

WEST MIDLANDS FIRE AND RESCUE AUTHORITY

AUDIT AND RISK COMMITTEE

26 OCTOBER 2020

1. **REQUEST FOR A DECISION ON ACTION TO BE TAKEN IN RESPECT OF IMMEDIATE DETRIMENT 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 is a claimant and retires on or after 1 November 2020.

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 consulting on 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 will 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 11 October 2020, but it is likely that the required changes to regulations will not be in place before 1 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 21 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:

4.7.1 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.

4.7.2 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 the 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.

4.7.3 Support for practitioners, to include:

- Supporting FRAs to evidence robust decision making on whether a case can proceed under the current guidance, and if not, why not;
- 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;
- 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 has not at this time been issued though it is expected before the end of October.

4.9 The Payroll and Pensions Manager requested advice from the Authorities legal advisor, and in an email dated 21 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.”

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

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