Case No: TLQ/11/0426

Neutral Citation Number: [2011] EWHC 3305 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2011

Before :

MR JUSTICE ANDREW SMITH

- -

Between :

Christopher Norman	**Claimant**
- and -	
Cheshire Fire & Rescue Service	**Defendant**

- -
- -

Antony White QC (instructed by **Thompsons**) for the **Claimant**
John Cavanagh QC (instructed by **Cheshire Fire & Rescue Service, Legal Department**) for the **Defendant**

Hearing dates: 18 & 19 October 2011

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Judgment

Mr Justice Andrew Smith:

Introduction

1. The claimant, Christopher Norman, was employed as a firefighter by the Cheshire Fire & Rescue Service ("the Authority") before his retirement on 29 May 2008. The issue for determination in these proceedings is whether certain sums that he received in his last year of employment are pensionable pay under the statutory Firemen's Pension Scheme ("the FPS"). Mr Norman contends that they are and that the Authority is liable to him because it has not recognised this in calculating his retirement benefits. Although he pleads his claim in breach of contract as well as in breach of statutory duty, Mr Norman acknowledges that the claim on either basis depends upon the proper interpretation and application of the rules of the FPS. More specifically, the issue is whether sums paid to him under a collective agreement made between the Authority and the Fire Brigades Union ("the FBU") on 28 September 2007 and described as his "retaining fee", "disturbance fee" and "public holiday pay" (sums to which I shall refer as "the consolidated elements", adopting language used at trial) were pensionable pay within the meaning of rule G1 of the FPS, because they are covered by the expression "the amount determined in relation to the performance of the duties of his role ...". (The parties agreed that, if I uphold the claimants' contention, I need not consider the financial implications of that conclusion, and they are confident that they can be resolved by agreement.)

2. The issue can be formulated in simple terms, but I have found it more difficult to resolve it, despite helpful submissions from Mr Antony White QC, who represented Mr Norman, and Mr John Cavanagh QC, who represented the defendant.

3. The facts are uncontroversial. Mr Norman relied upon his own witness statement dated 21 July 2011, and the Authority relied upon statements dated 21 July 2011 of Mr Paul Hancock, its Chief Fire Officer, and of Mr Philip Mobbs, a Principal Human Resources Advisor. Neither party wished to cross-examine about the statements, and they were received without oral evidence.

The FPS

4. The FPS was established under The Firemen's Pension Scheme Order 1992, made by powers conferred on the Secretary of State for Local Government by the Fire Services Act 1947, section 26 and continued, after the repeal of that section, under section 36 of the Fire and Rescue Services Act 2004. The FPS does not have trustees and does not hold a fund of investments to meet its liabilities. Instead, each Fire and Rescue Authority ("FRA") is required to maintain a pension fund which receives employer's and employees' contributions and pays benefits (and also receives and pays transfer values from and to other schemes). The contributions of employees are 11% of their "pensionable pay", and the employer authorities' contributions are 26.5% of "pensionable pay": the rules of the FPS themselves specify the level of employees' contributions and provide that the level of employers' contributions should be determined by the Secretary of State. If FRAs have insufficient to meet their liabilities, central government funding covers the shortfall.

5. The FPS is a final salary scheme for retirement pensions. The normal pensionable age under it is 55, but many members retire at the age of 50 if they have completed at

least 25 years of pensionable service. Members' benefits are calculated by reference to their "pensionable pay" in their last year of service, subject to a right (which Mr Norman did not exercise) to elect to have them calculated by reference to pensionable pay in one of the two preceding years of service. Periodical pensions and lump sums are determined by a formula set out in rules of the FRS and are calculated as a fraction of "average pensionable pay", the applicable fraction depending upon years of service.

6. Thus, under the FPS members' "pensionable pay" determines both contributions and benefits.

7. Before the Firemen's Pension Scheme (Amendment) (England) Order 2005 ("the 2005 Order"), which came into force on 21 November 2005, part G rule 1(1) provided that:

> "... 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 assistance chief officer … for the post."

The rule was amended by the 2005 Order and also the Firefighters' Pension Scheme (Amendment) (England) Order 2008 ("the 2008 Order"), and it now provides as follows:

> "... the pensionable pay of a regular firefighter is the aggregate of –
>
> (a) the amount determined in relation to the performance of his duties of his role (whether as a whole-time or a part-time employee); and
>
> (b) the amount (if any) paid to him in respect of his continual professional development."

The 2005 Order introduced the new wording in sub-paragraph (a) in circumstances that I explain below, and the new sub-paragraph (b) was added by the 2008 Order, following the introduction of continual professional development that attracts an annual payment.

8. Rule G1(6) identifies matters that are to be disregarded when calculating pensionable pay. Before 2005 it provided that, "… any reduction of pensionable pay during sick leave or stoppage by way of punishment shall be disregarded". The present version of rule G1(6) provides:

> "… any reduction of pensionable pay as a result of any –
>
> a) sick leave;
>
> b) stoppage by way of punishment;

c) ordinary maternity, ordinary adoption or paternity leave;

d) paid additional maternity or additional adoption leave; or

e) unpaid additional maternity or additional adoption leave where contributions have been paid under rule G2A,

shall be disregarded".

Mr Norman's contract of employment

9. Mr Norman was employed by the Authority on 14 August 1978. His contract of employment incorporated collective agreements reached locally between the Authority and the FBU, to which he belonged, and national collective agreements negotiated between the FBU and the National Organisation of Employers of Local Authorities Fire and Rescue Services through the National Joint Council for Local Authority Fire and Rescue Services ("the NJC"). The nationally agreed Scheme of Conditions of Service is commonly known as the "Grey Book", and there are in evidence (by way of agreed documents) the fifth edition of the Grey Book of 1998 ("Grey Book 5") and the sixth edition of 2004, as updated in 2009 ("Grey Book 6").

10. Mr Norman was employed as a fireman (later called a "firefighter"), the lowest of the ten operational ranks listed in Grey Book 5: he was not promoted before he retired. He worked full-time: indeed, in 1978 all firefighters were required to work full-time, but from 2004 some were employed part-time. It was a term of his employment that he should join the FPS.

11. Both Grey Book 5 and Grey Book 6 state that firefighters normally work an average 42 hour week, and describe different "duty systems" that they work, including the "shift system", and the day crewing system". (I can disregard for present purposes other duty systems worked by regular firefighters, such as the "day duties system", described in Grey Book 5 as the third of the "principal duty systems".) Clause 3(ii) of Mr. Norman's contract of employment provided that "your working arrangements are in accordance with the duty system operated at your station/office".

Retained firefighters

12. FRAs, including the Authority, employ, as well as regular firefighters such as Mr Norman, "retained" firefighters, who typically have other jobs, sometimes as regular firefighters under contracts separate from their main contracts of employment: Grey Book 6 provides, at section 4 part A paragraph 1 that, "Full-time and part-time employees on any duty system are free to undertake retained duties where appropriate". Retained firefighters respond to calls to emergencies from their home or place of work.

13. The duties of a retained firefighter were explained in Grey Book 5 at Section VII, where a "retained member" is defined as "a part time member of a brigade of any rank who undertakes the obligations set out ... in return for" specified emoluments. They are stated as follows at paragraph 2:

"(1) A retained member shall have an obligation to attend:

(i) at the station to which he or she is attached for training and maintenance duties for an average of two hours each week (plus an additional hour per week on average at the discretion of the fire authority) or such less time as the officer in charge of the station, subject to any orders of the chief officer, considers necessary;

(ii) promptly at the said station in response to a call at any time;

(iii) at any fire of other occurrence or at any other station for reserve or standby duties in accordance with the orders he or she received.

(2) Provided that the obligations set out above may be limited either by pre-arrangement or with the sanction of any superior officer so as to provide that during specified periods the member is not required to be available."

14. The FPS was a scheme only for regular firefighters, and it has never been open to retained firefighters. (Until 13 September 2004, all regular firefighters were full-time employees, but thereafter, when some regular firefighters were employed part-time, they were entitled to join the FPS.) The FPS was closed to new entrants from 6 April 2006. By the Firefighters' Pension Scheme (England) Order 2006 there was introduced with effect from that date a New Firefighters' Pension Scheme (or "NFPS"), which is open to both regular and retained firefighters. Until then there had been no pension scheme for retained firefighters and so no question arose about whether any of their pay was pensionable and if so what elements were pensionable. (I was told that Mr Norman would have been entitled to join the NFPS, but did not do so: it was less generous than the FPS to a firefighter in his position.) These new arrangements under the NFPS were made after the decision of the House of Lords in Matthews and ors v Kent and Medway Towns Fire Authiroity, [2006] ICR 365, which gave guidance about how the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 apply to the conditions of employment of retained firefighters in comparison with those of regular firefighters.

The day crewing system

15. When Mr Norman joined the Authority, he was based at Crewe Fire Station and worked under the shift system, which required him to attend at the station for all his working hours (except, of course, when actually engaged in operational duties). In 1998, he moved to Congleton Fire Station to work under the day crewing system: he attended at the station for most of his average 42 hours week but served some of them from his home, a "brigade house" close to the Fire Station, when he was on stand-by and available to respond to emergency calls. But in addition he worked what was called a "retained element". Grey Book 5, which was in force when Mr Norman began to work at Congleton, described the day crewing system as follows at section II paragraph (2)(b):

> "Under this system, 35 hours of duty shall be performed at the station on a day duties basis and the remainder as standby duty at home, on the understanding that the member will respond to any emergency call received at any time during the standby period. The fire authority may request a member who is employed on this system to accept obligations similar to those of a retained member in respect of periods outside of his or her normal duty hours. A rota giving effect to the foregoing shall be drawn up. The rota shall also ensure that there shall be two complete periods of 24 hours freedom from any duty each week."

16. The description of duties under the day crewing system is materially similar in Grey Book 6 at section 3 paragraph 8. It too states that employees who work under this system "may be requested to undertake retained duties outside the hours" when they attend the station for work and are on stand-by at home. Firefighters working under the shift system are not requested to undertake retained duties (and Mr Norman had not undertaken a retained element when he was working at Crewe).

17. The terms of Mr Norman's employment under the day crewing system were stated in a letter to him from the Authority dated 27 July 1998. (It contemplated that Mr Norman should countersign a copy. There is no evidence that he did so, but the parties agreed before me that it was contractual.) It confirmed that he was to move to Congleton with effect from 1 August 1998, and continued as follows:

> "You will work the 42 hour day manning system of duty operated by Cheshire Fire Brigade, with fixed additional periods of retained duty as detailed in the attached Administration Group Order No 2/3. You will receive the following pay and allowances:-…."

With regard to a retained element, the letter stated,

> "You should note that if you discontinue carrying out your retained obligations for any reason, payment of the annual retaining fee and the fuel and light allowance will cease. If, in these circumstances you continue to occupy Brigade accommodation, your concessionary rent will also cease and you will have to bear the mesne profits arising as a result of your continued occupation, thereby denying the County Council the value of occupying their property."

18. Although the Administration Group Order that was current in 1998 is not in evidence (because, I was told, it could not be found), the Authority produced a copy of the equivalent order dated January 1999 and I infer that, as far as is material for present purposes, the earlier group order was similar to it. It "detail[ed] a revised operational duty system for personnel employed by [the Authority] on those Fire Stations conditioned to the day crewing or day crewing system (sic)", and set out a scheme for arranging rotas for the 42 hour week and for retained duties. It stated that:

> "… It should be understood that the payment of retaining fees and the occupation of concessionary accommodation (or payment of allowances in lieu), is conditional upon satisfactory retained cover and response being given."

It also stated, under the heading "retained duties" that:

> "It is not intended, nor is it desirable, that wholetime personnel should respond at all times outside the period of the basic rota of duties. However, personnel are obligated by virtue of their contracted hours to make themselves available during periods when it is known that the wholetime cover together with the retained support is deficient."

19. Mr Norman's hours under the day crewing system at Congleton were not exactly those stated in the Grey Book, but the system was varied under local arrangements. Mr Hancock described its operation as follows:

> "The Day Crewing Duty system operates with employees working on the fire station during the day and providing retained cover from Authority owned houses adjacent to the fire station at night for four consecutive days. The firefighters are then entitled to four rota (non working days) days before resuming their four days duty pattern … From Monday to Friday, 10 hours are worked on the station within the period from 9am to 9pm (the remaining 2 hours employees are on standby) with retained cover between 9pm and 9am. At the weekends, employees work on station from 10am to 5pm (the remaining hours between 9am and 9pm on standby) with retained cover between 9pm and 9am."

20. Throughout his service, when he worked under the day crewing system, Mr Norman undertook the additional duties of a retained firefighter, providing the same cover outside his average 42 hours week as was provided by retained firefighters (although for obvious reasons, as a regular firefighter undertaking a retained element, he was not required to attend the training sessions for retained firefighters). Such duties by way of the retained element undertaken in these circumstances by regular firefighters on the day crewing system are provided under the same contract of employment as their other duties: Mr Norman never had a separate contract for the retained element. In most respects, his retained duties were similar to those when he was on stand-by during regular working hours in that in both cases he had to be available if called upon, but when on stand-by he was obliged to be at his home whereas during the hours of the retained element he was only required to be within five minutes of the fire station.

The "rank to role" assimilation

21. In around 2003 and 2004 there was a reorganisation of the fire service known as the "rank to role" assimilation. The purpose was to recognise the range of responsibilities that FRAs undertake besides operational firefighting. Its background is described by Rix LJ in R v The Boards of Medical Referees ex p. Marrion and ors,

[2009] EWCA 450, esp. at paragraphs 50ff. It introduced the concept that employees of FRAs should have a "role" rather than hold a rank, and they should have "role maps", which provided a basis for amending the definition of a "regular firefighter". The changes were embodied in the Fire Service Appointments and Promotions Regulations 2004 and in the Grey Book 6. Section 3.6 of Grey Book 6 states that, "Fire and rescue authorities can require any reasonable activity to be carried out by an individual employee within his or her role map". As Mr Norman was told by a letter dated 22 December 2006, his role was that of "firefighter" and he was provided with a corresponding "role map".

22. All employees with the role of firefighter had the same role map, and the duty system under which he or she worked did not affect his or her role map, any more than it had affected a firefighter's rank before the changes. Grey Book 6 gave a description of the duties of retained firefighters, which was introduced with the statement that, "The hours of availability of employees on the duty system shall be agreed between the fire and rescue authority and individual employees", but which is not materially different from that in Grey Book 5. Mr Norman held the "rank" of firefighter before the changes and had the "role" of a firefighter after the changes, but, in so far as his duties and the pattern of his work were governed by the day crewing system, they remained unchanged.

23. Grey Book 6 made clear the distinction, emphasised by Mr Cavanagh in his submissions, between a firefighter's role and the duty system under which he or she worked. It stated at section 4 part A at paragraph 1 that:

> "All working arrangements will operate on the basis that employees will undertake the duties appropriate to their role and be deployed to meet the requirements of the fire and rescue authority's Integrated Risk Management Plan. This may include a requirement to work at different locations. Full-time and part-time employees on any duty system are free to undertake retained duties where appropriate."

Paragraph 4 listed the different roles, firefighter being the most junior and area manager being the most senior. Paragraph 6 stated that the duty systems were to continue until "replaced or supplemented locally by new systems …". Paragraphs 7 to 16 described the different duty systems, including the day crewing system and the retained duty system. The description of the day crewing system at paragraph 8 was in the following terms:

> "The hours of duty of full-time employees on this system shall be an average of forty-two per week. The hours of duty of part-time employees shall be pro-rata. The rota will be based on the following principles:
>
> (1) An average of thirty-five hours per week shall be worked at the station.
>
> (2) An average of seven hours per week shall be on standby at home. Employees are required to respond to any emergency call received during this standby period.

(3) Employees on this system may be requested to undertake retained duties outside the hours at (1) and (2).

(4) There shall be at least two complete periods of twenty-four hours free from any duty each week.

(5) One hour per day shall be specified as a meal break. Account shall be taken of meal breaks interrupted by emergency calls."

Pay

24. Section V of Grey Book 5 was about "Pay of Whole Time Members" because when it was issued all regular firefighters worked full-time, Grey Book 6 reflecting the change made in 2004. Paragraph 1 of Grey Book 5 provided as follows under the heading "Rates of pay":

"(1) The rates of pay of members of brigades below the rank of assistant chief officer shall be as set out in circulars issued by the National Joint Council from time to time.

(2) Pay entitlement is determined by age and length of service from the date of appointment to the rank held …. and by the duty system to which the member is conditioned…."

25. Mr Norman was paid basic salary in respect of his duties under the day crewing system. Before 1 October 2007 he received recompense, "public holiday pay", if he was required to work on public holidays: Grey Book 6 at part C, which concerns "Leave", states that, "An employee in the role of Station Manager or below … who is required to work on a public holiday shall be paid at double time for those hours (which shall not be pensionable) and be granted a day's leave in lieu": paragraph 18.

26. Mr. Norman did not receive extra pay if he was called upon during the hours when he was on stand-by at home. He did, however, receive additional payments in respect of the retained element of his duties:

i) A "retaining fee", which was paid for being available for work while on retained duties. This was for the same amount whether or not he was called out.

ii) Further sums if he was called upon to provide services, namely turn-out fees and attendance fees, to which together I shall refer as "call-out fees".

27. In the letter of 27 July 1998 the Authority wrote:

"You will receive the following pay and allowances:

a) The 42 hour whole-time pay appropriate to your rank and service in accordance with nationally agreed rates. Your commencing salary will therefore be £19,515.00 per annum."

b) An annual retaining fee of £897 in respect of your fixed retained availability, together with appropriate turnout and attendance fees in accordance with nationally agreed rates."

28. The corresponding provisions of Grey Book 6, at section 4 part B, are introduced as follows:

> "1 Rates of pay are set out in circulars issued by the NJC.
>
> 2 The pay entitlement of an individual employee shall be determined by:
>
> (1) The employee's role.
>
> (2) Whether the employee is in training (for the roles of Firefighter and Firefighter (Control)), development or competent stage for his or her role.
>
> (3) Whether, for roles above Crew Manager and Crew Manager (Control), the employee is in the A or B job-size category."

29. Subparagraph 2(2) refers, in relation to the pay of firefighters such as Mr Norman, to their "stage". Grey Book 6 states (at section 3 paragraph 2) that there are the three "defined stages of development leading to demonstration of competence in the employee's role", and they affect the rate of firefighters' pay because they go to determine the level of basic pay itself (rather than because they attract an additional payment or uplift on top of basic pay).

30. With regard to public holidays, Grey Book 6 provides at section 4 part C paragraph 18 that, "An employee in the role of Station Manager or below … who is required to work on a public holiday shall be paid at double time for those hours (which shall not be pensionable) and be granted a day's leave in lieu".

31. Part B uses different terminology from Grey Book 5 when setting out "Retained duty system payments", and refers to "disturbance payment" and "payment for work activity" (which I shall regard as covered by the expression "call-out fees"), but these provisions are not materially different for present purposes from the corresponding provisions of Grey Book 5. Grey Book 6 states (at section 4 part B paragraph 17) that:

> "An employee on the day-crewing duty system who undertakes retained duties shall be paid an annual retainer of 5% of his or her full-time annual basic pay together with the disturbance and work activity payments ….".

32. These additional payments are similar in kind (but not in amount) to those of retained firefighters. The emoluments for a retained firefighter include annual retaining fees (paid to a retained firefighter providing "full cover" at 10% of a regular firefighter's basic pay, whereas the retaining fees paid to regular firefighters who undertake retained duties are said in Grey Book 5 and Grey Book 6 to be only 5% of their basic pay), and call out fees (referred to in Grey Book 5 as "turn-out fees" and "attendance

fees", and in Grey Book 6 as "disturbance payments" and "payments for work activity"). Retained firefighters receive further sums by way of payment for attendance at training centres and in some cases compensation for loss of remuneration from his or her usual occupation. If a retained firefighter is called out to an emergency incident on a public holiday, he is paid double the disturbance and activity payments: Grey Book 6 section 4 part C paragraph 25.

The Collective Agreement

33. On 1 October 2007 the Authority introduced new arrangements for firefighters who work on day crewing duties. They followed a Best Value Review conducted by the Authority and a report that recommended that the day crewing system be reorganised. The Authority, as is recorded in a report to it dated 1 November 2006, saw it as providing, among other advantages, "An opportunity to move to a consolidated earnings formula rather than the perverse incentive approach of salary and disbursements". The Authority and the FBU entered into negotiations about the proposed reorganisation and how firefighters should be paid after it. After the matter had been referred for conciliation to the NJC Joint Secretaries in accordance with procedures agreed between FRAs and the FBU, on 28 September 2007 the Authority and the FBU signed a Collective Agreement for the Introduction and Operation of Day Crewing Duty System (the "Collective Agreement"), which was said, at clause 3, to be "designed to detail the working arrangements of the Day Crewing Duty System which forms part of the contract of employment for relevant day crewing operational personnel". (This was consistent with Mr. Norman's employment contract: see paragraph 11 above.) Clause 13 stated that, "The duty system is based on the principles contained within the Grey Book, with the exception that the retained element shall be covered by the payment of a fixed allowance". The Collective Agreement went on to state at clause 18 that the "Working days [were] to be broken down into the three components of; Duty on Station (DS), Standby (ST) and Fixed Retainer (FR) …" in accordance with a rota which specified when each of these three components was to be worked.

34. The fact that the retained element was an intrinsic part of the day duty crewing system that firefighters were obliged to undertake by the Collective Agreement (and so by their contracts of employment, which incorporated local collective agreements) is reinforced by clause 19, which was headed "Shift System" and provided as follows:

> "Personnel will be required to work a rota of four 24-hour working days followed by four 24-hour off duty days on an eight week cycle. Where duty falls on:
>
> Monday to Friday. 10 hours to be worked on station within the period 09.00-21.00. The remaining two hours of that twelve hour period to be on standby. Retained cover to be provided between 21.00-09.00.
>
> Saturday. 10.00 to 17.00 to be worked on station. The remaining hours between 09.00 to 21.00 to be on standby. Retained cover to be provided between 21.00 and 09.00.

> Sunday. 10.00 to 17.00 to be worked on station. The remaining hours between 09.00 to 21.00 to be on standby. In addition every 8th Sunday will be on standby. Retained cover to be provided between 21.00 and 09.00...".

35. The Collective Agreement changed the arrangements for paying regular firefighter for a retained element. Clause 20 provided as follows under the heading "Pay Package":

> "The package will include the following elements, all of which shall be pensionable, with the exception of the fuel/light allowance:
>
> Basic pay (as contained in circulars issued by the NJC)
>
> Retaining fee (12.5%)
>
> Disturbance fee (12.5%)
>
> Public Holiday pay (1.85%)
>
> Fuel/light allowance
>
> For those who are not in provided accommodation that package will also include the following non-pensionable elements:
>
> Housing allowance
>
> Compensatory grant
>
> The package will be up-rated each year in line with the annual pay award."

36. On 25 October 2007 the Authority sent Mr Norman a letter headed "Day Crewing Duty System – Contractual Change". It referred to the Collective Agreement and consequential changes to "your work pattern and pay package", and enclosed a copy of the "Day Crewing Agreement which contains all of the changes to your duty system and remuneration". It continued:

> "With regard to the pay package, the agreement has consolidated the following elements which now form a single, pensionable, salary payment;
>
> Basic pay (as per NJC Circulars)
>
> Retaining fee (12.5%)
>
> Disturbance fee (12.5%)
>
> Public Holiday pay (1.85%)."

37. Thus, whereas previously Mr Norman had been paid a "retaining fee" by way of a fixed fee and a disturbance fee depending upon whether he was in fact called out and

received extra pay if in fact he worked on a public holiday, under the new arrangements the retaining fee, the disturbance fee and the public holiday pay were all by way of a percentage uplift on his basic pay. He no longer received more if in fact he was called out when on retained duties or if he in fact worked upon a public holiday. Mr Norman was paid in accordance with these new arrangements until he retired.

38. It will be observed that both the Collective Agreement and the letter to Mr Norman stated that the new payments, the consolidated elements, would be pensionable under the FPS. This does not, of course, determine whether they were pensionable. That depends not upon the views of the Authority, the FBU or Mr. Norman but upon the proper interpretation and application of the rules of the FPS. Mr Norman does not contend otherwise.

The correspondence about the consolidated elements

39. In the letter of 25 October 2007 the Authority referred to the basic pay and the consolidated elements as a "single, pensionable, salary element". Before he retired, Mr Norman was sent a statement of his pension benefits calculated on this basis by Mouchel Business Services ("MBS"), who manage the FPS. However, in May 2008 the Authority was advised by the Department of Communities and Local Government ("DCLG") that the consolidated elements were not "pensionable pay" for the purpose of rule G1 of the FPS. On 29 May 2008, the day that he retired, Mr Norman received a further letter from MBS advising him of his entitlements calculated accordingly.

40. The Authority, after initially questioning the advice of the DCLG, eventually accepted it, and it has paid Mr Norman's annual pension and lump sum accordingly. I need not, as I have explained, be concerned about precisely what difference this decision makes to Mr Norman's benefits, but I was told by Mr White that it is of some £15,000 to the lump sum and of some £200 to the monthly pension. The Authority indicated that the difference to the lump sum is rather smaller, and observed that these figures do not bring into account any benefits that Mr Norman might have had under the NFPS had he joined it.

41. I shall refer to some of the correspondence because it indicates some of the competing arguments. In a letter dated 21 May 2008 to the administrators of the FPS, the DCLG wrote:

> "It has come to our attention that fire and rescue authorities may be negotiating remuneration packages for day crewing staff which consolidate basic pay, retaining fees and other elements of retained duty pay and that there is confusion as to whether the whole of the revised pay package can be pensionable under the Firefighters' Pension Scheme 1992 (FPS).
>
> It is our view that for pension purposes the retained element of such a package cannot be regarded as pensionable under the FPS and that to do so would be ultra vires.

> Retained pay was not pensionable before 6th April 2006 when it became pensionable under the New Firefighters' Pension Scheme 2006 (NFPS). At that point the FPS became a closed scheme and no change was made to make retained pay pensionable under or within it. It follows that any agreement on day crewing pay which seeks to make the retained element pensionable under the FPS has no vires, and the two elements of pay must be kept separate for pension purposes.
>
> To regard the retained element as pensionable under the FPS in this manner has cost implications for a final salary scheme which threatens its affordability and viability."

42. In a letter dated 23 April 2009 the Authority questioned whether this advice applied to the consolidated elements by way of "disturbance fee" and "public holiday pay". They wrote to the DCLG as follows:

> "I note your interpretation, as regulator of the Firefighters' Pension Scheme, and your conclusion that the retained element of our consolidated pay package cannot be pensionable.
>
> Within the consolidated pay package there were two further elements, namely disturbance fee of 12.5% and public holiday pay of 1.85%. These are both payments made to reflect the regular duties of a firefighter and I take the view that these are pensionable. On this basis we will instruct our pension contractor to make pension payments based on all elements of the consolidated pay, save for the retaining fee."

43. On 9 December 2009 the DCLG issued a circular setting out concerns about the treatment of pay for pensionable purposes under the FPS and the NFPS. In a response to it, the Authority stated that it supported the "exclusion of temporary allowances from the definition of pensionable pay", but made further observations about two other allowances. With regard to the position of those working under the day crewing system, the Authority wrote this:

> "The Authority notes that the definition of pensionable pay only includes permanent emoluments and basic pay. The term 'permanent' suggests only those allowances that cannot be withdrawn should be counted within the definition of pensionable pay and 'temporary' allowances should be specifically excluded. The Authority supports that exclusion of temporary allowances from the definition of pensionable pay but would take this opportunity to make two points about specific allowances:…
>
> Cheshire Day Crewed Staff
>
> … In 2007 the Authority undertook a review of its day crewing system. This resulted in certain allowances typically associated with the day crewing system being consolidated into basic

> salary of such staff. The Authority cannot withdraw these allowances from staff other than to remove them from the day crewing system, therefore it is our contention that the basic pay of a day crewed firefighter includes these consolidated allowances i.e. is pensionable.
>
> On the latter point, colleagues in the CLG [sic: presumably DCLG] will be aware that we have engaged in lengthy dialogue around this issue with the result that prior to this circular, the consolidated allowances were determined by the CLG to be non-pensionable. As these allowances cannot be distinguished from basic pay, we believe that this decision is no longer valid."

44. The Authority also referred in its response to the Circular to the "Flexible Duty Allowance", which was referred in Grey Book 5 as a "flexible duty supplement" and in Grey Book 6 as a "flexible duty system supplement". In both versions of the Grey Book it was stated to be "a pensionable supplement of 20% of [the employee's] basic pay" (at section V paragraph 8 and section 4, part B paragraph 3 respectively). This supplement is paid to senior staff, formerly to those with the rank of Station Officer or higher and now to those with a role of Station Manager or higher; and it is and was paid to all with operational duties, but not to those with non-operational duties. The flexible duty system requires officers or managers to perform managerial duties by way of operational command or comparable duties and also to be on stand-by to perform managerial duties if called upon. The Authority wrote in response to the Circular as follows under the heading "Flexible Duty Allowance":

> "This allowance 'goes with the turf' of being an operational Officer. The only circumstances in which this allowance would be withdrawn (with the Officer remaining in Service) are where an Officer moves to a non-operational role or, where that Officer is demoted at a role below Officer level. It is therefore our contention that flexible duty allowance is a permanent allowance as in the normal course of events, it cannot be withdrawn."

45. There is no dispute that officers with the relevant roles, if they perform operational duties, are required by their contracts of employment to undertake the duties for which they are paid the flexible duty system supplement. They are not in a position to decline the duties and forego the supplement, as is clear from both Grey Book 5 (at section II paragraph 3) and Grey Book 6 (at section 4 paragraph 11). It is also not in dispute that others who have the same role and the same role map but who are on non-operational duties do not receive the supplement.

Mr Norman's contention

46. The question that I have to decide is whether the consolidated elements are pensionable upon the true interpretation and proper application of Rule G1. Mr White submitted that it is clear that they are if Rule G1 is interpreted in accordance

with authority, given its ordinary and natural meaning and construed so as to avoid anomalies that might result from other interpretations.

The Kent & Medway Towns Fire Authority decision

47. The authority upon which Mr. White relied is the decision of Blackburne J in Kent & Medway Towns Fire Authority v Pensions Ombudsman and anor, [2001] OPLR 357. That case concerned a firefighter who retired on ill-health grounds having accrued eight days of annual leave during his final year with the authority as a result of being on sick leave for the last 8 months or so of his employment, and who was therefore entitled to payment in lieu of the leave that he had not used. He contended that this payment was "pay determined in relation to rank" within the meaning of the definition of pensionable pay in rule G1 of the FPS before the changes of 2005. The Pensions Ombudsman had upheld his contention, but Blackburne J set aside that decision and determined that it was not pensionable pay. He provided guidance as to the meaning of pensionable pay, in particular at paragraphs 35, 36 and 39 of his judgment:

> "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 … to compensate the firefighter for the fact that he had been unable, on ill-health grounds, to take up his leave entitlement.
>
> ...
>
> 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 reduction 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.

48. Mr White submitted that the consolidated elements of Mr Norman's pay after the Collective Agreement satisfied the touchstones or indicia of "pensionable pay" that Blackburne J identified.

    i) First they were "calculated in accordance with [his] ordinary rate of pay", as Blackburne J put it at paragraph 35.

    ii) If the consolidated elements were not precisely payments "for work done ... under [the contract of employment]" (see paragraph 36 of the judgment), they were payments for being available to do work if called upon. That is not a distinction of any significance for present purposes, and Mr Cavanagh did not submit that it is.

    iii) The consolidated elements are payments that (i) are in an amount applicable to a firefighter's role, and (ii) are payments to which he is entitled in the *ordinary* course of fulfilling duties under the contract of employment and not by way of "one-off" or episodic or intermittent payments. In other words, they are "part of the regular pay to which the firefighter is entitled in the ordinary course of fulfilling his duties under his contract of employment": see paragraph 39

49. In paragraph 35 of his judgment, Blackburne J referred to the allowances and other payments set out in section VI of Grey Book 5. Section VI was entitled "Emoluments and Allowances for Full Time Members" and stated at paragraph 1 that "All allowances and emoluments prescribed in the following paragraphs of the Section are non-pensionable". The section then referred to accommodation, rent, fuel, light, travel, meal, subsistence, removal and lodgings and uniform allowances. Paragraph 10 of the section was headed "Turn out fees and other fees for certain members" and read as follows:

> "A member of a brigade of a rank below that of station officer:
>
> (a) who is engaged in operational duties, and
>
> (b) who has voluntarily accepted, in respect of periods which would not be periods of duty according to the duty system applicable in his or her case, obligations similar to those of a retained member of a brigade specified in Section VII [which was about the duties of retained members and their payments], shall be paid by way of allowance, in respect of duty performed under those obligations, the emoluments described in paragraphs 4, 5, 7 and 16 of that Section and where the fire authority requests the attendance of a member at the station on drill sessions the allowance set out in paragraph 6. A retaining fee shall be paid in accordance with circulars issued by the National Joint Council from time to time."

Section VI went on to list at paragraphs 11 to 15 payments for overtime work, for recall to duty because of a serious incident, for performing duties of a higher rank, for carrying out the duties of a mess manager or deputy mess manager or by way of a compensatory grant for any tax paid by a firefighter in respect of accommodation provided to him or her, or rent, fuel or light allowances or the like.

50. Mr White submitted that the author of Grey Book 5 was mistaken to include as non-pensionable receipts the payments referred to in section VI paragraph 10, and that Blackburne J should not be understood at paragraph 35 of his judgment to be endorsing the paragraph. I agree that it would read too much into paragraph 35 to suppose that Blackburne J was endorsing in detail the full list of allowances and emoluments mentioned in section VI that were said not to be pensionable. He referred in general terms to section VI simply to illustrate his point that pensionable pay had to be calculated in accordance with the firefighter's ordinary rate of pay: it is unrealistic to suppose that he had assessed the nature of each of the "emoluments and allowances" included in section VI.

51. However it also seems to me that Mr White might have misunderstood paragraph 10 and that his interpretation of it might raise an unnecessary obstacle to his case. As both the heading to section VI and paragraph 1 of the section made clear, the section was directed to "allowances and emoluments" that were pensionable. Paragraph 10 first referred to "emoluments" of retained members of the brigade by reference to paragraphs of section VII of the Grey Book which referred to turn out fees, attendance fees, "payments for remaining on duty" (earned when a member was entitled to a turn out fee and remained on duty for more than an hour) and enhanced payment in respect of such emoluments for service on public and extra-statutory holidays. It then referred to an "allowance" explained in section VII and paid as a "drill attendance fee" for attending the station for drill and maintenance duties. Mr White does not criticise the author of Grey Book 5 for including in section VI any of these payments as non-pensionable "allowances or emoluments": they all are of an episodic nature

which would exclude them from being pensionable. Mr. White was exercised only about the reference to paragraph 10 to retaining fees, which were paid by way of a fixed annual amount and not on a "one-off" or episodic basis. However the paragraph was drafted so as to avoid describing them as allowances or emoluments. Had this been intended, surely the author of the Grey Book 5 would simply have referred to paragraph 3 of the section VII, which deals with retaining fees of retained firefighters, in the same way as it referred to other paragraphs of section VII concerned with other payments. I am not persuaded that the reference to retaining fees in the last sentence of paragraph 10 is properly understood as stating that they were "allowances or emoluments", which were not pensionable. It is, I think, properly understood as directing the reader to more detailed descriptions of them in circulars because this would determine whether or not they were pensionable. However that may be, Blackburne J's reference to section VI of the Grey Book 5 is not inconsistent with Mr Norman's contentions.

52. Blackburne J was, as I have said, considering the unamended version of rule G1, but Mr White submitted that his reasoning applies equally to the amended rule. Mr Cavanagh did not dispute this. Mr White made two specific points in support of his contention that the unamended version of rule G1 and its interpretation by Blackburne J inform the meaning of the current version of the rule. First, Mr White submitted that, because of Blackburne J's decision, the so-called Barras principle applies. Under that principle, as stated by Bennion on Statutory Interpretation (5th Ed) p.599 section 210(3), "where an Act uses a form of words with a previous legal history, this may be relevant in interpretation". The principle applies to secondary as well as primary legislation, and it is not confined to statements of the law made by way of binding precedent: in Secretary of State for Work & Pensions v B, [2005] EWCA Civ 929, at para 35 Sedley LJ recognised it when the law had been stated by a Social Services Commissioner: see Bennion (loc cit) at p.600.

53. Secondly, my attention was drawn to the Explanatory Note for the 2005 Order**.** Reference may be made to explanatory notes in order to give an order an "informed construction": Bennion on Statutory Interpretation (5th Ed) at p.266. The 2005 Order made four changes to the definition of "pensionable pay":

i) Whereas the original rule had referred to "pay" being determined, the amended language instead referred to an "amount";

ii) The amended rule referred to a firefighter's role, rather than to his rank;

iii) It introduced the words "performance of his duties"; and

iv) It stated that the rule referred to the role of both full-time and part-time firefighters.

The reason for the last change is obvious and the second was, of course, consequential upon the reorganisation to which I have referred. The Explanatory Note dealt with the first change, explaining that it enabled FRAs which had introduced "salary sacrifice" schemes for benefits such as child care to collect pension contributions on the basis of the amount of pay before the reduction by way of salary sacrifice. It was not thought necessary to explain the third change in the Note. Mr Cavanagh submitted that it was consequential upon the first and made for reasons of grammar. I do not accept that,

as I shall explain, but on any view the Explanatory Note did not suggest that the amendment was intended to change which receipts of an employee are pensionable.

54. I also draw attention to the Explanatory Note to the 2008 Order, which echoes and reinforces Blackburne J's observation in paragraph 39 of his judgment that pensionable pay must have something of a permanent nature. When that order introduced the provision in paragraph (b) of the current Rule G1, the Explanatory Note stated, "Other amendments are consequential on the introduction … of a new scheme of payments in respect of continual professional development. Under that scheme the payments are subject to annual review and therefore temporary in nature. For that reason, they would not ordinarily be regarded as pensionable for the purposes of the Scheme".

55. I accept Mr White's two arguments about the interpretation of the amended rule as far as they go, but the starting point for any question of interpretation must be the language used, and this, as it seems to me, shows that new definition went further and enshrined the touchstones identified by Blackburne J. Blackburne J had distinguished the two parts of the unamended definition. He considered that the words "determined in relation to rank" excluded receipts on which the rank of the recipient had no bearing. He considered that the requirement that the receipt be "pay" connoted that the receipt had to be (i) "for work done (or to be done) under the firefighter's contract of employment" and (ii) a receipt to which the employee was entitled "in the ordinary course of fulfilling his duties under his contract of employment". Because, for the reason explained in the Explanatory Note, it was decided to change the word "pay" to "amount", these two connotations of the word "pay" would have been lost from the definition without other changes being made. In my judgment the significance of the words "in relation to the performance of the duties" was that they preserved the requirement that pensionable pay be for work done by way of duties under a contract of employment, and for work that is by way of work *of* the employee's role and (as I would interpret it) work done in the ordinary course of fulfilling his or her role.

56. Mr Cavanagh, however, submitted that the Authority's case is consistent with the judgment in the Kent & Medway Towns Fire Authority case. As he observed, Blackburne J was considering a payment which was very different from the consolidated elements, and he did not purport to give a complete definition of a pensionable payment or to identify an exhaustive list of determinative features that a payment had to meet in order to be pensionable. A payment was not said necessarily to be pensionable provided it satisfied the indicia that Blackburne J identified: the indicia were not presented as a replacement for the core question whether a payment satisfies the definition in the rules of the FPS of a pensionable payment.

57. I accept this part of Mr Cavanagh's argument. I therefore agree, while paragraphs 35, 36 and 39 of Blackburne J's judgment are consistent with Mr White's submission, they do not get him home: the judgment does not decisively support his contention that the consolidated elements are pensionable or refute the Authority's case.

The parties' cases about how rule G1 applies to retaining fees and disturbance fees

58. Mr White submitted that the various consolidated elements were paid to Mr. Norman in relation to the performance of the duties of his role. Mr Cavanagh submitted that

these uplifts are not paid in relation to a firefighter's role, and that they are properly seen as paid by reference to the duty system, under which an employee works.

59. I shall consider first the retaining fee and the disturbance fee elements together, and then deal with the public holiday pay element separately. Although the Collective Agreement distinguished between an uplift of 12.5% of basic pay in respect of retaining fees and a similar uplift in respect of disturbance fees, this distinction merely reflected the history and rationale for the arrangements and, I suppose, made it clear that the Authority's firefighters were being paid for the two same aspects of retainer duties for which firefighters employed elsewhere are paid. In substance the Authority agreed to pay a single uplift of 25% over basic salary to firefighters working on the day crewing system in respect of retained duties.

60. The language of Rule G1 is undeniably clumsy, but, as Mr White pointed out, because the amounts of the controversial payments are proportions of the basic pay, which is determined by the role of the employee, they too are similarly determined by the role of the employee. A retained element is not undertaken only by those with the role of firefighter but by employees with other roles, and they, because of their different roles, are paid different amounts.

61. The payments are designated as being made in respect of the retained duties, but that does not mean they are not referable 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 was pensionable and the other not.

62. In response to this Mr Cavanagh submitted that the essential question is whether a payment is referable to the employee's *role* as firefighter, and that the consolidated elements are not: that the change introduced by the Collective Agreement whereby call-out fees are determined by way of a percentage uplift on basic pay does not mean that they are referable to with recipients' roles. He developed this in two more specific propositions: (i) that only pay that is determined solely by the employee's role is pensionable, and (ii) that only basic pay is pensionable.

<u>Must pensionable payments be referable solely to the employee's role?</u>

63. Mr Cavanagh submitted that before 2005 pensionable pay had to be determined *solely* by the employee's rank and now it is *solely* determined by, or by reference to, his or her role, and that therefore a firefighter's only pensionable pay is his basic pay, because that is paid to all employees in the role of firefighter regardless of their duty system or any circumstances other than their role: it is, as Mr Cavanagh put it, paid for the "common responsibilities" of the role. Specifically he said that none of the 25% uplift for retainer fees and disturbance fees is paid in relation to the performance of the duties of the role of firefighter but both were attributable, and expressly attributable to, a particular duty that firefighters on a particular duty system undertake.

64. It might be that the payments are made in relation to the duty system but it is a false dichotomy to infer that therefore they are not made in relation to the performance of the duties of the role. I reject Mr Cavanagh's submission.

65. First, rule G1 itself refers to full time and part time firefighters: it contemplates that the amount of pensionable pay will depend upon the number of hours that a member works as well as his role.

66. Further, the Authority's proposition would exclude from pensionable pay earnings which have been stated in the Grey Book to be pensionable and have been treated as such. As I have said, the flexible duty system supplement is stated to be pensionable but the payment depends not only upon the employee's role but also upon whether the employee does operational duties.

67. Thirdly, neither the unamended Rule G1 nor the amended version states that the pay must be *solely* determined by rank or in relation to the performance of the duties of the role. Moreover, if it was intended that only basic pay is pensionable (either because this alone is determined solely by role or for any other reason) this could have been stated directly.

68. Fourthly, the Authority's submission is inconsistent with what was said in the Kent & Medway Towns Fire Authority case. At paragraph 22, Blackburne J recorded the submission of the Kent & Medway Towns Authority that the expression "pensionable pay" is intended 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". In that case, the Authority did not submit that only basic pay was pensionable. In paragraph 44 Blackburne J said this:

> "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 33 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."

Thus, Blackburne J recognised that under the FPS the amount of a member's pensionable pay might be affected not only by his rank but also by his "rate of pay, age and circumstances", expressions that are wide enough to include the fact that, at the time relevant for assessing his or her pensionable pay, a firefighter was working under the day crewing system and the effect on rate of pay of doing so and that are

inconsistent with pensionable pay being determined solely by reference to rank or role.

69. Finally, Mr Cavanagh's submission that pensionable pay must be determined solely by an employee's rank imposes too rigid and demanding a test: under it even basic pay would not be pensionable because that is not, and, as far as the evidence goes, never was determined solely by the employee's rank or role. For example, I was told that the basic pay of some firefighters is enhanced because it attracts a London weighting: this is paid to all employees of and below the role of area manager, and has always been treated as pensionable by the FBU and the relevant authority, the London Fire and Emergency Planning Authority. The DCLG has recently issued a consultation paper in which it states, "On the issue of London weighting, this should continue to be pensionable as it forms part of a London firefighters' basic pay". As I have said, Grey Book 5 stated at section V paragraph 1 that "Pay entitlement is determined by age and length of service from the date of appointment to the rank held … and by the duty service to which the member is conditioned"; and Grey Book 6 similarly states at section 4 part B that the "pay entitlement of an individual employee shall be determined by (1) the employee's role, (2) Whether the employee is in training … , development or competent stage for his or her role, (3) Whether for the roles above Crew Manager and Crew Manager (Control) [the employee's "job-size category"]". Thus, the basic pay depended and depends not only on rank or role but other considerations, and Grey Book 5 specifically includes among them the employee's duty system: Mr Cavanagh did not attach any significance to the fact that that is not expressly stated in Grey Book 6.

<u>The Authority's argument about the history of the payments</u>

70. Mr Cavanagh referred to the historical background to the uplifts by way of a retainer fee and a disturbance fee. Before the Collective Agreement, the prevailing view was (and had been since the FPS was introduced in 1992) that payments in respect of retained elements were not pensionable. This was considered to be the position in relation not only to the call out fees (which were paid only if the firefighter was called out, and so had the episodic, or "one-off", characteristic referred to by Blackburne J) but also to retainer fees, which were by way of an uplift on basic pay. Mr Cavanagh argued that the Collective Agreement did not introduce payments of a novel kind that can for any cogent reason be treated differently from their predecessor retainer fees.

71. The argument can be taken further. When the 2005 Order amended the definition of "pensionable pay", the draftsman should be taken to have known the prevailing view that retainer fees (like other fees for the retained element) were not pensionable. Nevertheless, the amendment contained nothing that indicates an intention to correct this understanding or to change the position.

72. The advice of the DCLG to which I have referred reflected how retainer fees and disturbance fees were generally regarded and treated before the Collective Agreement was made. Since 1992, it had been the predominant view not only in the DCLG (and its predecessor) but of the FBU and among its members, of FRAs and of MBS that these payments were not pensionable. Mr White accepted that call-out fees paid before the Collective Agreement were not pensionable, because, being paid only if and when a firefighter was called upon, they did not have the required quality of permanence. But he submitted that, notwithstanding the received wisdom,

pensionable pay included retaining fees, which had always been by way of a percentage uplift on basic pay, similar to (although smaller than) those paid under the Collective Agreement.

73. On the Authority's own case, the Collective Agreement demonstrates that the Authority, the FBU and the Joint Secretaries of the NJC had an imperfect understanding about when payments were pensionable. Further, as Mr White argued, it would be wrong to attach too much weight to the popular perception about what payments were pensionable because it lacked logic and coherence. While retainer fees were thought not to be pensionable, flexible duty system allowances were generally considered to be, and indeed were unambiguously stated to be pensionable in Grey Book 5 and Grey Book 6. I observe in passing that, if the Grey Books were right to regard flexible duty allowance supplements as pensionable, this would refute the submission that only basic pay is pensionable. (There can be no suggestion that received wisdom or the Grey Book is conclusive about what is pensionable: as Blackburne J said in the Kent & Medway Towns Fire Authority case (loc cit) at para 43, "… 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".)

74. The received wisdom before 2007 about retaining fees and flexible duty system allowances might be reconciled if the retained element of the work of a regular firefighter were not obligatory under his or her contract of employment but undertaken voluntarily under separate arrangements. (I shall return to this question later.) However, this would not assist the Authority: it is common ground that since the Collective Agreement of 2007 the retained element of regular firefighters employed by the Authority under the day crewing duty system has been obligatory under their employment contracts. In these circumstances the general view about what was pensionable would be consistent with the consolidated elements under the Collective Agreement being pensionable.

75. I can see no other principled basis for distinguishing the retaining fee from the flexible duty system supplement. Mr Cavanagh sought a distinction on the basis that the supplement is paid to all employees with certain roles and does not depend upon the system of duties under which they work. However, it is only paid to with those of the appropriate seniority with operating duties, that is to say it depends not only upon the recipient's role but also upon what duties (s)he does.

76. Mr Cavanagh then submitted (perhaps somewhat faintly) that it is consistent to treat the flexible duty allowance supplements as pensionable and the retainer fees of regular firefighters as non-pensionable because most senior officers have operational duties, and so the "default position" (as he put it) is that officers with the relevant roles are paid the supplement. I do not find that argument convincing: there is no default position, and whether the flexible duties system supplement is paid depends upon the officer's duties and not only upon his or her role.

77. In the end, Mr Cavanagh submitted that any inconsistency between how supplements and retaining fees were regarded and treated was a result of a misunderstanding about supplements, not retaining fees. This would be another blow to his contention that, when deciding what payments are pensionable, regard should be had to how they are generally regarded by employers, firefighters and others.

The Authority's other arguments

78. Mr Cavanagh had other points to which I should refer:

i) Until the Collective Agreement in 2007 contributions, both of members and FRAs, were calculated and paid on the basis that no payments to regular firefighters for a retained element were pensionable. If they were always pensionable (or some of them were), contributions have been too small and there will be a corresponding shortfall in the funding; and if they became pensionable as a result of the Collective Agreement, firefighters in Mr Norman's position will receive greater pension benefits that their contributions over their years of service warrant. Equally, of course, if the Authority's contention is correct, then since the Collective Agreement of 2007 the contributions made by employees in Mr Norman's position and the Authority have been more than they should have been, and Mr Norman has been offered repayment of the excess that he has paid.

ii) If pensionable pay includes the consolidated elements, anomalous and unfair inequalities between members of the FPS would result. Members who worked under the shift system for their last three years of service (even if they had previously worked under the day crewing system) would receive smaller benefits than those who worked in one of their last three years on the day crewing system with a retained element (even if their service was otherwise under the shift system).

iii) Mr Cavanagh relied upon the definition of pensionable pay in the NFPS, invoking the principle that "Where a later Act is in pari materia with an earlier Act, the provisions of the later Act may be used to aid construction of the earlier": see Bennion (loc cit) section 234, p.708. (It is not suggested that the NFPS altered the meaning of the FPS.)

iv) The FPS did not cover retained firefighters, and to be consistent it should not cover the emoluments of regular firefighters for undertaking similar work by way of a retained element. As Mr Cavanagh put it, the FPS draws the line between pensionable and non-pensionable receipts according to whether they were for retained duties, and not according to whether the person who carried out those duties was a regular or retained member of the brigade.

79. These four arguments, whether taken individually or conclusively, are to my mind far from conclusive. I shall comment upon them in turn.

Contributions

80. The argument about contributions is not to my mind persuasive. If (because the retained element was obligatory or for any other reason) receipts in respect of the retained element were pensionable and contributions were smaller than they should have been, that is no reason not to give proper effect to Rule G1.

Inequalities between members of the FPS

81. It is, of course, true that it would follow from Mr. Norman's contention that members of the FPS in his position who undertake a mandatory retained element in at least one of their last three years of service will receive greater benefits than those who did not do so (whether because they worked on shift system duties or for any other reason). This is unremarkable, and would simply reflect the fact that in one of the relevant years Mr. Norman and others in his position received more by way of pensionable pay than other firefighters. The so-called anomaly is a natural incident of a final salary scheme, and does not assist in deciding what receipts are pensionable pay.

The NFPS as an aid to interpreting the FPS

82. I do not consider that it assists Mr Cavanagh to rely upon the definition of pensionable pay in the NFPS. The definition of pensionable pay in part 11 paragraph 1(1) of the rules of the NFPS is as follows:

> "… 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, other than payments in respect of his continual professional development …, and
>
> (b) his permanent emoluments (including, in the case of a retained firefighter, any retaining allowance).

83. The language of sub-paragraph (a) largely mirrors that of amended rule G1 of FPS. Mr. Cavanagh submitted that sub-paragraph (b) shows that retaining allowances and other permanent emoluments were not regarded as covered by that language because there was separate provision to make them pensionable. However, even assuming that the FPS and the NFPS are to be regarded as being in pari materia notwithstanding the latter scheme was introduced after the former had closed and, unlike the former, covers retained firefighters, the principle that instruments are to be interpreted in light of other instruments that are in pari materia is to be applied with caution. Bennion (loc cit at p.604) states that, "It is … necessary to remain realistic. A drafter who produces an amending Bill does not always have the time or industry to read through the whole of a mass of preceding legislation to make sure the current drafting is in full accordance with it." The same might properly be said of a set of rules as intricate and detailed as those of the FPS. It is, to my mind, readily understandable that the rules of the NFPS, under which retained firefighters were for the first time given pensionable rights, should deal specifically with what part of their pay was pensionable and should do this by drawing an express distinction between temporary emoluments and a permanent emolument. Even so, it was not considered necessary to state specifically that the retainer fee of regular firefighters undertaking a retained element should be pensionable under the NFPS. I cannot find in the definition of pensionable pay in the rules of the NFPS any telling indication whether retainer fees were pensionable pay under the rules of the FPS.

The exclusion of retained firefighters from the FPS

84. I do not consider that the fact that retained firefighters are excluded from the FPS indicates that pay for the retained element of regular firefighters' work is also excluded. I readily accept that it means that there *could* be a rationale for excluding pay for a retained element, but not that it would be irrational or contrary to business sense to include such pay. This consideration does not, to my mind, inform the proper interpretation of rule G1.

Conclusion about retainer and disturbance fees

85. I therefore accept that the uplifts by way of a retainer fee and a disturbance fee are pensionable upon the true interpretation and proper application of Rule G1. I consider this conclusion is not only consistent with the Kent & Medway Towns Fire Authority case but also the ordinary and natural meaning of rule G1. I reject the Authority's various contrary arguments.

Was a retained element obligatory before 2007?

86. There is no dispute that after the Collective Agreement firefighters such as Mr Norman were obliged under their terms of employment to do retained duties: see paragraph 33 above. At the start of the trial it appeared also to be common ground between the parties that firefighters in Mr Norman's position had always been contractually obliged to undertake a retained element. This assumption was first questioned when in the course of Mr White's submissions Grey Book 5 and Grey Book 6 were examined. Mr Norman then contended that before 2007 he had not been obliged by his contract of employment to undertake a retained element but did this work because he had voluntarily entered into an arrangement with the Authority to do so.

87. The claim before me is about whether the consolidated elements paid after the Collective Agreement were pensionable and the position under previous arrangements does not directly fall for determination on the parties' pleaded cases. However, the question was argued before me, and it might be of some significance to the parties, both because Mr Norman served some months of his last year before the Collective Agreement and because it would be relevant to any issue about his (and the Authority's) contributions under the FPS.

88. Mr Cavanagh submitted at one point that, because of the way in which this issue emerged, the Authority might not have adduced relevant evidence. I invited him to seek time to produce further evidence, but he did not do so. I consider the position on the basis of the evidence before me.

89. The language of Grey Book 5 and Grey Book 6 supports Mr Norman's contention. The description of the day crewing duty system in Grey Book 5 at section II paragraph (2)(b), which I have already set out, stated that FRAs "may request a member who is employed on this system to undertake obligations similar to those of a retained member in respect of periods outside his or her normal duty hours", and section VI paragraph 10 referred to payments to those who had "voluntarily accepted … obligations similar to those of a retained member of a brigade…". While Grey Book 6 does not specifically refer to firefighters undertaking this work voluntarily, there is nothing that indicates that the position had changed, and section 3 paragraph 8 refers employees on the day crewing duty system being "requested to undertake

retained duties". Moreover, an obligation to undertake a retained element would not sit comfortably with provisions that the normal average weekly hours of firefighters on operational duties should be 42, or that basic working hours should average 42 per week for full-time employees: see Grey Book 5 at section II paragraph 1(1) and Grey Book 6 at section 4 part A paragraph 3(1). Neither version of the Grey Book indicates how many hours employers might require of employees by way of retained duties: if it is to be understood that employees were obliged to accede to their requests, it would be necessary to suppose that the employers were restricted to making reasonable requests, but the omission of any express provision suggests that neither Grey Book is to be understood to impose a contractual obligation on employees.

90. In the end Mr Cavanagh did not argue that the collective agreements in the Grey Books obliged firefighters working under the day crewing system to undertake retained duties. He contended, however, that Mr Norman was so obliged because of his own contract with the Authority that was recorded in the letter of 27 July 1998. I accept, of course, that Mr. Norman's individual contract might vary or displace collective agreements: the question is whether the terms of the letter of 27 July 1998 are sufficiently clear to do so. It stated that Mr. Norman was to work "the 42 hour day manning system … with fixed additional periods of retained duties…". On the other hand it also contemplated that he might cease to carry out his "retained obligation", and stated the consequences of him doing so.

91. It is clear, to my mind, that the arrangements about a retained element recorded in the letter of 27 July 1998 had some contractual effect between Mr Norman and the Authority. By the letter the Authority requested Mr Norman to undertake a retained element and by agreeing to what was said in the letter Mr Norman acceded to the request. It does not follow that Mr Norman was obliged under his contract of employment to undertake retained duties for as long as he was on the day crewing system. The letter did not so stipulate: on the contrary, the letter and the group order attached to it advised him that if he ceased to undertake retained duties he would not be entitled to be paid the retaining fee and that it would affect the terms upon which he was provided with accommodation, not that he could not remain on the day crewing system. This interpretation of the letter is in line with the Authority's response to the circular of 9 December 2009 (see paragraph 43 above), the clear implication of which was that it was a result of the Collective Agreement that it "cannot withdraw [the consolidated elements] from staff other than to remove them from the duty crewing system".

92. Mr Cavanagh fairly pointed out that there is no evidence in the witness statements that Mr Norman voluntarily entered into the arrangements with the Authority whereby he undertook day crewing duties, and indeed such evidence as there is indicates otherwise. Mr Norman said this in his witness statement: "A whole-time firefighter working the day crewing system, as I did, has a single contract of employment. Under this single contract of employment I performed the ordinary duties of a whole-time firefighter. In addition, under the same contract of employment, I provided the same out-of-hours cover provided by a "retained firefighter" who works on the "retained duty system". I cannot regard this as significant evidence that retained duties were obligatory under Mr Norman's contract of employment before 2007: his evidence was not directed to the issue that arose in the course of the trial.

93. Mr Cavanagh also relied upon the practical implications for the Authority if the retained element were not mandatory for regular firefighters working on the day crewing duty system. He submitted that the arrangements for such stations as Congleton depend upon those working there on the day crewing duty system undertaking retained duties: if they did not do so, the Authority would not be able to fulfil its statutory obligations to maintain proper 24 hour cover for Cheshire. Although evidence was not specifically directed to this, I accept the factual basis of Mr Cavanagh's argument. However, the force of this point is much diminished once it is recognised that the effect of the arrangements made by the Authority with Mr Norman and, no doubt, with other firefighters in his position was that the firefighters could not withdraw from their agreement to undertake retained duties without giving reasonable notice and that the question what constituted reasonable notice would take into account that the Authority must maintain proper cover from fire stations of this kind. Moreover, as Mr White observed, in reality firefighters in Mr Norman's position habitually did undertake retained duties and the financial incentives were apparently sufficient to attract them to do so.

94. If I am right that before the Collective Agreement it was not generally obligatory for firefighters working on the day crewing system to undertake a retained element but they undertook it voluntarily in response to a request from their employer FRA, this would justify the prevailing view that the payments in respect of the retained elements are not pensionable. The retained element was not undertaken by way of duties under their contracts of employment (even though they governed the terms upon which the retained duties were undertaken). It was rather like voluntary overtime, and under the provisions of the Grey Book it was not a contractual obligation, and pay for it is not, as Blackburne J put it, "part of the regular pay to which the firefighter is entitled in the ordinary course of fulfilling his duties under his contract of employment". In contrast flexible supplement system allowances are pay for duties done under contracts of employment and recognised to be pensionable. As for Mr Norman's own position, before the Collective Agreement he was not obliged as part of his contract of employment to undertake a retained element, although, when he moved to Congleton, he agreed with the Authority to do so; but his position changed when the Collective Agreement was made.

Public holiday pay

95. I can deal with public holiday pay briefly.

96. Both before and after the Collective Agreement firefighters employed by the Authority were and are required to work on public holidays as part of their duties under their contracts of employment and in the role of firefighter. The Collective Agreement changed the nature of the recompense paid to recognise this. Before the Collective Agreement it was paid only if and when the rota of a particular employee required him to work on a public holiday. It is readily understandable that it was not regarded as pensionable because it was of an episodic nature and did not have the permanence which is a feature of what is pensionable.

97. After the Collective Agreement, an employee of the Authority in that position that Mr Norman was is not paid extra for working on public holidays. "Public holiday pay" is paid in recognition that employees are to be available to work on public holidays if required to do so. It is no longer episodic and is regular in amount. Moreover, the

amount of the public holiday pay, being by way of a percentage uplift on basic pay, is determined by the role of the employee. In my judgment Mr Norman's public holiday pay under the terms of the Collective Agreement was "determined in relation to the performance of his duties of his role" within the meaning of rule G1 and was therefore pensionable.

98. Mr Cavanagh relied upon the fact that public holiday pay under the Collective Agreement was designed to be a substitute for payments previously made when an employee actually worked on holidays, and submitted that the change made by the Collective Agreement should not affect whether the pay is pensionable. I cannot accept that: an effect of the change in the basis of the pay is that it was brought within the definition in rule G1.

Conclusion

99. I conclude that the consolidated elements paid to Mr Norman were pensionable pay, and I shall ask counsel to assist by agreeing an order to give effect to my judgment.