

For publication

Bedfordshire Fire and Rescue Authority
Executive Committee
11 October 2022

REPORT AUTHOR: ASSISTANT CHIEF FIRE OFFICER

SUBJECT: FIREFIGHTER PENSION SCHEMES: REMEDY: LGA/FBU MEMORANDUM OF UNDERSTANDING AND IMMEDIATE DETRIMENT FRAMEWORK UPDATE

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Background Papers:

- Fire and Rescue Authority (FRA) minutes of 29 April 2021
- Home Office Immediate Detriment Guidance Note (June 2021)
- Local Government Association (LGA) Immediate Detriment Information note (June 2021)
- Bevan Brittan legal advice (October 2020)
- Public Services Pensions and Judicial Officers Bill (PSP & JO Bill) (July 2021)
- FRA Executive minutes 7 October 2021
- Memorandum of Understanding (MoU) between Local Government Association (LGA) and Fire Brigades Union (FBU) 8 October 2021 (Appendix A)
- Immediate Detriment Framework 8 October 2021 (Appendix B)
- LGA/FBU Framework for managing Immediate Detriment issues – update
- LGA's IDF Guidance for FRA's in their role as Scheme Managers (December 2021)
- HM Treasury note withdrawing Home Office informal guidance on IDF (November 2021)
- NPCC letter to Police Authorities (22 March 2022)

- FBU and LGA letter to Home Office (4 April 2022)
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PURPOSE:

To update Members and seek agreement on the way forward following developments since the last meeting of the FRA Executive in May 2022, concerning the treatment of Firefighters' Pension Scheme members who have (or will) suffer an "Immediate Detriment" by reason of their retirement (or impending retirement), following the decision made by the Court of Appeal on 20 December 2018 and the Employment Appeal Tribunal on 12 February 2021.

RECOMMENDATIONS:

It is recommended that Members:

- Note the report and consider the implications and risks associated with adopting the LGA/FBU Immediate Detriment framework;
 - Revisit the decision not to apply Immediate Detriment within BFRS;
 - provide any views on the above.
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1. Background

- 1.1 At the last FRA Executive meeting in April 2022 Members resolved that BFRS should continue to pause Immediate Detriment for both Category 1 and Category 2 members within BFRS until further clarification regarding financial risk was received.
- 1.2 During this time the Service has produced the workflows required to apply the Framework to Category 1 members. This was scrutinised at the Pensions Board on 28th February 2022 and is ready to be applied based on the current guidance available. Once the pending legislation is published, this will need to be reviewed to ensure it is still fit for purpose.

2 Other FRAs

- 2.1 Every FRA in the country is all considering whether and when to adopt the Framework. There was a change of intention following the legal advice sought and shared by the NPCC recommending Police Authorities not to apply Immediate Detriment to any category members until the legislation is published. However, since then the FBU have proactively sought to progress litigation against every FRS not applying the Memorandum of Understanding which has resulted in a number of FRAs applying Immediate Detriment for Category 1 members.

3 Implications and risks of applying/not applying the LGA/FBU Memorandum of Understanding and the Immediate Detriment Framework (IDF)

- 3.1 There remains a number of technical areas still 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. In these situations, the Memorandum of Understanding advises FRAs to agree a holding compromise with those individuals; it may be that their pension is calculated as best as possible with any outstanding queries being revisited once the necessary legislation is in place.
- 3.2 A major consideration for the Authority is that in not adopting the Memorandum of Understanding and consequently not applying the Immediate Detriment Framework, that we may be judged to be in breach of the age discrimination judgement.
- 3.3 Failure to apply Immediate Detriment will leave the Authority vulnerable to action from the FBU and any associated legal and administrative costs of defending our position. In the current climate, this is highly likely but may be mitigated by applying the Framework to Category 1 members as the FBU are aware that there are far more complexities relating to Category 2 members.
- 3.4 Through the LGA legal advisors Bevan Brittan, the Service has already responded to an Employment Tribunal claim that was submitted against a number of FRAs. The LGA are co-ordinating the approach on behalf of the FRAs affected including BFRS. The ET have stayed the proceedings until November 2022 pending national developments.
- 3.5 There are significant financial risks in adopting the Memorandum of Understanding before the legislation is published. As stated at 2.1 above, the Framework and the associated LGA Guidance introduces the remedying of scheme members who have had their benefits brought into payment. The guidance set out the LGA's understanding of the liability of any potential unauthorised payments charges and/or any tax liability charges. An unauthorised payment is any payment made to a member more than 12 months after their retirement; this payment is subject to a tax liability. The Framework and guidance

also state that the FRAs will compensate the member with an amount equal to that tax charge. The update advises that any compensation payments made will not be reclaimable and confirmation of this is still pending the legislation.

- 3.6 In adopting the Framework, it was the LGA's (and FRA's) understanding, that FRAs would receive all of the costs associated with implementing the remedy. This position is now questionable as it appears that ALL Category 2 costs will be borne by FRAs until the relevant legislation is laid before parliament and becomes Government Policy. The government intention is to introduce remedy-related legislation up to October 2023. There remain concerns around Category 1 member costs also.
- 3.7 If the Framework is adopted and applied to Category 1 members before the legislation is published, there will be costs to BFRS due to compensation paid to members for any tax charges for retrospective Annual Allowance breaches, and any other tax charges incurred. For Category 2 members, there would be additional charges, for example unauthorised payment charges and scheme sanction charges.
- 3.8 The withdrawal of the Home Office informal guidance poses significant risk surrounding which payments are reclaimable. For example, any 'compensation payment' is definitely not reclaimable, however, there is some ambiguity as to what is considered to be a 'compensation payment'. The guidance is clear that Unauthorised Payment Charges are compensation payments, but it is unclear if refunds of 2015 scheme contributions are considered to be compensation payments and this is a key financial risk.
- 3.9 There are also potential financial risks to the individuals; most of which are unknown at this stage but are likely to be due to tax issues.
- 3.10 It is not possible at this stage to identify the costs associated with the application of the Framework to those in-scope as the necessary clarification has not yet been provided. However, the initial estimate for applying IDF to Category 1 members is at least £214,986.75 (for the refund of 15 scheme contributions) plus any compensation payments for Annual Allowance Charges.
- 3.11 For applying the IDF to Category 2 members, the initial estimate is as at October 2021 was:
 - £231k refund of 2015 scheme contributions
 - £38k Unauthorised Payment Charges
 - £15k Scheme Sanction Charges
 - Totalling £284k

NOTE: This does not include the additional lump sum payments of £228,375.09 which may or may not be reclaimable depending on whether it is considered a legitimate pension payment (questionable as not covered by legislation at this point). These calculations also do not include the 8 individuals who retired with an ill health pension. Neither do they include the increased annual pension for these individuals.

- 3.12 In addition, the LPPA will charge £1,200 to £1,500 per case and will require an upfront cost of £6k to £8k for them to draw down on.
- 3.13 In not applying the guidance, any additional legal action taken by the FBU would result in further litigation costs. Conversely, in applying the guidance, BFRS could be subject to litigation costs for acting outside of legislation.

4. The Pensions Ombudsman

- 4.1 In July 2022, The Pensions Ombudsman (TPO) published a factsheet outlining his approach to McCloud and Sargeant age discrimination complaints.
- 4.2 The factsheet stated that *“Schemes may review and decided (taking appropriate advice) whether it is practicable for a remedy to be made available earlier for those members that may suffer immediate detriment.”*
- 4.3 The factsheet went on to say that *“presently TPO’s general starting position, is that it would not investigate complaints or disputes relating to remedying age discrimination in public sector schemes, but it will carefully look at the facts of each case before making a decision.”* It added that *“they may investigate where a member is suffering severe financial hardship or other serious injustice and the scheme is not putting in place interim arrangements to address the injustice within a reasonable period.”*

5. Options Appraisal

5.1 In considering the potential resolutions to Category 1 and 2 ID cases, the following options are available:

Option	Risks/Benefits
1A. Maintain ‘pause’ on processing any Immediate Detriment cases	-ve Further legal action resulting in potential for increased costs and reputational damage to the CFA
2A. Process all Category 1 and Category 2 cases	+ve Limits potential for legal action, and associated costs

2B. Process all Category 1 and Category 2 cases <u>WITHOUT</u> Compensation Payments	-ve Significant cost to the Authority
3A. Process Category 1 cases only	+ve Prevents Category 1 cases turning into Category 2 cases and incurring additional costs to the Authority +ve Limits potential for legal action from Category 1 cases
3B. Process Category 1 cases <u>WITHOUT</u> Compensation Payments	+ve All Category 1 cases may not retire in this period; reducing forecasted cost may not be as high as estimated
4A. Process all Category 2 cases only	+ve Prevent interest costs increasing
4B. Process all Category 2 cases only <u>WITHOUT</u> Compensation Payments	+ve Prevent further legal action and associated costs from Category 2 cases +ve Prevent HMRC tax charges being incurred for those within 12 months
5A. Process Category 2 cases, if within 12 months of retirement date only	+ve Prevent interest costs increasing
5B. Process Category 2 cases, if within 12 months of retirement date only, <u>WITHOUT</u> Compensation Payments	+ve Prevent HMRC tax charges being incurred

6 Options

6.1 In light of these developments, there are potentially four options for Members to consider:

Option 1: To maintain the previously agreed position and wait to apply the remedy until the legislation or further guidance is published as per the legal advice received by the NPCC.

Option 2: To adopt the Immediate Detriment framework outlined in the LGA/FBU Memorandum of Understanding and apply Immediate Detriment Framework to all those due for retirement only (Category 1 members). This may also assist in building a more positive working relationship with the FBU.

Option 3: To adopt the Immediate Detriment framework for those individuals due for retirement and adopt a phased approach for those that have retired since 2015 by applying Immediate Detriment firstly to those that retired less than 9 months ago (to avoid the Unauthorised Payment Charges etc), and then to all those remaining in scope once the legislation is published. Again, this phased approach would demonstrate the Service's commitment to positive industrial relations with the FBU.

Option 4: To fully adopt the Immediate Detriment framework for both those individuals due for retirement and also to those in-scope individuals that have retired since 2015 (all Category 1 and Category 2 members). Whilst this is the FBU's preferred approach, it carries the most risk for the Service and affected individuals.

RECOMMENDATIONS:

It is recommended that Members:

- Note the report and consider the implications and risks associated with adopting the LGA/FBU Immediate Detriment framework;
- Revisit the decision not to apply Immediate Detriment within BFRS;
- provide any views on the above.

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