Appendix A

Status of Report: **Public**

Meeting: **Local Pension Board**

Date: **10 November 2022**

Subject: **Scheme Manager's Report**

Report by: **The Scheme Manager**

Author: **Colin Sharpe, Scheme Manager**

For: **Discussion**

Purpose

1. To provide an update on the management of the Firefighters' Pension Scheme, and to review the approach to the immediate detriment remedy for category 2 retired members.

Recommendation

2. The Local Pension Board is asked to:

   a) Note this update and make any comments to the Scheme Manager and/or the Combined Fire Authority (CFA).

   b) Consider the approach to category 2 immediate detriment remedy for retired members and make any observations and/or recommendations to the Chief Fire and Rescue Officer (CFO), Scheme Manager and CFA.

Executive Summary

3. The Board previously received an update on 1 September 2022 and discussed the approach to Category 2 members. A decision/recommendation was deferred pending any updated information to be brought to a future meeting, ahead of the CFA meeting planned for 30 November 2022. This report provides an updated position.

4. Leicestershire Fire and Rescue Service (LFRS) Finance and HR teams continue to process day to day pensions work and the gathering of data relating to immediate detriment (McCloud/Sargeant) and the retained firefighters second options exercise (Matthews).

5. The Scheme Manager (and the Administrator) attended the Local Government Association (LGA) Firefighter Pensions AGM and Annual Conference in London on 25 and 26 October 2022.

6. No breaches have been identified for the period to 31 October 2022.

7. The risk register has been reviewed, with no significant changes proposed. It will be thoroughly reviewed for the next meeting.

8. With regards to immediate detriment, whilst discussions continue at national level, there are no significant national updates since the last meeting of the Board. However, the Board will wish to note that part of the ‘injury to feelings’ claim has been settled nationally.

9. The Board is invited to review the approach to the category 2 immediate detriment remedy for retired members. The recommendation from the Scheme Manager at this stage is to not offer category 2 members the option of taking their immediate detriment remedy in advance of the October 2023 legislation.

10. Sector updates continue to be a useful source of information; these are also referenced in the West Yorkshire Pension Fund (WYPF) report elsewhere on the agenda.

Background

Local Management and Administration

11. The local management and administration of the scheme continues. The Finance and HR teams continue to process day to day pensions work and the gathering of data relating to immediate detriment (McCloud/Sargeant) and the retained firefighters second options exercise (Matthews). Data regarding the retained scheme was provided to the LGA as part of a national scoping exercise.

12. The information provided nationally was extremely useful to the Home Office in gaining a better understanding of those affected by both Sargeant and Matthews, and to the Government Actuary Department (GAD) in its work on costing assumptions. It became apparent that further data is required, which will help the GAD and the Home Office in their work to introduce the Matthews remedy. Based on the Service’s more detailed responses to the prior data exercise, the GAD has recently selected Leicestershire to be asked to provide further data. The staff will be doing their best to provide this.

13. Meetings are held with the Regional Adviser and also with colleagues at Derbyshire and Nottinghamshire. Staff attend the LGA ‘coffee mornings’, where general updates are provided, together with a focus on a particular topic.

14. Staff also attend meetings with WYPF as the scheme administrator and a tailored monthly client report is received, which enables any specific issues to be picked up and addressed.

15. The Scheme Manager (and the Administrator) attended the LGA Firefighter Pensions AGM and Annual Conference in London on 25 and 26 October 2022. Topics included Local Pension Boards and the 2015 remedy, cyber-risk and security, The Pension Regulator, a view from the Home Office, recent case law, compensation schemes and discretions, an actuarial update, a members’ perspective from the Fire Brigades Union (FBU) and pensions dashboards. This was all very useful and provided plenty of food for thought.

16. Fire schemes (along with all other public sector schemes) are required to connect to the new national Pensions Dashboard by 30 September 2024, with a further requirement to be able to provide information about benefits (value data) by 1 April 2025 at the latest. The Dashboard will show a user their pensions information online, securely and all in one place - although it will not be a substitute for the detailed information made available by each scheme. More details can be found at https://www.pensionsdashboardsprogramme.org.uk/

17. The Scheme Advisory Board has recently written to Scheme Managers regarding the work required for the Dashboard, which is largely expected to be delegated to the Administrator (WYPF, for the CFA). It is proposed that a more detailed report be brought to a future meeting.

Breaches

18. The Pensions Act 2004 requires that The Pension Regulator must be informed of breaches of the law where that breach is likely to be of material significance. No breaches have been identified for the period to 31 October 2022.

Age discrimination remedy / immediate detriment – proceedings to date

19. The Board will recall from previous reports that following an employment tribunal and subsequent appeals, the transitional protections related to the 2015 Firefighters' Pension Scheme were found to be age discriminatory. These reports have provided a detailed background.

20. The LGA and FBU negotiated a Memorandum of Understanding (MoU) and a Framework agreement for handling Immediate Detriment cases. This was made available in early October 2021 and the CFA was to be asked to sign up at its December 2021 meeting. However, just days beforehand, the Home Office guidance underpinning the MoU was withdrawn following intervention by Her Majesty's Treasury, due to apparently fresh concerns about the level of risk and uncertainties relating to tax and associated matters. This unexpected development added to the complexities facing Fire and Rescue Authorities (FRAs). In the light of this, the CFA on 2 December 2021 agreed to pause action to address the immediate detriment and to receive a further report once matters became clearer.

21. Acting on the advice of the Chief Fire Officer and Scheme Manager, the CFA on 9 February 2022 agreed that a remedy should once again be offered to personnel approaching retirement (category 1), but that action regards those who have already retired should remain paused (category 2).

22. The CFO and the Scheme Manager regularly review the approach in the light of national developments and communications, attempting to steer a reasonable and balanced course that takes account of the benefits and risks of different courses of action. Their view has been that the current approach remains the most appropriate, although of course the Treasury position/advice is acknowledged that services should not implement any immediate detriment remedy prior to legislation being in place. This was noted by the CFA at its meeting on 15 June 2022.

23. The Board will however be aware that Fire Authorities are taking differing approaches; some continuing to offer an immediate detriment remedy to upcoming retirements and those who have already retired; others the former, but not the latter; and others neither. Anecdotally, the most common approach is to offer a remedy to personnel approaching retirement as in Leicestershire, although it is understood that more FRAs are considering offering category 2 retired members the opportunity to take their remedy earlier.

24. The Public Service Pensions and Judicial Offices Act 2022 took effect on 1 April 2022, as expected. The remaining protected members still in their legacy scheme moved into the 2015 scheme on 1 April 2022, so all active members are now in the 2015 scheme.

25. Retrospective remedy for members who had already retired (category 2) will not be implemented nationally until further legislation is enacted, which is still expected from October 2023. The PSPJO Act states that with effect from 1 October 2023 all in scope members must be rolled back into their relevant legacy scheme; and reformed service, for the remedy period, should be kept as an underpin (known as the deferred choice underpin).

26. Section 23 of the Act allows (but does not require) a scheme manager to pay compensation in respect of compensatable losses incurred by members, subject to certain conditions.

Review of remedy process for Category 2 members

27. It is timely for the Board to reconsider whether the remedy should now be offered to category 2 members in advance of the national implementation in October 2023, and to make any recommendations or observations to officers and the CFA. A decision to offer the remedy would not require category 2 members to take it in advance of the national roll out from October 2023, but would give them the option.

28. The Board will recall discussing this question at its meeting on 1 September 2022. A decision/recommendation was deferred pending any updated information to be brought to a future meeting, ahead of the CFA meeting planned for 30 November 2022. This report provides an updated position.

29. In summary, there is a clear tax cost risk to individuals and (in particular) the CFA in moving ahead of the national timetable. The following tax costs would be incurred:

    a) An unauthorised payment charge (UPC) of 40% of the remedy payment and a possible surcharge of a further 15%, making 55% in total. Under current legislation, additional pension benefits made to Category 2 pensioners more than twelve months after the original payment (i.e. retirement) are subject to this charge. This can amount to a significant cost and is an absolute legal obligation on the member (or the CFA, if the CFA were to pay it). There has been comment that the expected legislation may have retrospective effect to April 2022, however this has not been clarified by Government and should certainly not be assumed. This is the principal element which differentiates the risks of delivering immediate detriment to category

1 cases as they retire (which is already underway here), compared to category 2 pensioners.

b) The CFA could also be liable to a scheme sanction charge of up to 40%.

c) The potential clawback of tax relief already received on the contributions into the 2015 scheme, made between the date of transition (so after 1 April 2015) and the retirement date (or 31 March 2022 if earlier, as all active members are in the 2015 scheme from 1 April 2022). Generally, this tax relief would have been at the rate of 20%, unless the individual was on a higher tax band. It should also be noted that the retrospective payments of 1992 contributions to convert to remedy benefits may not be subject to tax relief. This area of tax law is not necessarily clear cut, however there is evidently a risk that this situation will prove to be the case and that the member and/or the CFA would incur a tax cost.

30. The Government's present position is that any taxation due to be paid by FRAs delivering remedy before the October 2023 facilitating legislation is payable under the current tax system, and will not be funded by the Government.

31. It is also understood that the LGA has advised that whilst the UPC must be paid, FRAs in fact do not have the discretion to deduct it from the member if they choose to allow category 2 payments before the secondary legislation. By choosing to pay remedy before October 2023, FRAs are effectively accepting the current UPC obligation. This would not be reimbursed by the Government, as things stand. The rationale for the FRA paying is of course in essence that the member should not be worse off by virtue of having suffered discrimination.

32. It should also be noted that the CFA could at a later date find itself required to reimburse the member any tax costs if the Pensions Ombudsman or the court were to hold that the CFA should not have facilitated the member to proceed (the legal background to this risk is reflected in the 'Cherry case' in 2015).

33. There is also a risk that the CFA paying the member's tax liabilities could in itself give rise to a taxable benefit, leading to a further round of tax payments/reimbursements by the CFA. It has not been possible to obtain a conclusive view on this.

34. The Board may recall some debate at its previous meeting about the scale of the financial risk. WYPF reports that, based on 35 Category 2 recalculations across its client base, the average UPC is £3,912.

35. Information from WYPF shows that for the CFA, twelve retired members may be entitled to the immediate detriment remedy. To calculate an actual cost would be a very time-consuming exercise. However, broadly, most costs are likely to be at the lower end of the potential scale. The total UPC payable by the CFA, if all eligible members were to take the remedy early (and staff resources could be found to process all the claims sooner rather than later), could therefore be in the region of £50,000 to £100,000.

36. The Board will recall an option appraisal attached to the 1 September 2022 report. This is not repeated here, because it does now seem quite clear that the CFA would have to meet the UPC and any surcharge attributable to the member, along with any scheme sanction charge. The CFA would also likely be required to pay any tax losses from switching 2015 scheme contributions back into the legacy scheme.

37. The Scheme Manager's recommendation to the Board is therefore, at this stage, to not offer category 2 members the option of taking their immediate detriment remedy in advance of the October 2023 legislation.

38. There is of course a risk that the FBU could support a legal claim here or elsewhere; and the position will be kept under on-going review as matters develop. For example, additional secondary legislation expected in the 'new year' may provide some leeway regards the UPC being payable at all; and if it is, then how it is funded.

39. It should also be noted that members will still receive their full entitlement, albeit at a later date than they may have hoped /expected - although with the benefit that no tax risks or penalties should materialise.

Age discrimination remedy / immediate detriment – administration and other matters

40. As previously reported, a lot of work continues to be required of the Finance and HR teams and the scheme administrator to prepare for the expected impact of the October 2023 legislation. Work continues to be required in respect of the second options exercise for retained firefighters employed between 2000 and 2006, who may have been disadvantaged by being treated differently to wholetime firefighters. This is referred to as the Matthews case. The LGA is coordinating a national scoping exercise, which as noted above has expanded in reach as discussions have continued.

41. The Board will recall that an employee of LFRS was selected as one of a number of potential test claimants for the purposes of an injury to feelings award. This is essentially a claim for compensation for the upset, distress or anxiety that firefighters might have suffered as a result of the discrimination. For example, the impact of being unsure about retirement age, benefits, and the options that might be available.

42. A national settlement has recently been reached for firefighters who completed the original FBU survey in 2015, with nearly 9,000 firefighters nationally set to receive £3,750 (increased to £7,250 for claimants with additional reasons for being aggrieved). The announcement by the FBU can be found at https://www.fbu.org.uk/news/2022/10/20/9000-firefighters-receive-least-nearly-ps4000-compensation-pensions-win. It should be noted, however, that the FBU states there remains a lot to be done in relation to the other claimants and potential claimants not included in this settlement.

43. Payments will be funded nationally and will take some time to come through due to the complexities and processes.

44. The FBU also notes that claims for out-of-pocket financial loss are still to be dealt with. The losses in question are, in the main, for financial advisers' fees, changed mortgage arrangements, continuing contributions after completing 30 years' service having joined at age 18-20, and opting out altogether.

Risk Register

45. Good governance requires that an appropriate Risk Register is in place and is regularly reviewed. It is also a requirement of The Pensions Regulator's code of practice on the governance and administration of public service pension schemes.

46. The Register presented to the Board on 1 September 2022 has been reviewed, and no significant updates are required. In the interests of brevity, the Register is not attached to this report. It will be thoroughly reviewed for the next meeting.

47. The implementation of the national age discrimination remedy judgements of course remains the key risk in practice.

General Sector Update

48. The LGA monthly Firefighters' pensions update bulletins focus on the administration of the scheme, immediate detriment, the retained firefighters second options exercise and wider national pensions updates. Some key points are reflected earlier in this report. The bulletins can be found at https://www.fpsregs.org/.

49. Further sector updates can be found in the Administrator's report.

Report Implications/Impact

50. Legal (including crime and disorder)

This report has been written to inform Members of the latest legal developments relating to the Firefighters' Pension Scheme and how the service is working on resolving the current situation.

The Public Service Pensions Act 2013 introduced a framework for the governance and administration of public service pension schemes. This report aims to fulfil the requirement for Members to assist the Scheme Manager in ensuring that effective administration arrangements are in place.

51. Financial (including value for money, benefits and efficiencies)

A number of financial risks continue to present themselves, including actions taken proving to not be entirely correct or with unresolved and/or unforeseen consequences. If no action had been taken, or continues to be taken, the CFA could be subject to legal proceedings, which would incur costs.

There is also a potential financial liability on the Authority and/or retiring members, for example tax costs pending the intended changes to tax regulations. This risk would become more significant if the immediate detriment remedy is offered to category 2 retired members.

Payments made under the Immediate Detriment Framework will either be a scheme payment and therefore from the pension fund account, or an employer payment which cannot be met from the pension fund account and will fall to the Authority to fund.

52. Risk (including corporate and operational, health and safety and any impact on the continuity of service delivery)

The CFA continues to face a number of risks associated with the management of pensions and the implementation of the remedy.

53. Staff, Service Users and Stakeholders (including the Equality Impact Assessment)

An equality impact assessment has not been carried out, as the Service is trying to correct inequalities as identified by court proceedings and judgements.

54. Environmental

There are no environmental implications arising from this report.

55. Impact upon “Our Plan” Objectives

There are no specific impacts, although a general impact on all ‘People’ related elements of the plan.

Appendices

None.

Background Papers

Previous Local Pension Board agendas.

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