

## 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

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

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## **Pensions update**

### **Background**

1. This report updates the Fire Services Management Committee 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 – These are the original claims issued in 2015 by the firefighters in England and Wales originally with the support of the FBU and represented by Ivan Walker of Walkers Solicitors. Ivan Walker is ceasing to act for the claimants, and they are in the process of transferring all the claims to Thompsons to take forward.
  - 4.1. Following the Court of Appeal's decision that there had been unlawful age discrimination in relation to the transitional arrangements for the 2015 FPS, the test cases were listed for a remedy hearing on 14 – 28 October 2022, to decide on the appropriate level of compensation for non-financial loss (injury to feelings).
  - 4.2. Following discussions with the Government Legal Department (GLD), we were notified that an offer had been agreed in principle in relation to these claims.
  - 4.3. It was agreed at the Steering Committee meeting on 12 October 2022 that the FRAs would support the application made by the Government and FBU

for the remedy hearing listed for 14 – 28 October 2022 to be vacated, to allow the parties to continue to negotiate the terms of the settlement of these claims.

- 4.4. An application for postponement was therefore made and we received confirmation from the Employment Tribunal that the application was successful. This confirmed that the remedies hearing was postponed, and the claims stayed until 28 April 2023.
  - 4.5. Since that time there have been further stays applied for and granted, most recently until **5 January 2024**. This latest stay has been granted on two primary bases: allowing Thompsons time to go on the record for each of the claimants; and to allow the negotiations of the terms of the COT3 to progress.
  - 4.6. Our legal advisors continue to negotiate the terms of the COT, but progress has been very slow – although not on the part of the FRAs.
5. Separate to the compensation for injury to feelings, the claimants also have a right to compensation for financial losses caused by the age discrimination in relation to the transitional arrangements for the 2015 FPS. They cover: ‘consequential’ financial losses (such as IFA fees, mortgage related losses, medical expenses, loss because of moving house etc.); and loss of pension benefits (including in relation to contribution holidays and non-joiners).
- 5.1. Consequential losses - it was agreed between the parties in February 2022 that these losses are *in principle* claimable and should be dealt with (again via the test cases) at a remedy hearing, but that this was to be separate to the injury to feelings remedy hearing which had been listed for October 2022 (and which was vacated as above). Originally, the parties had agreed that the position was that directions for dealing with these losses would need to be agreed between the parties/issued by the Tribunal for them to progress to a remedy hearing. In more recent communications with Thompsons and GLD it seems that these losses have become subsumed in general financial loss of pension benefits and directions have not been progressed.
  - 5.2. Loss of pension benefits – the position taken by the parties is that these are postponed pending the introduction of legislation/regulations to remedy the discrimination with parties being able to apply to the Tribunal at any time. Thompsons, as well as GLD, remain of that view in that the new legislation should deal with these losses and so should dispose of most of the claims. Any losses that are not dealt with (and Thompsons have indicated they think these would be limited) would be raised specifically with the parties. It may

be that Thompsons have in mind here the consequential losses referred to above.

6. Slater and Gordon claims - These claims are based on the same premise of age discrimination in relation to the transitional arrangements for the 2015 FPS but were issued after the Court of Appeal found those arrangements to be discriminatory. There is a minimum of around 200 claimants within multiple claims in different Tribunals across England, Wales, and Scotland.
  - 6.1. The claims are brought by Slater & Gordon with, we understand, the support of the FOA.
  - 6.2. It is not clear whether all the claims filed by Slater & Gordon on behalf of the claimants have been served on the relevant FRAs at this stage – it is possible that some have been held at the respective Tribunals whilst stays are in place.
  - 6.3. So far, the Tribunals in Scotland, England and Wales have been prepared to stay all the claims pending the outcome of the Sargeant claims – albeit our legal advisors are having to make multiple applications for such stays.
  - 6.4. Again, given the claims have all been stayed from the outset, no directions have been made in relation to different types of loss.
  - 6.5. We are aware that no suggestion of settlement has been made in respect of these claims to date.
  
7. New wave claims (also known as late claims) - We understand that there are approximately 4,200 of these claims by firefighters against certain FRAs in England and Wales, supported by the FBU and with representation from Walkers, again alleging age discrimination arising from the same transitional protections on the introduction of the 2015 FPS as the Sargeant claims.
  - 7.1. We understand from Walkers that the FBU ran a second exercise in 2020 to allow members who did not complete the questionnaire in 2015 a second opportunity to file a claim.
  - 7.2. There are multiple stays in place in respect of these, awaiting the outcome of the Sargeant claims, again, albeit we are having to make multiple applications for such stays.
  
8. Reverse claims - These are separate Employment Tribunal claims which have been brought by firefighters against certain FRAs in England, supported by the

FBU and with representation from Walkers initially and now (we assume, although it has not been confirmed) Thompsons, again alleging age discrimination arising from the transitional protections on the introduction of the 2015 FPS. However, these claims are brought by firefighters who belonged to the 2006 Scheme, (unlike the claimants in the main FBU claims who are/were members of the 1992 Scheme).

8.1. The allegation in these claims is that the effect of the transitional protections was to prevent the claimants, (who are older members of the 2006 Scheme), transferring to what they are alleging is the more favourable 2015 FPS and that this was discriminatory of grounds of age.

8.2. The claims have all been brought in the Central London ET and were stayed until the outcome of the FRAs' EAT appeal, but the claimants have not pursued the claims since then and the Tribunal has not chased the parties for an update.

8.3. In terms of settlement, the last update was provided by GLD, confirming on 24 November 2022 that they have no instructions in relation to the reverse discrimination claims. We are therefore not aware of any discussions regarding settlement of these claims.

8.4. There has been no recent change or update in relation to these claims.

9. Matthews & others v Kent & Medway Towns Fire Authority & others:

9.1. 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 regarding the many thousands of Employment Tribunal cases. The LGA acted for FRAs through the auspices of the National Employers.

9.2. 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.

- 9.3. 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.
- 9.4. 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.
- 9.5. 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.
- 9.6. 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 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.
- 9.7. 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.
- 9.8. 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. A

further request has been submitted for a stay to remain in place until 31 January 2024. The equivalent claims in Scotland have also been stayed pending the outcome in England and Wales.

10. 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**

11. The LGA continues to assist FRAs with their obligations in respect of the Matthews remedy.
12. Regular engagement sessions continue to take place with FRAs to ensure that they are aware of their role and responsibilities.

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

13. The LGA continues to assist FRAs with their obligations in respect of the remediable service regulations.
14. Regular engagement sessions continue to take place with FRAs to ensure that they are aware of their role and responsibilities.

#### **Scheme valuation results (2020)**

15. We understand that the results of the 2020 scheme valuation are imminent.
16. Preliminary results have been shared with the SAB, however, although not expected to change, the final results cannot be published until they have received Home Secretary approval.
17. The results will set the employer contribution rate for the period 1 April 2024 to 31 March 2027.
18. It is expected that there will be a considerable rise in the employer contribution, with funding to cover such rise to be provided by HMT for 1 April 2024 to 31 March 2025.

19. Funding for subsequent years will have to be agreed by the Spending Review.

### **Financial Implications**

20. 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**

21. Equalities issues are central to the McCloud/Sargeant litigation and will also be considered in wider workforce issues.

### **Next steps**

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