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Thursday 25th April, 2013.

BURNS

My Ref: PB01713,

Your Ref:

My Incorrect Pension

Dear Mr. Warren,

Your calculation of my Pension under the Firemen's Pension Scheme Order 1992 SI129 refers.

You inform me "therefore as you had 33 years and 188 days service at retirement we need to calculate your pension under regulation B1" and "Taking into account all of the above regulations the pension benefits paid to you are correct".

With respect neither statement is correct. There are a number of errors.

The fundamental error arises in the way you have chosen to construe the words "the ill-health pension is that of the notional retirement pension" within SI 129. It is simply a question of English and legislative intention which should be no mystery to a pension provider or any staff employed therein.

The SI provides at B3, Sch. 2 Pt B, Part 111 (I take the precise wording from your letter as my pension provider) the entitlement is provide pursuant to formulae:

"5.-(1) Where-

(a) if the person had continued to serve until he could be required to retire on account of age, he would have become entitled to an ordinary or short service pension ("the notional retirement pension"), and

(b) the amount calculated in accordance with paragraph 3 or 4 exceeds the amount of the notional retirement pension,
the amount of the ill-health pension is that of the notional retirement pension."

You have taken the last line (supra) to mean that if the ill-health pension is larger than the B1 pension then the B1 pension is to be paid.

As matter of applying the ordinary meaning of language, that is clearly wrong.

But more to the point by your construction you simply avoid the purpose of the legislation, which is to compensate the fireman who is A15 invalided out, by giving him an ill health pension. By replacing a higher ill health pension by an enforced early retirement B1 pension you deny the fireman his compensation.

Specifically you avoid the legislative intention (set out in the SI) to compensate a fireman for the loss of time he would have enjoyed in service but for invalidity. It follows that you ignore the purpose which is to compensate for loss in promotion, loss of salary and increments and pensionable years lost, and - on promotion and/or higher salary - the higher than the B1 pension, all of which would have accrued but for the imposed early retirement.

In looking at this the first consideration is the purpose of the legislation. To interpret in any way as to avoid its stated purpose would clearly be incorrect, and improper.

If the legislation makes provision for an award it is clearly against the intention of the legislation for you to avoid such an award. Here there is an award specifically and solely reserved for those retired under Rule A15. It would be also be incorrect to substitute for it a lesser ordinary B1 pension limited in years service to the date of forced early retirement, if to do so, avoids the compensation for which the SI makes express provision.

Yet that is precisely what you have done for the past 15 years.

Put another way you have paid me a pension as though it were my earned B1 pension, as though early retirement (so financial sacrifice) was voluntarily. You have put the B1 pension in place of the award given to me by law in compensation for having to retire early under A15. In effect you punish firemen for suffering injury in the course of their employment. It may help the fund but it is illegal.

As a matter of law, documents are construed against the interest of beneficiary who relies on the document – here you rely on the wording to deny payment to pensioners invalidated out of service. You are wrong to do so, the wording dictates otherwise.

Though the drafting of SI 129 may leave something to be desired in relying on a ‘one thing is another’ statement, which might initially be read it two ways, you were palpably wrong to choose the meaning which, whilst it might swell the coffers, was taken at the expense of due diligence and your higher fiduciary duty those to whom you owe the higher duty, your pensioners.

As you and your competent staff (past and present) must know, the simple test in an ‘either or’ or ‘this is that’ context to carefully ensure you do not get the wrong end of the stick. It is the test to ensure a correct meaning is understood before application and is simply to discover what, if anything, introducing a word to cause the wording to take on its opposite meaning. If it makes no difference then one has got the wrong end of the stick and one has originally misunderstood what is meant.

Here, to add the negative, since the original has none, gives the opposite meaning for comparison. Here you have chosen to take the original wording *the amount of the ill-health pension is that of the notional retirement pension* to mean, in context of *(b) the amount calculated in accordance with paragraph 3 or 4 exceeds the amount of the notional retirement pension*, that the pension to be paid is the notional pension, which you have taken to be B1 rather than the higher Para 4 sum. Was that correct?

To ensure it was one adds the negative to the premise *((b) the amount calculated in accordance with paragraph 3 or 4 **does not** exceed the amount of the notional retirement pension*’ what would you pay? B1 still gets paid. So there is no circumstance under which the paragraph 3 or 4 calculation gets paid.

If that is so, than you have rendered the legislation meaningless.

What in fact this wording means, and can only be taken to mean, is that there are two pensions to consider. That the ‘notional pension’ (your B1) gets paid when the ill-health is the smaller of the two. Otherwise, as the legislation provides, should the ‘*amount calculated in accordance with paragraph 3 or 4 exceed the amount of the notional retirement pension*’, then *the amount of the ill-health pension is that of the notional retirement pension*’ The point being that actually what the legislation is providing is a notional pension to be calculated either by the sum of the paragraph 3 or 4 calculation, or as though it were a B1 but with years of service credited between actual A15 retirement and when “on account of age” – 7 years in my case.

So: (a) if the person had continued to serve until he could be required to retire on account of age, he would have become entitled to an ordinary or short service pension (“the notional retirement pension”) establishes a right to pension, and if under (b) the ill-health pension does not exceed the (a) pension then the (a) pension gets paid, but if the (b) ill-health pension exceeds the (a) pension then the (b) ill health pension “is”, becomes, takes the place of, the notional pension. It is a question of sequence set up by the ‘and’. B1 having earlier been ruled out nevertheless an A15 retiree gets an (a) pension in any event, but if (b) is greater than (a). than the notional pension paid is at the higher ill-health rate. Any other construction renders the calculation formulae pointless and avoids the legislative intention.

Put simply, it makes no difference whether the negative is ‘in’ or ‘out’, under your application of the Rule. So whether the (b) amount calculated in accordance with paragraph 3 or 4 **does not exceed** – or **exceeds** - the amount of the notional retirement pension’ matters not, the words are irrelevant to you - for on your interpretation “the ill health pension is that of the notional retirement pension” always results in the exclusion of the ill-health pension and payment of B1. We can be sure of this because since, in my case, I would have been eligible for a B1 (a), and, my ill-health pension exceeds the notional pension (b) – so, if ever there was a case for an ill health-pension to be paid, it would be in my case.

Instead, in my case, you have taken what would have been my B1 pension as the notional pension, and then taken the notional pension as my ill health pension sum, denying me the compensation the legislation provides in event of an A15 ill health retirement. Instead of being compensated for my loss of a higher pension on completion of uninjured service, I have been penalised as though I chose to retire in full health early. I have been paid the reduced pension which early (voluntary) retirement would have afforded me. Had that been the legislative intention it would have been met by the provision of a B1 and an Injury Award. The ill-health provision would have been without meaning or legal effect. Words in legislation are always given legal effect – what is wrong is that you have privately chosen to ignore this and deny any legal effect. That is patently not the legislative intention.

Indeed, under your construction there never is, nor can be, any ill health pension payable which is not the notional pension, and the notional pension is the B1 with no credit for further service cut short.

I have tried to be clear on this for you but if there is any question left in your mind then if I can help in any further clarification I will be happy to try to.

In calculating my pension you also need to apply not the 33 years and 188 days as my pensionable service, as you would if a B1 pension was applicable. For the purposes of the B3, Clause 4 formula my pensionable years are not the time actually spent in service, but the time I would have spent in service - but for my accident.

A court may well also note that in order to follow the policy you have chosen to follow, you have acted in clear breach of the general direction given by SI 129 at L4 (3) by choosing to pay the lowest of two pensions of ‘unequal in amount’, when the direction plainly tells you ‘the one to be paid is the largest of them’. This direction is, of course, wholly consistent with B3, Cl 4 being given the legal effect which your policy has denied. It is also consistent with *the amount of the ill-health pension is that of the notional retirement pension*’ meaning the higher ill-health pension is paid by way of notional pension other than any other lesser sum – it otherwise being meaningless.

The provision for calculation of my ill health pension is clearly set out at B3. 4. The premise for reckonable years service is not as prescribed for a B1 pension, of 20 years and up to 5, but as stipulated by ‘D’ and ‘E’.

The calculation is therefore $(7 \times A/60) + (A \times D/60) + (2 \times A \times E/60)$ where 'A' is my pay of £35,033.36 (to be checked) – say for illustration £35k, 'D' is the first 20 years of pensionable service, and, 'E' the period years beyond 20 years, 'until I could have been required to retire on account of age', but for my invalidity.

In my case, given my rank, I would not have been required to 'retire on account of age' until 60. This makes 'E', 20 - until I would have had to retire normally 'on account of age'.

To the sum this is added my £5,838.56 Injury Pension (to be checked).

In sum the calculation is circa $(7 \times 35/60) + (35 \times 20/60) + (2 \times 35 \times 20/60) = 39 + 5.8 = £45,000$ pa. That is a shortfall of some £20,000 pa., from 1997.

Had I not been required to take A15 retirement I may well have progressed further during my final 7 years. Had I done so I may well have earned promotion to Principal (now Brigade) Officer or Deputy Chief Fire Officer level – I note the LFS is currently advertising such an appointment at a salary of >£100,000. It is for this sort of loss on promotion that the ill-health, as opposed to the separate injury pension for physical and sensory loss and incapacity, is awarded. On reflection it seems as though this simply has not been understood by those dealing with these matters, or the pension provision has been a fraudulent operation. What other explanation can there be?

I may be wrong but it also seems that the index linking you have been applying is incorrect. I also believe that my final pay was incorrectly stated.

Should you disagree with any of this please tell me precisely in what way and on what authority you do so. Otherwise I require of you a full account and a rectification and payment of all monies owing to me and interest thereon at the rate of 8% compound pa, these sums being wrongfully underpaid, retained, or deducted by a public authority.

I note that you have now commenced to pay the small sum due to me each month. It was wrong of you to deduct the monies that you did from my Injury Pension over several years.

I am in the process of seeking leave to appeal the recent judgment and I shall, in absence of a full account and rectification of the position to my full satisfaction, be issuing separate pension proceedings in the High Court without further notice

May I take it that you will take no action and not seek to enforce the judgment against me pending its appeal and until the larger issues the judge undertook to deal with, but then decided not to, are dealt with by a higher court.

Though it rather strains credibility to think this is all mere error, an immediate admission and correction on your part would tend to indicate that there had been no deliberate policy to defraud your pensioners. If so, then misfeasance is a far cry from the serious criminal offence of malfeasance in public office.

In view of the 'past errors' it would seem sensible for you to have the rectification done by an independent actuary.

Should you make it necessary for me to issue proceedings in respect of my pension then, by your reluctance to make matters right, I trust you and your staff will realise that you raise the possibility that the underpayments and miscalculations could well be found to be by way of a deliberate policy. It is, after all, an extra-ordinary 'error' for trained and expert pension providers to make. In the event my claim will be made personally against each and every person whose malfeasance or misfeasance over the time has occasioned my loss, damages, distress and

avoidance of amenity in life occasioned me in the autumn of my life by your denial to me of my proper pension, and latterly in respect of your wholly wrongful and most distressing action recently resulting in a judgment against me, when at no time have I been indebted to you.

In such event I shall also claim aggravated and/or exemplary damages for a Court to mark the fact that it is a grievous wrong for a trustee(yourself) and responsible employees within a pension fund, in a fiduciary relationship of trust to those relying on their honesty and due diligence, to betray that trust.

I am sure you will be aware that in such cases, in event of conduct being questionable, the court usually refers the papers to the DPP to consider criminal prosecutions.

Bearing in mind the May 3rd 2013 I require an answer from you to this letter by close of court business, Thursday 2nd May 2013, in absence of which action will be taken without further notice.

Yours Truly,



Paul P. Burns. GFireE
Divisional Fire Officer (Rtd)
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For Exemplary Fire Service

Order of Excellent Fire-fighter
Soviet Union



Oklahoma Medal of Honor
& Honorary Citizen

