

Status of Report: Public

Meeting: Local Pension Board

Date: 9 February 2022

Subject: Firefighters' Pension Scheme - Age Discrimination Remedy Update

Report by: The Scheme Manager

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For: Decision

Purpose

1. To provide an update on the developments concerning the age discrimination remedy / immediate detriment related to the Firefighters' Pension Scheme, and to note the decision of the CFA meeting earlier today regarding the approach to be taken.

Recommendation

2. The Local Pension Board is asked to:
 - a) Note this update concerning the age discrimination remedy / immediate detriment related to the Firefighters' Pension Scheme;
 - b) Note the decision of the CFA regarding the approach to be taken; and
 - c) Make any comments on the CFA decisions and the operational implications.

Executive Summary

3. It has previously been reported that following an employment tribunal and subsequent appeals, the transitional protections related to the 2015 Firefighters' Pension Scheme were found to be age discriminatory.
4. 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 However, just days beforehand, the Home Office guidance underpinning the MoU was withdrawn following intervention by Her Majesty's Treasury, due to apparently fresh concerns about the level of risk and uncertainties relating to tax and associated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.

5. In the light of this, at its meeting on 2 December 2021 the CFA agreed to pause action to address the immediate detriment and to receive a further report once matters became clearer. This was noted by the Board at its meeting of the same date.
6. Since the meeting, there has been little further national progress. Fire Authorities are taking differing approaches; some are 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.
7. The Chief Fire Officer and Scheme Manager have considered how the CFA should best be advised to proceed. It is a joint view that a remedy should once again be offered to personnel approaching retirement, but that action regards those who have already retired should remain paused. The CFA was therefore recommended to continue not to adopt the MoU.
8. A verbal update of any further developments will be provided at the meeting.

Background

9. A detailed background has been set out in previous reports. In summary:
 - From 1 April 2015, the 1995 and 2006 Firefighters' Pension Schemes were superseded by the 2015 Firefighters' Pension Scheme. Transitional arrangements were put into place to offer some protection against significant change to those firefighters close to retirement. Following an employment tribunal and subsequent appeals, these transitional protections relating to the 2015 Firefighters' Pension Scheme were found to be age discriminatory. Claimants were entitled to be treated as if they remained in the 1992 or 2006 Firefighters' Pension Schemes, up until 31 March 2022.
 - On 12 February 2021, the Employment Appeal Tribunal (EAT) gave a ruling that put pressure on FRAs to implement the remedy from the original cases without waiting for new pension legislation to be passed.
 - Following the ruling, the FBU commenced legal proceedings in the High Court for three test cases against FRAs. A settlement agreement on these cases was reached on 8 October 2021.
 - Alongside the settlement agreement, the LGA and FBU negotiated an MoU and a Framework Agreement for handling Immediate Detriment cases. FRAs adopting this would be protected from the FBU supporting further legal proceedings by scheme members; although there were concerns about processing timescales and tax.
10. On balance, the risk of not adopting the MoU appeared to be significantly higher than the risk of adopting it. The CFA at its meeting on 2 December 2021 was to be recommended to adopt the MoU. However, just days beforehand, the Home Office guidance

underpinning the MoU was withdrawn following intervention by Her Majesty's Treasury (HMT). This was due to fresh concerns about the level of risk and uncertainties relating to tax and associated matters, such as counting contributions to the 2015 scheme as having in fact been to the legacy scheme.

11. In the light of this, at its meeting on 2 December 2021 the CFA agreed a revised recommendation to pause action to address the immediate detriment and to receive a further report once matters became clearer.
12. There has been little further national progress. The Scheme Advisory Board has written an open letter to HMT on the withdrawal of the guidance to request more information on the risks and uncertainties mentioned in their assessment. Dialogue with the FBU nationally has continued.
13. The CFA has legal powers under Section 61 of the Equality Act 2010 to make payments of arrears of pension and lump sum. However, these powers do not address the uncertainties around tax and contributions.
14. The Home Office is clear that FRAs must determine what are legitimate pension costs to be accounted for, based on the scheme rules and finance guidance. This appears to include arrears of pension and lump sum where they are paid under section 61 - which allows individuals to be treated as having remained in their legacy scheme until 31 March 2022.
15. Fire Authorities are taking differing approaches; some are 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.
16. The Chief Fire Officer and Scheme Manager have considered how the CFA should best be advised to proceed. The CFA was advised of the joint view that a remedy should be offered to personnel approaching retirement, but that action regards those who have already retired should remain paused. For clarity, the CFA has therefore been recommended to continue not to adopt the MoU.
17. The rationale for this view is that:
 - The numbers of up and coming retirements are low (the service is aware of less than five in the next three months). Therefore, the risk of significant amounts of unrecoverable tax falling upon the CFA (potentially as a compensation payment to the retiring member which is not recoverable from the Home Office), is relatively low.
 - The maximum potential tax cost per retirement is estimated at around £25,000, if the member moved into the 2015 scheme from the start. The cost reduces the longer a member remained in the legacy scheme before tapering into the 2015 scheme. Moving forwards, the tax issues should be addressed to at least some extent by new legislation expected to take effect from 6 April 2022, and then by the final remedying legislation expected in October 2023.

- If the CFA does not offer the remedy, there may be a higher likelihood of a retiring member taking legal proceedings backed by the FBU, which could rapidly incur significant legal costs and consume significant amounts of senior staff time. Employee relations could also be damaged, with or without legal proceedings.
18. It should however be noted that taking an immediate detriment remedy in advance of the necessary legislation exposes the retiring member to a tax risk; hence the decision is not necessarily straightforward and a retiring member may choose to take benefits under the 2015 scheme.
 19. Attention is also drawn to the FBU circular of 19 January 2022, which states '*We will continue to meet with the LGA to see if these tax problems, which are not of the LGA's and FRAs making, can be avoided. But we have made it clear that, if necessary, we will commence further legal claims to achieve our aims. Preparation of the next round of test cases is already underway.*'
 20. The Local Pension Board will continue to be provided with progress updates, and the CFA updated as appropriate.

General Sector Update

21. Much of the current sector activity remains focussed on immediate detriment, the subject of this report. However, the latest LGA FPS bulletins, numbers 52 and 53, take a wider scope and links are provided for information in the Background Papers section of this report. These reference immediate detriment, as might be expected, and also cover various other matters.

Report Implications/Impact

22. 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.

23. 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 of breaching annual allowances pending the intended changes to tax regulations.

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. The LGA is negotiating New Burdens funding from Central Government to cover these costs, although there is a risk that it will not cover them in their entirety. The funding for personal tax liabilities ahead of changes to tax legislation is however a particular risk, and could fall to the CFA to fund.

The Authority received a grant of £37,714 from the Home Office to help with the additional costs related to McCloud. This is expected to be largely required to cover the national costs of updating pension administration software systems. The additional costs of work undertaken by the Authority and the pension administrators will need to be borne by the Authority and built into future budgets.

The Authority continues to pay a levy to the Scheme Advisory Board (SAB), to cover the cost of the national fire pensions technical advisor post and support the work of the SAB. The aim of the SAB in setting this levy is to help fire authorities to achieve cost savings by producing guidance and communications centrally for authorities to share.

24. 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.

25. 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.

26. Environmental

There are no environmental implications arising from this report.

27. Impact upon "Our Plan" Objectives

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

Appendix

None

Background Papers

Age discrimination remedy report to the Local Pension Board, 20 April 2021

<https://leics-fire.gov.uk/wp-content/uploads/2021/04/the-report-item-4-pages-9-20.pdf>

Urgent Action taken by the Chief Fire and Rescue Officer - Firefighter Pension Scheme Age Discrimination Remedy, CFA, 16 June 2021

<https://leics-fire.gov.uk/wp-content/uploads/2021/06/firefighter-pension-scheme-age-discrimination-remedy.pdf>

Firefighters' Pension Scheme - Age Discrimination Remedy Update, Local Pension Board 16 June 2021

<https://leics-fire.gov.uk/wp-content/uploads/2021/06/firefighters-pension-scheme-age-discrimination-remedy-update.pdf>

Firefighters' Pension Scheme - Age Discrimination Remedy Update, CFA, 22 September 2021

<https://leics-fire.gov.uk/wp-content/uploads/2021/09/agenda-item-8.pdf>

Firefighters' Pension Scheme - Age Discrimination Remedy Update, Local Pension Board, 22 September 2021

<https://leics-fire.gov.uk/wp-content/uploads/2021/09/agenda-item-7-1.pdf>

Taxation of public service pension reform remedy, HMRC, 27 October 2021

<https://www.gov.uk/government/publications/taxation-of-public-service-pension-reform-remedy/taxation-of-public-service-pension-reform-remedy>

Firefighters' Pension Scheme - Age Discrimination Remedy Update, CFA, 2 December 2021

<https://leics-fire.gov.uk/wp-content/uploads/2021/11/item-10-firefighters-pension-scheme-age-discrimination-remedy-update.pdf>

Firefighters' Pension Scheme - Age Discrimination Remedy Update, Local Pension Board, 2 December 2021

<https://leics-fire.gov.uk/wp-content/uploads/2021/11/item-5.-firefighters-pension-scheme-update-age-discrimination-remedy.pdf>

FPS Bulletin 52, December 2021

<https://www.fpsregs.org/images/Bulletins/Bulletin-52-December-2021/Bulletin-52.pdf>

FPS Bulletin 53, January 2022

<https://fpsregs.org/images/Bulletins/Bulletin-53-January-2022/Bulletin-53.pdf>

FBU, Immediate detriment MoU update, 19 January 2022

<https://www.fbu.org.uk/circulars/2022hoc0026mr/immediate-detriment-mou-update>

Officer to Contact

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