

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 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 R would not have acted differently, had he not received the incorrect information.

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 R was born in March 1966. He was previously employed by the Fire and Rescue Service (**the Service**), and was an active member of the Scheme from 12 April 1985, until he retired on 24 June 2016.
8. Prior to his retirement, Mr R's substantive post was Group Manager A Competent. He was previously temporarily promoted to the role of Group Manager B Competent from 16 June 2014 until 28 June 2015.
9. In March 2016, Mr R requested a retirement benefits quotation from the Council. The Council sent Mr R a retirement quotation dated 25 April 2016 (**the Quotation**). This informed Mr R that at retirement he could receive a lump sum of £196,579.55 and an annual pension of £29,846.93. His retirement benefit calculation included his temporary promotion salary.
10. At his retirement, Mr R received a lump sum of £197,243.25 and an annual pension of £29,586.49.
11. On 1 February 2019, the Service wrote to Mr R (**the February Letter**). A summary of the February Letter is detailed below, in paragraphs 12 to 22.

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.

12. 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.
13. To address this situation, the Authority considered a report at its meeting on 26 March 2018. At this meeting, the Authority concluded that it was imperative to correct the position going forward, by implementing the New Rule. Doing so would prevent further miscalculations of pensions based on temporary promotions under the old regulations.
14. The Authority sought to implement the rule change in a fair and ethical manner, taking into account the situation retired members of the Scheme would be in, through no fault of their own. The Authority determined the following:-
 - 14.1. Temporary promotions were pensionable and pension benefits are earned through an APB.
 - 14.2. The New Rule would be implemented with effect from 1 April 2018, and the change would not be applied retrospectively, because it was not the fault of the members affected, that the change was not implemented.
 - 14.3. The expectations of the affected members should be honoured by leaving existing and future pension benefits in the position they were currently, or were expected to be in, at the point of retirement.
15. As part of the 2017/2018 audit of accounts, the Wales Audit Office considered the decisions taken by the Authority to rectify the position going forward, and whether the Authority's decisions, as detailed in paragraphs 14.1 to 14.3 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.
16. To correct the misapplication of the New Rule, the Authority would have to:-
 - 16.1. Determine that temporary promotion payments were pensionable through an APB from 1 July 2013.
 - 16.2. Recalculate the pension entitlement for each person affected.
 - 16.3. Recover any overpayment of pension made.
 - 16.4. Amend ongoing pension payments to the correct level.
 - 16.5. Liaise with HMRC over any specific taxation impacts which may have occurred.

17. A further report was being presented to the Authority on 11 February 2019, to make three recommendations (**the Recommendations**), on how it should address the situation moving forward.³
18. Mr R's retirement 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.
19. This resulted in the final salary figures used to calculate his pension 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.
20. 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.
21. 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 if he would like to attend one of those meetings, or if he would like to have a meeting on an alternative date.
22. Subsequent to the Authority's meeting on 11 February 2019, it would write to him to formally notify him of the decision the Authority had taken, in respect of the Recommendations.
23. On 12 February 2019, the Service sent Mr R a further letter detailing the outcome of the Authority's meeting held the day before. This letter said the Authority had determined that:
 - 23.1. temporary promotions were pensionable through an APB, and that this decision was applicable from the effective date of the New Rule which was 1 July 2013;
 - 23.2. all future pension payments made after 31 March 2019, had to be adjusted to ensure that they were calculated on the correct APB basis; and
 - 23.3. it would not recover any overpayment of lump sum or pension made prior to 1 April 2019.

³ The three recommendations are detailed in Appendix 4.

24. Subsequently, Mr R made a complaint through stage one of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). A summary of his complaint is detailed below, in paragraphs 25 to 32.
25. In 2014, his father had been diagnosed with an aggressive form of dementia. This meant that the level of care he required would be progressively increased, and he would have ultimately needed full time residential care.
26. From that moment, his main aim was to support his father, to enable him to remain living independently at home, by providing a care package facilitated by the local authority and enhanced by him.
27. As his father's condition deteriorated, his support increased and got to a level which was unsustainable while he was still in full time employment. If he was going to prevent his father from entering residential care at that time, he needed additional support.
28. By June 2016, he had completed over 30 years of service in the Scheme, so was eligible to retire with a full pension. He decided to do so as it allowed him to provide additional care for his father. However, for him to be able to take this option, he needed to ensure that his retirement benefits would have been adequate to support his family for the rest of his life.
29. Prior to deciding to retire, he considered:-
 - 29.1. If his annual salary would have been sufficient to meet the financial needs of his family.
 - 29.2. If he retired at age 50, his annual pension would not receive increases until age 55.
 - 29.3. He did not have any other source of income.
 - 29.4. In the previous year, he had completed a period of temporary promotion which he believed would have attracted a high annual pension for the rest of his life.
30. After much deliberation, he concluded that the annual pension stated on the Quotation would be just enough to allow him to retire and support his family financially. Based on this and the factors stated in paragraph 29.1 to 29.4 above, he decided to retire.
31. Receiving the February Letter out of the blue had caused him concern for the detrimental effect this would have on him and his family. Through no fault of his own, he and his family would suffer financially for the rest of their lives.
32. He believed that if he had been provided with correct information, the option to retire in June 2016 would not have been financially viable.
33. On 27 March 2019, the Service replied to Mr R's stage one IDRP complaint. In summary it said:-

- 33.1. 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.
 - 33.2. 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.
 - 33.3. 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.
34. Subsequently, Mr R appealed the IDRP stage one decision.
35. On 9 July 2019, the Members of the Fire and Rescue Authority (**the Panel**), sent Mr R its decision under stage two of the Scheme's IDRP, not upholding his complaint. In summary, the Panel said:-
- 35.1. It was maladministration for the Authority to have issued incorrect information to Mr R. Mr R was now in a less advantageous financial position as a consequence.
 - 35.2. Mr R 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 adversely affect his annual pension, from 1 April 2019. Mr R decided to retire based on the figures he had received in the Quotation.
 - 35.3. The remedy for incorrect information was to put the correct benefits into payment and not to pay the incorrect benefits.
 - 35.4. 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 R's retirement benefits.
 - 35.5. An estimated overpayment of £16,401.92 had been made to Mr R. This included an overpayment of the lump sum of £11,611.97 and an overpayment in annual pension since Mr R retired of £4,789.95.
 - 35.6. It would not recover the estimated overpayment.
 - 35.7. Mr R's revised annual pension from 1 April 2019 would be £27,844.69. His revised pension was calculated on an APB basis.

Summary of Mr R's position

36. Mr R provided a detailed schedule of loss to evidence the financial detriment he asserts he suffered.⁴ He also made additional comments which are summarised below in paragraphs 37 to 57.
37. He considers that he is entitled to damages both for the direct financial losses suffered as a result of his reliance on the Council's negligent misstatement and damages for the loss of opportunity to obtain a higher rank, a higher final salary, and accordingly a higher pension.
38. Following receipt of the Quotation he carefully considered whether he could afford to retire on the figures stated. After much deliberation, he concluded that his pension, together with the carer's allowance he would receive, would have been "just enough" to allow him to retire while financially supporting his family. So, he decided to retire.
39. His monthly direct debits amounted to £2,080 of which his mortgage payments were £703.05. His monthly take home pay was £2,600, which left him with disposable income of £520 per month. The calculations on the Quotation gave him a net income of £2,155. This showed that the monthly income would only just cover his monthly outgoings. He calculated that if he could pay off a portion of his mortgage, this would have reduced his monthly outgoings, leaving him with adequate disposable income from his pension.
40. Following his retirement, he paid a lump sum of £51,282.68 towards his mortgage. This reduced his monthly mortgage payments from £703.08 to £129.71. Reducing his mortgage payments did not reduce his loss.
41. Moreover, in order to reduce his monthly outgoings such that he would not have been in financial difficulty, he might have opted to take the maximum lump sum, thereby also further reducing his monthly pension. The net result of this was that regardless of how the pension was carved, he acted to his detriment in reliance on the incorrect information and had he known the true position he would have acted to avoid this. This is illustrated by the fact that he had to find alternative employment to mitigate his losses.
42. Whether or not he suffered a financial detriment did not turn on the lump sum he received or was entitled to receive, it turned on the monthly income he was told he would receive. Appropriate or adequate weight needed to be given to his position on this, particularly, as the Authority had not contradicted his position.
43. Had he realised that his pension would not have been calculated using his temporary promotion pay, he would have continued in employment until age 55 to ensure that any pension received after that date would have been index-linked, and he would have made a different decision in relation to his father's care.

⁴ A summary of Mr R's schedule of loss is detailed in the Appendix 5.

44. His father went into full time residential care in May 2018, and his carer's allowance of £250 a month ceased.
45. Following the reduction of his pension in April 2019, he paid off the remainder of his mortgage. He also undertook casual employment as a Fire Steward at the Principality Stadium commencing in October 2019.

Loss of chance

46. He believed that if he had remained in employment until age 55, he would have achieved a permanent promotion to the role of Group Manager B (Competent) during or before the 2017 selection process. On average, one general promotion exercise was run each year at Group Manager level. He had met the criteria to be promoted to that role.
47. He had received positive feedback during his temporary promotion. However, he had not participated in a promotion process for the Group Manager B (Competent) role. He had been due to do this six months prior to his retirement, but did not do so because of his father's illness.
48. 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.
49. He believed the loss of chance basis was the proper means of assessing his loss in this regard, because there was a substantial chance, as opposed to a speculative one, that he would have retired in the rank of Group Manager B (Competent).
50. In light of the *Allied Maples* and *Perry* cases, the following question should have been asked:-
 - 50.1. Was there a substantial chance, as opposed to a speculative one, that he would have obtained the rank of Group Manager B (Competent) if he had stayed on in employment?
 - 50.2. If so, what was the chance he would have obtained that rank?
 - 50.3. What was the measure of loss to be awarded to him, for the loss of chance of obtaining that rank?
51. He had submitted compelling evidence to The Pensions Ombudsman (**TPO**), that he would have been promoted to the role of Group Manager B (Competent) on or before the 2017 selection process. In particular:-
 - 51.1. He understood that all eleven Group A managers who were in post at the time of his retirement went on to obtain promotions. That is a promotion rate of 100%.

- 51.2. He was among the most experienced of that cohort. There was no evidence to rebut this position, and in any event, it was the correct position.
52. He did not need to demonstrate on the balance of probabilities that he would have obtained the rank of Group Manager B (Competent). His chance of obtaining the salary of Group Manager B (Competent) was a substantial chance, particularly given that no promotion was necessary. The chance could be as much as 100% if he was almost bound to succeed.⁵ The Authority had not provided evidence to demonstrate that he would not have obtained Group Manager B (Competent) pay prior to retirement.
53. Turning to the measure of loss to be awarded to him, for the loss of chance of a promotion, Mr R submitted that:-
- 53.1. He would have retired from the Scheme at age 55, which was in March 2021.
- 53.2. By the date of his retirement, he would have been in the role of Group Manager B (Competent) from or before the 2017 selection process.
- 53.3. Upon retirement, he would have received a pension based on his final salary in the role of Group Manager B (Competent).
- 53.4. He had lost the chance of an increased salary and increased pension, and he should be compensated for those losses.

Overpaid pension contributions

54. As a result of the Authority's maladministration and negligence, he paid pension contributions at a higher rate than he otherwise would have, because his temporary promotion pay was not pensionable. The contributions on his temporary promotion pay were 15.5% of a higher salary, whereas contributions on his substantive pay were 15.5% of a lower salary. He estimated that he had overpaid contributions in the region of £462.64 and that he was entitled to credit or compensation for this amount, as well as an indemnity as to any underpaid tax.
55. Should his claim be successful, he was also entitled to claim for the loss of spouse's pension, as set out in his Schedule of Loss.⁶

Distress and inconvenience

56. This matter had caused him distress and inconvenience. The Authority not recovering the overpayment he had received could not be said to compensate him for the distress and inconvenience he suffered as a result of the maladministration.
57. The Authority knew by November 2017 that the Scheme was being administered incorrectly, and by March 2018, had resolved to take action. He was not informed of

⁵ *Hanif v Middleweeks* [2000] Lloyd's Rep. PN 920 at [14] per Mance LJ

⁶ See Appendix 5

any error until 12 February 2019, by which point he had made irrevocable financial decisions on the basis of the incorrect information.

Summary of the Authority's position

58. Mr R was not entitled to any losses as he had not acted to his detriment. The key question was would Mr R have acted differently had he been told the correct position.
59. The evidence disclosed by Mr R indicated that he was minded to retire notwithstanding the provision of incorrect information. This was because:-
 - 59.1. On becoming eligible to retire with a full pension in June 2016, Mr R decided to do so as it allowed him to provide additional care for his father.
 - 59.2. No evidence had been provided that Mr R would have remained in his substantive post until age 55, to ensure that any pension received after that date would have been index linked. Mr R retired at age 50, when it was clear that his pension would not be index linked. This position was not altered by the incorrect information provided by the Authority.
 - 59.3. Mr R's monthly outgoings related to decisions he had taken in terms of how to use his lump sum pension payment, which was a larger lump sum than he was entitled to. The Authority had not sought to recover that overpayment.
 - 59.4. Mr R's decision to obtain new employment after his retirement was not relevant for determining whether he would have acted differently had he known the correct position before retirement. No evidence had been provided as to why Mr R sought new employment.
 - 59.5. Mr R's new salary had not been disclosed. The difference between the figures that Mr R expected to receive and what he was actually entitled to, was £2,002.24 per annum.
 - 59.6. Mr R received a higher lump sum than he was entitled to and so had an increased opportunity to pay more of his outstanding mortgage at the time of his retirement. Mr R states that he paid a lump sum of £51,282.68 towards his mortgage, reducing his monthly mortgage payment from £703.08 to £129.71. Mr R's decision as to how much of his mortgage to repay could not be said to have resulted from the incorrect information provided by the Council.
 - 59.7. Had the lump sum been calculated at a lower figure than was the true position, Mr R could more realistically argue that he suffered a loss, as he may have been in a position to pay off more of his mortgage than would have been the case, but the contrary position applied here. Had Mr R wanted to pay more of his mortgage off and reduce his monthly sum accordingly, the incorrect information provided by the Council did not prevent him from doing so.
 - 59.8. The Authority did not agree that the overpayment of the lump sum was an irrelevant factor. To the contrary, the payment of an increased lump sum was

relevant to the question of Mr R's loss. It was difficult to see how receipt of a larger lump sum payment than would otherwise have been the case, could be viewed as a loss.

59.9. In respect to ongoing loss, Mr R was incorrectly informed that his annual pension was £29,846.93 when he retired. He was later informed that his revised annual pension from 1 April 2019 would be £27,844.69. This was an annual reduction of £2,002.24. No evidence had been provided to suggest that Mr R would have acted differently if he had been told that his annual pension would have been at the lower figure. It should be noted that the difference in annual pension amounted to £166.85 per month.

59.10. To the contrary, the evidence provided indicated that Mr R was minded to retire in June 2016, in order to provide care for his father. This is what he did, and he received an overpayment of his lump sum and annual pension, in the total amount of £16,401.92.

Loss of chance

60. The Authority does not agree that had Mr R known that he had been given the wrong information then not only would he have stayed on in employment, but he also would have been promoted. It was clear that there was a substantial chance that Mr R would have retired in June 2016, had he been given the correct information and the question of whether he would have been promoted if he had not retired was moot.
61. There was not a substantial chance that Mr R would have obtained the rank of Group Manager B (Competent) if he had stayed on in employment. Mr R had not participated in a promotion process for the Group Manager B (Competent) role because of his father's illness. So, it was not clear whether he would have applied for the Group Manager B (Competent) role in 2017 or at a later date. Any contention that he would have received that salary before his retirement was speculative.
62. It was not known whether all eleven Group A managers who were put in post at the time of Mr R's retirement went on to obtain promotions and no evidence had been adduced in relation to this.
63. It was not a given that Mr R would have attained the role of Group Manager B (Competent) had he not retired. Mr R has adduced no evidence to support his contention that he had excellent prospects of obtaining this role prior to retirement. Promotion to the role of Group Manager B (Competent) was not a guarantee.
64. In his submissions to TPO, Mr R stated that his chance of obtaining the salary of Group Manager B (Competent) was a substantial chance given that no promotion was necessary. This statement was clearly incorrect. While Mr R had been temporarily promoted to the role of Group Manager B (Competent) from 16 June 2014 until 28 June 2015, he would still have needed to apply for a substantive promotion (which he decided not to do in 2016 before the provision of incorrect information). In the event of an application for promotion there was no guarantee of

Mr R being successfully promoted to the role of Group Manager B (Competent) as claimed or otherwise.

65. It was not correct that the chance could be as much as 100% if Mr R was almost bound to succeed. Mr R was not bound to succeed. Any promotion process inherently included a prospect that the applicant was unsuccessful.
66. The Authority's position remained that there was only a speculative chance that Mr R would have obtained Group Manager B (Competent) salary prior to retirement were it not for the provision of incorrect information.
67. The Authority disagreed that Mr R had lost the chance of an increased salary and increased pension so did not consider any further compensation to be necessary.
68. Mr R had received an overpayment of £16,401.92 which the Authority had not sought to recover. The overpayment was significantly more than the alleged overpaid contribution figure stated by Mr R, so the Authority did not believe that further compensation was payable.
69. Any and all alleged losses in respect to Mr R's spouse's pension were too remote and could not reasonably be attributed to the incorrect information provided by the Council.

Distress and inconvenience

70. 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:-
 - 70.1. Mr R had received an overpayment of his pension entitlement.
 - 70.2. 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.
 - 70.3. Not all maladministration should inevitably lead to an award for non-financial injustice.
 - 70.4. The maladministration arose from a genuine error that the Authority sought to address. The Authority was transparent and open regarding the error.
 - 70.5. The Authority notified Mr R of the error within a reasonable timeframe, having carefully reviewed the position and available options.
 - 70.6. The Authority thoroughly investigated and responded to Mr R's complaint in accordance with the IDRP.
 - 70.7. The Authority is a publicly funded organisation.

71. On 3 September 2024, I sent Mr R and the Authority my Preliminary Decision (**the Decision**) on this complaint.
72. Mr R did not accept the Decision and in response made some additional comments. A summary of his additional comments is detailed below:-
- 72.1. For the purposes of a negligent misstatement claim, it should be taken into consideration that hindsight is not relevant. His actions, having relied on the misstatement, were not to be taken into account when assessing the hypothetical scenario of what he would have done but for the misstatement.
- 72.2. Even if he would have reduced his mortgage in any event, this does not mean that he would not have acted differently had he known his true pension entitlement.
- 72.3. He will have a lower disposable income than he otherwise would have had, where the margins were already very slim. His disposable income had reduced from £520 per month to around £374 per month. That means that he has just under £75 per week disposable income, when he would have had £104 per week. These seem like small amounts, but the difference is significant. It is a 30% drop in disposable income.
- 72.4. For the five year period until age 55 when his pension would become index-linked, he knew that retiring would mean a real-terms drop in his income. He is a prudent person, and even if finely balanced, his decision plainly would have been different had he known the true position.
- 72.5. In the five year period between him retiring and discovering the true position, he had made a number of financial decisions in reliance on the misstatement, not simply reducing his mortgage. His investment returns will now be lower because he has a lower overall income than he otherwise would have had.
- 72.6. He maintains that had he known the true position he would not have retired and his father would have gone into residential care earlier. The decision to care for his father at home was entirely based on a financial forecast which was incorrect.
- 72.7. He feels very strongly that the Authority, having breached its duty of care to him, has caused him and his family a considerable amount of distress and financial turmoil. He is disappointed that, despite acknowledging severe maladministration and that this had caused distress and inconvenience, I had declined to award a sum for distress and inconvenience because the Authority has decided not to recover the overpayment.
- 72.8. This is an error of principle, particularly given that the award for distress and inconvenience is for non-financial injustice, which in his case is significant. He would like me to reconsider this point, and to do so in light of the Court's

decision in *Smith v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 2545 (Ch); [2018] Pens LR 5 (**Smith**).

73. The Authority accepted the Decision. It reiterated comments it had previously made to TPO (see summary of the Authority's position above) but also added in summary:-
- 73.1. It was not clear why Mr R's investment returns will be lower. Mr R received a higher lump sum than he was entitled to and therefore had an increased opportunity to invest. Mr R's investment decisions were not relevant and were presumably based on the higher lump sum that he received.
- 73.2. The Authority does not agree that the overpayment of the lump sum is an irrelevant factor. To the contrary, the payment of an increased lump sum is relevant to the question of Mr R's loss. It is difficult to see how receipt of a larger lump sum payment than would otherwise have been the case can be viewed as a loss.

Conclusions

74. Mr R 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 financial losses as a result.
75. 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.
76. 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.
77. 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, most notably negligent misstatement. Here it is not disputed that the information provided was incorrect.
78. 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.⁷ The Authority owed a duty of care to Mr R to provide accurate information, and breached its duty.

79. 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:-

79.1. Did Mr R rely on the statements that his pensionable salary would be based on his temporary promotion pay?

79.2. Was that reliance reasonable?

79.3. Would Mr R have acted differently if he had been told the correct position?

80. Having considered the information that all parties have provided in relation to this complaint, I find that it was reasonably foreseeable that Mr R would have relied on the information provided in the Quotation to decide to retire, notwithstanding the existence of a disclaimer in this case⁸, and that he did rely on the information on the Quotation in his retirement planning. The Authority appears to me, to have accepted this position (see paragraph 35.2 above). This is because at the time that he had requested the Quotation, he would not have known that the Authority had failed to implement the New Rule correctly.

81. I find that Mr R had no reason to doubt that the figures provided in the Quotation were correct, so there was no need for him to make further enquiries about his retirement benefit entitlement with the Council or the Authority, prior to making the decision to retire. So, it was reasonable for him to have relied on the information in the Quotation to make the decision to retire.

82. In his initial submissions to TPO, Mr R indicated that his monthly take home pay while in employment was £2,600. His mortgage was £703.05 per month and, in combination with other outgoings, left him with £520 disposable income per month.

83. Mr R has submitted that, on the basis of the incorrect estimate of an annual pension of £29,586.49, he expected to receive a net income of £2,155 per month. Following

⁷ *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

⁸ The disclaimer, such as it was, read: ““Please note that the details given to you are without prejudice and are subject to final details from [the Council]. Information only based on your current situation in order to make a decision, you should seek further financial advice.”

his retirement, Mr R used £51,282.68 from his lump sum to reduce his mortgage payments from £703.05 to £129.71. The (incorrect) lump sum was £197,243.25.

84. The correct figure of his annual pension was £27,844.69, which was 6.7% lower than the incorrect figure. Applying that percentage to the net income estimate of £2,155 per month provides a correct estimated figure of £2,028.26, approximately £126.74 lower than what Mr R was told he was entitled to.
85. On this basis, I find that had Mr R been provided with the correct figures, he would not have acted differently. His submissions of what he considered when deciding whether to retire (see paragraphs 38 and 39 above) strongly supports the conclusion that he intended to (and did) reduce his mortgage payments by a sufficient amount to put him in the same net income position as he had been when employed and, that if he was able to achieve the same net income, he would retire.
86. I agree that Mr R's decision to reduce his mortgage was based on the information known to him at the time. However, I disagree that Mr R's decision to reduce his mortgage is not relevant evidence to consider in a case of negligent misstatement. His actual financial position at the point he received the incorrect information (and subsequently), and whether he would have been able to put himself in the same net income position, is relevant to a consideration of whether he would have acted differently had he not received the incorrect information.
87. Crucially, had he been given the correct information, he would have been able to put himself at the same net income position by using an additional sum from his lump sum to reduce his mortgage further. Indeed, this is what he in fact did when he realised that the information he had been given was incorrect. He applied more of the lump sum to reduce his mortgage to zero. This demonstrates that he had the money available at that point. I find it would also have been available earlier because Mr R has not identified any other large necessary expenditure he had incurred at the point the lump sum was received.
88. Further, when assessing how Mr R would have acted on the balance of probabilities, I consider that it is reasonable to take into account his understandable wish to increase the time he spent caring for his father. Clearly, this was a strong motivating factor in his decision to retire at that point. As Mr R has submitted himself, as his father's condition deteriorated, he needed to provide more care, which was difficult to manage while working full time.
89. In his submissions in response to the Decision, Mr R stated that he made a number of financial decisions in reliance on the misstatement aside from reducing his mortgage. However, he has not elaborated on what these are or presented any further evidence. So, I am unable to give any weight to these submissions, in relation to Mr R's claim of loss.
90. I do not consider that, had the correct information been provided, Mr R would have concluded that it was not financially viable to retire in June 2016. Rather, in my view the evidence shows that he would have been able to put himself into the same net

income position if he had been given the correct information and I consider that he would, on the balance of probabilities, have done so.

Loss of chance

91. Mr R has made a claim for loss of chance. It is important to note that loss of chance does not provide Mr R 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 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.
92. I have found that Mr R has not established, on the balance of probabilities, that he would have acted differently had the correct information been given to him, causing him loss. So, the quantification of that loss, whether on the basis of loss of chance or any other basis, does not arise.

Indexation

93. The Authority has stated that no evidence has been provided that Mr R would have remained in his substantive post until age 55 to ensure that any pension received after that date would have been index linked. Mr R retired at age 50, when it was clear that his pension would not be index linked. This position was not altered by the incorrect information provided by the Authority.
94. Mr R has said that he would not have given up an index linked pension had he known the true position.
95. Under section 3(2A) of the Pensions (Increase) Act 1971, it is correct that public sector scheme pensions in payment are not increased until a person reaches the age of 55.⁹
96. However, Mr R did not raise this himself as a factor on which he relied when making his decision to retire. He does not refer to any understanding that he would be receiving future pension increases between ages 50 and 55.
97. Further, both Mr R and the Authority appear to misunderstand that the lack of indexation is not a permanent feature of Mr R's pension, but only applied to payments between ages 50 and 55. Once Mr R reached age 55, his pension would have been uprated annually, from that point onwards as normal, under the terms of the 1992 Order.

Overpaid pension contributions and higher spouse's pension

98. Mr R has made a claim for the overpaid pension contributions he paid into the Scheme. The Authority has not challenged these figures and has not put forward

⁹<https://www.legislation.gov.uk/ukpga/1971/56/section/3>

alternative figures. I find that the overpaid contributions calculated by Mr R are recoverable. However, I consider it reasonable that they are offset against the overpayment Mr R received, and I do not direct that this sum is paid to Mr R.

99. Concerning Mr R's claim in relation to his spouse's pension, I find that this claim does not arise because of my finding that Mr R would have retired anyway, in June 2016.
100. 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 R 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

101. In the Decision, I found that the Authority's failure to implement the New Rule appropriately amounted to maladministration, and this caused Mr R severe distress and inconvenience.
102. However, the Authority had decided not to seek recovery of the overpaid sums, 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 considered that by not seeking recovery of the overpaid sums, the Authority had provided more than adequate recompense for its maladministration, and so I did not direct any additional sum to be paid in recognition of the distress and inconvenience Mr R has suffered.
103. In his post Decision submissions, Mr R relied on the decision in *Smith* in support of his submission that I ought to make an award in recognition of the non-financial injustice he suffered, and that to not make an award would be an error of principle.
104. In *Smith*, the Deputy Pensions Ombudsman (**DPO**) had made an award of £500 in recognition of the distress and inconvenience suffered, which was the starting point for awards, but this was overturned by the court, and an award of £2,750 directed.
105. I acknowledge that there are some similarities between the nature of the maladministration in *Smith* and the present case. However, in *Smith*, the judge identified an error of principle because the DPO had found only one instance of maladministration rather than several identified by the court. The respondent in that case had also offered Mrs Smith a sum of £5,000 in full and final settlement before her complaint to TPO, which the court found demonstrated the employer's understanding of the level and duration of distress, whereas the DPO had awarded a much lower sum.
106. The situation in the present case is sharply distinguishable. In recognition of the severe maladministration that Mr R has suffered, the Authority is not seeking to

recover the overpaid sum of £16,401.92. This sum is far in excess of what the judge in *Smith* identified as the top end of the “normal” band of award (£1,625), a figure which found further judicial approval in *Baugniet*¹⁰, and far higher than the upper limit for non-exceptional awards in TPO’s Non-Financial Injustice Factsheet dated September 2018 (£2,000).¹¹

107. Accordingly, I do not consider that it is an error of principle to take into account the overpaid sum, which the Authority is not seeking to recover, in recognition of the distress that its maladministration caused. Although I am not bound by previous TPO decisions, this sum is far higher than has previously been awarded by TPO in other circumstances in which severe maladministration has been found to have occurred, and much more than I would have directed as a stand-alone award for distress and inconvenience.¹²

108. I do not uphold Mr R’s complaint.

Dominic Harris

Pensions Ombudsman
11 March 2025

¹⁰ *Baugniet v Capita Employee Benefits Ltd (t/a Teachers’ Pensions) & Anor* [2017] EWHC 501

¹¹ https://www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Updated-Non-financial-injustice-September-2018-2_0.pdf

¹² Mr Lambden 74315/3, Miss Foster 82418/1 and Ms R (PO-18157).

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

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

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

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

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

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

Appendix 5

1. Mr R provided detailed calculations of the past losses he believed he incurred between 26 June 2016 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 26 June 2016 to 17 March 2021, after deducting the total amount of overpayment and annual pension Mr R received during the same period amounted to £56,490.04 net.
- 1.2. Overpaid pension contributions between 16 June 2014 and 28 June 2015 amounted to £462.64.¹³
- 1.3. Difference in pension from 17 March 2021 to 12 April 2022 totalled £3,758.05.¹⁴
- 1.4. Difference in lump sum he was paid when he retired on 24 June 2016 and the lump sum that he would have received, had he retired at age 55 in March 2021 totalled £14,717.81.
- 1.5. Total past loss inclusive of interest (£8,610.12) up to 12 April 2022 amounted to £84,038.66.

Future loss

- 1.6. Based on Mr R's assumption that he would live until age 84.57 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 £81,690.33. After deducting his total income from other sources between July 2017 and 12 April 2022, his total net future loss was £78,206.57.

Alternative approach

- 1.7. 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 in March 2021.
- 1.8. In this event, Mr R would seek past losses only, as outlined above, in paragraphs 1.1 to 1.5 of this Appendix, and grossed up to counterbalance the incidence of taxation.

¹³ This is Mr R's best estimate figure.

¹⁴ This figure is the amount after Mr R deducted the pension payments he had actually received during the same period.