



Weightmans

Weightmans

Firefighters' Pension Scheme – pensionable pay update

The story so far...

18 September 2018

Jane Marshall
Partner

0161 214 0508

Jane.Marshall@weightmans.com



What we will cover

- The case law so far:
 - Kent & Medway Towns
 - Norman v Cheshire
 - Recent PO determinations
- The Blackburne principles
- Additional principles arising from case law
- What is on the horizon?
- Practical implications
- Questions

The case law so far...

- Kent & Medway Towns Fire Authority v Pensions Ombudsman and anor, [2001] OPLR 357
- Norman v Cheshire Fire & Rescue Service, [2011] EWHC 3305 (QB)
- Mr Michael Smith v South Wales Fire & Rescue Service, PO-3511 (2014)
- Mr N v West Yorkshire Fire & Rescue Authority, PO-11867 (2017)
- Mr A v Warwickshire Fire & Rescue Authority, PO-15584 (2018)

Kent & Medway Towns

- Mr Hopper – a regular firefighter
- 1992 Firefighters’ Pension Scheme – ‘pensionable pay’ – pay as determined in relation to rank
- Retired on ill-health grounds in April 1997
- Accrued 8 days leave whilst on sick leave for last 8 months of service
- £643.64 paid in lieu – was this pensionable and should it have been include in his final pensionable salary?
- Decision – payments in lieu of annual leave are not pensionable

Norman v Cheshire

- Mr Norman – a regular firefighter & retained duties
- 1992 Firefighters’ Pension Scheme – ‘pensionable pay’ – aggregate of the amount determined in relation to the performance of his duties of his role and the amount in respect of continual professional development
- Received basic pay, public holiday pay, retaining fee, turn-out fees and attendance fees (“call-out/disturbance fees”)
- Collective agreement entered into 28 September 2007 – retaining fee, disturbance fees & public holiday pay rolled up as % uplift in basic pay

Norman v Cheshire

- Decision:
 - uplifts by way of retainer fee & disturbance fees are pensionable (before the collective agreement the retained elements were undertaken voluntarily, so not undertaken by way of duties under contracts of employment. The position changed when the collective agreement was made)
 - uplift by way of public holiday pay is pensionable (it ceased to be episodic in nature and became a regular payment as a result of the collective agreement)

Mr Michael Smith v South Wales Fire & Rescue Service

- Mr Smith – regular firefighter, retired May 2011
- The 2006 ‘New Firefighters’ Pension Scheme’ – “pensionable pay” includes permanent emoluments (including in the case of a retained firefighter, any retaining allowance)
- May 1997 seconded to full time trade union duties
- Continued to receive day crewing duty system allowances for rent, fuel & light and annual retainer
- Decision – annual retainer payments are not pensionable (for a regular firefighter the annual retainer payments are temporary because they can be moved to a different duty system)

Mr N v West Yorkshire Fire & Rescue Authority

- Mr N – retired 30 March 2016
- 1992 Firefighters’ Pension Scheme
- 2009 Authority decided temporary promotion was not pensionable
- Mr N temporarily promoted April 2013 – March 2014
- Regulations amended 2013 – discretionary power to treat temporary promotion as pensionable
- Decision – pensionable pay must have something of a permanent nature. The Authority was entitled to treat temporary promotion as non-pensionable

Mr A v Warwickshire Fire & Rescue Authority

- Mr A – retained firefighter & deferred member
- The 2006 ‘New Firefighters’ Pension Scheme’ – “pensionable pay” includes permanent emoluments (including in the case of a retained firefighter, any retaining allowance)
- Mr A received annual retained allowance (pensionable), disturbance payments, work activity payments & training attendance payments
- Decision – disturbance, work activity and training attendance payments are pensionable for the purpose of calculating Mr A’s pension

Blackburne principles

The requirement of pensionable pay:

- payment should be calculated in accordance with a firefighters' ordinary rate of pay (to be “determined in relation to rank”);
- payment must be ‘pay’, for work done under the contract of employment;
- payment must be regular in nature, i.e. it must be pay to which the firefighter is entitled, at the rate applicable to his rank;
- must not be of a “one-off” nature, as a result of some extraordinary event;
- it must have something of a permanent nature.

Additional principles arising from case law

- The starting point is the drafting of the Regulations at the applicable time – what is the true construction of the regulations?
- The Grey Book is not authoritative on what is pensionable
- DCLG (as was) can not determine what is pensionable
- Must consider the specifics of the contract of employment/collective agreements
- If a payment can't be distinguished from basic pay (i.e. % uplift) it is likely to be pensionable

Additional principles arising from case law

- Payments for duties that become obligatory under the contract of employment/collective agreement are likely to be ‘in relation to the performance of his duties of his role’
- Payments for voluntary duties are unlikely to be ‘in relation to the performance of his duties of his role’
- The fact that a payment may have been paid for years does not automatically confer permanence

What is on the horizon?

- We know there is currently another case with the PO about pensionable pay
- PO has alluded in correspondence to the significance of the case
- Believed to be on payments for undertaking separate duties under the 1992 Firefighters' Pension Scheme (such as urban search & rescue) and whether such payments are 'permanent'
- PO was hoping (best case scenario) to have a final determination out by mid-August, but a determination has not yet been released
- Wait and see?

Practical implications

- Review the current & historic payments that are/have been treated as pensionable
- Consider what each payment actually relates to and not just what each payment is called
- Consider contracts of employment/collective agreements to determine ‘duties of his role’
- Analyse the information collected against the Blackburne principles and the other principles established under case law
- Ensure current practices comply
- Correct historic issues identified?
- If in doubt, seek appropriate advice

The logo for Weightmans, featuring the word "Weightmans" in white text on a dark teal, wavy rectangular background.

Weightmans

Questions?

Jane Marshall

Partner

0161 214 0508

Jane.Marshall@weightmans.com