

Firefighters Pension Scheme

Pensionable Pay Workshop

20th July 2016

www.local.gov.uk

Welcome



An important note

- These slides are intended to provide an overview of the scheme regulations and should not be regarded as a complete guide
 - Please note that it is the responsibility of each FRA to apply the rules of the pension scheme in accordance with their interpretation of the scheme and to obtain legal advice where they consider this is necessary.
 - The information contained in these slides have been provided to give some guidance on the rules of the pension scheme, however they should be used only as an informal view of the interpretation of the firefighters' pension scheme **as only a Court can provide a definitive interpretation of legislation.**
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Morning Session

- Focus on the Norman V Cheshire case and the principles surrounding that
- A review of the case
- What are you doing?
- Implementation stories

Afternoon session

- Focus on regulations.
- 2013 amendments
- Differences between final salary schemes and CARE schemes
- Your stories

Breaks!!



- **Introductions and objectives**
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Weightmans

Weightmans

Norman v Cheshire Fire and Rescue Service

A case summary

20 July 2016

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Agenda

- Kent and Medway Towns Fire Authority v Pensions Ombudsman and another [2001]
- The Blackburne principles
- Norman v Cheshire Fire and Rescue Service [2011]
- Guiding principles that arise from the case law
- Questions

Kent and Medway Towns Fire Authority v Pensions Ombudsman and another

Background:

- Mr Hopper was appointed a firefighter in 1966
- Retired on ill-health grounds in April 1997
- Been on sick leave since July 1996
- He had accrued 8 days annual leave in his final year, and was paid in lieu on retirement
- Was the payment in lieu of holiday pensionable under the 1992 Scheme?
- Pensions Ombudsman held that it was pensionable
- On appeal, Mr Justice Blackburne decided that the payment was not pensionable

Kent and Medway Towns Fire Authority v Pensions Ombudsman and another

The principles arising out of the decision are:

- To be pay “*determined in relation to his rank*” the payment has to be:
 - calculated in accordance with the firefighter’s ordinary rate of pay
 - pay for work done or to be done under the firefighter’s contract of employment

Kent and Medway Towns Fire Authority v Pensions Ombudsman and another

- Therefore to be “pensionable” the payment must be:
 - regular in nature
 - pay to which the firefighter is entitled
 - at the rate applicable to his rank
 - in the ordinary course of fulfilling his duties under the contract of employment
- Payments of a one-off nature are not pensionable
- The Grey book is not determinative
- Depends on the true construction of the regulations

Norman v Cheshire Fire and Rescue Service

- Issue – whether consolidated sums paid under a collective agreement made in 2007 were pensionable pay under the 1992 Scheme
- The sums paid were in relation to a “*retaining fee*”, a “*disturbance fee*” and “*public holiday pay*”
- Mr Norman originally worked under the shift system at Crewe Fire Station
- In 1998 he moved to Congleton to work the day crewing system
- He also worked a retained element

Norman v Cheshire Fire and Rescue Service

- 1 October 2007 the Authority introduced new arrangements for firefighters on day crewing duties
- Moved to a consolidated earnings formula
- The retained element became an intrinsic part of the day crewing system
- The pay allowances for the retained element were rolled-up into a pay package which consisted of:
 - Basic pay
 - Retaining element (12.5%)
 - Disturbance fee (12.5%)
 - Public holiday pay (1.85%)
 - Fuel / light allowance

Norman v Cheshire Fire and Rescue Service

- Previously:
 - the “retaining fee” had been a fixed fee
 - the “disturbance fee” depended on being called out; and
 - extra pay was only received if a bank holiday was actually worked
- The Collective Agreement stated that the new consolidated elements would be pensionable
- In May 2008 DCLG advised the Authority that the consolidated elements were not pensionable
- Mr Norman retired on 29 May 2008 on a pension that excluded the consolidated elements

Norman v Cheshire Fire and Rescue Service

The decision:

- Pay uplifts by way of the “retainer fee” and the “disturbance fee” are pensionable
- Prior to the 2007 Collective Agreement it was not obligatory for firefighters working the day crewing system to undertake a retained element. This was undertaken voluntarily, so such payments were not duties undertaken under the employment contract and therefore were not pensionable
- After the Collective Agreement firefighters working the day crewing system were obliged under their terms of employment to do retained duties, therefore the payments are pensionable

Norman v Cheshire Fire and Rescue Service

The decision:

- “Public holiday pay” element is also pensionable
- After the Collective Agreement “public holiday pay” was paid in recognition that employees were available to work on public holidays if required. Before the Collective Agreement it was only paid if the rota required the employee to work that day. It was a contractual requirement under both arrangements, but under the Collective Agreement the payments ceased to be episodic in nature and are paid as a regular amount. As it is paid as a percentage uplift on basic pay, it is also determined by the role of the employee

Guiding principles

- It is important to look at the wording of the regulation, depending on whether the relevant scheme is the 1992 scheme, the New Firefighters' Pension Scheme or the 2015 scheme. This can affect what is or is not pensionable e.g. rent allowance that is permanent (i.e. a *“permanent emolument”*) may be pensionable under NFPS, but may not be pensionable under the 1992 scheme if it is not paid for “work done” and/or is not paid as an uplift of basic pay
- It is important to consider the contract of employment, and what duties are contractual obligations and which are voluntary

Guiding principles

- To be pensionable the payment should:
 - not be “one-off” or episodic in nature or intermittent;
 - be part of “regular pay”;
 - be calculated in accordance with ordinary rate of pay;
 - have some permanence i.e. not only payable if the firefighter is called upon;

Guiding principles

- relate to:
 - pay for work done by way of duties under the contract of employment;
 - work that is by way of work of the employee's role; and
 - work done in the ordinary course of fulfilling the role
- NB: it is not explicitly clear from the Norman case whether a payment has to fulfil all of the above criteria to be pensionable



QUESTIONS?

Group Session

- Challenges
 - Questions
 - Uncertainty
-



West Yorkshire
Fire & Rescue Service

Pensionable Pay Norman versus Cheshire

WYFRS

Implementation

Making West Yorkshire Safer
www.westyorksfire.gov.uk

Introduction

AM Jim Butters

SM Chris Lawton

- Not the Gospel according to WYFRS
- How WYFRS implemented NvC
- Share learning



West Yorkshire
Fire & Rescue Service

Reasons for Action

- 🛡️ The law
- 🛡️ Large number of additional allowances
- 🛡️ Grievances (process for registering action)
- 🛡️ An informed workforce with a thirst for information
- 🛡️ The right thing to do
- 🛡️ Needed a policy in order to make consistent decisions



Risk



Peer/ Partnership Network



Management Board

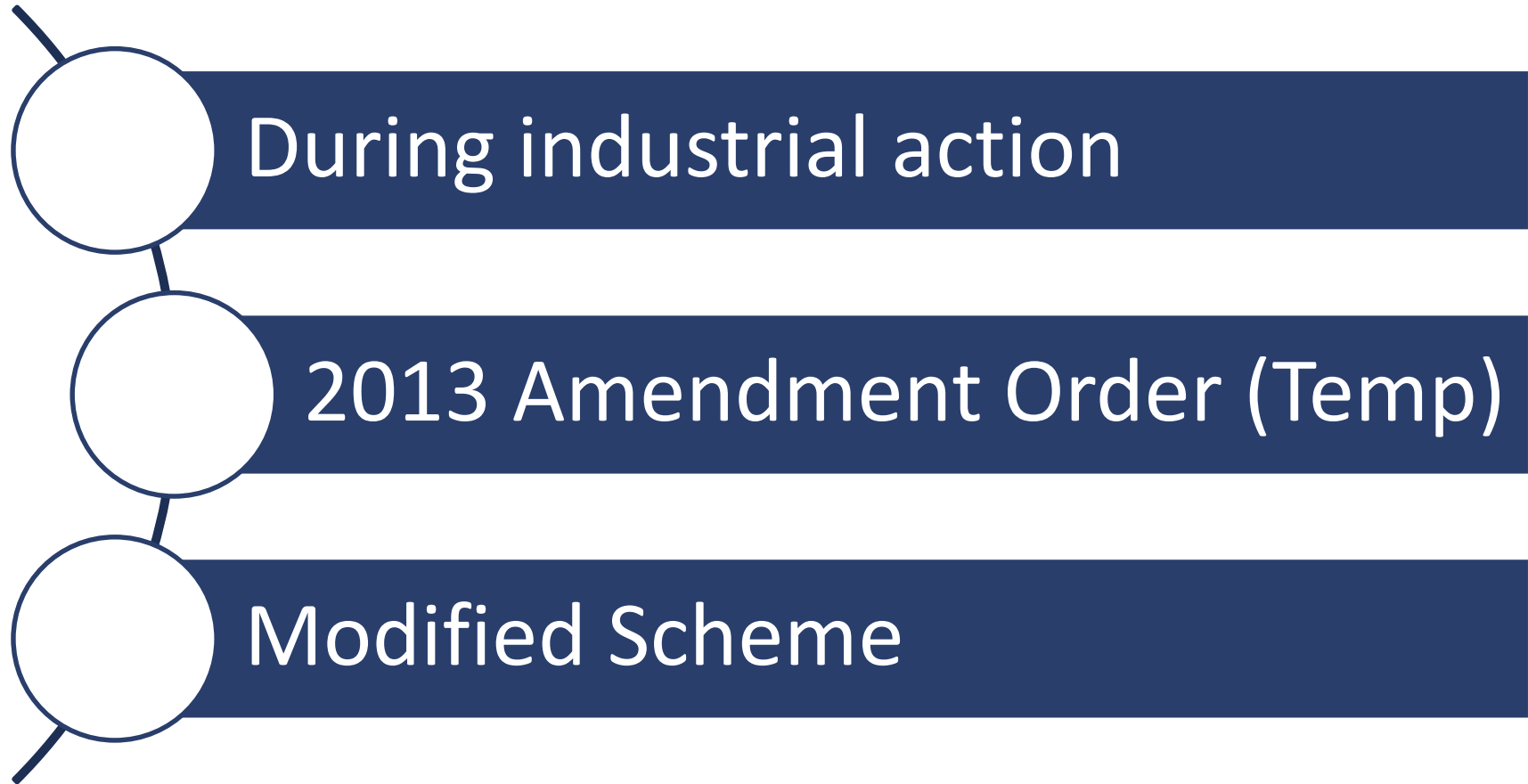
- ❖ Determined which allowances became pensionable based on the five criteria
- ❖ Set the time limits (Limitations act)
- ❖ Framework for implementation 3 phases
- ❖ Communication strategy
- ❖ Resource allocation
- ❖ Risk analysis



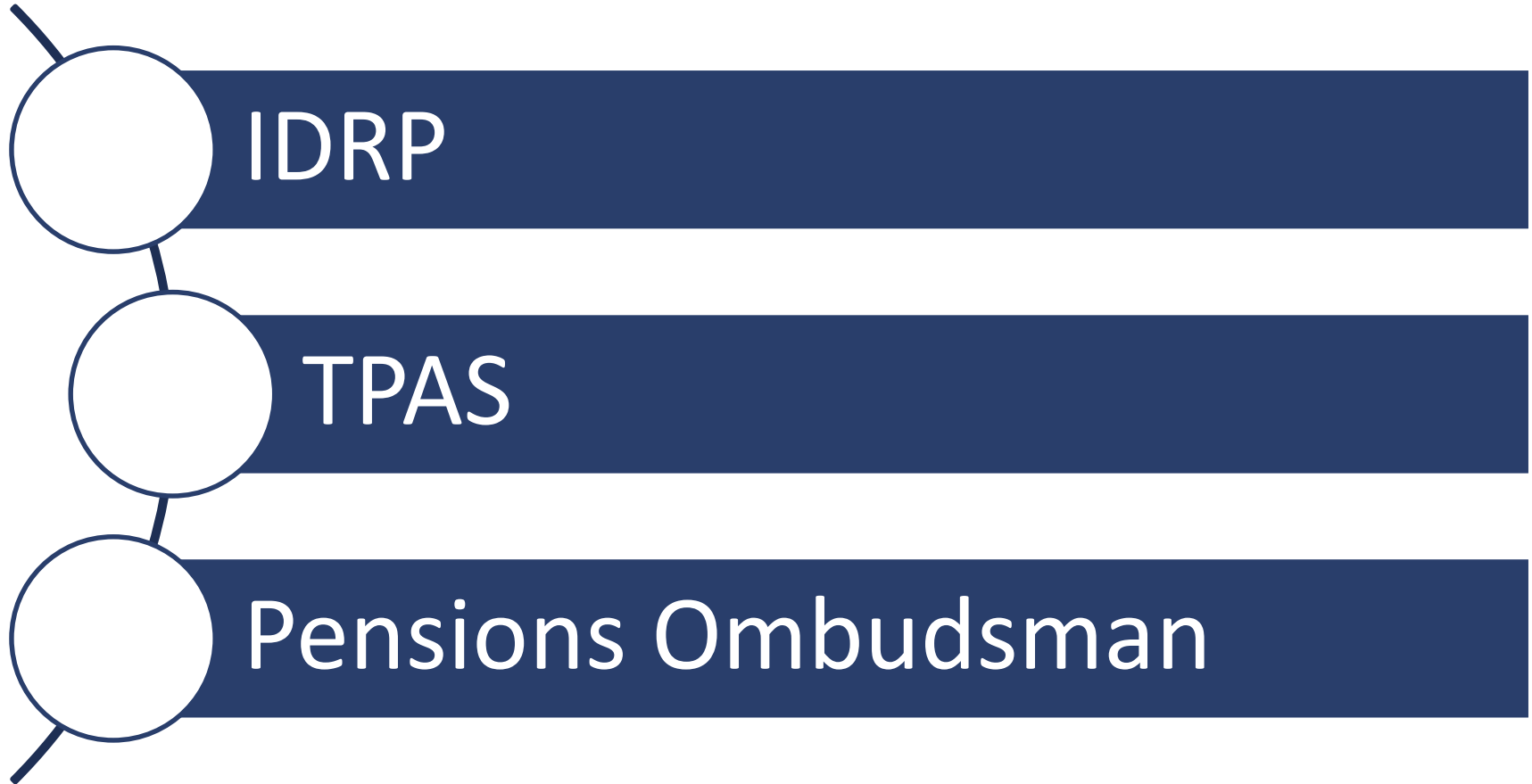
Good Project Management



Pensions Environment



Challenges



Pensionable Pay Derbyshire's experience of implementation

Derbyshire Fire & Rescue Service

Making Derbyshire Safer



The Journey

- Approach from FBU & legal assessment of N v Cheshire
- Research, Risk Assessment & Identification of Payments
- Agreed Local Solution
- Implementation
- Curve Balls
- Lessons Learned



FBU Approach

- Early days following N v Cheshire outcome
- Little prior awareness of case
- Clear judgement but very specific to Cheshire duty systems
- Therefore, comprehensive legal risk assessment required
- FBU wished to support Mgt's implementation – genuine partnership approach



Legal Assessment

- Definition of Pensionable Pay - sources:
 - Pension Regulations
 - Cheshire
 - Kent & Medway
- Compare to local Duty Systems & Payments
- Outcome – Day Staffing call-outs and Instructor Allowances
- So far so straightforward.....but.....



Cheshire-Derbyshire Differences

- Cheshire judgement specific to that duty system – only 4 years old
- Derbyshire L&D Allowance from late 90's
- Day Staffing introduced in 1959!
- FBU and Mgt partnership to provide benefits whilst mitigating prohibitive costs



Agreed DFRS Solution

- Day Staffing call-outs and Instructor's Allowance pensionable
- Use Limitation Act to limit back-dating to 6 years
- Employer pays e/r contribution for all cases within that 6 year net
- Retired e/es pay contributions in lump sum with back-dated uplift in pension
- Current e/es pay in 36 instalments (plus on current earnings)



Implementation

- Identify employees within that 6 year net
- Collect earnings data & calculate arrears
- Issue various letters & bulletins raising awareness – jointly signed CFO & FBU
- 6 presentations - jointly HR & FBU
- Individual e/e meetings – jointly HR & FBU
- Completion of pre-populated instalment agreements – jointly HR & FBU



Objections

- Q) I'm no longer in receipt of payment, how do I benefit?
 - A) Split Pension facility
- Q) Do I have to pay?
 - A) solution supported by FBU and if legal challenge, we can't say judge wouldn't order 30 year backdating
- Q) Promoted since, so I don't benefit
- Q) Why pay 6 years when could get same benefit for paying 1?
 - A) refer to answer (2)



Key Points

- Letters/articles raise awareness **but.....**
- Only face to face presentations/mtgs get results!
- Be fully prepared for all questions/objections
- Know your selling points:
 - Split Pension facility
 - Estimated benefits compared to cost
- **Overt FBU support & presence is key**
- Assess Pensionable Pay impact from now on





Derbyshire Fire & Rescue Service

Making Derbyshire Safer



Lunch



Pensionable Pay



Pensionable Pay Regs

- [1992 Scheme – Part G Reg G1](#)
 - [2006 Scheme – Part 11, Reg 1](#)
 - [2015 Scheme – Regulation 17](#)
-

2013 amendment order

- Amended [Part B, B5C](#) (1992 scheme) and [Part 3, 7B](#) (2006 scheme) to make certain payments pensionable under an Additional Pension Benefit (APB)
 - The APB is calculated by multiplying the pension contributions made on the deemed additional pension benefit by an age related factor provided by the scheme actuary.
 - Paragraph 5 sets out what benefits are pensionable as an APB
-

2013 amendment order

- (a) any allowance or supplement to reward additional skills and responsibilities that are applied and maintained outside the requirements of the firefighter's duties under the contract of employment but are within the wider functions of the job;
 - (b) the amount (if any) paid in respect of a firefighter's continual professional development;
 - (c) the difference between the firefighter's basic pay in their day to day role and any pay received whilst on temporary promotion or where he is temporarily required to undertake the duties of a higher role;
 - (d) any performance related payment which is not consolidated into his standard pay.
-

(1992) 2013 amendment order

- Amended rule [G1](#)
 - “(9) 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.”.
-

(2006) 2013 amendment order

- Amended [Part 11, Rule 1](#)
 - “(6) Where before 1st July 2013 and after that date, any allowance or supplement is being paid to a firefighter member which an authority treats as pensionable, but is not—
 - (a) pensionable pay within the meaning of paragraph (1)(a);
 - (b) additional pension benefit under rule 7A of Part 3 (long service); or
 - (c) a payment in respect of a firefighter’s continual professional development under rule 7B,
 - that allowance or supplement shall continue to be treated as pensionable for so long as the firefighter receives it without any break in payment.”;
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Pensionable Pay 1992 Scheme G1

- [1992/129](#) Original order
 - [2004/1912](#) Parental leave amendments
 - [2008/214](#) Introduced CPD / LSI
 - [2013/1392](#) 2013 amendment orders
 - [2015/589](#) (2015 transitional protection)
-

Pensionable Pay 2006 Scheme Part 11, Reg 1

- 2006 Original order [2006/3432](#)
 - 2008 amendment order 2008/213
 - 2013 amendment order [2013/1393](#)
 - 2015 transitional regulations [2015/589](#)
-

1992 Pensionable Pay, G1, 1A

- Subject to paragraphs (2), (9) and (10) , the pensionable pay of a regular firefighter is the aggregate of-
 - the amount determined in relation to the performance of the duties of his role (whether as a whole-time or part-time employee) other than those amounts payable to him in respect of the benefits within rule B5C(5) ; and
 - the amount (if any) of any benefits which are pensionable under rule B5C(1).
-

2006 Pensionable Pay, Part 11, Rule 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,
 - (aa)the amount (if any) of any benefits which are pensionable under rule 7B(1) of Part 3, and
 - (b)his permanent emoluments (including, in the case of a retained firefighter, any retaining allowance).
-

Group Session

Pensionable pay definitions [17(1)]

For the purpose of calculating a member's pension or other benefits under this scheme, the member's pensionable pay is—

- (a) the member's pay received for the performance of the duties of the member's role except any allowance or emoluments paid to that member on a temporary basis,
- (b) the member's permanent emoluments (including, in the case of a retained firefighter, any retaining allowance);
- (c) the amount foregone where a member has agreed to surrender the right to receive any part of that member's pensionable pay in exchange for the provision by the employer of any non-cash benefit;
- (d) the amount paid to the member for continued professional development which the authority determines is pensionable.
- (2) The payments in paragraph (1) do not include any payment made by an employer to a member who is on reserve forces service leave.

2015 Pensionable pay

- [17(1a)] the member's pay **received** for the performance of the duties of the member's role

Should be interpreted as 'actual pay'

- [17(1a)] **except** any allowance or emoluments paid to that member on a temporary basis
- [17(1b)] the member's permanent emoluments (including, in the case of a retained firefighter, any retaining allowance);

2015 Pensionable pay

- [17(1c)] the amount foregone where a member has agreed to surrender the right to receive any part of that member's pensionable pay in exchange for the provision by the employer of any non-cash benefit

Confirms that any part of pay that has been surrendered by the member for a non cash benefit, (salary sacrifice) should be treated as pensionable.

- [17(1d)] the amount paid to the member for continued professional development which the authority determines is pensionable

CPD should be included in the calculation of pensionable pay for the 2015 scheme

CPD Pensionable in the 2015 Scheme

- As per email sent on 3rd July 2015, available on knowledge hub at the following [link](#)
 - This confirms that the position in the 2014 regulations does not over-rule the NJC collective agreement that CPD should be pensionable, it just allows for a change in the employer position in the future.
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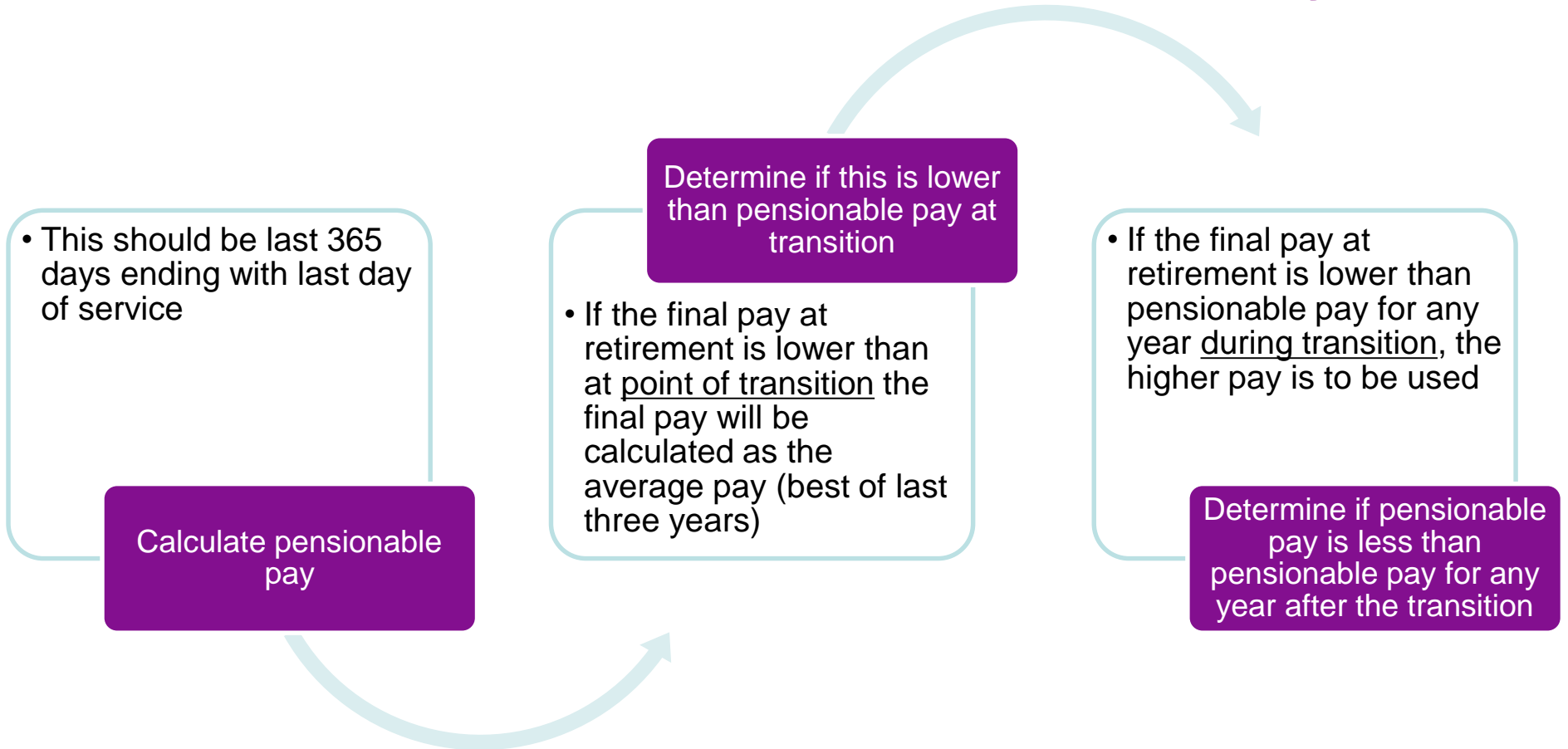
Pensionable pay

- The definition of pay mirrors the 2006 scheme definition with the exception of CPD
- Each FRA is able to make different decisions as to what is pensionable under the 2006 scheme. They have lots of different allowances, which is why the 2015 regulations cannot be more specific
- FRAs need to be applying the core tests as established by LJ Blackburne which are along the lines of:
 - It must be pay for work done
 - It must be in the ordinary course of the member's duties
 - It should be regular and permanent in nature.

Blackburne Principles

- It is a regular payment
 - It is a payment to which the Firefighter (or other role) is entitled to under the contract of employment.
 - Is payable at a rate applicable to the role (is an additional amount calculated as a percentage increase of an individual's salary).
 - Is paid in the ordinary course of fulfilling their duties (so not an exceptional payment related to a special event or circumstances).
 - Has something of a permanent nature.
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Transition Members – Final Pay



Transitional regulations 32 & 33

- Sub paragraph 3 safeguards final pay at the point of transition. If the final pay at retirement is lower than at point of transition the final pay will be calculated as the average pay (best of last three years)
 - Sub paragraph 4 further safeguards pay and says that where the final pay at date of retirement is less than pensionable pay for any year after the transition date, the higher pensionable pay is to be used.
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Transitional regulations 32 & 33

- Sub paragraph [5]
 - Temporary Promotion before July 2013 will continue to be included in the final salary link.
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Feedback

- What went well
 - What didn't?
 - Was this format useful?
 - What topics would you like to see covered in the future.
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With thanks to

- Jane Marshall, Weightmans LLP
 - Sean Connor, Derbyshire Fire
 - Chris Lawton, West Yorkshire Fire
 - Scheme Advisory Board
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Final Questions



Disclaimer

- **The information contained in these slides are the authors interpretation of the current regulations.**
 - **Readers should take their own legal advice on the interpretation of any particular piece of legislation.**
 - **No responsibility whatsoever will be assumed by LGA for any direct or consequential loss, financial or otherwise, damage or inconvenience, or any other obligation or liability incurred by readers relying on information contained in these slides.**
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Thank you for listening

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