

# Pensionable Pay



18 July 2019



@LGAworkforce #LGAFirepensions

# Agenda

- Welcome and Introduction
  - Legislation and legal background, Jane Marshall
  - Pensionable Pay Decision Making, Steven Pope and Sean Connor
  - Resources and Decision Making
  - Tax Consequences of Retrospective Action, James Durrant
-

- Panel Session

## Administration and management

- Each of the 45 Fire and Rescue Authorities (FRAs) are responsible for the management and administration of their scheme and are defined in law as the scheme manager - Responsibility to comply with over-riding pension legislation is on each FRA.
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- At present this responsibility is managed differently within each FRA, this can depend on whether they are a combined authority or whether the FRA function sits within a county council.
  - It is 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.
  - WHO IS MAKING THESE DECISIONS AND HOW?
-

# Pensionable Pay Regulations

FPS 1992	<u>G1</u>
FPS 2006	<u>Part 11, Chapter 1, 1 &amp; 2</u>
FPS 2015	<u>17</u>

## What are the issues

- The Firefighters Pension Scheme 1992 requires pay to be determined in relation to the 'performance of the duties of the
-

role'. Under case law (Blackburne) there has to be an **'element of permanency'**.

- The Firefighters Pension Scheme 2006 and the Firefighters Pension Scheme 2015, which are virtually identical, requires pay to be determined in relation to the performance of the duties of the role but in addition the the regulations specifically exclude an **'allowance or emoluments paid on a temporary basis'**.
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# Weightmans

Firefighters' Pension Scheme: pensionable pay

What's new?

18 July 2019

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## This is a story of...

- 4 firefighters
- 4 allowances
- 4 complaints
- 4 determinations
- 4 appeals
- and the potential for greater complexity...?



## The background facts

- Four complaints were made to the Pensions Ombudsman (PO) concerning pensionable pay under the Firefighters' Pension Scheme (Wales) and whether allowances paid alongside basic pay were pensionable
- Complainants were Mr Booth, Mr Bradshaw, Mr Jones and Mr Skhane
- All complaints were brought against Mid and West Wales Fire Rescue Authority
- The allowances related to training, day crewing, self-rostered crewing and urban search & rescue

## The background facts

- In October 2018 PO upheld the complaints of Mr Bradshaw (training) and Mr Skhane (USAR)), but dismissed the complaints of Mr Booth (day crewing) and Mr Jones (self-rostered crewing)
- Mr Booth and Mr Jones appealed
- Mid and West Wales Fire Rescue Authority appealed against the PO's decisions in the cases of Mr Bradshaw and Mr Skhane.
- All appeals went before the High Court – Booth v Mid and West Wales Fire Rescue Authority ; Mid and West Wales Fire Rescue Authority v Bradshaw

- Decision reached in March 2019

## Mr Bradshaw – training allowance

- Pensioner member
- The Firefighters' Pension (Wales) Scheme 1992, established by the Firemen's Pension Scheme Order (SI 1992/129)
- Appointed in 1984
- Had several 'temporary' promotions to a training role, attracting a 10% allowance
- Letter 12 June 2012 confirmed permanent transfer to role of 'Watch Manager A Direct Trainer' from July 2012, with 12% allowance
- Mr Bradshaw had to provide a minimum of 15 weekend days per year

## Mr Bradshaw – training allowance

- PO had upheld Mr Bradshaw's complaint
- PO determined that the training allowance was paid to him for the performance of the duties of his role
- This was regardless of whether the role was officially made permanent
- PO noted it was:
  - calculated as a % of basic pay
  - paid regularly
  - not paid on a one-off, extraordinary or exceptional basis
- Similar to the decision in *Norman v Cheshire Fire & Rescue Service* (2011)

## Mr Bradshaw – training allowance

- High Court:
  - accepted training allowance was calculated in accordance with ordinary rate of pay
  - relevant question was whether it was for work done under his contract of employment for duties of his role and, if so
  - whether it was sufficiently regular (as opposed to temporary)
- Duties under Mr Bradshaw's rolemap included supporting the development of teams & individuals, and assessing candidates

## Mr Bradshaw – training allowance

- High Court upheld the appeal of Mid and West Wales Fire Rescue Authority in part
- High Court held:
  - the training allowance paid before July 2012 was not pensionable
  - the training allowance became pensionable from July 2012 only
  - before this date it was paid in relation to a temporary promotion and therefore not a regular emolument to which Mr Bradshaw was entitled in the ordinary course of his role

## Mr Booth & Mr Jones – day crewing & self rostered crewing allowance

- Both deferred members of the New Firefighters' Pension Scheme (Wales) 2007, established by the Firefighters' Pension Scheme (Wales) Order (SI 2007/1072)
- Both active members of the Firefighters' Pension Scheme (Wales) 2015, established by the Firefighters' Pension Scheme (Wales) Regulations (SI 2015/622)
- Mr Booth received an allowance for working the day crewing duty system
- 7.5% of basic pay, paid with Mr Booth's monthly pay



## Mr Booth & Mr Jones – day crewing & self rostered crewing allowance

- Mr Jones received an allowance for self-rostered crewing duty system
- Paid as a supplement equivalent to 25% of basic pay
- Allowances paid for working specific duty systems was previously considered by the High Court in *Norman v Cheshire Fire & Rescue Service* in 2011 and *Smith v South Wales Fire and Rescue Service* in 2013 (although this case is unreported)
- These cases were considered in some detail in the judgements

## Mr Booth & Mr Jones – day crewing & self rostered crewing allowance

- PO dismissed the complaints of Mr Booth & Mr Jones
- The PO found that allowances for working a specific duty system were not pensionable as they were not ‘permanent’ – firefighters could be moved to a different duty system from time to time
- The PO considered the wording of the regulations in the 2007 scheme and the 2015 scheme to be more restrictive than in the 1992 scheme, as they specifically refer to pensionable pay as being pay which is permanent and not temporary

- On this basis, the PO distinguished the day crewing allowance payable to Mr [redacted] (who was in the 1992 Scheme) from the day crewing allowance payable to Mr Booth (who was in the 2007 & 2015 schemes)

## Mr Booth & Mr Jones – day crewing & self rostered crewing allowance

- The High Court upheld the appeals of both Mr Booth and Mr Jones and found the whole of the day crewing allowance and self-rostered crewing allowance to be pensionable
- Now seems to be general acceptance that allowances for working a duty system is ‘pay’ in relation to the performance of the duties of the role of a firefighter

- The main issue is whether such pay is ‘permanent’
- The High Court concluded that ‘permanent’ in the regulations does not mean that the pay or emolument has to endure to the end of the employment
- What is meant by ‘permanent’ is pay other than allowances or emoluments that are temporary in the sense of occasional, one-off, irregular, time limited

### Mr Booth & Mr Jones – day crewing & self rostered crewing allowance

- The High Court’s decision in relation to Mr Booth & Mr Jones would suggest (although is it not completely clear) that the ‘test’ is no higher for a member of the 1992 scheme compared to the later schemes

- The commentary suggests there is nothing to indicate that there was an intention to limit what could be considered as pensionable pay in the 2007 and 2015 schemes by the introduction of the words “permanent” and “temporary” in the definition of pensionable pay
- The reference in the decision to ‘permanent’ being pay other than allowances or emoluments that are temporary in the sense of occasional, one-off, irregular, time limited is akin to the Norman v Cheshire decision

## Mr Skhane – USAR

- Deferred member of the 2007 scheme & an active member of the 2015 scheme
- Appointed in 1994 as a regular firefighter
- Additional contract to provide urban search and rescue cover
- Details of the role contained in letter dated 2 May 2007 with its own contractual terms and conditions
- New All Wales USAR Team – in place wef 1 April 2012
- Formal offer issued 28 August 2012:
  - 12 month contract – start date 1 April 2012
  - to be renewed annually dependent on funding
  - if government funding ceased contract would be terminated on notice – one week, then one week per year for service between 2 and 12 years
  - additional 10% stated to be non-pensionable
- Contract has been renewed annually since 2009

## Mr Skhane – USAR

- PO upheld Mr Skhane's complaint
- PO concluded:
  - allowance was paid for the performance of the duties of Mr Skhane's role; and
  - the allowance was a permanent as it can be, as it would not be lost unless he ceased in the USAR role altogether
- Despite the one year contract the PO found there was no intention that it should end
- On the contrary, it would be renewed provided there was sufficient funding
- The termination provisions would be unnecessary if the contract was intended to be temporary

## Mr Skhane – USAR

- High Court upheld the appeal of Mid and West Wales Fire Rescue Authority
- The important question was whether the emoluments were permanent in relation to the role of a regular firefighter, not permanent in the context of the USAR contract itself
- Accepted that USAR duties were part of the role of a regular firefighter, but the allowance was paid under a separate contract
- The allowance was paid in relation to the duties of a specialist USAR team member and not in relation to the performance of the duties of a regular firefighter



- The USAR contract was short-term contract for one year, renewed subject to funding, so therefore also temporary

## What conclusions can we draw?

- The fundamental questions in terms of whether pay is pensionable are:
  - whether it is pay in relation to the performance of the duties of the role of a firefighter; and
  - whether the allowance is paid on a permanent or a temporary basis
- Both questions were particularly important in relation to Mr Skhane's USAR allowance
- The issue of permanency was more central to the other decisions
- It is clear from the decisions, particularly in relation to Mr Bradshaw and Mr Skhane, that the contractual arrangements can be key
- Is it really important when considering contractual changes or changing an individual's duties to consider the impact on pensionable pay



Questions?



**DEVON &  
SOMERSET**  
FIRE & RESCUE SERVICE

# **Pensionable Pay**

## **A Practitioner's Experience of Decision Making**

**18th July 2019**

**Steven Pope, Head of Human Resources**



## Background & Context

- Changes in risk profiles within our communities
- Modernisation of the Fire & Rescue Service with new ways of working
- Expanding roles of Firefighters
- Responding to austerity measures and reduced budgets
- Grey Book provides a framework for nationally agreed terms & conditions
- Can determine terms and conditions through local agreement
- Additional Responsibility Allowance – *“temporary and non-pensionable”*
- Historical payments but changing pension regulations and impact of case law
- Training Allowance
- Area Manager Allowance



# Timeline

- Special Rescue Allowance/Additional Responsibility Allowance
- Day Crewing – Rent Allowance
- Dog Handler Allowance
- 2004 - NJC Scheme of Conditions of Service, 6<sup>th</sup> Edition
- 2008 - DSFRS Additional Responsibility Allowances Policy
- 2009 - Area Manager Allowance trial
- 2010 - Special Rescue Allowance
- 2011 - Norman v Cheshire Fire & Rescue Service
- 2013 - DCLG Consultation Response on Amendment Order to the FPS and NFPS included reference to Norman v Cheshire and that pensionable pay is for FRS determination



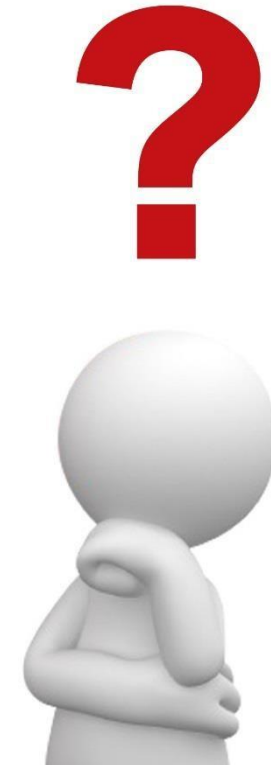
# Individual and Collective Challenges

- Trade Unions
- Senior Managers and staff near to retirement
- Retirees
- IDRPs and Grey Book s6C Negotiation Procedures



# Decisions Concerning Pensionable Pay

- Advice from DCLG Pensions Team in 2009 was that the AM Allowance should not be regarded as pensionable
- Legal landscape changed by Norman v Cheshire
- Application of “Blackburne Principles”
- Legal questions
- Permanence
- Payment for performing duties
- Contractual agreement to non-pensionable
- Legal advice obtained on AM Allowance in 2016







# Implementation of Pensionable Pay

- QC Opinion obtained in 2016
- Pre and post July 2013 appointments in relation to the FPS Amendment Order 2013 (temporary promotions and rule B5C(5)(c) for Additional Pension Benefit)
- Payment of employee and employer arrears and use of the Limitation Act if agreed with the Home Office
- Approach accepted by Home Office as in accordance with informal working party in 2013 chaired by Sean Connor, Derbyshire FRS
- Discussions and collective agreement with FBU and FOA



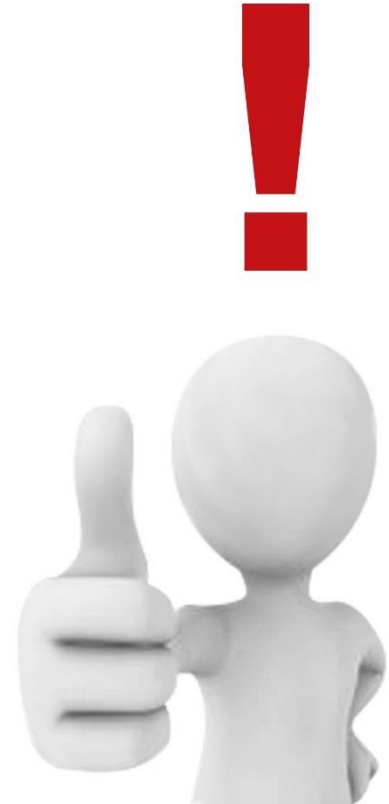


# Implementation of Pensionable Pay

- Resolution of IDRP cases
- Options for staff concerning arrears:
  - An immediate full payment of the arrears
  - Payment of arrears on a monthly basis up to a maximum of 6 years
  - Payment of arrears on a monthly basis until retirement, if this is for less than 6 years and any outstanding balance being deducted from the commutation lump sum payment at retirement.
  - Defer payment of arrears for up to 6 years with the outstanding balance being deducted from the commutation lump sum payment at retirement. If employment is continued then the total arrears will be payable in a single full payment at this 6 year point.



- Complexity of pension regulations and case law
- Problems of resolving retrospective payments
- Issue of employee contributions with no additional benefits
- With new case law, transparency and co-ordinated support from the LGA it is getting easier!





# Weightmans

Firefighters' Pension Scheme: pensionable pay

Where are we now?

18 July 2019

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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?



# Lunch



# Welcome Back

## Resources and Decision Making



# Is your decision making like this?

Duty System / Allowance

Flexibility ✓

Savings ✓

Matzak ✓

Risk / Demand ✓

Pensionable Pay

## Or Like this

Duty System / Allowance

Flexibility ✓

Savings ✓

Matzak ✓

Risk / Demand ✓

Pensionable? ✓

Pensionable Pay

What	Currently pensionable	1. Is it regular	2. Contractual	3. Payable at role rate	4. Fulfilling their duties	5. Permanent	Pensionable
ORP 10%	yes and no	yes	yes	yes	yes	yes	Pensionable
DCCC 5% RDS	NFPS only	yes	yes	yes	yes	yes	Pensionable
DCCC 22% close call	no	yes	yes	yes	yes	yes	Pensionable
DCCC 2% flexi working	no	yes	yes	yes	yes	yes	Pensionable
AM duty system	yes and no	yes	yes	yes	yes	yes	Pensionable
ARA	no	yes	yes	yes	no	no	no
Training ARA	no	yes	yes	yes	yes	yes	Pensionable
Training Duty system	no	yes	yes	yes	yes	yes	Pensionable
CPD	APB	yes	yes	yes	yes	no	no
Additional Weekend Working	no	no	yes	yes	yes	no	no
AWW Extra	no	no	no	yes	no	no	no
Pre-Arranged Overtime	no	no	no	yes	no	no	no
Lease car	no	no	yes	no	yes	yes	no
Recall to duty	no	no	yes	yes	no	no	no
Temporary promotion	no	yes	yes	yes	yes	no	no
Acting up	no	no	yes	yes	yes	no	no
Bank Holiday	no	no	yes	yes	yes	no	no

## Pensionable Pay Resources

- AGM 2018 – [Pensionable Pay Slides](#)
- Booth V Mid and West Wales [Factsheet](#)
- Bulletins [Topic List](#) ‘Pay’

## [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 \(QB\)](#)
- [Booth v MWWFRA \[2019\] EWHC 790](#)

## TPO Judgments

- Mr Michael Smith v South Wales Fire & Rescue Service,  
[PO-3511](#) (2014)
-

- Mr N v West Yorkshire Fire and Rescue Authority,  
[PO11867](#) (2017)
- Mr A v Warwickshire Fire and Rescue Authority,  
[PO15584](#) (2018)

## Secondary Contracts

- Eligibility to the pension scheme
-

- Additional duties are only pensionable where they are appropriate to the role of a firefighter, and the role includes resolving operational incidents or leading and supporting others in resolving operational incidents.
- If additional duties require a separate contract, the contract would need to state that the role is appropriate to a firefighter.

## Secondary Contracts

- Injury received while on second contract
-

- An injury award is calculated based on the period of service for the contract under which the qualifying injury was received.
- Where a second contract is used for additional duties and the qualifying injury is received while in the performance of these duties, the injury pension would be calculated based on the service for the second contract only.

## Secondary Contracts

- Pensionable Pay –
-



1. Is it pay for duties of the role

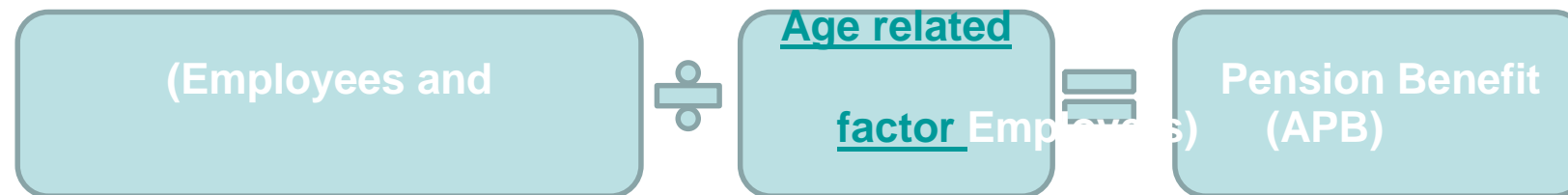
2. Permanency?

- FPS 1992 –does it meet required test for element of permanency
  - FPS 2006 & 2015– is pay an ‘allowance or emoluments paid to that member on a temporary basis’
-



## Final Salary Discretionary Benefits (APBs)

1. Allowance or supplement to reward additional skills and responsibilities
2. Continuous Professional Development (CPD)
3. Temporary promotion, which began after 1 July 2013
4. Performance Related Payment



# APB Factsheet

## Pay Protection

- In both the 1992 and 2006 scheme, a member has an entitlement to two pensions after a drop in pay, which is often known as a split pension.
  - We have recently published a [factsheet](#) on the entitlement to two pensions.
-

- The split pension effectively pro-rata's the expected benefit, calculated on two different salaries.
- The pension can only be split once.

## Drop in pay before transition

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- This should be last 365 days ending with last day of service

Calculate pensionable pay

- If the final pay at retirement is lower than at point of transition the final pay will be calculated as the average pay (best of last three years)

- If the final pay at retirement is lower than pensionable pay for any year during transition, the higher pay is to be used





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Fire & Rescue Service

# Tax Consequences of Retrospective Action

James Durrant

Disclaimer



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- These slides have been produced to provide a short overview of the tax rules governing payment of arrears of pension and lump sum and do not intend to replace the legislation.
- The legislation and pension tax manual references are referred to and should always be checked when calculating any benefit payable.
- If in doubt, please seek tax advice!

## Background





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- Retained element of day-crewing became pensionable within the FPS 1992 (retaining fee and turnouts & attendances).
- Change applied to current & former employees.
- Backdated contributions were collected going back 6 years from the date of the decision to make it pensionable, in accordance with the Limitation Act.



Essex County  
Fire & Rescue Service

- Payments were made to those pensioners who retired within the last 6 years from the date of decision to make retained element of day-crewing pensionable.

## Background

### Tax Considerations:-

- Tax Relief on Contributions due.
- Tax implications on making payments to pensioners.



# Tax Relief on contributions

## Active members:-

Backdated employee contributions paid through payroll will attract tax relief.

But if employment ends prior to the end of the repayment period?

If member is not retiring:-

- the outstanding amount to be recovered from final salary, or
- Invoiced for remaining amount – member can set up a repayment plan with Finance



# Tax Relief on contributions

If member is retiring – additional option to deduct remaining amount from the lump sum.

Deferred, Pensioner members and those leaving before repaid amount due

- If the contributions payment is made outside of the payroll, member cannot receive the tax relief, unless they make a claim.
- Once contributions paid or deducted from lump sum, member was sent a letter so they can claim the tax relief on the contributions they have paid.

# Tax Relief on contributions

- Letter is written from the members' point of view and for them to sign and send to HMRC.
- Attached to this is a schedule confirming what contributions were paid when.

## Tax Relief letter example:-

Pay As You Earn and Self Assessment

HM Revenue and Customs

BX9 1AS

Dear Sir/Madam,



Essex County  
Fire & Rescue Service

# Tax Relief on contributions

My final pensionable pay, applicable as at my date of retirement, has been retrospectively uplifted following a review by my former employer Essex Fire Authority. This is due to certain elements of pay related to my 'on call' (retained) duties now being regarded as pensionable under the Firefighters' Pension Scheme 1992.

I have been required to pay pension contributions and I wish to formally make a direct claim for the 'lost' tax relief on those pension contributions. I have enclosed a Statement of Historical Pension Contributions for your information.

Please confirm if I need to complete a Self-Assessment tax return in relation to the above; or if this letter and enclosures is sufficient information for you to proceed with my claim.

Yours faithfully,

- But.....A member very recently contacted us, stating HMRC replied that Fire tax relief claims are being halted.



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# Tax Relief on contributions

- Uncertain whether this relates to all tax relief claims or HMRC have confused this with the Modified scheme tax relief claims.
- Advised member to send us the letter from HMRC and we may need to send more clarification directly to HMRC.



# Tax Due on pension/lump sum

## Paying a lump sum

- There are tax implications if an additional lump sum payment is being paid to the individual more than 12 months after the original Benefit Crystallisation Event date (established at retirement).
- If so, the whole of the additional lump sum payment will be classified as an 'unauthorised payment' – a 40% tax charge.
- If within 12 months, this is an authorised payment, meaning no tax charge due – but you will need to do the 'permitted maximum' check again i.e.





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# Tax Due on pension/lump sum

25% of the capital value.

## Paying a pension

- Additional scheme pension arrears also regarded as an 'unauthorised payment', unless:-
- If it constitutes an 'error' the tax rules allows the additional pension arrears payment to be regarded as an authorised payment.

## Scheme sanction charge



# Tax Due on pension/lump sum

## Exemption if:-

- Payment is made to comply with a court order or an order by a person or body with the power to order the making of the payment. E.g. Milne V GAD, the Ombudsman made a determination which directly affected all FRA's, so clear that s241 could be relied on.
- Payment made on the grounds that a court or any such person or body is likely to order (or would be were it asked to do so) the making of the payment. This should be the only, or significant, reason for making the payment).



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Fire & Rescue Service

# Tax Due on pension/lump sum

Letter to HMRC said:-

Proposed treatment #1: To treat retrospective lump sum payments as unauthorised payments.

Proposed treatment #2: To treat the retrospective pension arrears as authorised payments as they are an error, as the Norman judgment means the payments should have been included as pensionable pay when the person retired.

Proposed treatment #3: A scheme sanction charge is not payable as it is likely that a court would order Essex Fire & Rescue Authority to make the payments.



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Fire & Rescue Service



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Fire & Rescue Service

# Tax Due on pension/lump sum

Reply from HMRC:-

Dear Mr Durrant

## **Retrospective Pensions & Lump Sum Payments**

Thank you for your letter.

Your proposed treatment of the three scenarios on page 4 of your letter appear to be in accordance with our published guidance.

Reply from HMRC:-



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# Tax Due on pension/lump sum

Point 1 - PTM063210 advises that a pension commencement lump sum can only be paid within a 12 month period after becoming entitled to it. A lump sum paid after this period would not be a pension commencement lump sum but would be an unauthorised payment. PTM146400 advises that it would remain as an unauthorised payment even though a genuine error had occurred.

Reply from HMRC:-



# Tax Due on pension/lump sum

Point 2 – This appears to be an authorised payment in accordance with guidance at PTM062800. The member is entitled to this pension payment and it is simply being paid as an arrear of pension due to a calculation error.

Point 3 – The re-calculation is only being done because of a court ruling. This re-calculation has resulted in a further payment of pension/lump sum. In accordance with PTM135200 it appears that the additional payment may in effect be a payment ordered by a court and would not therefore be scheme chargeable.

- ‘Appears’ gives an element of doubt, but we decided to proceed.

# Tax Due on pension/lump sum

- You may wish to take your own advice from HMRC as it may depend on the circumstances of each individual case!



# Payments of Pension & Lump sum

- Letter to pensioners confirmed amount due to be paid to them according to their original commutation election, minus the contributions due.
- Form enclosed with the letter giving permission for us to deduct any unauthorised lump sum tax charge from their payment, or they can report to HMRC themselves.





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- Gave pensioner option to receive it all as additional pension only and no additional lump sum and therefore with no tax charge (other than PAYE).

## Event Reporting

- Required to report the Unauthorised payments under Event Reporting.
- The information that must be provided is:
  - the name of the person to whom the payment was made,



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- their National Insurance number,
- the nature of the payment,
- the amount of the payment and ➤ the date of the payment.

## Event Reporting

- HMRC must receive the Event Report by 31 January after the end of the tax year to which the Event Report relates.

- E.g. If the Event Report is for the tax year ended 5 April 2020 the Event Report can be filed in the period 6 April 2020 to 31 January 2021.
- Where an Event Report is submitted late, penalties may apply.



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# Questions



# Closing remarks

# Training Survey



[https://www.surveymonkey.co.uk/r/FPS\\_training\\_survey](https://www.surveymonkey.co.uk/r/FPS_training_survey)

**Thank you for coming**

**[bluelight.pensions@local.gov.uk](mailto:bluelight.pensions@local.gov.uk)**