

HM Revenue and Customs

Sent by email to: pensions.policy@hmrc.gov.uk

6 January 2022

Consultation: The Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023

Thank you for your technical consultation seeking views and evidence on the draft Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023 ('the Regulations').

I respond on behalf of the Local Government Association (LGA). The LGA is a politically led, cross-party membership organisation which represents more than 330 councils of all types and 44 fire authorities across England. We work on behalf of our members to support, promote, and improve local government.

The response has been drafted by the Pensions Team at the LGA with particular reference to the Firefighters' Pension Scheme (FPS). The team provide employer and administrator support to various public service pension schemes, including the Local Government Pension Scheme (LGPS) and the FPS.

This response sets out the LGA's view on the draft regulations and guidance in respect of the FPS. We would like to thank HMRC for the opportunity to provide comments and for the roundtable engagement with schemes which took place prior to the response deadline.

While not directly relevant to the consultation, we would like to provide some background and context to the administration and management of the scheme, which provide unique challenges to the implementation of remedy.

Under the scheme regulations, each of the 44 Fire and Rescue Authorities (FRAs) are responsible for the management and administration of their scheme and are defined in law as the scheme manager. This puts the responsibility to comply with overriding pension legislation on each of the political bodies charged with governance of the Fire and Rescue Service (FRS), i.e. Combined Fire Authorities, PFCCs, County Councils, Mayoral functions etc.

Each FRA is required to administer the pension scheme either in-house or through appointing a third-party administrator. There are currently 12 different pension administrators in England, ranging from single client sites to the largest administrator with 23 FRA clients. They are mostly not for profit organisations, with one known exception, and are often linked to LGPS administering authorities.

While the scheme manager remains the legally responsible scheme administrator for the purposes of section 270 of the Finance Act 2004, in practice the FRA or delegated scheme manager relies heavily on the expertise of the appointed pension administrator to comply with the tax regulations and will rely on the appointed pension administrator to undertake the 'rollback' provisions under the Public Service Pensions and Judicial Offices Act (PSPJOA) 2022.

It is the responsibility of each administrator to contract a software supplier that underpins their solution. There are two software suppliers who supply pension administration software for the FPS: Civica and Heywood Pension Technologies.

While we welcome sight of the draft regulations and accompanying guidance it is disappointing that the lateness of providing these materials and the absence of final tax policy positions in the 'discrete' areas not covered by the consultation have caused a subsequent delay to schemes being able to draft and consult on their secondary legislation.

We have been made aware that the Home Office is not consulting on the FPS regulatory amendments until late February 2023, with the SI to be laid in September 2023 and effective from 1 October 2023. This presents a significant risk to administrative implementation; particularly given the locally administered nature of the scheme.

Also, the timing of the consultation and the length of time given to reply is disappointing. A six-week consultation over the festive period has meant we have been unable to consult meaningfully with stakeholders, which would have allowed us to provide a more considered response.

Please do not hesitate to contact me if you have any questions about this response.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Joanne Donnelly', with a large, stylized initial 'J'.

Joanne Donnelly
Head of Pensions

Comments on the Regulations

1. In this section we set out our views on the Regulations. Our response concentrates on the application of the Regulations to the FPS but also includes general comments.
2. Regulation 2(1) refers to Her Majesty's Revenue and Customs. This should instead read His Majesty's Revenue and Customs.
3. Where regulation 6 allows for a Pension Savings Statement (PSS) in respect of the 2022-23 tax year to be delayed until 6 October 2024, we are concerned that this presents a risk to the member of not being fully informed of their nominally correct tax position in that year, which could then impact on future, post-remedy years. Although we understand that the statement will need to be revisited following rollback, administrators have expressed discomfort at providing no information at all due to the continuing requirement for members to self-assess.
4. There is a small typo at regulation 9(5) where PSPJOA has been transposed as POPJOA. This is repeated at regulation 33(2)(a).
5. We understand that regulation 10 does not allow for a member to reverse a decision they may have made to settle an Annual Allowance Tax Charge (AATC) by lump sum, for example where the charge was under £2,000 but now exceeds that amount. In our view, this does not fully reinstate the individual to their pre-reform position as they may have made a different decision at that time.
6. Regulation 22 covers arrears of pension payments that arise as a result of the effect of the remedy on the benefits of a member who has died before the payments are made. We would welcome clarity on whether this also includes payment of arrears of pension in respect of a survivor pension when the survivor has died before the arrears are paid.

7. We are pleased to note that the Regulations broadly achieve the policy intent in the core areas set out in the Annual Allowance Provision Definition Document. However, it would have been helpful for clarification to be given within the Regulations as to the in- and out-of-scope tax years, as was indicated would be the case.
8. We understand that the Regulations come into force on 6 April 2023 and some provisions will have retrospective effect. It would provide greater clarity to administrators if retrospection was set out in each regulation where it so applied.
9. We welcome the provisions which have been made to alleviate some of the administrative burden associated with correcting a member's tax position retrospectively – in particular, the extension of the deadline to provide PSS to members in respect of the remedy period (regulation 6); the requirement to include new/increased AA or LTA charges on a future Accounting for Tax (AFT) return, rather than amending a previous submission (regulations 11 and 32); and removing any requirement to adjust previous Pension Input Amounts (PIAs) for scheme pays debits when recalculating the remedy period Pension Input Periods (PIPs) (regulation 10(6)).
10. These are especially welcomed as the application of double accrual in the earlier FPS legacy scheme (FPS 1992) makes it more likely that unprotected or taper-protected members may exceed the AA limit for the first time, or be subject to an increased AATC, as a result of rollback.
11. For members, we welcome the modifications to section 237B of FA 2004 which ensures that the financial conditions for a Mandatory Scheme Pays (MSP) election to be made in respect of the remedy period and tax year 2022-23 (regulations 8(3) and 9(2)) are treated as being met. We also welcome regulations 34 and 35 which ensure that the public service scheme will remain jointly and severally liable with the member for tax charges arising as a direct consequence of rectification.

Comments on the guidance

12. While not specifically requested, we have taken the opportunity to review the guidance which is to be published alongside the Regulations. We make the following comments:

13. It may be helpful to clarify for the purposes of the guidance and the Regulations that in most cases the 'new scheme administrator' and the 'legacy scheme administrator' will be the same entity. This use of terminology is potentially confusing.
14. In paragraph 1.3.1, the fourth bullet point confirms that the tax position for optant-outs is not dealt with by the core tax regulations. However, the sentence as currently worded suggests that remedy may automatically opt a member back in. Certainly for the FPS, a member will have to make a Section 5 PSPJOA contingent decision to opt back in, which may or may not be accepted. We would suggest changing the wording to "...the remedy may retrospectively allow them to opt back in,...".
15. Paragraph 2.2.1 states that scheme administrators must implement the rollback **by** 1 October 2023. It is our understanding that rollback cannot commence until Section 2(1) PSPJOA comes into force. For the FPS, this will be on 1 October 2023 which is a Sunday, therefore it is potentially not administratively feasible for rollback to occur for all affected members on this date, particularly as the scheme regulations are not expected to be laid until one month prior. Our view is that it would be more appropriate to state "...**from** 1 October 2023."
16. In relation to members who have received an immediate detriment remedy (paragraphs 2.2.12 – 2.2.14), a Framework was agreed in October 2021 between the LGA and the Fire Brigades Union (FBU), designed to make payments to FPS members in scope of remedy within existing legal powers on the basis that it would mitigate or avoid an immediate detriment to such members, therefore avoiding the need for continued legal action by those members.
17. The process agreed in respect of paying arrears of lump sum was based on the proposal for remedy as set out in the draft PSPJO Bill, i.e. to compensate for the unauthorised payment charges on late lump sums. However, shortly after the Framework was issued, HMRC published a [policy document](#) and Finance (No.2) Bill which both indicated a move towards making payments of late lump sums authorised. At a later date, the Home Office withdrew previously issued informal guidance and made clear to FRAs that any compensatory payments made in respect of immediate detriment would not be recoverable.

18. On 4 April 2022, after the Finance Act 2022 (FA 2022) had received Royal Assent, the LGA and the FBU sent a joint letter to the Treasury, asking for regulations to be brought forward as soon as possible to authorise the payment of lump sum arrears beyond 12 months of leaving.
19. It is therefore disappointing to note that the regulations are not fully retrospective to the introduction of FA 2022 on 6 April 2022 and that the regulations cannot apply to members obtaining an immediate detriment remedy, by virtue of the scheme regulations not coming into force until 1 October 2023. FRAs are under significant pressure to apply immediate detriment to affected members and risk incurring substantial unauthorised payment charges on their behalf due to the PCLS timing of payment condition, when this will not be the final legislative position (regulation 17).
20. At paragraph 3.4.2, the bullet points would be more logically ordered if they were reversed, as rollback will occur before a Section 6 or 10 election being made.
21. From a scheme manager perspective, it would be useful to understand the implications of waiving tax relief liabilities using Section 18 PSPJOA. In particular, whether this transfers the liability to pay this from HMT to the scheme and therefore ultimately to employers (paragraph 3.4.4).
22. Under section 4 of the guidance (Annual Allowance), it would be helpful to differentiate between tax treatment of in- and out-of-scope years. If adjustments to PIAs are needed for the three tax years preceding the remedy period (i.e. 2012-13, 2013-14, and 2014-15) to ensure the correct carry-forward position, this should be included at section 4.6.
23. There appears to be a word missing in the second line of the first bullet at paragraph 4.6.3 after "...benefit election..." as the sentence does not read correctly.
24. We would suggest adding the equivalent wording for protected and taper protected members to the end of the first bullet point at paragraph 4.6.4: "Scheme administrators will be aware of the change to the member's benefit entitlement from the date that the 'new scheme benefits election' is given to them".

25. We ask whether the position outlined at paragraph 4.6.5 could change based on the relevant scheme's policy on voluntary contributions? The paragraph states that these will remain as the only PIAs in the new scheme, however, would this remain the case if the only option at rollback is a return of contributions via compensation.
26. In the header above paragraph 4.6.6, the Regulation is quoted as 10(46). The number in brackets should be (6) only.
27. In respect of paragraph 4.10.4, we reiterate that administrators are concerned that not providing any PSS in respect of tax year 2022-23 until 6 October 2024 may have unintended consequences for members.
28. Paragraph 4.11.5 could be amended to reflect [The Public Service Pensions \(Exercise of Powers, Compensation and Information\) Directions 2022](#) coming into force on 19 December 2022.
29. In paragraph 5.5.10, we believe the pension amount in the example should be £48,000.
30. As a point of clarity, at paragraph 5.5.23, would the BCE 6 remain unchanged at £144,000 if Tom repays the overpayment of £18,000 (under regulation 29)?
31. There are a number of typos at in the first bullet point of paragraph 5.8.6.
32. There is a sentence within paragraph 5.11.3 (starting with the hyperlink to PTM063210) which appears to be in the wrong place, as the section does not read correctly. PCLS is also incorrectly transposed as PCL.
33. There is a small typo at the end of paragraph 5.16.4 where PCLS has been transposed as PCSL.
34. Regulation 36 provides that an election for new scheme benefits is treated as having taken effect on 5 April 2016 for the purposes of Individual Protection 2016 (IP 2016). However, the Regulations do not comment on the effect of rollback on a member's IP 2016 status. For FPS 1992 members retrospectively benefitting from double accrual, rollback is more likely to lead to a loss of LTA protection (than an election for new scheme benefits).

35. We understand that this is covered in The Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022 at paragraph 9(6)(d). It would be useful to clarify this in the guidance in section 7.1 for completeness.
36. The glossary refers to taper-protected members as those who were within 10 years and 13.5 years of their normal pension age at 1 April 2012. For the FPS, members were protected on a tapered basis if they were within 10 and 14 years of NPA¹ on the relevant date.

¹ <https://www.legislation.gov.uk/uksi/2014/2848/schedule/2/paragraph/18/made>