

## EAST SUSSEX FIRE AUTHORITY

**Panel** Policy & Resources Panel

**Date** 11 November 2021

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

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**Background Papers** Firefighters' Pension Schemes (FPS) Age Discrimination, Remedy & Immediate Detriment Previous Briefing Report to Policy & Resources Panel – 22 July 2021

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**Appendices**

Appendix 1: Emails from Local Government Association (LGA) & LGA Legal on Agreement on Immediate Detriment Framework with Fire Brigades Union (FBU) – 8 October 2021

Appendix 2: Joint Statement from the LGA & the Fire Brigades Union (FBU) – 8 October 2021

Appendix 3: Memorandum of Understanding (MoU) between the LGA & the FBU on the Immediate Detriment Framework – 8 October 2021

Appendix 4: LGAs Immediate Detriment Framework (IDF) Guidance for Fire and Rescue Authorities in their role as scheme managers – 8 October 2021

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### Implications

<b>CORPORATE RISK</b>		<b>LEGAL</b>	✓
<b>ENVIRONMENTAL</b>		<b>POLICY</b>	✓
<b>FINANCIAL</b>	✓	<b>POLITICAL</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 Policy & Resources Panel meeting in July 2021, at which decisions were made on payment under the informal Home Office Guidance dated June 2021, we have been asked to present this paper, to explain further developments in the situation relating to McCloud/Sargeant judgement on Age Discrimination.

This paper will also detail how ESFRS are able to proceed with future and past 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 Policy & Resources 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.

At the last meeting in July the Policy & Resources Panel considered if and how the Authority could safely follow the informal Home Office (HO) Guidance dated June 2021 as the basis on which they could make payments to certain Firefighter Pension Scheme members, although not all, who were still yet due to retire, under Immediate Detriment. At that meeting the Panel agreed that ESFRS should pay under Immediate Detriment, wherever possible, to those in scope at that time under that informal guidance.

Since then, following further legal cases brought in the High Court, on the 8 October 2021 the LGA and the FBU have come to an agreement through a Memorandum of Understanding on a Framework (Appendices 2 & 3) on how they would recommend that FRAs proceed going forward with regard to paying pension benefits and compensation under Immediate Detriment to both retrospective and prospective retirees.

As the Immediate Detriment Framework is not a legally binding document the Authority cannot completely rely upon its detail as it has no statutory basis, however, if it is adopted and followed, 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 Immediate Detriment Framework with regard to payment of Immediate Detriment Cases, where possible.
  - (iii) Consider agreeing to payment under the Immediate Detriment Framework and allowing those Firefighters' Pension Scheme members in scope to be offered payment under their legacy pension scheme regulations.
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**1. THE FRAMEWORK FOR MANAGING IMMEDIATE DETRIMENT ISSUES THAT THE LOCAL GOVERNMENT ASSOCIATION (LGA) & THE FIRE BRIGADES UNION (FBU) HAVE AGREED & RECOMMEND IS ADOPTED BY ALL FRAs**

- 1.1 On 8<sup>th</sup> October 2021, the LGA & the FBU agreed and issued a Framework for Managing Immediate Detriment issues in the Firefighters' Pension Schemes (FPS) going forward (Appendices 2 & 3).
- 1.2 The Immediate Detriment Framework (IDF) has been developed and agreed by the LGA (in line with the decisions of the Steering Committee specifically set up to deal with matters arising from Sargeant) and the FBU based on the current understanding of the provisions contained for remedy in the Public Service Pensions and Judicial Offices Bill 2021. Its purpose is to provide a framework under which members in scope can receive benefits prior to all remedying legislation being in force, therefore avoiding significant additional numbers of Immediate Detriment legal claims as a result of the Sargeant age discrimination case.
- 1.3 Immediate Detriment issues refers to those scheme members who were transferred from their previous legacy Final Salary pension schemes (the FPS 1992 & 2006 Schemes) to the reformed Career Averaged Revalued Earnings (CARE) pension scheme (the FPS 2015 Scheme) since April 2015, and have either already taken their pension benefits, or might be potentially due to take

their pension benefits, before the full changes to Age Discrimination Remedy legislation is brought in, which will not be until October 2023 at the earliest.

- 1.4 This ID Framework agreement was entered into by the LGA and the FBU following further legal cases brought in the High Court against the London Fire Commissioner (LFC) and Nottinghamshire and City of Nottingham Fire and Rescue Authority (NFRA). The cases concerned Immediate Detriment issues in relation to the McCloud/Sargeant judgment and the claimants were supported by the Fire Brigades Union (FBU).
- 1.5 It was apparent similar issues would arise more widely across the sector. The FBU was clear that matters for affected individuals needed to be resolved sooner rather than later and it would, if necessary, support further legal cases.
- 1.6 Many Fire and Rescue Authorities (FRAs) across the UK, including East Sussex Fire Authority, on an individual basis, have already indicated that they wished to be able to deal with Immediate Detriment issues, wherever possible, as soon as possible.
- 1.7 The problem was not an unwillingness to do so but rather the need to identify and develop a suitable mechanism to be able to do so in a way which minimised the risks while the Government is putting in place the McCloud/Sargeant remedying legislation.
- 1.8 With that in mind, the Local Government Association (LGA) and the FBU have been in discussions to identify a mutually acceptable Framework, setting out a mechanism for handling Immediate Detriment cases, to assist all parties prior to completion and implementation of the McCloud/Sargeant remedying legislation.
- 1.9 They hope this will help in resolving the genuine difficulties that had arisen for FRAs in making payments to those affected (including for example issues around unauthorised payment charges and contribution holidays) and in removing the potential for further court claims.
- 1.10 During the course of these discussions between the LGA and the FBU, the Government laid primary legislation before Parliament in the Public Service Pensions and Judicial Offices Bill (the Bill) and will make secondary legislation pursuant to the Bill (together, the Remedying Legislation) to provide the affected pension scheme members with a remedy for the discrimination found in the McCloud/Sargeant claims.
- 1.11 Following a series of complex discussions including respective legal representatives, which were also able to utilise the longstanding national relationship between the LGA and FBU, they advised ESFRA that agreement was reached on the attached Memorandum of Understanding (MoU) and Framework (Appendix 3).

- 1.12 They believe the Memorandum of Understanding (MoU) and Framework are consistent with the principles currently set out in the Bill and will mean that appropriate action can be taken.
- 1.13 As and when parts of the Remedying Legislation covering the relevant part of the Framework come into effect the MoU and Framework indicate that the relevant Remedying Legislation will then be used instead.
- 1.14 In a Joint Statement issued on 8<sup>th</sup> October 2021 (Appendix 2) the LGA & the FBU have asked each FRA to consider adoption of the Framework and they have stated that they would encourage such adoption in order to provide a consistent approach to Immediate Detriment cases across the fire and rescue service.

## **2. FIRE AUTHORITIES' LEGAL POWER TO ADOPT THE IMMEDIATE DETRIMENT FRAMEWORK**

- 2.1 As previously advised by the LGAs legal advisors, the informal Home Office Guidance dated June 2021, and the legal advice received from ESFRA's Deputy Monitoring Officer; ESFRA has the power to calculate and pay pension entitlements under their legacy schemes under Immediate Detriment, through the application of section 61 of the Equality Act 2010.

## **3. NUMBERS OF POTENTIAL ID FRAMEWORK CASES WITHIN ESFRS**

- 3.1 There are potentially 80 individuals affected by ID. They have been banded and quantified as shown below:
- 1 current employee / scheme member whose earliest date of retirement is before 1 April 2022, is over 50 years old and will have 30 years pensionable service.
  - 11 current employees / 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.
  - 3 current employees / scheme members who have more than 25 years pensionable service and will reach the age of 55 before October 2023.
  - 13 current employees / scheme members whose earliest date of retirement is before October 2023 and are over 55 years old by that date.

- 32 current employees / scheme members whose earliest date of retirement is before October 2023 and are over 50 years old with over 25 years pensionable service by that date.
- 20 former employees / scheme members who have already retired or died and therefore have pensions or dependant pensions already in payment.

3.2 In summary, these total 80 affected individuals break down between;

- 60 current employees who could prospectively retire before the remedy legislation is expected to be fully delivered in October 2023, plus
- 20 for whom pension benefits are already in payment who could apply for a retrospective review of their pension benefits under the ID Framework (2 of those already in receipt of pension have already indicated their intention to make such an application if the ID Framework is adopted).

#### **4. THE PRACTICALITIES OF ADOPTION OF THE ID FRAMEWORK**

4.1 We must not underestimate the level of effort and additional resources that will be required to implement the ID Framework. This includes:

- Working to the extremely tight 90 calendar day deadlines set out in the ID Framework document (from application by the member/dependent, to payment of benefits).
- Potentially having to review / amend 20 pensioner/dependent in payment cases in line with the ID Framework within the same or very close 90 calendar day period if the ID Framework is adopted, as soon as it is adopted.
- Assessment of those who apply to be treated under the ID Framework to establish whether they can be dealt with under the ID Framework.
- Issuing 'Member Waivers' & calculating and issuing 'Record of Agreed Compensation / Remedy' to retirees where appropriate for signing.
- Recalculation of employee pension contributions from the member's transition from the legacy scheme to date of retirement.
- Calculation / recalculation of all potential pension benefit options and subsequent payment of those benefits / increased benefits within the prescribed timescales.

- Set up a repayment agreement of contribution via payroll or retirement lump sum.
- Any rework that might be arising from inconsistency with the ID Framework and/or final remedy.

## **5. RISKS AND BENEFITS OF ADOPTION OF THE ID FRAMEWORK**

5.1 The East Sussex Fire and Rescue Service Firefighters' Pension Scheme has a 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 where the Authority choose to, but they will not accept any liability for any issues that may arise from this. The Authority has already signed a waiver to this effect accepting any such future liability.
- 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 resources and capacity currently available at ESFRS & WYPF creating significant difficulties in potentially meeting the extremely tight (90 calendar days) timescales to process each ID case.
- WYPF have already made the LGA aware that it is highly unlikely that they will be able to meet the timescales quoted within the ID Framework MoU in most cases until they have a more automated calculation process available. This is unlikely to be in place in the near future.
- 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, Leavers, Contributions Schedules under both schemes to be calculated/recalculated and differences plus interest repaid.

- 5.2 A major consideration for the Authority is that in not adopting the ID Framework is that we are in the breach of the age discrimination judgement. This is reinforced by the three cases of litigation that have recently been dealt with against two other Fire Authorities following which agreement to recommend all further cases be dealt with under the ID Framework was reached by the LGA and the FBU.
- 5.3 Failure to adopt the ID Framework will leave the Authority vulnerable to further legal action from the Fire Brigades Union and any associated legal and administrative costs of defending our position.
- 5.4 If ESFA choose as a Service to adopt the ID Framework we need to be clear of the scope and the conditions we will need to apply in our assessment of individual cases. It should be noted that adoption of the ID Framework will significantly increase those who are in scope for payment under ID, and therefore the increased immediate workloads that go with that, both at ESFRS and WYPF.
- 5.5 The framework extends payment under ID to include categories of scheme member who were previously out of scope under the Home Office ID Guidance issued in June 2021. For this reason, please be aware that adoption of payment under this ID Framework will significantly increase workloads both here at ESFRS and at WYPF. The ID Framework extends payment under ID to include:
- Members who will be owed contributions if electing for all of their pension benefits under the FPS 2006.
  - Members who will be owed contributions if electing for all of their pension benefits under the FPS 1992 and would have had a contributions holiday in the FPS 1992 had they not be transferred to the FPS 2015.
  - Pensioner's and their surviving dependants (if they have subsequently died) who have already gone into payment since being transferred to the FPS 2015 at some point since 1 April 2015.
  - **Therefore, In Scope – All pension scheme members (or their surviving dependant's) who were members of either of the legacy schemes (FPS 1992 & 2006) as at 31 March 2012 and 31<sup>st</sup> March 2015.**
  - **Out of Scope – Only those who joined the Pension Scheme after 1<sup>st</sup> April 2015.**
- 5.6 Prospective retirees who are in scope and leaving within the next few months may need to accept that any underpaid contributions will be taken from their retirement lump sum rather than through ESFRS Payroll.

- 5.7 These risks are extensive and varied and warns us of how challenging adoption of the ID Framework 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 ID Framework and the decision of the Employment Tribunal.
- 5.8 Balanced against 5.7 above, we need to accept that the level of resources and capacity currently available at both ESFRS and WYPF could equally result in further legal action if the ID Framework is adopted and then the extremely tight (90 calendar days) timescales fail to be delivered on any individual cases.

## **6. FINANCIAL IMPLICATIONS**

- 6.1 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 Framework will increase some direct amounts payable, and will bring some other costs forward. Costs will be incurred from ESFRA on compensation and interest to be paid in relation to overpaid contributions. However, as interest will be applied as part of the final remedy any way, it may result in lower overall costs on the basis that using the ID Framework now would close the period that interest is calculated over, instead of extending it to 2023 for the cases dealt with before then.
- 6.2 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.
- 6.3 In not adopting the ID Framework, further legal action could be taken by the Fire Brigades' Union and result in further litigation costs.
- 6.4 Equally; in adopting the ID Framework, further legal action could be taken by the Fire Brigades' Union and result in further litigation costs if the extremely tight (90 calendar days) timescales are missed on any individual cases.
- 6.5 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.
- 6.6 It is worth noting that the LGAs legal advisors have stated in their covering e-mail regarding the ID Framework (Appendix 1); *'We encourage all FRAs to adopt*

*the Framework..... Please note also we will inform the respective governments in England, Wales, Scotland and Northern Ireland about the Framework in connection with us seeking funding for all the costs arising out of the Sargeant age discrimination pensions claims, whether under New Burdens or otherwise.'*

## **7. OPTIONS**

7.1 **Option One:** Change nothing. In other words, insist that all retirees are only permitted to claim the benefits payable under the current regulations or continue to offer payment under ID only to the smaller amount of members who were already in scope under the previous Home Office Guidance. For many 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.

7.2 **Option Two:** Adopt the Immediate Detriment Framework. As described above, retirees, who are in scope, will be able to retire under their legacy scheme regulations and those who have already retired can apply to have their pension benefits reviewed and increased accordingly.

7.3 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.

## **8. CONCLUSION**

8.1 We have established that if we chose not to adopt the ID Framework 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.

8.2 Our understanding of the Pension Scheme changes and the ID Framework offers us the confidence to be able to adopt the ID Framework, with our main reservation being the extremely tight (90 calendar day) timescale turnaround given the current resources and systems available at ESFRS and WYPF. 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.