

Meeting of the Board 11 June 2020

Pensionable Pay

Introduction

1. The Scheme Advisory Board (the Board) has previously considered matters related to pensionable pay.
2. Pensionable pay continues to be a concern for Fire and Rescue Authorities (FRAs) with regards to what pay constitutes pensionable pay, and there have been several high court decisions on pay, notably
 - 2.1. [Kent and Medway Towns v Pensions Ombudsman and Hopper](#) (more commonly referred to as Blackburne)
 - 2.2. [Norman v Cheshire](#)
 - 2.3. [Booth v Mid and West Wales](#)
3. The Boards concern on pensionable pay has centred in three areas, these are
 - 3.1. FRA decision making
 - 3.2. Retrospective corrective action
 - 3.3. FRAs making pay pensionable which impacts the cost of the scheme
4. This paper looks at each of these areas to consider what if any action the Board may wish to take

FRA Decision Making

5. FRAs have typically found making pensionable pay decisions, i.e. where a firefighter receives additional payments on top of the basic pay, difficult.
6. The [legal advice note](#), paragraph 6.2 highlights some of the reason for this.
7. There have been some landmark high court decisions on Firefighters pensionable pay, notably [Kent and Medway Towns v Pensions Ombudsman and Hopper](#) (more commonly referred to as Blackburne), [Norman v Cheshire](#) and [Booth v Mid and West Wales](#) as well as some [ombudsman determinations](#).
8. LGA have run two [pensionable pay workshops](#) and produced a [factsheet](#) on the more recent judgment Booth v Mid and West Wales.
9. At the 2019 workshop, Jane Marshall, legal adviser to the Board presented a [case law round up](#) of the various decisions and the principles that can be taken.

10. Notably the broad principles are;

10.1. Each case has referenced the 'Blackburne principles' which are;

- Payment should be calculated in accordance with a firefighter's ordinary rate of pay
- Payment must be 'pay' for work done under the contract of employment
- Payment must be regular in nature, i.e. should be pay to which the firefighter is entitled at the rate applicable to rank / role
- Must not be one-off, as a result of an extraordinary event
- It must have something of a permanent nature

10.2. Pay in relation to a duty system an individual is required to perform is likely to be pay in relation to the performance of the role of a firefighter

10.3. Equivalent allowances paid for the same duty should be treated the same way regardless of whether the individual is a regular or retained firefighter.

10.4. An allowance will be permanent unless it is temporary in the sense of occasional, one-off, irregular, time limited.

10.5. Just because firefighters can be moved to different stations or different duty systems and an allowance may then terminate does not mean that the allowance is not 'permanent'

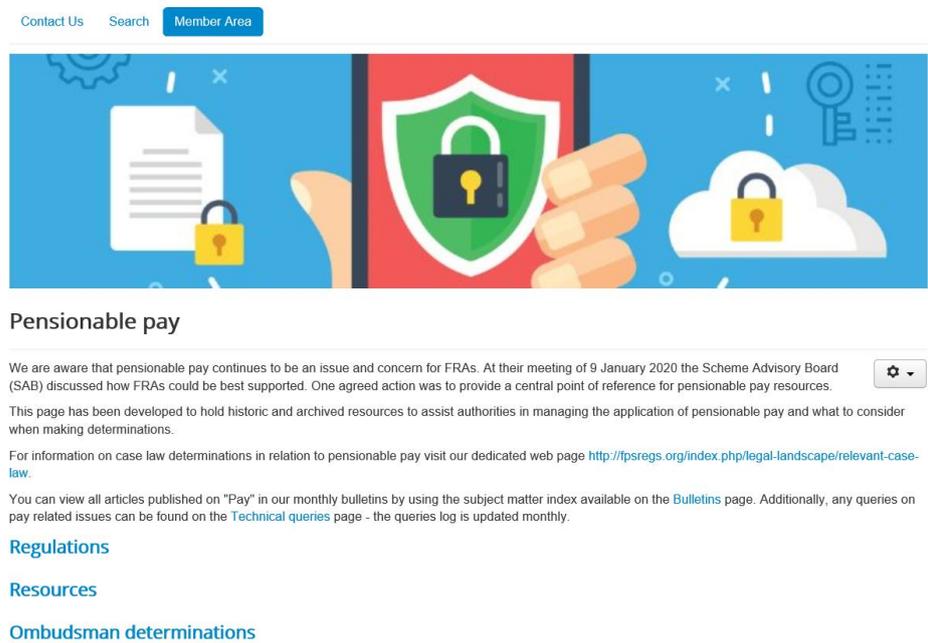
10.6. A 'permanent' payment does not have to endure for the whole of a firefighter's employment

10.7. Must consider the specifics of each contract of employment and any collective agreements

10.8. What is pensionable under the 1992 scheme is also likely to be pensionable under the later schemes i.e. the inclusion of the words "permanent" and "temporary" in the definition of "pensionable pay" was not intended to limit what could be considered pensionable under the later schemes

11. In order to assist FRA pensionable pay decision making, resources have been brought into one place - <http://www.fpsregs.org/index.php/member-area/pensionable-pay>

12. Password protected pensionable pay resource page



13. Factsheets have been provided on;

- 13.1. [Pensionable Pay](#)
- 13.2. [Additional Pension Benefits](#)
- 13.3. [Two Pension Entitlement and drop of pay in the 2015 scheme](#)

14. Consolidated versions of the regulations showing the amendments have also been provided

- 14.1. [FPS 1992: Regulation G1](#)
- 14.2. [FPS 2006: Part 11, Chapter 1, Rule 1 & 2](#)
- 14.3. [FPS 2015: Rule 17](#)

15. The importance of robust and transparent pensionable pay decision making has been included in scheme manager and governance training.

Board action

16. For the Board to note the considerable resources that FRAs have been provided with in order to make robust decisions.

Retrospective Corrective Action

17. Although the courts have ruled on pensionable pay and there is now more guidance to enable effective decision making going forward, authorities need to consider how they correct pensionable pay errors in the past.
18. In order to consider retrospective correction, authorities need to consider
 - 18.1. Under the regulations, contributions are based on 'pensionable pay', therefore if pensionable pay has been retrospectively amended contributions may have been underpaid and require being paid back.
 - 18.2. Promised pension benefits are based on pensionable pay
 - 18.3. Does the limitation act 1980 provide a legal defence to limit any action to recover lost monies to a six-year period after which the cause of action occurred?
 - 18.4. Do they need to consider the strain on the scheme, by making payments pensionable and not collecting contributions?
 - 18.5. Some members will not benefit from paying contributions on their corrected pensionable pay because they have been promoted since.
 - 18.6. Risk of challenge from members who did not benefit either by being outside the six-month limit or did not benefit from paying contributions.
 - 18.7. Potentially different scenarios on claims depending on whether the member is
 - 18.7.1. Still employed
 - 18.7.2. In receipt of pension
 - 18.7.3. A deferred member
19. There is a precedent already set when considering retrospective action from the court case arising under Norman v Cheshire, in that case an informal agreement between authorities was agreed to
 - 19.1. Accept allowances / pay which met the qualifying criteria in Norman v Cheshire as pensionable.
 - 19.2. Both employees and employers repay contributions back-dated for six years, including retired firefighters.
 - 19.3. Employees will be given 3 years to pay their element of the contributions.
 - 19.4. If employment ended before the three years, the remaining arrears could be paid out of the commutation lump sum.

- 19.5. The six year back dating will be from when local agreement is reached, so this might differ per FRA
- 19.6. Unpaid debts should be pursued as robustly as any other form of employee underpayment.
- 19.7. Each FRA would consider whether a split pension arrangement under the [two-pension entitlement](#) would be in the employees benefit.
20. The Board's legal adviser has been asked to comment on the corrective action that FRAs should take, and the advice note is available on the [board page](#).

Board action

21. The Board are asked to consider what if any role they should take on retrospection, noting that the Board is not a negotiating body between employers and employees.

Past Service Costs

22. The Board has been concerned about the impact on past service costs due to retrospective amendments to pensionable pay.
23. In some instances, there have been anecdotal reports where an FRA has made an allowance pensionable, while reducing the overall pay budget.
24. The Board raised those concerns in the [2016 valuation consultation response on past service costs](#).
25. It was noted that the predecessor to the Board, the Firefighters Pension Committee (FPC) had also raised pensionable pay issues as a result of the Norman v Cheshire judgment, and DCLG as they were at that time asked GAD to consider the implications on the valuation.
26. The Board requested that the minister takes the opportunity to consult the scheme advisory Board further on this issue.
27. Paragraph 2.13 of the [2016 valuation](#) commented on the uncertainty of the definition of pensionable pay as below

*We understand that there is some uncertainty regarding how the definition of pensionable pay is being interpreted by different Fire and Rescue Authorities. The results of this valuation are based on the pensionable pay figures that we received in the valuation data as at 31 March 2016 (and as at 31 March 2015 for the calculation of the **initial cost cap fund**) and no adjustment to the **valuation results** has been made to allow for any potential changes to how pensionable pay might be interpreted in the future. If the interpretation of pensionable pay is changed such that more elements of pay are included then the costs of the Scheme will increase, for the calculation of the **uncorrected employer contribution rate, corrected employer contribution rate and***

*the **employer contribution correction cost**, and vice-versa should fewer pay elements be counted as being pensionable.*

28. The Board have regularly kept this concern on their agenda, but no further action has been taken.

29. Previous FPC papers on pay¹

| FPC Meeting | Topic | Paper |
|-----------------------------------|---|--------------------------------------|
| FPC 3:28/04/2005 | Salary sacrifice schemes – childcare vouchers | FPC(05) 6 |
| FPC 4:29/06/2005 | Protection of pensionable pay | FPC(05)8 |
| FPC 23:20/06/2007 | CPD and LSI pensionability | FPC(07)10 |
| FPC 30:28/05/2009 | Pensionability of emoluments and allowances | FPC(09)4 |
| FPC 34:15/03/2010 | Pensionable pay: Response to consultation | FPC(10)2 |
| FPC 45:04/07/2102 | Pensionable pay, duty systems, and scheme liabilities | FPC(12)7: |
| FPC 47:17/01/2013 | Item 8. GAD Paper, Duty System Costs | GAD paper 14/01/2013 |
| FPC 52:22/04/2014 | 2015 Scheme: pensionable pay | FPC(14)9 |

Board action

30. The Board are asked to consider what further action should be taken (if any) to consider whether past service costs are likely to rise due to incorrect pensionable pay decisions.

Board Secretary
June 2020

¹ <http://www.fpsregs.org/images/FPC/FPCIndex.pdf>