

## AVON FIRE AUTHORITY

<b>MEETING:</b>	<b>Avon Fire Authority</b>
<b>MEETING DATE:</b>	<b>Wednesday, 5 October 2022</b>
<b>REPORT OF:</b>	<b>Chief Fire Officer/Chief Executive</b>
<b>SUBJECT:</b>	<b>Immediate Detriment Update</b>

### 1. **SUMMARY**

Following receipt of information from the HM Treasury in April 2022 about the potential tax costs (for scheme members and managers) of continuing with Immediate Detriment (ID) processing before the legislation is in place, at its meeting on 22 June 2022 the Authority decided to pause ID for forthcoming retirees pending information on the financial implications on Authority budgets. This report, and its appendices, provide the following to assist Members with decision making:

- The risks and implications of pausing, or resuming, ID processing.
- Based on the 'ready reckoner' provided by the Local Government Association (LGA), an estimate of ID cost liability for the Authority so far, and the further cost of resuming ID processing.
- How these costs could be funded, with implications.
- A general update on any further developments on ID since the June 2022 Fire Authority meeting.
- A forward look to potential further ID decisions at the December 2022 Fire Authority meeting.

### 2. **RECOMMENDATIONS**

Avon Fire Authority is asked to:

- a) Review the potential implications and costs of pausing or resuming ID processing for forthcoming retirees, together with the funding options and noting the caveats contained in this paper.
- b) Decide whether to resume ID processing with immediate effect by utilising the pension reserve and further revising the current legal agreement (COT3 at Appendix 1) signed in ID cases to ensure employees understand, and accept, the potential tax liability if they choose not to wait for the Government resolution.

- c) Or, in the alternative, decide to continue pausing ID processing pending any changes (legislative or otherwise) which would reduce the financial impact on local budgets and, in the interim, signpost forthcoming retirees to how they raise exceptional issues, such as severe financial hardship, for the initial consideration of the Chief Fire Officer/Chief Executive Officer (CFO/CEO) and Director of Corporate Services (DofCS) on a case-by-case basis.
- d) Note the developments since the Fire Authority meeting on 22 June 2022, most notably the factsheet from the Pensions Ombudsman (dated July 2022) which outlines their approach to ID cases.

### **3. BACKGROUND**

- 3.1. The Government is taking steps to address the age discrimination arising from the method of transition from the 1992 firefighter pension scheme to the new scheme in 2015, and with full retrospective effect. However, the Government continues to indicate that this resolution will not be in place until October 2023 because of the primary and secondary legislation required, the need for changes to pension administration systems, the development of software to process remedy electronically and the need to provide detailed information to scheme members about options.
- 3.2. In most cases there is not an adverse financial impact of waiting for the Government resolution but in some situations, for example those likely to retire before October 2023, there is a financial impact in the interim. The group who are impacted in this interim period are within a category known as Immediate Detriment (ID).
- 3.3. The financial impact doesn't mean those affected have retired, or are retiring, without a pension but it does mean that, through an issue which is not of their making, they receive a lower pension until the Government resolution and that can impact on decision making about retirement and family income in the interim.
- 3.4. As reported to the March 2022 meeting of the Authority, the pension administrator has provided example figures to demonstrate the difference in pension received by a firefighter retiring at age 50 after 30 years with, and without, ID applied as follows. These are example figures as there are several variables. A firefighter retiring at 50 (with 30 years' service) receives the following pension without ID applied at the point of retirement:
  - 1992 scheme annual pension (after 25% commutation) of **£17,991.57** and gross retirement lump sum of **£143,932.32**
  - 2015 scheme deferred annual pension (after 25% commutation) of **£1,553.84** plus a gross retirement lump sum of **£6,215.28**
- 3.5. If ID is applied, under the 1992 scheme, these figures increase as follows: annual pension after (25% commutation) of **£19,748.53** plus a gross retirement

lump sum of **£157,987.92** (firefighter scheme maximum lump sum before any relevant deductions).

- 3.6. The approach applied to ID by this Authority has, to date, enabled 22 firefighters/pension scheme members to retire under legacy scheme provisions in respect of the annual pension and lump sum. This number includes the pipeline cases Members agreed to continue to process during the pause. 17 of the 23 retirements which have been processed under ID were completed after the Home Office withdrew its guidance on 29 November 2022 and issued the following statement on funding:

*“... As the Government does not advise that ID cases should be processed in advance of the legislation coming into force, they would not be in a position to provide any additional funding for those costs paid outside of the pension account. These costs include payments that are not considered to be legitimate expenditure under the pension scheme regulations and any associated administration costs including any charges from your pension administrator. These will need to be funded locally by the fire and rescue authority from local budgets. In relation to ID costs paid from the pension account while processing pipeline cases, FRAs will need to ensure that these payments comply with the financing regulations of the pension scheme. If they are considered to be legitimate expenditure, then they will be considered for payment as part of the established processes for claiming the AME top up grant.”*

- 3.7. There has been no change to date on the Home Office position on funding.
- 3.8. Immediate Detriment is a complex and dynamic matter and the full detail of the situation and matters considered by AFA (as the Scheme Manager) at their 15 December 2021, 30 March 2022 and 22 June 2022 meetings are available on the Avon Fire Authority website. It is recommended that Members revisit these reports, and appendices:

[Browse meetings - Avon Fire Authority - Modern Council \(moderngov.co.uk\)](https://www.moderngov.co.uk)

#### **4. FINANCIAL IMPLICATIONS**

- 4.1 Until the required legislation is in place, there is no legal mechanism to pay ID pension cases without potential financial risk to both firefighters and the Fire Authority. It is also not currently possible to undertake a fully accurate or robust assessment of the likely financial implications, until the relevant legislation and associated guidance is in place and therefore any estimates contained in this paper are heavily caveated.
- 4.2 The Government have advised ID cases should not be processed in advance of the legislation coming into force because of the major practical issues (particular on tax) in dealing with ID cases in advance of the rollout of a remedy.

- 4.3 Both HMRC and HMT have issued documents with particular concern about tax liabilities if pension adjustments, and other payments, are made before the secondary legislation is in place. The extant HMT guidance (dated 23 March 2022) has been previously provided to Members. These tax liabilities may occur for scheme members/firefighters and scheme managers/employers.
- 4.4 The Government has confirmed it will not provide any additional funding for costs paid outside of the pension account. Therefore, should AFA agree to resume processing ID cases these costs are likely to fall to local budgets and be non-recoverable. That directly, or indirectly, creates an additional budget pressure for AFA and potentially puts the organisation at financial risk.
- 4.5 The Local Government Association (LGA) has produced a financial assessment calculator (a 'ready reckoner') to assist scheme managers to review the potential ID costs based on a series of underpinning assumptions which are caveated. It is LGA's understanding that for forthcoming retirees there are 3 areas of potential financial risk to scheme manager/Authority budgets and the ready reckoner contains the formula to calculate the potential cost:
- compensation for a contribution holiday
  - possible compensation arising should the HMRC deem that the scheme member is no longer entitled to tax relief on their FPS 2015 contributions where these contributions are offset against the arrears of FPS contributions
  - Where applicable, additional charges to be paid to the administrator to process these cases.
- 4.6 The 'ready reckoner' has been used by this Service to estimate the potential cost liability to the Authority of ID processing so far, and of resuming ID processing for forthcoming retirees up to, and including, 31 October 2023. These costs are outlined in the table overleaf, together with potential funding options. While the figures are based on worst case scenarios, they are potentially significant.
- 4.7 In addition, there is an added financial risk that, when the legislation is passed, ID cases will need to be re-assessed as there is likely to be a difference between the assumptions being made about what the legislation may contain, with what it does contain once enacted. While there are legal agreements (COT3s) in place to mitigate this risk, it is possible that further compensation claims from ID firefighters whose pensions have been processed outside of the legislation will occur which would also not be funded by Government. The current COT3 being used in ID cases is at **Appendix 1**.
- 4.8 However, the financial assessment of whether to pause or resume ID should also consider the risk of considerable legal fees if cases are brought against Fire Authorities not processing ID cases and therefore not having interim arrangements to address the age discrimination, and its financial impact on employees, in a reasonable period. Claims are being raised against some other Fire Authorities and, while it would be difficult to provide an estimate, legal

processes are costly, and the risk of claims in this Authority will increase if no ID processing is taking place. A blanket pause is also likely to give rise to multiple individual complaints under the Internal Dispute Resolution Procedure (IDRP), or collective complaints to The Pensions Ombudsman, both of which are costly to progress in terms of Member and officer time.

- 4.9 Therefore, there are financial risks and implications of both continuing to pause, or resuming, ID and it will be important for Members to weigh up the relative merits of both options, with a consideration of the potential impact, directly or indirectly, on local budgets and future precepts. It is noted that other considerations also factor in decision making, for example employee relations.

<b><u>A. Cost liability based on the estimates in the LGA ready reckoner*:</u></b>		<b>Total</b>
<b>Revenue:</b>		
<b>Cost liability <u>already incurred</u> for ID cases processed since Home Office withdrew funding in November 2021.</b>	<b>Non-recurrent expenditure</b>	<b>£84,046</b>
<b>Plus, cost of future ID processing based on retirements at age 50 and length of service 30 years (44 people)</b>	<b>Non-recurrent expenditure</b>	<b>£470,028</b>
	<b>Total revenue expenditure</b>	<b>£554,074</b>
<b>Additional cost if those age 50, with 25 years' service also retired under ID (14 people)</b>	<b>Non-recurrent expenditure</b>	<b>£129,664</b>
<b>Total potential cost liability for ID if processing is resumed</b>	<b>Non- recurrent expenditure</b>	<b>£554,074 to £683,738</b>
<b><u>B. Proposed funding:</u></b>		
<b>Baseline Budgets</b>		<b>N/A</b>
<b>Reserves</b>		<b>£577, 000</b>
<b>Other – please specify</b>		
<b>Total funding available:</b>		<b>£577,000</b>
<b>Total deficit</b>		<b>£0 - £106,738</b>

## **5. KEY CONSIDERATIONS**

### **Costs**

- 5.1 The costs identified in the financial table in section 4 have been generated by inputting the data held by payroll and the Service regarding the retirement profiles and salaries into the LGA's financial assessment calculator ('ready reckoner').
- 5.2 The spreadsheets and guidance are complex but available to Members on request. The calculations take the individuals tax rate into account (for example the tax relief on contributions will be affected by the tax rate of the individual so potential unauthorised tax relief will be calculated as tax rate multiplied by contributions paid into the FPS 2015). Therefore, the level of taxpayer (20% or 40%) has a considerable impact on the cost liabilities.
- 5.3 It is noted that, of the 44 people in the ID category reaching age 50 with 30 years-service before October 2023, 17 are 40% taxpayers which contributes significantly to the figures.
- 5.4 It is however important to note the figures present a worse-case scenario of the tax concerns raised by HMT, which may or may not end up being applied. The compensation arising from the use of offsetting of contributions paid in the 2015 scheme to the 1992 scheme is a particular area the LGA are discussing centrally because, if an agreement on approach can be reached in advance, this would considerably reduce liabilities.
- 5.5 It is also difficult to predict how many staff (with either 30 or 25-years' service) may decide to retire and, of those, how many are in the 40% tax bracket. However, based on ID processing to date, it is less likely that those without 30 years' service will decide to retire in this period.
- 5.6 To date, the Service has received two requests to retire under ID after 06 October 2022 should the pause be lifted, and they are both within the age 50 and 30-years' service category.

### **Funding**

- 5.7 The potential funding identified in the financial table in section four, is the pension reserve of £577k. However, it should be noted that, while the Authority have not needed to use the pension reserve in recent years, £230k of this reserve has already been allocated to cover additional ill health retirement costs. The £230k is the average cost of an additional ill health retirement to the Authority. While the revenue budget each year includes a forecast of ill health retirements, the number and costs of ill health retirements are difficult to forecast due to the number of variables.

- 5.8 Therefore, if the majority (or all) of the pension reserve is set aside to cover the cost of ID and it is utilised due to a high number of ID retirements and HMT applying the full range of tax costs and charges, there is a potential knock-on impact on revenue budgets if there are additional ill health retirement costs. There is also little resilience in respect of additional pension costs arising from other pension matters, and no ability to redirect this reserve for other purposes within a very volatile financial environment of rising costs.
- 5.9 The Authority receives a pension administration grant each year, but this has already been utilised on the administration of ID for 2022/23 and, due to the Government position on funding, ongoing receipt is uncertain. Therefore, this grant has not been factored into the funding.
- 5.10 The Service has contingency built into the baseline revenue budget but, in view of the potential newly arising pressures, it is considered more appropriate to consider the pensions reserve for this cost pressure which is, in comparative terms, more foreseeable and within the Authority's control.

### **Employee Relations and Workforce Planning**

- 5.11 This pension matter is of course about more than finance and it remains of significant importance to scheme members impacted. In addition, while pay is set nationally, it is a sensitive time in employee relations in view of the pay disputes, rising cost of inflation and the cost of living.
- 5.12 The FBU's position has long been that it will pursue legal action if Immediate Detriment issues cannot be resolved in a timely manner including using the [MoU and Framework](#) jointly agreed by the LGA and MOU in October 2021. While the Authority has not yet received a claim, the possibility exists that claim(s) will be received, and it is more likely to occur if ID processing continues to be paused for forthcoming retirees especially when others have been processed since the withdrawal of funding last November.
- 5.13 In addition to the FBU, the LGA state they continue to apply pressure to Government seeking an earlier resolution to this matter and enactment of secondary legislation.
- 5.14 It has been confirmed that a decision to cease, or continue, current Immediate Detriment processing is manageable within the current workforce plan model and the Service has the flexibility on how many candidates it takes from future training schools.

### **Other developments**

- 5.15 Since the Authority meeting in June 2022, there have been few further developments but in July 2022 the The Pensions Ombudsman (TPO) issued a fact sheet setting out their approach to McCloud Sargeant age discrimination complaints.

5.16 The TPO fact sheet is attached in **Appendix 2** confirms that, if a scheme member has a complaint or dispute about remedy or immediate detriment, they should first raise it with their scheme informally, and then, if they remain unhappy, they can complain under the scheme's Internal Dispute Resolution Procedure (IDRP) and, if still unresolved, contact TPO. The Fire Authority already apply this approach to ID related complaints and consideration of special circumstances. Therefore, in the event of an ongoing pause, raising an IDRP would remain a potential option for forthcoming retirees if, for example, there was a particular hardship issue.

5.17 In the event of scheme member contact with the TPO their approach is confirmed as follows:

*'TPO recognises that: the Government is taking steps to address the discrimination with retrospective effect; interest will be payable on any underpayments; schemes need time to change their administrative systems and provide detailed information to members about their options; and in most cases, members will not be adversely affected financially such as would require immediate action. Bearing in mind the above, presently TPO's general starting position, is that it would not investigate complaints or disputes relating to remedying age discrimination in public sector schemes, but it will carefully look at the facts of each case before making any decision. Examples of where TPO may investigate include, allegations of maladministration, like, failure to explain what is going on and/or engage properly with the member; or investigate where a member is suffering severe financial hardship or other serious injustice and the scheme is not putting in place any interim arrangements to address the injustice within a reasonable period. Any complaint or dispute will be subject to TPO's usual jurisdictional checks, for example, whether court proceedings have started which are the same as the complaint.'*

5.18 With reference to the LGA/FBU Framework, the LGA's stated position is that they are continuing to explore with the FBU and respective legal representatives, what, if any, amendments could be agreed to the Framework to minimise risk to Fire and Rescue Authorities (FRAs) and scheme members due to the recent statements from the Home Office and HM Treasury. At the time of report writing, there has been no confirmation of changes to the Framework or the timescale for these discussions to conclude.

5.19 Due to the work involved in assessing the cost liability of resuming ID for forthcoming retirements, the costs of assessing adoption of the full Framework is now more likely to come forward for consideration at the December 2022 Fire Authority meeting. The potential cost of adopting the full Framework are anticipated to be considerably higher because the compensatory elements for existing retirees are wider, including, for example interest.

5.20 There has been no national update regarding the secondary legislation on tax which was due in Autumn/October 2023 and when this may be applied, noting that this could considerably reduce tax liability for ID processing for scheme

members and managers once available.

## **6. RISKS**

- 6.1 The Firefighter Pension Scheme risk register informs the overarching Corporate Risk Register at CR15 Pensions and, when applicable, CR04 People, Resources, Capacity, Capability and Succession Planning. The risk rating of CR15 is currently high due to the issues regarding compliance, funding, and employee relations.
- 6.2 The Corporate Risk Register is regularly reviewed and scrutinised by the Service Leadership Team, Service Leadership Board and the Audit, Governance and Ethics Committee with scrutiny applied to ensure the controls and planned mitigations are sufficient to reasonably manage the level of risk.
- 6.3 The Fire Authority already carries some potential legal risk of claim because it has not yet adopted the full LGA and FBU Framework, including the processing of retirees. The ongoing pausing of processing Immediate Detriment cases creates an enhanced risk of litigation from firefighters who may pursue claims for discrimination on the basis of being 'denied' pension benefits fully under their legacy pension schemes. Any litigation is costly to the Fire Authority in terms of staff time and external legal fees.
- 6.4 The substantive risks are therefore legal and financial (as set out in the relevant paragraphs), and in respect of employee relations.

## **7. LEGAL/POLICY IMPLICATIONS**

- 7.1 The Clerk obtained detailed legal advice for the Fire Authority on the Immediate Detriment issue from a QC, which was considered in exempt session on 22 June 2021. That advice was that AFA should be cautious and only make Immediate Detriment payments in the 'clearest and least controversial claims' and advised that claims should not be processed as they had been identified within Home Office guidance as being more complex cases to resolve.
- 7.2 Unfortunately, since the QC's advice the legal landscape has changed significantly, and the following changes suggest that the financial risks are now clearer:
- HMRC Policy document dated 27 October 2021.
  - HM Treasury Information note issued on 29 November 2021 which included the words: '*Therefore, HMT and HO do not advise that schemes process pipeline immediate detriment cases before the legislation is in place*'
  - The withdrawal in November 2021 of previous Home Office informal guidance on ID.

- LGA's advice by letter dated 17 December 2021 that the legal basis for making payments under the MOU/Framework remains valid but recognises the significant financial risks and uncertainties now facing FRAs.
- HM Treasury's letter to SAB dated 23 March 2022 which states '*Government's view remains that processing immediate detriment cases before all of the necessary legislation is in place could give rise to significant consequences for schemes and members*'.
- NFCC's letter to CFOs of 25 March 2022 summarising HM Treasury's letter and NPCC legal advice that '*scheme managers should not be implementing immediate detriment at this time, as there is no legal mechanism to pay without undue risks to both members and the force*'.

## 8. **BACKGROUND PAPERS**

- Fire Authority Papers - 30 June and 15 December 2021; 30 March and 22 June 2022:

[Browse meetings - Avon Fire Authority - Modern Council \(moderngov.co.uk\)](https://www.moderngov.co.uk)

## 9. **APPENDICES**

1. COT3 form currently signed by recipients of ID.
2. TPO factsheet July 2022

## 10. **REPORT CONTACT**

Angela Feeney, Director of Corporate Services,