

CHESHIRE FIRE AUTHORITY

MEETING OF: STAFFING COMMITTEE
DATE: 8 NOVEMBER 2021
REPORT OF: DIRECTOR OF TRANSFORMATION
AUTHOR: ANDREA HARVEY

SUBJECT: SARGEANT/MCLOUD PENSION
DISCRIMINATION - IMMEDIATE DETERIMENT

Purpose of Report

1. This report provides Members with an update about developments and outlines the intended approach to the handling of Immediate Detriment cases.

Recommended: Members

- [1] Note the report; and
- [2] Endorse the intended approach to the handling of Immediate Detriment cases.

Background

2. Prior to April 2015 firefighters, depending on their employment start date, had access to either the 1992 Firefighter Pension Scheme (FPS 1992), 2006 FPS (FPS 2006), or modified Firefighter Pension Scheme 2006. In 2015, the Government introduced reforms to public service pensions, meaning most public sector workers were either:
 - a) moved into a new pension scheme in 2015, (for firefighters it was FPS 2015), or
 - b) subject to “transitional taper protection” which was made available, or denied, to existing members of the relevant schemes on the grounds of age, or
 - c) received full protection and remained in their existing scheme.

Those FPS scheme members who started work prior to 1st April 2012 and were still employed on 1st April 2015 were allocated into a), b) or c) above solely based on their age as at 31st March 2012.

3. The benefits and type of pension vary within each FPS, but one of the biggest changes in the FPS 2015 scheme was that it (along with all other public sector pension schemes) moved from a Final Salary to a Career Average Revalued Earnings (CARE) scheme.

4. An Employment Appeal Tribunal (EAT) considered the 2015 pension changes introduced in the judges' pension scheme (McCloud) and firefighters' pension scheme (Sargeant), and found against the Government. The Government appealed the EAT findings and in December 2018 the Court of Appeal found that the "transitional protection" which allowed certain members of the firefighters' pension schemes to remain in their existing schemes when they were closed to other members, gave rise to unlawful discrimination, on the grounds that transitional protection was only offered to older scheme members.
5. The Supreme Court denied the Government permission to appeal the decision and therefore the Government had no further avenue to appeal the decision, and HM Treasury (HMT) published a consultation on changes to the reformed 2015 public service pension schemes in order to remove the unlawful age discrimination. The main change proposed was intended to rectify the retrospective discrimination by giving members a choice of receiving:
 - Final salary (legacy) benefits (FPS 1992/FPS 2006), or
 - CARE (reformed) benefits (FPS 2015)for the period 1 April 2015 to 31 March 2022, or their date of leaving if earlier. This period is known as the Remedy Period. This will give eligible scheme members a choice at the point their pension becomes payable of:
 - whether they wish to receive benefits from their legacy scheme, or
 - benefits equivalent to those that would have been available under their reformed schemes in relation to their service between 1 April 2015 and 31 March 2022.
6. The second part of the remedy is to remove future discrimination from the schemes by providing that all members will move to a reformed scheme (FPS 2015) from 1 April 2022.
7. HMT consulted on two options as to when a member would be asked to make a choice, either within 12-18 months of 2022 (immediate choice) or at the date of leaving the scheme (deferred choice underpin – DCU). The outcome of the consultation as confirmed on 4 February 2021 was DCU. Under DCU all eligible FPS 2015 members will be returned to their original legacy scheme for the remedy period. This includes taper members regardless of their taper date.
8. All eligible members will be automatically entitled to remedy without having to make a claim. To be eligible, the member must have been in service on or before 31 March 2012 and on or after 1 April 2015.
9. Therefore, under the DCU the pension administrator must, for all eligible FPS members, for their relevant pension benefit period:
 - a) convert all CARE (FPS 2015) pension for the remedy period (01.04.2015 – 31.03.2022) to a final salary pension and store original

- CARE as an underpin pension;
- b) maintain underpinned benefits until the member retires; and
- c) offer choice at retirement of default final salary (FPS 1992 or FPS 2006) for remedy period or underpinned CARE.

Information

10. The Government has been given a deadline of October 2023 to put in place legislation to deliver the remedy associated with the removal of discrimination arising from the introduction of the FPS 2015. We are aware, however, that there are members who are approaching retirement in advance of the government's deadline of October 2023. These members fall under the category of "Immediate Detriment".
11. For clarity, the term "Immediate Detriment" covers two categories of people that have been discriminated against, and who have lost out, or will lose out, due to the way their pensions have been, or will be calculated. This involves those members already drawing their pension that have retired since April 2015, and secondly, members who will retire before the law is changed in October 2023.
12. On 10th June 2021 the Home Office issued revised informal Immediate Detriment Guidance to assist in the handling of members approaching retirement in advance of the government's deadline to bring in the new legislation (October 2023). The guidance was non-statutory and did not place a legal obligation on fire and rescue authorities (FRAs). However, the guidance did state that FRAs had "*the power to calculate and pay pension entitlements for those members who fall within the immediate detriment category under their legacy schemes, through the application of Section 61 of the Equality Act 2010.*" The decision of the EAT in February 2021 also confirmed that FRAs had the power under Section 61 of the Equality Act to make immediate detriments payments despite the fact that the new legislation had not been enacted.
13. The guidance is caveated and states that it should not be seen as providing a definitive resolution to all of the consequences arising from the discrimination, but rather as a short term means of progressing certain immediate detriment cases. It is also important to note that all cases processed using the guidance will need to be revisited once the full detail of the Government's approach is finalised and legislation is in place.
14. Since June the Service has been reviewing the guidance and has been working with its pension administrator, XPS to develop an approach to address cases of Immediate Detriment. To date there have been a handful of cases that have been progressed in a way which was intended to avert hardship for the individuals and remove the ongoing discrimination. In progressing these cases the risk of claims has been reduced.
15. On 8th October 2021, the LGA and the FBU announced that they had agreed a Memorandum of Understanding (MOU) which contained a framework that

provided a consistent approach to and description of how Immediate Detriment cases should be dealt with. The MOU was supplied with an expectation that all FRAs would adhere to the framework and follow the processes to resolve cases of Immediate Detriment.

16. Having reviewed the MOU, officers believe that it is helpful and is a good basis on which to deal with Immediate Detriment cases. It provides a clear means to address the ongoing discrimination, representing a pragmatic interim solution. The MOU covers Immediate Detriment cases involving serving employees who can retire between now and the end of September 2023 and retirees who retired under the 2015 scheme instead of their legacy scheme. This involves 16 retirees and 61 current employees who are due to retire.
17. The Service has engaged with XPS and discussions are ongoing in relation to the handling of what are relatively complex issues which ideally need to be dealt with within a short timeframe. There will be additional costs associated with this work.
18. Although the MOU has provided a pathway to managing Immediate Detriment cases, it is not legally binding and there are still risks and challenges associated with the undertaking of calculations for some Immediate Detriment cases because guidance on some technical aspects does not exist.
19. Whilst every effort will be made to ensure the correct calculation and payment of benefits is put in place, this may be challenging due to the complexities associated with the contributions rates and taxation along with the period of time over which the recalculation of benefits needs to be undertaken. This is compounding by the fact that software has not been developed to automate the calculations. To mitigate this, the pension provider has committed to have all calculations subjected to secondary review as a means of checking the accuracy of the figures.
20. To try to mitigate risks, known and unknown, all individuals will be required to sign a declaration to indicate they understand the request they are making and the potential consequences of their decision, and confirming they are aware of the need to seek independent advice. Whilst this may not be sufficient to avoid future claims, it does help stress the importance of the decision that an individual is being asked to make.
21. Since the launch of the MOU, officers have entered into discussions with the FBU to explain the intent to report to this Committee and to explain how Immediate Detriment cases are expected to be progressed. The FBU has agreed to the issuing a joint statement to staff regarding the current pensions landscape and specifically the approach to the handling of Immediate Detriment cases.

Financial Implications

22. It is not possible at this stage to identify the specific costs associated with the Immediate Detriment cases as these will only become clear as the cases are dealt with and decisions are made by the individuals affected. It is not clear whether all individuals will wish their cases to be processed in accordance with the MOU – some may wait until the legislation is changed.
23. What we do know is that there will be administrative charges associated with the work, and XPS has already indicated that these will be significant as cases are expected to involve an average of 4.5 hours work just to carry out the calculations. This effort will also be supplemented by other additional administrative work that will be required, e.g. to activate payments.
24. We hoped that, by now, we would have had more clarity on the funding of the necessary remedy to address the discrimination, including costs associated with Immediate Detriment cases. However this clarity has not materialised and therefore the current position is that there is uncertainty about the extent to which additional costs will be funded by Government.
25. One possible scenario is that the costs associated with the administration of the remedy will be borne by FRAs whilst the pension costs will be met by the Government.

Legal Implications

26. Reliance on the current Home Office Guidance note does not provide the Authority with any legal protection, or indemnify it against any claim, or cost arising from acting on the guidance. However, the Authority, as the Scheme Manager, can rely on the Employment Appeal Tribunal's Judgment and Section 61 and 62 of the Equality Act in progressing Immediate Detriment cases.
27. As matters stand the discrimination is continuing and therefore FRAs are at risk if they do nothing at this stage. The MOU appears to provide a reasonable approach to dealing with Immediate Detriment cases and has been negotiated on behalf of all FRAs; failure to follow it could leave the Authority at risk of legal challenge. The MOU does provide for a review as matters progress in order for any challenges encountered by implementing the MOU to be considered and addressed, where possible.
28. Any individual challenge against the decision of the Scheme Manager would be made through the Firefighters' Pension Scheme Internal Dispute Resolution Procedure. If this process does not resolve a matter, the issue can be escalated to The Pension Regulator.

Equality and Diversity Implications

29. The public sector equality duty requires public bodies to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.
30. To reduce the risk of discrimination, officers consider that the MOU should be followed, as far as possible, to deal with Immediate Detriment cases.

Environmental Implications

31. None

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