

Meeting of the Board 23 June 2022

Contingent decisions

Background

1. Member choice for the remediable period is a key area of the 2015 Remedy. All members who are in scope for the remedy have a right to choose which pension benefits they want for the period between 1 April 2015 and 31 March 2022. Pension schemes must give members all the information they need to make that choice in a clear and timely fashion. This extends to scheme members who made decisions contingent on the introduction of pension reforms in 2015.
2. Scheme members may have made a different decision(s) about their membership and benefits had it not been for the introduction of the reformed pension schemes in 2015 and the transitional protections which were later found to be discriminatory by the Court. These are termed as 'contingent decisions' and can be described as a course of action taken as a direct result of the imposition of the FPS 2015 and transitional protections contained in [Schedule 2](#).
3. The overarching legislation that covers the 2015 Remedy is in primary legislation proposed by the UK government. The [Public Service Pensions and Judicial Offices Act 2022](#) (PSPJOA 2022) came into force on 1 April 2022. The Act brings into law the outcomes of the government's public consultation which were published on 4 February 2021.
4. This paper has been developed from the consultation response, provisions within the Act, current policy thinking, and from informal engagement with sector stakeholders. The purpose of the paper is to inform the Board of the different types of claims that might be made and seek the Board's views on the development of appropriate implementation principles. To aid the discussion, the paper will outline the known categories of contingent decision and the current expectation on how these may be dealt with.
5. There are two main types of claims:
 - 5.1. Scheme-related claims are generally provided for under the Act and allow members to be put back into their pre-reform position. For example, opting out of the scheme or buying added years.
 - 5.2. Employment-related claims will generally require compensation to be paid. This is likely to include decisions such as retiring earlier or later than planned. The Act gives schemes powers to make regulations for these "special cases".
6. More information on contingent decisions is available in the [FPS coffee morning slides of 3 May 2022](#).

Consultation response

7. [Paragraphs A.96 to A.98 of the government consultation response](#) set out the intended policy direction. The response starts with the view that; “members will need to show that they took an action, relating to their membership of a public service pension scheme, that would have been different had it not been for the discrimination identified by the courts”. This means that members will need to make a claim before it is investigated by pension schemes.
8. The government accepts that central guidance is required to ensure consistency “across and within” public service schemes and that they will undertake work to agree guidance on contingent decisions but recognises that there may be unique or uncommon conditions specific to schemes so schemes will be given discretion to “consider cases on merit and on a case-by-case basis”.
9. In an [open letter to HM Treasury responding to the consultation response](#), the Board raised concern in relation to the contingent decision process and the potential for inconsistent decision making across 44 individual scheme managers. The Board noted that this could have funding implications and welcomed discussion on promoting consistency, such as through a national review body.

Provisions in the PSPJOA 2022

10. [Section 5](#) of the Act deals with elections for prospective service to apply to opted out service. This section ensures that opted out service can be treated as remediable service as long as an election is made by the member and that certain conditions specified in scheme regulations are met. It is the scheme regulations that will dictate what conditions need to be met in order to determine whether or not a period of opted-out service can be considered as remediable service.
11. [Section 25](#) of the Act deals with remediable arrangements to pay voluntary contributions to legacy schemes. This section gives schemes the ability to make regulations to allow a member to enter into an added years contract under the legacy scheme, where the scheme manager is satisfied that it is likely they would have done so if they had remained in that scheme.
12. Powers for schemes to deal with other types of contingent decision are covered under [Section 22](#). The compensation powers required to redress a member’s situation if their claim is successful are held in [section 23](#).

Contingent decisions

13. The table below sets out a list of the most common contingent decisions identified to date from conversations with scheme stakeholders.

Contingent decision	Description
Opted-out	Members who made a decision to opt out of the pension scheme because they were due to transition to the 2015 scheme or due to protection from transition to the 2015 pension scheme
Ill-health retirement	Transitional members who were not eligible or did not apply for ill-health retirement as they did not (or felt that they would not) meet conditions in that scheme. Alternatively a protected scheme member who could not apply for ill health retirement having achieved scheme NPA may have been able to if they were in the 2015 pension scheme as it has a later pension age
Early retirement	Transitional members who opted to retire early rather than transition to the CARE scheme. The member may have returned to employment post retirement and may have made alternative pension arrangements post retirement for subsequent employment
Left employment and deferred pension	A transitional member may have left after minimum pension age but deferred their pension until new CARE pension age. If all service was treated as legacy scheme, they may have taken early retirement instead
Opted out of the pension scheme without qualifying service	A new scheme member may have left the pension scheme before the 2015 reforms commenced with less than three months' service and received a refund of contributions rather than remain in the pension scheme through transition to CARE. They may not have opted out had they known that

	membership after 1 April 2015 was in the legacy scheme
Added Pension	A transitional member may have taken out additional pension contract(s) to mitigate the change to pension age and plan to retire early
Added Years	A transitional member may have elected to buy added years if they had remained in the legacy scheme

14. Current policy thinking is that contingent decisions elections could be made using a universal application form backed up by the scheme's existing internal dispute resolution process (IDRP). As the IDRP rules state that there is an exemption for proceedings in respect of a dispute that has been commenced in any court or tribunal, the member would only be able to submit a dispute if they are dissatisfied with the options they are given once the regulations are in place (October 2023).

Board actions

15. The Board is asked to consider any additional types of contingent decision which have not been captured.
16. The Board is asked to consider the feasibility of a central decision-making body to improve consistency in member outcomes and how this could be facilitated.
17. Board members are asked to attend the relevant Home Office joint SAB engagement session on 9 November to feed these views into discussion on the scheme-specific contingent decisions Provision Definition Document (PDD).

Board Secretary
June 2022