

Ombudsman's Determination

Applicant	Mr S
Scheme	Firefighters' Compensation Scheme (the Scheme)
Respondents	Devon & Somerset Fire & Rescue Service (the Service)

Outcome

1. Mr S' complaint is upheld and to put matters right the Service shall consider wholly afresh whether Mr S is entitled to an injury award and pay Mr S £500 for the significant distress and inconvenience caused.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S' complaint is that he has been refused an injury award.

Background information, including submissions from the parties

4. The relevant provisions contained in the Firefighters' Compensation Scheme (England) Order 2006 (**the 2006 Order**) are provided in the Appendix.
5. Mr S was a retained firefighter for the Service. Retained firefighters must live or work near a retained fire station and be able to arrive at the station within five minutes of a call.
6. On the morning of 19 September 2010 (shortly after 9 am), Mr S injured his left knee whilst responding to his 'alerter' (a radio pager). The next day a 'Report of Incident' was completed by the Station Commander:

"Whilst responding to his 'alerter' call at home, he slipped down the last couple of stairs and jarred his knee. Only slightly sore at the time but the officer in charge said he should report it if it gets worse and it has."
7. A 'Safety Event Reporting Form' (ES9 - **the Form**), was also partially completed by the Station Commander. Section 1 included a 'Safety event description':

"FF [S]...was responding to his alerter going off. He got dressed and ran down the stairs inside his house. Near the bottom of the stairs his leg slipped...and in trying

to regain his balance jarred his leg and felt something click in his left knee. It felt slightly sore but wasn't bothering him so he [carried on to] the station. He mentioned it to the...pump but said he was ok to continue."

8. The Station Commander's signed declaration included a note "Recorded for FF [S]".
9. The Form included a 'Witness statement' by the Crew Manager who said that on arriving at the Station he was approached by Mr S who said he had tripped on a step at home and fallen uncomfortably on his leg. He said he asked Mr S if he was fit for duty and Mr S replied that he was and "he would give it 24 hrs".
10. The Station Commander also completed Section 4 (1) of the Form. Under the question 'Following your initial investigation what do you think was the cause of the safety event?' he wrote:

"FF [S] was responding to his alerter call from bed. While still sleepy. He got up dressed and ran down stairs [*sic*] towards the front door. His foot slid on the stair causing him to stumble down the remaining stairs. In his haste to respond he didnt [*sic*] ground his foot properly on the stair."
11. Mr S says he was not given a copy of the Form at the time it was completed and was not asked for and did not give a statement at that time.
12. Mr S returned to work on 4 October 2010. He had further absences in relation his left knee and underwent knee surgery in July 2011 and February 2013. In early 2014 he was considered for an injury award (gratuity and allowance) and an ill health pension.
13. Before obtaining the opinion of an IQMP the Service informed Mr S that while they accepted that he had sustained his injury on duty they needed to decide if it was a qualifying injury.
14. On 24 February 2014, the Service wrote to Mr S informing him that their decision was that his injury was not a qualifying injury as it was deemed to have been received through his own default. The Service informed Mr S that if the IQMP was of the opinion that he was eligible for ill health retirement this would not include an injury award.
15. Subsequently Dr Bray (IQMP) certified that Mr S was permanently disabled from engaging in firefighting (as a result of osteoarthritis in his left knee) but was capable of sedentary administration work. Dr Bray certified that the condition was a qualifying injury. The Service duly awarded Mr S a lower tier ill health pension.
16. Mr S unsuccessfully appealed the Service's decision (that his injury was not a qualifying injury) via the Scheme's two-stage internal dispute resolution (**IDR**) procedure. At IDR stage one, among other things, Mr S said:
 - He had never been asked to give or had given a statement about the circumstances of his injury.
 - The statements on the Form were therefore mere supposition.

- There was no evidence that he had responded to the fire call while sleepy. The call was at approximately 9 am on the Sunday morning and he was not asleep.
- He was partially dressed when the 'alerter' sounded.
- He did not run downstairs but proceeded at the same speed he had responded to any other call attended over the past 23 years.
- At the foot of the stair his knee gave way. This caused him to stumble. There was no absence of due care and attention.
- There were no obstacles on the stairway.

17. The Services HR Manager rejected Mr S' appeal:

- There was no possible reason or motive for the Station Commander fabricating evidence and there was no evidence that Mr S had challenged what was said on the Form at the time it was completed.
- It was likely that the Station Commander's account was based on what Mr S had said to him at the time and, on balance, was more likely to be correct than Mr S' recent statement.
- "Consequently, I concur with the decision that your injury does not constitute a qualifying injury for the purposes of the compensation regulations, since the accident was due to your own culpable and serious negligence in that you descended the staircase with inappropriate speed and care."

18. At IDR stage two Mr S maintained his position/ He said he had no reason to suppose that the Station Commander had fabricated evidence; nevertheless the statements made were incorrect.

19. The Appeals Panel upheld the IDR stage one decision:

"the decision has been made that your Injury on Duty would not be regarded as a qualifying injury due to the fact that the injury was brought about by your own default, happening in your own home as a result of not proceeding with due care and attention."

20. Among other things the Service says:

- As Mr S was unable to explain how he came to fall on the stairs it was reasonable for the Service to rely on the statements that were taken on the day after the injury
- While their decision letter said that Mr S had not proceeded with due care and attention, it would appear that the fall was mainly due to Mr S tripping or slipping on the stairs and therefore the injury was mainly due to his own serious and culpable negligence.
- It would appear from Case law (Stitt, Woolley v Gloucestershire County Council, Court of Appeal 1971) that on-call firefighters are on authorised duty for the purposes of sick pay from when they leave home rather than when they are still inside their property. So even if the injury had been without default then the Compensation Scheme would not apply anyway.

Adjudicator's Opinion

21. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Service. The Adjudicator's findings are summarised briefly below:

- It was not clear how Mr S' actions amounted to serious and culpable negligence. As a retained firefighter he was duty bound to immediately respond to his 'alerter' and get to the station expeditiously. There appeared to be no evidence that in so doing Mr S had acted recklessly or his action was outside of the boundary of what he was reasonably expected to do when answering the call-out.
- It appeared that in making their original decision the Service had applied a lower threshold for a default injury than specified in the 2006 Order. Namely, their letter to Mr S of 24 February 2014 said his injury was brought about by his own default "as a result of not proceeding with due care and attention". The Appeals Panel, at IDR stage two, applied the same lower threshold.
- The Service's recent suggestion that Mr S may not have been on duty until he left his house was strange given that a retained firefighter is paid from the time his alerter sounds. The 1971 Court of Appeal case cited by the Service (*Stitt v Woolley*) concerned whether on-call firefighters were on duty when travelling in response to a call. The Judge had made no decision on his comment that "...once the men leave their home to answer a call...the men were probably on duty and were acting within their duty as retained firemen" – he said there was no need to do so.
- The Service's decision that Mr S' injury is not a qualifying injury was not properly made and consequently they should consider the matter again.
- The Service had focused their attention on the Form and the injury Mr S sustained in 2010, but did not appear to have separately considered whether his left knee osteoarthritis (on its own) made him eligible for an injury award.

22. The Service did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Service provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by the Service for completeness.

Ombudsman's decision

23. The Service has previously accepted that Mr S' injury factually, regardless of reason, occurred in the course of his employment. Latterly, they have sought to suggest otherwise and have referred to the Court of Appeal case of *Stitt v Woolley* [(1971) 115 S.J. 708]. The case law in this area, such as *Stitt*, has focused on injuries sustained during travel to or from a place of work, which is not the position with Mr S. However, the House of Lords said in *Smith v Stages and Others* [1989] 2 A.C 928:

“...It does not follow from the existence of a right on the part of the employers to direct and control an employee that at all such times the employee is in the course of his employment. There must be an exercise of that right by the employers. The commonest example is where an employee is required by the terms of his employment to make himself available at home or elsewhere for emergency callout. The course of his employment does not commence until, at earliest, he is called out.”

24. Here, the Service exercised their right to call-out Mr S to attend an incident. He is paid from that point accordingly. The nature of his work and his contract required a speedy response. There is no evidence that his home was kept in a state whereby a fall was likely, or that he was in so much of a hurry that he took unnecessary or unusual risks; it was an accident. The Service appears to proceed on the basis that either they or Mr S has to be at fault and have not allowed for an unfortunate accident. This does not mean that domestic accidents in the home not related to responding to an emergency incident will now come within the criteria of a qualifying injury, as the Service suggests. Mr S was responding to an emergency incident, the precise circumstances here indicate he was on duty, and his actions have not been shown to meet the test of serious and culpable negligence.
25. The Service say Dr Bray did not certify that Mr S' condition was a qualifying injury as the Service had already made that decision in Section C of the IQMP's Opinion. But under Section E, '4. The disablement' (referring to the osteoarthritis in Mr S' left knee) Dr Bray ticked the box 'has not' 'been brought about, or contributed to, by the firefighter's own default'.
26. The Service say Mr S' osteoarthritis is a degenerative condition and is not something that could be singularly related to an index event and that in all likelihood it would have been a pre-existing condition; but that is a matter for an IQMP to decide.
27. The Service say, should the injury be considered as a Qualifying Injury then the Service will be responsible for the significant additional costs of a lifetime injury pension, lump sum and injury gratuity award. However, the cost should not be a factor in making their decision. If Mr S satisfies the criteria for an Injury Award he is entitled to it irrespective of the cost to the Service.
28. Therefore, I uphold Mr S' complaint.

Directions

29. To put matters right:
 - Within 21 days of the finalised Opinion the Service shall consider again whether Mr S' 2010 left knee injury was or was not of his own default. The Service shall also pay Mr S £500 for the significant distress and inconvenience caused.

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- If the Service decide that the 2010 injury was not of Mr S' own default, within 14 days of that decision the Service shall request the certified Opinion of an IQMP as to his eligibility for an injury award from the date of his ill health retirement.
- Within 21 days of receiving the IQMP's certified Opinion the Service shall decide whether Mr S is entitled to an injury award from the date of his ill health retirement and explain to Mr S the reason(s) for their decision.
- If the Service decide that the 2010 injury was of Mr S' own default, within 14 days of that decision the Service shall request the certified Opinion of an IQMP as to whether Mr S' osteoarthritis stems from that injury; and, if not, whether on its own the condition qualifies him for an injury award from the date of his ill health retirement.
- Within 21 days of receiving the IQMP's certified Opinion the Service shall decide whether Mr S is entitled to an injury award from the date of his ill health retirement and explain to Mr S the reason(s) for their decision.

Anthony Arter

Pensions Ombudsman
3 October 2016

Appendix

Firefighters' Compensation Scheme (England) Order 2006

30. Part 1 (of Schedule 1), rule 7 – 'Qualifying Injury' says:

“(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.”

31. Part 6 (of Schedule 1), rule 1 – ‘Determination by fire and rescue authority’ says:

“(1) The question whether a person is entitled to any and if so what awards shall be determined in the first instance by the fire and rescue authority.

(2) Subject to paragraph (3), before deciding, for the purpose of determining that question or any other question arising under this Scheme-

(a) whether any disablement has been occasioned by a qualifying injury,

(b) the degree to which a person is disabled, or

(c) any other issue wholly or partly of a medical nature, the authority shall obtain the written opinion of an independent qualified medical practitioner [IQMP] selected by them; and the opinion of the independent qualified medical practitioner shall be binding on the authority.

(3) In his written opinion, the independent qualified medical practitioner must certify that-

(a) he has not previously advised, or given his opinion on, or otherwise been involved in, the particular case for which the opinion has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the employee, the authority, or any other party in relation to the same case.”