

MERSEYSIDE FIRE AND RESCUE AUTHORITY			
MEETING OF THE:	AUTHORITY		
DATE:	10 JUNE 2021	REPORT NO:	CFO/020/21
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TITLE OF REPORT:	FIREFIGHTER PENSION SCHEMES - MCCLOUD/SERGEANT RULING - TREATMENT OF HO INFORMAL GUIDANCE ON TREATMENT OF 'IMMEDIATE DETRIMENT' CASES.		

APPENDICES:	APPENDIX A: HOME OFFICE... MCCLOUD / SERGEANT RULING – GUIDANCE ON TREATMENT OF 'IMMEDIATE DETRIMENT' CASES
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Purpose of Report

1. This report considers how the Authority may wish to implement the Home Office 'Immediate Detriment' informal guidance. The guidance proposes a methodology for removing the age discrimination suffered by some Firefighters who were members of the 1992 or 2006 Firefighter Pension Scheme (FPS) members when the Government introduced public sector pension changes on 1 April 2015.

2. The report outlines the risks faced by the Authority and the eligible FPS members by implementing this informal guidance in advance of having all the required information and systems in place.

Recommendation

3. That Members;
 - a. Note the report,
 - b. Instruct the FPS Scheme Manager to continue to progress the proposals to enable the Authority to implement the HO Immediate Detriment guidance,
 - c. That the Scheme Manager take the final proposals to the FPS Pension Board for review, and
 - d. Include within the proposals to the Pension Board the agreement to offer those members who have yet to lose their tapered protection the option to remain within their legacy scheme if they so choose, and
 - e. That the Scheme Manager prepare a 'waiver statement' that any member who wished to take up the option to remain in their legacy scheme in

advance of the required guidance(s) must sign to acknowledge they understand the risks involved.

Introduction and Background

Background:

4. Prior to April 2015 firefighters depending on their employment start date had access to either the 1992 Firefighter Pension Scheme (FPS 1992), 2006 FPS (FPS 2006), or modified FPS 2006. In 2015, the Government introduced reforms to public service pensions, meaning most public sector workers were either;
 - a. moved into a new pension scheme in 2015, (for firefighters it was FPS 2015), or
 - b. were subject to 'transitional taper protection' which was made available, or denied, to existing members of the relevant schemes on the grounds of age, or
 - c. received full protection and remained in their existing scheme.

Those FPS scheme members who started prior to 1st April 2012 and were still employed 1st April 2015 were allocated into a, b or c above solely based on age on 31st March 2012.

5. The benefits and type of pension vary with each FPS scheme, but one of the biggest changes in the FPS 2015 scheme was that it (along with all other public pension schemes) moved from a Final Salary to a Career Average Revalued Earnings (CARE) scheme.
6. An Employment Appeal Tribunal (EAT) considered the 2015 pension changes introduced in the Judges scheme (McCloud) and Firefighters scheme (Sargeant), and found against the Government due to some specific issues. The Government appealed the EAT findings and in December 2018 the Court of Appeal found that the 'transitional protection' which allowed certain members of the firefighters' pension schemes to remain in their existing schemes when they were closed to other members, gave rise to unlawful discrimination, as transitional protection was only offered to older scheme members.
7. The Government had no further avenue to appeal the decision and HM Treasury (HMT) published a consultation on changes to the reformed 2015 public service pension schemes in order to remove the unlawful age discrimination. The main change proposed to **rectify retrospective discrimination** gives members a choice of receiving;
 - a. Final salary (legacy) benefits (FPS 1992 / FPS 2006), or
 - b. CARE (reformed) benefits (FPS 2015)

for the period 1 April 2015 to 31 March 2022, or their date of leaving if earlier. This period is known as the **remedy period**. This will give eligible scheme members a choice at the point their pension becomes payable of;

- whether they wish to receive benefits from their legacy scheme, or

- benefits equivalent to those that would have been available under their reformed schemes in relation to their service between 1 April 2015 and 31 March 2022.
8. The second part of the remedy is to remove **future discrimination** from the schemes by providing **that all members will move to the reformed scheme (FPS 2015) from 1 April 2022.**
 9. HMT consulted on two options as to **when a member would be asked to make a choice**, either within 12-18 months of 2022 (immediate choice) or at date of leaving the scheme (deferred choice underpin - DCU). The outcome of the consultation as confirmed on 4 February 2021 **was DCU**. Under DCU, all eligible FPS 2015 members will be returned to their original legacy scheme for the remedy period. This includes taper members regardless of their taper date.
 10. All eligible members will be automatically entitled to remedy without having to make a claim. To be eligible, the member must have been in service on or before 31 March 2012 and on or after 1 April 2015.
 11. Therefore, under the DCU the pension administrator must for all eligible FPS members for their relevant pension benefit period:
 - a. Convert all CARE (FPS 2015) pension for the remedy period (01.04.2015 – 31.03.2022) to a final salary pension and store original CARE as an **underpin** pension,
 - b. Maintain underpinned benefits until the member retires,
 - c. Offer choice **at retirement** of default final salary (FPS 1992 or FPS 2006) for remedy period or underpinned CARE.
 12. In order to return members to their original legacy scheme administrators will need additional data from Fire and Rescue Authorities (FRAs) to rebuild the final salary record. For example, an unprotected member who transitioned to FPS 2015 from FPS 1992 on 1 April 2015 and remains in employment will need a final salary record creating for the full seven-year period.
 13. Future Annual Benefit Statements (ABS) will need to provide both values of legacy and reformed benefits for the remedy period. However, those calculations will require significant pension software amendments, data collection and HMT / HMRC guidance on technical and tax issues which **are not expected to be finalised in time to enable dual benefit statements for eligible members before October 2023.**
- Home Office Immediate Detriment Informal Guidance:**
14. The Home Office issued **informal** guidance direct to Fire and Rescue Authorities (FRAs) in August 2020 regarding the treatment of **immediate detriment** cases in advance of a decision on the Government's final approach to removing the age discrimination.

15. 'Immediate detriment' includes those scheme members who were in service on or before 31 March 2012 and on or after 1 April 2015 (including those with a qualifying break in service of less than 5 years) and who did not benefit from full protection and were moved into the 2015 FPS on or after 1 April 2015:
 - a. Who become eligible to retire with an ordinary pension and want to have all their benefits paid from their legacy scheme (i.e. do not accept deferred 2015 FPS benefits); or
 - b. Who do not qualify for lower-tier (and therefore higher-tier) ill-health pension under the single pot ill-Health Retirement (IHR) arrangement BUT would do so under the IHR arrangements in their legacy scheme
16. The HO informal guidance would suggest that any scheme members that fall within either of the two categories above can have their pensions calculated under their legacy arrangement and put into payment. The note should **not be applied to scheme members who have already retired** and are in receipt of their pension payments. The note refers to these cases being more complex to address, especially due to complexities in rectifying the member's tax position.
17. The HO informal guidance also recognises that ALL cases processed using this guidance **will need to be revisited** once the Government's approach to removing the discrimination has been finalised, due to relevant matters that are currently subject to consultation.
18. The HO informal guidance contains significant gaps, particularly;
 - a. What the position is for FRAs if members make decisions without all the correct information, such as understanding tax relief, and once all the information is known the individual believes they made the wrong decision.
 - b. What risk the member accepts by having benefits paid out before the consultation has concluded, although the note states that all cases will need to be revisited once remedy is finalised.
 - c. How to deal with the tax implications.
 - d. The application of interest on owed employee contributions, if applicable.
 - e. Cash equivalent transfer values (CETVs) transferred into the FPS 2015 will need to be considered and how this is converted to additional service in the legacy scheme. (under the current rules for CETVs, benefits cannot be transferred into the FPS 1992 as the scheme is closed and there are no current factors available). What effect this would have if the CETV took the member over the 30 year' service cap.
 - f. Where a member has paid into FPS 2015 and bought added pension, it is not clear on how an equivalent added years pension would be created in the final salary scheme. It also does not comment on the position where the member would not have qualified for added year's in the legacy schemes, for example, the requirement in FPS 1992 to be more than two years from retirement when purchasing added year's, or what the effect would be if that added year's conversion took the member over 30 years' service.

- g. The guidance does not comment on the steps needed to calculate whether there is a tax liability, i.e. by recalculating the pension input amount over each of the pension input periods in the remedy period. It is understood that the informal position from HMT is that the pension input amount should be re-calculated over the periods in the remedy period based on the legacy scheme benefits. Further guidance from HMT and HMRC is required.
 - h. Any FRA who treats temporary promotion as pensionable in the final salary scheme will need to identify members with a temporary promotion since transition to FPS 2015. They will need to assess the notional pension contributions which apply to this additional temporary pay so that the pensions administrator can calculate the Additional Pension Benefit (APB) to be awarded to these members.
 - i. Any debits on the pension record for the remedy period, such as scheme pays or divorce, which will affect the value of the benefit at entitlement will need to be recalculated as a debit to the final salary pension.
 - j. The position of tax relief on employee contributions means that if a member chooses to have the contributions deducted from their lump sum, they will not qualify for tax relief under the HMRC PAYE or self-assessment process. Instead this will be claimed through a government process. This needs to be clearly explained to the relevant FPS members.
 - k. The consultation proposals suggest that taper members would only be able to select legacy or reform benefits for **the whole remedy period**, i.e. 1 April 2015 to 31 March 2022.
 - i. It is not clear how choice should be offered to a taper protected member in the immediate detriment category. Under the current legislation a taper protected member who has already moved into FPS 2015 would have both a pension that could immediately be paid upon retirement from FPS 1992 which would include service past 1 April 2015, and a deferred entitlement in FPS 2015.
 - ii. It is not clear whether a taper member choosing to retire under immediate detriment and accepting payment of an FPS 1992 pension based on service to date of retirement would have to forfeit any existing FPS 2015 deferred pension, and if that should be caveated at the time of retirement, based on the outcome of the consultation.
 - l. There is no commentary on abatement that would apply under the legacy schemes but not reformed schemes.
 - m. The guide gives no instruction for dealing with future planned transfers into FPS 2015 as staff reach the end of their tapered protection.
19. Under the immediate detriment note members who don't qualify for lower tier ill-health in FPS 2015 but would do so under FPS 1992 or FPS 2006 should be allowed to retire under the arrangements of their legacy scheme where possible. The IQMP would need to assess the applicant under the terms of the 1992 or 2006 scheme if applicable. Members who have retired on the grounds of ill-health during the remedy period will be given the same opportunity to choose either legacy or reformed benefits. Where the criteria are different between the

schemes, a new IQMP assessment may be required under the terms of the legacy scheme.

20. As the HO informal guidance is not supported by legislation this introduces significant risk to FRAs and any implementation may lead to further legal challenge in the future, once the final position is known.
21. The FRA is not required to make the employer contributions at this time, the 2020 FPS actuarial review will consider the overall impact of McCloud and build it into the 2024/25 Employer rates.

MFRA Approach to the HO Immediate Detriment informal guidance;

22. Originally no FRA had intended to implement the HO informal guidance note on immediate detriment cases **until** the required guidance from the HO (*direction on some of the technical aspects for implementing retrospective legacy benefit adjustments*); HMT / HMRC (*tax issues – retrospective tax relief for employee contributions and annual/lifetime allowance charges*); and, the LGA (*FPS lead – data collection and consistent treatment for implementing changes*) were available.
23. The reasoning behind this approach was that the preparation of accurate pension statements is critical in order to allow eligible firefighters approaching retirement to make the right choice for them under DCU. Once a member has made their decision they **may** not be able to reverse it at a later date. If, once all the required guidance is available, the legacy pension (due to additional tax charges or benefit adjustments) is found to provide a lower pension than the underpin option a member may not be able to change their choice.
24. If the Service waits until all the information is available, it would be in a position to provide eligible firefighters with accurate pension and tax information for them to make the right choice based on their known pension benefits. Unfortunately, the LGA's view is that pension statements and tax information may not be available until **October 2023**. Therefore, while all eligible firefighters will ultimately receive their chosen pension scheme and any underpayments will be made good, it is frustrating for all parties that the remedy implementation may take such a lengthy period to be actioned.
25. The FBU hold the position that as the HO supported their ask for retiring members to have immediate access to their legacy schemes over the remedy period (HO Immediate Detriment guide), then FRAs should give eligible retiring firefighters access to their legacy schemes now.
26. The FBU have commenced legal action against some FRAs who have not implemented the HO guide. The current FBU cases relate to ill-health retirements and the fact that these FRAs failed to consider eligibility to an ill-health retirement under the member's current and legacy scheme terms (which MFRS currently does). The likelihood is the FBU action will be extended to other FRAs if it is successful.

27. The position of some FRAs has now changed and they are now implementing the HO informal guide for eligible firefighter retirements. As stated earlier the HO offer of immediate detriment is **not** applicable to members who have already retired they will have to wait until potentially October 2023 before they get the pension statements so they can make their decision.
28. The Authority's FPS Scheme Manager has been working with officers to look at options for implementing the HO immediate detriment informal guidance. If this can be delivered it will still mean the statements and costs to any member who wished to take up this option, rather than wait for accurate information, will contain errors. To mitigate the Service from any future challenge a legal waiver document would need to be developed and any individual taking up the offer must sign the statement to indicate they understand the potential consequences of their decisions.
29. In order to prepare the required pension benefit statements the pension administrators will need additional data from Fire and Rescue Authorities (FRAs). In some cases' this would mean preparing both FPS 1992 / FPS 2006 and FPS 2015 benefits for the period 1 April 2015 and 31 March 2022. It would also require the conversion, if possible, of some FPS 2015 additional payments; special conditions (CETV); and other technical issues into a final salary benefit. This data capture requirement is crucial.
30. The LGA and pension representatives have been working on identifying a standard data template that could be used by all FRAs to collate the information to prepare the required final and underpin pension benefit statements. In addition, pension application software companies have been working with the LGA so that the data template can fully integrate with upgraded pension applications to allow the production of the benefit statements. The latest FPS Bulletin 44 (April 2021) published on 30th April 2021 announced these templates have now been agreed and have commenced workshops with FRAs and pension administrators to go through the statements. The remedy period data will be needed up to 31 March 2022. The LGA proposal is that FRAs and pension administrators should use the data templates to collect data up to 31 March 2021 and aim to have this on pension accounts by September 2021. FRAs could then submit data for the remaining 12 months at the end of that scheme year (31 March 2022) in line with annual postings, or, each month where monthly postings are in operation.
31. With the above data template now available it is hoped that in the coming months the Service would be in a position that it had the data to prepare the required dual pension benefit statements.
32. It is understood that HMT are drafting a policy statement that will cover the treatment of retrospective annual and lifetime tax allowance breaches, tax relief on employee pension contributions due from retired firefighters, and other tax related issues. The HMT policy statement is unlikely to be published for several months. Therefore, the Service would still not be in a position to confirm the total cost for a member accessing the legacy scheme or how pension benefits may change when all the relevant tax guidance was available. Without the required

full technical guidance there is a risk that individuals may make decisions based on information at the time but later find themselves responsible for a tax charge linked to that decision that would mean their pension choice may be wrong if it results in a lower net pension.

33. Currently members whose tapered protection has come to an end continue to be transferred into the FPS 2015. In order to protect the Authority and the individual the Scheme Manager is minded to continue to transfer those staff with tapered protection into the FPS 2015 as their protection ends to ensure they have the same choice as other transferred members. This will be considered on a case by case basis.
34. It would be beneficial if FRAs, the LGA, and other interested parties could work together to develop a framework on standardising the approach to implementing the HO guide. To that end the Service has signed-up to a proposal with a number of FRAs for exploring a settlement / remedies framework, but this has yet to be established. If it is successful it would minimise the risks that arise from different approaches to specific issues in implementing the HO guide.
35. Due to the above challenges the Scheme Manager does not foresee the option of immediate detriment being available before Autumn 2021, but will work with relevant partners to bring this date forward if possible. In order for the Service to have sufficient time to prepare the required statements and get the individuals to sign the legal waiver the Scheme Manager would need sufficient notice from the individuals of their intended retirement date. Currently most of the eligible firefighters only have to give 1-weeks' notice which would make it impossible to prepare the dual benefits statements. The Scheme manager would look to agree a period of retirement notice of, at least initially, 3 months to allow the time to prepare the required statements. This would also benefit the individual as they could spread the cost of retrospective employee contributions over this period and receive tax relief on these contributions as they would be deducted from their monthly pay.
36. Therefore, the FPS Scheme Manager subject to Members approval would recommend that he finalises the proposals for implementing the HO immediate detriment informal guidance and takes the proposals to the Local Pension Board for scrutiny and sign-off. Once this has been done, eligible retiring FPS members will be given the choice of accessing their legacy or underpin benefits.
37. Currently all Service ill-health retirements members with transitional 1992 benefits who are unsuccessful in an ill-health retirement assessment within the FPS 2015, have been assessed under both the 1992 and 2015 scheme terms. Any members who don't qualify for ill-health retirement in FPS 2015 but would do so under FPS 1992 have been allowed to retire under the arrangements of their legacy scheme were possible. Criteria for ill-health retirement are the same for standard FPS 2006 and FPS 2015, therefore assessment under the 2015 terms should be acceptable.

Equality and Diversity Implications

38. The McCloud / Sargeant case identified the pension changes introduced by the Government in April 2015 discriminated against individuals on the basis of age. The Government's proposed remedy removes that discrimination.

Staff Implications

39. Staff who were members of the FPS 1992 or NFPS 2006 who belonged to those schemes at 1 April 2012 and continued to do so on 1 April 2015 and did not qualify for full protection from being transferred into the new FPS 2015, were impacted by the Public Services Pension Act 2013 in relation to their expected pension benefits.
40. The Government and Authority have accepted the outcome of the McCloud / Sargeant case and the agreed remedy to offer these individuals the option to access their legacy (FPS 1992 / FPS 2006 scheme) benefits or underpin (FPS 2015 scheme) benefits. Under the HMT proposals the decision over which scheme benefits an individual want to access can be deferred until the individual retires.
41. In order for the individual to make this decision the pension scheme administrator will provide pension benefit statements that outline what the individual would receive under both the legacy and underpin pensions. Depending on the individual's decision this may result in the requirement to pay additional employee pension contributions and retrospective tax charges. Due to the data challenges and need for technical and tax guidance from various Government departments these statements may not be available before October 2023. This will mean for some individuals they will have retired on their current pension benefits. For FPS 1992 / 2006 members who have moved to the FPS 2015 at some point from 1 April 2015, this means they must wait before they can receive the option to access their legacy scheme benefits. If at a future date they decide to revert back to their old scheme the benefits will be backdated to the date they retired. Following a request by the FBU the HO issued an informal guidance note allowing FPS members who are due to retire immediate access to their legacy schemes. This report has outlined the work the MFRA FPS Scheme Manager is doing to look at implementing the HO guidance.

Legal Implications

42. The Authority demonstrates regard to the Employment Appeal Tribunal's Judgement and Section 61 and 62 of the Equality Act in making a decision to implement the HO Immediate Detriment guidance for dealing with all eligible FPS members requests to access to their legacy schemes immediately.
43. In order to implement the guidance further to the Employment Appeal Tribunal's Judgment the risk to the Authority will be sought to be mitigated through an appropriate legal waiver or agreement.

Financial Implications & Value for Money

44. HMT have agreed that the impact of the remedy on the FPS Employer rates will be considered as part of the 2020 Actuarial Review and feed into the 2024/25 revised employer rates. The current medium term financial plan assumes the employer rates will increase by +3% or £1m p.a.

Risk Management, Health & Safety, and Environmental Implications

45. The FBU have taken legal action against a number of FRAs for not implementing the HO Immediate Detriment guidance. If the Authority didn't progress the implementation of the HO guidance the FBU may consider taking legal action against the Authority on the same understanding.
46. If the Authority produces legacy pension benefit statements based on assumptions and inaccurate information in order to implement HO immediate detriment guidance it may result in eligible firefighter making the wrong pension choices. It will therefore be made clear to the individual that this would be the individual's choice and as a result they will be asked to sign a waiver to acknowledge this risk based on lack of absolute clarity at this time.

BACKGROUND PAPERS

GLOSSARY OF TERMS

MFRA	Merseyside Fire and Rescue Authority is the physical and legal entity. When writing reports MFRA is the "object".
MFRS	Merseyside Fire and Rescue Service is the service provided by MFRA. When writing reports MFRS is the "action"
DCU	Deferred choice underpin – DCU
FPS	Firefighters' Pension Scheme
HO	Home Office
HMT	Her Majesty's Treasury
FBU	Fire Brigades Union
LGA	Local Government Association