

Decision Notice

DN 18/2021 Date 17/09/2021

North Yorkshire Police, Fire and Crime Commissioner (Fire and Rescue Authority): interim policy statement on immediate detriment regarding pension remedy

The Commissioner, as Employer and Scheme Manager of the Fire and Rescue Authority's firefighter pension schemes, has decided to release an interim policy statement to offer (on request) Immediate Detriment to qualifying firefighter pension scheme members, outlined at Appendix 1.

Background

In 2015 most public service pension schemes, including the Firefighters' Pension Scheme (FPS), were reformed. These reforms included 'transitional protection' for people closest to retirement.

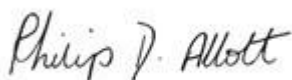
In 2018, the Court of Appeal ruled that the transitional protection element of the 2015 public service pension reforms constituted unlawful age discrimination in the Firefighters' and Judges' Pension Schemes.

The Government respected the Court's decision and confirmed that it would seek to remove the difference in treatment across all main public service pension schemes. To remove this discrimination, the most recent Home Office Guidance issued in June 2021 suggests that members be provided 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.

The Fire and Rescue Authority now has an interim policy that sets out the circumstances where we will offer Immediate Detriment and the systems under which such cases can be processed. This is in advance of a decision on the Government's final approach to removing the age discrimination, likely to be post April 2022.

Decision Record

The Commissioner has decided to support the interim policy to offer Immediate Detriment to eligible Fire and Rescue Authority firefighter employees.



Philip Allott
Police, Fire and Crime Commissioner for North Yorkshire

Statutory Officer Advice

Legal, Management and Equality Implications

The Commissioner's Chief Executive and Monitoring Officer, having read this report and having considered such information as has been provided at the time of being asked to express this view, is satisfied that this report does not ask the Commissioner to make a decision which would (or would be likely to) give rise to a contravention of the law.

Financial and Commercial

The Commissioner's Chief Finance Officer and S151 Officer has advised that It is not possible at this stage to identify the specific costs associated with cases of Immediate detriment and that these will be identified on a case by case basis. Using the immediate detriment guidance now will not increase any direct amounts payable, it will simply bring some of those costs forward.

In not applying the guidance, further legal action could be taken by the Fire Brigades' Union and result in further litigation costs.

It is expected that the costs associated with the administration of the remedy will be borne by the North Yorkshire Police, Fire and Crime Commissioner Fire and Rescue Authority whilst monies owed to members will be met by Government. In some circumstances individuals may also incur additional costs as a result of a change in pension schemes e.g. annual allowance costs.

Immediate Detriment

Policy Statement

Summary

This policy outlines the approach, eligibility and conditions set by the Fire and Rescue Authority (FRA) in relation to retirements for firefighters who may qualify for the proposed Pension Remedy and thereby may be given a choice of pension benefits.

This policy sets out the process regarding retirements, if a firefighter is approaching retirement in advance of the Government putting in place legislation, and administrators updating IT systems to deliver the proposed remedy to address the unlawful discrimination identified by the Court of Appeal in the McCloud/Sargeant cases.

Scope

This policy applies to Firefighters who are 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 (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 deferred 2015 scheme benefits);
OR
- II. who don't qualify for lower-tier (and therefore higher-tier) ill-health pension under the FPS 2015 because of the single pot Ill-Health Retirement (IHR) arrangement BUT would do so under the IHR arrangements in their legacy scheme and are therefore left without a pension in payment.

Further details with regards eligibility can be found in this policy.

Principles

General

- The Government recognises that there will be members who will be retiring between now and the introduction of their proposed remedy, which the Government states will be fully delivered by **October 2023** (however, this date may change).
- The Government has issued interim "informal" guidance to FRA's, regarding the processing of retirements for "eligible" members in advance of a decision on the Government's final approach to removing the unlawful age discrimination, these individuals fall into a category known as Immediate Detriment.

- If a scheme member qualifies for an Immediate Detriment calculation, it means that they will be provided with benefit options which includes a calculation reflecting the benefits they would receive had they remained a member of their legacy pension arrangement. For example, a calculation which attempts to reflect the government's proposed remedy in advance and before the finalising of legislation and policies to address the unlawful discrimination identified by the Court of Appeal.
 - If the member chooses this option, their benefits will be paid in accordance with our current interpretation of the Remedy i.e. it is not Remedy. Immediate Detriment payments are an interim remedy and will be recalculated once the government has put in place the final legislation to give effect to its proposal to address the unlawful discrimination identified in McCloud litigation. The member will also be required to sign an Agreement Document.
 - **Immediate Detriment is an option that is available only in limited cases. Before the firefighter proceeds with a possible Immediate Detriment calculation request, they will need to read this policy carefully.**
 - **Members are strongly encouraged to seek independent pensions and/or financial and/or tax advice in all pension matters and, in particular, when immediate detriment is requested. This advice cannot be provided by the Authority.**
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Background and Legislation

- In 2018, the Court of Appeal ruled that the transitional protection element of the 2015 public service pension reforms constituted unlawful age discrimination.
 - The unlawful discrimination covered the period **1 April 2015 – 31 March 2022**, this is known as the **Remedy Period** i.e. the period of time for which the government must remedy the unlawful discrimination.
 - The legacy schemes are the Fire Pension Scheme 1992 and The Fire Pension Scheme 2006.
 - The reformed CARE scheme is the Fire Pension Scheme 2015.
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Remedy

Information

- On 4 February 2021, the government set out their approach to rectify the unlawful discrimination identified by the Court of Appeal. The following key decisions were made:
 - *Decision 1 - The Deferred Choice Underpin*: At the point of retirement, a firefighter will be able to choose to receive:
 - Legacy pension scheme benefits; or
 - Benefits from the reformed scheme for the Remedy Period i.e. 1 April 2015 – 31 March 2022.
 - *Decision 2 – Future Pension Accrual*: From the end of the Remedy Period, i.e. 1 April 2022, any affected member who continues to be in

service, will do so as a member of the reformed CARE scheme, irrespective of age.

- The government believes the two decisions combined will remove the unlawful discrimination and ensure equality of treatment within public sector pension schemes.
 - Both decisions are together known as the Remedy.
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Process

- The government has decided upon the Deferred Choice Underpin option to rectify the unlawful discrimination. The Remedy process is summarised below:
 - To give effect to the Remedy, legislation will need to be put in place.
 - Following implementation of legislation to give effect to the Remedy, if an eligible member who was moved to the reformed CARE pension scheme in 2015 (or later if they had tapered protection) they will be moved back into their old legacy pension scheme for the whole of their service within the Remedy Period i.e. 1 April 2015 – 31 March 2022.
 - At the end of the Remedy Period, if the member continues in service, and they are eligible, they will do so as member of their respective reformed CARE pension scheme introduced in 2015.
 - The member will keep any service earned within the legacy scheme up to 31 March 2022. The legacy schemes will be closed to future accrual from 1 April 2022.
 - **At the point of retirement, a member will be able to choose to receive legacy pension scheme benefits or benefits equivalent to those available under the reformed CARE scheme for service between 1 April 2015 – 31 March 2022 i.e. the Remedy Period.**
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Implementation and Delivery

- When all pension rights and benefits in respect of scheme membership are documented in legislation.
 - To give effect to the Remedy and to address the unlawful discrimination the following will need to occur:
 - Legislation will need to be drafted, parliamentary time will need to be set aside, and relevant parties will need to be consulted to discuss the government's proposals; and
 - Additionally, administrators will need time to update their software and IT systems to implement and deliver the Remedy.
 - The Government anticipates at this stage, the above will happen no later than October 2023, however, this date could change. Therefore, in the meantime, Employers and Administrators are unable to process retirements which fully reflect the Remedy, as the level of legislative detail which will give effect to the Remedy is currently not known.
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Principles

- The Government recognises that there will be members who will be retiring between now and the introduction of the Remedy in 2023.
- In recognition of this the Government has issued informal Home Office guidance to FRA's as an interim measure on processing retirements for members, who meet certain eligibility.
- Eligible members (i.e. members who are eligible for the Remedy whose retirements are in advance of the passing of relevant legislation, and implementation of software to deliver the Remedy) fall into a category referred to as "Immediate Detriment".
- If a member falls in the Immediate Detriment category they will be given two or three sets of options depending on circumstances of the member as follows:
 - *Option 1:* Benefit calculations reflecting entitlements under the current legislation i.e. final salary and CARE to date of retirement; and
 - *Option 2:* Benefit calculations reflecting the benefits they would receive had they remained a member of their legacy scheme to their date of leaving or 31 March 2022, whichever is the earliest.
 - *Option 3:* Benefit calculation reflecting from their tapered date to the 2015 scheme.
- Members will have a choice as to which option to decide upon.
- Immediate Detriment is an **interim measure**. Once the Remedy is in place all cases will need to be revisited and recalculated to ensure members are receiving the correct pension entitlement.
- Further tax adjustments, underpayments/refunds of contributions, payment of contributions and interest are possible.

Important

- Payment of pensions via the Immediate Detriment route, is not automatic, and will depend on whether a member meets the eligibility criteria.
- Payment of pension is not the Remedy, as detailed above. The pension paid under Immediate Detriment will be based on the employing FRA's interpretation of the Remedy in advance of the government detailing its final approach.
- Before an Immediate Detriment pension can be put into payment, WYPF and the FRA will require the member to complete an Agreement document.
- Immediate Detriment pensions will be revisited and recalculated once the government has agreed its final approach.

Immediate Detriment - Criteria

Principles

- In order to qualify for an Immediate Detriment pension a Firefighter will need to satisfy the following:

- They were a member (or eligible to be a member) of a legacy scheme immediately prior to 1 April 2012; and
 - Have a period of service after 31 March 2015 during which they were a member of a legacy or reformed scheme; and
 - Where those periods of service are continuous including a qualifying break in service of less than 5 years and the firefighter becomes eligible to retire, for any reason, including ill-health, and they draw their pension and want to have all their benefits paid from their legacy scheme. I.e. they do not want 2015 scheme benefits. (This is irrespective of whether they have submitted a legal claim or not or whether they are currently an active or deferred or member).
 - If the firefighter falls within the above, they potentially can have their pension calculated and put into payment in accordance with the Home Office Immediate Detriment Guidance and elect to take all benefits from their legacy scheme.
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Approaching Retirement or Retired

- There are limitations as to which members can be offered Immediate Detriment even though they may satisfy the initial criteria to qualify for Immediate Detriment.
 - Currently Immediate Detriment will not be offered to those who have already retired.
 - Firefighters must satisfy the eligibility criteria which will be determined by the FRA.
 - Additionally, members must be entitled to retire under the rules of their legacy scheme i.e. attained normal pension age or have the required service and be over age 50. They will also need to be an “affected member” and eligible for the Remedy.
 - Currently if members have either transferred-in benefits where the transfer could not have been accepted into the legacy scheme had they been a member of the legacy scheme at the date of the transfer payment; or those who purchased additional pension, the transfer in or additional pension will remain in the 2015 scheme.
 - In accordance with current Home Office Guidance Immediate Detriment is not to be offered if members would have been entitled to a contribution holiday under their legacy scheme. This area requires further policy decisions from the government
 - Furthermore, under the Home Office Guidance Immediate Detriment can not be offered to members who have already retired and are in receipt of their pension or if beneficiary benefits of a member who has died in service. Also if the member wishes to take all of their benefits from the reformed CARE scheme or if they are a member who has overpaid contributions.
 - The Agreement document **must** be signed.
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Immediate Detriment Options Not Offered

- If Immediate Detriment options are not available to a Firefighter, their benefits will be paid in accordance with the current rules of the scheme.
 - Once the Remedy is in place, WYPF will revisit the benefits which the member receives and recalculate them in line with the Remedy solution.
 - WYPF will contact the member with details of any alternative benefits which will become available to them.
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Immediate Detriment - Process

Principles

- Firefighters must contact the FRA with at least **12 weeks** notice or more to confirm their formal retirement and intention to request legacy scheme benefits for the Remedy Period. However, if the firefighter is due to retire on the grounds of ill-health, there will be flexibility regarding the 12 week notice period.
- The 12 week notice period is required to provide the employer with additional time to obtain information to enable legacy benefits to be calculated, and to calculate any additional pension contributions which would have been paid into the legacy scheme had the firefighter remained there and to recover these contributions. Additionally, it also provides WYPF time to calculate the alternative benefits that may be available and will provide time for the firefighter to consider the information and seek independent financial advice, before selecting their final options.
- If 12 weeks notice is not received, the FRA may need to agree an alternative retirement date or discuss options with the member.
- The FRA will determine if the firefighter is in scope for an Immediate Detriment calculation.
- Firefighters will be required to read and sign an Agreement document to confirm that they understand that they are choosing to potentially elect for a pension payment and option outside of current legislation. By signing the document, they will also be agreeing to the adjustment and payment of pension contributions to reflect legacy scheme membership for the remedy period prior to date of leaving to be collected by payroll if necessary.
- Payroll will determine the member's pension contributions and pay details for the Remedy Period and complete an employee leaver form and forward to WYPF.
- On receipt of leaving information WYPF will prepare the benefit options. The first stage of this will be to determine if the member's pension growth would have exceeded the annual allowance limits set by government had their benefits remained in the legacy scheme. If they would have, WYPF will calculate any tax liabilities that may incur. If tax liabilities do occur, WYPF will notify the member of this and confirm whether they can provide additional options under Immediate Detriment or if uncertainties over the recording, recovery or payment of tax charges would prevent them from currently providing the additional options under Immediate Detriment.

- If Immediate Detriment is available, WYPF will calculate two sets of benefit options as outlined above. WYPF will issue all sets of options with an Election form for completion before payment is processed, these will be issued to the FRA to liaise with the member. The firefighter will have a choice of which benefits they wish to elect to take
 - Depending on the option chosen, scheme contributions may need to be adjusted.
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Agreement Document

Principles

- The Immediate Detriment calculation is a provisional remedy paid out before the government has implemented its final approach and as such the detail currently remains unknown.
 - WYPF will be putting in place a pension benefit which is based on the employer's interpretation of how the Remedy will be structured in advance of the outcome of the Government's final decision regarding legislation to implement the Remedy.
 - The Agreement is required for the following reasons:
 - The Immediate Detriment Home Office Guidance requires all members who are retiring under the Guidance to provide written confirmation of their election together with confirmation that the election is by reference to Section 61 of the Equality Act 2010; the consequences of S61 is that firefighters have the right to be treated as though they had been in service in their legacy scheme since 1 April 2015.
 - In accordance with the Home Office Guidance, firefighters will need to agree to accept the Government's final approach and any future adjustments to pension in payment that this requires.
 - Confirmation that the firefighter accepts that the Immediate Detriment calculations are provisional and may be revised depending on decisions still to be made together with changes to their governing scheme rules, in particular interest and taxation. Therefore, further payments, refunds, or recalculation of their pension benefit, once in payment, are possible.
 - To ensure that firefighters understand the financial and taxation risks in agreeing to the calculations in advance of the Government finalising legislation and related policies to implement the Remedy.
 - To obtain the firefighters authority to make presently and/or at a future date the relevant tax and administrative adjustments/financial deductions to reflect the chosen option at the point of payment and at the point of recalculation once the government has agreed its final approach.
 - To highlight liability exclusions regarding the employer's interpretation of the Remedy in advance of legislation being finalised.
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Tax and Financial Implications

Recovery of Outstanding Employee Contributions

- If firefighters choose to take their full pension benefits under the legacy scheme it will be necessary to charge the appropriate contribution for the benefits that are accrued and to do so in a way that ensures members are treated equally. Therefore, pension contributions will be adjusted, and firefighters will owe employee pension contributions.
 - Any employee contributions owed will need to be paid before the legacy scheme pension can be put into payment.
 - 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. The FRA will make an assessment if contributions are owed.
 - The position of tax relief on employee contributions must also be noted. Outstanding contributions must be repaid before leaving service to ensure that any tax relief entitlement can be applied. Any outstanding contribution collected from salary will attract tax relief at source.
 - If the firefighter chooses to have their outstanding contributions deducted from their lump sum or from any other personal source, they will not qualify for tax relief under the HMRC PAYE or self-assessment process. This position may change once a wider review has taken place of the final legislation to implement and give effect to the Remedy.
 - Once the employer receives the signed Agreement, the payroll section can start to deduct relevant contributions from their salary prior to retirement.
 - Upon receipt of the pension options, should the firefighter elect to be paid benefit option 1 and retire under the current scheme arrangements the payroll section will be notified to adjust and refund any pension contributions as necessary.
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Interest Charges

Principles

- It is the government's intention to apply interest charges to any contributions owed.
 - The Treasury are currently reviewing the appropriate rate of interest to apply, until this detail is received any scheme contributions due will need to be paid without the application of interest.
 - If benefits are paid under Immediate Detriment firefighters will be required to make payment of additional charges as soon as the rate of interest has been set. It is understood that the government will be consulting the Government Actuary on the appropriate rate of interest to add to sums owed by members.
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Annual Allowance Impact

Principles

- Under Remedy firefighters will be moved back to their legacy scheme. This will potentially alter pension benefits they have accrued in each of the tax years during the Remedy Period, this could mean they may breach the annual allowance limits in former pension input period years.
 - If benefits are put into payment under Immediate Detriment firefighters will need to be aware that their pension input periods may be subject to recalculation and this could impact on any carry forward arrangements, and other pension entitlements elsewhere.
 - If annual allowance limits are exceeded and there is no carry forward to mitigate the breach, a tax charge will fall due on the excess over the annual allowance.
 - It is understood that the Treasury are reviewing this and are expected to issue guidance as part of their final review of the Remedy, this could mean that any over/under paid tax or charges may become payable at a later date.
 - Although there is a requirement to review pension growth, any resulting Annual Allowance tax charges incurred from excess growth can only be corrected within the current statutory time limits.
 - To assist, the employer will review firefighters Pension Input Amounts for every year of the Remedy Period to date; and for the 2012-13, 2013-14, and 2014-15 input periods. If it is determined that pension input in any period has breached the annual allowance limit firefighters will be provided with details of their pension growth. Firefighters will be required to notify HMRC of any under or overpaid annual allowance tax charges. If the changes fall outside of the statutory time limits for payment of additional tax or to claim a refund of overpaid tax the data provided will assist in any claim firefighters may make for compensation. Please note that at the time of writing, there are no details regarding the compensation scheme.
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Payment of Tax Charges

Principles

- The Guidance states that where tax is to be paid or refunded, this can only be corrected within the current tax system, with HMRC for years within the statutory time limit, which is the current tax year and the previous four year statutory time limit, and where it is due it will be refunded for the whole period (i.e. beyond the statutory time limit) via a compensation scheme, details of which are not yet known.
- Tax charges can usually be satisfied either individually with a payment from the firefighter, or by Scheme Pays. There are two types of Scheme Pays:
 - Mandatory Scheme Pays (MSP) and
 - Voluntary Scheme Pays (VSP).

- MSP can only be used to the immediately preceding tax year; therefore, it cannot be used to pay tax breaches of the annual allowance in previous years within the remedy period.
 - If firefighters are unable to use MSP to pay a HMRC tax charge, then they may be able use VSP. Under VSP, firefighters are individually responsible. As VSP is a voluntary arrangement there are no conditions attached to it other than the scheme agreeing to pay it. The current limit for VSP is £1000; therefore, amendments to scheme regulations would be necessary to change this limit.
 - The guidance makes it clear that firefighters should contact HMRC about any changes to their Annual Allowance liabilities for the remedy period, i.e. it is a member responsibility.
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