

Appendix B

Bob Neill MP
Parliamentary Under Secretary of State
Department for Communities and Local Government
Eland House
Bressenden Place
London SW1E 5DU

30 August 2012

Dear Bob

I am writing to set out the position of the LGA's Fire Services Management Committee (FSMC) on the allocation of responsibility for the non-employee costs associated with the Employment Tribunal judgement granting retrospective access to the pension scheme for retained firefighters. As you are aware, following the judgement (case number: 6100000/21) and once the enabling legislation is in place, retained duty staff will be able to buy back pensionable service for the period 1 July 2000 and 5 April 2006 inclusive.

The non-employee financial costs associated with this judgement are potentially very large and in the worst case could amount to £500 million. It is not possible to say with any certainty what proportion of this financial risk will materialise, but in the view of FSMC the scale of the risk requires an in-principle decision soon on how the costs are to be met.

FSMC is grateful for the time you have devoted to this matter so far, in meeting with our delegation of members and also in setting out the government's position on the matter in a letter dated 25th June 2012.

We have now had the opportunity to consider your letter fully. We set out below our broad position, following legal advice, and in doing so our concerns with the government's position.

FRA's had no discretion to allow retained firefighters to join the firefighters pension scheme

The pension rights to which retained firefighters did not have access were those conferred by the Firefighters' Pension Scheme Order 1992, which was made by the Home Secretary under the Fire Services Acts 1947 and 1959. Article A3 of that Order limited the Scheme to regular firefighters. The terms of the firefighter pension schemes are set by ministers. Pension schemes are administered locally and FRAs can only make decisions on the scheme within the limits of discretion set out in the Acts and accompanying regulations. There was no discretion locally to admit retained firefighters to the scheme during the period in question.

Evidence that the government continues to see the retained pensions issue as its domain has been its decision to negotiate the terms of the settlement directly with Trades Unions, to the exclusion of FRAs.

Given that central government policy excluded retained firefighters from the scheme, we have sought through a close reading of your letter, to understand the principles that might lead government to impose costs on fire authorities. However, we find that the arguments set out in your letter dated 26 June 2012 do not support the government's position. You stated that *"In this way employers are responsible for their decisions which affect the cost of the pension scheme within the statutory framework set by Parliament"*.

This appears to be the rationale of the policy *that "pension costs are an employer responsibility and funding of liabilities, whether past or future service, should be met by employers"*. However, the rationale does not support the current proposal, because it was the Secretary of State who made the decisions. If the Secretary of State had not decided to exclude retained firefighters from the 1992 Scheme, then in force, the additional cost would ultimately have been borne by central Government.

If pension costs are to be borne by those responsible for the decision relating to them, then logically they should in the present case fall on central Government, as it was the Secretary of State who decided that retained firefighters should not have access to the 1992 Scheme.

Non-employee pension costs were funded by government during the period in question

During the period in question FRAs did not pay pension contributions. Had the government taken the decision to admit retained firefighters to the pension scheme in 2000 or at any time up to 5 April 2006, the additional cost to the pension scheme would have been met by government funding.

In the earlier part of the period in question this would have been based on Standard Spending Assessments (SSAs) where central government assessed relative spending needs of individual authorities through a formula grant mechanism which was subdivided in to a number of components which either directly reflected need or were a proxy for need. In this instance, we are concerned with the pension's component of the SSA process, which the Government would then largely fund through revenue support grant and business rates at an individual authority level. The pension's component of the SSA was based on an assessment of authority pension liabilities through a 5-yearly survey of individual authorities prepared by the GAD who prepared the reports for the relevant department.

Further evidence that the government would have borne the cost, had retained firefighters been admitted to the 1992 pension scheme in the period to July 2006, is provided by the manner in which it dealt with pension costs arising from *Preston and others vs Wolverhampton Healthcare NHS Trust and others* Employment Tribunal Decision 1995.

In these cases, which related to the application of the Equal Pay Act, the additional pension scheme liability was met by government.

A new burden on fire authorities

There is a further important consideration namely that this is a new burden on fire authorities. Consistent with the guidance for government departments published in June 2011 by the Department for Communities and Local Government the burden must be fully funded by the Department.

It is a new burden for those authorities that employed retained firefighters, because during the period in question any additional pension costs would have been assessed and met by government through the Standard Spending Assessment and subsequent spending frameworks.

In the case of fire authorities that did not employ retained firefighters, a proposal that they should contribute to the non-employee costs associated with the implementation of the Employment Tribunal Judgement is obviously a new burden because those fire authorities did not employ any firefighters covered by regulation 5 of the Part-time Workers Regulations.

It is the case that the 2000 Regulations apply to all employers, but the only obligation imposed by the regulations is imposed on employers of part-time workers. Our legal advice indicates that a decision that would (a) provide benefits for the retained firefighters through the 2006 scheme and (b) maintain a single contribution rate for that scheme notwithstanding this change to the scheme would leave “no doubt that the Government is imposing a new burden on authorities that did not employ retained firefighters”.

Our legal advice is that taken together the points raised above make a compelling case for the non-employee costs to be borne by central Government. We have been advised by leading counsel that there would be strong grounds for judicial review should the government decide to impose these pension costs on fire authorities.

The legal position aside, the view of FSMC is that these pension costs, if realised to any great extent and if imposed on fire authorities, would result in a substantial and detrimental impact on the service provided by fire and rescue services, which could include fewer firefighters and fire station closures.

We are keen to continue our dialogue on this issue and would be happy to meet with you again and to consider any further correspondence from you on the matter.

Yours sincerely

Cllr Maurice Heaster
LGA Fire Services Management Committee