

Age discrimination remedy – Guide to eligibility

Introduction

In December 2018, the Court of Appeal ruled in the McCloud and Sargeant cases that the 'transitional protection' offered to some members of the judges' and firefighters' schemes as part of the 2015 public sector pensions reforms gave rise to unlawful discrimination.

The Chief Secretary to the Treasury confirmed the requirement for a legal remedy across all public service pension schemes.

[The Public Service Pensions and Judicial Offices Act \(the 'PSPJOA 2022'\)](#) came into force on 1 April 2022 and includes measures that address the discrimination that arose when legacy schemes were closed to certain members in 2015.

A set of central provision definition documents (PDDs) has been developed across public service pension schemes which together describe the rationale, intent and technical changes to public service pensions intended to achieve government policy to remove discrimination resulting from changes made under the Public Service Pension Schemes Act 2013 (the 'PSPA 2013'). Following this, each responsible authority is developing a scheme-specific version of the documents where necessary, which will inform the drafting of secondary legislation.

All eligible members, as defined in the Eligibility PDD, are to be offered a choice, at retirement or death, to receive benefit accrual for any remediable service during the remedy period, from 1 April 2015 to 31 March 2022, based on either legacy scheme or new scheme rules.

This factsheet confirms which individuals are eligible for remedy under the terms of the PSPJOA 2022.

Eligibility conditions

To be eligible for remedy, a member must have 'remediable service'. The PSPJOA 2022 sets out four conditions in [section 1](#) which must **all** be met for service to be considered 'remediable':

1. The service must be during the period 1 April 2015 and 31 March 2022 inclusive.
2. The service is either pensionable service under legacy scheme rules or pensionable service under reformed scheme rules that would have been pensionable service under a legacy scheme if the discrimination had not occurred.

3. The person was, on 31 March 2012 or any earlier day, in service in any employment or office that is pensionable service under a [Chapter 1 legacy scheme](#), a [judicial legacy scheme](#), a [local government legacy scheme](#) or where an individual was, on 31 March 2012, in service as a firefighter which entitled them to be an active member of the FPS 2006.
4. There is no disqualifying gap in service falling within the period. This condition requires that the individual should not have any gap in service of 5 years or more i.e. between 31 March 2012 or, if earlier, the date they left service, and the date of re-joining.

Members who were active members of a relevant scheme on or before 31 March 2012, but who decided to opt out for some or all of their remediable service may apply to opt back in and have that period of service reinstated into their relevant legacy scheme, under a [section 5](#) contingent decision.

This will be subject to meeting certain conditions which are yet to be determined. See [contingent decision coffee morning slides](#) for more information.

Who is out of scope?

It therefore follows that the following members will be out of scope:

- Left employment or retired to pension prior to 1 April 2012, or
- Joined the relevant scheme or another public service pension scheme, for the first time, on or after 1 April 2012, or
- In the case of firefighters, where they were not eligible to be an active member of the relevant legacy Firefighters' Pension Scheme on 31 March 2012¹.

What does this mean for fire?

Scheme specific provisions

Unlike other schemes, transitional protection in the FPS was provided to those who were active members of a firefighters' pension scheme as at 31 March 2012 and 31 March 2015, and to those who were eligible to be an active member of a relevant legacy firefighters' pension scheme on these dates. Members who had transitional protection because of this provision (eligibility to be an active member rather than actual active membership) are therefore **in scope** of the remedy.

Firefighters often have multiple employments, sometimes consecutively and sometimes concurrently. It is common for a whole-time firefighter to have periods of concurrent employment as a retained firefighter. Where firefighters have multiple employments, some FRAs applied this protection to each employment separately, rather than considering the member.

¹ [Eligibility factsheet](#)

The interpretation of how the protections should be applied, i.e. that the transitional protection applied to the member not the employment, was agreed with Home Office's (DCLG at the time) solicitors at outset of the scheme in 2015, although there is no legislative guidance to this effect within the regulations. It has been agreed by the Home Office that despite this the original guidance should be adhered to.

Due to the locally administered nature of the scheme, different administrators of the FRAs have taken narrower or wider views of the 2015 regulations in assessing whether members were eligible for transitional protection. This means that members may not have been treated as eligible for assessment for transitional protection under the agreed position above.

Under the Act, all those who meet the criteria in [section 1 of the PSPJOA 2022](#), irrespective of whether they were given transitional protection at the time, are in scope for remedy.

Previous public service scheme membership

A member who qualified for transitional protection in a previous public service pension scheme (i.e. Teachers' Pension Scheme, LGPS, Police Pension Scheme, Ministry of Defence Pension Scheme, Civil Service Pension Scheme, Judicial Pension Scheme), but following a voluntary move to the FPS did not qualify for transitional protection because of their age **is in scope** and an eligible member for retrospective remedy.

Next Steps

Scheme managers need to ensure that all individuals who have either concurrent or consecutive service within an FRS have been identified.

In addition, scheme managers must consider what steps need to be taken to identify members who joined on or after 1 April 2012, but who have previous public service which may mean that the individual is eligible for retrospective remedy. This would also include members whose secondary employment is in the FPS.

Once this identification piece is resolved scheme managers then need to consider whether the individual is in scope using the criteria set out in [section 1 of the PSPJOA 2022](#).

What remedial action should be taken if individuals are identified?

We are aware that some members have been treated outside of the recommended guidance and protections applied based on each employment rather than to the member. This may also be the case where the member has previous public service membership that the FRA/administrator has not been made aware of.

In these circumstances, some posts will not have been deemed to fall within the scope of remedy. The Home Office has confirmed that all relevant positions **must** be treated as remediable where the eligibility conditions are met.

FRAs will now need to reconsider identifying affected members in line with the [data collection guidance](#) (paragraphs 15 and 16). When considering these cases regard should be given to what level of protection they should have been awarded if they had been treated correctly in the first instance:

- For members who are eligible due to multiple FPS employments this will be dependent on whether their other service is in FPS 1992 or FPS 2006. If, under their other record they have entitlement to FPS 1992 service or are Special Members of FPS 2006, then their date of birth should be assessed against the [FPS 1992 transitional protection criteria](#).

For example, a member that has two pension records one in FPS 1992 and one FPS 2006. The transition dates for both employments should be based on [FPS 1992 transitional protection criteria](#).

- Likewise, if they were a member of FPS 2006, then their date of birth should be assessed against the [FPS 2006 transitional protection criteria](#).

For example, a member joined FPS 2006 prior to 1 April 2012, they then subsequently enrolled in a second post after 1 April 2015. The transition date for the second post should be assessed against the [FPS 2006 transitional protection criteria](#).

- For members who are eligible due to the PSPS link, then their date of birth should only be assessed against the [FPS 2006 transitional protection criteria](#).

For example, a member joined an eligible public sector role to 1 April 2012, they then subsequently enrolled in a firefighter role after 1 April 2015. The transition date for the second post should be assessed against the [FPS 2006 transitional protection criteria](#).

Please note, the information above should only be used to establish what transitional arrangements the member should be assessed against and will therefore determine what level of protection the member should have been awarded. Regardless of the answer, all eligible members only have access to the FPS 2006 legacy scheme.

Any flags that have been added to pensions administration systems to identify memberships in-scope will also need to be revisited and these additional memberships added to the data collection template.

Additionally, for members who have been identified that should have received full protection up to 31 March 2022, immediate corrective action **is** required to ensure the member is put into the correct position ahead of retrospective legislation coming into force. Corrective action will include dealing with any contribution discrepancies which may arise.

For members who have been identified as tapering on an incorrect date but were not eligible for full protection, i.e. up to 31 March 2022, immediate corrective action is **not** required ahead of retrospective legislation coming into force.

In either case, FRAs are encouraged to have robust record keeping and ensure that case is clearly documented, and all action taken can be easily identifiable.

Finally, communications may need to be reissued to members to confirm the change in status of any multiple employments which were not initially treated as remediable. Template letters will be provided later.