



Neutral Citation: [2024] UKFTT 00568 (TC)

Case Number: TC09224

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/02014

*Pension – Fixed Protection 2012 – revoked by HMRC - meaning of year – 12 consecutive months or 12 aggregated months – logic favours former – but context requires the latter – appeal dismissed*

**Heard on:** 20 June 2024

**Judgment date:** 27 June 2024

**Before**

**TRIBUNAL JUDGE ALASTAIR J RANKIN MBE  
MS SUSAN STOTT**

**Between**

**MARTIN LAKER**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Michael Firth KC

For the Respondents: Ms Barbara Belgrano and Mr Ben Blades of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. The form of the hearing, with the consent of the parties, was by video using the Tribunal video hearing system. The documents to which we were referred were an electronic Hearing Bundle containing 342 pages, an electronic Supplementary Hearing Bundle containing 10 pages, an electronic Supplementary Hearing Bundle 2 also containing 10 pages and an electronic Authorities Bundle containing 768 pages.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

### BACKGROUND

3. This was an appeal by Dr Martin Laker (“Dr Laker”) against a decision by the Respondents (“HMRC”) dated 31 March 2014 to revoke his Fixed Protection 2012 certificate (FP 2012). pursuant to Regulation 11(a) of SI 2011/1752, the Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regulations 2011 (“the 2011 Regulations”). The appeal raises a short question as to the meaning of the word “year”. Mr Firth submitted that a year refers to 12 consecutive months. Ms Belgrano claimed it refers to a combination of 365 days aggregated to form a year.

4. On 6 April 2012, the pension lifetime allowance (the amount that an individual could accrue in their pension without incurring a tax charge) was reduced from £1.8m to £1.5m. In order to protect the position of taxpayers who had a certain level of savings before the reduction, FP 2012 (where obtained and retained) meant that the pension saver was treated as if they were entitled to a lifetime allowance of £1.8m (or the standard life-time allowance if greater). Pension savers who gave notice of their intention to rely on FP 2012 were advised that they would be entitled to its continued protection provided that they ceased to make any contributions and did not have benefit accrual on or after 6 April 2012.

5. Dr Laker obtained his FP 2012 certificate on 30 January 2012. He was reminded in the certificate itself that “failure to continue to meet the conditions in paragraph 14, Schedule 18, Finance Act 2011 would mean that fixed protection would no longer apply and the standard lifetime allowance would apply.

6. Between 1 February 1979 and 29 September 2018, Dr Laker was a Consultant in Forensic Psychiatry, employed by the South Essex Partnership NHS Foundation Trust (“the NHS Trust”). By virtue of his employment he was entitled to membership of the National Health Service Pension Scheme (“Pension Scheme”). The relevant Pension Scheme Regulations are the National Health Service Pension Scheme Regulations 1995, SI 1995/300 (“Pension Scheme Regulations”).

7. Dr Laker opted into the Pension Scheme and remained a member thereof for the majority of his employment. Broadly speaking, the value of the Appellant’s rights under the Pension Scheme increased in line with his pensionable pay and pensionable service. Dr Laker first opted out of the Pension Scheme with effect from 1 February 2013. He then rejoined the Pension Scheme with effect from 1 March 2013 before opting out for the final time on 15 August 2013 with effect from 1 September 2013).

8. It was common ground that by 5 April 2013, Dr Laker had accrued 14,465 days (39 years, 230 days) of pensionable service and by 31 August 2013 he had accrued 14,613 days (40 years, 13 days) of pensionable service. Dr Laker provided copies of payslips between

January 2012 and August 2013 and explained that payslips from before January 2012 were no longer available. Not all elements of his salary constitute “pensionable pay” as defined in Regulation C1(1) of the Pension Scheme Regulations. For present purposes HMRC were content to accept that the “Pensionable Pay” recorded on each of the payslips accurately reflected his monthly “pensionable pay” for the purposes of Regulation C1(1) of the Pension Scheme Regulations.

9. From the documents provided by Dr Laker, HMRC ascertained the following:

- 9.1 Between January 2012 and March 2013, his pensionable pay was £11,103.53 in each month.
- 9.2 In April 2013, his pensionable pay was £11,578.62.
- 9.3 In May 2013, his pensionable pay was £11,751.14.
- 9.4 Between June 2013 and August 2013, his pensionable pay in each month was £11,664.88.

10. Dr Laker provided a letter from NHSPA dated 17 June 2014 which gave a monthly payment for April 2013 of £11,664.88 and also gave annual figures for the period 1 April 2011 to 1 April 2012 of £133,242.36 and to 1 April 2013 of £139,978.56. However, HMRC agreed that the differences did not appear to be material. In cross-examination during the hearing Dr Laker explained that he received no increase in salary for three years due to the government’s austerity measures. Both parties accepted that Dr Laker’s pensionable pay between 1 February 2012 and 31 January 2013 was £133,242.36.

11. The Scheme administrator, NHSPA, in a letter dated 17 September 2014 explained that “Benefit Accrual has occurred on 20.07.2013” At the heart of the NHSPA’s calculation was the fact that Dr Laker’s final year’s pensionable pay had increased after 5 April 2012 by virtue of his increased pensionable pay from 1 April 2013 onwards. Karen Brown at the British Medical Association (“the BMA”) was subsequently engaged to calculate Dr Laker’s benefits accrual. She advised in an email dated 31 December 2013 that Dr Laker’s rights had exceeded the permissible 2.2% increase for 2013/14 on 20 July 2013.

12. Dr Laker sought a refund of the contributions made by him and his employer for the months of July and August 2013 through correspondence with the NHSPA. The basis upon which he sought to unwind the contributions was that there had been a “a technical error” regarding whether he had retained his MHO status after rejoining the Pension Scheme on 1 March 2013. NHSPA refused to refund the contributions on the basis that they had been made whilst he was eligible to contribute to the Pension Scheme as a member. They stated inter alia that, “Whilst you were a contributing member for these months you were also covered with death in service benefits”.

13. Dr Laker complained to the Pensions Ombudsman Service against the NHSPA’s decision to refuse to refund the contributions. The Pensions Ombudsman Service dismissed the complaint on 16 February 2015 explaining as follows: “In relation to the refund of contributions, NHS Pensions have correctly applied the Scheme Regulations because: a) Dr Laker has been a member of the Scheme for more than two years so the Regulations do not therefore permit a refund of contributions; and b) there is no provision in the Regulations that permits an individual to opt out of the Scheme retrospectively.”

14. Dr Laker wrote to HMRC’s Pension Schemes Services on 20 December 2013 explaining that he believed that he had lost his fixed protection and wrote again on 11 February 2014 confirming that benefit accrual had occurred on 20 July 2013. HMRC responded on 31 March 2014 confirming that his FP 2012 certificate had been revoked. Dr

Laker appealed against the decision to revoke his FP 2012 certificate on 1 August 2019. The original decision was upheld on review in a decision dated 10 February 2022 and on 9 March 2022, Dr Laker appealed to this Tribunal.

15. Various applications were made by both parties to amend the grounds of appeal and the statement of case but these do not concern the current appeal.

16. It is for the Tribunal to decide what “year” means. The fixed protection legislation requires a comparison of the value of the pension arrangement at the beginning of the tax year with the value of the arrangement from time to time in the tax year to ensure that it does not exceed the threshold (FA 2011, Sch 18, para 14(5), 14(12)).

#### THE LEGISLATION

17. FP 2012 is governed by paragraph 14, Schedule 18, Finance Act 2011 (“FA 2011”). It applies where the conditions in paragraph 14(1) are met:

“(1) This paragraph applies on and after 6 April 2012 in the case of an individual –

(a) who has one or more arrangements under a registered pension scheme on that date,  
(b) in relation to whom paragraph 7 of Schedule 36 to FA 2004 (primary protection) does not make provision for a lifetime allowance enhancement factor, and

(c) in relation to whom paragraph 12 of that Schedule (enhanced protection) does not apply on that date,

if notice of intention to rely on it is given to an officer of Revenue and Customs.”

18. FP 2012 ceases to apply in the circumstances set out in paragraph 14(4) (as it read prior to 5 April 2023):

“But this paragraph ceases to apply if on or after 6 April 2012 –

(a) there is benefit accrual in relation to the individual under an arrangement under a registered pension scheme,

(b) there is an impermissible transfer into any arrangement under a registered pension scheme relating to the individual,

(c) a transfer of sums or assets held for the purposes of, or representing accrued rights under, any such arrangement is made that is not a permitted transfer, or

(d) an arrangement relating to the individual is made under a registered pension scheme otherwise than in permitted circumstances.”

19. The relevant condition for the purposes of this appeal is paragraph 14(4)(a) which provides that paragraph 14, Schedule 18 ceases to apply if there is “benefit accrual” on or after 6 April 2012. Regulation 11(a) of the 2011 Regulations provides that HMRC may revoke a FP 2012 certificate if they have reason to believe that a paragraph 14(4) event has occurred:

“Her majesty’s Revenue and Customs may revoke a certificate if they –

(a) have reason to believe that a paragraph 14(4) event has occurred...”

20. Regulation 12 of the 2011 Regulations provides for a right of appeal against a revocation of a FP 2012 certificate. Following the Upper Tribunal’s decision in *Harrison (Deceased) v HMRC* [2021] UKUT 273 (TCC) (“*Harrison*”) (dealing with the nature of an appeal against a refusal to accept a notice electing for Fixed Protection 2012 under Regulation 7 of the 2011 Regulations), it is now clear that the sole question for the Tribunal on an appeal such as this is whether HMRC revoked the certificate in accordance with

Regulation 11. In any event, if there has been “benefit accrual” the effect is that FP 2012 ceases to apply regardless of whether HMRC revoke the FP 2012 certificate.

21. In relation to a defined benefit pension scheme, paragraph 14(5)(b), Schedule 18, FA 2011 provides that there is a benefit accrual where there is an increase in the value of an individual’s rights under the scheme on or after 6 April 2012. Whether there is an increase in the value of an individual’s rights under the scheme is to be determined by reference to whether there is an increase in the “benefits amount” (paragraph 14(6)(b), Schedule 18, FA 2011). However, paragraph 14(12), Schedule 18, FA 2011 provides that any increase is ignored for the purposes of paragraph 14(5)(b), Schedule 18, FA 2011 if it does not exceed the “relevant percentage”.

22. Paragraph 14(7), Schedule 18, FA 2011 provides that the benefits amount is calculated as  $(P \times RVF) + LS$  where P is the annual rate of the pension which would, on the valuation assumptions, be payable to the individual under the arrangement, RVF is the relevant valuation factor and LS is the lump sum to which the individual would, on the valuation assumptions, be entitled under the arrangement (otherwise than by commutation of pension).

23. During the period relevant to this appeal, the relevant valuation factor was 20 (paragraph 14(18), Schedule 18, FA 2011 and s276 FA 2004). Since the Pension Scheme did not stipulate any annual rate by which the individual’s rights would increase, the relevant percentage is the higher of the increase in the consumer prices index and the percentage increase set out in various enactments (none of which applies here) (paragraph 14(13), Schedule 18, FA 2011).

24. Paragraph 14(14), Schedule 18, FA 2011 defines the increase in the consumer prices index as the percentage by which the consumer prices index for the month of September in the previous tax year is higher than it was for the same month in the year before (or nil per cent if it is not higher). It is not in dispute that the increase in percentage as between September 2010 and September 2011 was 5.2% (relevant to tax year 2012/13) and the increase in percentage between September 2011 and September 2012 (relevant to tax year 2013/14) was 2.2%.

25. It was accepted by both parties that Dr Laker was an officer eligible to join the Pension Scheme Regulations. Membership of the scheme is automatic upon commencing NHS employment unless the employee opts not to be included.

26. Regulation E1 governs the annual rate of pension payable. It provides that a member is entitled to a pension at 1/80th of their “final year’s pensionable pay” for each complete year of “pensionable service” plus the relevant daily proportion of that rate for each additional day of such service:

“(1) A member who retires from pensionable employment on or after attaining age 60 shall be entitled to a pension under this regulation.

(2) The pension under this regulation shall be at a yearly rate of 1/80th of final year’s pensionable pay for each complete year of pensionable service, plus the relevant daily proportion of that rate for each additional day of such service.

(3) A member who stays in pensionable employment until age 75 shall be entitled to receive a pension under this regulation at that age even if he does not retire from such employment.”

27. “Pensionable service” is defined in Regulation C2. Regulation C2(1) provides:

“In these Regulations, “pensionable service” is service which counts both for the purpose of ascertaining entitlement to benefits under these Regulations and for the

purpose of calculating them and means, subject to paragraph (2), the aggregate of the following—

- (a) any period of pensionable employment in respect of which the member contributes to this Section of the scheme under regulation D1 (contributions by members);
- (b) any period that was reckonable under the previous regulations as a period of contributing service for the purpose of those regulations;
- (c) any period of contributing service that is reckonable under regulation 3 of the National Health Service (Superannuation) (War Service etc) Regulations 1977 (reckoning war service as contributing service under the principal regulations);
- (d) any period of pensionable service credited to the member under regulation N1(4) (transfers from other pension arrangements) or as a result of a transfer payment to this Section of the scheme under the previous regulations; and
- (e) any period of additional service which the member has purchased under regulation Q1 or under regulations 25 or 26 of the previous regulations.”

28. In calculating the length of a member’s pensionable service, all periods of pensionable service are added and each resulting period of 365 days (disregarding pensionable service on 29 February in a leap year) will be treated as one year (Regulation C2(6)). “Pensionable employment” means “NHS employment in respect of which the member contributes to the scheme in accordance with this section” (Regulation A2).

29. “Final year’s pensionable pay” is defined in Regulation C1(6):

“Subject to paragraph (6A), in these Regulations, “final year’s pensionable pay” means pensionable pay in respect of the member’s last year of pensionable employment, ending on the date the member ceases to be in such employment, or dies, whichever occurs first, except –

(a) if pensionable pay was greater in either or both of the 2 consecutive years immediately preceding the last year, “final year’s pensionable pay” means pensionable pay in respect of the year immediately preceding the last year or, if greater, pensionable pay in respect of the first of those 2 consecutive years; and

(b) if the member was in pensionable employment for less than 12 months, “final year’s pensionable pay” means –

pensionable pay x 365/number of days pensionable employment”.

30. Regulation C1(6) therefore draws on the concepts of “pensionable pay” and “pensionable employment”. “Pensionable pay” is defined in Regulation C1(1) (version prior to 1 April 2014):

“(1) In these Regulations, “pensionable pay” means, subject to the provisions of this regulation –

(a) all salary, wages, fees and other regular payments made to a member in respect of pensionable employment as an officer, but does not include bonuses, payments made to cover expenses or payments for overtime;

(b) pensionable earnings calculated in accordance with paragraph 3, or as the case may be, paragraph 4 of Schedule 2 in the case of a non-GP provider who does not receive any of the payments referred to above in respect of his pensionable

employment as an officer by virtue of the application of these Regulations to him as if he were such an officer under Regulation R1.”

31. A person may opt-out of the scheme by giving notice in writing to his employing authority. The effect of opting out is that the member is treated as having left pensionable employment on the date the notice takes effect.

Regulation B4(1) states:

“A person who does not wish to, or no longer wishes to, participate in this Section of the scheme may opt-out of this Section of the scheme at any time by giving notice in writing to his employing authority and such person will be treated as having left pensionable employment on the date the notice takes effect.”

32. Unless the written notice states otherwise, the notice takes effect according to two differing regulations:

Regulation B4(2):

Version 1 October 2009 to 28 February 2013:

“(2) A notice–

(a) referred to in paragraph (1) shall take effect–

(i) from the first day of the pay period immediately following its receipt by the employing authority; or

(ii) where a later date is specified in the notice, from the first day of the day period following the pay period in which the specified date falls;”

Version since 1 March 2013:

“A notice referred to in paragraph (1) shall take effect –

(a) from the first day of the pay period immediately following its receipt by the employing authority; or

(b) where a later date is specified in the notice, from the first day of the pay period following the pay period in which the specified date falls.”

33. Nothing turns on the slight amendment. A member who opts out of the scheme is not treated as having retired (Regulation B4(7)). A person who has opted-out can rejoin the scheme by giving notice in writing. They will be included in the scheme on the first day of the first pay period after the notice is received (or such later date which must be the first day of a pay period as is specified in the notice) (Regulation B4(5)).

34. “Pay period” means (Regulation A2):

Version to 28 February 2013:

“in the case of an officer, the period in respect of which each payment of salary or wages is made in accordance with the officer's contract of employment and, in the case of a practitioner, any period of three months ending on the last day of March, June, September or December”.

Version as at March 2013:

“in relation to members who receive either salary, wages or other regular payments under a contract of employment or a contract for services, the period in respect of which each payment is made in accordance with the terms of that contract.”

35. Again, nothing turns on the amendments. Regulation L4 is headed, “Early leavers returning to pensionable employment” and provides that:

“(1) This regulation applies to any member who leaves pensionable employment without becoming entitled to a pension under any of regulations E1 to E5 and later returns to pensionable employment before becoming entitled to receive a pension under this Section of the scheme.

(2) If the member leaves pensionable employment with a preserved pension under regulation L1 and then returns to pensionable employment within 12 months after leaving, the member will cease to be entitled to the preserved pension under regulation L1 and the member's pensionable service before and after the break in pensionable employment will be treated as continuous.

(3) Subject to paragraph (5), if the member leaves pensionable employment with a preserved pension under regulation L1 and then returns to pensionable employment 12 months or more after leaving (a) the member's pensionable service before and after the break in pensionable employment will be treated separately unless, when the member becomes entitled to receive a pension or the member dies (whichever occurs first), it would be more favourable to the member, or the member's spouse or civil partner, to treat the member's pensionable service before and after the break, and all such other breaks (if any), as continuous; and (b) if the member becomes entitled to receive a pension under regulation E2 or E2A, the pensionable service upon which that pension is based will be increased as described in paragraphs (4) to (6) of that regulation if the member's pensionable service before and after the break in pensionable employment is treated as continuous, but there will be no increase to any of the member's pensionable service if the member's pensionable service before and after the break is treated separately.

(4) Subject to paragraph (5), if the member leaves pensionable employment without becoming entitled to a preserved pension and then returns to pensionable employment within 12 months after leaving, the member's pensionable service before and after the break in pensionable employment will be treated as continuous.

(5) Where paragraph (4) applies and the member has received a refund of contributions under regulation L2 in respect of pensionable service before the break in pensionable employment, the member's pensionable service before and after the break will be treated as continuous only if, within 6 months after rejoining this Section of the scheme, the member pays to the Secretary of State an amount equal to the refund of contributions (including any interest added under regulation L3).

(6) If a member leaves pensionable employment with a preserved pension and, after returning, again leaves pensionable employment without becoming entitled to a pension under any of regulations E1 to E5, the member will be entitled to a preserved pension under regulation L1 in respect of the period after the break in pensionable employment whether or not he has 2 years' qualifying service in respect of that period.

(7) A member whose pensionable service before and after a break in pensionable employment is treated as continuous and who, before the break, was paying for additional benefits by regular additional contributions under regulation Q6 (paying for additional service or unreduced retirement lump sum by regular additional contributions) must continue to pay for those additional benefits after the break.

(8) If a member's pensionable employment before and after a break in pensionable employment (the “pre-break period” and the “post-break period” respectively) is treated



separately, the member's benefits in respect of such employment in the pre-break period and the post-break period shall be calculated—

(a) separately; and

(b) by reference to—

(i) the member's pensionable service comprising that pre-break or postbreak period as the case may be; and

(ii) his final year's pensionable pay in respect of that particular period,

as if that period had been his only period of pensionable employment.”

36. Regulation R3 applies where a member is in pensionable employment as an MHO (Regulation R3(1)) which is defined in Regulation R3(14). The effect of holding MHO status is that each complete year of pensionable service as a mental health officer in excess of 20 years will count as 2 years' pensionable service:

Regulation R3(5)(b):

“each complete year of pensionable service as a mental health officer in excess of 20 years will count as 2 years' pensionable service.”

#### **DR LAKER'S SITUATION**

37. Members are also entitled to a lump sum following retirement. That lump sum is (subject to exceptions, none of which are understood to apply on the facts, equal to three times the yearly rate of the pension.

38. A member is entitled to a pension at 1/80 of their “final year's pensionable pay” for each complete year of pensionable service plus the relevant daily proportion (E1(2)).

39. A key component of the calculation of the value of the arrangement is the “final year's pensionable pay” the definition of which is in Regulation C1(6) (see paragraph 29 above).

40. “Pensionable employment is defined in A2:

“pensionable employment” means NHS employment in respect of which the member contributes to the scheme in accordance with this Section”.

41. The effect of opting out is that the person is treated as having left pensionable employment:

“(1) A person who does not wish to, or who no longer wishes to, participate in this Section of the scheme may opt-out of this Section of the scheme at any time by giving notice in writing to his employing authority and such person will be treated as having left pensionable employment on the date the notice takes effect.” (B4(1)).

42. Dr Laker left pensionable employment with effect from 1 February 2013 and was not in pensionable employment throughout February, before re-joining in March 2013 and leaving again in September 2013.

43. The difference between the parties is whether “year” in C1(6), does it mean:

43.1 12 consecutive months (as Dr Laker submits), in which case his last year of pensionable employment ended on 31 January 2013; or

43.2. any combination of days, weeks or months that add up, in aggregate, to the equivalent of 12 months or 365 days (as HMRC submits), in which case one works backwards from 31 August 2013 until one has, in aggregate, the requisite number of months or days of pensionable employment.

44. The effect of those different interpretations can be understood as follows:

In numerical terms, as at 5 April 2013, Dr Laker's pension arrangement was worth £1,519,170.01 calculated as:

Final year's pensionable pay = £133,334.63

Annual pension = £66,050.87 (fraction of 14,465/29,200 applied to final pay)

Lump sum = £198,152.61 (3 x annual pension)

Capital value = (20 x £66,050.87) + £198,152.61.

45. Dr Laker's final year's pensionable pay did not increase in the following tax year (because it was calculated up to 31 January 2013) which leads to a percentage increase of 1%, which is less than the threshold:

Final year's pensionable pay = £133,334.63

Annual pension = £66,726.68 (fraction of 14,613/29,200 applied to final pay)

Lump sum = £200,108.03 (3 x annual pension)

Capital value = (20 x £66,726.68) + £200,108.03 = £1,534,713.56

Increase = £15,543.55

Percentage increase = 1%.

46. HMRC's submission, depending on what exact period they say amounts to a year, the final year's pensionable pay appears to be around £134,974.58, which gives the following calculation:

Final year's pensionable pay = £134,974.58

Annual pension = £67,547.38 (fraction of 14,613/29,200 applied to final pay)

Lump sum = £202,642.14 (3x annual pension)

Capital value = (20 x £67,547.38) + £202,642.14 = £1,553,589.70

Increase = £34,419.73

Percentage increase = 2.266%.

On this approach, Dr Laker was very slightly over the threshold of 2.2%.

#### **WHAT IS THE MEANING OF "YEAR" – DR LAKER'S ARGUMENTS**

47. It was common ground that Dr Laker was not in pensionable employment in February 2013. Accordingly, he claimed that HMRC cannot apply the definition to one year ending 31 August 2013 as that would not be a year of pensionable employment due to the February 2013 break.

48. Equally, Dr Laker submitted you cannot construct "the member's last year" from two non-consecutive periods because a year means 12 consecutive months. Whilst the period of one year can start on any date (and continue for 12 months), a period (or, more accurately, periods) that are disjunctive are not a year. Dr Laker submitted that this is no more than the ordinary meaning of the word "year" which is an ordinary word, and its meaning depends on how it is ordinarily used.

49. In *HMRC v Dolphin Drilling Ltd* [2024] EWCA Civ 1 Nugee, Jackson and Newey LJ said:

"41. So what is it for one use of an asset to be incidental to another? Where ordinary words are used in legislation it is well recognised that seeking to provide definitions of

them can be a dangerous exercise, as glossing the statutory language by using other words runs the risk of those (non-statutory) words being treated as a substitute for the statutory words when they may not have quite the same meaning. Most English words have nuances of meaning and shades of usage that are not precisely captured by substituting other words. So one should be wary of trying to lay down a definition of ordinary words; the meaning of an ordinary word is to be found not so much in a dictionary but in how it is in fact ordinarily used, and I think it is generally more helpful to tease out the meaning of ordinary words by providing illustrative examples of how they are used in everyday contexts.”

50. Mr Firth submitted that HMRC’s approach of treating non-consecutive periods as amounting to a year contradicts how the word “year” is ordinarily used. It was not consistent with any understood usage of that word. For instance, on HMRC’s approach, Dr Laker’s last year of pensionable employment did not include February at all and included the whole of August twice.

51. Adopting HMRC’s approach, according to Mr Firth results in any aggregation of a sufficient amount of time as a year. For instance, HMRC would say that every 7 June for the last 365 years, when aggregated, is a year. Anybody with common sense would know that it is not. In other words, once the requirement for a year to be a single, continuous period of time is removed, there is no way to limit the consequences of that step. One cannot, on any principled basis, according to Mr Firth, limit it to a maximum number of non-consecutive periods (if 2 periods are permissible, 3 must also be permissible and so on up to 365 or 366 non-consecutive periods or further if one includes parts of a day).

52. Similarly, if one can have regard to non-consecutive periods one month apart, why not two months apart, a year apart and so on? The result according to Mr Firth is a concept that is patently not a “year”.

53. Second, Mr Firth submitted that a period of 12 consecutive months is supported by the meanings of similar/related words such as “week” and “month”. A week is, self-evidently, 7 consecutive days. An aggregation of 7 non-consecutive days is plainly not a week. For instance, 13 January, 10 February, 20 June, and 1 to 4 December is a total of seven days, but they do not, together, amount to a week. Similarly, a “month” refers to the period from a date in one month to the immediately preceding date in the next month (e.g. 15 January to 14 February). An aggregation of 28, 29, 30 or 31 non-consecutive days is not, on any view, a month. The next step up according to Mr Firth, in terms of identifying time periods, would be a year. The same also applies to larger periods of time, such as decades, centuries and millennia. For instance, a decade patently refers (and only refers) to 10 consecutive years.

54. Third, depending on what measure HMRC decide to use (months or days), the ‘year’ varies. Based on 12 months, Mr Firth claimed that HMRC’s year is 368 days long in the present case (as a result of excluding February (28 days) and including August (31 days) twice, a net increase of 3 days). In other circumstances, HMRC’s “12 month” year could be as short as 336 days (twelve Februarys) or as long as 372 days (for 31-day months).

55. Even HMRC’s attempt to define a year in terms of a specified number of days (irrespective of whether they are consecutive) cannot justify choosing 365 days rather than 366 (sometimes 366 days is a year) according to Mr Firth.

56. Mr Firth then claimed the ordinary usage and meaning of “year” was confirmed by the dictionary meaning. The Oxford English Dictionary definition is:

“The time taken by the earth to make one revolution around the sun.”

“The period of 365 days (or 366 in leap years) starting from the first of January, used for reckoning time in ordinary circumstances.”

“A period of twelve months measured from a point other than 1 January: it’s almost a year since his heart attack.”

57. What all these definitions have in common Mr Firth claimed is that a year is a single period of time, namely, 12 consecutive months and this is what Parliament must be regarded as having intended to communicate by picking this ordinary word. In *R (oao) v Secretary of State for the Home Department* [2022] UKSC 3 Lord Hodge said:

“[31] Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered.”

58. In *R (oao Mawbey)* [2019] EWCA Civ 1016 Lindblom J said:

“[22] If there were any real doubt as to the ordinary relevant meaning of the word, I can see no reason why one should not turn to dictionaries to dispel it. This is a well established technique of statutory construction, recognized in *Bennion on Statutory Interpretation* (at section 24.23): “Dictionaries may be consulted to ascertain the meaning of terms...”

59. Mr Firth claimed that the “last year of pensionable employment” must be a period that includes every month of the calendar and equally cannot include the same month more than once.

60. Finally Mr Firth pointed out that the definition of “pensionable service” has a provision that specifically deals with (and aggregates) disjunctive periods of pensionable service (and deals with leap years):

“(6) In order to calculate the length of a member's pensionable service, all periods of pensionable service will be added and each resulting period of 365 days (disregarding pensionable service on 29th February in a leap year) will be treated as one year.” (C2(6)).

61. There is no such aggregation provision for “pensionable employment”. Pensionable service and pensionable employment are distinct concepts. This provision demonstrates that where Parliament intended to aggregate disjunctive periods, it did so explicitly. The absence of such a provision in relation to pensionable employment demonstrated that there was no intention to aggregate disjunctive periods (and no prescribed mechanism for doing so). Dr Laker’s last year of pensionable employment was, therefore, the year ended 31 January 2013, and, accordingly, his pensionable pay for calculating benefits in 2012/13 and 2013/14 was the same. The result is that the increase did not exceed the threshold and fixed protection was not lost.

#### **WHAT IS THE MEANING OF “YEAR” – HMRC’S ARGUMENTS**

62. The meaning of “final year’s pensionable pay” that is relevant to Dr Laker is “pensionable pay in respect of the member’s last year of pensionable employment, ending on the date the member ceases to be in such employment”.

63. Ms Belgrano claimed that the pensionable pay in respect of Dr Laker’s last year of pensionable employment, ending on the date he ceased to be in such employment refers to his pensionable pay in respect of the last 365 days of pensionable employment, ending on 31 August 2013 (i.e. the period running from 4 August 2012 to 31 August 2013, since the 28

days in February 2013 did not constitute pensionable employment as Dr Laker opted out of the Pension Scheme for the duration of February 2013).

64. The reference to "...member's last year of pensionable employment..." (C1(6)) is referring to pensionable pay in respect of Dr Laker's last year "of" pensionable employment.

65. It was therefore necessary according to Ms Belgrano to identify the "last year" i.e. the last 365-day period "of pensionable employment". She pointed out that Regulation C1(6) itself uses the period of 365 days and, in the context of the Regulations "relevant daily proportion" means 1/365th of the amount that would apply in respect of one year. (Regulation A2).

66. Regulation C1(6) makes it clear that Dr Laker's last year of pensionable employment is that "ending on the date the [he] ceases to be in such employment". The date on which Dr Laker ceased to be in pensionable employment for the purpose of Regulation C1(6) was therefore 31 August 2013 (not, as Mr Firth argued, 31 January 2013).

67. Given the terms and context of Regulation E1, we should adopt a 'wait and see' approach to determine the "last year" of pensionable employment "ending on the date the member ceases to be in such employment". The relevant date is therefore 31 August 2013 because, by virtue of Dr Laker's second opt-out (the opt-out in August 2013), he was treated as having left pensionable employment on the date the opt-out notice took effect, which was 1 September 2013 (Regulation B4(1)) . This gives a sensible meaning according to Ms Belgrano to the words "last year" and "ending on the date the member ceases to be in such employment".

68. Ms Belgrano claimed there were two fundamental problems with Dr Laker's case. The first is that he seeks to give meaning to the word "year", viewed in isolation and therefore fails to engage with the meaning of final year's pensionable pay that is actually provided by Regulation C1(6), and also fails to engage with Regulation L4, which applies to him. The second fundamental problem with his case is that his "year" does not end (as it must, given the terms of Regulation C1(6) and Regulation L4) "on the date the member ceases to be in such employment" because it ends on 31 January 2013 even though Dr Laker was subsequently in pensionable employment from 1 March 2013 to 31 August 2013 and the "pre-break" and "post-break" periods of pensionable employment are not to be treated separately under Regulation L4, with the effect that Dr Laker ceases to be in pensionable employment on 31 August 2013.

69. Ms Belgrano submitted that the fundamental problem that affects the entirety of the Dr Laker's case is that he seeks to construe the word "year" in isolation but that is not what Regulation C1(6) says. Thus, his reliance on the "ordinary meaning" of the word "year", "week", "month", "decade" etc. as well as his reliance on a dictionary meaning of the word "year" in isolation adopts the wrong approach to the construction of Regulation C1(6). It is necessary to construe the phrase that is actually used in that Regulation, in the context of the Regulations as a whole including, importantly, Regulation .

70. Regulation L4 applied to Dr Laker because he left pensionable employment (in February 2013) without becoming entitled to a pension under any of regulations E1 to E5 and later returned to pensionable employment (in March 2013) before becoming entitled to a pension under the scheme (see Regulation L4(1)). Ms Belgrano advised that Regulation L4(2) applied to Dr Laker because he left pensionable employment with a preserved pension under Regulation L1 and returned to pensionable employment within 12 months after leaving. The effect of that Regulation applying is,

“...the member will cease to be entitled to the preserved pension under regulation L1 and the member’s pensionable service before and after the break in pensionable employment will be treated as continuous.” (Regulation L4(2))

71. It should be noted that in Dr Laker’s case, “pensionable service”, which is “service which counts both for the purpose of ascertaining entitlement to benefits” under the Regulations and “for the purpose of calculating them”, means “any period of pensionable employment in respect of which the member contributes” to the scheme (Regulation C2(1)(a)).

72. Thus, on the face of it, the effect of Regulation L4(2) is that both the pre-break and post-break periods of pensionable employment count towards his pensionable service, and that when calculating his entitlement to benefits under the scheme, his pensionable service is treated as continuous. Putting it another way, Ms Belgrano argued the pre-break and post-break periods of pensionable employment are not treated separately when calculating his benefits. Regulation L4(8) makes express provision for the opposite situation i.e. where the pre-break period of pensionable employment and the post-break period of pensionable employment have to be treated separately:

“(8) If a member's pensionable employment before and after a break in pensionable employment (the “pre-break period” and the “post-break period” respectively) is treated separately, the member's benefits in respect of such employment in the pre-break period and the post-break period shall be calculated

(a) separately; and

(b) by reference to

(i) the member's pensionable service comprising that pre-break or post-break period as the case may be; and

(ii) his final year's pensionable pay in respect of that particular period, as if that period had been his only period of pensionable employment.”.

73. Dr Laker’s position, that disjunctive periods of pensionable employment cannot be treated together for the purpose of calculating final year’s pensionable pay, is wrong according to Ms Belgrano. When Regulation L4(2) applies and L4(8) does not apply, the final year’s pensionable pay should be calculated by reference to the whole period of pensionable employment taken together (and not by reference to the pre-break and post-break periods of pensionable employment, viewed separately as would be the case under Regulation L4(8)).

74. Dr Laker’s construction of Regulation C1(6), which has the effect of ignoring pensionable pay in respect of pensionable employment, is also inconsistent with the scheme of the Pension Regulations as a whole: for example, and without limitation, Regulation N1(5) provides that:

“(5) For the purposes of calculating a member's final year's pensionable pay, any period of pensionable service with which a member is credited in respect of a transfer payment will be treated as pensionable employment and the pensionable pay by reference to which that service is calculated will be treated as pensionable pay received in respect of that employment.”

This assumes, consistently with HMRC’s construction, that periods of pensionable employment should not be ignored when calculating a member’s final year’s pensionable pay.

75. Both parties accepted that Dr Laker was covered for death in service benefits prior to February 2013 and after March 2013. Regulation F1 provides:

“(1) If a member dies in pensionable employment before reaching age 70, a lump sum on death shall be payable in accordance with regulation F5.

(2) Subject to regulation S4 (benefits on death in pensionable employment after pension becomes payable), the lump sum on death will be equal to twice the member’s final year’s pensionable pay.”

76. The “last year of pensionable employment” is that which ends “on the date the member ceases to be in such employment” (Regulation C1(6)). HMRC’s construction gives that a sensible meaning since HMRC work backwards from 31 August 2013. By contrast, Dr Laker’s approach has the effect of treating the date he ceased to be in pensionable employment as being 31 January 2013 even though his pensionable employment resumed on 1 March 2013 and continued until 31 August 2013. Mr Firth seeks to justify that result on the basis that the legislation does not refer to the date on which the Appellant “permanently” ceased to be in pensionable employment. Regulation C1(6), in asking for the “date the member ceases to be in [pensionable] employment” is clearly looking for the date (singular) on which pensionable employment ceased for the last time.

#### **“YEAR” VIEWED IN ISOLATION**

77. Ms Belgrano argued that the word “year” should not be construed in isolation but in the context of the Regulations as a whole including importantly Regulation L4. What Regulation C1(6) says must be identified is the last year “of” pensionable employment. Dr Laker’s approach equates the language of C1(6) with a search for the last 12 consecutive months comprised solely of pensionable employment which is not what the Regulation says and there is no basis for that approach. The Regulations do not refer to “12 consecutive months” consisting “solely” of pensionable employment, as Dr Laker’s case requires.

78. Mr Firth argued that periods of pensionable service are expressly aggregated but there is no similar provision aggregating periods of pensionable employment. Ms Belgrano argued that on the face of it, the effect of Regulation L4(2) is that both the pre-break and post-break periods of pensionable employment count towards the Dr Laker’s pensionable service, and that when calculating his entitlement to benefits under the scheme, his pensionable service is treated as continuous. Put another way according to Ms Belgrano, the pre-break and post-break periods of pensionable employment are not treated separately when calculating his benefits.

79. Regulation L4(8) makes express provision for the opposite situation i.e. where the pre-break period of pensionable employment and the post-break period of pensionable employment have to be treated separately:

“(8) If a member's pensionable employment before and after a break in pensionable employment (the “pre-break period” and the “post-break period” respectively) is treated separately, the member's benefits in respect of such employment in the pre-break period and the post-break period shall be calculated

(a) separately; and

(b) by reference to

(i) the member's pensionable service comprising that pre-break or post-break period as the case may be; and

(ii) his final year's pensionable pay in respect of that particular period, as if that period had been his only period of pensionable employment.”

80. Dr Laker’s position, that disjunctive periods of pensionable employment cannot be treated together for the purpose of calculating final year’s pensionable pay, is wrong according to Ms Belgrano. When Regulation L4(2) applies and L4(8) does not apply, the final year’s pensionable pay should be calculated by reference to the whole period of pensionable employment taken together (and not by reference to the pre-break and post-break periods of pensionable employment, viewed separately as would be the case under Regulation L4(8)).

81. Mr Firth’s construction of Regulation C1(6), which has the effect of ignoring pensionable pay in respect of pensionable employment, is also inconsistent with the scheme of the Pension Regulations as a whole. For example, and without limitation,

a. Regulation N1(5) provides that:

“(5) For the purposes of calculating a member's final year's pensionable pay, any period of pensionable service with which a member is credited in respect of a transfer payment will be treated as pensionable employment and the pensionable pay by reference to which that service is calculated will be treated as pensionable pay received in respect of that employment.”

This assumes, consistently with Ms Belgrano’s construction, that periods of pensionable employment should not be ignored when calculating a member’s final year’s pensionable pay.

82. HMRC understands Dr Laker accepts that during the period of “pensionable employment” that he seeks to ignore for the purposes calculating the “final year’s pensionable pay” he was covered for death in service benefits.

83. Regulation F1 provides as follows:

“(1) If a member dies in pensionable employment before reaching age 70, a lump sum on death shall be payable in accordance with regulation F5.

(2) Subject to regulation S4 (benefits on death in pensionable employment after pension becomes payable), the lump sum on death will be equal to twice the member’s final year’s pensionable pay.”

84. Ms Belgrano argued that the “last year of pensionable employment” is that which ends “on the date the member ceases to be in such employment” (Regulation C1(6)). Her construction gives that a sensible meaning since HMRC work backwards from 31 August 2013.

85. By contrast, Dr Laker’s approach has the effect of treating the date Dr Laker ceased to be in pensionable employment as being 31 January 2013 even though his pensionable employment resumed on 1 March 2013 and continued until 31 August 2013. He seeks to justify that result on the basis that the legislation does not refer to the date on which he “permanently” ceased to be in pensionable employment. Regulation C1(6), in asking for the “date the member ceases to be in [pensionable] employment” is clearly looking for a single date on which pensionable employment ceased for the last time.

86. Ms Belgrano submitted that Regulation L4(8) is consistent with HMRC’s case that “final year’s pensionable pay” should be calculated by counting backwards from 31 August 2013 and not by counting backwards from 31 January 2013 because, in the absence of the deeming in Regulation L4(8), the 31 January 2013 date is not treated as the date on which the



member “ceases to be” in pensionable employment for the purposes of calculating the final year’s pensionable pay.

87. Ms Belgrano further submitted that, in Dr Laker’s case, the deeming in Regulation L4(8) does not apply (since the effect of Regulation L4(2) is that the pre-break and post-break periods of pensionable service are treated as continuous) a single calculation counting backwards from 31 August 2013 can be carried out (rather than needing to carry out two calculations, one as if the period up to 31 January 2013 had been the only period of pensionable employment and the other as if the period from 1 March 2013 to 31 August 2013 had also been the only period of pensionable employment). Mr Firth’s approach of working back from 31 January 2013 also creates an inconsistency between Dr Laker’s period of “pensionable service” which, it is understood he accepts, should be calculated up to 31 August 2013 and “last year of pensionable employment, ending on the date the member ceases to be in such employment” which Mr Firth says should be calculated only up to 31 January 2013. Given that in Dr Laker’s case pensionable service (as defined in Regulation C2(1)) is comprised of “any period of pensionable employment...”, it is inconsistent for the period of pensionable service to end on a different day to the period of pensionable employment.

88. Dr Laker’s case is also inconsistent with the approach of the BMA and the NHSPA who both considered that the final year’s pensionable pay was judged by reference to the year of pensionable employment ending on 31 August 2013.

89. Dr Laker’s construction also has the strange effect that if he had not been in NHS employment prior to 1 March 2013, Regulation C1(6)(b) would apply and his “final year’s pensionable pay” would be calculated by reference to his employment ending on 31 August 2013.

90. Finally, Ms Belgrano submitted that Dr Laker’s construction of “final year’s pensionable pay” also appears to be inconsistent with the language used in his contract of employment and with the publicly available NHS/BMA guidance on the interpretation and operation of the NHS Pension Scheme:

a. Dr Laker’s contract of employment provides as follows at clause 27:

“The provisions in Schedule 17 of the Terms and Conditions shall apply. You will be eligible for membership of the NHS Pension Scheme, the provisions of which are set out in the NHS Pension Scheme Regulations 1995 (as amended). The Scheme is a final salary scheme with benefits based on the best of the last three years pensionable pay. Pensionable pay will include basic salary (up to ten programmed activities, but- not any additional programmed activities above this), on-call availability supplements, clinical excellence awards and any existing discretionary points or distinction awards, and any other pay expressly agreed to be pensionable. You are contracted out of the State Second Pension Scheme.”

b. The NHS Pension Scheme Guide for members which provides inter alia in relation to the 1995 section:

“An annual pension worth 1/80th of the best of the last 3 years’ pensionable pay per year, and pro rata for any part year, of membership”

c. An article entitled ‘NHS Pensions – How to calculate Total Pensionable Pay’ which provides as follows:

“In the 1995 Section of the NHS Pension Scheme, a Total Pensionable Pay (TPP) figure is the yearly pensionable pay earned in the best of the last three years immediately prior to termination.

...

A straightforward TPP will cover a period of 365 paid days of pensionable employment. We will usually request the ‘last three years’ salary, which is generally defined as sets of 365 paid days of pensionable employment, counting back from the last day of membership.”

d. An article entitled ‘NHS Pensions – Pensionable pay’ which provides as follows: “Total Pensionable Pay is calculated by ‘stepping back’ 365 days from your last day of membership, which may result in it being partially calculated using an earlier pay rate. We would then take the previous 2 years pensionable pay and use the best of these last three years when calculating your pension.”

e. An article entitled ‘Your final pensionable pay for 1995 section benefit calculations’ which provides as follows:

“When you retire or leave the NHS, your pensions agency will use the pensionable pay figures during the three years leading up to your retirement/departure from the NHS. If you have had breaks of less than 5 years during this time the scheme will step back to have 3 years’ worth of pensionable pay. This figure needs to be checked to ensure that any late paid awards or arrears have been accounted for correctly.”

91. HMRC note that the Lifetime Allowance Charge has been abolished with effect from 6 April 2023: Dr Laker’s figures are understood to be out of date given the changes in the legislation. On the basis of HMRC’s current understanding of the facts the only lifetime allowance charge which will remain if Dr Laker loses his FP 2012 is the charge when he crystallised his NHS pension which was £13,970 and has been paid, although FP 2012 would also affect the quantum of the Lump Sum Allowance and his Lump Sum and Death Benefit Allowance.

#### **DECISION**

92. At first blush Mr Firth’s arguments that the word “year” must mean 12 consecutive months seem compelling but on further consideration of the examples given by Ms Belgrano this Tribunal prefers the definition adopted by HMRC as being a total period of 12 months working back from 31 August 2013. The Tribunal notes that Dr Laker was paid the same monthly salary regardless of whether the month had 28, 30 or 31 days. It is a coincidence that Dr Laker opted out for the month of February 2013.

93. In paragraph 53 above we referred to Mr Firth’s argument that a week is always seven consecutive days. This is incorrect. The Tribunal knows of several contracts of employment where the employee’s annual holidays are stated to be, for example, five weeks. Nowhere in the contract does it state that the employee may only take seven consecutive days at a time. The employee is entitled to take individual days and/or consecutive days as holidays so long as the overall number of days does not exceed five weeks. The Tribunal applies a similar approach to the word “year” so that it means a combination of periods totalling a year.

94. Reading the legislation in context (and Dr Laker’s contract of employment and the NHS Pension Scheme Guide) leads the Tribunal to the conclusion that the word “year” in regulation C1(6) – last year of pensionable employment – must mean a combination of periods totalling 12 months.

95. Although not relevant to the current appeal there could be occasions where adopting Dr Laker's definition of "year" the pension calculation would be less than fair if the member received a pay rise during the post-break period which period could be up to eleven months before the date the member ceases to be in employment.

96. Accordingly, using HMRC's calculations, Dr Laker was slightly over the threshold and they were correct to revoke his FP 2012 certificate.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

97. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ALASTAIR J RANKIN MBE**  
**TRIBUNAL JUDGE**  
**Release date: 27<sup>th</sup> JUNE 2024**