LONDON FIRE AND EMERGENCY PLANNING AUTHORITY

Report title

Injury Awards Verification Exercise

Meeting	Date
Resources Committee	16 July 2012
Report by	Document Number
Director of Finance and Contractual Services 5 July 2012	**FEP 1927**

Public

Summary

This report sets out the results of the work that has been done to check the accuracy of injury award payments to retired firefighters. This review which was first reported to members of the Audit Committee in September 2012 (FEP 1589), covers cases dating back to the 1990s, many of which are complicated. It has only been possible now that the Department of Work and Pensions has started sharing data about state benefits that are in payment with other agencies as part of the National Fraud Initiative (NFI). Many of these benefits will result in a reduction in the amount of the injury award that is payable. However prior to the NFI it was very difficult to track either the benefits that were being paid or any changes to those benefits. This has resulted in the issues identified in this report.

The report describes the actions that have been taken to address these issues and recommends how the outstanding overpayments should be handled. It also sets out the financial impact of this process and considers the performance issues that have led to this situation and the remedial action that has been taken. The overall impact of this on the Authority's financial position is set out in the report on the Review of the Financial Outturn for 2011/12 which is included elsewhere on this agenda.

Recommendations

(1) that the Resources Committee be recommended to write off £2,369k of overpayments to pensioners that cannot legally be enforced because of statutory time limits.

(2) that officers should review, on a case by case basis, whether to pursue the recovery of overpayments to pensioners in those exceptional cases where there is a lack of clarity over where the fault of

overpayment lies, or in respect of cases where the Authority, London Pensions Fund Authority or other agency is at fault that the Director of Finance and Contractual Services writes off any individual cases (up to approved limits) that are deemed irrecoverable.

(3) that for any overpayments where concealment or potential fraud is established, full recovery is sought from the pensioner.

(4) (a) that no legal action be taken against the London Pensions Fund Authority on these Overpayments,

(b) that a starting position on all injury pensions and benefits in payment be agreed and under the existing contract the London Pensions Fund Authority will be held liable for any future overpayments that occur on these pensions if they are not recovered from the pensioner,

(c) that the London Pensions Fund Authority be instructed that benefits in payment will automatically be uprated by the announced government percentage increase in benefits annually each April, so that reliance on pensioners to notify increases will be removed. Pensioners will still be reminded to check deductions being made and to notify the LPFA if a benefit is stopped or changes. The NFI exercise will then be used biannually to carry out a complete audit.

Introduction

1. The Firefighters' Pension Scheme 1992 (FPS) came into effect on 1 March 1992 and has been amended from time to time since that date. The FPS is a statutory, public service pension scheme initially made under section 26 of the Fire Services Act 1947. This Act was repealed by the Fire and Rescue Services Act 2004, but section 36 of the 2004 Act allowed the Scheme to continue in force. It became a closed scheme on 6 April 2006 when the New Firefighters' Pension Scheme was introduced.

2. The new financial arrangements for firefighter pensions introduced in 2006 created a pension fund account into which employees' contributions and the employer's contribution are paid. Pensions are paid out of this account and the Department for Communities and Local Government (DCLG) either tops it up if it is insufficient to meet the cost of the actual pension payments or recoups any surplus.

3. The new arrangements separated injury awards out from the firefighter pensions schemes on the basis that they are payable irrespective of whether or not the firefighter is a member of the scheme. A firefighter is entitled to injury award if he/she become permanently disabled or dies as a result of an injury received in the exercise of his/her duties as a regular firefighter. Under this arrangement injury award payments are paid directly from the Authority's budget, not from the pension fund account. This applies to all injury awards in both schemes. This means that any errors in calculating the awards which result in either an underpayment or an overpayment to a pensioner which cannot reasonably be recovered are borne by this Authority and not the pension fund account.

4. The administration for the firefighters' pensions schemes for LFEPA, including the calculation of all pension and injury award payments, is provided by the London Pension Funds Authority (LPFA). The LPFA has provided this service for LFEPA since the LPFA took over management of the Greater London Council's Superannuation Fund from the London Residuary Body in 1990. In 1998 the arrangement was formalised in a contractual agreement, following a competitive tender. The contract is due to be re-let in April 2013,

though it may be possible that this service could be provided under a shared services arrangement in future.

5. The process for calculating an injury award is complicated by the fact that the award must be reduced by the amount of any specified state benefit to which the pensioner is also entitled and the pension schemes have not kept up with the changes in names of the specified benefits paid by the Department of Work and Pensions (DWP). Historically it has been difficult to get information directly from DWP about the benefits that are in payment or changes to those benefits that are paid. Reliance has therefore been placed upon the pensioner notifying the scheme administrator at the time the injury award is first granted and if there are any subsequent changes. The DWP only started sharing data with other agencies as part of the National Fraud Initiative in 2008.

6. In 2004 the LPFA identified that a retired fire fighter had been overpaid his injury award following an individual case review. The overpayment had occurred over a period of 16 years and totalled £26k. This had arisen as a result of non-deduction of relevant DWP benefits. He was contacted and he agreed to repay the overpayment on a monthly instalment basis. He is currently continuing to make repayments through taking a reduced monthly pension and has some £5k left to pay. Representatives from HR, Finance and Legal Department met with the LPFA to review the arrangements for checking and monitoring injury awards and to request that the LPFA review the accuracy of the payments being made. Since then there have been three major exercises carried out by LPFA, to check the accuracy of these awards. This report sets out the results of these exercises and proposes actions to be taken as a result and the procedures and controls that have been put in place which will minimise the number of errors going forward, and ensure that a thorough check is made of all payments on a regular basis.

Checking Exercises

7. Following the identification of the overpayment error in paragraph 6 above, three specific checking exercises have been carried out. The first check was a sample targeted at cases that were administered before 1990, after which the LPFA had improved their procedures. The second was based on a data matching exercise managed by the Audit Commission, the National Fraud Initiative (NFI). The last checking exercise consisted of a 100% check of all remaining 1,906 cases in the light of the errors identified in the previous two exercises and to ensure that the Authority was confident that all injury pensions in payment were correct. It also enabled a database of all benefits in payment to be compiled so that these could be uprated annually in future to match any increase in DWP benefits without relying on pensioners to inform the LPFA potentially causing further overpayments to occur. These exercises took time to complete, because pensioners' agreements had to be sought for DWP to share the information, and the DWP response was slow. The 100% check is nearing conclusion. The current position is that of these 1,906 cases, 1,877 have been checked and payments corrected where necessary, 15 are still awaiting permission from the pensioner to access DWP data, and 14 are awaiting processing and verification by the LPFA or further data is awaited from the DWP.

Retirement Allowance

8. The Retirement Allowance (RA), which is payable under the Industrial Injuries Scheme, was introduced in 1989. It replaced Reduced Earnings Allowance for claimants aged 65 who were not in regular employment and were in receipt of the Reduced Earnings Allowance of £2.00 a week or more.

9. In October 2010 DCLG issued FPS Guidance Note 4/2010. This advised FRAs that deduction of RA was not provided for in the Firefighters Pension Scheme (though it is provided for in the police pension

scheme). This guidance was contrary to LPFA's interpretation of the rules, as a result of which they had been deducting Retirement Allowance from injury awards

10. Both the Authority's Legal Services and Counsel for the Authority have advised that Retirement Allowance is not a relevant benefit under the Firefighters' Pension Scheme and that all Retirement Allowance deducted from injury awards needs to be repaid to pensioners and monthly pensions corrected. Further, some cases identified as part of the exercises already completed by the LPFA that were deemed overpayments because Retirement Allowance had not been deducted needed to be recalculated and any overpayment reassessed. To date 115 cases of refunds of Retirement Allowance have been corrected and arrears of £796k paid.

Underpayment summary

11. Underpayments paid to pensioners from all the exercises undertaken and after taking into account the change in the way RA is dealt with have resulted in a total underpayment of £6,116k. £1,885k of this was met by underspends in prior year's budgets. The remaining sum of £4,231k has been met by making a provision in the 2010/11 accounts of £2,700k and remaining cost of £1,531k is contained within the overall underspend in 2011/12. This cost includes an additional provision of £750k allowed for in 2011/12 to meet any further underpayments identified in finalising the 29 cases that remain outstanding.

Overpayments

12. The current overall position on overpayments from all of the exercises undertaken is £3,149k. This includes the potential write off totals, those where it is possible that the pensioner is at fault and position on cases still to be determined.

13. This sum has built up over many previous financial years. No action has yet been taken to recover any of these overpayments because the overpayments needed to be viewed as a whole taking into account the long timescale over which they had built up, the likelihood that many of the pensioners had spent their pension payments in good faith without realising they were being overpaid, the prospects of being able to recover the overpayments if necessary through court action and the likely adverse publicity for the Authority. Counsel's advice was therefore sought, via the Head of Legal Services, on the likelihood of the recovery of this debt and how this might be approached. This included whether the Statute of Limitations in respect of debts over 6 years old would apply. Counsel's opinion in summary is as follows:

    a) Claims for repayment of pension payments wrongly made more than 6 years before proceedings are brought will be statute barred unless the pensioner has deliberately concealed the fact that s/he started to receive DWP benefits or that the benefits increased,

    b) Even in respect of claims for repayment of pension payments wrongly made less than 6 years before proceedings are brought, in many cases pensioners are likely to be able to establish a defence that they had changed their position relying on the payments as being correct. Therefore, in order to succeed in a claim for overpayment the court would have to be satisfied that the pensioner was not acting in good faith. In the majority of cases, this would be extremely difficult to prove: the lack of reminders sent to pensioners, coupled with the fact that significant administrative errors have been made by LPFA, would make it easy for pensioners to allege that they simply forgot about their pension obligations, or that they did notify either the LPFA and the relevant paperwork has been lost. (A number of pensioners have already written to say that they believed that were receiving the correct pension, they have been caused financial hardship by the reduction and they could not afford to make any repayments),

c) Since each case would turn on its own facts, it would mean the Authority would have to take multiple recovery actions in the county court, which would be expensive both in financial terms and in officer time, and in the absence of being able to prove fraud or bad faith on the part of the pensioner, the prospects of success would be slim,

d) Multiple actions against elderly ex-firefighters who, by reason of the fact they receive an injury award, may be assumed not to be in good health, are unlikely to be sympathetically received by the courts and are likely to generate a good deal of adverse publicity (a number of pensioners have raised concerns for their health and financial futures because of the reductions in their pensions),

e) Where LFEPA managed to succeed in obtaining judgement against the pensioner, the enforcement of the judgment could be difficult and costly in view of the likely limited financial means of the pensioner concerned,

f) For the above reasons LFEPA should take the decision not to recover the overpayments unless, exceptionally, there is circumstantial evidence that there may have been fraud and/or deliberate concealment in that the particular circumstances of a case point to the likelihood that the pensioner must have known that s/he was under an obligation to inform LPFA about his benefit situation at the relevant time.

14. As per FEP 1856, under the Authority's Financial Regulation 20 the Director of Finance and Contractual Services may write-off losses to a limit of £50k, and without report, provided no major question of principle is involved and that proper steps have been taken to mitigate the loss and prevent a recurrence of it. Sums to be written off above £50k in relation to a single debtor required the approval of the Finance and Personnel Committee after consideration of a report from the Director of Finance and Contractual Services. The financial regulations are being amended to reflect the new Committee Structure following the Authority's reconstitution at its meeting on 22 June, and under the new terms of reference for the Resources Committee, this Committee is requested to consider the recommendation of this report.

15. Having regard to Counsel's advice, LPFA have recalculated overpayments to take into account the 6 year limitation period and a sum of £2,369k has been identified for write off. It is recommended that the Resources Committee agree to write off this sum. As the overpayments have already been paid out over several years, there will be no financial impact on the Authority's revenue account or balance sheet.

16. On the remaining cases, it is recommended that officers should review, on a case by case basis, whether to pursue the recovery of overpayments to pensioners where there is a lack of clarity over where the fault of overpayment lies and that the Director of Finance and Contractual Services writes off any individual cases (up to approved limits) that are deemed irrecoverable. There are 107 cases totalling £780k which will need to be reviewed.

17. Where there is evidence of fraud or deliberate concealment on behalf of the respective pensioner or where there is some doubt a panel of officers from this Authority and the LPFA will meet to consider the evidence available on a case by case basis and to make a decision on seeking recovery of the debt or that

the case is submitted for write off to the Director of Finance and Contractual Services.

18. Where the panel decide that recovery should be sought, this would first be subject to negotiation with the individual pensioner. This negotiation would be based upon an expectation of full recovery within the context of the individual's financial circumstances. Because it is likely that most pensioners who agree to repay any overpayments will only be able to repay by monthly instalments deducted from their pension it is unlikely, because of the age of some pensioners that full recovery will be achieved and write-off of some balances will be inevitable. Approval is therefore sought for the Director of Finance and Contractual Services to write off any individual cases (up to approved limits) that are deemed irrecoverable.

Claim against LPFA

19. Counsel's advice was also sought on the prospect of the Authority making any claims against the LPFA. The 2008 contract places a duty on the LPFA to ensure that relevant state benefits are claimed and pension payments abated accordingly and where overpayments do occur on those occasions when a pensioner fails to notify them of receipt of benefits that they seek recovery of the amounts involved. However, the previous contractual agreement with the LPFA was less onerous and specific in this area and there was no provision entitling LFEPA to be indemnified in respect of overpayments made in error by the LPFA. A contractual claim against the LPFA would therefore be unlikely to succeed and any claim against the LPFA would have to be based on an allegation that it was professionally negligent.

20. Counsel advised that any action for recovery against the LPFA would encounter substantial legal obstacles, both in terms of a contractual claim and in terms of a claim based on professional negligence. Even if the Authority were to establish a breach, unless the Authority brings and succeeds in any actions against the pensioners, the LPFA is likely to argue that the Authority has not established that the monies are not recoverable from the pensioners and therefore it is unable to establish that it has suffered loss as a result of the LPFA's breach of contract/duty of care and/or to argue that the Authority has failed to mitigate its loss by trying to recover against the pensioners. Counsel has therefore advised against taking action against the LPFA.

21. The Audit Commission has published data on its success in identifying incorrect payments being made by public bodies through the National Fraud Initiatives. Many other Fire and Police Authorities have identified pensions being overpaid because of the problem of maintaining details of benefits in payment. It is not known how individual Authorities have dealt with recovery of overpayments. However it is understood that these have not resulted in any action against the pensions administrators as this is usually 'in-house', that is provided either by the authority itself or by a lead council.

22. It should also be noted that until the DWP started exchanging data, reliance has been solely on pensioners updating pension authorities of amounts in payment. There has also often been confusion which benefits relate to a Fire Brigade injury pension and whether an increase in benefit would affect the injury pension in payment.

23. It is therefore recommended that:-

    a) No legal action is taken against the LPFA on these overpayments,

    b) A starting position on all injury pensions and benefits in payment is agreed and under the existing contract the LPFA will be held liable for any future overpayments that occur on these pensions if they are not recovered from the pensioner,

c) Instructions will be issued to the contractor that benefits in payment will automatically be up rated by the announced government percentage increase in benefits annually each April so that reliance on pensioners to notify increases will be removed. Pensioners will still be reminded to check deductions being made and to notify the LPFA if a benefit is stopped or changes. The NFI exercise will then be used biannually to carry out a complete audit.

Contract management and remedial action

24. LPFA has provided pension administration services to the London Fire Brigade for many years including during the period prior to its inception as the LFCDA when the LPFA was an in- house service as part of the Greater London Council. Officers have been unable to locate any contract details covering the early years following the establishment of the LFCDA. The current service is provided under the contract let following a competitive tender process in 2008. That contract made a number of improvements in relation to this specific issue, including that a review is to be undertaken annually, in writing with each pensioner to verify their benefit entitlements. It is clear from the analysis of the overpayments that many of the incorrect injury pension payments occurred prior to detailed contractual arrangements being in place and case management has improved since then. The contract includes a method statement detailing how the LPFA will gather the information on the relevant state benefits, what it will do in the event that pensioners do not provide consent for the relevant checks to be made with DWP, and how it will ensure that changes are picked up and the appropriate alterations made to the award payable.

25. Overall the contract is clear on LPFA's responsibilities and the penalties that they will face if they do not comply with the contractual requirements. This is reinforced through formal contract management arrangements including regular meetings between LFEPA and LPFA to review performance.

26. The LPFA's procedures have improved under the current contract. No injury award cases are now processed until all information required has been received. The details are checked, and pensioners are reminded that they must keep the LPFA informed of any changes in benefits received. This message is reinforced each year in the Spring Newsletter and by targeted reminders during LIFE (exercise to ensure all widows or pensioners living abroad are still entitled to a pension) or NFI exercises.

27. LFEPA's Internal Audit annual plan will include an annual check on LPFA records with a particular focus on injury pensions and applicable abatements. This will provide further assurance and enable future NFI exercises to be undertaken without the need for additional resources or increased contract costs. The Audit Commission has been informed of this exercise and has been advised of Counsel's advice and the extent of the proposed write offs. The Commission is aware of the long timescales involved in gathering individual data from pensioners and the DWP and have been supportive of the work undertaken by the Authority and LPFA to ensure all pensions are paid correctly. They have also been informed of the steps taken to ensure that procedures within the LPFA and Authority going forward have been strengthened.

28. Arrangements for managing the service will be strengthened. The new procedures with the LPFA are designed to cover any planned and future changes to benefits. There will be a requirement for state benefits that need to be deducted from injury awards to be checked annually by the pensions administrator against the database now developed for LFEPA. All relevant state benefits will also be automatically uprated each April when the Government increases benefits so that reliance on pensioners

to notify increases will be removed.

Future relationship with the LPFA

29. The LPFA administers admission, membership and benefits for the Firefighters' Pension Scheme 1992 and the New Firefighters' Pension Scheme 2006. There are currently 5582 active members of these schemes. It also provides pension payroll services for 6789 pensioners and 1181 dependents. The LPFA generally provides a good service on the general running of these aspects of the contracted service.

30. They also provide support on the effect of changes to scheme rules that are implemented by CLG and on consequences of changes to taxation that Government legislation introduces. The unprecedented number of changes to Scheme rules and the complexity of some individual tax positions of officers in recent years has caused some problems for the Authority in obtaining timely advice from the LPFA.

31. The current contract for the administration of the Firefighters Pension Scheme with the LPFA expires in April 2013. There is very little experience outside of Fire Authorities or lead Local Authorities in providing administration services for firefighter pensions and therefore no established private sector market for this. Transferring the contract to a new provider who does not have experience of administering fire pensions will be difficult and is likely to require significant management resources to ensure this vital service meets or betters current standards. It is also likely that a further new Firefighters' Pension Scheme will be introduced in 2015 which will require significant input from the pension administrator.

32. LPFA has approached officers to discuss shared services arrangements for the provision of pensions administration, which the Authority could enter into under S401A of the GLA Act 1999. LFEPA officers have advised that this would only be an option if it could be shown that this approach would reduce the cost, and that there would be sufficient controls in place to ensure the administrative errors outlined in this report did not take place in the future. It is intended that options for the provision of pensions administration be the subject of a report to the Resources Committee in September 2012.

Head of Legal and Democratic Services comments

33. The Head of Legal and Democratic Services endorses Counsel's advice. A decision to write off the overpayments would be consistent with the Authority's fiduciary duties. Actions to recover the overpayments would face very difficult legal hurdles and are likely to be very costly. In addition, the Authority could spend considerably more in legal fees than in fact it was able to recover.

Director of Finance and Contractual Services comments

34. As noted, the cost of underpayments of £6,116k has been contained within the overall underspend in 2010/11 and 2011/12. This is after the application of a provision made in the 2010/11 accounts of £2,700k to meet the underpayments paid out in the current financial year as reported to the Finance and Personnel Committee in July 2011 (FEP 1766), and an additional provision of £750k, allowed for in 2011/12, to meet any further underpayments identified in finalising the 29 cases that remain outstanding.

35. It is proposed that the Resources Committee is asked to approve the write off of overpaid injury pensions that are time-barred at a sum of £2,369k. As the overpayments have already been paid out over several years, there will be no financial impact on the Authority's revenue account or balance sheet.

Sustainability Implications

36. There are no direct sustainability implications associated with the contents of this report.

Staff Side Consultations Undertaken

37. No staff side consultation has been undertaken.

Equalities Implications

38. The report is concerned with injury award pension payments and therefore impacts on individuals who are defined in the 2010 Equality Act as having 'protected characteristics'. The equality impact of any decision should be documented to demonstrate that account has been taken of this.

List of Appendices to this report: there are no appendices to this report	
LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985	
List of background documents 1. FEP 1109/X Firefighters Pension Scheme Administration - Acceptance of Tender	
Proper officer	Director of Finance and Contractual Services
Contact officer Telephone Email	Alison Ross 0208 555 1200 Ext. 31376 alison.ross@london-fire.gov.uk