



## Information

# Immediate Detriment

## Purpose

1. The purpose of this information note is to provide Fire and Rescue Authorities (FRAs) with additional information to the immediate detriment guidance note supplied by Home Office on 21 August 2020. It does not give detailed guidance on the process of payment of benefits.
2. This note will be subject to any changes on the note supplied by Home Office.

## Background

3. Following the 2018 Court of Appeal judgment in Sargeant, an [interim order was made by the Employment Tribunal](#) on **18 December 2019** which provided that members who had brought claims (claimants) are entitled to be treated as if they remained in the FPS 1992, as long as they were in the scheme at 31 March 2012 **and** 31 March 2015 *ending the final determination of the issues of remedy, all existing Claimants who, by reason of their age would not satisfy paragraphs 12(2)(c), 12(3)(c), 13(e) or 14(e) of Schedule 2 to the 2014 English Regulations or the 2015 Welsh Regulations from 31st March 2015 are entitled to be treated as satisfying those paragraphs from that date.*
4. We communicated the following Government position in [FPS Bulletin 28 - January 2020](#):
 

*...all entitlements including immediate ones should proceed under the 2015 scheme rules for the time being. This includes those who are due to taper into the 2015 scheme should continue to taper, and those due to retire normally at a later date should continue in the 2015 scheme.*
5. The bulletin asked FRAs to provide numbers of members who were likely to have an immediate event in 2020 and recommended some immediate steps that authorities could take in relation to ill-health assessments.
6. The SAB used the information provided to request guidance on dealing with immediate events as per their [paper submitted to Home Office in March 2020](#).

7. On 21 August 2020, at the request of the Fire Brigades Union (FBU), the Home Office issued a note<sup>1</sup> directly to English FRAs via finance leads titled 'McCloud / Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases' for both the Firefighters' and Police Pension Schemes.

## Home Office immediate detriment guidance

8. The note headed 'McCloud / Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases' for both the Firefighters' and Police Pension Schemes is available on the dedicated [Age Discrimination Remedy \(Sargeant\) page](#).
9. The note is labelled as informal guidance only and notes that the issues raised are subject of both ongoing litigation and the UK Government's consultation. It does not confirm on what basis FRAs may rely on the note for the purpose of making pension payments.
10. The scope of the note includes 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:
  - 10.1. 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**
  - 10.2. 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 under the IHR arrangements in their legacy scheme.
11. It is unclear whether the note applies to FPS 2006 members, however, based on the scope detailed above:
  - 11.1. For ordinary retirement, it is likely to only apply to special members (who have a normal retirement age of 55) and a very small cohort of standard members who would want to have benefits **paid from their legacy scheme** (i.e. do not accept deferred FPS 2015 benefits).
  - 11.2. For ill-health, it is unlikely that special and standard members of the 2006 scheme will qualify because FPS 2015 has the same criteria for ill-health as FPS 2006, and therefore if they do not qualify for lower tier ill-health in FPS 2015, they would also not qualify under FPS 2006.

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<sup>1</sup> <http://www.fpsboard.org/images/PDF/Boarddocs/Remedy/Home-Office-immediate-detriment-guidance-21-August-2020.pdf>

12. The note should **not** be applied to scheme members who have already retired and are in receipt of their pension payments. The note refers to these cases being more complex to address, especially due to complexities in rectifying the member's tax position. We believe this to refer to the HMRC timing of payment conditions and the potential for unauthorised payments.
13. Paragraph 5.3 of the note sets out that in order to provide a choice to members, two sets of pension entitlement quotes should be provided. The paragraph includes a "non-exhaustive" list of items to include in the quote. It does not include any mention of the change to the pension input amount for each pension input period of the remedy, or any tax charge as a result of that recalculation.
14. Under the heading '*Unresolved pension issues*', paragraphs 5.6 to 5.24 detail outstanding issues that are being consulted on and will not be resolved until the Government finalises its approach to removing discrimination.

## Current position

15. The note is helpful to explain UK government policy and shows progression from the previous position that all entitlements should proceed under the terms of FPS 2015. However, it does not cover the steps that FRAs and administrators would need to put into place to enact the guidance.

## Matters for the FRA to consider

16. Being mindful of the interim order which entitles claimants to be treated as members of the FPS 1992, FRAs now need to understand practically how they could give effect to the guidance. As the document notes in several places that it is informal guidance only, FRAs may wish to seek individual legal advice, which some authorities have advised they are pursuing.
17. 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 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.
18. The HO Guidance on the face of it does not make it clear;
  - 18.1. What the position is for FRAs if members make decisions without all the correct information, such as understanding tax relief.
  - 18.2. How auditors might treat such payments under legacy terms and on what basis an FRA can rely on the guidance to satisfy auditors.

18.3. What risk the member accepts by having benefits paid out before the consultation has concluded, although the note states that **all** cases will need to be revisited once remedy is finalised (3.4). It is understood that the Home Office and HM Treasury (HMT) are considering providing a waiver.

19. Nominated contacts at each FRA should be consulted on further matters to consider.

## Employer contributions

20. Contrary to the position as stated in paragraphs 5.12 and 5.13, we understand the Home office expectation is that revised guidance will now be issued to confirm there is no requirement for the FRA to make the employer contributions in order to enable payment of retirement benefits.

21. Any adjustments in employer contributions will be captured in the scheme valuation process and reflected in the future employer contribution rates going forward. This position would be welcomed.

## Employee contributions

22. The position of tax relief on employee contributions as stated in paragraph 5.11 means that if a member chooses to have the contributions deducted from their lump sum, they will not qualify for tax relief under the HMRC PAYE or self-assessment process. Instead this will be claimed through a government process once the consultation has concluded, this should be clearly caveated in member communications.

## Technical issues

23. There are several technical questions which have been raised with Home Office and HMT that mean in some cases the guidance cannot be applied until an answer has been received, which would leave FRAs in the position of being able to remedy some members but not others:

23.1. Paragraph 3.1 refers to 'members who were in service'. It is not clear whether this means 'in service as a firefighter' or pensionable service, and as such it is not clear whether someone who was '[eligible to be an active member](#)' is in scope, albeit as per paragraph 11 above it is noted that FPS 2006 members to whom that definition applies are likely to be out of scope.

23.2. The suggested position in paragraphs 5.14 to 5.16 on Cash Equivalent Transfer Values (CETVs) needs further clarification of how this could work in practice. Under the current rules for CETVs, benefits cannot be transferred into the FPS 1992 as the scheme is closed and there are no current factors available. So, it is unclear how a transfer could be processed under FPS 1992 terms.

23.3. Furthermore, if it was possible to calculate a CETV, the guidance does not comment on what effect this would have if the CETV took the member over the 30 year' service cap.

23.4. Where a member has paid into FPS 2015 and bought added pension, paragraphs 5.17 to 5.18 are not clear on how an equivalent added years pension would be created in the final salary scheme. It also does not comment on the position where the member would not have qualified for added years in the legacy schemes, for example, the requirement in FPS 1992 to be more than two years from retirement when purchasing added years, or what the effect would be if that added years conversion took the member over 30 years' service.

23.5. The guidance only comments under paragraphs 5.21 to 5.24 on the position where there is tax to be paid or refunded, it does not comment on the steps needed to calculate whether there is a tax liability, i.e. by re-calculating the pension input amount over each of the pension input periods in the remedy period.

23.6. It is understood that the informal position from HMT is that the pension input amount should be re-calculated over the periods in the remedy period based on the legacy scheme benefits. An HMRC CLM query form<sup>2</sup> has been submitted for further guidance and HMT and HMRC are understood to be jointly considering further guidance on this.

## Absent from the guidance

24. There are several areas where we would have expected a policy steer to be provided, but this is lacking from the guidance:

24.1. There is no commentary on the treatment of temporary promotion where an FRA has used their discretion to award Additional Pension Benefits (APBs) in the legacy schemes. Temporary promotion is not pensionable under CARE.

24.2. There is no commentary on creating an APB in the legacy scheme for a member who has received CPD during FPS 2015 membership.

24.3. There is no commentary on where a [two-pension entitlement](#) would have occurred if they had been a member of the legacy scheme.

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<sup>2</sup> <http://www.fpsregs.org/images/HMRC/HMRC-CLM-template-immediate-detriment-implementation-and-annual-allowance.pdf>

24.4. There is no reference to invoking a [contribution holiday](#)<sup>3</sup> by returning to the legacy scheme.

24.5. There is no instruction of how to convert any divorce debits applied in FPS 2015 and the impact on pension credits.

24.6. There is no reference to caveating that the recalculated cost cap may revise the accrual rate of FPS 2015 from 1 April 2019 and whether that would retrospectively affect the calculation of CARE benefits used in the choice calculation.

24.7. There is no commentary on abatement that would apply under the legacy schemes but not reformed schemes.

24.8. The consultation proposals suggest that taper members would only be able to select legacy or reform benefits for the whole remedy period, i.e. 1 April 2015 to 31 March 2022.

- It is not clear how choice should be offered to a taper protected<sup>4</sup> member in the immediate detriment category. Under the current legislation a taper protected member who has already moved into FPS 2015 would have both a pension that could immediately be paid from FPS 1992 which would include service past 1 April 2015, and a deferred entitlement in FPS 2015.
- It is not clear whether a taper member choosing to retire under immediate detriment and accepting payment of an FPS 1992 pension based on service to date of retirement would have to forfeit any existing FPS 2015 deferred pension, and if that should be caveated at the time of retirement, based on the outcome of the consultation.

25. We understand that the Home Office are in discussion with HMT regarding the issues brought to them and are working on reflecting this in revised guidance, however, this is a complex area of work so will take some time.

26. In advance of that guidance being available, we would offer the following commentary:

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<sup>3</sup> The Government introduced an employee contributions holiday for FPS 1992 members who accrue the maximum 30 years' pensionable service prior to age 50. This applies from the point of accruing maximum pensionable service in the scheme until the member's 50th birthday. This change was applied retrospectively to 1 December 2006.

<sup>4</sup> A taper-protected member is somebody who was not fully protected by virtue of age to stay in the final salary scheme (1992, 2006 or Special Modified 2006 Scheme), but was moved into the FPS 2015 between 24 May 2015 and 31 March 2022, depending on their age, as per the [table in the regulations](#).

## 27. Supplementary commentary

<a href="#"><u>Two Pension Entitlement</u></a>	Where a member would have an entitlement to two pensions due to a drop in pay during the period 1 April 2015 to retirement date or 31 March 2022, the two-pension entitlement must be recalculated in the estimate of benefits under FPS 1992
<b>Contribution holiday</b>	<p>Under the terms of FPS 1992, anyone who accumulates 30 years' service in the 1992 Scheme before reaching age 50 is entitled to a contributions holiday<sup>5</sup> between the date on which they reached 30 years' service and their 50<sup>th</sup> birthday.</p> <p>For those opting to retire under the 1992 Scheme, the value of this holiday must be deducted from the accumulated deficit in contributions. That may have the effect of turning the deficit into a surplus.</p> <p>If as a result of this exercise, there is:</p> <ul style="list-style-type: none"><li>• a net deficit in contributions, the member must pay it, or have it deducted from their lump sum;</li><li>• a net surplus in contributions, the employing FRA must refund it to the member or add it to their lump sum.</li></ul>
<a href="#"><u>Additional Pension Benefits (APBs)</u></a>	<p>Where a member has received a CPD payment pensionable under the FPS 2015, this should be re-calculated as an APB in the estimate of benefits under FPS 1992.</p> <p>If there is a discretion in place to treat temporary promotion as pensionable under the FPS 1992 and a member has had a temporary promotion while a member of FPS 2015, this should be re-calculated as an APB in the estimate of benefits under FPS 1992.</p>

## FRA immediate action

28. The FRAs have always been mindful of the interim order which entitles **claimants** to be treated as members of FPS 1992 and wish to give effect to this where they are able to do so.

29. This note highlights some of the issues with the content of the guidance in terms of FRAs being in a position to do this, for example in terms of;

29.1. What is absent from the guidance; or

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<sup>5</sup> Further information on [contributions holiday](#) is available on the password protected area of the website.

- 29.2. Unanswered technical questions which would leave FRAs in the position of being able to remedy some members but not others, e.g. a technical issue, such as a CETV or divorce on the record and no guidance on how to convert to final salary benefits.
30. In order to ensure the FRA has all the information needed in order to proceed with an immediate detriment case under the guidance, we have provided FRAs with a [template matrix](#) to complete. This template may also be used in order to evidence where they do not have the information to proceed. Completion of this checklist will no doubt require both employer and administrator input, please ensure this is complete before proceeding with a case.
31. In addition, nominated contacts at each FRA should be consulted before actioning any immediate detriment cases in order to inform decision making.
32. We issued guidance in [FPS Bulletin 28](#) on immediate action that FRAs could take, under the heading *Update on transitional protections remedy (Sargeant)*. If that action was not taken, we recommend that FRAs do so now.
33. We are pleased to provide further commentary on immediate action below.

## Current or new cases

### 34. III-Health: IQMP assessment

- 34.1. Members with transitional 1992 benefits – ask the IQMP to assess the applicant under both the 1992 and 2015 scheme terms.<sup>6</sup>
- 34.2. Under the immediate detriment note members who don't qualify for lower-tier ill-health in FPS 2015 but would do so under FPS 1992 should be allowed to retire under the arrangements of their legacy scheme where possible.
- 34.3. Transitional Special Members of the 2006 scheme – ask the IQMP to assess the applicant under the terms of the 2006 scheme noting that the normal retirement age of a special member is 55<sup>7</sup>.
- 34.4. The criteria for ill-health retirement are the same for standard 2006 members and transitional members of the 2015 scheme, therefore assessment under the 2015 terms should be enough.

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<sup>6</sup> Ill-Health certificates are available here - <http://www.fpsregs.org/index.php/member-area/ill-health-and-injury>.

<sup>7</sup> Rule 3, Paragraph 3 of FPS 2006 - <http://www.legislation.gov.uk/ukxi/2014/445/schedule/paragraph/2/made>



### **35. Estimation of benefits**

35.1. The estimate of benefits under both schemes should include:

- The pension payable to the member.
- The lump sum that would be payable, along with details of tax consequences, such as receiving an unauthorised lump sum or limiting the lump sum so it doesn't incur tax.
- Dependant benefits such as a partner's pension and death in retirement five-year guarantee from FPS 2015. This is particularly important where someone is retiring under ill-health terms and is paid their pension under the 'one-pot' arrangements from FPS 2015.
- A clear statement that all calculations are provisional and may be revised depending on decisions still to be made and changes to scheme rules, in particular regarding interest and taxation; and that further payments or refunds, or recalculation of pension benefits, are possible.

### **36. Schedule of contributions owed**

36.1. In order to receive benefits under the terms of FPS 1992, the immediate detriment note confirms that employee contributions must be repaid where they are due.

36.2. Members should be provided with a schedule of contributions owed, to include:

- Difference between FPS 2015 and FPS 1992 contributions for the remedy period.
- This should include any additional contributions that need to be paid in order to count a service break.
- Contributions on FPS 1992 terms of any temporary promotion to be treated as an APB.
- Difference between FPS 2015 and FPS 1992 contributions on any CPD payments in order to calculate the APB that will be payable under the legacy scheme.
- Adjustments for the contribution holiday if the member would be eligible under the legacy scheme.

36.3. Members should be made aware of the effect of claiming tax relief on their pension contributions if they choose to have contributions deducted from their lump sum, rather than paying before retirement.

- Pension Contributions made before retirement will qualify for tax relief under HMRC PAYE or self-assessment.

- Pension Contributions made after retirement, such as deducted from the lump sum will not qualify for tax relief under the HMRC PAYE or self-assessment process. Instead this will be claimed through a government process once the consultation has concluded.

### **37. Annual allowance**

37.1. For some members the impact of treating them as if they had never left their previous final salary scheme might mean that they would have breached the annual allowance limits in former pension input period years.

37.2. We understand that the HMT position on this is that benefits over each pension input period should be re-assessed on final salary scheme terms.

37.3. If benefits are put into payment under the immediate detriment note, the member will need to be aware of the recalculation of their pension input periods and the change on any carry forward, as this may affect other pension entitlements elsewhere.

37.4. Where a member has exceeded the annual allowance limit and there is no carry forward to mitigate the breach, a tax charge will fall due on the excess over the annual allowance. The member should be informed of any annual allowance breach for them to calculate the tax charge.

## **Retrospective Ill-health Cases**

38. Under paragraph 3.1 this applies only to members who did not qualify for lower-tier (and therefore higher-tier) ill-health retirement under FPS 2015 but would have done under their legacy scheme. They may have now left the FRA but are not in receipt of pension benefits.

39. These members should be treated as above as a current ill-health case and the relevant IQMP assessment should be sought and benefits put into payment where possible.

40. For members with a pension in payment and who therefore do not fall within the scope of the immediate detriment note, FRAs may want to ensure they are prepared to offer revised benefits as soon as possible by having valid IQMP assessments in place, as detailed at paragraphs 32.1 to 32.4 above.

41. Some of these members may be better off in the reformed schemes, for example, members with a higher tier ill-health in payment under the FPS 2015. FRAs may want to ensure members are aware of this by providing a quotation of benefits under the legacy scheme.

## Other pensions in payment

42. Our understanding is that pensions in payment, even if they have come into payment since 21 August 2020 are not in the scope of the immediate detriment note, as there are tax and other consequences that rely on policy decisions yet to be made by the HMT consultation.

## LGA practitioner support

43. We are talking to practitioners about how best to support implementation of the note to promote best practice and aid consistency, that work includes:

43.1. Working with the [Fire Communications Working Group](#) to provide a consistent template on how a member may be provided with a choice and what this should include, using documentation provided to support choice in 2006 as a guide<sup>8</sup>.

43.2. Working with administrators to provide example calculations for:

- APB calculations for members with CPD payments or temporary promotions.
- Pension tax breaches, where high earners might breach tax limits by gaining additional final salary pension growth.
- Members who would qualify for a contribution holiday in FPS 1992 by returning to the legacy scheme.
- Members who would be liable for abatement by choosing legacy benefits.

Please address any queries on the content of this request to [bluelight.pensions@local.gov.uk](mailto:bluelight.pensions@local.gov.uk)

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<sup>8</sup><https://webarchive.nationalarchives.gov.uk/20120919193018/http://www.communities.gov.uk/archived/general-content/fire/optionsexerciseddocuments/https://webarchive.nationalarchives.gov.uk/20120919193018/http://www.communities.gov.uk/archived/general-content/fire/optionsexerciseddocuments/>