

Workforce Report

Purpose of Report

To update the FSMC 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.

Action

Officers are asked to note member comments

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PENSIONS

Age Discrimination Remedy

1. The [formal HMT consultation](#) on remedying age discrimination 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. Within the response to HMT, we have requested clarity on the mechanism to recover employer contributions for the remedy period. The difference in employer contributions between FPS 1992 and FPS 2015 is 7.4% per annum from 2015 based on the [2012](#) valuation and 8.5% per annum from 2019 based on the [2016](#) valuation. The preferred mechanism would be that these are recovered through employer contributions based on the 2020 valuation, as there would be considerable funding pressures if these were required to be paid in 2022/2023.
8. GAD valuations are not yet available in order to consider the cost of either option on employer contributions.

9. 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.
10. The background to the Age Discrimination Remedy along with the consultation documents are available on www.fpsregs.org¹
11. An [age discrimination information note](#) for stakeholders was published on 1 October 2020.
12. An assessment of risk to both the FRA and member was considered the highest priority by the SAB, which was supported by both employee and employer members of the board.
13. Illustrations of reputational risk are:
 - a. Risk of inconsistency
The arrangements for responsibility and funding of the scheme mean that some FRAs have less resources and knowledge than others, which will likely lead to inconsistencies of approach with regards to the levels of technology and information members are given to support their decisions
 - b. Resources

Available resources and knowledge to implement a complex choice system are likely to be lower than for a centrally administered and managed scheme.
14. For these reasons the SAB and the Employers response will be indicating a preference for Deferred Choice Underpin (DCU) as this is considered the option that provides most mitigation to the risks that have been identified.

Immediate Detriment Guidance

15. 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.
16. The SAB requested guidance on dealing with immediate events as per their [paper submitted to Home Office in March 2020](#).
17. 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

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

/ Sargeant ruling – Guidance on treatment of ‘Immediate Detriment’ cases” for both the Firefighters’ and Police Pension Schemes.

18. 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.
19. It is understood that the legal position that underpins the application of the note is Section 61 of the Equality Act. That power is currently being contested in the courts under the FRA defence to age discrimination and legal advice will be needed to determine what that means for FRAs which has been requested by LGA on behalf of FRAs.
20. The LGA have asked for further clarification about several technical areas on the application of the note, including paragraph 5.13 that suggests employer contributions for the remedy period would need to be repaid, this could potentially lead to severe funding pressures.

KEY CURRENT WIDER WORKFORCE ISSUES

Pay 2020

21. At the time of the last FSMC meeting a pay claim had been put forward by the employees’ side of the NJC for Local Authority Fire and Rescue Services (covering firefighters to area managers).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 at firefighter level to restore wages in comparison to inflation (CPI) ‘over a decade of austerity’ and additionally increased pay for any changes in working practices sought by the employers.
22. The employers’ side has since undertaken three well attended ‘virtual’ consultation meetings with local Chairs and chief fire officers on the content of the claim and the current position in respect of affordability. The outcomes from the consultation meetings informed the employers’ side decision to make an offer of 2.0% on basic pay and continual professional development payments, backdated to 1 July 20. 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.
23. In addition, a 2.75% claim has been 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. That consultation is on-going.

Inclusive Fire Service Group

24. 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.
25. Having undertaken a detailed assessment of the positions in the fire service it issued a number of improvement strategies, which 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.
26. Members will be aware that this has recently included:
 - 26.1 an online survey of FRAs - to which all 49 services responded, to understand the extent of use and impact of the improvement strategies;
 - 26.2 employee 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; and
 - 26.3 workshops - with FRS equality and diversity officers and local union representatives to capture their experiences, comparisons and views going forward.
27. The intention had been for the outcomes to be considered within the IFSG towards the end of March/early April, a full report issued to FRAs and an approach going forward. Members will appreciate the COVID-19 situation has inevitably slowed down other work. However, the IFSG has now met and we expect a full report to be issued to FRAs later this month.

LGA and NFCC Core Code of Ethics

28. The HMICFRS State of Fire & Rescue report 2019 recommended that by December 2020, the Local Government Association and the National Fire Chiefs Council, should produce a Code of Ethics for fire and rescue services, which should be adopted by every service in England.
29. In initial feedback to HMICFRS, both the National Fire Chiefs Council (NFCC) and the Local Government Association (following discussion with members) indicated the potentially inadvertent difficulty in imposing a single prescriptive code, with no local flexibility, upon FRAs and FRSs. There should also be recognition that most services have an established ethical framework, and where these are well embedded, the culture has improved, compared with FRSs that had not embedded such frameworks.
30. Accordingly, joint work to respond to the recommendation has focused on a Core Code of Ethics (Core Code), which reflects best practice principles and has been designed to underpin the way we serve our communities, carry out our role and work together. It is intended to become the common foundation across all services in England. However, to

recognise the differing positions within FRSs currently, as well as differing governance arrangements, it has been written as a Core Code. This means that whilst all the principles within the Core Code should be adopted and embedded within each FRS, it also has the flexibility to add to (but not detract from) those principles at local level. This will help local FRAs/FRSs to reflect their local values, behaviours, and governance arrangement. Examples include where:

- an FRS is part of a county council and is likely to still have obligations placed upon it to evidence it also complies with the council's code.
- an FRS has a well-developed local ethical framework and/or related policies, which should be reviewed against the Core Code.

31. A joint [consultation](#) on the Core Code commenced on the 5th October with a closing date of Monday 2 November 2020. It is open to all interested parties, though within FRAs/FRSs it targets Chairs, CFO/CEs and HR Directors / Strategic Leads.
32. Members will also wish to be aware that the Fire Standards Board is now ready to [consult](#) on a related Fire Standard.

Pension Scheme Transitional Protection Arrangements Discrimination Cases

33. 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).
34. 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 continues to be 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.
35. 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.
36. A case management preliminary hearing on remedy 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.
37. 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 in 1992 FPS.

38. 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 did not bring claims (non-claimants). However, discussions are taking place on how to provide a remedy for those non-claimants as appropriate.
39. 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.
40. 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. Most recently, a formal letter has been sent to government on behalf of FRAs. The same action has been taken in respect of Wales, Scotland and Northern Ireland as the National Employers is a UK-wide body. Responses are awaited.

Defence of other categories of claims

41. Another 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.
42. We 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 defences have now been submitted on behalf of the FRAs who have to date received claims.
43. Furthermore, another related category of employment tribunal cases has emerged. 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.

44. We again 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.

Matthews & others v Kent & Medway Towns Fire Authority & others

45. This case relates to application of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 to retained duty system employees. Those Regulations were brought into force to implement the EU Part-time Workers Directive.
46. Members may recall that following a protracted legal process up to and including the House of Lords judgment, settlement agreements were reached in respect of terms and conditions in 2015 with both the RFU (now FRSA) and the FBU in regard to the many thousands of Employment Tribunal cases relating to potential discrimination under those Regulations. The LGA acted for FRAs through the auspices of the National Employers on the basis of a cost-sharing arrangement with FRAs similar to the arrangements in place for the legal cases already referred to in this report.
47. Defence of the pensions aspect of the case was led by central government. The House of Lords judgment allowed those who were serving during the period 1 July 2000 (the date the Regulations came into force) to the date on which they elected to join the 2006 Scheme, to have special provisions which generally reflect the rules of the Firefighters' Pension Scheme 1992 ("FPS 1992"). An options exercise took place to provide for those who qualified for membership of the modified Scheme, to elect to join by no later than 30 September 2015.
48. More recently, work has again had to take place on the pensions aspect of this case. This is because of a European Court of Justice judgment involving part-time judges (O'Brien) which in effect held that remedy could extend back before the Part-time Worker Regulations were implemented in July 2000. This also impacts on the fire service as the impact of the judgment and its interpretation of part-time workers' rights applies across all employers.
49. Consequently, together with legal representatives, we are in discussions with the government's legal department and legal representatives for the FBU and FRSA. As you would expect, we have also raised concern that this will be unbudgeted expenditure for FRAs, should central government not provide them with the necessary funding.

Fit for the Future

50. 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.

51. 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.
52. 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 and was also content to move to wider consultation..
53. The partnership is just in the process of finalising an online process to capture stakeholder views.
54. 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.
55. In addition, the work could also inform formulation of any business case to government on pay funding.

Coronavirus

56. 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.
57. Employer [advice](#) has also been issued in respect of quarantine on return from travel abroad.
58. 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.
59. 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.
60. 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.
61. National best practice risk assessments have also been developed for each of the activities.

Implications for Wales

62. 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 exception in this report is the Core Code of Ethics, which applies in England only. The WLGA is one of the four employer stakeholder bodies on the NJC for Local Authority Fire and Rescue Services.

63. The HMT consultation on age discrimination applies across all the devolved Fire and Rescue Authorities, however separate responses will be made. References in this report to the age discrimination consultation response are in relation to English FRAs only, Wales has its own advisory board who will be responding separately to the government consultation on reform, albeit they will also be indicating a preference for DCU.
64. The immediate detriment matters raised are the same in Wales where the matter of Section 61 of the Equality Act also applies. Welsh Government are dealing with immediate detriment cases arising from the guidance.