

WEST MIDLANDS FIRE AND RESCUE AUTHORITY

AUDIT AND RISK COMMITTEE

7 DECEMBER 2020

1. REQUEST FOR A DECISION ON ACTION TO BE TAKEN IN RESPECT OF IMMEDIATE DETERIMENT CASES UNDER THE MCCLOUD/SERGEANT RULING

Report of the Chief Fire Officer.

2. PURPOSE OF REPORT

This report is submitted to request that the Committee in their role as Scheme Manager confirm to the Scheme Administrator what action they wish to be taken in respect of immediate detriment cases following informal guidance issued by the Home Office.

3. RECOMMENDATION

In line with the legal advice received and in the interests of supporting members of the scheme, it is recommended that the Scheme Administrator apply the guidance issued by the Home Office to cases where a Firefighter retires on or after 1st February 2021 and to any eligible cases of ill health retirement.

4. BACKGROUND

- 4.1 In 2015 most public service pension schemes, including the Firefighters' Pension Scheme, were reformed. These reforms included 'transitional protection' for people closest to retirement.
- 4.2 In 2018, the Court of Appeal ruled that the transitional protection element of the 2015 public service pension reforms constituted unlawful age discrimination in the Firefighters' Pension Schemes. The Government respects the Court's

decision and has confirmed that it will remove the difference in treatment across all main public service pension schemes.

- 4.3 The Government is currently in a consultation process regarding proposals to remove this discrimination. Detail on the current proposals can be accessed here: <https://www.gov.uk/government/consultations/public-service-pension-schemesconsultation-changes-to-the-transitional-arrangements-to-the-2015-schemes>. The changes proposed in the consultation to remove the discrimination would apply across all the main public service pension schemes and provide members with a choice of which scheme they would like to be in for the remedy period. The remedy period is defined as between 1 April 2015 and 31 March 2022 in the consultation paper.

The remedy only applies to 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.

- 4.4 The Consultation ended on 11th October 2020 but it is likely that the required changes to regulations will not be in place before 1st April 2022. In advance of reaching this date the Fire Brigades' Union requested that the Home Office issue guidance to employers on dealing with "immediate detriment" cases.
- 4.5 The requested guidance was issued on 21st August 2020 and is attached at Appendix 1.
- 4.6 Discussions have taken place at a national level between scheme administrators and the LGA Firefighters' Pension Team. These discussions have highlighted some concerns regarding the use of the attached guidance primarily around whether it should be applied to all scheme members or only those who lodged a claim with the Employment Tribunal and who therefore have the benefit of the Court ruling in this case.

- 4.7 In FPS Bulletin 37 – September 2020 the LGA included the following statement.

Home Office immediate detriment note update

We commented in FPS Bulletin 36 – August 2020 on the immediate detriment note issued by the Home Office. We understand that the department will not be able to provide a response to the queries we have raised until October.

However, in the meantime, we appreciate that FRAs are being encouraged to progress cases under the terms of the note. We are working on providing further clarity to FRAs in three areas.

1. Legal status of the note.

We are seeking legal advice on behalf of FRAs, including application to claimants and non-claimants, any consequences arising from incorrect payment of benefits and any resulting unintended discriminatory treatment. We understand that the Home Office and HMT are relying on Section 61 of the Equality Act to provide legal underpinning to the note for non-claimants. That power is currently being contested in the FRA's appeal under Schedule 22 of the same act, in which they argue that they were required by law to follow the pension regulations and so had no choice but to implement the transitional protections for older firefighters.

2. A general information note on the key issues.

We have drafted a note to provide additional information to FRAs on the key considerations of implementing the Home Office informal guidance. This includes the legal considerations detailed above, the position of employer contributions, which we believe Home Office to be discussing with HMT, technical queries raised and areas where we believe a policy steer would be helpful to enable more accurate payments to be made.

3. Support for practitioners, to include:
 - 3.1. Supporting FRAs to evidence robust decision making on whether a case can proceed under the current guidance, and if not, why not;
 - 3.2. Working with the Fire Communications Working Group to provide a consistent template on how a member may be provided with a choice and what this should include, using documentation provided to support choice in 2006 as a guide;
 - 3.3. Working with administrators to provide example calculations to assist with bringing benefits into payment where the guidance is not explicit.

The information note is currently being reviewed and will be issued as soon as possible.

- 4.8 The information note referenced at point 2 of the LGA statement was not expected before the end of October (see 4.10 below).
- 4.9 The Payroll and Pensions Manager requested advice from the Authority's Monitoring Officer, and in an email dated 21st September 2020 copied to the Strategic Enablers for People and Finance and Resources, he stated "Having reviewed the relevant caselaw and the LGA guidance, I confirm: the steps set out at paragraph 5 of the Guidance provided by the LGA to address the 'immediate detriment' for Firefighters within the relevant Pension Scheme is appropriate for the Brigade to implement."
- 4.10 Further legal advice was received from the LGA on 23rd October 2020 and the Payroll and Pensions Manager requested that the Authority's legal advisor review this guidance and provide a more detailed response. The response to this request was received on 2nd November and is reproduced at Appendix 1.

5. **DECISION REQUIRED**

- 5.1 The Committee are asked to approve the recommendation of the scheme administrator.

6. **EQUALITY IMPACT ASSESSMENT**

In preparing this report an initial Equality Impact Assessment is not required and has not been carried out.

7. **LEGAL IMPLICATIONS**

The decision of the Scheme Manager in this case may be challenged by the member requesting the decision. The challenge would be made through the Firefighters' Pension Scheme Internal Dispute Resolution Procedure. If this process does not resolve the matter the issue can be taken to The Pension Regulator and finally to the Supreme Court.

8. **FINANCIAL IMPLICATIONS**

It is not possible at this stage to identify the specific costs associated with the recommendations although using the guidance note now will not increase any direct amounts payable it will simply bring some of those costs forward. However, if interest is applied as part of the final solution it may actually result in lower overall costs on the basis that using the guidance now would close the period that interest is calculated over, instead of extending it to 2022

BACKGROUND PAPERS

FPS Bulletin 37 – September 2020
Public service pension schemes: changes to the transitional arrangements to the 2015 schemes Consultation
Statement UIN HCWS380

The contact name for this report is Mike Griffiths, Treasurer and Strategic Enabler of Finance and Resources, telephone number 0121 380 6919.

PHIL LOACH
CHIEF FIRE OFFICER

APPENDIX 1

Advice received via email from the Authority's Monitoring Officer – Dated 2nd November 2020

Thank you for your below email and documents sent through in relation to your query following receipt of an advice note from Bevan Britten (BB).

In relation to the points/issues raised by BB within its advice note, I comment as follows:

1. My opening observation is that BB's advice note is perhaps at times overly complex and offers few if any solutions compared to the technical legal issues it seeks to highlight;
2. Taking into account the BB advice note, I think it important to ask the following question – who are we talking about in relation to the 'immediate detriment' issue? The answer is two categories of WMFRA employees relative to the immediate detriment 'remedy window' following the outcome of the McCloud and Sergeant litigation ie. those who will retire in the normal way and those who will retire on the grounds of ill health during the remedy window;
3. Flowing from the above Court decisions there exist, logically, two ways of addressing the age-related discrimination found by the Courts:
 1. transitional protection offered to everyone ie using the 'legacy schemes'; or
 2. not offering the transitional protection to anyone.

Put another way, 'level up' or 'level down' the discriminatory impact on scheme members. Unfortunately, the Court of Appeal did not address use of the above options in its Judgment, simply that scheme members suffered age discrimination.

4. As a result of the McCloud and Sargeant litigation, the Government proposed that those employees who are 'Claimants' in the litigation are entitled to a remedy and hence the 'two-year remedy window' to address the discrimination in the form of the above option. However, this left a significant cohort of 'affected' scheme members who are not actual Claimants within the McCloud and Sargeant litigation, but who are in the same circumstances as the McCloud and Sargent litigation Claimants. The Government guidance was also intended to offer protection to this category of scheme member. The remedy window allows the Government time to then consider its position on what it will do regarding the discriminatory effect of the 2015 Scheme;
5. The question then returns to the who is affected by 'immediate detriment' – those scheme members who retire or those who retire on the grounds of ill health within the remedy window are the relevant cohort. The next question is then, does an FRA provide the option for this cohort of the 2015 scheme; or – not provide an option of returning to the old scheme at all (before March 2022). If the Government decides the latter, this addresses the issue of discrimination using the option of 'levelling down'.
6. The FBU has favoured the approach of offering its affected members the option of re-joining the former or 'legacy' scheme and it is fair to assume that most affected FBU members will do so. The effect of the Government guidance is essentially that they do not know how they will resolve/remedy the discriminatory effect of the 2015 Scheme, but has proposed affected scheme members are provided a choice as to how the discriminatory impact is mitigated;
7. As mentioned, BB's note raises a number of technical legal concerns. One such concern is that if an FRA provide an affected scheme member (ie a non-Claimant) the choice of returning to the former scheme, this may not provide the comfort of a 'defence' against future claims of discrimination from this cohort of non-Claimant's as the Government Guidance is simply guidance. I agree, the 'Guidance' from the Government is exactly that and does not, in and of itself, provide a defence or protection against future claims of age

discrimination. However, if the option of keeping or forcing affected scheme members to remain in the new scheme is used, this I, logically, more likely to result in litigation. The option of 'levelling up' is less likely to lead to new claims in my view. It is important to bear in mind, the proposal of levelling up is advocated by the FBU and therefore there is merit in the argument that they are unlikely to advise their affected scheme members to initiate claims based the option of returning to legacy schemes (I return to this point below). Also, BB raise the issue of any agreement by an affected scheme member may not be legally enforceable or 'binding'. I disagree with this analysis. Any such agreement by an FRA to move an affected scheme member to the former scheme by way of an option goes beyond that individuals' legal rights – a prime and day-to-day example of this is use of compromise or settlement agreements by an employer and employee where actual or contemplated or potential claims are settled – this is the 'agreement in writing point' and (as BB accept) whilst not a panacea certainly very helpful to an FRA and an issue a Court will take into account in any attempt at future legal proceedings;

8. I consider that BB are correct to ask the question of whether an FRA has the legal power or *vires* to offer the proposed options to affected scheme members who are not part of the McCloud/Sargent litigation ie non-Claimants. However, BB state that only those Claimants as part of the McCloud/Sargeant litigation are entitled to be offered the choice of the two 'options' (not those outside the litigation/who are not yet Claimant's). Whilst BB is correct to ask the *vires* question, I disagree with their position and analysis for the following reasons:
 1. the Claimant's in the McCloud/Sargent litigation have been found by the Courts to have been discriminated against;
 2. those scheme members who are in the exact same circumstances as the McCloud and Sargeant Claimant's will, logically, also have been discriminated against – the only difference between these two cohorts is the second cohort have not initiated legal proceedings claiming age discrimination;

3. case law decides whether an unlawful act has been committed by an employer. In the McCloud and Sergeant litigation, the Courts have decided that such an act has indeed been committed in respect of the 2015 Scheme. The result of the Court's decision is that the Claimants who suffered the discrimination/unlawful act are then entitled to the benefit that flows from that Court finding/decision in their favour. This also applies to those employees/scheme members who are in the exact same circumstances as the (litigation) Claimant's, but are not actual Claimant's (ie potential Claimant's) – however, both cohorts are victims of a discrimination and cannot be said to be otherwise. This position was adopted by the Government within its Guidance issued in August 2020 where it stated that any necessary changes to pension arrangements to remove the discrimination identified by the Court of Appeal (McCloud) will also apply to all members with relevant service, not just those who have lodged legal claims;
4. a useful and practical analogy in relation to the *vires* issue raised by BB can be found in the form of 'class action' Equal Pay claims faced by public sector employers over the last decade or so. In light of a disparity in pay between male and female groups of employees which is gender based, the employer is required to address/remedy that discriminatory treatment for not only those employees/Claimants who registered Equal Pay claims, but all affected female staff in the same circumstances. An employer has the inherent legal right to do so and public sector bodies have done so up and down the UK since the implementation of 'single status';
5. finally, it is plainly arguable that an FRA providing non-Claimants the legacy option is furthering its Public Sector Equality Duty (PSED) ie 'the requirement for public sector bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities'. I note that BB's advice makes no mention of the PSED on FRA's; and

6. for the above reasons set out above, I consider BB's position of seeking to create an artificial distinction between 'Claimant's' and 'non-Claimant's' (and only offering the legacy option to the former) as legally unsound.
9. On the issue of 'time limits', the 2019 Supreme Court decision in the 'Miller' case (as case concerning part-time/fee-paid Judges) unanimously held that the ordinary statutory time limit to bring a claim for pension remedy claims runs from retirement from judicial office when pension is payable.

Conclusion

While BB are right to raise the issues they have raised, I do not consider those issues now mean it is inappropriate for WMFRA to seek to follow the Government Guidance issued in August 2020 in order to address the immediate detriment/discrimination faced by scheme members. The issues raised by BB (whilst arguably technically and legally correct) do not undermine the ability of WMFRA to address the discrimination suffered by its employees by offering the legacy choice set out in the Guidance. There is no material difference between those existing Claimant's and future Claimant's save for the fact the former have initiated legal proceedings and the latter have not. It is considered unlikely a scheme member will sue/litigate against their employer for providing them with a choice to remedy discrimination suffered by that scheme member. To suggest otherwise is, in my view, not taking into account the 'real world' or practical impact of the legacy choice offered to non-Claimant's – this is all the truer given the FBU robustly advocate the provision of such a choice.