

Neutral Citation Number: [2026] EWHC 2812 (Admin)

Case No: AC-2025-LON-003681

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**SITTING IN LONDON**

Monday, 9th November 2026

**Before**:
**THE HONORABLE MR JUSTICE KOLINSKY**

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**Between:**

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| **THE KING (on the application of JOHN FARRELL)** | **Claimant** |
| **- and –** | |
| **THE PENSIONS OMBUDSMAN** | **Defendant** |
| **- and –** | |
| **(1) LEICESTERSHIRE FIRE AND RESCUE SERVICE** | |
| **(2) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMEMT** | **Interested Parties** |

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**Andrew Short KC** and **Elizabeth Grace** (instructed by **Thompsons)** for the **Claimant**
**James Strachan KC** and **Edward Sawyer** (instructed by **The Pensions Ombudsman**) for the **Defendant**
The **First Interested Party** did not appear and was not represented
**Paul Luckhurst** (instructed by **Government Legal Department)** for **Second Interested Party**

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Hearing date: 22 October 2026

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# Approved Judgment

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KOLINSKY J

This judgment was handed down on 9.11.2026, by circulation to the parties and uploading to the National Archives.

**KOLINSKY J:**

1. This claim arises from a complaint made by the Claimant, a former firefighter who suffered a disabling injury and claims to be entitled to an injury award under the Firefighters' Compensation Scheme. The Defendant (The Pensions Ombudsman) initially accepted jurisdiction to investigate his complaint. However, following the decision of the Court of Appeal in Clark v Chief Constable of Derbyshire [2024] EWCA Civ 676, the Defendant decided that it had no jurisdiction. The jurisdiction issue turns on whether the complaint concerns a "pension scheme" within the meaning of s.1(5) of the Pension Schemes Act 1993 ("the 1993 Act").

2. In this judicial review claim (as amended), the Claimant challenges the Defendant's decision dated 25 July 2025 to discontinue the investigation of his complaint against the Leicestershire Fire and Rescue Service.

3. The complaint arises from the Claimant's claim to be entitled to an injury award under Part 2 Rule 1 in Schedule 1 of the Firefighters' Compensation Scheme (England) Order 2006. I refer to that Order as "the FCS Order" and the schedule to it as "the FCS".

4. Permission to proceed with the claim was granted by Lang J on 23 March 2026.

5. The Ministry of Housing, Communities and Local Government is the central government department responsible for the FCS and the various applicable firefighters' pensions schemes (referred to as "FPS"). The Secretary of State has been joined as an interested party and has participated in the proceedings and submitted evidence explaining relevant legislative and policy background.

6. There is a single issue in the case. Did the Defendant make an error of law in declining jurisdiction to deal with the Claimant's complaint on the basis that it was not about a pension scheme within the meaning of s.1(5) of the 1993 Act?

7. The Claimant's case is that the FCS is a pension scheme for the purposes of section 1(5) of the 1993 Act. It is therefore an occupational pension scheme for the purposes of section 1(1) of the 1993 Act, and the Defendant accordingly made an error of law in concluding otherwise.

8. The gist of the Defendant's case is that the complaint does not concern a pension scheme and the Court of Appeal's decision in Clark provides a clear and binding answer to that effect. Further, the Defendant contends that the FCS is not a pension scheme even on the different approaches contended for by the Claimant.

9. The Interested Party supports the Defendant's position and emphasises the conscious separation of the FCS from pension arrangements in the policy and legislative background.

**Factual Background**

10. There is no dispute about the relevant factual background. The Defendant has not investigated the circumstances of the Claimant's injury but accepts the factual account relied upon by the Claimant for the purpose of this judicial review. The essential facts are as follows.

11. The Claimant is a former firefighter and member of the Firefighters' Pension Scheme 1992 ("the FPS 1992"). He was employed by the First Interested Party.

12. On 23 March 2015 the Claimant suffered an injury at work, while undertaking a designated training session in his workplace gym.

13. On 25 September 2016 an Independent Qualified Medical Practitioner ("IQMP") found that the Claimant could not safely undertake operational duties and that he was permanently disabled from firefighting.

14. On 8 November 2016, the Claimant was informed that he was being retired on grounds of ill-health due to the injury. His ill health retirement took effect on 30 January 2017.

15. The Claimant had sought, but had been refused, an injury pension and gratuity under Part 2 Rule 1 of the FCS. The basis of that refusal was that the injury he sustained on 23 March 2015 was not a "*qualifying injury*" for purposes of the FCS because it was

not sustained "*in the exercise of his duties as a … firefighter*" as required by Part 1 Rule 7 of the FCS.

16. On 28 June 2016 the Claimant challenged the decision under the Internal Dispute Resolution Procedure established under s. 50 of the Pensions Act 1995 ("the 1995 Act").

17. On 10 December 2017, the IQMP decided that the injury was not a qualifying injury because it considered that it was not sustained by the Claimant in the execution of his duties. The Claimant contends that this determination is wrong because he was undertaking a designated physical training period in the gym at his place of work.

18. On 12 May 2019, the Claimant made a complaint to the Defendant, explaining that while he was receiving an ill-health retirement pension under the FPS 1992, the First Interested Party had not given him an uplift to his pension for the injury at work under the FCS. It is common ground that the applicable rule of the FCS is Part 2, Rule 1.

19. On 15 December 2020, the Defendant accepted jurisdiction for the Claimant's complaint. The First Interested Party was notified of the complaint on 27 January 2021 and responded on 12 April 2021 contesting it.

20. The determination of the Claimant's complaint was delayed. Initially, he was told that he was waiting to be assigned to an adjudicator due to its complexity.

21. There was further delay in addressing the complaint. Years passed.

22. The Employment Appeal Tribunal gave its decision in Clark on 23 October 2023. The Court of Appeal's decision in Clark was made on 19 June 2024.

23. On 26 November 2024, the Claimant was informed by the allocated Senior Adjudicator that the Defendant was "*currently considering the possible impact of a recent Court of Appeal case on our ability to investigate complaints relating to certain injury benefit schemes*".

24. On 22 April 2025, the Defendant wrote to the Claimant to inform him that because of the decision of the Court of Appeal in Clark, he would recommend discontinuing the investigation into the Claimant's complaint. The reasoning was, applying the guidance in Clark, the FCS was not an occupational pension scheme for the purposes of s.1 of the 1993 Act. This meant that the complaint fell outside of the Defendant's jurisdiction. The Claimant was given an opportunity to comment on this.

25. On 2 May 2025, the Claimant (then unrepresented) responded setting out his comments on the proposal to discontinue his complaint. He sought to distinguish Clark and contended that the FCS was an occupational pension scheme for the purposes of the 1993 Act.

26. On 25 July 2025, the Claimant received a letter from the Defendant explaining that he had decided to discontinue the complaint due to Clark. The Defendant explained that it could only act in accordance with its statutory powers under Part X of the 1993 Act, and that applying the Court of Appeal's decision, there was no jurisdiction to consider the Claimant's complaint.

27. Five points emerge from this chronology: -

    a. The underlying substantive issue for the Claimant is whether his circumstances fall within Part 2 Rule 1 of the FCS. The answer turns on the question of whether his injury occurred in the course of his duties at work or not.

    b. Despite this apparent simplicity, it has taken many years for his claim to progress. This is unfortunate, particularly given the conclusion subsequently reached by the Defendant as to its jurisdiction.

    c. At all stages prior to Clark, the Claimant, the First Interested Party and the Defendant proceeded on the basis that the Claimant was raising a complaint in respect of an occupational pension scheme in respect of which the Defendant had jurisdiction. This reflected the Defendant's practice prior to Clark.

d. The Defendant's position on that issue changed as a direct result of the decision of the Court of Appeal in Clark.

e. All parties accept that the judicial review claim raises a jurisdictional question for the Court to determine.

**Legislative Context**

28. The functions, and jurisdiction, of the Defendant are set out in the 1993 Act.

29. Section 146 of the 1993 Act provides that:

"146. Functions of the Pensions Ombudsman
(1) The Pensions Ombudsman may investigate and determine the following matters -
(a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme …
……
(c) any dispute of fact or law in relation to an occupational or personal pension scheme between –
(i) a person responsible for the management of the scheme, and
(ii) an actual or potential beneficiary."

30. Thus, the jurisdiction is confined to complaints concerning an occupational pension scheme (relevant to this case) or a personal pension scheme (not at issue in this case).

31. The term "occupational pension scheme" and the term "pension scheme" for these purposes are specifically defined in s.1 of the 1993 Act, as it was amended by s. 239 of the Pension Act 2004 ("the 2004 Act") from 22 September 2005. The amended section now provides, so far as material:

"(1) In this Act, unless the context otherwise requires—
"occupational pension scheme" means a pension scheme–
(a) that–
(i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or
(ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people, is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to
whom that subsection would have applied when the scheme was established had that subsection then been in force or a pension scheme that is prescribed or is of a prescribed description;
…

(5) In subsection (1) "pension scheme" (except in the phrases "occupational pension scheme", "personal pension scheme" and "public service pension scheme") means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people–
(a) on retirement,
(b) on having reached a particular age, or
(c) on termination of service in an employment."

32. This current definition has origins in the definition provided in s.51(3) of the Social Security Act 1973 which was the first major piece of pensions legislation intervening in the provision of private sector occupational pension schemes. The definition in s.1 of the 1993 Act was recast by s.239 of the 2004 Act to address a simplification of the tax regime and EU Directive 2003/41/EC (relating to Institutions for Occupation Retirement Provision known as "IORP").

33. Section 255 of the 2004 Act provides that the trustees and managers of an occupational pension scheme must limit the scheme's activities to "retirement-benefit activities" and s.255(5) defined "retirement benefits" as benefits paid by reference to reaching, or expecting to reach, retirement and also "benefits that are supplementary to [such benefits] and that are provided on an ancillary basis – (i) in the form of payments on death, disability or termination of employment or (ii) in the form of support payments or services in the case of sickness, poverty or need, or death." This change therefore removed benefits payable "on death", which had appeared in the statutory definition of "occupational pension scheme" since 1973, from the definition, but allowed for such benefits if they were supplementary and provided on an ancillary basis.

34. Section 50 of the 1995 Act requires dispute resolution arrangements to be made in respect of occupational pensions. In s.176 of the 1995 Act occupational pension scheme has the meaning given by s.1 of the 1993 Act.

35. The relevant procedural rules applicable to the Defendant are the Personal and Occupational Pensions Schemes (Pensions Ombudsman) (Procedural) Rules 1995 (made pursuant to powers conferred on the applicable Secretary of State under s.149 by the 1993 Act). The Defendant has a power to discontinue an investigation pursuant to rule 16(1)(c) – which is the power exercised in the present case to give effect to the Defendant's conclusion that it did not have jurisdiction.

## The FCS

36. The FCS is concerned with the provision of compensation to firefighters in respect of certain qualifying injuries. Entitlement to benefits under it does not depend upon receipt of a firefighters' pension.

37. The FCS Order is made in exercise of the powers conferred by s.34 and 60 of the Fire and Rescue Services 2004. Section 34 enables the Secretary of State to bring into operation one or more scheme making provision for payment of pensions, allowances and gratuities in respect of persons employed by a fire and rescue authority or who have died whilst so employed. Section 60 makes further provision in respect of order making powers.

38. Article 1(3) of the FCS Order defines (and differentiates between) "the Compensation Scheme" set out in the Schedule and "the Pension Scheme" which means "the Scheme set out in Schedule 2 to the Firemen's Pension Scheme Order 1992".

39. Article 2 of the FCS Order makes provision for the payment of "pensions, allowances and gratuities to and in respect of persons who die or are permanently disabled as the result of an injury sustained or disease contracted while employed by a fire and rescue authority".

40. The FCS is contained in the schedule to the FCS Order.

41. Part 1 of the FCS contains general provisions. Part 2 contains "rules" which govern injury awards and duty related compensation.

42. Part 1 contains definitions applicable across the FCS. However, there is also differentiation in how certain defined terms apply in the various rules set out in Part 2. For instance, a "qualifying injury" (defined in Part 1 Rule 7) refers to "an injury received by a person without his own default, in the exercise of his duties as a regular or retained firefighter" but a different meaning of qualifying injury applies for the purpose of Part 2 Rule 3 of the FCS.

43. The provisions of the FCS came into force on 1 April 2006 save for Part 2 Rule 3 which has effect from 1 April 2000.

44. The Schedule to the FCS (itself) sets out provisions relevant to the amount of the payment. In broad terms these set out calculations for the awards which may require account to be given for pensions received. Receipt of the award is not linked to receipt of a pension or any pension contribution record. However, the amount payable is determined by a formula which takes account of pension payments received. Part 2, Rule 3 contains its own method for calculating benefits payable under that provision.

45. Part 2 of the FCS is entitled "Injury Awards and Duty-Related Compensation".

46. Part 2 Rule 1 (under which the Claimant seeks an award) states as follows:

> "Injury awards
> (1) This rule applies to a firefighter who has retired and is permanently disabled if the infirmity was occasioned by a qualifying injury.
> (2) The firefighter is entitled—
> (a) to a gratuity, and
> (b) subject to paragraphs (3) and (4), to an injury pension,
> both calculated in accordance with Schedule 1.
> […]
> (4) Where the firefighter retired before becoming permanently disabled, no payment in respect of an injury pension shall be made for the period before he became permanently disabled".

47. As already stated, "qualifying injury" is defined in Part 1 Rule 7. "Permanently disabled" is defined in Part 1 Rule 8 as disablement from performance of duty as a firefighter that is expected to last until normal pension age.

48. I mention other benefit provisions in Part 2 of the FCS.

49. Part 2 Rule 3 contains two benefits.

50. First, under Part 2 Rule 3(1)(a) – compensation for death caused solely by the effects of a qualifying injury sustained in the performance of duties as a firefighter. A qualifying injury for the purpose of this Rule refers to "an injury received by a person in the exercise of his duties as a regular retained or volunteer firefighter" (see Part 1, Rule 7(2)). Where applicable a lump sum is payable as a multiple of the salary (five times the annual pensionable pay) (see Part 2 Rule 3(3)).

51. Second, under Part 2 Rule 3(1)(b) benefits are payable to "a firefighter who is permanently incapacitated at the date of discharge for carrying out any occupation solely by reason of a qualifying injury sustained in the performance of his duties as a firefighter". The definition of qualifying injury is the same as for Part 2 Rule 3(1)(a).

52. The FCS makes provision for payments of a special award to spouses (Part 3, Rule 1) where a person who is or has been a regular or retained firefighter dies from the effects - (a) of a qualifying injury, or (b) of infirmity of the mind or body occasioned by a qualifying injury, leaving a surviving spouse or civil partner. This is not contingent on the pension of the deceased firefighter.

53. Part 4 makes provision for a special allowance for children of a deceased firefighter who dies from the effects of a qualifying injury. Part 5 makes provision in respect of adult dependent relatives of such a deceased firefighter.

54. Part 6 of the FCS contains dispute resolution procedures. This includes obtaining the opinion of an IQMP (Part 6 Rule 1), appeals to a medical referee (Part 6, Rule 2) and an appeal to the Crown Court (Part 6, Rule 3).

**Legislative Background and Policy Context**

55. The witness statement of Ms Helen Fisher (Head of Firefighter Pensions at MHCLG) explains the background to the FCS.

56. The FCS was a new, dedicated compensation scheme which incorporated compensation provisions previously found in: (i) the FPS; and (ii) firefighters' terms and conditions of employment.

57. The compensation provisions could not remain in the FPS as this was to become a registered pension scheme under a new tax regime for pensions coming into operation in April 2006. Non-contributory compensation entitlements would attract negative tax consequences if contained in a registered pension scheme because they would: (i) amount to unauthorised payments attracting a tax liability (whereas firefighters' injury awards had been non-taxable prior to this date); and (ii) be added to the value of members' pensions for the purpose of calculating whether the lifetime allowance had been exceeded.

58. In respect of the compensation provisions formerly in the terms and conditions of employment (often referred to as the "Grey Book"), the Audit Commission had "taken the view that the compensation arrangements in the Grey Book were ultra vires" and should be provided for in an Order made by the Secretary of State under the relevant legislation (then the Fire Services Act 1947 and subsequently the Fire and Rescue Services Act 2004).

59. Various departmental notes (then from the Office of the Deputy Prime Minister) and circulars exhibited to Ms Fisher's statement record the decision-making process leading to the FCS. The material supports the conclusions that: -

    a. There was a conscious decision to separate out the compensation scheme from pensions.

    b. The provisions in Part 2 Rule 3 have their origin in terms and conditions which were subject of the vires concern expressed by the Audit Commission.

60. The material does not show any discussion of how the changes might impact on the jurisdiction of the Defendant.

61. Paragraph 8.3 of the Explanatory Memorandum to FCS dated 30 June 2006 encapsulates this background as follows:

> "The placing of the compensation provisions into a separate compensation Scheme will make clear the distinction between pension benefits (based on pension scheme membership and contributions) and compensation for service-related injury. As a result, serving firefighters will have a clearer understanding of benefits for which they are, or may become, eligible. The separation will also enable fire and rescue authorities to account for expenditure more efficiently (as compensation payments come from operating accounts rather than the pension fund)".

**Clark**

62. The case of Clark concerned two police officers who had each retired after suffering work related injuries that led to their total and permanent disablement. Both were

assessed as being entitled to an injury award under regulation 11 of the Police (Injury Benefit) Regulations 2006 ("PIBR"), but they were not entitled to a disablement gratuity under regulation 12, because, in each case, more than 12 months had elapsed between their injury and their total disablement.

63. The claimants (in Clark) made a claim in the Employment Tribunal ("ET") alleging that the refusal of the disablement gratuity constituted disability discrimination. A preliminary issue arose as to whether the ET had jurisdiction to hear the claim. The first instance decision that it did was overturned by the President of the Employment Appeal Tribunal ("EAT") (Eady J).

64. The jurisdiction issue arose from s.61 of the Equality Act 2010 ("2010 Act") which provides that "an occupational pension scheme" must be taken to include a non-discrimination rule. Section 212(1) of the 2010 Act provides that an occupational pension scheme has the meaning given in s.1 of the 1993 Act.

65. Thus, the jurisdiction issue raised a point of interpretation as to the meaning of occupational pension scheme under s.1 of the 1993 Act and whether the provision at issue in Clark fell within its meaning.

66. Eady J held that it did not. She reached this view by reference to the ordinary meaning of the language of regulation 12 and s.1(5) (see [2024] ICR 239 at paras 68-72) and by reference to the broader legislative history of the PIBR (see paras 76-81) which had a similar "de-coupling" of injury compensation provisions from the pension scheme in the aftermath of the pension tax changes brought about by the Finance Act 2004. The history of the PIBR echoes what happened with the FCS (as described above by reference to Ms Fisher's evidence).

67. Eady J's decision that there was no jurisdiction under s.61 of the 2010 Act was upheld by the Court of Appeal (rejecting ground 1 of the Appellants' argument). The jurisdiction appeal in fact succeeded on a different ground (ground 3 which related to s.108 of the 2010 Act - discrimination in the context of a close connection to a relationship which used to exist).

68. For present purposes, the relevant part of Clark is the Court of Appeal's approach to ground 1 (the jurisdictional question under s.61 of the 2010 Act which turns on whether there was an occupational pension scheme). The judgment was given by Lewis LJ with whom Underhill and Warby LLJ agreed.

69. Ground 1 itself is set out in para 6 of Lewis LJ's judgment. It stated: "The EAT erred in concluding that the regulation 12 gratuity, and/or the Police (Injury Benefit) Regulations 2006 more generally did not meet the definition of 'an occupational pension scheme' in s.1 of [the 1993 Act]" (emphasis added). This shows that the issue was raised both by reference to regulation 12 and the PIBR more generally. This is also apparent from para 40 of the judgment which records the submissions of Leading Counsel for the Appellants as drawing on both regulation 11 and regulation 12.

70. The critical part of Lewis LJ's judgment for present purposes is contained in paras 44-56.

71. At para 46, Lewis LJ stated:

> "The key word is 'on'. To be a pension scheme within the meaning of section 1(5) the scheme must provide, or be capable of providing, benefits to people 'on retirement' or 'on termination of service' not during, or after, or coincident with, retirement or termination of service. The occurring of one of the events specified in section 1(5)(a) to (c) must be the event, or the trigger, giving rise to the entitlement to benefits. That conclusion is reinforced by the use of the word 'on' in section 1(5)(b). A scheme will be a pension scheme if it provides benefits 'on a person having reached a particular age'. Having reached the particular age is the event which gives rise to the entitlement to benefits."

72. Lewis LJ emphasised at para 48: "It is not enough if the scheme provides for benefits in circumstances which coincide with the events specified in subsection 1(5)(a) to (c)".

73. At para 47, Lewis LJ applied this interpretation of the 1993 Act to regulation 12 of the PIBR as follows:

> "On analysis, regulation 12 does not provide an entitlement to benefits on retirement or on termination of service in the sense described above. A disablement gratuity is payable if all three of the conditions specified in regulation 12 are satisfied: (a) the person has suffered an injury in the execution of his or her duty; (b) the person ceases or has ceased to be a member of a police force; and (c) the injury has resulted in permanent and totally disability [sic] within 12 months of receiving the injury. Satisfaction of conditions (a) and (c)

> does not involve the provision of benefits on retirement or on termination of service. Condition (b) requires the person to cease, or have ceased, to be a member of a police force. The regulation does not, however, require any causal connection between ceasing to be an officer and condition (a), i.e. having suffered an injury, or condition (c), ie becoming permanently and totally disabled within 12 months as a result (although there may in fact be a causal connection, as it is in the case of these two appellants). Furthermore, the person may already have ceased being a police officer before the injury results in permanent and total disablement and before he or she becomes entitled to the payment of a disablement gratuity. It cannot be said, therefore, that the scheme provides benefits 'on retirement' or on 'termination of service'. As the EAT observed at para 71 of its judgment, cessation of service is a necessary but not sufficient condition of entitlement. It is not the event which triggers entitlement to the benefit. Consequently, regulation 12 is not a pension scheme within the meaning of section 1(5) and cannot be an occupational pension scheme within the meaning of section 1(1) of the 1993 Act."

## Discussion

(a) The application of Clark

74. As is apparent from the reasoning of Lewis LJ in Clark, the question of whether the case concerned an occupational pension scheme was approached from the perspective of evaluating regulation 12 of the PIBR against the definition in s.1(5) of the 1993 Act.

75. Applying that approach in the present case means that the question is whether Part 2 Rule 1 of the FCS meets the definition in s.1(5) of the 1993 Act.

76. In oral argument, Mr Short KC (who appeared with Ms Elizabeth Grace for the Claimant) conceded that there was no material difference between Part 2 Rule 1 and regulation 12 of the PIBR which was at issue in Clark. This is an important concession. If the Court of Appeal asked itself the right question in Clark, then the answer in this case would be the same as the conclusion reached by the Court of Appeal in Clark. Mr Short KC accepted that one must look outside of Part 2 Rule 1 to find any relevant differences between the FCS and the PIBR.

77. The main thrust of the Claimant's arguments is that a broader evaluation of the FCS is required to evaluate whether the Claimant's complaint is in respect of a pension scheme. Part 2 Rule 3(1)(b) of the FCS was said to produce a different answer to the question of whether the complaint concerned an occupational pension scheme. I address

those arguments below. But first, it is necessary to explain why this concession is correctly made.

78. On the premise, that Clark requires the Court to assess whether the rule at issue is an occupational pension scheme, the answer is that Part 2 Rule 1 clearly is not.

79. Under the definition in s.1 of the 1993 Act an occupational pension scheme must be one having, or capable of having, effect so as to provide benefits "on retirement", "on having reached a particular age" or "on termination of service in an employment".

80. The key word used in the definition is the word “on”. That is to be distinguished from a scheme which may provide benefits during, after or coincident with such events.

81. The occurrence of one of the three events must be the event, or trigger, giving rise to the entitlement to benefits.

82. An entitlement to benefits may be subject to a number of conditions, including one of the specified events, such as cessation of service; but if there is no required causal connection between that event and the other conditions (even though a causal connection may occur on the facts) then the definition is not satisfied. If cessation of service is a necessary condition for entitlement, but it is not sufficient, then it cannot be said to be the event which triggers the entitlement to the benefit and the scheme does not fall within s.1(5) of the 1993 Act.

83. The operative triggers of entitlement are: (a) permanent disability; (b) occasioned by a qualifying injury. It is a precondition of entitlement that the firefighter has retired. But that is not a sufficient condition. It is not the cause of the entitlement.

84. That is clear from the fact that entitlement may arise after retirement:
    a. Part 2, Rule 1(4) expressly contemplates that a firefighter may qualify for an award at a later date to retirement because that is when the disability manifests itself. Moreover, it provides that, in such circumstances, no award shall be paid in respect of the period between retirement and disablement.
    b. Part 1, Rule 8(6) contemplates that a firefighter might retire before becoming disabled. This dovetails with Part 2, Rule 1(4).

85. Therefore, the difficulties of finding that Part 2 Rule 1 is a pension scheme mirror those identified by Lewis LJ in respect of regulation 12 of the PIBR. Mr Short KC's concession (as to there being no material difference between regulation 12 of PIBR and Part 2 Rule 1) is correctly made.

Capable of having effect

86. The relevant definition of pension scheme in s.1(5) of the 1993 Act contains the words "is capable of having effect so as to provide benefits… on retirement".

87. Mr Short KC expressly reserved his position to rely upon the words "capable of having effect so as to provide benefits…on retirement" for the purposes of any appeal.

88. In so doing, he sensibly accepted that Lewis LJ had dealt with these words in para 48 of the Court of Appeal's judgment. Lewis LJ had noted the Respondent's argument that the words enabled a Court or Ombudsman to determine whether a scheme was a pension scheme where no benefits had been paid. This point had been endorsed by Eady J in the EAT (see para 73 of the EAT's judgment). Lewis LJ did not adopt this approach. He observed *"It is not immediately apparent what the words "capable of having effect" mean*". However, he was satisfied that those words are still governed by the remainder of the words in the subsection. "*The scheme must be one capable of having effect "so as to provide benefits to or in respect of people" "on the occurrence of the events specified in subsection 1(5)(a) to (c)*".

89. In the present case, the accepted position is that the Court of Appeal held that the words "capable of having effect" did not alter the primary analysis in Clark.

90. It may be useful to mention that the research of the Defendant's Counsel in the present case may shed some light on the doubt expressed by Lewis LJ as to what the words add.

91. Mr Sawyer (junior Counsel for the Defendant) referred me to the decision of Collins J in Hamar v Pensions Ombudsman [1996] Pens LR 1 which concerned a dispute about a transfer out of a pension scheme. An issue arose as to whether the arrangements were an occupational pension scheme (see paras 23 and 24). The specific point taken was

that until Inland Revenue approval had been obtained there was no guarantee that there would be a pension scheme at all – because of the effect of clause 24 of the deed (set out in para 2 of the judgment). Collins J rejected that argument relying on the words "capable of having effect" in the definition of pension scheme. He said: "the scheme in question is clearly capable of having effect if Revenue approval was obtained". The Court of Appeal reversed Collins J's decision (see [1998] Pens LR 321) but not on this point. At para 36 (Millet LJ with whom Saville and Simon Brown LLJ agreed) endorsed Collins J's conclusion on this issue.

92. Hamar was not cited to the Court of Appeal in Clark. It may have shone some light on the possible utility of the words "capable of having effect" but would have had no impact on the conclusions reached.

93. Taking stock of the argument so far, applying the analysis in Clark to the benefit at issue in this case (Part 2 Rule 1) provides a clear answer. The Claimant does not contend otherwise. Instead, his main argument is that a different approach is required. I turn to assess the way the case was advanced. I will start however, by identifying some significant obstacles in the way of such contention.

(b) Is the question of whether the Claimant's complaint about a pension scheme determined by reference to the individual benefit or the FCS as a whole?

*(1) Does Clark decide this question?*

94. The Claimant argues that the Court of Appeal in Clark did not address the question of whether the appropriate assessment focussed on the benefit in issue or the whole of the scheme.

95. The Claimant therefore argues that the Court of Appeal's decision is not binding on this Court as it did not consider what the Claimant contends is the critical question namely a comparison of the whole of the FCS with the definition of an occupational pension scheme (applying s.1(5) of the 1993 Act).

96. It is fair to recognise that there is little explicit discussion of this point in Lewis LJ's judgment. However, as I have identified above, the ground of appeal raised the question

of whether there was a pension scheme both by reference to regulation 12 of PIBR and by reference to the PIBR as a whole.

97. The Claimant seeks to support his submission that a broader inquiry is necessary by contending that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument or consideration by the earlier court. That proposition derives from the Court of Appeal's decision in R (Kadhim) v Brent London Borough Council [2001] QB 955 at para 33 which was followed by the Court of Appeal in FSHC Group Holdings Limited v GLAS Trust Corporation Ltd [2019 EWCA Civ 1361 at para 136. As stated in FSHC in the judgment of Leggatt LJ (as he then was) a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case, even if that proposition formed part of the ratio decidendi of the case (reasons for deciding the case) and even if that earlier case was that of a superior court.

98. Thus, the Claimant urges this Court to evaluate for itself how the FCS would be assessed as a whole against s.1(5) of the 1993 Act because the Court of Appeal assumed that the right approach was to consider the benefit in question (and so, the Claimant argues, their judgment does not bind this Court).

99. I consider that this invitation overlooks the practical guidance in Kadhim as to how this exception to the doctrine of precedent should be applied in practice. In Kadhim, Buxton LJ (with whom Schiemann and Jacob LLJ agreed) gave the following practical guidance (at para 38):

> "Like all exceptions to, and modifications of precedent, this rule must only be applied in the most obvious of cases and limited with great care. The basis of it is the proposition in question must have been assumed, and not to have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised before the Court and there has been no argument upon it…"

100. The question whether the PIBR, viewed generally, constituted an occupational pension scheme formed part of the issue identified by the Court of Appeal itself (see the way ground 1 was framed (and to a lesser extent from the way that the argument for the Appellant is recorded in para 40 of the judgment)). I therefore do not consider that the present case falls within the circumstances where this exception to the doctrine of precedent can be relied upon.

101. In the alternative, Mr Short KC submitted (in his skeleton argument) that the decision of the Court of Appeal in Clark was per incuriam. He put the point as follows: "*If necessary, the Claimant would submit that if Clark did have the effect [of requiring the Court to examine entitlement under Part 2 of Rule 1], it was per incuriam, in that the Court of Appeal was not directed to any of the very many legislative provisions which also rely upon the definition of "pension scheme" and "occupational pension scheme" which would be inoperable or would produce absurd results if this approach were taken to the definition*".

102. However, in oral submissions, Mr Short KC fairly and correctly acknowledged that a first instance judge cannot decline to follow the decision of the Court of Appeal on the basis that it is per incuriam – see Sinkala v Secretary of State for the Home Department [2026] EWHC 59 (KB) at paras 67-68.

103. Clark therefore places an unassailable obstacle in the way of the Claimant's primary argument at this level.

104. Notwithstanding that conclusion, I will assess the arguments advanced.

*(2) The Claimant's Argument That Clark Was Different*

105. A variety of points were put forward by Mr Short KC to invite the Court to take a different course than Clark.

106. It was argued that Clark was not a case about the Ombudsman's jurisdiction. That is true but it was a decision interpreting precisely the same provision (s.1(5) of the 1993 Act) in the context of a jurisdictional question (of whether the ET had jurisdiction under s.61 of the 2010 Act).

107. Mr Short KC argued that the complaint in Clark was a discrimination one which necessarily involved a focus on regulation 12. However, that conflates the nature of the complaint (disability discrimination) with the basis of jurisdiction – i.e. whether the complaint was about an occupational pension scheme. As Mr Strachan KC (who appeared with Mr Edward Sawyer for the Defendant) contended, the jurisdictional questions are essentially the same.

*(3) The Substance of the Claimant's Reliance on the FCS (as a whole)*

108. The main focus of Mr Short KC's argument was Part 2 Rule 3(1)(b) of the FCS. His argument was: -

a. The correct approach was to assess the FCS as a whole against the criteria in s.1(5) of the 1993 Act to decide if it is an occupational pension scheme.

b. Part 2 Rule 3(1)(b) satisfied the conditions set out in paragraph 46 of Clark.

c. The critical question was whether Part 2 Rule 3(1)(b) provided for the payment of benefits on retirement. The answer to that, he contended, was that it did. That was enough to make the FCS an occupational pension scheme. He relied on decision of Hart J in Swansea City v Johnson [1998] Ch 189 at 195-196 to contend that the inclusion of an extraneous benefit does not necessarily take a scheme outside the definition of a pension scheme.

109. Mr Strachan KC sought to challenge this argument at every stage of the analysis. The shape of his response was as follows:
a. Clark establishes that the focus is the benefit in issue.
b. Even if one looks at the wider arrangements, Part 2 Rule 1 and Part 2 Rule 3 are different schemes.
c. Even if they are part of one composite scheme, one qualifying benefit does not transform the whole arrangement into a pension scheme. A better overall assessment is that the FCS is not a pension scheme.
d. Even if Rule 3(1)(b) is examined on its own, it fails the Clark test.

110. I will evaluate the Claimant's case by reference to these points.

111. First, Mr Strachan KC submits that it is wrong to look at the FCS as a whole rather than the provision at issue to determine whether the complaint is in relation to an occupational pension. On that basis, the inquiry should be focussed on Part 2 Rule 1 not Part 2 Rule 3(1)(b) which is not relevant to the complaint the Claimant seeks to make. I see considerable force in this point. The Claimant is not raising any complaint

about Part 2 Rule 3(1)(b) or asserting any entitlement to payment under that part of the FCS.

112. Second, Mr Strachan KC submits that even if it were right to look at the "scheme" rather than the entitlement, it does not follow that the whole of the FCS is a pension scheme. Rather, he submits the better analysis would be to determine that Part 2 Rule 1 is in a different scheme to Part 2 Rule 3. He relies on (a) the application of different criteria (such as the different definition of "qualifying injury" and the different method of calculating compensation), (b) the fact that there were different start dates for Part 2 Rule 1 and Part 2 Rule 3 when the FCS came into force, (c) the different origins of the provisions (as will be recalled Part 2 Rule 1 migrated from the pension arrangements whereas Part 2 Rule 3 came from the Grey Book (terms and conditions) which was placed on a statutory footing in accordance with the recommendations of the Audit Commission (as Ms Fisher explains in her evidence)).

113. I see some force in Mr Strachan KC's submission that Part 2 Rule 1 and Part 2 Rule 3 are not part of the same scheme. If that is right, Mr Short KC's argument is built on a false foundation. As explained, the two rules have different provisions, a different origin and there is little overlap in the applicable provisions. However, this argument may emphasise form and origin more than substance. Thus, I am inclined against treating this part of the Defendant's argument as landing a fatal blow by itself. I therefore proceed on the assumption most favourable to the Claimant, namely that Part 2 Rule 1 and Part 2 Rule 3 form part of the same composite arrangement, and consider what difference that would make.

114. Third, Mr Strachan KC submits that even if Part 2 Rule 1 and Part 2 Rule 3 were to be treated as part of the same composite "scheme or other arrangement" then the presence of a single benefit falling within (a) to (c) of s.1(5) would not automatically transform a scheme that is not a pension scheme into one.

115. Rather, it would be appropriate to exercise a broad judgment as to the nature of the scheme. This might require a focus on the predominant effect of the provisions.

116. Such an inquiry would not support treating the FCS as an occupational pension scheme. There are five main benefits (see the discussion of the rules in Part 2 to 5 of

the FCS above) and the only provision relied upon as meeting the criteria for a pension is Part 2 Rule 3(1)(b) – which is only one part of one of the five benefit conferring rules within Part 2 to 5.

117. The decision of Hart J in Johnson is consistent with undertaking a broad evaluative judgment. In that case, the presence of one extraneous benefit did not make a pension scheme lose its identity. The converse would also apply, Mr Strachan KC submits. Thus, even if it were right that one small element of the FCS would meet the criteria for being an occupational pension, that would not transform the character of the whole scheme, which is a compensation scheme where its benefits flow from qualifying injuries in the course of duty and are not dependent on pension contributions or membership of any pension scheme, into a pension scheme.

118. For these reasons, I am satisfied that the Defendant has a compelling answer to the Claimant's case even if it were right that the correct approach – contrary to Clark – was to look at the FCS as a whole.

119. When one does that, it looks like an injury compensation scheme (as its name indicates); not a pension scheme. The statutory history shows it was uncoupled from pension arrangements. It provides specific benefits which are based on injuries which meet the specified criteria. There is no requirement that the firefighter whose condition the benefits relate was a member of the pension scheme.

120. The overwhelming character of the scheme is that of a compensation scheme. That is a different character than a pension scheme. It does not depend on contribution history but on the nature of the injury satisfying the applicable criteria.

121. The fourth and final string to Mr Strachan KC's bow was to argue that in any event Part 2 Rule 3(1)(b) on its own does not meet the requirements of being an occupational pension scheme.

122. Under Rule 3(1)(b), entitlement arises for a firefighter who is permanently incapacitated "at the date of discharge" for carrying on any occupation solely by reason of a qualifying injury sustained in the performance of duties as a firefighter. The key point made by the Defendant is that this lacks the requisite causal connection between that discharge and the qualifying injury (as required in para 47 of Clark).

123. The discharge itself could be unrelated to the qualifying injury. The date of discharge is a snapshot at which point the person has to have the qualifying injury, but the injury does not need to be the reason for the discharge. So, for example, a firefighter might in fact be discharged for some other reason (eg misconduct), rather than by reason of the "qualifying injury". Entitlement to the award would arise if the firefighter had the "qualifying injury" at the time of discharge, but there is no requirement for it to be the reason for the discharge.

124. Thus, the Rule 3(1)(b) entitlement does not fulfil the requirement of being "on retirement" or "on termination of service". Such discharge is similarly a necessary, but not sufficient condition of entitlement. Had it been intended to be within the scope of s.1(5)(a) to (c), it could and would necessarily have needed to be expressed in a way which reflects those provisions, e.g. a firefighter retiring "by reason of" the qualifying injury and permanent disablement which would create the necessary causal connection.

125. Mr Short KC acknowledged in his argument that the discharge from employment could be for "a different reason theoretically" but he submitted Part 2 Rule 3(1)(b) was intended to assist those who retire due to their qualifying injury.

126. He submitted that this was enough to meet the test in *Clark*. However, I consider that this overlooks the two strands to Lewis LJ's reasoning in para 47. As Mr Strachan KC submits, there is a similar lack of causal connection in the conditions of entitlement. I consider therefore that Part 2 Rule 3(1)(b) itself would not meet the *Clark* test. The fact that the benefit may be payable on discharge does not create the necessary causal connection between the discharge and the qualifying injury. The injury is not required to be the reason for, or trigger of, the discharge.

127. However, this discussion about the character of Part 2 Rule 3(1)(b) (viewed alone) is remote from what this case is really about and I am conscious that it is not necessary for me to decide whether Part 2 Rule 3(1)(b) alone would be a pension scheme applying Clark. For the reasons I have just given, I consider that the better analysis is that it would not be.

128. In my judgment, the Defendant's overall response to the Claimant's wider argument is well-founded. The Claimant's attempt to use Part 2 Rule 3(1)(b) as the route to the answer that the FCS is a pension scheme does not work legally or factually. It is a compensation scheme not an occupational pension scheme.

129. Accordingly, whether one approaches the matter through the analysis in Clark or through the broader characterisation exercise advocated by the Claimant, the same conclusion follows.

(c) Other Matters Raised

130. I address briefly other matters raised in argument.

131. The Claimant submitted that construing s.1(5) of the 1993 Act by reference to individual benefit entitlements would create difficulties elsewhere in the pensions legislation because many provisions operate at scheme level. I do not consider it necessary or appropriate to determine the implications of Clark in statutory contexts not before the Court.

132. This is a case about the FCS which has much in common with the PIBR evaluated in Clark. It is clear that s.255 of the 2004 Act allows a pension scheme to include benefits which are supplementary to retirement benefits and provided on an ancillary basis. The implications of Clark if any for adjudication of disputes in other scenarios is not before me and I express no view on it.

133. As mentioned above, the Claimant's argument sought to rely on provisions from the FPS and make comparisons with Part 2 Rule 3(1)(b). I found such comparisons to be unpersuasive. As above, s.255 of the 2004 Act recognises that not every benefit in what is otherwise an occupational pension scheme, has to be a s.1(5) benefit. It can be ancillary or supplementary to it. I have already dealt with the limits of how far the Claimant's reliance on Hart J in Johnson takes them. It invites an assessment about whether the character of a pension scheme is lost by an extraneous benefit. It does not follow that if one component of the FCS were to satisfy s.1(5); the whole scheme would. As I have found above, the premise of that proposition is not met but even if it were to be, it would not take the Claimant very far. A compensation scheme is different from a pension scheme.

134. The Claimant's argument drew on evidence from Mr Mark Rowe, National Officer of the Fire Brigades Union. He explains that in the "overwhelming majority of cases" where an injury pension is sought (under FCS), the permanent disability has arisen before the firefighter leaves service and the pension and gratuity becomes payable on their retirement. Instances of disability arising after retirement are the exception. I accept this evidence – which is unchallenged. However, it does not change the analysis. As the Court of Appeal has made clear the focus is on the effect of the rules; not on an empirical enquiry as to how they operate in practice.

135. The definition in s.1 of the 1993 Act is premised by the words "unless the context otherwise requires". No party advanced any contention that these words impacted on the outcome of this case or the applicability of the decision in Clark to the factual circumstances of the present case.

136. There was some focus on remedies in argument. The Defendant and Mr Luckhurst for the Secretary of State drew attention to the fact that there remains an appeal to the Crown Court pursuant to Part 6 Rule 3 of the FCS. It is acknowledged that this is not in itself a decisive indicator as to the absence of jurisdiction of the Defendant. There were previously similar provisions applicable to firefighters pensions legislation which were removed in 2013 (see paragraph 8 of schedule 1 of the Firefighters' Pension Scheme (Amendment) (No 2) (England) Order 2013/1392). The availability of this remedy supports the conclusions that I have reached but is not a necessary part of my reasoning and is certainly not in itself decisive.

137. I should mention that Ms Fisher's evidence indicated that a review is being undertaken of the FCS including consideration of its governance arrangements. I express no view about that. The policy question about whether access to the Pensions Ombudsman (or some other regulator) is desirable in cases involving the FCS is a question for the government.

138. This case turns on the legal question of how the law currently applies.

## Conclusion

139. For the reasons set out above, this claim is dismissed. The Claimant's claim under Part 2 Rule 1 of the FCS does not concern an occupational pension scheme. Accordingly, the Defendant does not have jurisdiction.

140. I conclude by expressing my gratitude to all Counsel for their helpful written and oral argument. This case was concluded in one day. That was possible due to their skill and focus in oral submissions. The bundles were prepared with great care. The provision of an agreed list of issues, joint reading list and a chronology in accordance with para 20.5.1 of the Judicial Review Guide (2026) was of real assistance to the Court. I express my thanks to all who contributed.