

REPORT REFERENCE NO.	DSFRA/21/26
MEETING	DEVON & SOMERSET FIRE & RESCUE AUTHORITY
DATE OF MEETING	10 NOVEMBER 2021
SUBJECT OF REPORT	FIREFIGHTERS PENSIONS SCHEMES – IMMEDIATE DETRIMENT FRAMEWORK
LEAD OFFICER	Director of Governance & Digital Services
RECOMMENDATIONS	<i>That, subject to the satisfactory resolution of the issues as outlined in this paper, the Chief Fire Officer be authorised to adopt the Immediate Detriment Framework on behalf of the Authority to process immediate detriment cases pending enacting of the remedy legislation.</i>
EXECUTIVE SUMMARY	<p>In December 2018, the Court of Appeal ruled that certain provisions of the Firefighters’ Pension Scheme 2015 were discriminatory on the grounds of age. This case is referred to as the McCloud/Sargeant ruling.</p> <p>Following the ruling, the Government consulted on proposals to remedy this position, which would require statutory changes. At its extraordinary meeting on 20 April 2021, the Authority approved – based upon legal advice it had commissioned together with Home Office guidance - a methodology for addressing “immediate detriment” cases pending any legislative change.</p> <p>The Government subsequently published the Public Services Pensions and Judicial Offices Bill (“the Bill”) to give effect to its proposed remedy earlier this year. Following this, the Local Government Association (LGA) commissioned legal advice on a framework to assist fire and rescue authorities process immediate detriment cases, based upon an understanding of the remedy provisions in the Bill.</p> <p>This paper now advises of production of this Immediate Detriment Framework (“the Framework”) which the LGA recommends is used by all fire and rescue authorities to process immediate detriment cases pending enactment of the Bill.</p>
RESOURCE IMPLICATIONS	Compensatory aspects arising from use of the Framework will be met, initially, from general reserves. All other costs will be borne by the Firefighters’ Pensions Schemes.
EQUALITY RISKS AND BENEFITS ANALYSIS	Use of the Framework is intended to address immediate detriment cases arising from the age discriminatory provisions of the Firefighters Pensions Scheme 2015

APPENDICES	Nil.
BACKGROUND PAPERS	<p>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.</p> <p>Report DSFRA/21/11 (“Firefighters Pension Scheme Immediate Detriment Cases – Further Considerations”) to the Authority ordinary meeting on 29 June 2021 and the Minutes of that meeting.</p> <p>Immediate Detriment Framework joint statement issued by the Local Government Association and the Fire Brigades Union.</p> <p>Immediate Detriment Framework Memorandum of Understanding.</p> <p>Immediate Detriment Framework – Guidance for Fire & Rescue Authorities in their role as Scheme Managers</p>

1. **BACKGROUND**

- 1.1. In December 2018, the Court of Appeal ruled that certain provisions of the Firefighters' Pension Scheme 2015 (FPS 2015) were discriminatory on the grounds of age. This case is referred to as the McCloud/Sargeant ruling.
- 1.2. Following the ruling, the Government consulted on proposals to remedy this position, which would require statutory changes. At its extraordinary meeting on 20 April 2021, the Authority approved – based upon legal advice it had commissioned together with Home Office guidance - a methodology for addressing “immediate detriment” cases pending any legislative change (Minute DSFRA/82 refers).
- 1.3. Subsequently, at its ordinary meeting on 29 June 2021, the Authority resolved to amend its Voluntary Scheme Pays arrangements to allow for individual taxation issues associated with immediate detriment cases to be addressed as required (Minute DSFRA/21/11 refers).

2. **CURRENT POSITION**

- 2.1. Earlier this year, the Government published the Public Services Pensions and Judicial Offices Bill (“the Bill”) to give effect to its proposed remedy to the age discrimination issues arising from the FPS 2015. Following this, the Local Government Association (LGA) commissioned legal advice on a framework to assist fire and rescue authorities process immediate detriment cases, based upon an understanding of the remedy provisions in the Bill.
- 2.2. The resultant Immediate Detriment Framework (“the Framework”) is in the form of a Memorandum of Understanding (MoU) between the LGA (representing employers i.e. fire and rescue authorities) and the Fire Brigades Union (“the FBU”). The LGA has issued guidance on use of the Framework. Fire and rescue authorities are encouraged to adopt the Framework, pending enactment of the remedy legislation, to mitigate against the likelihood of the FBU supporting its members in future employment tribunal claims associated with this issue. In this respect, though, it should be noted that the MoU stipulates, at paragraph 1.4:

“Nothing in the MoU shall be interpreted to mean that the FBU will not initiate or support legal proceedings on behalf of any Member whose case *is not* dealt with in accordance with the Framework or that timetable”.

3. **FRAMEWORK PROVISIONS**

- 2.3. The position previously adopted by the Authority provided only for addressing immediate detriment cases for individuals coming up to retirement, in line with the [then] Home Office guidance.
- 2.4. The Framework, however, provides for both individuals coming up to retirement (referred to as Category 1 in the Framework) **and** individuals who have retired and have benefits in payment or who did not qualify for ill-health retirement under the 2015 FPS but would under the 1992 FPS (referred to as Category 2) to elect to receive benefits under their legacy pension scheme rather than the FPS 2015.

2.5. To be eligible to elect to receive legacy benefits under the Framework, individuals must be “in scope” i.e. they **must** meet **all** of the following conditions:

1. They must have pensionable service under FPS 2015 in the period beginning 1 April 2015 and ending 31 March 2022 (the remedy period).
2. That service would have been pensionable service under FPS 1992 or FPS 2006 but for the person’s failure to meet the condition relating to the person’s attainment of normal pension age by a specified date. (i.e., they are unprotected or tapered members).
3. They must have been, on 31 March 2012 or any earlier day, in service in any employment or office that is pensionable service under:
 - (a). a public service legacy scheme,
 - (b). a judicial legacy scheme or
 - (c). a local government legacy scheme.
4. There must not be a continuous break of 5 years or more without any pensionable service in the schemes listed in condition 3, from the last day of pensionable service in condition 3 to the first day of pensionable service in condition 1.

2.6. The Framework also provides for individuals who elect to receive benefits from a legacy scheme:

- For both Category 1 and Category 2 individuals, to receive compensation for:
 - interest on the shortfall in retirement lump sum and past pension payments;
 - any excess pension contributions made by the individual (based on a “best estimate” calculation);
 - any annual allowance charge which has arisen only as a result of the individual being transferred to the FPS 2015; and
 - any unauthorised payment incurred by the individual, which they would not have otherwise had to pay but for transfer to the FPS 2015.

It should be noted that the above compensation payments are deemed an “employer payment” which cannot be met from the pension fund account. The Authority has the legal power to make such payments, though, by virtue of Section 92 of the Local Government Act 2000 and Article 7(7) of the Localism Act 2011 (Commencement No. 6 and Transitional, Savings and Transitory Provisions) Order 2012. Any such compensation payments would be met in the first instance from reserves held by the Authority but it is understood that the government will subsequently reimburse authorities for any compensation payments made in accordance with the Framework.

- For Category 2 individuals, to revisit the commutation decision (in relation to lump sum) made at the time of their retirement.

2.7. Finally, the Framework sets out precise timescales that must be adhered to in the event of an individual electing to use the Framework provisions.

4. IMPLICATIONS FOR THE AUTHORITY

4.1. Following the McCloud/Sargeant ruling, it was recognised that:

- legislative change would be required to address the discriminatory provisions of the FPS 2015; but
- pending this legislative change, fire and rescue authorities should nonetheless take all steps available to them to address immediate detriment cases without unnecessary delay.

4.2. The Authority previously adopted a stance to address immediate detriment cases based on Home Office advice available at the time and legal advice it had commissioned. Subsequently, following publication of the Public Services Pensions and Judicial Offices Bill, the LGA and FBU developed a Framework to address immediate detriment cases, based on an understanding of the remedy provisions of the Bill.

4.3. While the Framework has now been produced and is recommended for adoption by fire and rescue authorities, there remain some outstanding issues that it is felt prudent to address, notably:

- the legal power for a fire and rescue authority to allow a Category 2 individual to revisit the commutation decision made at the time of retirement. Clarification has been sought from the LGA on this issue; and
- the capacity of this Authority's pensions administrator (West Yorkshire Pension Fund - WYPF) to process immediate detriment cases in accordance with the provisions and, specifically, the timeframes as set out in the Framework. This may require additional resourcing on the part of WYPF which in turn could impact on fees charged to this Authority (and other authorities for which WYPF acts). As with the compensation payments, however, it is understood that the government will subsequently reimburse authorities for any additional charges incurred as a result of processing immediate detriment cases under the Framework.

5. CONCLUSION

5.1. This remains a complex area arising from the Government's reform of pension schemes in 2015 and a subsequent legal ruling that certain aspects of that were age discriminatory.

5.2. The Government has now published the Public Services Pensions and Judicial Offices Bill in which it sets out its intended remedy to these matters. Subsequently, the LGA and FBU have agreed a Framework – based on an understanding of the remedy provisions in the Bill - to enable immediate detriment cases to be processed by fire and rescue authorities pending enactment of the Bill, thereby avoiding unnecessary delay (as recommended in the McCloud/Sargeant ruling) and mitigating against the likelihood of further litigation on this matter.

- 5.3. While the Framework affords a comprehensive and credible path forward, there are still a few areas where further clarification is required. On this basis, the Authority is asked to delegate authority to the Chief Fire Officer to adopt the Framework, subject to satisfactory assurance on those issues identified in paragraph 4.3.

MIKE PEARSON

Director of Governance & Digital Services