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Circular: 2023HOC0466MR

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To: All Members

Dear Brother/Sister

‘Second Options Exercise’ Special Members of FPS 2006 (Matthews)

This circular deals with several aspects of the second options exercise:

1. Historical context

Members will be aware of the category of members of the Firefighters’ Pension Scheme 2006 (FPS 2006) known as “special members” who were introduced in 2014, following Matthews v Kent and Medway Towns Fire Authority & others, which allowed retained firefighters employed between 1 July 2000 and 5 April 2006 to join the FPS 2006 with retrospective effect to 1 July 2000.

Following the introduction of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, a claim was made by a number of retained firefighters supported by the Fire Brigades Union that they should receive equal treatment with full-time regular firefighters and thereby be able to access pension benefits under the Firefighters’ Pension Scheme 1992 (FPS 1992). The claim proceeded through the Employment Tribunal and Court of Appeal before judgment was given in the House of Lords in favour of the retained firefighters, and the claim was successful on remission to the Employment Tribunal.

Although retained firefighters have been eligible to join the FPS 2006 since April 2006, the House of Lords judgment paved the way for those who were serving during the period 1 July 2000 to the date on which they elected to join the FPS 2006, to have special provisions. They could not be given backdated membership of FPS 1992 because that scheme is now closed. Consequently FPS 2006 was amended to introduce pension benefits for these “special category” retained firefighters.

A time-limited options exercise took place between 2014 and 2015 to allow eligible individuals to join the FPS 2006. Those who qualified for special membership of FPS 2006 had to make an election to join no later than 30 September 2015.

9 March 2022

More recently, further work took place following the European Court of Justice’s decision in O’Brien v Ministry of Justice concerning fee paid judges in the Judicial Pension Scheme. The judgment held that remedy could extend back before the Part-time Workers Directive was required to be implemented on 7 April 2000. As a binding judgment, that finding applies across all such claims and therefore the UK Government recognised the right applies to retained firefighters’ claims or potential claims.

After an extended period of negotiations on the scope and mechanics of the settlement, a Memorandum of Understanding (MoU) was agreed with the FBU and all parties on 9 March 2022. Remedy for retained firefighters affected by the O'Brien judgment will be provided by way of a second options exercise allowing in-scope individuals the opportunity to purchase pension entitlement as a special member of the FPS 2006.

31 March 2023

On 31 March 2023, the Home Office launched their formal consultation on Retained Firefighters' Pensions: Proposed Changes to the Firefighters' Pension Scheme (England) 2006. This consultation focused on the government's commitment to provide further remedy to retained firefighters who were employed between 7 April 2000 and 5 April 2006 inclusive by providing access to 'special category' membership of the FPS 2006. It contained the proposed amendments to the Firefighters' Pension Scheme (England) Order 2006 and the Firemen's Pension Scheme Order 1992 to achieve this outcome. The consultation document sought views on proposals for achieving this outcome, and whether the proposed amendments achieved the policy intention for all eligible individuals. The FBU responded to the Home Office with an extensive response to the consultation. The consultation closed 9 June 2023.

8 September 2023

On 8 September 2023, the Home Office published their consultation response to the Retained Firefighters' Pensions: Proposed Changes to the Firefighters' Pension Scheme (England) 2006.

The Firefighters' Pension Schemes (England) (Amendment) Order 2023 was then laid in Parliament, here:

<https://www.legislation.gov.uk/ukxi/2023/986/made>

1 October 2023

The regulations will come into force on 1 October 2023.

The Second Options Exercise will be open to all RDS firefighters with service before 1 July 2000 which continued after that date without interruption. RDS firefighters with service which began after 1 July 2000, but before 7 April 2006, will also be able to take part if they were not given the opportunity to take part in the first options exercise.

In other words, eligible RDS firefighters (as above) will be given an opportunity to convert their service before 7 April 2006 to pensionable service (as special membership of the FPS 2006), provided that they pay the contributions that they would have had to pay at the time, and regardless of whether they took part in the First Options Exercise.

The FBU's position is that the MOU provides for those who transferred from RDS to wholetime employment on or before 6 April 2000 to be eligible to participate in the Second Options Exercise. That is **not accepted** by the Home Office and Fire Service employers. Work continues on this.

2. Timeline for second options exercise

The timeframes for the Second Options Exercise are set out in the legislation, and are as follows:

- (i) Fire authorities must use reasonable endeavours to notify by 31 December 2023 those of their current and former RDS firefighters employed between 6 April 2000 and 7 April 2006 who may be entitled to take part in the Second Options Exercise of their ability to do so;
- (ii) authorities must also use reasonable endeavours to notify by 31 December 2023 RDS firefighters who commenced service on or after 1 July 2000, and before 7 April 2006, who the authorities say were given an opportunity to take part in the first options exercise;

(iii) if an individual who commenced service on or after 1 July 2000 wishes to contest a determination that they were given an opportunity to take part in the first options exercise, they will have 28 days from the receipt of the notification under (ii) to give written notice to the authority under the Independent Dispute Resolution Procedure;

(iv) within six months of receiving the notification under (i), eligible individuals will be able to apply to their authority for a statement of the service in respect of which they may be able to pay contributions, and the contributions which would be payable;

(v) if eligible employees have not received the notification under (i), they will have until 30 June 2024 to apply to their authority for the statement of service and contributions referred to at paragraph (iv);

(vi) within three months of receiving an individual's notification under (iv) or (v), the authority must provide a statement setting out the service which may be purchased, and the contributions payable; and

(vii) an individual will have six months from the date of receiving the notification to elect in writing to pay the contributions in respect of the service as set out in the statement. No election can take effect after 31 March 2025.

3. The Aggregation Issue

Despite a significant part of the FBU response to consultation relating to the 'aggregation issue' this has not been addressed in the regulations.

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.

The issue identified is likely to apply in the main to members who transferred from RDS to Wholetime employment before 6 April 2006. But it could also arise for those who transferred from RDS to whole-time employment after that date. **It only applies to RDS members who joined the fire and rescue service before 6 April 2006.**

It relates to the different ways retirement benefits are calculated under the FPS 1992 and the NFPS 2006. Whole-time firefighters were able to join the FPS 1992 until 6 April 2006. RDS firefighters have been able to join the FPS 2006 for employment from 6 April 2006. RDS firefighters who were employed before 6 April 2006 have been able, under the so-called 'first options exercise', to take up 'special category' membership of the NFPS for employment between 1 July 2000 and 6 April 2006. This is sometimes referred to as membership of the "Modified Section" of the NFPS.

Different benefit structures under the FPS and NFPS

Under the terms of the Memorandum of Understanding agreed with the Home Office and employers, the remedy to be provided to all pre 6 April 2006 RDS firefighters under the 'second options exercise' being considered for resolution of the RDS pension claims will be through special category membership of the FPS 2006 for periods of employment *before* 1 July 2000 (and, in some cases, for periods of employment between 1 July 2000 and 6 April 2006).

The differences between the benefit structures of the FPS 1992 and the Modified Section of the FPS 2006 are as follows:

- I. The FPS 1992 nominally has a Normal Retirement Age ('NRA') of 55. In fact, members can take their pension from age 50, provided they have accrued 25 years' pensionable service. This means that the NRA for members is between age 50 and 55 – that is their age after 50 when they reach 25 years' service. The Modified Section of the FPS 2006 has an NRA of 55 for special members;

- II. The Modified Section of the FPS 2006 provides for an accrual rate of 1/45th of pensionable pay per year of pensionable service. The FPS 1992 provides for an ordinary accrual rate of 1/60th of pensionable pay per year of pensionable service and 'fast accrual' after 20 years' pensionable service – i.e. each year of service after 20 years of pensionable service counts as two years of pensionable service, meaning that the annual accrual rate for each year after 20 years' pensionable service is 1/30th. The Modified Section of the FPS 2006 does not provide for fast accrual.

Members who took up Wholetime employment before 6 April 2006 will have joined the FPS for their subsequent whole-time employment. After the first and second options exercises, they will also be members of the Modified Section of the NFPS in respect of their RDS employment.

Those members will have pensions in two different places. But, as matters stand, they wouldn't be able to count their NFPS employment towards entitlements in the FPS to (i) retirement from age 50 (after 25 years' service); and (ii) fast accrual (after 20 years' service). They will therefore be **disadvantaged** in comparison to a member with the same dates of employment, but whose employment is exclusively whole-time.

These issues arise now because of the additional periods of RDS employment which could be counted as pensionable under the second options exercise. Similar issues might also arise for those who took up whole-time employment *after* 6 April 2006 and joined the FPS 2006, but also had periods of RDS service before 2006 (with no break, or a break of no more than six months, between RDS and whole-time employment).

4. Aggregation next steps

The FBU and our legal team continue to meet with the Home Office in order to attempt to resolve this issue. Despite the aggregation issue not being resolved in the regulations the Home Office have committed to further consideration of this matter.

At the most recent Scheme Advisory Board (England) meeting the Home Office responded to questions from the FBU stating that the aggregation issue was not resolved in the regulations as they believed further dialogue was required and that as this dialogue may take some time they did not wish to delay or disrupt the agreed timeframe for the implementation of the second options exercise.

The FBU remain hopeful that the matter can be resolved by dialogue and an amendment to the regulations at a later date. If this dialogue fails we will discuss with our legal team any potential legal route to resolution.

Yours in unity,

A handwritten signature in black ink, appearing to read 'Mark Rowe', with a stylized flourish at the end.

Mark Rowe
National Officer

MR/jr