Neutral Citation Number: [2019] EWHC 790 (Ch)

Case No: CH-2018-000286
CH-2018-000288

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2019

Before :

MR JUSTICE FANCOURT

- -

Between :

(1) NATHAN BOOTH
(2) SIMON JONES **Appellants**

- and -

MID AND WEST WALES FIRE RESCUE AUTHORITY

Respondent

and between:

MID AND WEST WALES FIRE RESCUE AUTHORITY

Appellant

-and-
(1) NIGEL BRADSHAW
(2) DEREK SKHANE

Respondents

- -
- -

Andrew Short QC and Naomi Ling (instructed by **Walkers Solicitors**) for the **Appellants** in the first appeal and the **Respondents** in the second appeal
David E Grant and Elizabeth Grace (instructed by **Veale Wasbrough Vizards LLP**) for the **Respondent** in the first appeal and the **Appellant** in the second appeal

Hearing dates: 6 & 7 March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FANCOURT

Mr Justice Fancourt:

1. The issue raised by these appeals is whether certain allowances paid to firefighters in addition to their basic pay are "pensionable pay" within the meaning of the firefighters' pension scheme.

2. There are in fact three different statutory pension schemes involved:

   i) the Firefighters' Pension (Wales) Scheme 1992, established by the Firemen's Pension Scheme Order (SI 1992/129), as amended;

   ii) the New Firefighters' Pension Scheme (Wales) 2007, established by the Firefighters' Pension Scheme (Wales) Order (SI 2007/1072), as amended, and

   iii) the Firefighters' Pension Scheme (Wales) 2015, established by the Firefighters' Pension Scheme (Wales) Regulations (SI 2015/622).

   The relevant fire and rescue authority in each case is the Mid and West Wales Fire and Rescue Authority ("the Authority"). I shall refer to these schemes as the FPS, the NFPS and the 2015 Scheme respectively.

3. Complaints were made to the Pensions Ombudsman by four firefighters: Mr Bradshaw, who is a pensioner member of the FPS and Messrs Booth, Jones and Skhane, who are deferred members of the NFPS and active members of the 2015 Scheme. All four are "regular firefighters" within the meaning of the schemes. Their complaints related to different allowances:

   i) Mr Bradshaw complained that a training allowance had not been treated as pensionable pay;

   ii) Mr Booth complained that the Authority was obliged to treat his daily crew allowance as pensionable pay, which it was only doing in part on a discretionary basis;

   iii) Mr Jones complained that the Authority was obliged to treat the whole rather than just part of his self-rostered crewing allowance as pensionable pay, and

   iv) Mr Skhane complained that his urban search and rescue allowance was not being treated as pensionable pay.

4. In a final determination dated 2 October 2018, the Ombudsman upheld the complaints of Mr Bradshaw and Mr Skhane. He dismissed the complaints of Mr Booth and Mr Jones, while noting that the Authority was in fact treating the day-crewing allowance and part of the self-rostered crewing allowance as pensionable pay even though, as a matter of law, it was not obliged to do so.

5. Mr Booth and Mr Jones appeal against that determination with the permission of Snowden J. The Authority appeals against the determination in the cases of Mr Bradshaw and Mr Skhane, with the permission of Marcus Smith J. The appeals are brought under section 151 of the Pension Schemes Act 1993.

Mr Bradshaw: the FPS

6. Since the appeal by the Authority against the determination in Mr Bradshaw's case is the only appeal under the FPS, it is convenient to address first the terms of that scheme. It is a final salary scheme, though in fact the member can elect between the final three years of service as the basis for his pension entitlement. There are provisions for the payment of an ordinary pension, to which it is not necessary to refer. Rule B5A makes provision for payment of two pensions in the event that the member suffers a reduction in the amount of his pensionable pay. That provision is included because the scheme is a final salary scheme. Rule B5B provides for the payment of additional pension benefit in the case of a member with long service. Rule B5C(1) requires an authority to credit a member with additional pension benefit for any given year in which the authority determines that various specified benefits in rule B5C(5) are pensionable. These benefits do not otherwise count as pensionable pay within the meaning of that term. Rule G1 as amended provides:

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

7. Although there are basic contracts of employment between the Authority and firefighters, which specify among other things the role to which the firefighter is appointed, the rates of pay and the detailed conditions of service are set out in a lengthy document generally known as the "Grey Book". This is a Collective Agreement negotiated by the fire and rescue authorities and the Fire Brigades Union under the auspices of the National Joint Council for Local Authority Fire and Rescue Services ("NJC").

8. The Authority has a Statement of Particulars of Terms of Employment, which refers to the Grey Book, and includes the following general conditions:

> "**Place of work.** You have a duty to serve at any of the Service's premises situated in the Mid and West Wales area, and on any Watch, including, if necessary, a permanent transfer of your place of duty, and a liability to serve on any approved duty system applicable to your role and/or post, except where the provisions of the Grey Book, Section 4 (Part A) apply.
>
> …..
>
> **Remuneration.** Your commencing basic salary is per annum, within the salary scale for, which is ….. Where increments are applicable, your hourly rate will increase in line with these. Where you also provide secondary cover as part of

> your contract (not a separate On-Call contract), you will also receive the appropriate allowance according to whether you are based at a day-crewed or self-rostered (SRC) duty system station
>
> **Hours of Work/Availability**. In accordance with the NJC Conditions of Service you are conditioned to a 42-hour working week (averaged over an 8 week period) in accordance with the duty systems for Flexible 2-2-4 shift, and day crewed stations (as well as the Service's local agreement for day crewing arrangements), and a 42-hour working week (averaged over an 8 week period) in accordance with the Service's local agreement for self-rostered crewing (SRC) stations. You may also be required to work the Day Duty system.
>
> Whatever duty system you are currently conditioned to, it must be clearly understood that, during your service you may be required to serve on any approved duty system applicable to the relevant post, except where the provisions of the Grey Book, Section 4 (Part A) apply."

9. As a result of the transition in about 2005 from firemen's "rank" to firefighters' "role" in about 2005, the NJC produced a Fire and Rescue Services Rolemaps document as an appendix to the Grey Book. This document identifies the different roles of employees (such as "firefighter" and "watch manager") and for each such role provides a rolemap. This lists at a very high level of generality (such as "resolve operational incidents", "support the development of teams and individuals") the particular duties and responsibilities involved in the role in question.

10. The documentary material available to the Ombudsman in the case of each challenge appears to have been quite limited. In general, the material available to the Ombudsman in any given case depends on what a complainant includes with his written complaint and what documents if any the respondent authority includes with its response. I shall say something more about the procedure at the end of this judgment. In the case of Mr Bradshaw there was: his original letter of appointment as a fireman in 1984; documents relating to the temporary promotion of Mr Bradshaw to the Authority's Central Training Department, which attracted a 10% allowance for additional out of hours training; a letter recording his transfer away from Training Delivery in November 2004; documents relating to a further temporary promotion in 2005 to another role in the Staff Development Department that attracted the 10% training allowance; a letter of March 2012 relating to a further temporary transfer to the role of "Watch Manager A Direct Trainer", and then a letter dated 12 June 2012 confirming transfer on a permanent basis to that role with effect from July 2012. That letter says:

> "as you will be aware, the 42 hr Day Duty personnel within Training Delivery currently receive a 12% allowance in recognition of the flexibility provided by colleagues within the Department. Please note that this allowance requires you to

> provide a minimum of 15 weekend days per year as part of the Department's commitments to providing courses for employees."

11. The Ombudsman concluded that Mr Bradshaw's training allowance was pensionable regardless of whether his role was officially made permanent. This was on the basis that it was paid to him for the performance of the duties of his role as a Direct Trainer, which formed part of his overall contractual duties (para 42). Referring to the judgment of Blackburne J. in Kent Fire Authority v Farrand [2001] 58 OPLR 357, the Ombudsman noted that the allowance was calculated as a percentage of Mr Bradshaw's basic pay and that the pay was regular: it was received every time Mr Bradshaw was paid and not on a one-off, exceptional or extraordinary basis.

12. The Authority contends that the Ombudsman erred in misconstruing the words of Rule G1 and in failing to give effect to the judgment of Blackburne J. It argues that, for the allowance to be pensionable, it has to be determined in relation to the performance of the duties of a regular firefighter, not a trainer, and that in the light of the Kent Fire Authority case the allowance was not determined in relation to the role of a firefighter. As a separate ground of appeal, the authority contends that the allowance was insufficiently regular in nature, given that there was no requirement for Mr Bradshaw to undertake a training role and that the Authority was entitled to transfer Mr Bradshaw out of the Training Department.

13. Blackburne J was concerned in the Kent Fire Authority case with an earlier version of Rule G1, as originally enacted. That was in the following terms:

> "… (1) the pensionable pay of a regular firefighter is his pay as determined… (a) in relation to his rank, or (b) in the case of a chief officer or assistant chief officer… for the post".

The issue in that case was whether pay in lieu of accrued but untaken leave was pensionable pay. Blackburne J held that:

i) pensionable pay had to be calculated in accordance with the firefighter's ordinary rate of pay;

ii) the payment had to be for work done (or to be done) under the firefighter's contract of employment, and

iii) the payment had to be regular in nature, i.e. something to which the firefighter was entitled in the ordinary course of fulfilling his duties under his contract, not a one-off or unexpected payment.

14. In Norman v Cheshire Fire & Rescue Service [2011] EWHC 3305 (QB), Andrew Smith J had to consider an amended (2009) version of Rule G1 in the English pension scheme, which was in substantially the same terms (so far as material) as the Welsh version of the FPS and therefore different from the original version considered by Blackburn J. Andrew Smith J held that the language of the 2009 version was intended – while making the transition from "rank" to "role" – to preserve the effect of the previous wording, as interpreted by Blackburne J (para 55). He held, however, that the amended version of Rule G1 had to be construed according to its language. I

respectfully agree with Andrew Smith J's interpretation of the 2009 version: the indicia of Blackburne J are relevant background that explain the genesis of the current rule, but it is nevertheless the current rule that has to be construed.

15. The current rule is materially different from the original version and the 2009 version in that it specifically excludes from pensionable pay any amounts payable in respect of benefits within rule B5C(5). That wording is curious because the effect of rule B5C(1) appears to be that any such benefits are only pensionable if an authority determines that they are pensionable. Further, the benefits, by their nature, are not such as would amount to pensionable pay in accordance with Blackburne J's indicia, as they are not regular pay for the provision of contractual services for the firefighter's role. However, rule G1(1)(a) and G1(9)(a) appear to assume that these benefits might otherwise amount to pensionable pay.

16. I consider, therefore, that I should construe the new rule G1 without any assumption that the draftsman was only intending to put on a statutory basis the reasoning in the Kent Fire Authority case. On the other hand, there is no indication in the Explanatory Note with the Amendment Order of 2014 (SI 2014 No. 3242) that what was to qualify as pensionable pay was being intentionally broadened.

17. Mr Bradshaw's 10% allowance for training is calculated in accordance with his ordinary rate of pay, but the relevant questions are whether it was for work done under his contract of employment for duties of his role and, if so, whether it was sufficiently regular (as opposed to temporary) in nature to be appropriately treated as pensionable pay. The relevant role map for Mr Bradshaw (Watch Manager) includes supporting the development of teams and individuals and assessing candidate performance

18. In my judgment, Direct Trainer became part of Mr Bradshaw's role from July 2012 only. Before then, Mr Bradshaw had a temporary promotion to Watch Manager B with a training allowance of 10%, with other temporary promotions previously. As such, the training allowance was being paid on a temporary basis and was not a regular emolument to which Mr Bradshaw was entitled in the ordinary course of his role. But with effect from July 2012 he was transferred on a permanent basis to a role of Watch Manager A Direct Trainer. The indication in the letter dated 12 June 2012 that he would "currently receive a 12% allowance" does not in my view indicate that the allowance is temporary but rather that the rate of the allowance is currently 12%. It is clear that Mr Bradshaw was taking on a new permanent role at that time. The role combined regular firefighter duties with training duties and was – in so far as any role in the fire service is permanent – a permanent role. In disagreement with the Ombudsman, I therefore consider that the allowance paid to Mr Bradshaw before July 2012 was not pensionable pay, because it was not a permanent emolument of his role; but I agree with him that the allowance paid with effect from July 2012 was pensionable pay. To that extent only I allow the appeal by the Authority in Mr Bradshaw's case.

Mr Booth and Mr Jones: the NFPS and the 2015 Scheme

19. It is common ground that the appeals of Mr Booth and Mr Jones must stand or fall together, although they concern different allowances. The appeals depend on the answer to the question whether an allowance paid to a firefighter in consideration of

his working under a particular duty system in operation at his station is pensionable pay. This in turn depends on two issues: is the allowance paid in relation to the performance of the duties of the firefighter member's role, and is it paid on a permanent or a temporary basis.

20. It is common ground that a firefighter can be posted to whichever station the Authority considers appropriate, and can be relocated by the Authority; that different stations operate different duty systems for their regular firefighters, and that the duty system of a particular station can be changed. It is also common ground that various allowances, relating to duty systems or other matters, are negotiated either on a national level through the NJC or at a local level between the local fire and recovery authority and the FBU. Where such collective agreements exist, the firefighters are entitled to the benefit of them, and so are entitled to allowances that have been agreed for working in particular duty systems.

21. Despite a late submission on behalf of the Authority that duty for the additional hours required by a particular duty system is voluntary, not mandatory, I cannot accept that argument. It was not raised previously in response to the firefighters' complaints. The Ombudsman's determination expressly states the contrary, at paras [8] and [9]. Had the firefighters indeed been obliged to do no additional duty in excess of 42 hours a week, that would have been an obvious and strong argument for the Authority to have raised in answer to the complaints, but the point was not taken. Such documents relating to the firefighters' contractual arrangements as are available suggest that a firefighter transferred to a particular station is obliged to work under the duty system in place there. This was not an argument available to the Authority in the absence of a respondent's notice raising the point.

22. The NFPS is a final salary scheme that contains many of the same material provisions as the FPS. The NFPS was open to retained as well as regular firefighters, and in certain respects (identified in the Explanatory Note to the 2007 Order, which highlights differences from the FPS) it is less generous. The Explanatory Note does not, however, state that there was any change made to the pay and emoluments that would qualify as pensionable pay. Rule 1 in Chapter 1 of Part 11 of the NFPS, as amended, provides:

> "(1) Subject to paragraphs (3), (6) and (7) and rule 3(3), the pensionable pay of a firefighter member is the aggregate of –
>
> (a) the firefighter member's pay in relation to the performance of the duties of the firefighter member's role, except any allowance or emoluments paid to the firefighter member on a temporary basis,
>
> (aa) the amount (if any) of any benefits which are pensionable under rule 7B(1) of Part 3, and
>
> (b) the firefighter member's permanent emoluments (including, in the case of a retained firefighter, any retaining allowance)."

Rule 7B (1) corresponds to rule B5C(1) of the FPS.

23. There is thus a clear dichotomy in the definition of pensionable pay between allowances or emoluments paid to a member on a temporary basis and his permanent emoluments. Although para (b) of the definition expressly refers to a retaining allowance of a retained firefighter, that paragraph is not limited to the case of retained firefighters. Nor does it indicate that a retaining allowance paid to a regular firefighter is excluded from being a permanent emolument.

24. Regulation 26 of the 2015 Scheme is in very similar terms:

> "(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; and
>
> (d) the amount paid to the member for continued professional development which the scheme manager determines is pensionable."

25. In Mr Booth's case, the allowance in question is for firefighters working the Day Crewing Duty System. The Ombudsman described that system as requiring firefighters to provide 35 hours per week of positive cover and a further seven hours per week of standby cover in return for an allowance of 7.5% basic pay. In fact, that description is of the 42 hours of standard cover and the Day Crewing Duty System can involve retained duties outside those hours. The Authority in fact recognises two-thirds of that allowance as pensionable pay and the allowance is paid with Mr Booth's monthly pay.

26. In Mr Jones's case, the allowance is the Self-Rostered Crewing allowance. Under the Self-Rostered Crewing Duty System, firefighters are required to work 182 positive 12-hour shifts a year and provide on-call cover for a further 12 hours immediately following the day shift. The allowance is paid as a supplement equivalent to 25% of Mr Jones's basic pay.

27. The arguments as to whether such allowances amount to pensionable pay have been considered by the High Court twice: the English NFPS by Andrew Smith J in the Norman case, and the Welsh NFPS by HHJ Jarman QC sitting as a High Court Judge in Smith v South Wales Fire and Rescue Service (22.3.13, unreported). Both schemes are in identical terms for present purposes.

28. The issue in the Norman case was whether retaining fees, disturbance fees and public holiday pay, all of which were payable under a Day Crewing Duty System, were

pensionable pay under the FPS. The defendant's argument was that these elements were not paid in relation to a firefighter's role but by reference to the duty system under which a firefighter works. The retainer and disturbance elements were treated as being in substance a 25% uplift in basic pay, as a result of a collective agreement that applied. Andrew Smith J considered Blackburne J's judgment and held that it did not require that pensionable pay must be determined solely by an employee's rank:

> "the payments are designated as being made in respect of the retained duties, but that does not mean that they are not preferable to the role of firefighter. On the contrary, the role map of a firefighter applies no less to the duties of firefighters when they are undertaking a retained element than when they are undertaking other duties. As I have said, a firefighter's role when on stand-by under the day crewing system as part of his 42 hour week and his role when undertaking a retained element are very similar, and I cannot accept that in the one case he is undertaking the duties of a firefighter's role and that in the other case he is not. Moreover, on the face of it I would consider it rather anomalous if a firefighter were required to undertake both as part of his employment but the pay for the one is pensionable and the other not."

29. Andrew Smith J accordingly held that the uplifts by way of retainer fee and disturbance fee were paid in relation to a firefighter's role, even though they were payable by reference to a particular duty system. Although the principal issue in that case was whether the uplift was paid in relation to the performance of the role of firefighter, it is clear that the judge also had in mind the need for a degree of permanence. He referred to Blackburne J's decision and the requirement under the FPS that any pay be regular in nature, not occasional, and he explained that the changed language of rule G1 enshrined that principle. It is clear that Andrew Smith J accepted that the uplifts were sufficiently regular because they took the form of a percentage uplift on basic pay that did not depend on the degree of disturbance or call out actually experienced, and because it was payable for so long as Mr Norman worked the Day Crewing Duty System, even though he might be transferred to a different station or the duty system might be changed by the authority. That, of course, is a decision based on the wording of a different scheme, but it is a closely-reasoned decision that is consonant with the facts of Mr Booth's and Mr Jones's case.

30. The NFPS was the subject of decision in the Smith case. The judgment of Judge Jarman QC appears to be an ex tempore judgment and it does not refer to the Kent Fire Authority or the Norman cases. Mr David E. Grant, who appeared with Ms Elizabeth Grace on behalf of the Authority, told me that Ms Grace had been informed by counsel for the defendant in that case that the Norman case had been cited to the judge. The judge had to consider two categories of allowance in connection with a firefighter working the day crewing system: an annual retainer and a rent, heat and lighting allowance for using local accommodation. The judge remitted the first issue to the Ombudsman for further consideration. As for the second, he rejected an argument that the allowances were "permanent emoluments" within the meaning of rule 1(b). Though he accepted that the allowance was an emolument within that rule, he continued:

> "22. That, however, does not end the matter. The question then is whether these were permanent. There was disagreement between the parties as to how I should approach this question. On behalf of the Fire Service it was suggested or submitted that this must be looked at at the time the payment started, the first payment, and whether it could be said that these were permanent. The mere fact that years went by when these payments were continued would not convert something that was temporary to something which was permanent; it would be unworkable if that were the case.
>
> 23. Mr Davey submitted that that was nothing to the point, there may be difficulties of determining whether something is temporary or permanent, but that should not dictate the answer to the question.
>
> 24. It does seem to me that something which starts off as temporary may acquire the categorisation of something which is permanent in due course. The question is whether that occurred here. Again, on behalf of the Service Miss Tether emphasised the submissions that were made on behalf of the Service to the Ombudsman on this point. The position is that the allowances relate to the duty system to which a fire-fighter may be assigned from time to time. Flexibility, it was submitted, was integral to a fire-fighter's terms and conditions. A fire-fighter may, as I say, be transferred between duty systems or between different stations with different duty systems… The submission is made that if Mr Smith had not been seconded to full time trade union duties it was possible that he would have been moved and would have lost the day crewing allowance.
>
> 25. As I understand it, it is not in dispute that theoretically that was a possibility. What Mr Davey submits, however, is that in practice that did not occur and these payments continued. In my judgment the payments cannot be said to be permanent in light of that flexibility. With hindsight these payments have continued to be made but at any point along the way they might have determined if Mr Smith had been moved either to a different station or to a different duty system."

31. The judge therefore held that the possibility that the day crewing allowance would be lost in future, as a result of redeployment or a change in the duty system, meant that the emoluments were not permanent but temporary. There does not appear to have been any argument by reference to the decision in Norman or as to the origins of the language of rule 1(b) of Chapter 1 of Part 11 of the NFPS. If there was, the j;udge does not consider it, or otherwise refer to the judgments in the two previous cases. He was, of course, having to consider the language of a different scheme, in which an express distinction between permanent and temporary emoluments and allowances appeared for the first time. His acceptance that the allowance was an "emolument" within rule 1(b) is equivalent to Andrew Smith J's decision that Mr Norman's 25%

uplift in pay was being paid in relation to the performance of the firefighter's role. The reason for the different outcome in Smith is the need to satisfy the requirement that the emolument be "permanent".

32. There is, in my judgment, no material factual distinction between the Norman and Smith cases and this case. In the previous decisions, the allowances were held to have been paid by reference to the performance of the role of firefighter, which the individuals in question were required to perform on a particular duty system. The same conclusion in my judgment must follow here. The argument that pay had to be paid solely by reference to the role of all firefighters but the allowances in question were paid either wholly or in part by reference to a particular duty system that did not apply in all cases was rejected by Andrew Smith J. I consider with respect that he was right so to conclude and I similarly conclude, in agreement with the Ombudsman's determination at para [52], that the allowances paid to Messrs Booth and Jones were "pay in relation to the performance of the duties of the firefighter member's role" or "emoluments" within the meaning of rule 1(b) of the NFPS and "pay received for the performance of the duties of the member's role" or "emoluments" within the meaning of rule 26 of the 2015 Scheme. The remaining question is therefore whether they are allowances or emoluments that were paid to the member on a temporary rather than a permanent basis.

33. Andrew Smith J accepted that the 25% uplift had a sufficient degree of permanence, or regularity of payment, for the purposes of the terms of the FPS. He looked at that question in terms of the indicia of Blackburne J, which he considered to have been encapsulated into the language of the amended rule G1 of the FPS. Accordingly the touchstone was whether the allowances were regular as opposed to one-off or occasional. Judge Jarman QC had to address specifically the permanent/temporary dichotomy in rule 1(b) of the NPFS, as I do (exactly the same dichotomy exists in the language of rule 26 of the 2015 Scheme).

34. Given that in both Mr Booth's and Mr Jones's case, the allowance is paid as a supplement to basic pay, which is received every time they are paid, the allowance is "pay" falling within rule 1(1)(a) of the NFPS and rule 26(1)(a) of the 2015 Scheme. Applying that part of the rules, the question is whether the pay is an allowance or emolument paid to the member on a temporary basis. From the structure of those rules, if it is not paid on a temporary basis then it is regarded as permanent and so pensionable.

35. The Ombudsman considered that the NFPS had introduced a substantive change in what was pensionable because that scheme (and the 2015 Scheme following it) "are more restrictive than the 1992 Regulations, as they specifically refer to pensionable pay as being pay which is permanent and not temporary" (para [50]). He said: "I therefore find that the definition of pensionable was amended for the later Schemes" (para [61]). He considered that he could not distinguish the decision in Smith and accordingly followed it and distinguished the decision in Norman on the basis that it was a decision on the different wording of a different scheme. He explained that there was a "crucial difference" between the "element of permanency" identified by Blackburne J and the word "permanent".

36. The argument for the appellant firefighters was as follows.

i) The words "permanent" and "temporary" are ordinary English words, not terms of art;

ii) They are being used in the same sense as the contrasting alternatives identified in Kent Fire Authority, namely payments made in the ordinary course of a firefighter's remuneration on the one hand and payments made on a transient, unexpected or exceptional basis on the other, and not as a contrast between something that will endure indefinitely and something that may change in future;

iii) The fact that such allowances *could* be brought to an end does not make then temporary;

iv) Even if an allowance is terminated at an uncertain time in the future, the NFPS caters for the impact of any reduction in pay by providing for the ability to take a split pension (rule 7 of Part 3) and the 2015 Scheme impliedly caters for it because it is a career average pay scheme. There is therefore no conceptual or administrative difficulty in concluding that it is pensionable pay.

v) If the ability to terminate an allowance made such pay temporary, it is difficult to see what other than basic pay would be pensionable pay, and if that were so the scheme rules could and would have been drafted in a much simpler way;

vi) Mobility clauses in contracts of employment, which entitle employers to change an employee's place of work, do not mean that, viewed prospectively, the employee's place of work is temporary from the outset and remains such for the whole duration of his employment;

vii) Since the main purpose of the NFPS was to open the pension scheme to retained firefighters as well as regular firefighters and it is accepted that retainers paid to retained firefighters are pensionable as permanent emoluments, it would be odd if equivalent retainers paid to regular firefighters were not in the nature of permanent pay or emoluments, just as Andrew Smith J considered that it would be anomalous if a regular fireman who was paid for regular stand-by and retained stand-by work only earned a pension for the regular work;

viii) The Explanatory Note with the Order creating the NFPS does not state, as would otherwise have been expected, that the nature of pensionable pay is being changed so that allowances for duty scheme work that were pensionable under the FPS are no longer to be treated as pensionable.

37. The argument for the Authority was as follows:

i) Since the members' contributions as well as their benefits are determined by the amount of pensionable pay, what is permanent and what is temporary must be objectively clear in advance and not only in retrospect;

ii) For pay to be "permanent" and not "temporary" within the meaning of the NFPS and 2015 Scheme, it must endure to the end of the firefighter's employment;

iii) The case of Mullett v BSC Pension Fund Trustee Ltd [1992] PLR 71 supports the conclusion that, in the context of a pension scheme, permanent emoluments are those that persist until the end of the employment. In that case, the employer had the right to terminate a scheme under which company cars were lent to certain members. Pensionable salary was defined as including "the monetary value of any emoluments of a permanent character which are not in monetary form". Both May and Neill LJJ concluded that a permanent non-monetary emolument was one that continued until the end of the employment and not one that was merely non-transitory. That was a case in which the employer had the right to withdraw the benefit at any time.

iv) The allowances for specific duty systems do not endure until the end of the employment because the Authority is entitled to transfer a firefighter to a different station, where a different (or no) duty system operates, or to change the duty system at the firefighter's station;

v) In the case of a regular firefighter, ancillary allowances for retainer, disturbance, call out and the like (whether or not consolidated into a single uplift in pay) are not central to the role, but in the case of a retained firefighter they are central, and so there is justification for holding the allowances to be pensionable in the case of retained firefighters but not in the case of regular firefighters.

38. When I asked Mr Grant what pay other than basic pay and what emoluments satisfied his test of permanence, he considered the answer overnight and suggested the following:

i) Long service benefit, under rule 7A(1)(b) of Part 3 of the NFPS;

ii) Additional pensionable pay under rule 7B of Part 3 of the NFPS;

iii) Assumed pensionable pay under reg. 27 of the 2015 Scheme;

iv) Salary sacrifice under rule 1(2) of the NFPS and reg 26(1)(c) of the 2015 Scheme, and

v) Salary weighting of basic pay.

However, when analysed, these rules and regulations either expressly provide that an additional amount of pension benefit must be credited in a given year according to a formula, or they expressly deem non-cash benefits or pay foregone to have been received as pensionable pay. Apart from those separate, express provisions, there would still be nothing to which the general provisions about pensionable pay and permanent emoluments in rule 1(1) (a) and (b) and regulation 26(1)(a) and (b) could apply apart from basic pay. Salary weighting is only a method of calculating basic pay for a given role.

39. I have come to the conclusion that "permanent" in these statutory provisions does not signify pay or emoluments that must endure to the end of the employment. I consider that what is meant by "permanent" is pay other than allowances or emoluments that are temporary in the sense of being occasional, one-off, irregular or for a limited

period of time only. The words "permanent" and "temporary" have to be construed in context. Employment as a firefighter is generally employment for the whole or majority of a member's working life. It is not employment for a fixed term. Over a working lifetime, the way in which a firefighter's role is performed can change frequently; the circumstances and conditions are not ossified at the outset of employment so as to endure for its duration. To suggest that only allowances and emoluments that will endure for the whole of the member's employment are pensionable seems to me to be unrealistic and a class devoid of content. On the other hand, it is entirely sensible and realistic to exclude from pensionable pay any emoluments that are occasional, one-off, irregular or limited in time.

40. I set out below my reasons for so concluding.

41. First, although the drafting of the schemes is clumsy in places, it would be peculiar to draft the provisions relating to pensionable pay in terms of rule 1 of the NFPS and reg 26 of the 2015 Scheme if what was intended was that pensionable pay would comprise only basic pay and other types of remuneration for which separate provision is expressly made. It would not then be necessary or appropriate to make an exception for allowances or emoluments paid on a temporary basis or to identify a potentially broader class of permanent emoluments. All that would be required would be to list basic pay and other specified payments that were to be treated as pensionable. The rule and regulation, however, expressly include pay received for performance of the duties of the member's role that is not paid on a temporary basis and any permanent emoluments, as well as making provision for other specified types of remuneration.

42. Second, the ordinary and natural meaning of the words "pay received for the performance of the duties of the firefighter member's role" clearly includes pay calculated as a proportion of and paid at the same time as the basic pay, to which the firefighter is entitled month by month as a result of performing his contractual services in the location and on the particular duty system required by the Authority. These are not allowances paid for additional, optional services.

43. Third, unless the Authority decides to relocate the firefighter or change the duty system, the allowance will continue to be paid throughout the firefighter's employment with the Authority. Given the nature of the allowance, it is not obvious why it should be considered to be an allowance paid on a temporary basis. Looked at prospectively, as both sides accept it must be, it is payable regularly in consideration of the discharge of duties of a permanent role, not for a limited term or in return for occasional or exceptional services.

44. Fourth, any appeal to the context of the schemes as an aid to construing the words "permanent" and "temporary" reinforces the conclusion that temporary is not to be construed as meaning anything that will not endure for the whole period of the employment as a firefighter. The FPS was not construed as excluding regular pay that otherwise satisfies the indicia of Blackburne J in the Kent Fire Authority case, and was construed by Andrew Smith J as including a day crewing allowance, even though such an allowance might cease to be payable on a change of station or duty system. Although the words "permanent" and "temporary" were newly introduced in the NFPS, there is no indication in the background to the NFPS that it was intended to limit what could be considered as pensionable pay. There was in various respects a reduction in the benefits available under the NFPS, but these respects were identified

in the Explanatory Note. There is no similar indication of a change in what amounted to pensionable pay.

45. Fifth, the fact that the Authority is entitled as employer to put an end to a particular allowance, by transferring the firefighter to a different station or changing the duty system (but not otherwise), ought not to make a difference to the analysis. In the first place, the Authority may never do so. The allowance is permanent unless and until it does exercise that power. In the second place, although one particular allowance may terminate it is likely to be replaced by a different type of allowance for the different duty system under which the firefighter will then work. Although there are different allowances, they are in substance the same thing: regular remuneration for working as firefighter on such system as the Authority may require.

46. Sixth, the fact that a particular allowance may end does not create any administrative difficulty with the scheme. It will be clear in advance what pensionable pay will be received and when the amount changes. A reduction in pay resulting from a relocation or change of duty system, or otherwise, does not prejudice the firefighter under either of the schemes (the NFPS provides for split pensions and the 2015 Scheme is a salary average scheme) and does not create any administrative complexity beyond the need for the Authority to be able to identify the basis on which each firefighter is paid from time to time.

47. Seventh, excluding from regular firefighters' pensionable pay all allowances paid in consideration of additional duty under duty schemes would create an odd difference (within the same scheme) in treatment with retained firefighters. The Authority accepts that retainers paid to retained firefighters are pensionable pay. The NFPS included retained and voluntary firefighters in the pension scheme for the first time and express provision was made that retaining allowances for retained firefighters was pensionable pay (rule 1(1)(b)). That provision does not state (as it might have done) that only retaining allowances paid to retained firefighters are pensionable. At first blush it is surprising if the effect of the NFPS is to exclude an equivalent allowance for the same duty from pensionable pay for regular firefighters. Although the retainer may be the core of a retained firefighter's duties, whereas this was not so for a regular firefighter, where the same duty is done for equivalent remuneration one would expect the treatment to be the same.

48. Although the decision in Smith appears to support the Authority's case, I do not find it persuasive on the points that I have to decide. It was reached without reference to argument based on the terms of the FPS, the High Court cases decided under the FPS or the detailed terms of the 2007 Order. The decision appears to be premised on acceptance that the rent, light and heating allowance was temporary at the outset but could have become permanent. The authority said that this made it too uncertain, and so it could not be pensionable, whereas Mr Smith argued that he was not relocated so in substance the allowance had been or had become permanent.

49. The reason why that was the focus of the argument in Smith and why no argument similar to that presented to me is recorded in the judgment is, I infer, that – rather like the company car in Mullett – the rent, light and heating allowance was discretionary (unlike the day crewing allowance and self-rostering allowance for someone working on those duty systems). Part 4.E(12) of the Grey Book, to which the Judge referred, provides: "A fire and rescue authority may pay a rent and/or fuel and light allowance

to an employee on the day-crewing system who undertakes retained duties". So Mr Smith could have remained on the same duty system and yet (subject to proper procedures and safeguards, no doubt) had the rent, light and heating allowance terminated. As the judgment makes clear, the status of this allowance was separate from the status of the retainer allowance itself.

50. The judge appears to have decided the case on a broader ground, namely that the duty system itself could be changed, which made any other allowance that depended on the existence of that system a temporary one. But there are no reasons given for that broader conclusion, other than the mere fact that the authority had the right to change the duty system or Mr Smith's location, and it was not necessary for the judge's decision. The judge could have followed the reasoning in Mullett, as the rent, light and heating allowance could have been withdrawn at any time. It is also clear that he intended not to reach a decision on the retainer allowance issue (see para [17]). The decision was no doubt correct, on the basis that the allowance was discretionary and could be withdrawn, but the reasoning for any broader basis of decision is not persuasive.

51. I do not consider that the decision in Mullett really assists me one way or the other. The meaning of "of a permanent character" in relation to non-monetary emoluments in a superannuation scheme is unlikely to be a guide to the true interpretation of the provisions relating to pensionable pay in the statutory schemes with which I am concerned. The Court in that case accepted that the words were capable of having more than one meaning but was particularly influenced by the submission that it would not be clear until in retrospect whether the emolument had a permanent character, because the employer had the right to withdraw it for any reason (or none) at any time. That, it accepted, would create real administrative difficulties for the trustees and the employer company in the meantime. The position in relation to duty scheme allowances is different, for the reasons that I have given.

52. Another decision on which the Authority relied was R v Minister for the Civil Service, ex p. Lane [1993] OPLR 155. The Principal Civil Service Pension Scheme provided that, as a general rule, only permanent emoluments are pensionable and that additional emoluments paid for extra responsibility and granted on a permanent basis were pensionable. The Court of Appeal again accepted that the phrases in issue had various shades of possible meaning and were context-dependent. It distinguished Mullett on the basis that the allowance in question lasted for as long as the member held a particular post. It was held to be permanent. Another allowance which lasted for only a maximum of 5 years irrespective of the length of any particular post was held not to be permanent. In my judgment, that decision if anything assists the complainants but, as the Court pointed out, the meaning of permanent was entirely context-dependent.

53. In conclusion, I find that the whole of the day crewing allowance and the self-rostered crewing allowance are pensionable pay.

Mr Skhane: the NFPS and the 2015 Scheme

54. In addition to his employment (since 1994) in a regular firefighter role, Mr Skhane has an additional contract to provide urban search and rescue ("USAR") cover. This position in the Authority's USAR team was first intimated to Mr Skhane by letter

dated 2 May 2007: it was said to have its own contractual terms and conditions. By August 2009, what was proposed was a contract of employment in a new All Wales USAR Team, which had its own payment agreement framework. New arrangements had been put in place with effect from 1 April 2009 but the contracts had been delayed. Mr Skhane was told that ongoing membership of the Team was dependent on formal acceptance of full terms and conditions of employment. He was notified that, based on information available to the Authority, the 10% allowance for USAR would not be pensionable. The formal offer of employment was issued on 28 August 2009. The contract was for a period of 12 months from 1 April 2009, to be renewed annually in line with the agreed duration of funding with the Welsh Assembly Government.

55. It was stated that if Government funding ceased the contract could be terminated in accordance with its notice period terms. It was clear therefore that renewal of the one-year contract was dependent on Government funding year by year. The termination provisions of the contract specified a minimum period of notice, based on the period of continuous service: one week for service of less than two years; one week per year for service of between two and 12 years, and 12 weeks for continuous service of 12 years or more. It appears from the Ombudsman's decision that the USAR contract has in fact been renewed annually since 2009.

56. Although search and rescue in urban areas may be a standard part of the role of a regular firefighter, the additional allowance of 10% is payable for Mr Skhane's contractual duties as a specialist member of the USAR team under a separate contract. Thus, the allowance is not pay in relation to the performance of the duties of a regular firefighter's role; it is paid in relation to the performance of the duties of a specialist USAR team member. Nevertheless, the Authority accepts that the allowance is (subject to the question of permanence) an emolument falling within rule 1(1)(b) of the NFPS and reg 26(1)(b) of the 2015 Scheme. Although there was no evidence before the Ombudsman, it seems doubtful that anyone other than a regular or retained firefighter would be paid as a USAR team member, so there is a clear link between the emolument and the firefighter's role as such.

57. The Ombudsman concluded that the allowance was paid for the performance of the duties of Mr Skhane's role and that, since he would not lose his allowance unless he ceased the USAR role altogether, the allowance was "as permanent as it is possible to be". Despite the one-year term of the USAR contract, the Ombudsman found no intention that it should end and that, on the contrary, it would be renewed provided that there was sufficient funding. He considered that the termination provisions, providing for 12 weeks' notice in the case of continuous service of 12 years or more, would be unnecessary if the contract was intended to be temporary. He then referred to definitions of "permanent" as meaning intended to last and remain unchanged indefinitely, i.e. for an unlimited or unspecified period of time, and concluded that Mr Skhane's USAR position met those definitions.

58. I do not consider that those conclusions are justified. The allowance may well have been "permanent" in the context of the USAR contract itself, because it was co-terminous with that secondary contract, but the relevant question is whether the emoluments were permanent as emoluments of a regular firefighter. Further, considered prospectively and objectively, the USAR contract was a short-term contract for one year, with the aspiration to renew it on an annual basis, subject to

funding. In the context of the employment and remuneration of a regular firefighter, the allowance was therefore temporary, albeit for a period of one year. The aspiration that it should be renewed did not make it permanent rather than temporary, and the termination provisions do not have the effect that the contract will last for 12 years or for any period longer than a year. They cater for the possibility of future renewal.

59. The argument advanced on behalf of Mr Skhane was that his role as a firefighter included the duties under the USAR secondary contract, and so the allowance was pay for the discharge of that role, which was not in the nature of an allowance or emolument that was temporary. I do not consider that pay under a separate contract can be treated as pay in relation to the performance of the duties of the member's role (for the purposes of rule 1(1)(a)) in that way, but even if it can the question of permanence must be assessed by reference to the duration of the main role as a regular firefighter. When that comparison is made, the allowance was temporary, payable only contingently on a year by year basis, whereas Mr Skhane's role as a regular firefighter was open-ended and permanent in nature. In those circumstances, the emoluments from the secondary contract are not permanent emoluments within the meaning of rule 1(1)(b) of the NFPS or reg 26 (1)(b) of the 2015 Scheme.

60. I therefore allow the appeal of the Authority against the Ombudsman's determination in the case of Mr Skhane.

Procedural Footnote

61. It became clear during the hearing of these appeals that, in one or more of the complaints, the Authority as respondent was unaware until the draft determination was released that certain documents (or additional communications) had been sent by a complainant to the Ombudsman. The Authority was of course notified of each complaint made and was able to respond to it, but it was not provided with copies of correspondence between the complainant and the Ombudsman or documents sent to the Ombudsman (other than the letter of complaint itself). As a result, the Ombudsman was provided with detailed further argument after his draft determination was published and he made substantial changes in the final determination.

62. I stress that no criticism of the complainants whatsoever is implied by these observations. The Pensions Ombudsman is not a court or tribunal operating according to detailed procedural rules. The system is meant to be accessible and informal.

63. Nevertheless, it was suggested by Mr Short QC and Mr Grant, who both have considerable experience in this area of practice, that good administration and decision-making is likely to be furthered by the Ombudsman sending to the respondent any documents or communications sent to him by the complainant (unless it is clear that the respondent has previously been copied in), and similarly that communications and documents sent by the respondent should be forwarded to the complainant. I agree. This best practice should extend to further communications and documents sent by either party. Although doing so may delay, to a limited extent, the publication of the Ombudsman's draft determination – because the Ombudsman will need to allow a reasonable period for any response – it will also be likely to save the parties having to deal with new points or materials after receipt of the draft determination. It also has the advantage that the Ombudsman will make his draft

determination with the benefit of all relevant arguments that the parties wish to advance, rather than making a provisional decision and then having to consider whether to change or qualify his decision in the light of further submissions.

64. There may, of course, be cases in which it is inappropriate for confidential or sensitive material provided by a complainant to be shared with the respondent. In such cases, the Ombudsman will have to exercise a judgment, balancing the interests of the complainant and due process in decision-making. Nevertheless, in general and absent such considerations, each party to a complaint should be made aware before the Ombudsman issues his draft determination of communications between the other party and the Ombudsman and any documents relied upon by that party. In 2019, this is likely to be able to be achieved in most cases by the simple expedient of copying into or forwarding an email and so should not prove administratively burdensome. It may be that the Ombudsman will wish to give consideration to including an informative to this effect on The Pensions Ombudsman website.