

Ombudsman's Determination

Applicant	Mr A
Scheme	The New Firefighters' Pension Scheme (England) (the 2006 Scheme)
Respondent	Warwickshire Fire and Rescue Authority (the Authority)

Complaint summary

1. Mr A complains that the Authority is not treating certain elements of his pay as pensionable. He believes this is contrary to the 2006 Scheme rules, as set out in The Firefighters' Pension Scheme (England) Order 2006 (**the Rules**).

Summary of the Ombudsman's decision and reasons

2. The complaint is upheld against the Authority because it has wrongly interpreted the Rules. In particular, it has not applied the relevant case law correctly in deciding whether disturbance, work activity and training attendance payments should be considered permanent and therefore pensionable.

Detailed Determination

Material facts

3. Mr A was a retained firefighter and he is now a deferred member of the 2006 Scheme. As a retained firefighter, he worked shift patterns under a duty system called the Retained Duty System.
4. The different duty systems, and corresponding pay elements, for firefighters are set out in the National Joint Council for Local Authority Fire and Rescue Services Scheme of Conditions of Service sixth edition (2004) (updated 2009), commonly known as the 'Grey Book'. In particular, the Grey Book confirms that pay for firefighters working under the Retained Duty System is broadly made up of the following elements:
 - an annual retainer allowance (calculated and paid as a percentage of the appropriate annual basic pay for a whole-time firefighter);

- disturbance payments (paid hourly when a retained firefighter is called out and responds promptly to the station);
 - work activity payments (paid at the appropriate basic hourly rate for numerous activities, described further below); and
 - training attendance payment (paid at the appropriate basic weekly rate in respect of each week of a course, as well as any applicable excess).
5. The Grey Book also refers to compensation for remuneration lost. However, this is not relevant for the present purposes as it does not form part of the complaint.
 6. It should be noted that the annual retainer allowance is a set figure. In contrast, the other payments are calculated as and when the corresponding tasks are completed.
 7. Currently, the Authority includes Mr A's annual retainer allowance in pensionable pay, but not disturbance, work activity or training attendance payments. Mr A believes all of the above elements of pay should be considered pensionable.
 8. In raising his complaint, Mr A has stated that the following elements of his pay specifically should be treated as pensionable: turnouts; attendances; drill nights; and other work related activity. Mr A says these activities fall under work activity payments, as set out under Part B paragraph 10 of the Grey Book, and are applicable in the following circumstances:-
 - Turnouts – when answering a call to attend an incident (with pay consisting of a single turnout-fee for each incident, and hourly payments for each hour Mr A is in attendance at an incident).
 - Attendances – when called out to a fire station but not subsequently required to attend an incident.
 - Drill nights – when attending weekly “drill nights” for the purposes of training, development and maintenance (with pay consisting of a fixed “drill fee” equivalent to two hours’ pay).
 9. Mr A has also said that pay for training attendance, undertaken at centres other than the station to which he was attached, ought also to be pensionable. Training attendance pay is referred to under Part B, paragraph 14, of the Grey Book.
 10. Although, Mr A did not specifically reference his disturbance pay as part of his initial complaint it is clearly in dispute and has been considered by the Authority, so it is also dealt with in my Determination. Disturbance pay is referred to under Part B, paragraph 9, of the Grey Book.

11. The Rules set out which elements of a firefighter's pay are pensionable under the 2006 Scheme. In particular, Part 11, Rule 1, states that:

“(1) Subject to paragraphs (3), (6) and (7) and rule 3(3), the pensionable pay of a firefighter member is the aggregate of:

 - (a) his pay in relation to the performance of the duties of his role, except any allowance or emoluments paid to him on a temporary basis...
 - (b) his permanent emoluments (including, in the case of a retained firefighter, any retaining allowance)”.
12. The Authority believes that Mr A's annual retainer allowance should be included in his pensionable pay. It states that this is required under Part 11, Rule 1, paragraph 1(b), as set out in paragraph 11 above. However, the Authority does not include his disturbance, work activity or training attendance payments in his pensionable pay, as it states they do not have the required element of permanency. In particular, the Authority argues that they are hourly (or weekly) payments, which are intermittent and therefore temporary in nature. As such, they do not fall under either paragraph (1)(a) or paragraph (1b) of Rule 1 (see paragraph 11 above).
13. Mr A highlights that section (1)(a) states that all elements of his pay are pensionable, provided they are in relation to the performance of the duties of his role and are not temporary. He believes disturbance, work activity and training attendance pay, all meet this criteria. He adds that section (1)(b) states that any other pay can also be pensionable provided it is permanent.
14. Mr A's contract of employment indicates that the annual retainer allowance is only a small portion of his pay. It states that he is required to provide at least two to three days cover a week, and Mr A says that in practice he is called out more often. Initially he says he was called out two or three times a day, although more recently it has been an average of six times a week. Such cover triggers disturbance, turnout and attendance pay.
15. Mr A's contract also states that he must attend drill and maintenance duties for at least two hours a week, which triggers “drill nights” pay. In addition, his contract states that he must attend training courses as may be determined as necessary for the performance of his duties. Mr A says he was required to attend training at regional centres at least six days a year, and he often attended such training for up to 20 days a year. The Authority has not disputed this.
16. Mr A believes his contractual requirements evidence that the pay elements in dispute are pay in relation to the performance of the duties of his role. In addition, they are not temporary, as a result, they ought to be considered pensionable under Part 11, Rule 1, paragraph (1)(a). If the elements of pay in question cannot be defined as temporary, they may be defined as permanent by default. They may also, therefore,

fall under Part 11, Rule 1, paragraph (1)(b). However, Mr A believes that, in any event, they come within paragraph (1)(a).

17. Both parties cite case law to support their respective positions. In particular, they reference several relevant case law authorities which have considered the meaning of “pensionable pay” in relation to firefighter pension schemes.
18. Of particular interest in this instance are Kent & Medway Towns Fire Authority v Farrand [2001] OPLR 357 (**Kent & Medway**), and Norman v Cheshire Fire & Rescue Service [2011] EWHC 3305 (QB) (**Norman**). Both of these cases considered the meaning of pensionable pay under the 1992 Firefighter’s Pension Scheme (**the 1992 Scheme**), and respective rules. However, the judgments are also applicable in this case as the relevant wording of the two schemes is broadly the same.
19. In Kent & Medway, Blackburne J identified three indicia of pensionable pay, at paras 35, 36 and 39. These can broadly be summarised as:-
 1. The pay must be calculated in accordance with the firefighter’s ordinary rate of pay;
 2. The pay must be for work done under the contract of employment (a payment in lieu of leave not taken was not considered pensionable pay); and
 3. The pay must be regular in nature.
20. In relation to this last criterion, Blackburne J said that regular pay is pay which is in contrast to “payments of a one-off nature, however calculated, which happen to arise or become payable in the course of, or as a result of some unexpected or extraordinary event occurring in the firefighter’s employment”. He added that “the concept of pensionable pay is not concerned to pick up payments...above what the firefighter would have received in the ordinary course of his employment”.
21. Mr A argues that disturbance, work activity and training attendance payments, are paid in relation to the performance of the duties of his role, and that they are calculated as a percentage of his basic pay. As a result, he says these elements of pay satisfy the criteria for pensionable pay, as set out in Kent & Medway.
22. Mr A adds that Blackburne J did not refer specifically to “permanency” in Kent & Medway, but instead he distinguished between “regular” and “one-off” payments. Mr A argues that disturbance, work activity and training attendance payments, are not “one-offs” and instead they are regularly paid as a contractual obligation in the ordinary course of Mr A fulfilling his duties. Mr A believes that Blackburne J’s comments should be used to help interpret “permanent”, as referred to under the Rules, and that by doing so it is clear that disturbance, work activity and training attendance payments, are not temporary allowances or emoluments.

23. Both parties have also referred to Norman, in which Smith J considered the pay of a firefighter who worked under the Day Crewing Duty System. In particular, Mr Norman was a regular firefighter who undertook retained duties, and was a member of the 1992 Scheme. The court considered whether his retaining fee, disturbance fee, and public holiday pay, were pensionable after they had been incorporated into his basic salary by means of an uplift.
24. In reaching his judgment, Smith J cited Blackburne J's three-limbed test for pensionable pay. Smith J noted, since the elements of pay had been incorporated into Mr Norman's basic pay by way of a salary uplift, Blackburne J's criteria were satisfied. Smith J did not definitively state if this would still have been the case had a salary uplift not been used to incorporate the relevant pay elements into Mr Norman's pay. However, when discussing public holiday pay before the uplift, he observed that, "it was of an episodic nature and did not have the permanence which is a feature of what is pensionable" (paragraph 96).
25. Mr A refers to paragraph 64 of the Norman judgment in which Smith J also said "it might be that the payments are made in relation to the duty system but it is a false dichotomy to infer that therefore they are not made in relation to the performance of the duties of the role". Mr A believes this supports his assertion that pay can be pensionable even if it is only paid in relation to a specific duty system.
26. The Authority believes that Norman built upon the approach set out in Kent & Medway. In particular, it acknowledges that the pay elements in dispute may not be one-offs, unexpected or extraordinary, however, under Norman the key test is for pay to have an element of permanency. It argues Mr A's disturbance, work activity and training attendance pay, varies in terms of how much is paid and when it is paid. As such, the pay is unpredictable and in this way it is temporary and not permanent.
27. It adds that Smith J was only able to find in Mr Norman's favour because the relevant pay elements had been incorporated into his basic salary. The Authority has added that Smith J's requirement for pay not to be "episodic" means hourly or weekly payments fall outside of pensionable pay.
28. Mr A says that Smith J did not need to fully address the question of what "permanent" means. The elements of pay in question had been incorporated into Mr Norman's salary and Smith J was satisfied that the criteria of permanency was clearly met based on this. Mr A believes that Smith J's observations regarding permanency are therefore limited and do not build on Blackburne J's statements in Kent & Medway. Mr A says that there is therefore no reason to believe Smith J meant to depart from Blackburne J's definition of permanency as a distinction between "regular" and "one-off".
29. Mr A adds that the Rules were drafted after Kent & Medway, and therefore, with that case in mind, he points out that the definition of pensionable pay for the 2006 Scheme is largely the same as it was for the 1992 Scheme. Based on this, he

believes the draftsman clearly intended for the precedent set in Kent & Medway to be applied to members of the 2006 Scheme; namely, that only “one-off”, “unexpected” and “extraordinary” pay is not pensionable.

30. The Authority has also referred to a Determination, previously issued by our Office, in further support of its position. In particular, our Office considered a complaint (reference PO-3511), in which the above case law was applied to the 2006 Scheme and certain pay elements were found not to be pensionable.
31. PO-3511 was a matter that was initially considered by our Office, before being brought before the High Court, and subsequently remitted back to our Office for reconsideration on one point concerning the annual retainer fee. The Authority highlights that, when considering the matter on appeal, the High Court ruled that the then Deputy Pensions Ombudsman had not erred in law in stating that the rent, fuel and light allowances paid to the complainant were not part of the complainant’s pensionable pay under the 2006 Scheme. In particular, the Court agreed that these elements of pay were only payable by virtue of the firefighter’s assignment to a specific duty system. As such, the Authority says they were not considered to be permanent emoluments under Part 11, Rule 1, paragraph (1b), as they would not be payable if the firefighter were to be transferred to a different duty system.
32. Mr A acknowledges the decision reached in PO-3511, but highlights that a retained firefighter cannot be moved to another duty system. As a result, he believes this case supports his position that disturbance, work activity and training attendance payments, are permanent emoluments. Mr A also believes that PO-3511 was incorrectly decided, as it contrasts with Smith J’s comments in para 64 of Norman, as well as the ruling in Kent & Medway. Mr A states that the relevant test is whether an element of pay is “regular” as distinguished from “one-off”, “unexpected” and “extraordinary”. As such, Mr A states that, at best, PO-3511 supports his case. At worst, the Authority cannot rely on it as it cannot be reconciled with previous case law.
33. Lastly, in support of his position, Mr A has provided a copy of a document entitled “The New Firefighters’ Pension Scheme (England). The assessment of benefits for firefighters who undertake retained duties” (**the Supplement**).
34. In particular, the Supplement has an issue date of December 2006, and states it is to be read together with “The New Firefighters’ Pension Scheme 2006 (England). A Guide to benefits”. On page 8, the Supplement lists all elements of a retained firefighter’s pay under either “pensionable pay” or “non-pensionable pay”. Mr A highlights that all disturbance, work activity and training attendance payments, are listed under the column for pensionable pay.
35. The Authority states it has never acted in accordance with the Supplement and disputes its validity. It states that the Supplement was never widely distributed and it

believes it was archived upon publication with the intention that it would be subject to review.

36. In any event, the Authority notes that the Supplement cannot override the Rules. Therefore, if it is inconsistent with the Rules, then it is invalid and Mr A cannot rely on it.
37. Before the complaint reached our Office, the Authority sought the legal opinion of Counsel on whether hourly payments are pensionable pay under the 2006 Scheme. This opinion did not strictly review training attendance payments, but Counsel's overall assessment is applicable to all the pay elements in dispute here. Counsel's key conclusions are summarised below:-
 - Whether hourly payments can be considered pensionable largely rests on whether they can be considered permanent. However, there is no clear guidance within the statutory language to assist on the relevant definition of permanent. As such, whether hourly payments are pensionable may rest on how a court judge gives meaning to the word "permanent".
 - Kent & Medway indicated that permanency should be interpreted as regular, with regular meaning pay which is not unexpected or extraordinary. However, it is not clear where that leaves payments that are made occasionally and which the firefighter would expect to receive from time to time, but which may not necessarily be paid every week.
 - Norman suggests pay that is episodic is not pensionable. This suggests hourly fees may not be pensionable. Furthermore, in Norman, the claimants' Counsel accepted that call-out fees had not been pensionable before the salary uplift.
 - However, Norman also confirmed that payments only made in relation to a particular duty system can be pensionable. Once this is accepted, it is difficult to justify that allowances such as disturbance fees are not also pensionable. They are not temporary and it is difficult to see why it should matter that they are not regular in the sense of being predictable. In particular, the statutory language does not impose such a requirement.
 - Conversely, hourly payments are not temporary in the sense that they are embedded into the firefighter's contract, and they are only temporary in the sense they are intermittent and unpredictable.
 - In PO-3511 the then Deputy Ombudsman considered whether the retainer fee was pensionable where a regular firefighter was paid on the 'day crewing' duty system. The issue was the same as that considered in Norman, except that the retainer fee had not been consolidated into the firefighter's salary by

way of an uplift. The Deputy Ombudsman held that the retainer fee was not pensionable, as it was specific to the duty system the firefighter was assigned to. As the firefighter could be reassigned to another duty system at any time, the retainer fee was essentially temporary.

- It is difficult to reconcile the conclusions reached in PO-3511 with Norman. Smith J held that an element of pay did not stop being pensionable on the basis that the firefighter could be moved to another duty system. However, in any event, the reasoning in PO-3511 does not apply to retained firefighters, as they are not capable of being transferred to another duty system.
- It is unclear why the draftsman specifically referred to the retaining allowance under Part 11, Rule 1, paragraph 1(b). However, it does not necessarily follow that the draftsman was suggesting that other pay elements were not pensionable by default. If this indeed was his intention he could easily have stated so expressly.
- There is a mis-match between the guidance given in the case law regarding a correct interpretation of the Rules.
- If the hourly payments begin to be treated as pensionable, then additional contributions will need to be paid by both employer and employee. There appears to be no reason why these would need to be paid in one lump sum payment.
- In conclusion, on balance, Counsel felt that a judge would say that the hourly payments paid to firefighters are pensionable under the Rules. However, Counsel thought the issue sufficiently unclear that the Authority could probably justify coming to either conclusion.

Summary of Mr A's position

38. Mr A maintains that the case law supports his interpretation of the Rules. Namely, that disturbance, work activity and training attendance payments, fall under pensionable pay.
39. In particular, Mr A believes that Kent & Medway sets out how the requirement for emoluments to be permanent, or not temporary, under the Rules ought to be interpreted. He says Blackburne J's approach indicates that the test is whether pay is regular and not "unexpected", "extraordinary" or a "one-off".
40. Following Blackburne J's guidance, Mr A says disturbance, work activity and training attendance payments, are clearly pensionable. They are not unexpected or extraordinary, as they form part of the ordinary duties of his employment. As a

retained firefighter, they are in fact integral parts of his role and could not possibly be considered “one-off” payments.

41. Mr A does not believe that Norman developed Blackburne J’s approach in any meaningful way that is applicable to his case. He notes that Smith J did not fully consider Mr Norman’s elements of pay before they were incorporated into his basic salary by way of an uplift, and Mr Norman’s circumstances were not otherwise relevant to his. As such, there is no reason to depart from Blackburne J’s approach.

Summary of the Authority’s position

42. The Authority believes that the case law supports its interpretation of the Rules. In particular, it says Smith J considered similar pay elements as the ones currently in dispute; namely, the disturbance fee. It maintains that Smith J held this element of pay was pensionable because it had been incorporated into Mr Norman’s normal pay by way of an uplift to his salary. As such, it contends that Smith J would not have found the disturbance fee to be pensionable, had it not been incorporated into Mr Norman’s basic salary.
43. The Authority highlights the Counsel’s comments, which state it can legitimately conclude that hourly payments are not pensionable. It says this clearly demonstrates that its interpretation of the Rules is reasonable and Mr A’s complaint ought not to be upheld.
44. As part of its submissions to our Office, the Authority has reiterated its previous arguments in support of its position.
45. Lastly, the Authority has carried out a review of how other fire and rescue authorities treat disturbance, work activity payments and training attendance, and it confirms that there are variations across the country with regard to what is considered pensionable pay. However, the Authority believes its approach is correct in deciding on the interpretation of pensionable pay under the Rules.

Conclusions

46. Pensionable pay is defined by Part 11, Rule 1.
47. Case law on how the Rules should be interpreted, has been cited by both Mr A and the Authority in support of their respective positions.
48. With regard to the 2006 Scheme Supplement, although it cannot override the Rules laid down by Parliament, where the Rules are unclear it is understandable that Mr A has sought to rely on it in support of his argument. However, there is some doubt as to the Supplement’s status so I have not taken account of it.
49. With regard to the Rules, Counsel’s opinion is a useful guide to the difficulty of interpreting what is included as pensionable pay. In particular, it highlights the various legal arguments for the Authority to consider.

50. The Rules state that pay relating to work performed in relation to the duties of Mr A's role, and which was not temporary, should be considered pensionable. It does not appear to be in dispute that the disturbance, work activity and training attendance payments, are emoluments for work performed in the duty of Mr A's role. Instead, the key difference between the parties is whether the elements of pay are temporary emoluments.
51. Blackburne J's ruling was in reference to the 1992 Scheme, rather than the 2006 Scheme and the Rules being considered here. However, I agree that his third indicia provides some guidance on how "permanent" ought to be interpreted. In particular, Blackburne J suggests pay must be regular in order to be pensionable, and regular is to be interpreted as not an extraordinary, unexpected or for a one-off event.
52. Mr A's employment contract requires him to provide two to three days of cover every week, as well as attend weekly drill and maintenance duties. These tasks attract the disturbance and work activity payments, as described above. As such, and with Blackburne J's ruling in mind, it follows that the disturbance and work activity payments are paid weekly, without fail, and as such I take the view that they are permanent, and not temporary, emoluments.
53. The evidence also indicates that Mr A is required to attend training, at centres other than the station to which he is attached, for a minimum number of days each year. This attracts the training attendance payment, as described. Whilst this pay may be less frequent than disturbance and work activity payments, it would not be reasonable to conclude that it is a temporary payment.
54. The Authority relies on Norman, to counter Mr A's arguments. However, it is unclear what Smith J would have concluded about the elements of pay in that case had he considered them in lieu of Mr Norman's salary uplift. Whilst Mr Norman conceded certain elements of his pay were not pensionable before the uplift to his salary, Smith J says that this was not the legal position, only the prevailing view. Although, Smith J states that such a prevailing view may have been justified, he only says this in reference to the retainer fee. This was because Mr Norman was a regular firefighter undertaking retained duties which were voluntary before the payments in respect of those duties were incorporated into his salary. So, I do not believe that the Authority can rely on Norman in order to support its approach.
55. Smith J referred to pensionable pay as being pay that is not "episodic", but this was in the context of public holiday pay. Public holiday pay can be distinguished from disturbance, work activity and training attendance pay, on the grounds that public holiday pay may never be applicable, as a retained firefighter may never need to work on a public holiday.
56. On balance, I do not agree with the Authority's interpretation of Smith J's Judgment. This is because it would be a significant delineation from Kent & Medway, and Smith J's Judgment does not provide confirmation that he intends this. I agree with

Counsel's remarks, which question why regular must mean predictable rather than simply expected. In any event, Mr A's disturbance and work activity payments could be predicted to an extent, as he was contracted to provide a minimum level of cover and undertake two hours of drills every week. In practice, he also had to attend a minimum level of training, at centres other than his normal station, every year.

57. The Authority's Counsel has concluded that, whilst the relevant arguments are finely balanced, he considers it more likely than not that a judge would find that the hourly payments were "permanent". He has conceded that it is possible the Authority could decide either way on whether the hourly payments are pensionable, but I do not believe that the Authority has given sufficient weight to Counsel's analysis of the case law and his conclusions. The Authority's position has remained unchanged.
58. The Authority says that the draftsman could have included express provision in the Rules for the disturbance, work activity and training attendance payments, to be pensionable if he intended them to be so. However, the Rules do not provide an exhaustive list of which elements of pay are pensionable. As such, lack of reference in the Rules to the pensionable element of pay is not evidence that it is not intended to be pensionable.
59. In addition, the Authority's Counsel ultimately reached an opinion on what he believed was more likely to be concluded by a court on the question of permanency. The Authority has decided not to follow his advice. Whilst I accept that the Authority was not bound by its Counsel's conclusions, the Authority has not submitted any new reasoning for its position in view of Counsel's opinion. Its arguments remain the same as before, despite the fact that Counsel has highlighted flaws in those arguments.
60. Finally, for completeness, I believe it may be possible to reconcile PO-3511 with Norman. Smith J's comments, at paragraph 64 of the Judgment, indicate that pay is not automatically prevented from being pensionable by virtue of it being attributable to a certain duty system. In particular, Smith J concluded that an allowance can be considered as pay in the performance of the duties of the role, even if the pay element is specific to a particular duty system. However, this only relates to Blackburne J's second indicia of pensionable pay, as set out in Kent & Medway. Any pay element in dispute would still need to satisfy the remaining criteria, such as Blackburne's third indicia, in order to be considered pensionable. Smith J did not confirm whether pay can still be considered permanent, even if it is attributable to a particular duty system.
61. It is harder to reconcile PO-3511 with Kent & Medway. In any event though, as a retained firefighter, Mr A will only work under the Retained Duty System so, I do not believe that the Authority can rely on PO-3511 in support of their argument.
62. I have considered all of the points raised in the parties' submissions, and for the reasons I have given, I uphold the complaint. I believe the pay elements in dispute were those concerned with the duties performed in Mr A's role and they were not

temporary. As such, they ought to be considered as pensionable under Part 11, Rule 1, paragraph (1)(a). In addition, as the pay elements were not temporary, I find that by default they were permanent. They could also therefore be considered pensionable pay under Part 11, Rule 1 (1)(b).

63. My directions in respect of the disturbance, work activity and training attendance payments, are set out below. I understand there may be other elements of pay which retained firefighters, including Mr A, have received and which have not been specifically raised as a part of this complaint, or otherwise addressed. Whilst I can make no direction in respect of elements of pay which have not been considered as a part of this complaint, I trust the Authority will bear this Determination in mind when deciding whether those elements of pay are pensionable or not.
64. I note that this Determination may have repercussions for firefighters who are retired or active Scheme members, as well as deferred members such as Mr A. However, this is not a class action case; only Mr A has complained to me, and I have considered the relevant arguments and authorities specifically in relation to Mr A's circumstances; I do not have the power to bind others who are not joined in this complaint. Nevertheless, any members in a similar position should liaise with the Authority.

Directions

65. The Authority shall treat disturbance, work activity and training attendance payments, as pensionable pay for the purposes of calculating Mr A's pension. Within the next 28 days, the Authority shall:-
- Calculate the contribution arrears owed by Mr A and the arrears in relation to the Authority's contributions; and
 - Offer Mr A an opportunity to: either pay the arrears as a lump sum; or pay his arrears through a repayment plan over a reasonable period of time before Mr A reaches Scheme retirement age. The Authority should mirror Mr A's actions. That is if Mr A pays his contribution as a lump sum, the Authority will do so too. However, if Mr A pays by instalments, then the Authority will be able to do the same should they wish to do so.

Anthony Arter

Pensions Ombudsman
22 February 2018