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Circular: 2025HOC0167MR

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To: **ALL MEMBERS**

Dear Brother / Sister,

Retained Duty System (RDS) Pensions Employment Tribunal Claims

This circular provides a detailed update and information in relation to RDS claims which fall into various categories. It should be noted that both the Fire Brigades Union and Thompsons Solicitors are subject to the legal timeframes detailed by Employment Tribunals and that we have no direct control over these timeframes. It is widely recognised that one of the key reasons for the backlog in scheduling and hearings of Employment Tribunal claims is a shortage of judicial resources. As a result, both claimants and employers, are facing long delays before cases are heard. The Employment Tribunal backlog has risen by 23% in the last year alone with cases requiring over three days of consideration by the Employment Tribunal unable to be scheduled for up to two years.

Introduction

These claims arose out of the denial of access of RDS members to membership of the FPS, and related terms and conditions issues. There was an interim settlement of the pensions aspects in 2015 in the 'First Options Exercise'. There was a further settlement of pensions aspects provided for in the Memorandum of Understanding ('MoU') between Home Office, the LGA and the FBU of 9 March 2022, which gave rise to the 'Second Options Exercise'.

During the negotiation of the MoU, it became apparent that there may be a category of member who would not receive adequate remedy on the second options exercise. In the main, this related to those who had transferred to wholetime and would have pension in both the FPS and the modified section of the NFPS. Further issues also emerged in relation to (i) tax relief on contributions in the First Options Exercise, (ii) pre-7 April 2000 transfers to wholetime; (iii) deceased members; and (v) further tax issues relating principally to backdated pension and lump sum payments in the Second Options exercise. The ongoing work is to resolve these issues and arrange for the withdrawal of claims.

The Original Claims and the First Options Exercise

The FBU originally brought 10,500 claims on behalf of RDS members in 2000. The claims were for less favourable treatment in relation to access to the FPS and certain terms and conditions under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR'). The comparators were wholetime colleagues. Those claims were ultimately successful in the House of Lords, and on remission to the Employment Tribunal in 2007. Settlement of remedy in the terms and conditions aspects was achieved in 2012.

An initial settlement of the pensions aspects was achieved in 2015 through what was known as The First Options Exercise. At the time, the case law indicated that remedies for backdated pension under PTWR could not go back beyond 1 July 2000 (the date by which the UK had to implement the EU Part-Time Workers Directive). Membership of the NFPS was open to all RDS firefighters from 6 April 2006.

The First Options Exercise, which took place in 2015/2016, provided a right for all RDS firefighters with service between 1 July 2000 and 6 April 2006 to buy back their pension in respect of that service. That backdated pension was to be provided in the modified section of the NFPS as opposed to the FPS (which had by then closed).

However, by the time of the First Options Exercise, the O'Brien case was in front of the European Court of Justice on the issue of how far back a Claimant could backdate access to the pension scheme under Part-Time Workers Directive. Final resolution of the FBU claims was therefore stayed pending the determination of the O'Brien case.

The MoU and the Second Options Exercise

The O'Brien case was successful in the CJEU, meaning that successful Claimants in part-time worker discrimination cases were able to backdate pension to the start of their employment (assuming no interruption), provided that they were still employed as at 6 April 2000 (the date the Part-Time Workers Directive came into force).

We therefore entered into negotiations with Government Legal Department (GLD) to agree that individuals should be allowed to backdate their access to the modified section of the NFPS to the start of their employment. That was successful and led to the FBU initiated (and agreed) MoU of 8 March 2022. The MoU provided for a second options exercise to enable individuals to buy back service to the start of their employment. The MoU also recognised that the First Options Exercise should have allowed backdating to 6 April 2000.

The Second Options exercise was open to RDS firefighters with service between 6 April 2000 and 6 April 2006, as long as (in the main) they had uninterrupted pre-1 July 2000 service. This meant that eligible RDS firefighters would be able to buy back more service under the Second Options Exercise, whether they had taken part in the First Options Exercise or not. But firefighters who had only post 1 July 2000 service weren't allowed to take part in the Second Options Exercise because there was no additional benefit beyond what was available in the First Options Exercise. The principle was that they weren't allowed a second opportunity to purchase exactly the same service – unless they could prove that they hadn't been given the opportunity to take part in the First Options Exercise (we know for example that Surrey FRA never implemented the First Options Exercise).

The MoU and the Second Options Exercise provide appropriate remedy and resolution for all of the original FBU claims, except in the case of four limited Exceptional Circumstances, and one reservation.

Exceptional Circumstance 1: (i) ‘Aggregation’

In the First Options Exercise, the period of service which members could buy back was relatively small – a maximum of 1 July 2000 to 6 April 2006. However, in the Second Options Exercise, members could buy back (uninterrupted) service going back to the start of their employment. In many cases this means service going back to the 1970s or 1980s.

The remedy under PTWR is to put the members into the position they would have been in if they hadn’t been treated less favourably. That means, for periods of service prior to 6 April 2006, they should be provided with equivalent benefits to the FPS. But they couldn’t join the FPS by the time of the First Options Exercise because it had closed to new entrants from 6 April 2006. The important differences between the benefit structures for the FPS and the NFPS are as follows:

1. The FPS 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, meaning that the NRA for each individual member is between age 50 and 55. The modified section of the NFPS has an NRA of 55.

2. The NFPS provides for an accrual rate of 1/45 of pensionable pay per year of pensionable service. The FPS provides for an ordinary accrual rate of 1/60 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 1/30. The modified section of the NFPS does not provide for fast accrual.

It therefore became apparent, with the longer periods of service to be bought back under the Second Options Exercise, that there were likely to be some situations where membership of the modified section of the NFPS would not provide a complete remedy for the periods of RDS service where access to any pension scheme had been denied.

The category of member to whom this would most usually apply would be those RDS firefighters who transferred to wholetime without a break in service, and who then accrued at least 20 years’ wholetime equivalent overall service. If they were to be treated in the same way as wholetime members, in respect of their RDS service, having completed 20 years’ wholetime equivalent service subsequently anyway, their accrual rate would have to be in 1/30s. But the modified section of the NFPS only provides for accrual in 1/45s (which, in the ordinary course of event is advantageous to RDS members who do not transfer to wholetime). Instead of holding up the MoU and the ‘Second Options Exercise’, the MoU therefore recognised that this category of claim still required resolution.

Exceptional Circumstance 2: (ii) Tax relief: consequential loss claims

Prior to the signing of the MoU, another issue had arisen from the First Options Exercise.

Members should have got tax relief on the backdated contributions they paid in the First Options Exercise at their marginal rate of income tax, equivalent to what they would have received if they hadn’t been treated less favourably in the first place. It transpired that, in many cases, they had not. This meant that, for the purpose of their claims under PTWR, they were able to claim for consequential loss.

Exceptional Circumstance 3: pre-7 April 2000 transfers to wholetime

The MoU provides for eligibility for the Second Options Exercise for individuals ‘employed’ between 7 April 2000 and 5 April 2006. The group of original clams was not intended to capture those who had transferred to wholetime by 6 April 2000. Equally, the wording of the MoU was not intended to exclude those who had transferred to wholetime before 6 April 2000. Government Legal Department (GLD) has, however, adopted the position that eligibility for the Second Options Exercise is confined to those in RDS service (as opposed to any service) between 6 April 2000 and 6 April 2006.

Outstanding issue 4: (iv) Original Claimants who died after they retired, but before they could take part in the Second Options Exercise.

This is a new discrete outstanding issue that arose after the MoU. That is the situation of the unpaid additional pension attributable to a deceased Claimant's service during the extended limited period, and payable between the date of retirement and death.

To take an example: a Claimant who started employment on the Retained Duty System on 1 April 1990, who retired on 31 March 2014, and who then died on 31 March 2022. If they joined the NFPS from 6 April 2006, and elected to pay contributions in respect of the maximum permitted 'limited period' provided for under the First Options Exercise so as to entitle them to special membership of the NFPS, their pension payable from the date of retirement (31 March 2014) to their date of death (31 March 2022) would have been calculated on the basis of service from 1 July 2000 until 31 March 2014. But they should have been able to take part in the Second Options Exercise.

Home Office committed to providing a remedy – see consultation at:

https://www.gov.uk/government/consultations/amendments-to-the-firefighterspension-scheme-retained-firefighters

That consultation closed on 17 February 2025, the FBU submitted our response.

Reservation: tax issues

We have identified unresolved tax issues, concerning issues such as payment of backdated lump sums and arrears of pension, which are of universal application.

Progress on Exceptional Circumstances categories 1 to 4

The much preferred position is for all of the outstanding issues to be resolved by negotiation rather than having to be resolved by the Employment Tribunal, proceeding to Employment Tribunal will significantly increase the time to resolve these matters. We can't (at this point) tell whether a negotiated route will be possible.

Aggregation claims: Following the MoU in 2022, the FBU issued a circular to our members inviting members with potential aggregation claims (original Claimants and new Claimants) to come forward. 1015 such Claimants have come forward. We have filed new claims (554) for those who were not Original Claimants.

We developed a spreadsheet calculator in conjunction with Thompsons to assess whether Claimants are likely to have been treated less favourably as a result of the aggregation issue. As agreed with GLD, we have provided to them, on a without prejudice basis, details of the Original Claimants (281) and new Claimants (438) who we calculate have been treated less favourably. GLD's response is awaited.

Consequential loss claims: we used a suite of guidance notes and questionnaires to gather information to make consequential loss claims. The only viable claims for consequential loss concern non-availability of tax relief in the 'First Options Exercise'.

Thompsons then developed a spreadsheet calculator to enable us to quantify consequential loss claims. To date, as provided for in the MoU, we have notified GLD of 202 quantified consequential loss claims in England and Wales. The exercise has not yet been undertaken for Scotland and Northern Ireland – which are not covered by the MoU, and where making tax relief available in the First Options Exercise is known to have been slightly different. GLD has said in open correspondence that there are outstanding issues, and that cases will be considered on a 'case by case' basis. No proposal has yet been forthcoming.

Pre-7 April 2000 transfers to wholetime: we understand that GLD will comment further on this issue when it responds on the aggregation issue.

Deceased Claimants: the Home Office consultation on regulations to include the provision of a remedy for this category closed on 17 February. We will have to assess whether the final version of the regulations provides an appropriate remedy under this heading.

Tax issues: we await a response from GLD on the tax issues identified.

Current situation of the claims

The stay in the Original Claims and the New (aggregation) Claims in England and Wales was due to expire on 14 January 2025. On the FBU's instructions, Thompsons resisted GLD's request for a further stay for four months. The Employment Tribunal managing the cases (East Midlands) nonetheless granted GLD's request. The claims were stayed unto 14 May 2025.

The Employment Tribunal has listed the claims for a case management hearing on 11 July. Claims in Scotland are currently stayed, and the existing stay in Northern Ireland is being extended.

In preparation for the Preliminary Hearing on 11 July and having discussed strategy with counsel, an open letter will be sent to the other parties in the litigation proposing that:

(a) The question of the position of claimants who were originally employed as RDS but transferred to wholetime on or before 6 April 2000 should be considered as a preliminary issue and listed for a 1 day hearing on the first available date after 30 January 2026 (currently the earliest a 1 day hearing would be scheduled).

(b) The remaining issues should be listed for a substantive hearing, with a time estimate of 5 days, to take place on the first available date after 1 June 2027. (We have been informed by the employment tribunal that hearings with a time estimate of 3 days or more are currently being listed for mid-2027).

We will do so on the basis that deciding the preliminary issue at point (a) above would be likely to enable the parties to achieve the most progress towards resolving the outstanding issues in dispute.

At the same time, send a without prejudice letter inviting GLD to set outs its position on each of the 5 issues which remain unresolved and making the point that it is in the interests of all parties to explore the possibility of narrowing the issues which remain in dispute in advance of the preliminary hearing.

The Union recognises the frustration in relation to the length of time the current legal processes are taking to resolve these issues but these scheduling timeframes are beyond our control.

Members should be reassured that the Union acts immediately when responding to developments in these matters and therefore the delay (as explained above) is not of the Unions making nor of our legal team.

Yours in Unity,

Mark Rowe

National Officer