

**Reason for Urgency: To reduce the financial impact on the Fire and Rescue Authority and avoid financial penalties being imposed on the Authority by HMRC**

**SOUTH WALES FIRE & RESCUE AUTHORITY**

AGENDA ITEM NO

FINANCE, AUDIT & PERFORMANCE  
MANAGEMENT COMMITTEE

11 MAY 2015

REPORT OF THE DIRECTOR PEOPLE SERVICES

**PROTECTED PENSION AGE: FIRE AUTHORITY LIABILITY**

**SUMMARY**

The report summarises the legal and financial liability of the Authority in relation to HMRC tax rules in respect of protected pension ages for three individuals previously employed as wholetime staff within the Service

**RECOMMENDATION**

Members decision on which option detailed in paragraph 2.4 of the report that they wish to pursue.

**1. BACKGROUND**

- 1.1 Fire & Service became aware of an emerging issue in December 2013. The issue resulted from the introduction of specific clauses within the Finance Act 2004, which came into effect in April 2010. The matter was reported to the HR & Equality Committee and regular updates have been provided during the whole time period.
- 1.2 The particular clause in the Finance Act dealt with the minimum age at which police pension scheme members can retire, other than on ill health grounds. The retirement age rose from 50 to 55. Within the legislation certain protections were put in place to ensure that the rights of current members of the Firefighters' Pension Scheme before that age in certain circumstances were protected. This meant that there would be a group of members whose rights to retire before they reached 55 were protected and they could retire at 50.
- 1.3 However, this protection could be 'lost' under certain circumstances. If the protection was lost, then the pension payments being made would be considered as being "unauthorised" under the tax legislation and would be subject to significant penalty payments. Once the protection has been lost it cannot be regained.
- 1.4 In effect, where a regular firefighter retired from Wholetime, then took their pension and lump sum (1992 Scheme) and continued in employment as a Retained firefighter HMRC have determined that they

will have breached the PPA rules and this generates up to three tax charges.

- The unauthorised payments charge - An income tax charge at a rate of 40%, based on the total value of the unauthorised payment, their lump sum and their annual pension.
- The unauthorised payments surcharge - Where unauthorised payments go above a set amount in a set period an additional income tax charge at a rate of 15% will be due, based on the value of the unauthorised payment
- The scheme sanction charge - An income tax charge on the scheme administrator in respect of certain unauthorised payments in addition to the other two tax charges. The tax is due at a rate of 40%, based on the value of the payment. However, the rate may be reduced to as low as 15% where the unauthorised payments charge has been paid.

1.5 The punitive charges would apply for every year of employment until the person reached 55. Furthermore, if a retiree's 'lump sum' payment was paid during this four week period, it would also be subject to the penalty charges. Initially the Service had 4 personnel who had been captured by these changes. Over the past 15 month this figure has been reduced as HMRC firstly accepted a case presented by the Service which reduced the number of people affected to three.

1.6 There were complexities about the notification of information relating to the rules around the new legislation. A number of Fire & Rescue have been affected by this issue, no Service appeared to have been made aware of these significant changes until HMRC began to write to them in November 2013.

1.7 A significant amount of work took place to seek clarity over responsibility for the issue and agree nationally and locally the most appropriate course of action. Financial / tax advice was secured from Price Waterhouse Cooper and this was supplemented through the engagement of Queen's Counsel. The aim of the review was to assess the liability of the Fire Authority in this matter. Clarity was sought on:

- The specific definition of 'employment' and how this relates to the legal status of a police officer
- The term 'sponsoring employer' and whether this should have been the Fire Authority
- Legal clarification and interpretation of the new regulations and their consequences
- Scope of the issue
- The potential liability of individuals and the organisation

- The ‘vires’ (or legal ability) to compromise a potential claim of an individual caught by this issue, without adverse tax consequences
  - The status of the RDS employment contract.
- 1.8 During the period of investigation it was made very clear by the individuals affected that they considered that the Authority had fallen short of its duty of care, that they were in this position through no fault of their own and were taking legal advice in order to pursue a legal claim against the Authority.
- 1.9 Specific legal advice was sought on the liability of the Authority in this matter, and early January 2015 the ACO People Services, ACFO Operations and PWC representatives met with Queen’s Counsel to receive the legal advice and agree a way forward.
- 1.10 In totality the advice received concluded that the Authority is not liable for the financial penalties for these individuals. However, it has been identified that some Fire Authorities have not resisted a claim arise from the individuals arising from their continuous employment in a RDS role and their loss of PPA rather they have negotiated a settlement rather than defend the action.
- 1.11 HMRC has responded to the “event” report and the associated Queen’s Counsel advice. HM Revenue & Customs have determined that the “breaches remain as being substantiated” and that “unauthorised payments” have taken place. It is HMRC’s stated intention to initiate action to recover the tax charge on the payments.
- 1.12 The position was further complicated by HMRC rules around grossing up. This means that the Authority would need to present all the evidence of the submission of the claim and its negotiated settlement to satisfy the HMRC that the Authority was in fact settling a “legal claim”. The HMRC would otherwise work on the basis that any payments made to individuals was in fact income and they would tax that amount also; effectively grossing up the amount on which a penalty charge would need to be paid.

## **2. FINANCIAL COMMENTS**

- 2.1 The total HMRC charge had been estimated as being in the region of £494,000, based on the potential maximum charges.
- 2.2 Over the past 15 month this figure has been reduced as HMRC firstly accepted a case presented by the Service which reduced the number of people affected to three. They have also agreed to restrict scheme sanction charge period solely to the post “A” day period commencing in 2006, rather than apply it to the whole of the individuals’ service resulting in a total charge to the employer of between £7,900 to £21,100, depending on the individuals’ tax charge being settled.

- 2.3 The three remaining individuals currently have a cumulative tax charge for the 2013/14 tax year of £120,594.
- 2.4 In essence it is for the Fire Authority to choose whether it “wishes” to pay the individuals’ tax charges and the scheme sanction charges totalling £188,791, or to only pay the higher scheme sanction charge of £21,100 and to allow the three individuals to pay their own tax charge.
- 2.5 HMRC Inspectors have agreed not to commence proceeding to recover any of the tax charges until the Authority’s decision is relayed to them. However, they have identified that any delay in payment of the tax charges incurs a 3% interest charge.

### 3.0 RECOMMENDATION

- 3.1 Members decision on which option detailed in paragraph 2.4 of the report that they wish to pursue

| <b>Contact Officer:</b>                    | <b>Background Papers:</b> |
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| Phil Haynes<br>Director of People Services | None                      |