

EAST SUSSEX FIRE AUTHORITY

Panel	Policy & Resources Panel
Date	12 May 2022
Title of Report	Update on the Developing Situation on Firefighters' Pension Schemes (FPS) Age Discrimination, Remedy & Immediate Detriment
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Background Papers	Developing Situation on Firefighters' Pension Schemes (FPS) Age Discrimination, Remedy & Immediate Detriment – Report to Policy & Resources Panel, 20 January 2022
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Appendices	<p>Appendix 1: Historical Timeline for McCloud-Sargeant</p> <p>Appendix 2: HM Treasury Fire Pension Scheme Advisory Board (SAB) response <u>CONFIDENTIAL</u> by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972 in that the Information relates to the financial or business affairs of any particular person (including the authority holding that information).</p> <p>Appendix 3: Local Government Association (LGA)/Fire Brigades Union (FBU) subsequent Response to HM Treasury (HMT)</p> <p>Appendix 4: National Fire Chiefs Council (NFCC) letter to FRS CFOs Immediate Detriment Update <u>CONFIDENTIAL</u> by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972 in that the Information relates to the financial or business affairs of any particular person (including the authority holding that information).</p>
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Implications

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

PURPOSE OF REPORT

To update the Panel on recent advice received from the National Fire Chiefs Council (NFCC) regarding the processing of retirements under the Immediate Detriment Framework and to recommend a change to the Authority's current position.

EXECUTIVE SUMMARY

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

The NFCC has issued new guidance to all Fire & Rescue Services on Immediate Detriment (ID) following a response from HM Treasury to the Firefighters' Pensions England Scheme Advisory Board (SAB). The Treasury letter clarifies and expands their assessment of the risks facing Services and scheme members who make payments under ID.

This guidance has meant that the Chief Fire Officer after consultation with the other statutory officers has taken the decision to pause the processing of Category 1 cases under ID in advance of consideration of the matter at this meeting of the Panel.

The Panel now needs to consider the NFCC and Treasury advice and consider whether to continue the processing of Category 1 cases.

RECOMMENDATION

Policy & Resources Panel is asked to:

- (i) Consider the matters set out in this report.

- (ii) Agree option 2 that the Service cease the processing of Category 1 cases under the ID Framework.
 - (iii) Agree to delegate authority to the Chief Fire Officer in consultation with the Monitoring Officer and the Treasurer to decide whether to process the Ill Health Retirement cases referred to in paragraph 6.3 under ID.
 - (iv) Note that the position on Category 2 cases is unchanged.
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1. Age Discrimination Remedy and the withdrawal of Home Office Guidance

- 1.1 The Home Office has committed to provide full and detailed instructions to Fire pension scheme managers, commonly referred to as “Remedy”, by October 2023.
- 1.2 The approach followed by the Service since the Tribunal judgement to uphold the Fire Brigades Union’s (FBU) complaint of age discrimination in December 2019 is illustrated in Appendix 1 – Historical Timeline for McCloud-Sargeant.
- 1.3 The timeline reminds the Panel of the steps the Service has followed to the point of the P&R Panel meeting on 20 January 2022.

2. ESFRS Progress and Update Since January Policy & Resources Panel Meeting

- 2.1 The Treasury responded to the open SAB letter on 23 March 2022 which is marked as confidential and attached as Appendix 2.

The letter provides detail of the questions posed by the SAB and the Treasury also reiterates its view that “ ...processing immediate detriment cases before all the necessary legislation is in place could give rise to significant consequences for schemes and members...” (see penultimate paragraph of the letter).

Subsequent to this letter from the Treasury the LGA joined with the FBU to make a further response, a copy of which can be found at Appendix 3.

- 2.2 There was also an expectation that the Treasury would include, in the Spring Finance Bill, legislation to clarify the taxation status pertaining to second retirement lump sums and the “movement” of employee pension contributions between schemes. No such legislation was included in the Chancellor’s budget.
- 2.3 PSTax, our corporate tax advisers, have been commissioned by a group of Services to provide advice and guidance on the tax implications of Remedy and Immediate Detriment (ID). One of the key areas of risk identified is regarding the proper treatment of contributions made into the 2015 Scheme by those reverting to the 1992 scheme under Immediate Detriment and the associated tax liabilities. Despite several meetings of this group no substantial progress has been made on this issue.
- 2.4 The Treasurer has continued to support a consultative group with a number of other Fire Service Finance Directors/Treasurers which has met several more times in the last few months. Views and concerns have been discussed and any adopted approaches shared. It appears that the majority of services in this group have paused paying under Immediate Detriment since the Home Office guidance was withdrawn last November.
- 2.5 West Yorkshire Pension Fund (WYPF) as our professional pension administrators continue to support their customers in their chosen approaches to ID. Their feedback continues to reflect that there is no real consistency of approach across Fire Services.
- 2.6 In recent weeks, the NFCC have written to all Chief Fire Officers (marked confidential at Appendix 4) setting out clear new guidance based on the Treasury’s response to the queries raised by the SAB and legal advice received by the National Police Chief’s Council (NPCC).

This legal advice, although written confirmation is pending, describes the view of legal counsel that “...**that scheme managers should not be implementing immediate detriment at this time as there is no legal mechanism to pay without undue risk to both members and the force**”.

3. Affected Members

- 3.1 **Retirees processed under ID since July 2021:** There have been 6 ESFRS retirees who have been allowed to retire under their legacy Pension terms, due to the complexities of their cases. This included one under the Ill Health process.
- 3.2 **Retirees that could not be processed under ID since December 2019:** There have also been 6 retirees who could not be allowed to retire under their legacy Pension terms. This included one under the Ill Health process.

- 3.3 **Pensions in payment since April 2015 (not included at 3.2):** Our records show that there are 11 other retirees who have retired in the last 7 years whose pension pack will need to be recalculated, offered as an option and backdated as appropriate.
- 3.4 **Employees who have given notice of retirement:** As of 20th April 2022, we have no employees who have given their notice of retirement.
- 3.5 **Employees who are expected to retire for health reasons in next 6 months:** There is one case which has reached an advanced stage and two other cases of Ill Health but we cannot determine the effect of ID.
- 3.6 **Employees expected to retire in the next 6 months:**
- Not affected under ID: We have a number of employees who were protected within their legacy schemes until 31st March 2022 who are not affected by ID. There are approximately 14 current employees who are likely to retire soon.
 - Affected by ID: There still remain 55 pension scheme members who could choose to retire before October 2023. Of these we have some evidence that nine of these may have plans to retire over the Spring/Summer 2022.

4. **Options and Risks**

- 4.1 Following the receipt of the NFCC advice officers briefed the Chair of the Fire Authority and the Chairs of both the Policy & Resources Panel and the Pension Board on 27 April 2022. Subsequently following consultation with the Deputy Monitoring Officer and the Assistant Director Resources / Treasurer the Chief Fire Officer exercised delegated powers to pause the processing of any further ID Category 1 cases until the Policy & Resources Panel meet on 12 May 2022 to make a formal decision.
- 4.2 Given that the Treasury / HMRC has not amended tax regulations to allow the payment of further lump sums to those who have retired over 12 months without incurring further tax charges, the officers' recommendation is that the Panel maintains its current position and continues to pause the processing of Category 2 cases. The options below therefore only refer to Category 1 payments only.
- 4.3 **Option One:** The Service could restart its paused position and action ID for those scheme members wishing to retire before October 2023.

The Treasury is advising against this and doing so risks leaving the Service liable to pay the tax due on employee contribution transfers. There is also the risk that refunds of contributions from the 2015 scheme are deemed to be compensation

payments and therefore must be paid from the Service's revenue account and not the Pension Fund Account

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

- 4.4 **Option Two:** The Service continues to pause the processing of Category 1 cases under ID entirely until the Full Home Office remedy is published. This would effectively mean that any retirees from April 2022 until October 2023 would have to wait for their legacy Pension entitlement.

This would leave the Service exposed to the risk of further legal claims from retirees and their representative bodies for at least another 16 months.

5. **Financial Assessment**

- 5.1 Without the Remedy, and therefore legislation, in place, the most recent information available to us, indicates the risk that the Service may be exposed to significant financial liabilities should it process both Category 1 and Category 2 cases under ID.
- 5.2 Counter risk is that, Employment Litigation may arise from further claims from individuals, potentially supported by representative bodies, against the Authority if we do not adopt ID in full or part.

However, as we are now only 16 months from the latest date that the government have promised to deliver remedy, the scope for further employment tribunals to be heard diminishes.

- 5.3 The Service has commissioned its tax advisers PSTax to provide an estimate of the financial liabilities for which the Authority could be liable relating to the six cases already processed under ID and also in relation to the Ill Health Retirement case (paragraph 3.5 above) in the light of the NFCC and Treasury advice. This will be used to review our current broad estimate of the potential financial liability associated with processing of all ID cases which is currently of the order of £1m.
- 5.4 The Service holds a Pensions Administration Reserve which is intended to fund costs arising from the Remedy process which currently stands at £147,000. The Service will receive a further Pensions Administration Grant of £43,515.13 in 2021/22 bringing the total available to £191,000.

6. **Conclusion and Recommendation**

- 6.1 In January 2022 the Policy & Resources Panel agreed that the Service should continue to action those about to retire under the ID framework (Category 1) and to remain paused with any recalculations of pensions already in payment, who

would be have qualified to ID (Category 2). This position was based on our best assessment of risk following the withdrawal of the Government's informal guidance on ID.

- 6.2 The clarification of the Treasury's position and the legal advice received by NPCC has led the NFCC to issue clear new guidance in March, that sets out a different balance of risk and it is officers' recommendation that as a result the Service ceases the processing of Category 1 cases until the full Remedy is in place in October 2023 (Option 2 above).
- 6.3 There is one case of Ill Health Retirement (as mentioned in 3.5) under ID, that is close to completion. This is an exceptional case where the employee has not been able to work since 2020 and will only qualify for Ill Health retirement under their legacy scheme. In this case officers' recommendation is that authority to agree the processing of this case under ID is delegated to the Chief Fire Officer in consultation with the Monitoring Officer and the Treasurer.
- 6.4 It is recognised that this is a complex situation, and the FRA are reliant on guidance and advice about both the tax and legal perspectives and most significantly that changes to the process will be of concern to staff that are thinking of retiring. It is important that whatever decision is made, that communication to staff and retired staff is clear.