

Ombudsman's Determination

Applicant	Mr W, Mr H, Mr S and Mr E (Mr W et al)
Scheme	The Firefighters' Pension Scheme 1992 (the 1992 Scheme); The New Firefighters' Pension Scheme (Wales) (the 2007 Scheme); and The Firefighters' Pension Scheme (Wales) 2015 (the 2015 Scheme)
Respondent	Mid and West Wales Fire Rescue Authority (the Authority)

Complaint Summary

1. Mr W et al complain that the Authority is not treating certain elements of their pay as pensionable. They believe this is contrary to the 1992, 2007, and 2015, Scheme rules.
2. The relevant rules are set out in The Firemen's Pension Scheme Order 1992 (as amended) (**the 1992 Regulations**), The Firefighters' Pension Scheme (Wales) Order 2007 (**the 2007 Order**), and The Firefighters' Pension Scheme (Wales) Regulations 2015 (**the 2015 Regulations**), respectively (see the Appendix).
3. The pay elements in dispute are Training allowance, Day crewing allowance, Self-rostered crewing (**SRC**) allowance and Urban Search and Rescue (**USAR**) allowance.

Summary of the Ombudsman's Determination and reasons

4. The complaint is partly upheld against the Authority because it has wrongly interpreted the Scheme rules and relevant case law in relation to some of the pay elements in dispute. In particular, Mr W's Training allowance and Mr E's USAR allowance payments should be considered pensionable pay.
5. I do not uphold Mr H's complaint, as the Authority is treating his Day Crewing allowance as pensionable and, in any event, I find it is not required to do so under the relevant Regulations and case law.

6. I do not uphold Mr S' complaint, as the Authority is treating part of his SRC allowance as pensionable, and I find that it is not required to treat any of the SRC allowance as pensionable under the relevant Regulations and case law.

Detailed Determination

Material facts

7. Mr W has now retired but he received Training allowance and accrued benefits under the 1992 Scheme. The allowance is paid when a firefighter is providing training. The Authority has said that firefighters typically do this for 2-3 years as part of career development; however, they can potentially carry out the role up until retirement. Mr W himself carried out training school duties as a Direct Trainer up until retirement. In particular, on 13 June 2012, the Authority confirmed in writing that his position was permanent. Its letter confirmed that he was contracted to provide 42 hours per week of day duties, and he would receive a 12% supplement to his income for the role. The 12% supplement was paid in recognition of Mr W being required to work evenings and weekends as part of the role.
8. Mr H receives Day crewing allowance and has accrued benefits under the 2007 and 2015 Schemes. Day crewing allowance is paid to firefighters working the Day crewing duty system. Under this duty system, firefighters are required to provide 35 hours per week of positive cover, and a further 7 hours per week of standby cover. The allowance is paid as a 7.5% supplement of the firefighter's basic pay.
9. Mr S receives SRC allowance and has accrued benefits under the 2007 and 2015 Schemes. SRC allowance is paid to firefighters working the SRC duty system. Under this duty system, firefighters are required to work 182 positive 12-hour shifts per year, or an average of 42 hours a week. SRC firefighters usually work a 12-hour day shift, from 10am to 10pm. In addition, they are required to provide on-call cover for a further 12 hours immediately following the day shift. Mr S has confirmed his SRC allowance is paid as a supplement equivalent to 25% of his basic pay in recognition of the contractual standby duties, and he receives it every time he is paid.
10. Mr E receives USAR allowance and has accrued benefits under all three Schemes. However, he only began USAR work in 2009 and so he believes he should have accrued benefits as a result of his USAR allowance under the 2007 and 2015 Schemes. USAR work is carried out under a secondary contract, which is separate to his primary firefighter's contract. It is also funded separately by the Welsh government. USAR contracts are generally for a fixed term of one year and renewed annually, providing that funding continues to be in place. A USAR firefighter carries out his USAR duties for an agreed remuneration in addition to his duties under his primary firefighter contract.
11. The parties to the complaint have cited case law to support their respective positions. In particular, they reference several relevant case law authorities which have

considered the meaning of “pensionable pay” in relation to firefighter pension schemes.

12. Of particular interest in this instance are *Kent & Medway Towns Fire Authority v Farrand* [2001] OPLR 357 (**Kent & Medway**) and *Norman v Cheshire Fire & Rescue Service* [2011] EWHC 3305 (QB) (**Norman**). Both of these cases considered the meaning of pensionable pay under the 1992 Scheme and Regulations. However, the judgments also give some guidance as to the interpretation of the 2007 Order and 2015 Regulations.
13. In *Kent & Medway*, Blackburne J identified three indicia of pensionable pay at paras 35, 36 and 39. These can broadly be summarised as:-
 1. The pay must be calculated in accordance with the firefighter’s ordinary rate of pay;
 2. The pay must be for work done under the contract of employment (a payment in lieu of leave not taken was not considered pensionable pay); and
 3. The pay must be regular in nature.
14. In relation to this last criterion, Blackburne J said regular pay is pay which is in contrast to “payments of a one-off nature, however calculated, which happen to arise or become payable in the course of, or as a result of some unexpected or extraordinary event occurring in, the firefighter’s employment”. He added that “the concept of pensionable pay is not concerned to pick up payments...above what the firefighter would have received in the ordinary course of his employment”.
15. Both parties have also referred to *Norman*, in which Smith J considered the pay of a firefighter who worked under the Day crewing duty system. In particular, Mr Norman was a regular firefighter who undertook retained duties, and was a member of the 1992 Scheme. The court considered whether his retaining fee, disturbance fee, and public holiday pay were pensionable after they had been incorporated into his basic salary by means of an uplift.
16. In reaching his judgment, Smith J cited Blackburne J’s three-limbed test for pensionable pay. Smith J noted, since the elements of pay had been incorporated into Mr Norman’s basic pay by way of a salary uplift, Blackburne J’s criteria were satisfied.
17. There are also two Determinations, previously issued by our Office, which are relevant in this matter. Firstly, our Office considered a complaint (reference PO-3511) in which the above case law was applied to the 2007 Order.
18. PO-3511 was a matter initially considered by our Office, before being brought before the High Court and subsequently remitted back to our Office for reconsideration on one point concerning the annual retainer fee. When considering the matter on appeal, the High Court ruled that the then Deputy Pensions Ombudsman had not erred in law

in stating that the rent, fuel and light allowances paid to the complainant were not part of the complainant's pensionable pay. In particular, the Court agreed that these elements of pay were only payable by virtue of the firefighter's assignment to a specific duty system. As such, they were not considered permanent emoluments under the relevant Regulations, as they would not be payable if the firefighter were to be transferred to a different duty system.

19. In addition, our Office recently determined a case involving similar issues (reference PO-15584). In this case, the firefighter was a retained firefighter and the relevant Regulations were The Firefighters' Pension Scheme (England) Order 2006 (**the 2006 Order**). Whilst these Regulations are not in dispute here, the provisions regarding pensionable pay are almost identical to the corresponding provisions under the 2007 Order and 2015 Regulations.
20. The parties agreed that the pay elements in dispute were emoluments for work performed in the duty of the firefighter's role. However, the Authority in that case argued that they were not pensionable as they were temporary and not permanent emoluments.
21. The Ombudsman noted that the Regulations specifically referred to pensionable pay as being pay for work performed in the duty of the firefighter's role which is not temporary; or, alternatively, any pay that is permanent. The Ombudsman found it significant that the firefighter was contractually obliged to provide services attracting the relevant pay elements regularly. The Authority argued that the firefighter might receive more of the relevant pay in some weeks than others, as he may do more than his minimum contractual obligations. However, the Ombudsman was satisfied that it was sufficient that the pay was expected. It was not necessary for the exact level of pay to always be predictable.
22. Importantly, in PO-15584, the Ombudsman did not have to consider whether the pay elements in dispute would still be considered permanent if the firefighter could be moved to another duty system. This was because the firefighter in that case was a retained firefighter working under the retained duty system. Retained firefighters only work under the retained duty system and so he could not be moved to another duty system.

Summary of the Authority's position

23. The Authority argues that the pay elements in question here arise out of specific working arrangements and as such do not have the required element of permanency to be pensionable pay.
24. In relation to Training allowance, the Authority has confirmed that the pay would not be considered as falling under B5C(5) of the 1992 Regulations. However, it reiterated that most firefighters only provide corresponding services for 2-3 years. As such, the allowance is temporary and it is only in rare instances that it would be paid permanently.

25. The Authority has also explained that SRC and day crewing allowance are paid in respect of services provided under specific duty systems. The Authority has highlighted that it retains the right to transfer firefighters from one duty system to another, and as such the relevant allowances may only be paid temporarily.
26. Regarding all three allowances, the Authority has confirmed that they are not consolidated into the firefighter's basic salary. Instead, the supplement is based on the firefighter's basic salary but paid as a separate line item on his payslip, and only for the duration for which he is providing the relevant services.
27. The Authority has added, however, that Day Crewing allowance is treated as pensionable for members of the 2007 and 2015 Schemes. This is because Day Crewing allowance is a retaining fee payment as per Section 4 Part B Paragraph 9 Grey Book, which states:

"An employee on the day crewing duty system who undertakes retained duties shall be paid an annual retainer of 5% of his or her full-time annual basic pay together with the disturbance...payments...".
28. The Authority argues that all retaining allowances are pensionable under Part 1(b) of the 2007 Order and s26(1)(b) of the 2015 Regulations, which state that a Scheme member's permanent emoluments will be pensionable, "including, in the case of a retained firefighter, **any retaining allowance**" [bold added].
29. Following on from the above, the Authority also treats part of SRC allowance as pensionable for members of the 2007 and 2015 Schemes.
30. The Authority explains that the SRC duty system is not a duty system under the Grey Book, but it has treated 5% out of the 25% uplift as pensionable for consistency. It adds that disturbance payments are paid separately under the Day Crewing system, but that they are incorporated into the larger SRC allowance. As such, it is reasonable to say that only part of the SRC allowance, the part that represents a retaining payment, is pensionable. The remaining part of SRC allowance is not treated as pensionable.
31. In relation to USAR work, the Authority has highlighted that this arises out of a secondary contract. As such, the allowance is not pay in relation to the performance of the duties of a firefighter's role, which is an explicit requirement of pensionable pay for all the Schemes.
32. Furthermore, the Authority has said that USAR contracts are fixed-term contracts and will only be renewed if the Welsh government continues to fund USAR work. As such, the firefighter's USAR contract has a known end date and he may not continue USAR work after this.

Summary of Mr W et al's position

33. Mr W et al have confirmed that they became aware they had cause for complaint following an email from their Union in July 2016. The Union had been aware of the potential issue and had first raised it with the Authority without involvement from any Scheme members. The Union says its negotiations with the Authority began following the Norman judgment, as it highlighted that the Authority's position on pensionable pay may have been incorrect.
34. In relation to Training allowance, Mr W has argued that he received the pay in question as a supplement to his basic pay. In particular, it was calculated as a percentage of his basic pay and paid for the performance of his duties as a Direct Trainer. He has also said that he received it every time he was paid.
35. In relation to Day crewing and SRC allowance, Mr H and Mr S have highlighted that the court in Norman confirmed pay could be regarded as pay for the performance of a firefighter's duties, even if the pay element was specific to a particular duty system. In particular, at para 64 of the Norman judgment, Smith J said: "it might be that the payments are made in relation to the duty system but it is a false dichotomy to infer that therefore they are not made in relation to the performance of the duties of the role".
36. Furthermore, Mr H and Mr S argue that the pay elements in Norman were regarded as pensionable, as they had been paid as an uplift to Mr Norman's salary. They highlight that Day Crewing and SRC allowance are similarly paid as uplifts to their salaries, as they are supplements calculated as a percentage of their basic salary; they believe Norman ought to be followed in this case.
37. Mr H and Mr S note the ruling for PO-3511 (as summarised in paragraph 18 above) but say that it ought not to be followed, as it cannot be reconciled with Norman. They emphasise that the ratio of Norman is that a pay element becomes pensionable if it is paid via an uplift and therefore satisfies Blackburne J's indicia of pensionable pay. They argue that Norman found, at para 83, that the 2006 Order (and thereby the 2007 Order and 2015 Regulations) did not intend to change the definition of pensionable pay as set out in the 1992 Regulations.
38. Mr H and Mr S go on to argue that Mr Norman's additional pay elements would have been considered pensionable, even if they were not paid by way of an uplift to his salary. They highlight that Smith J said, at para 73, that the flexible duty system allowance was pensionable, for example.
39. In any event, Mr H and Mr S say that the Authority has not acted consistently in treating their allowance as pensionable in some instances and not others. Mr H has confirmed that his Day Crewing allowance is 7.5%, not 5%, of his basic pay; and all of this is treated as pensionable but it is not treated as pensionable for 1992 Scheme members. Mr S highlights that the way the Authority has split the SRC allowance into different types of payments is arbitrary and not supported by his SRC contract. Mr S

argues that the SRC allowance has all the characteristics of a retainer payment, and so should be considered as one in this respect.

40. Mr H and Mr S add that PO-3511 is inconsistent with Rule B5A of the 1992 Regulations and Part 3 Rule 7 of the 2007 Order (see Appendix), as these provisions refer to a Scheme member being subject to a reduction in pensionable pay as a result of being moved within an existing role. Mr H and Mr S have said that these provisions would not make sense if the Authority's arguments are correct, as an allowance could not be pensionable pay in the first place if it could be lost by a Scheme member being moved within their existing role.
41. Finally, Mr H and Mr S highlight that PO-3511 is inconsistent with Part 2 Rule 3 of The Firefighters' Compensation Scheme (Wales) Order 2007, which states that compensation payments will be the equivalent of five years' of "pensionable pay". They argue that the provision does not indicate this will differ depending on which scheme the firefighter is a member of, indicating that the definition of pensionable pay was not changed under the 2007 and 2015 Scheme rules.
42. In relation to USAR allowance, Mr E has argued that he receives the pay for the performance of his duties. He does not believe it is relevant that these duties are under a secondary contract. He adds that, although his contract is on a fixed term basis, he does not believe the draftsman would wish to discriminate between permanent and fixed-term workers; this should not render the pay non-pensionable.
43. Where there is a dispute regarding permanency, Mr W et al have argued that all the allowances may be paid up until retirement. They all have an unspecified end date and the fact they are not guaranteed to be paid until retirement is insufficient to refer to them as temporary. They add that it would be impractical to wait until the end of a firefighter's career to see which allowances had been 'permanent' after all, as there would be contribution arrears and potentially breaches of auto-enrolment. The allowances should be considered permanent, and not temporary, simply because there is an intent they will continue to be paid and no specified date at which they will cease.

Conclusions

44. There have been a significant number of issues and arguments raised by the parties to the complaint. Also, it is important to note that there are different schemes and rules which have different definitions of pensionable pay. I have considered each firefighter's circumstances and benefits under separate headings below.

Mr W's case

45. Mr W has benefits under the 1992 Scheme. His pay must therefore come within the relevant definition in the 1992 Regulations in order to be pensionable. Mr W needs to show that his Training Allowance was pay for the performance of the duties of his role and did not fall under one of the benefits specified in rule B5C(5).

46. In addition, Blackburne J's three indicia of pensionable pay from Kent & Medway provide assistance in establishing whether Mr W's Training Allowance ought to be considered pensionable.
47. Having considered all of the information provided to me and also the judgment in Kent & Medway, I am satisfied that Mr W's Training allowance is pensionable. It was paid to him for the performance of the duties of his role as a Direct Trainer, which formed part of his overall contractual duties. The allowance also did not fall under any of the benefits specified in rule B5C(5), as confirmed by the Authority.
48. In addition, the pay was a percentage of his basic pay, and so it was calculated in accordance with his ordinary rate of pay. Lastly, the pay was regular. He received it every time he was paid, it was expected, and it was not one-off, exceptional or extraordinary.
49. For completeness, I believe Mr W's Training allowance would have been pensionable regardless of whether his role was made officially permanent or not. He was not a member of the 2007 and 2015 Schemes, and so I do not need to consider whether the Training Allowance was permanent in a strict sense of the word; only whether it was regular and had an element of permanency. The difference between an allowance being permanent and having an element of permanency is something I will discuss further below in relation to Mr H's and Mr S' cases.

Mr H's case

50. Mr H only has benefits under the 2007 and 2015 Schemes. I consider that the 2007 Order and 2015 Regulations are more restrictive than the 1992 Regulations, as they specifically refer to pensionable pay as being pay which is permanent and not temporary.
51. I agree that Mr H's Day Crewing allowance is paid as an uplift to his salary, in a similar way to how Mr Norman's relevant pay elements were paid as an uplift to his salary. In both cases, the pay element is calculated as a percentage of the firefighter's basic pay, rather than a fixed fee. It is unclear whether Mr Norman's pay elements were listed as separate line items on his payslip, but I cannot see that it would matter.
52. I note Mr H also argues that Smith J said, in Norman, pensionable pay can be pay for the performance of a firefighter's duties even if it is specific to a duty system. Overall, I agree that the Day Crewing allowance is pay for the performance of Mr H's duties.
53. However, whilst this satisfies part of the relevant Regulations' definition of pensionable pay, it is not completely satisfied. Whilst Smith J may have confirmed duty-specific pay could still be pay for the performance of a firefighter's duties, he did not go on to add that it could also be considered permanent and not temporary.
54. When considering PO-3511, the High Court endorsed the previous Ombudsman's approach in considering whether duty-specific pay elements can be permanent (see

paragraph 18 above). This case related to different Regulations, but the relevant wording is the same. I do not see that I can distinguish Mr H's case from PO-3511.

55. I acknowledge that Mr H has argued that PO-3511 cannot be reconciled with Norman. However, the court in Norman was primarily considering the 1992 Scheme rules. In PO-3511, and in this case, different rules are being considered.
56. The 2007 Order and 2015 Regulations (as with the 2006 Order), explicitly include the words "not temporary" and "permanent". The 1992 Regulations did not, and the case law on the 1992 Regulations refers to an *element* of permanency being a requirement of pensionable pay. In particular, this is the language used by Blackburne J in Kent & Medway, and his approach was endorsed by Smith J in Norman.
57. I believe there is a difference between saying something must have an element of permanency and saying something must be permanent. As such, there is a crucial difference between the 1992 Regulations and the later Regulations, which allows me to reconcile Norman with PO-3511. The High Court endorsed the approach in PO-3511.
58. Mr H has argued that Smith J, at para 83 of Norman, indicated the relevant wording in all the Regulations is not materially different. He highlights that Smith J said the words "not temporary" and "permanent" are only included in the later Regulations as a way of stating that a retained firefighter's retainer fee is pensionable. Mr S says that the definition for pensionable pay under the 2007 Order and 2015 Regulations should therefore not be seen as delineating from the definition for pensionable pay under the 1992 Regulations.
59. Smith J says (at para 83 that:

"It is, to my mind, readily understandable that the rules of the NFPS, under which retained firefighters were for the first time given pensionable rights, should deal specifically with what part of their pay was pensionable and should do this by drawing an express distinction between temporary emoluments and a permanent emolument. Even so, it was not considered necessary to state specifically that the retainer fee of regular firefighters undertaking a retained element should be pensionable under the NFPS. I cannot find in the definition of pensionable pay in the rules of the NFPS any telling indication whether retainer fees were pensionable pay under the rules of the FPS".
60. When reviewing para 83 of the judgment in Norman, I believe Smith J is primarily rejecting counsel for the Authority's argument that retainer fees were not pensionable under the 1992 Regulations on the basis that they were only referred to as pensionable later, under the 2006 Order. Overall, I believe Smith J is saying that is not necessarily the case, as it is understandable why the draftsman would explicitly include the terms "temporary" and "permanent emoluments" in the 2006 Order, without it meaning that those terms were not relevant to the 1992 Scheme.

61. I find that Smith J's comments are not conclusive of whether the 2006 Order (and thereby the 2007 Order and 2015 Regulations), amended the definition of pensionable pay from the 1992 Regulations. In light of PO-3511, I therefore find that the definition of pensionable was amended for the later Schemes.
62. I appreciate the amendment is subtle, given that the case law on the 1992 Regulations referred to 'permanency', and I note that Smith J was not satisfied there was a change in the definition of pensionable pay. However, turning that point on its head, Smith J was also not satisfied there *was not* a change in the definition of pensionable pay. These nuanced factors mean that PO-3511 can be reconciled with Norman.
63. I have considered Mr S' comments that Smith J confirmed the flexible duty system allowance was pensionable. In short, I do not agree he did this. Instead, he commented that the flexible duty system allowance was "generally considered" to be pensionable. He did not confirm this was actually the case and noted in passing that, whilst the Grey Book also stated the flexible duty system allowance was pensionable, the Grey Book cannot be relied on as a conclusive resource for confirmation of what pay elements are pensionable. Instead, Smith J confirmed that only a proper interpretation of the Regulations can conclusively state what is pensionable.
64. Lastly, I have noted Mr H's and Mr S' argument regarding whether these findings are consistent with other provisions within the corresponding legislation. In relation to references concerning Rule B5A of the 1992 Regulations and Part 3 Rule 7 of the 2007 Order, the Authority has explained that some roles have different weightings within the same "rolemap"; for example, because the job size will change depending on location. I believe the provisions can be reconciled with Smith, because these roles do not attract specific allowances that are gained and lost as the member is moved around. Instead, it is the same type of pay itself which simply varies according to the appropriate weighting. The provisions can be applicable to some scenarios, even where PO-3511 is followed.
65. In relation to their reference to Part 2 Rule 3 of The Firefighters' Compensation Scheme (Wales) Order 2007, I note that the provision assumes "pensionable pay" is known, and provides for compensation to be calculated based on that assumption. In this case, I am considering whether an allowance ought to be included in the pensionable pay taken into account by the Compensation Scheme.
66. Therefore, I do not find that Day Crewing allowance is pensionable under the 2007 Order or the 2015 Regulations.
67. Notwithstanding my findings, I note that the Authority is currently treating Day Crewing allowance as pensionable for members of the 2007 and 2015 Schemes, on the basis that the corresponding 2007 Order and 2015 Regulations state all retaining allowances are pensionable. I do not agree that this is what the legislation requires. I agree that the 2007 Order and 2015 Regulations refer to a retaining allowance as

being pensionable, but this is with specific reference to a retained firefighter's retaining allowance. I am not satisfied that the draftsman meant for the example given to be extended to all retaining allowances, not least because it would have been easy for the draftsman to have simply stated that.

68. However, if the Authority has agreed to treat Day Crewing allowance as pensionable for 2007 and 2015 Scheme members, then that is a matter for the Authority and so I will not make any further comment.
69. The Authority does not treat Day Crewing allowance as pensionable for members of the 1992 Scheme but this does not affect the position for Mr H, so I have not determined that particular point. However, I hope my comments may provide some useful guidance on the matter.

Mr S' case

70. Mr S has benefits under the 2007 and 2015 Scheme. I do not find that SRC allowance is pensionable for members of the 2007 and 2015 Schemes. This is for the same reasons that I have given in relation to Day Crewing allowance. I have not addressed the position of the 1992 Scheme members as the 1992 Regulations do not apply in Mr S' case..
71. I note that the Authority has agreed to treat part of Mr S' SRC allowance as pensionable. Whilst I find that it is not obliged to do so under the 2007 Order or 2015 Regulations, treating the allowance as pensionable is a matter for them.

Mr E's case

72. Mr E began USAR work in 2009, any benefits he accrued in relation to it accrued under the 2007 and 2015 Schemes. The relevant Regulations are the same as for Mr H and Mr S. In particular, the USAR allowance must be permanent in the strict sense of the word rather than simply regular.
73. The Authority has argued that the USAR allowance is not pay for the performance of the duties of Mr E's role. I disagree. The 2007 and 2015 Regulations do not specify that pensionable pay can only be pay which arises from a firefighter's primary contract of employment. Mr E has an entirely separate contract for his USAR work, and he has firefighter duties that arise from that contract for which he is paid. In short, I believe the USAR allowance is paid for the performance of the duties of Mr E's role.
74. Notably, Mr E does not work under a specific duty system as part of his USAR contract. He, therefore, does not work under a system from which he can be transferred, and he will not lose his USAR allowance unless he ceases the role altogether. So, I believe his USAR allowance is as permanent as it is possible to be. For example, it is permanent in the same way that a firefighter's basic salary is permanent, and it is therefore pensionable.

75. The Authority has emphasised the USAR work is carried out under fixed term contracts. However, from reviewing Mr E's contract, I do not find that there is an intention for the contract to end. Instead, the contract indicates that the firefighter's role will be renewed providing there is sufficient funding. For example, it provides the renewal date of his contract and says it is "subject to continued funding". The letter dated 28 August 2009, which was sent to Mr E with his contract, similarly states "this contract...will be renewed annually in line with the agreed duration of funding".
76. In addition, part m of the contract, entitled, 'Termination of Contract', outlines a notice period once Mr E has worked 12 years or more. This provision would not be necessary, if Mr E's contract was intended to be temporary.
77. It is true to say that a USAR firefighter might not continue the role indefinitely, or that he may have to cease USAR work due to a lack of funding. However, if that were to render the pay as temporary then even a firefighter's basic salary under his primary contract of work would not be pensionable. The Oxford dictionary defines "permanent" as "lasting or intended to last or remain unchanged indefinitely". In turn 'indefinitely' is defined as "for an unlimited or unspecified period of time". I find that Mr E's USAR position meets these definitions.
78. I therefore find that USAR allowance is to be considered as pensionable pay under the 2007 Order and 2015 Regulations.

Closing observations

79. I note that this Determination may have repercussions for other firefighters. However, this is not a class action case; only Mr W et al have complained to me, and I have considered the relevant arguments and authorities specifically in relation to their circumstances. I do not have the power to bind others who are not joined in this complaint. Nevertheless, any members in a similar position should liaise with the Authority.

Directions

80. The Authority shall treat Training allowance and USAR allowance as pensionable pay for the purposes of calculating Mr W's and Mr E's pensions respectively. Within the next 28 days, the Authority shall:-
 - Calculate the contribution arrears owed by Mr W and Mr E, and the arrears in relation to the Authority's contributions;
 - Offer Mr W and Mr E an opportunity to: either pay the arrears as a lump sum; or pay their arrears through a repayment plan over a reasonable period of time. The Authority should mirror their actions. That is, if Mr W and Mr E pay their contribution as a lump sum, the Authority will do so too. However, if they pay by instalments, then the Authority will be able to do the same should they wish to do so; and

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- Pay Mr W pension benefit arrears which have accrued since he retired, on the basis that his Training Allowance ought to have been included in his pensionable pay. The Authority shall pay the pension benefits arrears with simple interest, calculated using the base rate for the time being quoted by the reference banks.

Anthony Arter

Pensions Ombudsman
2 October 2018

Appendix

Relevant provisions from The Firemen's Pension Scheme Order 1992 (as amended)

Rule B5A

(1) A regular firefighter who—

(a) on taking up a different role; or

(b) becoming entitled to a different rate of pay in his existing role,

suffers a reduction in the amount of his pensionable pay such that the amount to be taken into account in the calculation of the pension to which he will be entitled at normal pension age is less than it would otherwise have been, is entitled to two pensions.

Rule 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.

(2) Subject to paragraph (3), the amount of additional pension benefit in respect of that year shall be determined on 1st July immediately following the year in question in accordance with guidance and tables provided by the Scheme Actuary.

(3) The amount of additional pension benefit determined in accordance with paragraph (2) shall be increased on the first Monday of the following relevant tax year by the same amount as any increase which would have applied if that additional pension benefit were a pension to which the Pensions (Increase) Act 1971 applied and the beginning date for that pension were the 1st July of the tax year immediately before the relevant tax year.

(4) For the avoidance of doubt, the increase of additional pension benefit in the tax year 2010/2011 shall be increased by the same percentage as the percentage increase in the Consumer Prices Index in September 2010 with effect from Monday 11th April 2011.

(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 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.

Rule G1:-

(1) Subject to paragraphs (2), (9) and (10), 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) other than those amounts payable to him in respect of the benefits within rule B5C(5); and

(b) the amount (if any) of any benefits which are pensionable under rule B5C(1).

Relevant provisions from The Firefighters' Pension Scheme (Wales) Order 2007

Schedule 1, Part 3 - Entitlement to two pensions

7.-(1) Subject to paragraphs (6) and (9), a firefighter member who—

(a) satisfies an eligibility condition; and

(b) on taking up a different role within the authority or becoming entitled to a different rate of pay in the member's existing role, suffers a reduction in the amount of pensionable pay such that the amount to be taken into account in the calculation of the pension to which the member will be entitled at normal retirement age is less than it would otherwise have been,

is entitled to two pensions.

Schedule 1, Part 11:

1.—(1) Subject to paragraph (3) and rule 3(3), the pensionable pay of a firefighter member is the aggregate of—

(a) the firefighter member's pay in relation to the performance of the duties of the firefighter member's role, other than any allowance or emoluments that are paid to the firefighter member on a temporary basis, and

(b) the firefighter member's permanent emoluments (including, in the case of a retained firefighter, any retaining allowance).

Relevant provisions from The Firefighters' Pension Scheme (Wales) Regulations 2015

26.—(1) For the purpose of calculating a member's pension or other benefits under this scheme, the member's pensionable pay is—

(a) the member's pay received for the performance of the duties of the member's role except any allowance or emoluments paid to that member on a temporary basis;

(b) the member's permanent emoluments (including, in the case of a retained firefighter, any retaining allowance);