

London Fire Brigade

Date 5 January 2016

Dear Mr Txxxxx

Internal Dispute Resolution Procedure - Stage Two

I write further to your IDRP stage two application dated 02 December and your subsequent email to Ms Janice Lawton dated 13 December 2015.

I am the Authority's Head of Employment and Litigation Law and I am advising the Director of Finance and Contractual Services in relation to your IDRP stage two appeal. As such, your email dated 13 December has been passed to me for legal consideration.

In your email of 13 December, you query the validity and lawfulness of the Authority's IDRP stage two process (currently heard by the Authority's Directors), in that you believe IDRP stage two appeals should be heard by the Authority's elected members. You refer to the Department of Communities and Local Government (DCLG) guidance as well as the Statutory Instrument 2008, No. 649 – PENSIONS - The Occupational Pension Schemes (Internal Dispute Resolution Procedures Consequential and Miscellaneous Amendments) Regulations 2008 in support of your assertion.

In responding to your email, it may be helpful to go back to the original provisions of the Pension Act 1995, the Occupational Pension Schemes (Internal Disputes Resolution Procedures) Regulations 1996 (SI 1996 No 1270) and Fire Service Circular 2/1997 issued by the Home Office.

Section 50 of the 1995 Act, as originally enacted, placed a requirement on trustees or managers of an occupational pension scheme to secure the making and implementing of required arrangements for the resolution of disputes in relation to the scheme. The required arrangements had to provide for a two stage decision making process, the second of which involved the trustees or managers reconsidering the matter in question and confirming the decision of the first stage decision maker or giving a new decision in its place.

Neither the primary legislation nor the 1996 Regulations dealt with the composition of the second stage decision making body beyond requiring the reconsideration to be undertaken by 'the trustees or managers'.

Section 124 of the 1995 Act specifies that 'managers' in relation to an occupational pension scheme other than a trust scheme means the persons responsible for the management of the scheme. The Authority falls within the definition of 'Scheme managers' provided by Schedule 1 Part 1 of the Firemen's Pension Scheme Order (FPS) 1992.

Fire Service Circular 2/1997 issued by the Home Office gave advice on the application to the FPS of Section 50 and the 1996 Regulations. It confirmed that the advice had been agreed by the Central Fire Brigades Advisory Council. Reference was made in the advice to the required two stage process of the Internal Disputes Resolution Procedures (IDRP) and a recommendation was made as to who should consider an application under the IDR at both stages. It was this advice that stated that at stage two "the application should be considered by elected members of the fire authority through its appeal committee i.e. the same body that considers certain disciplinary matters on behalf of the fire authority

under Regulation 13(2) of the Fire Service (Discipline) Regulations 1985". Those Regulations have subsequently been repealed and this Authority no longer has an appeals committee.

Until 2007, consideration of applications relating to the FPS through this Authority's IDRPs were undertaken by the Commissioner or his nominated representative at stage one and by the Disciplinary Appeals Committee at stage two.

On 21 September 2007, the Authority received a report from the Head of Human Resources (FEP 1091) that, inter alia, noted:-

'With the subsequent repeal of the Fire Services (Discipline) Regulations 1985, this Authority has amended the terms of reference of the Disciplinary Appeals Committee so that it no longer deals with individual staffing matters e.g. in relation to disciplinary appeals. Officers now deal with disciplinary appeals.'

The Authority approved the report's recommendations that delegated authority be given to the Heads of Human Resources and Finance to determine stage one appeals and to Directors to determine stage two appeals.

In 2009, the DCLG issued Circular 1/2009. In my view, the specified statutory changes were stated to be the reason for the review of IDRPs and the issue of new DCLG advice. However, in terms of our particular focus, the most relevant aspect of the statutory changes was that they allowed a single stage of IDRPs decision making, notwithstanding a discretion for scheme managers to make provision for a two stage process. In this context, the Circular 'proposed' the maintenance of two stage arrangements, with the second stage involving elected members.

In summary, whilst there was previously a statutory requirement for a two stage IDRPs process, there has never been a statutory requirement for elected member involvement in the second stage. Fire Service Circular 2/1997 and DCLG Circular 1/2009 both set out a two stage arrangement on the basis of the second stage determination being made by elected members. However, the first termed it a recommendation and the second a proposal. Furthermore, both Circulars were non-statutory guidance.

Whilst it is accepted that there is a need in certain circumstances for a local authority (such as LFEPA) to have due regard to even non-statutory guidance, my view is that such due regard was not required in respect of DCLG Circular 1/2009. The second stage of the IDRPs process is, in any event, discretionary and the composition of the second stage decision maker was never placed higher than in a recommendation or a proposal. Moreover, the 2009 Circular made no significant substantive change to the advice in relation to elected member involvement that was in place when this Authority considered and approved IDRPs decision making arrangements in 2007. If anything, by the time the 2009 Circular had been issued, the status of the second stage of the process had diminished as it was no longer mandatory and only discretionary.

On this last point in your email, I note that you appear to consider employees to be 'the Authority', but not elected members. In my view, it is the elected members who comprise the Authority and the employees carry out their instructions. In practice, however, there is no distinction of the type described by you. A Director can only determine a stage two IDRPs appeal because he or she has been given the necessary delegation (FEP 1091) to do so by the Authority.

In conclusion, my view is that the Authority considered the substantive IDRPs in 2007 (FEP 1091), and any subsequent changes (made either through legislation or non-statutory guidance) did not materially affect that previous consideration. The Authority has given delegated authority to Directors to consider IDRPs stage two appeals and I have no reason to doubt the lawfulness of that decision.

You were informed by Ms Lawton that your IDRPs stage two appeal will be heard on 15 January 2016. This hearing will take place as scheduled and it is anticipated that you will be advised of the outcome by no later than 01 February 2016.

Yours faithfully

Yvonne McKenna Head of Employment and Litigation Legal and Democratic Services

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Dear Ms. McKenna,

I was interested to hear your views because quite simply that is all they are, your opinion.

In any event I fear that the LFPPA was ill advised by its staff in 2007 to approve a fundamental breach in natural justice in that the LFPPA could in future sit as Judge and Jury in its own Court - not once - but twice?

I wonder how this *first arbitrary decision* will harmonise with the current views of the Courts, the Pensions Regulator, and the Pensions Ombudsman and their collective sense of fair play?

I am surprised in an otherwise comprehensive review of the law and 'Guidance' notes you have chosen to ignore the role and impact of the Firefighters Pension Committee which is a national Fire Service Committee chaired by the DCLG but which in part is a direct replacement for the historical CFBAC in matters pension and in matters of National Pension management Agreements.

Your views on what happened in 2009 whilst intriguing are nevertheless materially flawed.

According to your views it would seem, in being charitable, that it really did not matter what the remainder of the UK Fire Service pension world signed up to, whether 'non statutory' or 'guidance' because the LFPPA in a *second arbitrary decision* became determined to ignore National Collective Bargaining and its by-product National Pension Agreements.

You have indeed confirmed that that is exactly what the LFPPA chose to do in 2009. It chose to ignore a National Agreement which it was actually party to at that time by effectively ignoring the conclusions and agreements of the Firefighters Pension Committee in becoming a law unto itself by ignoring a National Agreement.

It will seem to a casual observer that the LFPPA is keen to ignore that which does not suit it in terms of fair play and justice...

I regret that you have decided to defend these arbitrary decisions with a whiff of arrogance which in effect means 'I will because I can'. Would that the Fire Service world actually worked that way but it does not because in following your line of thought you have chosen to ignore FS industrial/pension relations history.

The fact of the matter is that with time and increasing usage the IDRPs have not 'diminished over time' in statistical fact it has increased in use simply because it reflects the consistent and increasing failures of pensions Scheme managers.

You have not validated your views with case law which disappoints me and of course this matter still remains to be tested in law as it will with all the consequences that that will lead to in terms of those hundreds of LFPPA retirees who, as they see it, have been wrongly adjudicated on in Stage II and thus denied natural justice contrary to a Fire Service National Agreement.

I doubt that the Pensions Regulator; the Pensions Ombudsman; or indeed the Courts will share your dismissive views on the law and the intent of 'Notes for Guidance' when put to the test. In general the Courts view being that where only 'Guidance' exists in the absence of statutory law Courts will be unhappy about ignoring the existence of 'Guidance' as an historical fact.

Indeed in recently released new Pension management Codes of Practice The Pensioner Regulator specifically includes that statement that Courts 'must' consider Codes of Practice in their judgements. For CoP read DCLG Circular 1/2009.

Should the FBU mount a successful challenge (because they sit on the FPC), which I believe they will win, then this will become not just a simple pension issue but a major question of confidence of when is a National Agreement not a National Agreement where the LFPPA and Firefighters pensions are concerned ?

Of course the LFB must do what it feels it must do but bearing in mind that both the new Pensions Regulator and the new Pension Ombudsman may well have contrary and impacting views later, decisions which may well have financial consequences for the LFPPA in its deliberate breach of a Duty of Care to me which included failing to guarantee me natural justice and my rights within a Nationally agreed IDR Procedure.

Yours etc

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From: yvonne.mckenna@london-fire.gov.uk

To: rbethomas99@hotmail.com

Subject: RE: My last email

Date: Tue, 12 Jan 2016 08:04:30 +0000

Dear Mr Txxxxxx0

I confirm that your objections to the process will be considered as a preliminary point at the IDRPs Stage 2 hearing and the relevant Directors will take a decision on whether to accept or reject your submissions. If the Directors decide to continue with the Stage 2 process your objections will be formally recorded as a preliminary procedural point, along with reasons for continuing with the process. If the Directors accept your submissions the IDRPs Stage 2 hearing will be adjourned for further consideration, the reasons formally recorded and notified to you.

Yours sincerely,

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Sent: Wed 20/01/2016 15:54

Dear Ms.McKenna,

Thank you for your note. I think we both need clarity at this point.

Q1.If it is your intention to continue to adjudicate on my Stage II Application with a panel consisting of LFB employees which ignores the spirit of natural justice and the guidance of the DCLG 2009 Circular on Fire Service IDRPs then the necessity for any mutually agreed extension beyond the usual time limit is quite simply pointless.

Q2 If it is your intention to adjudicate on my Stage II Application with a panel consisting of Elected Members of the Fire Authority, an action which will comply fully with the spirit of natural justice and the guidance of the DCLG 2009 Circular on Fire Service IDRPs, then a mutually agreed time limit extension of perhaps 2 months or more will give you the opportunity to assemble an Elected Members Panel and me the opportunity to make further representations during this agreed extension to your envisaged panel.

I respectfully suggest that from these two options I have presented to you above you must choose and let me know *your decision* by return.

Yours etc

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From: yvonne.mckenna@london-fire.gov.uk
To: rbethomas99@hotmail.com
Subject: RE: IDRPs Stage 2 Objection
Date: Fri, 22 Jan 2016 18:47:44 +0000

Dear Mr Txxxxx,

Thank you for your email.

On reviewing the papers for the IDRPs Stage Two hearing the Director who has been nominated to consider your appeal has advised me that the IDRPs Stage One process should have been supplemented by the appointment of an independent advisor. This arrangement applies to all appeals that have resulted from the Injury Awards Verification Exercise. I set out below the relevant background information.

You are familiar with the FEP report 1927 having referred to it in your IDRPs Stage One application. This report was considered by the Resources Committee at their meeting on 16 July 2012 when it was decided that:-

'Recommendations for an independent appeals process in relation to the recovery of overpaymentsbe included in the pension administration report scheduled for the September meeting of the Committee.'

The pension administration report referred to in that decision was considered by the Resources Committee meeting on 17 September 2012 which stated:-

'When the report on the Injury Awards Verification Exercise was presented to the Resources Committee on 16th July 2012 members asked about the appeals process that would be made available as part of any decision to recover any individual overpayments to pensions. It is a statutory requirement for all pension schemes to have an independent appeals process. For LFEPA this is the Internal Disputes Resolution Procedures (IDRP).....The IDRP will be supplemented by the appointment of an independent advisor for the purpose of hearing appeals arising as a result of the injury awards verification exercise.'

The minutes from that meeting confirm the Committee:-

'Agreed to use the Authority's Internal Disputes Resolution Procedure for Injury Awards Verification Exercise appeals supplemented by the appointment of an independent advisor.'

It is therefore clear that an independent advisor is required where recovery of pension overpayments are the subject of an appeal under the IDRP process.

As the Stage One process appears to be defective, the nominated Director for the IDRP Stage Two hearing has decided that the IDRP Stage One hearing should be reheard, with a new decision maker assisted by an independent advisor who can provide independent advice on the matters that you have raised in your appeal. As a result of this decision the IDRP Stage Two hearing that is due to be heard on 28 January 2016 has been cancelled. Furthermore, I would ask you to agree that the normal 2 month time limit which should be applied to Stage One appeals be suspended until such time as the Authority instructs an independent advisor with expertise in pensions. I am hopeful this can be achieved within the next 28 days.

As we are reverting back to the IDRP Stage One appeal I propose to leave your representations in relation to the constitution of the IDRP Stage Two panel in abeyance until the rehearing and determination of the IDRP Stage One appeal. You will appreciate that if your Stage One appeal is upheld there should be no requirement to consider these representations.

In the meantime, please accept my apologies for any inconvenience this oversight may have caused you.

Yvonne McKenna

Solicitor

Ref:8351

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Wed 27/01/2016 15:13

Dear Ms.McKenna,

Thank you for your note of the 22nd inst.

I am glad that finally someone in charge has grasped the implications for, not only myself, but the Authority as a whole.

As we all know an employee(s) in previous office failed to correctly understand and implement the Resources Committees intent and directions in 2012 which was to correctly use the statutory IDRPs as clarified in practical guidance terms by the DCLG Circular 1/2009 to which the LFB was a signatory.

It would be remiss of me not to point out that this core issue of the subsequent actions of an ill-advised LFB, long before your time, has put the LFB in an extremely difficult position since 2007 - to date- and will have repercussions from those who have been disenfranchised by a maladministered IDRPs in which they placed their trust at the time.

Clearly it is your intention to address this rather messy 'unlawful inheritance' intentions which are to be encouraged, welcomed, and supported.

I agree with your evaluation that my Stage I procedure was entirely flawed from a natural justice standpoint as well as an LFB failure to follow its own policies, whether right or wrong.

Let me say at this early point that you have my entire agreement to take the necessary time you require to set matters right and if I can assist further please do not hesitate to contact me.

The previous core issues of lack of duty of care; denial of justice; and individual discrimination were principles I intended to raise directly with the Pension Regulator; the Pensions Ombudsman; and the Home Office when you had completed your deliberations in exhausting IDRPs at Stage II.

I hope that all this now will not be necessary given the refreshing manner you are approaching this dispute but you should not doubt my resolve after all these years, nor that I reserve the right to recommence the IDRPs from the beginning once more insisting that the National Agreement and the DCLG guidance Circular 1/2009 be complied with in its entirety.

Now for sake of clarity and in a spirit of constructive joint goodwill in moving matter forward I append formal statements and answers to your requests:

1. I must reiterate my legal position at this point which I was going to raise with the above authorities, and for the record once more, I reject and rebut any allegation by the LFB that they were never informed of the entire circumstances of my DWP benefits(at the appropriate times) or that in any manner I had either attempted to deceive or received from the Fire Authority and the DWP any monies to which I was not entirely my entitlement.

2. I agree to a review of your Stage I decision on my appeal.

I would be obliged if you would keep me informed at the time when this review will occur and who all those involved in the re-adjudication will be;

3. I agree to the suspension of the IDRPs Stage I, 2 month time limit, to facilitate the above review;

4. I agree to suspend any representation which I would have made at Stage II especially in respect of the constitutionality of the envisaged adjudication panel and the LFB correct implementation of IDRPs procedures most notably in respect of the DCLG Circular 1/2009 – IDRPs Guidance and National Pension Agreement.

Finally, I appreciate you working late on this matter on last Friday night because it is as you know a dispute which has blighted my entire life and that of my family for these many years past.

I am sure that common-sense will prevail in the end in bringing this pension dispute to a just and speedy conclusion.

Yours Sincerely,

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