

Status of Report: Public

Meeting: Local Pension Board

Date: 16 April 2021

Subject: Firefighters' Pension Scheme - Age Discrimination Remedy

Report by: The Interim Chief Fire and Rescue Officer and The Treasurer

Author: Callum Faint, Interim Chief Fire and Rescue Officer

For: Decision

Purpose

1. To inform the Local Pension Board (LPB) of the issues concerning Firefighters' Pension Scheme (FPS) arrangements following the Employment Appeal Tribunal (EAT) judgement handed down on the 12 February 2021, and to seek support for the recommendations set out below.

Recommendation

2. It is recommended that, noting further advice and guidance from the Local Government Association (LGA), Her Majesty's Revenue and Customs (HMRC) and Her Majesty's Treasury (HMT) is likely in the near future, that
 - a) the Local Pension Board supports the following:
 - i. The tapering of members on to the FPS 2015 scheme shall cease with immediate effect;
 - ii. Pension scheme members who are approaching retirement and any ill health related cases to be provided with the choice to have retirement benefits calculated in their legacy scheme or in the FPS 2015
 - iii. 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;
 - iv. A retrospective review of all retired members since 1 April 2015 with a view to moving them back to their legacy scheme, where appropriate.
 - b) The LPB notes that the Chief Fire and Rescue Officer and Treasurer using existing delegated powers and following consultation with the Chairman and Vice Chairman of the Combined Fire Authority (CFA), will request the Scheme Administrator to implement the above

recommendations and will meet any necessary and appropriate costs including any identified additional internal resource;

- c) The LPB notes that a further report will be submitted when further advice and guidance is received to enable the LPB and CFA to consider the wider implications.

Executive Summary

3. This report highlights the changing environment regarding the outcomes of this ruling and provides an update on the latest position relating to FPS administration arrangements.
4. The report includes details of the legal implications associated with the 2015 FPS and how the age discrimination remedy presents new and significant risks to the CFA (as Scheme Manager).
5. The consequences and risks to the CFA are detailed within this report (in paras 28 to 31), but essentially show that the previous stance of waiting for full and detailed legal resolution and guidance from HMT and HMRC to rectify the issues has been determined to be an unacceptable approach following conclusion of an Employment Appeal Tribunal (EAT) on 12 February 2021 (as detailed in paras 18 and 19).
6. The report explains that the Fire Brigades Union (FBU) is actively pursuing legal action on the outcome of the High Court ruling (as detailed in paras 20 and 21) at a national and local level (see letter to the Pension Scheme Manager attached at the Appendix) and that FRAs are facing these issues and working together through the LGA to determine the best approach to minimising risks, but also to ensure that individual scheme members receive the correct pension and payments.
7. The report sets out in paras 26 to 27 the actions taken by the Chief Fire and Rescue Officer under the Urgent Action procedure (following consultation with the Chairman and Vice Chairman of the CFA to take action to request the Scheme Administrator to implement a series of recommendations to mitigate risks with further reports to be submitted to the LPB and CFA when further advice and guidance is received. It is unlikely that actions proposed will perfectly resolve all of the issues and some alterations may be needed in the future.

Background

The History

8. In 2015, the Government introduced reforms to public service pensions, meaning most public sector workers (including firefighters) were moved into new pension schemes in 2015 and some members of the existing pension schemes (1992 and 2006) were subject to 'transitional protection' which was

made available, or denied, to existing members of the relevant schemes on the grounds of age.

9. In December 2018, the Court of Appeal found that the 'transitional protection' offered to some members of the FPS was discriminatory on the grounds of age against younger members. The judgement came after two Employment Tribunals concerning the pensions of Judges (McCloud) and Firefighters (Sargeant) respectively.
10. This judgment was appealed by the Government and the appeal was rejected in July 2019 and the cases were remitted to Employment Tribunal remedy hearings. The case was referred to Employment Tribunal (ET) to determine remedy. An interim declaration was made in December 2019 by the ET that claimants were entitled to be treated as if they remained in their legacy schemes.
11. In July 2020, the Government published a consultation outlining proposals regarding public service pensions and on the 4 February 2021, the Chief Secretary to the Treasury issued a statement advising that Government had considered responses to the consultation announcing it will implement the 'deferred choice underpin' (DCU). This will give eligible scheme members a choice at the point their pension becomes payable, of whether they wish to receive benefits from their legacy scheme or benefits equivalent to those that would have been available under their reformed schemes in relation to their service between 1 April 2015 and 31 March 2022. In the meantime, eligible members will be deemed to have been members of their legacy schemes for any period of service between those dates.
12. This statement also confirmed that the legacy schemes will close on 31 March 2022. From 1 April 2022, all those who remain in service will do so as members of the reformed schemes that were introduced in 2015. Benefits built up in the legacy schemes will be protected. It is important to note that it is the 'transitional protection' arrangements based upon members' number of years to normal pension age that were found to be unlawful. Introducing new schemes for existing staff has not been found to be unlawful.
13. The Government has indicated that it accepts the Court's decision and has confirmed that it will remove the difference in treatment and will bring forward new primary legislation, when parliamentary time allows, to provide requisite powers to deliver these changes to public service pension schemes.

Pension Administration

14. As a result of the judgements, arrangements for existing members to transfer into the FPS 2015 are no longer needed until 1 April 2022 when all members will be transferred. Transferring members will need to have a series of calculations completed at this time so that their final benefits of their legacy scheme can be established.

15. The benefits accrued by members who have tapered into the FPS 2015 will need to be reviewed allowing their final salary benefits to be aligned to their legacy scheme. This involves complex administrative processes with adjustments to pay, employer and employee contributions, tax relief, and pension tax liabilities.
16. The Home Office issued informal guidance direct to Fire and Rescue Authorities (FRAs) in August 2020 regarding the treatment of immediate detriment cases in advance of a decision on the Government's final approach to removing the age discrimination. However, this guidance contains significant gaps, particularly in the areas of how to deal with the tax implications and pension contribution holidays. Those affected and deemed to be 'immediate detriment' cases include those scheme members who were in service on or before 31 March 2012 and on or after 1 April 2015 (including those with a qualifying break in service of less than 5 years) and who did not benefit from full protection and were moved into the 2015 FPS on or after 1 April 2015 and (1) who become eligible to retire with an ordinary pension and want to have all their benefits paid from their legacy scheme (i.e. do not accept deferred 2015 FPS benefits); or (2) who do not qualify for lower-tier (and therefore higher-tier) ill-health pension under the single pot Ill-Health Retirement (IHR) arrangement BUT would do so under the IHR arrangements in their legacy scheme.
17. Any immediate detriment cases where the pension is put into payment now may need to be revisited if the Government's final approach includes the application of interest on owed employee contributions and the FRAs should ensure that any members making a decision under this guidance are aware of, and accept, this condition. This introduces significant risk to FRAs as it is not supported by legislation and any implementation may lead to further legal challenge in the future once the final position is known.

Transitional Protections Pensions Claims: Schedule 22 Appeal Judgement

18. On 12 February 2021, the EAT gave its judgment on a separate (but related) case¹. The case related to three parts of the Equality Act 2010:
 - **Schedule 22** gives a defence where an employer is required by legislation to act towards its employees in a way which is discriminatory;
 - **Section 61** prohibits employers from acting in a manner which discriminates on the grounds of age;
 - **Section 62** – provides an opportunity for trustees or managers who did not otherwise have the power to make non-discrimination alterations to alter a scheme.

¹ London Fire Commissioner, West Midlands Fire and Rescue Authority, Cornwall Fire and Rescue Authority, South Wales Fire and Rescue Authority v Ms R Sargeant and Others, Daniel Bebbington, Michael Bygrave, Mark Dodds, Emma McEvoy, Secretary of State for the Home Department, The Welsh Ministers- (Transitional Protections Claims (Appeal No. UKEAT//0137/17/LA (V)))

19. The FRAs' appeal was based on the argument that the FRAs did not make the legislation which was found by the Court of Appeal to be discriminatory on grounds of age but were legally obliged to follow it because it was the law (Schedule 22). The firefighter respondents argued that the discriminatory provisions were overridden by s.61 of the 2010 Act, so that the authorities were no longer required to apply discriminatory rules, meaning that the Sch.22 defence was not available. The EAT upheld this argument and decided that the FRAs cannot rely on the Schedule 22 defence – that is that FRAs should have followed Section 62 and passed a resolution making non-discrimination alterations to the scheme.
20. This ruling requires all FRAs to implement the remedy from the original ET cases without waiting for new pension legislation to be passed which had been the original intention. Following this ruling the Fire Brigades Union (FBU) has commenced legal proceedings against two FRAs in the High Court on behalf of three retired firefighters looking to set a legal precedent for the treatment of hundreds of other retired members. The FBU have communicated openly that it will take legal action against every employer on behalf of each and every member if outstanding cases are not resolved immediately and will seek to recover all of its legal costs if this is required.
21. On 11 March 2021, a letter was received from the FBU to the LPB Scheme Manager requesting that immediate action is undertaken in recognition of the ruling, reversing the discrimination suffered by their members by allowing those facing immediate detriment access to their pensions. The letter is attached at the Appendix.
22. Notwithstanding the potential for legal challenge in the near future, there is general acceptance across FRAs that taking immediate action in relation to the ruling is the right thing to do, cognisant of the risks and difficulties in implementing the remedy due to the lack of legislation, guidance and agreement on the approach to take. Indications suggest over 25 FRAs across the UK are adopting this approach.
23. Further clarity is anticipated from the Government regarding the treatment of immediate detriment cases (see para 20) in April 2021, which may alleviate some of the issues and unknowns. However, the risk of waiting for this is considered by Officers to be higher than approving the recommendations and taking action now. This position will be reviewed once clarity is received from the Government so this may not be the very final outcome.

Actions Proposed

24. The guidance available for dealing with each pension scheme member is likely to change over the coming months or years. However, to minimise the risk of legal action and associated costs against the CFA whilst considerate of the impact to individual scheme members, it is recommended that the LPB support the Chief Fire and Rescue Officer and the Treasurer in making the following actions:

- a) The tapering of members on to the FPS 2015 scheme shall cease with immediate effect.
This will reduce complications and issues associated with calculations further into the process and reduce confusion. **Please note** – The Interim Chief Fire and Rescue Officer and Treasurer have taken urgent action between meetings to bring this measure into effect.
 - b) Pension scheme members who are approaching retirement and any ill health related cases to be provided with the choice to have retirement benefits calculated in their legacy scheme.
This may be complex and involve a number of calculations that need to account for the possibility of individuals owing contributions to the scheme. This is likely to result in personal tax liability for the individual to deal with. Some retirement cases will be relatively easy to resolve whereas some will be more complicated;
 - 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;
 - d) A retrospective review of the calculations for all retired members since 1 April 2015 with a view to moving them back to their legacy scheme, where appropriate.
25. The membership of the LPB comprises of an equal number of employer and member representatives and its purpose is to assist the CFA in its role as Scheme Manager. Employer representatives shall be CFA Members provided they do not exercise delegated responsibility for discharging the Scheme Manager function of the CFA.
26. Given the significance of the issue and the potential costs likely to arise in terms of the administration as a result of the actions proposed above, this matter needs the approval of the CFA. The next CFA meeting is in June 2021 and as the recommended course of action needs a timely decision, the Chief Fire and Rescue Officer dealt with this matter under the Urgent Action procedure as set out in the CFA's Constitution.
27. The LPB should note that the Chief Fire and Rescue Officer and Treasurer using existing delegated powers and following consultation with the Chairman and Vice Chairman of the CFA, will request the Scheme Administrator to implement the above recommendations and will meet any necessary and appropriate costs including any identified additional internal resource.

Consequences and Risks to the CFA

28. The lack of definitive guidance and legislation in relation to managing the issues associated with the FPS age discrimination remedy present risk of legal challenge, either from the FBU as set out in para 25 of this report, or in the future once the final position is known.

29. In the absence of national guidance there will be inconsistencies in the way that FRAs respond to the situation and a risk of challenge as to why there is not uniformity. Officers are confident in their approach to this matter, which is consistent with that of a number of FRAs including Derbyshire Fire and Rescue Service and Nottinghamshire Fire and Rescue Service as ascertained through joint working / intelligence sharing.
30. These issues affect scheme members as well as FRAs. If any amendments are made to the scheme before legislation is approved (which is not anticipated until October 2023) or guidance provided, it will need to be based on many assumptions. If these assumptions subsequently turn out to be incorrect and require amending there are likely to be financial implications to both the CFA and scheme members. These costs cannot be determined at this stage but for the CFA are likely to be linked to additional work contracted to pension administrators and the need for additional internal resource.
31. The identified consequences of the Home Office Immediate Detriment guidance on scheme members and the CFA include:
 - i. The cost of any subsequent court actions should the assumptions made in implementing the remedy turn out to be incorrect once new pension legislation is passed;
 - ii. Amendments to the members' lump sums could create additional personal tax charges;
 - iii. Amendments to members' accrual rates could lead to changes to their annual allowance and lifetime allowances increasing personal tax charges;
 - iv. Changes to members' pension contributions will affect tax relief, with any arrears collected presenting tax implications from previous years;
 - v. Employers' contributions may need to change to reflect changes to employees' contributions placing additional pressure on budgets;
 - vi. The No Detriment note from the Home Office and the Government consultation response both state that pensions of members who have already retired and are in receipt of their benefits should not be retrospectively amended as these contain complexities that still need resolving;
 - vii. Contribution holidays will need to be considered for any members who may have exceeded their maximum required years in the 1992 FPS as a result of being tapered into the 2015 FPS;
 - viii. Unclear how any added years purchased as part of the 2015 FPS are transferred back into the 1992 FPS where added years were not permitted;
 - ix. Unclear on the mechanism for putting members back into the 1992 FPS which is now closed and cannot be reopened;
 - x. Unclear how interest on members' contributions will be calculated and dealt with;
 - xi. Unclear how divorce sharing orders will be dealt with;
 - xii. Ensuring that accurate information is provided to members – there is a risk of future legal action if appropriate information is not provided;

- xiii. The lack of skilled pension administration staff with the knowledge to manually calculate pensions in the absence of externally provided updated software, creating an increased risk of errors and delays in calculations.

Consequences and Risks to Fire Fighters

- 32. It is helpful to appreciate the issues and risks that scheme members face:
 - i. Early implementation may result in lost opportunity in the future, for example if a window of opportunity is opened in a future year for tax adjustments this may exclude those members who have already had remedy applied;
 - ii. There is no access to self-help pension software as it will need developing and cannot even commence until central government guidance is received. Members need to ascertain manual calculations from pension administrators which has time bound limitations;
 - iii. The arrangements for staff eligible for and considering early retirement after April 2022 are unclear with legislation expected to be enacted in October 2023.
- 33. These lists are not exhaustive, and Officers are working closely with the LGA, pension administrators and other FRAs to identify further risks and consider ways of mitigating them.

Communications with Scheme Members

- 34. The Frequently Asked Questions released by the Home Office in February 2021 will be communicated internally to employees. This ensures that information released is accurate, consistent and appropriate. Further information will be released as it becomes available.
- 35. An update will be shared across the Service post this meeting, with the purpose of updating interested parties on any developments or decisions.

Report Implications/Impact

- 36. Legal (including crime and disorder)
 - a) This report has been written to inform Members of the current legal cases relating to the Firefighters' Pension Schemes 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.
 - b) 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 Pension Board members to assist the

Scheme Manager in ensuring that effective administration arrangements are in place.

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

- a) A number of financial risks are associated with these matters. If no action is taken it is likely there will be a number of legal challenges against the CFA, which will attract associated costs. There is still the potential that in taking the immediate recommended actions, these may prove to be not entirely correct (when further guidance is issued). However, the anticipated cost of any further corrections is expected to be less if action is taken now, an approach being mirrored by an increasing number of FRAs.
- b) There is also an anticipated financial liability to some scheme members who are affected by the remedy. Annual pension contribution limits may be breached, unless national tax rules are changed.

38. 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 which are outlined in this report.

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

An equality impact assessment has not been separately carried out as the purpose of this report is to inform members on how the Service is trying to correct inequalities identified by the recent court cases.

40. Environmental

There are no environmental implications arising from the recommendations in this report.

41. Impact upon "Our Plan" Objectives

There are no direct links to our plan, however there are clear impacts on all "People" related elements of the Plan.

Background Papers

Home Office Informal Guidance issued August 2020 -

<https://www.fpsregs.org/images/Age-discrimination/Home-Office-immediate-detriment-guidance-21-August-2020.pdf>

Frequently Asked Questions Released by the Home Office in February 2021 -

<https://www.fpsregs.org/images/Age-discrimination/Home-Office-public-service-pension-schemes-consultation-response-Fire-FAQs-4-February-2021.pdf>

Public Service Pensions Consultation Response and Update - Statement made on 4 February 2021-

<https://questions-statements.parliament.uk/written-statements/detail/2021-02-04/hcws757>

Appendix

Letter from the Fire Brigades Union to the Pension Scheme Manager requesting that action is undertaken with immediate effect.

Officers to Contact

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Dear Colin

Re: AGE DISCRIMINATION 1992 FPS AND 2006 NFPS – Immediate Detriment Cases

In relation to the claim of Age Discrimination in the 1992 FPS and 2006 FPS, brought by the Fire Brigades Union (FBU) in 2016, the most recent Employment Appeal Tribunal (EAT) judgment, *London Fire Commissioner & Others v Ms R Sargeant & Others UKEAT 0137 17 LA*, FRAs argued that they should not be held responsible, claiming that they had no choice but to apply the regulations that were put on the statute book by the government in 2015, even if they were discriminatory.

This issue was lost at the Employment Tribunal in 2016, the appeals to that decision continued and the specific issue appealed by the FRAs (that they could not be held responsible for age discrimination) was heard at EAT 16 December 2020. This was subsequently handed down on 12th February 2021, following a fresh appeal by Employers, reaffirming the discriminatory nature of the regulations.

Employers and Local Pension Boards have known since 2016 that they would have to address these cases for our members who have already retired and who are already losing money. The FBU has taken this action because even though the courts have told the employers that they do not have to wait to pay our members what they are owed most employers have indicated that they will still await further government guidance from the Treasury and the tax authorities. No further guidance is required. The courts have been clear in what must be done.

The FBU message is clear: Employers must resolve these cases without delay. If employers do not act immediately the FBU will inaugurate legal proceedings and shall claim the legal costs, costing authorities thousands of pounds.

To reaffirm this, legal proceedings have been issued in the High Court, for three test cases, and served on 3rd March 2021 to compel Fire and Rescue Authorities (FRAs) to pay our retired members the pension that they are entitled to, the pension that they earned serving their communities.

Therefore, on behalf of our members, we strongly insist that the Leicestershire Local Pension Board recognises this ruling and takes action to reverse the discrimination suffered by our members and ensure action is undertaken to allow members of the FPS facing immediate detriment are allowed to access their pensions with immediate effect. We await a response within 14 working days of the date of this letter, indicating whether the Fire and Rescue Authority will comply immediately with this ruling.

Yours sincerely, Mark

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