

## Ombudsman's Determination

Applicant	Mr E
Scheme	Firemen's Pension Scheme (1992) ( <b>the Scheme</b> )
Respondents	South Wales Fire & Rescue Authority ( <b>the Authority</b> ) Rhondda Cynon Taff County Borough Council ( <b>the Council</b> )

### Complaint Summary

1. Mr E has complained about the Authority's maladministration in failing to implement an amendment to the Firemen's Pension Scheme Order (1992) (**the 1992 Order**). He asserts that he has suffered a financial loss because of the Authority's maladministration.

### Summary of the Ombudsman's Determination and reasons

2. The complaint is partly upheld against the Authority because:-
  - 2.1. Mr E relied on incorrect information he received from the Council and suffered a financial loss, as a result of the Authority's maladministration in failing to apply the rules governing the Scheme correctly.
  - 2.2. Mr E suffered serious distress and inconvenience as a result of the Authority's maladministration as detailed in paragraph 2.1 above.

## Detailed Determination

### Material facts

3. The Authority is the Scheme Manager and the Council is the Scheme's Administrator. The Scheme is governed by the Rules of the 1992 Order as amended.<sup>1</sup>
4. On 31 December 2014, The Firefighters' Pension (Wales) Scheme (Amendment) Order 2014 (**the 2014 Order**) was implemented. This Order made some retrospective amendments to the 1992 Order from 1 July 2013.
5. Prior to the 2014 Order, if a firefighter was temporarily promoted in the last three years of their employment, they would benefit from the increase in salary in their pensionable pay calculation. This was because their average pensionable pay at retirement (the member's 'final salary') was calculated using their best pensionable pay over the last three years. This was then used as the basis of their pension entitlement.
6. The 2014 Order amended Rule B5C (**the New Rule**). This changed the way in which pension benefits are calculated.<sup>2</sup> Under the New Rule, firefighters are awarded an Additional Pension Benefit (**APB**), in relation to any temporary promotion, prior to their retirement, for the duration of that promotion. Because the extra salary while on temporary promotion does not count towards the final salary pension calculation, the overall benefit under the New Rule is not as great as it was prior to its implementation.
7. Mr E was born in 1965. He was previously employed by the Fire and Rescue Service (**the Service**) and was an active member of the Scheme from 11 April 1983 until he retired in November 2015.
8. On 27 October 2014, Mr E was temporarily promoted to the role of Group Manager A (Development) (**Group Manager**), his substantive role at the time was Flexible Duty Station Manager (Competent). On 22 July 2015, Mr E was substantively promoted to the role of Group Manager.
9. Around the time of his promotion, Mr E specifically requested and received from the Council confirmation that his retirement benefits would be calculated using his temporary promotion salary.
10. On 14 September 2015, the Council sent Mr E a retirement benefit quotation (**the Quotation**). This informed Mr E that the benefits he could receive at retirement were a lump sum of £177,041.18 and an annual pension of £26,556.18. His retirement benefit calculations were calculated using his temporary promotion salary.
11. Mr E received the benefits stated on the Quotation, when he retired on 4 November 2015.

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<sup>1</sup> Relevant sections of the 1992 Order are in Appendix 1.

<sup>2</sup> Details of the Old and new Rule B5C are detailed in Appendices 2 and 3.

12. On 1 February 2019, the Service wrote to Mr E (**the February Letter**). A summary of the February Letter is detailed below, in paragraphs 13 to 23.
13. It had come to light at the end of November 2017, that the Authority had not implemented the New Rule and continued to treat temporary promotions as pensionable pay under the old regulations. It had included such payments in final salaries for pension purposes, where they had occurred within three years of retirement.
14. To address this situation, the Authority considered a report at its meeting on 26 March 2018. At this meeting, the Authority concluded that it was imperative to correct the position going forward, by implementing the New Rule. Doing so would prevent further miscalculations of pensions based on temporary promotions under the old regulations.
15. The Authority sought to implement the rule change in a fair and ethical manner, taking into account the situation retired members of the Scheme would be in, through no fault of their own. The Authority determined the following:-
  - 15.1. Temporary promotions were pensionable and pension benefits are earned through an APB.
  - 15.2. The New Rule would be implemented with effect from 1 April 2018. The change would not be applied retrospectively because it was not the fault of the members affected that the change was not implemented.
  - 15.3. The expectations of the affected members should be honoured by leaving existing and future pension benefits in the position they were currently, or were expected to be in, at the point of retirement.
16. As part of the 2017/2018 audit of accounts, the Wales Audit Office considered the decisions taken by the Authority, as detailed in paragraphs 15.1 to 15.3 above, and whether those decisions were lawful. The advice the Auditor and the Authority received indicated that it would be unlawful for the Authority to continue to make pension payments calculated using the old regulations, after the date the New Rule should have been implemented. The Authority had to reconsider its approach and previous decisions in respect of the implementation of the New Rule.
17. To correct the misapplication of the New Rule, the Authority would have to:-
  - 17.1. Determine that temporary promotion payments were pensionable through an APB from 1 July 2013.
  - 17.2. Recalculate the pension entitlement for each person affected.
  - 17.3. Recover any overpayment of pension made.
  - 17.4. Amend ongoing pension payments to the correct level.

- 17.5. Liaise with HMRC over any specific taxation impacts which may have occurred.
18. A further report was being presented to the Authority on 11 February 2019, to make three recommendations (**the Recommendations**), on how it should address the situation moving forward.<sup>3</sup>
19. Mr E's pension benefits, at the time he retired, were based on pensionable earnings either in his final year before retirement or based on an average of pensionable earnings over a specified period prior to retirement. The pensionable earnings would have included any additional salary received during a period of temporary promotion during that time.
20. This resulted in the final salary figures used to calculate his pension benefits being inflated, as additional salary received during a period of temporary promotion should have been excluded. His final pensionable salary should have been based solely on his substantive, rather than his temporary, role when he retired. Accordingly, he had been identified as a recipient of an overpayment of benefits.
21. If, at its meeting on 11 February 2019, the Authority accepted the Recommendations, it would result in Mr E's annual pension being adjusted with effect from 1 April 2019. However, there would be no requirement for the Authority to recover any previous overpayment of pension, including lump sums already paid, up to 31 March 2019.
22. It appreciated that the information in this letter would have been the first communication Mr E would have received in respect of this matter and that it would have caused him great concern. So, it provided details of the meetings it had arranged to discuss this matter and asked Mr E to confirm whether he would like to attend one of those meetings or whether he would like to have a meeting on an alternative date.
23. Following the Authority's meeting on 11 February 2019, it would write to him to formally notify him of the decision the Authority had taken, in respect of the recommendations.
24. On 12 February 2019, the Service sent Mr E a further letter, detailing the outcome of the Authority's meeting held the day before. This letter said the Authority had determined that:
- 24.1. temporary promotions were pensionable and that this decision was applicable from the effective date of the New Rule, which was 31 July 2013;
- 24.2. all future pension payments made after 31 March 2019 had to be adjusted, to ensure that they were calculated on the correct APB basis; and

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<sup>3</sup> The three recommendations are detailed in Appendix 4.

- 24.3. it would not recover any overpayment of lump sum or pension made, prior to 1 April 2019.
25. Subsequently, Mr E made a complaint through the first stage of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). In summary he said:-
  - 25.1. He had retired from the Service on the strength of the figures stated in the Quotation. Had the New Rule been applied correctly, he would have remained in his substantive role of Group Manager for 12 months to guarantee that his retirement benefits would have been maximised.
  - 25.2. To find himself in this predicament through no fault of his own was very distressing. He had given the majority of his working life to the Authority, which through its apparent negligence had let him down.
  - 25.3. The significant reduction of his annual pension had detrimentally impacted on everything he had diligently worked for during his 33 years of service. So, he "demanded redress."
26. On 2 April 2019, the Service responded to Mr E's complaint under stage one of the Scheme's IDRP. In summary it said:-
  - 26.1. It understood that Mr E felt it was unfair that, through no fault of his own, he would suffer a detriment as his annual pension would be reduced.
  - 26.2. The Authority had accepted full responsibility for the error in not implementing the New Rule, and for not informing him of the changes and implications on his future pension, on which he took the decision to retire.
  - 26.3. While it felt disappointed with the errors that had been made, there was nothing it could do other than confirm the Authority's decision. It could not overturn that decision. If it did, it would be making a decision that had already been determined as unlawful, under the Scheme's rules and regulations.
27. On 17 April 2019, Mr E appealed the Service's stage one IDRP decision.
28. On 8 July 2019, the Members of the Fire and Rescue Authority (**the Panel**) sent Mr E its stage two IDRP decision, not upholding his complaint. In summary, the Panel said:-
  - 28.1. It was maladministration for the Authority to have issued incorrect information to Mr E.
  - 28.2. Mr E could not have reasonably known, at the time he retired, that there had been a mistake in the application of the New Rule and that this would have adversely affected his annual pension, from 1 April 2019. Mr E decided to retire based on the figures he was given at the point of his application for retirement.

- 28.3. The remedy for incorrect information was to put the correct benefits into payment and not pay the incorrect benefits.
- 28.4. If the New Rule had been applied correctly by the Authority, the temporary promotion additional salary would not have been included in the calculation of Mr E's retirement benefits.
- 28.5. An estimated overpayment of £19,566.66 had been made to Mr E. This included an overpayment of the lump sum of £13,044.46 and an overpayment in annual pension, since Mr E retired, of £6,522.20.
- 28.6. It would not recover the overpayment.
- 28.7. Mr E's new annual pension from 1 April 2019 would be £24,874.61. His amended annual pension was calculated on an APB basis.

### **Summary of Mr E's position**

29. Mr E provided a detailed schedule of loss to evidence the financial detriment he asserts he suffered.<sup>4</sup> He also made some additional comments which have been summarised below, in paragraphs 30 to 49.

#### *Loss of higher income/salary*

30. He was generally aware that his retirement benefits would be calculated using a full year's salary, whether this included his temporary promotion salary or not. He asked and received confirmation of this from the Council.
31. As a result of this confirmation, he decided to retire in November 2015, as he would then have been in the Group Manager role for a year, so his pay in that role would have been counted in his retirement benefits calculation.
32. His decision to retire was also based on the fact that, from his calculations, after tax, he would have received £2,000 net per month. This was sufficient to cover his living expenses.
33. Had he realised his retirement benefits would not have been calculated using his temporary promotion salary, he would have continued in his substantive role as Group Manager until July 2016. At that time, he would have served a full year in this substantive post and his retirement benefits would have been properly calculated using his salary in that role.
34. Had he done so, he would have worked towards the Group Manager (Competent) level. This would have increased his salary by a further £1,568 per year. He would have commenced gathering evidence towards this promotion at the beginning of his temporary promotion period, knowing that he would have been seeking promotion to that substantive post. He expected that he would have been appointed to the role of

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<sup>4</sup> A summary of Mr E's schedule of loss is detailed in Appendix 5.

Group Manager (Competent) within one to two months of him being substantively promoted to Group Manager.<sup>5</sup>

35. The fact that he had reached 33 years' service was not relevant. He would not have retired had he known his correct pension entitlement. The key point is that he would have had a higher final salary for a pension that has a final salary link.

*Loss of chance*

36. He considered that there was a substantial chance, as opposed to a speculative one, that he would have retired in the rank of Group Manager (Competent). Because of this, he considered that he was entitled to damages on the loss of chance basis, as well as damages for any other financial loss and non-financial injustice he had suffered.
37. As set out by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602 (**Applied Maples**), and approved by the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5; [2020] A.C. 352 (**Perry**), where a chance of a better financial outcome is lost on the basis of the act of a third party, then this is assessed on the loss of chance basis.
38. In light of *Allied Maples* and *Perry*, the following questions needed to be asked:
- 38.1. Was there a substantial chance, as opposed to a speculative one, that he would have obtained the rank of Group Manager (Competent) if he had stayed on in employment?
- 38.2. If so, what was the chance that he would have obtained that rank?
- 38.3. What was the measure of loss to be awarded to him for the loss of chance of obtaining that rank?
39. The role of Group Manager (Competent) would not have been a promotion for him, it was a pay scale within the same rank. With the passage of time, a Group Manager moved to Group Manager (Competent). This was not akin to obtaining a promotion. Moving to a pay scale within the same rank did not require any competition or application process. It was a mere formality whereby someone in a development rank submitted a portfolio of evidence to demonstrate that they met the competent criteria.
40. It was his view that:-
- 40.1. He did not need to demonstrate on the balance of probabilities, that he would have obtained the rank of Group Manager (Competent);
- 40.2. His chance of obtaining the salary of Group Manager (Competent) was a substantial chance, particularly given that no promotion was necessary. The

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<sup>5</sup> Mr E provided to the Pensions Ombudsman, a letter from his previous line manager to support his assertion that he would have obtained the role of Group Manager (Competent).

chance could have been as much as 100% if he was almost bound to succeed.<sup>6</sup>

- 40.3. The Authority had provided no evidence to demonstrate that he would not have obtained Group Manager (Competent) pay prior to his retirement.
41. He accepted that he would have had to have submitted a portfolio of evidence to demonstrate his competence in the role. However, given his experience and period of time on temporary promotion, he maintained this would have been a mere formality, as he already had the evidence he needed. The Authority had not provided any rebuttal evidence and had merely made a blanket denial.
42. The fact that the Authority asserted that there was a substantial chance that he would have retired is the incorrect approach in law. The question was whether or not, having found that but for the negligence he would not have retired, the Pensions Ombudsman (**the PO**) considered that there was a substantial chance that he would have been promoted. A substantial chance was a low threshold. He had given convincing evidence on this point. He had already been promoted substantively to Group Manager prior to his retirement. His claim was for the difference between development pay and competent pay in the same role.
43. £140 per month, for the next 30 years, adjusted for inflation, was a significant amount for an ordinary hardworking person upon retirement. The calculation provided by the Authority was vastly oversimplified. It did not consider increases for inflation or interest and sought to unfairly diminish his losses. He asserted that the figures used by the Authority in its submissions were incorrect. He had provided correct figures in his schedule of loss. His initial loss was £214 per month and his annual loss was in the region of £1,956.66. This had increased year on year with the Consumer Prices Index.
44. Turning to the measure of loss to be awarded to him, for the loss of chance of a promotion, he submitted that:-
- 44.1. He would have retired from the Scheme in July 2016;
- 44.2. By the date of his retirement, he would have been in the role of Group Manager (Competent);
- 44.3. Upon retirement, he would have received a pension based on his final salary which would have included six months of salary in the role of Group Manager (Competent) and consequently a higher overall final salary.
- 44.4. He had lost the chance of an increased salary and increased pension, and he should be compensated for these losses.

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<sup>6</sup> *Hanif v Middleweeks* [2000] *Lloyd's Rep.* PN 920 at [14] per Mance LJ



*Overpaid pension contributions and loss of spouse's pension*

45. As a result of the Authority's negligence, he paid pension contributions at a higher rate than he otherwise would have because his temporary promotion pay was not pensionable. The contributions on his temporary promotion pay were 15.5% of a higher salary, whereas contributions on his substantive pay were 15.5% of a lower salary. He estimated that he had overpaid pension contributions in the region of £770.20, and that he was entitled to credit for this amount, as well as an indemnity as to any underpaid tax.
46. He was entitled to claim for the loss of spousal pension. As he would have continued working until July 2016, he would have had a higher pensionable salary. So, even before taking into account any chance he had of retiring on a higher salary, there was a claim for loss in respect of his spouse's pension. Any loss of chance calculation should also take into consideration the lower spouse's pension.

*Costs of an independent financial adviser*

47. He intended to seek financial advice in respect of purchasing an annuity with the amount he will be awarded. So, he was seeking the cost of a financial advisor to advise upon and assist with the purchase of an annuity.

*Distress and inconvenience*

48. It had taken the Authority 16 months to inform him of the error in relation to his pension. The severe delay was inexplicable. The error in the calculation of pension, as well as the issues he detailed in paragraphs 30 to 43 above, and the inexplicable delay clearly merited an award for non-financial injustice.

*Subsequent employment*

49. In September 2015, he set up a Fire Safety Consultancy through a limited company. He would have done the same if he had retired nine months later.<sup>7</sup>

**Summary of the Authority's position**

50. Mr E was not entitled to any losses as he had not acted to his detriment and would not have acted any differently had he known the correct position.

*Loss of higher income/salary*

51. Mr E had not provided evidence to support his assertion that he would have remained employed until 22 July 2016, and continued to receive a salary and accrue pension and lump sum benefits during that period of time. Or that he would have retired on 22 July 2016, had he not been given inaccurate information about his retirement benefits.

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<sup>7</sup> Mr E provided a letter from his accountant showing that his total earnings between 4 November 2015 to 22 July 2016 inclusive, was in the region of £5,000.

52. The evidence disclosed by Mr E indicated that he was minded to retire notwithstanding the provision of incorrect information. The following points supported this position:
- 52.1. Mr E had completed 33 years' service at the date of his retirement in November 2015.
  - 52.2. Mr E set had up his own a Fire Safety consultancy business in September 2015. This was not obtained to supplement his income as a result of the reduction in his pension. It was not clear that he would have set up this business had he not expected to retire in November 2015.
  - 52.3. The difference in Mr E's annual pension to the amount he was expecting was not significant. The difference in his pension going forward was £1,681.57 per annum, which equated to £140.13 per month.

*Loss of a chance*

53. Mr E had not established that there was a substantial chance that he would have obtained the permanent role of Group Manager (Competent), had he not received incorrect information, and had stayed on in employment. Its view was that it was clear that there was a substantial chance that Mr E would have retired in November 2015 had he been given the correct information. So, the question of whether he would have been promoted if he had not retired was moot.
54. The Authority agreed that Group Manager was simply a rate of pay associated with a Group Manager A role, paid to those that were newly promoted into the role. Over a period of time and with the demonstration of competence, these individuals would then be paid a Group Manager A salary. However, it was not agreed that moving into the Group Manager role was merely a formality. So, it did not agree that there was a substantial chance that Mr E would have obtained the role of Group Manager (Competent) on or before July 2016.
55. It was not correct that the chance of Mr E receiving the salary of a Group Manager (Competent) could have been as much as 100% if he was almost bound to succeed. Mr E was not bound to succeed.
56. The Authority's position remained that there was only a speculative chance that Mr E would have obtained Group Manager (Competent) salary prior to retirement were it not for the provision of incorrect information. So, there were no grounds to assess Mr E's losses on a loss of chance basis.
57. The Authority did not agree that Mr E had lost the chance of an increased salary and increased pension and did not consider any further compensation to be necessary. Mr E's submission that he would have retired from the Service in or around July 2016 was entirely speculative.

*Overpaid pension contributions*

58. Mr E had received an overpayment of £19,566.66. The Authority had not sought to recover that overpayment from Mr E. The overpayment was significantly more than the alleged overpaid pension contribution Mr E asserted he had paid. Accordingly, the Authority asserted that no further compensation was payable.
59. Any and all alleged losses in respect to Mr E's spouse's pension were too remote and could not reasonably be attributed to the incorrect information provided by the Authority.

*Distress and inconvenience*

60. While the provision of incorrect information caused Mr E distress and inconvenience, the Authority believed that no further compensation was payable to Mr E because:-
- 60.1. Mr E had received an overpayment of his pension entitlement;
- 60.2. The Authority had not sought to recover that overpayment, which was significantly in excess of the fixed amounts that the PO usually awarded for non-financial injustice, with only serious cases of non-financial injustice leading to awards of £1,000;
- 60.3. Not all maladministration should inevitably lead to an award for non-financial injustice;
- 60.4. The maladministration arose from a genuine error that the Authority had sought to address. The Authority was transparent and open regarding the error;
- 60.5. The Authority notified Mr E of the error within a reasonable timeframe, having carefully reviewed the position and available options;
- 60.6. The Authority thoroughly investigated and responded to Mr E's complaint in accordance with the IDRPs; and
- 60.7. The Authority is a publicly funded organisation.
61. On 3 September 2024, I sent Mr E and the Authority my Provisional Decision (**the Decision**) on this complaint.
62. Mr E did not accept the Decision. In response, he reiterated that he would have retired in July 2016, in the rank of Group Manager (Competent) had he been given correct information. He also said in summary:-
- 62.1. He accepts that the correct legal test to establish causation of loss is the balance of probabilities test.<sup>8</sup>

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<sup>8</sup> *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 and *PCP Capital Partners LLP and another v Barclays Bank plc* [2021] EWHC 307

- 62.2. He would not have commenced gathering evidence in the temporary promoted role in October 2014. This was because he would not have been eligible to submit a claim for competent pay until he was promoted on 22 July 2015. This was the point at which he could have reviewed work he had done up to that date, with a view to submitting a portfolio of evidence. He would have submitted this portfolio on or around October 2015, not October 2014.
- 62.3. It would have been an obvious benefit to him to have submitted the evidence in order to obtain competent pay upon his substantive promotion into the role of Group Manager. However, this was not something that he could have done prior to his substantive promotion. For the avoidance of doubt, he already had the evidence to obtain competent pay from acting up in the role. However, it was only upon his substantive promotion to Group Manager that he would have been able to submit it to obtain competent pay.
- 62.4. It could not be said that he delayed in submitting a portfolio of evidence. Appointment to a new role came with various initial challenges. Submitting a portfolio of evidence was not the first duty of any conscientious Group Manager upon appointment to the role.
- 62.5. He maintained that but for the incorrect information in the Quotation, he would have obtained the role of Group Manager (Competent) in or around January 2016 at the latest and would have benefited from around 6 months' competent Group Manager pay to his final salary. So, he would have retired on a higher salary and a higher pension benefit. He was able to demonstrate this on the balance of probabilities, particularly since he would have submitted his portfolio of evidence in October 2015.
- 62.6. His argument in this regard was as strong as it could be, and it had not been contradicted by anything the Authority had said. The Authority had not submitted any evidence, whether documentary or witness, to contradict his case.
- 62.7. To conclude in the circumstances that he had not discharged the burden of proof that he would have: (i) obtained Group Manager (Competent); (ii) submitted the requisite evidence in October 2015; and (iii) been awarded competent pay by January 2016 at the latest, would be to give rise to a significant procedural unfairness.
- 62.8. He did not accept that interest payable on his losses was not material.<sup>9</sup>
63. The Authority agreed with the Decision in relation to my finding that Mr E would not have been promoted, had he retired later than November 2015. However, it disagreed that Mr E would have retired in July 2016 instead of November 2015. It

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<sup>9</sup> Mr E provided an example of why he believed interest was material, using his salary.

reiterated some of the comments it had previously made to The Pensions Ombudsman (**TPO**), and also said in summary:-

- 63.1. It would have been to Mr E's financial benefit to start collating evidence to demonstrate competence in respect to the Group Manager (Competent) role from October 2014 onwards and to have completed this by August 2015.
- 63.2. While Mr E may not have been eligible to submit a claim for competent pay until his promotion in July 2015, it was clear that if he wished to do so, he would have needed to have already collated evidence to support such competence. He did not do so. So, the fact that he received incorrect information in September 2015 had no bearing on his decision not to begin collating or submitting evidence necessary for promotion at any time. The Authority noted that Mr E did not collate or submit evidence at any time, even after his promotion to Group Manager in July 2015.
- 63.3. It would have been entirely reasonable to expect that an employee seeking promotion to Group Manager (Competent) would have collated evidence to demonstrate competence at the earliest possible time. It may be the case that submitting a portfolio of evidence may not have been the first duty of any conscientious Group Manager upon appointment. However, Mr E's failure to collate the necessary records and evidence before the date he was promoted did not discharge the burden of proof in respect of his contention that he would have obtained Group Manager (Competent) salary prior to retirement, were it not for the provision of incorrect information.

## **Conclusions**

64. Mr E asserts that he has suffered a financial loss due to the Authority's maladministration, in not implementing the New Rule. This is because the Authority's failure to implement the New Rule resulted in him being provided with an erroneous retirement benefit quotation, on which he relied and consequently applied for retirement.
65. The manager/administrator of a public sector statutory scheme is required to pay the correct benefits under the scheme rules. If a higher pension is being paid than provided for in the rules by mistake, the manager/administrator of a public sector statutory scheme is required as a matter of law, to reduce the pension to the correct level. It has also been confirmed by the Courts that I cannot direct a public authority to provide an ultra vires benefit even if the member has been told incorrectly that he is entitled to it.
66. Accordingly, I consider that the Authority acted correctly by reducing Mr E's pension to the correct level for the future. In this case, the Authority is not seeking to recover any past overpayments of pension, so I do not need to consider any defences in law that Mr E may have to such a claim.

67. However, this does not mean that Mr E could not have any claim against the Authority for any financial or non-financial injustice, as a consequence of its maladministration in not implementing the New Rule correctly. To make an award for financial injustice, I would need to be satisfied that there was an infringement of an underlying legal right that has resulted in financial loss in accordance with established legal principles, such as negligent misstatement. Here, it is not disputed that the information provided was incorrect.
68. For a claim of negligent misstatement to be successful, it is necessary to establish whether the Authority, as Scheme manager, owed Mr E a duty of care to provide accurate information and, by providing incorrect information, breached its duty. Following *Robinson v Chief Constable of West Yorkshire Police (Rev 1)* [2018] UKSC 4, I consider that the correct approach is to consider whether there is already established precedent for a duty of care to apply in a particular situation. Here, I consider that there is clear established precedent that an administrator or manager providing information following a request from a scheme member is under a duty to ensure that the information is accurate.<sup>10</sup> The Authority owed a duty of care to Mr E to provide accurate information and breached its duty.
69. It has been established in *Corsham and Others v Police and Crime Commissioner for Essex and Others* [2019] EWHC 1776 (Ch), that the following questions should be considered when establishing reliance:-
- 69.1. Did Mr E rely on the statements that his pensionable salary would be based on his temporary promotion pay?
- 69.2. Was that reliance reasonable?
- 69.3. Would Mr E have acted differently if he had been told the correct position?
70. It is now accepted by the parties that the correct standard of proof to which these questions must be established is the balance of probabilities.
71. The next stage is to consider whether Mr E relied on the incorrect information. Mr E said that as a result of the confirmation from the Council that his retirement benefits would be calculated using his temporary promotion salary, and the Quotation he had received, he decided to retire. I find that Mr E did rely on the confirmation he had received from the Council and the figures in the Quotation before deciding to retire and, notwithstanding the existence of a disclaimer in this case<sup>11</sup>, it was reasonable for him to have done so, and the Authority appears to me, to have accepted this position (see paragraph 28.2 above).

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<sup>10</sup> *Musawi v Bevis Trustees* [2009] 055 PBLR - [2009] EWHC 1915 (Ch) at para 16  
*NHS Business Services Authority v Leeks & Ors* [2014] EWHC 1446 (Ch) at para 59  
*NHS Pensions Agency and another v Pensions Ombudsman and Beechinor* [1997] OPLR 99 at 102  
*Westminster City Council v Haywood* [1998] Ch. 377 at 394

<sup>11</sup> The disclaimer read: "Please note that the details given to you are without prejudice and are subject to final details from [the Council]. Information only based on your current situation in order to make a decision, you should seek further financial advice."

72. This is because the information and the Quotation were provided by the Authority in response to Mr E's request about how his temporary promotion salary would be treated for the purposes of calculating his pension. The mistaken basis on which the figures had been prepared would not have been obvious to Mr E, as he would not have known that the Authority had failed to implement the New Rule at the time. So, there was no reason for him to make further enquiries about his retirement benefits entitlement with the Council or the Authority.
73. Mr E said that had he known the correct position concerning the calculation of his retirement benefits, he would not have retired when he did. Instead, he would have continued to work until July 2016, as he would have been substantively promoted to the role of Group Manager for a year by that time. So, his retirement benefits would have been correctly calculated using his year's salary as a Group Manager.
74. Based on Mr E's circumstances at the time, I consider that, on the balance of probabilities, had he known the correct position concerning the calculation of his retirement benefits he would not have retired until July 2016. This is because: (i) prior to retirement, Mr E had queried with the Council if his temporary promotion salary would have been used in his retirement benefits calculations (and he ultimately retired just over a year after the temporary promotion to Group Manager); (ii) he was age 51 at the time that he retired; and (iii) he would only have had to work for a further nine months to achieve a full year's salary in the substantive role of Group Manager.
75. I find that by retiring earlier than he would otherwise have done, Mr E has incurred a financial loss. This is as a direct result of relying on the incorrect retirement quotation, and it follows that he should be compensated accordingly. Mr E is entitled to be put in the position he would have been in, had the incorrect statement not been made.
76. In addition to Mr E's submission that he would not have retired on 4 November 2015, had he not relied on the information and the figures in the Quotation, he has also submitted that he would have been able to attain the incremental grade of Group Manager (Competent) before he would have retired. He submits that it is necessary to consider the additional loss he suffered as a result of not attaining this incremental grade.
77. It has not been disputed that the progression from permanent Group Manager to Group Manager (Competent) was not a promotion as such, but a process of gathering evidence to demonstrate competence in the role. It appears to not be in dispute that it was for Mr E to collate that evidence.
78. In his submissions to TPO, prior to the Decision, Mr E stated that he "would have started gathering evidence towards [the Group Manager (Competent) level], at the beginning of [his] temporary promotion, knowing that [he] would be working towards appointment to the substantive position.
79. The issue with this assertion is that October 2014 precedes any specific written misinformation given by the Authority to Mr E. Mr E states that he was "generally

aware” that temporary promotion salaries were pensionable, and that he spoke to the Council for confirmation that this was correct. However, he did not seek written confirmation of his projected benefits until substantially later, on 15 September 2015. I do not consider that it was reasonable for Mr E to rely on a general understanding or verbal confirmation in making an important decision about whether to collate evidence to demonstrate competence as Group Manager (Competent).

80. In his post Decision comments Mr E said that he would not have commenced gathering evidence in the temporary promoted role in October 2014, because would not have been eligible to submit a claim for competent pay until he was promoted on 22 July 2015. This was the point at which he could have reviewed work he had done up to that date, with a view to submitting a portfolio of evidence. He would have submitted this portfolio on or around October 2015, and not October 2014.
81. Contrary to Mr E’s submissions, I did not find that Mr E would have submitted the portfolio of evidence in October 2014, only that it would have been to his benefit to start the evidence gathering process then, and that he knew this was the case in October 2014, regardless of the later misinformation. The evidence is that he did not do so.
82. In his submissions to TPO, it appears that Mr E estimated the process to demonstrate competence would have taken between 10 and 11 months. Had he started to do this in October 2014, he would have completed it as early as August 2015. The higher salary, and with it higher pension benefit at Competent level would then, on his understanding, have been included in the calculation of his aggregate salary under Rule G1 of the 1992 Order.
83. Mr E maintains that he would have obtained the role of Group Manager (Competent) in or around January 2016. However, to have achieved this, he would have needed to collate evidence from before the point he received the incorrect information in September 2015, which he did not do.
84. I do not consider that Mr E’s decision not to start the process of gathering information to show competence was taken in reliance on either the verbal information in October 2014 or the specific incorrect information in September 2015. I consider that it is more likely than not that Mr E had made the decision not to collate evidence to demonstrate competence on the basis of his “general understanding,” prior to September 2015. It follows that Mr E has not established on the balance of probabilities, that the loss of higher salary and benefits by him failing to collate evidence to demonstrate competence was caused by reasonable reliance on the misinformation he received in September 2015.
85. Even if Mr E had received the correct information in September 2015, and had started collecting evidence at that point, based on his own assessment of the time it would have taken (10-11 months), this would have been a period of only 9 months. So, it was unlikely that this would have given him sufficient time to demonstrate



competence and be promoted to the role of Group Manager (Competent), before retiring in July 2016.

86. I agree with Mr E's submissions that the Authority has not contradicted his version of events. However, for me to uphold this complaint, Mr E must present sufficient evidence to establish that, on the balance of probabilities, if had he not received the incorrect information he would have acted differently. Based on Mr E's submissions and the evidence presented by him, I consider it was more likely than not that that he would not have taken a different course of action had he not received the misinformation. This is because on his own evidence, his decision to take the course of action he did (not starting to gather evidence from October 2014) preceded the specific written misinformation by the Authority.
87. Mr E has submitted that it would be procedurally unfair if I do not find that he would have acted differently, because the Authority has not contradicted his evidence. However, in line with my investigatory role and inquisitorial function, it is for Mr E to present sufficient evidence to me that he would, on the balance of probabilities, have acted differently. If this was a case where there was simply no evidence, and I could not make a finding of fact on the evidence about whether Mr E would have acted differently, it might have been necessary for me to determine the issue, exceptionally, by resorting to the burden of proof.<sup>12</sup> However, for the reasons set out in paragraphs 77 to 86 above, I consider that the evidence presented is sufficient to reach a finding of fact on the balance of probabilities that Mr E would not have acted differently in respect of seeking the additional promotion.

#### *Overpaid pension contributions and spouse's pension claims*

88. Mr E estimates that he overpaid employee pension contributions by £770.20 during his period of temporary promotion because he paid contributions at 15.5% of a higher salary rather than 15.5% of a lower salary. These figures have not been challenged by the Authority, and I find that this figure is recoverable.
89. I have taken Mr E's comments regarding the overpaid pension contributions and a lower spouse's pension into consideration, when setting out the redress payable in my directions below.
90. I acknowledge Mr E's detailed assessment of loss, set out in Appendix 5, as well his submissions that the interest on his financial loss is not material. However, I consider that the directions below provide appropriate redress for the financial loss Mr E has suffered.

#### *Maladministration*

91. I find that this situation has caused Mr E distress and inconvenience. This is because, after being in receipt of his pension for over two years, he was informed that his annual pension benefits would be reduced. Mr E's retirement plans were seriously

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<sup>12</sup> *Stevens v Cannon* [2005] EWCA Civ 222, *Verlander v Devon Waste Management Ltd* [2007] EWCA Civ 835

impacted by the inaccurate information provided, causing him distress and inconvenience separate from and in addition to the financial loss he has sustained.

92. I acknowledge the Authority's position that the overpayment paid to Mr E of £19,566.66 is substantially higher than the usual level of award I would make in these circumstances. Certainly, in situations where a respondent has not sought to recover past overpayments, I will often not make a separate award for distress and inconvenience. However, in this case, as the directions at paragraph 94 below take the overpayment of the lump sum of £13,044.46 and overpayment in annual pension, since Mr E retired, of £6,522.20 into account when assessing the financial loss that Mr E has suffered (and thus diminishes the 'windfall' received), I consider that a separate award for distress and inconvenience is appropriate.

93. I uphold Mr E's complaint in part.

### Directions

94. Within 28 days of the date of this Determination, the Authority shall calculate the loss Mr E has incurred at the date of this Determination (**the Calculation Date**). The loss should be equal to Amount A less Amount B (if positive) where:-

94.1. Amount A is equal to:-

94.1.1. The total of pension and lump sum benefits Mr E would have been paid under the Scheme up to the Calculation Date on the following assumptions: (i) he had remained in employment as Group Manager until 22 July 2016, and accrued additional pensionable service in the Scheme during this period;<sup>13</sup> (ii) he had received the salary increases he would have been entitled to if he had remained as Group Manager; (iii) he had retired from the Scheme on 22 July 2016, and his pension and lump sum came into payment, having been calculated in accordance with the New Rule, on that date; plus

94.1.2. the estimated cost of purchasing an annuity with an insurer to provide a pension on and after the Calculation Date for and in respect of Mr E on the assumptions specified in (a) assuming Mr E is in good health; plus

94.1.3. the total of the salary Mr E would have received on the assumptions specified in 94.1.1 above, less any employee contributions he would have needed to pay to remain in the Scheme while accruing additional pensionable service; plus

94.1.4. the sum of £770.20 in overpaid employee contributions.

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<sup>13</sup> Provided that this does not exceed the maximum accrual of pensionable service under the Scheme Rules.

94.2. Amount B is equal to:-

- 94.2.1. the total of the pension and lump sum payments paid to Mr E by the Scheme in the period from 4 November 2015 until the Calculation Date (including any overpayments which the Authority does not seek to recover from Mr E); plus
  - 94.2.2. the estimated cost of purchasing an annuity with an insurer to provide a pension on and after the Calculation Date equal to the pension that is actually payable under the Scheme for and in respect of Mr E, assuming Mr E is in good health; plus
  - 94.2.3. the total of earnings Mr E received from his role as Fire Safety Consultant in respect of the period he was engaged in consulting activities on or after 4 November 2015 to 22 July 2016; plus
  - 94.2.4. the total of any employer and employee contributions paid into a pension in respect of his role as a Fire Safety Consultant on or after 4 November 2015 to 22 July 2016.
- 94.3. No interest should be added to the pension, lump sum and salary payments before the Calculation Date as the amounts are unlikely to be material.
- 94.4. The Authority should instruct the Actuary to calculate the loss acting as expert holding the balance fairly between the parties. The Actuary should be the Scheme Actuary or, if the Scheme Actuary is not willing to perform this role, such other Actuary instructed for this purpose by the Authority. The Actuary's costs should be met by the Authority. The Actuary's calculations should be shared with Mr E once they are available.
- 94.5. The Authority should pay Mr E an amount equal to 80% of the loss (if any), as calculated by the Actuary using the above methodology, within 28 days of the date the Actuary completes the calculations. The reduction of the payment by 20% is designed broadly to put Mr E in the same net tax position he would have been in, if the inaccurate statement had not been made. If HMRC then seeks to levy income tax on the payment made by the Authority pursuant to this paragraph, the Authority should pay Mr E an additional sum designed to put him in the position he would have been in, if such additional tax liability had not arisen. The Authority should also pay Mr E an additional amount designed to meet any additional tax liability, if HMRC treat the above payment as an unauthorised member payment for the purposes of the Finance Act 2004.

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95. Within 28 days of the date of this Determination, the Authority shall pay Mr E £1,000 for the serious distress and inconvenience this situation has caused him.

**Dominic Harris**

Pensions Ombudsman  
11 March 2025

## Appendix 1

### Relevant sections of the Firemen's Pension Scheme Order 1992

"...

#### PART G

#### PENSIONABLE PAY AND CONTRIBUTIONS

##### **G1 Pensionable pay and average pensionable pay**

- (1) Subject to paragraphs (2), (9) and (10), the pensionable pay of a regular firefighter is the aggregate of—
  - (a) the amount determined in relation to the performance of the duties of his role (whether as a whole-time or part-time employee) other than those amounts payable to him in respect of the benefits within rule B5C(5); and
  - (b) the amount (if any) of any benefits which are pensionable under rule B5C(1).
- (2) ...
- (3) The average pensionable pay of a regular firefighter is, subject to paragraphs (5) to (7C), the aggregate of his pensionable pay for the year ending with the relevant date.
- (4) The relevant date—
  - (a) for the purposes of rule C7 (spouse's or civil partner's award where no other award payable), and the Compensation Scheme, is the date of the person's last day of service as a regular firefighter, and
  - (b) for all other purposes of this Scheme, is the date of the person's last day of service in a period during which contributions were payable under rule G2.
- (5) Subject to paragraphs (6) and (7), if he was in receipt of pensionable pay for part only of the year ending with the relevant date, his average pensionable pay is the aggregate of his pensionable pay for that part multiplied by the reciprocal of the fraction of the year which that part represents.
- (6) For the purposes of paragraphs (3) and (5), any reduction of pensionable pay as a result of any—
  - (a) sick leave;

- (b) stoppage of pay by way of punishment;
  - (c) ordinary maternity, ordinary adoption or paternity leave;
  - (ca) parental bereavement leave;
  - (d) paid additional maternity or additional adoption leave; or
  - (e) unpaid additional maternity or additional adoption leave where contributions have been paid under rule G2A,
- shall be disregarded.

(7) If the amount determined in accordance with paragraphs (3) to (6) is less than it would have been if the relevant date had been the corresponding date in whichever of the two preceding years yields the highest amount, that corresponding date shall be taken to be the relevant date.

(7A) The average pensionable pay of a regular firefighter who—

- (a) is entitled to a long service increment; and
- (b) retires after 30th September 2006 and before 1st October 2007, or becomes entitled to a deferred pension under rule B5 within that period,

shall be calculated—

- (i) as if his long service increment had accrued at the rate of £990 per annum (disregarding the reduction in the amount of the long service increment that had effect in relation to times on and after 1st October 2006), and
- (ii) disregarding any LS-related payment.

(7B) The average pensionable pay of a regular firefighter who—

- (a) is entitled to additional pension benefit under rule B5B (additional pension benefit: long service increment), and
- (b) retires on or after 1st October 2007,

shall be calculated on the basis of whichever of the following paragraphs yields the greater amount—

- (i) the calculation is made with regard to the amount credited to him under rule B5B, but without regard to his long service increment and any LS-related payment, or

- (ii) the calculation is made with regard to his long service increment and any LS-related payment, but without regard to the amount credited to him under rule B5B.
- (7C) The average pensionable pay of a regular firefighter shall be calculated without reference to any additional pension benefit credited under rule B5C (additional pension benefit).

## Appendix 2

### Details of the Old Rule B5C

#### **“B5C Additional pension benefit: continual professional development**

- (1) A regular firefighter who, in any CPD year beginning with the year commencing on 1st July 2007, receives CPD payments, shall be credited with an amount of additional pension benefit in respect of that year.
- (2) Subject to paragraph (3), the amount of additional pension benefit in respect of a CPD year shall be determined on 1st July immediately following the year in question in accordance with guidance and tables provided by the Scheme Actuary.
- (3) Where the Retail Prices Index for the month of September preceding the relevant tax year is higher than it was for the month of September in the CPD year in question, the amount of additional pension benefit for that CPD year (as calculated in accordance with paragraph (2) and, if applicable, this paragraph) shall be increased by the same percentage as the percentage increase in the Retail Prices Index.
- (4) Any increase in accordance with paragraph (3) shall be applied with effect from the first Monday of the relevant tax year.
- (5) In this rule—

“CPD payments” , as regards a firefighter, means payments made to him by his employing authority in respect of his continual professional development;

“CPD year” means a period of 12 months beginning with 1st July in which a firefighter is in receipt of CPD payments;

“relevant tax year” means a tax year in relation to which—

- (a) the amount of a firefighter’s pension benefits is calculated for the purposes of this Scheme, and
- (b) he is not in receipt of a pension under this Scheme or entitled to a deferred pension under rule B5;

and a tax year is a relevant tax year in relation to a particular CPD year if it is the tax year in which CPD payments for that CPD year are taken into account; and

“tax year” means the period of 12 months beginning with 6th April.”



## Appendix 3

### Details of the new Rule B5C

“ ...

#### **B5C Additional pension benefit**

- (1) Where a fire and rescue authority determines that the benefits listed in paragraph (1) are pensionable, and in any additional pension benefit year pays any such pensionable benefits to a regular firefighter, the authority shall credit the firefighter with an amount of additional pension benefit in respect of that year.
- (2) Subject to paragraph (3), the amount of additional pension benefit in respect of that year shall be determined on 1st July immediately following the year in question in accordance with guidance and tables provided by the Scheme Actuary.
- (3) The amount of additional pension benefit determined in accordance with paragraph (2) shall be increased on the first Monday of the following relevant tax year by the same amount as any increase which would have applied if that additional pension benefit were a pension to which the Pensions (Increase) Act 1971 applied and the beginning date for that pension were the 1st July of the tax year immediately before the relevant tax year.
- (4) For the avoidance of doubt, the increase of additional pension benefit in the tax year 2010/2011 shall be increased by the same percentage as the percentage increase in the Consumer Prices Index in September 2010 with effect from Monday 11th April 2011.
- (5) The benefits referred to in paragraph (1) are—
  - (a) any allowance or supplement to reward additional skills and responsibilities that are applied and maintained outside the requirements of the firefighter's duties under the contract of employment but are within the wider functions of the job;
  - (b) the amount (if any) paid in respect of a firefighter's continual professional development;
  - (c) the difference between the firefighter's basic pay in their day to day role and any pay received whilst on temporary promotion or where he is temporarily required to undertake the duties of a higher role;
  - (d) any performance related payment which is not consolidated into his standard pay.
- (6) In this rule—

“additional pension benefit year” means the period of 12 months beginning with 1st July in which a firefighter is in receipt of any of the benefits listed in paragraph (5).

“the beginning date” means the date on which the pension is treated as beginning for the purposes of section 8(2) of the Pensions (Increase) Act 1971;

“following relevant tax year” means the tax year after the relevant tax year, in relation to which the member is not a pensioner member or entitled to a deferred pension under rule B5;

“relevant tax year” means a tax year in relation to which—

- (a) the amount of a firefighter’s pension benefits determined under this rule for the purposes of this Scheme is taken into account for tax purposes, and
- (b) the firefighter is not in receipt of a pension under this Scheme or entitled to a deferred pension under rule B5; and

“tax year” means the period of 12 months beginning with 6th April.”

## **Appendix 4**

### **The three recommendations detailed in the Service's 1 February 2019 Letter**

"The first recommendation is that the Fire Authority confirms that temporary promotions are pensionable, and that this decision is applicable from the effective date of the new Rule B5C, i.e. 1 July 2013.

The second recommendation is that the Fire Authority adjust all future pension payments made after 31 March 2019, to ensure they are calculated and made on the APB basis.

The third recommendation is that the Fire Authority does not recover any overpayment of lump sum or pension made prior to 1 April 2019.

The second and third recommendations are based on the principle that there is already a precedent set in respect of recovering pension overpayments in the public sector. The general approach taken by public sector pension schemes to this issue has been to reduce future pension payments to the correct level going forward and to waive the repayment of any historic overpayments to avoid financial hardship to members.

## Appendix 5

### A summary of Mr E's schedule of loss

1. Mr E provided detailed calculations of the past losses he believed he incurred between November 2015 and 12 April 2022. He also provided a summary of the future losses that he believes he will incur. A summary of these losses is detailed below.

#### *Past loss*

- 1.1. Loss of earnings – from 4 November 2015 to 21 July 2016, after deducting the total amount annual pension Mr E received during the same period amounted to £7,696.94 net.
- 1.2. Overpaid pension contributions between 27 July 2014 and 22 July 2015 amounted to £770.20.<sup>14</sup> Mr E is also claiming an indemnity to any underpaid tax as a result of tax relief on his contributions.
- 1.3. Difference in pension from 21 July 2016 to 12 April 2022 totalled £4,961.29.<sup>15</sup>
- 1.4. Difference in lump sum he was paid when he retired in November 2015 and the lump sum that he would have received, had he retired on 21 July 2016 totalled £23,158.64.
- 1.5. Total past loss inclusive of interest (£7,965.98) up to 12 April 2022 amounted to £44,553.05.

#### *Future loss*

- 1.6. Based on Mr E's assumption that he would live until age 83.66 and his wife living until the age of 87, he estimated his total future loss (his pension and his wife's spouses' pension) to be £90,744.66.

#### *Mitigation/Credit*

- 1.7. Between the time Mr E retired and 12 April 2022, Mr E had earned £74,000 dividends from the Fire Safety Consultancy business he had set up following his retirement.
- 1.8. He also earned £8,000 net in 2017-1018 working for registered landlords.
- 1.9. In the year to September 2020, he withdrew £29,000 in dividends from his Fire Safety Consultancy business. He also received a pension of approximately £24,948.52, giving a total of £53,874.61. £29,000 was calculated to be £19,903.47 net.

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<sup>14</sup> This is Mr E's best estimate figure.

<sup>15</sup> This figure is the amount after Mr E deducted the pension payments he had actually received during the same period.

1.10. Total credit up to 12 April 2022 amounted to £19,903.47.

*Taxation*

1.11. Mr E gave details of the tax that he believes he would have to pay on the compensation he believes he is entitled to. He asserts his losses amounted to a total of £115,394.24 net of taxation. After grossing this loss up to reflect the incidence of taxation on any award of damages, the total compensation he is claiming is £173,320.44.

*Alternative approach*

1.12. As an alternative, Mr E suggested that I could direct the administrators and/or managers of the relevant pension scheme to take steps to remedy the injustice, namely, to ensure that he receives the equivalent of the pension that would have been payable had he retired on 21 July 2016.

1.13. In this event, he would seek past losses only, as outlined above, in paragraphs 1.1 to 1.5 of this Appendix, and grossed up to counterbalance the incidence of taxation.