



**DORSET & WILTSHIRE
FIRE AND RESCUE
AUTHORITY**

Item 21/58

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| MEETING | Dorset & Wiltshire Fire and Rescue Authority |
| DATE OF MEETING | 15 December 2021 |
| SUBJECT OF THE REPORT | Age Discrimination Remedy – Implementing the Immediate Detriment Framework (IDF) |
| STATUS OF REPORT | For open publication |
| PURPOSE OF REPORT | To note and approve |
| EXECUTIVE SUMMARY | <p>In 2015 many public service pension schemes, including the Firefighters Pension Scheme (FPS) were reformed. These reforms included ‘transitional protection’ for those closest to retirement.</p> <p>In 2018, the Court of Appeal ruled that the transitional protection element constituted unlawful age discrimination.</p> <p>To resolve the age discrimination a process of ‘remedy’ is required to ensure all scheme members are treated fairly by removing the discrimination. A Memorandum of Understanding – Immediate Detriment Framework has been jointly developed by the Local Government Association (LGA) and the Fire Brigades Union (FBU) to achieve the remedy in a consistent manner whilst awaiting the enactment of forthcoming pension legislation.</p> <p>The LGA guidance encourages Authorities to adopt the Immediate Detriment Framework. However, on 29 November 2021 the Home Office published a note withdrawing its guidance and advised Authorities not to process immediate detriment cases until enacting legislation is set in place. This is not due to be in place until April 2022.</p> |

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| RISK ASSESSMENT | <p>In not applying the framework, further legal action could be taken by the Fire Brigades' Union and result in further litigation costs.</p> <p>Individual members could also make a complaint/referral to the Pension Ombudsman.</p> |
| COMMUNITY IMPACT ASSESSMENT | Not Applicable |
| BUDGET IMPLICATIONS | It is not possible at this stage to identify the specific costs associated with processing immediate detriment as these are dependent on each case. |
| RECOMMENDATIONS | <p>Members are asked to:</p> <ol style="list-style-type: none"> 1. Note the contents and appendices of this report 2. Agree that an update on immediate detriment be provided at the Authority meeting in February 2022. |
| BACKGROUND PAPERS | <p>HMRC policy paper on taxation of public sector pension reform remedy: https://www.gov.uk/government/publications/taxation-of-public-service-pension-reform-remedy/taxation-of-public-service-pension-reform-remedy</p> |
| APPENDICES | <p>Appendix A - Immediate Detriment Framework (IDF) joint statement issued by the Local Government Association (LGA) and the Fire Brigades Union (FBU)</p> <p>Appendix B - Memorandum of Understanding - Immediate Detriment Framework</p> <p>Appendix C - Immediate Detriment Framework Guidance for Fire & Rescue Authorities in their role as Scheme Managers</p> <p>Appendix D - Framework for Managing Immediate Detriment Issues – Update issued 19.11.2021– Joint statement regarding the payment of late lump sum payment and HMRC policy</p> <p>Appendix E - Processing immediate detriment cases - Home Office note – issued 29 November 2021</p> |

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1. Introduction

- 1.1 In 2015 many public service pension schemes, including the Firefighters Pension Scheme (FPS) were reformed. These reforms included 'transitional protection' for those closest to retirement.
- 1.2 In 2018, the Court of Appeal ruled that the transitional protection element constituted unlawful age discrimination. This case is referred to as the McCloud/Sargeant ruling.
- 1.3 To resolve the age discrimination in the Firefighter Pension Scheme a process of 'remedy' is required to ensure all scheme members are treated fairly by removing the discrimination.
- 1.4 The case was referred back to the Employment Tribunal (ET) to determine remedy. An interim declaration was made in December 2018 by the ET in that claimants were entitled to be treated as if they had remained in the 1992 or 2006 Firefighters' Pension Schemes.
- 1.5 On 12 February 2021, the Employment Appeal Tribunal (EAT) gave its judgement on a separate (but related) case (Transitional Protections Claims). Following the ruling the Fire Brigades Union (FBU) commenced legal proceedings in the High Court for three test cases against FRAs. The ruling put pressure on FRAs to implement the remedy from the original ET cases without waiting for new pension legislation to be passed.
- 1.6 In May 2021, the decision to apply the remedy for those firefighters coming up to retirement (where reasonable to do so) was approved by the Fire Authority Monitoring Officer, Chief Fire Officer, and Head of Financial Services and Treasurer, along with the decision to cease tapering members who had not yet transitioned to the 2015 scheme until all members are transitioned in April 2022. Four individuals who retired since May have been processed in line with immediate detriment.
- 1.7 On 10 June 2021, the Home Office updated the existing informal immediate detriment guidance which applied to cases where the member was about to retire but this did not apply where a pension is already in payment, so further clarification was required.
- 1.8 On 26 August 2021, the Public Services Pensions and Judicial Offices Bill was published. This proposed law was to seek reform to public sector pensions and to seek remedy to the age discrimination issues from the FPS 2015.
- 1.9 This was followed on 08 October 2021, by a Joint Statement by the Local Government Association (LGA) and the Fire Brigades' Union (FBU) (Appendix A) which advised of the publication of a Memorandum of Understanding (MoU) – Immediate Detriment Framework (Appendix B).

- 1.10 The Immediate Detriment Framework Guidance for Fire & Rescue Authorities in their role as Scheme Managers (Appendix C) advises that it is for each Fire and Rescue Authority, as the relevant scheme manager for the Firefighters' Pension Scheme (FPS), to adopt the IDF.
- 1.11 A further joint statement (Appendix D) regarding the payment of late lump sum payment and HMRC policy was published on 19 November 2021.

2. The Immediate Detriment Framework

- 2.1 As stated in paragraph 1.6 above, the Authority were addressing immediate detriment cases for individuals due to retire (Prospective (current) retirements). However, it was not anticipating that the Framework issued on 08 October 2021 would also include Retrospective (those already retired) retirements to be processed at the same time. To enable the processing of both 'Prospective' and 'Retrospective' cases, the IDF has defined cases into two categories:
- 2.2 **Category 1** - Members who, at the date of the MoU, are employed by an FRA and:
- become eligible to retire (for any reason, including ill-health) and draw any pension and/or lump sum benefit and want to have all their benefits paid from their Legacy Scheme (not the 2015 Scheme).
 - do not qualify for a lower-tier (and therefore higher-tier) ill-health pension under the single pot ill-health retirement arrangement provided for in the 2015 Scheme and are therefore left without an immediately payable pension but would be entitled to such a pension under their Legacy Scheme.
- 2.3 **Category 2** - Members who, at the date of the MoU:
- have already retired (for any reason, including ill-health) and who are receiving a pension under the 2015 Scheme, and who wish to be treated as having retired as a member of their Legacy Scheme.
 - have left the fire and rescue service and did not qualify for a lower-tier (and therefore higher-tier) ill-health pension under the single pot ill-health retirement arrangement provided for in the 2015 Scheme and are therefore left without a pension in payment but would be entitled to such a pension under their Legacy Scheme.
- 2.4 The Service has a total of 616 people whose pension arrangements will ultimately be impacted by immediate detriment. The vast majority of these individuals are some way from retirement and will move into the 2015 scheme on 1st April 2022. Currently there are only three people who have indicated that they wish to retire on or before 31 March 2022 and one individual who is going to be ill health retired in this time period.

2.5 There are 19 recent Whole-time Duty System (WDS) retirees, five On Call retirees and 12 ill health retirement cases who are impacted by immediate detriment and their pension will need to be recalculated. All calculations will need to be completed by October 2023 at the latest but it is anticipated that this work could be completed by March 2023 with support from West Yorkshire Pension Fund (WYPF) who have produced a spreadsheet that auto calculates and produces contribution rates when pay data is added.

2.6 Implementation and Timeframe

2.7 Annex 2 of the MoU (Appendix B) sets out the process and expected timeframe (90 days) for completion of a request for Immediate Detriment. Paragraphs 1 – 3 of the MoU states:-

- *Any Member who believes that he or she is a Category 1 or a Category 2 case, and any person who believes that he or she is a dependant of a Category 1 or a Category 2 case Member ('an **Applicant**'), may give notice to the FRA which last employed the Member concerned requiring the FRA to investigate their case. Any such notice must be given in writing (by post or by email).*
- *Within 14 days of receipt, the FRA shall acknowledge receipt of any such notice in writing (by post or by email), and inform the Applicant:*
 - *either that the FRA accepts that the Applicant is entitled to a remedy under the Framework; or*
 - *explain why, in the FRA's view, the Applicant is not entitled to a remedy under the Framework.*
- *If the FRA accepts that the Applicant is entitled to a remedy under the Framework, as soon as reasonably practicable and in any event within 62 days after receiving an application under paragraph 1, the FRA shall send... {appropriate documents to enable them to make their final election}.*

2.8 The Framework was developed to ensure a consistent approach to implementing immediate detriment. The LGA guidance document (Appendix C) encourages Authorities to adopt the Framework in order to avoid any further legal action.

3. Resourcing of Immediate Detriment

3.1 The Fire Authority's external administrator for firefighter pensions is West Yorkshire Pension Fund who are responsible for the provision of pension forecasts.

3.2 Internal resources for administration of pensions are managed through the Employee Relations Team and comprises a Team Leader, two HR Advisors and an administrator.

- 3.3 Staff changes have already taken place within the Service's Employee Relations team to support the additional work of immediate detriment; this has included recruitment of a second HR Advisor role and subsequent backfill of an administration assistant. It is anticipated that these staffing arrangements will need to continue for at least a further 12 months.
- 3.4 A key area of concern in dealing immediate detriment cases is the capacity of WYPF to be able to process the volume of cases that they are likely to receive. WYPF currently provide pensions administration services to 23 fire and rescue authorities. We expect to see additional administration charges from WYPF to cover the additional work required. Further costs will be incurred to pay for the software changes necessary to implement the remedy proposals on pensions IT systems.
- 3.5 The Authority has already been given a pensions administration grant of £89,360 by the Home Office to help meet the additional costs of implementing remedy.
- 3.6 In addition to the above, there are the direct payments to be made in processing immediate detriment cases. The table in Annex 1 of Appendix C sets out the different types of payment. Those payments will either be scheme payments, which can be charged to the Home Office pension fund account or employer payments, which will have to be charged to the FRA revenue budget.
- 3.7 At this stage it is not possible to quantify the specific costs associated with implementing immediate detriment as these will be identified on a case-by-case basis as claims are processed and will be influenced by the complexity of each case and the timing of payment of any pension arrears.

4. Latest position – withdrawal of Home Office guidance

- 4.1 On 29 November the Home Office issued a note (Appendix E) regarding the processing of immediate detriment cases.
- 4.2 The note advised that further work carried out by HMT and HMRC when drafting the legislation to implement the remedy has highlighted significant gaps and uncertainties about the tax implications of following the Home Office guidance. It further advised "*Because of this, HMT's current view is now that immediate detriment cases, including those yet to retire, can not be processed before legislation is in place without considerable risk, uncertainty and administrative burdens for individuals, schemes and employers.*"
- 4.3 As a result, the note recommended "*Therefore HMT and Home Office do not advise that schemes process pipeline immediate detriment cases before the legislation is in place.*"

- 4.4 The legislation referred is the Public Service Pensions & Judicial Offices Bill which is currently before Parliament. The relevant provisions are intended to come into force on 1 April 2022.
- 4.5 The LGA is seeking legal advice on behalf of Authorities and the FPS Bulletin 51 – November 2021 published on 30 November also advised that they are “*considering various the aspects within the note and will write to FRAs and FRSs with further information as soon as possible.*”
- 4.6 Following the publication of the note, the arrangements set out in 1.6 have been paused. For retirements to be processed we have advised staff that they must provide at least three months’ notice.

5. Summary and key points

- 5.1 Immediate detriment remains a complex and dynamic area arising from the Government’s reform of pension schemes in 2015 and a subsequent legal ruling that certain aspects of that were age discriminatory.
- 5.2 The Public Services Pensions and Judicial Offices Bill sets out its intended remedy to these matters and the LGA and FBU have agreed a Framework based on an understanding of the remedy provisions in the Bill, to enable immediate detriment cases to be processed by fire and rescue authorities in advance of the enactment of this forthcoming pensions legislation.
- 5.3 The Home Office note issued on 29 November recommends that immediate detriment cases should not be processed until the legislation is in place.
- 5.4 Legal advice is being sought by the LGA on behalf of Authorities.

December 2021