

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

Applicant: Mr CFG Doyle
Scheme: The Firemen’s Pension Scheme (**the Scheme**)
Respondent: Suffolk County Council (**the Council**)

MATTERS FOR DETERMINATION

1. Mr Doyle complains that the Council failed to include in his final pensionable earnings, those sums which were paid to him in respect of “During Performance Inspections” (**DPI**) undertaken by him, from which sums pension contributions were deducted by the Council.
2. Some of the issues before me might be seen as complaints of maladministration while others can be seen as disputes of fact or law and indeed, some may be both. I have jurisdiction over either type of issue and it is not usually necessary to distinguish between them. This determination should therefore be taken to be the resolution of any disputes of fact or law and/or (where appropriate) a finding as to whether there had been maladministration and if so whether injustice has been caused.

MATERIAL FACTS

3. The Scheme is a statutory pension scheme the rules of which are contained in The Firemen’s Pension Scheme Order 1992 (**the Order**) made by the Secretary of State in the exercise of powers conferred upon him by section 26 of the Fire Services Act 1947 and section 8 of the Fire Services Act 1959. The relevant provisions of the Order are set out in the Appendix to this determination.
4. Prior to his retirement with effect from February 2003, Mr Doyle was employed by the Council as a firefighter. However, commencing in March 1997, Mr Doyle undertook additional work in agreeing to carry out a certain number of DPIs per

annum, for which he was paid an additional annual allowance in twelve monthly instalments with his monthly salary (his **DPI pay**).

5. The DPIs were carried out pursuant to a separate contract which, in each case, included a clause 9 as follows:

“You will be “on duty” for insurance and pension purposes whilst undertaking these duties.”

6. Pension contributions were deducted from Mr Doyle’s DPI pay at the normal rate.
7. In November 1999, Mr Doyle was provided with a pension projection by the Council that included his DPI pay within his pensionable pay. At some other time prior to his retirement Mr Doyle says that he was informed by a Council employee, that the DPI pay “would count towards” his pension.
8. On 8 January 2002, Mr Doyle sent an e-mail to the same Council employee headed ‘Firefighters Pension’, in which Mr Doyle said among other things:

“The illustrations you did for me before, included the honorium[sic] which does not count for pension (shame!). Will you exclude that from the calculation.”

9. The only copy of that e-mail that I have seen includes a handwritten annotation by someone at the Council that reads:

“But he is paying conts on it!!”

I understand “conts” to be an abbreviation for “contributions”.

10. Following the e-mail of 8 January 2002, on 24 January 2002, Mr Doyle received a further projection of his pension, which did not include the DPI pay within his pensionable pay.
11. Subsequent to his retirement in February 2003, Mr Doyle complained, in April 2003, to the Council and pursued his complaint through the internal dispute resolution process operated by the Council.

SUMMARY OF SUBMISSIONS

12. Mr Doyle submits that:
 - 12.1. Pension contributions were paid on all DPI pay and the payments of DPI pay were made on the same payroll as the rest of his pay;
 - 12.2. The DPIs were carried out in uniform and when Mr Doyle was on duty;
 - 12.3. He believed, both from the terms of clause 9 of the DPI contracts and what he was told by Council employees, that his DPI pay would be pensionable;
 - 12.4. The e-mail of 8 January 2002 does not indicate that he believed the DPI pay not to be pensionable, but was meant “tongue in cheek” and in recognition that he and the Council were in disagreement over the issue of whether DPI pay was pensionable;
 - 12.5. If the Council has made a mistake, they should bear responsibility for it and pay him a pension on his DPI pay nonetheless.

13. The Council submits that:
 - 13.1. The scope of Mr Doyle’s pension is defined by the Order;
 - 13.2. Rule G1 of the Order defines pensionable pay as pay determined in relation to a firefighter’s rank. This precludes from forming part of pensionable pay any additional payments that are not determined by a firefighter’s rank;
 - 13.3. The DPIs were carried out pursuant to separate contracts from Mr Doyle’s normal contract of employment;
 - 13.4. The pay received by Mr Doyle in respect of the DPIs was not determined by his rank;
 - 13.5. The words ““on duty” for ... pension purposes” in the contracts relating to the DPI were intended to bring the DPI work within the scope of the death and injury benefit provisions of the Scheme in the event that a firefighter was killed or injured in the course of DPI work, not to make the DPI pay pensionable per se;

- 13.6. Therefore, the DPI pay does not form part of Mr Doyle's pensionable pay within the meaning of the Order and the Council cannot be required to pay him a pension based upon inclusion of that pay;
- 13.7. The sums deducted from the DPI pay in respect of pension contributions were deducted in error. The contributions amounted to £930.13 and a full refund of this amount was made to Mr Doyle on 25 April 2003, so he has suffered no loss.

DISPUTED FACTS

14. There is a dispute between the parties as to whether Mr Doyle believed his DPI pay was pensionable.
15. Mr Doyle has said that he believed that DPI pay was pensionable and that this belief was based upon clause 9 of the DPI contracts and what was said to him by the Council employee. The Council has said that the e-mail of 8 January 2002 indicates that Mr Doyle knew all along that DPI pay was not pensionable.
16. In my view, the evidence suggests that, for a period of time prior to January 2002, it was more likely than not that Mr Doyle did believe that the DPI pay was pensionable. I accept Mr Doyle's evidence that this belief was based upon clause 9 of the DPI contract, the fact that pension contributions were deducted from DPI payments, and what Mr Doyle was told by the Council employee. Albeit with some hesitation, I also accept Mr Doyle's explanation of the intention behind the 8 January 2002 e-mail.

CONCLUSIONS

17. The pension payable to Mr Doyle, pursuant to the Order, is determined by the terms of the Order. Pursuant to G1(1) of the Order, the pay received by Mr Doyle which is pensionable is that pay which "is his pay as determined...in relation to his rank". I accept that this definition excludes from being pensionable such pay as Mr Doyle received that was not "determined in relation to his rank". The Council's contention that Mr Doyle's DPI pay was not determined in relation to his rank has not been challenged by Mr Doyle. I agree that Mr Doyle's DPI pay was not "determined in

relation to his rank” and so is not strictly pensionable within the meaning of the Order.

18. However, the matter does not end there. I have also to consider whether the Council is contractually obliged nonetheless, to pay to Mr Doyle a pension calculated to include his DPI pay. For such an obligation to arise, it would be necessary to find a contractually binding promise to this effect contained within the contracts pursuant to which Mr Doyle carried out the DPIs.
19. Clause 9 of those contracts is open to interpretation. I accept that, viewing the written contracts in isolation, it is not immediately obvious whether the clause has any bearing on whether DPI pay is pensionable or not. However, a contract must be interpreted in context, and this includes the provisions of the Scheme as contained in the Order.
20. When considered in the light of the Order as a whole, the meaning of clause 9 becomes clearer. In the Order the distinction between being “on duty” and not “on duty” is crucial, not for the purposes of determining whether pay is pensionable (which turns upon whether the pay is determined in relation to a firefighter’s rank), but for determining whether a firefighter will be entitled to an injury award or his dependents will be entitled to an award on his death in the event of an accident.
21. Both an “injury award” and a “special pension” and “special gratuity” awarded on death under the Order, are dependent upon the firefighter in question suffering a “qualifying injury” within the meaning of Rule A9 of the Order. That Rule defines a “qualifying injury” as “an injury received by a person without his own default in the execution of his duties as a regular firefighter”. Viewed in the light of these provisions in the Order, the reference to being “on duty” in clause 9 is a reference to being “on duty” for the purpose of Rule A9 of the Order. Therefore, I accept that the meaning of clause 9 of the DPI contracts is to ensure that an injury sustained by a firefighter in the course of carrying out DPI work, was capable of being a “qualifying injury” for the purposes of injury and death benefits under the Scheme. In other words, what Mr Doyle was promised in the DPI contracts, was not that his DPI pay would be pensionable, but that, in the event of his suffering a “qualifying injury”

whilst carrying out the DPIs, he or his relatives would obtain certain additional benefits under the Scheme.

22. Nor do I conclude that what the Council employee said to Mr Doyle was sufficient to amount to a contractual promise that his DPI pay would be pensionable. Such a conclusion would require that what was said to Mr Doyle, together with his response, put in its context, reflected all of the attributes necessary to form a legally binding agreement. However, I do not know precisely what the Council employee said, nor do I know when, where or in what context it was said. The evidence available therefore falls well short of enabling me to conclude that anything here amounts to a legally binding agreement.
23. The deduction of pension contributions from Mr Doyle's DPI pay was wrong and constitutes maladministration on the part of the Council. However, the Council has repaid to Mr Doyle the entirety of the contributions wrongly deducted from his pay. In consequence I find that Mr Doyle has suffered no loss as a result of the Council's maladministration and I make no award in relation to that.

CHARLIE GORDON
Deputy Pensions Ombudsman

8 March 2006

The Firemen's Pension Scheme Order 1992 - extracts

A9 Qualifying Injury

(1) Except in rule J4 *, references in this Scheme to a qualifying injury are references to an injury received by a person without his own default in the execution of his duties as a regular firefighter.

* Rule J4 extends the qualifying injury award to part time firefighters and treats them as regular firefighters for the purposes of rule B4.

Ordinary pension

B1.—(1) Subject to paragraph (2), this rule applies to a regular firefighter who retires if he then—

- (a) has attained the age of 50, and
- (b) is entitled to reckon at least 25 years' pensionable service, and
- (c) does not become entitled to an ill-health award under rule B3.

...

(3) A person to whom this rule applies becomes entitled on retiring to an ordinary pension calculated in accordance with Part I of Schedule 2.

...

Pensionable pay and average pensionable pay

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.

(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 applies his pay shall be taken not to include any excess, in any

Appendix

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 (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, subject to paragraphs (5) to (7), the aggregate of his pensionable pay during the year ending with the relevant date. rules G1 etc.