



Buckinghamshire & Milton Keynes Fire Authority

Meeting and date: Executive Committee, 17 November 2021

Report title: Immediate Detriment Framework

Lead Member: Councillor David Hopkins

Report sponsor: Mark Hemming, Director of Finance and Assets

Author and contact: Mark Hemming, mhemming@bucksfire.gov.uk

Action: Decision

Recommendations:

1. That the Immediate Detriment Framework be adopted on behalf of the Authority (the Scheme Manager of the Authority's firefighter pension schemes).
2. That the Director of Finance and Assets be the authorised signatory for any 'Record of Agreed Compensation and Remedy' ('Compensation Record') on behalf of the Authority.

Executive summary:

This report outlines the latest position in relation to immediate detriment cases under the McCloud/Sargeant ruling.

In advance of any changes to legislation, the Home Office had previously issued informal guidance in relation to immediate detriment cases. Legal advice was then sought on whether it was lawful and appropriate for the Authority to apply this guidance in the circumstances indicated. At its meeting on 24 March 2021, the Committee resolved that all firefighters who were members of the Firefighters' Pension Scheme 1992 or New Firefighters' Pension Scheme 2006 ("their old schemes"), subject to the criteria detailed in that report, were to be treated as if in their old scheme. That resolution applied to those due to retire and those due to taper from the date of the resolution, where the calculation of benefits under legacy scheme for the remedy period is possible. It did not apply to members who had already retired.

Since then, legal cases were brought in the High Court against the London Fire Commissioner and Nottinghamshire and City of Nottingham Fire and Rescue Authority. The cases concerned Immediate Detriment issues in relation to the McCloud/Sargeant judgment and the claimants were supported by the Fire Brigades Union (**FBU**). The FBU was clear that matters for affected individuals needed to be

resolved sooner rather than later and it would, if necessary, support further legal cases. Many Fire and Rescue Authorities (**FRAs**) across the UK on an individual basis had indicated that they wished to be able to deal with Immediate Detriment issues as soon as possible. The problem was not an unwillingness to do so but rather the need to identify and develop a suitable mechanism to be able to do so in a way which minimised the risks while the Government is putting in place the McCloud/Sargeant remedying legislation.

With that in mind, the Local Government Association (**LGA**) and the FBU have been in discussions to identify a mutually acceptable Framework, setting out a mechanism for handling Immediate Detriment cases, to assist all parties prior to completion and implementation of the McCloud/Sargeant remedying legislation. This will help in resolving the genuine difficulties that had arisen for FRAs in making payments to those affected and in removing the potential for further court claims.

On 8 October 2021, the LGA and FBU announced that they had reached agreement on the Memorandum of Understanding (**MoU**) and Framework (see Appendices 1 and 2). Each FRA is asked to consider adoption of the Framework. The FBU are of course party to the MoU which contains the Framework agreement, and in that MoU they agree that where a member receives a remedy/compensation under the Framework they will not provide any financial or other support to the member to bring legal action relating to such remedy/compensation.

The MoU (para. 4.1) makes a distinction between Category 1 and Category 2 cases:

- Category 1 - members who have not yet had benefits brought into payment
- Category 2 - members who have had benefits brought into payment.

The exception to the above is members who did not qualify for ill-health retirement under the FPS 2015 and are not currently in receipt of benefits and are applying for FPS 1992 ill-health benefits, who are treated as Category 2.

The key elements of the process outlined within Annex 2 of the MoU are that:

- Any Member who believes they fall within either Category 1 or 2 may give notice to the FRA which last employed the Member concerned requiring the FRA to investigate their case
- Within **14 days** of receipt, the FRA shall acknowledge receipt of any such notice in writing
- If the FRA accepts that the Member is entitled to a remedy under the Framework, as soon as reasonably practicable and in any event within **62 days** after receiving an application, the FRA shall send to the Member all the information they require to decide whether to receive benefits under their legacy scheme or the 2015 Scheme.

The LGA has produced guidance for FRAs on the Framework in their role as scheme managers (see Appendix 3) (the Authority is the 'scheme manager' of the firefighter

pension schemes). This sets out (pp. 2-3) the following steps FRAs should undertake when considering adoption of the Framework:

1. Obtain the necessary agreement to adopt the Framework
2. Notify their administrator of their intention to make use of the Framework and the timescales contained.
3. Discuss with the administrator the necessary resourcing and/or re-prioritising of work.
4. If the decision is that the Framework will not be adopted, it will be for the FRA to make their own arrangements with regard to any claims and payments made by/to members in this area. In this case, the Service would continue to treat Category 1 cases in accordance with the decision taken at the meeting of the Executive Committee on 24 March 2021. A further paper would need to be brought to the Committee on how to treat Category 2 cases.
5. If the Framework is adopted, scheme members should be made aware of their right to apply under the Framework and the local process for doing so.
6. This step provides further detail on what to include in the communication noted in step 5.

The LGA guidance also covers the detailed steps to be taken when undertaking remedy calculations if the Framework is adopted.

As noted earlier, the Authority has already made the decision to treat members who have not yet had benefits brought into payment as if they were in their old scheme. The MoU and Framework will help to ensure consistency of treatment of members in Category 1 across all FRAs that adopt the Framework. If the Authority adopts the Framework, it will need to revisit the benefits of those subject to immediate detriment who have already retired (Category 2). It is estimated that this could be up to 30 cases.

Financial implications:

It is not possible at this stage to identify the specific costs associated with the recommendations of this report as these will be identified on a case-by-case basis. Using the immediate detriment framework now will not increase any direct amounts payable, it will simply bring some of those costs forward.

In not applying the framework, further legal action could be taken by the Fire Brigades' Union and result in further litigation costs.

Risk management:

The impact of changes to firefighter pension schemes is noted as a red risk on the Corporate Risk Register. While the MoU and Framework don't directly address any of the budgetary or resourcing impacts, it does reduce the risk of a potential failure to comply with legal requirements.

Legal implications:

The MoU contains a 'Compensation Record' (Annex 3 of the MoU) which the member signs and which is signed on behalf of the FRA, recording the benefits provided to the member under the Framework process. In addition, the Compensation Record also states that the benefits provided are in full and final settlement of the relevant issues noted in the Compensation Record, and the member agrees not to issue proceedings in respect of them against the FRA either as employer or as scheme manager, other than if there is a failure to abide by the agreement.

The MoU covers compensation as set out in the Framework. It does not cover any additional remedies as that is currently under consideration in the Employment Tribunal, such as injury to feelings. Therefore, the Compensation Record does not seek to settle those claims.

Although the Compensation Record states it is in full and final settlement of the Framework issues, it is not a formal settlement agreement or ACAS (Advisory Conciliation and Arbitration Service) COT3 agreement which would prevent an employee bringing a tribunal claim in respect of the issues.

The LGA has advised FRAs that:

1. The terms of the MoU give comfort in that the FBU agrees that it will not provide any financial or other support to members who have received compensation or are otherwise remedied under the Framework. Whilst this does not mean that claims will not or cannot be brought on an individual or collective basis supported by 'no win no fees' type solicitors, one would expect that fewer firefighters would want to embark on claims themselves, and no win no fee solicitors would be aware of the risk of no awards being made for such claims, due to 'just and equitable' considerations¹;
2. If FRAs were to try to enter into mass settlement agreements or COT3s it would be difficult to organise (as it is likely to be on an individual basis) and if it is by way of a settlement agreement there would be a cost per agreement for the independent legal advice which the FRA would usually be expected to cover. A standard cost would be around £300 plus VAT for an agreement where the terms are agreed in principle; and
3. Moreover, COT3s and settlement agreements usually exclude the right to claim accrued pension rights from any waiver as a matter of public policy as

¹ The general principle for compensation for age discrimination is that it is "just and equitable" and so there should be strong arguments that a tribunal hearing such a claim should take into account, and so set off, any compensation already paid in respect of the same loss. That concept is effectively supported by the provisions in the Public Service Pensions and Judicial Offices Bill (the primary remedy legislation) designed to prevent double recovery.

set out in s.91 of the Pensions Act 1995, which prevents such a waiver subject to some very limited exceptions.

Privacy and security implications: No direct impact.

Duty to collaborate: The Memorandum of Understanding and Framework are available for all fire and rescue services to adopt.

Health and safety implications: No direct impact.

Environmental implications: No direct impact.

Equality, diversity, and inclusion implications:

To reduce the risk of discrimination, this report proposes that in applying the immediate detriment framework, individuals who meet the eligibility criteria are provided a choice of which scheme they would like to be in for the remedy period regardless of whether they are a claimant or non-claimant.

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 resolution in this report aims to meet this duty.

Consultation and communication:

The Service has already received a number of enquiries from members and retired members in relation to the MoU and Framework. They have been advised that the Executive Committee will be considering whether to adopt the Framework at its meeting on 17 November 2021, and that further correspondence will be provided after that decision has been made.

If the Framework is adopted scheme members will be made aware of their right to apply under the Framework and the local process for doing so.

Background papers: Executive Committee. 24 March 2021. Firefighters' Pension Scheme – Age Discrimination Remedy and Employment Appeal Tribunal Judgment. Available at: <https://bucksfire.gov.uk/documents/2021/03/ec-240321-item-8.pdf/>

Appendix	Title	Protective Marking
1	LGA/FBU. 8 October 2021. Framework for Managing Immediate Detriment Issues (Joint Statement)	
2	LGA/FBU. 8 October 2021. Memorandum of Understanding between the LGA and FBU.	
3	LGA. 8 October 2021. Immediate Detriment Framework (IDF) - Guidance for Fire and	

	Rescue Authorities in their role as scheme managers.	
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