

**Status of Report: Public**

**Meeting: Local Pension Board**

**Date: 1 September 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, including local administration, breaches, developments concerning the age discrimination remedy / immediate detriment, the risk register and sector updates.

### **Recommendation**

2. The Local Pension Board is asked to:
  - a) Note this update and make any comments to the Scheme Manager and/or the CFA.
  - b) Consider the approach to category 2 immediate detriment remedy for retired members and make any observations and/or recommendations to the CFO, Scheme Manager and CFA.

### **Executive Summary**

3. The 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).
4. No breaches have been identified for the period to 31 July 2022.
5. The risk register has been reviewed, with no significant changes proposed.
6. With regard to immediate detriment, there are no significant national updates since the last meeting of the Board.
7. The Board is invited to review the approach to the category 2 immediate detriment remedy for retired members.
8. Sector updates continue to be a useful source of information.

## **Background**

### Local Management and Administration

9. 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 has recently been provided to the LGA as part of a national scoping exercise, including additional data as the scope of the exercise subsequently increased.
10. 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. Recent topics have included outcomes from the Matthews poll of FRAs, scheme valuations, Home Office/Scheme Advisory Board engagement, the national Pensions Dashboards Programme and remedy eligibility.
11. Staff also attend meetings with WYPF as the scheme administrator and receive a tailored monthly report, which enables any specific issues to be picked up and addressed. The Board is expected to receive a verbal update from WYPF.

### Breaches

12. 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 July 2022.

### Age discrimination remedy / immediate detriment – review of approach

13. 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.
14. The Local Government Association (LGA) and Fire Brigades Union (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 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.

15. 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 regarding those who have already retired should remain paused (category 2).
16. 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. The view has been that the current approach remains the most appropriate, although the Treasury position/advice that services should not implement any immediate detriment remedy prior to legislation being in place is acknowledged. This was noted by the CFA at its meeting on 15 June 2022.
17. 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.
18. The Public Service Pensions and Judicial Offices (PSPJO) 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.
19. Retrospective remedy for members who had already retired (category 2) will not be implemented nationally until further legislation is enacted, which is 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).
20. It is however timely for this Board to reconsider whether the remedy should now be offered to category 2 members in advance of the national implementation, 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.
21. There is a clear risk to individuals and the CFA in moving ahead of the national timetable. Waiting for the tax issues to be resolved nationally will undoubtedly give the scheme member and the CFA greater certainty and security. There is however an argument that individual members should be given the opportunity to decide for themselves whether they wish to proceed sooner. In doing so, they would incur:
  - a) An unauthorised payment charge (UPC) of 55%. Under current legislation, additional pension benefits made to Category 2 pensioners more than 12 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 choose 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 ID to category 1 cases (which is already underway here), compared to category 2 pensioners.

- b) The potential clawback of tax relief already received on their 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 clearly a risk that this situation will prove to be the case and that the member and/or the FRA would incur a tax cost.
22. The Government's 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.
23. It should also be noted that the CFA could at a later date find itself required to reimburse the member for all or some of the 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); or indeed if such an approach to reimburse members were to become the sector standard.
24. An options appraisal is attached at Appendix 3, which sets out some options together with the benefits and risks to retired members and the CFA.

Age discrimination remedy / immediate detriment – administration and other matters

25. As previously reported, a lot of work is required of the Finance and HR teams and the scheme administrator (West Yorkshire Pension Fund) 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 has expanded in reach as discussions have continued.
26. The Board will be aware from the previous report that an employee of LFRS has been selected as one of a number of potential test claimants for the purposes of an injury to feelings award in the remedy proceedings. This is essentially a claim for compensation for the upset, distress or anxiety that firefighters might have suffered as a result of discrimination. For example, the impact of being unsure about retirement age, benefits, and the options that might be available.

27. The LGA has developed a spreadsheet intended to provide FRAs with a basic estimate of their financial exposure from immediate detriment. The Scheme Manager will be looking at this.
28. A national factsheet has been produced to provide scheme members with information about the timeframes associated with the remedy. Scheme Administrators are encouraged to send this to impacted members with their 2021/22 benefit statement.

### Risk Register

29. 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.
30. The Risk Register consists of relevant risks considering both the administration of pensions by LFRS staff and its relationship and work undertaken by WYPF as scheme administrator. The register is at Appendix 1 and the matrix at Appendix 2.
31. Each risk is scored as it currently is with existing actions/controls, and then further management actions/controls are identified which should have the effect of reducing the risk score.
32. The risks are essentially unchanged since the previous report. The implementation of the national age discrimination remedy judgements remains a key risk, although perhaps with an increasing likelihood of legal challenge against FRAs. The inclusion of an LFRS employee in a recent national 'injury to feelings' claim is now reflected in the register.

### General Sector Update

33. 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/>.

### **Report Implications/Impact**

34. 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.

### 35. 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.

### 36. 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.

### 37. 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.

### 38. Environmental

There are no environmental implications arising from this report.

### 39. Impact upon "Our Plan" Objectives

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

## **Appendices**

Appendix 1 – Risk register

Appendix 2 – Risk matrix

Appendix 3 – Options Appraisal for Category 2 Immediate Detriment

## **Background Papers**

Previous Local Pension Board agendas.

## **Officer to Contact**

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