

Warwickshire Fire and Rescue Local Pension Board

McCloud -Age Discrimination remedy and immediate detriment guidance

26 November 2020

Recommendation(s)

1. To note and comment on this report

1. Executive Summary

- 1.1 Following a legal challenge to public pension scheme changes effective from 2012, the government is introducing a new remedy to provide underpin protection to affected scheme members, including members of the Fire Pension Scheme.
- 1.2 The proposals that were set out in the Age Discrimination (McCloud) consultation will apply to all 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, across all affected public service schemes. This is irrespective of whether they have submitted a legal claim or not, or whether they are currently an active, deferred or pensioner member.
- 1.3 Depending on a person's circumstances, many scheme members are likely to be better off in the reformed schemes (CARE) rather than the legacy (Final Salary) schemes. The government believes it is therefore not fair to simply move everyone back into the legacy schemes, even though this would be enough to remove the unlawful discrimination identified by the Court of Appeal.
- 1.4 The government therefore proposes to provide members with the option to choose between receiving legacy or reformed scheme benefits in respect of their service during the period between 1 April 2015 and 31 March 2022. This is referred to as the remedy period. This consultation sought views on that proposal and especially on which of two possible approaches:
 1. An immediate choice
 2. A deferred choice underpin (DCU)
- 1.5 Under the immediate choice exercise, members would make this decision in the year or two after the point of implementation in 2022. For many members, this will be some years prior to retirement, and at a time when there is still

some uncertainty over the precise benefits that would accrue to them in the alternative schemes.

- 1.6 In contrast, under DCU, this decision would be deferred until the point at which a member retires (or when they take their pension benefits). Until that deferred choice is made, all members would be deemed to have accrued benefits in the legacy scheme, rather than the reformed scheme, for the remedy period.
- 1.7 The Home Office have released informal guidance to Fire and Rescue Authorities in England on the processing of 'immediate detriment' cases 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.
- 1.8 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:
 1. 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
 2. 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.
- 1.9 Any scheme members that fall within either of the two categories above can have their pensions calculated and put into payment according to this guidance.
- 1.10 If followed 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.
- 1.11 It is important to note that any cases processed using this guidance would 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.

2. Matters for consideration

- 2.1 Fire and Rescue Authorities (FRAs) now need to understand practically how they could give effect to the guidance, should they chose to follow it. As this is informal guidance only, FRAs can choose to seek individual legal advice. WCC legal team have reviewed the guidance and are of the opinion that it should be followed where possible. Information sent out to the member for these cases must include a caveat to explain that the benefits calculated could still be subject to change.
- 2.2 FRAs need to take a cautious approach in following the HO guidance and that any legal advice taken would not form protection, against FRAS who act outside of their vires or make incorrect conclusions in the calculation of the value of pension benefits.
- 2.3 We understand that the Home Office assert the legal position which underpins the application of the guidance in the note for non-claimants (those not covered by the interim order) is Section 61 of the Equality Act. The effect of Section 61 is being contested in the FRA's appeal under Schedule 22 of the Equality Act, in which they argue that they were required to follow the pensions regulations and so by law had no choice but to implement the transitional protections for older firefighters.
- 2.4 If WCC chooses not to apply the guidance at this stage, there is a chance that the members will protectively issue an age discrimination claim in the employment tribunal. It is clear that the pension loss would be remedied in future regardless of whether a claim is made. However, a member could also claim 'injury to feelings' based on the period of inaction. Such awards, if made, are likely to be nominal but even nominal awards can quickly add up where there is a large number of employees affected.
- 2.5 The County Council's Section 151 Officer has delegated responsibility for payments in respect of all liabilities falling to be discharged by the council which are not otherwise detailed in financial regulations. A briefing is being prepared for his consideration on whether to follow the Immediate detriment guidance issued by the HO.

3. Financial Implications

- 3.1 There are potential financial implications of the cost for not following this guidance and potential claims of 'injury to feelings' being made by members. However, there is also the potential that an overpayment of benefits could arise if the regulations are not amended as suggested in the consultation.

4. Environmental Implications

None

5. Supporting Information

None

6. Timescales associated with the decision and next steps

As WCC's Section 151 Officer the Strategic Director for Resources will be required to take a decision on whether WCC should apply the informal guidance issued by the Home Office, taking account of the risks therein.

Appendices

None

Background Papers

1. <https://www.fpsregs.org/images/Age-discrimination/Home-Office-immediate-detriment-guidance-21-August-2020.pdf>

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The report was circulated to the following members prior to publication:

Local Member(s): None

Other members: None