



Appeal No: CH/2001/APP/010315

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 October 2001

Before:

THE HONOURABLE MR JUSTICE BLACKBURNE

KENT & MEDWAY TOWNS FIRE AUTHORITY

Appellant

- and -

(1) DR JULIAN FARRAND, PENSIONS OMBUDSMAN

Respondents

(2) ROBERT ANTHONY HOPPER

Raoul Downey (instructed by Kent County Council Legal Services for the Appellant)
Martin Seaward (instructed by Thompsons for the Second Respondent)

**JUDGMENT: APPROVED BY THE COURT FOR
HANDING DOWN (SUBJECT TO EDITORIAL
CORRECTIONS)**

*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.*

The Hon Mr Justice Blackburne

Mr Justice Blackburne:

Introduction

1. This is an appeal from the decision of the Pensions Ombudsman given on 22 March 2001 determining in favour of the complainant, Robert Anthony Hopper, that the Kent & Medway Towns Fire Authority ("the Authority") had wrongfully failed to include an amount of £643.64 in the salary figure used to calculate Mr Hopper's retirement benefits under the Firemen's Pension Scheme ("the Scheme"). The Authority, which appears by Mr Downey, is the appellant. Mr Hopper, who was added as a party to the proceedings on 11 June 2001 and appears by Mr Seaward, is the effective respondent.
2. Mr Hopper was appointed a firefighter in September 1966. His appointment was and remained throughout his service subject to and with the benefit of the Scheme.
3. At the time of his retirement from the Authority's employment on ill-health grounds in April 1997 Mr Hopper, who had attained the rank of station officer, had accrued eight days' annual leave during his final year with the Authority. The sum of £643.64 was the payment made to him in lieu of those eight days' leave. His last day of service was 6 April 1997. It had been preceded by a continuous period of sick leave which had started on 30 July 1996.
4. Mr Hopper had originally received the £643.64 payment under deduction of a pension contribution at the rate of 11% (being the applicable rate), ie £70.80. A statement of his retirement benefits under the Scheme, checked by persons acting on his behalf, resulted in a claim that there was a shortfall in his benefits equivalent to £643.64 in the salary figure used to calculate those benefits. Following investigation, the Authority sent Mr Hopper a cheque for the £70.80 which, it said, had been deducted in error. Mr Hopper was then advised that the Authority should not have decided to refund that contribution. He contended that it should have paid his retirement benefits based on a final salary which included the £643.64 and, consequently, that the deduction of the 11% contribution had been correctly made.
5. The issue which arises on this appeal is whether, as the Pensions Ombudsman held, that contention was correct.
6. The Scheme is a statutory scheme. It is set out in the Firemen's Pension Scheme Order 1992 (SI 1992/129) made by the Secretary of State in exercise of the powers conferred upon him by section 26 of the Fire Services Act 1947 and section 8 of the Fire Services Act 1959. It came into force on 1 March 1992 and replaced an earlier scheme set out in the Firemen's Pension Scheme Order of 1973 (SI 1973/966).
7. Mr Hopper's conditions of service, including rates of pay, were, so far as material, as laid down by the National Joint Council for Local Authorities' Fire Brigades. They appear in the National Joint Council for Local Authorities' Fire Brigades Scheme of Conditions of Service. Known as "the Grey Book" the Conditions of Service are revised from time to time, for example, to reflect increases in rates of pay. The National Joint Council is the body authorised for this purpose pursuant to regulations made by the Secretary of State under section 17 of the 1947 Act. That is the provision concerned with the conditions of service of persons employed as members of fire brigades, such as the Authority, maintained in pursuance of the 1947 Act.

8. The payment in lieu of leave which Mr Hopper received fell to be calculated in accordance with sections IIIA (entitled "Annual Leave") and IIIC (entitled "Long Service Leave") of the Grey Book. Paragraph 4 of section IIIA (headed "Entitlement in cases of ill health retirement") provides that:

"In cases of retirement on ill health grounds, payments in lieu of annual leave shall be made in accordance with the following conditions:

- (i) consideration shall be limited to leave accrued before the start of the period of sick leave which ended in retirement;
- (ii) the amount of annual leave to be considered shall be calculated by reference to paragraphs 2 and 3 of this section;
- (iii) any leave actually taken from the leave accrued shall be discounted in considering the amount of pay in lieu."

Paragraph 2 provides that the leave year extends from 1st January to 31st December and that save in exceptional circumstances (as there set out) annual leave not taken in the normal leave year is forfeited. Paragraph 3 sets out a scale of leave entitlement according to rank and provides that in determining leave entitlement regard is to be had only to completed calendar months of service.

9. Applying those provisions and taking into account leave actually taken before his period of sick leave began, Mr Hopper had accrued eight days' annual leave for which, on retirement, he became entitled to a payment in lieu. A person of his rank and length of service who went on sick leave in, say, mid-September but who had taken no actual leave during the calendar year in question could have accrued 24 days' leave for which a payment in lieu could be made. If of a higher rank (ie DO1 and above) a person could accrue as much as 33 days' leave. By contrast those provisions have no application to someone who retires other than on ill health grounds, whether voluntarily or by reason of dismissal or on attaining the compulsory retirement age limit. As paragraph 4 makes clear, the payment is triggered once retirement has terminated the person's service and not before, presupposes a period of sick leave ending in retirement and is calculated by reference to leave entitlement accrued before the start of the period of sick leave.
10. On retirement Mr Hopper became entitled (a) to an ill-health pension under Part III of Schedule 2 to the Scheme as applied by rule B3 and (b) to an injury award under Part V of Schedule 2 to the Scheme as applied by rule B4. (He also opted for commutation of a part of his ill-health pension but I need not concern myself with that.) The details of the calculations do not matter. It is sufficient to note that, in both, the calculation is by reference to the person's "average pensionable pay". It is the meaning of that expression, in particular "pensionable pay" which is at the heart of this appeal.
11. Rule G1 of the Scheme sets out, insofar as any provision of the Scheme does so, what is meant by "pensionable pay" and "average pensionable pay". The rule is in the following terms:

"G1(1) Subject to paragraph (2), 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, or in Scotland a firemaster or assistant firemaster, for the post.
- (2) [not material]
- (3) The average pensionable pay of a regular firefighter is, subject to paragraphs (5) to (7), the aggregate of his pensionable pay during the year ending with the relevant date.
- (4) The relevant date is -
- (a) for the purposes of the rules B4 (injury award), ... the date of the person's last day of service as a regular firefighter, and
 - (b) for all other purposes, the date of his last day of service in a period during which pension contributions were payable under rule G2.
- (5) Subject to paragraphs (6) and (7), if he was in receipt of pensionable pay for part only of the year ending with the relevant date, his average pensionable pay is the aggregate of his pensionable pay for that part multiplied by the reciprocal of the fraction of the year which that part represents.
- (6) For the purposes of paragraphs (3) and (5) any reduction of pensionable pay during sick leave or stoppage by way of punishment shall be disregarded.
- (7) If the amount determined in accordance with paragraphs (3) to (6) is less than it would have been if the relevant date had been the corresponding date in whichever of the two preceding years yields the highest amount, that corresponding date shall be taken to be the relevant date.
- (8) A regular firefighter's average pensionable pay for a week is his average pensionable pay divided by 52 1/6th."

There was no need to have recourse to rule G1(7) in the calculation of Mr Hopper's average pensionable pay.

12. Rule G2(1) provides that:

"A regular firefighter shall, except while an election under rule G3 has effect, pay pension contributions to the fire authority at the rate of 1p a week less than 11% of his pensionable pay."

There was no election under rule G3.

13. In reaching his conclusion the Ombudsman rejected the contention advanced on behalf of the Authority that pensionable pay (for the purposes of rule G1) did not include irregular additions to earnings, such as overtime, and that a payment in lieu of leave, although not specifically referred to in rule G1, is an irregular addition and

therefore is not to be included in the calculation. Instead, he preferred the contention advanced on Mr Hopper's behalf that payments in lieu of holiday entitlement are "pay as determined in relation to his rank" as that expression is used in rule G1(1). He said that he accepted the contention because such payments

"...will be calculated not specially but in accordance with the firefighter's ordinary rate of pay, and therefore fall within the meaning of "pensionable pay" in Regulation G1(1). In substance, the payments will be consideration for work done in the course of his employment: the payments are pay, not ex gratia."

14. It is that approach to the meaning of "pensionable pay" and the conclusion in respect of payments in lieu of leave to which it leads that the Authority challenges on this appeal.

Average pensionable pay

15. There was a considerable debate before me over the meaning of "average" in the expression "average pensionable pay" appearing in rule G1.
16. "Average pensionable pay" is defined by rule G1(3) as being "the aggregate of his pensionable pay during the year ending with the relevant date". "Pensionable pay" (as distinct from "average pensionable pay") is defined by rule G1(1). In Mr Hopper's case, it refers to "his pay as determined ... in relation to his rank".
17. Mr Downey submitted that the concept in play, implied by the use of "average", was (consistently with his arguments in support of the appeal, to which I shall return a little later) of payments which are either annual or are capable of being made on an annual basis and which therefore are regular in nature. The intention, he submitted, was to contrast such payments with others which are irregular in nature (such as payments in lieu of leave and payments for overtime) and which therefore are not to be aggregated.
18. I did not find this a convincing explanation for the use of "average". Much more likely, to my mind, was Mr Seaward's explanation, although it did not advance his arguments for upholding the Ombudsman's decision, which involved an examination of the corresponding provision in the 1971 Scheme (SI 1971/145).
19. In the 1971 Scheme the expression "average annual pensionable pay" was defined, by article 51(2)(a), as meaning:

"The aggregate of the pensionable pay of the fireman, ignoring any reduction of pay during sick leave and any stoppage of pay by way of punishment, during the 3 years immediately preceding his death or retirement or, in a case where he was not serving as a regular fireman when he died, the date on which he last ceased to serve as such, divided by 3 ...;" (emphasis added)

That, as Mr Seaward submitted, was a real average. The article then went on to provide (by paragraph 2(b)) that:

“The expression “average pensionable pay” means the average annual pensionable pay of the fireman divided by 52 1/6th”

In other words it was a weekly average, this being consistent with the fact that, under the 1971 Scheme, benefits were calculated by reference to weekly pensionable pay.

20. The 1973 Scheme, which succeeded the 1971 Scheme, did away with averaging over three years and provided instead (by article 55(4)) a provision which was equivalent in effect (although different in wording) to rule G1(7) of the 1992 Scheme. However, it maintained the concept of a weekly amount serving as the multiplicand (see article 55(2)(b)) in defining the expression “average pensionable pay” to mean the average annual pensionable pay divided by 52 1/6th. The notion of averaging in the computation of average pensionable pay altogether disappeared but without adaptation of the wording to omit the reference to “average”. This infelicity of drafting, as I conceive it to be, was later carried through into the 1992 Scheme. Indeed, under the 1992 Scheme, “average pensionable pay” has become an annual amount; hence the reference in rule G1(3) to average pensionable pay being “the aggregate of ... pensionable pay during the year ending with the relevant date” (emphasis added). It is this annual amount which features in the calculation of benefits set out in, among others, Parts III and V of Schedule 2.
21. As Mr Seaward submitted, no averaging in the computation of the pensionable pay under rule G1(3) is involved. Rule G1(8) is not relevant: it is concerned with those cases (limited in number) where a pension is calculated by reference to the firefighter’s average pensionable pay for a week, eg a spouse’s special pension. In any event it involves taking a fraction (for the purpose of calculating a weekly sum) of a figure - the average pensionable pay - which is already assumed to be “average” in amount.

The Authority’s arguments

22. Mr Downey submitted that the emphasis in the expression “pensionable pay” is not on the manner of calculation of the payment as the determining factor (as the Ombudsman appears to have concluded) but on what pay, determined in relation to his rank (because he is a regular firefighter below the rank of assistant chief officer), Mr Hopper can expect to receive for the provision of his service. It is intended, he submitted, to refer only to payments which are either expressed to be (or can be expressed as) an annual amount, in other words, basic pay and recognised additions to it. It is not intended to include all the remuneration received by a regular firefighter for, if it had been, the rule could easily have so provided. Indeed, if the Ombudsman’s approach were correct, it is difficult to see why overtime payments should not be included. Yet no one, at any rate in recent times, has suggested that overtime payments are included.
23. He submitted that, although rule G1 does not refer to the Grey Book, it reasonably plain that, when enacting the 1992 Statutory Instrument which gave rise to the Scheme (in substitution for the 1973 Scheme), Parliament must have had the Grey Book in mind. The Grey Book, setting out rates of pay and the like, had existed long prior to 1992. The words of rule G1(1) are reflected in the provisions of section V of the Grey Book, concerned with the pay of whole-time members. Thus paragraph 1 of that section provides as follows:

“(1) The rates of pay of members of brigades below the rank of assistant chief officer are as set out in Appendix I.

(2) Pay entitlement is determined by age and length of service from the date of appointment to the rank held, subject to the provisions of paragraph 4 below [concerned with qualifying service and how that service is to be computed] and by the duty system to which the member is conditioned.

(3) Rates of pay are expressed in terms of annual amounts ...”

Appendix 1 sets out the various scales expressed in terms of annual amounts (with overtime scales set out as hourly rates).

24. Payments in lieu of leave, by contrast, are dealt with in section III concerned with leave. Such a payment is not, he submitted, pay determined in relation to rank within the meaning of rules G1(1). Rather it is a payment determined in relation to other factors, namely the triggering factors set out in paragraph 4 of section III. The payment is not of a regular amount. It arises on a single occasion and out of a particular set of circumstances.
25. In any event the definition of average pensionable pay set out in rule G1(3) refers to the aggregate of the firefighter's pensionable pay “during the year ending with the relevant date”. The “relevant date” is the firefighter's last day of service. See rule G1(4). The right to a payment in lieu of leave is triggered by (and not before) retirement. By rule A16, however, a firefighter is taken to retire “immediately after his last day of service”. It therefore follows, said Mr Downey, that a payment in lieu of leave, even if it were otherwise “pay” within the meaning of rule G1(1), would not qualify for aggregation under rule G1(3) because it is not pay during the year ending on the firefighter's last day of service.
26. Moreover, he submitted, a payment in lieu of leave which only arises on termination of a firefighter's contract of employment, in that it is triggered by his retirement and becomes payable after retirement, is not a payment in consideration of an obligation on the part of the firefighter to render his services or in consideration of past services. It is not pay within the ordinary meaning of that expression. In Delaney v Staples [1992] 1AC 687, where the meaning of wages under section 7(1) of the Wages Act 1986 was in issue, Lord Browne-Wilkinson (at 692) said that:

“The essential characteristic of wages is that they are consideration for work done or to be done under a contract employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the ‘wages’. It follows that if an employer terminates the employment (whether lawfully or not) any payment in respect of the period after the date of such termination is not a payment of wages (in the ordinary meaning of that word) since the employee is not under obligation to render services during that period.”

It is true, he said, that, in a sense, a payment in lieu of leave is referable to past service but the Authority's obligation to pay was triggered by Mr Hopper's retirement and is payable because he failed, before going on sick leave, to take up his full leave entitlement. In short, it is not a payment for work done or to be work done under his

contract of employment, which is the essence of the nature of pay, but compensation for his failure, owing to ill-health, to take up his full leave entitlement.

27. He referred to a commentary on the Scheme produced by the Home Office and designed to help users - mainly local authority superannuation offers who have to administer the Scheme - to understand its provisions. Although the commentary makes no reference to payments in lieu of leave, it has a passage entitled "To do with 'pensionable pay'" which includes the following:

"1. Rates of pay do not include irregular additions to earnings such as overtime which are thus not pensionable. London weighting is pensionable as is flexible duty allowance. If the pensionable status of a particular payment is in doubt this will normally be clarified in the NJC Conditions of Service Booklet.

2. Rule G1(1) relates the pensionable pay of chief fire officers and assistant chief fire officers to the pay determined for their post (as opposed to rank for other firefighters). This is simply because the pay for these posts varies according to the population size of their Brigade. There is no suggestion that anything other than basic pay should be included in the pensionable pay calculation ..."

Accepting that, as the commentary itself points out, the guidance contained in it cannot replace or override the provisions of the Scheme itself, Mr Downey nevertheless submitted that it indicates the purpose behind the rules, showing how they are to apply. It was, he submitted, persuasive evidence that the purpose of rule G1 was to limit pensionable pay to regular annual payments.

28. The Ombudsman's decision, as the Ombudsman himself recognised, gives rise to an anomaly, namely that different pension payments could be made to two firefighters of the same rank, rate of pay, age and circumstances if one of the firefighters received a payment in lieu of leave and the other either received no payment in lieu (because all accrued leave had been taken) or received a different payment (because of different accrued untaken leave). By including a payment in lieu of leave in pensionable pay, the firefighter, said Mr Downey, is effectively obtaining a pension based upon average pensionable pay for a period in excess of one year. In Mr Hopper's case it is as if he had worked a 373 day year. In an extreme case the number of additional days, for which a payment in lieu of leave, could be made, could be as much as 33. Such an addition to pensionable pay could make a substantial difference to the firefighter's pension payments.

29. The Ombudsman's response, in paragraph 14 of his determination, was to say that "the remedy for any accepted anomaly or inequity would lie in amendment of the regulations rather than in declining to apply their present plain meaning". The Ombudsman failed, Mr Downey submitted, to apply the well-established presumption against construing an enactment in a way that creates an anomaly or otherwise produces an irrational or illogical result. This can be avoided, he said, by construing rule G1(1) so as to exclude payments in lieu of leave on the basis (a) that such a payment is not pay in the accepted sense and (b) that it is irregular and not a payment which is either expressed or can be expressed as an annual amount.

Mr Hopper's arguments

30. In seeking to uphold the Ombudsman's conclusion, Mr Seaward said that past practice in the operation of the Scheme was no guide to its correct interpretation. Nor were the views of the Home Office commentary on it. The commentary, he said, is neither authoritative (it is not produced pursuant to any statutory duty) nor even accurate (the reference in it to the exclusion of so-called "irregular additions to earnings" is a gloss on the terms of the Scheme). It is, at best, an opinion on how the Scheme is to be applied and is probably inadmissible as an aid to construction. In fact, he said, going back at least 20 years, overtime payments had been treated as part of pensionable pay while, in recent years, although so-called pre-determined overtime effectively no longer existed, casual overtime was treated in the Grey Book as non-pensionable. London weighting, by contrast, was (at any rate until March 1998) treated by the Grey Book as pensionable. In any case, he submitted, it is outside the competence of the National Joint Council (through the Grey Book) to determine what is or is not pensionable pay.
31. The Scheme, he said, was intended to operate generously. Hence rule G1(7) which enabled the best of the last three years of service to be taken as the relevant year for the calculation of average pensionable pay. Looking simply at the wording of rule G1(1) it was noteworthy, he said, that there are no words of limitation such as "regular" or "basic". Nor does the definition specify that the payments should be annual in nature. The definition embraces any regular firefighter's pay "which is determined in relation to his rank". The intention, he submitted, was to exclude elements of pay which are not determined in relation to rank but are the same for any firefighter regardless of rank, for example allowances and expenses, such as medical charges, which are the same for any firefighter. There was nothing, he said, to indicate that only basic rates of pay were intended to be included rather than the actual pay, whether of a regular or irregular nature, which the particular firefighter received. Indeed, he argued, the fact that average pensionable pay is the aggregate of pensionable pay during the relevant year suggests that the constituent elements to be aggregated may not be annual or regular in amount. In the absence of some clear Parliamentary purpose to limit the definition to some types of pay but not others, the wording of rule G1(1) should be given its ordinary and natural meaning.
32. It is true, he said, that London weighting which was not determined by reference to rank had been (and was stated by the Grey Book to be) part of a regular firefighter's pensionable pay but the correctness of that practice was questionable. The same could be said of other payments and allowances which are described in section VI of the Grey Book as non-pensionable. (Paragraph 1 of section VI states that the allowances and emoluments prescribed in the section are non-pensionable.) He submitted that whether they are or are not properly so described depends purely and simply on whether they are determined in accordance with that person's rank (assuming he is a regular firefighter below the rank of an assistant chief officer). Thus, although overtime payments are within section VI of the Grey Book, in fact the rates at which they are paid are determined by reference to rank (see, for example, appendix 1 to the Grey Book setting out the pay and overtime scales of whole-time members by reference to rank, number of years in rank and years in the service) and ought therefore to be treated as part of pensionable pay.

33. In any event, he submitted, payments in lieu of leave are a species of pay. In Delaney v Staples, concerned with a payment in lieu of notice, the Court of Appeal had concluded - and the appeal to the House of Lords did not seek to challenge - that holiday pay was part of the appellant's wages, ie consideration for work done or to be done under his contract of employment. Here, said Mr Seaward, the payment in lieu of leave is referable to work done during Mr Hopper's period of employment. In substance it is part of his pay package for working as a regular firefighter. The fact that the Authority's obligation to pay it only crystallises on the day of retirement which, under rule A16 was immediately after Mr Hopper's last day of service, should not, he said, stand in the way.
34. He accepted that treating payments in lieu of leave as pensionable pay can give rise to an anomaly as between two regular firefighters of identical rank, pay and circumstances where at the time that each goes on sick leave one has taken his full holiday entitlement and the other has not. But the anomaly, he submitted, is very far from giving rise to the kind of absurdity that may properly be avoided by re-writing rule G1(1) as, in effect, it would have to be to exclude payments such as payments in lieu of leave. In any case, he submitted, there are other anomalies in the way the Scheme operates, for example, the so-called flexible duty system supplement. This is applicable to certain officers whose contract of service is so conditioned. Under it the officer in question is on call for 96 hours in a working week and receives a supplement to his pay (calculated as a percentage of "basic pay" and necessarily therefore an amount determined in relation to his rank) to reflect this obligation. The supplement is pensionable (see paragraph 6 of section V of the Grey Book). By contrast, those officers whose contracts are not so conditioned but are required to do casual overtime receive payments for such overtime, which are determined in relation to rank but which are not treated as pensionable. There is, he submitted, no difference in substance between the two: they are both payment for what is essentially overtime. They differ merely in the way in which the matter is approached under the respective contracts of service of the officers in question. The fact that anomalies of this kind are present in the Scheme should be recognised. They do not justify distorting, much less rewriting, provisions of the Scheme which are clear in meaning.

Conclusions

35. It is a necessary requirement of pensionable pay that the payment should be calculated in accordance with a firefighter's ordinary rate of pay so as to give effect to the need, set out in rule G1, for the pay to be "as determined in relation to his rank". That requirement serves to exclude the various allowances and other payments, being amounts not determined by the firefighter's rank, which are set out in section VI of the Grey Book.
36. But it does not follow, in my view, that merely because the payment is determined in relation to his rank it qualifies as pensionable pay. The payment must be "pay". That means that the payment must be for work done (or to be done) under the firefighter's contract of employment. A payment in lieu of leave is not of that nature. Rather it is a payment made (if the requirements set out in paragraph 4 of section III are fulfilled) to compensate the firefighter for the fact that he has been unable, on ill-health grounds, to take up his leave entitlement.

37. There is no question in this case of Mr Hopper having worked more days in his last year of service than he was obliged to do under his contract of employment. It is simply that, owing to ill-health resulting in a period of sick leave which terminated in his retirement, he was deprived of the opportunity of taking up his full annual leave entitlement. Although the payment he received was the equivalent of the daily rate of pay for the eight days in question the payment cannot, in any real sense, be described as payment for work done (or to be done) under the contract of employment. On the contrary, Mr Hopper was fully paid for the work he did. Nor can it be said that he rendered more services than he was obliged to do: during his absence on sick leave he was rendering no services but was continuing to be paid a salary.
38. The fact that in Delaney v Staples holiday pay was accepted as being part of the appellant's wages is not inconsistent with this conclusion. When examining the nature of the payment it is important to analyse how the entitlement to the payment arises and whether, in the particular case, it can be described as "pay" in the sense intended in the provision under consideration.
39. But, if I am wrong about the true nature of a payment in lieu of leave and such a payment is indeed "pay", I am persuaded that, to constitute "pensionable pay", the pay must be regular in nature, ie it must be pay to which the firefighter is entitled, at the rate applicable to his rank, in the ordinary course of fulfilling his duties under his contract of employment. The contrast here is with 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. Rule G1 is concerned to disregard reductions in pay resulting from sick leave or stoppage by way of punishment (see rule G1(6)) in the calculation of pensionable pay and enables the best of the last three years pensionable pay of the firefighter in question to be taken (see rule G1(7)). This is to ensure that some unexpected or extraordinary drop in regular pay does not reduce the amount of the pensionable pay which is to be taken for the purpose of calculating that firefighter's retirement benefits. Likewise, in my view, the concept of pensionable pay is not concerned to pick up payments which have arisen as a result of some unexpected or extraordinary event and which, if included, would serve to increase the amount of pay above what the firefighter would otherwise have received in the ordinary course of his employment. In my view, a payment in lieu of leave is of that nature. It is not part of the regular pay to which the firefighter is entitled in the ordinary course of fulfilling his duties under his contract of employment.
40. It follows that I have come to a different conclusion from the Pensions Ombudsman and, accordingly, that his determination must be set aside and a declaration made that payments in lieu of annual leave are not pensionable within the meaning of the Scheme.
41. In reaching this conclusion I decline to express any view on whether payments for casual overtime constitute pensionable pay. That is not an issue which arises for decision. Equally, I express no view on whether, under the Scheme, there is any inconsistency in treating overtime payments as non-pensionable and the flexible duty system supplement as pensionable.
42. I accept, indeed it was common ground, that the Home Office commentary is no more than an expression of opinion by its author and is not authoritative on what is or is not

pensionable pay. I note nevertheless, without expressing any view on what constitutes an irregular addition, that the view which it expresses that irregular additions do not comprise pensionable pay broadly coincides with my own.

43. My conclusion is also broadly in line with the approach to what is and is not treated as pensionable pay as set out in schedules V and VI of the Grey Book. I should make it clear, however, that the fact alone that the Grey Book treats one species of payment as pensionable and another as non-pensionable is not determinative of the position even if, when enacting the Scheme, Parliament had in view that rates of pay would be determined by the National Joint Council (and set out in the Grey Book). What is or is not pensionable pay depends ultimately on the true construction of rule G1 and not on what the National Joint Council should choose from time to time to regard as pensionable pay. Put another way, I do not discern from rule G1 any intention on Parliament's part that the scope of what is pensionable pay should be as determined by the National Joint Council.
44. Finally, I observe that the conclusion to which I have arrived avoids the anomaly (referred to by the Ombudsman in his decision and mentioned by counsel in the course of their submissions) which could arise if a payment in lieu of leave is part of a firefighter's pensionable pay. This is where, as between two regular firefighters of the same rank, rate of pay, age and circumstances, one receives a payment in lieu of leave and the other does not (for example, because that firefighter had taken up all of his accrued leave before going on sick leave). As indicated earlier, a payment in lieu of leave, although in Mr Hopper's case it involved no more than eight days, could be for as much as thirty-three days. The effect of such a payment on a firefighter's retirement benefits could be substantial. I cannot think that the scheme was intended to operate so as to give rise to an anomaly of such potentially far reaching effect.