



Weightmans

Weightmans

Firefighters' Pension Scheme: pensionable pay

What's new?

18 July 2019

Jane Marshall

Partner

(0161) 214 0508

jane.marshall@weightmans.com



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 Norman (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?