

## **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. On 4 February 2021 the government published its [consultation response](#) on how it intends to remove the discrimination identified by the courts in the 2015 pension reforms through changes to primary legislation and Firefighters' Pension Schemes regulations. More information can be found on our [age discrimination remedy implementation](#) page.
2. The response confirms that discrimination will be addressed in two parts; the first is prospectively for future benefits from 1 April 2022, the second is retrospectively for benefits built up during the period of discrimination 1 April 2015 to 31 March 2022 (the remedy period).
3. **Prospectively**, to remove future discrimination from the schemes and ensure equal treatment. All remaining protected members who are not currently members of FPS 2015 will transfer into this scheme on 1 April 2022.
4. This means that all future service for all members will build up in the reformed CARE scheme. Final salary benefits already built up are fully protected.
5. While we expect that transferring remaining members into FPS 2015 at 1 April 2022 will be relatively straightforward in terms of process, there will be an immediate requirement to communicate to affected members what this means for them. Early indications are there are 375 members who will move into FPS 2015 at 1 April 2022.
6. **Retrospectively**, for benefits built up during the period of discrimination, 1 April 2015 to 31 March 2022. Unprotected and taper members will be credited with final salary build-up in their original scheme. At retirement, all members will be able to keep their legacy final salary benefits or choose to receive the CARE benefits that they would have built up in the same period. This is known as Deferred Choice Underpin. (DCU).
7. The conversion of CARE benefits into final salary will involve complex administrative processes with adjustments of pay, contributions, tax relief, and pensions tax liabilities.
8. Government have confirmed that to allow for the DCU process to be implemented, the retrospective amendment of benefits in the remedy period should be completed by October 2023. This confirmation of the timeline is welcomed, nevertheless implementation of the DCU is going to be a significant challenge
9. The decision to take forward the DCU option is welcomed and this was the preferred choice submitted by both the response submitted by [LGA on behalf of employers of Firefighters and Teachers](#), and by the [Scheme Advisory Board \(England\)](#)
10. The consultation response only confirms high level policy decisions, there are many more policy decisions needed to fully implement the remedies. The Home Office will consult

separately on changes needed to the Firefighters' Pension Scheme regulations to enact the remedy.

11. We are working closely and at pace across the whole of the FPS sector and with government departments to support FRAs through the remedy implementation process.

## **Valuation**

12. At the same time as publishing the response setting out the governments approach to removing discrimination, Government also announced the position on both the paused 2016 cost cap valuation and the 2020 valuation, in the written ministerial statement [[HCWS757](#)]

### **2016 valuation**

13. The pause on the 2016 cost cap valuation will now be lifted, and the Government Actuary (GA) will now proceed with finalising the valuations based on the DCU approach to removing discrimination.
14. The cost cap for the Firefighters Scheme was set as 16.8%<sup>1</sup> as at 1 April 2015, the provisional result of the 2016 valuation before the pause was affected was a cost cap cost of 11.6%<sup>2</sup> which was 5.2% lower than the cost cap set at 1 April 2015.
15. The current process sets out that any breach to the floor of the cost cap would see scheme improvements in benefits to bring the cost cap back in range, and any ceiling breaches would see reductions in scheme benefits. Floor breaches refer to a change in value by more than 2% below this figure, i.e. less than 14.8% and a ceiling breach is a change in value by more than 2% above this figure, i.e. more than 18.8%.
16. Employers are continuing to pay increased employer contributions based on improving scheme benefits because of the floor breach in the paused 2016 cost cap valuation.
17. The Government confirmed that early estimates of the cost cap taking into account the increased value of schemes to members as a result of the McCloud remedy mean that on review some schemes would now breach the ceiling, which for the Firefighters scheme would mean the cost cap once calculated would need to be above 18.8%.
18. If normal statutory procedure were followed, any ceiling breaches would lead to a reduction in member benefits to bring costs back to target. However, the Government have announced that it would be inappropriate to reduce member benefits and the effect of any ceiling breaches on the 2016 valuation would be waived.

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<sup>1</sup> <https://www.legislation.gov.uk/ukxi/2015/465/regulation/5/made>

<sup>2</sup> Table 3.6 - <https://www.fpsregs.org/images/Valuation/Valuation2016FV.pdf>

### **2020 valuation**

19. In July 2020 Government announced<sup>3</sup> a review to the mechanism to control the cost of public service pensions for future valuations, while this review will not affect the process of the 2016 cost cap valuation which will continue on the current mechanism, the 2020 valuation will be subject to any recommendations as a result of this review.
20. The Government announced in [[HCWS757](#)] that due to interactions with wider pension policies, in particular the implementation of the McCloud remedy reforms, completion of the 2016 valuation process and the review of the cost control mechanism, that any changes to employer contribution rates resulting from the 2020 valuations will therefore be delayed from April 2023 to April 2024.
21. That has the effect that employer contributions will remain at the same rate as set in the 2016 valuation until 2024. Further updates on any changes to that position will be made when information becomes available.

### **Immediate Detriment Guidance**

22. Following the decision of the EAT on the FRAs schedule 22 appeal as discussed in paragraph 54 below, FRAs will now want to consider their decision with regards to payments under the [immediate detriment guidance](#), which was issued from Home Office at the request of the Fire Brigades Union directly to Fire and Rescue Services (FRSs) via the finance leads on 21 August 2020.
23. The six page note from Home Office is labelled as informal guidance only. There has been no update from HMT or Home Office on this note, despite a more cautionary note included under [question 10 of the Home Office FAQs](#) that the legislation that allows schemes to do this is limited in effect (we believe that is a reference to section 61 of the equality act), which does not allow for all consequential matters to be dealt with satisfactorily in all cases. For example, in cases where there are interactions with the tax system, perhaps where members have incurred or will incur tax charges or where contributions differ between the schemes.
24. 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.
25. 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.
26. FRAs now need to determine whether they have the necessary information available to them to make decisions and understand the risk to their organisation, to do this they may want to consider:

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<sup>3</sup> <https://questions-statements.parliament.uk/written-statements/detail/2020-07-16/HCWS380>

- 26.1. Is the six-page note provided by Home Office and in-house scheme knowledge sufficient guidance to enable accurate calculations for members
- 26.2. What risk is there to the member on accepting payments without key policy decisions being made on how to apply interest on contributions due and how they might be taxed on any pension, and what legislation is in place to deal with these issues bearing in mind the note of caution in question 10 of the FAQs.
- 26.3. What governance might they put in place to assure themselves that
- The correct benefits are being paid to members
  - Members have been satisfactorily been made aware of any changes such as future payments due to interest being collected on contributions.
  - Necessary processes will be in place to calculate and record the payments due bearing in mind that no automated processes or systems are available for the calculation until the significant software development has been completed.

## **KEY CURRENT WIDER WORKFORCE ISSUES**

### **Pay 2021**

27. 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

28. 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.

29. The only one of the three bodies to have yet received a claim for 2021 is the NJC for Local Government Services (usual settlement date 1 April). The very recently received trade union side claim (Unison, Unite and GMB) seeks:
- A substantial increase with a minimum of 10% on all spinal column points
  - Introduction of a homeworking allowance for all staff who are working from home
  - A national minimum agreement on homeworking policies for all councils
  - A reduction of the working week to 35 hours with no loss of pay, and a reduction to 34 hours a week in London. Part-time staff to be given a choice of a pro rata reduction, or retaining the same hours and being paid a higher percentage of FTE
  - A minimum of 25 days annual leave, plus public holidays and statutory days, for all starting employees, plus an extra day holiday on all other holiday rates that depend on service
  - An agreement on a best practice national programme of mental health support for all local authorities and school staff
  - A joint review of job descriptions, routes for career developments and pay banding for school support staff, and completion of the outstanding work of the joint term-time only review group
  - A joint review of the provisions in the Green Book for maternity / paternity / shared parental / adoption leave
30. Councils across England, Wales and Northern Ireland will be consulted during March at the usual round of (now virtual) regional pay consultation briefings. The National Employers will then consider feedback from those events before responding formally to the unions, which will be after the local elections in May.
31. As far as the NJC for Local Authority Fire and Rescue Services (Grey Book) is concerned the usual pay award settlement date is not until 1 July. General informal discussions have commenced which to date have largely focused on issues around pay structure with the employees' side raising matters such as the current flat pay structure, period from trainee to competent and the Continual Professional Development scheme.

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

### Background

32. 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.
33. 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.

34. Accordingly, joint work to respond to the recommendation 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, the Core Code approach recognises the differing positions within FRSs currently, as well as differing governance arrangements. 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.
35. A joint consultation on the Core Code was undertaken towards the end of last year. It was open to all interested parties, though within FRAs/FRSs it targeted FRA Chairs, PFCCs, CFO/CEs and HR Directors / Strategic Leads. Outcomes from the consultation indicated a high level of support for the approach taken with an average of 84 per cent of respondents across the seven sections being content.
36. Given the level of interest, including from the Home Office, Fire Standards Board and HMICFRS we, together with the NFCC, approached HMICFRS to extend the recommendation deadline to the end of March 2021. This would allow time to build upon that engagement further to ensure we have the best possible code going forward and to support the need to then embed it at local level.

#### Current position

37. Since then that further engagement has taken place and comments and suggestions for further improvement taken on board. Feedback on the resulting revised Core Code was very supportive. FSMC lead members were also supportive.
38. Since 19 January the APCC has joined the LGA and NFCC as co-authors of the Core Code. LGA, NFCC and APCC discussions have taken place to explore amendments suggested by the APCC and by far the majority incorporated into a revised draft.

39. Each of the three organisations will need to seek approval of the Core Code through their own governance arrangements in time to be ready to launch at the end of March. Therefore, the intention for today's meeting is to consider a final draft with a view to securing FSMC members approval. As further comment is awaited from the APCC it is not possible to provide a copy of the final draft at the time of writing this report. It will therefore be issued separately in advance of the meeting.

#### Next steps

40. Work is also underway on guidance to accompany the Core Code and on how we can best support implementation. As part of the implementation work the LGA and NFCC had already undertaken a workshop with seven services to explore with them how it can best be achieved and what we can do to assist. The intention is to hold a further three workshops on the same basis to capture all FRSs. We can then, for example, develop and provide toolkits, further specific workshops (such as discussing with staff) and the sharing of good practice.

#### **Fit for the Future**

41. 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.
42. 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.
43. A consultation open to all interested parties has taken place and work is currently underway considering an analysis of the responses and how they can best inform future work and further engagement.

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

44. 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).
45. 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.

46. 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.
47. 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.
48. 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.
49. The Order anticipated that the final determination on the remedy issue in regards to membership of the 1992 FPS would be resolved in 2020. That year has passed but in any event the outcome will be affected by what the ultimate outcome is on the FRA's Schedule 22 appeal (see paragraph 50 below). It should be noted that irrespective of the Schedule 22 issue it may be some time before this remedy can be put into effect fully 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.
50. In addition, the FRAs had the separate appeal to the Employment Appeal Tribunal (EAT) 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 was heard at the EAT on 16 December 2020 and the judgment was issued on 12<sup>th</sup> February. The EAT held that the FRAs cannot rely on the Schedule 22 defence. Consideration is now being given with the Steering Committee and legal representatives to whether it is appropriate to appeal the judgment to the Court of Appeal. For legal privilege reasons, further information has been provided to the person nominated by your service to receive communications in respect of this, and related, legal cases.
51. 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 several reminder letters have been sent.

*Defence of other categories of claims*

52. 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.
53. 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.
54. 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.
55. 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 have therefore taken this forward and submitted defences. Once submitted the claims have been stayed pending developments in the original proceedings.

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

56. 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.
57. 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.
58. 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.

59. 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.
60. 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**

61. Members will 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 could undertake to alleviate pressure on ambulances services and other partners during the COVID-19 pandemic.
62. Following the breakdown of that arrangement the NJC put in place an agreement (effectively carrying over the tripartite arrangement) to allow a period of one month during which it was hoped agreement could be reached with the FBU on an alternative to a particular control measure. The end date was identified in the agreement – 11 January 2021. Despite best endeavours and intense joint discussion, it was not possible to do so and the agreement therefore expired.
63. The National Employers did continue to engage with employee representatives to see if an agreed way forward could be identified building upon the first draft of an agreement the employers had provided on 7 January. It was made clear that amendments incorporated after the employees' side detailed response on the evening of 11th, represented the employers' final position. Given the interim agreement had ended, an urgent response was sought. The employers were clear that it would need to communicate with FRAs and FRSSs advising them of the outcome one way or the other by 5.00p.m. on 13 January.
64. In order to assist communications with staff and others [FAQs](#) were provided to FRA/FRSSs.
65. The employees' side has indicated it would still wish to see a nationally agreed position. In response, the National Employers has agreed to meet to discuss COVID support arrangements, which could include exploration of the potential for a replacement agreement.

### **Implications for Wales**

66. 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 exceptions in this report are the Core Code of Ethics and Fit for the Future, which apply in England only. The WLGA is one of the four employer stakeholder bodies on the NJC for Local Authority Fire and Rescue Services.
67. 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.
68. 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.