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To: **All Members**

Dear Brother/Sister

Immediate Detriment: Memorandum of Understanding

This circular and its attachment reports to members the conclusion and outcome of the without prejudice negotiations convened at the request of the FRAs to resolve issues of immediate detriment. This request followed the lodging in the courts of three immediate detriment test cases by the Fire Brigades Union.

Background

The “immediate detriment” cases are the firefighters who have retired since the 2015 pension scheme was introduced, or will do so before further legislation to provide firefighters with a remedy is introduced. These members may have retired or may retire in the future with a pension that is smaller than it should be.

The government accepts that these members should be paid the correct, higher, pension and lump sum with effect from the date of retirement, and if a member has already retired (or should have been allowed to do so) that they will therefore have to be paid arrears with interest. The proposed legislation to remedy the age discrimination will not require FRAs to do so until October 2023.

The FBU have been clear throughout that this delay is unacceptable, negotiations have been taking place since the FBU commenced legal action in the three test cases. The FBU negotiations with the Local Government Association (LGA) and Bevan Brittan solicitors (acting on behalf of the FRAs) sought an agreement through a Framework document (detailed in a Memorandum of Understanding) that can, where adopted at local level, be utilised by each FRA to deal with its immediate detriment cases within 90 days of being notified by the member concerned that they wish the payment of the full benefits, that they are entitled to, to be paid.

The Local Government Association (LGA) will encourage FRAs to adopt the Framework document.

The broad structure

(i) Members who are covered

The process will apply to members who have already left, and to members who do so before the remedying legislation comes into force in October 2023.

It does not apply to the dependents' of such members – most importantly, it does not deal explicitly with the unmarried partners of members who were in the 1992 Scheme and who have died. An unmarried partner is not eligible for a pension under the 1992 Scheme rules, but they should be treated as if the member had been a member of the 2015 Scheme when they died.

There is commitment within the Framework to deal with such cases within the same timescales as other members (see below), but dealing with the partner of a member who has died is too sensitive and fact-specific to approach on a one-size-fits-all basis.

The agreement covers immediate detriment cases that need to be dealt with before the relevant remedying legislation covering the issue in the case comes into force. It will expire once all the remedying legislation is in place because the FRAs will then have to follow the legislative arrangements no matter what has been agreed. The expectation however is that once FRAs become accustomed to dealing with cases within the timescales envisaged in the agreement they will be able to continue to do so after the new legislation comes into effect.

(ii) The process and timescales

The process envisages that following adoption by an FRA affected members who are close to retirement or who have already retired since the 2015 Scheme was introduced will make themselves known by making an application to the FRA. It envisages that the process for individuals will be completed within 90 days of the member making an application – that is, the member will receive the payment within 90 days.

1. Once a member has made an application, the FRA will have to acknowledge receipt and tell the member whether they accept that the member is in scope. This acknowledgement will have to be sent within 14 days of receiving the application. The application to the FRA can be made via an email or a letter stating that the member believes they are in scope.
2. The FRA will have 62 days from the date of receiving the application in which to provide the member with a statement of the benefits that the member would be entitled to under the terms of (a) the 1992 Scheme and (b) the 2015 Scheme. If the member has already retired, the FRA will have to send a statement of the arrears payable at the same time, taking account of the difference between the contributions that the member paid under the 2015 Scheme rules and the contributions that the member would have had to pay as a member of the 1992 or 2006 Scheme.
3. The member will then have to choose which benefit package to take.
4. The FRA will then process future pension benefits on a “business as usual” basis, depending on the package that the member has chosen. It will have to pay any arrears that are due within 28 days of receiving the member's election.

Although 62 days might seem a long time within which the FRA must make its calculations, there are 2,700 immediate detriment cases, of whom 1,400 have already retired; and all of the calculations will have to be done by hand and checked. From the member's perspective, the important point is that they will be told within 14 days that their case will be dealt with.

As there are a considerable amount of immediate detriment cases that will need to be resolved by the FRAs, members are kindly asked not to submit a request for figures purely out of curiosity if you are not already suffering immediate detriment. This will enable the FRAs to prioritise those members who have retired and are not receiving their full pension and also those members who are retiring imminently.

Specific issues

(i) *Arrears of contributions*

If a member has been treated as a member of the 2015 Scheme they will have paid contributions at the (lower) 2015 Scheme rate compared to 1992 Scheme contributions. These arrears will have to be paid, as in the RDS settlement agreed in 2014.

Interest will also have to be paid, at the rate specified in the remedying legislation once it is published. The rate is likely to be bank base rate. The adjustment for interest will have to be made at a later stage (once the legislation is published) rather than at the time when the member makes his or her choice.

There may be cases where a member of the 2006 NFPS wants to retire on the terms of the 2015 Scheme – in some cases the 2015 Scheme terms are better. In such a case the member will be compensated for the higher 2006 Scheme contributions that were paid, with interest.

(ii) *Contribution holidays*

You will be aware that members of the 1992 Scheme are not required to contribute at the ages of 48 and/or 49 if they have built up the maximum 1992 Scheme pension (i.e. they joined at ages 18 or 19), but this provision for a contribution holiday disappeared once a member was transferred to the 2015 Scheme.

In such a case, if the member chooses 1992 Scheme terms the contributions that the member paid at ages 48 and/or 49 will have to be compensated for by the FRA, with interest.

(iii) *Interest*

Payments due to members will carry interest at 3% simple. This is a higher rate than the legislation is likely to require (the government's intention is to require interest to be paid at bank base rate).

Interest on payments due *to* the member in respect of overpaid contributions and arrears of pension and lump sum, and due *from* a member will also carry interest, at the rate determined in the remedying legislation once it is published. That rate is likely to be bank base rate.

(iv) *Tax*

Tax raises complications in the settlement at a number of stages, and HMRC will not waive any tax due. The FRAs accept that members should not have to pay any tax that would not have been payable if the member had been treated as a member of the correct scheme throughout.

1. Pension payments are ordinarily subject to income tax, and pension payments made after a case has been settled will be paid subject to tax in the ordinary way. If arrears of pension are taxable, and if the member is required to pay tax at a higher rate than would otherwise have been the case and cannot recover it through their tax return, the FRA will have to pay the tax.
2. Some members will be entitled to a top-up to the lump sum they were paid when they retired. This top-up will be taxable at 55% (as an "unauthorised payment") of which 40% would be the member and 15% is the scheme sanction charge. The FRAs accept that they will have to pay this tax. They are in discussions with the Home Office exploring reimbursement for the FRAs.
3. Members who have to pay or receive arrears of contributions (see above) have paid or would have paid contributions with tax relief. The government intends to deal with issues relating to tax relief on contributions through the remedying legislation; the agreement says that any arrears payable by members will have to be paid without making an adjustment for tax relief, but the remedying legislation adjustment for tax relief will be applied once it is made (meaning

that members will receive a tax refund later). If members are owed overpaid contributions, the FRA will calculate compensation for that overpayment with an allowance for tax relief and make any adjustment if necessary once the legislation has been published.

4. Some members will be presented with a tax demand as the pension they accrued for the years since 2015 exceeds the annual allowance (i.e. the maximum amount of pension that can be accrued with tax relief in any tax year).

If an annual allowance charge would have arisen in any event, the member will have to account for the tax (usually by getting the FRA to pay and adjusting their benefits). If an annual allowance charge would not have arisen if the member had been treated correctly, the FRA will have to pay the tax.

Unresolved issues

There are a few issues which will have to be dealt with on a case-by-case basis outside the Framework.

1. One has already been mentioned: the benefits payable to dependants, particularly the unmarried partners of members of the 1992 Scheme who have died. The FRAs would like to settle these cases too, but cannot make commitments as to how they will be dealt with except on a case-by-case basis. Where officials are aware of any such case they should put it forward for consideration and processing.
2. The second is complex. Some members who were transferred to the 2015 Scheme paid additional contributions for added pension, or transferred in benefits from a previous employer's scheme, where the additional contributions or transfer payment could never have been paid into the 1992 Scheme. If they then retire on 1992 Scheme terms they should be treated as if they had never been a member of the 2015 Scheme – on the face of it, their additional contributions or transfer value are trapped in a scheme which they have never been a member of. This will be sorted out under the remedying legislation, but the issue has been parked for now. We have told the FRAs that if a member comes forward with such a case, and should it be necessary, the FBU will consider issuing further proceedings.
3. Some members will have divorced since 2015 and settled their divorce proceedings on the assumption that they were members of the “wrong” scheme. The member may have under-settled; they may have over-settled. The issue can only be resolved in the divorce court, but the FRAs should pay any additional legal costs incurred if the divorce proceedings are reopened.

FRAs will be encouraged by the LGA to adopt the Framework. The Framework has been the subject of intense legal scrutiny and the difficult issues raised have been resolved (in the majority) for the FRAs. There is no reason why the FRAs should not adopt the Framework.

The FBU also expects that the FRAs will adopt the Framework and reminds any FRAs who do not adopt the Framework that we have previously litigated against FRAs and will have no hesitation in doing so again, if necessary.

Yours in unity.



MARK ROWE
National Officer

MR/jr