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Circular: 2019HOC0658MW

16 December 2019

TO: **All Members**

Dear Brother/Sister,

PENSIONS: AGE DISCRIMINATION CLAIMS: REMEDIES HEARING 18 DECEMBER 2019

This circular contains important information for members who joined the fire and rescue service before 1 April 2012.

Having won our landmark discrimination claim earlier this year, the case has now returned to the Employment Tribunal to determine what the Government and the Fire and Rescue Authorities must now do to rectify the position.

An initial hearing has been listed to deal with this on **18 December 2019**. It will be followed by further hearings that deal with some of the issues in more detail. The purpose of this circular is to provide an overview of the process, and an outline of the likely final outcome.

The Government accepts that the rules which required members to transfer from the 1992 and 2006 pension schemes to the 2015 scheme are unlawful. The rules will have to be amended, but that will take time.

However, the Government also accepts that changes will have to be made **now**, without waiting for new legislation, so that members who leave the fire and rescue service (or who have done so recently) receive the benefits to which they are entitled as a result of the discrimination case. That is what the Employment Tribunal should now deliver although (as explained above) the full remedy may take further hearings.

The Employment Tribunal will also decide what compensation must be paid to members who have lost money as a result of the unlawful discrimination, and what compensation must be paid to members for the upset and anger they have been caused.

1. A “Declaration”

A Declaration is a formal order from a court or tribunal, stating what the law is. The Government and the FRAs will have to abide by the terms of the Declaration which the Employment Tribunal makes, whatever the scheme rules say. Discussions about the Declaration have been taking place prior to the hearing.

The Government has already confirmed that it will consent to a Declaration being made by the Employment Tribunal, the effect of which will be to override the rules. The wording is likely to be agreed. It would say that all members who did not satisfy the age-based requirements for full protection (i.e. they were too young) are entitled to be treated as if they did satisfy them. That would mean that all members of the 1992 Scheme or the 2006 Scheme who were in service on 31 March 2012 would be entitled to be treated as if they had never left.

Note that the wording is “**entitled to be treated ...**” not “**must be treated ...**”. Our lawyers have carefully analysed the differences between the three schemes. In almost all circumstances a member who has a choice between the 1992 Scheme and the 2015 Scheme will be better off on 1992 Scheme terms. That is not necessarily the case for a member who has a choice between the 2006 Scheme and the 2015 Scheme – in some circumstances they would be better off if they are treated as if they are a member of the 2015 Scheme. The Government accepts that no-one should be worse off as a consequence of unravelling the 2015 changes.

The important point is that, provided that you were employed before 1 April 2012, if you were in the 1992 Scheme you would be back in the 1992 Scheme. If you were in the 2006 Scheme you would be back in the 2006 Scheme, provided that it is a better pension scheme for you.

2. Compensation

We have made a claim for compensation for members who have lost money as a consequence of the 2015 changes. This is not likely to affect many members. The only clear exception is for members who have lost money because they have had to retire on the terms of the wrong pension scheme. That is outlined in more detail below. We will ask all members who believe that they have suffered a financial loss for further details of their claim early in the New Year.

We have also claimed compensation for the non-financial damage which has been caused. This is called “injury to feelings” by lawyers, and covers issues such as anger, upset, anxiety and, in severe cases, depression. In most cases the degree of injury to feelings will be the same for everyone. Again, we will ask all members who believe that they have suffered more than most for further details of their claim early in the New Year.

3. In practical terms: what does this mean now?

The retirement plans for most members of the 1992 and 2006 Schemes will not yet be affected by the changes made in 2015. Either they remained in the 1992 or 2006 Scheme (because they are older than the members who had to transfer) or they were transferred to the 2015 Scheme but are not yet old enough to retire. But there are some exceptions.

If you think you are within one of these exceptions (or if you know someone else who may be) it is important that you tell us now by contacting local FBU officials.

(a) Ill-health retirement

The clearest cases are for members who have applied to retire early on the grounds of ill-health. The criteria used to decide whether a member qualifies for upper-tier ill-health retirement are more favourable in the 1992 Scheme, and the ill-health benefits in the 1992 Scheme are different too, and in most cases they are better. This means that some members might have applied for an ill-health pension and not succeeded because the 1992 Scheme rules were not applied. It also means that some members might have retired on ill-health grounds, but their pension is smaller than it should be.

Once the Declaration has been made, the Fire and Rescue Authorities will have to re-examine the ill-health applications they have dealt with since 31 March 2015. If any member is worse-off because the 2015 Scheme rules were applied, their benefits would have to be improved, retrospectively. Any new applications would have to be dealt with under the terms of the correct scheme. That would apply immediately.

(b) Age retirement – the “rule of 75”

Under the 1992 Scheme rules, a member who is over the age of 50 can retire once they have completed 25 years’ service: that is, their age added to their length of service is equal to 75 or more. That was not replicated in the 2015 Scheme.

We have now reached the point where some 1992 Scheme members with tapered protection have been transferred to the 2015 Scheme, and now have a retirement age of 60, whereas they would have been able to retire under the 1992 Scheme terms. If you find yourself in this position, you could still retire. Your 1992 Scheme pension would not be reduced, but the bit of pension you have earned under the 2015 Scheme would be.

Once the Declaration has been made, you would be entitled to be treated as if you had never left the 1992 Scheme. If you do retire, and if your pension is reduced as a result, the reduction will have to be disapplied retrospectively.

(c) Contributions

The contributions that members of the 1992 Scheme pay are higher than the contributions paid by 2015 Scheme members. That is because it is a better pension scheme. But if members are put back in the 1992 Scheme, one side effect will be that they have to pay the higher contribution rate, and pay the arrears going back to 1 April 2015.

We will negotiate the terms for payment of arrears. They should not have to be paid as a single lump sum, but 1992 Scheme members should start budgeting and planning for this now.

4. When will this all take effect?

The Declaration will be binding as soon as it is made. If, as we anticipate, the wording is agreed the Declaration will be made on 18 December.

Strictly speaking, in the first place it will apply only in England and Wales. Similar Declarations will need to be made by the Scottish Employment Tribunal and the Northern Ireland Industrial Tribunal, but that will inevitably follow (probably without the need for a hearing at all).

It may take the Fire and Rescue Authorities a little time to redesign the forms they use for processing retirements, on the grounds of ill-health or otherwise, and we have started the process of getting that implemented. But your retirement terms do not depend on the forms that are used. Further advice will be issued to FBU Brigade officials to assist in this. So:

- If you are going through the ill-health retirement process at the moment, you should insist that the 1992 Scheme rules are applied if you were a member of the 1992 Scheme.
- If you have retired recently on the grounds of ill-health you should tell the Fire and Rescue Authority that you want your case reconsidered. You should also tell us. The Government has asked us to assist with identifying all of the members who might have been retired on the wrong terms.

- If you were a member of the 1992 Scheme and you have reached the age when you could have retired under the 1992 Scheme rules, you should consider whether you want to do so now. If you do, tell the Fire and Rescue Authority, and tell them that you want to retire under the terms of the 1992 Scheme. Tell us too by contacting local FBU officials.
- If you have recently retired, and if you were a member of the 1992 Scheme and had to transfer to the 2015 Scheme, tell the Fire and Rescue Authority that you want any reduction that was made to your pension disapplied. Tell us too so that we can identify your case to the Government.

Sorting out the issues relating to compensation for financial losses and for injury to feelings will take a little longer. The Government is likely to resist these claims and it may take until the autumn of next year to get them resolved. Any issues relating to increased contributions, and arrears of contributions, are likely to be resolved at the same time.

5. ... and in the longer term

As explained above, the Government will need to amend the legislation. The devolved administrations will have to do so too. The discriminatory provisions must be removed. What cannot happen is that members who had to transfer to the 2015 Scheme are transferred to it again retrospectively.

We must anticipate that the Westminster Government and the devolved governments will try to worsen benefits earned by future service at the same time, to recoup some of their losses. We have the right to be consulted before any changes are made, and we will engage in the process vigorously, as we did last time.

We will keep you informed of developments.

Yours fraternally,



MATT WRACK
General Secretary

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