

25 September 2020

## **Workforce Update**

### **Purpose of Report**

To update the Fire Commission on matters in relation to fire service industrial relations and pension matters.

### **Summary**

This briefly describes the main industrial relations and pension issues at present.

### **Recommendation:**

Members are asked to note the issues set out in the paper.

<b>Contact officer:</b>	Gill Gittins (industrial relations)	Clair Alcock (pensions)
<b>Position:</b>	Senior Adviser (Workforce and Negotiations)	Senior Fire Pensions Adviser
<b>Phone no:</b>	020 7187 7335	020 7664 3189
<b>E-mail:</b>	<a href="mailto:gill.gittins@local.gov.uk">gill.gittins@local.gov.uk</a>	<a href="mailto:clair.alcock@local.gov.uk">clair.alcock@local.gov.uk</a>

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## **PENSIONS**

### *Age Discrimination Remedy*

1. The [formal HMT consultation](#) was published on 16 July 2020 with a closing date of 11 October 2020. The paused employer cost-cap process will also resume.
2. The proposals are in two parts, the first is the retrospective effect of the current age discriminatory regulations and the proposals to rectify these, by allowing members to be returned to their former legacy schemes or to allow a choice to receive benefits based on the current Career Average Revalued Earnings (CARE) scheme if it is better to do so.

3. The proposals consult on two options on when the member might make the choice, this could be;
  - 1) Immediate Choice: The choice will be made during a twelve-month period following the end of the remedy period, this will be the same time right across public sector.

OR

- 2) Deferred Choice Underpin (DCU): All members will be returned to the legacy scheme at 1 April 2022 and the member can make a choice at retirement whether they wish to choose benefits from the reformed scheme.
4. Each of those options have pros and cons, under immediate choice, the choice is irrevocable once made and therefore in order to make it the member will need to be provided with robust information to make that choice. The consultation references 'schemes would have to develop online resources including benefit calculators for members to use to inform their decision.' This potentially introduces considerable risk to the member that they make the 'wrong' choice.
5. Under the DCU there is no risk to the member as they will be able to choose which option is better at retirement.
6. The consultation acknowledges that both options represent an administrative challenge, and this is especially true of the Firefighters Pension Scheme, given that the scheme is managed by each FRA and administered by 18 different administrators.
7. GAD valuations are not yet available in order to consider the cost of either option on employer contributions.
8. The second part of the HMT proposals are to rectify the age discrimination going forward and move all members into the reformed CARE schemes with effect of 1 April 2022.
9. The background to the Age Discrimination Remedy along with the consultation documents are available on [www.fpsregs.org](http://www.fpsregs.org)<sup>1</sup>

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<sup>1</sup> <http://www.fpsregs.org/index.php/legal-landscape/age-discrimination-remedy-sargeant>

*Immediate Detriment Guidance*

10. Following the 2018 Court of Appeal judgment in Sargeant an interim order was made by the Employment Tribunal on 18 December 2019 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 FPS 1992, as long as they met the other criteria, which was to have been in the scheme at 31 March 2012 and 31 March 2015:

*Pending the final determination of the issues of remedy, all existing Claimants who, by reason of their age would not satisfy paragraphs 12(2)(c), 12(3)(c), 13(e) or 14(e) of Schedule 2 to the 2014 English Regulations or the 2015 Welsh Regulations from 31st March 2015 are entitled to be treated as satisfying those paragraphs from that date.*

11. The SAB requested guidance on dealing with immediate events, such as ill-health retirements, as per their [paper submitted to the Home Office in March 2020](#).
12. On 21 August 2020, at the request of the Fire Brigades Union, the Home Office issued a note directly to Fire and Rescue Authorities (FRAs) via the finance leads headed “McCloud / Sargeant ruling – Guidance on treatment of ‘Immediate Detriment’ cases” for both the Firefighters’ and Police Pension Schemes.
13. The note says that the guidance is informal guidance only and does not confirm on what basis FRAs may rely on the note for the purpose of making pension payments.
14. It is understood that the Home Office assert that the legal position which underpins the application of the guidance in the note for non-claimants (and so not covered by the interim order above) is section 61 of the Equality Act. That power is currently being contested in the FRA’s appeal under Schedule 22 of the Equality Act, in which they argue that they were required to follow the pensions regulations and so by law they had no choice but to implement the transitional protections for older firefighters. Legal advice will be needed to determine what the issuing of the guidance means for FRAs.
15. The LGA have asked for further clarification about a number of technical areas on the application of the note.

**KEY WIDER WORKFORCE ISSUES**

**Pay 2020**

16. Members will be aware that since the Fire Commission last met a pay claim was put forward by the employees’ side of the NJC for Local Authority Fire and Rescue Services (covering firefighters to area managers).
17. It did not seek a specific figure, referring instead to seeking a substantial pay increase and a number of factors it believed should be taken into account including an increase of £4,091 to restore wages in comparison to inflation (CPI) ‘over a decade of austerity’ and additionally increased wages for any changes in working practices sought by the employers.

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18. The employers' side undertook three well attended 'virtual' consultation meetings with local employers on the content of the claim and the current position in respect of affordability which informed the employers' side decision to make an offer of 2.0%. The Fire Brigades Union then consulted its membership. Agreement was subsequently reached within the NJC at 2.0%. However, the [FBU](#) has been clear that it will now be focusing on lobbying and campaigning in support of increased pay going forward.
19. In addition, a 2.75% claim was put forward by the employees' side of the NJC for Brigade Managers (Chief, Deputy chief and assistant Chief Fire Officers or equivalents). The employers' side of that NJC decided to consult Chairs separately on this matter and discussions with Chairs indicated they were content for this to be done through correspondence. A message was sent to Chairs earlier this month with the consultation details. The closing date is 25<sup>th</sup> September.

### **Inclusive Fire Service Group**

20. The Inclusive Fire Service Group (IFSG) is an NJC for Local Authority Fire and Rescue Services led group. Its membership however is wider and includes the National Employers, NFCC, FBU, FOA and the FRSA. It is unique in that it comprises national employer and employee representation, senior management and trade unions. It considers matters such as equality, diversity, inclusion and cultural issues including bullying and harassment in the fire service with the aim of securing improvement.
21. Upon its inception it undertook a detailed assessment of the current positions in the fire service. A number of improvement strategies were subsequently issued. More information can be found in circular [NJC/1/18](#). (The areas of weakness identified by the group bore a strong similarity to those more recently also identified by HMICFRS in England).
22. The strategies were widely welcomed with virtually all services indicating their support and providing, as requested, timescales within which they expected to see improvement. The IFSG resolved to monitor and measure use of the improvement strategies at a point when they should be embedded into each service.
23. Accordingly, the IFSG has now undertaken a monitoring exercise, which included:
  - 23.1 **Online survey of FRAs** - to which all 49 services responded, to understand the extent of use and impact of the improvement strategies.
  - 23.2 **Employee focus groups** - the LGA's Research team was commissioned to independently run a series of focus groups to capture the experiences of employees (who identified as at least one of the following protected characteristic groups: BAME, LGBT and Female) on a range of equality, diversity and cultural issues and views going forward. Similar focus groups were commissioned by the IFSG in 2017 so findings from both years will provide a useful comparison.

23.3 **Workshops** - The NJC joint secretariat held workshops with FRS equality and diversity officers and local union representatives to capture their experiences, comparisons and views going forward.

24. The refocus of resources to Covid-19 response has delayed the IFSG in considering the outcomes. However, it will now meet at the beginning of October to do so, consider a report for wider release, and to determine next steps. This will also be useful for complementary work taking place elsewhere such as that of the NFCC and LGA.

### ***Pension Scheme Transitional Protection Arrangements Discrimination Cases***

25. These cases concern the issue of whether the transitional protections in the 2015 Fire Pension Scheme (FPS), which provide protections based on age allowing older members to remain in their former final salary scheme, are age discriminatory (other claims were made but it is the age discrimination claim which is the primary one).

26. As they were named as respondents in the case, Fire and Rescue Authorities (FRAs) had to submit a defence to the legal challenge. This defence has been managed collectively on behalf of the FRAs by the LGA under the auspices of the National Employers and decisions have been taken by a central steering group which is comprised of a number of legal and HR advisers from varying types of fire and rescue services across the UK, the Advisory Forum legal adviser, employers' secretariat, and from the LGA its Corporate Legal Adviser and a Senior Employment Law Adviser.

27. The Court of Appeal found that the transitional protections unlawfully discriminated on age and the case has now returned to the Employment Tribunal for it to determine remedy. Members will be aware that in common with its approach to a request from Government, the Supreme Court rejected the fire authorities' application to appeal.

28. A case management preliminary hearing was held on 18 December 2019. An interim Order was agreed by all parties and the detail is contained in circular [EMP/8/19](#). The Order does not bind the parties beyond the limited interim period before the final declaration.

29. Paragraph 2 of the Order in effect provides that pending the final determination of all of the remedy issues, those that brought claims in England and Wales (the claimants) are entitled to be treated as if they remained in the 1992 FPS.

30. The Order anticipated that the final determination on the remedy issue in regards to membership of the 1992 FPS should be resolved in 2020, although that is expected to be affected by what the position is on the FRA's Schedule 22 appeal (see paragraph 31 below). It should be noted that even when we have a final determination on that issue it may be some time before this part of the remedy can be put into effect for all claimants. Furthermore, there may be other issues relating to remedies to be resolved, for example in regards to claims for injury to feelings. It should also be noted that the Order does not cover those who

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did not bring claims (non-claimants). However, discussions are taking place on how to provide a remedy for those non-claimants as appropriate.

31. In addition, the FRAs still have the live and separate appeal in relation to their potential defence under Schedule 22 (which is that the FRAs had no choice but to follow the Government's legislation) which again was fully considered with the Steering Committee and legal representatives. The appeal has now been listed for 16 December 2020.
32. Since the outset, the position of FRAs that any costs arising from these cases should be met by governments has been made clear. Work continues with legal representatives on appropriate approaches to reinforce that position.

***Defence of new categories of claims***

33. A new related category of employment tribunal claims has been issued by the Fire Brigades Union against fire and rescue authorities on behalf of firefighters. In short, the claims relate to members of the 2006 Scheme who were not transferred to the 2015 Scheme (and never will be), which they claim would have provided them with better benefits.
34. We have approached FRAs to seek their views on whether they would like the LGA, along with the Steering Committee to coordinate the defence of the new claims on their behalf, as we have done for the original claims. This would be on a cost-sharing basis, based on headcount, as they are for the original claims. The overwhelming majority of respondents were in favour and we are currently in the process of gathering the necessary documentation from FRAs, ready to submit defences to the claims.
35. Furthermore, another new but related category of employment tribunal case is emerging. These have been issued by Slater and Gordon solicitors against fire and rescue authorities on behalf of firefighters. Slater and Gordon is working with the Fire Officers Association. In short, the claims are of the same type as the main claims brought by the FBU on behalf of their members in that they allege that the transfer of younger firefighters to the 2015 pension scheme amounts to age discrimination. We anticipate the claims have been brought in order to protect these particular claimants' position in relation to any injury to feelings award.
36. We asked FRAs if they would like the LGA, along with the Steering Committee made up of representatives from fire authorities, to coordinate the defence of these new claims on their behalf, as we have done for the original claims. The overwhelming majority of respondents were in favour and we are therefore taking this forward and submitting defences.

### **Fit for the Future**

37. Members will recall receiving updates on the development of an agreed improvement narrative, *Fit for the Future*, which includes improvement objectives that will give a national sense of direction to the future of Fire and Rescue Services in England.
38. The NFCC and the National Employers (England) working in partnership have developed the narrative and objectives based on analysis of the evidence available from a wide variety of sources, including the recommendations of the Grenfell Tower Inquiry (GTI) and the outcomes of inspection by Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS). This evidence has been brought together, analysed to identify themes and has led to the development of the improvement objectives within the document. This analysis will be ongoing as more evidence becomes available, e.g. learning from the COVID-19 pandemic, and the objectives may develop over time. The work should be regarded as a system that reflects the current position, based on current evidence.
39. LGA representatives on the employers' side of the NJC for Local Authority Fire and Rescue Services, referred to in the document as National Employers (England), have endorsed the direction of travel and are content to continue to work in partnership with the NFCC on this matter. The LGA's Fire Service Management Committee has also endorsed the direction of travel and resolved that the LGA be directly included and support the Fit for the Future approach, becoming the third partner alongside National Employers (England) and the NFCC.
40. The partnership is just in the process of finalising an online process to capture stakeholder views.
41. Discussions between employer and trade union representatives, undertaken by the National Employers (England), will also begin as the outcomes of such work will also be relevant to them.
42. In addition, the work can also inform formulation of any business case to government on pay funding.

### **Coronavirus**

43. The National Joint Council for Local Authority Fire and Rescue Services issued a [circular](#) in respect of Novel Coronavirus (Covid-19) which provided sources of further information across the UK and confirmed pay arrangements should an employee be required to self-isolate or be placed in quarantine.
44. Employer [advice](#) has also been issued in respect of quarantine on return from travel abroad.
45. Members will also be aware that both sides of the National Joint Council and the NFCC have developed a series of [tripartite statements](#) on additional areas of work that firefighters

can undertake to alleviate pressure on ambulances services and other partners during the Covid-19 pandemic.

46. Since agreement on the principles document on 26 March a number of additional work areas have been identified:
- ambulance driving and patient/ambulance personnel support
  - delivery of essential items to vulnerable persons
  - movement of bodies (Covid-19)
  - face fitting for masks to be used by frontline NHS and clinical care staff working with Covid-19 patients;
  - delivery of PPE and other medical supplies to NHS and care facilities;
  - assisting in taking samples for Covid-19 antigen testing;
  - driving ambulance transport not on blue lights (excluding known Covid-19 patients) to outpatients appointments or to receive urgent care;
  - driving instruction by FRS driver trainers to deliver training for non-Service personnel to drive ambulances (not on blue lights)
  - assembly of single use face shields for the NHS and care work front line staff;
  - packing/repacking food supplies for vulnerable people;
  - Known or suspected Covid-19 patients: transfer to and from Nightingale hospitals under emergency response (blue light) or through non-emergency patient transfer (not on blue lights)
  - Non Covid-19 patients: transfer to and from Nightingale hospitals under emergency response (blue light) or through non-emergency patient transfer (not on blue lights) – this includes recovering and recuperating patients no longer infected with Covid-19
  - Delivery of pre-designed training packages on Infection Prevention and Control, including hand, hygiene, PPE 'donning' & 'doffing' guidance and procedures; and supporting the care home staff testing i.e. to train care home staff to train others according to the principle of 'train the trainers.'
  - Delivery of pre-designed training packages on Infection Prevention and Control, including hand, hygiene, PPE 'donning' & 'doffing' guidance and procedures; and supporting the care home staff testing i.e. direct to care home staff.
47. Where an employee chooses to volunteer to facilitate such work, the NJC for Local Authority Fire and Rescue Services has agreed such work will be regarded as part of the core job. This ensures there are no potential pension/compensation complications, which encompasses all Grey Book employees undertaking such work.
48. National best practice risk assessments have also been developed for each of the activities.

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### **Code of Ethics**

49. Members will recall the HMICFRS State of Fire recommendation for the LGA and NFCC to develop a national Code of Ethics for application across fire and rescue services in England.
50. Following joint LGA and NFCC working an approach has been developed, which will go out for consultation in the next few weeks.

### **Implications for Wales**

51. Each of the wider workforce matters in this report have the same implications for Wales as for England and we are working with WLGA, Welsh FRAs and FRSs as appropriate. The WLGA is one of the four employer stakeholder bodies on the NJC for Local Authority Fire and Rescue Services.
52. References to the scheme advisory board are for the English scheme advisory board only. Wales has its own advisory board who will be responding separately to the government consultation on reform