

## Pensions update

### Purpose of Report

For information.

**Is this report confidential? No**

### Summary

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

**LGA Plan Theme:** Support to the LG Workforce

### Recommendation

**That Fire Commission note the issues set out in the paper.**

### Contact details

Contact officer: Elena Johnson

Position: Acting Senior Adviser (Pensions)

Phone no: 07770 763031

Email: [elena.johnson@local.gov.uk](mailto:elena.johnson@local.gov.uk)

## **Error! Reference source not found.**

### **Background**

1. This report updates the Fire Commission on matters in relation to pension matters and briefly describes the main pension issues at present.

### **Legal cases related to pension matters**

2. Members are aware of the range of legal cases brought against FRAs (supported by the FBU) that fall broadly under the category of the McCloud/Sargeant litigation. As they were named as respondents in the cases, Fire and Rescue Authorities (FRAs) had to submit defences. The defences continue 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 national employers' Advisory Forum legal adviser, national employers' secretariat, and from the LGA its Corporate Legal Adviser and a Senior Employment Law Adviser.
3. The details of each category have been covered in previous reports. Therefore, each category is covered in short below, together with the current positions:
4. McCloud/Sargeant – this is the main category and concerns 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).
  - 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 (a request to appeal was rejected by the Supreme Court).
  - Current position - an [interim Order](#) on remedy was agreed by all parties. It does not bind the parties beyond the limited interim period before the final declaration. 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. While the Order anticipated that the final

determination on the remedy issue in regard to membership of the 1992 FPS would be resolved in 2020, legislation to provide the main remedy needs to be put in place. Pending the legislation, which is expected to come in force on 1 October 2023, an Order in substantively the same form as the interim Order remains in place.

- The injury to feelings Employment Tribunal hearing which was scheduled to take place from 14 – 28 October was vacated, the parties having agreed provisional settlement arrangements.
  - The injury to feelings claims were made as part of the Sargeant (age discrimination) litigation and are claims for compensation for non-financial loss.
  - Vacation of the hearing followed agreement in principle as to issues of non-financial loss, and to provide further time to negotiate the full settlement details between all parties (including FRAs) through their respective legal representatives. In the case of FRAs, approval will then be needed by the Steering Committee before final agreement is reached.
  - The compensation amounts are based on the established principles (often referred to as ‘Vento’ bands) and will have appropriate interest applied. The cost of compensation will be fully met by the Government, on the basis that FRAs are in funds before any payments are required to be made.
  - In respect of the claimants this applies to, it is all the named original 2015 claims in England and Wales brought by the FBU (but not claims in Scotland or Northern Ireland). This does not settle the further claims served last year, the Fire Officers’ Association (Slater and Gordon) claims nor any of the reverse discrimination claims.
  - There have recently been negotiations between the respective legal representatives on the details, including timescales and practicalities around making payments. The parties could apply for a tribunal hearing if matters were not fully resolved by 28 April 2023. However, rather than applying for a hearing the parties have recently requested a two-month extension to the deadline, and they are finalising wording for an agreement to progress the settlement. We continue to keep FRAs updated on any material developments through their nominated contacts.
5. Another related category of employment tribunal claims has been issued by the FBU against fire and rescue authorities on behalf of firefighters. 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.

- Current position – Working together with Bevan Brittan, the solicitors acting for FRAs, we are coordinating the defence of those claims on behalf of FRAs. The claims are currently stayed pending the outcome of the main FBU claims.
6. The FBU has also issued another batch of employment tribunal claims for its members who had not brought claims before. Those claims are broadly of the same type of claims that have been brought previously.
- Current position – Working together with Bevan Brittan, we are coordinating the defence of those claims on behalf of FRAs. The claims are currently stayed pending the outcome of the main FBU claims.
7. Claims 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. 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 to protect these particular claimants' position in relation to any injury to feelings award.
- Current position – Working together with Bevan Brittan, we are coordinating the defence of those claims and the cases are currently stayed, pending the outcome of the main FBU claims.
8. *Matthews & others v Kent & Medway Towns Fire Authority & others*:
- 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. 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. The LGA acted for FRAs through the auspices of the National Employers.
  - Defence of the pensions aspect of the case was led by 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"). A time-limited options exercise took place between 2014 and 2015 to

allow eligible individuals to join the FPS. While the benefits awarded to special members largely mirrored the benefits under the FPS 1992, the FPS 2006 was amended as the FPS 1992 was closed.

- More recently, work has again had to take place on the pension's 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.
- Current position - On 9 March 2022, after an extended period of negotiations, a [Memorandum of Understanding](#) (MoU) was agreed between the government, the Fire Brigades Union, the Fire & Rescue Services Association, and FRA employers.
- It was confirmed that remedy for retained firefighters affected by the O'Brien judgment will be provided by way of a second options exercise allowing in-scope individuals the opportunity to purchase pension entitlement as a special member of the FPS 2006. Under the terms of the MoU it was agreed that the Employment Tribunal proceedings should be stayed for 18 months to enable that options exercise to progress.
- A further issue arose during negotiation of the MoU around an inability to aggregate periods of pensionable service in the FPS as a retained firefighter with periods of service as a wholetime firefighter ("aggregation"). This has been addressed by affected retained firefighters (or their representatives) having the ability to give written notification to the GLD (on behalf of the Home Office) and FRAs prior to the commencement of the second options exercise of:
  - their identity; and
  - details of the factual and legal basis of any aggregation claims

with a view to discussions for six months from the MoU date on a resolution of those claims. If agreed resolution of the aggregation issues was not reached by then it has been agreed that those Claimants can ask for the stay on their tribunal claims to be lifted so the tribunal can determine outstanding issues in relation to them. As resolution was not reached within this time, a number of claims were submitted and we proposed an approach to the collective defence of those claims.

- As all FRAs agreed that they were content with the approach, a joint defence of the claims commenced, continuing to use DAC Beachcroft to represent

FRAs on a cost sharing basis. A significant number of individual, and later group, claims were responded to on this basis while DAC Beachcroft sought to secure a preliminary hearing to discuss the issues raised. DAC Beachcroft also sought for the requirement to file all other responses to be paused in the interim.

- The Employment Tribunal granted this application in respect of claims in England and Wales, and the requirement to file responses had been stayed until at least 20 April 2023, the date a preliminary hearing was listed for. The stay has now been extended until 8 September 2023 and the hearing has been postponed. The equivalent claims in Scotland have also been stayed pending the outcome in England and Wales.

9. Legal costs in relation to the above cases are currently shared between FRAs. 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, and a formal letter was sent to UK governments on behalf of FRAs. Discussions are ongoing between the Home Office and LGA officers as representatives of the FRAs to discuss the costs issues.

#### **Matthews and the second options exercise**

10. The LGA continues to assist the Home Office with its policy development in this area. Project management meetings are held between the LGA, the Home Office and the Government Actuaries Department (GAD) every four weeks.
11. The LGA has published a [Matthews Project Implementation Document](#) (PID) which sets out the scope, deliverables, and high-level timeline for the project. The PID also includes a communications plan and draft terms of reference for the Scheme Advisory Board working group.
12. There are a number of steps which FRAs should be taking now to establish the data needed to implement the second options exercise. We have issued a [factsheet on pre-work](#) that authorities can undertake before October 2023.
13. A [consultation on the draft regulations](#) was launched on 31 March 2023 with a response deadline date of 9 June 2023.

#### **Immediate Detriment Framework for McCloud/Sargeant type cases**

14. The proposed amendments to the Framework remain with the respective legal representatives for agreement. The amendments would also require final approval from the Steering Committee before the revised Framework is published.

15. In the meantime, the technical guidance to FRAs has been updated to include clarity around the proposed treatment of contributions and add the technical/practical issue and proposed resolution (if any), and potential risk and liability, to each element. At such point that the amendments to the Framework are agreed, the guidance will be updated to reflect those changes.
16. The Framework will also be reviewed in light of the publication of the Treasury Directions which were published on 14 December 2022.
17. We have asked FRAs to be alert to the receipt of future claims brought on behalf of scheme members, and to inform the LGA immediately on such receipt.
18. In the meantime, we remain in continuous dialogue with the Government on potential alternative solutions.

### **Consultation on the Firefighters' Pension Schemes' (Remediable Service) Regulations 2023**

19. On 28 February 2023, the Home Office launched its [consultation on the Firefighters' Pension Schemes' \(Remediable Service\) Regulations 2023](#).
20. These regulations concentrate on the retrospective elements of the 2015 Remedy that are required to fully deliver the remedy. This includes establishing the deferred choice underpin (DCU) and the changes needed to offer pensioners and beneficiaries of deceased scheme members an immediate choice between legacy or reformed scheme benefits.
21. The consultation closed on 23 May 2023 and the LGA published [its response](#) accordingly.

### **SCAPE Discount Rate Methodology Consultation Response**

22. In June 2021 a public consultation on the discount rate (the "SCAPE rate") methodology had been launched. The Superannuation Contributions Adjusted for Past Experience (SCAPE) discount rate is a discount rate used in the valuation of unfunded public service pension schemes to set employer contribution rates.
23. The consultation sought views on the appropriate methodology for setting the discount rate used in scheme valuations. The consultation closed on 19 August 2021.
24. On 30 March 2023, the UK Government announced the [publication of its response](#) to the June 2021 consultation on the methodology used to set the SCAPE discount rate and has concluded that the existing methodology best

meets the balance of the Government's objectives for the SCAPE discount rate, and therefore does not intend to modify the methodology.

25. The SCAPE discount rate to be used as part of the ongoing 2020 valuations will therefore be based on the expected long-term Gross Domestic Product growth figures, published by the Office for Budget Responsibility in July 2022. Based on these figures, the new SCAPE discount rate is CPI + 1.7 per cent p.a.
26. In recognition of the impact this announcement will have on the employer pension contribution rate, and following close work across Home Office, Government Actuary's Department and the Treasury, HMT has agreed additional funding for 2024/25. Agreeing this funding principle provides fire authorities with certainty with which to take important operational decisions and manage their budget for 2024/25.
27. The commitment covers the net outcome (on the employer contribution rate) of the 2020 valuations. That means, if the employer contribution rate payable from April 2024 is equal to or lower than the current employer contribution rate plus the isolated SCAPE impact, the increase from the current rate will be covered in full.
28. If the employer contribution rate payable from April 2024 is higher than the current employer contribution rate plus the isolated SCAPE impact, the additional funding will match the isolated SCAPE impact only. As there are some scenarios where the latter may apply to the Fire scheme, the Home Office has secured a commitment from HMT that pensions pressure should not create an operational risk for fire. The Home Office and HMT will continue discussions on any outstanding pressure in 2024/25 for FRAs once the Government Actuary's Department have completed the valuations.
29. The initial assessment that the Home Office have undertaken, with the advice of their actuaries, indicates that there may be additional costs on FRAs in 2024/25 because of the changes to the employer contribution rate. This is because, based on their initial assessment, there are some scenarios where the funding commitment from HMT is likely to cover the full impact on FRAs in 2024/25 and there are some scenarios where the funding commitment will cover the majority, but not the full, impact on FRAs in 2024/25.
30. The Home Office will continue to work with their actuaries and with HMT in order that any additional cost pressures on FRAs will be considered in the Local Government Finance Settlement for 2024/25 which will take place in December 2023.

### **LGA staffing updates**



31. Claire Hey left the LGA on 23 April 2023. Recruitment for the Senior Pension Adviser role has taken place and the successful applicant was Claire Johnson. As Claire is currently on maternity leave, Elena Johnson has been appointed as Acting Senior Pension Adviser for the interim period.

### **Scheme Advisory Board (SAB)**

#### **SAB meeting 23 March 2023**

32. The SAB last met on 23 March 2023 and discussed the following areas:

- The spring budget 2023
- Matthews second options exercise
- 2020 valuation
- Home Office retrospective remedy consultation

#### **SAB membership**

33. Cllr Leslie Byrom has been nominated to replace Cllr Leigh Redman as the Labour representative. Ministerial approval of the nomination is awaited.

#### **SAB engagement sessions on the Matthews remedy**

34. The Scheme Advisory Board and the Home Office began engagement sessions in September 2022 which focussed on the Matthews pensions remedy. The aim is to discuss Matthews legislation and policy, Matthews and McCloud/ Sargeant interaction, and the proposed timeline for implementation. A further engagement session took place on 25 May 2023.

#### **SAB Response to Consultation on the Firefighters' Pension Schemes' (Remediable Service) Regulations 2023**

35. The SAB was invited by the Home Office to take part in a series of joint engagement sessions with the Police SAB to consider scheme specific versions of the Provision Definition Documents (PDDs) which define the provisions of the [Public Service Pensions and Judicial Offices Act \(PSPJOA\) 2022](#) for each area of the 2015 Remedy.

36. One session took place per month between June and December 2022, with two topics discussed at each meeting. These discussions took place to help to inform the drafting of secondary legislation. The schedule of sessions is set out below.

| Policy topic 1              | Policy topic 2        | Date         |
|-----------------------------|-----------------------|--------------|
| Eligibility                 | Interest              | 24 June      |
| ABS/ RSS                    | IC, DCU, defaults     | 27 July      |
| Added Pension               | Transfers             | 24 August    |
| Contributions/ compensation | Ill-health retirement | 23 September |
| Early/ late retirement      | Abatement             | 12 October   |
| Contingent decisions        | Bereavement           | 9 November   |
| CETV/ Divorce               | Tax                   | 15 December  |

37. Following the launch of the consultation on the Firefighters' Pension Schemes' (Remediable Service) Regulations 2023, the SAB submitted [its response](#) to the Home Office accordingly.

### Financial Implications

38. There will be financial implications arising from the legal remedies in Sargeant and Matthews in the following areas: administration, software, legal, and operational costs. Representations will continue to be made to the Government to seek to recover all costs arising as a direct result of the remedies.

### Equalities implications

39. Equalities issues are central to the McCloud/Sargeant litigation and will also be taken into account in wider workforce issues.

### Next steps

40. The pension issues will continue to be progressed as set out above.