

PENSION FUND COMMITTEE – 12 NOVEMBER 2021

AGE DISCRIMINATION CASES IN THE FIREFIGHTERS PENSION SCHEME

Report by the Director of Law and Governance, the Director of Finance and the Chief Fire Officer

RECOMMENDATION

1. **The Committee is RECOMMENDED to note the latest legal position on the age discrimination cases in the firefighters' pension schemes and adopt the Immediate Detriment Framework as published by the Local Government Association and Fire Brigades Union.**

Introduction

2. As reported to the June meeting of this Committee, there have been a number of legal challenges to Fire and Rescue Authorities across the Country, supported by the Fire Brigades Union (FBU) in respect of the failure of the authorities to address the age discrimination resulting from the Government's changes to the firefighters' pension schemes. The June report set out a number of complex issues involved in addressing the discrimination in advance of the Government passing new legislation but indicated that the Local Government Association (LGA) and the FBU were working to develop a framework which would enable decisions to be made in advance of the new legislation.
3. The Committee agreed to hold a special meeting to be attended by the Council's Monitoring Officer once the framework had been published. On 8 October 2021 the LGA and FBU published a joint letter and a Memorandum of Understanding and Framework, setting out the agreed way forward until the implementation of new legislation. Each Fire and Rescue Authority was invited to consider the documentation and adopt the Framework. The FBU confirmed that they would not support any further legal action against any Authority who had adopted and adhered to the Framework.
4. This report sets out a short reminder of the background to this issue, the key details from the Memorandum of Understanding and Framework and the advice of the Council's Monitoring Officer of the legal implications going forward. The Committee are recommended to adopt the Framework to mitigate the risk of further legal challenge.

Background to the Issue

5. 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.
6. 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.
7. 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.
8. 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.
9. The Government are now in the process of introducing further changes to all the public sector pension schemes to remedy the age discrimination. There initially needs to be changes implemented through primary legislation, and the Public Service Pensions and Judicial Offices Bill is currently before Parliament. Once enacted, this will allow the Government to publish further secondary legislation to address the issues associated with remedying the age discrimination. For the purposes of this report, the primary and secondary legislation have been jointly referred to as the Remedying Legislation.
10. The Government have set out the principles behind the remedy arrangements within the current Bill. 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 covering the remedy period to be calculated under either their legacy scheme or the 2015 Scheme.

11. The FBU have successfully challenged Fire and Rescue Authorities who have not sought to address the age discrimination in respect of their members in advance of the Remedying Legislation. This is despite the fact that there a number of complex issues associated with any proposal, including legal and taxation challenges.
12. As a consequence, the LGA on behalf of the Fire and Rescue Authorities in England, Scotland, Wales and Northern Ireland, and the FBU on behalf of members of the firefighters' pension schemes have worked together to produce a Memorandum of Understanding and Framework to set out an agreed way forward as to how to deal with all issues in advance of the Remedying Legislation. In some cases, it has been agreed that due to the complexity of the issue, it cannot be addressed until the Remedying Legislation has been enacted. The Framework includes a legal template to be signed by both the Fire and Rescue Authority and the Scheme Member setting out the basis of the payments made and those payments subject to further review on enactment of the Remedying Legislation, and a commitment not to commence or continue any legal proceedings in respect of the payments covered by the agreement unless as a result of a breach of the agreement itself.

The Memorandum of Understanding and Framework

13. The Memorandum of Understanding sets out the immediate detriment cases in scope of the Framework. These are:
 - current active members of the firefighters' pension schemes who become eligible for retirement and want to take all their benefits under their legacy pension scheme
 - current active members who would qualify for an ill-health pension under their legacy scheme, but not under the 2015 scheme
 - pensioner members of the scheme who are receiving a pension under the 2015 scheme and wish to be treated as having retired under their legacy scheme and
 - those who have left active service without an entitlement to an ill-health pension under the 2015 scheme, but who would have been entitled under their legacy scheme.
14. Annex 1 to the Memorandum of Understanding sets out the Framework as to how all known issues under the scheme will be dealt with in advance of the Remedying Legislation. These have been based on the principles already published by the Government. The issues covered include payment shortfalls in lump sums and pension benefits, the adjustment of employee contributions when moving between schemes, the treatment of excess contributions when moving back into a legacy scheme which provided for contribution holidays, and the review of prior year annual allowance calculations when moving back into a legacy scheme.

15. For issues around compensation for tax relief foregone on arrears of contributions, interest payable/receivable in respect of adjustments of employee contributions and the calculation of transfer values payable, the Framework confirms a requirement to await Remediating Legislation.
16. The Memorandum of Understanding includes a requirement for the parties to meet and review the documentation on a periodical basis, with the first meeting no later than five weeks from the initial date of the Memorandum. This review will consider the practicalities of the timescales set out in Annex 2 for the Memorandum in light of the number of cases being dealt with, as well as the need to amend the Framework itself in light of the progress of the Remediating Legislation.
17. The Memorandum of Understanding makes it clear that the Remediating Legislation will take precedence over the Framework from the date it is enacted, and as such will expire no later than 1 October 2023 which is the latest date set by the Government for when they intend to have implemented all the provisions required.
18. Annex 2 to the Memorandum sets out the process and timescales to be followed in delivering the Framework. Once the Framework has been adopted, the Fire Authority must communicate with all members setting out their rights under the Framework and the process to be followed in dealing with any applications. These communications must cover both active members and those retired under the 2015 Scheme, as well as targeting those who were refused ill-health retirement under the 2015 Scheme.
19. Once the Fire Authority has received an application from a member for their case to be investigated, they have 14 days to produce an initial response to confirm whether the applicant is entitled to a remedy under the Framework. Where a case is accepted, the Fire Authority must send out a statement to the applicant setting out the benefits and costs associated with a retirement under both the 2015 scheme and the relevant legacy scheme, alongside a form inviting the applicant to make a choice between receiving their benefits under the 2015 or their legacy scheme. This statement must be sent out within 62 days of the initial application. This period can be extended in respect of any time required to collect further medical data in cases where the applicant has sought an ill-health retirement under their legacy scheme.
20. Following receipt of a completed election form, the Fire Authority has 28 days to make the appropriate payments to an existing pensioner member. Payments to an active member would follow the normal timescales for the bringing into payment of a new pension. In both cases, payment is subject to the completion of a Record of Agreed Compensation/Remedy form signed by both the scheme member and the Fire Authority setting out the basis of the payments to be made, and those payments subject to review on enactment of the Remediating Legislation. The Member also commits not to commence or continue any legal action in respect of the payments covered by the form, except where they believe there has been a failure to abide by the terms set out. Once a Member has completed an application, the decision is irreversible.

Specific Issues within Oxfordshire

21. From an analysis of the data held, we believe there are currently 8 cases where a firefighter has left the scheme where they could make an application for their pension benefits to be paid under their legacy scheme. There are potentially a further 12 cases where the firefighter could retire before 31 March 2022 (the last day of the remedy period) and who could seek to make an application for their pension to be paid under their legacy scheme. It is anticipated that meeting the requirements of the Framework for these cases within the stipulated timeframes could be met from within existing resources.
22. At the time of writing this report, there are potential costs involved for the Council in adopting the Framework. The guidance received from the LGA sets out for each of the potential types of payment to be made under the framework, whether the payment would be a scheme benefit payable from the Pension Fund Account (and therefore reclaimable from the grant received from the Home Office), or a non-scheme benefit, in which case payment would be by way of compensation, to be met from the Fire Service budget.
23. The latter category of payment includes compensation in respect of
 - lost interest in underpaid lump sum payments,
 - excess contributions paid, whether as a result of the higher rate in the 2015 Scheme or in respect of an entitlement to a contribution holiday in the legacy scheme,
 - any excess annual allowance charge paid by the Member
 - any unauthorised payment charge payable by the Member.
24. The LGA is currently in discussion with the Government to ensure that all Fire and Rescue Authorities are properly compensated for these costs, which have only arisen as a result of the age discrimination ruling. The potential figures involved are difficult to estimate as they are dependent on the individual circumstances of each case, including decisions to be made by the member in respect of amount of pension commuted to lump sums.
25. There are also potential costs to be chargeable to the Fire Service budget related to the need to make changes to the pension software to deal with the requirement to provide figures under both the 2015 Scheme and the relevant legacy scheme going forward to all members in scope of the Remedying Legislation. The LGA are also in discussions with the Government seeking full compensation for any costs incurred.
26. It should be noted that these issues/costs are also likely to be incurred if the Committee does not adopt the Framework, as the Courts have made it clear that the issue of age discrimination must be addressed, and the FBU have made it clear that they will seek further court action where a Fire and Rescue Authority does not adopt the Framework. In such cases, the Fire Service budget would also be responsible for meeting any costs associated with the legal challenge. The LGA have made it clear that they would be unable to support any Authority

who wishes to work outside the Framework either through the provision of further advice, or by supporting Funds to work together on a collective defence.

Views of the Director of Law and Governance

27. The Local Government Association (LGA) and the Fire Brigade Union (FBU) have agreed a framework for the handling of immediate detriment claims whilst awaiting the enactment of secondary remedying legislation. The Memorandum of Understanding and proposed Framework outline arrangements for dealing with unlawful age discrimination identified by the Court of Appeal, in the 2015 reforms to the Judicial and Firefighters' pension schemes.
28. The proposed arrangements being a mechanism to provide an interim remedy whilst also preventing the issuing of claims prior to the introduction of secondary legislation. Not to accept the suggested proposal will leave the authority subject to claims from fire fighters for age discrimination, damages and costs in an already established area of law that supports such causes of action.

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