

Status of Report: Public

Meeting: Local Pension Board

Date: 2 December 2021

Subject: Firefighters' Pension Scheme - Age Discrimination Remedy Update

Report by: The Scheme Manager

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For: Decision

Purpose

1. This report provides an update on the developments concerning the age discrimination remedy / immediate detriment related to the Firefighters' Pension Scheme, and to note the decisions of the CFA regards adopting the national Memorandum of Understanding and the order in which individual cases will be processed. A sector general update is also referenced.

Recommendations

2. The 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 adoption of the national Memorandum of Understanding and associated Framework, and the order for dealing with immediate detriment cases; and
 - c) Make any comments on the CFA decisions and the operational implications.

Executive Summary

3. Members 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.
4. The Local Government Association (LGA) and Fire Brigades Union (FBU) have negotiated a Memorandum of Understanding (MoU) and a Framework agreement for handling Immediate Detriment cases. Each Fire and Rescue Authority (FRA) is required to decide whether to adopt this.
5. On balance, the risk of not adopting the MoU appears to be significantly higher than the risk of adopting it. The Authority is in effect already implementing the MoU for Category 1 members, these being scheme members approaching retirement before April 2022.

6. Given the challenges of processing all the likely claims within the timescales set out in the MoU, a priority order for Category 2 members (those who have retired since 2015) has been proposed to the CFA.
7. The CFA is scheduled to meet immediately before this Board to consider adopting the MoU and the priority order, hence the decisions of the CFA will be reported verbally to the Board at its meeting.
8. An update on how the Authority is progressing immediate detriment work generally is provided.
9. 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

10. From 1 April 2015, the 1995 and 2006 Firefighter's Pension Schemes were superseded by the 2015 Firefighter's Pension Scheme. Transitional arrangements were put into place to offer some protection against significant change to those firefighters close to retirement.
11. Following an employment tribunal and subsequent appeals, the transitional protections related to the 2015 Firefighters' Pension Scheme were found to be age discriminatory.
12. The case was referred to the Employment Tribunal (ET) to determine remedy. An interim declaration was made in December 2018 by the ET that claimants were entitled to be treated as if they remained in the 1992 or 2006 Firefighter's Pension Schemes.
13. On 12 February 2021, the Employment Appeal Tribunal (EAT) gave its judgment on a separate, but related, case (Transitional Protections Claims). The ruling has put pressure on FRAs to implement the remedy from the original ET cases without waiting for new pension legislation to be passed.

Adoption of the Memorandum of Understanding

14. Following the ruling, the Fire Brigades Union (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 Local Government Association (LGA) and Fire Brigades Union (FBU) negotiated a Memorandum of Understanding (MoU) and a Framework Agreement for handling Immediate Detriment cases – these are attached at Appendix A. Each FRA is required to decide whether to adopt this.
15. An update on the Framework was issued by the LGA and FBU on 19 November, focussing on tax and funding. This is attached at Appendix B.
16. The principal advantages are that it provides nationally agreed arrangements for addressing Immediate Detriment cases, and that the FBU agrees that it will not provide any financial or other support to members who have received compensation or are otherwise remedied under the Framework to bring any court or tribunal proceedings relating to matters which have been (or are being) properly addressed under the Framework.

17. The principal concerns are the practical ability to meet the prescribed timelines for processing all claims; and emerging uncertainty about whether the Government will reimburse FRAs for certain costs - in particular, the tax (to be paid on behalf of scheme members) that is due on any unauthorised charges on claims processed before tax legislation is updated (expected to take effect from 6 April 2022, i.e. the 2022/23 tax year).
18. However, on balance, the risk of not adopting the MoU appears to be significantly higher than the risk of adopting it – crucially that by not adopting, the Authority would be liable to the FBU backing scheme members to take legal action, and would be seen not to have taken advantage of the nationally agreed framework.
19. The CFA (meeting earlier) has therefore been recommended to adopt the MoU and Framework. The decision of the CFA will be reported to the Board at its meeting.

Implementation of the Framework Agreement

20. The CFA was also asked to approve a priority order through which the framework agreement can be implemented locally.
21. The framework agreement makes reference to Category 1 and Category 2 cases. These are respectively those members who have not yet had benefits brought into payment (i.e. not yet retired) and those who have had benefits brought into payment (have already retired). The exception is members who did not qualify for ill-health retirement under the FPS 2015 and are not currently in receipt of benefits and are applying for FPS 1992 ill-health benefits, who are treated as Category 2.
22. The remedy is already being applied for those firefighters coming up to retirement (where reasonable to do so), and new tapering of members who have not yet transitioned to the 2015 scheme ceased until all members are transitioned in April 2022. This decision already covers the Category 1 cases, so in effect the Authority is already implementing the MoU for Category 1.
23. The adoption of the Framework will therefore endorse this decision and also enable the Service to apply the Framework to Category 2 members - i.e. those who have already retired who are receiving a pension under the 2015 Firefighter's Pension Scheme, and who wish to be treated as having retired as a member of their Legacy Scheme, or retired on ill health grounds; or those members who did not qualify for an ill health pension under the 2015 Scheme but would be entitled to such a pension under the 1992 Scheme.
24. The Framework provides guidance in many of the difficult areas associated with implementing the remedy. However, it should be noted that the final Remediating Legislation (due to come into force in October 2023) will provide a mechanism for some matters to be dealt with more conveniently once it comes into force. These include compensation for any foregone tax relief, transfers into the scheme and interest payable on adjusted member contributions. The Government also intends to make detailed technical changes in secondary legislation regards pension taxation, expected to take effect from 6 April 2022, to put members in the tax position they would have been in had they always had the pension provision they finally receive.

25. Once the Remedying Legislation comes into force, it may be necessary to retrospectively adjust cases in areas where it differs from the Framework agreement.
26. The most challenging aspect of adopting the Framework is likely to be meeting the 62-day time limit for providing benefit calculations to applicants. This will start to apply once the CFA formally adopts the MoU and Framework.
27. The Authority initially has 14 days following receipt of a notice or claim from a member, to acknowledge the notice and advise whether or not an entitlement to a remedy is accepted. This should not generally prove to be a challenge; indeed the Service is in the process of identifying Category 2 members with the intention of not requiring these members to contact us individually to ensure that their claim will be dealt with.
28. Once the principle of entitlement is agreed, the Authority is expected to provide the applicable statements of benefits within 62 days of receiving the notice (i.e. including the initial 14 days).
29. Having received the necessary statements, the applicant is required to inform the Authority as to whether they wish to take benefits under the 2015 scheme or their legacy scheme. The Authority then has 28 days to pay any arrears of pension and lump sum and is required to put the on-going benefits into regular payment.
30. Whilst the Service will make every effort to identify and provide the relevant information to the Scheme Administrators (West Yorkshire Pension Fund – WYPF), it should be remembered that WYPF provide this service to 21 Fire and Rescue Services. Despite best efforts of all those involved, this may cause a bottleneck in providing information, placing achievement of the 62 day time limit at risk. This being said, the Service will make best endeavours to work with WYPF to provide information within the timescale so far as is possible.
31. In order to prioritise the most affected members of the pension scheme, it is proposed that Leicestershire will provide the required information to WYPF to enable calculation of remedy figures in the following order:
 - i. Continue applying immediate detriment to those firefighters coming up to retirement in retirement date order (Category 1 members). At present, these members are being requested to give early notice where possible, to ensure that calculations are provided in time for the member to decide under which scheme to retire.
 - ii. Those Category 2 members who have retired in the last 12 months – this will prevent any additional lump sum payments becoming unauthorised payments which would be taxable. This group will be relatively small as the Authority has been applying Immediate Detriment to those coming up to retirement for some time.
 - iii. Any Category 2 members who have retired on ill health, as the impact on these may be significant.
 - iv. Remaining Category 2 members, prioritised from oldest to newest (i.e. 2015 retirements, followed by 2016 etc).

32. The implementation of this order will of course be subject to adjustment for any particularly complex cases or anomalies, which may be taken out of order.

How immediate detriment work is being progressed

33. As noted above, upcoming retirements are being prioritised by the Service. However, WYPF is in turn prioritising their work by upcoming retirement dates across their wider client base, which is understandable. This has the effect that even where our upcoming retirees provide extended notice and the Service provides the necessary data to WYPF in good time, a delay in the member receiving the 2015 and legacy benefit statements can result. This may discourage upcoming retirees from providing extended notice.
34. The Service receives some requests for benefit statements from personnel considering retirement, in particular seeking to establish the financial merits of retiring before or after March 2022. Whilst these requests are understandable, unfortunately, there is no capacity to process them.
35. The Finance and HR teams are working on pulling together a range of data which is helping the Service to understand the various implications of immediate detriment, of implementing the MoU and Framework, and also working towards possessing the data necessary to process applications from individual members.
36. Internal coordination meetings have taken place and will continue on a regular basis, chaired by a senior officer.
37. Information and advice is received from the tri-service pensions adviser. Regard is given to how other FRAs both locally and nationally are progressing immediate detriment.
38. The Local Pension Board will continue to be provided with progress updates, and the CFA updated as appropriate.
39. Once the adoption of the Immediate Detriment Framework has been approved, and the prioritisation order for cases agreed, this information will be communicated with the affected members.

General sector update

40. Much of the current sector activity is focussed on immediate detriment, the subject of this report. However, the latest LGA FPS bulletin takes a wider scope and is attached for information at Appendix C. It starts with immediate detriment as might be expected, and then proceeds to cover various other matters.

Report Implications/Impact

41. Legal (including crime and disorder)

This report has been written to inform the Board 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

including the Memorandum of Understanding 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.

42. 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 are 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), which will 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.

43. 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.

44. 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.

45. Environmental

There are no environmental implications arising from this report.

46. Impact upon “Our Plan” Objectives

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

Appendix

Appendix A - Memorandum of Understanding (MoU) and Framework Agreement

Appendix B – Framework for managing immediate detriment issues update, LGA and FBU, 19 November 2021

Appendix C – FPS Bulletin 50, October 2021

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>

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