

Ombudsman's Determination

Applicant	Mr N
Scheme	Firefighters' Pension Scheme (the Scheme)
Respondents	West Yorkshire Fire & Rescue Authority (the Authority)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by the Authority.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N disagrees with the Authority's decision that his temporary promotion between April 2013 and March 2014 is not pensionable.

Background information, including submissions from the parties

4. Mr N joined the 1992 section of the Scheme in 1986. He retired on 30 March 2016.
5. The relevant rule ¹in relation to pensionable pay when Mr N joined the Scheme stated:

"Subject to paragraph (2) the pensionable pay of a regular firefighter is his pay as determined –

(a) In relation to his rank²; ..."

6. The definition of pensionable pay was amended by the Firemen's Pension Scheme (Amendment) (England) Order 2005 (and again in 2008) to:

"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

¹ Part G: Pensionable Pay and Contributions, Rule G1(1) of the Firefighters' Pension Scheme Order 1992

² This was later amended to "role"

(b) The amount (if any) paid to him in respect of his continual professional development.”

7. In 2009, the Authority made the decision that temporary promotions were not pensionable. The Authority says this decision was based on guidance available at the time.

8. In December of the same year, the Department for Communities and Local Government issued a circular in relation to the 1992 and 2006 sections of the Scheme and pensionable pay. The circular states:

“Clearly, allowances or emoluments that are paid in addition to a firefighters’ basic pay for the role and are temporary in nature, i.e. are specifically time limited; do not normally feature in pay; are subject to review and withdrawal, **should not be pensionable.**”

9. The circular raised concerns about the costs to the Scheme of various authorities treating temporary promotions and emoluments as pensionable, in particular:

“Because the FPS and NFPS are unfunded schemes, pension costs have to be met from a pension account maintained by each FRA into which all employee and employer contributions are paid with any deficit covered by a “top-up” grant drawn from the total Central government funding of the Fire and Rescue Service. Any additional net pension costs, i.e. those that cannot be covered by employee and/or employer contributions, might not immediately feed through into the “top-up” grant required (i.e. the cash deficit), but does nevertheless represent an additional threat to the long term affordability and sustainability of both the 1992 and 2006 Schemes.”

10. As a result of this circular and a further consultation, The Firefighter’s Pension Scheme (Amendment) (No.2) (England) Order 2013 (**SI 1392**) was introduced in July 2013. Pensionable pay under Rule G1 was amended to include reference to a new rule, Rule B5C:

“Additional pension benefit

B5C – (1) Where a fire and rescue authority determines that the benefits listed in paragraph (1) are pensionable, and in any additional pension benefit year pays any such pensionable benefits to a regular firefighter, the authority shall credit the firefighter with an amount of additional pension benefit in respect of that year.

...

(5) The benefits referred to in paragraph (1) are –

(a) any allowance or supplement to reward additional skills and responsibilities that are applied and maintained outside of the requirements of the firefighter’s duties under the contract of employment but are within the wider functions of the job;

(b) the amount (if any) paid in respect of a firefighter's continual professional development;

(c) the difference between the firefighter's basic pay in their day to day role and any pay received whilst on temporary promotion or where he is temporarily required to undertake the duties of a higher role;

(d) any performance related payment which is not consolidated into his standard pay."

11. As part of the documentation Mr N has provided, he has included a "Explanatory Memorandum" which details the purpose of SI 1392:

"2. Purpose of the instrument

2.1 The Firefighters' Pension Scheme (Amendment) (No.2) (England) Order 2013 (No. 1392) amends the Firefighter's Pension Scheme 1992, ... to:

...

- Amend the definition of pensionable pay to ensure that temporary allowances are not treated as pensionable pay and to introduce new discretionary additional pension benefit arrangements for temporary allowances and emoluments;"

12. From April 2013 to May 2014, Mr N was temporarily promoted. In September 2014, the Fire Brigades Union wrote to the Authority to register a dispute regarding the decision to not treat temporary promotions as pensionable. Mr N made a complaint under the Scheme's internal dispute resolution procedure (**IDRP**) in 2015, which was not upheld under either stage.

13. The Authority took legal advice when responding to Mr N's complaint. The advice was based on High Court judgments³, in particular:

"...the decisions of Blackburne J and Andrew Smith J in the Medway Towns and Norman cases regarding the proper interpretation of the definition of pay in the 1992 Scheme as being inclusive only of payments which have a degree of permanence and obviously temporary promotions are by their very nature not permanent.

Despite the fact the Opinion and the Norman decision postdate the 2009 Management Board decision not to carry on treating temporary promotions as pensionable we are entitled to take the view that the decision in 2009 was legally justifiable given that the 2011 Norman decision merely asserts what the law was and of course the Medway decision was made in 2001."

³ Norman v Cheshire Fire & Rescue Service
Matthews (and others) v Kent and Medway Towns and Fire Authority and others

14. In other words, the Authority decided in 2009 that the rules of the Scheme did not allow temporary promotions to be pensionable and their review of that position, after legal review, concluded that their decision was a proper one.
15. Mr N disagreed with the Authority's decision and complained to this office in February 2016.

Adjudicator's views

16. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Authority. The Adjudicator's findings are summarised briefly below:
 - The Authority have correctly interpreted the relevant scheme rules.
 - The Authority's argument in relation to the court cases was reasonable. Both cases considered whether payments paid outside of a firefighter's regular pay were pensionable and, in particular, that pensionable pay must have something of a permanent nature (i.e. not temporary). The Adjudicator felt that it was not unreasonable for the Authority to have sought legal advice and to have relied on that advice to refuse Mr N's claim.
 - The SI 1392 is, essentially, a red herring. The decision not to make temporary promotions pensionable was made in 2009 on the basis of the interpretation of the scheme rules. While SI 1392 does provide the Authority with a discretion to make such temporary promotions pensionable, again, the decision was based on the interpretation of the relevant scheme rules in 2009.
17. Mr N did not agree with the Adjudicator's views in relation to his complaint and has submitted:

"I feel you do not understand my arguments regarding my complaint.

Firstly, I was never informed that the temporary role wasn't pensionable when I started it and I feel penalized by a decision made prior to July 1st 2013 when the statutory instrument came into force.

I am receiving less pension now in comparison to other employees in the Fire Service who carried out temporary roles, we are all employed by a public sector organisation and there is no quality or fairness in this."
18. As Mr N did not accept the Adjudicator's views, the complaint was passed to me to consider. I agree with the Adjudicator's views, summarised above, and I will therefore only respond to the key points made by Mr N for completeness.

Ombudsman's decision

19. Mr N has raised two issues in his latest response, namely that he was not aware that his temporary promotion was not pensionable at the time he took on the role and that he is being treated differently from other employees.
20. As the Adjudicator has mentioned to Mr N and his union representative previously, this office can only investigate his membership of the Scheme and the Authority. How other Fire and Rescue Services interpreted the scheme rules or have chosen to exercise additional discretions since 2013 is not relevant to his claim. I note his comment that all firefighters are employed by the public sector, but that it not how the Scheme works. Each employer (i.e. the Authority) is required to administer the Scheme by receiving contributions and transfer values from other schemes and paying out benefits and transfers to other schemes. In undertaking its administrative duties, the Authority is required to interpret the scheme rules and to take account of its ability to fund benefits to all employees, at retirement. It does not have to take account of what other employers have chosen to do, or what they may or may not be able to afford to fund.
21. I agree that the Authority was entitled to treat temporary promotion as non-pensionable under the relevant scheme rules and there is no evidence to show that Mr N is being treated differently from other employees of the Authority in a similar position.
22. It is not clear what difference it would have made to Mr N's position if he had known in 2013 when he took up the temporary promotion that it would not be pensionable. There is no suggestion that he was ever positively misled about the Authority's position on treatment of temporary promotions and he has not sought to argue that, had he known the correct position, he would have refused the temporary promotion. It would in any event be difficult to argue this position with benefit of hindsight because a temporary promotion has other attractions and benefits including additional pay.
23. I can see no basis on which to criticise the Authority's decision. Therefore, I do not uphold Mr N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
11 January 2017