

HM Revenue and Customs

Email to: pensions.policy@hmrc.gov.uk

19 June 2023

Consultation: The Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) (No 2) Regulations 2023

Thank you for your technical consultation seeking views and evidence on the draft Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) (No.2) Regulations 2023 ('the Regulations').

I respond on behalf of the Local Government Association (LGA) and the Local Government Pensions Committee (LGPC).

The LGA is a politically led, cross-party membership organisation that works on behalf of councils to ensure local government has a strong, credible voice with national government. 331 councils in England including district, county, metropolitan, unitary, London boroughs and the City of London are members of the LGA. There are 22 Welsh unitary authorities in membership via the Welsh Local Government Association (WLGA). The LGPC is a committee of councillors constituted by the LGA, the WLGA and the Convention of Scottish Local Authorities (COSLA). The LGPC considers policy and technical matters affecting the Local Government Pension Scheme (LGPS).

This response sets out the LGA's view on the draft regulations.

I hope the content is helpful. Please do not hesitate to contact me if you have any questions about this response.

Yours faithfully



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Background to the response

This response is submitted in the context of the Local Government Pension Schemes (LGPS) in England and Wales, and Scotland. The LGPS is one of the largest defined benefit schemes in the world. In England and Wales there are over 19,000 employers, 6.3 million members and assets of £400 billion. The scheme is administered locally by 86 administering authorities in England and Wales, and 11 in Scotland.

Teachers' excess service issue

In our response to the consultation on the previous set of tax rectification regulations, we mentioned that the Regulations did not cover the excess teacher service issue.

We suggested including a provision that defines 'the relevant chapter 1 legacy scheme' as the local government new scheme for certain purposes. We suggested this on the basis that it could simplify the changes needed to deliver a fair result in respect of the tax position for members with excess teacher service after the remedy has been applied.

We note the inclusion of this provision in regulation 2 of the Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023 [SI2023/113]; however, this group has not been addressed anywhere else in those Regulations or these draft Regulations.

We understand that HMRC will be considering this group separately once more clarity is available from DfE and DLUHC, who will be amending their regulations accordingly. We set out the background to these cases and some of the potential issues at the end of this response.

DfE has informed us there are approximately 18,000 teachers in scope of being rolled back into the LGPS.

Comments on the Regulations

In this section we set out our views on the Regulations. Our response concentrates on the application of the Regulations to the LGPS but also includes general comments.

- 1. Regulations 7 to 10** – in the roundtable we attended there was a discussion about whether these regulations apply to local government pension schemes. To confirm, we think these regulations are needed for local government pensions schemes and that this is delivered by the current wording.

2. Regulation 15 – lifetime allowance excess lump sum: lump sum already paid

We understand this regulation applies to all pension schemes including private pension schemes. The regulation applies where a member's pension reduces because of a McCloud recalculation and a lifetime allowance excess lump sum that has already been paid is no longer, partly or wholly, a lifetime allowance excess lump sum.

The lifetime allowance excess lump sum could have been paid in respect of a different pension scheme if the member has gone on to take further benefits after retiring from the public service pension scheme to which remedy relates.

The regulation provides that the lifetime allowance excess lump sum that has already been paid is treated as:

- a) an uncrystallised funds pension lump sum (UFPLS) where it does not exceed the individual's LTA
- b) an LTA excess lump sum where it does exceed individual's LTA.

We understand that the above only relates to the treatment of the lump sum for tax purposes. It will still have been paid as a lifetime allowance excess lump sum. This is important because the LGPS does not have the power to pay an UFPLS as it is not a money purchase scheme. This will also ensure the member is not subject to the Money Purchase Annual Allowance.

3. Regulation 28 of the Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023 [SI2023/113]

This regulation deals with retrospective reduction to existing scheme pensions due to McCloud recalculations. The regulation provides for unrecovered overpayment to continue to be authorised.

In our response to the consultation on the above regulations, we mentioned that the above regulation does not apply to survivor benefits. We would be grateful if HMRC could confirm if survivors are covered under different legislation for this purpose.

Tax and excess teacher service

Introduction

Remedy in the LGPS is very different from remedy in the other public service pension

schemes. The LGPS (England and Wales) is a single scheme that changed from a final salary structure to a career average structure from 1 April 2014. Remedy will not mean a change in scheme for LGPS members, no adjustments to pension contributions will be required and any payment of arrears of pension resulting from remedy will constitute a new BCE. Past BCEs will not be re-visited. As a result, many of the tax issues that will arise in other public service pension schemes due to the remedy will not affect current LGPS members.

Remedy will look very different for one group. Certain teachers will be rolled back into the LGPS for the remedy period. Tax implications for this group will be much more complex than for most LGPS members. The existing tax rules (and those that came into force from April 2023) may not deliver the same results for this group as for other public sector employees who will be rolled back from a career average scheme to a corresponding legacy scheme for the remedy period.

The current position

The final salary Teachers' Pension Scheme (TPS) in operation before 1 April 2015 restricted members from building up benefits in excess of full time. TPS regulations specifically prevented an additional part time contract from being pensionable in the TPS if the member also held a full time contract.

Before 1 April 2015, if a teacher held a part time teaching post in addition to a full time post, the part time post was pensionable in the LGPS, as long as the employer participated in the LGPS. All state schools and academies are LGPS employers and some private schools are LGPS admitted bodies.

The TPS rules in force from 1 April 2015 allowed members to build up pension in excess of full time. Any unprotected teachers who had a part time contract and a full time contract after that date should have been pensionable in the TPS for all their posts. The same would apply to teachers with tapered protection from the date their membership of the career average scheme started.

Protected teachers remained members of the TPS final salary scheme up to 31 March 2022. Any part time post held by a protected teacher in addition to a full time post should have been pensionable in the LGPS (providing their employer was an LGPS employer).

From 1 April 2022, all teachers are members of the career average TPS. All teaching posts are pensionable in the TPS, irrespective of the member's protection status and whether they work more or less than full time.

The effect of remedy

The implementation of the McCloud remedy from 1 October 2023 will mean changes in pension entitlements for some teachers with a part time contract and a full time contract during the remedy period – this is known as excess teacher service.

References to protected and unprotected members relate to the protection status before the McCloud remedy is introduced.

Active and deferred unprotected members: full time service will be rolled back to the TPS legacy scheme for the remedy period. Excess teacher service will be rolled back to the LGPS. The same will apply to taper protected members for any period they had excess teacher service after they joined the career average scheme. Corrections to member contributions will be needed. In general, members will have overpaid pension contributions because the contribution rates in the TPS are higher than those in the LGPS.

Members who are active in the TPS career average scheme after 31 March 2022 will have the option of transferring their LGPS benefits back to the TPS. On retirement, the member will have a deferred choice between final salary and career average benefits for the remedy period in the TPS. If the LGPS benefits have been transferred back to the TPS, they will make their decision based on the combined benefits. If the LGPS benefits are separate, they will remain separate - they will not be affected by the member's deferred choice, even if the member chooses new scheme benefits.

Active and deferred protected members: any excess teacher service will remain in the LGPS after remedy. If the member is active in the career average scheme after 31 March 2022, they may be able to transfer the LGPS benefits to the TPS career average scheme. On retirement, they will have a deferred choice between legacy and new scheme benefits for the remedy period. If the LGPS benefits are separate, they will remain separate. They will not be affected by the member's deferred choice, even if the member chooses new scheme benefits.

Unprotected pensioner members: Will be rolled back to the TPS legacy scheme in respect of the full time post. Excess teacher service will be rolled back to the LGPS. Members will be able to make an immediate choice of legacy scheme or new scheme benefits for the remedy period. For members with excess teacher service, this will be a choice between:

- Legacy scheme benefits: TPS final salary scheme in respect of their full time post and LGPS career average benefits with underpin protection for the part time post,

and

- TPS new scheme benefits: We understand that TPS is planning to introduce regulations that mean a TPS new scheme pension in payment continues to be paid by the TPS if the member makes a Section 6 election (PSPJOA 2022) for new scheme benefits.

Protected pensioner members: These members should be in the correct scheme during the remedy period – TPS for their full time post and LGPS for excess teacher service. The remedy will not change that. Any section 6 election for new scheme benefits would affect only the TPS pension associated with their full time contract. The member would remain in the LGPS in respect of excess teacher service.

Taper protected pensioner members: Assuming the member has both an LGPS and TPS pension in payment, they will be given an immediate choice between:

- Legacy scheme benefits: any excess teacher service before their ‘taper date’ will already be in the LGPS. Any excess teacher service in the remedy period after their taper date will be rolled back from the TPS new scheme to the LGPS. The pension in payment will increase.
- New scheme benefits: any excess teacher service before their ‘taper date’ will be in the LGPS. If the member makes a Section 6 new scheme benefits election, that pension will stop and the member will instead receive a TPS new scheme pension. They will already be in receipt of a TPS new scheme pension in respect of the period after their taper date. We assume TPS is planning to introduce regulations to provide for the TPS pension to be paid by the TPS.

Further permutations and complications are possible depending on:

- whether the member has retired from both the LGPS and TPS
- if so, whether the retirements happened on the same date
- whether the individual left the Scheme before or after their ‘taper date’.

Possible tax implications

The Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023 (‘the Regulations’) make provisions concerning the tax position for certain payments after the remedy has been applied. The Regulations take account of ‘rollback’ from a Chapter 1 new scheme to a Chapter 1 legacy scheme.

The LGPS is not a Chapter 1 legacy scheme. For the purpose of rollback for individuals with excess teacher service, the LGPS is “the relevant Chapter 1 legacy scheme” – see section 4(4) of the PSPJOA 2022.

The provisions in the Regulations that aim to protect the tax position of members of Chapter 1 schemes after rollback may not have the same effect if the individual is a teacher with excess teacher service who is being rolled back to the LGPS. Examples of possible problem areas follow. It is not possible to consider the implications fully as we have not yet seen how the TPS intends make further provisions under the PSPJOA 2022 Section 22(2)(f) to implement the policy in relation to this group.

Regulation numbers quoted relate to The Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023, unless indicated otherwise.

1. **Regulation 11.** There is no requirement for the TPS to share information with the LGPS about any scheme pays notice made by a member in respect of a pension input period that falls within the remedy period. Although such information would be useful to the LGPS, additional information would be required that relates to the ‘adjusted’ annual allowance tax charge that arises in the TPS legacy scheme after rollback.
2. **Regulation 12** covers the impact of an immediate choice for new scheme benefits on the annual allowance. We understand that TPS intends to pay a pension to an unprotected or taper protected member who makes an immediate choice for new scheme benefits. The wording of regulation 12 does not appear to capture a member in this group and further clarification on the tax position for these members is needed.
3. **Regulation 15(4)** covers the position for LGPS members whose annual allowance liabilities reduce as a result of regulation 14(1). There is no corresponding provision to cover members whose annual allowance liabilities in the LGPS increase as a result of rollback for members with excess teacher service.
4. **Regulation 18** covers the payment of a top-up lump sum outside the usual time period. Any additional benefits paid to an LGPS member as a result of the remedy will constitute a new benefit crystallisation event (BCE) and therefore this provision will not apply. Clarification on the position for those with excess teacher service would also be helpful. This should cover members who have already had a BCE in respect of LGPS benefits and those who only have LGPS benefits because of the rollback of excess teacher service.

- 5. Regulation 32** does cover teacher excess cases because it applies to ‘the relevant Chapter 1 legacy scheme’, not the ‘Chapter 1 legacy scheme’. However, a member with excess teacher service will be rolled back to the TPS legacy scheme in respect of their full time contract and to the LGPS in respect of the excess teacher service. Additional information must be exchanged between the schemes to ensure that the correct proportion of the tax liability is assigned to each ‘relevant’ legacy scheme.

The regulation does not cover a taper protected member who makes an immediate choice for new scheme benefits. If such a member has incurred a lifetime allowance tax charge in the LGPS in respect of excess teacher service, there are no provisions concerning the treatment of that tax liability when the pension moves to the TPS following the member’s immediate choice.

- 6. Regulation 40** provides for a member’s Fixed Protection not to be lost if their benefits increase following an election for new scheme benefits under Chapter 1 legacy scheme. It is not clear how this will operate if TPS intends to allow a taper protected member with excess teacher service to elect for new scheme benefits under the TPS, not under ‘the relevant Chapter 1 legacy scheme’.