

Firefighters' Pension Schemes

McCloud/Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases

1.0 Purpose of guidance

- 1.1 The purpose of this note is to provide informal guidance to Fire and Rescue Authorities (FRAs) in England on processing 'immediate detriment' cases (see definition in section 3 of this guidance) in advance of legislating to remove the age discrimination as found in the McCloud/Sargeant Employment Tribunal litigation. As the guidance is non statutory and informal, it does not in itself place legal obligations on FRAs. However, FRAs have the power to calculate and pay pension entitlements for those members who fall within either of the two categories at paragraph 3.2 under their legacy schemes, through the application of section 61 of the Equality Act 2010. That provision means that these individuals have the right to be treated as though they have been in service in their legacy scheme since 1 April 2015, if that is what they want and they inform the scheme of this¹.
- 1.2 The informal guidance is provided at the request of the Fire Brigades Union and the Firefighters' Pensions (England) Scheme Advisory Board to assist employers with "immediate detriment" cases. It is specific to members of the Fire Pension Schemes.
- 1.3 The issues raised in this document are the subject of ongoing litigation and the Government's announced proposals to introduce legislation, when Parliamentary time allows, to address the discrimination identified by the Court of Appeal. As such this guidance will be kept under review to ensure that it is consistent with any judgment, or legislative proposals, and it is therefore subject to any further developments in these respects.
- 1.4 In this guidance a reference to the "2015 scheme" is to the applicable reformed 2015 Fire CARE Pension Scheme, and a reference to the "legacy scheme" is to the applicable Fire Pension Schemes that applied to a member before 1 April 2015.
- 1.5 This guidance **should not** be seen as providing a definitive resolution to all of the consequences arising from the discrimination, rather as a way to progress certain immediate detriment cases (as defined in this guidance) now there is some clarity as to how certain issues should be approached. It is important **to note that ALL cases processed using this guidance will need to be revisited** once the full detail of the Government's approach is finalised, and legislation is in place. Legislation is expected to be in place by October 2023.

¹ To note, Part 3 Chapter 1 Regulation 7(2) of the 2014 Regulations states: "A person who is in service in a scheme employment (P) is an eligible person in relation to that employment unless in relation to service in that employment— (a) P is a protected member of the 1992 Scheme or the NFPS; or (b) P is a member of any other pension scheme and the authority employing P pays contributions to that scheme in respect of P."

2.0 Background to McCloud/Sargeant ruling

- 2.1 Most public service pension schemes, including the Firefighters' Pension Schemes, were reformed in 2015. These reforms included 'transitional protection' for scheme members closest to retirement.
- 2.2 In December 2018, the Court of Appeal ruled that the transitional protection element of the 2015 public service pension reforms constituted unlawful age discrimination in the Firefighters' and Judges' Pension Schemes. The Government respects the Court's decision and has confirmed that it will remove the difference in treatment across all main public service pension schemes, including the Firefighters' Pension Scheme.
- 2.3 The Government consulted on proposals to remove this discrimination and responded on 4 February 2021. Details of the proposals and the response are available online from GOV.UK². The changes set out in the consultation response to remove the discrimination will apply across all the main public service pension schemes and provide affected members with a choice of which scheme benefits they would like to receive for the remedy period. The remedy period is defined as between 1 April 2015 and 31 March 2022 in the consultation paper.

3.0 What are 'Immediate Detriment' cases?

- 3.1 This guidance aims to deal with cases where the benefits are not yet in payment as these are less complicated to deal with (compared to where benefits are already in payment).
- 3.2 For the purposes of this guidance, the term 'immediate detriment' applies only to individuals who were members or eligible to be members of a legacy scheme immediately prior to 1 April 2012, and have a period of service after 31 March 2015 during which they were members of a legacy or reformed scheme, where those periods of service are continuous including those with a qualifying break in service of less than 5 years (this is irrespective of whether they have submitted a legal claim or not) and who
 - I. become eligible to retire (for any reason, including ill health) and draw their pension and want to have all their benefits paid from their legacy scheme (i.e. do not accept 2015 scheme benefits); **OR**
 - II. do not qualify for lower-tier (and therefore higher-tier) ill-health pension under the single pot Ill-Health Retirement (IHR) arrangement, and are therefore left without a pension in payment **BUT** would be eligible under the IHR arrangements in their legacy scheme.

² <https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes>

- 3.3 Any scheme members that fall within either of the two categories above can have their pensions calculated and put into payment according to the guidance set out in section 5 below. As set out above, FRAs have the power to calculate and pay pension entitlements for these members under their legacy schemes, through the application of section 61 of the Equality Act 2010. That provision means that these individuals have the right to be treated as though they have been in service in their legacy scheme since April 2015, if that is what they want and they inform the scheme of this.
- 3.4 This guidance **should not** be applied to scheme members who have already retired and are in receipt of their pension payments. As set out in more detail in para 4.4 below, these cases are likely to be more complex to resolve, including on tax. At present, it is not clear that cases where an individual has already retired can consistently be processed under current legislation without adverse impacts. Nor should the guidance be applied where the member has died in service as the government's approach to these cases has not yet been finalised.
- 3.5 This guidance applies only to unprotected and taper protected members of the reformed schemes. This guidance should not be applied to protected scheme members, whose benefits will be received from the legacy scheme.

4.0 Guidance on treating immediate detriment cases

- 4.1 Transition members are members who were members of a legacy scheme and subsequently moved into the 2015 scheme either at 1 April 2015 or later under the tapered protection arrangements in relation to their service from that date and are in scope for remedy, as set out in paragraph 3.2 above.
- 4.2 There are some transition members who have already been dismissed from work on grounds of ill-health, but without a pension as they did not qualify for an ill-health pension under the 2015 Scheme. In addition, there are transition members who are now approaching retirement and want to take their full pension benefits under their legacy pension scheme. This guidance provides employers with advice on how these cases can now be processed in advance of final remedy implementation.

Transition members who are already in receipt of a pension

- 4.3 There are cases (in respect of both ill-health/ordinary retirements) where transition members have already retired and are currently receiving an ill-health/ordinary pension. It is recognised that many of these members' pensions are lower than they would be if they had instead been members of their legacy pension scheme since April 2015. For example, where a transition member has retired on ordinary grounds below age 55, their benefits accrued under the 2015 Scheme will currently be deferred until their State Pension Age.
- 4.4 These cases are likely to be more complex to resolve, and at this stage it is not clear that cases where an individual has already retired can consistently be processed

under current legislation without adverse impacts. Even for cases that do not need legislative change, schemes and in some cases individuals will require further guidance or information to be provided on how the detail of cases should be processed, and on interpretation of existing rules where these do not provide immediate clarity, given the complexity and novelty of this situation. This material needs to be worked through in some detail, to ensure that – as far as possible – individuals whose cases are processed under section 61 receive the same, or as close as possible, treatment as those being processed once new legislation is in place. Work in this area is ongoing. FRAs may be able to process these cases once outstanding points have been resolved. However, providing a full remedy in these cases may not be possible until legislation has been implemented.

5.0 Giving scheme members a choice

- 5.1 This section provides guidance where FRAs offer members meeting the criteria set out in para 3.2 the opportunity to take all their pension benefits accrued during the remedy period under their legacy pension scheme, rather than under the 2015 Scheme.
- 5.2 In order to provide this choice, FRAs will need to present two sets of pension entitlement quotes to each qualifying scheme member, which includes any legacy scheme entitlement that becomes due such as APBs or Two Pension entitlement, and include updated Pension Input Amounts for all years of the remedy period for all members who have paid an annual allowance (AA) charge or who may be liable for an AA charge – more detail on this is set out below.
- 5.3 Whilst not an exhaustive list, each quote must also set out the pension benefits that the member would receive under each choice, to include: recurring annual pension (before and after commutation), commutation retirement lump sum entitlement, employee contributions owed/refunds due etc.
- 5.4 It should be noted that any decision to take benefits from their legacy scheme may impact earlier tax liabilities (AA charge) on the increase in a member's pension savings – FRAs should consider what support they can provide to members to revisit these assessments.
- 5.5 Given section 61 of the Equality Act allows individuals to be treated as though accruing in their legacy scheme since 2015, the information that schemes should provide to members includes:
 - recalculated Pension Input Amounts (PIAs) for every year of the remedy period to date; and
 - PIAs for 2012-13, 2013-14, and 2014-15 (which would not be changed by an election under section 61).
- 5.6 Members should contact HMRC about any changes to their AA tax liabilities for the remedy period. AA charges can only be corrected within the tax system, with HMRC,

for years within the statutory time limits. Further information about statutory time limits can be found in the Compliance Handbook (CH51300)³.

- 5.7 However, individuals will also need revised PIAs for earlier years, beyond the statutory time limits and out of scope for tax correction, including to claim compensation where they have paid higher AA charges on reformed scheme benefits for out of scope remedy period years.
- 5.8 For periods within the usual statutory time limits for correction of tax, where an individual has already used mandatory Scheme Pays, pension debits for previous years can be adjusted to accommodate any revisions to the AA charge owed.
- 5.9 Where an individual has already used voluntary Scheme Pays and there is a reduction in the AA charge owed, pension debits for previous years can be adjusted.
- 5.10 Where individuals have not used Scheme Pays before or used voluntary Scheme Pays and there is an increase in the AA charge owed, pension schemes should offer voluntary Scheme Pays to help individuals affected to pay any additional AA charge. Alternatively, individuals can pay additional AA charge owed in cash, if they prefer. An election/option must be made into Scheme Pays before an individual's pension is put into payment. Interest will be payable on late paid AA charges.
- 5.11 There remain several outstanding issues that will not be resolved until such time that the Government finalises its approach and legislation is in place to remove the discrimination identified by the McCloud/Sargeant ruling (see unresolved pensions issues section below). Each scheme member will need to agree to accept the Government's final approach and any future adjustments that this requires.
- 5.12 Each scheme member should be required to provide written confirmation of their election, stating that it is made by reference to section 61 of the Equality Act. Once written confirmation has been received from each member, the FRA can put the chosen pension into payment, once scheme pays elections have been made.
- 5.13 In the absence of any written confirmation, the default position should be the current regulatory position for a transition member. Therefore, the pension paid will be in accordance with their pension entitlement as provided under both the legacy scheme regarding accrual from years before the remedy period, and 2015 CARE Scheme regarding accrual for remedy period years.

Unresolved pension issues:

- 5.14 As outlined above, there remain outstanding issues which limit the provisions of this guidance, where the Government is still finalising the details of its approach. Legislative change will also be required in some areas, to implement a full remedy.

³ <https://www.gov.uk/hmrc-internal-manuals/compliance-handbook/ch51300#:~:text=The%20normal%20time%20limit%20of%204%20years%20applies%20to%20all%20taxes>

Adjustments to employee contributions

- 5.15 Scheme members who choose to take their full pension benefits under their legacy scheme will either owe employee contributions or be entitled to a refund. Any employee contributions owed will need to be paid before the member's legacy scheme pension can be put into payment, or paid out of a member's retirement lump sum upon retirement. Where contributions owed are paid from a retirement lump sum it is less likely they will attract tax relief – as set out below in paragraph 5.18.
- 5.16 Any contributions owed will need to be based on the pay that is considered to be pensionable under the legacy scheme, which may vary from that pay which is considered pensionable under the 2015 Scheme. It will be for employing FRAs to make an assessment for each member and seek payment.
- 5.17 A member will be permitted to pay any outstanding employee contributions from their retirement lump sum or from any other personal source, though it should be noted that in these cases the individual is unlikely to get tax relief. Members will eventually have an opportunity to apply for compensation for any shortfall in tax relief in relation to those contributions when the legislation is in place. If the contributions are made under net pay before an individual has retired, and go through the payroll, then tax relief should be available. Therefore, where possible, FRAs should ensure that any employee contributions owed are paid by the member before they leave service. This may not be possible in some cases, for example for deferred members or where an individual has retired previously on ill-health grounds and did not qualify for a pension under the 2015 Scheme but would qualify under their legacy scheme. In such cases, the scheme member will have to wait until legislation has been implemented to receive any appropriate compensation.
- 5.18 Where an individual has overpaid contributions, their case should not be processed at this time. This is due to complexities regarding ensuring fair and non-discriminatory treatment of returned contributions, without new legislation, that have not yet been resolved.
- 5.19 A final decision is yet to be made in respect of whether, and at what rate, interest should be applied to contributions owed by employees should they elect to receive benefits from their legacy scheme during the remedy period (2015 to 2022). As the Government's approach to this issue is yet to be confirmed, this guidance proposes that interest is not applied to employee contributions owed at this time.
- 5.20 Notwithstanding this, any immediate detriment cases where the pension is put into payment now may need to be revisited in respect of interest if the Government's final approach includes the application of interest on owed employee contributions. FRAs should ensure that any members making a decision under this guidance are aware of, and accept, this condition. As at para 1.15, all cases processed using this

guidance will need to be revisited once the full detail of the Government's approach is finalised, and legislation is in place.

- 5.21 It is recognised that some members by virtue of age and service would qualify for a contribution holiday under the legacy 1992 Scheme having reached 30 years' service before age 50. These members may also be taper members who have paid contributions to 2015 Scheme after their 30-year anniversary date. The position of applying tax relief and interest on contributions underpayments or refunds for these members is yet to be confirmed. Therefore, these cases should not be processed at this time.

Recovery of outstanding employer contributions

- 5.22 The Firefighters' Pension Schemes are in a unique position compared to other public sector pension schemes in that they do not have a uniform employer contribution rate across all schemes. As such, any election by a scheme member under this guidance to take their full pension benefits under their legacy scheme will impact on the corresponding employer contributions owed in respect of that member during the period that they were in the 2015 Scheme.
- 5.23 Employing FRAs do not need to recalculate the contributions that they, as the employer, should have paid under the legacy scheme for each transitional member that chooses to take their full benefits under the legacy scheme. This shortfall in employer contributions will be captured in future scheme valuations as an unfunded, past service deficit and reflected in the employer contribution rates going forward.

Treatment of Cash Equivalent Transfer Value (CETV) transfers into the 2015 Scheme

- 5.24 It is recognised that there will be some transition scheme members who will have transferred benefits from an external pension arrangement into the 2015 Scheme under a Cash Equivalent Transfer Value (CETV), known as a transfer in.
- 5.25 However, the rules of the FPS 1992 legacy scheme do not permit the receipt of a transfer in after 5 April 2006 when the scheme closed.
- 5.26 The transfer-in should remain in the 2015 Scheme until such time that the Government's approach to removing the discrimination has been finalised and legislation is in place. It will be at this time that these cases can be revisited. If this is not done the transfer in will be considered an unauthorised payment for tax purposes, with the member incurring unauthorised payments charges of up to 55%, and scheme sanction charges may apply.

Treatment of purchased added pension in the 2015 Scheme

- 5.27 Some transitional scheme members will have elected to make voluntary contributions to purchase 'additional pension' in the 2015 Scheme. For those members that elect to take their full benefits under the legacy scheme, any employee contributions paid in respect of the additional pension purchased will

need to be converted to the equivalent value of additional pension that could have been purchased in the member's legacy scheme.

- 5.28 The legacy schemes do not currently have 'additional pension' provisions. Additional pension purchased in the 2015 Scheme is one of the unresolved issues for which the Government's approach has not yet been finalised. Until this issue has been resolved, any added pension accrued by a member should remain in the 2015 Scheme. As with 'transfers-in', these cases will need to be revisited when the Government's approach to removing the discrimination has been finalised and legislation is in place.

Scheme Pays – treatment of debits applied to 2015 Scheme pension

- 5.29 There may be instances where transitional members have previously incurred certain tax charges and have elected for these to be paid under Scheme Pays, with the associated pension debit applying to the 2015 Scheme benefits.
- 5.30 Where this is the case and the member elects for all their pension benefits to be paid from their legacy scheme, FRAs will need to recalculate the pension debit. The recalculation of the pension debit will need to be undertaken by FRAs as if it had been taken at the time of the original Scheme Pays elections, using the actuarial factors that were applicable at that time.

Revisiting AA tax assessments on previous years

- 5.31 Under current arrangements, there is generally a statutory time limit for reassessing tax for previous years – this is usually the current year and the four full previous tax years. This means that where a scheme member's pension benefits change for past years, altering their tax position in relation to their AA charge, HM Revenue and Customs can collect and refund tax where it is owed for the current tax year, and the four previous tax years. As noted at paragraph 5.8-5.10, this may require FRAs to adjust previous Scheme Pays calculations or make Scheme Pays available where it was not used previously. As set out above, where Scheme Pays has not previously been used, schemes will need to make voluntary Scheme Pays available. Otherwise, members will need to pay additional AA charges in cash.
- 5.32 Where a scheme member's benefits change due to an election under this guidance so that additional AA tax is due for a tax year that sits outside the statutory time limits, HMRC cannot collect that additional tax. As such, the member will not be required to pay this. However, the recalculation of the pension input amount will still be necessary, including to enable members to claim compensation for overpaid AA in out of scope years, where appropriate.
- 5.33 The Government has confirmed that where a scheme member's benefits change, reducing their liability to tax, the scheme member will be able to seek a tax refund from HMRC in respect of any overpaid tax charges within the usual statutory time limits.

For years outside the statutory time limit, scheme members can claim compensation for overpaid tax, once legislation is in place.