

PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE PENSIONS OMBUDSMAN

Complainant : Mr R A Hopper
Scheme : Firemen's Pension Scheme
Respondents : **1.** Kent and Medway Towns Fire Authority (the **Authority**)
2. Kent Fire Brigade (the **Brigade**)

THE DISPUTE (dated 23 August 2000)

1. As against the Authority and the Brigade, Mr Hopper has contended that they are wrongly failing to include an amount of £643.64, the sum he received in respect of eight days leave he had not taken in the year before he retired, in the salary figure used to calculate his retirement benefits from the Scheme.

MATERIAL FACTS

2. Mr Hopper was employed by the Authority until 6 April 1997, when he retired early on grounds of ill-health. At the time of his retirement he had eight days leave which had accrued during his final year with the Authority.
3. Mr Hopper stated that, in accordance with the provisions of the National Joint Council for Local Authorities' Fire Brigades Scheme of Condition of Service, the eight days of leave he had accrued were converted to pay at the standard rate, and accordingly a sum of £643.64 was aggregated into his salary in the final year. He said that pension contributions at a rate of 11% had been deducted from this sum.
4. Mr Hopper received a statement from the Authority, dated 7 April 1997, of his ill-health early retirement benefits from the Scheme. This statement was checked by officials of his trade union, the Fire Brigade Union (**FBU**), and an accountant, and it was found that there was a shortfall in the benefits equivalent to a salary figure of £643.64. Following queries of the shortfall by FBU with the Authority, he received a letter, dated 9 June 1997, from the Authority enclosing a cheque for £70.80 and stating that this amount had been deducted in error from the sum of £643.64.

5. Mr Hopper said FBU had advised him that it was inappropriate for the Authority to have decided to refund the pension contributions it had deducted, rather than pay the full requisite pension. He stated that FBU had remarked that it was unable to see any reference in the regulations governing the Scheme which gave the Authority the right to make an ad hoc decision to pay part of his salary as if it was not pensionable.

6. On 24 April 1998 the Authority wrote to FBU's solicitors stating that the sum of £643.64 paid to Mr Hopper in respect of his outstanding leave could not be deemed as pensionable under the Firemen's Pension Scheme Order 1992 (the **Regulations**). The Authority said that pension contributions had been deducted in error from the payment of £643.64, and on discovering the error arrangements were made to refund the contributions. It pointed out that Regulation G1(1)(a) provides that the pensionable pay of a regular firefighter is his/her pay as determined in relation to his/her rank, and added that therefore the payment of any lump sum or irregular additions to pay cannot be deemed as 'pay in relation to rank'. In addition, it pointed out that Regulation G1(3) provides that the average pensionable pay used to calculate the benefits of a regular firefighter is the aggregate of his/her pensionable pay during the year ending with the relevant date (ie the person's last day of service as a regular firefighter).

7. Mr Hopper complained to the Authority about the calculation of his early retirement benefits, and his complaint was dealt with under stages one and two of the Scheme's Internal Dispute Resolution (**IDR**) procedure. The Authority's decision under both stages one and two of IDR was that a payment in lieu of annual leave is an irregular addition to earnings and therefore not pensionable, and that Mr Hopper's average pensionable pay had been calculated correctly.

8. Pensionable pay and average pensionable pay are defined under Regulations G1(1), (3) and (4)(a) as follows

“**G1.**-(1) Subject to paragraph (2), the pensionable pay of a regular firefighter is his pay as determined-

 - (a) in relation to his rank, or
 - (b) in the case of a chief officer or assistant chief officer, or in Scotland a firemaster or assistant firemaster, for the post.

...

- (3) The average pensionable pay of a regular firefighter is, subject to paragraphs (5) to (7), the aggregate of his pensionable pay during the year ending with the relevant date.
- (4) The relevant date is-
 - (a)... the date of the person's last day of service as a regular firefighter ...
- (6) ... any reduction of pensionable pay during sick leave or a stoppage by way of punishment shall be disregarded"

There is no provision as to disregarding irregular additions to pay.

- 9. Mr Hopper has contended that the Authority's interpretation of Regulation G1(3) was wrong. He claimed that, according to the wording of this Regulation, the aggregate pay he received during the twelve months ending with his last day of service included the payment in lieu of eight days of leave. He said that the basis upon which leave accrues supports this argument since leave accrues proportionately throughout the year. He stated that the eight days are directly referable to his actual service in the twelve months ending with his last day of service, and therefore the sum he received for those eight days formed pay to which he was rightly entitled. He said that there was no concept of "irregular additions" in the Scheme, and therefore the sum for the eight days in question was pay in relation to rank and should also be treated as an aggregate of his pensionable pay.
- 10. The Authority stated that the National Joint Council/Fire Brigade National Employers had confirmed that payments in lieu of holidays should not be included in pensionable pay under the Scheme. It said that the relevant provisions are contained in Regulations G1 and G3, but admitted that there was no specific reference in these Regulations to payments in lieu of holidays. It pointed to the "Commentary on the Firefighters Pension Scheme" (the **Commentary**) issued by the Home Office, which is designed to aid administrators in the interpretation of the Regulations, and stated that this confirmed the provisions of Regulations G1 and G3. It added that in the Commentary under 'Points to note' and subheading 'To do with Pensionable Pay' it was further confirmed that rates of pay did not include irregular additions to earnings such as overtime which are therefore not pensionable.

11. The Authority said that, in its opinion, payment in lieu of holidays is clearly an irregular addition. It added that it would not be reasonable to expect the majority, or even a significant number, of retiring firefighters to enjoy such an addition to their final or preceding year's pay. It pointed out that adding back eight days of pay would mean that the pension is based upon the last 373 days pay and not the last 365 days pay as required by the Regulations. It said that even though the Regulations are silent as far as payments in lieu of holidays are concerned, it is reasonable to consider what the Regulations intended. Taking the example of two firefighter who retire, both of equal rank, pay, service, age and circumstances, having paid exactly the same level of contributions during the respective periods of service, it would be inequitable for one officer to be paid a greater pension than the other simply because that officer had not taken his full holiday entitlement in the final year.

CONCLUSIONS

12. The matter that I have to decide is whether or not a payment in lieu of leave should be included as part of pensionable pay for the calculation of benefits from the Scheme. The Regulations are indeed silent on this matter and provide no express assistance.
13. The Commentary purports to supply this assistance, but the question remains if whether it does so correctly. The 'Points to note' section of the Commentary sub-headed 'To do with "pensionable pay"' states
 - “1. Rates of pay do not include irregular additions to earnings such as overtime which are thus not pensionable. London weighting is pensionable as is flexible duty allowance. If the pensionable status of a particular payment is in doubt this will normally be clarified in the NJC Conditions of Service Booklet.
 2. Rule G1(1) relates the pensionable pay of chief fire officers and assistant chief fire officers to the pay determined for their post...There is no suggestion that anything other than basic pay should be included in the pensionable pay calculation.”
14. However, the Regulations (set out in paragraph 8) do not, in my judgment, justify this restrictive commentary which can be no more than persuasive and certainly not authoritative as to the proper construction. On the contrary, I accept Mr Hopper's contention that payments in lieu of holiday entitlement are “pay as determined in relation to his rank”, since they will be calculated not specially but in accordance with

the firefighter's ordinary rate of pay, and therefore fall within the meaning of "pensionable pay" in Regulation G1(1). In substance, the payments will be consideration for work done in the course of his employment: the payments are pay, not *ex gratia*. Whilst I agree with the Authority that, if such payments are pensionable, an anomaly may be thought to arise in the case of two firefighters who retire on the same rank, pay, age and circumstances, if one had not taken his full holiday entitlement, although views may differ as to whether this is inequitable. The level of their pensions will be different because their pensionable pay would not be the same due to the fact that one of them has received a payment in lieu of holidays, although concomitant extra contributions will have been made and duties performed. However, the remedy for any accepted anomaly or inequity would lie in amendment of the Regulations rather than in declining to apply their present plain meaning.

15. For the reasons given in paragraph 14 above, I determine the dispute in favour of Mr Hopper's contention.

DIRECTIONS

16. The Authority shall forthwith recalculate Mr Hopper's ill health early retirement benefits as at 6 April 1997 including the sum of £643.64 in his pensionable pay. The Authority shall also calculate the contribution, net of tax, Mr Hooper will have to pay to the Scheme on the sum of £643.64. The Authority shall then advise Mr Hopper of the additional benefits he would receive from the Scheme and the contribution, net of tax, he would have to pay.
17. If Mr Hooper agrees to, and pays, the aforementioned contribution, the Authority shall increase his pension to the level it would have been if the sum of £643.64 was included in his pensionable pay as at 6 April 1997. In addition the Authority shall pay him any additional lump sum benefit he may be entitled to as a result of the increase in his pensionable pay and a lump sum equal to the difference in the level of the pension he was receiving and the pension he should have received, if £643.64 had been included in his pensionable pay, calculated from 6 April 1997 to the date of payment. Interest shall be added to the above lump sum payments calculated from the due dates to the date payment is made.

18. The interest referred to in paragraph 17 above shall be calculated on the base rate for the time being quoted by the reference banks.

DR JULIAN FARRAND
Pensions Ombudsman

22 March 2001