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THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE D N MILTON

MEMBERS: Mrs P M Woods
Mr A Jinkinson

BETWEEN:

Mr B R Matthews and Others Claimants

AND

- (1) Kent & Medway Town Fire Authority Respondents
- (2) Royal Berkshire Fire & Rescue Service
- (3) The Secretary of State for communities
and local government

ON: 12, 13, 14, 15 November (16 November reading day) 2007; 7, 8, 9 January 2008
and 14, 16, 17, 18 (in Chambers) 2008

APPEARANCES:

For the Claimant: Mr Robin Allen QC
Mr M Seaward, Counsel

For the Respondent: Mr John Bowers, QC (for 1st and 2nd Respondents)
Mr N Chronias, Solicitor
Mr Nicholas Paines, QC (for 3rd Respondent)
Mr R Hill, Counsel

REASONS FOR THE TRIBUNAL'S JUDGMENT ISSUED ON

Sent to the parties on.....and provided at the Claimants' and the Respondents' request.

INTRODUCTION

1. We heard our original evidence and submissions during the last two weeks of November 2001 and 7 February 2002 and after some time deliberating in Chambers we issued our original Decision entered in the Register and sent to the parties on 22 July 2002. There were then a succession of appeals – firstly to the Employment Appeal Tribunal; then to the Court of Appeal and finally to the House of Lords. The House of Lords heard the appeal on 11/12 January and 1 March 2006 and the case was remitted to our same Tribunal for reconsideration of the principal factual finding as to “broadly similar work”.
2. Having been remitted back to the London South Tribunal there has been further delay because of what appears to have been a substantial misunderstanding/misapprehension about one of our important factual findings in respect of the work carried out by whole time fire fighters (WTF) and retained fire fighters (the Claimants – RTF) in respect of the issuing of statutory fire certificates and related inspections and visits. That in turn led to an application for Review by the Claimants which was successful to the extent set out in our various orders and judgments in the review proceedings.
3. It follows that our own proceedings – finally – involved not only a reconsideration of our original findings of fact in the light of the guidance and judgments in particular of Lord Hope and Lady Hale but also a reassessment of our findings of fact (paragraphs 15 – 22 of our original reasons), as a result of our acceptance of the Claimants’ right to call fresh evidence on those issues again for the reasons set out in our more recent orders and judgments which are a matter of record.

Evidence and the Remitted Hearing

4. Although we had indicated during the course of the review application proceedings that we envisaged a small amount of “fresh” evidence as a result of the issues for the review, we in fact had seven further witnesses on the Claimants’ side, four of those witnesses making supplemental statements. From the Respondents we had four witnesses in total.
5. We came to the conclusion that we should first of all consider strictly speaking what findings of fact from our original Tribunal should be reviewed under the ordinary review principles that evidence at the original hearing was seriously distorted, in particular in relation to fire certificate work.
6. However we would observe before we turn to the limited factual issues for the Review that it is obvious that a number of our conclusions about the work carried out by the two comparator groups were not particularly based on the clear direction from the House of Lords that we should confine ourselves to work “actually” carried out rather than work which for example a WTF might be qualified to do but seldom if ever actually carried out. In reality our remitted and review evidence covered quite a wide range of what for convenience at the moment we describe as “non occurrence duties”.
7. Part of our original reasons for granting the application for review was the Respondents’ own we would point out very responsible attitude to researching the

question of fire certificates and which WTF's did fire certificate work. Those researches resulted in the very important admission that the issuing of fire certificates was a specialised job carried out only by specially trained teams and WTF's. It was the possibility of that admission originally which principally persuaded us to allow the Claimants to reopen that issue of the evidence.

8. A number of the types of duty which we heard further evidence about at our remitted hearing covered ground which had already been covered in the original hearing and was not we would point out strictly speaking part of the area which the Claimants were entitled to reopen on a review application. Since however we heard that evidence and all Counsel made submissions about it and there were no appeals and application for strike out for non admissibility we came to the conclusion that we were entitled to look at all that evidence about non occurrence duties both from our original hearing and our new hearing. The fact that the protests at the rather expanded evidence on the Claimants' side were not carried through to applications to the EAT and a stance of that kind by the First Respondent was we say commendable and perhaps consistent with a general view by the Respondents that our final decision should be seen by all parties as based on the best evidence – finally – available.

“Non Occurrence Duties”

9. We turn now to revisit our conclusions at paragraphs 15 – 22 of our original reasons. It is we declare reasonably obvious from the wording and content of those paragraphs that we did not have the material for or in fact reach the more specific types of conclusion which Counsel have addressed us about at some length and in some detail at our resumed hearing.
10. It is difficult now for us to remember precisely how we saw the position in 2002 but it is we believe clear from these paragraphs that to put the matter simply we lumped together all under one broad heading the following activities:-
 - (i) The assessment visits for and the issuing of fire certificates and the subsequent inspection in relation to fire certificates of the specified [mainly non domestic] properties under the Fire Precautions Act 1971 at page 291 onwards.
 - (ii) The “familiarisation” visits under Fire Services Act 1947 section 1(1)(d).
 - (iii) The inspection and maintenance of fire hydrants under sections 14 – 16 Fire Services Act 1947.
 - (iv) Home fire risk assessments.
 - (v) Home visits with a view to the installation of domestic smoke alarms.
 - (vi) Visits to schools and other local groups to carry out demonstrations and deliver talks, literature and fire prevention information.
 - (vii) A similar type of activity with involvement in local youth's groups such as Duke of Edinburgh Award schemes and Cadet groups.

- (viii) Specific community prevention work sometimes described as “seasonal checks” for example prior to Christmas and fireworks day.
 - (ix) Attendance at local fetes and other such gatherings with demonstrations and dissemination of advice/literature.
 - (x) Specific projects targeting hotspot areas noted as being particularly at risk.
11. It is also clear we believe from our original paragraphs that we did not seek to decide or conclude that any of these duties were more important from any particular point of view [save in respect of the fire certificates]. Nor for that matter did we distinguish a great deal between the activities actually carried out and the activities which for example we mainly described on the basis of the brochure referred to.

Fire Certificates

12. It is however obvious that we were very impressed by and persuaded by what we understood to be the qualifications, training for and activities of the WTF's in relation to this activity. We certainly had in mind that many WTF's were qualified to carry out the assessment visits for the issuing of a fire certificate and in due course the process of the actual issuing of the fire certificate and in so far as it was necessary a subsequent checking up visit to ensure compliance with the fire certificate.
13. By the time of our final hearing it was agreed and common ground that no ordinary WTF is qualified to or in fact carries out the initial assessment inspection visits with a view to the issuing of a fire certificate or equally importantly the actual issuing of the fire certificate. As to the subsequent compliance duties of inspections ensuring a building's compliance with the fire certificate which has been issued there was a difference on the evidence between the two areas of Kent and Berkshire. The agreed position was that in Kent some work was carried out by fire fighters [not distinguishing for the moment between WTF and RTF] of the compliance type of duty i.e. checking that premises were not in breach of the fire certificate. In our two Berkshire test areas however, no fire fighters carried out any duties in relation to fire certificates (outside of specialist units).
14. It is therefore self evident that our original conclusion that WTF's had the skills and ability to carry out the pre-certificate evaluation inspections and also actually to issue the certificates was an erroneous factual conclusion.
15. However, the matter does not simply end with that important difference. Reminding ourselves of our original evidence and conclusions and reminding ourselves of our conclusions in these particular paragraphs 15 – 22 we believe that the fact that we homed in on this particular area of what we believed to be the exclusive province of the WTF's not only on the one hand persuaded us of a significant qualitative difference both in the skills and actual activities of the WTF's from the RTF's it also probably distracted us from defining too carefully the sub-divisions of the non occurrence type of duty on which we concentrated on the resumed hearing. Furthermore we believe that the fact that we were perhaps dazzled by this particular expertise and activity we allowed that to percolate into our

assessment of the comparative roles and activities of the two groups of fire fighters when looking at the other activities.

16. Thus for example we would have had in mind that when a WTF may have been attending a factory on what in our subsequent hearing we all agreed to define as a “familiarisation visit” under section 1(1)(d) Fire Safety Act 1947 the WTF’s would have been likely to be much more informed and skilled in carrying out such a visit because we would have assumed that they would have been involved in or aware of (because of their duties and qualifications) any previous fire certificate activity in respect of such premises.
17. It is also self evident that in our original conclusion we thought that the WTF’s skills, qualification and actual practice in relation to fire certificates was a very important factor in our conclusion. It follows that in our resumed analysis of the case that that important differential is removed from our assessment.

Fire Certificate Inspection Visits

18. There remained therefore only for us to consider whether the fact that there was some evidence that in the Kent region only WTF’s carried out the fire certificate compliance/inspection duties remained a strong point in the Respondents’ case. On the evidence at the resumed hearing we find that there was evidence that both WTF’s and to a lesser extent RTF’s carried out “pre-Christmas checks” and that this activity was properly to be categorised as coming under the general heading of “Fire Certificate Inspection Work”.
19. We were by the agreement of the parties invited to reach conclusions about the fire service as a whole and along side that evidence about the situation in Kent we had the evidence that at the Berkshire stations there was no such compliance inspection by any of the test case fire fighters or their colleagues. Our broad conclusion therefore is that overall the actual day-to-day fire certificate compliance inspection work carried out by fire fighters was limited. This was consistent with the revised agreed evidence that in the main all fire certificate work is carried out by specialist teams and designated “fire inspectors”. In so far as there was some evidence that in Kent somewhat more of this kind of work was carried out by WTF’s rather than RTF’s our conclusion is that this work as a whole was significantly less skilled and demanding than the specialist work carried out by the fire inspectors and specialist teams. In so far therefore that it may in some regions have been exclusively the province of WTF’s we find there was not a major qualitative difference. In other regions the difference was only quantitative.

Section 1(1)(d) Visits

20. Whilst we had some evidence about this activity at our first hearing we did not deal with it in any detail. This is plainly one of the main itemised list of activities set out in the very first section headed “provision of fire services” in the Fire Services Act 1947 and reads as follows:-

“(d) Efficient arrangements for obtaining by inspection or otherwise information required for fire fighting purposes with respect of the character of the buildings and other property in the area of the fire authority, the available water supplies

and the means of access thereto and other material local circumstances”.

21. This activity which as we have stated above at our resumed hearing was described as “familiarisation visits” was we found carried out by both WTF’s and RTF’s. Putting the matter in more layman’s language the object of this particular subsection we find and declare was to impose the duty upon fire stations to ensure that there were regular visits to local buildings and properties as a familiarisation exercise in the unhappy event that an emergency might arise. Thus the local station might take time to check at a particular factory whether there were difficulties of access to different parts of the buildings, problems with connecting hoses to distant hydrants, the method for evacuation of residents and all that kind of logistic exercise.
22. This was a statutory obligation. The familiarisation visits have to take place on a regular basis and be logged and recorded in appropriate documentation when the visits are made.
23. At our resumed hearing we came to the conclusion that there really was no dispute that this was an activity which was in fact carried out by the majority of RTF’s as well as WTF’s on a regular basis. Sometimes the familiarisation visit would be carried out jointly by teams of both WTF’s and RTF’s.
24. It is obvious we find that it was important for all fire fighters to know their way around their local patch and to be aware of the geography and layout of local buildings and fire risk areas. Local country fire stations near larger towns (such as Maidstone for example) needed to be familiar with the problems of access in the local town in the event that they might be called as back up fire fighters in the event of a large emergency or for that matter in the event that a town emergency or fire took place when the nearest WTF teams were elsewhere on other fire/emergencies.
25. This was an activity we find obviously closely linked to the central common fire ground activity of attending fires at the fire ground. From the qualitative viewpoint we could not see that there was any distinction in this activity between the WTF and RTF roles. Hypothetically perhaps it might be said that a WTF on a familiarisation visit might happen to notice that a particular wing of a large factory had a particular type of building construction about which he may have received training on one of his more frequent training courses. That however we find would have been a very minor differential in the central nature of this particular activity, namely making sure that all fire fighters had as good a knowledge as reasonably possible of the operational problems of any particular emergency site.
26. Jumping straight to the guidance in the critical passages relied upon by the Claimants our conclusion about this particular activity is that it falls to be described as “exactly the same”. Indeed it is difficult to see that even from the quantitative point of view the WTF’s would have spent more time carrying out more familiarisation visits than their part time colleagues. Such a quantitative difference however would in our judgment be irrelevant in any event.

Section 13 – 16 Fire Services Act 1947

27. The third activity which flowed from express statutory requirement relates to the checking and maintenance of fire hydrants. We had reached a general conclusion about this activity at paragraph 24 of our original reasons and that paragraph we adopt for the purposes of our conclusions in this case. In so far as however we may seem to suggest that it is not a particularly important duty by the wording which we used we now record that this is a further statutory obligation – a duty which plainly has to be carried out on a regular basis. It is obviously pointless for fire engines to be called to any particular location only to find that the nearest hydrant has rusted up or become otherwise unusable. The inspection and maintenance duties in respect of fire hydrants are probably not particularly demanding but they are plainly again duties directly linked to the central fire ground activity of dealing with fires. Both WTF's and RTF's we find and record would have carried out this activity to a similar level of competence and skills and again we find that applying the test laid down by Lady Hale this is a further activity which can be described as "exactly the same". No doubt there would have been more quantitatively of this activity carried out by WTF's in certain areas. On the other hand in country areas no doubt the majority of this work was carried out by RTF's.

Section 1(1)(f)

28. We had some debate in the closing stages of submissions as to where this particular duty upon the fire authority to make arrangements for the "giving of advice in respect of buildings and other property in the area of the fire authority as to fire prevention, restricting the spread of fires and means of escape in case of fire" fitted in to the evidence which we heard. We had no particular witness who referred specifically to this sub paragraph in his/her evidence in the course of any of our proceedings. It is we find and declare a paragraph to which there were a number of somewhat similar paragraphs in all the mass of documentation which we read at the two hearings emphasising the desirability of fire fighters giving useful advice about fire prevention "when requested". We debated the extent to which an off duty fire fighter (whether WTF or RTF) had a legal responsibility to roll up his sleeves and tackle a fire if he happened to be passing at the critical moment. We did not see that it was necessary for us to resolve this interesting question or that it was of any significance in the conclusions which we had to reach in our enquiry.

Conclusions About Non-Occurrence Express Statutory Obligations

29. We did however at the end of our deliberations in our review exercise and on remission from the House of Lords come to the conclusion that we had failed to pay sufficient regard to the express statutory obligations set out above on the one hand and plainly we had paid far too much regard to the express obligations under the Fire Precautions Act in relation to fire certificates.
30. The correct view we find and declare is that in respect of section 1(1)(d) visits and in respect of fire hydrant inspections the duties and work carried out by whole timers and part timers was for all practical purposes to be treated as exactly the same. On the major question of the fire certificates we have already itemised our conclusions and in the sense that neither whole timers nor part timers carried out the important duties which we originally believed they did that distinction which we drew originally was invalid and erroneous.

31. Furthermore in the light of the evidence overall and the evidence on the review we came to the conclusion that the familiarisation duties and the fire hydrant duties and the occasional checks carried out by both whole timers and part timers of the kind described as “pre Christmas checks” were rather more important activities generally speaking for the organisation as a whole linked as they were to the very important central duty of fighting fires on the fire ground. Furthermore as a matter of job description nomenclature we find that fire certificate work section 1(1)(d) visits and fire hydrant inspection and maintenance albeit plainly “non occurrence duties” should not properly be described as “community fire safety work” (CFS work). Looking at our original decision we may have perhaps erroneously placed all these duties together in one category rather than providing evidence of what was actually done.

Community Fire Safety

32. This was the area about which we had the majority of our evidence at our resumed hearing. Despite the clear guidance from Lady Hale we found that both Claimants and Respondents still resorted to addressing us in some detail about a variety of documents, policies, guidance, action plans and the like in relation to this area of activity.
33. Some of the factual matters were not in dispute. We find that as we found in our first deliberations some RTF’s did some community fire safety work by attendance at fetes and local gatherings. There was a small amount of unchallenged evidence that some test Claimants’ were paid small sums of money for attendance at such fetes. Since that was work which did not easily fit in to the Claimants’ complex pay structure it had to be separately accounted for. We had no similar method of assessing the extent to which full timers attended fetes or even whether they did so at all. However, as we found in the first set of proceedings it is clear that at the very least some RTF’s did a small amount of this kind of community fire safety work – perhaps arguably better described as good will activity by attendance at such fetes.
34. The evidence about the extent to which frequency and detail with which WTF’s carried out regular CFS work in the community was not very precise or specific. Witnesses on both sides gave general evidence about the “typical working day”, the average number of times per week when a whole timer or part timer went out into the community and evidence of that kind.
35. Mr Bowers on the First/Second Respondents’ behalf sought understandably to play down the extent to which RTF’s carried out any of this kind of activity. He carefully highlighted the limited resources made available for RTF CFS work; the limited training both at the initial stages of recruitment and thereafter for CFS work and the lack of “structure” for this kind of work to be carried out.
36. We accept that in our test cases there were very limited resources made available for part time fire fighters to carry out this kind of work. We accept that £500 divided between a number of part time fire fighters at, say, £10 per hour does not go very far in a local fire station. The other sums mentioned were also in comparison with the total wage bill, call out payments and so on very, very small. Nevertheless

however, we find that it is clear that for the period up to the presentation of our Tribunal cases some budgetary resources were made available during the actual year we were concentrating upon and before.

37. So far as training is concerned we accept again the force of Mr Bowers' submissions that a much larger proportion of the initial training and the ongoing training given to WTF's was greater in respect of CFS work. We accept that training in CFS was a very minor part of the initial training for RTF's. They did however receive a small amount of formal training see page 91 – 113 which indicates a training topic headed "goodwill advice to the public".
38. For obvious reasons (i.e. there was no separate pay category indicator) it was very difficult for us to reach any conclusion with any degree of precision as to in our two test regions as to precisely how much CFS work such as home visits, talks to schools and other organisations the WTF's in fact carried out.

Smoke Alarms

39. It was we find not in dispute that during the period we were considering smoke alarms and the necessary "equipment" for fitting smoke alarms [a step ladder and one or two basic hand tools] were carried on fire appliances manned by both WTF's and RTF's. Mr Bowers on behalf of the First/Second Respondents contended that we should disregard this evidence because it appears to have been the case that the RTF's were in a pay dispute on this particular aspect of the workload and were not in fact carrying it out.
40. Whilst we accept that we have been enjoined by the guidance in particular of Lady Hale to look at the work which was "actually" being carried out we came to the conclusion that it is patently obvious that if there was a pay dispute about whether RTF's should receive some kind of additional allowance for carrying out this work it had been plainly accepted by the employer that the RTF's were capable and qualified to carry out the work. Looking at it strictly speaking from the view point that this was a head of work not in fact carried out by the Claimants at our relevant period of time we would find that it was a distinction of no real significance at all.
41. Adopting our original classification we would certainly describe such a differential as "low". But since however it was plainly contemplated by both sides that the work would be carried out if an appropriate time/pay arrangement could be resolved this element of the non occurrence duties again is something which in broad terms we believe should properly be classified as being a duty which both whole timers and part timers would normally carry out (subject to the greater time available for the whole timers). Thus for example at pages 1864-5 Commander Eckley confirmed that the arrangements as to smoke alarms would be applicable for RTF's once the pay issues had been resolved in the Kent area. Furthermore as a proportion of both groups' overall workload we find that the actual proportion of time spent by both groups on this kind of activity would very much have been an occasional "blitz" from time to time. Indeed in one locality there had been problems in fitting the alarm and a free donation of a large quantity of smoke alarms were left at the station unused.

Home Fire Risk Assessment

42. It is we believe clear from our original conclusions on this particular issue at paragraph 22 of our original reasons that we had not appreciated the fact that the quite impressive evidence as to work carried out in the Kent area was strictly speaking not within the time scale we were actually considering for the purposes of our particular case. On a strict approach we direct ourselves that we are not entitled to take this factor into account in support of the Respondents' argument that this remains even after the review evidence and after application of the House of Lords guidance an important qualitative difference between the two groups.
43. It is clear we believe from the wording of paragraphs 21 and 22 that this particular body of work came closely behind in our thoughts and reasons our leading and main conclusion about what we believed to be the significantly higher qualification and working practice of the whole timers in issuing fire certificates for commercial/statutory buildings. We cited it as a further lesser example of what we believed to be the important risk assessment expertise and duty of the whole timers. It was as it were a further but lesser example of that same type of what we erroneously believed to be distinguishably qualified work. Again we clearly had it in mind that that general expertise experience and reasonably regular exercise of the assessment/inspection/issuance of fire certificates would have flowed into and informed what would presumably be in the vast majority of cases the much less complicated and demanding area of dealing with domestic buildings.
44. We had a quantity of evidence for the purposes of our review issues on HFRSA matters within bundle 5 at pages 1864 – 1948. A number of the memoranda are headed "campaign 2001 – 2002". In common with many large organisations where there are health and safety issues it is clear that there was a detailed process of careful consultation about how the campaign should be organised, what was the proper approach by fire fighters to residents including a detailed list of guidance points about not making unnecessary or patronising comments to householders and a form of check list risk assessment form an example of which is at page 1872 – 1873. We found it difficult to see precisely the correct period. Certainly the document as to the Margate pilot at page 1885 – 1890 describes the "period" as "01/ 08/00 – 31/03/01." Thus that report would appear to suggest that some of this HFRSA work was indeed carried out in the second half of the year 2000. That particular report we find clearly indicates that there were a number of problems in the laudable objective of inspiring the local community and the "hot spot" ward in particular in being more fire safety conscious. The conclusions at paragraph 11 on page 1889 we find equivocal. The author of the report appears to have been unconvinced as to precisely how many fewer fires and injuries had been shown to have been attributable to the campaign.
45. It is however quite clear that (as can be seen for example in the report of D O Rowney for the period 5 March – 27 April 2001) that the use of retained staff on this kind of work was certainly not ruled out. The second bullet point paragraph at page 1894 reads as follows:-
- "The payment and use of retained staff must be clarified. At Ashford it was proposed to pay..... and then hourly rate which was agreed in principle to be put forward. The FBU did not accept this arrangement. The retained do not consider standard F7 rate acceptable".

46. A further report at page 1897 at paragraph (iv) reads “consultation with all personnel whole time and interested retained with regard to HFSRA procedure, method of fitting smoke alarms, booking of time etc., primarily by Station Officer Troth...”
47. In the light of these documents it is our conclusion on the Review questions that our original conclusion that the Claimants’ “were not qualified” to do this work was erroneous. It is clear from the documents we have recited that it was certainly contemplated in this “campaign” or “pilot scheme” that once the wrinkles of the pay arguments had been sorted out retained personnel would be used as appropriate. Above all we find it is quite clear that it is nowhere suggested in those documents that this home risk assessment work was outside the skills and qualifications of the RTF’s as we clearly originally had in mind. It is also clear that in some particular areas one or two RTF’s were being used (obviously because they were keen and interested) as instructors in CFS local community work.
48. As to the actual time spent by WTF’s and RTF’s on HFSRA/smoke alarm work our main evidence was from the Kent area. It is clear that there was indeed a pilot scheme or campaign which may have somewhat skewed the figures by increasing the amount of this kind of work in the Kent area and that the actual work as opposed to the preparatory/planning stages was mainly carried out after our critical period. In any event however it is clear to us that this particular aspect of the work in fact remains a small part of the RTF weekly/monthly routine. It is plainly a greater proportion of the non occurrence duties of the WTF’s generally speaking. However as we have already mentioned our original conclusion that it was part of what we perceived to be a special extra qualified duty/role of the WTF’s was incorrect and it certainly is a role which on our evidence we find the RTF’s could carry out if there was time and on a very few occasions in our own period a handful of RTF’s carried out on some occasions.
49. Most importantly however we resile from our original conclusion that it is the type of work which RTF’s are not qualified to carry out. As to the general nature of this sort of work it is also clear to us that it is something which many areas in the country have from time to time concentrated upon and it is plainly generally desirable that all domestic and commercial occupiers should be encouraged/trained to increase their fire awareness. On the other hand the domestic/community side of the work has clearly never been treated as a matter of urgency or high priority and as we have already cited above reservations have been expressed as to precisely how best this work can be achieved. Although for obvious reasons Mr Bowers argued that the work was “structured” we did not find that there was any strong evidence of structure (for example of the kind which plainly has existed for some time in relation to the checking of fire hydrants where inspections have to be logged and accounted for).

Conclusions as to “work on which the workers are actually engaged at the time”.

50. We turn now to the question of the much debated “pie chart” which featured to a certain extent in our original decision and rulings and has been debated in our own submissions and evidence. We say straight away that we find that Mr Bowers was on the evidence presented at the first hearing and in particular the witness

statement of Mr Troth perfectly entitled and justified in putting forward his arguments based on the quite helpful diagram of the pie chart as to the broad percentages of work carried out in the Kent area as attested mainly by Mr Troth.

51. Neither party had before us sought to dispute that in very broad terms the WTF's still and always have spent a much greater proportion of their time carrying out "training" than that of the RTF's. It would of course be impossible for us to work out percentage wise how much time was spent by RTF's on "training" since the percentage of time spent on training by a part time fire fighter who did not carry out many call outs/attendances would be very much higher. We would still conclude that in very broad terms WTF's spend approximately one quarter/one third of their time on "training".
52. As to the hotly contested remaining section dealing with "non occurrence duties" we find that it is much more difficult now for us to reach a clear conclusion based on percentages. We did not distinguish (as we have already pointed out on several occasions) anything like the different types of non occurrence duty on which we have concentrated at our review hearing and our resumed hearing. We have already concluded above that the statutory section 1(1)(d) visits and the fire hydrant work was work which was carried out by both groups of comparators and in a very similar fashion and that the only difference would have been a quantitative difference flowing obviously from the part time/whole time situation and thus not reckonable.
53. As to the remaining types of non occurrence duty we accept again that it is obvious that the WTF's carried out several hours more work per month on the non statutory types of community work and that so far as RTF's were concerned looking at the matter very broadly there would be only a handful of hours spent on this kind of work by the RTF's, say, who did not as a matter of their overall working year spend much time at the station.
54. As a result of our fresh enquiry we find that there is very little which remains by way of a qualitative difference based on qualifications, skills and experience between the work carried out by the two groups of comparators [the very important fire certificate work having been removed from the analysis].

Conclusion as to application for Review

55. We found it somewhat surprising that there had been such a lengthy period of time before it became as clear as it did in our own hearing that the evidence before us originally had been so unclear on the issues which we finally we believe we have resolved correctly. As we pointed out in our earlier review hearing we suspect that there was simply such a mass of evidence on every aspect of the comparative role of the WTF's and RTF's and a mass of evidence on all the different working practices, contractual arrangements, pay arrangements and so on that it was very difficult for all of us to anticipate in advance precisely which aspects of the picture would in the end be focused upon.
56. Be this as it may we have concluded finally that it must be in the interest of justice for us to reach a conclusion at this stage on the evidence which we assume both sides have, finally, agreed is the best available on the issues we had to determine

and we therefore grant the Review by setting aside the paragraphs of our original ruling (and of course in consequence the concluding paragraphs based on those paragraphs) and replacing those conclusions with the conclusions in these reasons.

Conclusions as to the remitted issues

Similarities

57. We return now to the issues remitted to us by the House of Lords in the light of the findings we have made on the Review questions above. Turning to the perhaps obvious question of the main similarity in the work duties and responsibilities of the WTF's and the RTF's we reiterate what we found in our earlier conclusions and never in any way we believe underplayed or ignored that the central role of fire fighting on the fire ground was the same. Applying the guidance of the House of Lords judgments we have no hesitation in concluding additionally that the central fire ground work is to be treated as "exactly the same".
58. We also considered the additional guidance in paragraph 44 in the judgment of Lady Hale. We are enjoined to consider additionally whether a "large component" of the work is exactly the same. Additionally we were enjoined to consider the "importance" of the work which is the same to the enterprise as a whole and we were also enjoined to consider whether the comparative groups spend "much of their time on the core activity of the enterprise".
59. At paragraph 45 of the judgment Lady Hale also refers to the need to "acknowledge the centrality of that work to the enterprise on the fire brigade as a whole. That centrality is demonstrated by the fact that in large areas of the country cover is provided only by retained fire fighters..."
60. The test of "centrality" was also referred to in paragraph 16 of Lord Hope's reasoning where he was referring to our own original conclusion at paragraph 152 about the role of the retained fire fighter.
61. It is we believe obvious that we have now concluded that there is to be removed from the comparison exercise a job function which we originally erroneously found was in fact carried out exclusively by the whole timers and was thus an additional extra duty carried out by whole timers and which was a duty which reflected to a marked degree a significantly higher level of "qualification, skills and experience". Furthermore even what for convenience we describe as the "lesser" non occurrence duties which we find were carried out with a higher level or qualification, skills and experience we have now concluded were not in fact carried out with a higher level of qualification, skills and experience.
62. As to the question of the significance of the "level of qualification, skills and experience" it is clear to us that we are required to consider reasonably strictly the extent to which additional qualification, skills and experience are actually relevant to the actual work carried out. As we have already concluded above there is nothing of any great quantum or significance which we have found in our comparator groups where the obvious additional recruitment/training/qualifications of the WTF's had "contributed something different to work that appears to be the same or broadly

similar". We stress that we do not believe that we earlier concluded or appeared to conclude in any of our paragraphs that there was any similar work which as it were the WTF's carried out "better" than their part time colleagues. We do not believe there was any finding of that kind in our conclusions and we certainly did not intend for there to be any such finding.

63. Returning therefore to the central question, namely whether the Claimants have established that they were carrying out "broadly similar work" we find that there was indeed a substantial body of work which was exactly the same, namely the fire ground work and the whole process of call out attendance at the fire ground and all that kind of activity and additionally the regular and important statutory duties in relation to section 1(1)(d) visits and fire hydrant work. Our conclusion on the facts is that in addition to the fire ground work therefore there was a regular body of work carried out by both groups which was exactly the same and these duties all covered by statutory obligations must be viewed as being important in the general sense of the word and plainly important to the Respondent organisation. Taken as a whole these duties are also properly described as "central" to the job role of both groups.

Differences?

64. It is clear from the passages on which we concentrated that we are entitled in appropriate cases to take account of differences. However, as a matter of fact and for the reasons we have set out above we find that the differences which have remained as a result of our enquiry are mainly quantitative differences which are reflective of the obvious fact that whole time fire fighters have many more hours in the week than the majority of their comparators to carry out much more training and more non occurrence duties more frequently. It is we suppose obvious that for the sake of argument an inspection by an experienced whole time fire fighter of a building or a fire hydrant may be carried out somewhat more quickly than that of an inexperienced part time fire fighter and that those additional few minutes may partly flow from his training and qualifications. Mainly however, it would be we find reflective of the obvious fact that he carries out a number of the non occurrence type of duties more regularly and more frequently than the majority of his part time colleagues and that "minor" additional expertise is simply a reflection of that increased available time.

Berkshire Community Work

65. We would comment that both Claimants' Counsel and Respondents' Counsel to a certain extent accused each other of relying for part of their respective cases on documentary evidence contrary to the injunction of in particular Lady Hale to concentrate on the actual work. So far as community work generally is concerned we did have a considerable quantity of documentation which to borrow the adjective used by witnesses and counsel was to a certain extent "aspirational". For example in the Royal Berkshire Fire Service Community Safety Plan 99/2000 at page 2208 the introduction commences:-

"Community safety is not some job for one or two specialist personnel it is part of every firefighter's role albeit personnel in different roles will be involved in differing ways".

66. Mr Allen referred (under protest from Mr Bowers) in his closing submissions to a number of other documents confirming what appeared to be management intent that retained fire fighters should be part of that kind of activity. We would not wish it to be thought that there was no evidence of such activity by retained fire fighters in Berkshire and we accept that for example in the evidence of Mr Pinnell, Station Commander at Bracknell that the plans included Crowthorne. There are additional references in the documents at 2273 which clearly envisage retained fire fighters and retained stations being encouraged to and actually carrying out community fire safety work. There are also further similar references.
67. So far as it was protested on the Respondents' part that some of the Claimants' case was being as it were padded out by references to statements of intent and thus falling foul of the injunction from the House of Lords for us to concentrate upon the work "actually engaged upon" we repeat our gloss on that instruction that the instruction we find and direct ourselves was plainly intended to warn Tribunals of the danger of taking into account skills abilities and potential work as a distinguishing factor. We rely upon our observations in relation to the HFSRA/smoke alarm documentation in Kent likewise in respect of the Berkshire documentation to confirm that again management were accepting of the general principle that subject to availability, funds being made available and so retained fire fighters were to be encouraged to develop this element of their role. It follows again therefore that there was no question of their not being qualified to carry out the role and although their actual participation may have been very small in certain areas in comparison with other areas they were still to a certain degree actually carrying out that part of the role.

Conclusions as to Listed Issues

68. It follows therefore that in response to issue no. 1 of the agreed list of issues we find and declare that the answer to that first question is "Yes". We believe that we have answered and addressed our minds to the matters set out in issues 3.1, 3.2 and 3.3. For the avoidance of doubt and without prejudice to our findings and conclusions set out above we find and declare that the weight to be given to the similarities between the jobs is very considerable.
69. As to issue 3.2 our final conclusion on the remitted issues and flowing from our revised conclusions of fact is that paragraphs 118, 152 – 155 should also be set aside. It is we find an inevitable corollary to our foregoing findings of fact and conclusions that at the level of seniority/rank we are considering our original conclusion that the role of the whole time fire fighter is a "fuller wider job" cannot stand. As to paragraph 154 of our original decision that also we find cannot now be justified and supported by our current conclusions.
70. As to issue 3.3 in so far as it is not already covered by our foregoing conclusions it is we believe clear that we have concluded that in so far as the whole time fire fighters had additional qualifications, skills and experience they were not of any significant relevance to the actual work and job functions carried out and thus the two job roles are truly comparable within regulation 2(4)(a)(ii) of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. It follows therefore that we should continue to deal with the remaining questions as to

whether the Claimants establish less favourable treatment and if so whether such a claim is defeated by a defence of justification.

Regulation 5 “Less Favourable Treatment of Part Time Workers (PTWR)”.

71. This regulation reads as follows:-

- “(1) A part time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full time worker –
- (a) as regard to the terms of his contract; or
 - (b) by being subjected to any other detriment by any act or deliberate failure to act of his employer
- (2) The right conferred by paragraph (1) applies only if –
- (a) the treatment is on the ground that the worker is a part time worker; and
 - (b) the treatment is not justified on objective grounds
- (3) In determining whether a part time worker has been treated less favourably than a comparable full time worker the pro rata principle shall be applied unless it is appropriate.
- (4) [deals with overtime payments]”

72. The only agreed issue before us is issue No. 4 in the following terms:-

“In respect of the “less favourable treatment issue” if the Tribunal determine that the Claimants/retained fire fighters and their comparators/whole time fire fighters were engaged on broadly similar work for the purposes of regulation 2(4)(a)(ii) were they treated less favourably on the grounds that they were part time workers within the meaning of regulation 5? In particular on consideration of the overall pay package of both groups did the differently structured pay package of the Claimants/retained fire fighters balance any access to the pension scheme granted only to their comparators/whole time fire fighters or justify the Claimants/ retained fire fighters exclusion from the scheme?”

73. At paragraph 50 of his closing submissions for the Third Respondent (the party most interested in the impact of any remedy claim) Mr Paines wryly observed that it was not clear from the agreed formulation of the issues whether the Claimants were also claiming less favourable treatment in relation to the whole time comparators’ sick pay arrangement and also the whole timers’ increased pay for additional responsibilities. It seems to us to be obvious that the Claimants were indeed making these two additional claims to the pension access claim and that presumably the same types of issues should be considered in relation to the three heads of claim.

Denial of Access to the Statutory Pension Scheme

74. Mr Paines' first and attractively simple point was that since we had concluded earlier as a matter of fact that it was extremely unlikely that it would be economically profitable for any retained fire fighter who contemplated less than 10 years service joining a final salary pension scheme of the type in which all WTF's are entered and since events have now moved on and all fire fighters since 2005 have been in a global pension scheme no Claimant or colleague is likely to prove that they have suffered "unfavourable treatment".
75. We assume in favour of the Claimants and their advisors that there has been a sensible and pragmatic appraisal of the likely potential financial benefits of the majority of the RTF's joining the scheme for what is now a reasonably finite period of about five years. This is because since 2005 all fire fighters have had the option to join the newly negotiated scheme.
76. As to the actual financial benefits it would appear that our conclusions did not reflect the death in service/dependants' benefits. That is a factor which has both a financial significance and perhaps a more indefinable but quite important emotional significance for the family of the retained fire fighter and something which it is not necessarily possible to evaluate in terms of pounds, shillings and pence.
77. We note as well that there are many thousands of Claimants who all plainly feel that the denial of pension rights is an unfavourable detriment (unlike the Territorial Army case chaired by our colleague Regional Judge John MacMillan referred to in submissions).
78. We considered the decision of Shamoon v Chief Constable of the Royal Ulster Constabulary paragraph 37 of the IRLR report at page 292 in the judgment of Lord Nicholls of Birkenhead where he stated as follows:
- "...a reasonable employee in her position might well feel that she was being demeaned in the eyes of those over whom she was in a position of authority. The Tribunal did not make an express finding to that effect but there was material in the evidence from which this conclusion could reasonably be drawn.:
79. The Third Respondent did not lead any evidence to the contrary and so the Third Respondent is in no position to contest the general continuing assertion that they can prove detriment.
80. We recognise however that there is a possibility that when the calculations are carried out it may be the case that some retained fire fighters' calculations may not necessarily show a worthwhile financial advantage in switching for that now five year period.

Term by Term Comparison?

81. The main legal question argued before us centred on what should be the Tribunal's correct approach to both the question of "unfavourable treatment" and the question of "justification". We rely upon the guidance at paragraph 49 of Lady Hale's

judgment first of all to support the potential approach by a Tribunal of considering whether in respect of any particular term there was an offsetting comparable term which effectively cancelled out any disadvantage. Lady Hale also clearly envisaged that there could indeed be a conclusion by a Tribunal that “more favourable treatment on one point might supply justification for less favourable treatment on another”.

82. Both Mr Allen and Mr Paines presented arguments as to the leading decision of Yolanda del Cerro Alonso v Osakidetza – Servicio Vasco de Salud judgment of 13 September 2007. The decision deals with the enforcement of clause 4(1) of the framework agreement on fixed term work (Directive 1999/70 EC) which reads as follows:

“In respect of employment conditions fixed term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed term contract or relation unless different treatment is justified on objective grounds”.

83. The Claimant was a “temporary” member of staff. The main question for the Court was whether a difference in treatment provided for by a law or by an agreement between staff union representatives and the administration was capable of constituting an objective ground. The main relevant passages in our view are as follows:-

(53) The Court held that that concept of “objective reasons” must be understood as referring to precise and concrete circumstances characterising a given activity which are therefore capable in that particular context of justifying the use of successive fixed term employment contracts. Those circumstances may result in particular from the specific nature of the task for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or as the case may be from pursuit of a legitimate social policy objective of a member state.

(54) On the other hand a national provision which merely authorises recourse to successive fixed term contracts in a general and abstract manner by rule of statute or secondary legislation does not accord with the requirements as stated in the previous paragraph.

(55) More specifically recourse to his fixed term contract solely on the basis of a general provision unlinked to what the activity in question specifically comprises does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is appropriate to achieving the objective pursued and is necessary for that purpose.

(57) In those circumstances that concept must be understood as not permitting a difference in treatment between fixed term workers and permanent workers to be justified on the basis that the difference is provided for by a general abstract national norm such as a law or collective agreement.

(58) On the contrary that concept required the unequal treatment issue to be

justified by the existence of precise and concrete factors characterising the employment condition to which it relates in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need is appropriate for achieving the objective pursued and is necessary for that purpose.”

84. We derive from those reasons in the Opinion of Advocate General Jacobs dealing with questions of justification for the disparate treatment of fixed term workers a requirement that the Tribunal should consider the picture very specifically by reference to precise and concrete circumstances characterising a given activity. Paragraph 58 of the judgment in particular emphasises the need for precise and concrete factors characterising the employment condition to which it relates...We interpret “condition” as being for our purposes effectively the same formula as “contractual term”.
85. The other decision referred to in argument by Counsel was the decision of *Jamstalldhetsombudsmannen v Orebro Lans Landsting* [2001] ICR at page 249 onwards decision of the Court of Justice of the European Communities. This was a case brought by two female midwives claiming equal pay as to certain rates with male clinical technician comparators on the basis of work of equal value.
86. The main paragraphs referred to by Counsel on each side were as follows:-
- (30) I concur with the Finnish Government’s view that it is not possible to lay down an unvarying rule that different elements of pay either should or should not be taken into account in making a pay comparison. However whereas the Finnish Government submits that the rule will vary on factors arising out of the assessment of equal value I consider that it is rather the nature of the pay structure at issue which will determine how equal pay is to be assessed.
- (31) Treating each element of remuneration independently for the purposes of an equal pay comparison will in general be the only proper way to ensure equality. It is moreover the only way to achieve transparency and assure effective judicial review as the Court confirmed in ...Thus as a general proposition I consider that in accordance with the statement of the Court in *Barber* the principle of equal pay should apply to each of the elements of remunerations granted to men and women.
- (32) Where however for historical or other reasons the pay structures are complex so that individual elements or the basis on which they are granted are difficult or impossible to disentangle it may be both unrealistic and unprofitable to look at individual components of the pay package in isolation. Moreover to do so may lead to discrimination against the other sex. In such cases a global assessment may be the only valid – or even feasible – method pending a restructuring of the system. It is doubtless such circumstances which the court had in mind.....
- (33) That does not mean however that one element in the overall package can necessarily be set off against another. Thus in *Barber* itself in which men who had been made redundant were entitled to an immediate pension if they

had attained the age of 55 whereas women who had been made redundant were entitled to an immediate pension if they had attained the age of 50 it is understandable that the court regarded it as inappropriate to seek to offset discriminatory pension rights by taking into account possible differences in redundancy payments.

(35) In this case it is possible to separate the midwives' basic salary from the supplement and hence to compare the basic salary with that of the comparator. In my view the correct approach to this and similar cases is to accept that the group receiving lower basic in the present case the midwives is paid less so that the second question set out above, namely whether the pay of the two groups is unequal is regarded as receiving an affirmative answer. I would add that that approach would in this and similar cases ensure greater transparency: the fact that the supplement varies from month to month depending on the time and the day the relevant shifts were worked would make it difficult to make a sensible comparison of on the one hand a midwife aggregate salary and supplement and on the other the comparator's basic salary.

(39) It is accordingly my view that where the pay structure is such that it is in principle possible to extract and compare individual strands that is what should be done with the employer preserving the possibility of disproving that inequality on that basis is due to sex. Where however the pay structure is less penetrable a global assessment will be all that is possible. It is for the National Court to determine whether it is possible in a given case to make an item for item comparison or whether a global assessment is all that is feasible.

87. As to the bounty payments our conclusion is that the general intention of and agreement about these payments was that they should be some kind of compensation for the fact that the retained fire fighters did not receive pension rights. The payments we accept do not match either the straight financial terms or more importantly security, long term benefit and dependency rights provided by the full time pensioners' state funded scheme. However we do find and declare that the term in relation to bounty payments was intended to be a matching or comparable term for the full timers pension payments and that therefore it should be taken into account either in negotiations about or if necessary litigation about the actual pension loss suffered by the retained fire fighters.

Justification

88. The main argument put forward by the Secretary of State was an argument of "justification" which is fully set out in Mr Paines' able written representation. He relied principally on an overall average wage comparison of a number of the Claimants with whole time comparators at page 1379. The calculations plainly include the retaining fee. It follows that in the case of a retained fire fighter who for the sake of example did not carry out many hours more than the basic weekly drill nights there would have been a dramatically high hourly rate because the retaining fee (which did not depend as such upon any hourly attendance of any description) would substantially inflate the hourly rate. Some of the comparisons show for

example an hourly rate of more than double the hourly rate of the full time comparator.

89. Mr Allen on the Claimants' behalf in reply to that argument sought to exclude from the calculation of the whole timers hourly rate various "non active" parts of the whole timers' day such as meal breaks, physical training, sleeping time (in the case of night shifts) and so on. If on any remaining issues in the case it is necessary for us to reach a conclusion about the whole timers' rate of pay we do not accept that there should be excluded from the analysis the various items for which Mr Allen argues which in our judgment and conclusion are misconceived. The whole timers' rate for the job in our finding plainly includes as part of the working day the various elements protested by Mr Allen.
90. As to the question of evaluating the overall "average pay" of the retained fire fighters we find that the position is not nearly so straight forward. We refer to our original findings about the complexity of the Claimants' wage packet and the various different elements starting with the flat figure retainer fee and the various different rates of pay for different types of work/activity carried out by retained fire fighters.
91. Upon the hypothesis however that it were established by the Third Respondent that the overall pay rate of the retained fire fighters was substantially higher than that of the whole timers we considered in the light of the guidance of Lady Hale, Lord Hope and the particular European decisions to which we have already referred whether such a higher overall pay package "justified" the apparent alleged pension disadvantage.
92. We noted various factors which we took into account. We bore in mind that under section 1 Employment Rights Act 1996 at section1(4)(d)(ii) and (iii) specific reference to the requirement for an employee's contract of employment to contain terms and conditions relating to incapacity for work due to sickness or injury including any provision for sick pay and pensions and pension schemes.
93. We find that it is obvious that over the years pensions and sick pay have always been in a separate compartment as part of the employment contract of an employee whether whole time or part time. They are both patently financial benefits which are invariably calculated on a "pro rata" basis usually as some kind of percentage of either the rate of pay and/or the quantum of actual work carried out. With the advent of modern computerised wages systems they are in our judgment and experience comparatively easy to calculate depending solely on the number of hours/days/weeks of work carried out in the one case and as we shall record in a moment the periods of sickness absence in the other. It is plainly possible in our judgment and experience both on the basis of the evidence which we heard on the last occasion and in our general experience of pension cases possible to work out an equitable approach to pension contributions by both employer and employee on a pro rata basis.
94. We refer to the passages cited above in the two European decisions and it is clear from the guidance in those decisions that we should look for specific and concrete evidence of justification. We should if possible "extract and compare individual

strands". We find and direct ourselves that in the context of pension rights there should be clear and specific evidence that payment made to retained fire fighters were specifically intended to "make up for" non payment of pension. We accept the force of Mr Allen's point that historically speaking there has been no statutory obligation upon the employer to make pension payments and that there has been no serious calculation exercise of the comparative advantages/disadvantages of pension rights versus bounty payments.

95. We find that the WTF state pension scheme is patently an individual strand which should be extracted and compared with the bounty scheme of the RTF. The Claimants assert that the detailed comparison will result in detriment.
96. We have come to the conclusion that our original provisional conclusion is correct and that the Claimants establish unfavourable treatment in the denial of their access to pension rights which cannot be justified by the arguments of the Third Respondent.

Sick Pay?

97. For similar reasons set out in the immediately foregoing paragraphs we find that the arrangements for sick pay which were provided to the Claimants were less favourable than those for their whole time comparators. For the same reasons we find that the treatment of the Claimants in relation to the sick pay term should also be treated on a term by term analysis. In this particular respect it is quite clear that there are terms expressly relating to the sick pay rights of the retained fire fighters. It was not seriously argued by the Respondents that the current retained fire fighters' sick pay terms are as favourable as those of the whole time fire fighters. Again we do not accept that particularly since there is a specific sick pay scheme for retained fire fighters that it is open to the Respondents as it were to "top up" the part timers' sick pay arrangement by reference to a global package type of argument. It is we find quite clear that the parties approached the question of sick pay as a separate discrete part of the employment deal.
98. As a matter of law we have concluded that our decision on the issues of pension rights and sick pay should be on a "term by term" approach. Our reasoning is based on our general experience that such terms are usually discrete and supported by s1 ERA 1996. We do not need to reach a wider legal conclusion. We incline to the view that, for example, if there were a dispute about overtime rights between WTF's and RTF's a global approach might be correct.
99. Mr Paines argued that a term-by-term approach might cause insuperable problems for employers genuinely seeking to set up appropriate rates of pay and terms of employment for part time employees. It is impossible for us to speculate generally about this kind of issue. On our own facts we have come to the conclusion that although there may be some mathematical/financial/time complications in our rulings, the overall rights to pension and sick pay plainly are capable of being dealt with under the pro rata principle. We stress that it is plainly still open to an employer to provide transparent arrangements for part time employees and that if there are obvious arrangements which are in the interests of both parties and which are apt for part time employees (such as the provision of casual transport

arrangements for part time employees as opposed to the provision of a motor car) so long as such an arrangement of that kind is objectively favourable we see no reason why different but fair arrangements cannot in appropriate cases stand the test of the regulations.

Conclusion as to Access to Pension Rights and Sick Pay Rights

100. Our conclusion therefore is that we are persuaded that the Claimants establish unfavourable unjustified treatment in respect of these two heads of claim.

Increased Pay for Additional Responsibilities?

101 The third head of claim by the Claimants relies on paragraph V.3 of the grey book as follows:

“Increased pay for additional responsibilities

The rate of pay of a member of the brigade whose ordinary duties involve responsibilities additional to those normally attaching to his or her rank may be increased to such an extent as the fire authority decide subject to the approval of the national joint council provided that a member’s rate of pay shall not be increased under this. In respect of any period during which his or her rate of pay is increased under paragraph 2 above [acting up allowance] or he or she is in receipt of an allowance under paragraph 13 of section V1.

102. We refer to our original conclusions under this heading at paragraphs 117 – 120.

103. Even after this lengthy interval of time there remained no specific example of what precisely is being claimed by the Claimants under this particular heading.

104. We were referred to section VII of the grey book which sets out the main elements of the Claimants’ payments, namely at paragraph 3 – retaining fees; 4 – turn out fees; 5 – attendance fees; 6 – attendance fees; 7 – extra payments for remaining on duty; 8 – payments for extra work. Paragraph 11 – additional emoluments for performing the duties of a higher rank. Paragraph 12 – compensation for remuneration lost.

105. The Claimants’ original further and better particulars at page 50 – 51 of the bundle refer only to the whole timers’ right under the grey book V.3. We have never been provided with chapter and verse about precisely the value of this right since it appears to depend in the end upon the discretion of the local fire authority as to precisely how much “extra” is paid by way of hourly rate subject to the approval of the NJC. Both whole timers and part timers plainly receive something like an “acting up allowance”. The retained fire fighters plainly at paragraph 8 at page 876 received “payments for extra work”. We were still unclear at the end of our deliberations what was covered by the situation contemplated by paragraph 3 at page 865 and the type of duties “which involve responsibilities additional to those normally attaching to his or her rank” which were not acting up duties which are plainly excluded under paragraph 3.

- 106. In view of the lengthy history we have no wish to lengthen these proceedings. Equally it is undesirable we believe that we should reach a firm conclusion one way or the other without proper material or submissions. We wonder rhetorically whether this particular alleged detriment is in the overall reality of this case likely to be of any real significance. It would seem to be an allegation that a few retained fire fighters over the years may have carried out some kind of duty or another on a few occasions and we wonder whether there really is any purpose in this issue being resolved hypothetically. In view of what appears to be to us (in comparison with the other two heads of claim) the lesser importance of this head of claim we would have thought this is classically an area which should be dealt with by negotiation.
- 107. In the event that the parties are not content to deal with this matter by such means we direct that within 8 weeks of the promulgation of this judgment and reasons the parties should either deal with the matter by way of further written submissions or if necessary a very short half day hearing for absolutely final evidence and submissions on this apparently narrow issue.

Overall Conclusion

- 108. The factual/legal situation in which found ourselves was unique in our experience in Tribunals, namely having to reconsider important areas of fact after a very considerable length of time. Mainly because of the enormous quantity of facts and documentation the parties and ourselves inadvertently made factual assumptions about a few important areas which have in the end we accept skewed our approach to the central issue of job role similarities/differences. We have we believe made clear our final conclusions of fact and law. We have also we believe amended/struck out the paragraphs of our original ruling which can no longer stand. We request that the parties' legal advisors consider our rulings carefully and if there is any obvious matter relating to our original rulings which has been overlooked it is plainly desirable that the matter should be dealt with either by a certificate of correction or if absolutely necessary a further review hearing if felt appropriate.

Employment Judge
Date:

Reasons sent to the parties and entered in the Register on: : : .

_____ for Secretary of the Tribunals