TYNE AND WEAR FIRE AND RESCUE AUTHORITY **Item No. 9**

MEETING: HUMAN RESOURCES COMMITTEE – 7TH FEBRUARY 2022

SUBJECT: FIREFIGHTERS PENSION SCHEME - IMMEDIATE DETRIMENT UPDATE

REPORT OF THE FINANCE DIRECTOR

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1. PURPOSE

1.1 The purpose of this paper is to update members on the issue of Immediate Detriment in respect of the Firefighters' Pension Scheme with regard to implementing the Immediate Detriment Framework (IDF) developed between the LGA and the FBU and to recommend this report is forwarded to the full Authority for further consideration.

2. BACKGROUND

2.1 Members are reminded that on the 8 October 2021 the Local Government Association (LGA) and Fire Brigades Union (FBU) agreed a Memorandum of Understanding (MOU) and an Immediate Detriment Framework (IDF).

2.2 Immediate Detriment is where a member has been transitioned to the Firefighter Pension Scheme 2015 (FPS2015) and has retired or is due to retire and cannot access their full legacy pension prior to remedying legislation being put in place by the government in October 2023.

2.3 Following the decision made by the Court of Appeal on 20 December 2018 and the Employment Appeal Tribunal on 12 February 2021 in the Sargeant claims, these individuals were then able to request retirement benefits based solely on their legacy schemes. In part this was due to the Authorities being able to pay pension and lump sums arrears from the scheme using section 61 of the Equality Act 2010 where the person has suffered discrimination.

2.4 Although the Authority was determined to have the legal power under section 61 to pay pensions under legacy terms the technicalities of actually doing this were very complex and complicated. Due to this, the IDF was established to assist FRAs prior to completion and implementation of remedying legislation due in October 2023 and so the MOU was agreed and set out a mechanism for processing Immediate Detriment cases.

2.5 Prior to proposing the adoption of the MOU, this Authority sought clear assurances from the LGA, in relation to the consistency of the Framework to the proposed remedying legislation and also with regards to the funding the Authority would receive if it was to adopt the Framework.

2.6 Tyne and Wear had been assured that the IDF was consistent with the proposed remedying legislation to be laid in October 2023. This is now not the case as detailed further in this report. In relation to funding it was understood the LGA would be requesting new burdens funding from the government for any costs incurred by each FRA that was a direct result of applying remedy. However, recent advice from the government has indicated that the funding was not guaranteed, nor was it guaranteed to cover the full cost, should funding be made available.

2.7 The adoption of the IDF was already not without its risks, however on balance of the risks known at that particular time, the Authority being subject to probable High Court proceedings for non-compliance by the FBU, the Fire Authority approved the adoption of the MOU and IDF on the 15th November 2021.

2.8 This paper is to make members aware of developments since 15th November 2021, and to recommend that full Authority considers if the adoption of the MOU is paused whilst further information is sought in light of those developments.

3. CHANGE TO UNAUTHORISED PAYMENTS

3.1 If a retired pension scheme member was to be processed through IDF, and they received their lump sum arrears 12 months after their retirement date then this would be determined as an unauthorised payment under current tax legislation. An unauthorised payment is subject to a potential tax charge of 55% of the additional payment and most retired members would fall into this category.

3.2 The IDF stated that the Authority would compensate members for any unauthorised tax charges relating to the member moving back into their legacy scheme that they would not have otherwise have been liable for. This compensatory payment would then form part of any additional funding request the Authority would receive from government.

3.3 However since publication of the Framework, HMRC has published a policy document and a Finance (No.2) Bill which indicates a move towards making payments of lump sums paid more than 12 months after retirement (‘late lump sums’) authorised if these payments relate specifically to Sargeant claims.

3.4 This is contrary to the earlier guidance provided by the Government contained within the provisions of the Public Service Pensions and Judicial Offices Bill (draft primary legislation) - that late lump sum payments would be unauthorised and that under remedy FRAs would be required to compensate the member for any tax charges which could ultimately be reclaimed from the Government.

3.5 It is understood that the new legislation in relation to unauthorised charges or now termed late lump sums will be in place at some stage during 2022/2023 tax year, and will be retrospectively applied from 6 April 2022.

3.6 In summary, the Framework was based on the understanding that any payment of late lump sums after 12 months would be an unauthorised payment and that the member would need a compensation payment for any additional tax charge they incurred. However, the proposed HMRC policy will now be that these payments will not be unauthorised and therefore no tax charge will arise, and therefore no compensatory payment will be required. But importantly, this will not be in place until 6 April 2022 as per proposed legislation.

3.7 This means that where immediate detriment payments are made that are not consistent with the government revised proposed method of providing remedy the government will now not fund the costs of any compensatory payments.

3.8 Effectively this means that if the Authority makes payments to retired members outside of the 12 months retirement date to compensate for any unauthorised tax charges then it is highly unlikely that the Authority will receive any funding from Government to cover these costs, unless it processes them after 6th April 2022, when the new legislation applies.

3.9 On the 19th November a Joint statement from the LGA and FBU states that "FBU recognises that there is an issue, but it cannot accept any further delay. Accordingly, its position is that if FRAs do not operate the provisions in the Framework as originally intended, it will assist members in pursuing legal action to secure their entitlements. That may take the form of complaints to the Pensions Ombudsman where compensation would be sought for the distress and inconvenience caused by late payment or non-payment."

3.10 The joint statement indicates that legal action may take the form of a complaint to the Pension Ombudsman and not initially to the High Court. Although it should be noted that this has not been confirmed by either party.

3.11 This change will only affect those that have already retired more than 12 months ago.

4. HOME OFFICE GUIDANCE WITHDRAWAL

4.1 Members are reminded that prior to the MOU and IDF, the Home Office had released guidance on processing Immediate Detriment cases published in August 2020 and which was revised in June 2021. TWFRA implemented this guidance as it was provided by Government and provided a pathway to resolving Immediate Detriment cases.

4.2 On 29 November 2021, the Home Office however unexpectedly withdrew its guidance on Immediate Detriment cases ahead of legislation, with immediate effect. Less than 2 months after the MOU was published, and only 14 days after the Authority had approved adoption of the MOU and IDF.

4.3 Whilst the MOU and IDF are not reliant on the guidance to remain in place, the Home Office guidance provided assurance that the government was supportive of resolving specific Immediate Detriment cases prior to providing detailed remedying legislation. The removal of the guidance causes great concern that the government are no longer supportive of this approach.

4.4 HMT also released a Note on the same date, titled - Processing immediate detriment cases – November 2021. The note states that a current assessment of processing Immediate Detriment cases is:

"The further work done by HMT and HMRC on drafting the remedy in the McCloud Bill (i.e. the Public Service Pensions and Judicial Offices Bill) has made it clear that these gaps and uncertainties are considerably greater than was previously thought."

"Because of this, HMT's current view is now that immediate detriment cases, including those yet to retire, cannot be processed before legislation is in place without considerable risk, uncertainty and administrative burdens for individuals, schemes and employers."

"Therefore HMT and Home office do not advise that schemes process pipeline immediate detriment cases before the legislation is in place, given the uncertainty of how to proceed on some elements, and the significant risk of generating unintended tax consequences that may, to a greater or lesser extent, then need to be reversed once legislation is in force."

4.5 In relation to Section 61 the Note states, "Whilst section 61 permits individuals affected to be treated as members of their legacy scheme, given the uncertainty around how it operates on some of the detailed elements of the McCloud remedy, HMT no longer views the current version of the Home Office guidance as accurately representing the situation."

4.6 The example provided in the Note calls into question the ability to consider pension contributions paid into the FPS2015 have been paid, as a matter of fact, into FPS1992. Creating uncertainty on some aspects of the IDF, including tax relief on pension contributions. This could mean that members could owe tax on contributions made on their FPS2015.

4.7 It is important to note that the Government is not instructing Fire Authorities not to process Immediate Detriment cases, only that it is advising not to do so. This distinction is important for two reasons.

4.8 The first reason being the Government, "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."

4.9 Work is currently being carried out to understand what would be classed as "legitimate expenditure" and it is believed that Lump Sum and Pension arrears would meet this definition. However, any part of the Framework that is compensatory would unlikely not qualify and therefore would not receive any government funding.

4.10 The second reason is that FRAs are now in the untenable position of having to choose to either process immediate detriment cases with significant financial risk with unknown consequences for both the Authority and the member or follow the government advice and face potential legal action from the FBU for non-compliance of the IDF.

4.11 If the Authority continues with Immediate Detriment cases, it unlikely that there would be any support from government if issues are uncovered as they are progressed further. The HMT Note goes so far as to say "if schemes process cases and run up against tax issues which it is not straightforward to resolve … they will have to operate within the existing tax legislation and HMRC will not be able to help resolve those issues".

5. Future Developments

5.1 We understand that the LGA and FBU are continuing discussions in relation to the IDF to see if any changes can be made to reflect the changing landscape. However, the indication at this stage is that the IDF will remain in place in some form and that the FBU would seek legal challenges against an FRA who state they will not adopt the Framework.

5.2 We further understand that any changes to the IDF will be communicated by the end of January 2022. It is possible that the IDF is amended to specifically resolve the issue around recovery of contributions, however the amendments will not be able to resolve the change in tax policy or the government's advice on not continuing with immediate detriment cases.

6 Current Status

6.1 The MOU identified Category 1 members as those who have an impending retirement and Category 2 members as those who have already retired.

6.2 In relation to Category 1 members, the Authority has already processed 6 retirements under Immediate Detriment since September 2021 in line with the initial Home Guidance. They are 2 further retirements considered as "in the process of being dealt with" and an additional ill health application currently being progressed. There are a further 4 cases where the member had been contacted in September 2021 and informed that the Authority had adopted the Home Office guidance, and the member had at that point provided an indicative retirement date.

6.3 These members had not been processed under IDF, as they had commenced their respective processes whilst the Home Office guidance was in place. This may be beneficial in that the Note from HMT that removes the Home Office guidance states that for "cases that have already been dealt with, or are in the process of being dealt with, the new legislation will give powers intended to allow schemes to put these individuals into the correct position, drawing on the provisions of the McCloud Bill."

6.4 It should be noted that as more members who had not been fully protected come up to retirement, then potential Category 1 member numbers will increase.

6.5 In relation to Category 2 members, the Finance department identified 27 members who had retired from the FPS2015 scheme who would have been eligible to claim under the IDF.

6.6 Ten members, from the 27 identified, contacted the Finance team requesting that their retirement benefits be recalculated in line with IDF as at 16 November 2021.

6.7 On 29 November 2021, TWFRA had confirmed with these members that they were eligible for IDF and that they would be provided with revised figures on 17 January 2022. The emails confirming eligibility within 1 hour of the HMT Note then removing the Home Office guidance.

6.8 On the 17 January 2022, these members where informed that the decision to progress IDF was being re-assessed due to the above detailed developments.

6.9 No communications have so far been sent to the remaining 17 identified members. The initial priority was to process the 10 members who had contacted the service directly, and then progress making contact with the other 17 members. However, in light of the changes no communication has been carried out at this stage.

6.10 Due to the uncertainties surrounding the MOU and IDF, and the risks it creates to the Authority and to the member, the information in this report it is recommended should be taken to Fire Authority in February to reassess their original decision.

7 Financial Implications

7.1 As noted, the uncertainties in relation to IDF are by definition not fully known and this impacts on detailing all the financial implications. However below is an assessment of the types of costs the FRA may encounter.

7.2 Category 2 members - The cost of unauthorised allowances is estimated at £120,000 for the identified 27 retired members. If this compensatory payment is made before 6th April 2022, then it is highly unlikely that the FRA would receive any funding for this from government.

7.3 In addition to this, if Category members 2 receive any other compensatory payments as part of any payment, these too will increase the cost to the Authority as the government have indicated all compensatory payments will not be funded. These payments may include;

- Compensatory payment for tax liability on pension arrears,
- Compensatory interest payments on lump sum and pension arrears
- Compensation for any tax relief foregone on pension contributions, and

- Compensation payments for annual allowance charge

7.4 It is likely that if the payments are made after 6 April 2022, then the unauthorised charges and annual allowance charges will satisfy the revised tax legislation then in place and that they will then no longer require a compensatory payment. At that point the costs to the Authority will reduce to compensation on tax liability, interest on arrears and tax relief foregone.

7.5 Category 1 members - The cost of unauthorised tax charges, compensation for tax liability, interest on arrears of pension and lump sum would not apply to Category 1 members.

7.6 If a member was unable to pay for their pension contributions prior to retirement then they would be categorised as compensation payments on tax relief foregone, and compensation for annual allowance charges. These compensatory payments would not attract funding.

7.7 It should be noted, that by not incurring these costs the FRA may incur the costs of a possible Pension Ombudsman fine and/or High Court proceedings which at this point cannot be quantified.

8 EQUALITY IMPLICATIONS

8.1 The pause to the Immediate Detriment Framework would continue the age discrimination found by Employment Tribunal until a mechanism is put in place to allow for retirement benefits to be recalculated.

9 HEALTH AND SAFETY IMPLICATIONS

9.1 There are no health and safety implications arising from this report.

10 RECOMMENDATIONS

10.1 Note the contents of the report and recommend that this report is considered by full Authority as soon as possible (February Authority).