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To: All Members

Dear Brother/Sister

Judicial Review Judgement: 2015 Scheme Cost-Cap Mechanism

Judicial review proceedings by six trade unions, relating to changes made by the government to public sector pensions, were heard 31 January - 3 February 2023. The unions were the Fire Brigades Union, GMB, PCS, the Prison Officers Association, the Royal College of Nursing and Unite.

The government's own estimate of the amount at stake is £17bn.

The case concerns the government's botched reforms of the pension schemes for firefighters the NHS, teachers, civil servants, local government, the armed forces, police officers and others in 2015. In 2018 the reforms, challenged by the Fire Brigades Union were held by the Court of Appeal to be unlawful, because the way they were implemented discriminated against younger members. The government accepted that they had to be reversed.

In a separate development, it transpired that the cost of the new schemes was substantially less than had been anticipated when they were assessed by the government actuary in 2019. Under the applicable legislation, younger members' benefits should have been improved, or their contributions should have been reduced, by up to 4.9%. That is because the schemes contain an arrangement, called the "cost control mechanism" , whereby if the schemes turn out to be more expensive than anticipated the members have to pay (in the form of reduced pensions or increased contributions) but if they turn out to be cheaper the position is reversed and pensions go up or contributions go down.

The government wants to avoid this result by imposing the cost of its own discriminatory conduct on the schemes, effectively making members of the new schemes pay.

The FBU maintained that this treatment is unlawful because:

- adding the cost of the discrimination into the cost control mechanism flouts the purposes that Parliament intended when the cost control mechanism was set up – the government has tried to make this change by "directions" issued by the Treasury without Parliamentary control or consultation with members
- it also flouts promises made to scheme members when the schemes were reformed in 2015, in an attempt to defuse a bitter dispute
- it is once again discriminatory – only younger members will have to pay

The cost control mechanism has since been reformed, and is unlikely to result in increases or reductions in pensions or contributions in the future, but the government's actions have effectively denied members a contribution reduction of up to 4.9% or the equivalent in terms of pension improvements. That should have taken effect in April 2019, and was due to last until March this year.

The Judgement has now been handed down, in short we lost. However, as I am sure Members are already aware the majority, if not all of our Pensions challenges against government have not been successful at the first hurdle but we have achieved greater success on appeal.

We are now consulting with our legal team regarding any appeal and further information will be provided following the conclusion of those meetings.

A brief explanation of Justice Choudhury's Judgement is below:

1. ***The purpose of the cost control mechanism***: the judge said that the wording of the Public Service Pensions Act is wide enough to allow directions to be made passing on the McCloud cost to members; the purpose of the cost control mechanism (CCM) is to control the cost of the new schemes; and McCloud is such a cost.

2. ***Expectations raised by ministers***: the statements made by ministers that only member costs would be factored into the CCM were not sufficiently clear and unambiguous. Nor were the statements made by ministers in 2018 that the 2016 valuations would be acted upon. In any event the class to whom any statements were made was too large, and even if promises had been made the government was justified in breaking them because of the sheer scale of the cost.

3. ***The first judicial review***: the 2021 directions did not have retrospective effect. The draft valuations published in 2019 before the "pause" did not trigger the operation of the CCM, and we therefore have no basis for saying that the first judicial review was stymied.

4. ***Discrimination***: although the imposition of the McCloud cost did lead to some members being advantaged and others being disadvantaged, the dividing line was not their age but the nature of the McCloud remedy itself.

The judge said that this wasn't just a case of the government passing on the cost of its own discrimination. It has to make decisions about how to allocate financial resources, and it would be no more absurd or unconscionable to pass on this cost than it would be to pass on the cost of poor economic decision-making.

To appeal the FBU will need to get permission, either from the judge or from the Court of Appeal. Whilst discussions continue with our legal team the Union has put in an application for permission to appeal on a protective basis, the application contains submissions setting out why we think the judgment is wrong.

Members will be informed of any developments.

Yours in unity,

Mark Rowe
National Officer

MR/jr