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Nottinghamshire and City of Nottingham Fire and Rescue Authority Policy and Strategy Committee

Date: Friday, 1 April 2022

Time: 9.15 am

Place: Joint Fire/Police HQ - Sherwood Lodge, Arnold, Nottingham, NG5 8PP

Governance Officer: Cath Ziane-Pryor **Direct Dial:** 0115 8764298

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NOTTINGHAMSHIRE
Fire & Rescue Service
Creating Safer Communities

Nottinghamshire and City of Nottingham
Fire and Rescue Authority
Policy and Strategy Committee

FIREFIGHTER PENSION SCHEME IMMEDIATE DETRIMENT REVIEW

Report of the Chief Fire Officer

Date: 01 April 2022

Purpose of Report:

To report to Members on the developments concerning the age discrimination / immediate detriment remedy related to the Firefighters' Pension Scheme.

Recommendation:

It is recommended that Members:

- Note the update concerning the age discrimination / Immediate Detriment (ID) remedy position related to the Firefighters' Pension Scheme.
- Approve that firefighters approaching retirement (Cat 1) continue to be offered the option of an immediate detriment remedy.
- Approve that retired firefighters eligible for an immediate detriment remedy (Cat 2) continue to be offered the option of an immediate detriment remedy.
- Delegate to the Head of Finance and Treasurer, as delegated Pension Scheme Manager, authority to adopt a new Memorandum of Understanding, when available, which removes liability from Nottinghamshire Fire and Rescue Service.

- Delegate to the Head of Finance and Treasurer, as delegated Pension Scheme Manager, authority to pause all ID cases if conformation from the government is received significantly increasing the financial liability to Nottinghamshire Fire and Rescue Service.

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1. BACKGROUND

- 1.1 Members will recall from previous reports that following an employment tribunal and subsequent appeals, the transitional protections related to the 2015 Firefighters' Pension Scheme were found to be age discriminatory.
- 1.2 Following the ruling, the Fire Brigades Union (FBU) commenced legal proceedings in the High Court for three test cases against FRAs. Two of these cases were against NFRS as they related to former NFRS employees. A settlement agreement on these cases was reached on 8 October 2021.
- 1.3 Alongside the settlement agreement, the Local Government Association (LGA) and Fire Brigades Union (FBU) negotiated a Memorandum of Understanding (MoU) and a Framework agreement for handling Immediate Detriment cases. This was made available in early October 2021 and adopted by NFRS on 12 November 2021. Several cases for remedy have since been progressed under this MoU.
- 1.4 However, in late November 2021, the Home Office guidance underpinning the MoU was withdrawn following intervention by Her Majesty's Treasury (HMT), due to apparently fresh concerns about the level of risk and uncertainties relating to tax and associated matters (see Appendix A). This unexpected development added to the complexities facing FRAs.
- 1.5 In the light of this, the service has progressed a small number of new retirements under the MoU but has paused on Cat 2 cases pending further guidance.
- 1.6 However, no further clarification has been obtained from HMT and there has been little further national progress. The Scheme Advisory Board has written an open letter to HMT on the withdrawal of the guidance to request more information on the risks and uncertainties mentioned in their assessment. At present this letter remains unanswered. Dialogue with the FBU nationally has continued.
- 1.7 The Treasury is clear that FRAs continuing to offer remedy in advance of legislation do so with a significant risk. Secondary legislation to address issues primarily associated with Cat 1 cases is not due until October 2023, similarly, changes to HMRC tax laws, effecting Cat 2 cases, will not be in place until October 2022. There is no guarantee that either change in legislation will be applied retrospectively although some assurance has been given that the changes to HMRC tax laws will be backdated to 5 April 2022.
- 1.8 Against this backdrop, the Authority needs to determine whether to continue applying Immediate Detriment or to pause pending further guidance.

2. REPORT

- 2.1 There is a clear risk associated with progressing remedy. However, this should be balanced with the knowledge that if NFRS does not offer the remedy, the service would be open to legal challenge, backed by the FBU, leading to significant legal costs. The Authority has received a letter from the FBU stating that *“the FBU will not hesitate to take further legal action should it be required to secure the pensions that our members deserve in Nottinghamshire”*. The full letter is attached at Appendix B. Due to the original tribunal ruling and the subsequent settlement agreement referred to in section 1.2, it is highly unlikely that NFRS could successfully defend such a legal case.
- 2.2 Employee relations would also be impacted, with or without legal proceedings, as retiring firefighters face financial uncertainty or are prevented from retiring due to not all retirement benefits being released. FRS’s have collectively sought advice and confirmed services do have the legal powers under Section 61 of the Equality Act 2010 to make payments of arrears of pension and lump sum. However, these powers do not address the uncertainties around tax and contributions.

CURRENT FIREFIGHTERS - CAT 1 CASES

- 2.3 The calculations to convert one pension schemes contributions and benefits to a different scheme are complicated and contain many different elements. The most significant financial risks relate to additional employee contributions which may not be tax deductible, and refunds of overpaid contributions. Each different element carries a different level of risk and in total the service estimates the value of these at risk adjustments, for all firefighters eligible to retire with an immediate detriment remedy before October 2023, to be approximately £100,000.
- 2.4 In addition to these risks part of the HMT communication stated *“...it is not certain that Section 61 (of Equality Act) will allow contributions paid in the past to reformed schemes, as a matter of fact, paid into Legacy schemes.”* This would mean contributions Firefighters have made to the 2015 scheme could not automatically be used to offset 1992 arrears, or in effect converted to 1992 scheme benefits. Whilst this appears to be an unethical and legally challengeable stance it is clearly identified as a potential risk by the Treasury. For those affected firefighters the value of these contributions is estimated at £500,000.

RETIRED FIREFIGHTERS – CAT 2

- 2.5 A number of retired firefighters in receipt of an unremedied pension are also eligible for additional commutation payments and increased pension. Under current legislation any additional pension benefits made more than 12 months after the original payment are subject to an unauthorised payment charge

(UPC), UPC, of 55%. To properly comply with the tribunal ruling that the firefighter is not negatively affected this charge would fall to NFRS. It is estimated the risk elements of the Cat 2 cases to be in the region of £40,000.

- 2.6 The anticipated Finance bill due in April 2022 is expected to contain legislation removing this additional unauthorised payment charge. The legislation requires secondary legislation in order that it can be enacted. This is expected to be passed in October 2022 but is expected to be backdated to 6 April 2022 although there remains a small risk that this will not be the case. The safest option would be to wait until October to progress Cat 2 ID when they could be progressed with no additional tax complication. However, Members need to be mindful that the 2 test cases that were settled out of court (see section 1.2) fell into this category. If the FBU were to raise a further case, it is highly likely that the service would not be successful in defending the case and would incur significant legal fees. It is therefore recommended that the Authority approves that Cat 2 cases be progressed from 6 April 2022.

FINANCIAL IMPACT

- 2.7 While the financial risk outlined in this report is significant in value, the service believes it to be unavoidable. Delaying the progression of ID would only add the cost of a legal challenge but not remove these identified potential risks.
- 2.8 In progressing ID the service will act in 'good faith' and continue to treat the costs described as eligible under its current understanding of pension grant funding. This will mean there is not an immediate financial impact but rather a risk of a future repayment if the government ultimately does not provide retrospective legislation to address ID. The service will include a provision in the 2021/22 to cover costs that are more certain at the point that the year-end accounts are closed and create an earmarked reserve to cover those costs that are considered less likely or cannot be calculated with certainty. This will exclude the costs identified in section 2.4 which are considered to be unlikely at this stage.

OPTIONS APPRAISAL

- 2.9 It is important to recognise the costs that the Authority would incur in defending a legal challenge and the considerable time that officers would need to spend in dealing with such a claim. The original framework that was agreed was designed to avoid that and without the framework, we are still responsible for delivering against the High Court order to deliver immediate detriment.

3. FINANCIAL IMPLICATIONS

- 3.1 In addition to the risks already described elsewhere in this report, there is a separate area of risk known as "Contingent Decisions" compensation. The national framework with which Remedy is delivered includes reference to some identified and quantifiable contingent decisions. An example of such is that Firefighter Pension Scheme members receiving an Immediate Detriment

Remedy sign a waiver document accepting that they will be liable for interest on arrears of contributions at a rate to be announced within the finalised primary legislation and becoming payable by the member in October 2023. Risks within this type of contingent decisions are therefore mitigated by virtue of the member signing a legal undertaking accepting the risk themselves.

- 3.2 However, there are numerous unidentified or unquantifiable contingent decisions upon which fire authorities remain open to risk. Some of these risks cannot be identified until primary legislation is finalised, for example unintended tax treatment of pension payments or contributions already paid. Such risks by definition cannot be mitigated as a fire authority is in no position to describe these risks in sufficient detail to demonstrate the member was able to make a fully informed decision in accepting ID remedy. As such, these risks cannot be mitigated and may fall on the Authority.
- 3.3 Additionally, there may be some contingent decisions sought by individuals that could not have been predicted by anyone but nevertheless are a direct impact of the discriminatory pension reform and therefore legally challengeable by the pension scheme member seeking compensation. For example, some members may be able to show that due to delay in receiving a remedied pension, they settled their mortgage a year later than otherwise or opted-out of the reformed scheme when first transferred in 2015 and now seek 7 years' worth of lost membership.
- 3.4 Some of these types of compensation may be included in the current Employment Tribunal compensation-claim Hearing as "Heads of Losses". Such Heads of Losses, if agreed by the Judge will be paid via the Employment Tribunal and therefore at least govt will be jointly liable for such compensation.
- 3.5 However, any types of contingent decisions losses which aren't included as Heads of Losses will be fall solely on the FRA as liability will fall outside of the Tribunal system. Discussions on funding for all forms of costs directly related to the Sargeant/McCloud ruling are ongoing but government is currently taking the unhelpful stance that funding for anything outside of direct adjustments to pension payments will not be funded under New Burdens.
- 3.6 In addition to the costs identified in the report there will be additional employer contributions as members are moved back into legacy schemes. These will be included in future pension scheme valuations and will not be affected by the recommendations in this report.

4. HUMAN RESOURCES AND LEARNING AND DEVELOPMENT IMPLICATIONS

There are significant implications to the workforce relating to the Firefighters' Pension Schemes – these are covered in the body of the report.

5. EQUALITIES IMPLICATIONS

This proposal is intended to meet the judgement laid down by the Sargeant/McCloud Employment Tribunal and as such corrects a recognised unlawful age discriminatory impact on affected personnel. Additionally, this proposal supports the Service's obligations under Section 61 of Equality Act to correct this unlawful treatment timeously rather than awaiting the delayed passing of primary legislation in October 2023.

6. CRIME AND DISORDER IMPLICATIONS

There are no crime and disorder implications arising from this report.

7. LEGAL IMPLICATIONS

- 7.1 FRSs have collectively sought legal advice regarding the issues raised in this report. This includes that FRAs have the powers to make payments under the now withdrawn Home Office Framework should they consider that to be in their best interests with regard to the costs and outcomes of potential legal cases being brought by the FBU.
- 7.2 Legal advice has not been sought on what would be considered legitimate expenditure to be included in the pension fund – the Home Office has been clear that it is for FRAs to determine what are legitimate pension costs based on their interpretation of the scheme regulations (see 2.8). Arrears of pension and lump sums have been considered to be chargeable expenditure to the Pension Fund where they are paid under Section 61 of the Equality Act 2010.
- 7.3 The Public Service Pensions Act 2013 introduced a framework for the governance and administration of public service pension schemes. This report aims to fulfil the requirement in ensuring that effective administration arrangements are in place.

8. RISK MANAGEMENT IMPLICATIONS

Clearly there is significant risk in applying immediate detriment in advance of guidance being released by the Home Office and Treasury. However, this needs to be balanced against the risk of failing to meet the Authority's obligations under Section 61 of the Equality Act and the risk of having another legal case raised against the Authority by the FBU and the costs that would accompany such a case.

9. COLLABORATION IMPLICATIONS

There are no collaboration implications arising from this report.

10. RECOMMENDATIONS

It is recommended that Members:

- 10.1 Note the update concerning the age discrimination / immediate detriment remedy position related to the Firefighters' Pension Scheme.
- 10.2 Approve that firefighters approaching retirement (Cat 1) continue to be offered the option of an immediate detriment remedy.
- 10.3 Approve that retired firefighters eligible for an immediate detriment remedy (Cat 2) continue to be offered the option of an immediate detriment remedy.
- 10.4 Delegate to the Head of Finance and Treasurer, as delegated Pension Scheme Manager, authority to adopt a new Memorandum of Understanding, when available, which removes liability from Nottinghamshire Fire and Rescue Service.
- 10.5 Delegate to the Head of Finance and Treasurer, as delegated Pension Scheme Manager, authority to pause all ID cases if conformation from the government is received significantly increasing the financial liability to Nottinghamshire Fire and Rescue Service.

11. BACKGROUND PAPERS FOR INSPECTION (OTHER THAN PUBLISHED DOCUMENTS)

None.

John Buckley
CHIEF FIRE OFFICER

Processing immediate detriment cases – November 2021

This note sets out HM Treasury's best assessment at this point on the advisability of processing immediate detriment cases before new legislation to enact the McCloud remedy is in place, and the implications of this assessment for the Home Office guidance on processing immediate detriment cases published in August 2020 and revised in June 2021.

Background

Before the McCloud legislation is in place, any corrections to individuals' pension arrangements depend on an interpretation of how section 61 Equality Act 2010 would operate.

The government made clear in its July 2020 consultation and February 2021 consultation response that it accepts that members who moved to the reformed pension schemes on or after 1 April 2015 and have subsequently retired already have an entitlement to be treated as a member of their legacy scheme for the remedy period if they wish. This is based on the view that section 61 Equality Act 2010 permits pension scheme regulations to be read as though discriminatory provisions do not apply, allowing members in this position to be treated as a member of their legacy scheme.

It was initially thought that section 61 would be sufficient to allow the position of unprotected individuals due to retire before the deferred choice underpin is implemented ('pipeline' immediate detriment cases), who wished to receive legacy scheme benefits, to be corrected before the McCloud Bill, scheme regulations and relevant tax legislation came into force. This was reflected in the position set out in the July 2020 consultation document, which stated that the government would work with schemes to give members of reformed schemes due to retire before 2022 a choice of benefits, where this was administratively possible. It was acknowledged that there were still some policy and administrative issues to work through, and the consultation document noted the complexity involved and that systems changes may be required.

Consistent with that, the Home Office guidance document originally published in August 2020 was the best attempt possible at that time to set out a pathway for processing pipeline cases ahead of legislation. The document was produced in response to specific requests from the Firefighters' Scheme Advisory Board and in recognition of the particular pressures affecting the locally administered schemes. In producing the document, the complexity of these issues became increasingly apparent. The guidance did not therefore cover cases where individuals had already retired ('rectification' cases). Home Office and HMT were also clear that the document contained gaps in respect of pipeline cases, and that cases may need to be revisited, though the belief at the time was that it provided a basis to process at least some pipeline immediate detriment cases.

The February 2021 consultation response also reflected this position and acknowledged the particular complexities associated with rectification cases. The updated version of the Home Office guidance document published this year following further discussions with the sector was an attempt to provide more detail in some areas where this was possible, and to correct areas where thinking had moved on as a result of the further work that had been done. Both of these guidance documents were produced in good faith based on the best information available at the time, and it was made clear that there were still gaps and uncertainties.

Current assessment

The further work done by HMT and HMRC on drafting the remedy in the McCloud Bill (i.e. the Public Service Pensions and Judicial Offices Bill) has made it clear that these gaps and uncertainties are considerably greater than was previously thought. In some situations, it now appears that section 61

may not give all the powers required to operate the remedy smoothly and predictably, without generating significant uncertainty for schemes, and risking significant second or third adjustments for individuals.

Because of this, HMT's current view is now that immediate detriment cases, including those yet to retire, cannot be processed before legislation is in place without considerable risk, uncertainty and administrative burdens for individuals, schemes and employers.

The fundamental issue is that to support correction of immediate detriment cases before new legislation is in place, section 61's impact on some fairly obscure aspects of the McCloud remedy needs to be understood. Any such interpretation of how section 61 comes into play on these points is novel and contestable, and actions taken on the basis of it are risky.

This risk has become more apparent over time, as HMT and HMRC have worked through the McCloud remedy and its tax consequences in more detail. On some of these points, the effect of section 61 would only be known for certain if it is tested in a court of law. This means schemes face significant uncertainty on how to proceed.

For example, where an individual's situation is corrected before legislation is in place, analysis at this point suggests it is not certain that section 61 will allow contributions paid in the past to reformed schemes to have been paid, as a matter of fact, into legacy schemes. This could call into question certain aspects of the remedy, including those contributions' tax relievable status. That could mean that the individuals in question will owe tax on contributions made in the past to their reformed scheme. This issue could affect all individuals who have made contributions into their reformed scheme – not just those for whom an adjustment in the amounts of contributions is required. Schemes and employers could then face difficult decisions over how to deal with those past contributions, plus significant administrative burdens as they attempted to fully unwind historic situations. Some individual members could lose out – potentially temporarily, but to a significant degree if tax is owed on past contributions but compensation for tax relief on contributions now being made into the legacy scheme is not available until the full remedy is in place. Individuals may also face significant second, and sometimes third, corrections once legislation is in place, as some of these problems are corrected.

Other areas of uncertainty exist and based on the experience so far of preparing the McCloud remedy, it is reasonable to conclude that further issues could emerge as work continues on the detailed McCloud remedy for changes to tax legislation and through scheme regulations.

The legislation the government is putting in place, through the McCloud Bill and tax legislation, and through the scheme regulations changes, aims to address uncertainties to deliver proportionate and reasonable results which are robust to further challenge on the grounds of discrimination, in line with the policy set out in the consultation and response documents. It is HMT's view at this point, based on the analysis as it currently stands, that cases cannot be smoothly and predictably processed until this legislation is in place and that there are risks and uncertainties for schemes and for individuals if cases are processed ahead of that.

Therefore HMT and Home office do not advise that schemes process pipeline immediate detriment cases before the legislation is in place, given the uncertainty of how to proceed on some elements, and the significant risk of generating unintended tax consequences that may, to a greater or lesser extent, then need to be reversed once legislation is in force.

It is of course still up to schemes to choose to process cases or not based on their own assessment of the competing legal risks, but at this stage it is not possible to give any guarantees that the remedy and its tax consequences will work as intended for everyone, before the legislation is in place.

Implications for the Home Office guidance

Whilst section 61 permits individuals affected to be treated as members of their legacy scheme, given the uncertainty around how it operates on some of the detailed elements of the McCloud remedy, HMT no longer views the current version of the Home Office guidance as accurately representing the situation. Unfortunately, that uncertainty also means the guidance cannot be revised to give schemes a clear way forward on how to process these cases that is certain to be correct. Home Office have therefore taken the difficult decision to withdraw this guidance.

It is also important to note that if schemes process cases and run up against tax issues which it is not straightforward to resolve – because the situation is either ambiguous under current rules due to uncertainty about how section 61 acts on some elements, or the current rules generate unwelcome tax outcomes – they will have to operate within the existing tax legislation and HMRC will not be able to help resolve those issues. This may mean that individuals could face unwanted tax bills and/or corrections to their tax affairs, which may then need to be corrected again once the legislation is in place.

For cases that have already been dealt with, or are in the process of being dealt with, the new legislation will give powers intended to allow schemes to put these individuals into the correct position, drawing on the provisions of the McCloud Bill. However, this could entail significant second or third corrections and so HMT would not advise that schemes continue to process cases on the assumption these provisions will mean a smooth and predictable experience for themselves and for members.



Ben Selby – Executive Council Member

Fire Brigades Union

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Sent via email only

Cllr.michael.payne@nottsc.gov.uk

28 March 2022

Dear Michael,

The Fire Brigades Union (FBU) attended a meeting of the Scheme Advisory Board on 9 December 2021, which included a representative from the Home Office. At that meeting the FBU were clear and direct that in our view the interventions from the Home Office were purposefully designed to 'scupper' the immediate detriment agreement because it does not want the FBU settling our immediate detriment cases ahead of any other public sector body.

The FBU is fighting a government that has demonstrated on numerous occasions that they simply do not care that our members are suffering pensions detriment. The FBU will continue to fight so that members do not have to wait until October 2023 to receive the pension that the court ruled that they should be paid, a pension they are entitled to receive now.

We will continue to meet with the LGA to see if these tax problems, which are not of the LGA's and FRAs making, can be avoided. But we have made it clear that, if necessary, we will commence further legal claims to achieve our aims. Preparation of the next round of test cases is already underway.

Dialogue between all parties involved in the MoU Framework (FBU, LGA and legal representatives) continues to resolve the problems created by Home Office withdrawing their guidance. The MoU Framework is still regarded as the quickest route to resolving immediate detriment cases.

The Home Office withdrawing their guidance does not alter the Fire Brigades Union stated position in relation to immediate detriment cases. Those cases must be resolved as previously directed by the courts, and if necessary, the union will take legal action against Fire and Rescue Authorities that refuse to do so.

As you are aware, the Fire Brigades Union has already taken legal action against Nottinghamshire Fire Authority for two immediate detriment cases. For the avoidance of doubt, the FBU will not hesitate to take further legal action should it be required to secure the pensions that our members deserve in Nottinghamshire.

Local and national officials will continue to work with the Fire Authority to resolve these issues, through cooperation and understanding we can put an end to the discrimination that our members are still being subjected to.

I politely ask that you share this letter with all Fire Authority members in advance of your upcoming meeting.

Yours sincerely,

Ben Selby

Ben Selby
Vice President
Fire Brigades Union

CC: Craig Parkin – Chief Fire Officer
Mark Stilwell – Nottinghamshire FBU Secretary
Adam Taylor – East Midlands FBU Secretary

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