

TYNE AND WEAR FIRE AND RESCUE AUTHORITY

Item No. 7

HUMAN RESOURCES COMMITTEE: 4th OCTOBER 2021

**SUBJECT: IMMEDIATE DETRIMENT – FIREFIGHTER’S PENSION
SCHEME – UPDATE REPORT**

REPORT OF: THE FINANCE DIRECTOR

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.

2. BACKGROUND

- 2.1 As part of reforms to public sector pensions, the Firefighters’ Pension Scheme regulations 2014 created the Fire Pension Scheme 2015. This scheme was introduced on the 1 April 2015 and members of the FPS1992 and FPS2006 transitioned across to the new scheme on this date.
- 2.2 The Firefighters’ Pension Scheme regulations 2014 did provide “protection” to members of the Fire Pension Scheme 1992 (FPS1992) and the New Fire Pension Scheme 2006 (NFPS2006). These specific protections took two forms, “fully protected” and “tapered protected” and were age based.
- 2.3 For fully protected, this protection meant that all members of FPS1992 with a date of birth prior to 2 April 1967, and all member of NFPS2006 with a date of birth prior to 2 April 1962 would be “fully” protected in their original pension scheme. This means they would remain in the respective Final Salary Scheme and would not be moved into the new FPS2015.
- 2.4 Additionally, tapered protection was provided to FPS1992 members born between 2 April 1967 to 1 April 1971 and NFPS2006 members born between 2 April 1962 and 1 April 1966. The tapered protection meant that members would not be moved into the FPS2015 scheme on 1 April 2015, but at a later date dependent on their date of birth. The tapered protection would end on the 31 March 2022.
- 2.5 Anybody who did not qualify for protection or tapered protection was immediately moved into FPS2015 scheme on the 1 April 2015.

3. FBU LEGAL CHALLENGE

- 3.1 After a series of industrial actions, a legal challenge was bought by the Fire Brigades Union (FBU) on behalf of their fire pension scheme members on whether these protections constituted direct age discrimination, and indirect race and sex discrimination. The legal argument primarily centred on two main facts, did government have a legitimate aim in providing protection and tapered protection, and was the aim achieved proportionately?
- 3.2 The argument from government was that the protections did not constitute direct age discrimination under Article 6 of the Equality Directive 2000/78 which states that “Member States provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”
- 3.3 Following Employment Appeal Tribunals, in February 2017 and December 2017, in November 2018, the Court of Appeal (CoA) found that, having introduced the protections, the government should then have justified any discriminatory impact but that they had failed to do so, and therefore the justification of the protections on the grounds of legitimate aims had not been met.
- 3.4 In summary, the protections provided under the Firefighters' Pension Scheme regulations 2014 resulted in age discrimination. It should be noted that the FPS2015 scheme itself was not discriminatory.
- 3.5 On the 15 July 2019, the government made a written statement accepting the Court's decision and confirming their intention to engage with the Employment Tribunal (ET) to agree a remedy.
- 3.6 From 1 April 2022 all members will be moved into the FPS2015 scheme irrespective of age.

4. INTERIM DECLARATION

- 4.1 On the 18 December 2019, at a Firefighters' case management hearing, an interim order was made which stated that claimants would be treated as satisfying the age criteria regardless of their actual age, thereby providing protection to those members to be treated as members of the FPS1992, as long as they met the other criteria, which was to have been in the scheme at 31 March 2012 and at 31 March 2015.
- 4.2 Effectively this meant that claimants were entitled to be treated as members of the 1992 scheme. This affects the application of the rules relating to ill-health pension and to retirement on grounds of age.

- 4.3 The interim declaration applied to any claimants who were currently in the process of retiring or who had already been retired on the grounds of ill-health since 31 March 2015 using the incorrect rules. It also applied to those who were eligible to retire on grounds of age and length of service and who wished to retire.
- 4.4 On the same date, 18 December 2019, the National Employers of the National Joint Council (NJC) sent a circular (EMP/8/19) to Fire and Rescue Authorities in relation to the interim order. The circular stated, “So that FRAs can implement this provision of the Order we are pushing the Home Office to quickly issue guidance on implementation” and further to that “Pending that guidance, FRAs should take no immediate steps save that if they are dealing with ill-health retirements, to avoid delay, they should ask the IQMP to assess the applicant under both the 1992 FPS and 2015 FPS rules.”

5. SUBSEQUENT EMPLOYMENT TRIBUNAL RULING

- 5.1 On 12 February 2021, the Employment Appeal Tribunal (EAT) gave its judgment on the FRAs’ appeal based on Schedule 22 of the Equality Act 2010. This appeal was based on the argument that the FRAs did not make the legislation which was found by the Court of Appeal to be discriminatory on grounds of age but were bound to follow it because it was the law. The EAT held that the FRAs cannot rely on the Schedule 22 defence.
- 5.2 Section 61 and Schedule 22 of the Equality Act 2010. Section 61 implies a “Non-Discrimination Rule” (“NDR”) in occupational pension schemes. The NDR makes clear that “responsible persons” (in this instance FRAs) can be liable if they discriminate with regard to the pension scheme.
- 5.3 The effect of the EAT ruling on Section 61 has the effect of automatically disregarding any discriminatory parts of the occupational pension scheme, i.e. the protection afforded due to age.
- 5.4 This means FRAs were not obliged to apply the Regulations as they were written but were obliged in law to apply the scheme devoid of the age related rules.
- 5.5 In summary, in order to pay the immediate detriment pension, the FRA can use its powers under Section 61 and Schedule 22 of the Equality Act 2010, by disregarding the age requirement for protection and apply it to all members irrespective of age.

6. HOME OFFICE GUIDANCE ON TREATMENT OF IMMEDIATE DETRIMENT

- 6.1 On 21 August 2020, the Home Office issued a note directly to English FRAs titled ‘McCloud / Sargeant ruling – Guidance on treatment of ‘Immediate Detriment’ cases’ for both the Firefighters’ and Police Pension Schemes.

- 6.2 It is important to highlight, that the guidance is stated as “informal guidance” and was being “provided at the request of the Fire Brigades Union.”
- 6.3 It should also be noted that the note stated that, “It is important to note that ALL cases processed using this guidance will need to be revisited once the Government’s approach to removing the discrimination has been finalised, due to relevant matters that are currently subject to consultation, to include interest on contributions etc. This is likely to be after April 2022.”
- 6.4 Additionally the guidance stated that, “***This guidance should not be applied to scheme members who have already retired and are in receipt of their pension payments. These cases are more complex to address, especially due to complexities in rectifying the member’s tax position.***”
- 6.5 It is important to note that the guidance specifically references that it is not to be applied to retired members, as some FRAs are now being challenged through the high court to retrospectively apply immediate detriment to their retired members.
- 6.6 It is believed the “complexities in rectifying the member’s tax position” could be due to HMRC timing of payment conditions and the potential for unauthorised payments of lumps sums.

7. UNRESOLVED PENSION ISSUES – EMPLOYEE CONTRIBUTIONS

- 7.1 The guidance however identified some “unresolved pension issues,” one of these relates to the recovery of outstanding employee contributions. A member of the FPS2015 scheme pays less pension contributions than that of the FPS1992 scheme.
- 7.2 The guidance states, “Any employee contributions owed will need to be paid before the member’s legacy scheme pension can be put into payment”.
- 7.3 The guidance states, “Where possible, pension authorities should ensure that the employee contributions owed are repaid by the member before they leave service to ensure that any tax relief entitlement can be applied.”
- 7.4 If a member does not pay the contributions whilst still employed, and instead chooses to have the contributions deducted from their lump sum, they will not qualify for tax relief under the HMRC PAYE or self-assessment process. Instead this will be claimed through a government process that has not yet been decided upon, or introduced.
- 7.5 The guidance does not cover the practicalities of recovering pension contributions, for example when can the recovery commence and over what period. It would appear beneficial to recover contributions from staff whilst they are still employed and prior to their retirement.

- 7.6 Additionally, the consultation stated that an interest rate will be applied to the pension contributions owed. As the interest rate has yet to be decided, and will likely only be confirmed when the legislation is enacted in April 2022 it will not be possible to recover interest rates at the point of retirement and will therefore need to be recovered at a later date after retirement.
- 7.7 The guidance did not reference the treatment of contribution holidays. This is where a member of the FPS1992 scheme having reached 30 years of service prior to 50 years of age is not required to pay pension contributions.
- 7.8 The guidance also states that members will need to be provided with a schedule of pension contributions owed.
- 7.9 Clearly the guidance issued has identified a number of areas that have yet to be fully resolved and these help point to some of the complexities around processing immediate detriment by the Authority.

8. POLICY DECISIONS AND REGULATIONS

- 8.1 There are also in addition other technical areas that the guidance references but does not detail how these can be resolved.
- 8.2 Treatment of Cash Equivalent Transfer Value (CETV) transfers into the 2015 Scheme - Under the current rules for CETVs, benefits cannot be transferred into the FPS1992 as the scheme is closed and there are no current factors available. So, it is unclear how a transfer could be processed under FPS1992 terms.
- 8.3 Treatment of purchased added pension in the 2015 Scheme - The guidance again does not make clear how an equivalent added years pension would be accommodated within the FPS1992.
- 8.4 Scheme PAYS - The guidance does not specify how scheme debits applied to the 2015 scheme should be recalculated.
- 8.5 Revisiting Annual Allowance tax assessments on previous years - it is understood that the informal position from HMT is that the pension input amount should be re-calculated over the periods in the remedy period based on the legacy scheme benefits. There has been no guidance from HMT or HMRC on how this is to be achieved.

9. RISK ASSESSMENT

- 9.1 Although remedy will impact on every Fire Pension Scheme Member who had service on 1 April 2012. An initial risk assessment of TWFRS members shows that approximately 80 members could be affected by immediate detriment.

- 9.2 The number of members who had previously been in FPS1992 and subsequently transitioned to the FPS2015 and will attain 30 years of service prior to 1 April 2022 is 13. And although 3 of them have transfers in, these had been completed prior to 1 April 2015. 1 member has had Annual Allowance breaches, and Scheme Pays.
- 9.3 There are a further 45 members who will reach 25 years of service, and be over the age of 50, prior to 1 April 2022. These could also need to be treated under immediate detriment if they choose to retire at this point.
- 9.4 However, the number of employees who retire with 25 years of service and over the age of 50 has historically been extremely low as this results in a restricted lump sum (i.e. a significantly lower lump sum payment).
- 9.5 Again all CETVs had been completed prior to 1 April 2015.
- 9.6 There are under 30 members who have retired who have some benefits deferred under FPS2015, but their FPS1992 element is in payment.

10. PROGRESS

- 10.1 TWFRAs under Section 61 and Schedule 22 of the Equality Act 2010, can use their powers to implement immediate detriment in accordance with the Home Office guidance provided in August 2020.
- 10.2 The risk assessment indicates that TWFRAs will be able to use the Home Office guidance as the number of potentially affected members is quite low.
- 10.3 To mitigate risk, members who would choose to retire under the immediate detriment guidance have been asked to sign a Declaration that they are choosing to have their FPS1992 paid as opposed to their FPS2015 pension. This Declaration also states that they understand the pension is being paid under immediate detriment guidance, and that their case will be revisited once the legislation is enacted in April 2022.
- 10.4 As part of the process any member who is seeking to retire under immediate detriment is to provide notice in excess of 12 weeks. This allows time to provide the required information to the member and is an opportunity to recover contributions prior to retirement.
- 10.5 The Declaration has been reviewed by the Authority's legal team, and the pension team will work with the pension administrator to finalise a robust process and ensure that all data is managed correctly in accordance with the available guidance.
- 10.6 A process has been developed that provides members with the required information to make their choice (which we must provide them with).

The qualifying member is therefore to be presented with two sets of pension entitlement quotes. Each quote will set out the main pension benefits that they would receive under each choice.

- 10.7 However, the Home Office guidance states that this guidance should not be applied to retired members, until further guidance is provided. This position will continue to be reviewed on an ongoing basis as high court rulings and further guidance is made available.
- 10.8 As of 10th September 2021, 2 members have retired under immediate detriment and a further 3 members are due to retire by December 2021.

11. FINANCIAL IMPLICATIONS

- 11.1 The HMT have confirmed that Employer contributions will not be covered, but will form part of the next valuation which would likely result in an increase in employer pension contributions.

12. EQUALITY IMPLICATIONS

- 12.1 There are no equality implications arising from this report.

13. HEALTH AND SAFETY IMPLICATIONS

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

14. RECOMMENDATIONS

- 14.1 Members are requested to note the contents of the report

