

Meeting of the Board 17 September 2020

## Abatement guidance

### Introduction

1. HM Treasury (HMT) policy requires public service pensions to be abated in certain circumstances when an employee is re-employed following retirement. Fire and Rescue Authorities (FRAs) are statutorily obliged to apply abatement when it occurs in accordance with the regulations of the Firefighters' pension schemes.
2. Abatement applies in the final salary Firefighters' Pension Schemes (FPS 1992, FPS 2006) where a member begins to draw their pension and remains employed or is re-employed. The general principle is that the new salary plus pension cannot exceed the previous salary. have been abated into the pension fund account. Abatement does not apply to FPS 2015.
3. The FRA has a discretion not to apply abatement to a member. If this discretion is exercised, they become liable to make a payment equal to the amount that could have been abated into the pension fund account.
4. Each FRA should have their own policy, stating their position on the discretion and how they will apply abatement.
5. There is no prescribed advice on how abatement should be applied or calculated. The Home Office recommended in 2019 that general advice on principles and best practice could be provided to FRAs to improve consistency. Following the 2019 FPS AGM, the secretariat drafted the [informal guidance](#) below based on workshop feedback and examples of accepted good practice from FRAs.
6. Consultation on the draft guidance has been undertaken with the Home Office and a small group of practitioner stakeholders. Feedback from those responses has been incorporated into the document.
7. While an agreed position has been reached on the majority of scenarios, two key questions remain outstanding:
  - 7.1. How the pension value in the abatement calculation should be established, in particular where pension increase has been applied (or not applied if they are under 55), and where the pension includes an Additional Pension Benefit (APB) element.
  - 7.2. The treatment of concurrent employments. It is common for firefighters to have both a regular and retained employment at the same time. The regulations are unclear on whether abatement should be considered when a firefighter retires from one post and continues in another. The issue is further complicated because of [HMRC'S position on protected pension age](#)

which states that continued employment constitutes being re-employed. It is unclear whether HMRC's view should be applied when interpreting the abatement regulations.

8. These questions have previously been raised with the Home Office. However, a response has not been received to date. The secretariat considers that establishing a consistent practice of abatement would be valuable and the Board are asked to consider further how these two issues can be resolved.

## **Actions for Board members**

9. For the Board to agree the draft guidance in principle.

10. In order to resolve the outstanding queries:

- 10.1. The Board seek legal advice to agree the interpretation of the regulations;  
or,

- 10.2. The guidance is resubmitted to the Home Office on behalf of the Board for comment on policy intent, with a request that this is escalated to any relevant government department, such as HMT.

Board Secretary  
11 September 2020



## Information

# Abatement guidance for FRAs

## Introduction

Government policy, set by HM Treasury, requires public sector pensions to be abated in certain circumstances when a public sector employee is re-employed following retirement. The principle behind abatement is to protect the public purse from paying both pension and salary to the same individual.

There are two forms of abatement:

- In-service abatement occurs where re-employment is in a post covered by the same scheme which is paying the individual's pension.
- Inter-service abatement, where retired public sector employees are re-employed to any employing public sector organisation without going through an open competition.

Fire and Rescue Authorities (FRAs) are statutorily obliged to apply abatement when it occurs in accordance with the regulations of the Firefighters' pension schemes. This document provides guidance on applying abatement in line with the regulations of the Firefighters' Pension Schemes.

## Abatement in the Firefighters' Pension Scheme

Abatement applies in the final salary Firefighters' Pension Schemes (FPS 1992, FPS 2006) where a member begins to draw their pension and remains employed or is re-employed. The general principle is that the new salary plus pension cannot exceed the previous salary. In this case, the pension would be reduced by the excess. The pension would continue to be abated until the re-employment has ceased, or there was a change to the new salary which meant that the total was no longer higher than previous pay.

The FRA has a discretion not to apply abatement to a member. If this discretion is exercised, they become liable to make a payment equal to the amount that could have been abated into the pension fund account.

Abatement does not apply to FPS 2015.

Each FRA should have their own policy, stating their position on the discretion and how they will apply abatement.

There is no prescribed advice on how abatement should be applied or calculated, therefore the following general advice on principles and best practice is provided to improve consistency. The advice has been collated following the 2019 AGM workshop and using examples of accepted good practice at FRAs.

We are aware that in some cases part-time or zero-hour contracts are used to limit the amount of new salary, so that this plus the pension in payment does not exceed the old pay. This alone does not guarantee that abatement will not apply, and **abatement should still be tested in all cases.**

Please note that it is the legal responsibility of each FRA to apply the rules of the pension scheme in accordance with independent legal advice where they consider this is necessary. The LGA can only give an informal view on the interpretation of the FPS as only a Court can provide a definitive interpretation of legislation. FRAs should not rely directly on these informal views.

## Regulations

The relevant regulations are:

### FPS 1992

K4 – as amended in 2013 (SI [2013/1392](#)) to include **any** employment with **any** FRA: for rule K4 (withdrawal of pension during service as a regular firefighter) substitute—

#### **“Withdrawal of pension whilst employed by a fire and rescue authority**

**K4.** The fire and rescue authority by whom a pension is payable may, in their discretion, withdraw the whole or any part of the pension, except a pension under Part C (awards on death—spouses and civil partners), for any period during which the person entitled to it is employed by any fire and rescue authority in whatever capacity.”

LA2(9) – inserted in 2013 by SI [2013/1392](#) to require an equivalent payment to the pension fund account if abatement not applied:

“(9) Where an authority exercises its discretion not to withdraw the payment in whole or in part of any pension under rule K4 (withdrawal of pension whilst employed by a fire and rescue authority), the authority shall in the financial year in which payment is not withdrawn, transfer into the FPF an amount equal to the amount of pension paid during that financial year to that person which could have been abated or withdrawn.”

### FPS 2006

Part 9, paragraph 3 – [SI 2006/3432](#):

#### **Withdrawal of pension during service as firefighter**

3.— (1) Subject to paragraph (2), the authority by which a pension under Part 3 is payable may withdraw the whole or any part of the pension for any period during which the person entitled to it is again employed as a firefighter by any authority.

(2) Where a person who is entitled to pensions under this Scheme in respect of both regular and retained or volunteer service (whether from the same authority or from different authorities)—

(a) resumes regular service, but does not resume retained or volunteer service, or

(b) resumes retained or volunteer service, but does not resume regular service,

paragraph (1) applies only as regards the pension referable to his previous retained or volunteer service or, as the case may be, his previous regular service.

(3) An authority may abate a pension to which a person is entitled under Part 3 so long as he is employed (in whatever capacity) by any authority.

(4) A person who—

(a) is entitled to a pension under Part 3, and

(b) accepts an offer of employment with an authority (in whatever capacity),

shall, as soon as reasonably practicable after accepting that offer, give written notice to each authority by which a pension is payable to him under Part 3, specifying the name of his employing authority.

Part 13, paragraph 2(11) – inserted in 2013 by SI [2013/1393](#) to require an equivalent payment to the pension fund account if abatement not applied:

“(11) Where an authority exercises its discretion not to withdraw or abate the whole or any part of a pension under rule 3 (withdrawal of pension during service as a firefighter) of Part 9 (review, withdrawal and forfeiture of awards), the authority shall in the financial year in which payment is not withdrawn or abated, transfer into the FPF an amount equal to the amount of pension paid during that financial year to that person which might have been abated or withdrawn.”.

## Resources

We have issued the following factsheets on abatement<sup>1</sup> and protected pension age<sup>2</sup>.

[Abatement](#)

[Protected Pension Age](#)

[FPSC 10/2009](#)<sup>3</sup> was previously issued by DCLG and provides useful historical background. However, it is no longer endorsed by Home Office, LGA or SAB. Please also see [FPSC 08/2006](#)<sup>4</sup> [paragraph 3.(i)]

[CLG commentary on the FPS 1992 – Rule K4](#)

[Fire pensions annual conference 2019 – workshop 2](#)

Queries on abatement can be found under the Abatement section of the technical queries log held on the following [technical queries web page](#). The log is updated monthly in line with the bulletin release dates.

## Frequently asked questions

### What counts as re-employment?

The regulations state that abatement applies where a member is re-employed by **any** FRA in **any** capacity. This raises questions in circumstances where an individual is providing a service to an authority, but is not directly employed by them under a contract.

For example, would any work for an FRA, even if self-employed, be considered for abatement where a member is re-employed as a contractor and currently in receipt of an FPS 1992 pension.

A likely test as to whether the member is subject to abatement is how they are assessed under the new [IR35 rules](#)<sup>5</sup>. If through that assessment they are classed as an employee for tax purposes, then it is likely they will also be classed as an employee for abatement purposes too. Another test would be whether they qualify under auto enrolment as a ‘worker’<sup>6</sup>.

A further consideration is “inter-service” abatement, which applies when “retired public servants are re-employed to any employing public sector organisation without going through an open competition”. At a minimum this would apply until the member reaches normal pension age for their scheme. Although this falls outside the scope of the FPS regulations, the Home Office (formerly CLG) have previously confirmed

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<sup>1</sup> <http://fpsregs.org/images/admin/Abatementv1.pdf>

<sup>2</sup> <http://fpsregs.org/images/admin/PPAv1.pdf>

<sup>3</sup> <http://fpsregs.org/images/FPSC/10-2009.pdf>

<sup>4</sup> <http://fpsregs.org/images/FPSC/8-2006.pdf>

<sup>5</sup> <https://www.gov.uk/guidance/understanding-off-payroll-working-ir35>

<sup>6</sup> <https://www.tpr.gov.uk/-/media/thepensionsregulator/files/import/pdf/detailed-guidance-1.ashx>

their informal view that FRAs should consider applying the minimum standard where it occurs.

## What pay figure to use

While the calculation of (new pay + pension) – old pay seems relatively straightforward, this is often one of the greatest areas of uncertainty, especially for retained members. In particular, what elements of pay should be used to ascertain the ‘old’ pay and how ‘new’ pay should be determined if earnings are variable.

### ‘Old’ pay

Informal guidance issued by CLG in 2009 references the “level of earnings directly prior to...retirement” and goes on to say: “The substantive pay at the last day of service comprised of all permanent elements of pensionable pay, expressed as an annual rate, should be the level of earnings used for the comparison”.

While previously published circulars are no longer endorsed, we can see no reason to deviate from this approach. This could therefore reasonably exclude temporary promotion and allowances, and overtime. Relevant PI should be added to the pay at leaving to account for any period of time between retirement and re-employment.

In June 2006, the technical group considered whether APB pay (e.g. CPD/LSI) should be included in the calculation of earnings<sup>7</sup>. The consensus was that APB elements should be excluded, as they do not fall within the definition of ‘pensionable pay’.

Although this may seem inequitable as the APB amount is likely to be included in the comparable pension, the amount of pension derived is not commensurate with the pay received – rather it is based on the total of employer and employee contributions divided by an actuarial factor.

For **retained firefighters**, our informal view is that this should reflect the proportion of service, and should be calculated similarly to the calculation of retained pay that applies for the ill-health charge when it relates to a retained member.

Averaging out the pay over the period that the firefighter has been in the post in question avoids the pay being compared as being unfairly high or low, which is the problem that could arise if the firefighter had particularly high or low earnings in the most recent year.

So, to take a practical example of a retained firefighter who has worked three years, say 50% WTE in the first year, 75% in the second year and 25% in the third year, this would be averaged out, producing a figure of 50%. Thus 50% of FTE pay should be used.

So, in practical terms a retained firefighter has an FTE in the year of retirement of £23,000

Their employment history is

Year 1 50%

Year 2 75%

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<sup>7</sup> <http://fpsregs.org/images/Tech/Meeting22/Minutes260619.pdf> [Item 8)b.]



Year 3 25%

Total = 150% divided by 3 = 50%

Pay to be used for the abatement is 50% \* £23,000 = £11,500

Where a deferred pension is being bought into payment, the final salary could be uprated in line with annual pay increases since the member left employment with a deferred entitlement.

## **'New' pay**

New pay must be based on actual pay received, therefore the pro-rata amount for part timers.

For **retained firefighters** who do not have a guaranteed income, some authorities apply abatement retrospectively, using the end of year pay to do the calculation and adjust the pension as necessary in the following year.

Others do a calculation of old pay minus pension and inform the employee of the cap, in terms of how much can be earned before abatement will apply. This allows the employee to monitor the situation in year. In this situation, one FRA assesses earnings on a quarterly basis to provide further assurance.

The method used may depend on the size of the affected workforce and subsequent administrative burden. The most important thing is to ensure that the reason for the decision can be robustly justified, and that it is applied consistently across an organisation.

## **How often should the abatement test be performed?**

This test ensures that the level of earnings (new salary plus pension) does not exceed the previous salary.

A common principle applied is that the calculation is actioned on re-employment and need not be revisited unless there is a material change. However, with recent pension increases being in excess of pay awards, a positive gap or surplus may arise so FRAs may consider whether this necessitates a revision to the abatement recalculation.

Some FRAs confirm that they perform an annual check for firefighters and a quarterly check for retained firefighters.

One authority has stated that they do a monthly review of the position and decision whether to abate or not as firefighters want to know how much they can earn before abatement applies.

A reasonable option is to assess at any material change, plus to undertake an annual calculation to see how much salary and pension was being received and compare that to an index linked salary at retirement. Any excess above the indexed linked salary at retirement could be abated.

For retained firefighters whose earnings naturally fluctuate, the check could be performed quarterly.



## Concurrent employments

It is increasingly common for firefighters to have both a regular and a retained contract or, if they have been employed on an on-call basis, to have multiple retained contracts.

This therefore brings into question whether abatement applies in FPS 2006 for an individual who has two concurrent employments, retires from one and continues in the other. Should the FRA abate under the terms of [Schedule 1, part 9, Paragraph 3](#) and, if so, which paragraph instructs them to do so. As the firefighter has not been 'again employed', it is a continuation of a current employment.

The policy behind abatement is that both a pension and salary from the public purse should not be more than the earnings before retirement i.e. the income from the public purse should not be increased by the addition of a pension.

In the case where a person has two roles before retirement and therefore two streams of income, but only retires from one and continues in the other, the income from the public purse has not been increased, merely one stream of income has been replaced from salary to pension.

Nevertheless, HMRC when considering protected pension age took the view that continued employment constitutes being re-employed, because after becoming entitled to their pension, they are still employed by a sponsoring employer<sup>8</sup>. It is unclear whether HMRC's view should be applied when interpreting the abatement regulations, and it may be necessary to obtain a legal view on whether the interpretation below of the regulations can be relied on.

### Informal interpretation of the regulations

Scenario: A person held two posts: one wholtime and one retained. They have retired from the retained post and are continuing in the wholtime post.

3.—(1) Subject to paragraph (2), the authority by which a pension under Part 3 is payable may withdraw the whole or any part of the pension for any period during which the person entitled to it is again employed as a firefighter by any authority.

Paragraph 1 deals with a single pension in payment and any period during which that pensioner is "again employed as a firefighter". One could consider that the individual is not "again employed as a firefighter" once the pension in relation to the retained post is paid, since they simply remained a WT firefighter and therefore no abatement would apply under this subparagraph. A legal view may be necessary to determine whether HMRCs view of re-employment should be applied.

(2) Where a person who is entitled to pensions under this Scheme in respect of both regular and retained or volunteer service (whether from the same authority or from different authorities)—

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<sup>8</sup> Loss of Protected Pension Age – Concurrent Employment - <http://www.fpsregs.org/images/admin/PPAv1.pdf>

(a) resumes regular service, but does not resume retained or volunteer service, or

(b) resumes retained or volunteer service, but does not resume regular service,

paragraph (1) applies only as regards the pension referable to his previous retained or volunteer service or, as the case may be, his previous regular service.

Paragraph 2 deals with firefighters who have more than one pension in payment from regular and retained/volunteer service and when dealing with withdrawal/abatement compares like with like only. This individual does not have such multiple pensions in payment and therefore this sub paragraph does not apply.

(3) An authority may abate a pension to which a person is entitled under Part 3 so long as he is employed (in whatever capacity) by any authority.

Paragraph 3 does not address being 'again employed', just simply is employed, which could imply that withdrawal/abatement would apply, or at least be tested.

(4) A person who—

(a) is entitled to a pension under Part 3, and

(b) accepts an offer of employment with an authority (in whatever capacity),

shall, as soon as reasonably practicable after accepting that offer, give written notice to each authority by which a pension is payable to him under Part 3, specifying the name of his employing authority.

Paragraph 4 refers to a person having to give written notice after accepting an offer of employment, which obviously indicates a new employment rather than a continuation of an existing employment.

To note, the FPS 1992 rules simply say that an FRA may abate for any period the person 'is employed', with no qualification around being 'again employed'. However, a second retained contract would not apply in the scheme, as retained firefighters were not eligible to join.

## Continuing employment

### FPS 1992

A member of FPS 1992 who opts out of the scheme and is over normal retirement age (60) is entitled to receive a deferred pension while continuing in the same employment. However, the pension must be fully abated until employment ends. [Agreed by consensus at the technical meeting of [26 June 2019 \[5c\]](#)<sup>9</sup>]

### FPS 2006

Under the terms given to eligible special members of FPS 2006, special firefighter members (active firefighters) had the option to convert their benefits under the standard 2006 terms to special 2006 service.

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<sup>9</sup><http://fpsregs.org/images/Tech/Meeting22/Minutes260619.pdf>

If an active member chose to purchase special membership from 2000 to 2006 but not convert FPS 2006 membership, they have a special deferred benefit under the scheme rules. These members would have the same right to receive payment of the special deferred benefit from age 60, while continuing their active employment (and membership) under the standard FPS 2006 for the same employment that the special membership has been awarded for. However, the pension must be fully abated until employment ends.

## **Does re-employment in a green book role or grey book non-operational role qualify as in-service abatement or inter-service abatement?**

The regulations were amended in 2013 (backdated to 2009) to confirm that abatement applies where a person is 're-employed by any fire and rescue authority **in whatever capacity**'. Before these changes were made, the circular published under CLG confirmed:

“Whilst the rules of the FPS stop short of dealing with the abatement of a retired member's pension when they are re-employed to a position other than that of a regular firefighter, **it is DCLG's view that abatement of the FPS pension should be applied where a retired member has been re-employed to any position by any FRA.**”

Therefore, in-service abatement is any re-employment by **any FRA in any capacity** and should continue for the duration of the employment.

## **Responsibility for abatement when pension is held with a different FRA**

In the case where a member is re-employed by a different FRA than their pension is paid in respect of, where does responsibility / liability to monitor and calculate the abatement sit.

The LGA's informal view is that it is the responsibility of the FRA paying the pension to whom the regulations fall. They are statutorily responsible for assessing, monitoring and implementing abatement and, if not, for paying into the notional pension fund.

If another FRA is employing the firefighter they have a moral duty to ensure the firefighter is aware that their pension might be abated and to inform the FRA paying the pension. However, they cannot enforce abatement. If, as the new employer, they were to reduce the member's salary in order to abate, this may cause non-compliance with other legislation such as equal pay, National Minimum Wage etc. While we are aware that some authorities choose to abate pay rather than pension, there is no specific provision to do so under the rules of the scheme and we therefore make no further comment on this.

Under the FPS 2006 regulations there is a requirement on the firefighter under sub para 4 to 'give written notice to each authority by which a pension is payable to him under Part 3, specifying the name of his employing authority.'

Administrators and FRAs agree it is the responsibility of the firefighter to notify their pension provider of any re-employment and what the nature of the arrangement is. It would be good practice to include wording in retirement letters regarding the requirement to notify if re-employed with another authority, and in new starter letters to enquire about any pensions in payment.

The NFI also provides a safety net to monitor re-employment.

## **When might you choose not to abate?**

There are circumstances in which an FRA may choose to exercise their discretion not to abate.

An example of this is where individuals with management experience have retired but have specialist skills which would be of value to the service in positions that they are otherwise struggling to recruit to. In this instance, the FRA may choose not to abate, as an incentive for the individuals to carry out these duties and because of the valued contribution they are making to the authority.

If an authority is going to waive abatement, they need to be clear what the reasons for doing so are.

A question was raised as to how this could apply when different FRAs were involved, in terms of funding. The employing FRA are prepared to make the payment that would be necessary under the regulations but, as they are not the FRA paying the pension, it is technically not their decision or responsibility.

To ensure transparency and clarity, it could be proposed that the new FRA arrange to pay (from their operating account) the necessary amounts to the previous FRA. However, the Home Office have suggested from a strict 'informal' interpretation of the financing provisions that the FRA re-employing the firefighter should inform the FRA responsible for paying the pension that the individual has been re-employed and, as such, the FRA (responsible for paying the pension) should exercise their discretion to abate, or make the required payment under Rule LA(9) into their pension fund account, with no requirement to transfer monies between FRAs.

Logically, the FRA paying the pension would abate accordingly as otherwise there would be a financial detriment to them (with no benefit). Most importantly, both FRAs should retain open communications with each other with regards to the individual's re-employment so that they can ensure that the correct abatement is being applied and that it ceases at the end of the period of re-employment.

## **Transitional members (current regulations in force)**

Members of FPS 2015 with transitional final salary benefits in FPS 1992 can choose to retire and draw their FS benefits from age 50 (with over 25 years total service) while deferring their CARE benefit until State Pension age (or 55 – SPA with reductions).

Normal retirement from the scheme is treated as a 'two-pot' benefit, with each pot being treated under the rules of the individual scheme. This means that when someone retires from FPS 1992, their pension is treated under the rules of the 1992 scheme, and any subsequent FPS 2015 benefits treated under the rules of the 2015 scheme.

Therefore, upon re-employment, abatement would apply only to the FPS 1992 pension in payment.

An exception to this is where benefits are paid on the grounds of ill-health. Under the terms of the FPS 2015, an ill-health pension is paid under the 2015 scheme rules for transitional members; this is known as a 'one-pot'<sup>10</sup> benefit. The regulations direct that a payment known as the 'equivalent amount' is included in the 'one-pot' benefit, which is the amount that would have been payable under FPS 1992 or FPS 2006. At normal pension age<sup>11</sup> the equivalent amount becomes a continued pension payable under the original final salary scheme

Under FPS 2015 there is no requirement to abate, however, in the case of an ill-health pension once the equivalent amount becomes a continued pension payable under FPS 1992 or FPS 2006 it becomes liable for abatement upon employment with any FRA.

APBs payable under FPS 1992 or FPS 2006 for an ill-health pension would be liable for abatement. This is because there is no direction from FPS 2015 under [\[65\(4b\)\]](#) to pay APB benefits in the 'equivalent amount'.

This has been discussed by the technical group (see [16.02.16 9e](#)<sup>12</sup> and the [actions summary](#)<sup>13</sup>). The Home Office have previously advised they are content for the regulations to remain un-amended.

This document has been prepared by LGA to give some guidance on the rules of the pension scheme and associated legislation using the regulations as they stand at July 2020, however they should be used only as an **informal view** of the interpretation of the firefighters' pension scheme as only a court can provide a definitive interpretation of legislation. This factsheet should not be interpreted as legal advice

Please address any queries on the content of this factsheet to [bluelight.pensions@local.gov.uk](mailto:bluelight.pensions@local.gov.uk)

June 2020

<sup>10</sup> Slide 10 '[Quick Guide Ill-health and Injury Scheme Rules](#)'

<sup>11</sup> NPA for a 1992 member is attainment of 30 years' service or age 55, for a 2006 member is 60

<sup>12</sup> <http://www.fpsregs.org/images/Tech/Meeting12/Minutes160216.pdf>

<sup>13</sup> <http://www.fpsregs.org/images/Tech/Meeting21/Actions120219.pdf>

