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NATIONAL SECRETARY'S OFFICE

12 June 2019

BB CIRCULAR – 011-2019

To: National Council

Cc: National Board, Branch Council Admin

Dear Colleague,

DEDUCTIBILITY OF INCAPACITY BENEFIT AND INDUSTRIAL INJURY DISABLEMENT BENEFIT

We write in relation to the recent decision of the Court of Appeal in *Evans & Ashcroft v Chief Constable of South Wales Police* and the impact this will have on the many injury retired officers who may have had their injury pensions over-deducted since 2010.

Constabularies have an obligation to take steps to refund the monies which have been unlawfully deducted and the Police Federation has produced a questionnaire for retired officers to work out whether they may be eligible for a refund. For those that consider they are, a template letter has also been attached for officers to edit and send to their Chief Constable.

Background

The appeal involved a question of interpretation of the Police (Injury Benefit) Regulations 2006, S.I. 2006 No.932 ("the 2006 Regulations"), which provide (among other things) for the making of an injury award to a person who is retired from a police force and is permanently disabled as a result of an injury on duty.

An injury award payable under the 2006 Regulations is separate from any social security benefits to which the police officer may be entitled. In the case of certain benefits (described in paragraph 7 of schedule 3 of the 2006 Regulations), these must be deducted from the weekly payment of injury pension made to the retired officer. The benefits which must be deducted in this way are ones which relate directly to the injury on duty, so that the former officer does not receive a 'double recovery' (i.e. once from the force and once from the Department for Work and Pensions) regarding his/her injury on duty.

The way these additional benefits are to be taken into account is provided for by sub-paragraphs 7(1) and (2) of schedule 3 to the 2006 Regulations, as follows:

“7(1) The amount of the injury pension in respect of any week, calculated as aforesaid, shall be reduced on account of any such additional benefit as is mentioned in sub-paragraph (3) to which the person concerned is entitled in respect of the same week and, subject to sub-paragraph (2), the said reduction shall be of an amount equal to that of the additional benefit or, in the case of benefit mentioned in sub-paragraph (3)(a) or (b), of so much thereof as is there mentioned.

(2) Where the provisions governing scales of additional benefits have changed after the person concerned ceased to be a member of a police force, the amount of the reduction in respect of any week on account of a particular benefit shall not exceed the amount which would have been the amount thereof in respect of that week had those provisions not changed...”

Regulation 7(1) therefore sets out the basic rule which is to deduct an amount equal to the full value of the benefit on a weekly basis. This is then subject to sub-paragraph (2) which applies *“[w]here the provisions governing scales of additional benefits have changed after the person concerned ceased to be a member of a police force”*.

In those circumstances, the amount of the weekly deduction must not exceed the amount which would have applied if those provisions had not changed.

It was the meaning of this provision that was the subject of the Court of Appeal’s decision in *Evans & Ashcroft*.

Although we do not detail the specifics of the case in this circular, we have enclosed a copy of the judgment should you wish to review it. Instead we focus on the findings and outcomes in this matter.

Findings

The Claimants were successful in two ways:

- a. The Chief Constable was deducting Employment and Support Allowance (“ESA”) at the point that it was not an “additional benefit” for the purposes of paragraph 7 of Schedule 3 to the Police (Injury Benefit) Regulations 2006; and
- b. The Chief Constable was deducting too much in respect of Incapacity Benefit (“IB”) and Industrial Injuries Disablement Benefit (“IIDB”).

In their defence to the claim, and for the first time, the Chief Constable of South Wales Police agreed to stop deducting ESA and to repay the sums which had been wrongly deducted.

The Secretary of State subsequently introduced Regulations to make ESA an additional benefit. For the purposes of the case however, the new Regulations were irrelevant because they had no retrospective effect and only applied going forward¹.

The question of “over deduction” of IB and IIDB is not straightforward. The key finding of unlawfulness by the Court is in paragraph 59 of the judgment which states:

“It follows that the increases in the relevant benefits to which the appellants became entitled at

¹ The Regulation which made ESA an additional benefit came into effect on 10 February 2017. Before this date, ESA should not have been deducted from retired members’ injury pensions.

any time from 12 April 2010 to 14 April 2011 arising from the 2010 Up-rating Order should not have led to any increase in the deductions applicable to their injury pensions during that period, and to the extent that these increased deductions were made by the Chief Constable, they were unlawful by reason of the proviso in paragraph 7(2)".

It was therefore held that the Chief Constable had been over-deducting both IB and IIDB every year since 2010.

Going Forward

Although the Claimants were not successful in their central arguments, they were nevertheless successful in establishing the unlawfulness mentioned above; i.e. the over-deduction from their pensions following the 2010 Up-rating Order. We consider that there are many former officers around the country who have been affected by these over-deductions and are owed hundreds of pounds by their Constabularies.

Earlier this year, we notified each Constabulary in England & Wales of their obligation to refund the monies which have been unlawfully deducted from injury-retired officers. We have had a range of responses, including some forces which have not responded at all.

Following this, it has been decided that the most appropriate course of action is for the retired officers concerned to write to their Chief Constables and ask for reimbursement.

We have prepared a questionnaire for individuals to use which will help them decide whether they may have been affected by the over-deduction of benefits caused by the 2010 Up-Rating Order.

If the individual officer is affected, s/he can use the template letter to write to their Chief Constable to start the process of obtaining a refund of monies which have been wrongly deducted.

It is likely that some forces will state that individuals must resolve this matter directly with the pension provider (such as Capita or XPS) rather than the Chief Constable.

Our advice is that this is the wrong approach. The obligation to take steps to refund the monies rests with the Chief Constable, not a private company. Additionally, a company which administers the pensions does not act independently of the Chief Constable but on the Chief Constable's instructions. As such, it is the Chief Constable's responsibility to resolve this matter, whether that is in concert with the private pension administrator or on his/her own.

Where a force fails to resolve the matter, the former officer should approach the Pensions Ombudsman for assistance. For information on the powers of the Pensions Ombudsman and how to make a complaint, please visit: <https://www.pensions-ombudsman.org.uk/>.

Yours faithfully,



ALEX DUNCAN
NATIONAL SECRETARY

DRAFT QUESTIONNAIRE

1. Are you a retired police officer?
If Yes, move on to Q2
If No, you have no claim

2. Are you in receipt of regular payments from your Constabulary in respect of an injury on duty?
If Yes, move on to Q3
If No, you have no claim

Incapacity Benefit

3. Have you ever been entitled to Incapacity Benefit (IB)?
If Yes, move on to Q4
If No, you have no claim with respect to IB

4. Were you in receipt of IB *prior to* 12 April 2010 (i.e. 11 April 2010 or earlier)?
If Yes, move on to Q5
If No, you have no claim with respect to IB

5. Has IB been deducted from your injury pension?
If Yes, you may have a claim for a refund of over-deducted Incapacity Benefit
If No, you have no claim with respect to IB

Industrial Injuries Disablement Benefit

6. Have you ever been entitled to Industrial Injuries Disablement Benefit (IIDB)?
If Yes, move on to Q7
If No, you have no claim with respect to IIDB

7. Were you in receipt of IIDB *prior to* 12 April 2010 (i.e. 11 April 2010 or earlier)?
If Yes, move on to Q8
If No, you have no claim with respect to IIDB

8. Has IIDB been deducted from your injury pension?
If Yes, you may have a claim for a refund of over-deducted Industrial Injuries Disablement Benefit
If No, you have no claim with respect to IIDB

Employment Support Allowance

9. Have you ever been entitled to Employment Support Allowance (ESA)?
If Yes, move on to Q10

If No, you have no claim with respect to ESA

10. Has ESA been deducted from your injury pension?

If Yes, move on to Q11

If No, you have no claim with respect to ESA

11. Was it deducted from your injury pension before 10 February 2017 (i.e. 9 February 2017 or earlier)?

If Yes, you may have a claim for a refund of wrongly deducted Employment Support Allowance

If No, it is unlikely that you have a claim with respect to ESA

[CONSTABULARY]

[ADDRESS

ADDRESS

ADDRESS

ADDRESS]

[Date]

Dear Chief Constable [*Name*],

Deductibility of Employment and Support Allowance, Incapacity Benefit and Industrial Injury Disablement Benefit

I write in relation to my injury award and the recent decision of the Court of Appeal in *Evans & Ashcroft v Chief Constable of South Wales Police*.

Findings

The Claimants were retired officers who had suffered injuries on duty. The Chief Constable had been deducting the amount of certain benefits from their award payments. The Claimants were successful in two ways:

- a. The Chief Constable was deducting Employment and Support Allowance (“ESA”) when it was not a “relevant benefit” for the purposes of paragraph 7 of Schedule 3 to the Police (Injury Benefit) Regulations 2006; and
- b. The Chief Constable was deducting too much in respect of Incapacity Benefit (“IB”) and Industrial Injuries Disablement Allowance (“IIDB”).

The Chief Constable of South Wales Police agreed to stop deducting ESA and to repay sums wrongly deducted.

The fact that the Secretary of State subsequently made Regulations to make ESA a relevant benefit is irrelevant because those Regulations did not have retrospective effect; they only were effective going forward.

The Claimants established in this action that there was an “over deduction” in relation to IB and IIDB.

The key finding of unlawfulness by the Court of Appeal is in §59 of the judgment of Henderson LJ which provided:

“It follows that the increases in the relevant benefits to which the appellants became entitled at any time from 12 April 2010 to 14 April 2011 arising from the 2010 Up-rating Order should not have led to any increase in the deductions applicable to their injury pensions during that period, and to the extent that these increased deductions were made by the Chief Constable, they were unlawful by reason of the proviso in paragraph 7(2)”.

It was accordingly held that the Chief Constable had been over-deducting both Incapacity Benefit and Industrial Injuries Disablement Benefit since 2010.

Going Forward

I believe that I have been negatively affected by over-deductions of my benefits.

Include all that apply:

- [I have been in receipt of IIDB since [date] and I believe it has been over-deducted from my payments due to the 2010 Up-Rating Order].

- [I was in receipt of IB from [date] to [date] and I believe it was over-deducted from my payments due to the 2010 Up-Rating Order].

- [I have been in receipt of ESA since [date] and I believe this was wrongly deducted from my payment before ESA became a deductible benefit.]

Please provide a breakdown of the calculation of my pension payments from 2009 to date so that I can see how the 2010 Up-Rating Order has impacted my pension payments.

As you are aware from previous communications from Cartwright King Solicitors, the force is obliged to take steps to refund monies which have been unlawfully deducted from injury-retired officers.

If you have a private pensions service provider, include the following paragraph:

It is not enough to refer me to [name of your private pensions service provider] to resolve this matter. The legal obligation to correct the unlawful over-deduction and to repay monies which have been over-deducted rests with the Chief Constable.

I ask that you confirm receipt of this letter within 14 days and provide a substantive response within 28 days of this letter as to how you propose to implement the judgment.

Yours sincerely,

[your name]

[your contact details]