

Ombudsman's Determination

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

Complaint Summary

1. Mr S has complained about the Authority's maladministration in failing to implement an amendment to the rules of The Firemen's Pension Scheme Order (1992) (**the 1992 Order**). He asserts that the Authority's maladministration resulted in him relying on incorrect information he received from the Council to decide to retire, and that he has suffered a financial loss as a result.

Summary of the Ombudsman's Determination and reasons

2. The complaint is not upheld because I find that Mr S did not wholly rely on the information he was given by the Council preceding the misinformation, and to the extent that he did, it was not reasonable for him to have done so.

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.¹
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.² 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 S was born in September 1963. 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 on 30 June 2018.
8. Mr S said that around November or December 2017, he had heard through "friendly conversations" with a colleague at the Service, (**Mr M**), that a change might be made concerning how temporary promotions were reflected in pension calculations. In early 2018, Mr S and his colleague Mr R had a meeting with Mr M. Mr S said that during this meeting, Mr M informed them that from 1 April 2018, any temporary promotion salary would be reflected by an APB, and would not be used in the calculation of his pensionable pay. However, Mr M informed him that all retrospective service prior to 1 April 2018 would be treated in the same way as it had been previously. So, essentially, he had to decide whether he wanted to retire at that time or continue working.

¹ Relevant sections of the 1992 Order are in Appendix 1.

² Details of the Old and New Rule B5C are detailed in Appendices 2 and 3.

9. On 28 January 2018, Mr S received a spreadsheet from the Council (**the January Spreadsheet**). Alongside separate tabs setting out calculations regarding Mr S having exceeded his annual allowance, the Spreadsheet also set out a retirement quotation, which contained substantially the same incorrect information as provided in the Quotation (see paragraph 13 below).³ The January Spreadsheet included the following disclaimer:

“Note: This illustration is based on my understanding of the calculation and IS NOT definitive [sic]. YOU should take your own advice from RCT Pensions or an Independent Financial Adviser. [original emphasis]

All figures used in the calculation are taken from those provided to you by RCT Pensions Administrator - there accuracy [sic] is dependent on the figures provided by RCT Pensions

If you feel these figures are not accurate you should make enquiries with RCT Pensions”

10. Mr S gave his notice to retire on 1 April 2018. At the time his substantive post was ‘Group Manager A, Competent’. He had been temporarily promoted to ‘Group Manager B, Competent’ from March 2016, and remained in this post until he retired.
11. In April 2018, the Service issued a bulletin (**the Bulletin**) to members of the Scheme. This informed members that if they retired after 1 April 2018, new rules concerning how temporary promotions would be treated for pension calculations, would be implemented.⁴
12. Subsequently, and after he had already put in his notice to retire, Mr S requested a retirement quotation from the Council.
13. On 23 May 2018, the Council sent Mr S a quotation of his estimated retirement benefits, (**the Quotation**). This informed him that the estimated benefits he could receive at retirement was a lump sum of £201,614.32 and an annual pension of £29,398.71. His final salary was stated as £58,555.20. This figure included his temporary promotion salary. The Quotation included the following disclaimer:
- “It must be borne in mind that these are provisional figures and any changes in the assumptions made will produce a change in your estimate award.”
14. Mr S received the benefits stated in the Quotation when he retired on 30 June 2018.

³ Mr S did not include the January Spreadsheet or refer to it in his initial submissions to The Pensions Ombudsman. Following my Preliminary Decision on this complaint, Mr S provided a copy of the January Spreadsheet and also provided evidence that it was prepared on 14 December 2017. He had sent it to his solicitors on 20 January 2022. His witness statement setting out the details of his complaint, appended to his application to The Pensions Ombudsman was dated 27 January 2022.

⁴ This Bulletin was sent by way of the weekly Routine Notice of 3 April 2018. Details of the Bulletin are in Appendix 4.

15. On 1 February 2019, the Service wrote to Mr S (**the February Letter**). This letter said in summary:-

- 15.1. 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 promotion salaries 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.
- 15.2. 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.
- 15.3. 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:-
 - 15.3.1. Temporary promotions were pensionable and pension benefits are earned through an APB.
 - 15.3.2. The New Rule would be implemented with effect from 1 April 2018, and the change would not be applied retrospectively because it was not the fault of the members affected that the change was not implemented.
 - 15.3.3. 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.
- 15.4. As part of the 2017/2018 audit of accounts, the Wales Audit Office considered the decisions taken by the Authority to rectify the position going forward, and whether the Authority's decisions, as detailed in paragraphs 15.3.1 to 15.3.3 above, were lawful. The advice the Auditor and the Authority itself 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.
- 15.5. To correct the misapplication of the New Rule, the Authority would have to:-
 - 15.5.1. Determine that temporary promotion payments were pensionable through an APB from 1 July 2013.
 - 15.5.2. Recalculate the pension entitlement for each person affected.

- 15.5.3. Recover any overpayment of pension made.
- 15.5.4. Amend ongoing pension payments to the correct level.
- 15.5.5. Liaise with HMRC over any specific taxation impacts which may have occurred.
- 15.6. 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.⁵
- 15.7. 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 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.
- 15.8. This resulted in the final salary figures used to calculate his pension benefits being inflated. His final pensionable salary should have been based solely on his substantive role at the point of retirement. Accordingly, he had been identified as having received an overpayment of benefits.
- 15.9. 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. But the Authority would not seek to recover any previous overpayment of pension, including lump sums, already paid, up to 31 March 2019.
- 15.10. 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 whether he would like to attend one of those meetings or have a meeting on an alternative date.
- 15.11. 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.
16. 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:
 - 16.1. temporary promotions were pensionable and that this decision was applicable from the effective date of the New Rule, which was 1 July 2013;

⁵ The three recommendations are detailed in Appendix 5.

- 16.2. 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
- 16.3. it would not recover any overpayment of lump sum or pension made prior to 1 April 2019.
17. On 8 March 2019, Mr S made a complaint through the first stage of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). In summary he said:-
 - 17.1. The decision to retire was difficult. In March 2018, when the Authority implemented the New Rule, he decided to review his situation.
 - 17.2. After checking the figures in the Quotation, and being aware that the New Rule would influence his figures negatively, he decided to retire. He had certain outgoings at the time, such as paying for his daughter's legal practice course. He wanted to ensure he could afford his outgoings.
 - 17.3. He made financial decisions for his family based on the figures in the Quotation, including using the lump sum and annual income to achieve certain aims for his family.
 - 17.4. To be informed less than a year after his retirement that, through no fault of his own, his pension would be reduced, was grossly unfair. He had complied with all the requirements.
 - 17.5. There had been incompetence and/or negligence on the part of the Authority and he did not feel he should be penalised. Had the New Rule been implemented by the Authority, this situation would have been avoided. It should resolve the matter swiftly and at no expense to him.
 - 17.6. By the time he had retired, he had been temporarily promoted to the role of Group Manager B for over 15 months. Had he known the correct position, prior to his retirement, he would have competed for the permanent role of Group Manager B. Having been in the role for over a year, he was confident that he would have been appointed.
 - 17.7. The recruitment process for a Group Manager B post occurred during his notice period and he actively handed the role over to his successor. Had he achieved permanent status, the New Rule would not have affected him. He did not stay and compete for the Group Manager B role because the figures provided in the Quotation showed that he could not improve his pension by staying.
 - 17.8. This situation had caused him and his family unnecessary stress.
 - 17.9. In addition, the new figures supplied in the February Letter were incorrect. This was another display of incompetence and added further stress to him. The figures were only amended in a subsequent letter, after he had highlighted the error.

18. On 26 March 2019, the Council wrote to Mr S. It provided a revised retirement benefits statement and said in summary:-
 - 18.1. His monthly gross pension had been reduced to £2,314.10 from 1 April 2019, increasing to £2,335 gross per month from 8 April 2019, in respect of the Pensions Increase award.
 - 18.2. To recalculate his pension, his pensionable pay had been adjusted to exclude the period of temporary promotion. The temporary promotion he received had resulted in an APB amounting to £231.34 per annum.
19. On 27 March 2019, the Service replied to Mr S' complaint under stage one of the Scheme's IDRPs. In summary it said:-
 - 19.1. It understood that he felt it was unfair that through no fault of his own, he would suffer a detriment as his annual pension would be reduced.
 - 19.2. 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.
 - 19.3. 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 the Authority's decision. If it did, it would be making a decision that had already been determined as unlawful, under the Scheme's rules and regulations.
20. On 3 April 2019, Mr S appealed the stage one IDRPs decision through stage two of the Scheme's IDRPs.
21. On 8 July 2019, the Members of the Fire and Rescue Authority (**the Panel**), sent Mr S its stage two decision, not upholding his complaint. The Panel said in summary:-
 - 21.1. It was maladministration for the Authority to have issued incorrect information to Mr S. Mr S had suffered unnecessary stress as a consequence. But, Mr S had not provided any medical evidence in relation to the stress caused.
 - 21.2. 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 that would have adversely affected his annual pension, from 1 April 2019. Mr S decided to retire based on the figures provided in the Quotation.
 - 21.3. The remedy for incorrect information was to put the correct benefits into payment and not to pay the incorrect benefits.
 - 21.4. 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.

21.5. An estimated overpayment of £12,437.43 had been made to Mr S. This included an overpayment of the lump sum of £11,211.33 and an overpayment in annual pension since Mr S retired of £1,226.10.

21.6. It would not recover the estimated overpayment.

22. Following Mr S referring his complaint to The Pensions Ombudsman (**TPO**), Mr S and the Authority made further submissions. These have been summarised below.

Summary of Mr S' position

23. Mr S provided a detailed schedule of loss to evidence the financial detriment he asserts he suffered.⁶ He also made additional comments which are summarised below, in paragraphs 24 to 41.

24. He submitted that it needed to be decided, whether on the balance of probabilities, he would have remained in employment had he not been given an incorrect picture regarding his pension, and secondly, whether if he were to remain in employment, he had a substantial chance of being promoted.

Loss of income/salary

25. He understood that nine months of his final salary would have been calculated under the Old Rules. This potentially had a significant impact on his pension because had he continued working without being substantively promoted after 1 April 2018, the value of his pension would have started to decrease. He had already accrued more than 30 years' service in the Scheme, so there was no benefit in him continuing to work.

26. He was specifically told by Mr M that had he remained in employment past 1 April 2018, the Authority would not have considered any temporary promotion pay pensionable. While this was not the correct position, it was plainly information that he had relied upon in handing in his notice on 1 April 2018. But for the Authority's negligence, he would have understood the true position well before 1 April 2018, and would have realised that his true pension entitlement was considerably lower.

27. In those circumstances, it was more likely than not that he would have continued working since, regardless of having achieved 30 years' service in the Scheme, he would have obtained a higher final salary in his substantive role, and would have obtained the benefit of receiving further salary payments in any event. Accordingly, and contrary to what he was told, it would have been beneficial for him to have continued working. Had he known the true position, he would have withdrawn his notice and continued in employment.

28. The individual who held the substantive Group Manager B role was temporarily promoted to the Group Manager Role. That individual was appointed to the substantive role of Group Manager in March 2018, so there was a vacancy for the

⁶ A summary of Mr S' schedule of loss is detailed in the Appendix 6.

role he had been temporarily promoted to. Even if he had given his notice to leave employment, which he did not think he would have, he thinks that the Service would have allowed him to withdraw his notice to allow him to apply for the substantive role of Group Manager B, when it was advertised.

29. He believes he would have been well placed to be appointed to that role if he had applied. This was because he had been temporarily promoted to that role for two years and had received positive appraisals from his line manager concerning his performance. Further, he had more experience than the person who was eventually appointed to that role. The gross salary for that role would have been £50,270 plus a 20% flexible duty allowance. This would have increased the overall salary of the role to £60,324.
30. As a result of his reliance on the incorrect information, he has a reduced annual income. So, he has suffered loss, and satisfies the test in *Corsham*.⁷

Loss of chance

31. Had he not been given the wrong information, not only would he have remained employed, he would have been promoted and retired in the substantive role of Group Manager B. 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.
32. In light of the *Allied Maples* and *Perry* cases, the following questions should be asked:-
- 32.1. Was there a substantial chance, as opposed to a speculative one, that he would have obtained the substantive role of Group Manager B, had he stayed on in employment?
- 32.2. If so, what was the chance that he would have obtained that role?
- 32.3. What was the measure of loss to be awarded to him for the loss of chance of obtaining that role?
33. He had compelling evidence which demonstrated that he had a substantial chance of being promoted to the substantive role of Group Manager B on or before July 2018, in particular:-
- 33.1. The substantive role became vacant in March 2018, prior to him leaving employment. But for the Authority's negligence, he would not have tendered his resignation in April 2018, and would have been available to apply for promotion;

⁷ *Corsham and Others v Police and Crime Commissioner for Essex and Others* [2019] EWHC 1776 (Ch)

- 33.2. He had already been doing the Group Manager B role for over two years, and was more experienced in operational matters than the person who was appointed to the substantive role. So, it was extremely likely that had he not retired because of the Authority's negligence, he would have been promoted into that role ahead of the current post-holder;
- 33.3. He had trained the current post-holder.
34. Mr S contended that:-
 - 34.1. He did not need to demonstrate on the balance of probabilities that he would have obtained the substantive role of Group Manager B;
 - 34.2. His chance of obtaining the substantive salary of Group Manager B was a substantial chance. The chance could have been as much as 100% if he was almost bound to succeed.⁸
35. On that basis:
 - 35.1. he would have retired from the Scheme in or around July 2019, one year after being substantively promoted;
 - 35.2. by the date of his retirement, he would have been in the role of Group Manager B since July 2018 at the latest; and
 - 35.3. upon retirement, he would have received a pension based on his final salary in the role of Group Manager B.

Overpaid pension contributions

36. It was clear that as a result of the Authority's maladministration and negligence, he had 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 contributions of approximately £1,447.55. So, he was entitled to credit or alternatively compensation for this amount, as well as an indemnity as to any underpaid tax.
37. Should his claim be successful, he believed he was also entitled to claim for the loss of spouse's pension.⁹
38. While the Authority had not sought recovery of the overpayment he had received, the difference in his pension going forward was £1,629.49 per annum. This amount over the next 30 years was a significant amount for an ordinary hardworking person upon retirement.

⁸ *Hanif v Middleweeks* [2000] *Lloyd's Rep.* PN 920 at [14] per Mance LJ

⁹ See Appendix 6.

Subsequent employment

39. Around January 2019, he started working for a firefighter's charity three days a week. He earned a gross salary of £23,000 a year in that role. He intended to continue in this role until age 60. This further employment was not obtained to supplement his income when his pension was reduced.
40. He also worked two hours a week, training cadets for the Service. He commenced this role in October 2018. This was a paid role, earning approximately £100 a month net. He would not have taken this role if it had not been for the issues with his pension. He needed to try to make up the shortfall in his pension.

Distress and inconvenience

41. This matter had caused him distress and inconvenience. The fact that he had received an overpayment of benefits, which the Authority had not sought to recover, could not be said to compensate him for the distress and inconvenience he had suffered. He should receive a separate award for the distress and inconvenience he suffered because of the Authority's maladministration in failing to implement the New Rule.

Summary of the Authority's position

42. Mr S was not entitled to any losses as he did not act to his detriment and would not have acted any differently, had he known the correct position.

Loss of income/salary

43. Mr S had not established that there was a substantial chance that he would have obtained the permanent role of Group Manager B had he not received incorrect information.
44. The submissions Mr S made to TPO indicated that he was minded to retire, notwithstanding the provision of incorrect information. The following points supported this position:-
 - 44.1. Mr S had completed 30 years' service at the date of his retirement in June 2018.
 - 44.2. Mr S had become aware that the recruitment process for a Group Manager B post occurred during his notice period but he decided not to remain employed and compete for that role. He did not seek to withdraw his notice at any time.
 - 44.3. Mr S commenced a new job, earning £23,000 per annum, before learning of the error in the calculation of his retirement benefits. This employment was not obtained to supplement his income as a result of the reduction in his pension.
 - 44.4. The difference between Mr S' annual pension, and the annual pension he was expecting to receive was not significant. The difference in his pension going forward was £1,629.49 per annum, which equated to £135.79 per month.

Loss of chance

45. The Authority did 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, there was also a substantial chance that he would have been promoted to the Group Manager B role on or before July 2018. It was clear that there was a substantial chance that Mr S would have retired in June 2018, had he been given the correct information and the question of whether he would have been promoted if he had not retired was moot.
46. It was incorrect to state that Mr S would have been guaranteed to move into the Group Manager B role. It was not a given that Mr S would have attained the role of Group Manager B had he not retired. Promotion to the role of Group Manager B was not a guarantee. While it may have been true that Mr S conducted a hand-over with the incoming Group Manager B, it was not accepted that he had trained that individual.
47. It was not correct that the chance of Mr S receiving the salary of a Group Manager B 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 could be unsuccessful.
48. The Authority did not agree that Mr S did not apply for the vacant Group Manager B role because of the error in his retirement benefit calculations. The Authority's position remained that there was only a speculative chance that Mr S would have obtained the Group Manager B salary prior to retirement, were it not for the provision of incorrect information. So, there were no grounds to assess Mr S' losses on a loss of chance basis.
49. The Authority disagreed that Mr S had lost the chance of an increased salary and increased pension, so it did not consider any further compensation in this regard to be necessary.
50. Mr S received an overpayment of £12,437.43. The Authority had not sought to recover that overpayment from Mr S. The overpayment was significantly more than the alleged overpaid pension contributions Mr S had detailed in his submissions to TPO. The Authority averred that no further compensation was payable.
51. Any and all alleged losses in respect to Mr S' spouse's pension was too remote and could not reasonably be attributed to the incorrect information provided by the Authority.

Distress and inconvenience

52. It was accepted that the provision of incorrect information caused Mr S distress and inconvenience. However, the Authority averred that no further compensation should be awarded on the following grounds:-

- 52.1. Mr S had received an overpayment of his pension entitlement.

- 52.2. The Authority had not sought to recover that overpayment, which was significantly in excess of the fixed amounts that TPO usually awarded for non-financial injustice, with only exceptional cases of non-financial injustice leading to awards of more than £2,000. This was not an exceptional case.
- 52.3. Not all maladministration should inevitably lead to an award for non-financial injustice.
- 52.4. The maladministration arose from a genuine error that the Authority sought to address. The Authority was transparent and open regarding the error.
- 52.5. The Authority notified Mr S of the error within a reasonable timeframe, having carefully reviewed the position and available options.
- 52.6. The Authority thoroughly investigated and responded to Mr S' complaint in accordance with the IDRP.
- 52.7. The Authority is a publicly funded organisation.
53. On 3 September 2024, I send my Preliminary Decision (**the Decision**) on this complaint to Mr S and the Authority.
54. Mr S did not accept the Decision and in response said in summary:-
 - 54.1. There appeared to be an omission in his initial submissions to TPO. He had also received the January 2018 quotation, on which he had relied to retire.
 - 54.2. The January 2018 quotation contained a disclaimer. However, in the Decision, I had found that an administrator or manager providing information following a request from a scheme member, was under a duty to ensure the information was accurate. The Authority owed a duty of care to Mr S to provide accurate information, and breached this duty, regardless of the wording of the disclaimer.
 - 54.3. Further, the wording of the disclaimer itself sought to place responsibility on the Council, and merely stated "if you feel these figures are not accurate you should make enquiries." If this is a disclaimer, it is an ineffective one, since he had no reason to "feel" these figures were not accurate: they reflected his understanding, as well as the understanding of the Authority.
 - 54.4. Him putting in his notice on 1 April 2018 because he was concerned that his pension would be less valuable if he continued in employment was not a misunderstanding but a reliance on a misstatement by the Authority, that his final pensionable salary would be lower.
 - 54.5. His reliance on this misinformation coupled with the incorrect benefit quotation from the Council was entirely reasonable. The Scheme Rules are complex and difficult to analyse for pensions experts, let alone firefighters whose expertise lay elsewhere. The Authority itself was applying Rule B5C incorrectly and explaining it incorrectly to those who enquired as to its effect. There was no

evidence from the Authority as to the content of the representation made by Mr M and his evidence on this is not disputed.

54.6. In his case there were multiple subsequent misstatements, all of which confirmed what he had been told by Mr M in November or December 2017. His actions in light of those representations easily demonstrate reliance on the balance of probabilities.

55. The Authority accepted the Decision.

Conclusions

56. Mr S asserts that as a result of the Authority's failure to implement the New Rule, he relied on incorrect information he received from the Council to decide to retire, and that he has suffered a financial loss as a result.
57. 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 had been told incorrectly that he was entitled to it.
58. 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 Mr S may have to such a claim.
59. However, this does not mean that Mr S could not have a 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, most notably negligent misstatement. Here, it is not in dispute that the information provided was incorrect.
60. 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.¹⁰ The Authority owed a duty of care to Mr S to provide accurate information, and breached its duty.

61. 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:-
 - 61.1. Did Mr S rely on the statements that his pensionable salary would be based on his temporary promotion pay?
 - 61.2. Was that reliance reasonable?
 - 61.3. Would Mr S have acted differently if he had been told the correct position?
62. Mr S asserts that he relied on the information he obtained from Mr M in November or December 2017, as well as the information in the HR Bulletin (see paragraphs 8 and 10 above), when considering whether or not to retire. The information Mr S was given on both occasions, which was incorrect, was that APB would only be applied prospectively from 1 April 2018, not retrospectively. Mr S subsequently gave his notice to retire on 1 April 2018.
63. An initial issue with Mr S' stated reliance on the information, is that he was notified about it in the HR Bulletin of 2018. This Bulletin was sent by way of the weekly Routine Notice of 3 April 2018, which post-dated his decision to retire. However, given that he has stated that the HR Bulletin confirmed what he had heard in November or December 2017, and it also confirmed what he was told by Mr M in the meeting in early 2018, I do not consider this discrepancy to have a negative impact to Mr S' claim that he relied on the information that he had heard from Mr M and the Bulletin.
64. As part of his initial submissions to TPO, Mr S asserted that after reviewing the Quotation and checking the annual pension he would receive, along with the fact that he was aware that the New Rule would influence his retirement figures negatively, he made the decision to retire. However, the Quotation was issued on 23 May 2018, which post-dated his decision to retire.
65. In his submissions, in response to the Decision, Mr S provided additional evidence in the form of the January Spreadsheet in support of his assertion that, had he been given the correct information, he would have acted differently.
66. I accept that the failure to provide the January Spreadsheet at the time that he had provided his initial submissions to TPO appears to be a genuine one, and it is reasonable for me to take it into account when reaching my decision. However, despite the failure to include the evidence itself, there is also no reference to, or

¹⁰ *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

stated reliance on, the January Spreadsheet in any of his previous submissions, in particular his sworn witness statement. In his witness statement, Mr S only referred to having relied on the Quotation.

67. I am not persuaded by Mr S' late submission that he had also relied on the January Spreadsheet. Even if the Spreadsheet had not been appended to his earlier submissions in error, Mr S had sent the January Spreadsheet to his solicitor on 20 January 2022. It is clear from Mr S' covering email to his solicitor attaching the Spreadsheet that he was aware of it before he made his witness statement on 27 January 2022. Yet he did not refer to it as evidence that he had relied on in making his decision to retire.
68. In any event, even if he did rely on the January Spreadsheet when he made his decision to retire, I consider that it was not reasonable for him to have done so. In the covering email from Mr S to his solicitor, he referred to the January Spreadsheet being provided to him "when my annual allowance was exceeded." It does not appear to have been prepared specifically as a result of his request for retirement figures, but to model the effect of Mr S exceeding his annual allowance.
69. One of the tabs in the spreadsheet is solely about his annual allowance being exceeded in the 2014/15 and in 2016/17 tax years, and the calculation of the repayment of the tax liability on a "scheme pays" basis. Further, had he indeed relied on the January Spreadsheet, there would have been no need for him to seek further confirmation of his projected benefits in May 2018.
70. The "Final Pension & LTA (V1)" tab does set out estimated figures for lump sum and annual pension. However, the disclaimer (see paragraph 9 above) was also included on the January Spreadsheet.
71. It was held in *McCullagh v Fox Lane & Partners* [1995] EWCA Civ 8 that a disclaimer is not the same as a contractual exclusion clause. When considering the effectiveness of a disclaimer the correct approach is to treat the existence of the disclaimer as one of the facts relevant to answering the question whether there had been an assumption of responsibility by the respondent for the statement. The answer to that question is reached by reference to what a reasonable person in Mr S' position would have understood at the time he relied on the representation.
72. The disclaimer is highly equivocal, clearly expresses that the figures are not definitive, and that Mr S should not rely on them. I consider that a reasonable person would not have concluded, having read the disclaimer, that the person who sent the statement was assuming responsibility for its accuracy or use, especially for use as a definitive statement of Mr S projected retirement benefits.
73. It follows that the additional evidence does not form the basis for Mr S' assertion that he relied on evidence prior to his decision to retire, or if he did rely on it, that that reliance was reasonable.

74. In relation to the Quotation, Mr S received this on 23 May 2018, which was subsequent to him handing in his notice to retire. Because of this, I consider that Mr S could not, in fact, have relied on the incorrect annual pension figure of £29,398.71 and a lump sum of £201,614.32 when making his decision to give in his notice to retire on 1 April 2018, because he did not have those figures at the time he made the decision.
75. Mr S commenced pensionable service on 20 June 1988, so the point at which he completed 30 years pensionable service in the Scheme was 19 June 2018. As part of his submissions to TPO, Mr S said that had he continued working after 1 April 2018, the value of his pension would have decreased. He had already accrued 30 years' service in the Scheme, so there was no benefit to him in continuing to work (see paragraph 25 above).
76. Under Rule B1 of Part 1 of Schedule 2 to the 1992 Order¹¹, Mr S would have continued to accrue additional benefits attributable to the length of his pensionable service until and including 19 June 2018. It appears that he had not accrued 30 years' chronological service as at 1 April 2018, and would only have done so on 19 June 2018.
77. In any event, even if Mr S had achieved maximum accrual in the Scheme before 19 June 2018, he has also asserted that with each additional month he worked between April and June 2018, his pension became less valuable. However, the incorrect information given to Mr S does not support this assertion.
78. Mr S had been at the temporary promotion salary since March 2016. He has stated that he was aware that the 'last three years' best salary rule would apply, based on the wording in the HR Bulletin and the conversation with Mr M.
79. The last three years' rule is set out in Rule G1 of the 1992 Order. Rule G1(3) of the 1992 Order provides that average pay is calculated as the aggregate pay for the year ending on the day of a member's last day of service. Rule G1(7) provides that if the amount calculated under Rule (3) is less than it would have been had the last day of service occurred in the two years preceding, the date that provides the highest figure will be used.
80. Mr S had been temporarily promoted since March 2016. His total pensionable pay used to calculate his pension would, on the basis of the incorrect information, not have immediately started to decrease the longer he stayed employed without being promoted permanently, because it would have been calculated according to one of the preceding two years' salary figures.
81. So, even though this information was in fact incorrect, there was no basis on which Mr S could form the view that the value of his pension would be 'less valuable' until at least 1 April 2020. Even if he had immediately resumed his substantive role, his temporary increased salary between March 2016 and April 2018 would, according to

¹¹ See Appendix 1.

the Bulletin and his understanding of the 'last three years' best salary rule, have been used in the calculation of his benefits until 1 April 2020.

82. Mr S' misunderstanding that his pension would start to lose value after April 2018 appears to have caused him to put in his notice on 1 April 2018, for him to retire on 30 June 2018. This was because he was concerned that his pension would be less valuable if he continued in employment.
83. I consider that Mr S' misunderstanding does not reasonably derive from the incorrect information presented by the Authority. It is not a conclusion that was reasonable to form, based on the actual incorrect information he was given.
84. I have already found, in the paragraphs 74 to 83 above, that it was not reasonable for Mr S to have relied on the information he was told by Mr M and the HR Bulletin in reaching the conclusion that his pension would "lose value" if he continued in employment, and that Mr S did not rely on the incorrect information on the Quotation he received in May 2018, to decide to retire.
85. I consider that as Mr S had not received the figures on the Quotation until after he had given in his notice to retire, this is firm evidence that he had decided to retire in any event, on 1 April 2018. He cannot have undertaken any calculation based on the incorrect figures to ensure that he would receive sufficient income to meet his outgoings, because they were not in his possession, at the time that he had given his notice to retire. Despite stating that he had specific outgoings, he did not wait until he had received any estimate of benefits before taking the decision to retire.
86. I find that Mr S has not established, on the balance of probabilities, that he would have applied for the substantive role of Group Manager B had he not received the incorrect information.
87. So, although it appears that Mr S may have had a good chance to successfully apply for that role, had he decided to remain in employment, the question does not arise because he has not established, on the balance of probabilities, that he would have acted differently and would have decided to remain in employment, but for the incorrect information from the Authority.

Loss of chance

88. Mr S has made a claim for loss of chance. It is important to note that loss of chance does not provide Mr S with an additional opportunity to discharge his burden of proof at a lower standard than the balance of probabilities. Rather, it is a method of quantifying loss that has been found to have 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.
89. I have found that Mr S has not established, on the balance of probabilities, that he acted reasonably in reliance of the incorrect information causing him loss, and that he would not have acted differently had the correct information been given to him. So,

the quantification of that loss, whether on the basis of loss of chance or any other basis, does not arise.

Overpaid employee pension contributions and higher spouse's pension

90. Mr S has made a claim for the overpaid employee contributions he paid into the Scheme. The Authority has not challenged these figures and has not put forward alternative figures. I find that the overpaid contributions calculated by Mr S are recoverable. However, I consider it reasonable that they are offset against the overpayment Mr S received. So, I do not direct that this sum is paid to Mr S.
91. Concerning Mr S' claim for a higher spouse's pension, I consider that this claim does not arise because I have found Mr S would have retired anyway, in June 2018. In any event, a spouse's pension is contingent on the member pre-deceasing the spouse. So, any loss at this stage, even if Mr S would not have retired anyway, is hypothetical. I cannot see that subrogation applies because, until the member dies, the spouse has no entitlement under the scheme. The benefits to which the member is entitled and those to which the spouse would, on the member pre-deceasing the spouse, be entitled are in any event distinct, albeit the spouse's benefits are calculated by reference to the member's benefits while alive.

Maladministration

92. I find that the Authority's failure to implement the New Rule appropriately amounted to maladministration, and this caused Mr S distress and inconvenience. TPO publishes guidance on redress for non-financial injustice which can be found on our website. I consider that this situation amounts to severe maladministration by the Authority.
93. Notwithstanding what I have said in paragraph 92 above, I note that in this case the Authority has decided not to seek recovery of the overpaid sum, which, even taking into account the overpayment of employee contributions, exceeds substantially the ordinary level of award I would direct in cases of severe, even exceptional, maladministration. I consider that by not seeking recovery of the overpaid sum, the Authority has offered adequate recompense for its maladministration. So, I do not direct any additional sum to be paid in recognition of the distress and inconvenience Mr S has suffered.
94. I do not uphold Mr S' complaint.

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).

SCHEDULE 2

Part 1 – Ordinary pension

Rule B1

Subject to Parts VIA, VII AND VIII of this schedule, the amount of an ordinary pension is-

$$\frac{30 \times A}{60} + \frac{2 \times A \times B}{60}$$

Where-

A is the person's average pensionable pay and

B is the period in years (subject to a maximum of 5 years#0 by which his pensionable service exceeds 25 years.

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

Details of the South Wales Fire and Rescue Service HR Bulletin 2018 (05)

“Title: Firefighters’ Pension Scheme 1992 (FPS 1992) (Amendment to Rule B5C)

The Firefighters’ Pension (Wales) Scheme (Amendment) Order 2014 came into force on 31 December 2014 and made retrospective amendments from 1 July 2013 to the Firefighters’ Pension Scheme 1992 (FPS 1992).

The Order introduced a new Rule B5C – Additional Pension Benefit to the FPS 1992. This new Rule requires the Fire Authority to take a decision on whether temporary promotion for members of the 1992 Scheme is pensionable or non-pensionable (if pensionable then the calculation of pension of pension will be made on an Additional Pension Benefit (APB) basis).

At the Fire Authority meeting held on 26 March 2018, the Fire Authority took the decision not to introduce the new Rule B5C – Additional Pension Benefit on a retrospective basis to 1 July 2013, but to make all temporary promotion pensionable on an APB basis **with effect from 1 April 2018**.

The effect of this decision is that:

Active members of the 1992 Scheme who are temporary promoted on or after 1 April 2018 will have their pension calculated on an APB basis from this date forward.

Active members of the 1992 Scheme who have been temporary promoted after 1 July 2013, but before 1 April 2018, and their retirement date is more than 3 years since the temporary promotion, will have their period(s) of temporary promotion calculated on an APB basis.

Active members of the 1992 Scheme who have been temporary promoted prior to 1 April 2018, and can retire within 3 years of the 1 April 2018, will still be able to use any period(s) of temporary promotion as part of the best of their last 3 years to benefit from the increase in salary in their final salary pension calculation, hence leaving existing and future pension benefits in the position they are currently at the point of retirement.

It should be noted that for this group if an individual chooses not to retire within 3 years of 1 April 2018, then their pension calculations will be based on the new Rule B5C – Additional Pension benefit and have any previous temporary promotion recalculated and applied on an APB basis.

Date of Bulletin issue: 29 March, 2018...”

Appendix 5

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 6

1. Mrs S provided detailed calculations of the past losses he believed he incurred between 1 July 2018 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 salary - From 1 July 2018 to 1 July 2019, after deducting the total amount of overpayment and annual pension Mr S received during the same period amounts to £16,105.75 net.
- 1.2. Overpaid pension contributions for the same period amounts to £1,447.55.
- 1.3. Difference in pension from 1 July 2019 to 12 April 2022 totalled £7,024.56.¹²
- 1.4. Difference in lump sum he was paid when he retired on 30 June 2018 and the lump sum that he would have received, had he retired on 30 June 2019 totalled £18,869.69.
- 1.5. Total past loss inclusive of interest (£4,891.78) up to 12 April 2022 amounted to £48,449.33.

Future loss

- 1.6. Based on Mr S' assumption that he would live until age 84.69 and his wife living until the age of 87, he estimated his total future loss (his and his wife's spouse's pension) to be £81,621.45.

Alternative approach

- 1.7. 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 1 July 2019.
- 1.8. In this event, Mr S would seek past losses only, as outlined above, in paragraphs 1.1 to 1.4 of this Appendix, and grossed up to counterbalance the incidence of taxation.

¹² This figure is the amount after Mr S deducted the pension payments he had actually received during the same period.