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Norman v Cheshire Fire and Rescue Service

A case summary

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Agenda

- Kent and Medway Towns Fire Authority v Pensions Ombudsman and another [2001]
- The Blackburne principles
- Norman v Cheshire Fire and Rescue Service [2011]
- Guiding principles that arise from the case law
- Questions

Kent and Medway Towns Fire Authority v Pensions Ombudsman and another

Background:

- Mr Hopper was appointed a firefighter in 1966
- Retired on ill-health grounds in April 1997
- Been on sick leave since July 1996
- He had accrued 8 days annual leave in his final year, and was paid in lieu on retirement
- Was the payment in lieu of holiday pensionable under the 1992 Scheme?
- Pensions Ombudsman held that it was pensionable
- On appeal, Mr Justice Blackburne decided that the payment was not pensionable

Kent and Medway Towns Fire Authority v Pensions Ombudsman and another

The principles arising out of the decision are:

- To be pay “*determined in relation to his rank*” the payment has to be:
 - calculated in accordance with the firefighter’s ordinary rate of pay
 - pay for work done or to be done under the firefighter’s contract of employment

Kent and Medway Towns Fire Authority v Pensions Ombudsman and another

- Therefore to be “pensionable” the payment must be:
 - regular in nature
 - pay to which the firefighter is entitled
 - at the rate applicable to his rank
 - in the ordinary course of fulfilling his duties under the contract of employment
- Payments of a one-off nature are not pensionable
- The Grey book is not determinative
- Depends on the true construction of the regulations

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- Issue – whether consolidated sums paid under a collective agreement made in 2007 were pensionable pay under the 1992 Scheme
- The sums paid were in relation to a “*retaining fee*”, a “*disturbance fee*” and “*public holiday pay*”
- Mr Norman originally worked under the shift system at Crewe Fire Station
- In 1998 he moved to Congleton to work the day crewing system
- He also worked a retained element

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- 1 October 2007 the Authority introduced new arrangements for firefighters on day crewing duties
- Moved to a consolidated earnings formula
- The retained element became an intrinsic part of the day crewing system
- The pay allowances for the retained element were rolled-up into a pay package which consisted of:
 - Basic pay
 - Retaining element (12.5%)
 - Disturbance fee (12.5%)
 - Public holiday pay (1.85%)
 - Fuel / light allowance

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- Previously:
 - the “retaining fee” had been a fixed fee
 - the “disturbance fee” depended on being called out; and
 - extra pay was only received if a bank holiday was actually worked
- The Collective Agreement stated that the new consolidated elements would be pensionable
- In May 2008 DCLG advised the Authority that the consolidated elements were not pensionable
- Mr Norman retired on 29 May 2008 on a pension that excluded the consolidated elements

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The decision:

- Pay uplifts by way of the “retainer fee” and the “disturbance fee” are pensionable
- Prior to the 2007 Collective Agreement it was not obligatory for firefighters working the day crewing system to undertake a retained element. This was undertaken voluntarily, so such payments were not duties undertaken under the employment contract and therefore were not pensionable
- After the Collective Agreement firefighters working the day crewing system were obliged under their terms of employment to do retained duties, therefore the payments are pensionable

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The decision:

- “Public holiday pay” element is also pensionable
- After the Collective Agreement “public holiday pay” was paid in recognition that employees were available to work on public holidays if required. Before the Collective Agreement it was only paid if the rota required the employee to work that day. It was a contractual requirement under both arrangements, but under the Collective Agreement the payments ceased to be episodic in nature and are paid as a regular amount. As it is paid as a percentage uplift on basic pay, it is also determined by the role of the employee

Guiding principles

- It is important to look at the wording of the regulation, depending on whether the relevant scheme is the 1992 scheme, the New Firefighters' Pension Scheme or the 2015 scheme. This can affect what is or is not pensionable e.g. rent allowance that is permanent (i.e. a “*permanent emolument*”) may be pensionable under NFPS, but may not be pensionable under the 1992 scheme if it is not paid for “work done” and/or is not paid as an uplift of basic pay
- It is important to consider the contract of employment, and what duties are contractual obligations and which are voluntary

Guiding principles

- To be pensionable the payment should:
 - not be “one-off” or episodic in nature or intermittent;
 - be part of “regular pay”;
 - be calculated in accordance with ordinary rate of pay;
 - have some permanence i.e. not only payable if the firefighter is called upon;

Guiding principles

- relate to:
 - pay for work done by way of duties under the contract of employment;
 - work that is by way of work of the employee's role; and
 - work done in the ordinary course of fulfilling the role
- NB: it is not explicitly clear from the Norman case whether a payment has to fulfil all of the above criteria to be pensionable



QUESTIONS?