

Ombudsman's Determination

Applicant	Mr Patrick Kilgallon
Scheme	Police Pension Scheme (the Scheme)
Respondent(s)	West Yorkshire Police Authority (WYPA)

Complaint Summary

Mr Kilgallon has complained about the way WYPA handled his claim for an injury benefit. He says that they unlawfully reduced his injury benefit based on a flawed Home Office circular 46/2004 for a period of 12 months. He complains about the way WYPA implemented the reduction. He also says that they have not offered him adequate compensation for the distress and inconvenience caused to him by their error and for the costs he has incurred in pursuing his complaint.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against WYPA to the limited extent that they should pay some legal fees potentially outstanding. Otherwise, although their incorrect reduction of Mr Kilgallon's injury benefit has caused him both financial and non-pecuniary injustice, they have offered him satisfactory redress.

DETAILED DETERMINATION

Material Facts

1. Relevant extracts from The Police (Injury Benefit) Regulations 2006 (**the Regulations**) are:

Regulation 7(5):

“where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force.”

Regulation 37(1):

“the police authority shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered, and if after such consideration the police authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly”.

2. Home Office Circular 46/2004 is guidance issued by the Home Office. Annex C of the circular addresses matters concerning the review of police injury pensions. In January 2012 the circular was deemed to be unlawful in part by His Honour Judge Behrens. A further judicial review hearing, before Mr Justice Supperstone at Leeds High Court in February 2012 held that part of Home Office circular 46/2004, concerning "Review of Injury Pensions once Officers reach 65", and paragraph 20 of section 5 of the Home Office 'Guidance on Medical Appeals under the Police Pensions Regulations 1987 and the Police (Injury Benefit) Regulations 2006' are inconsistent with the Police (Injury Benefits) Regulations 2006 and therefore unlawful.
3. Mr Kilgallon retired from WYPA on medical grounds in 1993 and was in receipt of a Scheme pension and an injury benefit award.
4. The Senior H R officer at WYPA wrote to Mr Kilgallon on 9 May 2012 saying,

“I write further to the recent reassessment of your IUE award...

Following recent legal cases we have now had the opportunity to re-examine the process used to determine the level of your award. This was done initially by following the guidance contained in Home Office

Circular 46/2004. The Force has now adopted the position whereby it believes that this guidance was fundamentally flawed meaning that the recent reassessment is now invalid.

We will also be writing to you personally to inform you that your award will be returned to its previous level along with details of any back pay once the recalculations have taken place...

We would like to apologise for any inconvenience and distress that has been caused by the flawed guidance..."

5. WYPA had reduced Mr Kilgallon's injury benefit from 27 April 2011 up until 30 April 2012. Prior to the reduction he was receiving an injury benefit award of £11,399.76 p.a. Following WYPA's reassessment of his injury benefit, he received £12,364.20 p.a. from 1 May 2012. WYPA also reimbursed him £5,959.47 of injury benefit on 1 May 2012 and so his injury benefit was fully restored.
6. The Senior HR officer at WYPA wrote to Mr Kilgallon again on 18 June 2012 saying,

"I have now had the opportunity to review your individual case file and have noted that West Yorkshire Police Authority ...repaid your monies back to the original reduction date of 27 April 2011..."
7. Mr Kilgallon provided WYPA with details of the professional fees amounting to approximately £1,710 that he said he incurred in pursuing his complaint with them. This included solicitors fees and costs associated with hiring a Human Resources Consultant.
8. WYPA say that Mr Kilgallon said that half of the £1,710 professional fees were reimbursed to him by the Superintendent's Association, the union which Mr Kilgallon was a member of.

Summary of Mr Kilgallon's position

9. Mr Kilgallon has made detailed and substantial submissions. Some (see below) concern matters which did not cause him any harm, though he says they could have done. Many concern matters that have since been put right. Others concern the motives behind what he was told. I do not set them out in detail below, though I have had regard to them.

10. He was subjected to an unlawful process by WYPA whereby his injury benefit was reduced for 12 months. During the course of the process they sent him misleading information regarding the injury benefit. Had he acceded to the misleading information his injury benefit would have been reduced for about two years instead of one.
11. WYPA failed to deal with his medical records in a proper a proper manner.
12. He questions the use of the Annual Survey of Hours and Earnings (**ASHE**) median figures for the over 65s by WYPA in calculation of his injury benefit award - which he says produces a flawed calculation The Home Office Guidance advised the use of mean average for the population overall.
13. He has suffered distress and inconvenience caused by WYPA's error in unlawfully reducing his injury benefit. He has also incurred costs of employing solicitors and a Human Resources Consultant to deal with is complaint. It was crucial to his case (particularly in dealing with the matter of his earning capacity) that he employed their services.
14. He wants an explanation and an apology for the error from a person with seniority and authority within WYPA.
15. The authority to deal with matters relating to the Scheme was not properly delegated from the Police Authority to the Chief Constable.

Summary of WYPA's position

16. The Home Office guidance, HOC 2004/46 was the subject of legal actions and was eventually considered by the Court of Appeal. With the clarification that the court of appeal provided, WYPA offered to reconsider any case to which the guidance had been applied. Mr Kilgallon was one of those cases. His injury benefit was reinstated and arrears were paid with interest so he received restitution. WYPA apologised to Mr Kilgallon for their error.
17. WYPA offered to pay Mr Kilgallon £400 in respect of the worry he suffered during the year in which his injury benefit was reduced and £400 towards his legal costs.
18. Half of the £1,710 professional fees that Mr Kilgallon incurred were reimbursed to him by the Superintendent's Association.

19. Mr Kilgallon's case was closed on 21 March 2013 and the medical records were returned to his medical advisor.
20. It is not accepted that the use of ASHE median figure for the category of 65 years and over is an act of maladministration. Its adoption is a reasonable and lawful way of calculating the injury award when speculating as to the capacity to earn.
21. The Police Authority Standing Order on Resource Management states that the Chief Constable is authorised to "For Police Officers below Assistant Chief Constable rank and all Police Staff, make all discretionary decisions under Police Pension Regulations or the Local Government Superannuation Scheme". This was changed in September 2011 to read "For all serving and former Police Officers below..." Regulation 37 PIBR 2006 states that "the Police Pension Authority shall at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered..."
22. The review of Mr Kilgallon's pension was not a discretionary matter. It is clear from the legislation the review is a mandatory duty and requires no decision or exercise of discretion. The delegation complained of by Mr Kilgallon therefore has no relevance to the commencement of the review in 2009. The form of delegation is sufficient and lawful. The amendment was made for absolute clarity.
23. 107(3A) Local Government Act 1972 states that the Chief Constable may make arrangements for the discharge of the Police Authority's functions by an employee of the Authority not under the Authority's direction and control. The HR department at WYPA has for many years carried out the functions necessitated by the regulations. Mr Kilgallon complains that there was no written delegation in place in 2009. WYPA dispute that there is any requirement for a written delegation. The arrangements made at WYPA have for many years involved the existence of a specialist unit dedicated to the Pensions Regulations functions, with a supervisory structure, and staffed by employees with specific role profiles. These arrangements have formally recorded in writing.

Conclusions

24. I begin by saying that my concern is not whether there has been maladministration on its own. In effect, for a complaint to be upheld, Mr Kilgallon must have suffered injustice as a result of maladministration. Although Mr Kilgallon feels very strongly

that WYPA have behaved improperly – in some respects in bad faith – the real issue is whether Mr Kilgallon has been adequately compensated for the totality of what happened. I do not think it is necessary to make findings as to allegations of fraud, ulterior motives and deceit in order to do that.

25. The review of injury benefits under Regulation 37 was the subject of a number of court cases and Ombudsman determinations over the past few years. There is now a considerable body of authority indicating how such a review should properly be conducted.
26. Whilst the Home Office is responsible as a whole for the Scheme's regulations they deem each Police Authority to be the Scheme Manager at a local level. WYPA was responsible for ensuring their SMP interpreted the 2006 Regulations correctly when carrying out a review.
27. As has been found by my office in other cases (for example, Ayres 27979/2 and Sharp 80008/1) it is not appropriate to try and impose a meaning on the relevant Regulations which they do not hold simply because the Home Office (or the WYPA) think that logically they should. This was an error of law, albeit that WYPA was following Home Office guidance and was acting in good faith.
28. It is not disputed by WYPA that they incorrectly reviewed Mr Kilgallon's injury benefit under the Regulations and wrote to him on this basis. This amounts to maladministration. In other cases, we have directed the respondents to re-assess the applicant. I would, in the normal course of events, direct WYPA to reinstate Mr Kilgallon's injury benefit and pay him arrears with interest. However, as WYPA have now reinstated his benefits to the required level and to the satisfaction of Mr Kilgallon this is not necessary.
29. Mr Kilgallon contends that during the process of reviewing his injury benefit that WYPA sent him misleading information. He also says that they mishandled his medical records. These contentions are disputed by WYPA. However, Mr Kilgallon is in receipt of the correct amount of injury benefit and accepts that his injury benefit was fully restored so I do not think that any significant injustice would have flowed from these alleged failings by WYPA.

30. Mr Kilgallon has also raised concern about WYPA's use of the ASHE in the assessment of his injury award and its impact on the level of his injury award. My role in connection with this case is to establish if the process followed by WYPA in reviewing whether Mr Kilgallon's injury benefit award was correct and that the decision reached by them was made properly. It is not to decide the level of injury benefit award that was appropriate to Mr Kilgallon. The Regulations do not prescribe a set method for WYPA to follow in assessing a person's earnings capacity in determining their degree of disablement. In my view, it was open to them to decide how they assessed Mr Kilgallon's particular case. It should be noted that through enquiry of Mr Kilgallon WYPA established that he had not acquired further skills during the past 20years. I therefore, do not consider the use of ASHE by WYPA when they assessed Mr Kilgallon's injury benefit award to be so inappropriate as to be irrational (which would be the test).
31. Mr Kilgallon asserts that although WYPA have reimbursed him for the financial loss of an amount of income which he could legitimately expect for 12 months. He says that he engaged the services of a solicitor and a Human Resources Consultant to assist him in his complaint against WYPA. The combined cost of the professional fees amounted to about £1,710. Mr Kilgallon says that WYPA should reimburse him the full £1,710.
32. Half of the £1,710 fees were reimbursed to Mr Kilgallon by the Superintendent's Association. But the fact that Mr Kilgallon received support from elsewhere should not result in a windfall to WYPA. In, for example, an action in Court costs could be awarded in respect of fees paid by a union.
33. WYPA have offered Mr Kilgallon £400 compensation towards his legal costs and a further £400 for the distress and inconvenience he has suffered from their error in incorrectly reviewing his injury benefit.
34. Mr Kilgallon had suffered a significant reduced income for about 12 months. He clearly felt the need to protect his position. I conclude that he acted reasonably in instructing his solicitors as his income loss was significant. However, I do not consider that WYPA should reimburse him for the Human Resources Consultancy fees that he incurred. This is because he had engaged the services of a firm of solicitors and this should have been sufficient to deal with his complaint. I therefore find that the £400 being offered by WYPA towards his legal fees was reasonable

redress for the professional fees he incurred personally. But I also find that if the Superintendent's Association choose to ask Mr Kilgallon to repay the sum they supported him with, then WYPA should pay that sum to Mr Kilgallon. Mr Kilgallon says that the amount in question is about £855.

35. I further find that the additional £400 offered by WYPA was sufficient redress for the distress and inconvenience he has suffered resulting from their error in unlawfully reducing his injury award. It is in line with what I would normally award in other similar cases. I also think that an appropriate explanation and apology were provided to Mr Kilgallon by WYPA in the Senior HR officer's letter to him of 9 May 2012.
36. I turn to Mr Kilgallon's complaint about delegation by the Police Authority and delegation by the Chief Constable. Regulation 37 says that "the Police Pension Authority shall at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered..." I do not think that there are any reasonable grounds for me to find that WYPA had breached the regulations in this regard. But, even if there was no appropriate valid delegation, the remedy would be that the decision should be remade. Since that has already happened I need not consider the point further.
37. I therefore uphold Mr Kilgallon's complaint to the extent that a further sum may be payable in relation to costs.

Direction

38. If, within 56 days of this Determination, Mr Kilgallon provides WYPA with evidence that the Superintendents' Association has asked for repayment, and that he has repaid the sum requested, then WYPA shall forthwith pay Mr Kilgallon that sum.

Anthony Arter

Pensions Ombudsman
5 June 2015