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Firefighters' Pension Scheme: pensionable pay

Where are we now?

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Where are we now?

- Case law round up
- The Blackburne principles and beyond
- Legal remedies
- Practical considerations
- What is next?

Case law round up

- 18 years
- 9 firefighters
- 3 major High Court decisions, plus one unreported case
- Numerous Pension Ombudsman determinations
- 3 schemes (or 6 if count England and Wales separately)

Case law round up

- Kent & 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 & Rescue Authority, PO-11867 (2017)
- Mr A v Warwickshire Fire & Rescue Authority, PO-15584 (2018)
- Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw, [2019] EWHC 790

Case law round up

Case	Firefighter	Scheme	Pay/ Allowance	Decision
Kent & Medway Towns	Regular	1992	Payment in lieu of annual leave	Not pensionable
Norman v Cheshire	Regular	1992	Retaining fee, disturbance fee, public holiday pay rolled up as % uplift in basic pay	Pensionable
Smith v South Wales	Regular	2006	Day crewing duty system allowances	*Not pensionable

Case law round up

Case	Firefighter	Scheme	Pay/ Allowance	Decision
Mr N v West Yorkshire	Regular	1992	Temporary promotion	Not Pensionable
Mr A v Warwickshire	Retained	2006	Disturbance, work activity & training attendance payments	Pensionable
Booth v Mid and West Wales	Regular	All	(1) Training allowance (2) Day crewing allowance (3) Self-rostered allowance (4) USAR	(1) Partly pensionable (2) Pensionable (3) Pensionable (4) Not Pensionable

The Blackburne principles and beyond

For pay to be pensionable:

- payment should be calculated in accordance with a firefighters' ordinary rate of pay for it to be “determined in relation to rank” (now “role”);
- payment must be ‘pay’, for work done under the contract of employment;
- payment must be regular in nature, i.e. it must be pay to which the firefighter is entitled, at the rate applicable to his rank;
- must not be of a “one-off” nature, as a result of some extraordinary event;
- it must have something of a permanent nature.

The Blackburne principles and beyond

- The recent case of Booth v Mid and West Wales clearly followed these principles:
 - pensionable pay has to be calculated in accordance with a firefighter's ordinary rate of pay
 - payment has to be for work done under the firefighter's contract of employment
 - payment has to be 'permanent'
- First limb of the test easily met, as all allowances were paid as a % of basic pay or a % uplift in basic pay
- The second limb of the test was most significant in relation to Mr Skhane's USAR allowance as this was payable under a secondary contract
- The third limb of the test seems to be the most problematic area

Additional principles arising from the case law

- The starting point is the drafting of the Regulations at the applicable time – what is the true construction of the regulations?
- Must consider the specifics of each contract of employment and any collective agreements
- 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
- Pay in relation to a particular duty system which an individual is required to perform is likely to be pay in relation to the performance of the role of a firefighter

Additional principles arising from the case law

- Equivalent allowances paid for the same duty should be treated in the same way regardless of whether the individual is a regular or a retained firefighter
- An allowance will be permanent unless it is temporary in the sense of occasional, one-off, irregular, time limited
- Just because firefighters can be moved to different stations or different duty systems and a particular allowance may then terminate does not mean that the allowance is not 'permanent'
- A 'permanent' payment does not have to endure for the whole of a firefighters employment

Legal remedies

- Do all historic mistakes have to be rectified?
- Under the regulations:
 - Contributions are based on ‘pensionable pay’
 - Promised pension benefits are based on ‘pensionable pay’
 - No express power to reduce pension benefits because contributions have not been paid in full
- Legal defence – Limitation Act 1980:
 - Section 9 – *an action to recover any sum recoverable by virtue of an enactment shall not be brought after the expiration of 6 years from the date on which the cause of action accrued*

Legal remedies

- Potential claims:
 - Claim brought by the FRA for underpayment of pension contributions
 - Claim brought by member for underpayment of pension
- Claim brought by FRA – potentially limited to 6 years, but from when?
- Claim brought by member, potentially different considerations depending on:
 - Whether still employed by FRA
 - Whether in receipt of pension
 - Whether current deferred member who has left service

Risk based approach

- Assess total exposure
- Categorise potential claims based on:
 - Quantum
 - Individual (i.e. current employee, pensioner, deferred leaver)
 - Chances of success
 - Risk of claims
- Make a decision dependent on appetite for risk

Next steps

- Legal advice to the SAB
- Issue pensionable pay guidance note



Questions?