

Appendix A – Report Summary

1. Background

- 1.1. In 2015 most public service pension schemes, including the Firefighters' Pension Scheme, were reformed. These reforms included 'transitional protection' for people closest to retirement.
- 1.2. In 2018, the Court of Appeal ruled that the transitional protection element of the 2015 public service pension reforms constituted unlawful age discrimination in the Firefighters' Pension Schemes. The government stated that it respects the decision and has confirmed that it will remove the difference in treatment across all main public service pension schemes.
- 1.3. The government consulted on proposals to remove this discrimination in 2020 and a response to the consultation was presented to the Fire Authority on 14 October 2020. On 4 February 2021, the government issued its response to the consultation indicating its intention to proceed with the deferred choice underpin.
- 1.4. The changes proposed in the consultation to remove the discrimination will apply across all the main public service pension schemes and provide members of the firefighter schemes affected; the Firefighters Pension Scheme 1992 (FPS 1992) or New Firefighters Pension Scheme 2006 (NFPS 2006), with a choice of which scheme they would like to be in for the remedy period. The remedy period is defined as between 1 April 2015 and 31 March 2022. The remedy only applies to 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 five years.

2. Immediate Detriment

- 2.1. Whilst the response to the consultation has now been indicated, it is unlikely that the required changes to regulations will be in place before 1 April 2022. In advance of reaching this date the Fire Brigades' Union requested that the Home Office issue guidance to employers on dealing with "immediate detriment" cases.
- 2.2. The requested guidance was issued on 21 August 2020 and is attached at Appendix B. Clarity on the guidance has been sought both via the Local Government Association (LGA) and locally to assist fire and rescue authorities determine what action should be taken. This clarity is required in relation to the legal status of the note, who it applies to i.e. all scheme members or only those who lodged a claim with the Employment Tribunal and to identify any consequences arising from incorrect payment of benefits and any resulting unintended discriminatory treatment.
- 2.3. In defence of the original discrimination claim, the LGA argued on behalf of the fire and rescue authorities (FRAs) who were also listed as respondents along with government, that, as they were required by law to follow the pension regulations in force and so had no choice but to implement the transitional protections, they had a defence to unlawful age discrimination under Schedule 22 of the Equality Act 2010. The outcome of this case was received on 12 February 2020. The Employment Appeal Tribunal's judgment is that the FRAs cannot rely on the Schedule 22 defence where an employer is required by legislation to act towards its employees in a way which is discriminatory. The Tribunal also identified that under section 62 of the Equality Act 2010, FRAs have vested in them the power to pass a resolution making non-discrimination alterations to the scheme of which they are managers.
- 2.4. The ruling provides some expectation that FRAs deal with immediate detriment cases to the extent that they are able within the terms of the government guidance. Furthermore, it is understood that the Home Office and HMT are relying on Section 61 of the Equality Act to provide legal underpinning to the note for non-claimants.

- 2.5. There are currently 15 individuals in BFRS that are deemed to be immediate detriment cases with a number of those being eligible to retire immediately / within the next few months. As amendments to the regulations will not be in place for some time, legal advice was sought on whether it was lawful and appropriate, for the Authority to apply the immediate detriment guidance issued by the Home Office.
- 2.6. Legal advice confirms that the Immediate Detriment Guidance Note issued by the Home Office does not have legal status and reliance on it would not provide the Authority with any legal protection or indemnify it against any claim or costs arising from acting on the guidance.
- 2.7. However, the Authority is able to rely on the judgment from the Employment Appeal Tribunal (EAT), and, in particular, can rely on the ruling that Section 61 of the Equality Act 2010 means that the discriminatory provisions in a pension scheme are automatically, by law, set aside and disapplied. In addition, Section 62 empowers trustees and managers of pension schemes to make non-discrimination alterations to a scheme issued through resolutions effecting those changes.
- 2.8. The Executive Committee, in its position on behalf of the Scheme Manager, is therefore invited to resolve the recommendations set out at 2.1 – 2.4 above.

3. Members Due to Taper

- 3.1. There are a small number of individuals due to taper to the 2015 pension scheme from their legacy scheme, before 31 March 2022. The government has indicated in its response to the consultation that individuals will be returned to the legacy scheme until they make their choice at retirement as to how they wish the remedy period to be treated. It is therefore proposed as a result of the EAT judgment that individuals, now remain in their legacy scheme until further details are known and new regulations are drafted.

4. Pension Administration

- 4.1. The LGA has drafted a note (Appendix D) to provide additional information to FRAs on the key consideration of implementing the Home Office informal guidance. This includes identifying some of the legal and technical considerations.
- 4.2. There are still many technical areas to be resolved and clarified in relation to remedy as pension benefits will need converting from one scheme which is a Career Average Revalued Earnings (CARE) scheme to final salary scheme benefits. As guidance is not currently available in relation to matters such as taxation and transfer values for example, calculation of benefits in some immediate detriment cases may be difficult and will present challenges for pension administrators.
- 4.3. Whilst the LGA will aim to support FRAs to evidence robust decision making on whether a case can proceed under the current guidance, and if not, why not, it is evident that there are still many unknown factors which will need consideration on a case by case basis. It is expected that the LGA will work with administrators to provide example calculations to assist with bringing benefits into payment where the guidance is not explicit. Individuals will need to be provided with sufficient information to make informed decisions about their benefits and what action to take.
- 4.4. West Yorkshire Pension Fund, BFRS' administrators is currently in the process of seeking its own legal advice in relation to the provision of benefit calculations and until such time as the detail to support the remedy position is clarified by government and software systems can be built or adapted to deal with the complexity associated with the remedy actions, all immediate detriment calculations will need to be undertaken manually.
- 4.5. Affected individuals will need to sign a disclaimer to acknowledge uncertainties in the position and that any overpayments will be recovered. BFRS may also need sign a similar document as employers when instructing WYPF accepting liabilities

arising from the instruction.

- 4.6. To inform calculations, HR staff are gathering the relevant employment and pay details back to 2015 for each case. The process of preparing for and discharging calculations for each staff member in this position is time- consuming and administratively burdensome for both the Service and the administrator.
- 4.7. RBFRS and BFRS are exploring the provision of a shared resource in recognition of the challenges to keeping up to date with developments in pension's legislation and administration and identifying how FRAs should respond to these changes. A joint Pensions Officer position is to be established to aid governance and management of this complex subject. Working closely with the LGA, regional pension groups and our pension administrator they will work with key officers to maintain oversight, ensure the correct preparation activity is undertaken and effective and tailored communication is issued to individuals and staff groups.