

## EAST SUSSEX FIRE AUTHORITY

**Panel** Policy & Resources Panel

**Date** 22 July 2021

**Title of Report** Firefighters' Pension Schemes (FPS) Age Discrimination, Remedy & Immediate Detriment

**By** Assistant Director People Services

**Lead Officer** John Olliver, Payroll, Pensions and HR Assurance Manager

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**Background Papers** None

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**Appendices** Appendix 1: Email from Legal Team

Appendix 2: Home Office Guidance on Immediate Detriment – 10 June 2021

Appendix 3: Fire Authority Waiver to Pension Administrator

Appendix 4: Member Waiver to ESFRS

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### Implications

<b>CORPORATE RISK</b>		<b>LEGAL</b>	<b>X</b>
<b>ENVIRONMENTAL</b>		<b>POLICY</b>	<b>X</b>
<b>FINANCIAL</b>	<b>X</b>	<b>POLITICAL</b>	<b>X</b>
<b>HEALTH &amp; SAFETY</b>		<b>OTHER (please specify)</b>	
<b>HUMAN RESOURCES</b>		<b>CORE BRIEF</b>	

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**PURPOSE OF REPORT** Further to the SLT meeting in May 2021 we have been asked to present this paper to explain the situation relating to McCloud/Sargeant judgement on Age Discrimination. This paper will also detail how ESFRS are able to proceed with on-going retirements that are immediately affected and includes the Service's legal position, identifies the scope and risks and recommends an approach it can take.

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**EXECUTIVE SUMMARY** This report is to inform the P&R Panel on the current position East Sussex Fire & Rescue Authority finds itself

in with regard to Age Discrimination, Remedy & Immediate Detriment Cases in the Firefighters' Pension Schemes.

Over past months SLT have been considering if and how the Authority can safely follow the informal Home Office (HO) Guidance as the basis on which they can make payments to certain Firefighter Pension Scheme members, although not all, who are due to retire, under Immediate Detriment.

As the HO Guidance is an informal document the Authority cannot completely rely upon its detail as it has no statutory basis, however, it may be considered as a defence against complaints about any decisions made pursuant to it or any misinterpretation, errors or omissions made.

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## **RECOMMENDATION**

The Policy & Resources Panel is recommended to:

- (i) Review this paper and the supporting appendices, giving particular note to the risks identified.
- (ii) Give consideration to how the Authority can follow the informal Home Office Guidance with regard to Immediate Detriment Cases, where possible.
- (iii) Agree to implement Immediate Detriment and allow those Firefighter Pension Scheme members in scope (as defined in paragraph 4.3) to retire under their legacy scheme regulations.
- (iv) Authorise the Assistant Director People Services to sign the waiver requested by West Yorkshire Pension Fund (Appendix 3).

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## **1. GOVERNMENT'S FURTHER GUIDANCE TO REMOVE THE AGE DISCRIMINATION IN PUBLIC SERVICE PENSIONS SCHEMES**

- 1.1 At the March Senior Leadership Team (SLT) meeting officers were advised that the Local Government Association (LGA) had assured all Fire & Rescue Authorities (FRAs) that new guidance from the Home Office (HO) would be available by the end of that month. This was to be accompanied by a legal

waiver appropriate for members that would support any Authorities that choose to enact Immediate Detriment (ID) before the appropriate legislation is in place. This has not been forthcoming. No reason was given by LGA for this delay.

- 1.2 In April a further update from LGA came by the way of a circulated email. Within this circular the LGA were still advising FRAs not to proceed with retirements under ID on the basis that choosing this approach might confuse a Framework that they are building to help with standardising these procedures. They recognised that, in the absence of a clear statutory or regulatory framework, this framework itself is likely to contain elements of risk.
- 1.3 The email also covered some reference to combined legal advice from Bevan Brittan and discussions with the Fire Brigade Union (FBU).
- 1.4 West Yorkshire Pension Fund (WYPF) has confirmed that six FRAs for whom they provide pension administration services have chosen to adopt the guidance, however, one of these has since withdrawn following the aforementioned update from LGA.
- 1.5 The Service's Pension Adviser has been working with WYPF on the standard template from the LGA designed to address all other members affected by the Age Discrimination judgement in preparation for the publication of the final remedy instruments.
- 1.6 The LGA have since issued further information notes to FRAs to support and clarify the HO Guidance notes, the latest one being in June 2021. The updated Immediate Detriment guidance from Home Office was published on 10 June 2021 and can be seen at Appendix 2.

## **2. FIRE AUTHORITIES' POWERS TO IMPLEMENT THE GUIDANCE FOR CASES OF IMMEDIATE DETRIMENT**

- 2.1 March's SLT meeting requested further investigation into how the Service can move to a position where we can opt to act on the ID Guidance and at which level of the Authority we should seek approval for such a move, if the decision was made to follow this path.
- 2.2 The Authority's Deputy Monitoring Officer (DMO) has offered the advice by email and is displayed at Appendix 1.
- 2.3 As you will see, the DMO's advice is that we should seek a determination by the Fire Authority in due course, but Chief Fire Officer (CFO) has the power to authorise payments on any individual case.

At present, the Service has three individuals who have given notice of their retirement before the end of July 2021. Just one of these can be considered an

achievable case where the member's record does not include any situation that will prevent the Service from enacting ID.

2.4 If the Panel agree that the Service should begin to follow the guidance we will need to put two waivers in place.

- Appendix 3 shows the administrative waiver that WYPF will require the Authority to issue.
- Appendix 4 shows a member waiver which has been reviewed and approved by the Service's legal team.

### **3. NUMBERS OF POTENTIAL ID CASES AND THE PRACTICALITIES OF ENACTMENT**

3.1 Those affected, or potentially so, by ID have been banded and quantified as shown below:

- Scheme members whose earliest date of retirement is before 1 April 2022, are over 50 years old and will have 30 years pensionable service. 4 cases, all of which are considered out of scope. One employee is currently on long term sick and two have already elected to retire before the end of July.
- Scheme members whose earliest date of retirement is before 1 April 2022, are over 50 years old and will have more than 25 years pensionable service and will also attain 30 years of service before October 2023. 11 cases, one of which is mentioned above.
- Scheme members who have more than 25 years pensionable service and will reach the age of 55 before October 2023. 3 cases.
- Scheme members whose earliest date of retirement is before October 2023 and are over 55 years old by that date. 13 cases.
- Scheme members whose earliest date of retirement is before October 2023 and are over 50 years old and over 25 years pensionable by that date. 33 cases.

In summary, these total 64 employees could retire without penalty (just a temporary reduction in scheme benefits) before the remedy is expected to be fully delivered in October 2023.

The first three categories should be considered as employees who are highly likely to retire under ID. However, beyond the three cases mentioned above (2 section one and another from section two), we can only identify one other individual who might retire under ID before September 2021.

3.2 We must not underestimate the level of effort required to implement the ID guidance.

These include:

- Assessment of those wishing to retire to test whether they are covered by the ID Guidance
- Issuing member waiver to retirees where appropriate
- Recalculation of employee pension contributions from the member's transition from the legacy scheme to date of retirement.
- Set up a repayment agreement of contribution via payroll or retirement lump sum
- Any rework that might be arising from inconsistency with the aforementioned LGA ID Framework and/or final remedy.

#### **4. RISKS AND BENEFITS OF ID**

4.1 The Service's Pension Adviser has been working on a general Risk Register for the Pensions Board which includes a Red Risk for ID. Areas of risk listed under this area include the following:

- Primary and secondary legislation not yet in place
- WYPF have advised they will calculate and pay benefits under ID if the Authority choose to but they will not accept any liability for any issues that may arise from this and that they will require the Authority to sign a waiver to this effect.
- Some members have technical issues which the HO Guidance doesn't address or resolve, so the Service couldn't pay all members under ID
- Automated Systems have not yet been developed to perform the calculations required, so the processes of providing relevant data (as below) and then calculating legacy pension benefits will be largely manual and therefore has a higher risk of errors or omissions due to human error.
- Lack of available resources at the Authority & WYPF (To cover 3.2 and data below)
- Missing or not easily obtainable data / service information necessary to accurately recreate Final Salary and CARE (Career Averaged Revalued Earnings) Pension Records for the 7 year remedy period including: Pay (FS Pay & CARE Pay), Continuing Professional Development (CPD) (which can give rise to an Additional Pension Benefit (APB) in FS Schemes), Service History Service Breaks, Changes of Hours (e.g. : full time to part time), Temporary Promotions (APB in FS Schemes none pensionable in CARE Scheme), Split Pension Awards in FS Schemes, Transfers In to 2015 scheme, Added Pension bought in 2015 scheme, Pension Debits on Divorce or Scheme Pays, Opters Out, Leavers, Contributions Schedules under both schemes to be calculated/recalculated and differences repaid.

- 4.2 A major consideration for the Authority is that in not enacting ID that we are in the breach of the age discrimination judgement. This is reinforced by the three cases of litigation already in progress against two other Fire Authorities.

Failure to enact ID will leave the Authority vulnerable to action from the Fire Brigade Union and any associated legal and administrative costs of defending our position.

- 4.3 If we choose as a Service to enact ID we need to be clear of the scope and the conditions we will need to apply in our assessment of individual cases.

- **In Scope** – Any pension scheme member who was a member of either of the legacy schemes (FPS 1992 & 2006) as at 31 March 2012 and 31<sup>st</sup> March 2015 and whose pension record does not include any of the criteria listed below.
- **Out of Scope** – The scenarios below cover several issues that will prevent the Service from following the ID Guidance:
  - a) Joined the Pension Scheme after 1<sup>st</sup> April 2015
  - b) Scheme members who have already retired and are in receipt of their pension payments.
  - c) Death in Service
  - d) Where an individual has overpaid contributions and is therefore due a refund
  - e) Members who by virtue of age and service would qualify for a contribution holiday under the legacy 1992 Scheme having reached 30 years' service before age 50

Retirees who are in scope and leaving within the next few months may need to accept that their underpaid contributions will be taken from their retirement lump sum rather than from their monthly pay but the administrative effort required by ourselves and WYPF of enacting ID is achievable.

- 4.4 These risks are extensive and varied and warns us of how challenging ID will be. However, we understand the risks and need to consider what level of risk is acceptable to the Service against any possible litigation for not following the guidance and the decision of the ET.

## 5. **FINANCIAL IMPLICATIONS**

- 5.1 It is not possible at this stage to identify the specific costs associated with the recommendations of this report as these will be identified on a case by case basis. Using the ID guidance note now will not increase any direct amounts payable, it will simply bring some of those costs forward. However, if interest is applied as

part of the final remedy it may actually result in lower overall costs on the basis that using the guidance now would close the period that interest is calculated over, instead of extending it to 2023 for the cases identified.

- 5.2 It is expected that the costs associated with the administration of the remedy will be borne by FRAs whilst monies owed to members will be met by government. In some circumstances individuals may also incur additional costs as a result of a change in pension schemes e.g. annual allowance costs. There is the potential that the financial impact of the remedy will be seen through the next valuation of the Scheme and resultant higher employer's contributions from 2023/24. The Sector continues to lobby Government to fully fund these additional costs. The Service will also be liable for any claim for Injury to Feelings made by the 67 scheme members listed on the original ET claim.
- 5.3 In not implementing ID, further legal action could be taken by the Fire Brigades' Union and result in further litigation costs.
- 5.4 Given the absence of some technical information to support calculations there is potential for error. Whilst the pension administrator will use best efforts in any calculation and payment of benefits, the Authority may be required to meet any financial liabilities arising in these circumstances.

## 6. **OPTIONS**

- 6.1 **Option One:** Do nothing. In other words, insist that all retirees are only permitted to claim the benefits payable under the current regulations. For most of those detailed above this will mean that they will only be able to draw pension benefits relating to their legacy scheme accrued to the point of transfer into the FPS 2015, with their FPS 2015 benefits being deferred until their normal retirement age in that scheme.
- 6.2 **Option Two:** Enact Immediate Detriment. As described above, retirees, who remain in scope, will be able to retire under their legacy scheme regulations.

As we have detailed above neither option is without risk, but these are sufficiently understood and can be communicated to the retirees and mitigated by our process of review on a case by case basis. The Personal Impact Assessment process documentation created will also support each of our decisions.

## 7. **CONCLUSION**

- 7.1 We have established that if we chose not to enact ID the Authority would be knowingly in breach of the Age Discrimination Employment Tribunal findings and therefore be at a significant risk of litigation with the associated expense, possible sanction and reputational damage that may also be caused.

7.2 Our understanding of the Pension Scheme changes and ID offers us the confidence to be able to follow the most recent Home Office guidance. This position is reinforced by the professional support we have from WYPF and the processes and controls that we have designed to mitigate the risk of future complaints and/or litigation.