



Scottish Police Federation

5 Woodside Place Glasgow G3 7QF

JCC Circular 44 of 2020

Ref: CS/LS

28 August 2020

Attachments: Guidance doc

Dear Colleague

SPPA Scottish Firefighters' & Police Pension Schemes - Court of Appeal Judgement in McCloud/Sargeant - Guidance on Treatment of "Immediate Detriment" Cases - Information

Please find document attached for your information.

Yours sincerely

Calum Steele
General Secretary

Scottish Firefighters' and Police Pension Schemes

Court of Appeal judgment in *McCloud/Sargeant* – Guidance on treatment of 'Immediate Detriment' cases

This guidance is based on equivalent guidance issued to Fire and Rescue Authorities in England and police forces in England and Wales by the Home Office on 21 August 2020.

1. Purpose of guidance

1.1 The purpose of this update is to provide informal guidance to the Scottish Fire and Rescue Service (SFRS), Police Scotland and pension administrators on the processing of 'immediate detriment' cases (the definition is in section 3 of this guidance) in advance of a decision on the UK Government's final approach to removing the age discrimination as found in the *McCloud/Sargeant* Employment Tribunal litigation¹.

1.2 The guidance was produced at the request of the Fire Brigades Union and is issued with agreement of police staff associations for the purpose of assisting employers and administrators with 'immediate detriment' cases in the Police and Firefighter Pension Schemes only.

1.3 Further, it must be noted that the guidance relates to issues that are the subject of both ongoing litigation and the UK Government's consultation (see paragraph 2.3). 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 Firefighter CARE Pension Scheme, and a reference to the 'legacy scheme' is to the applicable Police or Firefighter Pension Scheme that applied to a member before 1 April 2015.

2. Background to *McCloud/Sargeant* ruling

2.1 Responsibility for occupational and public service pensions is reserved to the UK Government. In 2015, most public service pension schemes, including the Firefighters' and police schemes, were reformed as required by the Public Service Pensions Act 2013. 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 Judges' (*McCloud*) and Firefighters' (*Sargeant*) pension schemes. The UK Government has confirmed that the difference in treatment will need to be removed in all the main public service pension schemes, and Scottish Ministers will do the same for the devolved schemes, including the Scottish Firefighters' and Police schemes.

¹ Further information is provided in SPPA Circulars:
Firefighters' 2020/3: <https://pensions.gov.scot/firefighters/scheme-governance-and-legislation/circulars> and
Police 2020/04: <https://pensions.gov.scot/police/scheme-governance-and-legislation/circulars>

2.3 The UK Government is currently consulting on proposals to remove this discrimination.² The changes proposed in the consultation to remove the discrimination will apply across all the main public service pension schemes and will 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 five years.

3. What are 'Immediate Detriment' cases?

3.1 For the purposes of this guidance, immediate detriment cases applies to 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 five 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 (for example, do not accept deferred 2015 scheme benefits); **or**
- ii). who do not qualify for lower-tier (and therefore higher-tier) ill-health pension under the single pot Ill-Health Retirement (IHR) arrangements, 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.

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, given complexities in rectifying the member's tax position.

3.4. It should be understood 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. This is likely to be after April 2022.

4. 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 and ordinary retirements) where transitional members have already retired and are currently receiving an ill-health or ordinary pension. 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

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

under 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 and employee/employer contribution adjustments 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. 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 The SPPA and scheme employers should now offer this choice to all those scheme members who:

- i) have transitioned into the 2015 Scheme and who are approaching retirement; and
- ii) 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, the SPPA 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 and employee contributions owed/refunds due. Each scheme member should be required to provide written confirmation of their election.

5.4 Outstanding issues remain that will not be resolved until the Government finalises its approach to removing the discrimination (see unresolved pensions issues in section 5.6). Each scheme member will need to agree to accept the UK Government's final approach and any future adjustments that this requires.

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

Unresolved pension issues

5.6 Some related issues will not be resolved until the UK Government finalises its approach to removing the discrimination. The UK 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 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.

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 the pay which is considered

pensionable under the 2015 Scheme. The employer should then make an assessment for each active 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 and SPPA will work with employers to establish the best approach to this.

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 UK 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 UK Government's final approach includes the application of interest on owed employee contributions. Scheme employers and the SPPA 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, Scheme employers 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 UK 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 SFRS employer contributions

5.12 Uniquely, the Firefighters' Pension Scheme does 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 SFRS 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 SFRS from the pension fund account.

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

5.14 There may 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 CETV) 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 the SPPA 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 Annual Allowance 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 is correct.

5.23 The UK 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 UK Government finalises its approach to removing the discrimination. This is likely to be after April 2022.

Scottish Public Pensions Agency
27 August 2020