

For Publication

Bedfordshire Fire and Rescue Authority
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REPORT AUTHOR: CHIEF FIRE OFFICER

SUBJECT: FIREFIGHTER PENSION SCHEMES: REMEDY/IMMEDIATE DETRIMENT

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Background Papers:

HM Treasury Public Service Pension Schemes: changes to the transitional arrangements to the 2015 schemes. Government response to consultation

Home Office Immediate Detriment Guidance Note (August 2020)

LGA Immediate Detriment Information note (October 2020)

Implications (tick ✓):

LEGAL		✓	FINANCIAL	✓
HUMAN RESOURCES		✓	EQUALITY IMPACT	
ENVIRONMENTAL			POLICY	
CORPORATE RISK	Known		OTHER (please specify)	
	New	✓		

Any implications affecting this report are noted at the end of the report.

PURPOSE:

The purpose of this paper is to consider the options available to Bedfordshire Fire & Rescue Service regarding those Firefighters who are due to be transitioned to the 2015 scheme, and those Firefighters who are due for retirement before the new pension regulations are implemented (The 67 firefighters that have retired since April 2015 are excluded from this report/consideration).

RECOMMENDATIONS:

1. That Members agree that all Firefighters who are currently taper protected in their legacy scheme (FPS 1992 or NFPS 2006) and are due to be transitioned to the 2015 scheme, shall remain in their legacy scheme and are not transitioned on their due date to the 2015 scheme, unless an individual specifically requests to be transitioned due to certain benefits.
2. That Members agree to not apply the interim Home Office Immediate Detriment Guidance Note, and not revert Firefighters into their legacy scheme, until the pension legislation has been implemented with the necessary detail to mitigate the risk of claims and/or sufficient further legal advice or HMT guidance is made available.
3. Members support that further work will be undertaken by officers, in conjunction with the Authority's Pension Administrator, to ensure the Authority is progressed as much as possible to support employees on this matter.

1. Background

- 1.1 In 2015 most public service pension schemes, including the Firefighters' Pension Scheme, were reformed. These reforms included 'transitional protection' for individuals closest to retirement.
- 1.2 In 2018, the Court of Appeal ruled that the transitional protection element of the 2015 public service pension reforms constituted unlawful age discrimination in the Firefighters' Pension Schemes. The government stated that it respects the decision and has confirmed that it will remove the difference in treatment across all main public service pension schemes.

- 1.3 The government consulted on proposals to remove this discrimination in 2020 and a response to the consultation was presented to the Fire Authority on 14 October 2020. On 4 February 2021, the government issued its response to the consultation indicating its intention to proceed with the deferred choice option.

FRA Members have seen this issue flagged as a Contingent Liability in the Authority's Statement of Accounts since 22015/16. It has also been included as part of the Risk/Uncertainties in the Authority's annual budget setting papers since 2016/17.

- 1.4 The changes proposed in the consultation to remove the discrimination will apply across all the main public service pension schemes and provide members of the firefighters schemes affected, the Firefighters Pension Scheme 1992 (FPS 1992) or New Firefighters Pension Scheme 2006 (NFPS 2006), with a choice of which scheme they would like to be in for the remedy period. The remedy period is defined as between 1 April 2015 and 31 March 2022. The remedy only applies to members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than five years.

2. Immediate Detriment

- 2.1 Whilst the response to the consultation has now been indicated, it is unlikely that the required changes to regulations will be in place before 1 April 2022. In advance of reaching this date the Fire Brigades' Union requested that the Home Office issue guidance to employers on dealing with 'immediate detriment' cases.
- 2.2 The requested guidance was issued on 21 August 2020 and is attached at Appendix A. Clarity on the guidance has been sought both via the Local Government Association (LGA) and locally to assist fire and rescue authorities (FRAs) in determining what action should be taken. This clarity is required in relation to the legal status of the note, who it applies to (i.e. all scheme members or only those that lodged a claim with the Employment Tribunal), and to identify any consequences arising from differences in the interpretation and application of the guidance resulting in the incorrect payment of benefits and any unintended discriminatory treatment. Updated guidance is anticipated shortly.
- 2.3 In defence of the original discrimination claim, the LGA argued on behalf of the FRAs who were also listed as respondents along with government, that as they were required by law to follow the pension regulations in force and so had no choice but to implement the transitional protections, they had a defence to unlawful age discrimination under Schedule 22 of the Equality Act 2010. The outcome of this case was received on 12 February 2021. The Employment Appeal Tribunal's judgment is that FRAs cannot rely on the Schedule 22 defence where an employer is required by legislation to act towards

its employees in a way which is discriminatory. The Tribunal also identified that under Section 62 of the Equality Act 2010, FRAs have vested in them power to pass a resolution making non-discrimination alterations to the scheme of which they are managers.

- 2.4 The ruling provides some expectation that FRAs deal with immediate detriment cases to the extent that they are able within the terms of the government guidance. Furthermore, it is understood that the Home Office and HMT are relying on Section 61 of the Equality Act to provide legal underpinning to the note for non-claimants. However, it is not yet known whether the Government will appeal the outcome of the EAT, consequently this guidance cannot be wholeheartedly relied upon.
- 2.5 There are currently 8 individuals in BFRS that are deemed to be immediate detriment cases (likely to retire before April 2022) with a number of those being eligible to retire within the next few months, and amendments to the regulations will not be in place for some time. The below table shows BFRS' 'best guess' of the most likely date that affected individuals will retire. This is a prediction only, as individuals with service in the 92 scheme can retire at age 50 with 25 years' service so there could be an additional 7 individuals who could retire with immediate effect. These have not been included in the 'best guess' figures as their pensions would be actuarially reduced for early retirement making their immediate retirement unlikely.

June 2021	August 2021	September 2021	October 2021
1	5	1	1

- 2.6 Legal advice sought by other FRAs confirms that the Immediate Detriment Guidance Note issued by the Home Office does not have legal status and reliance on it would not provide the Authority with any legal protection or indemnify it against any claim or costs arising from acting on the guidance.
- 2.7 It is possible BFRS could rely on the judgment from the EAT, and in particular the ruling that Section 61 of the Equality Act 2010 means that the discriminatory provisions in a pension scheme are automatically by law set aside and disapplied. In addition, Section 62 empowers trustees and managers of pension schemes to make non-discrimination alterations to a scheme issue through resolutions effecting those changes. However, if BFRS were to rely upon this judgment and it is later appealed by the Government and overturned, BFRS would have no defence to any claims.

3. Members Due to Taper

- 3.1 There are 5 members of BFRS due to taper to the 2015 pension scheme from their legacy scheme, before 31 March 2022. The government has indicated in its response to the consultation that individuals will be returned to their legacy scheme until they make their choice at retirement as to how they wish the remedy period to be treated. Consequently if BFRS move individuals to the 2015 scheme on their taper date, they will then have to be moved back again once the legislation is in place. It is therefore proposed that individuals now remain in their legacy scheme until further details are known and new regulations are drafted, unless an individual specifically requests to be tapered due to certain benefits of the 2015 scheme (eg death benefits are paid to non-married partners).
- 3.2 Currently we are aware of a small number of FRAs across the country that have stopped moving individuals to the 15 scheme on their taper date. The LGA are pressing the Home Office for more information on this matter, so it may be that the number increases. Without knowing the reason the Home Office are still instructing FRA's to taper their FFs, it is difficult to assess the risk of not doing so.

4. Risk of applying Home Office Immediate Detriment Guidance Note

- 4.1 The LGA has drafted a note (Appendix B) to provide additional information to FRAs on the key consideration of implementing the Home Office informal guidance. This includes identifying some of the legal and technical considerations.
- 4.2 There are still many technical areas to be resolved in relation to remedy as pension benefits will need converting from one scheme which is a Career Average Revalued Earnings (CARE) scheme to final salary scheme benefits. As guidance is not currently available in relation to matters such as taxation and transfer values for example, calculation of benefits in some immediate detriment cases will be difficult and will present challenges for pension administrators. In some cases there may be insufficient information available to individuals to enable them to make a decision, and in other cases the administrator may simply be unable to calculate the benefits.
- 4.3 Whilst the LGA will aim to support FRAs to evidence robust decision making on whether a case can proceed under the current guidance, and if not, why not, it is evident that there are still many unknown factors which will need consideration on a case by case basis. It is expected that the LGA will work with administrators to provide example calculations to assist with bringing benefits into payment where the guidance is not explicit, however, this guidance would be based on LGA assumptions rather than the necessary regulations. Individuals would need to be provided with sufficient

information to make informed decisions about their benefits and what action to take, but this information could not be provided with absolute certainty in the absence of regulations.

- 4.4 Local Pensions Partnership Administration (LPPA), who are the Authority's pension administrators, are currently in the process of seeking their own legal advice in relation to the provision of benefit calculations in the absence of specific regulations. Until such time as the detail to support the remedy position is clarified by government, and software systems can be built or adapted to deal with the complexity associated with the remedy actions, all immediate detriment calculations would need to be undertaken manually thus increasing the opportunity for error.
- 4.5 There is a risk that benefits may be calculated incorrectly due to the complexities associated with contribution rates, taxation, and the period of time over which recalculation of benefits need to be undertaken.
- 4.6 Affected individuals would need to sign a disclaimer to acknowledge uncertainties in the position and that any overpayments will be recovered. They would also be acknowledging, and agreeing to, any (currently unknown) charges that may arise in the future resulting from the application of the Home Office guidance note. Many complex technical issues remain unresolved at this point and it is not clear what the future implications will be (e.g. Annual Allowance tax charge, interest charges etc). There is a risk that individuals may make decisions based on information provided at the time, but later find themselves responsible for a tax charge linked to that decision. There is also a risk that the disclaimer may not be sufficient to avoid later claims.
- 4.7 BFRS would also need to sign a similar document as employers when instructing LPPA to undertake calculations outside of regulations. The disclaimer would need to accept liabilities resulting from the instruction, including any charges that may arise.
- 4.8 There has been an indication from the FBU nationally that legal action will be taken against FRAs who do not seek to apply the immediate detriment guidance. Affording individuals the choice whether to take immediate detriment may limit the potential for future challenge but this would not negate the issue of unresolved technical complexities and the resulting erroneous calculations.

5. Costs

- 5.1 It is not possible at this stage to identify the specific costs associated with the recommendations of this report as these will be identified on a case by case basis.

- 5.2 Using the Home Office Immediate Detriment Note now will not increase any direct amounts payable, it will simply bring some of those costs forward.
- 5.3 It is expected that the costs associated with the administration of the remedy will be borne by FRAs, whilst monies owed to members will be met by government. In some circumstances individuals may also incur additional costs as a result of a change in pension schemes, e.g. annual allowance costs. We will be receiving a grant next month for £35,400 to cover some of the administration costs.
- 5.4 In not applying the guidance, further legal action could be taken by the FBU and result in further litigation costs. Conversely, in applying the guidance, BFRS could be subject to litigation costs for acting outside of legislation.
- 5.5 Given the absence of some technical information to support calculations there is potential for error; BFRS may be required to meet any financial liabilities arising in these circumstances.

6. Legal

- 6.1 Under the current Scheme of Delegation to Officers, the Chief Fire Officer has discretion from the Authority “within the approved budgets and policies, [to] exercise all matters of day-to-day administration and operational management of the services and functions.”
- 6.2 Reliance on the guidance note does not provide the Authority with any legal protection or indemnify it against any claim or costs arising from acting on the guidance.
- 6.3 Any individual challenge against the decision of the Scheme Manager would be made through the Firefighters’ Pension Scheme Internal Dispute Resolution Procedure (IDRP). If this process does not resolve the matter, the issue can be taken to the Pensions Regulator.

7. Options

- 7.1 To continue/not continue to transition members to the 2015 scheme on their original taper date

- 7.2 To apply/not apply the Home Office Immediate Detriment Note to all those due for retirement before April 2022.
- 7.3 To apply/not apply the Home Office Immediate Detriment Note to Claimants only
- 7.4 To apply/not apply the Home Office Immediate Detriment Note to those individuals without complexities only.
- 7.5 To work with the Authority's Pension Administrator to progress as much as possible on this matter, to ensure the Authority is proactively supporting its employees.

8. Recommendation

- 8.1 For the reasons outlined in this paper, the FRA are asked to consider the options and agree a way forward that would mitigate the risks and costs to the Authority and treat those affected fairly and consistently. Having discussed this as a Corporate Management Team, the proposed recommendations are to:
 - Keep the 5 FFs due to transition to the 2015 scheme in their legacy scheme, unless individually requested due to benefits.
 - Not apply the Home Office Immediate Detriment Guidance Note and await further legal and/or HMT guidance.
 - That Members support further work on this matter where possible, to support employees, if an individual requests their personal information on the immediate detriment choices.
- 8.2 Members will be kept up to date as the above progresses over 2021/22 and beyond.

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