

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr Nigel Reynolds
Scheme	Firefighters' Pension Scheme 1992 (" the Scheme ")
Respondent(s)	Oxfordshire County Council (" the Council ")

Subject

Mr Reynolds complains that the Council has incorrectly calculated his pension benefits because they have not used the best pensionable pay in the last three years. He believes that pay arrears which were paid to him in November 2007 should be included in their entirety for the purpose of determining his aggregate pensionable pay.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld because the Council have correctly interpreted the Firefighters' Pension Scheme 1992 (Consolidated) Order and Mr Reynolds' pensionable pay.

DETAILED DETERMINATION

Relevant Regulations

1. The Firefighters' Pension Scheme 1992 (Consolidated) Order ("**the Order**") says,

"PART G

PENSIONABLE PAY AND CONTRIBUTIONS

Pensionable pay and average pensionable pay

G1. (1) Subject to paragraph (2), the pensionable pay of a regular firefighter is the aggregate of —

 - (a) the amount determined in relation to the performance of the duties of his role (whether as a whole-time or part-time employee); and
 - (b) the amount (if any) paid to him in respect of his continual professional development.

(2) For the purposes of paragraph (1), in the case of a person by whom pension contributions became payable after 31st May 1989 either —

 - (a) for the first time, or
 - (b) following any period in respect of which they were not payable, except where regulation 4 of the Retirement Benefit Schemes (Tax Relief on Contributions) (Disapplication of Earnings Cap) Regulations 1990(a) applies his pay shall be taken not to include any excess, in any tax year, over the figure which is the permitted maximum for that year for the purposes of section 594(2) and (3) of the Income and Corporation Taxes Act 1988(b) (that is to say, the figure specified for the year by an order made by the Treasury under section 590C(6) of that Act).

...

(3) The average pensionable pay of a regular firefighter is, ... the aggregate of his pensionable pay for the year ending with the relevant date.

(4) The relevant date is—

...

 - (b) for all other purposes of this Scheme, the date of his last day of service in a period during which pension contributions were payable under rule G2.

...

- (7) If the amount determined in accordance with paragraphs (3) to (6) is less than it would have been if the relevant date had been the corresponding date in whichever of the two preceding years yields the highest amount, that corresponding date shall be taken to be the relevant date.”

Material Facts

2. Mr Reynolds was employed by the Council at the county's Fire and Rescue Service and a member of the Scheme for the past 30 years.
3. Following national industrial strike action by the Fire Brigade in 2003 over modernisation of the service, the Council introduced a new pay and grading structure and amended its terms and conditions of employment. Instead of being paid by rank the employees were paid in accordance with their duties. Mr Reynolds says the 13 ranks were replaced with 8 roles. Each role had two pay elements 'A' or 'B' (with 'B' being the higher pay scale).
4. Mr Reynolds was a Watch Manager at a fire station up to February 2004.
5. Mr Reynolds says he was transferred to a specialized group (Fire Protection department) at Headquarters in February 2004 when a job vacancy became available. This new post had originally been occupied by a Substantive Flexible Duty Station Officer which under the flexible duty system had paid 20% on top of a 42 hour Station Officer's pay. That post was then filled by a Sub Officer who was temporarily promoted to Station Officer rank prior to the new pay and grading structure (which was graded Station Manager 'A' under the new pay structure). However, even though the job references increased the role was later downgraded from Station Officer to a Sub Officer. When that happened, the incumbent officer declined to carry on the role for less pay and so the role became vacant. As Mr Reynolds was a Sub Officer he says he could not refuse to carry out this new role. He worked in this new role between February 2004 and October 2007.
6. During those 3²/₃ years Mr Reynolds says he was working in the same department doing the similar work but with a change of reference (e.g.

technical aspects of hospitals/schools, technical team for policy writing, etc). As a result every time his job reference changed he had a new job evaluation. Over this period he says he had four or five job evaluations.

7. According to Mr Reynolds he was one of five people working in this newly formed department. Four of the people were Station Managers and he was the only Sub-Officer grade employee even though they were doing very similar work.
8. Mr Reynolds' taxable pay for 2006/07 was £27,983.04 and his pension contributions were £3,452.88 (making gross pay of £31,435.92).
9. Mr Reynolds subsequently made a grievance and this was upheld.
10. Consequently, Mr Reynolds was paid £20,544.50 with his November 2007 pay which represented pay arrears from February 2004 to October 2007 inclusive. His P60 shows his taxable pay for 2007/08 was £52,074.24. Mr Reynolds says this lump sum payment was not totally the result of the rank to role evaluation process but it was paid from the funds set aside from that evaluation process.
11. After October 2007 Mr Reynolds started working for the Chief Fire Officer giving technical advice and it is his pay from this job role in 2008 that his pension benefits have been based on. This remuneration was based on pay designated to be paid at a Station Manager 'B' rate. From June 2009 Mr Reynolds says he performed a different role and was paid at the lower Watch Manager 'B' rate.
12. On 30 October 2008 Mr Reynolds wrote to his Inspector of Taxes. He stated he had been taxed on the arrears of pay all in the same year which had pushed all of his earnings into the next tax bracket. He said it had been brought to his attention by his pay department and some of his colleagues that this should not be the case, and had it been spread out since 2004 then he would not have paid as much tax (40%) on his earnings. He provided a breakdown of how the back pay was calculated.
13. Her Majesty's Revenue and Customs replied to Mr Reynolds in November 2008 explaining that the receipts of arrears of pay are treated when they are actually paid. In other words, he was taxed for the earnings from an office or employment on the remuneration paid in the year of receipt and

not when they arose. Consequently, he had been taxed correctly on the receipt of his lump sum payment of pay arrears.

14. In August 2009 Mr Reynolds began corresponding with his employer about his pension entitlement, as they also carry out the administration on the Scheme, and in September 2009 contacted the Pensions Advisory Service (“**TPAS**”).
15. On 1 January 2010 Mr Reynolds retired having accrued the maximum pensionable service of 40 years.
16. When Mr Reynolds retired the Council calculated his highest salary as £39,143.08. His pension was calculated using this figure as his average pensionable pay and represented the 365 days from 1 January 2008 to 31 December 2008.
17. On 27 February 2010 Mr Reynolds instigated the Scheme’s internal dispute resolution procedure (“**IDRP**”). Following his retirement Mr Reynolds said he believed that his pension entitlement had been incorrectly calculated based on rule G1 (3). He thought Rules G1 (5) to (6) were irrelevant but Rule G1 (7) was relevant and stated in his opinion the calendar year of 2007 was his best year, as it included an additional single pensionable payment, and should have been used for calculation purposes.
18. Mr Reynolds stated he was unable to find any rule or reference in the Order that would support the Council’s position on why this single pensionable payment could not be included. Further, the Order made no reference to facilitate:
 - backdating any additional pension contributions for preceding years in relation to a single pensionable payment made in a different period;
 - to exclude single pensionable payments from average pensionable pay;
 - to discount/exclude any single pensionable payment from the aggregate pensionable pay for the year ending within a relevant date and thus reduce the average pensionable pay.
19. Oxfordshire Fire and Rescue Service dealt with the first stage of the IDRP and did not uphold the complaint. Their decision of 30 March 2010

focused on the key phrase of 'for the year' in Rule G1 (3) which they explained meant pensionable pay made in respect of the period in question. The lump sum payment for arrears of pay made in 2007/08 was a payment made in respect of the tax years 2003/04 to 2007/08.

20. Mr Reynolds invoked the second stage of the IDRPs which was received on 28 September 2010. He did not think he had received answers to the fundamental issues relating to his dispute under the Order.
21. The stage-two IDRPs appeal was not upheld by the Council. In their letter dated 17 December 2010 they reiterated that his average pensionable pay was the aggregate of his pensionable pay for the year ending with the relevant date. His arrears of pay that he received in 2007 was paid as a lump sum but related to the tax years 2003/04 to 2007/08. Rule G1(3) ensured that for pensionable pay purposes the arrears were allocated to the relevant financial year, thus putting him in the position as if he had received the additional pay from the appropriate point in 2003/04. That remains their position.
22. Mr Reynolds consulted TPAS again and further correspondence ensued throughout 2011 including reference to pensionable pay in the Minutes of the 32nd meeting of the Firefighters' Pension Committee ("FPC").
23. TPAS made Mr Reynolds aware of another Ombudsman case (McMullen – 71419) where the word 'for' was highlighted. Mr Reynolds says that, notwithstanding that that case related to a different scheme (Local Government Pension Scheme) and the rules are written differently, a factor in that case was the Ombudsman's interpretation of pay earned for (as opposed to pay received). Mr Reynolds contends his circumstances regarding the pensionable payment he received are very different.
24. He disagrees with the Council's reply that stated arrears of pay were the result of a job evaluation. This is only partially true. Mr Reynolds states the job evaluation process determined the level of pay within a new role, based on your responsibilities and expertise compared to your previous rank, therefore establishing whether a person attracted 'A' or 'B' pay scale within the new role structure.

25. Mr Reynolds says that if, for arguments sake, the administrator's explanation was accepted that the money was earned in the previous years because there was an intent to reimburse employees at a later date following the outcome of the job evaluation review, then that would indicate funds had been put aside and therefore would suggest it was earned awaiting receipt of payment at a later date. However, in his case he received 75%-80% more than anyone else completing the same process. The reason for this was because there were two elements of pay arrears; the first element was the job evaluation process (determining 'A' or 'B' pay scale) and the second element was pay awarded which reflected a major discrepancy relating to a previous management decision to downgrade his new role which historically had been designated to a higher role or rank.
26. Mr Reynolds argues that the intent to pay or pay owed must be established for the administrators to hold their view. If there was no intent at the time he was carrying out this new role (2004-2007) to pay him, which is established by the downgrading of the position, then no pay was earned. It can therefore only be concluded that the additional pay was only earned when he submitted a grievance and the Assistant Chief Fire Officer made the decision in his favour based on the evidence he provided. The job evaluation process just happened to be the way to facilitate that decision. Thus, as the decision he was owed the amount was taken in October 2007 and he received this owed payment it would appear, in effect, that the above pay should have been included for pay purposes and included in the calculation of his pension benefits.
27. With regard to the comments from the Council about artificially inflating benefits, Mr Reynolds says the Order was originally written at a time when the pay structure related to rank. As a result of modernising the fire service and introducing a role based structure new allowance and emoluments have been permitted. The Scheme Managers have carried out a number of significant changes to the Scheme but at no time have they properly dealt with the issue relating to pensionable pay (as acknowledged in the FPS Circular FPSC 11/2009 (point 1.7) ("**the Circular**")). One has to conclude that the Department for Communities

and Local Government (“**DCLG**”) must have known that this could become an issue but decided for whatever reason not to act, therefore by venture of the failure to act, they must have agreed with the practice and acknowledged that it complied with the rules (10.1 (iii) and (iv) of the Circular proposed that any allowance or emolument treated as pensionable pre 18 November 2009 should be regarded as pensionable and pensionable allowance or emoluments should be protected).

28. Having reviewed the additional arguments and supporting material (i.e. the Circular, the proposals and the high court judgement), the Council says they all appear to address the question of whether certain payments made to firefighters constituted ‘pensionable pay’. The Council does not consider that Mr Reynolds has been able to demonstrate that the additional payments made to him were not made in respect of the period February 2004 to October 2007. The Council says these additional payments must logically be attributable to those periods for the purposes of calculating his pensionable pay. Any other conclusion would lead to perverse outcomes.
29. Mr Reynolds also says that within Rule G1 (3) there are several keywords apart from the word ‘for’, namely ‘average’ and ‘aggregate’. Mr Reynolds says he believes the Council is placing its own interpretation on the pension rule and not adhering to the rules as written. He believes they have misinterpreted its meaning, as it is clear that the meaning of the word ‘for’ is further detailed in Rule G1 (7). He says all the words, including the keywords within Rule G1 (3) should be read in their entirety, no one key word should be read in isolation otherwise the meaning of the rule could be distorted. He notes the Council recently highlighted “*for the year ending with the relevant date*” in correspondence with the Ombudsman indicating that they may now agree with him that words should not be used in isolation.
30. Mr Reynolds argues Part 1 (Glossary of expressions) in Schedule 1 (Interpretation) of the Order includes no mention anywhere of the word ‘for’, however there is regarding the other two keywords. If the word ‘for’ is such an important keyword as claimed by the administrator in determining why the payment he received in 2007 cannot be included in his pension

calculation, why are there no other documents or guidance from the DCLG that provides a greater in-depth interpretation of this word in relation to this scheme at the time of his retirement.

31. Mr Reynolds says he considers he has acquired a good interpretation of the various paragraphs within the Scheme's G1 rule. He says there seems to still be a difference of opinion with regards to interpreting the rule G1 (3) and the term 'for the year ending with the relevant date'.
32. It can be seen from reading Rule G1 (1) and specifically paragraph (a) refers to pensionable pay as pay received in relation to the performance of the duties. Mr Reynolds contends that, when you now put this together with the rest of the rules in G1 and, in particular, G1 (3) it is possible to understand that any pensionable pay earned and received within the relevant year should be included into any pension calculations of his benefits.
33. He finds the Council's statements that his approach would "fly in the face of the regulation but would, if applied more generally, potentially lead to adverse outcomes of other scheme members" somewhat insulting. The format of the evaluation and the completion time were outside his control. If the Council had dealt with the above in a timely manner the complaint relating to Rule G1 (3) could not be made. He accepts that if this pay had been paid on time or if he had retired later so that the pay in November 2007 fell outside the last three years then his pensionable pay would have been less. But the November 2007 'pensionable' pay was made in his last three years.
34. The Council's key position is the payment made in November 2007 must logically be broken up and attributed to those periods that were used to calculate the additional payment and not the period in which it was paid even though the payment was made within the time period detailed in G1 (3) and (7). The Council has never explained or provided any evidence detailing that they are entitled to adopt this approach. This is the Council's key justification that supports their 'logical' claim.
35. Mr Reynolds' understanding is that the Scheme operates on a pay-as-you-go basis and pension contributions are deducted in line with G2 (1A) on

each instalment of pay. The paragraphs in Rule G2 specifically deal with pension contributions (extracts of which are shown below) but he is unable to find where the Council's approach would fit within that rule.

“(1) A regular firefighter shall, except while an election under rule G3 has effect, pay pension contributions to the fire and rescue authority at the rate specified in paragraph (1A).

(1A) The rate is–

(a) for a person who takes up employment ... on or after 6th April 2006, ...

(b) in any other case, 11 per cent of his pensionable pay.

(2) The contributions payable under paragraph (1) on each instalment of pay are due at the same time as that instalment and, without prejudice to any other method of payment, may be deducted by the fire and rescue authority from the instalment.

...”

36. Until the Council provides information that would support their view, it is still an unverified claim. Mr Reynolds says it is one thing stating that a particular approach is theoretically logical but it is another for the Council to be able to practically implement it. If this action by the Council cannot be substantiated then the Council's claim that they have correctly calculated his pension benefits and they have used the best pensionable pay in the last three years is flawed and incorrect
37. As the Council did not fully address his arguments he says all the issues concerned with his original complaint need to be reviewed by the Ombudsman, including the provision (rule), process and procedures which could facilitate and permit the backdating of pensionable pay for the preceding years.
38. A colleague has lodged a complaint regarding the same issue and although the issues are similar the reasons why the payment was made is different, as explained above.

Conclusions

39. During his complaint Mr Reynolds submitted Minutes from the FPC on the subject of different elements of pay (e.g. housing allowances, waiting

allowances, additional responsibility pay and flexible duty system pay) and said that despite this being a national scheme the various Fire and Rescue Authorities have not been administering the Scheme at a local level consistently across the country. During this investigation he has also submitted the Circular from the DCLG; the London Fire and Emergency Planning Authority's proposed response; and a judgement from the High Court (TLQ/11/0426). Whilst Mr Reynolds acknowledges that none of the documents are totally relevant to his case, he says they all have the same point with regard to the ambiguity surrounding the term pensionable pay. However, I must deal with the complaint before me in relation to him and the Council (rather than how other people and/or issues may have been treated at different authorities).

40. Mr Reynolds has commented that his pay arrears are pensionable because he had pension contributions deducted from them but that is not in dispute. He has also queried in correspondence how pension contributions could be backdated to preceding years. In his application to me, Mr Reynolds stated within his complaint that the Council had not identified the rule within the Scheme which permitted them to backdate a pension contribution paid in one year and spread it over a period between 2003 and 2008 tax years. His complaint to my office was accepted on the basis of being concerned with the correct "average pensionable pay" that should be used for his Scheme benefits since the injustice being claimed related to him receiving a lower pension (and associated benefits). At that time his statement about his pension contributions were taken to be made to support that complaint (rather than be a complaint in its own right) but Mr Reynolds now wishes me to address that aspect too though he has not alluded to what further injustice that has caused.
41. In a defined benefit scheme such as this one, there is not an exact correlation between the contributions and benefits, and any such argument based on that direct linkage is likely to fail. As contributions do not determine the members' benefits then neither could the timing of those contributions. But I do not think Mr Reynolds is arguing that position. He appears instead to be arguing that the contributions paid in a particular period should determine the pensionable pay in that period, and the

benefits payable should therefore be based on that pensionable pay (where such pay falls within the last three years).

42. Despite saying the Scheme operates on a PAYG basis Mr Reynolds contends that the contributions deducted from his pay in November 2007 have been spread over preceding years. He has, however, provided no evidence to substantiate that statement, though it strikes me he is trying to argue that if his pensionable pay for 2007 is less than he received then his contributions must have been attributed to another period of time.
43. The fact that the Order says contributions on each instalment of pay are due at the same time as that instalment does not necessarily make that instalment of pay pensionable for that particular period. It merely means the contributions on that pay are deducted at that time. So I do not see this argument advances his case.
44. I now turn back to the issue of his 'average pensionable pay'.
45. More recently Mr Reynolds seems to be interpreting Rule G1(3) from the perspective that his pay paid to him in 2007 was earned at that time (and not before) and so the total pensionable pay for the 2007 calendar year was the pay he received. This is despite his earlier letter to his local Inspector of Taxes where he had previously stated he had been under paid from February 2004 onwards and argued it should be taxed accordingly (i.e. spread) rather than taxed all in 2007/08. In my view, the pay arrears was a payment in return for work or service and was 'earned' (as opposed to 'received') in the period from February 2004 to October 2007 even if it was belatedly decided that is what he would earn for performing his duties of his role for that period.
46. The meaning of 'pensionable pay' and 'average pensionable pay' (as opposed to simply 'average') are stated in Part 1 (Glossary of expressions) in Schedule 1 (Interpretation) of the Order as being construed in accordance with rule G1. Whilst 'pensionable pay' is as defined in Rule G1(1) and needs to be used throughout the Regulations including Rule G1 (3), the issue here is not whether the lump sum payment is pensionable but over what period it should be regarded as being pensionable.

47. Average pensionable pay is simply the member's pensionable pay for the final year before retirement or, if greater, for one of the two preceding years. In Mr Reynolds' case the Council have taken his average pensionable salary to be his pensionable pay for the calendar year 2008 (instead of 2009) whereas Mr Reynolds believes it should be the calendar year 2007 on the basis that the pay arrears are attributable solely to 2007.
48. Because the amount for performing his duties of his role (and any for his continual professional development ("CPD")) was determined in October 2007 and paid to him in November 2007 Mr Reynolds argues that it should be taken into account in its entirety for the purposes of his pensionable pay for 2007.
49. The Council has determined that a proportion of the lump sum pay arrears was with respect to the performance of his duties of his role (and any CPD) for 2007 and thus attributed that part of it as pensionable pay in 2007, but they have also determined that the remainder related to the performance of his duties of his role (and any CPD) for earlier years. As a result, the Council considers his pensionable pay for 2008 is higher.
50. Rule G1(3) says "The average pensionable pay of a regular firefighter is ... the aggregate of his pensionable pay for the year ending with the relevant date." The key word in this Rule is "for" – it is the pensionable pay *for* the year ending with the relevant date. I have no doubt that this is not the same as, for example, pay received *in* the year (which is in effect what Mr Reynolds is arguing for).
51. Mr Reynolds has queried what provision (rule) justifies the Council's actions. Whilst Rules G1 (3) and G1 (7) clearly set out the possible time periods over which 'average pensionable pay' can be taken, 'average pensionable pay' is, in effect, the best pensionable pay in the last three years. It is thus the provision (rule) of Rule G1 (1) which allows the Council to determine what his pensionable pay for a year is.
52. In my opinion the payment of £20,544.50 which was the additional amount determined for performing his duties of his role (and any CPD) was not all for the 2007 calendar year but covered earlier years as well. It therefore is

not unreasonable of the Council to conclude that that sum could not be considered pensionable pay for 2007 alone.

53. “Aggregate” is not defined in the Order (though “Aggregate pension contributions” are). “Aggregate” simply means that one has to take the sum total of pensionable pay. But the total is still limited to pay *for* the year. “For” in this context means “relating to” – in the same sense as Mr Reynolds received pay “for” work as a firefighter. The majority of the lump sum was arrears of the pay he should have received in previous years. It is not pay for the one year in which it was received; it is pay *for* each year over a four year calendar period.
54. HMRC has explained that pay is taxable in the year of receipt, but that does not make it pay *for* the year of receipt.
55. I do not uphold Mr Reynolds’ complaint.

Jane Irvine
Deputy Pensions Ombudsman

17 January 2014