

WEST MIDLANDS FIRE AND RESCUE AUTHORITY

AUDIT AND RISK COMMITTEE

19 JULY 2021

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 guidance issued by the Home Office.

3. **RECOMMENDATION**

In line with the legal advice received, it is recommended that the Scheme Administrator continues to apply guidance issued by the Home Office in August 2020 and subsequently updated in June 2021 to cases where a Firefighter retires on or after 1 February 2021 and to any eligible cases of ill-health retirement.

4. **BACKGROUND**

4.1 On 7 December 2020 the Audit and Risk Committee, in its role as Scheme Manager for the Firefighter Pension Schemes, took the decision to instruct the Scheme Administrator to act upon guidance issued by the Home Office in August 2020.

4.2 The guidance was updated on 10 June 2021 and included within the further information was a paragraph advising FRAs

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not to use the August 2020 guidance in cases where a member would have been eligible for a “contribution holiday” under the rules of the 1992 Scheme.

- 4.3 By implementing the updated guidance, the administrator will be providing different options to employees in different positions. This matter raised some concerns and the Authorities Monitoring Officer was asked to provide a legal opinion on three specific questions.
- 4.4 The questions raised, and subsequent responses (in italics), are shown below:

Q1. If we follow the Home Office guidance, as updated, and do not process cases for members with a contribution holiday entitlement, are we directly discriminating against those Members who by default must have joined the Scheme at the early age?

This example is not an instance of fresh discrimination – the above is an example of ongoing discrimination which the Government seeks to cure. Paragraph 5.21 of the guidance makes it clear the tax and interest implications for Scheme Members who have had a contribution holiday is unknown currently. The guidance is not suggesting that by not processing these Members as immediate detriment cases, nothing will be done to cure the historical discrimination – 5.21 simply says, in effect, ‘wait’ until the tax and interest implication for Scheme Members is known. Following on from this we, as a FRA, do not know the tax or interest implications either. Once the tax and interest implications are known, these Members’ detriment cases can be resolved.

Q2. If we choose to ignore the latest update and continue to process cases under the August 2020 guidance, on what legal basis would be doing this?

I do not advise the June Home Office guidance is ignored. Even though the guidance is described as non-statutory and informal, that does not mean we, as an FRA, are not obliged to follow it. In law, non-statutory guidance is to be followed

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unless there is a good reason not to do so. For context, any decision not to follow the June Home Office guidance is capable of Judicial Review and this applies to any non-statutory guidance issued in England & Wales.

Please bear in mind the Government is also the Taxing Authority and it would be prudent to follow its guidance on the issues of tax and interest for 1992 Scheme Members.

Q3. Do we have the power to take an alternative course of action which may allow us to process all cases whilst still acknowledging the Home Office guidance?

The Pension Administrator has the power to vary the terms of any scheme in accordance with s.61 and s.62 of the Equality Act 2010. This power enables processing of cases, but not (as paragraph 5.21 implies) cases that involve a contribution holiday where the tax and interest implications are currently unknown. Put another way, the guidance is not saying that all cases cannot be processed, just that in the case of Members who have had contributions holiday, FRA's should wait.

4.5 The WMFRA Pensions Board convened an extraordinary meeting on the 1st July 2021, to review the issues and advice set out in this report. The consideration of the Board is set out in 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

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challenged by Members. 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**

There are no direct Financial implications of this decision.

BACKGROUND PAPERS

FPS Bulletin 37 – September 2020

Public service pension schemes: changes to the transitional arrangements to the 2015 schemes Consultation

Statement UIN HCWS380

Home Office Guidance – McCloud/Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases – Issue date: 21st August 2020

Minutes of the Audit and Risk Committee meeting 7th December 2020

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PHIL LOACH
CHIEF FIRE OFFICER

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