

## Ombudsman's Determination

Applicant	Mr N
Scheme	Firefighters' Compensation Scheme
Respondents	West Yorkshire Fire & Rescue Service ( <b>WYFRS</b> )

### Outcome

1. I do not uphold Mr N's complaint and no further action is required by WYFRS.
2. My reasons for reaching this decision are explained in more detail below.

### Complaint summary

3. Mr N disagrees with the decision not to award him an injury benefit. It is his view that the asthma he is suffering from was triggered by disciplinary action taken against him in 2011.

## Background information, including submissions from the parties

### Background

4. Mr N was employed by WYFRS as a firefighter. He retired on the grounds of ill health.
5. In 2011, Mr N was subject to a disciplinary hearing. He went on sick leave on 6 January 2011. Mr N was examined by WYFRS' medical adviser (**MA**) on 3 February 2011. The MA recorded Mr N had been diagnosed with asthma, which was stable on treatment. The MA obtained a specialist's report in March 2011. This stated that they did not have a clear diagnosis but Mr N probably had mild asthma. Mr N was certified fit to return to operational duty on 24 March 2011.
6. Mr N had further periods of sickness absence relating to respiratory problems in 2011 and 2012. He was also absent due to stress. Mr N was temporarily moved to modified duties in June 2013 due to his respiratory problems. In November 2013, the MA obtained a further specialist's report. The specialist expressed the view that Mr N had sufficient clinical features and investigative results to support a diagnosis of asthma.
7. Mr N went on long term sick leave in August 2015. He was seen by WYFRS' MA in January 2016. The MA certified that Mr N was not fit for full operational duties but

was fit for modified duties. Mr N's medical conditions were recorded by the MA as "Depression/Respiratory".

8. In a letter dated 29 February 2016, WYFRS' Chief Employment Services Officer said an investigation had revealed some anomalies in the disciplinary case. He went on to say that he was not convinced that the disciplinary action would necessarily have been taken against Mr N if the case were to be investigated in 2016. However, he said he had made it clear that he would not be reinvestigating a case which was, by then, several years old and had been subject to appeal at the time. He went on to say that the disciplinary action was no longer part of Mr N's service record.
9. Mr N was seen by the MA again on 9 March 2016. The MA had obtained a further report from Mr N's chest specialist. He recorded Mr N had been diagnosed with poorly controlled asthma, which had led to hospitalisation on three occasions in the past 12 months.
10. The MA had also obtained a report from a consultant psychiatrist. In his report, dated 10 December 2015, the psychiatrist said Mr N had three diagnoses: chest problems, depressive illness, and chronic embitterment. With regard to the last, the psychiatrist said this condition was not described in the International Classification of Diseases but had been described in medical journals. He described it as persistent feelings of being let down by an organisation but feeling helpless to do anything about it. He said it usually occurred in response to a single exceptional negative event.
11. Mr N's case was referred to an independent qualified medical practitioner (**IQMP**) in March 2016. In a letter dated 30 April 2016, Mr N requested he be considered for an injury benefit. He said he had not suffered from asthma prior to the disciplinary action and, after speaking to his specialist, he believed this had been the trigger for it.
12. The IQMP, Dr Sarangi, provided a certificate and report in June 2016. He certified that Mr N was permanently disabled from engaging in firefighting and disabled from performing the duties of a regular firefighter. He certified that Mr N's disablement had not been brought about, or contributed to, by his own default. Dr Sarangi certified that Mr N was capable of undertaking alternative regular employment. In his report, Dr Sarangi said:

"[Mr N] states that he feels his Asthma was caused by the disciplinary issues. I was unable to find any significant evidence for this. I did see various timelines where [Mr N] was informed of potential disciplinary action and it seems that the start of his respiratory difficulties may well have predated this. Nevertheless, although stress may well be an exacerbating factor for Asthma recurrent, there does not appear to be any evidence that his Asthma was as a result of his disciplinary issues. As a consequence, there does not appear to be any injury to consider as a potential qualifying injury."

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13. Mr N invoked the internal dispute resolution (**IDR**) procedure. A stage one IDR decision was issued by WYFRS' Chief Employment Services Officer in July 2016. He did not uphold Mr N's case on the grounds that:-
  - The disciplinary sanction in 2011 was at the heart of Mr N's absence and poor health.
  - This did not meet the definition of an illness or injury arising out of authorised duty.
  - The Scheme rules stated that an injury would be treated as having been received without the individual's default unless it was wholly or mainly due to his or her own serious and culpable negligence or misconduct. It was Mr N's alleged misconduct which had led to the disciplinary sanction.
14. Mr N invoked stage two of the IDR procedure. His case was considered by WYFRS' Executive Committee. It issued a decision, in October 2016, not upholding Mr N's case.
15. The relevant rules are found in the Firefighters' Compensation Scheme (England) Order 2006 (SI2006/1811) (as amended). Rule 7, Part 1, Schedule 1 provides:

“Qualifying injury

  - (1) ... 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 or retained firefighter.
  - ...
  - (5) For the purposes of this Scheme an injury shall be treated as having been received by a person without his default unless the injury is wholly or mainly due to his own serious and culpable negligence or misconduct.”
16. The definition of “injury” includes disease.
17. Under Rule 1, Part 6, Schedule 1, the question of entitlement to an award is determined in the first instance by the fire and rescue authority. Before deciding whether disablement has been occasioned by a qualifying injury, the authority must obtain a written opinion from an IQMP selected by it. Rule 2, Part 6, Schedule 1 provides for an appeal if the individual is dissatisfied with the authority's decision.

### **Mr N's position**

18. The key points in Mr N's submission, taken from his correspondence with TPO and WYFRS, are summarised as follows:-

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- His illness was brought about by the disciplinary case, which he considers to have been improperly conducted. It was not the disciplinary procedure which caused him stress; rather, it was the findings.
- He had not suffered from asthma before the disciplinary case and, having spoken to his specialist, he believes this was the trigger for it starting.
- Although no specialist can say that stress is the cause of his asthma, they all agree that it is a major contributing factor.
- He had no previous contact with the IQMP who reviewed his case and questions whether he was the best person to make a decision because of his lack of knowledge of the case.
- For the last 12 months of his employment, his absence from work was for work-related stress and not asthma.
- He had a right to make a submission to the IQMP. He submitted this to the Head of the Occupational Health and Safety Unit who then failed to include it in the information supplied to the IQMP.
- He asked to be allowed to attend the IDR hearings in order to put forward his case. He was refused on both occasions.

## WYFRS' position

19. WYFRS' submission is summarised briefly below:-

- Injury awards can only be awarded to a firefighter who has retired and is permanently disabled if the infirmity was occasioned by a qualifying injury. This is defined as "an injury received by a person, without his own default, in the exercise of his duties as a ... firefighter".
- Case law has established that "in the exercise of his duties" is not simply a requirement that the firefighter must have sustained the injury whilst on duty. It cites *Stunt v Commissioner of Police for the Metropolis* [2001] EWCA Civ 265 and *R (on the application of Merseyside Police Authority) v Gidlow* [2004] EWHC 2807 (Admin).
- The IQMP acknowledged that stress might be an exacerbating factor for Mr N's asthma but said there did not appear to be any evidence that the asthma was a result of the disciplinary case.

## Adjudicator's Opinion

20. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by WYFRS. The Adjudicator's findings are summarised briefly below:-

- For Mr N to be eligible for an injury benefit under the Scheme rules, he would have to have received a qualifying injury; that is, an injury, including a disease, received “in the exercise of his duties”.
- There appeared to be two principal questions arising in Mr N’s case:-
  - Whether an injury or disease caused by disciplinary action can be a qualifying injury; and
  - Whether Mr N’s asthma can be said to have been caused by the disciplinary action.
- What is meant by an injury received in the exercise of the individual’s duties had been considered by the Courts in a number of cases over the years. WYFRS had referred to the *Stunt* and *Gidlow* cases. These cases concerned the Police Pensions Regulations 1987. However, the wording of the relevant regulations was essentially the same and the Courts had treated them as analogous.
- Briefly, the Courts had said:-
  - There has to be a direct causal connection between the injury or disease and the duty.
  - Execution/exercise means fulfilment or discharge of a function or office. It does not require some specific action on the part of the individual. In other words, a disease contracted over time could still be a qualifying injury.
  - The critical question is whether the officer’s mere subjection to the disciplinary process of itself constitutes the execution/exercise of his duty.
  - The notion of execution/exercise of duty cannot be stretched to encompass stress-related illness through exposure to disciplinary proceedings. The natural meaning of the words used in the relevant regulation cannot bear such an interpretation.
- Mr N’s argument was that he did not suffer from asthma before the disciplinary action and this action was the trigger for it starting. If that was indeed the case, Mr N’s case could not succeed because it would fall foul of the Court’s decision in the *Stunt* case; that is, an award is not payable to an officer disabled through his reaction to disciplinary proceedings.
- The Adjudicator noted Mr N’s submission to the effect that it was not the disciplinary procedure itself which had caused him stress. However, in both *Stunt* and *Gidlow* the officers concerned felt that the disciplinary action had either been incorrectly brought or poorly handled. The Adjudicator did not find anything to distinguish Mr N’s case.

- Even if that were not the case, Mr N had not shown that his asthma was indeed caused by the disciplinary action. The current medical opinion appeared to be that the reason why people develop asthma was not known<sup>1</sup>. Mr N, himself, acknowledged that his specialists have not said that it was caused by stress.
- In the Adjudicator's view, Mr N's case for receiving an injury award on the basis that his asthma was caused by the disciplinary action could not succeed.
- The psychiatrist, from whom a report was obtained by the MA, had said Mr N had three diagnoses: chest problems, depressive illness, and chronic embitterment. The focus has been on Mr N's asthma. Mr N's depressive illness is of longstanding and, the Adjudicator understood, he was not arguing that this was received in the exercise of his duties. The Adjudicator had considered whether greater consideration should have been given to Mr N's chronic embitterment. The psychiatrist had acknowledged that this condition was not described in the International Classification of Diseases but had said it had been described in medical journals. However, it appeared to the Adjudicator that this aspect of Mr N's case would face the same issues as with his asthma; namely, it arose out of the disciplinary action and was not received in the exercise of his duties.
- The Adjudicator noted Mr N's concern about the IQMP. However, the Scheme rules required WYFRS to obtain an opinion from an IQMP selected by it. WYFRS was, therefore, acting in accordance with the regulations in obtaining Dr Sarangi's opinion.

21. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr N for completeness.

### **Ombudsman's decision**

22. Mr N considers that his stress was not taken into account sufficiently by the IQMP. It is the case that the focus has been on Mr N's asthma. This is largely because Mr N made his application on the basis that his asthma had been triggered by the disciplinary action. It was noted, by the psychiatrist consulted by WYFRS' MA, that Mr N had three conditions: asthma, depressive illness and chronic embitterment. Mr N's depression predates his joining WYFRS. His chronic embitterment has arisen more recently.

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<sup>1</sup> NHS website

23. The psychiatrist who expressed the view that Mr N was suffering from chronic embitterment did not actually say what had caused this. He described it as persistent feelings of being let down by an organisation but feeling helpless to do anything about it. He did say it usually occurred in response to a single exceptional negative event, which could be taken to mean the disciplinary action. As explained by the Adjudicator, this would then face the same issues as Mr N's asthma in terms of being a qualifying injury.
24. I do not find that it was maladministration for the consideration of Mr N's application for an injury benefit to focus on his asthma; this is, after all, the basis upon which he had submitted his case.
25. I find that WYFRS took an appropriate approach to considering Mr N's application. It referred the case to an IQMP, as it was required to do under the Scheme rules. I am satisfied that both WYFRS and the MA understood the requirements of the Scheme rules and applied them correctly. They have applied the definition of qualifying injury in accordance with the Scheme rules and the relevant Court judgments.
26. I note Mr N's concern that information he had provided was not made available to the IQMP. However, the IQMP clearly stated, in his report, that he had been provided with "supporting information" from Mr N.
27. Mr N also says that he was not allowed to attend the IDR hearings in person. There is no statutory requirement for WYFRS to allow Mr N to attend an IDR hearing in person. He should be given adequate opportunity to present his case, but this need only be the opportunity to make a written submission. I do not find that WYFRS' decision not to allow Mr N the opportunity to attend the hearings in person amounts to maladministration.
28. Therefore, I do not uphold Mr N's complaint.

**Anthony Arter**

Pensions Ombudsman  
24 January 2018