

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

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|----------------------|---|
| <b>Applicant</b>     | Mr Calum McBride  |
| <b>Scheme</b>        | Firefighters' Pension Scheme ( <b>FPS</b> )                   |
| <b>Respondent(s)</b> | Strathclyde Fire & Rescue Authority<br>( <b>Strathclyde</b> ) |

**Subject**

Mr McBride says that Strathclyde has wrongly refused his request for a pension on grounds of ill health. In particular, he disagrees that the alternative employment offered to him was suitable.

**The Deputy Pensions Ombudsman's determination and short reasons**

The complaint should be upheld against Strathclyde because I am not satisfied that Strathclyde have carried out an accurate assessment when calculating the average number of hours Mr McBride worked in the 12 weeks before the incident on 22 March 2006.

## DETAILED DETERMINATION

### Regulations and Guidance

1. The applicable rules are the Firemens' Pension Scheme Order 1992, as amended by the Firemen's Pension Scheme Amendment (Scotland) Order 2004, which came into force on 13 September 2004.
2. The following Rules are relevant::

#### A10 Disablement

- (1) References in this Scheme to a person's being permanently disabled are references to his being disabled at the time when the question arises for decision and to his disablement being at that time likely to be permanent.
- (1A) In determining whether a disablement is permanent, a fire authority shall have regard to whether the disablement will continue until the age at which the person would otherwise be required to retire in accordance with rule A13.
- (2) Subject to paragraph (3), disablement means incapacity, occasioned by infirmity of mind or body, for the performance of duty, except that in relation to a child, it means incapacity, so occasioned, to earn a living.
- (3) Where it is necessary to determine the degree of a person's disablement, it shall be determined by reference to the degree to which his earning capacity has been affected as a result of a qualifying injury; if, as a result of such an injury, he is receiving in-patient treatment at a hospital he shall be treated as being totally disabled.
- (4) Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the fire authority.

#### A15 Compulsory retirement on grounds of disablement

- (1) Subject to paragraph (2), a regular firefighter may be required by the fire authority to retire on the date on which the authority determine that he ought to retire on the ground that he is permanently disabled.
- (2) A retirement under this rule is void if, on an appeal against the medical opinion on which the fire authority acted in determining that he ought to retire,

the medical referee decides that the appellant is not permanently disabled.

B3 Ill-health award

- (1) This rule applies, unless immediately before his retirement an election under rule G3 not to pay pension contributions had effect, to a regular firefighter who is required to retire under rule A15 (compulsory retirement on grounds of disablement).
- (2) A person to whom this rule applies becomes entitled on retiring—
  - (a) if he is entitled to reckon at least 2 years' pensionable service or the infirmity was occasioned by a qualifying injury, to an ill-health pension calculated in accordance with Part III of Schedule 2, and
  - (b) in any other case, to an ill-health gratuity calculated in accordance with Part IV of Schedule 2.

- H1. - (1) The question of whether a person is entitled to any and if so what awards shall be determined in the first instance by the fire authority.
- (2) Subject to paragraph (3), before deciding, for the purposes of determining that question or any other question arising under this Scheme—
  - (a) whether a person has been disabled
  - (b) whether any disablement is likely to be permanent
  - (c) whether any disablement has been occasioned by a qualifying injury
  - (d) the degree to which a person is disabled
  - (e) whether a person has become capable of performing the duties of a regular firefighter, or
  - (f) any other issue wholly or partly of a medical nature

the fire authority shall obtain the written opinion of an independent qualified medical practitioner selected by them and the opinion of the independent qualified medical practitioner shall be binding on the authority.

- (2A) In his written opinion, the independent qualified medical practitioner must certify that—
  - (a) he has not previously advised, or given his opinion on, or otherwise been involved in, the particular case for which the opinion has been requested; and

(b)he is not acting, and has not acted at any time acted, as the representative of the member, the fire authority, or any other party in relation to the same case.”

3. The following guidance, in relation to the FPS, was issued by the Scottish Government in October 2004:

“(a) Amendment to the definition of “regular firefighter” (Schedule 1, Part 1)

Eligibility for full membership of the FPS is limited to regular firefighters only. The definition of “regular firefighter” includes a requirement to engage in firefighting. This remains a term of eligibility for joining the FPS. However, the definition has been amended to allow a firefighter who subsequently becomes permanently disabled for firefighting while remaining fit for other related duties to continue as a member of the FPS. This is on condition that there has been no break in service. Consequently, if a FRA is of the view that the retention of a firefighter would be of value to the service, redeployment to other duties, as appropriate to the role of the firefighter should be considered and would be allowable under the FPS rules. If the FRA cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with an ill-health award.”

4. Further guidance, in relation to the FPS, was issued by the Department for Communities and Local Government, on 24 October 2008 as follows:

“The onus is on a fire and rescue authority to make every effort, through reasonable adjustments, including reasonable re-designing of jobs within an authority - to enable firefighters to stay in work within the role if they can, rather than be retired early. In the case of retained duty system firefighters any redesign and readjustment should be consistent with the duty system. But of course it will not always be possible for firefighters to stay in work. In considering the case for ill health retirement the fire and rescue authority will need to consider the application of the criteria in the regulations in light of the facts and circumstances of individual cases. These facts and circumstances include the realistic prospect of suitable employment. This is not a simple matter, before reaching a final determination as to the absence of any suitable employment within the role, the fire and rescue authority must consider whether they can create a suitable post within their structure, rather than simply look at the employees to existing opportunities. The absence of a realistic prospect of suitable employment within the role at the end of this process is material to the decision on whether the criteria apply, and whether an award is made.”

5. Strathclyde's Redeployment Policy and Procedures (October 2010) says:

Part 1 – General Principles

“Redeployment Framework

Suitable alternative employment is intended to reflect the match between the current post requirements in relation to relevant skills, knowledge and experience and the requirements of the new post... Suitable Alternative Employment is an individual but includes issues around:

- nature of job
- status of job
- salary
- qualifications and skills
- hours - how and when
- location and accessibility...”

“Appendix 2 - Assessment of Ill Health Retirement

...Where the potential for ill health retirement is identified...the Area Commander/Deputy Director will:

- (a) Arrange the earliest possible appointment with the Occupational Health Service.
- (b) Arrange and support the employees completion of a Skills Profile...
- (c) Consider the content of the Skills Profile Form from an Area/Directorate and complete the information detailed in Step 1 of the “Consideration of Re-deployment/Alternative Duties”...”

6. The terms and conditions for firefighters derive from the National Joint Council for the Local Authorities' Fire and Rescue Services Scheme of Conditions of Service (the **Grey Book**).

7. Section 3, Part 3 of the Grey Book sets out the Roles and Responsibilities of firefighters and states:

- “5. Fire and rescue authorities can use whichever roles they consider necessary. Specific activities within roles will be determined by the authority to meet the local needs of the service based on its Integrated Risk Management Plan...
6. The units of competence that form each of these roles are laid down in the NJC document – Fire and Rescue Services Rolemaps. Fire and rescue authorities can require any reasonable activity to be carried out by an individual employee within his or

her role map. These role maps reflect fire and rescue service responsibilities incorporated into local Integrated Risk Management Plans”

8. Section 4, Part A, of the Grey Book sets out the hours of duty and the duty systems and states:

“All working arrangements will operate on the basis that employees will undertake the duties appropriate to their role and be deployed to meet the requirements of the fire and rescue authority’s Integrated Risk Management Plan...”

*Retained Duty System*

The hours of availability of employees on this duty system shall be agreed between the fire and rescue authority and individual employees. An employee on this system shall be required to attend for duty as follows:

- (1) At the station to which the employee is attached for training, development and maintenance duties for an average of two hours per week (or three hours at the discretion of the fire and rescue authority).
- (2) Promptly at the station to which the employee is attached in response to an emergency call at any time during the employee’s period of availability.
- (3) At any incident or other occurrence or at any other station for standby duties during the employee’s period of availability.”

9. Section 4, part B, of the Grey Book sets out the rates of pay and says:

“The pay entitlement of an individual employee shall be determined by (1) the employee’s role...

*Payment for work activity*

All work activity shall be paid at the appropriate basic hourly rate set out in circulars issued by the NJC. Work activity includes those duties at paragraph 16 [Retained Duty System] of Part A of this section together with any pre-arranged work undertaken by the employee.

An employee who has been called out to an emergency incident and forms part of the crew shall receive a minimum of one hour’s pay. Where the employee remains on duty for more than one hour and fifteen minutes he or she shall receive two hour’s pay. Where the employee remains on duty for more than two hours he or she shall then be paid for complete periods of fifteen minutes.

An employee who has been called out to an emergency incident but does not form part of the crew shall receive a minimum of half an hour’s pay. Where the employee remains on duty for more than one hour and fifteen minutes,

he or she shall receive two hours' pay. Where the employee remains on duty for more than two hours he or she shall then be paid for complete periods of fifteen minutes.

### **Overtime**

Overtime rates of pay apply to employees in the retained duty system only where they work in excess of forty-two hours in a seven day period.

#### *Pre-arranged overtime*

Employees are free to volunteer for pre-arranged overtime..."

10. In addition Section 4 Part B of the Grey Book says that employees on the Retained Duty System will be entitled to receive payments in respect of Disturbance, Work Activity, Lost remuneration, Attendance at training and an Annual Retainer payment.
11. Section 4, part C, of the Grey Book deals with Leave. In relation to annual leave for employees on the Retained Duty System the Grey Book says "A week's pay during a period of annual leave shall mean the employee's average weekly remuneration in the previous twelve weeks (excluding any week in which he or she has been on sick leave or received no pay), taking all payments into account."
12. Section 5, part B, of the Grey Book sets out the conditions in relation to Occupational Health as follows "Where an employee on the retained duty system ...is on authorised sick leave as a result of an illness or injury arising out of authorised duty 'full pay' means the employees average weekly remuneration in the previous twelve weeks, taking all payments into account..."
13. The Emergency Fire Services Rolemaps (May 2003) say:
 

**"Crew Manager Rolemap**

Ref Title

FF1 Inform and educate your community to improve awareness of safety matters..."
14. The Integrated Personal Development System Code of Practice (February 2008) says:
 

**"Using Rolemaps / National Occupational Standards**

13 National Occupational Standards are important because they describe the skills, knowledge and understanding

needed to undertake a particular task or job to a nationally recognised level of competence.

14 They are particularly important in the Fire and Rescue Service because, for staff working to the Grey and Gold books, these standards have been developed into rolemaps and incorporated into their pay structures and conditions of service.”...

**Are Rolemaps mandatory?**

17 The rolemaps are enshrined in the terms and conditions of all operational staff. But there is flexibility in how they are used. For example, it is not necessary for all staff to work to all parts of their Rolemap.

18 Specific activities within roles can be determined by the FRA to meet their local needs and Fire and rescue authorities can require any reasonable activity to be carried out by an individual employee within his or her role map.”

**Material Facts**

15. Mr McBride was employed as a Retained Firefighter with Strathclyde from 21 October 1991 and as Crew Commander on the Retained Duty System from 2001 until 20 October 2010.
16. On 22 March 2006, Mr McBride was injured during the course of his operational duties. He went on long term sickness absence and he did not return to work.
17. In January 2008, Mr McBride’s case was referred to an Independent Qualified Medical Practitioner (**IQMP**) for consideration of ill-health retirement benefits. The IQMP provided her report on 24 January 2008 confirming that in her opinion Mr McBride was permanently incapable of “engaging in firefighting” but was able to undertake the “duties of a regular firefighter additional to engaging in firefighting.” The report included a number of non-operational duties that Mr McBride was likely to be able to carry out.
18. On 25 March 2008, in line with the redeployment procedures, Mr McBride completed a Skills Profile which can be summarised as follows:
  - He would be prepared to work up to a maximum of 40 hours per week for the same salary as a full time Crew Commander on the Retained Duty System.

- He would prefer to be based near to his current location as driving distances was problematic.
  - He would consider Operational Crew Commander Posts such as Training or a Community Safety job.
  - He did not want to be considered for roles as a Driver, Administration Assistant, Janitor, Handyman or Cleaner.
  - His primary employment was as a joiner and he owned a construction business.
19. On 30 July 2008, Strathclyde had a meeting with Mr McBride in which he was offered a role for three hours per week within the Retained Duty System. A letter confirming the details of the meeting was sent to Mr McBride on the same day. The letter said:
- “You stated that you felt that you were expecting to be offered a 40 hours per week contract and we confirmed that the offer was with regard to your 3 contractual hours on RDS. We have made adjustment to a Firefighter’s role which we deem to be reasonable.”
20. On 15 August 2008, Mr McBride’s representative from the Retained Firefighter’s Union (**RFU**) rejected the offer of employment on the basis that it was not a suitable alternative role as he had previously been working in excess of fifteen hours per week. Strathclyde was asked to reconsider its offer.
21. On 2 September 2008, Strathclyde wrote to the RFU and said that they had reconsidered Mr McBride’s position and could not change their offer. The letter said that given Mr McBride would prefer to be based in his current location and driving distances was problematic they had tried to provide a reasonably adjusted post within Mr McBride’s current duty system which suited his skills and experiences.
22. On 10 November 2008, Mr McBride completed another Skills Profile which can be summarised as follows:
- He would not work less than 15 hours per week (maximum hours was not completed) for a salary in keeping with a current crew commander.

- There were some limitations with regard to driving for periods exceeding one and a half hours. He would be prepared to consider any reasonable location within a one hour drive.
  - His current duties included operational training and development, practical training, lectures as well as elements of record keeping and basic administration and Community Fire Safety.
  - He has experience in tactical skills analysis, management, administration and record keeping.
  - He would consider roles as a liaison officer, in community education, community fire safety duties or supervising a community fire safety team.
  - He did not want to be considered for a role that involved driving, as a janitor or a role that involved heavy lifting.
23. On 11 February 2009, Strathclyde wrote to Mr McBride and said that no suitable alternative vacancies had been identified however it had been possible to redesign his existing post in order that his employment with Strathclyde could continue. The offer was for a role working three hours per week on Drill Night at his current location and a further three hours on a flexible basis which may be at a different location. The letter said that the hours would not exceed 24 hours in any four weekly period. The weekly pay was £106.40 (which equates to an hourly rate of £17.20) plus an additional £3.20 per week in respect of a CPD payment.
24. RFU, on Mr McBride's behalf, rejected the offer on the basis that before he was injured on 11 March 2006 he was working in excess of fifteen hours per week. The letter from RFU, dated 18 February 2009, said the number of hours Mr McBride had worked seemed to have been accepted by Strathclyde as he had received full pay on the basis of those hours when he was on sick leave.
25. On 30 March 2009, Mr McBride attended a meeting with Strathclyde to discuss the position. Strathclyde confirmed the points discussed at the meeting in a letter dated 10 April 2009 as follows:
- “You advised that you had previously been paid 15 hours per week and these were the hours you wished to be

considered for. It was explained to you that your contract of employment requires you to work 3 hours per week i.e. drill period. There is no guarantee of any additional hours given that there are many external variants to the organisation, which responds to public need/demand, as well as seasonal /climatic fluctuations and the needs/demands of your primary employment, all of which are outwith the control of the organisation. Considering this and the limited availability of non operational duties within the organisation...the six hours per week offered to you are considered more than reasonable...

You advised that you did not feel that, due to your medical condition, you were able to carry out the administrative duties offered to you in the correspondence of 11 February 2009. You were advised that the duties offered to you would be the subject of a risk assessment prior to you commencing any duties. You asked for a further referral to Occupational Health to confirm if the duties offered to you were suitable. I can confirm that following our meeting Occupational Health have again reviewed your case and confirmed that the duties offered to you are appropriate in terms of your medical condition...

You advised that you wished to be considered for 40/42 hours in the Wholetime Service. It was explained to you that this was not an option as this was not considered by the organisation to be reasonable due to the part time nature of your contract and the limited availability of non-operational duties within the organisation. “

26. On 23 December 2009 Mr McBride was examined by Strathclyde's occupational health physician who said that Mr McBride remained unfit for operational duties but that a return to work could be achieved if a suitable non-operational post were to be identified.
27. On 17 March 2010 Mr McBride instigated Stage 1 of the FPS Internal Dispute Resolution Procedure (**IDRP**) on the grounds that the offer of three hours a week employment was not a reasonable alternative role and therefore he was entitled to an ill-health pension. In addition Mr McBride complained that the matter had not been resolved in a timely manner.
28. The Appointed Person issued his Stage 1 IDRP decision on 18 May 2010 and said that although it was understood that Mr McBride had in fact been offered employment of six hours per week Strathclyde had been asked to reconsider the number of hours offered. With regard to dealing with the situation in a timely manner the Appointed Person said that he was aware

that the matter had been on going for some time and he had asked Strathclyde to meet with Mr McBride to conclude the issue.

29. On 18 June 2010, Strathclyde wrote to Mr McBride confirming that the offer of six hours per week on the Retained Duty System was still considered appropriate.
30. Mr McBride rejected the offer once more and, on 20 October 2010, Strathclyde wrote to Mr McBride confirming that he would be paid in lieu of notice and therefore his employment would be terminated on the grounds of capability with immediate effect.
31. The Stage 1 IDRP decision was upheld at Stage 2 of IDRP.

### **Additional Information**

32. Strathclyde have provided a calculation of the average number of hours Mr McBride worked in the twelve weeks before the incident on 22 March 2006 (27 December 2005 to 22 March 2006) which they say amounts to 6.39 hours each week. The calculation shows the dates Mr McBride was called out and the amount of time he spent at each incident on each occasion. The calculation shows that between 29 December 2005 and 12 February 2006 the actual time Mr McBride spent at various incidents amounted to 14.22 hours. The decimalised equivalent is shown as 38.37 hours (incidents attended) + 4.5 hours (called out but not included in crew) = 42.87 hours which has been divided by 12 to give a weekly number of hours of 3.57 to which the additional 3 hours for training has been added. The calculation shows that the hours Mr McBride was paid for amounted to 79.72 which has been divided by 12 to give a weekly number of hours of 6.64 (decimalised) and that the total actual hours paid = 6.39.
33. Mr McBride has provided copies of some of the payslips he received during the period 29 December 2005 and 22 March 2006. The payslips are for two week periods paid two weeks' in arrears and include the following information:

**Payment Date 2 March 2006** (for the two week period ending on 14 February 2006)

Turnout £429.92 (including £219.81 for Community Safety work)

Disturbance £40.68

Retained Fee £108.62

Drill Night £77.58

**Payment Date 16 March 2006** (for the two week period ending on 28 February 2006)

Attendance £12.93

Turnout £193.95

Disturbance £57.63

Retained Fee £108.62

Drill Night £77.58

**Payment Date 30 March 2006** (for the two week period ending on 14 March 2006)

Turnout £84.05

Disturbance £16.95

Retained Fee £108.62

Drill Night £77.58

#### **Summary of Mr McBride's position**

34. Retained firefighters do an average of 2-3 hours per week known as the "drill period" which allows the firefighter to attend training and administrative duties. Retained firefighters then work a number of additional hours in respect of the operational aspects of their role (e.g. attending incidents).
35. His average hours before his injury were in excess of fifteen hours per week equating to a gross weekly pay of £220.00. This is evidenced by his payslips and was accepted by Strathclyde as this was the level of pay he received after his injury as contractual sick pay. The offer of 3 hours per week, which equated to a gross weekly pay of £53.20, was substantially less than he had been receiving. In addition the role included administrative duties although he had specifically stated that his literacy skills were poor and that he would prefer not to be redeployed into an administrative role. Such an offer cannot be deemed to be a suitable alternative.
36. There is no reason for Strathclyde to utilise its rules for determining sick pay in assessing the reasonableness of an offer of alternative employment. To do so in other areas of employment rights (for example in redundancy situations) would arguably be unlawful. Strathclyde should

have taken into consideration Mr McBride's regular income from the Service.

37. His payslips relating to the periods immediately before his accident show that for the last week in February 2006 he received £458.72 which equates to having worked 15 hours per week.
38. The figures presented by Strathclyde are not representative of the hours he actually worked as firefighters are paid for at least one hour not a fraction of an hour as well as receiving other payments for attending drill nights and a disturbance fee. Also, he was on annual leave from 29 December 2005 to 8 January 2006 and again from 6 March 2006 to 12 March 2006 therefore the hours worked in the 12 weeks immediately prior to the incident cannot accurately reflect his average hours.
39. The special project undertaken in February 2006 may have been for community safety work which is not a "one-off", it is something that retained and whole time fire fighters are regularly required to do.
40. The Emergency Fire Services Rolemaps (May 2003) states that a Crew Manager should "inform and educate your community to improve awareness of safety matters."
41. The Integrated Personal Development System Code of Practice states "The rolemaps are enshrined in the terms and conditions of all operational staff... Specific activities within roles can be determined by the FRA to meet their local needs and Fire and Rescue authorities can require any reasonable activity to be carried out by an individual employee within his role map."
42. The Grey Book Sixth Edition confirms the relevance of the Rolemaps to the terms and conditions of employment of firefighters at the relevant time.
43. His P60 for the year ending 2006 shows a salary of £10,909.34. In order for an alternative role to be suitable, regardless of the actual hours offered, the pay should be commensurate to that received before the accident. The offer from Strathclyde would have resulted in a yearly salary of between 0 (if he were given no hours at all) and £5,532.80 which is, at best, a 50% reduction in pay.

44. Strathclyde's has not followed its own guidance in relation to redeployment which states "suitable alternative employment is an individual issue but includes issues around the nature of the job, the status of the job, salary, qualifications and skills, how and when, location and accessibility, personal circumstances [and] career prospects."
45. He accepts that he is unfit for operational duties but fit for non-operational duties. He is particularly experienced in training and health and safety issues and given that there were non-operational roles of that nature he was hopeful that Strathclyde would redeploy him into one of those roles. Although he accepts that there is no legal obligation for Strathclyde to have offered him a full time role given that he was no longer able to carry out his primary employment he felt that Strathclyde should have considered redeployment in those roles.
46. His skills profile was not restrictive given his injury. He was informed that no travel costs would be paid therefore to offer to make a round trip of three hours was reasonable of him.
47. The second offer of 3 – 6 hours could still have been only three hours per week as the other three hours were on a flexible basis. The role still comprised of administrative duties and it took Strathclyde seven months to put forward an offer that was potentially as unsuitable as the first offer.
48. Strathclyde wrongly allege that this offer is suitable alternative employment and say that his refusal to accept the offer disentitles him to an ill health pension. He is clearly entitled to an ill health pension under the FPS as he has sustained a qualifying injury and there is no suitable alternative employment.
49. The judgment in the case of *Marrion and Others v The Secretary of State [2009] EWCA Civ 450* applies to his case. This confirms that it is not the ability of the individual to carry out non-operational duties that disentitles him to an ill health pension, it is the availability of a suitable alternative non-operational role. The Court of Appeal summarised the position as follows:

"The question for [IQMP] and, if raised on appeal, for the Board, is whether the fireman is (permanently) subject to incapacity for the performance of his operational firefighting duty and any other duties within the definition of "regular

firefighter” and within his contract which it is proposed he perform, but not any additional duties. If therefore no redeployment away from operational firefighting is available, then the question stops with (permanent) incapacity for the performance of operational firefighting.”

### **Summary of Strathclyde’s position**

50. Mr McBride’s skills profile was very restrictive in that it did not allow the service to consider roles outwith a radius of 1.5 hours of the area. The skills profile advised that Mr McBride would be interested in community education work. He also advised that he would not consider administrative work. The role that has been offered to him is still within the Retained Duty System and is not an administrative role.
51. Mr McBride was offered 6 hours a week on 2 September 2008. This was seen as reasonable given the restrictions Mr McBride placed on the tasks and roles he could perform and the travel distance he could undertake. The role that Mr McBride had and the role he would have in the future was to a large extent limited by his own perceptions rather than any valid or vouched for restrictions.
52. The custom and practice of the Service when considering alternative duties for all staff is to consider their contractual hours and for Retained Duty staff the practice as set out in the NJC National Conditions of Service has always been applied. All alternative duties for staff are considered on their contractual hours first. For Retained Duty System staff this would be 3 hours per week. However, when considering alternative duties for Retained Duty System staff the custom and practice is to calculate working hours on the previous 12 weeks.
53. Mr McBride was originally offered 3 hours per week as Retained Duty System staff are contracted for 3 hours on their drill night. In response to Mr McBride’s concerns a review of the previous 12 weeks average showed that he was paid 6.39 hours per week. The offer of 6 hours per week was then made to Mr McBride. It is not agreed that Mr McBride was previously working on average 15 hours per week.
54. In terms of determining a Retained Duty System employee’s previous earnings for the calculations of sick pay, annual leave etc. the NJC National Conditions of Service for firefighters is clear that “the employee’s

average weekly remuneration in the previous twelve weeks taking all payments into account” is considered.

55. The 12 week average period used for Mr McBride included the periods when Mr McBride was on holiday. If the two weeks holiday is excluded and the two previous weeks are taken into account Mr McBride was paid for 9 hours of turnouts. Taking this into account the average over the 12 weeks worked would be 79.72 (actual hours paid) plus 9 hours =  $88.72/12 = 7.3$  hours average over 12 weeks.
56. In respect of Mr McBride’s payslips these cover 2 week’s pay for weeks dated 2 March, 16 March and 30 March and cover all payments which he would have been due as an operational Retained Duty System employee. Given that Mr McBride would no longer operate in an operational capacity he would not be due his retainer payment which retains him for his Retained Duty System role, turnout payment which is paid when he turns out for an incident and attendance which is paid when he attends the station to a turn out. The 12 week average equated to 6.39 weekly hours.
57. Mr McBride’s hourly rate was £12.93 an hour.
58. The hours where Mr McBride was called out but did not make the crew have now been included in the calculation of his average hours. The average pay Mr McBride would have received based on the 12 weeks average before 22 March 2006 was £114.18 per week. Without the disturbance payments his average pay would have been £91.86 per week. The hourly rate this is based on was crew commander rate, however, the alternative duties that were offered would not have attracted this rate but a lower rate of pay.
59. The payslip dated 2 March 2006 included a one-off payment of £219.81 in relation to a special project and, if this amount is deducted, the payslips show an average of 6.25 hours a week. The special project was a Community Safety pilot project where Retained Duty System staff were asked to undertake community safety work in the Cumnock area. The work was offered on a voluntary basis and Mr McBride was paid 17 hours for this work.
60. Over the 12 weeks average, Mr McBride’s actual hours at incidents was 14.22 hours, his actual time decimalised was 38.37 and his actual hours

paid was 79.72. On this basis he was offered the 6 hours which included the 3.57 decimal hours and the 3 hours for drill night.

61. Mr McBride has not been offered an ill health pension because he does not meet the criteria and is unable to undertake operational duties. Mr McBride was referred to the occupational health unit on 20 December 2009 and the outcome was that there was no change to his condition. As the service could offer alternative duties in line with the Scottish Government circular no ill health retirement was offered.
62. The purpose of the pension is not to compensate the operational firefighter for any loss or inability to carry out his primary employment. The non-operational duties are to compensate the firefighter for his inability to provide and fulfil his role for the secondary employer i.e. the Fire Service.
63. The reference to the case of Marrion and Others v The Secretary of State (2009) is noted but its relevance to Mr McBride's case is denied. The circumstances in Mr McBride's case are different in that the main difference is that Mr McBride was offered redeployment to non-operational duties within his role by the employer.

### **Conclusions**

64. Ill health benefits are awarded under the FPS to a firefighter who is subject to compulsory retirement on grounds of permanent disablement. Disablement is defined in Rule A10(2) as incapacity for the performance of duty; 'permanent' is defined as lasting until a member's normal retirement date. Although the Fire Authority makes the decision as to whether ill health benefits are payable (Rule H1), it is bound by the opinion of the IQMP to whom it must refer the application. Where the member is dissatisfied with the opinion of the medical practitioner, he may appeal against it to an independent person nominated by the Secretary of State as medical referee (Rule H2).

65. In October 2004 the Regulations were amended to allow a firefighter who subsequently becomes permanently disabled for firefighting while remaining fit for other related duties to continue as a member of the FPS (on condition that there has been no break in service). The guidance issued states that “if a Fire Authority is of the view that the retention of a firefighter would be of value to the service, redeployment to other duties, as appropriate to the role of the firefighter should be considered and would be allowable under the FPS rules. If the [Fire Authority] cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with an ill-health award.”
66. There appears to be no dispute that, following the incident in March 2006, Mr McBride was permanently disabled for firefighting. Nor is there any dispute that Mr McBride remained fit for other non-operational duties. The dispute that has arisen is the suitability or otherwise of the role offered to Mr McBride.
67. Mr McBride argues that the alternative role offered by Strathclyde cannot be considered as a suitable alternative because the hours and the salary are considerably less than he was working and receiving before March 2006. Strathclyde submit that the hours worked are the same but the salary offered is less because Mr McBride will no longer be entitled to the additional payments and allowances he received as an operational firefighter.
68. The terms and conditions of Mr McBride’s former employment with Strathclyde derive from the National Joint Council for the Local Authorities’ Fire Services Conditions of Service (the **Grey Book**). Strathclyde say that when considering alternative duties it is their custom and practice to calculate the working hours based on the previous 12 weeks as they would when calculating sick pay, annual leave etc. as set out in Section 5 of the Grey Book, ‘full pay’ means the employees average weekly remuneration in the previous twelve weeks...”. I see nothing wrong in that approach given that for firefighters on the Retained Duty System the number of hours worked must vary week by week because of the nature of the job.
69. However, in calculating a figure that accurately reflects the average number of hours worked it cannot be correct to include periods of time

where the individual has been on sick leave or has not been available for work because of annual leave. Indeed this approach is reflected in Section 4, part C, of the Grey Book which deals with annual leave and says “A week’s pay during a period of annual leave shall mean the employee’s average weekly remuneration in the previous twelve weeks (excluding any week in which he or she has been on sick leave or received no pay), taking all payments into account.” During the course of this investigation Strathclyde appear to have accepted that the twelve week period they considered included times when Mr McBride was on annual leave and that this was incorrect however the fact remains that the initial calculation, and the one Strathclyde are still asking Mr McBride to accept, was flawed.

70. The guidance, issued in October 2008, states that “In the case of retained duty system firefighters any redesign and readjustment should be consistent with the duty system.”. Section 4 of the Grey Book sets out the hours of duty and the duty systems. Under the heading “Retained Duty System” the Grey Book states that such employees shall be **required** (my emphasis) to attend for duty for training, development and maintenance duties for an average of two or three hours per week and shall also be **required** (my emphasis) to respond to an emergency call, incident or other occurrence.
71. 71. I have considered the decision of the High Court in London Borough of Newham v Skingle & Pensions Ombudsman [2002] 3 All ER 287, where the High Court rejected the argument that, because a rate of pay for overtime worked was provided in the member's contract, that made the overtime contractual and thereby pensionable. Leave was given to appeal to the Court of Appeal but only on the point of law as to whether or not Mr Skingle was contractually obliged to work overtime. The Court of Appeal held that the nature of Mr Skingle's contract was that he was required to work the overtime in question, unless he had made proper arrangements for someone else to do so. Thus, Mr Skingle's overtime was contractual, the pay for that work constituted part of his pensionable salary. It follows therefore, that because Mr McBride was required to attend for duty to undertake training, development and maintenance and was also required to respond to emergency calls and attend incidents or other occurrences all of those hours must be regarded as contractual hours. Furthermore, the

requirement, as set out in the Grey Book, was for Mr McBride to attend promptly at the station to which he was attached in response to an emergency call or to be on standby at another station. The Grey Book does not extend the requirement to attending the incident. Therefore, in my judgment, the hours when Mr McBride was called out but did not make the crew should also be regarded as contractual and ought therefore to be included in the calculation of the average number of hours Mr McBride worked in the 12 weeks (excluding annual leave) before the incident on 22 March 2006.

72. However, although Strathclyde have, to an extent, reached this conclusion it maintains that the payment Mr McBride received for undertaking community safety work in February 2006 should not be included in its calculation of the average hours worked by Mr McBride. Strathclyde say that this was a “one off” payment as the work was a special project and was undertaken on a voluntary basis. Mr McBride argues that the work was not voluntary but that he was required to undertake community safety work. The question therefore is whether such work is contractual or undertaken on a voluntary basis.
73. Section 3 of the Grey Book sets out the Roles and Responsibilities for firefighters and states that these are linked to the Fire and Rescue Services Role maps.” The Grey Book states that “Fire and rescue authorities can require any reasonable activity to be carried out by an individual employee within his or her role map. The first element on the role map for a Crew Manager, Mr McBride’s former role, is “Inform and educate your community to improve awareness of safety matters”. Given the clear message that the role, responsibilities and requirements expected of fire fighters are those set out in the role maps together with the high priority afforded to community safety work in Mr McBride’s role map I conclude that such hours should be regarded as contractual and therefore be included in the calculation of the average number of hours Mr McBride worked in the 12 weeks (excluding annual leave) before the incident on 22 March 2006.
74. Insofar as the payments Mr McBride was receiving as an operational firefighter e.g. the retainer payment, the disturbance allowance etc. these

are supplements to a firefighter's basic pay as an allowance for inconvenience or for the reimbursement of expenditure which might be incurred in connection with a person's employment. In my judgment such allowances and payments do not equate to additional hours worked and so should be excluded from the calculation of the average number of hours worked in the 12 weeks before an incident.

75. Mr McBride argues that the information used by Strathclyde in its calculation of the average hours does not tally with the information shown in his payslips. This is because in order to calculate the average number of hours worked it is necessary to use "actual time". "Actual time" is the time from when Mr McBride is alerted that he is required to respond to an emergency call, incident or other occurrence to the time when the incident ends. That, in my view, would appear to accurately reflect the number of hours worked. The "actual time" hours will not correspond with the number of hours which are actually paid because, as stated in the Grey Book, fire fighters are paid a minimum of one hour's pay up to one hour. If they remain on duty for more than one hour and fifteen minutes he or she will receive two hour's pay and after two hours on duty he or she shall then be paid for complete periods of fifteen minutes. Therefore, dividing the amount of pay Mr McBride received each week, as shown on his payslip, by his hourly rate artificially inflates the number of hours actually worked and so provides an inaccurate figure.
76. For instance, the payslip for the 2 March 2006 shows that for the period 31 January 2006 to 14 February 2006 Mr McBride received £210.11 for "turnouts" which equates to having been paid for 16.5 hours. That is the number of "paid hours" shown on Strathclyde's calculation sheets which in turn relates to 10.41 "actual hours". For the period 15 to 28 February 2006 Mr McBride was paid for 15 hours but actually worked 8.47 hours and for the period 1 to 14 March 2006 he was paid for 6.5 hours but actually worked 3.82 hours.
77. Mr McBride says that Strathclyde has not followed its own guidance in relation to redeployment which state that "suitable alternative employment is an individual issue but includes issues around the nature of the job, the status of the job, salary, qualifications and skills, how and when, location

and accessibility, personal circumstances [and] career prospects.

Strathclyde asked Mr McBride to complete a Skills Profile, which included details about his qualifications, skills, location and accessibility amongst other matters. There is no evidence to suggest Strathclyde did not take the information supplied to them into consideration and in my judgment, setting aside the flawed calculation in relation to the average number of hours, I find nothing to support an argument that Strathclyde deviated from the guidance in relation to redeployment.

78. In summary, the payments Mr McBride was receiving as an operational firefighter e.g. the retainer payment, the disturbance allowance etc. should be excluded from the calculation of the average number of hours worked in the 12 weeks before the incident on 22 March 2006.
79. However, the hours when Mr McBride was called out but did not make the crew and the hours where community safety work was undertaken should be included in the calculation of the average number of hours Mr McBride worked in the 12 weeks before the incident on 22 March 2006. Further, the 12 weeks used for the calculation should exclude weeks where annual leave has been taken or periods where no pay is received.
80. I am not satisfied that Strathclyde have carried out an accurate assessment of the average number of hours Mr McBride worked in the 12 weeks before the incident on 22 March 2006 and I am therefore remitting the matter to Strathclyde to reconsider Mr McBride's eligibility for ill-health benefits having taken into account the points I have made above in relation to the calculation.
81. I am also ordering payment of compensation for the distress and inconvenience Mr McBride will have suffered as his assessment has not been correctly completed.

### **Directions**

82. I direct that, within 28 days of the date of this Determination, Strathclyde shall, having obtained such information as is necessary, recalculate the average number of hours Mr McBride worked in the 12 weeks before the incident on 22 March 2006 and, issue a further decision regarding Mr McBride's redeployment or his eligibility for an ill health award.

83. In the event that it is decided that Mr McBride was entitled to an ill health award, the benefits shall be put into payment as soon as is practicable and, if they are payable from a past date, interest is to be paid on any benefits from the due date of each payment to the date of actual payment.
84. In addition, within 28 days from the date of this Determination, Strathclyde shall pay Mr McBride £150 for the distress and inconvenience he has suffered over the period while his assessment has been ongoing.

**Jane Irvine**  
Deputy Pensions Ombudsman

23 December 2013