

Pensionable Pay

Introduction

This factsheet has been prepared to give guidance to FRAs on Booth v Mid and West Wales [2019] EWHC 790 (Justice Fancourt)¹, a recent High Court judgment on pensionable pay. While the judgment considered pay for the Welsh Firefighters Pension Schemes, the points of the judgment apply equally to pay in the English Firefighters Pension Schemes.

It is important to note that the issues in any pensionable pay case are finely balanced and often depend on the exact detail and nature of the payments. As this note illustrates, the reasons for pay being pensionable may depend on the nature of the contract or on the precise requirements of the role. Therefore you cannot assume that if a duty system in place for your FRA has the same name as the ones in this factsheet the same rules will apply.

This factsheet should be read with that in mind and you should seek reassurance that any pensionable pay decision made for your FRA has considered all of the relevant case law.

Background

As reported in [FPS Bulletin 14 - November 2018](#) the Pensions Ombudsman decision [PO-14863](#) considered a number of different pensionable pay elements for the Welsh Firefighter schemes as summarised below

Pensionable Element	Scheme	TPO decision – relevant paragraphs	TPO judgment
Training Allowance	1992	45 – 49	Pensionable
Day Crewing	2007 ² & 2015	50 - 69	Not pensionable
Self-Rostered Crewing	2007 & 2015	70 – 71	Not pensionable
USAR	2007 & 2015	72 - 78	Pensionable

The Ombudsman's decision was appealed and considered by the High Court. This factsheet considers the High Court judgment³ on this case.

¹ <http://www.fpsregs.org/images/Legal/Caselaw/BoothvMWWFRA.pdf>

² In England this scheme is known as the Firefighters Pension Scheme 2006 (FPS 2006) or New Firefighters Pension Scheme (NFPS).

³ A summary of the High Court Judgment on these elements can be found on page [4](#)

Does this judgment mean that all temporary allowances or overtime should be pensionable?

The judgment comments specifically on four types of allowance only. While the judge makes some useful comments on how to interpret the regulations it is still a matter for each FRA to determine what is and isn't pensionable taking into account their contractual arrangements, the regulations and all relevant case law.

What are the issues?

The case considered by the High Court is whether these four allowances and payments are pensionable within the meaning of the Firefighter Pension Scheme rules⁴.

■ The regulations

- The Firefighters Pension Scheme 1992 (FPS 1992) requires pay to be determined in relation to the 'performance of the duties of the role'. Under case law there has to be an 'element of permanency'.
- The Firefighters Pension Scheme 2006 (FPS 2006) and the Firefighters Pension Scheme 2015 (FPS 2015) regulations, which are virtually identical, requires pay to be determined in relation to the performance of the duties of the role but in addition the payment in effect has to be permanent as the regulations specifically exclude an 'allowance or emoluments paid on a temporary basis'.

Therefore under the FPS 2006 and FPS 2015 there is a specific requirement in the regulations for pay to be permanent, in that they specifically exclude payments 'paid on a temporary basis', whereas under the FPS 1992 the case law has determined that there has to be an 'element of permanency'. It is not clear from the case law whether this means that a payment that may be pensionable under the 1992 regulations might not be pensionable under the later regulations. However, this is a possibility that FRAs should be alive to when determining whether a payment is pensionable.

■ A definition of 'temporary'

The 2006 and 2015 regulations themselves do not provide a definition of 'temporary'. Therefore the application of the those regulations has long been an issue for the Firefighters' scheme with confusion over the correct interpretation of temporary in regulations such as [\[17\(1a\)\]](#) which uses the term "the member's pay received for the performance of the duties of the member's role except any **allowance or emoluments paid to that member on a temporary basis**".

⁴ [Firefighters Pensionable Pay Rules](#)

The meaning of the word ‘temporary’ within the regulations has often been the subject of debate, and this judgment provides some important commentary on how to construe the meaning of the words ‘temporary’ and ‘permanent’ within the regulations.

Paragraph 39 says

“I have come to the conclusion that “permanent” in these statutory provisions does not signify pay or emoluments that must endure to the end of the employment. I consider that what is meant by “permanent” is pay other than allowances or emoluments that are **temporary in the sense of being occasional, one-off, irregular or for a limited period of time only**. The words “permanent” and “temporary” have to be construed in context. Employment as a firefighter is generally employment for the whole or majority of a member’s working life. It is not employment for a fixed term. Over a working lifetime, the way in which a firefighter’s role is performed can change frequently; the circumstances and conditions are not ossified at the outset of employment so as to endure for its duration. To suggest that only allowances and emoluments that will endure for the whole of the member’s employment are pensionable seems to me to be unrealistic and a class devoid of content. On the other hand, it is entirely **sensible and realistic to exclude from pensionable pay any emoluments that are occasional, one-off, irregular or limited in time.**”

■ The ‘Blackburne Principles’

When interpreting the application of pensionable pay, the ‘Blackburne principles’ are often cited. In Norman v Cheshire Fire & Rescue Service [2011] EWHC 3305 (QB)⁵ the judge cited that the decision of Kent & Medway Towns Fire Authority v Pensions Ombudsman and anor, [2001] OPLR 357 (Justice Blackburn)⁶, held that in order for pay to be pensionable it had to be:

- i. Calculated in accordance with ordinary rate of pay
- ii. For work done under the Firefighters contract of employment
- iii. Regular in nature, i.e. something to which the firefighter was entitled in the ordinary course of fulfilling duties under the contract, not a one off or unexpected payment

These principles have become known as the ‘Blackburne principles’ and should be considered as part of any pensionable pay decision.

⁵ [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2011/3305.html&query=2011.+EWHC+3305+\(QB\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2011/3305.html&query=2011.+EWHC+3305+(QB))

⁶ <http://www.fpsregs.org/images/Legal/Caselaw/KentvTPO.pdf>

High Court Judgment⁷

As noted in bulletin 14, it was expected that the decision of the Ombudsman would be appealed. The High Court judgment handed down on 29 March 2019 was as a result of that appeal.

The case considered four different elements of pay across the three firefighter pension schemes, the High Court judgment can be summarised as follows

Pensionable Element	Scheme	High Court – relevant paragraphs	High Court judgment
Training Allowance	1992	18	Pensionable as part of permanent role, but not pensionable if attached to a temporary promotion
Day Crewing	2007 ⁸ & 2015	53	Pensionable
Self-Rostered Crewing	2007 & 2015	53	Pensionable
USAR	2007 & 2015	56 & 59	Not pensionable because it is part of a secondary contract which is paid in relation to the performance of the duties of a specialist USAR team member rather than forming the duties of the Firefighter's role as a Firefighter.

In respect of each element of pay the Court considered the 'Blackburne principles' (as noted above).

▪ Training Allowance

The court determined that the training allowance while attached to a permanent role is pensionable. However before the permanent role it was received as part of a temporary promotion and, therefore, while paid on a temporary basis it was not pensionable.

The judge considered the following points in making his conclusion.

1. Was it pay for work done was it paid in relation to the 'performance of duties as a regular firefighter?

⁷ <http://www.fpsregs.org/images/Legal/Caselaw/BoothvMWWFRA.pdf>

⁸ In England this scheme is known as the FPS 2006 or NFPS

The FRA argued that the allowance for training did not meet the requirements of being 'in relation to the performance of duties as a regular firefighter'⁹. The judge nevertheless concludes in Paragraphs 17 & 18 that "The relevant role map for Mr XXX (Watch Manager) includes supporting the development of teams and individuals and assessing candidate performance" and **as such the role of trainer should be considered in relation to the duties of a regular firefighter**. However, "Direct Trainer became part of Mr Bradshaw's role from July 2012 only".

2. Was the pay regular in nature (in line with the ordinary course of duties)?

The judge concluded in paragraph 18 that while the allowance was attached to a temporary promotion, it was not pensionable due to the temporary nature of the role and therefore the temporary nature of the payment. "I therefore consider that the allowance paid to Mr Bradshaw before July 2012 was not pensionable pay, because it was not a permanent emolument of his role". However on transfer to a new permanent role, combining firefighter duties with training duties the emolument became permanent and therefore pensionable.

3. The pay is in line with ordinary rate of pay

Under the 'Blackburne principles' it is necessary to consider whether the pay is in line with the ordinary rate of pay, i.e. paid as a % of pay according to role. The judge agreed that this was the case. "10% allowance for training is calculated in accordance with his ordinary rate of pay"¹⁰

In this case the judge concluded that the role of trainer was within the duties of a regular firefighter as it formed part of the individual's relevant role map, so was paid in relation to work done under his contract of employment. This highlights the importance of considering the contractual arrangements.

While the judge concluded that the role of trainer was within the duties of a regular firefighter and therefore any allowance received for that should be treated as pensionable, the judge also considered that it can only be treated as pensionable while it is a permanent position. If a person receives a training allowance attached to a temporary role, it does not meet the required test of being 'regular in nature'. We can draw from that whether or not an allowance is pensionable depends on the nature of the contract as well as the role.

The case considered specifically whether the training allowance was pensionable under FPS 1992. Nevertheless the argument for the allowance being pensionable once attached to a permanent role can equally be applied to FPS 2006 & FPS 2015, as both sets of regulations specifically exclude temporary allowances.

Actions for FRAs

- To consider whether training allowances or other allowances paid to members of FPS 1992, FPS 2006 & FPS 2015 are paid (i) in relation to work done under the contract of employment in relation to the duties of the role; and (ii) are attached to a permanent role and paid regularly, in which case it should be made pensionable if not already treated as such.

⁹ Paragraph 12

¹⁰ Paragraph 17

- Consider whether there are historic mistakes that need correcting (further information on corrective action is on page [\[8\]](#)).

▪ **Day Crewing and Self-Rostered Crewing**

The court has determined that the allowances paid to a regular firefighter in relation to working under a particular duty system (such as the day crewing and self-rostered crewing allowances) are pensionable.

The case considered two main points;

1. Whether the allowance is paid in relation to the performance of the duties of the firefighter member's role

The judge concludes in paragraph 32 "...in agreement with the Ombudsman's determination at para [52], that the allowances paid to Messrs Booth and Jones were "pay in relation to the performance of the duties of the firefighter member's role" or "emoluments" within the meaning of rule 1(b) of the NFPS and "pay received for the performance of the duties of the member's role" or "emoluments" within the meaning of rule 26 of the 2015 Scheme."

2. Whether the allowance is paid on a permanent or a temporary basis?

Paragraphs 33 to 53 of the judgment cover the arguments put forward by both parties on what is meant by "temporary" and "permanent" and sets out seven reasons given by the judge in paragraphs 41 to 47 on **why "permanent" in the statutory provisions does not signify that pay or emoluments must endure to the end of employment.** The judge found in favour of the appellant firefighters concluding in paragraph 53 that the whole of day crewing or self-rostered allowances are pensionable.

While the case considered specifically whether pay received for duty systems was pensionable under FPS 2006 & FPS 2015 only, the judge's concluding points could be applied to FPS 1992, as both the Kent & Medway Towns Fire Authority and the Norman v Cheshire Fire and Rescue case (see above) required there to be an element of regularity and permanency for a payment to be pensionable.

Actions for FRAs

- To consider whether duty system allowances in FPS 2006 & FPS 2015 should be made pensionable if not already done so.
- To consider whether duty system allowances in FPS 1992 should be made pensionable.
- Consider whether there are historic mistakes that need correcting.

■ **USAR (Urban Search and Rescue)**

The court has determined that the way the contract is structured may affect whether the payment is pensionable.

The case considered two main points;

1. Whether the allowance is paid in relation to the performance of the duties of the firefighter member's role?

In this case the duties of the USAR role were contracted under a secondary contract. The judge concluded¹¹ that pay under the separate contract was pay in relation to contractual duties as a specialist member of the USAR team. It was not pay in relation to the performance of the duties of the member's role as a regular firefighter. This was despite the fact that it is unlikely that anyone other than a regular or retained firefighter would be paid as a USAR team member. "Thus, the allowance is not pay in relation to the performance of the duties of a regular firefighter's role; it is paid in relation to the performance of the duties of a specialist USAR team member."

2. Whether the allowance is paid on a permanent or a temporary basis?

The judge concluded¹² "In those circumstances, the emoluments from the secondary contract are not permanent emoluments within the meaning of rule 1(1)(b) of the NFPS or reg 26 (1)(b) of the 2015 Scheme". This is because the secondary contract was renewed on a yearly basis, depending on the continuation of Government funding. The USAR contract was effectively a short-term contract for one year, despite it being renewed yearly from 2009 onwards.

The case considered specifically whether pay received for USAR payments was pensionable under FPS 2006 and FPS 2015 only. Nevertheless the judges concluding points can equally be applied to other specialist roles that might be under a second contract, or indeed USAR payments made to the 1992 scheme members.

The judgment was specific to the terms under which the member received the USAR payment. The payment failed both tests, in that it was not paid in relation to 'the performance of the duties of the firefighter's role' and it was not paid on a permanent basis.

The judgment did not consider what the status would be in relation to a payment for USAR work which forms part of an individual's role map under their main contract or where it is paid as an additional responsibility allowance (ARA). Whether such a payment is pensionable may depend on the specific contractual arrangements. However, if those arrangements are renewed on a yearly basis or dependent on periodic funding then, we can take from the judges concluding points in paragraph 59, that such allowance would not be permanent.

Actions for FRAs

- To consider secondary contract arrangements, and if the secondary contract does not include duties that are part of the Firefighter's role, to ensure that payments from secondary contracts are not treated as pensionable.
- Consider whether there are historic mistakes that need correcting.

¹¹ Paragraph 56

¹² Paragraph 59

Corrective Action

FRA's will need to review all contracts and allowances in place in line with this judgment and if necessary take legal advice to consider whether amendments are needed to a pensionable allowance. You may find that you need to make an allowance or payment either pensionable when it was previously considered non-pensionable, or non-pensionable when it was previously considered pensionable.

When making any pensionable pay decision, the reasoning for that decision and what case law has been considered should be documented.

With regards to any retrospective action that may be needed to correct pensionable pay where it has been previously deemed as not pensionable, LGA on behalf of SAB are taking further legal advice, specifically on whether the limitations act can or should be used. Please address any queries in the meantime to bluelight.pensions@local.gov.uk

Further Information

LGA Firefighters Pension Scheme Conference 2018; Firefighters Pension Scheme – pensionable pay update: Jane Marshall, Weightmans -

<http://www.fpsregs.org/images/admin/AGMpenpayv1.pdf>

■ Known Case Law

- [Kent and Medway Towns Fire Authority v Pensions Ombudsman and anor, \[2001\] OPLR 357](#)
- [Norman v Cheshire Fire & Rescue Service, \[2011\] EWHC 3305 \(QB\)](#)
- Mr Michael Smith v South Wales Fire & Rescue Service, [PO-3511](#) (2014)
- Mr N v West Yorkshire Fire and Rescue Authority, [PO-11867](#) (2017)
- Mr A v Warwickshire Fire and Rescue Authority, [PO-15584](#) (2018)

■ Pensionable Pay Regulations

	England ¹³	Wales	Scotland	Northern Ireland
FPS 1992	G1	G1	G1	Article 56
FPS 2006¹⁴	Part 11, Chapter 1, 1 & 2	Part 11, Chapter 1, 1 & 2	Part 11, Chapter 1, 1 & 2	Part 11, Chapter 1, articles 61 & 62
FPS 2015	17	26	17	26

■ Additional Pension Benefits (APBs)

Certain pension payments are pensionable under an APB. The APB factsheet is available [here](#)

¹³ The pensionable pay regulations are identical across England, Wales, Scotland and Northern Ireland, however presently the consolidated version is only available for England.

¹⁴ Applies to Special Members of the FPS2006, also known as modified scheme members

This factsheet has been prepared by LGA to give some guidance on the rules of the pension scheme using the regulations as they stand at April 2019, however they should be used only as an informal view of the interpretation of the firefighters' pension scheme as only a court can provide a definitive interpretation of legislation. This factsheet should not be interpreted as legal advice

Please address any queries on the content of this factsheet to
bluelight.pensions@local.gov.uk

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