

IMMEDIATE DETRIMENT FRAMEWORK

REPORT OF THE CHIEF FIRE OFFICER



For Approval

1. PURPOSE OF REPORT

- 1.1 The purpose of this report is for members to approve the adoption of an agreed Framework for pension scheme members affected by Immediate Detriment which has been drafted by the Local Government Association (LGA) on behalf of all Fire Authorities.

2. RECOMMENDATIONS

- 2.1 It is recommended that:
- (i) The Immediate Detriment Framework be adopted on behalf of the Authority (the Scheme Manager of the Authority's firefighter pension schemes).
 - (ii) The Scheme Manager be:
 - a. the authorised signatory for any 'Record of Agreed Compensation and Remedy' ('Compensation Record') on behalf of the Authority; and
 - b. authorised to agreed with Scheme members variations to the timescales for dates of payments when in the interests of the Scheme Manager and the Scheme member to do so.

3. BACKGROUND

- 3.1 As part of government reforms to public sector pensions, the Firefighters' Pension Scheme regulations 2014 created the Fire Pension Scheme 2015 (FPS2015) often referred to as the 'reformed' scheme.
- 3.2 This scheme was introduced on the 1 April 2015 and members of the existing Firefighter Pension Scheme 1992 (FPS1992) and Firefighter Pension Scheme 2006 (FPS2006), often referred to as legacy schemes, transitioned across to the new 'reformed' scheme on this date.
- 3.3 Protection, based on age, was given to members who were within 10 years of the normal retirement age (NRA) of each scheme, FPS1992 being 55 and FPS2006 being 60. These members remained in their legacy schemes.

- 3.4 Further protection was given to members who were within 15 years of the NRA, as they would transition to the reformed scheme at a different date depending on their age.
- 3.5 After a series of industrial actions, a legal challenge was brought by the Fire Brigades Union (FBU) on behalf of their fire pension scheme members on whether these protections constituted direct age discrimination, and indirect race and sex discrimination.
- 3.6 In December 2018, the Court of Appeal (CoA) found that, having introduced the protections, the government should then have justified any discriminatory impact but that they had failed to do so, and therefore the justification of the protections on the grounds of legitimate aims had not been met. Succinctly, although FPS2015 itself is not discriminatory the protections are.
- 3.7 To remedy the discrimination the Government is intending that from 1 April 2022 all pension scheme members will move in to the FPS2015. For the period 1 April 2015 to 31 March 2022, pension scheme members will be given the option to have this period either be treated as being in the legacy 1992 scheme or in the reformed 2015 scheme.
- 3.8 Legislation is being drafted to move members to the new scheme as of 1 April 2022, however legislation to remedy the period 1 April 2015 to 31 March 2022 is not expected until October 2023.

4 IMMEDIATE DETRIMENT

- 4.1 On the 18 December 2019, the Employment Tribunal (ET) made an interim order stating that members who have retired or are coming up to retirement could have their pension calculated under the legacy scheme.
- 4.2 On the same date, 18 December 2019, the National Employers of the National Joint Council (NJC) sent a circular (EMP/8/19) to Fire and Rescue Authorities in relation to the interim order stating that FRAs should take no immediate steps until they had received further guidance from the Home Office.
- 4.3 On 21 August 2020, eight months later, the Home Office issued a note directly to English FRAs titled 'McCloud / Sargeant ruling – Guidance on treatment of 'Immediate Detriment' cases' for both the Firefighters' and Police Pension Schemes. It is important to highlight, that the guidance was stated as "informal guidance" and was being "provided at the request of the Fire Brigades Union."
- 4.4 Additionally the guidance stated that, "This guidance should not be applied to scheme members who have already retired and are in receipt of their pension payments."
- 4.5 On 23 February 2021, the FBU took three test cases to the High Court against two FRAs who had not recalculated retired member's pensions by taking into account the ET interim order.

- 4.6 In May 2021, The CFO, under the delegated power as Scheme Manager, instructed its Firefighter Pension Administrator, XPS to calculate pension benefits due to any members retiring in line with the Home Office guidance. However, the retired member's pensions could not be recalculated as instructed in the Home Office Guidance (point 4.4 above).
- 4.7 In summary, although the legislation to remedy the discrimination is not due until October 2023, the courts have in essence instructed FRAs that they can (and must) recalculate pensions now. This is further strengthened by an Employment Appeal Tribunal ruling in February 2021 that in simple terms states that FRAs should not have implemented FPS2015 in 1 April 2015 as it was age discriminatory.

5. MEMORANDUM OF UNDERSTANDING

- 5.1 In Spring 2021, The LGA (on behalf of the FRAs) and the FBU commenced discussions on a Framework that would enable FRAs to progress immediate detriment cases in an agreed and consistent manner.
- 5.2 On 8 October 2021, a Memorandum of Understanding (MoU) was agreed between the LGA and the FBU. It provides a mechanism to calculate pensions and will minimise risk to FRAs of acting outside of the legislation whilst it is still being drafted.
- 5.3 It is important to highlight that the MoU and the Framework will enable the FRA to recalculate retired members which up until this point has not been possible, in addition to also providing members coming up to retirement with the required legacy options and calculations.
- 5.4 The scope of members who can apply for the Framework, if adopted by the Authority, is if they were transitioned from a legacy scheme into the reformed scheme prior to retirement.
- 5.5 The MoU sets out the terms on which it has been agreed, and has three annexes which provide the detail on what actions need to be undertaken;
- Annex 1 – Framework – Guidelines to use in order to calculate pensions and compensation payments
 - Annex 2 – Process – Time lines and detail on what information needs to be provided to pension scheme members
 - Annex 3 – Record of Agreed Compensation / Remedy – A declaration signed by the FRA and the pension scheme member that by following Annexes 1 and 2 that no further legal action will be taken by the FBU against the FRA.
- 5.6 If an FRA adopts the framework then the MoU states that the FBU agrees that it will not provide any financial or other support to pension scheme 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) addressed under the Framework.

- 5.7 A copy of the MoU and the Annexes are attached as Appendix A to this report for information.

6. FEASIBILITY OF ADOPTION OF THE FRAMEWORK

- 6.1 From a perspective of implementing the Framework, the guidelines provide a consistent approach, not only to CFA but at a national level for all FRAs.
- 6.2 On application from retired members, the service will have 62 days to provide the pension scheme member with figures in relation to their re-calculated pension, contribution history, and tax adjustments. The FRA would have 28 days to then make payment on the revised calculation, making it a 90 day process.
- 6.3 The time frame is viewed as challenging. The Finance department has held discussions with the LGA and XPS to understand whether the time frames are achievable and the implications if they are not met.
- 6.4 It should be noted, that as the remedying legislation has not been drafted the system development for the pension administrator is still to be completed. This means that these complex calculations will need to be done manually.
- 6.5 In addition to this, there is a requirement for the Finance department to provide information to XOS. Essentially CFB needs to provide information so that XPS can build a new pension record so as to then carry out calculations.
- 6.6 The HR department has identified approximately 30 retired members who would be eligible to apply under the Immediate Detriment Framework. This would result in 600 manual calculations to be completed in a short time frame.
- 6.7 It is likely that if adopted the Framework will be in place until October 2023 and this will result in an ongoing burden for each member who reaches retirement and meets the criteria for the Framework to be applied to them.
- 6.8 XPS are currently looking at what interim measures can be put in place to meet the increased workload and if any calculations can be automated. The HR/ Pension Management Team at CFB are also working on what tools can be used to make the data extraction from the payroll system more efficient which in turn will help to make the process more streamlined.

7. FINANCIAL RISK

- 7.1 Within Annex 1 there are references to compensatory payments such as, but not limited to, 3% interest on pension and lump sum arrears, compensation for annual allowance breaches as a result of moving back to the FPS1992, and compensation for taxation on all unauthorised payments.
- 7.2 The taxation on unauthorised payments will be due if the member is receiving an additional lump sum payment that is 12 months later than when they received their first lump sum payment.

- 7.3 It is understood the LGA will be requesting new burdens funding from the government for any costs that are incurred by each FRA that is a direct result of applying remedy. However, this funding is not guaranteed, nor is it guaranteed to cover the full cost, should funding from the government be made available.

8. ADOPTION OF THE FRAMEWORK

- 8.1 The LGA has stated that; "Each FRA is asked to consider adoption of the Framework and we would encourage such adoption in order to provide a consistent approach to Immediate Detriment cases across the fire and rescue service."
- 8.2 It is important to fully understand that if the CFA does not adopt the Framework then there is a high probability that the FBU would seek to challenge the Authority through the High Court.
- 8.3 Although the Framework provides challenges both in terms of process and financial costs, these risks are outweighed by the potential for high court proceedings, both in terms of the cost of the proceedings and the likely success by the FBU.
- 8.4 Although the Framework was agreed by the LGA on the 8 October 2021, it is understood that it can only be formally adopted by an FRA once it has been through its governance and due diligence procedures. However, the LGA has indicated that the decision to adopt the Framework is time critical and should be agreed as soon as possible so as to avoid any High Court action by the FBU.
- 8.5 If adopted, CFA will make all retired members aware that they have the right to make an application. The HR team has already received **five** applications to date from retired members, however the Framework cannot be applied yet as it has not been formally adopted. These members have been provided with a holding statement prior to any formal decision being made, and the time frames thus will not be applied until a formal decision has been made by the Authority.

9. FINANCIAL IMPLICATIONS

- 9.1 There are financial implications of adopting the Framework which are set out in the report but the additional costs may be mitigated by new burdens grant funding from the government if the LGA is successful in its application for this funding. There is also the fact the FBU will highly likely be successful in any legal action it brings against the Authority with regard to pension remedy and non-adoption of the Framework in the High Court which almost certainly means the Authority would face not only the risk of being taken to court but then having to meet the significant court costs involved. This risk alone justifies adherence to the Framework according to the LGA.

10. **RISK MANAGEMENT**

- 10.1 The impact of changes to firefighters pension schemes is noted as a red risk on the Corporate Risk Register. While the MoU and Framework do not directly address any of the budgetary or resourcing impacts, it does reduce the risk of a potential failure to comply with legal requirements.

11. **LEGAL IMPLICATIONS**

- 11.1 The MoU contains a 'Compensation Record' (Annex 3 of the MoU) which the member signs and which is signed on behalf of the FRA, recording the benefits provided to the member under the Framework process. In addition, the Compensation Record also states that the benefits provided are in full and final settlement of the relevant issues noted in the Compensation Record, and the member agrees not to issue proceedings in respect of them against the FRA either as employer or as scheme manager, other than if there is a failure to abide by the agreement.
- 11.2 The MoU covers compensation as set out in the Framework. It does not cover any additional remedies as that is currently under consideration in the Employment Tribunal, such as injury to feelings. Therefore, the Compensation Record does not seek to settle those claims.
- 11.3 Although the Compensation Record states it is in full and final settlement of the Framework issues, it is not a formal settlement agreement or ACAS (Advisory Conciliation and Arbitration Service) COT3 agreement which would prevent an employee bringing a tribunal claim in respect of the issues.

The LGA has advised FRAs that:

- a) The terms of the MoU give comfort in 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. Whilst this does not mean that claims will not or cannot be brought on an individual or collective basis supported by 'no win no fees' type solicitors, one would expect that fewer firefighters would want to embark on claims themselves, and no win no fee solicitors would be aware of the risk of no awards being made for such claims, due to 'just and equitable' considerations
- b) If FRAs were to try to enter into mass settlement agreements or COT3s it would be difficult to organise (as it is likely to be on an individual basis) and if it is by way of a settlement agreement there would be a cost per agreement for the independent legal advice which the FRA would usually be expected to cover. A standard cost would be around £300 plus VAT for an agreement where the terms are agreed in principle; and
- c) Moreover, COT3s and settlement agreements usually exclude the right to claim accrued pension rights from any waiver as a matter of public policy as set out in s.91 of the Pensions Act 1995, which prevents such a waiver subject to some very limited exceptions.

12. EQUALITY IMPLICATIONS

12.1 There are no equality implications arising from this report.

13. HEALTH AND SAFETY IMPLICATIONS

13.1 There are no health and safety implications arising from this report.

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