

## Ombudsman's Determination

Applicant	Mr T
Scheme	The 1992 Firefighters Pension Scheme (the <b>1992 Scheme</b> )
Respondent	Lancashire Fire and Rescue Service (the <b>Authority</b> )

### Complaint Summary

1. Mr T has complained that:-
  - His Day Crewing Plus (**DCP**) allowance should be treated as fully pensionable in accordance with the Firefighters Pension Scheme (England) Order 1992 (**the 1992 Regulations**).
  - The Authority unreasonably delayed issuing a response under Stage Two of the Internal Dispute Resolution Procedure (**IDRP**).

### Summary of the Ombudsman's Determination and reasons

2. The complaint is upheld because the full "32% uplift" in Mr T's basic pay is pensionable under the 1992 Regulations. This is supported by relevant case law.

### Material facts

3. Mr T is a serving crew manager with the Authority and is a member of the 1992 Scheme. The 1992 Regulations (as amended) state:

#### **"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."

4. The benefits referred to in paragraph (1) include payments to reward additional skills and responsibilities under the firefighter's contract of employment and non-consolidated performance related payments. It also includes any additional pay while

on temporary promotion or while temporarily carrying out the duties of a higher role and any payments in respect of continual professional development.

5. Rule G1: pensionable pay and average pensionable pay, provides that:

“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**) [emphasis added in bold] other than those amounts payable to the firefighter 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).

...

Where before 1st July 2013 and after that date, any allowance or supplement is being paid to a firefighter which a fire and rescue authority treats as pensionable, but is not—

- (a) pensionable pay within the meaning of paragraph (1)(a);
- (b) additional pension benefit under rule B5B (long service increment);  
or
- (c) a payment in respect of a firefighter’s continual professional development under rule B5C,

that allowance or supplement shall continue to be treated as pensionable for so long as the firefighter receives it without any break in payment.”

- 6. In October 2009, the Fire Brigades Union (**FBU**) and the Authority proposed a DCP contract (the **Contract**). It acknowledged that the DCP system required additional commitment. In recognition of this, firefighters would receive a non-pensionable DCP allowance equivalent to 32% of basic salary. The allowance would be payable only for such time as the firefighter is employed on the DCP system. The DCP terms and conditions drafted in October 2009 contain similar wording to the Contract.
- 7. On 1 April 2010, the Authority introduced its DCP system. A description is provided in the Appendix.
- 8. In February 2012, Leicestershire Fire and Rescue Service (**Leicestershire FRS**) obtained advice (**Counsel’s Opinion**) on its proposed DCP allowance: equivalent to 32% of basic pay (**DCP Premium**).
- 9. The Counsel’s Opinion stated that the DCP Premium would constitute part of the amount determined in relation to performance of the duties of the firefighter’s role. Consequently, it is pensionable. It indicated this interpretation was based on case

law. The Norman v Cheshire Fire & Rescue Service [2011] EWHC 3305 (QB) (**Norman v Cheshire**) represented the current legal position.

10. The Counsel's Opinion described a five-point test to determine whether Leicestershire FRS' DCP Premium constitutes pensionable pay under the 1992 Scheme. Under that test, a payment will be pensionable if it is:-
  - Regular.
  - Pay to which the firefighter is entitled (under his employment contract).
  - Paid in the ordinary course of fulfilling his duties.
  - Has something of a permanent nature.
  - Is payable at the rate applicable to the role.
11. On 8 April 2013, the FBU wrote to the Authority. The FBU advised that following the Norman v Cheshire judgment Leicestershire FRS had received legal advice that DCP allowances would now have to be pensionable. The FBU enclosed a copy of the Counsel's Opinion.
12. A circular, published by the Department for Communities and Local Government (the **DCLG**), addresses amendments made to the 1992 Scheme and the New Firefighters' Pension Scheme (England) (the **2006 Scheme**), coming into effect from 1 July 2013. It provides that Fire and Rescue Authorities can decide whether a payment falling within one or more of the definitions under paragraph (1) of the 1992 Regulations is pensionable.
13. On 18 February 2016, Mr T commenced working on the DCP system on a temporary basis.
14. In October 2016, Mr T was notified that he had been transferred to the role of "Crew Manager" with effect from 1 November 2016. Consequently, he would be subject to the DCP system. The letter confirmed his rate of salary and that he would receive an additional non-pensionable DCP allowance equivalent to 32% of his basic pay.
15. On 8 September 2017, the FBU issued a circular. It clarified that the DCP allowance, payable to members who work the "Day Crewing Duty System" described in the "Grey Book," was pensionable pay.
16. In the Authority's correspondence with the FBU, the Authority restated its position that the DCP allowance was a locally agreed non-pensionable allowance. The Authority said it was prepared to enter negotiations with the FBU to make it pensionable. In response, the FBU argued that the DCP Allowance was pensionable under the 1992 Regulations.
17. In the FBU's subsequent exchanges with the Authority, it acknowledged that the DCP allowance had been increased because it was non-pensionable. The FBU indicated that it wanted to amend this and bring the DCP allowance in line with allowances paid by other services following Norman v Cheshire.
18. On or around 1 November 2017, Mr T complained under the IDRP.

19. On 29 November 2017, the Authority issued its response. The Authority explained that the DCP allowance was introduced following extensive discussions, which concluded in the local agreement with the FBU, and was a voluntary arrangement.
20. The Authority advised that the DCP allowance was higher, than it would otherwise have been, because it was not pensionable. If it were made pensionable it would have to be reduced. The Authority did not uphold the complaint.
21. On 23 May 2018, Mr T made an application under Stage Two of the IDRP.
22. The Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, (the **1996 Regulations**), provide that a decision must be issued within two months from the date the trustees or managers receive the application. Otherwise, “an interim reply must immediately be sent to the complainant and, where applicable, his representative setting out the reasons for the delay and an expected date for issuing the decision.”
23. In August 2018, the Authority’s offer to reach agreement on a 30% pensionable DCP allowance was rejected by the FBU.
24. The Authority has provided a copy of the minutes of the Authority’s “Resources Committee” meeting held on 28 November 2018 (the **Minutes**). It records that recommendations in respect of a complaint made under Stage Two of the IDRP were approved at that meeting. It also records that the complaint concerns the “pensionability” of the DCP allowance. It states that the matter had been discussed at the Resources Committee’s previous meeting that was held on 26 September 2018.
25. The proceedings of the Resources Committee held on 28 November 2018, were noted and “endorsed” on 17 December 2018.
26. On 18 January 2019, the Authority issued its response to Mr T’s complaint under Stage Two of the IDRP. The Authority explained that his application had been placed in “abeyance” because of ongoing negotiations with the FBU. As those negotiations had failed to resolve the issue, it was necessary to proceed with his application. The Authority advised that his complaint had been considered by the Resources Committee. The Authority confirmed that the decision upholding the original decision was ratified by the “Full Combined Fire Authority” on 19 December 2018.
27. The Authority has explained that negotiations with the FBU, to reach a resolution on the issue of the DCP allowance, took place over several years and had stalled.
28. A preliminary decision was issued on 4 November 2020. Mr T and the Authority made further representations in response to that decision.

29. The Authority has cited the High Court ruling in the case of Booth and Jones v Mid and West Wales Fire and Rescue Authority [2019] EWHC 790 (Ch) (**Booth v MWWFRA**). The issue raised by these appeals is whether certain allowances paid to firefighters in addition to their basic pay are “pensionable pay” within the meaning of the firefighters’ pension scheme. The High Court concluded that the whole of the “day crewing allowance” and the “self-rostered crewing allowance” are pensionable pay.

### **Summary of Mr T’s position**

30. Mr T’s submissions are summarised below:-

- Leicestershire FRS moved towards implementing an identical shift system around the time the Authority introduced its DCP system. Leicestershire FRS sought legal advice and changed its decision and introduced a DCP system with a 27% increase in pay and made this pensionable. In his view, the Authority did not carry out “legal due diligence” before implementing its DCP system.
- Before February 2016, he worked a “2,2,4” shift system averaging 42 hours a week. He moved onto the DCP system initially on a temporary basis. He was permanently transferred onto the DCP system in November 2016. This involved working 84 hours a week for a 32% increase in pay.
- At the time, the Authority did not distinguish between pay “for work” [and for being on call].
- The Authority has never accepted that it was wrong to treat the DCP allowance as non-pensionable. The FBU advised the Authority in October 2018 that it could not negotiate a collective agreement that would “usurp the law”.
- The Authority has refused to accept that the DCP allowance is pensionable pay.
- It is beyond the Authority’s legal power to agree a pay arrangement other than one prescribed by law.
- The Authority’s position is that the Norman v Cheshire ruling affirmed that the DCP allowance under the local Cheshire arrangement was an uplift in pay and therefore pensionable in accordance with the law. In his view, the ruling had wider implications.
- The Ombudsman’s Determination in the case of Mr A (PO-15584) supports the Norman v Cheshire judgment.
- The full 32% uplift should be pensionable. Following the Norman v Cheshire ruling, it is unlawful for the Authority to offer a lower uplift.

- The Authority cannot treat any part of the DCP allowance as non-pensionable. The Counsel's Opinion supports this view.
- The Authority's response under Stage Two of the IDRPs was issued outside the statutory timescales under the 1996 Regulations. The Authority failed to issue an interim reply.

### **Summary of the Authority's position**

31. The Authority's submissions are summarised below:-

- A collective agreement was made with the FBU that the uplift would be set at 32% of basic pay. During the consultation with the FBU, it was "explicitly agreed that this was non-pensionable and was included in the individual contracts of employment".
- It was also agreed that the 32% uplift was higher than it may otherwise have been because it was non-pensionable.
- The Authority also does not accept that it was negligent in this case. The collective agreement was agreed by both sides in good faith. While the decision to make the 32% uplift non-pensionable was based on a "mis-application" of the 1992 Regulations, it was based on clear guidance from the DCLG. This stated that the 1992 Regulations "did not allow such supplements to be pensionable and any such agreement would be ultra vires."
- Mr T's claim that the Authority failed to carry out due diligence before introducing its DCP system "seems unfair" in the circumstances. The Authority obtained legal advice from Queen's Counsel on the interpretation of the Scheme [regulations].
- Leicester FRS introduced a DCP type arrangement after the court ruling in the Norman v Cheshire case. In contrast, the Authority introduced its DCP system before the date of that ruling.
- It has not been possible for the Authority to locate any documents that directly relate to the collective agreement between the parties. This does not mean that agreement was not reached with the FBU. The FBU has not challenged this at any time. The Authority's most common shift system ("2-2-4") was agreed by local collective agreement. Similarly, there is no single written document to reflect this.
- If the Authority had not received guidance from the DCLG and had decided to make the DCP allowance pensionable at the outset, the percentage of the 32% uplift would have been amended accordingly.

- The Authority has always reserved the right to transfer whole time staff between duty systems and has exercised that right. There is no guarantee that any staff member on a DCP system will remain on that system. The letter confirming Mr T's transfer to the DCP system makes clear that the DCP allowance is not pensionable.
- Norman v Cheshire can be distinguished from Mr T's complaint. In that case, there was a collective agreement which stated that the uplift was pensionable. This is relevant in terms of what should be categorised as "pay".
- Mr Justice Andrew Smith referred to a legal test in the earlier case of Kent & Medway Towns Fire Authority v Farrand [2001] OPLR 357 (**Kent**). The relevant part of that test is at paragraph 55 of that judgment:

“...the receipt had to be (i) for work done (or to be done) under the firefighter's contract of employment...”

- The collective agreement that applies in this case forms part of Mr T's contract of employment.
- The 32% uplift introduced by the Authority included a further (unspecified) uplift to compensate for the fact that it was not intended to be pensionable. The Authority's position is that this element of the 32% uplift does not represent pay for “work done or to be done” but is some other form of benefit. Consequently, it is not pensionable.
- That element of the DCP allowance is comparable to pay in lieu of leave, which the court ruled was not “pay” in the Kent case. This is referred to in paragraph 47 of the Norman v Cheshire judgment. Paragraph 56 of that judgment deals with how Mr Norman's circumstances differs when compared with the circumstances of the applicant's in the Kent case.
- Remuneration must be considered in terms of the total financial reward to a firefighter. This is irrespective of whether the payment is received every month or is a “subsequent pension entitlement.”
- The collective agreement, and therefore Mr T's contract of employment, allows for a simple payment of 32% in monthly pay, but no additional pension entitlement. If the full 32% uplift were made pensionable, this would significantly increase Mr T's total financial remuneration beyond what is stated in his contract.
- To give “practical effect” to the Norman v Cheshire judgment, an adjustment needs to be made to the 32% uplift. Once the adjusted uplift is made pensionable, the total financial remuneration would be broadly the same as the 32% non-pensionable DCP. If this adjustment is not made, it would amount to unjust

enrichment in Mr T's case and have a "crippling financial burden" on the Authority if applied to all firefighters on the same shift system.

- It would be contrary to natural justice as Mr T entered into the DCP system in the full knowledge that the 32% uplift would not be treated as pensionable pay.
- In the Kent case, payment in lieu of leave was distinguished from pay for work done or to be done and deemed not to be pensionable pay. The same test was applied in Norman v Cheshire to a different pay element and a different conclusion was reached in that case.
- It is clear from that test that there must be some clear understanding of why the payment is being made. The Authority accepted that some of the DCP allowance paid to Mr T is in "recompense for him being on call". Consequently, following the Norman v Cheshire judgment, it constitutes pensionable pay. That said, not all of the 32% uplift was recompense for being on call.
- The unspecified part of the 32% uplift, was in effect compensation for the fact that the DCP allowance was not considered to be pensionable pay. That part of the DCP allowance represents a "pension substitute" and does not represent payment for "work done or to be done."
- In the Norman v Cheshire case, the uplift was intended to be pensionable at the outset. Consequently, the full uplift represented "pay." When the agreement to make it pensionable was later revoked, there was no increase to the uplift to reflect the reduction in the overall financial benefit of the arrangement. As highlighted above, in Mr T's case the whole of the uplift does not represent pay.
- Following the Norman v Cheshire case, until the High Court decision on 29 March 2019, in the case of Booth v MWWFRA and others, the position was not as "clear" as suggested by the Ombudsman's preliminary decision on Mr T's complaint.
- "Conflicting" court decisions and Pension Ombudsman cases existed which post-dated the Norman v Cheshire case. In the case of "Michael Smith v South Wales", which raises similar issues to Mr T's dispute, the original Determination reached a different outcome. This presented a much more confused situation, as opposed to the current situation which is much clearer. Given the lack of clarity, and the circular published by the DCLG, there is "considerable mitigation" for the Authority taking the stance it took at the time.
- The Authority accepts that it did not recognise the DCP allowance was fully pensionable under the original agreement with the FBU. The Authority has subsequently rectified this.

- The Authority has always maintained that the issue needed to be negotiated due to the implications on individuals, especially in respect of changes to contractual terms and arrears of pension contributions.
- The Authority has at all times tried to act to achieve an outcome that was “fair and just” to all the parties against a legal background that was not always very clear.
- The local negotiation with the FBU did not reach a conclusion. The basis of implementation, without breaching a local agreement, was available to the Authority following the Booth v MWWFRA decision. After lengthy discussion with the FBU, [a fully pensionable DCP allowance], was implemented on 1 June 2020.
- The Authority considers that it followed a correct procedure when it considered Mr T’s complaint under stage two of the IDRP.

## Conclusions

32. This Determination only deals with whether the DCP allowance is fully pensionable specifically in relation to Mr T’s circumstances. I am not considering matters that fall outside the scope of that complaint.
33. Mr A’s complaint (PO-15584), which I Determined on 22 February 2018, shares some similarities with Mr T’s complaint. Mr A complained that Warwickshire Fire and Rescue Authority was not treating certain pay elements as pensionable contrary to the Firefighters' Pension Scheme (England) Order 2006.
34. The issue here is whether the full DCP allowance falls within the description of pensionable pay in Rule G1 of the 1992 Regulations. The key phrase in Rule G1 is the amount determined in relation to the performance of the duties of the fire fighter’s role.
35. The meaning of pensionable pay was addressed in the Kent ruling. The judgment is also relevant to this complaint as it concerns the 1992 Scheme. The court identified distinguishing features of “pensionable pay”. These are summarised below:-
  - The payment must be regular in nature.
  - At a rate applicable to the firefighter’s rank, in the ordinary course of fulfilling his duties, under his contract of employment.
36. The court concluded that it is an essential requirement of “pensionable pay” that the payment should be calculated in accordance with the firefighter’s ordinary rate of pay. This excludes various allowances and other payments not determined by the firefighter’s rank. The payment must be “pay”. That is, the payment must be for work done (or to be done) under the firefighter’s contract of employment. A payment in lieu of leave is not of that nature.

37. The Kent ruling is relied on in Norman v Cheshire, which also concerns the 1992 Scheme. I have referred to that judgment in paragraph 40 below.
38. The Authority's position is that it was agreed in the local collective agreement that the 32% uplift was non-pensionable. Consequently, this forms part of Mr T's employment contract.
39. I acknowledge that the Authority considers that part of the 32% uplift represents compensation, rather than pay for work done or (to be done), as in the case of pay in lieu of leave. I do not agree.
40. In Norman v Cheshire the applicant claimed a breach of contract as well as a breach of statutory duty. The applicant argued that Cheshire Fire & Rescue Service had not incorporated certain payments into his pensionable pay. The court ruling makes clear that the principal consideration when deciding whether any payments are pensionable, is the proper interpretation and application of the rules of the Firefighters Pension Scheme.
41. The court noted that both the collective agreement and the letter to the applicant stated that the new payments, the consolidated elements, would be pensionable. The court ruled that this does not determine whether they were pensionable nor do the views of Cheshire Fire & Rescue Service, the FBU or the applicant.
42. Paragraph 61 of the decision states:

"a firefighter's role when on stand-by under the day crewing system as part of his 42 hour week and his role when undertaking a retained element are very similar, and I cannot accept that in the one case he is undertaking the duties of a firefighter's role and that in the other case he is not."
43. I note that the Authority has not contested the above point. I also note that the Authority subsequently decided to treat the DCP allowance as fully pensionable from 1 June 2020.
44. In the case of Mr A [PO-15584] I concluded that the pay elements in dispute were those concerned with the duties performed in Mr A's role and were not temporary. Consequently, they should be considered pensionable.
45. I acknowledge that the Counsel's Opinion cannot be cited as legal authority more widely as it was obtained by a different fire authority. Nevertheless, I consider that it is persuasive and relevant to Mr T's case. I note that the Norman v Cheshire ruling is considered in the Counsel's Opinion.
46. The evidence reviewed supports the view that the DCP allowance applies to a different shift pattern covering extended hours but involves the same duties. On this basis, it is difficult to see how the full 32% uplift can be treated differently from pay that is pensionable prior to the uplift. Applying the Regulations of the 1992 Scheme and relevant case law I find that the full 32% uplift to Mr T's basic pay is pensionable.

47. I note that Mr T commenced working under the DCP system on 18 February 2016 before being permanently transferred on to the DCP system in November 2016. I acknowledge that the Authority reserved the right to transfer whole time staff between duty systems and that there was no guarantee that any staff member on a DCP system will remain on that system. The issue is not the operational demands of the Authority but the 1992 Regulations relating to pension provision.
48. Rule G1 of the 1992 Regulations, provides that there should be no differentiation between whole time and part time employees. While silent in respect of temporary roles, I consider it reasonable that this principle applies to both permanent and temporary roles. Consequently, I find that the DCP allowance paid to Mr T is fully pensionable from 18 February 2016.
49. The Authority shall treat the full DCP allowance as pensionable pay from 18 February 2016, for the purposes of calculating Mr T's pension benefits.
50. This dispute stems from a misunderstanding on the part of the Authority of how the 1992 Regulations should be applied.
51. I acknowledge that the Authority delayed issuing a response under Stage Two of the IDRP while it consulted with the FBU. The Authority should have issued an interim reply, in accordance with the 1996 Regulations. The Authority failed to do so, which likely compounded matters. Having considered the individual circumstances of Mr T's case, the Authority shall pay £500 in respect of the significant non-financial injustice the Authority has caused to him.

## **Directions**

52. The Authority shall treat the full 32% uplift as pensionable pay from 18 February 2016, for the purposes of calculating Mr T's pension benefits under the 1992 Scheme. Within 28 days of the date of this Determination, the Authority shall:
  - pay £500 to Mr T in recognition of the significant non-financial injustice he has suffered;
  - calculate the arrears of employee and employer pension contributions due from 18 February 2016, in respect of the 32% uplift in Mr T's basic pay; and

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- offer Mr T an opportunity to pay the arrears of employee contributions as a lump sum; or pay the arrears through a repayment plan over a reasonable period before he reaches his normal pension age. The Authority can choose to pay the arrears of the employer contributions as a one-off lump sum or in instalments.

**Anthony Arter**

Pensions Ombudsman  
25 January 2021

## **Appendix**

### **“DAY CREWING PLUS**

The day crewing plus system of duty consists of a combination of ‘positive’ and ‘standby’ hours.

(i) Positive Hours - provides an average working week of 42 hours over a twelve month period. No fixed working pattern is imposed and employees are required to self-roster in accordance with relevant guidance.

The positive component involves 12-hour shifts (including meal breaks) during which time employees undertake routine duties i.e. training, community fire safety etc. Whilst indicative start and finish times of 08:00 and 20:00 are employed, these are flexible in accordance with local needs.

To meet the 42 hour week contractual obligation, staff are required to work a total of 148 shifts per annum after leave and public holidays are taken into account (figures quoted assume long service leave entitlement).

Working patterns are agreed in 12-week blocks and will be required to work a total of 34 shifts in each 12-week period. For managerial purposes, all shifts must be agreed and the rota fully populated a minimum of six weeks prior to the commencement of the relevant 12-week block.

(ii) Standby Hours – staff are available in 12 hour periods for up to 42 hours per week on average. During this time they will be on call for emergencies and must be able to respond to incidents within the specified timeframe. Staff may be on call at their own base provided that they can meet the specified response time. Alternatively, purpose built accommodation is provided if this is not possible.”