FIRE BRIGADES UNION

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Dear Brother/Sister

Pensions Updates

Members are aware that the Fire Brigades Union pursued and was successful in challenging elements of the imposed changes to firefighter pensions. As a consequence there are a number of consequential Pensions related matters currently being pursued by the Union on behalf of our members. This circular gives a comprehensive update on several of those matters. I appreciate that it is a lengthy circular but it is important that members have the full details available to them.

This circular contains updates on:

1. Injury to Feelings claims
2. Immediate Detriment claims
3. RDS to Wholetime aggregation
4. 'The Pensions Trap'

Injury to Feelings (ITF) Claims

As has already been reported to members the FBU were due to go to trial in October 2022 to deal with 16 "benchmark" claims for injury to feelings (ITF), the idea being that if we knew the ITF award in these 16 cases, their benchmark could be used to settle all of the other claims.

In the event, we did not need to go to a hearing. Two days before it was due to commence the Government Legal Department (GLD) made an offer to settle at a level that Andrew Short KC (representing the FBU) and Ivan Walker (Walkers Solicitors) were able to recommend. The October hearing has been postponed on the understanding that the tariffs proposed will be used to settle all claims.

The ITF claims have not settled in formal terms: the tariff rates have been agreed as foreseen by the benchmarking process. The formal settlement will be achieved by agreeing and then acting on a formal written agreement: it is not possible to settle a Tribunal claim except on the basis of a formal settlement agreement signed off by a solicitor, or (more typically) a "COT3" agreement, nominally negotiated with the assistance of ACAS.

It is important to note that the outline agreement reached so far applies to the claimants for whom claims were filed in 2015, and at the moment it only applies to firefighters employed by FRAs in England and Wales.

We filed a second round of claims when the on-line survey was reopened in 2020. Those claims have not yet been settled. The GLD has offered to settle these second-round claims at a lower level, their argument being that if the claimants did not join in the proceedings at the first opportunity, and did so only after the Government had announced that it would provide a remedy for everyone, they cannot have been that upset – they were just jumping onto a bandwagon. Our legal team have told GLD that we don't accept that, but the important point for present purposes is that we do not yet have the outline of a settlement for this second wave.

The claims for firefighters in Scotland and Northern Ireland remain stayed, pending the resolution of the claims in England and Wales. The reason is inter-governmental financing. The Scottish and Northern Irish devolved administrations will settle on the same terms if the Westminster Government pays. Our legal team are aware that an agreement in principle is in place that Westminster will pay: it will be triggered when the devolved administrations are able to sign off on a COT3, and they are waiting for the English and Welsh COT3s to be signed off.

We have applied for the stay in the Scottish claims to be lifted. Provided that the COT3 is agreed quickly, and provided that the Scottish Fire and Rescue Service commits formally to adopt the same terms, lifting the stay will not in fact be necessary.

The settlement process

If the principles for settlement have been agreed, the process for putting the settlement in train are administratively complex.

(a) Who makes the payments?

A total of about 5,300 claims are covered by the agreement reached in October. Making 5,300 individual payments will be a complicated process.

At the outset there was a question mark whether the FRAs would have the administrative resources to make the payments. Walkers Solicitors made arrangements with a third party administrator which could conduct the task. It is a company that specialises in this type of work: the defendant in group litigation makes a block payment to the third party administrator, and they then distribute it by checking identities and making payments to each claimant. The FRAs and GLD said they would like to consider using them, but the FRAs or the Government would have to pay for this process.

The FRAs then agreed to undertake the work themselves. The FRAs and GLD agreed between themselves that this is what the FRAs would do.

(b) The COT3 agreement

Now that that question has been resolved the COT3 agreement can be sorted out. A draft has been sent to the GLD and FRAs to consider. It should be uncontroversial. The FBU believe that the length of time that the FRAs are allowed to take to make individual payments once they have individual consents should be limited to 28 days, we do not have the agreement of the FRAs or GLD on that timeframe yet.

The defendants not only have to check each claimant's identity and check that they are in fact a claimant, they also have to get authority to make the payments. Since the money will come from the Home Office, and since it will come to millions of pounds in aggregate, authority to pay will need to be given by civil servants and politicians.

(c) Data handling

The COT3 will list, in a schedule, all of the individual claims which are settled. They are likely to be settled in batches: individual consents are required from each claimant, and some members will be quicker than others in providing that consent. If previous precedents are followed, Walkers Solicitors will write to each member (claimant) to explain what the COT3 agreement does and ask for consent; the consents will be sent to Walkers Solicitors; and Walkers Solicitors will then sign the COT3s for each batch.

The scale of the task should not be underestimated. Sending individual letters to members by email is relatively straightforward. But it does depend on having a complete and accurate list of the claimants and their email addresses. We collected email addresses when the survey was conducted in 2015, but it is surprising how many people change their email address from time to time. There are bound to be many cases where we will have to contact members to get an update.

As members can see there is a lot of work being undertaken to resolve the ITF payments to members. Members are asked to **please be patient** as there is still a considerable amount of work that needs to be undertaken before any payments can be made, the data cleansing and assembling work is being undertaken but it is a time consuming process.

Am I on list/ did I submit a claim in 2015 or 2020?

Following discussion with our legal team (and having successfully resolved the GDPR data protection issue) we will shortly be in a position to be able to let members know whether or not they submitted a claim in either 2015 or 2020, a question members have frequently asked.

An FBU email address will be set up in order for members to email asking that question, the spreadsheet of claims will be cross referenced and members will receive a response. **Please do not email this question in yet.** Once the email address is set up and our legal team have provided the spreadsheet of registered claimants a separate All Members circular will be issued advising members how to make their enquiry and what information that enquiry will need. The email address that members should contact will be provided in the circular.

Immediate Detriment

Background

"Immediate detriment" refers to members who are suffering a financial loss because they were treated as members of the 2015 Scheme when they left the service, and should have been treated as members of the FPS. They have suffered a loss because they should be receiving a pension, or a higher pension, under the rules of the FPS. It is clear, following the *Sargeant* litigation, that they were in fact still members of the FPS when they left, or were certainly entitled to be treated as such. A Tribunal declaration has been made to that effect.

The typical immediate detriment cases are:

1. Members who retired early on the grounds of ill-health;

2. Members who should have retired early on the grounds of ill-health but who were not granted a pension because, although they would have qualified for ill-health retirement (IHR) under the rules of the FPS they do not qualify under the rules of the 2015 Scheme; and

3. Members who should have been permitted to retire with a full FPS pension before reaching the age of 60 because the sum of their reckonable service and age was equal to or exceeds 75 – so-called "rule of 75" cases.

As members are aware from previous circulars, the FBU negotiated a memorandum of understanding with the Local Government Association (LGA) which would require FRAs to process immediate detriment cases now, without waiting for remedying legislation to be laid before Parliament and then acted upon. Most FRAs are not giving effect to the memorandum of understanding (which is not legally binding) or are doing so only in part.

The problem, in a word, is tax. The FPS and the 2015 Scheme are separate pension schemes for tax purposes. Guidance issued by the Treasury has scared most FRAs from giving effect to the memorandum of understanding. The Treasury wants to avoid the tax complexities.

An alternative

The FBU and the LGA have continued to work on the memorandum of understanding (MoU) in an attempt to resolve the issues of tax. We have made a proposal for an alternative MoU which we believe avoids the tax issues that the Treasury is concerned about. We understand that it is something that they have agreed to in a different context.

At the moment, at the Treasury's insistence, we cannot outline how it would work, but if adopted it would provide a good solution for members which could be acted on quickly. Our solicitors have told the FRAs' solicitors and the Government Legal Department that it needs to be agreed before the 28th April 2023, because we have a deadline, from the Tribunal, to reopen the Tribunal claims before then if an agreement is not reached.

The FBU has collated claims for members and court proceedings are ready to be issued for every immediate detriment case, these claims would probably succeed. Three test cases have already been fought and won, and that is what prompted the memorandum of understanding referred to above. Given the numbers involved however, court proceedings would be cumbersome and slow. They would be very expensive for the FRAs which gives them a strong incentive to agree to a memorandum of understanding. Court proceedings could provide a far slower remedy for members than waiting for the new legislation to come into effect. An agreed process provides a quicker result for members, and a less expensive one for the FRAs. That is why a negotiated memorandum of understanding would be a good outcome.

As members can see all options have been explored in order for those suffering immediate detriment to receive the pensions that they are owed. It is of course important that the option that provides the quickest route to resolve this issue for members is pursued, nothing is off the table for the FBU in achieving that objective.

We regret that we cannot provide more details at this stage, but we will do so as soon as we can. Hopefully we will have some good news to report in the near future.

Members who have transferred from RDS to Wholetime employment

Pension benefits for those expected to reach 20 years' combined RDS and Wholetime service before age 55 ('aggregation issues').

Our legal team continue to lodge claims to protect the position of members who transferred from the Retained Duty System to Wholetime and who may benefit from a successful conclusion to the so-called 'aggregation issues'.

This matter relates to members who have transferred from RDS to Wholetime employment specifically the pension benefits for those expected to reach 20 years' combined RDS and whole-time service before age 55 and concerns an issue which potentially affects those who have transferred from RDS to whole-time employment. As was reported separately, the negotiations for the resolution of those claims have been concluded successfully, and a memorandum of understanding has been entered into with the Home Office. However, the issue relating to transfers from RDS to whole-time employment remains to be resolved.

Circular 2022HOC0440MR provides the full detail and can be found here:

https://www.fbu.org.uk/circulars/2022hoc0440mr/members-who-have-transferred-rds-whole-time-employment-pension-benefits

All claims are now being transferred for case management to the Employment Tribunal in Nottingham. This includes the original ET claims from 2000, and the claims we have been lodging since October 2023.

We are now preparing schedules of Claimants to whom the aggregation issue applies and will be continuing dialogue with the Home Office to try to resolve this issue.

The Pensions Trap

Circular 2022HOC0331MR provided an in-depth explanation of what we refer to as 'The Pensions Trap'.

This is a problem for firefighters who have service in the 1992 FPS and in the 2015 Scheme in that whatever choice they make when they reach the age of 50 or 55 they stand to lose out. The example we provided to Home Office is a member who has accrued 25 years' pensionable service in the 1992 Scheme by 31 March 2022.

This member was born, say, in 1977 and joined the fire and rescue service in 1997 at the age of 20. On 31 March 2022 s/he is therefore aged 45, and not yet able to draw his or her 1992 Scheme benefits. Five years later, at the age of 50, s/he can do so. By that stage s/he has accrued five years' membership of the 2015 Scheme. But he or she has a dilemma:

- If he or she draws the 1992 Scheme pension and lump sum at the age of 50, the commutation factor applicable to a 50-year-old will be applied (£24 : £1). But because he or she must leave the service, the five years of 2015 Scheme pension is treated as deferred. It cannot be taken at all at age 50.

- He or she could decide to take the deferred 2015 Scheme pension from age 55 and accept that it will be subject to actuarial reduction. But the reduction would (in England) be a massive 46.6% (this member's State pension age is age 67).

- He or she could continue working until retiring and drawing both pensions at age 55, but (a) the 2015 Scheme pension will be reduced in England by 21.7% and (b) the 1992 Scheme pension has not been paid for five years, and the commutation factor applied will be the factor for a 55 year old (£21.9 : £1).

- If he or she carries on working until age 60, the 15 years' 2015 Scheme pension can be taken without any early retirement reduction. But his or her 1992 Scheme pension is being paid 10 years late without any actuarial uplift, and the commutation factor applicable will be £19.4: £1.

This is grossly unfair. Whichever choice they make, the member has lost tens of thousands of pounds. For example, if the accrued 1992 Scheme pension is worth £15,000 (approximately 30/60ths of a competent firefighter's pay), delaying payment by 10 years represents a loss of £150,000. But unless the regulations are changed this continues to be lawful.

Since the circular was published the FBU has continued to make representation to resolve this issue.

At present the dialogue to resolve this particular matter, and the potential solutions being discussed, have been agreed by those parties (inc the FBU) to be confidential. The reason why they are, at present, agreed to be confidential is in order to enable all parties to bring any proposal to the table without the risk of automatic veto by any party and also to avoid setting any false expectation amongst scheme members should any of the dialogue be reported (before completion and before agreement) to any of the parties' broader organisations.

All FBU Pensions Circulars are available here: https://www.fbu.org.uk/pensions

Yours in unity,

Mark Rowe
National Officer

MR/jr