

## **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

<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>

## **PENSIONS**

### **Age Discrimination Remedy**

1. The [formal HMT consultation](#) on remedying age discrimination opened on 16 July 2020 and closed on 11 October 2020.
2. A response was submitted by [LGA on behalf of employers of Firefighters and Teachers](#), and by the [Scheme Advisory Board \(England\)](#).
3. A policy decision by HMT on whether the option taken forward will be Immediate Choice or Deferred Choice Underpin (DCU), is expected to be announced early to mid-January 2021. It is hoped that HMT will also set out in this response expectations for implementation of remedy.
4. Both the SAB and the Employers response indicated a preference for DCU, this approach was also the preferred option of the devolved Firefighter Scheme Advisory Boards in [Wales](#) and [Scotland](#). Northern Ireland have been working to a different timetable as set out by the Department of Finance NI, however they are expected to also identify a preference for DCU. This is in common with many other public sector pension schemes, as this is considered the option that provides most mitigation to the risks that have been identified.
5. Nevertheless regardless of the approach taken, implementation of the remedy is going to be a significant challenge, and while the timetable or HMTs expectations have yet to be established, the consultation points towards remedy being in place by April 2022.
6. Software providers have already confirmed a lead in time of at least 18 months from draft regulations will be necessary for the software to be in place, which means that administrators will almost certainly be without software.
7. More immediately there will be a requirement to communicate the effects of the remedy and reforms to the workforce to prevent myths and misunderstanding leading to individuals leaving or retiring earlier than they would otherwise have done. LGA officers on the bluelight pension team are members on the HMT led remedy technical and project management groups and will be co-ordinating central communication resources throughout 2021.
8. It is expected the challenge of implementation and communication will be felt more keenly by the locally administered schemes of Fire and Police, as each FRA will be individually responsible for managing implementation with their stakeholders.
9. For that reason we are establishing a senior stakeholder group of FRA scheme manager representatives in order to have oversight of the implementation plans and progress. The focus of this group is on implementation and effect of the new arrangements.
10. **As such we ask FSMC to nominate an elected member to sit on this steering group, along with representatives from NFCC and senior fire officer leads in HR and Finance.**

### **Immediate Detriment Guidance**

11. 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.*

12. The SAB requested guidance on dealing with immediate events as per their [paper submitted to Home Office in March 2020](#).
13. 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.
14. 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.
15. 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 (as paragraph 52 below). A legal note has been issued to all nominated contacts on the position of implementing the guidance for both claimants and non-claimants.
16. The LGA published an [immediate detriment information note for FRAs](#) which gave further clarification of the technical issues yet to be commented on by Home Office or HMT and the issues that would need to be decided by FRAs in their decision making on making any immediate detriment payments.
17. Decision making is likely to be on a case by case basis and a [matrix](#) was included to help FRAs identify whether they have all the information necessary to make a payment.

### **Complexity and challenge**

18. As discussed below, the legal conversations on the Matthews case continue, however this is expected to lead to a second options exercise for retained Firefighters employed prior to July 2000. The first exercise was very challenging on FRA officers, and a second exercise is expected to be just as challenging.
19. Timescales and expectations are as yet unknown; however, this will be likely to coincide in some way on the age discrimination remedy.

20. The challenge is felt more keenly in some part due to the framework in which the Firefighters scheme operates. Each Fire and Rescue Authority (FRA) is considered the scheme manager for the purposes of the Firefighters' Pension Scheme Regulations 2014 and is responsible for the local operation and management of the scheme, this includes appointing an administrator to undertake the administration.
21. Administrators do not and cannot make decisions on behalf of the FRA, the responsibility for decisions remain the responsibility of the FRA.
22. There are currently 18 administrators operating in the English pensions market, however this is gradually dropping down as more FPS administrators have decided to leave the marketplace due to the rising complexity of the FPS. It is understood that when FRAs are approaching other administrators there is limited interest in taking on further business for the Firefighters' scheme.
23. Further details of this complexity are detailed in the [paper to the SAB on pension administration market and complexity](#), and we are discussing options on the administration market with the sector to see how this can be improved.

### **Coronavirus**

24. Members will be aware that any COVID related impacts on the operation of the pension scheme have been updated on the [COVID-19 and the FPS](#) tab of the website.
25. HMT have confirmed that the temporary relaxation of the tax rules in place until 1 November 2020, to prevent tax charges occurring for FPS 1992 members who retire before 55 and subsequently are re-employed, have now expired.
26. Those who have returned to support the government's response to COVID-19 before 1 November will however not lose their protected pension age if they continue working after that date. This pension age is protected irrespective of whether they move jobs or employers.
27. However any person being re-employed after 1 November 2020 will face losing their protected pension age if they do not comply with the re-employment conditions as set out in [rule 7F](#) of the Finance Act 2004.

### **Scheme Advisory Board Levy 2020-2021**

28. The SAB budget for 2020-21 has received ministerial approval and we can now start the invoicing process.
29. The total levy for the 2020-21 year will be £8.29 per firefighter, which is calculated at £6.20 for the SAB and £2.09 for employers.
30. A letter has been sent out to FRAs advising them of this and how it is calculated.

## **KEY CURRENT WIDER WORKFORCE ISSUES**

### **Pay 2020**

31. Since the last FSMC meeting, the employers' side of the NJC for Brigade Managers made a 2.0% pay offer for 2020 in response to the 2.75% claim from the Fire Leaders Association (the employee representative body on that group). In reaching its position members took into account a number of factors including views expressed by Chairs/Portfolio holders arising from a consultation process. The offer was accepted.

### **Pay 2021**

32. The Government recently announced, as part of the Spending Review, its approach to pay in 2021 for public sector employees for whom it has responsibility.

“In order to ensure fairness between the public and private sectors and protect public sector jobs and investment in services as Covid-19 continues to impact the public finances, the government will temporarily pause headline pay awards for some workforces. Pay rises for over 1 million NHS workers and the lowest paid\* will continue despite the challenging economic context.”

\* earning less than £24,000 who will receive a minimum £250 increase

33. The announcement does not have direct effect on fire and rescue service employees that fall within the scope of the NJC for Local Authority Fire and Rescue Services (Grey Book), NJC for Brigade Managers (Gold Book) and NJC for Local Government Services (Green Book) all of whom have their own national collective bargaining arrangements in respect of pay awards. Therefore, while a factor in pay considerations, it should not be assumed that the same approach will automatically apply.

### **Inclusive Fire Service Group**

34. 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.
35. 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.
36. A full report of the outcomes will be issued shortly.

### **LGA and NFCC Core Code of Ethics**

37. 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.
38. 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.
39. 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.
40. A joint [consultation](#) on the Core Code recently closed. It was open to all interested parties, though within FRAs/FRSs it targeted Chairs, CFO/CEs and HR Directors / Strategic Leads. Outcomes from the consultation indicate a high level of support for the approach taken (86%). Work is underway to take on board comments and suggestions for further improvement.
41. Given the level of interest, including from other interested parties such as the Home Office and Fire Standards Board, we would like to continue to build upon that engagement to ensure we have the best possible code going forward and to support the need to then embed it at local level. With that in mind, the LGA and the NFCC have asked HMICFRS to extend the recommendation deadline to the end of March '21 to allow time for that further detailed engagement, which will also support the development of accompanying guidance.

### **Fit for the Future**

42. 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.
43. Initially the NFCC and the National Employers (England) worked in partnership to develop 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). Following discussion within the FSMC it was resolved that the LGA would be directly included, supporting the Fit for the Future approach and becoming the third partner in this work.
44. All three partners were content to move to wider consultation on the Fit for the Future document. That consultation recently closed, and work is currently underway to analyse the responses in general and to also consider responses specifically and additionally sought around the potential impact of the COVID pandemic moving forward.
45. The process of developing Fit for the Future will not stop at this early engagement exercise. We will also be considering how further involvement and engagement can take place. Accordingly, there will be further opportunities for views to be expressed.

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

46. 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).
47. 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.
48. 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.
49. 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.

50. 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.
51. 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 outcome is on the FRA's Schedule 22 appeal (see paragraph 52 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.
52. 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 is listed for hearing at the Employment Appeal Tribunal (EAT) on 16 December 2020, although it is anticipated the EAT's decision will not be available until several months later.
53. 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. Substantive responses are awaited and therefore reminder letters have been sent.

*Defence of other categories of claims*

54. 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.
55. 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.



56. 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.
57. 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. Once submitted the claims have been stayed pending developments in the original proceedings.

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

58. 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.
59. 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.
60. 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.
61. 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.
62. Consequently, together with legal representatives, discussions are continuing with the government's legal department and legal representatives for the FBU and FRSA. As you

would expect, we have also raised the concern that this will be unbudgeted expenditure for FRAs, should central government not provide them with the necessary funding.

### **Coronavirus**

63. Members will also be aware that both sides of the National Joint Council and the NFCC 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. A verbal update on the agreement will be provided at the meeting.

### **Implications for Wales**

64. 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. However, in the context of the National Employers, it is recognised that Fit for the Future applies to England only.
65. 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 [responded](#) separately to the government consultation on reform.
66. 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.