

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

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| Applicant | Mr Carl Stokes |
| Scheme | Firefighters' Pension Scheme (the Scheme) |
| Respondent(s) | Oxfordshire County Council (the Council) |

Subject

Mr Stokes complains that the Council have not used the best year from the last three years of service in order to calculate his pension. Mr Stokes believes that a lump sum payment made to him in November 2007 should be attributed in its entirety for pensionable pay purposes.

The Pensions Ombudsman's determination and short reasons

The complaint should not be upheld because the Council have correctly interpreted the Firefighters Pension Scheme 1992 (Consolidated) Order.

DETAILED DETERMINATION**Relevant Regulations****The Firefighters' Pension Scheme 1992 (Consolidated) Order (the Order)****"PART G****PENSIONABLE PAY AND CONTRIBUTIONS**

Pensionable pay and average pensionable pay

G1.—(1) Subject to paragraph (2), 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

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

(2) For the purposes of paragraph (1), in the case of a person by whom pension contributions became payable after 31st May 1989 either—

(a) for the first time, or

(b) following any period in respect of which they were not payable,

except where regulation 4 of the Retirement Benefit Schemes (Tax Relief on Contributions) (Disapplication of Earnings Cap) Regulations 1990(a) applies his pay shall be taken not to include any excess, in any tax year, over the figure which is the permitted maximum for that year for the purposes of section 594(2) and (3) of the Income and Corporation Taxes Act 1988(b) (that is to say, the figure specified for the year by an order made by the Treasury under section 590C(6) of that Act).

...

(3) The average pensionable pay of a regular firefighter is, ... the aggregate of his pensionable pay for the year ending with the relevant date.

(4) The relevant date is—

...

(b) for all other purposes of this Scheme, the date of his last day of service in a period during which pension contributions were payable under rule G2.

...

(7) If the amount determined in accordance with paragraphs (3) to (6) is less than it would have been if the relevant date had been the corresponding date in whichever of the two preceding years yields the

highest amount, that corresponding date shall be taken to be the relevant date.”

Material Facts

1. Mr Stokes retired from active service on 25 September 2009 after completing 40 years of pensionable service.
2. In November 2007 the Council notified Mr Stokes that, due to a retrospective job evaluation exercise, arrears of salary were due to him because he had carried out work at a higher level than he was being paid for.
3. The arrears in total were £9,474.22. They related to identified underpayments in the years 2003/4 to 2007/8. They were paid to Mr Stokes as a lump sum in his November 2007 salary and included within the total taxable income for 2007/08. His P60 for that year showed Mr Stokes received £39,761.09.
4. When Mr Stokes retired his pension was calculated using the average pensionable pay from the last 365 days before his retirement date. The Council used the highest salary – which was £34,630.79 from 2008/09.
5. Mr Stokes invoked the Internal Dispute Resolution procedure in October 2009. Mr Stokes said that his pension was incorrectly calculated. He said that his best pensionable pay year was 2007/08 – the year he received his arrears in pay. In addition Mr Stokes says that he has paid tax on the arrears in 2007/08 and therefore it must be considered as pensionable pay. Mr Stokes wanted to know where in the Order it restricts lump sum payments from being considered as pensionable pay.
6. The Council replied in December 2009 with their stage 1 response. They said that based on Rule G1 (3), pensionable pay is the pay *for* the year ending, which means pay received in respect of work carried out for the year. The lump sum payment covering a period of 2003/04 to 2007/08 tax years could not be considered as pay for the work carried out in the year. That remains their position.
7. Mr Stokes says that the words “aggregate” and “for” should be considered together – one word cannot be considered without the other. Mr Stokes explains that his pensionable pay should be made up of the “aggregate” of

his pensionable pay “for” the year ending. Mr Stokes defines “aggregate” to mean a whole amount made up of different parts.

8. Mr Stokes puts forward a scenario in which he retired before salary arrears were found to be due for the year of retirement. He asks whether his pension would have been recalculated.

Conclusions

9. Rule G1(3) says “The average pensionable pay of a regular firefighter is ... the aggregate of his pensionable pay for the year ending with the relevant date.” The key word in this Rule is “for” – it is the pensionable pay *for* the year ending with the relevant date. I have no doubt that this is not the same as, for example, pay received *in* the year (which is effect what Mr Stokes is arguing for).
10. “Aggregate” simply means that one has to take the sum total of pensionable pay. But the total is still limited to pay *for* the year. “For” in this context means “relating to” – in the same sense as Mr Stokes received pay “for” work as a firefighter. The lump sum was arrears of the pay he should have received in previous years. It is not pay for the one year in which it was received; it is pay *for* each year over a five year period.
11. Mr Stokes also argues that because the lump sum was recorded on the P60 – at the end of the year- it should be deemed as pensionable pay for 2007/08. But there is no connection. Pay is usually taxable in the year of receipt, but that that does not make it pay *for* the year of receipt.
12. As far as Mr Stokes’ hypothetical scenario is concerned (though it is not directly relevant) the answer is that the pension ought to be adjusted in relation to back payments for the year of calculation of final pay.
13. I do not uphold Mr Stokes’ complaint.

Tony King
Pensions Ombudsman

4 October 2013