

## Ombudsman's Determination

Applicant	Mr S
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 S 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 upheld against the Authority because:-
  - 2.1. Mr S reasonably relied on incorrect information he received from the Council and has suffered a financial loss, as a result of the Authority's maladministration in failing to apply the rules governing the Scheme correctly; and
  - 2.2. Mr S has suffered serious distress and inconvenience as a result of the Authority's maladministration stated 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 Additional Pension Benefits (**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 S was born in April 1965. He was previously employed by the Fire and Rescue Service (**the Service**) and was an active member of the Scheme from 19 September 1988 until he retired, on 14 August 2017.
8. In 2017, as Mr S was approaching his 30th year of service, he requested retirement quotations for the benefits he could receive at retirement. At the time, his substantive role was Station Manager Competent. He had been temporarily promoted to the role of Flexi Duty Station Manager Competent (**Flexi Duty Station Manager**), between 1 August 2016 and 6 August 2017 inclusive.
9. The quotation he was subsequently sent (**the Quotation**) informed him that, at retirement, he could receive an annual pension of £23,784.99, and a lump sum of £167,191.51.
10. Mr S retired in August 2017 and received the benefits stated on the Quotation.
11. On 1 February 2019, the Service wrote to Mr S (**the February Letter**). A summary of the February Letter is detailed below in paragraphs 12 to 22.

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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. It had come to light at the end of November 2017, that the Authority had not implemented the New Rule and had continued to treat temporary promotions as pensionable pay under the old regulations. It included such payments in final salaries for pension purposes, where they had occurred within three years of retirement.
13. 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.
14. 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:-
  - 14.1. Temporary promotions were pensionable and pension benefits are earned through an APB.
  - 14.2. 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.
  - 14.3. 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.
15. As part of the 2017/2018 audit of accounts, the Wales Audit Office considered the decisions taken by the Authority as detailed in paragraph 14.1 to 14.3 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 rules, 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.
16. To correct the misapplication of the New Rule, the Authority would have to:-
  - 16.1. Determine that temporary promotion payments were pensionable through an APB from 1 July 2013.
  - 16.2. Recalculate the pension entitlement for each person affected.
  - 16.3. Recover any overpayment of pension made.
  - 16.4. Amend ongoing pension payments to the correct level.
  - 16.5. Liaise with HMRC over any specific taxation impacts which may have occurred.

17. 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>
18. Mr 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 earning 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.
19. 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 role at the point of retirement. Accordingly, he had been identified as a recipient of an overpayment of benefits.
20. If, at its meeting on 11 February 2019, the Authority accepted the Recommendations, it would result in Mr 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.
21. It appreciated that the information in this letter would have been the first communication Mr S 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 S to confirm if he would like to attend one of those meetings or if he would like to have a meeting on an alternative date.
22. 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.
23. On 12 February 2019, the Service sent Mr S a further letter, detailing the outcome of the Authority's meeting held the day before. This letter said the Authority had determined that:
  - 23.1. temporary promotions were pensionable through an APB and that this decision was applicable from the effective date of the New Rule, which was 31 July 2013;
  - 23.2. 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
  - 23.3. it would not recover any overpayment of lump sum or pension made prior to 1 April 2019.

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

24. On 7 March 2019, Mr S made a complaint through the first stage of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). In summary he said:-
- 24.1. His decision to retire was based solely on the retirement figures he had received from the Council. The figures showed that he would be able to support his family. He did not have to retire at the time, as he was only 52 years old and was not suffering from ill health. He could have continued working.
  - 24.2. He withdrew from the promotion process on the basis of the erroneous retirement benefit figures he was quoted. He had taken part in the promotion process three years previously. Had he known his benefits were less than he was informed they would have been, he would have applied and been promoted on his own merits.
  - 24.3. If his pension was reduced by £3,793 per annum, as was being proposed, he would need to seek further employment. He had asked seriously about whether he could return to his previous role.
  - 24.4. If the option to return to his previous role was not offered to him, he would explore pursuing a claim for constructive dismissal because he believed the advice he had received from the Service made him leave his job.
25. On 27 March 2019, the Service responded to Mr S' complaint under stage one of the Scheme's IDR. In summary it said:-
- 25.1. It understood that Mr S felt it was unfair that, through no fault of his own, he would suffer a detriment as his annual pension would be reduced.
  - 25.2. 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.
  - 25.3. 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.
26. On 31 March 2019, Mr S appealed the Service's IDR stage one decision.
27. On 8 July 2019, the Members of the Fire and Rescue Authority (**the Panel**) sent Mr S its decision under stage two of the IDR. The Panel said in summary:-
- 27.1. It was maladministration for the Authority to have issued incorrect information to Mr S.
  - 27.2. Mr S 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 S decided to

retire based on the figures he was given at the point of his application for retirement.

- 27.3. The remedy for incorrect information was to put the correct benefits into payment and not pay the incorrect benefits.
- 27.4. 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 S' retirement benefits.
- 27.5. An estimated overpayment of £32,669.25 had been made to Mr S. This included an overpayment of the lump sum of £26,663.35 and an overpayment in annual pension, since Mr S retired, of £6,005.90.
- 27.6. It would not recover the overpayment.
- 27.7. Mr S' new annual pension from 1 April 2019 would be £19,991.79. His amended annual pension was calculated on an APB basis.

### **Summary of Mr S' position**

28. Mr S provided information he had received from the Authority following a Freedom of Information (**FoI**) request, and a detailed schedule of loss to evidence the financial detriment he asserted he had suffered.<sup>4</sup> He also made some additional comments, and these have been summarised below, in paragraphs 29 to 51.
29. Prior to receipt of the Quotation, the Service had verbally informed him of the benefits he could get at retirement. The figures provided in the Quotation were consistent with the figures he had previously been given by the Service. Had he been given correct information concerning how his pension would be calculated, he would not have retired in August 2017.

### *Loss of higher salary/income*

30. The fact that he had reached 30 years' service was not a relevant point in circumstances where he would not have retired had he known his correct pension entitlement. The key point was that he would have had a higher final salary in a pension that had a final salary link and would have worked to obtain this.
31. By 2017, he had completed four out of the five stages of the promotional process to become a Flexi Duty Station Manager. He decided to withdraw from the promotional process and retire, because by August 2017, his pension would have been based on a year's worth of his temporary promotion salary.
32. Had he been correctly informed about how his pension should have been calculated, he would not have withdrawn from the promotion process. He was only 52 years old

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

at the time and would have continued to work until age 55, which would have been in April 2020.

33. He had provided all the evidence he could feasibly have, to demonstrate that he clearly met the standard of the balance of probabilities in this case, that he would have remained employed until April 2020. By contrast, the Authority has provided no evidence to rebut his position.

*Loss of chance*

34. There was a substantial chance as opposed to a speculative one, that had he not retired in August 2017, he would have been promoted to the role of Flexi Duty Station Manager. The promotion process occurred every year. Had he remained in employment and not retired in August 2017, the next promotional round for Flexi Duty Station Manager would have taken place in April 2018.
35. During the April 2018 promotion process, 18 candidates were interviewed and of the 18, 12 were promoted. He understood that four or less of those appointed were the same level as his substantive post, and the others were Watch Managers, who were less qualified than him.
36. He believes that having been promoted to the role of Flexi Duty Station Manager on three previous occasions, he was well placed to compete for the role in the promotion process. Further, his line manager had said in an email that it was likely that he would have achieved the next step in the promotion trail, given his experience and capability.<sup>5</sup>
37. As set out by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602 (**Allied 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. Whether or not he would have been successful in obtaining a promotion would have been dependent on the assessment of those involved in any promotion process.
39. In light of *Allied Maples* and *Perry*, the following questions needed to be asked:-
- 39.1. Was there a substantial chance, as opposed to a speculative one, that he would have been promoted if he had stayed on in employment?
- 39.2. If so, what was the chance he would have been promoted?
- 39.3. What was the measure of loss to be awarded to him, for the loss of chance of promotion?
40. The evidence from his line manager was compelling evidence that he had excellent prospects of promotion to Flexi Duty Station Manager. This evidence was not

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<sup>5</sup> Mr S provided a copy of his line manager's email to The Pensions Ombudsman.

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

41. The Authority provided no evidence to demonstrate his chances of promotion or otherwise. In circumstances where his case is not disputed by the Authority, the Pensions Ombudsman (**the PO**) should accept the evidence of his line manager, and assess his loss of chance of a promotion, a higher salary and a higher pension, accordingly.
42. The fact that the Authority asserted that there was a substantial chance that he would have retired was the incorrect approach in law. The question was whether, having found that but for the negligence, he would not have retired, the PO considers that there was a substantial chance that he would have been promoted. A substantial chance is a low threshold. He has given cogent evidence on this point, and it was clear that it could not be “entirely speculative” that he would have obtained a promotion if he was already acting up in the role.
43. Turning to the measure of loss to be awarded to him for the loss of chance of a promotion he submitted that:
  - 43.1. he would have retired from the Scheme on his 55th birthday;
  - 43.2. by the date of his retirement, he would have been in the role of Flexi Duty Station Manager;
  - 43.3. upon retirement, he would have received a pension based on his final salary in the role of Station Manager; and
  - 43.4. he has lost the chance of an increased salary and increased pension, and he should be compensated for these losses.

*Overpaid pension contributions and spouse's pension*

44. 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 14.7% of a lower salary. He estimates that he has overpaid contributions in the region of £1,343.86, and that he is entitled to credit for these amounts, as well as an indemnity as to any underpaid tax.
45. He is also entitled to claim for the loss of spousal pension, as set out in his schedule of loss. He would have continued working until his 55th birthday. So, it follows that he would have had a higher pensionable salary. Consequently, even before taking into account any chance of promotion, there is a claim for loss in respect of the spouse's

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



pension. Any loss of chance calculation should also take into consideration the lower spouse's pension.

46. He believes the loss he incurred in relation to the spouse's pension was recoverable, since the PO has jurisdiction to assess the losses of any beneficiary under a scheme. The Authority has not explained why it considers that this claim was too remote.

*Distress and inconvenience*

47. The Authority's maladministration has had a negative impact on him. The severe delay of 16 months between when the Authority discovered it had incorrectly implemented the New Rule, and when it informed him that his pension was incorrect, as well as the other factors as set out in paragraphs 30 to 46 above, merit an award for non-financial injustice.

*Subsequent employment*

48. Following his retirement, he commenced working as a teaching assistant with a zero hours contract, between October 2017 and his 55th birthday. He earned £7,571.86 gross in that role. He ceased this role because of Covid-19.
49. Since January 2021, he had been working for the Fire Brigade as a Civilian Training Officer. The full-time salary for this role was £24,000 per annum and he worked part-time hours. He did not intend to continue working in this role after September 2022, because it was tough work building and maintaining fires for training purposes, particularly at his age.
50. He commenced this role because he needed the money to make up the shortfall in his pension benefits and would not have commenced this role had it not been for the issue with his pension.
51. Whether or not he would have obtained employment as a teaching assistant was not relevant to the causation question which the PO must decide. He would not have needed to seek or obtain this employment had he not retired in August 2017, based on the negligent misstatement by the Authority.

**Summary of the Authority's position**

52. Mr S is 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 income/salary*

53. Mr S has not provided evidence to support a contention that he would have remained employed until April 2020 and continued to receive a salary and accrue pension and lump sum benefits during that period. He has also not provided evidence that he would have retired on or around April 2020, had he not been given inaccurate information about his retirement benefits.

54. The evidence disclosed by Mr S indicated that he was minded to retire, notwithstanding the provision of incorrect information. The following points support this position:-

54.1. Mr S had completed 30 years' service at the date of his retirement in August 2017; and

54.2. Mr S commenced employment as a teaching assistant in October 2017. This role was not obtained to supplement his income because of the reduction of his pension. It was not clear that he would have sought and obtained this employment had he not retired in August 2017.

*Loss of chance*

55. The Authority does not agree that had Mr S known that he had been given the wrong information then, not only would he have stayed on in employment, but he also would have been promoted. It was clear that there was a substantial chance that Mr S would have retired in August 2017 had he been given the correct information. So, the question of whether he would have been promoted if he had not retired was moot.

56. There was not a substantial chance that Mr S would have obtained the Flexi Duty Station Manager role on or before April 2020. He was incorrect to state that he would have been guaranteed to move into the Flexi Duty Station Manager role. It was not a given that Mr S would have attained the role of Flexi Duty Station Manager had he not retired. Promotion to the role of Flexi Duty Station Manager was not guaranteed.

57. It was not correct that the chance of Mr S receiving the salary of Flexi Duty Station Manager could be as much as 100% if he was almost bound to succeed. Mr S was not bound to succeed. Any promotion process inherently included a prospect that the applicant was unsuccessful.

58. The Authority's position remained, that there was only a speculative chance that Mr S would have obtained a Flexi Duty Station Manager salary prior to retirement was it not for the provision of incorrect information. There were no grounds to assess Mr S' losses on a loss of chance basis.

59. The Authority does not agree that Mr S had lost the chance of an increased salary and increased pension and does not consider any further compensation to be necessary. Mr S' submission that he would have retired from the Authority in or around April 2020 was entirely speculative.

*Overpaid pension contributions*

60. Mr S had received an overpayment of £32,669.25. The Authority had not sought to recover that overpayment from Mr S. The overpayment was significantly more than the alleged overpaid contribution figure cited by Mr S. The Authority believed that no further compensation was payable.

61. Any and all alleged losses in respect of Mr S' spouse's pension were too remote and could not reasonably be attributed to the incorrect information provided by the Authority.

*Distress and inconvenience*

62. While the provision of incorrect information caused Mr S distress and inconvenience the Authority believed that no further compensation should be awarded to Mr S because:

62.1. Mr S received an overpayment of his pension entitlement;

62.2. 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;

62.3. not all maladministration should inevitably lead to an award for non-financial injustice;

62.4. the maladministration arose from a genuine error that the Authority had sought to address. The Authority was transparent and open regarding the error;

62.5. the Authority notified Mr S of the error within a reasonable timeframe, having carefully reviewed the position and available options.

62.6. the Authority thoroughly investigated and responded to Mr S' complaint in accordance with the IDR; and

62.7. the Authority is a publicly funded organisation.

63. On 3 September 2024, I sent Mr S and the Authority my Preliminary Decision (**the Decision**) on this complaint.

64. Mr S accepted the Decision.

65. The Authority did not accept the Decision. It reiterated the comments it had previously provided to The Pensions Ombudsman (**TPO**) but added:-

65.1. It is incorrect to state that Mr S would have been guaranteed to move into the Flexi Duty Station Manager role. Mr S had completed four of the five stages towards promotion before his retirement. The fifth stage was the interview to achieve Flexi Duty Station Manager. Mr S would have had to have performed well at the next interview process. There was no guarantee of success at this stage.

65.2. In any event, had Mr S succeeded at interview and been promoted, such promotion would not have taken place on 1 May 2018. Interviews took place on 17 July 2018 and promotion would have been shortly after the interviews if Mr S had scored sufficiently. An interview did not take place. So, it believed

that it was not correct that the chance of Mr S receiving the salary of Flexi Duty Station Manager could be as much as 100% if Mr S was almost bound to succeed. Mr S was not bound to succeed.

## Conclusions

66. Mr S 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.
67. 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.
68. I find that the Authority acted correctly by reducing Mr 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 S may have to such a claim.
69. However, this does not mean that Mr S 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.
70. For a claim of negligent misstatement to be successful, it is necessary to establish whether the Authority, as Scheme manager, owed Mr S 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>7</sup> The Authority owed a duty of care to Mr S to provide accurate information, and breached its duty.

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<sup>7</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

71. The next stage is to consider whether Mr S relied on the incorrect information. 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:-
- 71.1. Did Mr S rely on the statements that his pensionable salary would be based on his temporary promotion pay?
- 71.2. Was that reliance reasonable?
- 71.3. Would Mr S have acted differently if he had been told the correct position?
72. Mr S has said that he applied for a statement of his retirement benefits in 2017, as he was approaching 30 years of service. He has said that he relied on the information contained in the Quotation when deciding to retire. Mr S approached the Authority when approaching 30 years' service, and he retired after receiving the Quotation. I consider that Mr S had not decided to retire before receiving the Quotation and that he did so on the basis of the figures provided.
73. The mistaken basis on which the figures had been prepared would not have been obvious to Mr S, and the figures were similar to those quoted in other benefit statements he had received previously. My attention has not been drawn to a disclaimer indicating that the figures were illustrative only, or that they could not be relied upon. Further, Mr S 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.
74. Mr S has also 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 age 55.
75. I consider that, based on: (i) Mr S' age; and (ii) him asking if it were possible for him to have his job back after being notified of the error, on the balance of probabilities, Mr S would have continued to work until age 55, had he known the correct position.
76. I find that by retiring earlier than he otherwise would have done, Mr S 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 S is entitled to be put in the position that he would have been in, had the incorrect statement not been made.
77. In addition to Mr S' submission that he would have continued to work until age 55, he has also claimed that he would have achieved promotion within that period. He submits that it is necessary to consider the additional loss he suffered as a result of not attaining the role of Flexi Duty Station Manager, and that the correct standard of proof by which to assess this is on the loss of chance basis.

78. I will consider first what the correct standard of proof is in this case, and then whether Mr S' additional claim meets this standard.

*Loss of chance*

79. It is important to note that loss of chance is a method of quantifying loss that has been incurred because of the actions of a respondent, where what is lost is a chance of financial gain contingent on the subsequent act of an independent third party.

80. The key element of the modern statement of loss of chance in *Allied Maples* and confirmed by *Perry*, is that it is only loss incurred by the hypothetical actions of a third party that is assessed on a loss of chance basis. It was held by Leggatt J in *Hirstenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm) (**Hirstenstein**) that:

“When a court has to decide what people would have done in the absence of professional negligence, the standard of proof differs according to whose actions are under consideration. Where the question is what a party to the proceedings would have done, the matter is decided on the balance of probability. Thus, if the court considers that it is more probable than not that the claimant would have acted in a particular way, the court will proceed on the basis that the claimant would indeed have acted in that way; while if that burden is not met, the court will proceed on the basis that the claimant would not have done so. The same all-or-nothing approach applies where the question is what the defendant would have done. By contrast, where the question is what a third party would have done, to the extent that there is a substantial doubt about the matter the approach of the court, as established by cases such as [*Allied Maples*] and many others, is to assess the chance that the third party would have acted in the relevant way and to award damages which reflect that chance.”

81. While the cases stated in paragraph 80 above relate to professional negligence rather than to negligent misstatement, it was confirmed in *Allied Maples* that the principle does not just apply to cases of professional negligence but is of general application. So, I consider that Leggatt J's statement is equally applicable to loss of chance situations generally.
82. The statement of law in *Hirstenstein* was endorsed by Waksman J in *PCP Capital Partners LLP and another v Barclays Bank plc* [2021] EWHC 307 (Comm), where it was held that “when hypothetical actions of the defendant are in issue, the claimant must prove its case in relation to them on a balance of probabilities.”
83. Accordingly, unless causation turns on the hypothetical acts of a third party, even where the applicant's loss might turn on hypothetical actions they may or may not have taken, loss of chance is not the appropriate measure of causation and assessment of loss. In Mr S' cases, there are no relevant third parties and the only relevant actions are those of Mr S and the Authority. It is likely to be the case that the individuals in the Authority that were responsible for issuing incorrect information were different to those individuals who would have assessed Mr S for promotion.

However, I find that this would strain the natural meaning of “independent third party” somewhere beyond its breaking point. This is because in discharging these functions, each individual or group of individuals would only have been acting in the capacity of agent or employee of the Authority.

84. It follows that loss of chance is not the appropriate basis on which to consider causation and damages in this case, and I consider that the correct standard of proof is the balance of probabilities.

*Balance of probabilities*

85. Mr S is claiming an additional loss on the basis that, had he not received the incorrect information on which he relied in making his decision to retire, he would have achieved promotion to the substantive role of Flexi Duty Station Manager.

86. For me to decide whether Mr S would, had he not received incorrect information, have been promoted to the substantive role of Flexi Duty Station Manager, prior to him retiring at age 55, I need to consider:-

86.1. Is it more likely than not that Mr S would have continued to carry out the steps required to be eligible for permanent promotion and not withdrawn from the process anyway?

86.2. Is it more likely than not that Mr S would have successfully completed the final stage of the promotion process?

86.3. If the answer to the questions in paragraphs 86.1 and 86.2 above is yes, I will then need to consider whether Mr S would, on the balance of probabilities, have been appointed to a Flexi Duty Station Manager role, based on the promotion process that actually occurred, and that he would have participated in.

*Would Mr S have continued with the promotion steps?*

87. As part of his submissions to TPO, Mr S said that he had completed four out of the five stages of the promotion process for the Flexi Duty Station Manager role. Mr S’ statement in this regard has not been challenged by the Authority, so it is reasonable to accept that what Mr S has said is true.

88. Mr S has said that he would have continued to work towards promotion as it would have resulted in a higher salary in the calculation of his pension. Given that he had completed four out of the five stages required, I consider that he was actively engaging in the promotion process at the point that he received the incorrect information.

89. Consequently, I find that it is more likely than not that he would have continued with the process, and only withdrew from the promotion process based on the incorrect information he had received.

*Would Mr S have successfully completed the final stage of the promotion process?*

90. Mr S has provided an email from his line manager which said:

“[Mr S] was a very capable leader when working in the department and if he had not taken the decision to retire would have attended the competitive process which are run on a yearly basis for permanent promotion to Station Manager Flexible Duty, with [Mr S]’ experience and his capability it is quite likely that he would have achieved the next step in the promotion trail.”

91. I do not consider Mr S’ line manager’s comments are sufficiently specific in isolation. This is because it does not refer to a specific position, to the specific final stage in the process, to Mr S’ prospects of passing that stage or being promoted in a particular round of promotion before he retired. However, in combination with the fact that Mr S had previously acted up on three occasions in the Flexi Duty Station Manager role, it is clear that he had been able to demonstrate sufficient experience in that particular role previously. Because of this, I consider that had Mr S continued with the steps needed for promotion, on the balance of probabilities, he would have successfully completed the final stage of the promotion process.

*The probability of Mr S being appointed to a Flexi Duty Station Manager role*

92. As part of his submissions to TPO, Mr S confirmed that the next promotional round, had he not retired in August 2017, would have been in April 2018. He presented evidence from the Authority obtained from a FoI request that 12 candidates out of 18 were successfully appointed to Flexi Duty Manager roles, four or fewer of whom were the same grade as Mr S, with the remaining successful candidates being of a lower grade.

93. Based on these figures, I find that it is more likely than not that had he been a candidate, Mr S would have attained the substantive role of Flexi Duty Station Manager during the April 2018 promotion round, before his retirement at age 55 in April 2020. Based on what the Authority has said (see paragraph 65.2 above), I consider it reasonable to estimate that Mr S’ promotion would have taken effect on 30 July 2018.

*Overpaid pension contributions and spouse’s pension claims*

94. Mr S estimates that he overpaid employee pension contributions by £1,343.86 during his period of temporary promotion because he paid contributions at 15.5% of a higher salary rather than 14.7% of a lower salary. These figures have not been challenged by the Authority, and I find that this figure is recoverable.

95. I have taken Mr 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.



96. I acknowledge Mr S' detailed assessment of loss, set out in Appendix 5. However, I consider that the directions below provide appropriate redress for the financial loss Mr S has suffered.

### *Maladministration*

97. I find that this situation has caused Mr S 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 S' retirement plans were seriously impacted by the inaccurate information provided, causing him distress and inconvenience, separate from and in addition to the financial loss he has sustained. I acknowledge the Authority's position that the overpayment made to Mr S of £32,669.25 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, as the directions at paragraph 99 below take the overpayment of the lump sum of £26,663.35 and the overpayment in annual pension since Mr S retired of £6,005.90 into account when assessing the financial loss that Mr S has suffered (and thus diminishes the 'windfall' received), I consider that a separate award for the distress and inconvenience Mr S has suffered is appropriate.

98. I uphold Mr S' complaint.

### **Directions**

99. To put matters right, within 28 days of the date of this Determination, the Authority shall calculate the loss Mr S incurred at the date of this Determination (**the Calculation Date**). The loss should be equal to Amount A less Amount B (if positive) where:-

99.1. Amount A is equal to:-

99.1.1. the total of the pension and lump sum benefits Mr S would have been paid under the Scheme up to the Calculation Date on the following assumptions: (i) he had remained in employment as a Station Manager (Competent) until 29 July 2018, and thereafter remained in the substantive role of Flexi Duty Station Manager until his 55th birthday in April 2020 and accrued additional pensionable service in the Scheme during these periods;<sup>8</sup> (ii) he had received the salary increases he would have been entitled to if he had remained in these roles; (iii) he had retired from the Scheme on his 55th birthday in April 2020 and his pension and lump sum came into payment having been calculated in accordance with the New Rule, on that date; plus

99.1.2. 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 S

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<sup>8</sup> Provided that this does not exceed the maximum accrual of pensionable service under the Scheme Rules.

on the assumptions specified in 99.1.1 above, assuming Mr S is in good health; plus

99.1.3. the total of the salary Mr S would have received on the assumptions specified in 99.1.1 above, less any employee contributions he would have needed to pay to remain in the Scheme while accruing additional pensionable service; plus

99.1.4. the sum of £1,343.86 in overpaid employee contributions.

99.2. Amount B is equal to:-

99.2.1. the total of the pension and lump sum payments paid to Mr S by the Scheme in the period from 14 August 2017 until the Calculation Date (including any overpayments which the Authority does not seek to recover from Mr S); plus

99.2.2. 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 S, assuming Mr S is in good health; plus

99.2.3. the total of the net earnings Mr S received from his new job as a teaching assistant in respect of the period he was employed on or after 14 August 2017 to his 55th birthday; plus

99.2.4. the total of any employer and employee contributions paid into a pension in respect of his job as a teaching assistant between August 2017 and his 55th birthday.

99.3. 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.

99.4. The Authority should instruct the Actuary, acting as expert, to calculate the loss 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 S once they are available.

99.5. The Authority should pay Mr S 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 S 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 shall pay Mr S 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 shall also pay Mr S an additional amount designed to

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meet any additional tax liability, if HMRC treat the above payment as an unauthorised member payment for the purposes of the Finance Act 2004.

100. Within 28 days of the date of this Determination, the Authority shall pay Mr S £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 S' schedule of loss

1. Mr S provided detailed calculations of his past losses he believed he incurred between 14 August 2017 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 14 November 2015 to 7 April 2020, after deducting the total amount of annual pension Mr S received during the same period amounted to £39,485.00.
- 1.2. Overpaid pension contributions between 1 August 2016 and 6 August 2017 amounted to £1,343.86.<sup>9</sup> Mr S is also claiming an indemnity to any underpaid tax as a result of tax relief on his contributions.
- 1.3. Difference in pension between 7 April 2020 and 12 April 2022 totalled £8,314.22.<sup>10</sup>
- 1.4. Difference in lump sum he was paid when he retired in August 2017 and the lump sum that he would have received, had he retired on 7 April 2020 totalled £16,425.317.
- 1.5. Total past loss inclusive of interest (£7,207.23) up to 12 April 2022 amounted to £72,775.63.

#### *Future loss*

- 1.6. Based on Mr S' assumption that he would live until age 84.6 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 £112,513.70.

#### *Mitigation/Credit*

- 1.7. Between October 2017 and 7 April 2020, Mr S earned £7,571.86. Between January 2021 and September 2022, he received approximately £21,875 in income from his employment as a civilian training officer.
- 1.8. Total credit up to 12 April 2022 amounted to £21,875.

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<sup>9</sup> This is Mr S' best estimate figure.

<sup>10</sup> This figure is the amount after Mr S deducted the pension payments he had actually received during the same period.

*Taxation*

- 1.9. Mr S 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 £163,414.33 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 £260,629.69.

*Alternative approach*

- 1.10. As an alternative, Mr S suggested that I could direct the administrators and/or managers of the 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 7 April 2020.
- 1.11. 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.