

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mr G J Sharp
Scheme	The Police Injury Benefit Scheme
Respondents	Northamptonshire Police Authority (NPA)

Subject

Mr Sharp disagrees with the decision by Northamptonshire Police Authority to review his injury benefit at state pension age. He is unhappy with the way the review has been carried out and, in particular, he says that he was not given any written reasons for the decision nor was he informed when Northamptonshire Police Authority changed their policy on reviews.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against Northamptonshire Police Authority because the review of Mr Sharp's injury award was not carried out properly.

Northamptonshire Police Authority had the opportunity to correct this by referring Mr Sharp's case for further review under Regulation 32(2), but declined to do so.

DETAILED DETERMINATION

Material Facts

1. The Police Injury Benefit Scheme provides for payment at different levels (or “Bands”) dependent on the degree of loss of earnings capacity. The benefit payable may be adjusted to take account of the extent to which the incapacity is attributable to an injury received in the execution of duty (known as “apportionment”).
2. Mr Sharp was awarded an injury benefit in 1995. In October 1995, a Dr Davies signed a ‘Certificate of Permanent Disablement’ stating that Mr Sharp was permanently disabled from performing the ordinary duties of a member of the police force by reason of a back injury. Dr Davies stated that Mr Sharp’s earning capacity had been affected by 55%.
3. In May 2007, NPA wrote to Mr Sharp stating that his injury benefit was to be reviewed because he was approaching age 65, which is the compulsory retirement age. The letter explained that the injury benefit could be varied as a result of a comparative change in the degree of medical disability and/or the comparative salary figure used to determine percentage loss of earnings. The letter stated,

“Once the age of 65 is reached, an injury award will reduce to the lowest banding given that former officers would no longer be expected to be in employment and that despite possible continuing medical disability. Unless you can provide cogent reasons to the contrary (this may include for example, where you are still working beyond the age of 65).”
4. Mr Sharp contacted NPA and referred them to the Employment Equality (Age Discrimination) Regulations 2006. He suggested that it would be illegal to reduce an injury award merely because of reaching the age of 65. In response, NPA said that Home Office guidance indicated that the age discrimination legislation did not apply and this was not a valid cogent reason.
5. Mr Sharp wrote to NPA pointing out that, at the time of his retirement, he had been told that his injury award was “for life” and at no time had he been told that it was subject to review. He said that, had he been told that the award would be reviewed when he reached 65, he could have taken steps to

find alternative employment which would not have aggravated his back and enabled him to accrue an alternative pension. Mr Sharp said that he felt badly let down by only being informed of the review some seven weeks before his 65th birthday.

6. Mr Sharp was seen by a Dr Major (the NPA's selected medical practitioner (**SMP**)) in December 2007. Dr Major signed a form to the effect that Mr Sharp's degree of disablement was reduced to 19% or Band One (0 – 25%). The form stated,

“Once a former officer reaches the age of 65 he or she will have reached State Pension Age irrespective of gender. In the absence of a cogent reason otherwise, the SMP may place the former officer in the lowest band of degree of Disablement. At such a point the former officer would normally no longer be expected to be in employment.”

7. Mr Sharp's injury allowance was reduced with effect from May 2008.
8. In response to further enquiries from Mr Sharp, NPA said that the definition of a cogent reason (in Home Office guidance Circular 46/2004) was “a potent or weighty argument and powerfully persuasive”.
9. In November 2009, Mr Sharp requested NPA to refer his case back to the SMP under Regulation 32(2). He asked for details of when NPA had adopted the Home Office guidance they had referred to, what consultation had taken place prior to adoption and when they had commenced reviews of injury awards. NPA said that Mr Sharp's request for a referral had been made outside the 28 days allowed for an appeal of the SMP's decision and, therefore, they declined to refer his case back. They said that they had adopted the Home Office guidance in February 2005 and that a Police Negotiating Board had been involved. NPA said that they had commenced reviewing injury awards on 20 April 2006.

The Police (Injury Benefit) Regulations 2006 (SI2006/932)

10. Regulation 7(5) provides,

“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”.

11. Regulation 30(2) provides,

“Subject to paragraph (3), where the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions -

...

(d) the degree of the person’s disablement;

and, if they are considering whether to revise an injury pension, shall so refer question (d) above.

12. Regulation 30(6) provides,

“The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations 31 and 32, be final.”

13. Regulation 31 provides for the individual to appeal the SMP’s decision within 28 days of receiving a copy of that decision.

14. Regulation 32(2) provides,

“The police authority and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him, or as the case may be it, for reconsideration, and he, or as the case may be it, shall accordingly reconsider his, or as the case may be its, decision and, if necessary, issue a fresh report, which, subject to any further reconsideration under this paragraph or paragraph (1) or an appeal, where the claimant requests that an appeal of which he has given notice (before referral of the decision under this paragraph) be notified to the Secretary of State, under regulation 31, shall be final.”

15. Regulation 37(1) provides,

“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.”

Home Office Circular 46/2004

16. Home Office Circular 46/2004 was issued in August 2004. It states,

“Following consultation with both sides of the Police Negotiating Board the Home Office have now produced guidance for forces on reviews of injury awards ... This guidance is intended to help ensure a fairer and more consistent approach from all police authorities reviewing injury awards when the former officer is above the compulsory retirement age for hi or her last-held rank.”

“Review of Injury Pensions once Officers reach Age 65

Once a former officer receiving an injury pension reaches the age of 65 they will have reached their State Pension Age irrespective of whether they are male or female. The force then has the discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest band of Degree of Disablement. At such a point the former officer would normally no longer be expected to be earning a salary in the employment market.

A review at age 65 will normally be the last unless there are exceptional circumstances which require there to be a further review.”

Conclusions

17. Regulation 37(1) clearly allows NPA to review Mr Sharp’s injury award and he should have been made aware of this.
18. The question of reviewing injury benefits paid under the Police Injury Benefit Regulations 2006 has been the subject of a number of court cases in recent years; the most recent of which was the *Laws* case in 2010¹.
19. The *Laws* case does not directly address the question of whether a police authority should reduce an injury award at state retirement age unless there are cogent reasons not to do so, but it does address the question of what a SMP should be looking at when an injury award is reviewed under Regulation 37. In the original case brought by Ms Laws, the judge had found that each SMP decision was to be treated as final and that the question on review was whether the individual’s degree of disablement had substantially altered since

¹ *Metropolitan Police Authority v Laws* [2010] EWCA Civ 1099

the last review. Laws LJ agreed that this was the correct approach and that it was supported by wording of the relevant Regulations.

20. Where Laws LJ disagreed with the original judgment was on the question of whether an individual's earning capacity was affected by anything other than the injury. He took the view that an individual's earning capacity might vary from time to time "by force of external factors" and that earning capacity might improve either because there had been an improvement in the relevant condition or because a job had become available which the individual was able to take. In Ms Laws' case, this was the acquisition of a law degree since her retirement. The judge also commented that "one pensioner's earning capacity will differ from another's". There seems to be little support here for an automatic assumption that earning capacity all but ceases at state retirement age. Rather, it seems to be the case that each review should take into account the individual's particular circumstances.
21. I have previously commented (in *Ayres 27979/2*) that I can see the logic behind a review at age 65. However, I also found, in *Ayres*, that 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 NPA for that matter) think that logically they should. Regulation 7(5) provides for Mr Sharp's degree of disablement to be determined by reference to the degree by which his earning capacity has been affected as a result of his injury. There are no special provisions in the Regulations relating to the degree of disablement at age 65. I do not find it appropriate that a review should start from the assumption that at state retirement age Mr Sharp's earning capacity reduced to nothing or that it was for him to prove otherwise; particularly in view of the coming into force of the Employment Equality (Age) Regulations 2006.
22. The Regulations do provide that the SMP's decision is final, subject to appeal within 28 days. However, they also provide for the police authority and the claimant to agree to refer a final decision back to the SMP for reconsideration. There was, therefore, scope for NPA to address the fact that the review of Mr Sharp's injury award had proceeded on an inappropriate basis. I find that it was maladministration on their part to

decline to refer the matter back to the SMP and that Mr Sharp suffered injustice as a consequence inasmuch as his injury award was not reviewed on an appropriate basis. I uphold his complaint.

23. Whilst NPA were entitled to review Mr Sharp's injury award, the fact that the review was improperly carried out and came after an interval of 12 years in which there had been no mention of a review will have caused him considerable distress. I find that this should also be recognised and make directions accordingly.

Directions

24. I now direct that, within 21 days of the date of this determination, NPA shall refer Mr Sharp's case back to the SMP for reconsideration, having first made it clear to the SMP that there should be no assumption that the injury benefit will be reduced unless he can provide a cogent reason why not.
25. I also direct that, in the interim, NPA shall restore Mr Sharp's injury award to its previous rate and pay him arrears from May 2008 to the date of restoration, together with simple interest at the rate quoted for the time being by the reference banks.
26. Also within the 21 day period, NPA shall pay to Mr Sharp the sum of £300 for the distress he suffered as a consequence of the maladministration I have identified.

TONY KING
Pensions Ombudsman

30 June 2011