

Ombudsman's Determination

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

Complaint Summary

1. Mr R 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 R relied on incorrect information he received from the Council and has suffered a financial loss as result of the Authority's maladministration in failing to apply the Rules governing the Scheme correctly.
 - 2.2. The Authority's maladministration as detailed in paragraph 2.1 above, has caused Mr R serious distress and inconvenience.

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 (that is, 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 R was born in September 1962. 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 in June 2018.
8. Mr R said that in February or March 2018, he was informed verbally by the Director of People Services (**the Director**), that, as of 1 April 2018, the Authority would be implementing an amendment to how retirement benefits were calculated. Temporary promotion salary would no longer be used in the calculation of retirement benefits, instead an APB would be used.
9. At the time, Mr R's substantive post was 'Group Manager B, Competent.' He was temporarily promoted to the role of Area Manager in the Operational Risk Department (**Area Manager**), from 14 June 2017 until his retirement.
10. In March 2018, Mr R had applied for the permanent role of Area Manager. Mr R's application was unsuccessful. His colleague, Mr S(1), was appointed instead.
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

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.

how temporary promotions would be treated for pension calculations, would be implemented.³

12. Mr R said that during a debriefing on the appointment process, after he was unsuccessful in his application for the Area Manager post, the Chief Fire Officer (**CFO**) informed him that he was next on the list to be appointed to the role of Area Manager. The CFO also informed Mr R that as there had been four appointable candidates, there would not be another recruitment process for the Area Manager post in the near future. The CFO said that the Assistant Chief Fire Officer (**ACFO**) would be retiring within the next 12 to 18 months, and Mr R would then be appointed to the next Area Manager position.
13. Mr R also said that during his conversation with the CFO, the CFO had pointed out that if he were going to retire in the near future, it would have been more beneficial for him to retire in June of 2018 rather than September 2018 because in doing so he could rely on nine months “of his temporary [Area Manager] pension.”
14. Following this, Mr R requested retirement quotations showing the benefits he could receive if he retired in June or September 2018.
15. On 13 April 2018, the Council sent Mr R the quotations. There were no disclaimers included with the quotations. The quotation with a retirement date of 15 June 2018 (**the Quotation**), stated Mr R’s final salary as £68,923.04 and showed that the benefits he would receive at this retirement date were:-
 - 15.1. an annual pension of £34,213.53; and
 - 15.2. a lump sum of £228,090.17.
16. The quotation with a retirement date of 18 September 2018, showed Mr R’s final salary as £65,841.02, and stated that the benefits he would receive at retirement were:-
 - 16.1. an annual pension of £33,042.59; and
 - 16.2. a lump sum of £220,283.92.
17. Both quotations showed that Mr R’s temporary promotion salary had been used to calculate his retirement benefits. No explanation was provided for the minor difference in pensionable salary figures.
18. Mr R decided to retire on 14 June 2018. He was awarded the benefits detailed in paragraph 15 above.
19. On 1 February 2019, the Service wrote to Mr R (**the February Letter**). A summary of the February Letter is detailed below in paragraphs 20 to 30.

³ Details of the Bulletin are in Appendix 4.

20. It had come to light at the end of November 2017, that the Authority had not implemented the New Rule and continued to treat temporary promotions as pensionable pay under the old regulations. It had included such payments in final salaries for pension purposes, where they had occurred within three years of retirement.
21. 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.
22. 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:-
 - 22.1. Temporary promotions were pensionable and pension benefits are earned through an APB.
 - 22.2. 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.
 - 22.3. 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.
23. 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 those decisions, as detailed in paragraph 22 above, were lawful. The advice the Auditor and the Authority received, indicated that it would be unlawful for the Authority to continue to make pension payments calculated using the old regulations, after the date the New Rule should have been implemented. The Authority had to reconsider its approach and previous decisions in respect of the implementation of the New Rule.
24. To correct the misapplication of the New Rule, the Authority would have to:-
 - 24.1. Determine that temporary promotion payments were pensionable through an APB from 1 July 2013.
 - 24.2. Recalculate the pension entitlement for each person affected.
 - 24.3. Recover any overpayment of pension made.
 - 24.4. Amend ongoing pension payments to the correct level.
 - 24.5. Liaise with HMRC over any specific taxation impacts which may have occurred.

25. 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.⁴
26. Mr R'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. His pensionable earnings would have included any additional salary received during a period of temporary promotion during that time.
27. This resulted in the final salary figures used to calculate his retirement benefits being inflated. His final salary pensionable pay 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.
28. If, at its meeting on 11 February 2019, the Authority accepted the Recommendations, it would result in Mr R's annual pension being adjusted with effect from 1 April 2019. But, 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.
29. It appreciated that the information in this letter would have been the first communication Mr R 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 R to confirm whether he would like to attend one of those meetings, or whether he would like to have a meeting on an alternative date.
30. 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.
31. On 12 February 2019, the Service sent Mr R a further letter, detailing the outcome of the Authority's meeting held the day before. This letter said the Authority had determined that:
 - 31.1. temporary promotions were pensionable through an APB and this decision was applicable from the effective date of the New Rule, which was 1 July 2013;
 - 31.2. 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
 - 31.3. it would not recover any overpayment of lump sum or pension made prior to 1 April 2019.

⁴ The three recommendations are detailed in Appendix 5.

32. Subsequent to this letter, Mr R made a complaint through the first stage of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). A summary of his IDRP stage one complaint is detailed below, in paragraphs 33 to 44.
33. Mr R submitted that his decision to retire on 14 June 2018 was heavily influenced by his personal knowledge of the Scheme at the time, advice and pension calculations provided to him. These were all based on the premise that his temporary promotion salary as an Area Manager would contribute to his pension calculations. During debriefing discussions with members of the panel, following his unsuccessful application for the permanent role of Area Manager, he was informed that if he was going to retire in the near future, it would be more beneficial to retire in June rather than in September 2018. In doing so, he would be able to rely on nine months of higher salary for his pension calculation.
34. Following receipt of the retirement quotations, he considered his options. These were:-
 - 34.1. **Option 1** – Continue to work and wait for the next Area Manager role to become available. This would have meant working an additional two years beyond the date he would have been appointed as an Area Manager. This was the commitment he had given to the CFO at the time of the promotion process. The worst case scenario for this option would have been him retiring in September 2021.
 - 34.2. **Option 2** – He could have retired in June 2018, three months short of his 30 years' service and secure nine months' Area Manager salary in his pension calculation, as advised by the Service.
 - 34.3. **Option 3** – He could have completed 30 years' service and retired in September 2018, having secured six months' Area Manager salary in his pension calculations.
35. After discussing the options with his wife, and considering his long-term future, he felt that Option 1 was a significant commitment, given it would only have led to an additional three months of Area Manager salary in his pension calculation. However, it had subsequently transpired that, had he remained in employment, he would have secured a permanent Area Manager position in September 2018. This is certainly what he would have done, had he been provided with the correct information at the time.
36. At no point during any of his conversations around the time he applied for retirement was any advice or guidance given that temporary promotions would not have been included in his final salary for pension calculation purposes. The advice he was given was to enable him to maximise his temporary promotion rather than complete 30 years' service.

37. The February Letter came as a huge shock. At a subsequent meeting with the Director and the Service Treasurer, additional information was provided to him for the first time.
38. The Authority failed to provide him with critical information that led him to make the wrong retirement decision. He would not have retired in June 2018, if he had been provided with correct information, which the Authority had been aware of since November 2017.
39. It was clear to the Service that his rationale for retiring was to maximise his Area Manager temporary promotion salary in his pension calculations. The quotations he received from the Council included his salary as a temporary Area Manager.
40. Prior to retiring he sought advice from his financial adviser (**IFA**). The advice the IFA gave him was based on the calculations in the retirement quotations. The key aspect of his long-term financial planning was based on his annual pension and what he could afford on a monthly basis.
41. He had now been told that his annual pension would be reduced from 1 April 2019 by £4,645.75 per annum, which equated to £387 per month. The reduction would have a huge impact on his financial plans. He could no longer afford to continue with his plans, meaning he would incur significant penalties which in turn would cause him financial hardship.
42. He retired from the Service after almost 30 years of great memories, life-long friendships and comfortable in the knowledge that he would have been financially secure for the rest of his life. The proposed amendment to his annual pension had left a sour taste in his mouth. It had significantly changed what retirement looked like for him. He would now struggle financially and would probably have to return to work. This situation was causing him stress, anxiety and sleepless nights.
43. He was in this position through no fault of his own. His hope was that the Service would find in his favour and continue to pay him the annual pension on which he based his decision to retire.
44. If that was not possible, he requested that the Service reinstate him into the permanent role of Area Manager.
45. On 27 March 2019, the Service responded to Mr R's complaint through stage one of the Scheme's IDRP. In summary it said:-
 - 45.1. It understood that he felt it was unfair that through no fault of his own, he would now suffer a detriment as his annual pension would be reduced.
 - 45.2. 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.

- 45.3. 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.
46. On 5 April 2019, Mr R appealed the stage one decision through stage two of the Scheme's IDRP.
47. On 8 July 2019, the Members of the Fire and Rescue Authority (**the Panel**) sent Mr R its stage two decision under the Scheme's IDRP. In summary, the Panel said:-
- 47.1. It was maladministration for the Authority to have issued incorrect information to Mr R. Mr R had suffered financial loss as a consequence. It was not able to offer Mr R the opportunity of reinstatement.
- 47.2. Mr R did reasonably know, at the point of retirement, that there had been a mistake in the application of the New Rule that would adversely affect his annual pension, as the Director had informed him of this prior to his retirement date.
- 47.3. Mr R decided to retire based on the figures he had received in the Quotation.
- 47.4. The remedy for incorrect information was to put the correct benefits into payment and not to pay the incorrect benefits.
- 47.5. 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 his retirement benefits.
- 47.6. An estimated overpayment of £34,949.49 had been made to Mr R. This included an overpayment of the lump sum of £31,465.18 and an overpayment in annual pension since Mr R retired of £3,484.31.
- 47.7. The Authority would not recover the overpayment.
- 47.8. Mr R's revised annual pension from 1 April 2019 would be £29,460.55. His revised annual pension was calculated on an APB basis.

Summary of Mr R's position

48. Mr R provided a detailed schedule of loss to evidence the financial detriment he asserts he suffered.⁵ He also made additional comments which are summarised below in paragraphs 49 to 73.
49. He recalled discussing the issue concerning the change in the calculation of retirement benefits, which meant that after 1 April 2018, his pension would not be based on his Area Manager's salary unless he was substantively promoted to that role. He noted that the Director had spoken to him and a colleague about this issue

⁵ A summary of Mr R's schedule of loss is detailed in Appendix 6.

around the same time, as they both would have potentially been affected going forward, by this change.

50. As a result of his unsuccessful application for the Area Manager post in March 2018, and the information given to him by the Director, he had to make some important decisions about his career.
51. He decided to retire in June 2018. He was age 55 and 9 months at the time. He decided that a further three and a half years' service was a significant commitment given that it would have only led to an additional three months of Area Manager salary being added to calculate his retirement benefits.
52. His gross pay as a temporary Area Manager was £71,372.21 and it would have been the same had he been substantively appointed to this role. He believed that after a year in this role, he would have qualified for the Area Manager Competent salary which was approximately £82,816.92. He had already started gathering evidence and had completed a gold command course. To be promoted, he only needed to provide some case studies, which he would have done, had he remained in the role for longer.

Loss of income/higher salary

53. The correct test in respect of loss as a result of negligent misstatement is set out in *Corsham and Others v Police and Crime Commissioner for Essex and Others* [2019] EWHC 1776 (Ch) at paragraph 173 per Morgan J. As a result, the following questions should be asked on the balance of probabilities:-
 - 53.1. Did he rely on the statements that his pensionable salary would be based on his temporary promotion pay?
 - 53.2. Was that reliance reasonable?
 - 53.3. Would he have acted differently if he had been told the correct position?
54. He has provided strong evidence that he would have acted differently had he known the correct position. Including:-
 - 54.1. He had not reached maximum accrual in the Scheme. Had he known the true position, there would have been no logical basis for him to retire three months short of 30 years' service.
 - 54.2. But for the negligence, he would have waited for the Area Manager role to open up to maximise his pension, having not even reached maximum accrual in the Scheme. Had he done so, then on the balance of probabilities he would have become aware that the Area Manager role would be available and would have opted to take it. So, it was more likely than not that he would have obtained the Area Manager role and not retired when he did, had he been given the correct information.

- 54.3. He was just under 56 years old when he retired. He would have been capable of working in his managerial role for several more years. He had continued to work, on a part-time basis, as a fire safety consultant after retirement. His plan had always been to retire at age 60, and he now proposed to retire at age 67 as a result of the negligence. He was unable to retire at age 60, even having obtained other employment, because of the Authority's negligence. The fact that he now had surplus income was not something that could have been known to him at the time he retired. Hindsight could not be applied to his case.
- 54.4. There would have been significant financial incentives for him to have remained in employment and wait for an Area Manager role to become available, had he known the true position. This included receipt of a higher final salary in his substantive role and an increase of £50,000 to his lump sum and an annual pension of a further £11,000, as set out in his schedule of loss.
55. The Authority has asserted that he knew, at the point of his retirement, that there was a mistake in the application of the New Rule that would have adversely affected his annual pension amount from the 1 April 2019, as he was notified of this by the Director, prior to his retirement date.
56. However, the Authority's assertion was misleading and mischaracterised his evidence. He did not know that the application of the New Rule would have adversely affected his annual pension entitlement. To the contrary, he was told that unless he decided to retire when he did, his entitlement would be affected. That was not the true position, and it was a further example of negligent misstatement by the Authority, upon which he reasonably relied. The first time he knew that his pension entitlement was incorrect was upon receipt of the February 2019 Letter.
57. The Authority asserted that the evidence supported he was minded to retire, notwithstanding the provision of incorrect information. This was not the correct position. He retired when he did because he was advised by the Director that it was in his best interest to do so. He did not know the true position when he retired.
58. His decision to retire instead of work for three further years, with no corresponding pension benefit, was a cost benefit analysis, and one that he carried out on the basis of incorrect information from the Authority. The fact that he requested his job back once he learnt of the error, was strong evidence that he would have stayed in employment, had he been aware of the correct position.
59. Him considering that it was not beneficial to continue working related to the incorrect information which was provided by the Authority. Consequently, it supported his case rather than detracted from it.

Loss of chance

60. He considered that had he known he had been given the wrong information, then not only would he have stayed on in employment, he would also have been promoted.

He considered he had a substantial chance of being promoted to the role of Area Manager.

61. The proper means of assessing his loss in this regard was on a loss of chance basis, because there was a substantial chance, as opposed to a speculative one, that he would have retired in the substantive role of Area Manager.
62. 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.
63. In light of *Allied Maples* and *Perry* the following questions should be asked:-
 - 63.1. Was there substantial chance, as opposed to a speculative one that he would have obtained the rank of Area Manager if he had stayed on in employment?
 - 63.2. If so, what was the chance that he would have obtained that rank?
 - 63.3. What was the measure of loss to be awarded to him for the loss of chance of obtaining that rank?
64. He had compelling evidence that he would have been promoted to the role of Area Manager on or before September 2018. In particular, the CFO had said that he was next in line for the substantive role of Area Manager, and was number two of a list of four candidates. He was already acting up in the role. On that basis alone, he had a substantial chance of promotion. On no basis could it be speculative. The earlier position of Area Manager had gone to number one on that list, in April 2018.
65. Another recruitment process would not have been necessary because there were three remaining qualified candidates from the appointment. In the premises, the individual who was number three on the list (Mr S(2)) moved into the Area Manager role when he (Mr R) retired. Mr S(2), was promoted to Area Manager in September of 2018, and was not required to undertake any further process to secure this position.
66. But for the Authority's negligence, he would not have retired in June 2018 and would have been guaranteed to move into the Area Manager role in September 2018. The Authority had not contested his recollection of his discussion with the CFO.
67. As a result, it was certain that had he not retired as a result of the Authority's negligence, he would have moved into the Area Manager role. There was no evidence to rebut this position, and in any event, it was the correct position.
68. It was his view that:-
 - 68.1. He did not need to demonstrate, on the balance of probabilities, that he would have obtained the substantive role of Area Manager.

68.2. His chance of obtaining the salary of an Area Manager was a substantial chance, particularly given the evidence that he was next in line for a promotion into the role. The chance could be as much as 100% if he was almost bound to succeed.⁶

68.3. The Authority provided no evidence to demonstrate that he would not have obtained the Area Manager pay prior to retirement.

69. Turning to the measure of loss to be awarded to him, for the loss of chance of a promotion, he submitted that:

69.1. he would have retired from the Scheme in September 2020;

69.2. by the date of his retirement, he would have been in the role of Area Manager by September 2018 at the latest; and

69.3. upon retirement, he would have received a pension based on his final salary in the role of Area Manager.

Overpaid contributions and higher spouse's pension

70. 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 approximately 16% of a higher salary, whereas contributions on his substantive pay were 6% of a lower salary. He estimated that he had overpaid contributions in the region of £1,578.90 and that he was entitled to credit for this amount, as well as an indemnity as to any underpaid tax. He was also entitled to claim for the loss of spouse's pension, as set out in his schedule of loss.⁷ Any loss of chance calculation should also take into consideration the lower spouse's pension.

Distress and inconvenience

71. The Authority's maladministration in failing to correctly implement the New Rule caused him distress and inconvenience.

72. The fact that he received an overpayment which the Authority did not seek to recover could not be said to compensate him for the distress and inconvenience he suffered as a result of the maladministration. He believed that he should be awarded an amount in recognition of the distress and inconvenience he suffered.

73. This was because the Authority had known, by November 2017, that the New Rule had not been applied correctly. By March 2018, the Authority had resolved to take action. However, it did not inform him of any error until February 2019, by which point he had made irrevocable financial decisions on the basis of the incorrect information. He had to pay significant penalties and suffered stress, anxiety, and sleepless nights

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

⁷ See Appendix 6.

as a result. He was so perturbed by the situation that he asked the Authority for his job back.

Summary of the Authority's position

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

Loss of higher income/salary

75. The evidence disclosed by Mr R indicated that he was minded to retire notwithstanding the provision of incorrect information. The following points supported this position:

- 75.1. The Authority noted that Mr R did reasonably know that at the point of his retirement there was a mistake in the application of the New Rule that would adversely affect his annual pension amount from 1 April 2019, as he was notified of this by the Director, on 1 April 2018, which was prior to his retirement date.
- 75.2. Mr R was aware that he was three months short of 30 years' service before he made the decision to retire in June 2018. His decision to retire on that date, notwithstanding his close proximity to 30 years' service, was his own and was not based on any incorrect information provided by the Authority. The information provided by the Authority was very clear in relation to Mr R's length of service.
- 75.3. The statement that Mr R would have waited for the Area Manager role to open up rather than retire had not been evidenced. Mr R had applied for the Area Manager role before and his application had been unsuccessful. It was not clear nor evidenced why Mr R would have remained in employment in order to apply for a role that he had no guarantee of obtaining.
- 75.4. Mr R's statement that his plan had always been to retire at 60 was not understood. Mr R retired in June 2018 at the age of 56.
- 75.5. Mr R said that he had decided that a further three and a half years' service was a significant commitment given that it would only have led to an additional three months of Area Manager's salary on which his pension would have been based. While it is acknowledged that Mr R was referring to a time/benefit analysis of his position, it was clear that he anticipated that remaining in employment represented a "significant commitment." So, it could not be said that he would have remained in employment but for the provision of incorrect information.
- 75.6. Mr R asserted that he started working again on a part time basis because "he needed the money." Yet in his submissions to The Pensions Ombudsman (TPO), he said that his plan had always been to retire at age 60. On Mr R's own case he would have received some salary after his retirement from his

role with the Authority in June 2018. So, it was reasonable and appropriate for the Pensions Ombudsman to take Mr R's surplus monthly income into account when determining whether he would have made a different decision had he known the true position.

76. Vacancies for Area Manager follow a recruitment process whereby the result is generally a pool of successful candidates. When a vacancy becomes available the next candidate is picked up from the list. Its records indicate that Mr S(2) was appointed to Area Manager on 1 October 2018, following the permanent appointment of the previous Area Manager to another role. This suggests that a recruitment process had run and Mr S(2) was next on the list to pick up a permanent promotion. Unfortunately, it could not locate any of the documentation in terms of the application form/interview notes for Mr S(2).
77. A historical Routine Notice (weekly staff publication) indicated the advert for a permanent Area Manager job was launched on 2 February 2018 and closed on 28 February 2018. A promotional process would have stemmed from this.

Distress and inconvenience

78. It was accepted that the provision of incorrect information caused Mr R distress and inconvenience. However, it was the Authority's view that no further compensation should be awarded on the following grounds:-
- 78.1. Mr R received an overpayment of his pension entitlement.
- 78.2. The Authority had not sought recovery of 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.
- 78.3. Not all maladministration should inevitably lead to an award for non-financial injustice.
- 78.4. The maladministration arose from a genuine error that the Authority sought to address. The Authority was transparent and open regarding the error;
- 78.5. The Authority notified Mr R of the error within a reasonable timeframe, having carefully reviewed the position and available options.
- 78.6. The Authority thoroughly investigated and responded to Mr R's complaint in accordance with the IDRP.
- 78.7. The Authority is a publicly funded organisation.
79. On 3 September 2024, I sent Mr R and the Authority my first Preliminary Decision (**the Decision**) on this complaint.
80. Mr R and the Authority did not accept the Decision and in response made some additional comments. Their additional comments have been summarised below.

Summary of Mr R's post Decision comments

81. He accepts that the correct standard of proof to establish causation of loss is the balance of probabilities test, not loss of chance.⁸
82. In his submissions to TPO, he asserted that he was told by the CFO that he was next in line for a promotion to Area Manager. The Authority had not provided any evidence to contradict his recollection.
83. To conclude in the circumstances of his case that he had not discharged the burden of proof that he would have been appointed to the role of Area Manager, whether in September or on 1 October, would be to give rise to a significant procedural unfairness.
84. When applying for an Area Manager role in February/March 2018 he was willing to commit to serve in it for two years, which would have taken him to March 2020. He was told by the CFO that another Area Manager role would become available in the next 12 to 18 months. Taken together with the two years' commitment, this would have taken him to September 2021 at the latest, a further 18 months working for the Service than what he had previously envisaged.
85. In the Decision, I had said that Mr R could not have known that a post would become available in September 2018 (though it is probable that he would have become aware of this before 18 September 2018 when his employment came to an end).
86. He had obtained further evidence from the CFO⁹ and this demonstrated that it was known in June 2018, after he had retired, that the previous incumbent of the role would vacate it in September 2018. The additional evidence states that, following a single recruitment round in February 2018, there were four successful "appointable" candidates for the role of Area Manager. The results order were:
 - 86.1. Mr S(1)
 - 86.2. Mr R
 - 86.3. Mr S(2); and
 - 86.4. Mr S(3)
87. The CFO stated in his additional evidence that, had Mr R "not made the decision to retire he would have been substantively promoted instead of [Mr S(2)]." However, even in the absence of the CFO's further evidence, staying in employment to the date of September 2021 to boost his pension by a substantial annual sum for life from the age of 59 would have been a powerful motivating factor for anyone. This would only

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

⁹ Mr R provided a new statement to TPO from the CFO. A summary of the CFO's statement is detailed in Appendix 7.

have been 18 months more than the two years he had already demonstrated that he was committed to work in February 2018, when he applied for the Area Manager role.

88. The fact that the pension of £29,460.55 (the figure to which his pension was reduced to in 2019) was insufficient for his needs at the time is evidenced by the fact that he recommenced work in a business that he did not particularly enjoy to make up the difference.
89. His pre Decision submissions to TPO where he said that to work for a further three years would have been a 'significant commitment' was specifically qualified by the observation that it would only have led to another 'three months of Area Manager's salary' on which his pension would be based. This was on the understanding that if he retired in June 2018, his pension would have been calculated on the basis of a final salary of which nine months would have been at the Area Manager rate.
90. He submitted that his case was as strong as it could be in the circumstances, that he would have chosen to remain in employment in the expectation of being appointed to the next Area Manager role when it came up.
91. The CFO's most recent statement should remove any doubt or confusion as to the circumstances in which the Area Manager role became available and the fact that he would have been appointed to it.
92. The finding in the Decision that there was a single recruitment round in February 2018, and Mr S(2)'s appointment occurred on 1 October as a result of that recruitment round was entirely consistent with his case. It was not clear on the evidence available, how any doubt had arisen that the Area Manager position to which Mr S(2) was appointed was the job that he would have been appointed to had he chosen to remain in employment.
93. In relation to the finding in the Decision that he would not have been substantively promoted to the role of Area Manager, he did not assert that he would have been. In his initial submissions to TPO he referred to the position becoming available three months after he had retired. In any event, the job must have become available in September 2018 for Mr S(2) to have been appointed to it on 1 October 2018. The difference between September and 1 October was not sufficient to reject his case, which was consistent with Mr S(2)s' appointment on 1 October 2018.
94. He does not accept that interest payable on his losses is not material.¹⁰

Summary of the Authority's post Decision comments

95. The Authority repeated comments it had made to TPO prior to the Decision and also added:-

¹⁰ Mr R provided reasons for this view using his net salary loss between June and September 2018 as an example to demonstrate the interest he believes is payable.

- 95.1. It did not agree that had Mr R known 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 R would have retired in June 2018 had he been given the correct information. So, the question of whether he would have been promoted had he not retired was moot.
- 95.2. There was not a substantial chance that Mr R would have obtained the role of Area Manager on or before September 2018, there was only a speculative chance that this would have occurred. It was not correct that the chance of Mr R receiving the salary of an Area Manager could be as much as 100% if Mr R was almost bound to succeed. Mr R was not bound to succeed.
- 95.3. While the evidence Mr R has provided was noted, any promotion process inherently included a prospect that the applicant was unsuccessful.
- 95.4. It did not agree that Mr R has lost the chance of an increased salary and increased pension, nor that any further compensation was necessary.
96. Subsequent to the Decision, there were further exchanges between Mr R, the Authority and TPO.
97. On 19 March 2025, I sent Mr R and the Authority my second Preliminary Decision (**the Second Decision**) on this complaint.
98. The Authority did not submit any comments in response to the Second Decision.
99. Mr R did not accept the Second Decision and made some additional comments, which have been summarised below.

Summary of Mr R's submissions in response to the Second Decision

100. Mr R submitted that had he not been provided with incorrect information then not only would he have remained in employment and obtained the substantive role of Area Manager, he would also have progressed to the role of Area Manager Competent prior to his retirement.
101. Mr R provided details of some of the challenges and experience he had gathered during the 12 month period he was temporarily promoted as Area Manager, and he provided a further statement from the CFO. He also provided some additional comments, and these have been summarised below:-
 - 101.1. It is important to acknowledge that the move from Area Manager Development to Area Manager Competent is not a promotional process, it is an evidenced based managerial developmental process while in role. The policies and procedures for the Service state that once permanently promoted all personnel are placed into a development phase of the Skills for Justice (**SFJ**) competency framework.

- 101.2. This framework is portfolio based and allows for personnel to move from development to competent while permanently promoted in role. The completion of the portfolio generally takes a newly promoted officer 12-18 months to complete. However, the Service's policies and procedures allow all evidence gathered while temporarily promoted in role to be used to complete this portfolio, thereby considerably shortening this 12-18 months' timeline.
- 101.3. He would have had a significant advantage in gaining competency over someone promoted directly from Group Manager to Area Manager. He had already undertaken 12 months as a temporary Area Manager and had significant senior management level experience. He would have used challenges and experiences he had gathered during the 12 month period he was temporarily promoted to the Area Manager role as evidence in his Development to Competent portfolio. These included chairing strategic committees within Service, leading a busy and demanding department to representing both the whole of Wales and South Wales on national committees.
- 101.4. He was also qualified to Gold Command SFJ level 6 award in Advanced Incident Command, which allowed him to make strategic operational command decisions without the need of being monitored or supervised. This is a key and safety critical component to progress from Development to Competent. Knowing the Service's policies and procedures as well as he did, along with the evidence he gathered while temporarily promoted in the Area Manager role, he would have qualified for Area Manager Competent at best within the first six months of his permanent promotion, at worse by the end of his first year in post.
- 101.5. His performance while he was temporarily promoted as Area Manager was documented through his personal reviews by his line manager, who was an Assistant Chief Fire Officer, and were nothing but exemplary. This further supported that he would have moved from Area Manager Development to Area Manager Competent fairly quickly.
- 101.6. Throughout his career, he always had positive reviews with his line manager. He never had any issues regarding his competence. He was a very self-driven person and prided himself on personal development and high professional standards. This was evidenced by his professional qualifications of a BSc in Business Fire Studies, and an MSc in Management. He also holds Member level qualification of The Institution of Fire Engineers attained while in various roles across the Service.
- 101.7. In his earlier submissions to TPO, he referred to the Area Manager promotional process in which he came second out of five. He could confirm that every person involved in that process, even the officer who failed it, all retired as competent Area Managers.

101.8. He would have qualified for the Area Manager Competent pay grade had he been promoted to the substantive grade of Area Manager. This is what would have happened had he remained in employment and so forms part of his loss. The Authority has not denied this assertion in its submissions.

101.9. Had he retired in September 2020, he would have served in post for over 3 years at Area Manager level, which he believes would have allowed him to move comfortably from development to competent. Furthermore, by providing him with the wrong information at the time he decided to retire, not only did the Service prevent him from being promoted to Area Manager but also took away his chance to prove his competencies.

102. The Authority did not respond to Mr R's further comments. TPO contacted the Authority to inform it that, on the basis of Mr R's further submission and evidence, I was minded to find that he would have been incrementally promoted from development to competent between 1 May and 1 September 2019, with attendant consequences for the redress calculation. Despite being informed that, in the absence of a response or further submissions, I would proceed to issue my Determination, the Authority did not respond.

Conclusions

103. Mr R has asserted that as a result of the Authority's failure to implement the New Rule, he relied on incorrect information he received from the Council when he decided to retire, and he has suffered a financial loss as a result.

104. 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.

105. I find that the Authority acted correctly by reducing Mr R'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 R may have to such a claim.

106. This does not mean however, that Mr R 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 in dispute that the information provided was incorrect.

107. For a claim of negligent misstatement to be successful, it is necessary to establish whether the Authority, as Scheme manager, owed Mr R 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.¹¹ The Authority owed a duty of care to Mr R to provide accurate information, and breached its duty.
108. The next stage is to consider whether Mr R 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 on incorrect information:-
- 108.1. Did Mr R rely on the statements that his pensionable salary would be based on his temporary promotion pay?
- 108.2. Was that reliance reasonable?
- 108.3. Would Mr R have acted differently if he had been told the correct position?
109. Following the Decision, it was accepted by all parties that the correct standard of proof to which these questions must be established is the balance of probabilities.
110. Mr R said that as a result of the verbal information given to him by the Director in February or March 2018, concerning how his retirement benefits would be calculated, and his unsuccessful application for the role of permanent Area Manager in March 2018, he decided to retire. Mr R also obtained the Quotation from the Council as part of his retirement planning. My attention has not been drawn to a disclaimer on the Quotation, indicating that the figures were illustrative only, or that they could not be relied upon. I find that it was reasonably foreseeable that Mr R would have relied on the information he received from the Director and the information in the Quotation to decide to retire in June 2018, and that he did rely on the information in the Quotation in his retirement planning.
111. I consider that, at the time that Mr R received the information from the Director and had requested the Quotation, he would not have known that the Authority had failed to implement the New Rule.
112. I note the comments made by the Panel, in the IDRP stage two decision, and the Authority's submissions at paragraph 75.1 above, that Mr R did reasonably know, at

¹¹ *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

the point of retirement that there had been a mistake in the application of the New Rule, that would have adversely affected his annual pension.

113. However, based on the information in the Quotation, I find that it was reasonable for Mr R to have believed the figures provided in the Quotation were correct. This is because the Quotation had details of the APB that Mr R had accrued. Further Mr R had been informed by the Director that the New Rule would be applied from 1 April 2018.
114. I acknowledge that the quotation with a retirement date of 18 September 2018, on its face might, in ordinary circumstances, have been challenged on the basis that it appears inherently illogical that a longer period of pensionable service would result in a lower projected pension benefit. However, the information reflected what Mr R had been informed, incorrectly, by the Authority, namely that it would be to his benefit to retire earlier to take advantage of nine months of his temporary promotion salary. On this basis, I find that it was reasonable for Mr R to have relied on the oral information given by the Authority and the contents of the Quotation.
115. At the time of his retirement, Mr R was three months away from accruing 30 years' pensionable service in the Scheme. Prior to his retirement, the quotation he had received from the Council with a retirement date of September 2018 showed that Mr R would receive lower benefits than he would receive, if he retired in June 2018 instead.
116. I consider that, had Mr R been given correct information verbally by the Director concerning how his retirement benefits would be calculated, and the information on the Quotation had been correct, on the balance of probabilities, Mr R would not have retired in June 2018.
117. I find that by retiring earlier than he would otherwise have done, Mr R has incurred a financial loss. This is as a direct result of relying on the incorrect information in the Quotation and it follows that he should be compensated accordingly. Mr R is entitled to be put into the position he would have been in had the incorrect statement not been made.
118. In addition to Mr R's claim that he would not have retired in June 2018, he has also claimed that when a substantive Area Manager role became available in September 2018, he would still have been in employment and would have achieved promotion to that role. He also submits that within 12-18 months of being promoted to the Area Manager role, he would have achieved the grade of Area Manager Competent. He asserts it is necessary to consider the additional loss he suffered as a result of not attaining the roles of Area Manager and Area Manager Competent.
119. For me to decide whether Mr R would have been successfully appointed to the role of Area Manager on 1 October 2018, I need to decide whether:
- 119.1. Mr R would have chosen to remain in employment after June 2018;

119.2. Mr R would have been offered the substantive Area Manager role; and

119.3. Mr R would have accepted the substantive Area Manager role.

120. I have already found, in paragraph 116 above, that had Mr R been given correct information regarding the calculation of his retirement benefits, on the balance of probabilities, he would not have retired in June 2018.

121. In the Decision I found that, based on the evidence submitted to me at the time, on the balance of probabilities, Mr R would not have been successfully appointed to the role of Area Manager in September 2018, had he not retired in June 2018.

122. The additional evidence from the CFO, subsequent to the Decision, establishes that the Recruitment round for the Area Manager position in February 2018 resulted in four successful candidates.¹² When Mr S(1) was appointed to the substantive role of Area Manager in March 2018, Mr R was informed that he was second on the list.

123. In June 2018, the ACFO resigned and retired in September 2018. Another Area Manager was promoted to ACFO, leaving his former Area Manager role vacant. It was this vacant Area Manager role that Mr S(2) was appointed to on 1 October 2018.

124. The CFO's post Decision statement states that Mr S(2) was third in line for the Area Manager position and the CFO explicitly stated that "If [Mr R] had not made the decision to retire he would have been substantially promoted instead of [Mr S(2)]."

125. Based on the CFO's post Decision statement, and the fact that I have already found that Mr R would not have retired in June 2018, had he been given the correct information, I also find that Mr R has established, on the balance of probabilities, that he would have been in post as a temporary Area Manager and offered the substantive role of Area Manager in September 2018.

126. Although the additional evidence provided by the CFO is striking in that it was the CFO's original statements to Mr R that encouraged him to retire,¹³ I have not seen any indication that the CFO has changed his position or that his evidence should not be relied upon. The CFO was in a sufficient position of authority to have made a decision about the appointment of the successful candidate to the Area Manager role in October 2018. The evidence was also explicitly given in the context of Mr R's complaint and intended for Mr R to submit as evidence.

127. I now need to consider whether Mr R would have accepted the Area Manager role and, if so, when he would have retired and whether he would he have been promoted to Area Manager Competent, prior to his retirement.

128. I consider that there is no positive evidence to suggest that Mr R would not have accepted the Area Manager role in October 2018. He had made the decision to apply for the role in February 2018, so, on the evidence available and in the absence of any

¹² See paragraph 86 above.

¹³ See paragraph 13 above.

evidence to the contrary presented by the Authority, I find it was more likely than not that he would have accepted the Area Manager role had it been offered to him in October 2018.

129. In his post Decision submissions, Mr R said he would have been willing to carry out the substantive Area Manager role for at least two years. In his initial submissions to TPO, he stated that his intention was always to retire at 60.
130. Mr R reached age 60 in September 2022. He had commenced pensionable service in September 1988, so he would have reached maximum accrual in the Scheme in September 2018. After this point, the only impact longer service would have had on his pension calculation was the salary at which he retired.
131. Under Rule G1 (3), the average pensionable pay of a firefighter is the aggregate of his pensionable pay for the year immediately preceding his retirement date.¹⁴ So, from 1 October 2019 onwards (assuming for these purposes), Mr R's pension would have been calculated solely by reference to the Area Manager salary. After this point his pension would not have materially increased.
132. Taking into account the factors above, I find that Mr R would not have continued in employment until he reached age 60, but that he would have continued in the Area Manager role until 30 September 2020.

Would Mr R have progressed to Area Manager Competent prior to his retirement?

133. For me to decide whether Mr R would have progressed to the grade of Area Manager Competent prior to his retirement on 30 September 2020, I need to consider whether it is more likely than not that Mr R would have attained the required evidence to demonstrate the relevant competencies to progress to the grade of Area Manager Competent.

Would Mr R have attained the relevant evidence required to progress to Area Manager Competent?

134. Mr R has said that to progress from Area Manager Development to Area Manager Competent is not a promotional process, it is an evidenced based managerial developmental process while in role. This characterisation of the process has not been challenged by the Authority.
135. Mr R asserts that he would have been able to use challenges and experiences he had gathered during the 12 month period he was temporarily promoted to the Area Manager role as evidence in his Development to Competent portfolio. In support of his assertions Mr R provided details of the experience and evidence he had gathered during that period and a further supporting statement from the CFO.
136. Mr R further asserted that knowing the Service's policies and procedures as well as he did, along with the evidence he gathered while temporarily promoted in the Area

¹⁴ See Appendix 1.

Manager role, he would have qualified for Area Manager Competent at best within the first six months of his permanent promotion, at worst by the end of his first year in post.

137. The Authority presented no evidence on this point, despite receiving the notice referred to in paragraph 102 above. The CFO, in his statement which Mr R submitted as part of his post Second Decision submissions said:-

“In the year [Mr R] was temporary Area Manager he had extensive strategic experience in both the operational and managerial aspect of the role. He was assessed competent in safety critical command decision making, which is a highly pressurised command assessment.

Having worked with [Mr R] on the Senior Management Team whilst he was temporary Area Manager, and reviewing the evidence [Mr R] has provided, I have no doubt whatsoever that if [Mr R] had remained in post and been substantively promoted to Area Manager he would have progressed from development to competent within a short time frame of within the first six months of his promotion...

[Mr R] was a valuable and well respected senior officer at the Service; his experience, knowledge and leadership skills stood him out above the others.”

138. The evidence before me on this point is not fully aligned. In Mr R’s original submissions, he asserted that he would have achieved the competent grade “after” a year at the development grade. He later described 12 months as a “worst case scenario.” The CFO has submitted that Mr R could have expected to be promoted to competent in six months. I consider then that the evidence sets out, broadly a “worst case scenario” of more than 12 months and a “best case scenario” of six months.

139. A finding that he would have achieved competence at 12 months is compatible with all the evidence. However, a finding that it would have occurred after only six months is not compatible with Mr R’s initial witness statement because he referred to promotion “after” a year in the development role. I have taken into account the CFO’s evidence, and I acknowledge that, at the time, Mr R would have been in post. I have also taken into account the Authority’s lack of response or submissions on the point.

140. However, in order to find that Mr R would have been promoted to competent in six months, I would need to be able to find that the best case scenario was more likely than not to have occurred. I do not consider that I can safely reach this conclusion because a best case scenario is inherently less likely than a non-best case scenario, and would require higher cogency of evidence than I have before me. On that basis, I find, on the balance of probabilities, that had Mr R not retired on 14 June 2018 and had been substantively promoted to the role of Area Manager on 1 October 2018, he would have progressed to the grade of Area Manager Competent twelve months after being appointed on 30 September 2019. This is sooner than Mr R originally submitted but later than the date in the “best case scenario”. I find that Mr R would also have

remained at the Area Manager Competent grade until he retired on 30 September 2020.

Overpaid pension contributions and higher spouse's pension

141. Mr R estimates that he overpaid employee pension contributions by £1,578.90 during his period of temporary promotion because he had paid contributions at 16% of a higher salary rather than at 6% of a lower salary. These figures have not been challenged by the Authority, and I find that this figure is recoverable.
142. I have taken Mr R'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.
143. I acknowledge Mr R's detailed assessment of loss, as set out in Appendix 6, as well as his submission that the interest on his financial loss is not non-material. However, I consider that the directions below provide appropriate redress for the financial loss Mr R has suffered.

Maladministration

144. I find that this situation has caused Mr R distress and inconvenience. This is because, after being in receipt of his pension for approximately seven and a half months, he was informed that his annual pension benefits would be reduced. Mr R'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 paid to Mr R of £34,949.49 is substantially higher than the usual level of award I would make in these circumstances. However, the directions at paragraph 146 below, take the overpayment of the lump sum of £31,465.18 and overpayment in annual pension, since Mr R retired of £3,484.31 into account when assessing the financial loss that Mr R has suffered. So, I consider that a separate award for the serious distress and inconvenience Mr R has suffered is appropriate.
145. I uphold Mr R's complaint.

Directions

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

146.1. Amount A is equal to:-

- 146.1.1. the total of pension and lump sum benefits Mr R would have been paid under the Scheme up to the Calculation Date on the following assumptions: (i) he had remained in employment as a temporary Area Manager until 30 September 2018, thereafter remained in the substantive role of Area Manager until 30 September 2019, and

thereafter remained at the substantive grade of Area Manager Competent until 30 September 2020 and accrued additional pensionable service in the Scheme during these periods; (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 30 September 2020, and his pension and lump sum came into payment, having been calculated in accordance with the New Rule, on that date; plus

146.1.2. 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 R on the assumptions specified in paragraph 146.1.1, assuming Mr R is in good health; plus

146.1.3. the total of the salary Mr R would have received on the assumptions specified in paragraph 146.1.1 above, less any employee contributions he would have needed to pay to remain in the Scheme while accruing additional pensionable service; plus

146.1.4. the sum of £1,578.90 in overpaid employee contributions.

146.2. Amount B is equal to:-

146.2.1. the total of the pension and lump sum payments paid to Mr R by the Scheme in the period from 14 June 2018 until the Calculation Date (including any overpayments which the Authority does not seek to recover from Mr R); plus

146.2.2. the total, net amount Mr R earned as a fire safety consultant between 15 June 2018 and 18 September 2018; plus

146.2.3. 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 R, assuming Mr R is in good health.

146.2.4. the total of any employer and employee contributions paid (if any) into a pension in respect of his job as a fire safety consultant between 15 June 2018 and 18 September 2018.

146.3. 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.

146.4. The Authority should instruct the Actuary to calculate the loss acting as expert holding the balance fairly between the parties. The Actuary should be the Scheme Actuary or, if the Scheme Actuary is not willing to perform this role, such other Actuary instructed for this purpose by the Authority. The Actuary's costs should be met by the Authority. The Actuary's calculations should be shared with Mr R once they are available.

146.5. The Authority should pay Mr R 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 R in the same net tax position he would have been in, if the inaccurate statement had not been made. If HMRC then seeks to levy income tax on the payment made by the Authority pursuant to this paragraph, the Authority should pay Mr R an additional sum designed to put him in the position he would have been in, if such additional tax liability had not arisen. The Authority should also pay Mr R an additional amount designed to meet any additional tax liability, if HMRC treat the above payment as an unauthorised member payment for the purposes of the Finance Act 2004.

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

Dominic Harris

Pensions Ombudsman
3 July 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;

“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 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

CAS-84083-M5S5

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. Mr R provided detailed calculations of the past losses he believed he incurred between 14 June 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 14 June 2018 to September 2020, after deducting the total amount of overpayment and annual pension Mr R received during the same period amounted to £38,430.09 net.
- 1.2. Overpaid pension contributions between 14 June 2017 and 14 June 2018 amounted to £1,578.90.¹⁵
- 1.3. Difference in pension from September 2020 to 12 April 2022 totalled £16,798.57.¹⁶
- 1.4. Difference in lump sum he was paid when he retired on 14 June 2018 and the lump sum that he would have received, had he retired in September 2020 totalled £53,834.33.
- 1.5. Total past loss inclusive of interest (£8,204.38) up to 12 April 2022 amounted to £118,846.27.

Future loss

- 1.6. Based on Mr R's assumption that he would live until age 84.73 and his wife living until the age of 87, he estimated his total future loss (his pension and his wife's spouse's pension) to be £302,137.29.

Total loss net of mitigation and taxation

- 1.7. After deducting his total income from other sources between October 2018 and 2021 and tax between the same period, his total net loss was £401,411.56.

Alternative approach

- 1.8. As an alternative, Mr R suggested that I could direct the administrators and/or managers of the relevant pension scheme to take steps to remedy the injustice, namely, to ensure that he receives the equivalent of the pension that would have been payable had he retired on 30 September 2020.
- 1.9. In this event, Mr R 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.

¹⁵ This is Mr R's best estimate figure.

¹⁶ This figure is the amount after Mr R deducted the pension payments he had actually received during the same period.

Appendix 7

A summary of the Statement from the previous Chief Fire Officer of the South Wales Fire and Rescue Service

“...I retired as the [CFO] in April 2024. I provide this statement as a true and accurate record of accounts and sequence of events centering around [Mr R] and the promotion process to Area Manager of South Wales Fire and Rescue Service facilitated in 2018 (sic).

In the early part of 2018 a vacancy arose to the role of Area Manager, which due to the infrequency and low number of positions in the Service the promotion services for this role were facilitated on in ‘just in time’ and needs basis only. The promotion process was a multi stage process with eligible candidates applying but few being successful at the conclusion.

Prior to the promotion process [Mr R] approached me for a professional discussion on his future. He was concerned that he may not be seen as a credible candidate for promotion to Area Manager as he was approaching 30 years service (sic). I reassured [Mr R] that the promotion process would be fair and equitable for all, and if successful with his length of service he would bring significant experience to the Senior Management Team. In fact at this time he was temporary promoted to Area Manager and was performing extremely well in role leading the Operational Risk Management function (sic). With this reassurance [Mr R] made the decision to apply for the promotion process and stated to me that he would if successful, he would give a two year commitment to the Service.

The Area Manager process in 2018 provided four successful candidates, which then made up a promotion list for the Service to use to fill vacancies as they arose in the next year or two. The successful candidates in result order were:

[Mr S(1)]

[Mr R]

[Mr S(2)]

[Mr S(3)]

[Mr S(1)] was appointed with immediate affect to the vacancy that arose as a result of [Mr N] retiring (sic). All candidates we debriefed on their performance and were advised on where they were on the Area Manager promotion list. As part of the debrief discussion I had with [Mr R] we discussed his good performance at the assessment centre, his ongoing strong performance in role as temporary Area Manager and that he was in a strong position for an Area Manager vacancy as he was 2nd on the list. As [CFO] succession planning and scenario planning is a strong requirement to ensure the Senior Management

Team continues to function with a diversity of colleagues. Based on the knowledge and assumptions I made I anticipated the [ACFO] ...would likely retire in the next 12-18 months. I shared this with [Mr R] and I advised him to 'keep his powder dry' and see how the next 12 months materialise, which may bring him a substantive promotion to Area Manager.

Regrettably in June 2018 [the ACFO's] family circumstances changed dramatically and he tendered his intention to retire at the end of September 2018. In this period of time I was aware that [Mr R] had received pension estimates from the Services' pension administrator, and ultimately made a decision to retire based on the pension estimates he received. On 1st October [Mr S(2)] who was third on the promotion list was substantively promoted. If [Mr R] had not made the decision to retire he would have been substantively promoted instead of [Mr S(2)]..."