

Strictly Private and Confidential

Pensions Services Summary of Fire Injury Benefit Review

Lancashire Fire & Rescue Service Injury pension review

Toward the end of 2007 LFRS decided to undertake a review of all Fire Injury pensions being paid. This decision followed the discovery that an overpayment had been made to an individual Fire pensioner in receipt of an Injury pension. The review focussed on the benefits currently being paid not the actual injury / level of injury for which the payment was being made. The Pensions Scheme is administered by LCC Pensions Services on behalf of LFRS under the terms of a contract with them and LCC has no statutory role in relation to the operation of the Scheme.

The regulations governing Fire Injury pensions require that the actual injury allowance payable be offset by benefits paid by the state in respect of the same injury. In short, the regulations set out to ensure that individuals are not compensated twice for the same injury. Therefore, the review effectively compared the current level of injury allowance in place against the level of state benefits also paid to the individual. The review included all 167 injury payments in place at the outset of the review from the date the individual pensioner retired.

However, whilst the terms of the Pension Scheme require LFRS to obtain details of the additional benefits received by those pensioners eligible for injury pensions, the Scheme does not expressly provide for this information to be accessed from DWP by LFRS. This being so, if DWP were not prepared to provide the information without specific consent from pensioners then this meant that where consent is withheld then the operation of the provision in the Scheme is frustrated.

Details of any additional benefits received by these individuals therefore needed to be obtained from, or confirmed by, the Department for Work and Pensions (DWP) and individuals were asked to give their consent to allow DWP to provide LCC Pensions Services with details of any additional benefits received. At this point a number of pensioners in receipt of an injury allowance refused to give their consent citing that this would be a breach of their rights under data protection legislation.

At the beginning of 2008, in conjunction with LFRS, LCC considered this issue and sought counsel's advice, including the effect of the individual pensioners withholding consent. In summary, counsel advised that the obtaining/disclosure by DWP of the specific information required for the determination of the correct amount of injury pension payable was found to be compliant with the Data Protection Act. Furthermore, declining to disclose such information could have the effect of facilitating a form of benefit fraud.

Therefore, where consent was not given LFRS were justified in suspending injury pension payments until the necessary information was provided as otherwise there was the possibility that payments made by LFRS would be in breach of the provisions of the Pension Scheme and therefore ultra vires. In order to address this issue, without the need for legal action, an approach was made to the Permanent Secretary at DWP on 28 March 2008 explaining the issue in detail and seeking the disclosure of the necessary information without consent, explaining the legal basis on which it was considered that the Data Protection Act allowed such disclosure.

At the same time those pensioners who had withheld consent were written to explaining why the information was required and giving an assurance that the information would only be used for the purpose of correctly determining the amount of injury pension properly payable. It was also explained that, if consent was not given, or if DWP refused to provide the necessary information, then LFRS would have no other realistic option other than to suspend payment of injury pensions until such time as the necessary information had been made available.

A response was received from DWP on 23 April indicating that whilst they would consider disclosure on the basis outlined their normal practice would be to rely on the customer's consent. It was also suggested that a national arrangement for disclosure of information might be put in place.

As requested by DWP, further information was therefore provided in relation to the detail of what was required and the likely volume of requests and making the point that whilst a national arrangement may well be sensible it was likely to take some considerable time before this could be put in place and arguing that it was unnecessary in that DPA already provided a sufficient statutory basis for disclosure.

A further response from DWP was received on 17 June 2008 and confirmed that whilst it was accepted that the DPA exemptions referred to could apply, they still felt unable to disclose the information and instead suggested a national data sharing agreement. That aside, DWP indicated that they would only provide the information on the basis of consent or if ordered to do so by a court. At around the same time DWP at regional level advised LPS that they were revising the existing form of consent to be signed by individuals agreeing to disclosure. This revised form was sent out to relevant pensioners i.e. those individuals that had not consented and those where further disclosures were necessary in order to reaffirm particular benefits.

In the light of the refusal by DWP to provide the information, and that 5 out of 167 pensioners continued to withhold consent, then unfortunately it proved to be necessary to suspend Injury Pensions being received by the individuals refusing to give consent. Following the letter of explanation sent during March a further letter was then sent out the individuals withholding consent. The letter informed them of the DWP stance and gave them the opportunity to complete the revised form. Following non receipt of the form, injury pensions were suspended.

Annex A

Data Protection

It is clear that the information required in relation to the receipt of benefits should be regarded as "personal information" for the purposes of the Data Protection Act 1998 (DPA) and indeed much, if not all, will be likely to be "sensitive personal information". Disclosure by DWP to a Fire and Rescue Authority (FRA) of the specific information necessary in order to calculate amounts owed to individuals is therefore necessary for the exercise by an FRA of functions conferred on it by the Scheme and the enabling legislation (the Fire and Rescue Services Act 2004). The information is therefore necessary for the exercise of functions of a public nature exercised in the public interest and as such falls within one of the provisions of the DPA which allows disclosure of information without the consent of the individual in question.

The disclosure of information by DWP in this situation would also meet other provisions of the DPA allowing disclosure on the basis that the information is necessary to comply with a legal obligation and necessary for the purposes of legitimate interests pursued by the data controller or by the third party/parties to who the data are disclosed. The disclosure would also be necessary for the exercise of any functions conferred by or under an enactment. It therefore follows that obtaining/disclosing information about social security payments in respect of individuals in receipt of injury pensions would meet the first data protection principle and is indeed consistent with DWP's own Fair Processing Statement.

The problem with seeking the consent of those eligible for injury pensions to obtaining details of the additional benefits they receive from the DWP is that if consent is withheld then the operation of the provisions referred to above is frustrated and indeed, arguably, continuing payments made by an FRA would be ultra vires. Of course where consent is required it must be freely given and therefore an approach to individuals may be frustrated as they are free to give or withhold consent. Clearly, making an important aspect of the Scheme contingent upon the voluntary consent of those eligible for injury pensions is not what is contemplated by the Scheme or the enabling legislation.

Implications of Refusal to Consent

In summary, the obtaining/disclosure of the specific, limited information required for the determination of particular injury pensions complies with the DPA. Declining to disclose such information could have the effect of facilitating a form of benefit fraud. That of course would also place the FRA in breach of its statutory duties under the Scheme and in a more general sense in breach of its fiduciary duties in respect of public funds, by virtue of which an FRA is obliged to ensure that individuals are not paid more than they are entitled to receive under the Scheme. In that context it is important to note that the review currently being undertaken by LFRS has already identified a

number of overpayments, some of which are significant, as well as a smaller number of underpayments.

In the absence of information on additional benefits, an FRA is unable to calculate the amount of individual injury pensions, and therefore finds itself with no option other than to withhold or suspend injury pension payments. Whereas it is considered that such a step is capable of legal justification, it is clearly undesirable both from the pensioners' perspective and that of the LFRS, which is thereby exposed to the possibility of legal action by a pensioner, whether by way of an appeal to the Crown Court under the terms of the Scheme or by way of judicial review.

As a result LFRS were contacted by solicitors acting for the Fire Brigades Union and the individual pensioners disputing the right to suspend Injury Pension payments.

During October 2008, following the response from DWP, an approach was made, by LCC, to the Department for Communities and Local Government (the central body with statutory responsibility for the Fire Injury Scheme). The issue was highlighted, referring them to the comments made by DWP, and making the specific point that the issue was of national concern. At this time the Audit Commission were also asked to consider this issue as part of the National Fraud Initiative. The Department (DCLG) were asked to consider an amendment to the Scheme as being the most direct and appropriate remedy.

A response was received from DCLG on 21 November 2008 proposing that they (DCLG) discuss the issue with other public sector schemes. In the meantime the Department felt that the Scheme regulations provided the authority for any Fire Authority to suspend part or all of an injury pension where an individual refused their consent to obtain relevant information until the matter had been resolved.

At the beginning of April 2009, the National Fraud Initiative (NFI) Team wrote to key contacts, including LCC, to explain that, as a result of the Audit Commission's new data matching powers, they were issuing the results of a new pilot data matching exercise. This involved comparing details of pensioners in receipt of an injury pension with relevant state benefit records (industrial injuries disablement benefit or incapacity benefit) at a particular point in time. The data specification for pensions required Fire bodies to include details where individuals were in receipt of injury benefits. The report identified 53 Fire Injury pensioners in receipt of additional benefits. Of these 53 cases, 50 cases individuals had already been identified as part of the ongoing review. A breakdown is shown within the position statement as follows: -

The position as of 27 October 2009 is as follows: -

Of the 167 individuals in receipt of an injury pensions, 162 individual cases have been reviewed. Five cases are outstanding and injury pensions are currently suspended awaiting the individual's authority to allow Pensions Services' access to DWP information.

Of these 5 cases, 3 of them were identified on the NFI report from the Audit Commission as referred to above. LFRS are following up these cases, as they are required to do under the terms of the National Fraud Initiative. The remaining 2 individuals did not appear on the report and it is assumed that they were not in receipt of benefits at the time that the data matching took place. However, it is possible that these individuals could have been in receipt of benefits over the period of review and these cases remain outstanding.

Of the 162 cases reviewed, it was found that 114 individuals were in receipt of the correct pension, 17 had been underpaid and 31 individuals were found to have been overpaid. The underpaid pensions have been corrected and arrears of pension have been paid. In respect of the 31 overpaid pensions, 4 individuals have repaid the amount overpaid and 10 individual are currently in the process of repaying the amounts overpaid. LFRS are following up the remaining overpayments.

Of the total number of cases reviewed, the NFI report highlighted 21 cases reviewed and found to be correct i.e. the individual had kept us informed of state benefits received. The NFI report identified 9 cases previously reviewed and found to be underpaid i.e. the individuals had not informed us when state benefits had been reduced or ceased. The NFI report identified 20 cases that had previously been reviewed and found to be overpaid i.e. the individuals had not informed us when state benefits began or increased. It should be noted that the NFI data matching exercise captured only those individual Injury pensioners in receipt of benefits at the time that the match took place whereas the Injury Review itself encompassed benefits from the date of retirement through to 2009.

The total amount of injury pensions found to be underpaid as a result of the review was £151,613. The total amount of injury pensions found to be overpaid as a result of the review was £622,934. The recovery of these amounts is a matter for LFRS.