

PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr C Brunning
Scheme	Police Pension Scheme (“ the Scheme ”)
Respondent(s)	West Yorkshire Police Authority

Subject

Mr Brunning has complained that, in pursuing his complaint about a review of his injury benefit the West Yorkshire Police Authority (“**WYPA**”) will not:

- award any compensation in respect of his distress and inconvenience, or
- reimburse him for his legal fees and other associated costs incurred.

The Deputy Pensions Ombudsman’s determination and short reasons

The complaint should be upheld in part against the WYPA because the incorrect review of Mr Brunning’s injury benefit in 2008 has caused him both financial and non-pecuniary injustice.

Whilst some of the fees and costs Mr Brunning is claiming following that review cannot be regarded as a direct and inevitable expense, this aspect of his complaint can be upheld to the extent that expenses connected to the hearing of the Police Medical Appeal Board (“**PMAB**”) and for his travelling expenses to attend a medical examination and the PMAB’s hearing should be refunded.

DETAILED DETERMINATION

Statutory Regulations

1. The Police (Injury Benefit) Regulations 2006 (“**the 2006 Regulations**”) and, in particular, paragraphs 3 and 8 of Schedule 6 (Medical Appeals) to those regulations provides,

” ...

3 (2) The board of medical referees shall appoint a time and place for hearing the appeal, at which it may interview or examine the appellant, and for any such further hearings as it may consider necessary and shall give not less than two months’ notice, or such shorter period as the police authority and appellant may agree, thereof to the appellant and police authority.

3 (3) The police authority and the appellant shall, not less than 35 days (including weekends and public holidays) before the date appointed for the hearing, inform the board of medical referees whether they intend to be represented at the hearing.

...

8 (1) Save as provided in this paragraph, the expenses of each party to the appeal shall be borne by that party.

...

8 (7) Where the board of medical referees decides in favour of the appellant, the police authority shall refund to the appellant any expenses actually and reasonably incurred by the appellant in respect of attending any such hearing as is mentioned in paragraph 3.

2. At the time of Mr Brunning’s first review in September 2008, The Employment Equality (Age) Regulations 2006 [2006 No. 1031] provide,

“3 Discrimination on grounds of age

(1) For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if –

(a) on grounds of B’s age, A treats B less favourably than he treats or would treat other persons, or

...

and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

Material Facts

3. Mr Brunning retired from West Yorkshire Police on 8 January 1985. On a review of his injury benefit application in October 1985 he was awarded an injury pension when the degree of his earnings incapacity was increased from 25% (band 1) to 50% (band 2). On the form dealing with this later review it was written "no further re-exams".
4. Mr Brunning requested a further medical review in 1989 but the outcome resulted in no changes. Thereafter no further assessments were carried out until 2008.
5. In April 2008 the WYPA wrote to Mr Brunning about amendments to the Scheme's regulations and advice from the Home Office. That advice was once a former officer reached the age of 65 and their State Pension Age then, in the absence of a cogent reason, they should be placed in the lowest band of Impact upon Earnings ("**IUE**") Award. This was because of an expectation that they would normally no longer be earning a salary in the employment market.
6. WYPA told Mr Brunning that they had consulted with the National Association of Retired Police Officers ("**NARPO**") and the Police Federation about these changes. They noted he was aged 65 or above (he was then aged 69) and said they were giving him 24 months' notice (effective from 7 April 2010) of the reduction in his IUE award unless there were exceptional circumstances (cogent reasons) in his case.
7. In May 2008 Mr Brunning requested a copy of his medical records from WYPA and in June he completed an IUE Award questionnaire on the basis there were exceptional circumstances / cogent reasons. In July 2008 Mr Brunning signed a medical consent form, though he says he later withdrew his permission when he was told by WYPA's Occupational Health ("**OH**") Unit that they had no records for him. However, he says they had medical papers for him from 1984 and 1989 at the 2011 PMAB hearing.
8. Mr Brunning's case was reviewed on 30 September 2008 by WYPA's medical adviser. Dr Hynes of AXA ICAS Wellbeing opined that based on his paper assessment the contents would not constitute a cogent reason

why Mr Brunning's award should not be reduced to the lowest band – though he noted there was no generally accepted definition of the term 'cogent reason'. Mr Brunning's award was reduced accordingly.

9. In November 2008 Mr Brunning wrote to The Police Federation and NARPO saying the money for a legal challenge could be beyond his means and asked them for assistance. From December 2008 Mr Brunning also started corresponding with WYPA, and in February 2009 he requested all documentary records from the West Yorkshire Pension Fund ("**the Fund**"). [*The Fund, part of the Local Government Pension Scheme and a completely different pension scheme to the (Police) Scheme, is operated by the pensions department of Bradford Metropolitan District Council ("**the Council**"). At that time, though, they also separately administered the Scheme for WYPA*].
10. Mr Brunning says a barrister friend of his told him to proceed through all avenues. He therefore decided to take advice and he initially consulted a firm of solicitors, Russell Jones & Walker, in or around February/March 2009. This appears to have been a free consultation, but they were reluctant to put Mr Brunning to the expense of giving advice on the terms discussed.
11. Following reminder letters, NARPO told Mr Brunning in March 2009 that unlike the Police Federation they did not generally provide individual legal support to members in the way that the Federation did. Mr Brunning says the Police Federation never replied.
12. In April 2009 Mr Brunning approached another firm of solicitors, Chadwick Lawrence LLP, and they were instructed to deal with his appeal.
13. Between April and December 2009 Chadwick Lawrence LLP carried out work for Mr Brunning, for which regular invoices and receipt payments have been submitted. This included following up a request for information from the Fund. Mr Brunning made his appeal on 4 June 2009, resulting in another medical review by Dr Hynes on 28 September 2009, but this was unsuccessful.
14. Mr Brunning has supplied his tax coding from HM Revenue and Customs for 2009/10 in which his State pension is stated to be £5,847 a year and

his P60 for 2009/10 confirming that his police retirement pension was £12,111.43 a year. The amount of injury pension paid in the 2009/10 tax year was £4,498.58 (*as orally confirmed by Mouchel, who took over the administration of the Scheme for uniformed police staff from the Council from 1 April 2012*). As pensions are normally paid on the first day of the month the figure of £4,498.58 represents the pension payments made between 1 May 2009 and 1 April 2010 and so differs slightly from the annual rate of injury pension in force from 6 April 2009 of £4,773.24 a year. The figure of £4,498.58 also reflects a reduced payment on 1 April 2010 for April 2010.

15. Mr Brunning says he has no other sources of income. His total annual income from these three sources for 2009/10 was therefore £22,457.
16. The pensions department of the Council sent a letter to WYPA on 19 March 2010 saying they had reassessed Mr Brunning's injury pension and from 7 April 2010 his injury pension would be reduced from £4,773.33 a year to £416.74 a year.
17. After a period of time during which Mr Brunning was recovering from cancer, Mr Brunning says he took up his appeal again. On 4 February 2011 he paid his general practitioner's surgery for a copy of his own medical records which he says he sent to WYPA on 28 February 2011.
18. On 19 May 2011 Mr Brunning met with the WYPA's selected medical practitioner ("**SMP**") (Dr Senior of AXA ICAS Wellbeing) who completed her reports on 23 May and 14 July 2011. Though she said his right shoulder had deteriorated substantially since he was first awarded the IUE she assessed the degree to which his earnings capacity was affected as 22.66%.
19. As part of his continuing appeal Mr Brunning requested on 4 August 2011 (and formally on 6 October 2011) a copy of his medical referral file from WYPA, for which he paid a fee. A few days later he also asked AXA ICAS for information which they held and he paid a fee to them as well.
20. Mr Brunning changed his solicitors because he heard that Lake Jackson Solicitors had had some success in challenging the decisions in cases similar to his. In October 2011 Lake Jackson aided him with his appeal to

the PMAB. Some Pension Ombudsman cases (i.e. 27979/2 from 24 August 2009, and 80008/1 from 30 June 2011) and certain case law involving other police authorities and/or the PMAB were cited as part of his grounds for appeal.

21. Mr Brunning says the WYPA made it clear that legal representation at the PMAB hearing was not allowed. Consequently, Lake Jackson referred him to Mr Watson of the National Police Advocacy Service who represented him at his PMAB's hearing, for which he had to pay a fee.
22. The PMAB met on 7 December 2011 to consider Mr Brunning's appeal, including the relevant case law, and gave their decision on 20 December 2011. The assessment of the PMAB was that,

“... since the last review the degree to which Mr Brunning's earning capacity has been affected by the relevant injury has not altered substantially and his degree of disablement should remain in Band 2 and therefore his appeal is upheld.”
23. On 7 February 2012 Mr Brunning wrote to the WYPA noting that arrangements had been made for his pension to be reinstated. However, he said he was unhappy that there was (i) no interest on the pension payments which were withdrawn over the last 22 months (i.e. from 7 April 2010 onwards), (ii) no compensation for the manner in which his case had been dealt with, and (iii) no refund of payments made on their insistence to obtain information to support his appeal.
24. The Home Office wrote to Chief Officers and Police Authority Chiefs on 23 February 2012 about the High Court's decision of 21 February regarding a judicial review in the case of *Simpson v Police Medical Appeal Board & Others* [2012 EWHC 808 (Admin)]. The new advice was that Annex C and the section entitled 'Review of Injury Pensions once Officers reach Age 65' and paragraph 20 of Section 5 entitled 'Degree of disablement after age 65' in the Guidance on Medical Appeals must not be relied upon in the conduct of such reviews.
25. In response to a further letter from Mr Brunning dated 20 March 2012, WYPA said in their reply of 13 June 2012 that they were sorry to hear he had found the manner in which the statutory 'review' duties concerning his injury pension had been applied had caused him distress. They

acknowledged the 2006 Regulations had been the subject of much litigation following governmental interpretation, and had caused difficulties for both those applying the Scheme's regulations as well as the beneficiaries of them. Though they recognised there had been frustrating periods experienced as a result of this confusion and uncertainty, they said such circumstances fell short of any actionable claim. Accordingly, his request for compensation and repayment of costs incurred was declined. They did, however, agree to his claim to pay interest (and interest of £205.54 was subsequently paid to him on 6 August 2012).

26. WYPA says advice was taken internally from legal services following Mr Brunning's March 2012 letter, and a suggested letter was drafted. That drafted reply appears to have formed the basis of WYPA's response of 13 June, although changes to the letter have been made from the original draft and, in particular, in relation to the repayment of costs. Whilst the gist of the final issued letter is the same as the draft in that the request for repayment of costs incurred was declined, the draft gave a further rationale for declining it (by reference to the 2006 Regulations).
27. Mr Brunning instigated a complaint under the Scheme's internal dispute resolution procedure ("**IDRP**") on 12 July 2012. He said he thought what had happened to his injury pension was illegal and eventually the courts had come to the same decision.
28. In a letter dated 1 October 2012 to Mr Brunning, WYPA said that Schedule 6 paragraph 8 of the 2006 Regulations stated that "each party shall bear their own expenses arising out of an appeal". Further, an application under the IDRPs Regulations can be made about "any claimed action or omission by the Police Authority or Secretary of State within the scope of the Police Pension Scheme ...". WYPA concluded that the "action or omission" (i.e. the refusal to pay his legal expenses) was outside the scope of the Scheme. The issue which was within the scope of the Scheme (i.e. his entitlement to injury pension) had been resolved via the appeal and he had been appropriately compensated by the payment of arrears and interest.
29. Mr Brunning is seeking the reimbursement of the undernoted payments.

£ 57.50 (inclusive of VAT) – Payment to Chadwick Lawrence LLP to reimburse them for paying the Fund for a copy of their file, including medical records.

£ 4,594.25 (inclusive of VAT) – Fees paid to Chadwick Lawrence LLP for legal work.

£10.00 – Fee paid in February 2011 to his GP surgery for his medical records.

£25.80 – Cost of three train fares to Leeds at £8.60 a trip.

£10.00 – Fee paid in October 2011 to AXA ICAS Wellbeing.

£10.00 – Fee paid in October 2011 to WYPA.

£ 900.00 (inclusive of VAT) – Fee paid to Lake Jackson Solicitors.

£ 350.00 (inclusive of VAT) – Fee paid Mr Watson on 7 December 2011.

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£ 5,957.55
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30. Mr Brunning says if he had not been subject to this review, which he believed was illegal and was proved to be so; he would not have had to seek legal advice and incur the subsequent costs. He also says “I have found the stress on myself ... during this long and protracted fight with the maladministration, uncaring and on occasions threatening wordage of correspondence all geared to frighten people from continuing their fight”.
31. WYPA says the legislation is very clear and unambiguous as to who pays the costs of a medical appeal and that remains their position. The general effect of the legislation is to discourage the parties from instructing solicitors and a party opting to do so does so at their own risk. It should be noted, though, that the provisions relating to the costs of a ‘medical appeal’ are different to those relating to a ‘review of injury benefit’, although these relate to costs other than legal costs. The basic cost of £6,200 for a medical appeal by the PMAB is usually borne by WYPA.
32. With regard to paragraph 8 (7) of Schedule 6 to The Police (Injury Benefit) Regulations 2006, WYPA says they pay reasonable travelling expenses from point of entry into the Force area, and only upon request.

33. Mr Brunning now questions why, at the outset of this process, was the position on costs not included and made clear. He tried to get help from the police unions, legal aid (for which he was not eligible) and his MP but each police officer was on his own and if he had not sought legal advice his pension would have been lost.
34. Though Dr Hynes' letter of 28 September 2009 stated he had no corroborative medical evidence to substantiate Mr Brunning's account of his medical problems, Mr Brunning says Dr Hynes did have his GP records which he (and his wife) saw when he was physically examined. Further, Mr Brunning states in his letter of 7 February 2012 to WYPA that this was also confirmed in a letter dated 4 March 2009 from WYPA's Human Resources ("**HR**") officer in the Medical Appeals and Reviews Team. In his letter to the Pensions Advisory Service of 19 October 2012, Mr Brunning also makes reference to a letter of October 2009 from Dr Hynes in which he refers to having sight of his GP records.
35. Mr Brunning says he travelled to Leeds on four occasions; once to see his barrister, once to see Dr Hynes, once to see Dr Senior and once to attend the PMAB hearing. He paid cash for his train tickets and did not keep any receipts. On other occasions he travelled by car with his wife which was a cheaper option.
36. As Mr Brunning's injury pension had been reinstated from the time it ceased with interest and without rehearsing in detail what had gone before, WYPA were asked during my office's investigation if they would consider making an offer of compensation for distress and inconvenience because any non-pecuniary injustice would not be a cost of proceeding with an appeal.
37. WYPA accepts they followed Home Office guidance when dealing with the review of injury benefit cases, and that that guidance was subsequently found to be unlawful. It is contended WYPA acted in good faith at all times and have subsequently rectified the position in a proactive way. WYPA says that, with the benefit of hindsight it probably has to be conceded there was maladministration; however every effort has been made to rectify the consequential injustice. Once the legal position was crystallized WYPA wrote to those affected explaining the position and rectified it. So

Mr Brunning would have had his injury award reinstated and been repaid arrears and interest even if he had not instructed solicitors.

38. On the subject of distress and inconvenience, WYPA would like to offer Mr Brunning the sum of £350 as compensation for the way the 2008 review was carried out.
39. Mr Brunning paid a £10 fee prescribed by the Data Protection Act for the provision of a copy of the referral file sent to the SMP in May 2011 and for Dr Senior's findings. The referral file is usually provided to the retired officer by the Force's Medical Appeals Section free of charge following the outcome of a review. It therefore seems Mr Brunning was referred to the Data Protection Unit by mistake and this fee charged in error. WYPA will arrange for this fee to be refunded to him.
40. WYPA says it is a matter for the other organisations (e.g. his GP, Dr Senior and the Scheme's administrator) what information they share with Mr Brunning and whether any fees are charged by them under the Data Protection Act.

Conclusions

41. The 2006 Regulations provide that reviews can be conducted "at such intervals as may be suitable" and WYPA were able to carry out a review in 2008 even if they had not done so before. Though a review is generally permissible, such a review still needs to be performed appropriately and properly.
42. 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. I note WYPA's comments about the guidance from the Home Office and the resultant confusion / uncertainty. Be that as it may, WYPA is still responsible for ensuring their SMP interpreted the 2006 Regulations correctly when carrying out a review.
43. It might be possible to argue that it is not necessarily maladministration for a decision maker to take a wrong view of the law, but if it is linked to some other act of maladministration (for instance, if the decision was taken carelessly, with lack of good faith or was the result of flawed or inadequate procedures) then it may amount to maladministration.

44. This was an error of law albeit that WYPA was following Home Office guidance and was acting in good faith. However, 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. Regulation 7 (5) provides for Mr Brunning's degree of disablement to be determined by reference to the degree by which his earnings capacity has been affected as a result of an 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 Brunning's earning capacity reduced to nothing or that it was for him to prove otherwise; particularly as the Employment Equality (Age) Regulations 2006 were in force at the time of the first review on 30 September 2008. A proportionate legitimate aim would have to be unconnected to any age discrimination, but WYPA clearly reduced members' benefits on account of them giving up work at age 65. So the WYPA either had no regard for these age equality regulations or, if they did, they acted contrary to them. Either way, the overall approach taken was therefore flawed and amounts to maladministration.
45. In recent years, case law has clarified the question of what a SMP should be looking at when any injury award is reviewed and WYPA now accepts in hindsight that there was maladministration in the way Mr Brunning's award was reviewed in 2008.
46. It therefore seems Mr Brunning has been challenging a review carried out in an inappropriate way over a period of 3 years and 8 months, and although I note that he had a break of one year whilst he was dealing with a serious illness it is unlikely the worry completely disappeared over this period.
47. Essentially, this complaint relates to the remnants of injustice stemming from Mr Brunning's previous complaint about the way his review was carried out in 2008 and the reduction in his injury pension. Though the issue of his injury pension has been remedied by the WYPA before coming to my office, Mr Brunning considers there are other injustices

which have not been resolved. So the issue for me is what injustice resulted from the way that review was conducted which remains to be remedied.

Costs / Expenses

48. Mr Brunning is seeking his costs to be reimbursed to him and his claim is set out in paragraph 29 above. I observe he also paid WYPA a fee for a Subject Access Request in May 2008 prior to the review being carried out. Regulation 3 of The Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000 [S.I. 2000 / 191] does allow such a fee. But, in any event, Mr Brunning is not claiming this fee, which would appear to pre-date the review and any maladministration.
49. WYPA has argued that the 2006 Regulations provide that “each side must bear its own costs”. But that statement, taken from paragraph 8(1) of Schedule 6, appears to have been abbreviated and does not encompass the 2006 Regulations in full. Even if that statement were completely true, I do not necessarily consider that that automatically precludes a person from being able to claim costs if they are a direct and inevitable consequence of maladministration. Clearly such a provision in the 2006 Regulations is appropriate for appeals where there has been no failure in due process. But where an appeal by the PMAB is upheld, paragraph 8 (7) of Schedule 6 of the 2006 Regulations obliges WYPA to make a refund limited to the expenses actually and reasonably incurred “in respect of attending any such hearing as is mentioned in paragraph 3”.
50. Expenses have not been defined within the 2006 Regulations. That naturally leads to the question as to what constitutes ‘expenses’. In my view such expenses could normally entail travel and subsistence costs. Since paragraph 3 (3) allows an appellant to be represented, and the regulations provide for expenses that are reasonably incurred in attending the hearing, I also consider any reasonable expense associated with being represented at such a hearing can be included. But I do not consider that such expenses extend to covering any legal fees under the 2006 Regulations.

51. Notwithstanding the above, if, as happened here, the 2008 review was not done properly, then I do not see why Mr Brunning could not recoup any justifiable costs that he may have incurred as a result of having to correct any injustice. I do not accept WYPA's argument that it was unnecessary for him to take action as the pension would have been refunded anyway. Mr Brunning faced a significant reduction to his income and would have been unaware of what the final outcome was to be. He was wholly entitled to appeal.
52. A distinction does however need to be made between making an award for any reasonable losses arising as a result of WYPA's maladministration and what the Scheme's regulations say about each side bearing their own expenses or being able to recover certain expenses. In view of this, I think Mr Brunning's costs can be broken down into three parts; his legal fees, his expenses of attending the PMAB hearing and his other costs.
53. Paragraph 8(7) of Schedule 6 makes provision that the police authority must refund to the appellant (in this case Mr Brunning) any expenses actually and reasonably incurred by him in respect of attending any such hearing of the PMAB.
54. Since Mr Brunning's appeal was upheld by the PMAB then I see no reason why his claim for actual and reasonably incurred expenses should not be reimbursed. I therefore make a suitable award for these below.
55. No explanation has been given as to why paragraph 8(7) of Schedule 6 of the 2006 Regulations was not discussed in WYPA's letter of 13 June 2012 but the position on expenses in relation to PMAB hearings was wrongly quoted to Mr Brunning despite the WYPA having taken internal legal advice.
56. So I find that the WYPA did not fully disclose the correct position and this information/advice must have caused Mr Brunning further distress and inconvenience.
57. Some of Mr Brunning's costs were incurred before the PMAB's hearing and as there is secondary legislation concerning expenses concerned with the PMAB appeal itself it seems appropriate to look at these other 'pre PMAB expenses' separately. In law Mr Brunning has a duty to mitigate

any loss(es) and so I also need to consider whether the costs he has identified were incurred reasonably or of necessity.

58. After receiving little assistance from his union and corresponding with the WYPA, Mr Brunning chose to take legal advice ahead of any other alternatives (such as consulting TPAS) and these costs form a significant part of his overall expenses. The purpose of an appeal process and Ombudsman service is to avoid litigation costs. Despite the fact that this matter was not necessarily straightforward, assistance was available from TPAS, free of charge. I observe that Mr Brunning did eventually approach TPAS in mid-October 2012 following WYPA dealing with his July 2012 IDR application on 1 October 2012 but had not done so beforehand.
59. Given that the services of TPAS are free, and once a matter is referred to my office all aspects of the complaint can be considered using inquisitorial and investigative powers, this office's starting position is that it is only in exceptional circumstances (for example, as extreme ill health or other disability on the part of the complainant) that I award compensation in respect of legal costs. I observe that other police officers have successfully brought similar complaints to my office without incurring such legal costs and so in some respects it was not necessarily inevitable that Mr Brunning's legal fees directly arose from the maladministration alone but from his choice of appealing against such maladministration.
60. Having said that, though, each case needs to be considered on its own merits.
61. Reference has been made to the Simpson case where some legal costs were awarded albeit at court. Generally the starting position of the Courts is that a successful party may ask for their costs and judges have a lot of discretion over awards.
62. Further, in the Court case of Simpson v PMAB (and others) the defendants' solicitor accepted that they had to pay costs whereas that is not the position here. Nevertheless, I also note that costs were only partly awarded in that court case. In the Simpson case costs on an indemnity basis (assessed as circa £52k) were requested but Mr Justice

Supperstone did not award costs on a full indemnity basis. Instead, an interim award of £20k was made against the Home Office in respect of un-
unlifted costs of around £30k and a direction for an assessment to be carried out if the balance of un-
unlifted costs could not be agreed. So only some of Mr Simpson's legal costs were recouped.

63. Mr Brunning did not sustain any financial loss until 7 April 2010 when his injury pension was reduced – though it could be said that he had sustained non-financial injustice prior to that date in the knowledge that he knew his injury pension was going to be reduced. There is possibly an argument that his costs incurred in trying to stop the pension reduction prior to him being able to come to this office should be considered. However, Mr Brunning's appeal based on advice from Chadwick Lawrence LLP was unsuccessful, Chadwick Lawrence handled matters prior to Mr Brunning becoming ill, and there were alternative avenues such as TPAS that he could have tried first.
64. Further, it seems to me that the number of grounds (11) that Chadwick Lawrence tried to argue was wider than those argued by Lake Jackson and such a scatter-gun approach, where numerous alternative arguments are put forward, is likely to raise the overall level of fees. I am also mindful of the fact that Mr Brunning has changed his solicitors and so there is likely to be some duplication of fees while his solicitors got to grips with the same issues. So it is difficult to justify refunding both sets of legal costs.
65. Mr Brunning has stated he met his barrister and some of the expenses shown for Chadwick Lawrence also include his barrister's fees. Given Mr Simpson's costs were not fully indemnified, thereby meaning his consultations with his barristers were not recouped, I do not see why Mr Brunning should be treated any differently.
66. Nevertheless, Mr Brunning faced a complicated set of arguments and a significant reduction in his income (being around 20%) whilst suffering from cancer. He clearly felt the need to protect his position. So overall, whilst he could have come to TPAS and my office, I conclude he acted reasonably in instructing Lake Jackson Solicitors as his income loss was so immediate and significant, they were appointed after his diagnosis of a

serious illness and they were successful in challenging the initial decision of 2008.

67. All in all, I have decided to award Mr Brunning part of his legal costs, i.e. those incurred with Lake Jackson LLP.
68. The other expenses being claimed relate to data protection fees, which Mr Brunning paid to a variety of organisations, and his travel costs. Of those being claimed, WYPA accepts that the one fee Mr Brunning paid to them for his medical referral file in October 2011 should not have been charged and are willing to refund this to him. I will therefore formalize that by including it in the legally binding directions below.
69. Turning to the other payments, I consider that some of these could have been avoided while others may not have been necessary.
70. The Council's pension department is run as an autonomous unit within the Council and the cost of it is deducted from the Fund. So some services provided to members of the Scheme are incurred by the Fund (i.e. members of that fund). A fee of £57.50 was therefore paid to the Fund in April 2009 for Council's pensions department to provide a copy of Mr Brunning's file held by them under the Scheme.
71. I can accept that obtaining a copy of Mr Brunning's pension file from the Council / the Fund in relation to his membership of the Scheme may have provided some historical background information about Mr Brunning's injury pension. Nevertheless, there is no evidence that the Council / the Fund were involved with the review in 2008 and so it is difficult to conclude that it was essential to obtain that information from the Fund when appealing against the 2008 review itself.
72. As for the fee paid to obtain his GP records, Mr Brunning originally gave his consent in July 2008 to the WYPA for them to obtain his medical records but he says he later withdrew his permission. When the SMP had these medical records is not entirely clear. Dr Hynes conducted a paper review on 30 September 2008 and may have obtained GP medical records before Mr Brunning rescinded his consent. Though Dr Hynes' letter of 28 September 2009 suggests he did not have these records at this later date, Mr Brunning says he did because he (and his wife) saw them at his

examination. Also, Mr Brunning has referred in correspondence to a letter from WYPA dated 4 March 2009 as well as a report from Dr Hynes dated October 2009 to substantiate this but those pieces of evidence do not appear to have been submitted in the bundle of papers to me. This matter is, though, not being disputed and there is no reason to doubt what Mr Brunning says.

73. Nonetheless, instead of paying his local GP surgery in February 2011 to obtain his medical records and then sending a copy to WYPA, Mr Brunning could have simply given his consent again to WYPA to obtain this information (or for them to obtain up-to-date information if they held a copy up to 2008). WYPA would then have paid the GP's fee, though under The Access to Medical Reports Act 1988 ("**the 1988 Act**") Mr Brunning had the right to see, within 21 days, any report prior to it being sent to the WYPA. Alternatively, if WYPA already had his medical records up to 2008, which Mr Brunning contends they did, and Mr Brunning wanted to see them then he could have obtained a copy of these GP records when he made his request to WYPA on 4 August 2011 (which was formalized on 6 October 2011). Similarly, his request to AXA ICAS at October 2011 seems a duplication of a request to WYPA for his medical file. I note Mr Brunning was concerned to get this information prior to his appeal to the PMAB and that information had to be presented to the PMAB at least 35 days before the hearing. I observe he has been critical of WYPA responding to his request and their procedure taking up to 40 days to process. But the onus was really on Mr Brunning to gather his evidence before launching his appeal in August 2011, rather than instigating his appeal and medical request together and then hoping evidence could be gathered ahead of any deadline for the appeal.
74. As his barrister's fees are not being awarded, I consider it would be inconsistent to award his train travel costs to visit his barrister.
75. Although there are no receipts for his train fares he clearly did attend an examination with Dr Senior and the PMAB's hearing. On the balance of probability I accept that he did incur these extra costs and I am minded that these are justifiable.

76. Whilst some of his costs were avoidable and are not directly attributable to the maladministration, this aspect of his complaint is upheld to the extent that part of his legal fees, expenses connected to the PMAB's hearing, travel expenses to attend a medical examination and the data protection fee incorrectly paid to WYPA, should be refunded back to him.

Distress / Inconvenience

77. It is accepted, with hindsight, that there was maladministration and I have no doubt this caused Mr Brunning non-pecuniary injustice in the form of distress and inconvenience at having to appeal against that decision.
78. Whilst WYPA has now offered £350 in compensation for such injustice, that offer was only made after my office's involvement and so this aspect of Mr Brunning's complaint is upheld. Whilst acknowledging that this offer is £50 more than the other settlements awarded in the cases of Messrs Ayre and Sharp, Mr Brunning considers that this offer is on the low side "after years of worry". Awards for non-pecuniary injustice are subjective and tend to be modest. However, each case needs to be considered in isolation. Mr Brunning had 18 months of distress pending the reduction in his injury benefits, though his appeals were handled by solicitors and from that perspective he has therefore been put to less inconvenience than if he had dealt with the appeal himself.
79. On the other hand, the reduction in his injury pension from £4,773.33 to £416.76 a year caused a reduction in his overall income of about one-fifth. That is a meaningful reduction which impacted on his standard of living for nearly two years and no doubt caused much inconvenience. He was also seriously ill during that time while this matter was ongoing. To my mind, the sum of £350 is not enough in these circumstances. In setting the amount of compensation for non-pecuniary injustice, I have had regard to the distress of finding out that his injury pension was being reduced, the inconvenience of having less income for nearly two years and the further distress and inconvenience resulting from having not being told about paragraph 8(7) of Schedule 6.

Directions

80. Within 21 days of the date of this determination, West Yorkshire Police Authority shall pay Mr Brunning:

- £900.00 to reimburse him for part of his legal fees;
- £18.60 to reimburse him for the £10 data protection fee charged by WYPA which they accept they should not have been levied and £8.60 to reimburse him for his train fare to be medically examined by Dr Senior;
- £358.60 for the expenses incurred in attending the PMAB's hearing (travel costs of £8.60 plus £350 to be represented at the hearing);
- £750 in compensation for the distress and inconvenience caused by the maladministration of the 2008 review.

Jane Irvine

Deputy Pensions Ombudsman

17 April 2014