

Ombudsman's Determination

Applicant	Mr L
Scheme	Fire Fighters Pension Scheme 1992 (the Scheme)
Respondent	Leicestershire Fire and Rescue Service (LFRS)

Outcome

1. I do not uphold Mr L's complaint and no further action is required by LFRS.

Complaint summary

2. Mr L has complained that when LFRS calculated his pensionable salary, pay increases he received in the final two years of service were not included. This occurred because, in a prior year, he received an additional allowance which was since removed.
3. Mr L argues that the allowance, along with the pay increases, should have been used for the purposes of establishing his final pensionable salary.

Background information, including submissions from the parties

4. In 1991, Mr L joined the Fire Service and became a member of the 1992 section of the Scheme, subject to the regulations of the Firefighters Pension Scheme 1992 (**the Regulations**).
5. On 19 April 2013, Mr L signed a contract (**the Contract**) to work under the Day Crewing Plus Duty System (**DCP**). Relevant sections of the Contract are set out in Appendix 1 below.
6. On 23 March 2015, Mr L suffered an accident whilst at work. Initially, he maintained normal duties after the accident.
7. On 3 June 2015, Mr L went on modified duties due to the accident. Whilst on modified duties Mr L did not undertake DCP duties.
8. In September 2015, after 13 weeks, Mr L's allowance for DCP was removed.

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9. On 9 September 2015, Mr L challenged the removal of the DCP allowance on the basis that the enhancement was consolidated pay, pensionable, and not separable. A grievance was raised.
10. On 10 September 2015, in internal correspondence regarding the DCP, LFRS's solicitor said:-

"It is consolidated for pension purposes but reduced via an express contractual term."
11. On 15 October 2015, LFRS confirmed that the DCP allowance would be stopped.
12. On 30 October 2015, Mr L went on sick leave.
13. On 27 November 2015, Mr L returned to modified duties.
14. Between 28 November 2015 and 22 June 2016, Mr L was on modified duties. This remained the case apart from two further weeks of sick leave in June and September 2016.
15. On 21 January 2016, Mr L received legal advice in relation to his grievance about the removal of the DCP allowance. The legal advice concluded that the removal was a lawful deduction from his wages on the basis of the terms of the contract. In the legal advice, Mr L's adviser said:-

"...the day crewing plus enhancement is 'consolidated' pay and thus pensionable this does not apply to your contractual entitlement. Your pension is unaffected by the removal of the allowance at a time when the contractual entitlement ceases."
16. The grievance was not upheld, and the removal of the allowance was deemed lawful.
17. Following the grievance, Mr L applied for and was awarded ill health early retirement. The pension that was put into payment was based on his pensionable salary for the year before the DCP allowance was removed. As a result, the pay increases paid to Mr L in the final two years of service were excluded from his final pensionable salary.
18. On 6 January 2017, LFRS wrote to Mr L explaining why, for the purpose of his pensionable pay, it was unable to include his DCP allowance for the final two years of service. It explained that there was no entitlement for the pension to be paid where the necessary contributions had not been made. Because the DCP allowance had been removed, the contributions were not made.
19. On 9 January 2017, Mr L challenged this position, stressing that it was consolidated contractual pensionable pay as confirmed in the case of 'Norman v Cheshire FRS'. This position is also reflected in internal advice already received by LFRS, which stated that the DCP allowance was "consolidated for pension purposes". Mr L argued that when his DCP allowance was removed, the pension contributions should not have been reduced as LFRS was aware of his application for ill health retirement. Mr

L also considered that LFRS breached the 1992 Regulations by reducing his pensionable pay due to sickness.

20. On 1 February 2017, Mr L retired on ill health grounds.
21. On 4 July 2017, Mr L wrote to LFRS, starting the internal dispute resolution procedure (**IDRP**), and arguing that the 1992 Regulations establish that “any reduction of pensionable pay during sick leave...shall be disregarded.” On the basis of this clause, Mr L argued that his pension should be based on pensionable pay including the DCP allowance and should include all pay rises he received up until his retirement.
22. LFRS responded, disagreeing with Mr L’s interpretation of the relevant rules. It referred to Section 20 of the DCP contract (paragraph 5 above). The letter highlighted that the DCP duty system was not compliant with the grey book (Scheme of Conditions of Service) terms and conditions and this is specified in the contract. As the terms of the contract relating to the DCP allowance were not compliant with the grey book, the 1992 Regulations were not applicable to it.
23. In August 2017, Mr L appealed the stage one decision.
24. On 6 March 2018, the stage two response was issued, not upholding Mr L’s appeal. It said, in summary:-
 - It was accepted that the DCP allowance was pensionable pay, and that if a Firefighter’s pay was reduced due to sickness absence (for less than 13 weeks), they would continue to receive the allowance and the full pension contributions would be made on that basis.
 - It was also accepted that, under the 1992 Regulations, a reduction of pensionable pay due to sickness is disregarded when determining average pensionable pay.
 - However, under the DCP contract, which Mr L had voluntarily agreed, after 13 weeks’ sickness absence, the DCP allowance would cease. With the consequence that no contributions would be made by him or taken account of when his pension entitlement was calculated.
 - The grey book terms and 1992 Regulations did not override this contractual position.
 - Advice had been sought by LFRS from the Firefighters’ Pensions Advisor who confirmed that there was no power for a notional element of pay to be used for pension purposes. Mr L’s employer could not treat Mr L as if he was being paid the DCP allowance if it had ceased, and he was not paying contributions in respect of it.

Adjudicator's Opinion

25. Mr L's complaint was considered by one of our Adjudicators who concluded that no further action was required by LFRS. The Adjudicator's findings are summarised below:-

- On the basis of the Regulations, the initial calculation of Mr L's benefit would have been based on his final year's salary and would have taken account of the pay increases he now seeks to be included in his benefit calculation. However, this initial calculation would not have included the DCP allowance as it was not in payment in Mr L's final year of service.
- However, the Regulations allow an earlier year's average pensionable pay to be used instead of the final year where that year's pensionable pay was higher. This was the basis of LFRS' calculation and took account of the payment of the DCP allowance in the earlier years, which provided a higher level of pensionable pay than the years with a pay increase.
- The Adjudicator concluded that as Mr L's DCP allowance ceased after the contractual 13 weeks, and he had no entitlement to this allowance whilst on modified duties, as was established by the outcome of the grievance. It was justified that the DCP allowance would not be included in any pensionable pay calculations for the years following its removal.
- Regulation G1 (6), which Mr L sought to rely on, might be relevant if he had gone directly from sick leave to ill-health early retirement, but, in fact, Mr L returned to work on modified duties. He was not on sick leave for the period when the DCP allowance was withdrawn.
- The DCP allowance was undoubtedly pensionable under the contract. However, there was no requirement for the DCP allowance to be paid beyond 13 weeks, and LFRS was entitled to cease paying it at that point.
- LFRS was required by the Regulations to use the highest pensionable pay in the final three years before retirement. It would be making an error in law if LFRS did not follow that method and therefore the DCP allowance and pay rises could not be combined to produce a higher pensionable pay figure.
- The Adjudicator took the view that the Regulations had been properly applied by LFRS in using the earlier period of higher pensionable service which did not include the subsequent pay increases.

26. Mr L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr L provided further comments, summarised below, which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr L.

Mr N's submissions

- Mr N considers that the Adjudicator has misunderstood his complaint, in that he does not think the pension has been calculated in error. Instead, his complaint is that when his pay was reduced, LFRS ought to have continued paying the contributions as if he was still receiving the DCP allowance, but it failed to do so.
- Mr L disagrees that his change in duties to being on modified duties does not equate to him being on sick leave for the purposes of Regulation G1(6). He highlights that having moved to modified duties he was absent from the “12 negative hours” part of his shifts which was what the additional allowance was paid to cover, and under the contract the modified duties were clearly referred to as an absence. If he was not absent, then the removal of his allowance was unjustified.
- Mr L has explained that normally if a firefighter went on to modified duties their pay would not be affected and so Regulation G1(6) would not be necessary. But here because LFRS has used the contract to withdraw the allowance he has been affected by the move to modified duties and appears unable to rely on that Regulation. In the course of the grievance he was informed that the removal of the allowance would not affect his pension, but he is now being unfairly penalised for making himself available for modified duties and working within his capabilities.
- In that context, he considers it is not fair that the absence of “modified duties” from Regulation G1 excludes it from being disregarded. If his absence does not meet the definition of sick leave, then it should be treated as a period of unpaid absence for other reasons, which would allow him to make up any missed contributions.
- He highlights the inequity of the fact a reduction in pensionable pay due to stoppage of pay for punishment purposes would be disregarded, and the fact that those involved in industrial action are entitled to make up missed contributions, something he did in 2016. But by moving to modified duties and making himself available for work, he is being treated worse than those circumstances. This could have been corrected at the point of retirement and had he been offered the opportunity to make the unpaid contributions he would have done so.
- Additionally, had LFRS intended for his pension to be reduced in this way, it could have terminated his DCP contract and transferred him to a non DCP station, or made this scenario explicit within the Contract.
- His circumstances warrant the application of the sick leave rule and the reduction disregarded, or he should be treated under the “other absence” and given the opportunity to make up the missed contributions.

Ombudsman's decision

27. While I acknowledge the arguments Mr L has submitted, the fact remains that his pension is calculated by reference to the Regulations and LFRS cannot depart from them. Central to this are the Regulations setting out how average pensionable pay is calculated.
28. Under the Regulations, in summary, the pensionable pay figure to be used in the calculation is the best of the previous three years at the point of retirement. For Mr L, this means that the best year of pensionable pay was the year in which he received the DCP allowance, but this means he does not benefit from the annual pay increases he subsequently received being included in the calculation.
29. In addition to that being the clear position under the Regulations, it is established that under the Contract, LFRS was entitled to remove the DCP allowance after 13 weeks of absence, which is the reason it was not included in the pensionable pay calculation in the following years, despite him remaining on the DCP contract.
30. The question is whether there is any scope between the provisions of the Contract or the Regulations to disregard this reduction in pensionable pay.
31. The Regulations allow a reduction in pensionable pay to be disregarded for the following reasons:-

"G1

(6) For the purposes of paragraphs (3) and (5), any reduction of pensionable pay as a result of any—

- (a) sick leave;
- (b) stoppage of pay by way of punishment;
- (c) ordinary maternity, ordinary adoption or paternity leave;
- (d) paid additional maternity or additional adoption leave; or
- (e) unpaid additional maternity or additional adoption leave where contributions have been paid under rule G2A,

shall be disregarded."

32. If the reduction in Mr L's pensionable pay can be categorised under any of these provisions, then the DCP allowance ought to be included in the later years' pensionable pay calculation.
33. Between the accident and his retirement Mr L was on modified duties for all but a few weeks over the course of 2015 and 2016, at which time he was on sick leave. In respect of the modified duties he undertook, he has provided an explanation of how a DCP shift worked (see Appendix 2 below) and explained that he continued to

undertake the “positive hours”, but he was excused the “negative” or “Stand-By Hours”.

34. Under the Contract, being on modified duties is classed as an absence from his DCP duties. It is this absence that was used to justify the removal of the DCP allowance after 13 weeks. I also note this condition falls under the Sickness Scheme section of the contract.
35. I have considered Mr L’s suggestion that this absence should be treated as unpaid leave and that he should be given the opportunity to pay the necessary contributions to reinstate that unpaid leave. I note that this is referred to as an option in a document entitled “A Guide to the Firefighters’ Pensions Scheme 1992” on LFRS’ website. However, while that might be an option for Mr L to pursue directly with LFRS, I cannot see that the Regulations provide Mr L with a right to take this option and so I cannot direct that it enables him to exercise it.
36. The only route to Mr L having the DCP allowance treated as pensionable for his final years of service is if the modified duties are treated as sick leave and that period is disregarded.
37. I have sympathy here for Mr L as he has highlighted a legitimate inconsistency between his circumstances and a Firefighter who’s pay is reduced due to punishment or extended sick leave. In those alternative circumstances his pensionable pay would disregard the reduction. Mr L had an injury that appears to have been recognised as potentially entitling him to an ill health pension as early as October 2015 and he continued to make himself available for work within his capabilities. This does appear inequitable.
38. However, while this appears unfair, my role is to determine whether LFRS has applied the Regulations correctly when calculating his pensionable pay. As Mr L has quoted from a previous determination in his response to the Adjudicator, “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.” This remains the case.
39. Although Mr L had been excused the negative or stand-by hours required of him for the DCP allowance to be paid as part of his modified duties, I cannot artificially redefine these alternative duties as sick leave. Whether it should be classed as sick leave or not turns on the wording of the Contract, the relevant section of which states:-

“In the event that you are on modified duties or absent from work as a consequence of long-term sickness payment of the DCP Allowance will only be guaranteed for the first 13 weeks of the absence.
40. An individual is either on “modified duties” or “absent from work as a consequence of long term sickness”, not on “modified duties...as a consequence of long term sickness”. I consider that there is a distinction between modified duties and long-term sickness.

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41. The Regulations only allows for a reduction in pensionable pay to be disregarded in these circumstances where the member is on sick leave. The Regulation is express in its drafting to only cover leave, and modified duties is not sick leave. As a result, it is not correct to say that Mr L's pensionable pay was reduced as consequence of sick leave.
42. Mr L has reemphasised the fact that the DCP allowance was deemed to be consolidated pay for pension purposes as per *Noman v Cheshire*. I do not disagree with that, and the Contract, which postdates that judgment, confirms this fact when saying:-
- “The DCP Allowance is pensionable as determined by the current fire fighter pension regulations.”
43. However, whilst it clearly was pensionable when in payment, there is no requirement that it be deemed a notional part of pensionable pay when not in payment.
44. Mr L has referred to comments made by his legal adviser, and a legal adviser for LFRS to show that their view was the pay was “consolidated for pension purposes” and:-
- “Your pension is unaffected by the removal of the allowance at a time when the contractual entitlement ceases.”
45. However, these comments were made in the context of his grievance about the removal of the DCP allowance from his pay, and not in relation to the specific issue currently under consideration, involving the loss of pay increases. I agree with the legal advice Mr L refers to in that at that time, his pension was not affected by the removal. If he had taken benefits at that time, his pension would be based on his pensionable pay, including the DCP allowance and the removal did not alter that position.
46. I find that there has been no error on the part of LFRS in calculating Mr L's pensionable pay and I do not uphold the complaint.

Anthony Arter

Pensions Ombudsman
20 November 2019

Appendix

Appendix 1

Extracts from Mr L's Contract of Employment – Wholetime Firefighter DCP

7 Salary

...

You will be paid an allowance (the DCP Allowance) that reflects the additional commitment that you are providing. The level of the DCP Allowance you will be entitled to is 27% of basic pay as defined in the National Joint Council for Local Authorities' Fire Brigades Scheme and Conditions of Service (Grey Book). The DCP Allowance is pensionable as determined by the current fire fighter pension regulations.

This DCP Allowance will be payable only for such time as you are employed on DCP. Where a transfer from DCP to an alternative duty system occurs, the DCP Allowance will cease with immediate effect.

...

Any allowance is only payable whilst you are fulfilling the post to which the allowance relates and will be removed when you are transferred or promoted.

...

19 Pensions

The Pensionable pay upon which contributions are assessed is the core pay and all permanent emoluments determined by the firefighter's role.

If sick pay ceases, no contributions are payable (the period of unpaid sick leave does not count for pension purposes).

...

20 Sickness Scheme

...

In the event that you are on modified duties or absent from work as a consequence of long-term sickness payment of the DCP Allowance will only be guaranteed for the first 13 weeks of the absence. In the event that you are absent for a period of more than 13 weeks, the payment of DCP Allowance will be stopped unless determined otherwise by the Chief Fire and Rescue Officer. Notwithstanding this, all other salary payments will be made in accordance with the terms as set out in the National Joint Council for Local Authorities' Fire Brigades Scheme of Conditions of Service [the Grey Book]."

Appendix 2

“Description of DCP Shifts

Each shift will consist of period)(sic) of Positive Hours and Stand-By Hours.

Positive hours [:] hours whereby staff are rostered for immediate operational and other duties appropriate to the employees' role

Stand-By Hours: hours whereby staff are available on an on-call basis to attend emergency Incidents as and when required and to carry out other duties essential to maintaining availability for emergency incidents.”