRS (at stage 1), and Kent & Medway Fire & Rescue Authority (at stage 2), pointed out that Mrs H had not provided any medical evidence to enable KFRS to assess whether Mr H's death could be attributed to the injury that caused his ill health retirement.
9. On 27 June 2014, Mr H's family doctor stated that he could not say whether stress had caused Mr H's fatal illness. Mrs H has not provided any other medical evidence to support her claim.
10. In recent correspondence KCC acknowledged that its correspondence with Mr H and Mrs H in 1998 was misleading, as it did not satisfactorily explain the statutory eligibility criteria for a spouse's pension and created an impression that such a pension would be paid if Mr H predeceased Mrs H. KCC offered to pay Mrs H £500 for her distress and inconvenience.

Adjudicator's Opinion

11. Mrs H's complaint was considered by one of our Adjudicators, who concluded that subject to KCC making a compensation payment of £500 to Mrs H, as it had already offered, no further action was required by KCC or KFRS. The Adjudicator's findings are summarised briefly below:
 - The FPS is a statutory pension scheme, governed by statutory rules. Only the benefits set out under those rules are payable: there is no discretion in those rules to pay additional or more generous benefits.
 - The Firefighters' Pension Scheme Order 1992, provided for a spouse's pension to be paid where a retained firefighter “dies from the effects of a qualifying injury”, namely the injury which caused his ill health retirement.

- Mrs H was not entitled to receive a pension from the FPS because he was a retained firefighter, and his death was not shown to be due to the injury which caused his early retirement.
 - The letters that KCC sent to Mr H in 1998 were misleading, because they created a false impression that a spouse's pension would be paid to Mrs H, but the letters did not give Mrs H a right to receive a pension. Therefore, Mrs H had suffered a loss of expectation rather than a loss of entitlement.
 - KCC's offer to pay Mrs H £500 for her distress and inconvenience was reasonable, because it was in line with the minimum amount that I award nowadays in those cases where there has been maladministration causing significant distress and inconvenience; this sum was not intended to bridge the gap in value between the benefits actually payable and the benefits that Mrs H thought should be payable, and the Adjudicator did not think that I would make any additional award.
12. Mrs H said she did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mrs H provided a copy of her solicitor's advice note on the relevant legislation and his conclusions. KCC and KFRS accepted the Opinion and provided a copy of their leading counsel's opinion, obtained at an earlier stage when they were formulating their response to Mrs H's complaint, and his conclusions which ran contrary to Mrs H's solicitor's conclusions.
13. I agree with most of the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs H, KCC and KFRS and their legal advisers, for completeness.
14. Mrs H's position:
- Under Rule H1 of the FPS, the fire and rescue authority is responsible for determining what awards are payable. Therefore, the respondent to Mrs H's complaint was KFRS, as the relevant fire and rescue authority; KCC's role was to administer the FPS on behalf of KFRS.
 - It was not entirely clear whether the rule of the FPS or the rules of the Firefighters' Compensation Scheme (**FCS**) applied to the complaint, but that did not matter because under the transitional provisions of Article 4 of the FCS (England) Order 2006 the FCS provisions were effectively the same as the FPS provisions as at 31 March 2006.
 - Although Mr H was not employed as a regular firefighter and did not pay contributions to the FPS or accrue a retirement pension in it, the FPS applied to him to the extent provided for in Rule J4 (Retained or volunteer member of brigade). His entitlement was the same as that of a whole-time firefighter working in the same role with similar pensionable service. Rule J4(1) sets out the entitlements of a retained firefighter who is injured in the performance of his duties and has to retire as a consequence,

whereas Rule J4(3) sets out the spouse's and children's entitlements if the retained firefighter dies as a consequence of being injured in the performance of his duties.

- Because he had served as a retained firefighter for more than two years, Mr H was entitled to awards under Rules B3 (Ill-health award) and B4 (Injury award).
- Unless it is concluded that the cause of death was related to an injury on duty – then Rule J4(4) is irrelevant. Rule J4(4) does not contemplate the situation where a retained firefighter has to retire as a consequence of an injury sustained on duty (but does not die). The answer as to what happens in this situation must be found elsewhere in the rules and that is in Rules J4(1), B3, and C1 because it is those rules which deal with death not caused by an injury sustained in the execution of duty.
- As Mr H had died whilst in receipt of an ill-health pension, leaving a surviving spouse, Mrs H became entitled to a pension under Rule C1 (Spouse's ordinary pension). The Applicant's entitlement to an ordinary spouse's pension flows from the fact that the FPS did in fact apply in relation to Mr H and his widow because he retired in the circumstances provided for in Rule J4.

15. The respondents' opinion:

- When Mr H retired in 1998 the applicable scheme was the Firemen's Pension Scheme established by the Firemen's Pension Order 1992 (**the 1992 Scheme**) as amended.
- The Firemen's Compensation Scheme 2006 (**the 2006 Scheme**) revoked relevant provisions of the 1992 Scheme with effect from 1 April 2006 (i.e. after Mr H had retired but before he died).
- Under Article 4 of the FCS (England) Order 2006 (Transitional provision: decisions and determinations made before 1st April 2006), the 1992 Scheme still applied because a determination or decision as to whether Mr H's permanent disablement was caused by a qualifying injury had been made before 1 April 2006. Even if the 2006 Scheme had applied, the analysis would be much the same.
- Rule J4(1) and (2) provided that if retirement was due to a qualifying condition, a retained firefighter was entitled to an ill-health or injury award under Rule B3 or B4 respectively as if he were a regular firefighter. However, Rule J4(1) and (2) do not make any reference to Rules C1, C2 or C3. If it had been intended that a firefighter to whom Rule J4(1) applied was to be treated as having been a regular firefighter for the purposes of Rule C1, one would have expected the rules to say so.
- Rule J4(3) and (4) provided that if the member's death was due to a qualifying condition, the surviving spouse was entitled to a special or augmented award under Rule C2 or C3 as if the member had been a regular firefighter. Mrs H was not entitled

to a special or augmented award because although Mr H's retirement was due to a qualifying condition his death was not due to it.

- Although a retained firefighter who satisfied the relevant conditions was entitled to receive an ill-health pension, a spouse's pension under Rule C1 was not payable on his death: there was no basis for the proposition that the deceased member had to be treated as a regular firefighter for all purposes connected with the scheme, including payment of death benefits.
 - Mr H as a retained firefighter was not a member of the pension scheme, and was being awarded an ill-health award and injury award by virtue of the application of a rule applicable to a special case, i.e. by way of an extension of the normal position. Had it been intended that a firefighter to whom Rule J4(1) applies was to be treated as a regular firefighter for the purposes of Rule C1, J4(2) would have listed that rule.
16. Relevant extracts from the Rules are appended to this determination.

Ombudsman's decision

17. The statutory rules governing this complaint are unfortunately quite complicated, as evidenced by the fact that Mrs H's representative and the respondents' representative have spent a lot of time and effort in setting out their analysis, and have reached different conclusions.
18. Firstly, I agree with Mrs H's view that KFRS should be a respondent, because it is the relevant fire and rescue authority responsible for determining whether any awards under the FPS are payable to Mrs H. However, I consider that it was appropriate for Mrs H to name KCC as a second respondent, because the letters that referred to a spouse's pension were sent to Mr H by KCC.
19. Secondly, I agree with the respondents' view that the FPS applied. That is because "a determination or decision" about Mr H's permanent incapacity was made before April 2006. Article 4 of the FCS (England) Order 2006, says that in those circumstances the provisions of the FPS continue to have effect.
20. Thirdly, there is no dispute between the parties that Rule J4(1) and (2) applied to Mr H, as he was a retained firefighter who had to retire due to a qualifying injury. However, those provisions say that he shall be treated for the purposes of specified rules as having been a regular firefighter. Those specific rules do not include Rules C1, C2 and C3 relating to a surviving spouse's benefits.
21. Rules C2 and C3 are mentioned in Rule J4(4), but that is irrelevant here because Rule J4(3) applies only where the retained firefighter dies from the effects of a qualifying injury (or of infirmity caused by a qualifying injury); that is not applicable to Mr H because, as the parties have agreed, his death was due to other causes. Furthermore, Rule C1 is not mentioned in Rule J4(4).

22. The proposition being put forward on behalf of Mrs H is that Mr H should be treated as having been a regular firefighter for all the purposes of the FPS, including death benefits. However, in view of the wording of Rule J4 I agree with the conclusions of the respondents that the statutory rules do not support that proposition. I say this because Rule J4(2) would have been worded differently and specifically provided for this if it were intended to include the surviving spouse's pension.
23. Therefore, I do not uphold Mrs H's complaint.
24. I recognise that this matter has been distressing for Mrs H, and note that KCC has offered to pay Mrs H £500 for her significant distress and inconvenience. As that amount is in line with the amounts that I currently award for non-financial injustice I do not consider it appropriate for me to make any additional award.

Anthony Arter

Pensions Ombudsman
8 September 2016

Appendix

The Firefighters' Compensation Scheme (England) Order 2006 SI 2006/1811

Transitional provision: decisions and determinations made before 1st April 2006

4(1) With the exception of...the Compensation Scheme shall not have effect in relation to a person in respect of whom a determination or decision under the Pension Scheme relevant to whether permanent disablement has been occasioned by a qualifying injury... has been made before 1st April 2006.

(2) In a case to which paragraph (1) applies, the provisions of the Pension Scheme, in the form in which they existed immediately before 1st April 2006, shall continue to have effect in relation to such person.

The Firemen's Pension Scheme Order 1992 SI 1992/129

B3 Ill-health award

- (1) This rule applies...to a regular firefighter who is required to retire under rule A15 (compulsory retirement on grounds of disablement).
- (2) A person to whom this rule applies becomes entitled on retiring
 - (a) if he is entitled to reckon at least 2 years' pensionable service or the infirmity was occasioned by a qualifying injury, to an ill-health pension...

B4 Injury award

- (1) This rule applies to a regular firefighter who has retired and is permanently disabled if the infirmity was occasioned by a qualifying injury.
- (2) A person to whom this rule applies is entitled
 - (a) To a gratuity, and
 - (b) ...to an injury pension...

C1 Spouse's ordinary pension

- (1) This rule applies where a person entitled to reckon at least 2 years' pensionable service dies, leaving a surviving spouse or civil partner
 - (a) while serving as a regular firefighter...or
 - (b) while in receipt of an ordinary, short service or ill-health pension, or
 - (c) while in receipt of an injury pension, if he has been but no longer is in receipt both of that pension and of an ill-health pension, or
 - (d) in consequence of an injury on account of which he retired from service as a regular firefighter with an ill-health gratuity, if he has not since had any period of such service.

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- (2) Where this rule applies the surviving spouse is, subject to paragraph (3), entitled to an ordinary pension...
- (3) Where the deceased died while serving as a regular firefighter, the surviving spouse...may...elect to have, instead of an ordinary pension, a reduced pension and a gratuity...

C2 Spouse's special award

- (1) This rule applies where a person who is or has been a regular firefighter dies from the effects
 - (a) of a qualifying injury, or
 - (b) of infirmity of mind or body occasioned by a qualifying injury,leaving a surviving spouse...

C3 Spouse's augmented award

- (1) This rule applies where a person who is or has been a regular firefighter dies from the effects
 - of a qualifying injury, or
 - (a) of a qualifying injury, or
 - (b) of infirmity of mind or body occasioned by a qualifying injury,leaving a surviving spouse...

J4 Retained or volunteer member of brigade

- (1) ...this paragraph applies to a person who was employed by a fire and rescue authority as a retained firefighter...and has retired and is permanently disabled if the infirmity that occasioned his incapacity for the performance of duty was occasioned by a qualifying injury...
- (2) A person to whom paragraph (1) applies shall be treated for the purposes of rules B3 (ill-health award) and B4 (injury award) as having been a regular firefighter falling within the description in paragraph (7), and rules B7 (commutation), B9 (allocation), B10 (limitation of commuted or allocated portion), K1 (cancellation), K2 (reassessment) and K3 (reduction in case of default) apply accordingly in relation to the awards to which he is entitled.
- (3) ...this paragraph applies where a person who is or has been employed by a fire and rescue authority as a retained firefighter or who is or has been a volunteer firefighter dies from the effects
 - (a) of a qualifying injury, or
 - (b) of infirmity of mind or body occasioned by a qualifying injury...
- (4) Where paragraph (3) applies and the deceased leaves a surviving spouse...the deceased shall be treated for the purposes of rules C2 (spouse's or civil partner's special award) and C3 (spouse's or civil partner's augmented award) as having been a regular firefighter falling within the description in paragraph (7)...