

**PENSION SCHEMES ACT 1993, PART X**  
**DETERMINATION BY THE PENSIONS OMBUDSMAN**

<b>Applicant</b>	Mr Michael Smith
<b>Scheme</b>	New Firefighters' Pension Scheme ( <b>the 2006 Scheme</b> )
<b>Respondent(s)</b>	South Wales Fire & Rescue Service ( <b>the Service</b> ) Rhondda Cynon Taf County Borough Council ( <b>the Council</b> )

**Subject**

Mr Smith has complained about the decision not to include certain allowances paid to him during his employment in the calculation of his pensionable pay.

**Appeal**

Mr Smith's original complaint was dealt with by the Deputy Pensions Ombudsman who issued a determination on 11 December 2012, which Mr Smith subsequently appealed. Following a decision in the High Court, on 22 March 2013, the appeal was allowed in part. The Court held that the Deputy Pensions Ombudsman did not err in law in holding that the rent, fuel and light allowances paid to Mr Smith were not part of his pensionable pay under the Scheme. In his judgment His Honour Judge Jarman QC said that the rent, fuel and light allowances were not permanent emoluments within the meaning of Regulation 1(1)(b) on the basis that allowances which are payable by virtue of a firefighters' assignment to the day-crewing duty system are essentially temporary, because regular firefighters are liable to be transferred to different duty systems.

However, the matter has been remitted to my office for reconsideration with particular reference to whether the annual retainer paid to Mr Smith constituted part of Mr Smith's pensionable pay under the Scheme.

What follows is my further determination of Mr Smith's complaint.

**The Pensions Ombudsman's determination and short reasons**

The complaint should not be upheld against either the Service or the Council because the annual retainer payments made to Mr Smith were temporary payments and were not pay in relation to the performance of the duties of the firefighter member's role and therefore do not constitute part of Mr Smith's pensionable pay within the meaning of Regulation 1(1)(a) or 1(1)(b) under the Scheme.

## DETAILED DETERMINATION

### Regulations and Guidance

1. The relevant Regulation is Part 11 Chapter 1(1)(1) of The Firefighters' Pension Scheme (Wales) Order 2007 which provides:
 

“Pensionable pay

  - (1) Subject to paragraph (3) and rule 3(3), the pensionable pay of a firefighter member is the aggregate of-
    - (a) the firefighter member's pay in relation to the performance of the duties of the firefighter member's role, except any allowance or emoluments paid to the firefighter member on a temporary basis, other than payments in respect of the firefighter member's continual professional development (see rule 7B of Part 3), and
    - (b) the firefighter member's permanent emoluments (including, in the case of a retained firefighter, any retaining allowance).”
2. The terms and conditions for firefighters derive from the National Joint Council for the Local Authorities' Fire and Rescue Services Scheme of Conditions of Service 6<sup>th</sup> Edition (**the Grey Book**).
3. Section 3, Part 5 of the Grey Book sets out the Roles and Responsibilities of firefighters and states “Specific activities within roles will be determined by the authority...”
4. Section 4, Part A, of the Grey Book sets out the hours of duty and the duty systems and states:
 

“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...

The following duty systems shall continue to operate...

*Shift Duty System*

Each period of twenty four hours shall be divided into a day shift and a night shift...

*Day Crewing Duty System*

  - ...(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.

*Day Duty System*

...The normal working day shall cover the period of normal office hours...

*Flexible Duty System*

...applies only to employees in the roles of Station Manager and above

*Retained Duty System*

The hours of availability of employees on this duty system shall be agreed between the fire and rescue authority and individual employees. An employee on this duty system shall be required to attend for duty as follows:

- (1) At the station to which the employee is attached for training...
- (2) Promptly at the station to which the employee is attached in response to an emergency call at any time during the employee's period of availability "

5. Section 4, Part B, of the Grey Book sets out the rates of pay in relation to each duty system and states:

The pay entitlement of an individual employee shall be determined by (1) the employee's role...

*Payment for work activity*

All work activity shall be paid at the appropriate basic hourly rate set out in circulars issued by the NJC. Work activity includes those duties at paragraph 16 [Retained Duty System] of Part A of this section together with any pre-arranged work undertaken by the employee.

**“Retained duty system payments**

4. The payments at paragraph 5 to 16 below apply to employees on the retained duty system

*Annual retainer*

5. ...The annual retainer for an employee providing full cover ....is 10% of the appropriate annual basic pay...
7. The annual retainer for an employee providing cover as part of the day crewing system shall be 5% of the employee's full time annual basic pay.”

6. The Statement of Particulars issued to regular firefighters states:

**“Place of work**

...you have a duty to serve at any of the Service's premises situated in the South Wales area and on any Watch, including if necessary, a permanent transfer of your place of duty, and a liability to serve on any approved duty system applicable to your rank and/or post...

### **Hours of Work/Availability**

In accordance with the NJC Conditions of Service you are conditioned to a 42 hour working week on a rota basis...

Whatever duty system you are currently conditioned to, it must be clearly understood that, during your service you may be required to work on any approved duty system applicable to the relevant post, except where the provisions of the Grey Book Section 4 (Part A) apply.

### **Posting**

Following satisfactory completion of your Recruits Course, you will be posted to a Fire Station working either the shift duty system or the day crewing duty system, which will include retained obligations.

### **PERSONNEL SUBJECT TO DAY CREWING DUTIES**

In recognition of carrying out standby duties at home, as part of your day staffing duties, you will be entitled to an Annual Retaining Fee of 5% of your basic salary”

### **Material Facts**

7. Mr Smith joined the Fire Service on 24 July 1978 and as a regular fire fighter he became a member of the Firemen’s Pension Scheme 1992.
8. After his initial training Mr Smith was posted to Ebbw Vale Fire Station and in July 1980 he transferred to Caldicot Fire Station which operated a day crewing duty system.
9. In May 1997 Mr Smith was seconded to full time trade union duties with the Fire Brigades Union (**FBU**). The arrangements were set out in a letter dated 16 April 1997 as follows:

“As you are aware the Fire Brigade Union agreed to reimburse the Brigade 75% of your salary and allowances payable to day staffing personnel other than calls.

The 25% of the salary and allowances that the Brigade pay you will represent 1 day a week Brigade duties, however you will be entitled to leave in respect of your membership of a unitary authority.

This arrangement will commence with effect from 1 May 1997, and you will be attached to Fire Service Headquarters and may be required from time to time to carry out duties associated with central training or central command functions as determined.

Should you be required to return to full duties for whatever reason you will be posted to Caldicot Fire Station if at all possible. If it is not possible for you to be posted to this station

you will be posted to the nearest wholetime station to your home...”

10. Mr Smith continued to receive the day crewing duty system allowances for rent, fuel and light and the annual retainer payment until his retirement on 28 May 2011.
11. The 2006 Scheme was introduced on 6 April 2006 and Mr Smith opted to transfer his accrued service from the Firemen’s Pension Scheme 1992 to the 2006 Scheme. Mr Smith’s retirement benefits were therefore calculated in accordance with the 2006 Scheme Regulations.

### **Submissions made on behalf of Mr Smith**

12. Paragraph 1(1)(b) of the Regulations provides that “pensionable pay” includes “the firefighter’s permanent emoluments (including in the case of a retained firefighter, any retaining allowance).”
13. The expression “permanent emoluments” is not defined in the Regulations. However, it comprises two ordinary English words and, so far as is consistent with the terms of the Scheme, such words should be given straightforward interpretations. As regards “permanent”, this denotes a state of affairs that is not expected to change and, axiomatically, is to be contrasted with “temporary”. As regards “emolument” the Oxford English Dictionary defines such term as a “profit or gain arising from station, office or employment”.
14. Although Paragraph 1(1)(b) does not expressly define “permanent emoluments” it does provide an example of something that answers to such description, namely “in the case of a retained firefighter, any retaining allowance”. Given that a retained firefighter’s allowance does fall within the meaning of the expression “permanent emoluments” it is relevant to consider whether the annual retainer Mr Smith receives falls within the scope of the expression “retaining allowance”. And if it does then whether the fact that Mr Smith was not a retained firefighter means that, notwithstanding he was in receipt of a “retaining allowance”, such allowance was not one amounting to “permanent emoluments”.
15. The expression “retaining allowance” is not defined under the Regulations however such expression clearly covers an annual retainer. In the present context the two expressions are synonymous. In the Grey Book the expression “retaining allowance” is not used but “annual retainer” is. As regards the position of a firefighter on the day crewing duty system the Grey Book states “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...” There is no proper basis, whether in the wording of the Regulations, or in the Grey Book, or as a matter of freestanding conceptual analysis, to view the annual retainer payments Mr Smith received as outwith the notion of “retaining allowance”.

16. The issue is whether Mr Smith’s status as a “regular firefighter” as opposed to a “retained firefighter” has the effect that, notwithstanding he was in receipt of a “retaining allowance”, it is not the sort of retaining allowance that qualifies as “permanent emoluments”. Crucially, the difference between a retaining allowance received by a “firefighter” on the “day crewing duty system” and a retaining allowance received by a firefighter on the “retained duty system” is merely one of quantum, not kind. A “firefighter” on the “day crewing duty system” receives a retaining allowance of 5% of basic pay and a firefighter on the “retained duty system” receives a retaining allowance of 10% of basic pay. There is no logical basis to view the latter as exemplifying “permanent emoluments” but the former as not.
17. Paragraph 1(1)(b) is best viewed as making express reference to the retaining allowance of a retained firefighter simply for the avoidance of doubt (i.e. to make clear that the retaining allowance of a firefighter is, like the retaining allowance for other firefighters, ultimately an element of pensionable pay) rather than to single out retained firefighters as a special case.
18. The express reference to retained firefighters in the Regulations may be because retained firefighters could not be members of the 1992 Scheme and therefore the draftsman of the Regulations may have been particularly keen to ensure that their position was clear under the Regulations. See *Norman v Cheshire Fire & Rescue Service* [2011] EWHC 3305 (QB); *Kent & Medway Towns Fire Authority v Farrand* [2001] OPLR 357).
19. The construction for which Mr Smith contends pays proper regard to all the words of Paragraph 1(1)(b), including those in parentheses, and is supported by the evolution of the legislation, having regard to the Scheme’s predecessor. Retained Firefighters could not be members of the previous scheme, and so the draughtsman would have been keen to ensure that their position was clear.

20. If the retaining allowance received by a retained firefighter is properly viewed as “permanent” then there is no sound reason why the retaining allowance for someone in Mr Smith’s position should not be viewed in the same way.
21. Mr Smith received the annual retainer for 31 years up to his date of retirement. To characterise such arrangement as temporary rather than permanent is wholly unrealistic and in circumstances where there is nothing in the Scheme provisions which compels the same such unrealistic characterisation should be avoided.
22. It is incorrect to say that the annual retainer should be regarded as temporary as it would have ceased if Mr Smith was transferred off the day-crewing duty system. Mr Smith was transferred off the day crewing duty system when he took on his union role and yet continued to receive this allowance. Therefore, whether one focuses on pure conceptual analysis, the provisions of the Scheme or the facts on the ground the Respondent’s argument falls to be dismissed.
23. The key fact is that Mr Smith did cease to carry out the duties associated with the day-crewing duty system once he took on his union role and yet continued to receive his allowance. It is wholly artificial to ignore what actually happened. It is similarly artificial to characterise such arrangement as merely temporary. An example of an allowance or emolument paid to a firefighter on a temporary basis would be one paid where a more senior firefighter is briefly unavailable. Such a situation is entirely different from the circumstances of Mr Smith’s case involving several decades of service in a particular position.
24. Mr Smith’s position amounts to a straightforward and logical interpretation of the provisions of the Scheme. For an example of a similar policy based argument being rejected by the High Court in respect of the Scheme’s predecessor see the decision of Andrew Smith J in *Norman*.
25. Further or alternatively to Mr Smith’s contention that sums paid to him as an annual retainer formed part of his pay under Regulation 1(1)(b) Mr Smith contends that such sums form part of his pensionable pay under Regulation 1(1)(a).
26. Regulation 1(1)(a) refers to “pay in relation to the performance of the duties of the firefighter member’s role, except any allowance or emoluments paid to the firefighter member on a temporary basis”. Sums paid to a firefighter as annual retainer for working the day-crewing duty system are paid to reflect the fact of

being on call at certain times when away from the station. Therefore such payments are properly describable as being in relation to the “performance of the duties of the firefighter member’s role”. The fact that “role” is defined under the Scheme in a manner which does not make express reference to duty systems does not alter the validity of this analysis. If a regular firefighter is working the day-crewing duty system then it cannot be right that his obligation to respond to an out of hours call does not constitute “the performance of the duties of his role”.

27. The payment of an annual retainer cannot be said to be temporary by contrast, for instance, to a payment received by a firefighter for a limited period for the fulfilment of a more senior role in circumstances where more senior colleagues are not available.
28. The position set out by Blackburn J in *Kent & Medway Towns Fire Authority v Farrand* [2001] OPLR 357 is inapplicable to the present situation and reflects a misunderstanding of Mr Smith’s contention. Blackburn J was considering payment in lieu of leave. It is of the essence of payment in lieu of leave that it is not in return for work done or to be done. It is triggered on retirement and becomes payable after retirement to reflect the fact that prior to the firefighter finishing work he failed to take his full leave entitlement. In contrast the annual retainer payment is payment for work done or to be done; it is payment for being on call to respond to emergency situations. The key point is that it is a mischaracterisation of a firefighter’s position to say that work is only being done if the person on call is actually being called out. On the contrary, the very fact of being on call constitutes work as set out in the decision of the Court of Appeal in *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494.
29. A finding that Mr Smith’s annual retainer is pensionable pay under Regulation 1(1)(a) would be in line with the conclusions of the High Court in *Norman v Cheshire Fire & Rescue Service* [2011] EWHC 3305 and *Kent & Medway Towns Fire Authority v Farrand* [2001] OPLR 357. The case of *Norman* concerned the predecessor scheme to the Scheme. But the basic issue in question was the same i.e. whether a retainer fee paid to a firefighter constituted “pensionable pay” for the purposes of the scheme in circumstances where the relevant wording of the scheme was materially the same as in Regulation 1(1)(a). At [61] Andrew Smith J stated:

“The payments are designated as being made in respect of retained duties, but that does not mean they are referable to the role of the firefighter. On the contrary the role map of a firefighter applies no less to the duties of firefighter when they are undertaking a retained element than when they are undertaking other duties.”

and concluded:

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

### **Additional submissions made by Mr Smith**

30. The Service has never treated the allowances paid to firefighters of the day crewed duty system as part of their pensionable pay because under the 1992 Scheme those allowances were not pensionable. They only became pensionable on the introduction of the 2006 Scheme and to the best of his knowledge no serving firefighter working the day crewed duty system has ever transferred to the 2006 Scheme.
31. As a policy decision the day crewed duty system has been removed from the Service’s operational duty systems and the Service now only operates the retained duty system and the whole-time shift duty system. However, whole-time firefighters who undertake retained firefighting duties in the areas in which they live will be paid the appropriate retaining fee for their retained duties and if they are members of the 2006 Scheme those retained allowances will be pensionable under the Scheme.
32. He was transferred from Caldicot Station to Headquarters when he was elected to his union position and his allowances continued to be paid to him. He was informed that if he was not re-elected to his Union position he could not return to operational duties at Caldicot or anywhere else and a position would be found for him at Headquarters. It can only be speculation as to what would have happened to his pay if he had not been re-elected.
33. If the allowances were temporary then that negates the whole point of the 2006 Scheme. The 2006 Scheme was introduced to ensure that persons receiving allowances under the course of their employment would receive a pension based

on those gross earnings. If the Service operated a policy whereby someone could be employed on the day crewed duty system for 27 or 28 years, paying contributions on their allowance (which he accepts he did not) and then be arbitrarily transferred to a different shift system for the remaining two or three years of their career then that would be inequitable and negate the intention of the 2006 Scheme.

34. Caldicot Fire Station was seen and has been used as a transient station following training and initial posting and there were many firefighters posted there who wanted to transfer out as quickly as possible. The figure of 33 quoted by the Service includes 14 who were compulsory transferred when the Service downgraded the station from a day crewed duty system to a retained duty system i.e. crewed by part time firefighters.
35. An allowance is paid for performing certain duties, it is a reward, remuneration and is paid whilst a person carries out those duties or as in his case is exempt for other particular reasons. An assignment to a particular duty system is intrinsically permanent unless something intervenes to prevent that happening. There have been hundreds of firefighters in the Service who have served on the same duty system, the same station and indeed the same watch for their entire career without interruption.
36. The Service did not pay the whole of his salary during his secondment to union duties. The FBU re-paid the Service 75% of his salary for 16 years. The lawful justification for the payments is not an issue. The Union paid for his secondment.
37. He is not seeking to be treated as a special case. On a straightforward interpretation of the relevant provisions of the Scheme, and on a realistic analysis of his work circumstances, the annual retainer he received falls to be treated as pensionable pay.

#### **Submissions made on behalf of the Service and the Council**

38. Mr Smith now says that it is not common ground that the annual retainer does not constitute “pay in relation to the performance of the duties of the firefighters’ role” within the meaning of Schedule I, Part II, Chapter I, paragraph I(1)(a). Mr Smith advanced his case before the Ombudsman by reference to Paragraph I(1)(b) of Schedule I Part II of the Regulations. In his original application Mr Smith stated that he would like the Service to calculate

and pay him a pension based on Paragraph 1(1)(b). Further, when he appealed against the decision of the Ombudsman his Grounds of Appeal referred only to Paragraph 1(1)(b).

39. Mr Smith's Skeleton Argument similarly focussed on the contention that the annual retainer constituted pensionable pay within the meaning of Paragraph 1(1)(b). There was only one reference to Paragraph 1(1)(a) and this was plainly included for the purpose of making a submission concerning the meaning of the word "permanent."
40. It is not accepted that it would have been open to Mr Smith to raise by way of oral submissions a contention that was not on the application to the Ombudsman and did not form part of his Grounds of Appeal to the High Court. That would have required Mr Smith to at the very least have amended his Grounds of Appeal.
41. For the sake of completeness and without prejudice to the contention that this is essentially a new argument it is submitted that the annual retainer paid to a regular firefighter who undertakes retained duties is not pensionable pay within the meaning of Paragraph 1(1)(a) because the retainer is not "pay in relation to the performance of the duties of the firefighter member's role" or, contrary to that, the retainer is pay in relation to the duties of the firefighter member's role, it does not constitute pensionable pay because it is paid to the firefighter on a temporary basis.
42. The applicable roles are defined in Section 3 of the Grey Book and include Firefighter and Firefighter (Control). The payment is not referable to the firefighter member's role i.e. in the case of the role of a firefighter, because the retainer is only paid to those firefighters who happen to be working on the day crewing duty system. In other words, the payment of the retainer is referable to being placed on a duty system and not to the role of a firefighter.
43. In contrast if the payment of the retainer is referable to the role of a firefighter, it is not paid "in relation to the performance of the duties of the firefighter member's role." The annual retainer is not intended to be compensation for work done by the firefighter, it is intended to compensate him for being on standby at a time outside his working hours when he is not performing any duties.

44. The fact that the retaining allowance paid to retained firefighters is mentioned under Paragraph 1(1)(b) but not under Paragraph 1(1)(a) supports the conclusion that a retainer is not to be regarded as a payment in relation to the performance of the duties of the firefighter's role. If Parliament had considered that a retainer intended to compensate a firefighter for the inconvenience of being on standby could properly be characterised as a payment in relation to the duties of his role then the retaining allowance payable to retained firefighters would have been mentioned under Paragraph 1(1)(a).
45. Mr Smith was not requested to undertake any retained duties after he was elected to his trade union position, nor was he required to be on standby at any material time. Indeed Mr Smith has now stated that he was actually transferred from Caldicot station to Brigade Headquarters when he took up his trade union position. The day-crewing duty system did not apply to firefighters assigned to Brigade Headquarters. Mr Smith ceased to be conditioned to the day-crewing duty system and in those circumstances it is doubtful whether the continued payment to Mr Smith was *intra vires*.
46. In contrast, if the retainer is pay in relation to the duties of the firefighter member's role, it does not constitute pensionable pay because it is paid to the firefighter on a temporary basis for the same reasons that the annual retainer is not pensionable under Paragraph 1(1)(b) because it is not a permanent emolument.
47. The cases of *Norman v Cheshire Fire & Rescue Service* [2011] EWHC 3305 and *Kent & Medway Towns Fire Authority v Farrand* [2001] OPLR 357 were both concerned with the definition of pensionable pay within rule G1(1) of the Firemen's Pension Scheme Order 1992, as amended. The definition of pensionable pay within Rule G1(1) of the Firemen's Pension Scheme Order 1992 differs from the definition of pensionable pay in the 2006 Scheme. In *Norman* Andrew Smith J doubted whether it was appropriate to draw an analogy between the definition of pensionable pay in the Firemen's Pension Scheme and the 2006 Scheme. It follows that both decisions are of limited assistance in Mr Smith's case.
48. In *Kent* the issue was whether a payment in lieu of accrued holiday constituted pensionable pay under Rule G(1)(1) of the Firemen's Pension Scheme Order 1992. Blackburn J held :

“...it does not follow that merely because the payment is determined in relation to his rank it qualifies as pensionable pay. The payment must be ‘pay’. That means it must be payment 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 payment made...to compensate the firefighter for the fact that he has been unable on ill health grounds to take up his leave entitlement.”

By analogy with the reasoning adopted by Blackburn J the annual retainer paid to a regular firefighter working the day-crewing duty system who undertakes retained duties is a) not related to his role and b) is not pay because it is not payment for work done or to be done.

49. The claim in *Norman* was founded on the terms of a collective agreement concluded between Cheshire Fire and Rescue Service and the FBU in 2007 which introduced new arrangements for firefighters who worked on day crewing duties. Specifically, the 2007 collective agreement consolidated into basic pay the annual retainer which had been previously payable to firefighters pursuant to the Grey Book – see paras 33 to 38 of the judgment.
50. In *Norman* it is clear from the judgment that the consolidation of the retainer in basic pay by the 2007 collective agreement was critical to the Judge’s conclusion that the retainer had become part of pensionable pay under Rule G1(I) of the Firemen’s Pension Scheme Order 1992. Indeed the Judge expressly rejected the Claimants argument that the retainer was a part of basic pay before the 2007 collective agreement. Andrew Smith J pointed out that under the Grey Book it is not obligatory for firefighters working on the day-crewing duty system to undertake a retained element and that, by consolidating the retainer in basic pay, the 2007 collective agreement had therefore brought about a fundamental change in the status of the annual retainer. It follows that, insofar as the judgment in *Norman* is of any assistance (given that it concerned the definition of pensionable pay in the Firemen’s Pension Scheme Order 1992) it supports the contention that the retainer paid to Mr Smith was not part of pensionable pay within the meaning of Regulation 1(1)(a).
51. In relation to Regulation 1(1)(b), Mr Smith contends that the annual retainer paid to regular firefighters on the day crewing duty system constitutes a “permanent emolument”.

52. The word “emolument” is not defined by the Regulations. The Oxford English Dictionary definition is a “salary, fee or profit from employment or office.
53. The primary definition of the word “permanent” in the Oxford English Dictionary is “continuing or designed to last definitely without change. The annual retainer of a regular firefighter assigned to the day crewing duty system is not designed to last indefinitely without change.
54. As their terms and conditions make clear regular firefighters are liable to serve on any approved duty system applicable to their role, including the shift duty system, the day crewing duty system and the day duty system. Regular firefighters may be transferred from a fire station where one duty system is in operation to another fire station where another duty system operates. This flexibility is integral to the firefighters’ terms and conditions and means that the assignment of any individual firefighter is intrinsically temporary.
55. In the period from 1997 until Mr Smith’s retirement, 33 firefighters at Caldicot fire station were moved to stations at which a different duty system operated, and therefore lost their day-crewing allowances, including the annual retainer. If Mr Smith had not been seconded to full-time trade union duties it is entirely possible that he too would have been moved to a different station and lost the benefit of the annual retainer.
56. The fact that, in practice, Mr Smith received the annual retainer for a period of some years cannot of itself convert the retainer into a permanent emolument. Whether a particular emolument is to be regarded as “temporary” or “permanent” for the purposes of Regulation 1(1)(b) must depend on its nature and purpose and must necessarily be capable of being ascertained from the date when the emolument is first paid. The period of time for which the allowance has been paid is not a relevant factor. If it were, this would lead to enormous uncertainty, because it would mean that at some undefined point in time an emolument, which was not initially pensionable would become pensionable. Regulation 1(1)(b) cannot have been intended to operate in that way.
57. Mr Smith’s contention that because he received the retainer during a period when he was engaged on trade union duties the retainer changed its nature during that period and ceased to be referable to his assignment to the day crewing duty system is misconceived. The retainer continued to be paid because, notwithstanding his secondment to union duties, Mr Smith was regarded as

employed in his substantive post and consequently deemed to be assigned to the day crewing duty system. It follows that the question of whether the retainer constituted part of Mr Smith's pensionable pay must be determined in accordance with the principles which would be applied if he had actually carried out the duties of his substantive role. Mr Smith cannot properly claim to be in a better position than his working colleagues because he was seconded to trade union duties.

58. If the annual retainer payment ceased to be referable to his assignment to the day crewing duty system during the period when he was seconded to trade union duties, it would be debateable whether the continued payment of the retainer was *intra vires*. As public bodies the Respondents cannot make or authorise payments for which there is no lawful justification, and if the continued payment of the annual payment was not attributable to Mr Smith's assignment to the day crewing duty system and therefore *ultra vires*, the retainer could plainly not form part of pensionable pay.
59. Mr Smith contends that the retainer paid to regular firefighters who are assigned to the day crewing duty system is similar in nature to the retaining allowance paid to retained firefighters. There is a fundamental difference between the retainer which is paid to regular firefighters who are assigned to the day crewing duty system and the retainer which is paid to retained firefighters. Retained firefighters are part-time firefighters who typically have other jobs. All retained firefighters are subject to the retained duty system. Unlike a regular firefighter, a retained firefighter is not liable to serve on a range of duty systems. Due to the nature of his or her commitment, a retained firefighter serves only on the retained duty system. Accordingly, the retaining allowance paid to a retained firefighter is necessarily a permanent feature of his or her contractual relationship with the relevant fire service. By contrast the annual retainer paid to a regular firefighter who is assigned to the day crewing duty system is inherently a temporary allowance which is paid to him only for so long as he happens to be assigned to the day crewing duty system.
60. If the day crewing retainer were to be regarded as pensionable, it would follow that the pensionable pay of regular firefighters who happen to be assigned to a day crewing duty system would be significantly higher than that of firefighters

which are assigned to other shift systems including firefighters assigned to the shift duty system.

61. There are cogent policy reasons for concluding that Parliament could not have intended that regular firefighters who work on the day crewing duty system in the three years prior to their retirement should have pensionable pay which is materially higher than the pensionable pay of regular firefighters who work on other duty systems. The fact that temporary emoluments and allowances are expressly excluded from the definition of pensionable pay in the 2006 Scheme demonstrates that Parliament intended that incidental differences in the remuneration would not affect pensionable pay.
62. HHJ Jarman QC accepted that assignment to a particular duty system is essentially temporary. The Judge's reasoning applies equally to the annual retainer under both Paragraph 1(1)(a) and Paragraph 1(1)(b).

**Statement from the Service in response to Mr Smith's additional submissions**

63. Mr Smith correctly states that the Service has never treated the annual retainer paid to regular firefighters working on the day-crewing duty system as part of their pensionable pay. The annual retainer payable to regular firefighters on the day-crewing duty system did not become pensionable on the introduction of the 2006 Scheme.
64. It is correct that no serving firefighter working on the day-crewing duty system transferred from the Firemen's Pension Scheme 1992 to the 2006 Scheme. However, regular firefighters who commenced employment after 1 April 2006 were only eligible to join the 2006 Scheme. The Service has employed a number of regular firefighters who have worked on the day-crewing duty system who were members of the 2006 Scheme. The annual retainer which was paid to regular firefighters working on the day-crewing duty system whose employment started after 1 April 2006 was not treated as pensionable.
65. Until 2010, the Service had four stations that operated the day crewing duty system. Over the last four years these four stations have been transferred to the Retained Duty System and are now crewed by part-time retained firefighters. Caldicot fire station changed in March 2010.

66. Regular firefighters who were working at these stations on the relevant dates were transferred to other stations at which the Whole Time Duty System operated. From that point onwards these firefighters were employed on the Whole Time Duty System contract under which they were paid a basic salary. There is no provision in the Whole Time Duty System contract for the payment of a retainer or other allowances. The Service paid lump sum compensation to firefighters who transferred to compensate them for the loss of the allowances they previously received. The compensation payments were not treated as pensionable.
67. Regular firefighters who are employed on a Whole Time Duty System contract have the option of entering into a separate Retained Duty System contract. The retaining allowance paid to any retained firefighter is treated as pensionable under the 2006 Scheme because it is regarded as permanent. This is because the payment of a retaining allowance to a retained firefighter continues for as long as the Retained Duty System contract continues i.e. it is intended to be a permanent benefit.
68. The letter dated 16 April 1997 made clear that the FBU had agreed to reimburse the Service in respect of 75% of Mr Smith's salary and day staffing allowances which were to be paid to Mr Smith. With effect from 1 May 1997 Mr Smith was attached to the Fire Service Headquarters and could be required to carry out duties associated with the central training or central command functions. It was agreed that should Mr Smith be required to return to full operational duties for whatever reason he would be posted to Caldicot station if at all possible. The effect of these arrangements was that Mr Smith could not be requested to undertake retained duties. In view of the written assurance given to Mr Smith that, if he was required to return to full duties he would be posted to Caldicot station Mr Smith's claim that he would not be able to return to operational duties if his secondment to trade union duties came to an end is not accepted.
69. From the date he joined the 2006 Scheme until he retired from service on 28 May 2011 Mr Smith did not pay pension contributions in relation to the annual retainer (or any other day crewing allowances). It would have been obvious to Mr Smith from his payslips that no such contributions were being paid. However Mr Smith did not raise the argument that the retainer and allowances were part of his pensionable pay until 13 April 2011.

70. Caldicot was not seen or used as a transient station. It is true that it was difficult for the Service to fill vacancies at day crewed stations because the day crewing duty system did not suit everybody, especially as there was a requirement to live close to the station. When Caldicot was transferred to the retained duty system on 27 March 2010, the regular firefighters who were working there at that time were transferred to other stations
71. The annual retainer paid to Mr Smith could have been withdrawn at any time e.g. if he had ceased to be seconded to trade union duties and been returned to operational duties on a duty system other than the day crewing duty system, or if the FBU had decided it was no longer prepared to fund 75% of Mr Smith's remuneration.
72. The annual retainer which was paid to regular firefighters working on the day crewing duty system was intended to compensate them for the inconvenience of being on call outside their normal working hours. During the period in which he was seconded to trade union duties, Mr Smith was not requested to carry out any retained duties, and the payment of the retainer could not therefore be a reward for performing any retained duties or for holding himself available to perform retained duties.

### **Conclusions**

73. In his judgment HHJ Jarman QC said that the rent, fuel and light allowances were not permanent emoluments within the meaning of Regulation 1(1)(b) on the basis that allowances which are payable by virtue of a firefighters' assignment to the day-crewing duty system are essentially temporary, because regular firefighters are liable to be transferred to different duty systems. However, he ordered that the matter should be remitted back to this office to be reconsidered with particular reference to whether the annual retainer paid to Mr Smith constituted part of his pensionable pay under the Scheme.
74. The Service and the Council say that there was, hitherto, no dispute that the annual retainer does not constitute "pay in relation to the performance of the duties of the firefighters' role" within the meaning of Schedule 1, Part 11, Chapter 1, paragraph 1(1)(a). That is so. In the skeleton argument provided to the Court Mr Smith made no submissions to support an argument that the annual retainer constituted pensionable pay within the meaning of Schedule 1, Part 11, Chapter 1, paragraph 1(1)(a).

75. It has only been during the course of this further investigation that Mr Smith has argued that the annual retainer paid to a regular firefighter on the day crewing duty system constitutes a “permanent emolument” within the meaning of Schedule I, Part II, Chapter I, paragraph I(1)(b) **or** alternatively that such sums form part of his pensionable pay under Regulation I(1)(a).
76. It is common ground that the annual retainer paid to a retained firefighter is a permanent emolument and therefore constitutes part of his or her pensionable pay. Mr Smith submits, however, that the only difference between the annual retainer payment received by a firefighter on the day crewing duty system and the annual retainer payment received by a firefighter on the retained duty system is one of quantum. He says that there is no logical basis to view the annual retainer payment paid to a retained firefighter as exemplifying “permanent emoluments” but that paid to a regular firefighter is not.
77. The annual retainer payment is made “in recognition of carrying out standby duties at home...” That is the same for a firefighter on the day crewing duty system as it is for a firefighter on the retained duty system. Both are required to be available to respond to any emergency call received during a standby period. The difference is that a regular firefighter on the day crewing duty system spends the majority of his working week on duty at the fire station. Thus the underlying reason for making the payment is clearly the same for both duty systems. However, whilst the purpose of making the payment might be same it does not necessarily follow that all such payments can therefore be considered permanent.
78. All retained firefighters are on the retained duty system. They are contracted to that role and receive the retaining allowance for the length of their contract. Logically, therefore, the annual retainer payment made to a retained firefighter must be considered permanent.
79. In contrast, an annual retainer payment made to a firefighter on the day crewing duty system will only be paid whilst the firefighter remains on that duty system. If he or she moves to a fire station that operates a different duty system, or the fire station to which he or she is attached changes the type of duty system by which it operates, then the annual retainer payment will cease because the other duty systems all require full attendance at the relevant fire station, there is no “standby” element. Consequently, annual retainer payments made to a regular firefighter must, in my judgment, be regarded as temporary.

80. I do not agree with Mr Smith that paragraph 1(1)(b) makes express reference to the retaining allowance of a retained firefighter in order to make clear that the retaining allowance of a firefighter is, like the retaining allowance for other firefighters, ultimately an element of pensionable pay rather than to single out retained firefighters as a special case. If that were the case then, in my view, the sentence would not be constructed in the way it is. If, as suggested by Mr Smith, the retaining allowance paid to *any* firefighter was to be regarded as a permanent emolument then there would clearly be no need to make reference to retained firefighters at all. The sentence could simply say “the firefighter member's permanent emoluments (including any retaining allowance).”
81. Mr Smith suggests that the reference to retained firefighters is there for the avoidance of doubt, rather than to identify them as a special case. I am wary of trying to read the mind of the drafter, as Mr Smith suggests I should – but if (as he argues) the only difference between the allowance for retained firefighters and other is of quantum, then there would be no more need to settle any doubt as to inclusion of the retaining allowance than there would in relation to any other element of pay.
82. In my view the natural reading of the wording is that the retaining allowance for retained firefighters is unexpectedly to be treated as pensionable. The situation to which it is contrary is that retaining allowances for other firefighters are not pensionable. It is artificial to separate out the two ingredients in the mix (the nature of the allowance and the status of the firefighter) when it could, as mentioned above, have been phrased to say what Mr Smith would like it to say, but was not.
83. Mr Smith submits that it is artificial to ignore that he ceased to carry out the duties associated with the day-crewing duty system once he took on his union role and yet continued to receive his allowance for several decades. The fact that an allowance is paid for many years does not automatically confer permanence. The key factor is whether the retaining allowance was “continuing or designed to last definitely without change” which, as stated above, it was not. It is only payable whilst the firefighter is on the day crewing duty system. If that stops and the duty system changes then the annual retainer payment ceases to be paid. In Mr Smith’s case it ended up being paid permanently. But theoretically it could have ended at any time and was therefore temporary in nature.

84. I turn now to Mr Smith's recent argument that the annual retainer constitutes "pay in relation to the performance of the duties of the firefighters' role" within the meaning of Schedule 1, Part 11, Chapter 1, paragraph 1(1)(a).
85. For the annual retainer to fall within Paragraph 1(1)(a) the allowance would have to be "pay in relation to the performance of the duties of the firefighter member's role". Section 3 of the Grey Book sets out the Roles and Responsibilities for firefighters and states that these are linked to the Fire and Rescue Services Role maps."
86. Mr Smith argues that if a regular firefighter is working the day crewing duty system then it cannot be right that his obligation to respond to an out of hours call does not constitute "the performance of the duties of his role". I am guided by the comments of Blackburn J in *Kent & Medway Towns Fire Authority V Farrand [2001] OPLR 357* (Kent). He explained:
- "...it does not follow that merely because the payment is determined in relation to his rank it qualifies as pensionable pay. The payment must be 'pay'. That means it must be payment 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 payment made...to compensate the firefighter for the fact that he has been unable on ill health grounds to take up his leave entitlement."
87. Although Blackburn J was referring to a payment in lieu of leave entitlement, the same principle can be applied here. For a payment to be pensionable it must be payment for work done or to be done. As stated by Mr Smith the annual retainer is paid to compensate for the obligation of being on standby to respond to an out of hours call. The annual retainer cannot therefore be regarded as payment paid directly for work that is done or to be done because it is paid regardless of whether, or not, the firefighter is called out and so undertakes the duties of the firefighters' role.
88. Mr Smith argues that the position in his case is different to that in *Kent*. He contends that a payment in lieu of leave is triggered on retirement and becomes payable after retirement to reflect the fact that prior to the firefighter finishing work he failed to take his full leave entitlement. In contrast the annual retainer payment is payment for work done or to be done; it is payment for being on call to respond to emergency situations.

89. Mr Smith points me towards the decision of the Court of Appeal in *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494 (*British Nursing Association*) in which it was concluded that being on call constitutes work. In that case the Court of Appeal held that a homeworker is to be regarded as "working" for the purposes of national minimum wage legislation when "on call" awaiting telephone calls at home but not actively engaged in work.
90. In my judgment the decision in *British Nursing Association* does not particularly assist Mr Smith's argument. In *British Nursing Association* one of the main issues was that the nurses' place of work was their home and the argument was whether they were working when on standby to answer telephone calls or only considered to be working when actively taking telephone calls. In my view the facts relating to the dispute in *British Nursing Association* are fundamentally different to those in Mr Smith's case. The position in Mr Smith's case is much closer to that in *SIMAP v Conselleria de Sanidad y Consume de la Generalidad Valenciana*. In that case the European Court of Justice held that where a worker was actually working on or at his employer's place of business on call to undertake work when requested to do so, this counted as working time under the Working Time Directive. Where he was away from work, however, but on call (in the sense he must be contactable) it did not because he had a large degree of control over what he did when on call.
91. None of the cases mentioned above is directly on point, though. I regard it as more conclusive that paragraph (1)(b) expressly brings a retaining allowance for a retained firefighter in as "permanent emoluments" rather than "pay in relation to the performance of the duties of the firefighter member's role". In that context it would be inconsistent to take Mr Smith's retaining allowance as being pay in relation to the performance of the duties of his role.
92. In reaching that conclusion, I have carefully considered *Norman v Cheshire Fire & Rescue Service* [2011] EWHC 3305, as Mr Smith asks me to. He says that although the case concerned the predecessor scheme to the Scheme the basic issue in question was the same i.e. whether a retainer fee paid to a firefighter constituted "pensionable pay" for the purposes of the scheme in circumstances where the relevant wording of the scheme was materially the same as in Regulation 1(1)(a).

93. It is true that the wording was substantially the same, but with a significant exception. There was no exclusion equivalent to "...except any allowance or emoluments paid to the firefighter member on a temporary basis..."
94. There is, however, a clear difference in the nature of the payment: it had been consolidated into pay under a collective bargaining agreement. Andrew Smith J considered whether, before consolidation, it was pensionable (there had long been a general understanding that it was not) and said:

"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."

95. Andrew Smith J made one reference to the Scheme (which had, by the time of his decision replaced its predecessor) that might be regarded as helpful to Mr Smith's case. He said:

"... The language of sub-paragraph (a) largely mirrors that of amended rule G1 of FPS. Mr. Cavanagh [leading counsel for Cheshire Fire and Rescue Service] 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."

96. The words “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” in my view fall short of a finding that a specific statement was unnecessary because the retainer was pensionable. But even if it had been such a finding, it would not have formed part of the judgment – not being a matter that the judge was required to decide – and would not have been binding on me.
97. In summary, the annual retainer payments made to Mr Smith were, in my judgment temporary and were not pay in relation to the performance of the duties of the firefighter member’s role and so do not constitute part of Mr Smith’s pensionable pay within the meaning of Regulation 1(1)(a) or Regulation 1(1)(b) under the Scheme.
98. So having considered Mr Smith’s complaint in the light of the additional submissions put forward on behalf of Mr Smith and the Respondents, and with particular reference to the question set out in paragraph 73, I do not find in Mr Smith’s favour.

**Tony King**  
Pensions Ombudsman

13 August 2014