



<b>Classification</b>	<b>Official (Sensitive – Commercial)</b>		
<b>Meeting</b>	<b>Service Leadership Team</b>	<b>Agenda no.</b>	<b>6c A</b>
	<b>Strategic Board</b>		<b>10</b>
<b>Date</b>	<b>29 August 2024</b>		
	<b>19 September 2024</b>		
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<b>Presented By</b>	<b>Neil Cross, Chief Financial Officer</b>		
<b>Subject</b>	<b>McCloud pension remedy report</b>		
<b>Type of Report</b>	<b>Update</b>		
<b>Action Point No.</b>		<b>For Publication</b>	<b>Yes</b>

### **RECOMMENDATION(S)**

- That SLT note the progress made so far in relation to the McCloud remedy.

### **EXECUTIVE SUMMARY**

This report discusses the progress made by ECFRS on the McCloud pension remedy, highlighting issues with tax that has hindered progress.

HM Treasury identified that interest payments on pension arrears and lump sums would be treated as unauthorised if the interest paid was over the commercial rate. HMRC later confirmed that interest payments should be treated as the commercial rate, but another issue has been identified regarding the treatment of unauthorised payments, which is still unresolved. The delegated Scheme Manager has decided to progress the remaining immediate choice (previously category 2) cases, and that the Authority will cover the unauthorised payments, should they become due, so that retired members of the Firefighter Pension Scheme (FPS) are not adversely affected and face no further delay in receiving their payment.

The Firefighter Pension Scheme (FPS) faces routine tax payments, and any unauthorised payments will result in additional lump sums being subject to 40% tax and a Scheme Sanction Charge of 15%. The government's inability to make decisions or public statements during purdah has delayed the resolution of these tax issues. Now the election has concluded and ministers are in place, a written ministerial statement, instructing Authorities to continue with making payments is expected shortly. A change in HMRC's regulations will follow in 2025.

Contingent Decisions (CD) in the Firefighter Pension Scheme include opt-outs and additional service claims, with specific provisions made for each category. An issue has been identified regarding the inability of members to purchase opted-out FPS 1992 service, which may lead to complaints.

Other McCloud provisions, such as compensation, re-assessments of ill-health retirements, and death in service cases, need to be progressed now that the immediate choice cases have been concluded.

## **BACKGROUND**

The Public Service Pensions and Judicial Offices Act 2022 (PSPJOA) received Royal Assent on 10 March 2022 and made provision about public service pension schemes, including retrospective provision to rectify unlawful discrimination in the way in which existing schemes were restricted in the 2015 reforms. This Act provides an overarching framework to allow public service pension schemes to remedy the impact of unlawful age discrimination.

The Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022 came into force on 19 December 2022. These specify how certain powers in the PSPJOA must be exercised and gives the relevant government departments the powers to rectify the discrimination by making secondary legislation to amend their schemes. The Firefighters' Pensions (Remediable Service) Regulations 2023 were laid before Parliament on 20th July 2023 and come into force on 1 October 2023. The regulations remove the effect of the transitional protections in place between 1 April 2015 and 31 March 2022 ('the remedy period') and in-scope members are placed back into the relevant legacy pension scheme for their remedy period service.

These regulations implement provisions for a deferred choice underpin (DCU). The DCU will give members a choice of pension benefits at their point of retirement or when the benefit comes into payment in respect of the remedy period, which is the period during which discrimination took place. Eligible members will be able to choose to receive legacy pension scheme benefits or benefits equivalent to those available under the 2015 reformed scheme for service during the remedy period. The options will be explained in a Remediable Service Statement (RSS) which is a document that clearly shows the value of pension scheme benefits available under the election.

On 18 March 2021, the PFCC for Essex made a formal decision to implement immediate detriment for retirees from that date onwards. This did not apply to those who were eligible for the McCloud remedy and had retired prior to the PFCC's decision. There are 19 people in this group, known as immediate choice cases (previously called cat.2. cases). Since October 2023, ECFRS and its pension administrator's Essex Pension Fund have written out to those 19 individuals to offer them the pension remedy. This work was completed by 31 December 2023. We were not convinced by the guidance supplied around the treatment of tax, so a proportion of the pension benefits were withheld while these were being investigated. The members were fully informed of this.

## OPTIONS AND ANALYSIS

In January 2024, HM Treasury notified the public service pension schemes that HMRC had identified that the Treasury directed interest payments on pension arrears and lump sums would be treated as unauthorised where the interest paid was over the commercial rate. This was a significant policy issue which had not been raised before. HMRC have since taken legal advice and confirmed on 25 April 2024 they can treat these interest payments as being the commercial rate.

While the position of authorised payments has been confirmed, the position of unauthorised payments is still unclear. This is significant for the Firefighter Pension Scheme because unauthorised payments are commonplace. Discussions with HMRC continue about how the interest on these payments should be treated. The current advice is that interest on unauthorised amounts is also unauthorised, and therefore taxable.

This flagged up a further issue, in that HMRC had not allowed for the rectification of previously paid unauthorised amounts in their legislation or considered how the payment of new 'top-up' lump sums should be treated when an unauthorised amount has already been paid. This is a routine tax paid by Firefighters and if part of a payment is 'unauthorised' it will result in part of the additional lump sum being subject to 40% tax and a Scheme Sanction Charge of 15% passed onto the FRA. At the time of writing this paper, this issue has still not been rectified. HMRC confirm that there is a gap in their regulations, and they would seek a ministerial statement to instruct public sector pension schemes to make the payments, ahead of new legislation.

Since these issues came to light, two other immediate choice individuals have returned their forms to receive their remedy and were awaiting payment.

As a result of the General Election being called for the 4 July 2024, the Government was unable to take forward and make any decision or any public statements from then up to the date of the election. Now the election has concluded, and ministers are in place, a written ministerial statement is expected shortly, instructing Authorities to continue with making payments. A change in HMRC's regulations will follow in 2025.

The delegated Scheme Manager has decided to progress the remaining immediate choice (previously category 2) cases, and that the Authority will cover the unauthorised payments, should they become due, so that retired members of the Firefighter Pension Scheme (FPS) are not adversely affected and face no further delay in receiving their payment. The unauthorised payments for the remaining immediate choice cases, should they be payable, totals £7,500. It is the author's understanding that these will become payable by 31 January 2026, by which time is expected that a written ministerial statement will have been issued confirming that these are not due, and amending legislation may also be in place by then.

17 individuals have received payment of their remedied benefits. 2 others have yet to return their claim form. However, the amount due to these individuals is very small (less than £50 each). They will be sent reminder letters.

### Contingent decisions

A Contingent Decision (CD) is a decision taken by a member or their eligible decision-maker, relating to their membership of the Firefighters' Pension Scheme (FPS), that would have been different had it not been for the discrimination identified by the courts.

There are two categories of CD in the FPS for which specific provision has been made:

A. Opt-Outs: A Member who would not have opted-out if they had been allowed to remain in the Legacy Scheme (FPS 1992/FPS 2006) beyond their transition date or if protected Members had been allowed to join the 2015 Reformed Scheme from 1 April 2015.

B. Additional Service: Members argue they would have purchased (more) additional service if they were in the Legacy Scheme.

Those with Opted-Out Service during the remedy period (1 April 2015 to 31 March 2022) can be considered for retrospective remedy if the member was in the Pension Scheme on or before 31 March 2012 (with no disqualifying gap).

Members who made a choice to opt out directly relating to the pension reforms prior to their transition date will be or their eligible decision maker will be able to make a CD claim. Members will fall into one of two categories, which will largely depend on when the member opted out:

Group 1: This group of members will have opted out during the period up to six months prior to their transition to the 2015 Scheme and ending on 28 February 2022.

Group 2: This group of members will have opted out on or after 12 March 2012 and do not meet Group 1 conditions.

The timeframes for making a CD are set in the regulations and operate from receipt of the first Remedial Service Statement (RSS), however some members will not receive an RSS until 31 March 2025, at which point the regulations allow them twelve months in which to make their election after receipt of the CD-RSS.

The CD-RSS will show the member their current position, i.e. with the opted-out service and also what their pension benefits would be should they decide to purchase the opted-out period to be pensionable service.

We are aware of a potential issue. In the rules of the FPS 1992, once a member opts out, they cannot opt back in to it. If they want to re-join the Firefighters' Pension Scheme, they re-join the FPS 2006. Previous guidance was issued to the Authority, stating that the remedy regulations have created an exception where the opt out occurs during the remedy period (1 April 2015 to 31 March 2022). Therefore, if a member opted out of FPS 1992 before 1 April 2015, then the relevant Legacy Scheme they are re-instated to is FPS 2006. However, we have since been notified that all contingent decisions, regardless of when a person opted out or the scheme they opted out from, they will only be able to purchase pension benefits under the FPS 2006, which generally provides lower pension benefits than the FPS 1992. This is likely to be unsatisfactory to any members who are captured by this scenario, and we already have one complaint under the Internal Dispute Resolution Procedure about it, even though ECFRS have issued no CD-RSS's. ECFRS have over 25 individuals within this scenario. This is a national issue, and it is understood that HM Treasury are not minded to amend the regulations with regard to this.

Despite the risks of receiving applications under the IDR, under the regulations, the Authority must address CD claims. It is therefore recommended that ECFRS begins the process for CD claims.

## Other McCloud provisions in progress

- Compensation - Section 23(1) of the Public Service Pensions and Judicial Offices Act 2022 (PSPJOA 2022) gives scheme managers the power to pay compensation in respect of compensatable financial losses incurred by members, or in the case of deceased members, their personal representatives. These must not be losses that are rectified by a member's immediate or deferred choice and the provisions of The Firefighters' Pensions (Remediable Service) Regulations 2023 ("2023 Regulations").

Refunds of contributions as covered by the regulations count as compensation. Other compensatable losses which may be claimed by members are accountancy and actuarial services, independent financial advice, legal services (excluding those associated with litigation), tax losses and financial loss claims. These types of claims will require evidence before the scheme manager can accept them. The payment of compensation will be covered by a new top-up grant process and will not be paid from the operating account.

- Ill-health retirements cases - Re-assessments of ill-health cases are required where a person may be entitled to receive improved pension benefits under their legacy scheme where they were assessed under the terms of the reformed scheme, and vice versa. The focus has been primarily on immediate choice members, but now the focus will be on these cases. The first step is to contact those individuals in scope to ask for their permission for their case to be reassessed.
- Death in service cases – As with ill-health cases, reassessments of death in service cases are required where a beneficiary may be entitled to receive improved better pension benefits under their spouse's reformed scheme where the benefit was calculated under the terms of the legacy scheme. As mentioned, the focus has been primarily on immediate choice members, but now the focus will be also on these cases. The next step will be for our pension administrators to recalculate the pension benefits and give the beneficiary the choice of benefits.

## **RISKS AND MITIGATIONS**

Failure to meet the required deadline in the Firefighters' Pension Schemes (England) (Amendment) Order 2023, the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022 and the Public Service Pensions and Judicial Offices Act 2022 (PSPJOA), will mean ECFRS has breached the law and must report itself to the Pension Regulator if it is considered materially significant to the Pensions Regulator.

Making payment of the benefits without having the correct tax treatment runs the risk of making an incorrect payment to the member. If a member was overpaid, ECFRS will need to recover this amount which may cause distress to the member and be reputationally damaging. However, the delegated Scheme Manager has decided to progress the remaining immediate choice (previously category 2) cases, and that the Authority will cover the unauthorised payments, should they become due.

If ECFRS failed to communicate with its members over the delays caused by the tax issues and if it delayed the opening of contingent decision process, this may also cause distress and confusion amongst its current and former employees. This may also lead

to complaints under Internal Dispute Resolution Procedure. However, opening contingent decision processes opens ECFRS to challenge, anyway. There is a risk that this may expose our Service to complaints under Internal Dispute Resolution Procedure, or potential litigation, should a member wish to challenge the approach for former FPS 1992 members. It should be noted that other Authorities have accepted contingent decision claims and offered FPS 1992 scheme benefits to their members, which will now need to be rescinded and replaced with offers of the less favourable FPS 2006 benefits instead.

**LINKS TO FIRE AND RESCUE PLAN**

The report supports the following priorities of the Fire and Rescue plan:

- Promote a positive culture in the workplace.
- Be transparent, open, and accessible.
- Make best use of our resources.

**FINANCIAL IMPLICATIONS**

The unauthorised payments for the remaining immediate choice cases, should they be payable, totals £7,500.

**LEGAL IMPLICATIONS**

The activities discussed in this paper are in accordance with the Firefighters’ Pension Schemes (England) (Amendment) Order 2023, The Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022 and the Public Service Pensions and Judicial Offices Act 2022 (PSPJOA).

**STAFFING IMPLICATIONS**

The tax issues explained in this paper relate to former employees and has no effect on current employees.

The issue relating to former FPS 1992 members making a contingent decision may have a detrimental effect on morale for around 25 employees, who may then make a complaint under the Internal Dispute Resolution Procedure.

**EQUALITY AND DIVERSITY IMPLICATIONS**

The actions being taken will not have a disproportionate impact on individuals with protected characteristics (as defined within the Equality Act 2010), when compared to all other individuals and will not disadvantage people with protected characteristics.

Race	N	Religion or belief	N
Sex	N	Gender reassignment	N
Age	N	Pregnancy & maternity	N
Disability	N	Marriage and Civil Partnership	N
Sexual orientation	N		

The Core Code of Ethics Fire Standard has been fully considered and incorporated into the proposals outlined in this paper.

**HEALTH AND SAFETY IMPLICATIONS**

No health and safety implications are anticipated.

## **CONSULTATION AND ENGAGEMENT**

ECFRS' Pensions Manager has discussed the issues with the Local Government Association's Senior Pension Advisor and a few other Fire & Rescue Authorities.

## **FUTURE PLANS**

All McCloud activity must be concluded by 31 March 2025, under the relevant regulations.

## **LIST OF BACKGROUND PAPERS AND APPENDICES**

None.