

Meeting of the Board 17 September 2020

## Retrospective correction of historic pay mistakes

### Introduction

1. The Scheme Advisory Board (the Board) has previously considered matters related to pensionable pay.
2. The Board have previously noted the considerable resources that FRAs have been provided with in order to make robust decisions and are satisfied that the importance of robust and transparent pensionable pay decision making has also been included in scheme manager and governance training.
3. Nevertheless, while the Board are satisfied there is now enough information to make the right decisions on pensionable pay going forward, authorities still need to consider how they correct pensionable pay errors in the past.

### The role of the SAB

4. The SAB's role, as set out in regulations made under section 7 (Scheme Advisory Board) of the [Public Services Pensions Act 2013](#), is:
  - 4.1. to provide advice in response to a request from the Secretary of State on the desirability of making changes to this scheme [the Firefighters' Pension Scheme] and any connected scheme  
  
and
  - 4.2. to provide advice to scheme managers and local pension boards in relation to the effective and efficient administration and management of this scheme [the Firefighters' Pension Scheme] and any connected scheme.
5. Given the SAB's important role in providing advice to FRAs (in their role as scheme managers) on the efficient administration and management of the Firefighters' Pension Scheme, it is vital that the SAB gives clear, accurate and, where possible, unequivocal advice and guidance.

This paper asks the board to consider how this issue can be moved on in order to provide consistent advice to FRAs

## **Retrospective corrective action issues**

6. In order to consider retrospective correction, authorities need to consider:

6.1. Under the regulations, contributions are based on 'pensionable pay', therefore if pensionable pay has been retrospectively amended contributions may have been underpaid and require being paid back.

6.2. Promised pension benefits are based on pensionable pay.

6.3. Whether the Limitation Act 1980 provides a legal defence to limit any action to recover lost monies to a six-year period after which the cause of action occurred.

6.4. The strain on the scheme, by making payments pensionable and not collecting contributions.

6.5. Some members will not benefit from paying contributions on their corrected pensionable pay because they have been promoted since.

6.6. Risk of challenge from members who did not benefit either by being outside the six-year limit or did not benefit from paying contributions.

6.7. The funding position of FRAs if required to make past pension contributions beyond the six year limit.

6.8. Potentially different scenarios on claims depending on whether the member is:

6.8.1. Still employed.

6.8.2. In receipt of pension.

6.8.3. A deferred member.

7. There is a precedent already set when considering retrospective action from the court case arising under Norman v Cheshire; in that case an informal agreement between authorities was reached to:

7.1. Accept allowances / pay which met the qualifying criteria in Norman v Cheshire as pensionable.

7.2. Both employees and employers repay contributions back dated for six years, including retired firefighters.

- 7.3. Employees will be given three years to pay their element of the contributions.
  - 7.4. If employment ended before the three years, the remaining arrears could be paid out of the commutation lump sum.
  - 7.5. The six year back dating will be from when local agreement is reached, so this might differ per FRA.
  - 7.6. Unpaid debts should be pursued as robustly as any other form of employee underpayment.
  - 7.7. Each FRA would consider whether a split pension arrangement under the [two-pension entitlement](#) would be in the employee's benefit.
8. However the retrospective effect of allowances under the Norman v Cheshire case in most cases did not go back further than six years at the time of correction.

## **Retrospective corrective action legal advice**

9. The Board have previously considered [legal advice](#) drafted by the boards legal adviser
10. The Board agreed that parties would consider the advice and bring back comments to the next Board meeting with regards to that advice.
11. During that time the Board's legal adviser, the secretariat, Sean Starbuck and the legal adviser for FBU have met to consider the advice and common ground.
12. During those discussions, the Board's legal adviser has drafted a [supplementary note](#) to the legal advice dated August 2019 in order to aid discussion.
13. Nevertheless, despite constructive conversation it was not possible to agree on common ground on which to base SAB advice, as there is no decided case law on correcting historic pensionable pay errors.
14. The particular area of discussion is on asking for contributions to be paid further back than the Limitations Act, which applies to both employer and employee pension contributions and a lack of clarity over the interaction between contributions and pensionable pay.
15. A decision to ask for contributions beyond the six-year limit could potentially introduce a funding pressure on some FRAs.
16. It is not clear what pressure is put on the funding arrangements for the scheme by only paying employer and employee contributions for a six-year period and what is expected by Home Office in the top-up grant arrangements.

17. It would appear to be clear that further engagement with Home Office and GAD is needed to understand the past service cost impact of pensionable pay and the Home Office expectations on how the top-up grant would accommodate this.
18. It would be useful to have some example cases of this issue, to bring to a discussion with Home Office, GAD and the SAB.
19. It is possible, that a solution will need to be sought in the form of a [Part 8 basis – alternative procedure for claims](#), although who would be responsible for taking it and paying for it needs to be discussed.

## Board action

20. The Board need to consider this issue and their role in achieving consistency between FRAs and decide whether they should:
  - 20.1. NOT provide guidance on retrospection and instead leave this to the individual FRAs, it should be noted that this leaves individual FRAs having to get their own legal advice with the likelihood being this will differ for each FRA.
  - 20.2. Provide limited practical notes for FRAs to consider the issue on their own.
  - 20.3. Engage with Home Office and GAD with regards to the funding implications and on the practicalities of considering a [Part 8 - alternative procedure for claims](#) decision.

Board Secretary  
September 2020