

Firefighters'/Police 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 (in England) and Police Forces (in England and Wales) on processing 'immediate detriment' cases (see definition in section 3 of this guidance) in advance of a decision on the Government's final approach to removing the age discrimination as found in the McCloud/Sargeant Employment Tribunal litigation.
- 1.2 The guidance is provided at the request of the Fire Brigades Union and for the purpose of assisting employers with "immediate detriment" cases. For that reason, it is only relevant to members of the Police and Fire Pension Schemes.
- 1.3 Further, it must be noted that the issues raised in this document are the subject of both ongoing litigation and the Government's consultation. As such this guidance will be kept under review to ensure that it is consistent with any judgment or outcome from the consultation and will be amended to give effect to any such judgement or outcome.
- 1.4 In this guidance a reference to the "2015 scheme" is to the applicable reformed Police or Fire CARE Pension Scheme, and a reference to the "legacy scheme" is to the applicable Police or Fire Pension Scheme that applied to a member before 1 April 2015.
- 1.5 The term 'pension authority' refers to the appropriate Fire and Rescue Authority or Police Force.

2.0 Background to McCloud/Sargeant ruling

- 2.1 In 2015 most public service pension schemes, including the Firefighters' Pension Scheme and Police Pension Scheme, were reformed. These reforms included 'transitional protection' for people closest to retirement.
- 2.2 In 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 Police Pension Scheme.

- 2.3 The Government is currently consulting on proposals to remove this discrimination. Detail on the current proposals can be accessed here: <https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes>. The changes proposed in the consultation to remove the discrimination will apply across all the main public service pension schemes and provide members with a choice of which scheme they would like to be in for the remedy period. The remedy period is defined as between 1 April 2015 and 31 March 2022 in the consultation paper.
- 2.4 The remedy only applies to members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years.

3.0 What are 'Immediate Detriment' cases

- 3.1 For the purposes of this guidance, immediate detriment includes those scheme members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years, and who did not benefit from full protection and were moved into the 2015 Scheme on or after 1 April 2015:
- I. who become eligible to retire with an ordinary pension and want to have all their benefits paid from their legacy scheme (i.e. do not accept deferred 2015 scheme benefits); **OR**
 - II. who don't qualify for lower-tier (and therefore higher-tier) ill-health pension under the single pot Ill-Health Retirement (IHR) arrangement BUT would do so under the IHR arrangements in their legacy scheme.
- 3.2 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.
- 3.3 This guidance **should not** be applied to scheme members who have already retired and are in receipt of their pension payments. These cases are more complex to address, especially due to complexities in rectifying the member's tax position.
- 3.4. It is important **to note** that ALL cases processed using this guidance will need to be revisited once the Government's approach to removing the discrimination has been finalised, due to relevant matters that are currently subject to consultation, to include interest on contributions etc. This is likely to be after April 2022.

4.0 Guidance on treating immediate detriment cases

- 4.1 There are some transitional scheme members who have already been dismissed from work without a pension as they did not qualify for an ill-health pension under the 2015 Scheme. In addition, there are transitional 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.

Transitional members who are already in receipt of a pension

- 4.2 There are cases (in respect of both ill-health/ordinary retirements) where transitional 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 were paid under the member's legacy pension scheme. For example, where a transitional 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.
- 4.3 These cases involve complex tax implications, employee/employer contribution adjustments etc. which still need to be resolved – these points are currently being consulted on and a final approach has yet to be confirmed. We will look to process these cases as a priority as soon as these outstanding points have been resolved.

5.0 Giving scheme members a choice

- 5.1 Scheme members falling under the scope of this guidance will effectively be given the opportunity to take all their pension benefits accrued between 1 April 2015 and 31 March 2022 under their legacy pension scheme, rather than take some benefits under the 2015 Scheme.
- 5.2 Pension authorities can now offer this choice to all those scheme members who:
 - have transitioned into the 2015 Scheme who are approaching retirement; and
 - have retired due to poor health but who didn't qualify for an ill-health pension under the 2015 Scheme regulations but would qualify under their legacy scheme regulations.
- 5.3 In order to provide this choice, pension authorities will need to present two sets of pension entitlement quotes to each qualifying scheme member. Whilst not an exhaustive list, each quote should set out the main pension benefits that they 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. Each scheme member should be required to provide written confirmation of their election.
- 5.4 There remain a number of outstanding issues that will not be resolved until such time that the Government finalises its approach to removing 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.

- 5.5 Once written confirmation has been received from each member, the pension authority can put the pension chosen into payment.

Unresolved pension issues:

- 5.6 As explained above, there remain outstanding issues that will not be resolved until the Government finalises its approach to removing the discrimination. The Government is currently consulting on its proposed approach and will finalise its proposals following careful consideration of stakeholder responses.

Recovery of outstanding employee contributions

- 5.7 Any scheme members who choose to take their full pension benefits under their legacy scheme will 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.
- 5.8 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 pension authorities to make an assessment for each member and seek payment. The member has a choice to pay any outstanding employee contributions from their retirement lump sum or from any other personal source. Any refunded employee contributions can be repaid to the member from the employer's local pension fund account.
- 5.9 A final decision has 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 has yet to be confirmed, this guidance proposes that interest is not applied to employee contributions owed at this time.
- 5.10 Notwithstanding this, any immediate detriment cases where the pension is put into payment now may need to be revisited if the Government's final approach includes the application of interest on owed employee contributions. Pension authorities should ensure that any members making a decision under this guidance are aware of, and accept, this condition.

Tax relief on employee contributions

- 5.11 Where possible, pension authorities should ensure that the employee contributions owed are repaid by the member before they leave service to ensure that any tax relief entitlement can be applied. Where this is not possible, for example 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, the

scheme member will have to wait until the Government's final approach to removing the discrimination has been implemented to receive any appropriate reimbursement. This is likely to be after April 2022.

Recovery of outstanding employer contributions (Firefighters' Pension Schemes only)

5.12 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 scheme member who elects 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.

5.13 It will be for each employing Fire and Rescue Authority (FRA) to recalculate the contributions that they, as the employer, should have paid under the legacy scheme for each member and pay any shortfall into their pension fund account. Where this results in an excess of employer contributions having been paid, these can be refunded to the employer from their pension fund account.

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

5.14 It is recognised that there will be some transitional scheme members who will have transferred benefits from an external pension arrangement into the 2015 Scheme. Where a scheme member elects to take all their benefits from the legacy scheme, the original transfer-in (the Cash Equivalent Transfer Value) will need to be recalculated to determine the amount of pensionable service that should be purchased in the member's legacy scheme.

5.15 The recalculation of the transfer-in will need to be undertaken by pension authorities as if it had been taken at the time of the original transfer, using the actuarial factors that were applicable at that time.

5.16 Where conversion of transferred benefits from the 2015 Scheme to the legacy scheme results in the pension input amount changing due to actuarial adjustment, then an individual's Annual Allowance position may need to be reassessed.

Treatment of purchased added pension in the 2015 Scheme

5.17 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.

5.18 The legacy schemes do not currently have 'additional pension' provisions. Additional pension purchased in the 2015 Scheme is one of the unresolved issues that the consultation is considering.

Scheme PAYS– treatment of debits applied to 2015 Scheme pension

5.19 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.

5.20 Where this is the case and the member elects for all their pension benefits to be paid from their legacy scheme, there may be subsequent changes to the tax charges retrospectively. If this is the case, pension authorities will need to recalculate the pension debit. The recalculation of the pension debit will need to be undertaken by pension authorities 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

5.21 Under current arrangements, there is a four-year statutory time limit for reassessing tax for previous years. This means that where a scheme member's pension benefits change for past years, altering their tax position, HMRC can collect and refund tax where it is owed for the current tax year, and the four full tax years immediately preceding the point at which the individual's benefits change.

5.22 Where a scheme member's benefits change due to an election under this guidance so that additional tax is due for a tax year that sits outside the four previous tax years, HMRC cannot collect that additional tax. As such, the member will not be required to pay this. However, the recalculation will still be necessary to ensure the member's tax position going forward is correct.

5.23 The Government has confirmed that where a scheme member's benefits change so that they are owed a reimbursement of any tax charges paid since April 2015, they will get a full refund for the full period. The scheme member will initially be able to seek a tax refund from HMRC in respect of any overpaid tax charges in the previous four tax years.

5.24 Any further entitlement to a tax refund for years outside the four-year period will be refunded by means of compensation payments, which are expected to be paid after the Government finalises its approach to removing the discrimination, likely to be after April 2022.

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