

**PENSION FUND COMMITTEE – 11 JUNE 2021**

**AGE DISCRIMINATION CASES IN THE FIREFIGHTERS PENSION SCHEME**

**Report by the Director of Finance**

**RECOMMENDATION**

1. **The Committee is RECOMMENDED to note the latest legal position on the age discrimination cases in the firefighters pension schemes and the intention to call an additional meeting of this Committee to determine our Policy in advance of revised Regulations once in receipt of further legal advice and the publication of the National Framework.**

**Introduction and Background**

2. As part of the reform of the public sector pension schemes following Lord Hutton's review the Government established the Firefighters Pension Scheme 2015. Unlike under the Local Government Scheme where all members of the legacy scheme were transferred to the new scheme, and the legacy scheme closed for the accrual of new benefits, the Government left open the legacy Firefighters Pension Scheme (either the 1992 Scheme or the 2006 Scheme), with Members transferring to the 2015 Scheme at different points dependent on age.
3. For those members of the 1992 Scheme who were 45 or older as at 1 April 2012, they were given protected rights to stay in the 1992 Scheme on the assumption that they would retire at or before their normal retirement age in the 1992 Scheme of 55. For those aged between 41 and 45, they were given tapered protection which meant that they transferred to the 2015 Scheme at some point between 1 April 2015 and 31 March 2022. Those younger than 41 as at 1 April 2012 were transferred to the 2015 Scheme with effect from 1 April 2015.
4. Similar protections existed for those members of the 2006 Scheme, except the relevant ages at 1 April 2012 were 50 or older, 46-50 and under 46 reflecting the normal retirement age in the 2006 Scheme of 60.
5. The Fire Brigades Union (FBU) did not accept the changes made to the pension schemes for their members and alongside the Judges launched legal action to challenge the decision. The 2 test cases were in the name of McCloud for the judicial scheme and Sargeant for the Firefighter scheme. Following a series of legal decisions, McCloud and Sargeant finally won their cases against the

Government reforms on the grounds of unlawful age discrimination, and in 2018 the Appeal Court refused the Government leave for further appeal.

6. The Government are now in the process of introducing further changes to all the public sector pension schemes to remedy the age discrimination. Unfortunately, this is not a quick process requiring changes to the primary legislation set out in the Public Sector Pensions Act 2013 before changes can be introduced in the secondary legislation in respect of each public sector scheme.
7. The Government have set out the principles behind the remedy arrangements they intend to implement. As of 1 April 2022, all active scheme members irrespective of their age will earn all future pension benefits within the 2015 Scheme. For the Remedy Period (1 April 2015 to 31 March 2022), all members who were in a legacy scheme as at 1 April 2012 and were still an active member as at 1 April 2015 (or re-joined after that date where the break in service is deemed as a qualifying break under the Regulations) will be placed back in their legacy scheme for the full remedy period. At the point of their retirement, they will be given the option for their pension benefits for the remedy period to be calculated under either their legacy scheme or the 2015 Scheme.
8. Unlike the other public sector unions, the FBU have issued further legal challenges to seek immediate remedy of the age discrimination rather than wait for all remedies to be actioned following implementation of the new Regulations. The new Regulations are not expected until April 2022 at the earliest. The Courts have already ruled in favour of the FBU in dismissing the shared defence of the Fire Authorities that they were required to act under the statutory regulations, with the Employment Appeals Tribunal ruling that Fire Authorities cannot base a defence on regulations which have been found to be discriminatory, and must seek to address the unlawful discrimination in their role as Scheme Manager to their schemes.
9. The FBU currently have further test cases in front of the Courts in order to force the appropriate Fire Authorities to address the age discrimination present in each case. The FBU have stated that on the basis of a successful outcome, they will join all Fire Authorities to further legal challenge if they do not have in place arrangements to address the current age discrimination issues.

### **Current Position**

10. The challenge facing all Fire Authorities is the complexity of the proposed remedy and the fact that many of the features of the 1992, 2006 and 2015 schemes are different including normal retirement age, contribution rates, ill health retirement provisions, ability to purchase additional pension benefits, definition of pensionable pay. As such, where any member moves retrospectively from the 2015 Scheme back to their legacy scheme, there are a number of complex calculations to be performed. For some elements, there are no equivalent elements in the legacy scheme to enable a straight transfer of 2015 benefits to be undertaken.

11. The issues are all compounded by the interaction between the pension regulations and the tax regulations, with issues including the treatment of tax relief when adjusting prior year contributions. The tax issues are seen to be greatest where individuals are already in receipt of their pension.
12. The Scheme Advisory Board is therefore working through the Local Government Association in an attempt to produce a Framework which all Fire Authorities and Administrators can use to provide a consistent approach to addressing these issues. On 25 May 2021, the Scheme Advisory Board wrote an open letter to Her Majesty's Treasury seeking guidance on those financial and tax issues which must be determined to allow Fire Authorities to address the age discrimination issues in advance of new Scheme Regulations. Further advice is also being sought from the Home Office as the Government Department with ultimate responsibility for the Firefighters Pension Schemes

### **Oxfordshire Position**

13. There are a raft of legal issues therefore to resolve in determining how to move forward on the age discrimination cases in the firefighters pension schemes. We are currently seeking advice from Queens Counsel as well as waiting for the National Framework which the Scheme Advisory Board is seeking to produce.
14. The Fire Authority is currently monitoring the situation and will re-evaluate the position once the legal advice has been obtained and guidance clarified. It is at this point that the Fire Authority will return to an additional meeting of this Committee with a more in-depth paper outlining the legal position and proposed way forward. It is anticipated that consideration will need to be given to approximately 20 cases.
15. For those Members interested in finding out more information in advance of the additional meeting, please see the employer and scheme member websites run by the Local Government Association at [Welcome \(fpsregs.org\)](https://www.fpsregs.org) or [Welcome to Firefighters' Pension Scheme | Firefighters' Pension Scheme \(fpsmember.org\)](https://www.fpsmember.org) respectively.

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