

EAST SUSSEX FIRE AUTHORITY

Meeting Policy & Resources Panel

Date 20 January 2022

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

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Background Papers Firefighters' Pension Schemes (FPS)
Age Discrimination, Remedy & Immediate Detriment
Briefing Note

Firefighters' Pension Schemes (FPS) Age
Discrimination, Remedy and Immediate Detriment
Briefing Note and Update – SLT 25 March 2021 Item 8

Appendices Appendix 1: FPS SAB Letter to HMT (December 2021)

Appendix 2: Table of ID Approach of Other Services

Implications

CORPORATE RISK		LEGAL	X
ENVIRONMENTAL		POLICY	X
FINANCIAL	X	POLITICAL	X
HEALTH & SAFETY		OTHER (please specify)	
HUMAN RESOURCES		CORE BRIEF	

PURPOSE OF REPORT Further to the November Policy & Resources Panel decision to adopt Local Government Association MOU and framework in relation to Immediate Detriment, and the subsequent decision made by the December 2021 Fire Authority to pause our position following the withdrawal of the guidance from the Home Office on ID, this paper, with supported appendices is

an update on the further changes that have been published and the recommended approach for the Service

EXECUTIVE SUMMARY This report is to inform the Policy and Resources Panel of the changing position in regard to Age Discrimination, Remedy & Immediate Detriment Cases in the Firefighters' Pension Schemes.

There is a fresh need to apprise the Authority of these facts and the how the Service are planning to act from this point.

RECOMMENDATION The Policy & Resources Panel is asked to:

- (i) review this paper and the supporting appendices; and
- (ii) receive an update from officers and consider the options set out in paragraph 3 of the report.

1. Age Discrimination Remedy ID Cases and the Withdrawal of Home Office Guidance

- 1.1 There are a number of urgent and pressing cases (known as “immediate detriment” cases). Immediate Detriment cases are where firefighters who belonged to the legacy pension schemes were obliged to transfer to the FPS 2015 scheme and are now looking to retire and take pension benefits.
- 1.2 Some of those are urgently seeking Ill Health Retirement pensions and believe that those pensions would be significantly better if the terms of the pre-2015 legacy final salary FPS applied to them.
- 1.3 Others would have qualified for retirement under the legacy schemes on the grounds of age and length of service and are very keen to claim those pensions now and again believe that their pensions would be more advantageous to them if the rules in the legacy schemes applied to them rather than the FPS 2015.
- 1.4 Following requests from the Firefighters Pension Scheme (England) Scheme Advisory Board (SAB) and the Fire Brigades Union (FBU) for guidance on how to deal with Immediate Detriment cases, on 21 August 2020, the Home Office

issued an informal guidance note directly to English Fire and Rescue Authorities (FRAs).

- 1.5 This guidance stated it may be possible for schemes to offer members a choice before final Deferred Choice Underpin (DCU) legislation is implemented, however, the legislation that allows schemes to do this was limited in effect. This original guidance did not cover all technical issues satisfactorily in order for FRAs to be able to process any cases under Immediate Detriment.
- 1.6 It stated that schemes could return eligible members who retire from the reformed schemes to the legacy schemes in relation to service after 1 April 2015 but did not allow for all consequential matters to be dealt with satisfactorily in all cases.
- 1.7 Following consultations with the Local Government Association (LGA) and the Scheme Advisory Board (SAB), on 10 June 2021 the HO issued an updated guidance note on ID cases. This stated, 'As the guidance is non statutory and informal, it does not in itself place legal obligations on FRAs. However, FRAs have the power to calculate and pay pension entitlements for those members who fall within either of the two categories under their legacy schemes, through the application of section 61 of the Equality Act 2010...'
- 1.8 After taking legal advice and weighing up the risks and mitigations involved carefully the decision was taken at a meeting of the Policy & Resources Panel of ESFA held on 22 July 2021, for ESFRS to pay pensions by offering ID DCU options wherever possible from then on, in line with the revised Home Office Guidance. So far, four such cases have arisen, and the members affected offered pension benefit options under ID. Three were age retirements and the other was an ill health retirement.
- 1.9 Subsequent to this on 8 October 2021 the Local Government Association (LGA) and the Fire Brigades Union (FBU) issued a joint 'Memorandum of Understanding & Framework for Managing Immediate Detriment Issues'.
- 1.10 This 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.'
- 1.11 After taking further legal advice and weighing up the risks and mitigations involved carefully the decision was taken at a meeting of the Policy & Resources Panel of ESFA held on 11 November 2021 to adopt the LGA and FBUs Immediate Detriment Framework. For the avoidance of doubt, no cases have yet been processed in line with this Framework.
- 1.12 On 29 November 2021, the Home Office withdrew its informal and non-statutory guidance on processing certain kinds of immediate detriment case ahead of

legislation, with immediate effect. The decision to withdraw the guidance was indicated as being based on HM Treasury's best assessment on the advisability of processing immediate detriment cases.

- 1.13 The Home Office stated that, although the decision remains for scheme managers to make, it does not advise schemes to process any immediate detriment cases before legislation is in place, given in its view the risk and uncertainty of correcting benefits before the Public Service Pensions and Judicial Offices (PSPJO) Bill, scheme regulations and relevant tax legislation are finalised and all come into force in or before October 2023.
- 1.14 Although the MoU and the accompanying framework is separate from, and is not subject to or dependent on, any guidance issued in relation to immediate detriment before the legislation comes into force, HMT's note is a cause of concern to FRAs who: (a) are considering adopting the framework; or (b) who have already adopted the framework (but have not reached a final settlement with individual scheme members pursuant to the framework on or before 29 November 2021).
- 1.15 HMT's note suggests that Section 61 cannot be relied upon to fully rectify a member's benefits and may have unintended and adverse tax consequences. It also indicates that members may face multiple corrections to their benefits once legislation is in place.
- 1.16 Concerns have also been raised regarding the Home Office's latest position on funding for immediate detriment, which was communicated with the Treasury's note as follows: *"... As the Government does not advise that immediate detriment cases should be processed in advance of the legislation coming into force, we will not be in a position to provide any additional funding for those costs which are paid outside of the pension account. These costs include payments that are not considered to be legitimate expenditure under the pension scheme regulations and any associated administration costs including any charges from your pension administrator. These will need to be funded locally by your fire and rescue authority from local budgets. In relation to immediate detriment costs paid from the pension account in the course of processing pipeline cases, FRAs will need to ensure that these payments comply with the financing regulations of the pension scheme. If they are considered to be legitimate expenditure then they will be considered for payment as part of the established processes for claiming the AME top up grant."*
- 1.17 The LGA further stated, there has never been a guarantee that costs arising from the Sargeant legal judgment would be covered by government. However, the FRAs position has long been that the government must fund all the costs of remedy, and we have always made that clear in our discussions with

government. Further the LGA has been working with Bevan Brittan for some time on recovering costs for FRAs, including under the New Burdens doctrine.

- 1.18 On 17 December 2021, The Scheme Advisory Board (SAB) wrote an open letter to HM Treasury on the withdrawal of the guidance to request more information on the risks and uncertainties mentioned in their assessment (Appendix 1). As at the date of writing this paper, we have not yet seen any response to this letter.
- 1.19 As a result of these developments, the following recommendation was adopted by ESFA at their meeting on 9 December 2021. *‘That the Fire Authority ask the CFO, in conjunction with the Treasurer and Monitoring Officer, to keep this matter under close review and take appropriate action to mitigate and minimise the risk to the authority prior to further clarity being obtained and in advance of either an update or revised position to be brought back to the Policy & Resources Panel at its meeting on the 20 January 2022.’*

2. ESFRS Actions and Progress Made Since December Fire Authority Meeting

- 2.1 Requested a group advice pack from PSTax. This has been agreed with approximately 15 other Fires Services across the country. We expect this advice from PSTax before the end of January.
- 2.2 Advice sought via deputy monitoring office as to the legal position for ESFRS with a request to gather opinion of the wider FireLawyers Network.
- 2.3 The Treasurer arranged a conference call (7th January 2022) with a number of other Fire Service Financial Directors/Treasurers to canvas their views/concerns and any adopted approaches. This is set to be a recurring activity so that views and approaches can be shared as ourselves and others progress.
- 2.4 Chief Fire Officer has been able to supply a “straw-poll” document via the NFCC which indicates the direction that other Services are likely to pursue or the status of their decision making processes. See appendix 2. Although useful, this does not indicate a strong trend of approach at this time.
- 2.5 WYPF Account Manager has been requested to indicate the positions taken by their other customers. Their feedback also reflects no real consistency across other Fire Services.
- 2.6 We have carried out some financial modelling to give an indication of the exposure that might become payable if we adopt ID for those who retired without the benefit of the legislative changes.

This will require ratification by WYPF but the 6 cases that are currently affected would expose the Service to a total of approximately £40,000.00 of compensation to cover additional “tax” charges that the HO have informed us that they will not fund.

3. Options and Risks

- 3.1 **Option One:** ESFRA could restart its paused position and action ID for both retirees and pensioners in retirement.

There maybe some cases where the framework cannot support very complex scenarios, however each instance will be actioned under WYPF advisement and communicated appropriately with the individual concerned.

The Home Office are advising against this, by removing their guidance, and will leave the Service exposed for some possible costs associated to compensation to scheme members in relation to the payment of second retirement lump sums and tax relief of employee contribution transfers (as item 2.6).

This would protect the Service from exposure to legal claims from retirees and their representative bodies.

- 3.2 **Option Two:** ESFRA could remain paused whilst further information and guidance is obtained from those sources/actions described under item 2.

This will delay correcting payments for those intending to retire in the coming months (approximately 4 Firefighters) and pensioners already in receipt of their pensions (currently a maximum of 6 individuals).

This would leave the Service exposed to legal claims from retirees and their representative bodies until we have enough information to make a final decision on its approach.

- 3.3 **Option Three:** ESFRA opts out of ID entirely until the Full Home Office remedy is published. This would effectively mean that any retirees from January 2022 until October 2023 would have to wait for their legacy Pension entitlement.

This would also leave the Service exposed to legal claims from retirees and their representative bodies for at least another 20 months.

- 3.4 **Option Four:** ESFRA reverts to its approach agreed in the Summer 2021 and continue with paying legacy benefits for those due to retire in the coming months but not revisiting those already in retirement until we have more certainty of how to action the retrospective changes.

This would leave the Service exposed to limited legal claims from retirees and their representative bodies until we have enough information to make a final decision on its approach.

4. Conclusion

- 4.1 The Service, along with many other Fire Authorities, remains in a difficult position without any definitive guidance. However, the threat of litigation from representative bodies is real and expected. The cost of any litigation is not possible to predict but we believe that any such action will result with the Service being obliged to make immediate payment under the framework.