

Hampshire Fire and Rescue Authority

Human Resources Committee 21st November 2013 Item:

THE RE-EMPLOYMENT OF GREY BOOK EMPLOYEES IN THE FIREFIGHTERS PENSIONS SCHEME AND GREEN BOOK EMPLOYEES IN THE LOCAL GOVERNMENT PENSION SCHEME FOLLOWING RETIREMENT

Report by the Chief Officer

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1 Summary

- 1.1 On 1 December 2006 the Service Management Team (SMT) and the Hampshire Fire and Rescue Authority (HFRA) Human Resources (HR) Committee agreed that eligible employees conditioned under national terms and conditions of employment for firefighters (termed the Grey Book), may request to commute their pension lump sum and, following a break in service, be re-employed in their existing role. On 20 April 2007, the policy was extended to all other eligible staff in the Service who were conditioned under separate terms and conditions of employment (terms the Green Book).
- 1.2 Facing funding and budget constraints as a result of the Comprehensive Spending Review (CSR), Hampshire Fire and Rescue Service (HFRS) undertook a review of the existing policy (as authorised by the HFRA (HR) Committee on 12th July 2011) with a view to considering the validity and form of any re-employment policy for HFRS into the future. A temporary freeze on further re-employment was put in place at that time pending any outcomes from this review.
- 1.3 The review and a report were duly completed and presented to the HFRA (HR) Committee on 10th November 2011. In accord with the report recommendations it was resolved at this meeting that the Re-Employment Policy be removed at that time and that a date in late Summer/Autumn 2013 be noted as a potential first point from which the requirement for any new policy could be revisited.

2 Recommendation

- 2.1 That the Human Resources Committee considers this report and on the basis of the information and risks identified does not reinstate a re-employment policy.
- 2.2 If recommendation 2.1 above is agreed, a period of 24 months is the minimum time required before the policy is reviewed, unless a significant event requires an earlier review.

- 2.3 That the Human Resources Committee recommends to the HFRA that the Pay Policy Statement be updated to reflect the decision on re-employment and all other material factors relating to pay.

3 Introduction and background

- 3.1 Prior to 6 April 2006, tax legislation required any payments received from pension schemes as a lump sum payment to be paid as non-taxable if the employee actually retired. The advice given from Her Majesty's Revenue and Customs (HMRC) was that if employment was then taken up which utilised the skills from their previous employment (under which a pension was paid) then to all intents and purposes they were not 'retired' and as such could become subject to penalties over and above normal taxation rates.
- 3.2 From 6 April 2006, under the Tax Simplification Rules, employees were able to receive their lump sum from the pension scheme and could take up similar employment without incurring any penalties. In order to receive the lump sum payment the employee must retire from their present post, which requires a clear break in service. If following this retirement the employee is re-employed, their monthly pension payment is abated, either in part or in whole, whilst they are in receipt of a salary payment if this takes their earnings above their pre-retirement HFRS earnings.
- 3.3 Following recommendations made by SMT on 10th November 2011, the Hampshire Fire and Rescue Authority (HFRA) Human Resources (HR) Committee ratified the removal the current re-employment policy with immediate effect from that date. It was further resolved that a date in late Summer/Autumn 2013 be noted as a potential first point from which the requirement for any new policy could be revisited and any changes in the situation, as described in Policy Review Report, be considered. This report has been prepared to assist in the consideration of this matter.

4 Advantages

- 4.1 In principle there are some clear advantages to allowing re-employment. Whether these are actually advantageous at any particular point in time can be very subjective and is always contingent on the primary goals, objectives and pressures on a particular organisation at that time.
- 4.2 A re-employment policy would act as an excellent staff retention tool as was demonstrated when this facility was available previously. It assists organisational stability, at least in the short term, as knowledge and experience can be retained within the organisation. Allowing re-employment has the potential to reduce training and recruitment costs when compared to bringing in fresh talent with little or no initial knowledge and experience. Section 9, People Impact Assessment below, provides further information.

5 Case Law

- 5.1 A risk to the Service and more significantly to staff has been identified in a number of recent cases relating to the lack of validity Courts have attributed to the break in service. Tax law states that there must be a break of at least one month to establish a break in service; however these new cases are casting doubt on the legitimacy of this break in situations where future employment with the same employer has been agreed prior to the break in service. At worst the 'retirement' could be seen as invalid and if continuity of service were to be found, potentially resulting in significant tax implications on the pension lump sum paid out prior to re-employment.
- 5.2 Previous HFRS re-employment was based on the details of a new contract of employment being agreed prior to the break in service occurring. Legal advice is that organisations need to be careful when considering whether termination of one employment contract followed by re-employment breaks continuity. The thrust of the Courts' findings in these cases has been: "The promise of a job in the future may be enough for continuity of employment to exist." (Reported in People Management Magazine Dec-2012). Greater detail of some relevant cases has been included in this report at Appendix A.

6 Staff Turnover

- 6.1 The Chartered Institute of Personnel and Development (CIPD) 'Human Capital checklist for the UK' Reports in 2011 and 2012 indicated average UK staff turnover rates are in the range of 12-16% per annum. HFRS turnover rates for these years for whole-time staff were only 2.7% and 5.0% respectively. Most organisations believe that some reasonable amount of natural staff turnover is necessary to prevent a lack of motivation setting in and also to inject a company with fresh blood and new ideas. The approach HFRS has had in recent times has been one of having a diverse workforce that reflects our community.

7 Supporting our corporate aims and objectives

- 7.1 Whilst the policy was reviewed annually in the past to ensure no detrimental impact on the Service's aim of achieving a more diverse workforce, the reintroduction of a re-employment policy has potential to impact on several HFRS Corporate Aims, Objectives and core values.
- 7.2 Current and any future staff review savings could potentially be adversely affected by the reinstatement of this policy. Any policy encouraging staff retention as successfully as the re-employment policy has done in the past will inevitably reduce natural staff turnover.
- 7.3 It could be viewed as wholly incompatible to be trying to reduce staff numbers,

with the possibility of invoking voluntary and compulsory redundancies whilst at the same time reinstating a policy that actively encourages long-term retention. The lack of recruitment enabling 'new blood' to enter the workforce could have long term implications for HFRS, particularly as it is currently four years since any significant external recruitment activity was undertaken, and even then the ensuing course comprised just twelve trainees.

8 Risk analysis

8.1 At the point of consideration of this matter by the Service Management Team, our internal reports indicate that we had 34 whole-time duty system (WDS) staff who could elect to retire and re-engage if this became an option. This would have the effect of stopping our current recruitment plans which are as follows:

- those to be offered a move into WDS from RDS. Initially 7 posts followed by a further 7 as required to fill vacancies prior to external recruitment process have been completed (see below).
- external WDS recruitment for an estimated at 12 posts.
- some hard to fill posts may need to be filled from external sources.

If a policy were re-introduced and the level of uptake was almost 100% as before, there is clearly potential for proper external WDS recruitment to be pushed back even further and the introduction of new employees bringing a fresh perspective further delayed.

8.2 Within the next five years 158 whole-time duty system staff in the (Old) Fire-fighters Pension Scheme will have achieved 25 years service (equalling 30 yrs. for pension purposes), and be 50 years of age or over. Within the next ten years this figure rises to 270. These staff would potentially all be eligible for re-employment if a policy were reinstated. See Appendix B. Current staff in reemployed positions are summarised at Appendix C.

8.3 As mentioned above, the main legal risk is for staff in terms of the tax status of their lump sums. If the re-introduction of a new policy were to be considered it is strongly advised that it should contain a clause excluding HFRS from any latent or contingent (tax) liability arising from any interpretation or change in tax treatment required by HMRC. A disclaimer should be incorporated in any new re-employment documentation that required an employee signature to that effect.

8.4 We have a small number of individuals in a related issue who are potentially at risk of a significant tax charge. The Service has exceptionally agreed to underwrite any net cost arising to these individuals because of the manner in which their particular situation has arisen. If a re-employment policy were to be reintroduced HFRS should be clear with any staff re-employed that the risk and any resulting tax liability lay exclusively with them, and will not be considered by HFRS in the future.

8.5 HFRA is required to publish an annual Pay Policy Statement under section 38(1)

of the Localism Act 2011. The policy on re-engagement is an important aspect of that policy and should be reflected clearly in the published statement. The decision made by the HR Committee resulting from this paper should therefore be reflected in that statement and the published statement amended accordingly. The Pay Policy Statement is published on the external web site and is accessible to the public. Changes to this policy and other material factors affecting pay, should be reflected in the published statement. The HR Director is delegated the responsibility to review and maintain the Pay Policy Statement to ensure on-going compliance with the law on behalf of the HR Committee. Material changes to staff pay awarded under national terms and conditions of service that affect the accuracy of the Pay Policy Statement are required to be amended accordingly. Failure to publish and maintain the statement would be a breach of the Act.

9 People Impact Assessment

- 9.1 Reinstating a policy that allows re-employment could be a barrier to HFRS in its long term aim to increase the diversity of the workforce, and in particular could have an adverse impact on recruitment opportunities for the wider community.
- 9.2 Reinstating a policy that allows re-employment could mean we are less likely to achieve any required reductions in our workforce via natural turn-over which at this time is on the low side of what is considered to be a healthy turn-over rate.
- 9.3 Retirement and re-employment is attractive to pension scheme members because it gives them a tax free lump sum through commutation, whilst allowing them to remain in employment in the same or similar role. Potential positive financial impacts are that it could result in increased movement from the FPS to the NFPS or LGPS where employer contributions are lower.
- 9.4 While the re-employment of experienced staff to maintain the levels of experience and knowledge appears to be a benefit to the Service, the need to do so could be seen as a symptom of the failure of the Service to plan and prepare for the natural turn-over of staff, ensuring we have the right skills at the right time to support the development of the Service in the future. If this process was properly managed there would be no need to re-employ retirees, as their replacements would be trained and ready to take over.
- 9.5 If a policy were to be reinstated HFRS could retain 'expertise' that would be lost if individuals were to retire. The Service invests substantially into many specific skill sets, often in disciplines that are not easy to recruit or retain (e.g. Technical Fire Safety). It could be argued that to gain the maximum benefit of that investment, retaining this knowledge and experience for as long as reasonably possibly would be economically judicious. This may also result in reduced recruitment and training costs for particular roles.
- 9.6 Direct re-employment without advertising a vacancy could be seen as not openly recruiting. However, if the Service did not allow re-employment, any eligible employees could remain in work but without access to their pension lump sum. If this was the case, eligible employees could equally argue that they are being penalised for this, or discriminated against on the grounds of age as they were employed when the workforce was not so diverse.

- 9.7 Within the FPS, to be eligible for retirement employees must be aged 50 or over with at least 25 years reckonable service. Any contributions made after reaching the service threshold but before meeting the age criterion do not offer any additional financial benefit. This could be considered discriminatory on the grounds of age. However, this is not something that HFRS can influence, it is a stipulation of the pension scheme, and therefore any risk of age discrimination is not likely to be carried by HFRS. The current arrangements of the pension scheme are being challenged nationally.

10 Resource implications

10.1 Physical Resources

There is no impact on physical resources. Arguably, there is a cost saving as Grey Book employees who are re-employed would retain their existing Personal Protective Equipment (PPE), rather than having new PPE issued for new employees. In addition, there would be a cost saving on training for the same reason; employees who are re-employed would not require the same level of training as a new operational employee.

10.2 Financial Implications

- 10.2.1 The risk to staff in terms of the tax status of the lump sum should HMRC apply a Court decision that no break of service was recognised.
- 10.2.2 An overall implication to HFRS is that individuals with the required length of service to take re-employment are likely to be paid at the highest level in their roles. Where recruitment was necessary following retirement, any employment offered would initially be based on a lower salary as a starting point with pension contributions being commensurately less.
- 10.2.3 If HFRS continued with its policy of not allowing re-employment, whilst it is likely that some individuals would continue in their employment regardless, others would inevitably leave in order to access their lump sum and pension. Employer contributions would cease, and no further entitlement to join the LGPS or NFPS would be a consideration.

11 Conclusion

- 11.1 Since the original decision to implement a policy to offer re-employment was taken the situation that the Service finds itself in has drastically changed in a way that could not have been reasonably foreseeable. There have been finely balanced arguments as to whether retain or remove the policy in the past. These resulted in 2011 with the removal of the policy. However, the critical financial drivers that now face us, together with the new legal risks identified, make the reinstatement of a policy an avoidable additional risk. The recommendation made reflects that imperative whilst leaving open the option for a reconsideration of the policy by future leaders when the situation may be more conducive. The Authority's Pay Policy Statement should reflect the decision on the policy for re-engagement and amend it accordingly along with other material factors relating to pay.

12 Background papers

- 12.1 The following documents disclose the facts or matters on which this report, or an important part of it, is based and has been relied upon to a material extent in the preparation of the report:

Hampshire Fire and Rescue Authority, Human Resources Committee Paper dated 30 January 2013 entitled Pay Policy Statement

Note: The list excludes: (1) published works; and (2) documents that disclose exempt or confidential information defined in the Act.

Appendix A

Cases finding Continuity of Service

Welton v Deluxe Retail Ltd [2012] The Employment Appeal Tribunal (EAT) agreed that where any absence from work was due to a temporary cessation in work, this would not break continuity. This judgment suggests that if employees are offered new work, they are governed by the terms of the contract from the date of acceptance. It is important to note that, if there has not been a full week between ending work and being offered new work, then continuity of service will not be broken.

Previous HFRS re-employment was based on a new contract of employment being agreed prior to the break in service occurring. Legal advice is that organisations need to be careful when considering whether termination of one employment contract followed by re-employment breaks continuity. "The promise of a job in the future may be enough for continuity of employment to exist." (reported in People Management Magazine Dec-2012)

Hussain v Acorn Independent College [2010] In this case the gap in employment occurred because of the school summer holidays, which is typical in the education sector. However, it should be noted that any short and temporary gap in work might result in the continuity of employment continuing.

Tongue Hotel Co Ltd v Mackay [1983] The Employment Appeal Tribunal ruled that when Mackay's contract came to an end each year, both parties expected that she would return to work again when the hotel opened for the following summer season. There was in effect an implied mutual promise of future performance. The consequence of this was that the employee's employment was regarded as continuous from the time she began working for the hotel.

Appendix B

Recruitment figures below are actuals and current best estimates

Staff Numbers	Mid May 2013	By 2018	By 2023
Eligible to re-engage	34	158	270
Planned Recruitment	In progress	Next six months	2014/15
Transfer into WDS from RDS	7	7	
Transfers In (from other FRS)	To be determined		
Full WDS recruitment			12

Appendix C

Current staff in re-employed positions

Staff who have opted for re-employment in the past currently occupy 33 posts ranging from fire-fighter to senior ranks. The current average length of service for these staff is 3.7 years with extremes as indicated in table below:

Current staff in re-employed positions	33
Average length of added Service	3.7yrs
Minimum length of added Service	1.9yrs
Maximum length of added Service	5.8yrs