

Status of Report: Public

Meeting: Local Pension Board

Date: 22 September 2021

Subject: Firefighters' Pension Scheme - Age Discrimination Remedy Update

Report by: The Scheme Manager

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For: Information

Purpose

1. To provide an update on the developments concerning the age discrimination remedy / immediate detriment related to the Firefighters' Pension Scheme, together with the actions being taken in response.

Recommendation

2. The Board is asked to note this update concerning the age discrimination remedy / immediate detriment related to the Firefighters' Pension Scheme.

Executive Summary

3. The age discrimination remedy is of great significance to certain members of the Firefighters' pension scheme and to the Combined Fire Authority. It is important that the CFA as Scheme Manager, together with the Local Pension Board, remains aware of developments and actions. Therefore, this report will also be presented to the CFA at its meeting on 22 September 2021.
4. This report provides an update as at the time of writing. As this remains quite a fast moving area, a verbal update of any further developments will be provided at the meeting.

Background

Role of the CFA and the Local Pension Board

5. The CFA is the Scheme Manager for the Firefighters' Pensions Scheme, as defined in the Firefighters' Pension Scheme (England) Regulations 2014. The CFA holds responsibility for managing and administering the Scheme. Under the CFA's Constitution, and as permitted by the Regulations, the CFA has delegated the scheme manager functions to an officer. However, this does not absolve the CFA of responsibility.
6. The Local Pension Board assists the CFA to secure compliance with regulations, any other legislation relating to governance and administration, and requirements imposed by the

Pensions Regulator. The Board also ensures the effective and efficient governance and administration of the scheme. The Board receives detailed reports at each meeting to support it in the discharge of its responsibilities.

The Age Discrimination Remedy

7. The CFA and the Board have received a number of updates about the impact of the age discrimination remedy concerning the Firefighters' Pension Scheme. In the most recent reports on 16 June 2021, the Chief Fire Officer (CFO) provided background to the remedy and set out a number of urgent actions taken to mitigate the immediate pressures.
8. By way of a reminder, in 2015 the Government introduced reformed pension schemes across all the main public service workforces. Of particular note to this report, transitional protection was available for members closest to their Normal Pension Age to stay in their legacy schemes (1992 and 2006 for firefighters) for the transition period between April 2015 and March 2022 (or earlier, if retiring). The Court of Appeal later found this transitional protection to be discriminatory against younger members, known as the McCloud and Sergeant judgements. Since then the government has been working to address the discrimination. Also relevant is the Employment Appeal Tribunal judgement related to the Firefighters' Pension Scheme, handed down on 12 February 2021.
9. Between July and October 2020, the Government consulted on proposals to remove the discrimination. In February 2021, the implementation of a 'deferred choice underpin' was announced. This allows eligible members a choice when they retire, of which pension scheme benefits they would prefer to take for the remedy period (April 2015 through to March 2022). Where members are already receiving pensions, they will be given a choice as soon as practicable.
10. From 1 April 2022, all those who continue in service will do so as members of the 2015 scheme, regardless of age. This means all members will be treated equally from that date.

Update on urgent actions taken by the CFO

11. The CFO undertook four urgent actions, as agreed by the Local Pension Board on 20 April 2021 and reported to the CFA on 16 June 2021. The progress against each of these is detailed below:
 - a) Cessation of the tapering of members with transitional protection onto the FPS 2015 scheme with immediate effect – this has ceased.
 - b) Allowing Pension Scheme members who are approaching retirement and any ill health related cases the choice to have retirement benefits calculated in their legacy scheme or in the FPS 2015 - this continues to be progressed for the small number of urgent cases, including members approaching retirement. Our early experience demonstrates the complexities and uncertainties of the calculations, implications and decision making for both the employee and the employer. Scheme members are being asked to provide as much notice as possible of their intended retirement date, to allow time for the necessary calculations and for the member to be able to consider which scheme to select. Advanced notice also facilitates any retrospective contributions being made whilst the member remains in employment, which is

beneficial from a tax perspective. Each case takes a number of days to process, depending upon the individual complexity.

- c) A retrospective review of the calculations for pensioners who retired after 1 April 2015 on the grounds of ill health with a view to moving them back into their legacy scheme at an early stage, where appropriate – this has not yet progressed, due to complications and uncertainties around the calculations and the focus on members approaching retirement.
- d) A retrospective review of all retired members since 1 April 2015 with a view to moving them back to their legacy scheme, where appropriate – this has not started, pending further clarity nationally (as discussed below) and the focus on the more immediate categories above.

Update on response by LFRS, WYPF and Warwickshire County Council

- 12. The CFO and his team continue to devote significant time and effort to immediate detriment and the wider pension changes, which are a considerable call on resources. For example, information is being made available to employees, a 'roadshow' with the shared pensions adviser is being planned, the finance team is employing an additional staff member funded by the grant previously received, as noted above urgent cases are being processed, and an information pack and waiver form has been made available to members approaching retirement. An internal coordination group meets regularly chaired by the Assistant Chief Fire and Rescue Officer (ACFO); and strategic level meetings take place with the ACFO, Scheme Manager and regional adviser.
- 13. West Yorkshire Pension Fund (WYPF) as the scheme administrator is seeing a significant workload increase, in processing members approaching retirement, arranging data collection to support the full response in due course, and working with software suppliers. This seems likely to affect turnaround times. Officers keep in close touch with WYPF, and the Local Pension Board receives detailed update reports from WYPF. As noted above, members intending to retire are being asked to provide as much notice as possible.
- 14. There are potential implications for Warwickshire County Council as payroll provider, in providing the necessary data and in the required format for WYPF to undertake the remedy calculations.

Government latest response

- 15. The Government states that a range of national guidance, decisions and regulatory/legislative changes are required to enable the age discrimination remedy to be implemented nationally in a certain and consistent manner, thereby much reducing the risk for scheme employers and retired members.
- 16. On 19 July 2021, HM Treasury introduced the Public Service Pensions and Judicial Offices Bill to the House of Lords. The Bill sets out in law how the Government will remove the discrimination in the way that the 2015 reforms were introduced. This is the primary legislation which will close final salary schemes for accrual past 31 March 2022 and moves all remaining members into FPS 2015, while ensuring that existing transitional protections such as the final salary link and double accrual are retained.

17. Eligible members who were moved to FPS 2015 will be moved back into their legacy pension scheme for the period during which the discrimination occurred, between April 2015 and March 2022. When payment of pension benefits commences (i.e. at retirement), they will receive a choice of which pension scheme benefits they would prefer to take for the period. This is called a 'deferred choice', or 'deferred choice underpin'. The differences between the legacy and reformed pension schemes mean the set of benefits that is best for members depends on personal circumstances and preferences at the point of retirement.
18. The Home Office advises that provisions for the deferred choice will be implemented by 1 October 2023 for all members. Schemes may implement provisions for deferred choice earlier where possible. Schemes are expected to carry out consultations on more detailed scheme specific changes to both prospective and retrospective scheme regulations.
19. The potential tax implications of retrospective changes have emerged as a key concern for scheme members and authorities alike. Where the changes legislated for through the Bill produce disproportionate tax results that cannot be resolved through powers provided in the Bill, the Home Office advises that further changes will be made in the upcoming Finance Bill and scheme regulations. For example, the current framework does not straightforwardly permit individuals to ask their pension scheme to settle Annual Allowance charges from previous tax years by reducing their future pension benefits (known as 'Scheme Pays') – this is being addressed. Further details of any further measures are expected in due course.
20. The Government accepts that affected members who have retired since 1 April 2015 or will retire before the deferred choice underpin is introduced, already have an entitlement to be treated as a member of their legacy scheme for the remedy period. However, as noted above, giving effect to this entitlement before legislation is implemented creates complex issues, particularly where there are interactions with the tax system. It is not clear that all of these cases can consistently be processed under pre-existing legislation without potentially creating adverse impacts. The Government is continuing work to resolve these issues and to make legislative changes.
21. The Government acknowledges however that many pension administrators and scheme managers are already processing some immediate detriment cases. At the request of the police and fire sectors, in June 2021 the Home Office issued informal and non-statutory guidance to assist. For the purpose of this guidance, immediate detriment covers members who become eligible to retire and want all their benefits paid from their legacy scheme; and ill health retirement where the member is left without a payment but would be eligible in their legacy scheme. Any scheme members that fall within either of these two categories can have their pensions calculated and put into payment according to the guidance. The guidance should not be applied to scheme members who have already retired and are in receipt of their pension payments. As noted above, LFRS is processing members currently retiring and approaching retirement, in common with a number of other Fire and Rescue Authorities (FRAs).
22. The LGA issued a further information note (version 2), referencing the Home Office Guidance.

23. The Home Office also considers that provisions made through scheme regulations and established via the Bill should help ensure a consistent approach is taken to processing more complex cases; and in turn help mitigate the risk of adverse tax impacts for members.
24. The Fire Brigades Union (FBU) notes on its website that the new legislation will not provide a remedy for all cases until October 2023, unless a scheme can commit the administrative resources to sort them out sooner – and the FBU anticipates that most schemes will not.
25. It should also be noted that the Home Office guidance does not provide a definitive or complete resolution to all of the issues arising from immediate detriment cases. All cases processed using this guidance will need to be revisited once the full detail of the Government's approach is finalised, and legislation is in place. This revisiting may include some considerable adjustments regarding tax, potentially affecting the individuals and the Authority.

The next national steps for the Firefighters' Pension Scheme

26. It is intended that legislation to move members to the reformed schemes (the 2015 scheme, for firefighters) will take effect on 1 April 2022. Legislation to implement the deferred choice underpin will take effect by 1 October 2023 at the latest. Scheme specific policy decisions will also be taken, and necessary legislation drafted.
27. The Home Office will engage with stakeholders including the Firefighters' Pensions Scheme Advisory Board. The Home Office will also continue to engage with scheme managers and administrators to allow them to prepare for implementation of the deferred choice underpin.
28. Following the Employment Appeal Tribunal judgement in February 2021, the FBU issued court proceedings against two FRAs for an initial three test claimants who have already retired, aiming to require their employing FRAs to address the immediate detriment remedy. The claims are due to be heard in the High Court on 20 or 21 October, with the FBU having applied for summary judgement (as the FBU contends that the FRAs have no realistic defence).
29. There have been a number of without prejudice meetings with the LGA and the solicitors acting for the FRAs and further meetings are scheduled. The cut-off date to reach agreement before the High Court hearing is 20 October.
30. The FBU reports that the current negotiations, set against the backdrop of the legal challenge, seek to address the immediate detriment issues and provide a timeframe for the FRAs to follow to process retirements and resolve detriment for those already retired. The FBU reflects that there is no guarantee that all issues will be able to be resolved, but if they cannot be agreed through the negotiations then the FBU expects they will be dealt with in the October hearing.
31. Once the detailed way forward has been determined by agreement or court decision, there will be significant workloads for some considerable time as all the affected individuals are worked through and the detail of how to address particular complexities becomes clearer.

Report Implications/Impact

32. 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 legal implications of the age discrimination case, transitional arrangements and immediate detriment issues are as set out in the body of the report.

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.

33. 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, the CFA could be subject to legal proceedings, which would incur costs. There is also a potential financial liability on retiring members, for example tax costs of breaching annual allowances pending any changes to tax regulations. The report sets out some of the actions and mitigations being taken.

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

The CFA faces a number of risks associated with the management of pensions and the implementation of the remedy.

35. 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.

36. Environmental

There are no environmental implications arising from this report.

37. Impact upon "Our Plan" Objectives

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

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>

Home Office - Guidance on treatment of 'Immediate Detriment' cases, 10 June 2021

<https://www.fpsregs.org/images/Age-discrimination/Home-Office-informal-immediate-detriment-guidance-10-June-2021.pdf>

LGA – Immediate detriment information note (version 2)

<https://www.fpsregs.org/images/Age-discrimination/LGA-immediate-detriment-information-note-version-2-June-2021.pdf>

Home Office - McCloud/Sargeant – Public Service Pensions and Judicial Offices Bill
Frequently asked questions (FAQs)

<https://www.fpsregs.org/images/Age-discrimination/PSPJO-Bill-Home-Office-FAQ-FPS-August-2021.pdf>

FBU Pensions update, 23 August 2021

<https://www.fbu.org.uk/circulars/2021hoc0445mr/pensions-update>

FPS Bulletin 48, published 31 August 2021

<https://www.fpsregs.org/images/Bulletins/Bulletin-48-August-2021/Bulletin-48.pdf>

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