

REPORT REFERENCE NO.	DSFRA/21/17
MEETING	DEVON & SOMERSET FIRE & RESCUE AUTHORITY (Ordinary Meeting)
DATE OF MEETING	29 JUNE 2021
SUBJECT OF REPORT	FIREFIGHTERS' PENSION SCHEME IMMEDIATE DETRIMENT CASES – FURTHER CONSIDERATIONS
LEAD OFFICER	Director of Governance & Digital Services
RECOMMENDATIONS	<i>That, in light of the contents of this report, the Authority resolves to amend its discretionary policy on Voluntary Scheme Pays arrangements as indicated in paragraph 2.4 of the report.</i>
EXECUTIVE SUMMARY	This report advises on the need to consider amending the Authority's approved pensions discretionary policy on Voluntary Scheme Pays arrangements to include an additional circumstance relating to "immediate detriment" cases that were subject to the decision taken by the Authority, at its Extraordinary Meeting on 20 April 2021.
RESOURCE IMPLICATIONS	As indicated in the report.
EQUALITY RISKS AND BENEFITS ANALYSIS	The public sector equality duty requires public bodies to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010. The proposal in this report, which is linked to the previous Authority decision to address "immediate detriment" cases, will assist the Authority in meeting this duty in such cases.
APPENDICES	Nil.
BACKGROUND PAPERS	Report HRMDC/18/25 (Pensions Discretions – Firefighters' Pension Scheme) to the Human Resources Management & Development Committee meeting on 3 July 2018 (and the Minutes of that meeting and the Authority meeting held on 30 July 2018). Report DSFRA/21/11 (Firefighters' Pension Scheme (FPS) – Age Discrimination Remedy) to the Authority Extraordinary Meeting held on 20 April 2021 (and the Minutes of that meeting).

1. **BACKGROUND**

“Immediate Detriment” Cases

- 1.1. At its Extraordinary Meeting on 20 April 2021, the Authority considered a report of the Director of Governance & Digital Services (DSFRA/21/11) and determined an approach to address, on a case-by-case basis and in accordance with Home Office guidance, “immediate detriment” cases arising from the judgements that the pension protection arrangements of the Firefighters’ Pension Scheme 2015 (“the 2015 Scheme”) were discriminatory on age grounds (Minute DSFRA/ refers).
- 1.2. The report identified, though, that – pending government legislation (anticipated April 2022 at the earliest) to address, fully and unequivocally, the issue – there were still a number of issues that remained unresolved. These issues included potential personal tax liabilities arising from the annual and lifetime pension allowances.

Voluntary Scheme Pays

- 1.3. At its meeting on 3 July 2018, the Human Resources Management & Development Committee considered a report (HRMDC/18/25) on pension discretions associated with the Firefighters’ Pension Schemes and the implications of certain taxation law changes on such Schemes. This report identified, amongst other things, that any individual in a previous scheme who had transferred to the 2015 Scheme would see growth in both schemes (i.e. the previous scheme and the 2015 Scheme) up until the point of retirement.
- 1.4. Where an individual’s annual pension growth in a single Scheme exceeds the Annual Allowance limit (currently £40,000), the individual would be subject to an Annual Allowance tax charge. The Finance Act 2004 provides for a Mandatory Scheme Pays (MSP) facility whereby the Scheme pays, initially, the individual’s tax charge which is then recovered by reduced pension benefits to the individual. This is, though, subject to the following qualifying conditions:
 - (a). the HMRC Annual Allowance limit (£40,000) has been exceeded **for the pension scheme** for which the Scheme Pays election is made;
 - (b). an Annual Allowance tax charge exceeding £2,000 has been triggered; and
 - (c). the relevant time limits for making an election have been met.
- 1.5. However, by virtue of accruing pension growth across two rather than one pension scheme, there is an increased likelihood that - although an individual’s total annual pension grown across **both** schemes may exceed the £40,000 limit, the pension growth in any single scheme may fall short of this limit. As such, the individual would not be eligible to use the Mandatory Scheme Pays facility to pay the Annual Allowance tax charge.
- 1.6. Legal advice obtained by the Local Government Association (LGA) at the time (i.e. in 2017) confirmed that individual Scheme Managers (of which this Authority is one) could introduce a Voluntary Scheme Pays provision whereby the Authority:

1. would pay the annual allowance charge to HMRC on behalf of the scheme member. This Authority could rely on the general power of competence (inserted as Section 5A of the Fire & Rescue Services Act 2004 by Section 9 of the Localism Act 2011) for this; and
2. then adjusts the member's pension benefit to reflect this payment. This Authority could rely on the provisions of the Registered Pension Schemes (Modification of Scheme Rules) Regulations 2001 for this.

1.7. The legal advice also provided, however that:

1. the power of general competence must be exercised reasonably and that it would be reasonable to exercise it in the following circumstances (as proposed by the Home Office and the Scheme Advisory Board):
 - (a). where access to the Voluntary Scheme Pays arrangement for transitional members with service in one of the 1992 or 2006 Schemes and the 2015 Scheme would be the same as the access a protected 1992 or 2006 scheme member, or member with service only in the 2015 Scheme, would have to the Mandatory Scheme Pays arrangement; or
 - (b). where access to the Voluntary Scheme Pays arrangement is afforded to those Scheme members where the pension growth in one or more schemes is more than their own Tapered Annual Allowance limit but less than the £40,000 Annual Allowance; and
2. that a fire and rescue authority wishing to make a Voluntary Scheme Pays arrangement for reasons other than the two listed at 1(a) or 1(b) above, then it should consider whether to do so would represent a reasonable exercise of its powers.

1.8. In light of the legal advice set out in report HRMDC/18/25 and summarised paragraphs 1.4 and 1.7 above, the Human Resources & Management Development Committee resolved to recommend to the Authority that a Voluntary Scheme Pays arrangement be introduced for this Authority for the payment of pension Annual Allowance tax liabilities but applicable only in one (or both) of the circumstances [as identified in paragraph 1.7(1(a) and 1(b) above] (Minute HRMDC/4 refers). This recommendation was subsequently approved by the Authority at its meeting on 30 July 2018 (Minute DSFRA/16(a) refers).

2. IMPLICATIONS FOR THE AUTHORITY

2.1. The issue of immediate detriment linked to the unlawful pension protection provisions of the Firefighters Pensions Scheme 2015 was unknown at the time the Authority approved its Voluntary Scheme Pays arrangements and consequently these arrangements do not currently extend to meeting costs associated with any remedy that might be afforded for immediate detriment cases.

- 2.2. The discretionary policy for Voluntary Scheme Pays provision approved by the Authority was based on legal advice obtained by the Local Government Association. This advice expressed the view that, while the circumstances proposed for the provision (see paragraphs 1.7(1(a)) and 1.7(1(b)), which in turn were based on those proposed by the Home Office and agreed by the Scheme Advisory Board, would represent sound reasons for the exercise of the Authority's general power of competence, they were not necessarily the only reasons but that any Authority wishing to make a Voluntary Scheme Pays arrangement for other reasons should consider whether doing so would represent a reasonable exercise of general power.
- 2.3. As indicated previously, the Authority was advised in report DSFRA/21/11 that there were still a number of unknown implications associated with any immediate detriment remedy, some of which related to individual taxation issues. Given the presumption from the Employment Tribunal cases, though, that fire and rescue authorities should seek to address immediate detriment cases at the earliest opportunity (i.e. in advance of the government's final, legislated, solution) and could do so on the basis of the Home Office guidance, it is suggested that making associated provision for any individual taxation issues to be addressed by a Voluntary Scheme Pays arrangement would be a reasonable exercise of the Authority's general power of competence.
- 2.4. On this basis, it is proposed that the Authority's approved discretionary policy on Voluntary Scheme Pays arrangements be extended by the addition of an additional circumstance, (c), as indicated in ***bold italics*** below:
- That a Voluntary Scheme Pays arrangement be made available to individuals where one or more of the following circumstances apply:
- (a). where access to the Voluntary Scheme Pays arrangement for transitional members with service in one of the 1992 or 2006 Schemes and the 2015 Scheme would be the same as the access a protected 1992 or 2006 scheme member, or member with service only in the 2015 Scheme, would have to the Mandatory Scheme Pays arrangement;
 - (b). where access to the Voluntary Scheme Pays arrangement is afforded to those Scheme members where the pension growth in one or more schemes is more than their own Tapered Annual Allowance limit but less than the £40,000 Annual Allowance;
 - (c). ***where access to the Voluntary Scheme Pays arrangement is necessary to meet additional tax charges resulting from an "immediate detriment" remedy.***
- 2.5. The Authority is asked to consider this report and resolve to amend its discretionary policy on Voluntary Scheme Pays arrangements as indicated in paragraph 2.4 above.

MIKE PEARSON
Director of Governance & Digital Services