

Meeting of the Board 24 March 2022

## **FPS 2006 Special Members second options exercise (Matthews)**

### **Background**

1. Board 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.
2. *Matthews & others v Kent & Medway Towns Fire Authority & others* concerns the application of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 to retained duty system employees. Those Regulations were brought into force on 1 July 2000 to implement the EU Part-time Workers Directive (albeit that had an implementation deadline of 7 April 2000). Following a protracted legal process up to and including the House of Lords judgment, settlement agreements were reached in respect of terms and conditions in 2015 with both the RFU (now FRSA) and the FBU in regard to the many thousands of Employment Tribunal cases. The defence of the pensions aspect of the case was led by government. The LGA coordinated the defence and settlement of the claims for FRAs through the auspices of the National Employers.
3. The House of Lords judgment led to those who were serving during the period 1 July 2000 (the date the Regulations came into force) to the date on which they elected to join the 2006 Scheme, to have special provisions which generally reflect the rules of the Firefighters' Pension Scheme 1992 (FPS 1992).
4. A time-limited options exercise took place between 2014 and 2015 to allow eligible individuals to join the FPS. While the benefits awarded to special members largely mirrored the benefits under the FPS 1992, the FPS 2006 was amended as the FPS 1992 was closed.
5. More recently, work has again had to take place on the pensions aspect of this case, 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.
6. After an extended period of negotiations on the scope and mechanics of the settlement, a [Memorandum of Understanding \(MoU\) was agreed by all parties](#) on

9 March 2022. Negotiations were again led by government given the issues were solely around the pension aspect of the case. The role of the LGA within the negotiations was to endeavour to mitigate potential issues that could cause problems for FRAs, as far as it was possible to do so.

7. 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.
8. A further issue arose around during negotiation of the MoU around an inability to aggregate periods of pensionable service in the FPS as a retained firefighter with periods of service as a wholetime firefighter ("aggregation"). This has been addressed by affected retained firefighters (or their representatives) having the ability to give written notification to the GLD (on behalf of the Home Office) and FRAs prior to the commencement of the second options exercise of:
  - 8.1. their identity; and
  - 8.2. details of the factual and legal basis of any aggregation claims
9. with a view to discussions for six months from the MoU date leading to a resolution of those claims. If agreed resolution of the aggregation issues is not reached by then those Claimants can pursue Tribunal claims to determine outstanding issues in relation to them.

## 2014 options exercise

10. Fire and Rescue Authorities (FRAs) had to identify individuals who were eligible and use reasonable endeavours to notify existing and former employees who were entitled to join the scheme.
11. Eligible firefighters had to apply for a statement of service from the FRA.
12. The statement of service provided the amount of service that was available, and the options to pay contributions either via a lump sum at the time of election or by periodical contributions over ten years or until retirement date.
13. The regulations set out timescales for completion of each stage but allowed a discretion for the FRA to allow an extension to 30 September 2015 where it was not reasonably practicable to comply.
14. Eligible firefighters had to make a positive election in order to join the scheme as a special member by 30 September 2015.
15. There are reported cases of individuals not being allowed to join the scheme because the deadlines were missed. These cases were dealt with via Internal Resolution Dispute Procedures (IDRP) and in some cases proceeded to the Pension Ombudsman (TPO). This position was commented on in [FPS Bulletin 3 - Nov/ Dec 2017](#) under 'backdated elections to the 2006 modified scheme (RDS)'.

16. A 'lessons learned' exercise recently undertaken by the Home Office and the LGA identified several areas for improvement and a number of recommendations have been made to mitigate known issues. Feedback from the recent [FRA self-assessment survey](#) will also be taken into account.

## 2023 options exercise

17. The following individuals are in scope for the second options exercise:

17.1. Retained firefighters employed on any date between 7 April 2000 and 30 June 2000 (inclusive);

17.2. Retained firefighters employed on any date between 7 April 2000 and 30 June 2000 (inclusive) as well as on any date between 1 July 2000 and 5 April 2006 (inclusive);

17.3. Retained firefighters employed on any date between 1 July 2000 and 5 April 2006 (inclusive) who were eligible to take part in the first options exercise **but were not given opportunity to do so**.

18. Retained firefighters employed on any date between 1 July 2000 and 5 April 2006 (inclusive) who were given opportunity to take part in the first options exercise but did not elect to do so within the statutory time limits are **not in scope for the second options exercise**.

19. A retained firefighter will be deemed to have been given opportunity to take part in the first options exercise where the FRA can evidence that the relevant correspondence was sent by the appropriate deadlines.

20. Where there is a dispute between a retained firefighter and an FRA as to whether adequate opportunity to take part in the first options exercise was provided on the basis of the evidence produced, the matter shall be dealt with under IDRP. If the dispute is not resolved through IDRP, the individual retains the ability to pursue the matter with TPO.

21. Retained firefighters in scope will be able to purchase pension entitlement as a special member for some or all of their service between 7 April 2000 and 5 April 2006, as well as any continuous service up to 7 April 2000 and/ or continuous service from 5 April 2006.

22. The regulations to implement the second options exercise in England will be drafted by the Home Office and consulted on before they are laid before Parliament. The Home Office has a maximum period of 18 months to draft, consult, and introduce the necessary secondary legislation.

23. FRAs will be expected to start the second options exercise as soon as possible after the legislation comes into force. The exercise will run for a maximum period of 18 months after it begins.

24. The MoU applies to England only. However, previous agreements have subsequently been applied to Scotland, Wales, and Northern Ireland.

## Next steps

25. FRAs have been advised to take steps to identify retained firefighters who were employed between the relevant dates and ascertain what steps were taken to identify and contact individuals who were eligible for the first options exercise, prior to the legislation coming into force.

26. FRAs have also been asked to provide the information on aggregation set out above, split by scheme that the firefighter joined in respect of their wholetime employment (i.e. FPS 1992 or FPS 2006).

27. The LGA will be working closely with the Home Office and GAD on the data requirements for the second options exercise over the coming months. The LGA will also be working with the parties to the MoU and its wider stakeholder groups on communications for the second options exercise.

## Challenges

28. One of the main challenges will be FRAs acquiring robust and complete data. While an eligible retained firefighter has to have been employed between 2000 – 2006, the start date for potential service could date back to the 1970s.

29. The majority of respondents to the self-assessment expressed concern that data will no longer be available for the periods in question, and that there would be difficulty in identifying and verifying all eligible individuals. Some FRAs added that although they may have some archive information available, it is unlikely to be in electronic format, for example hard copy ledgers or microfiche.

30. While the legislation which introduced the 2014 options exercise outlined some steps for dealing with missing pay data, FRAs have requested that a standard set of data assumptions are provided for the 2023 options exercise, which can be used in the absence of employer and employee records. FRAs have also requested guidance on what constitutes 'reasonable endeavours' for contacting individuals.

31. Time and resources are likely to be another major challenge. The 2023 options exercise is expected to commence in September or October 2023, at around the same time that the secondary legislation to implement retrospective remedy will come into force. These timescales will cause considerable pressure across the sector, including on the Home Office as responsible authority.

32. There are a relatively small number of technically knowledgeable experts across all the FRAs but many of the FRAs in isolation do not have that level of expertise meaning that most FRAs are heavily reliant on other authorities and central support.

33. The costs of implementation should also be considered:

- 33.1. On top of software and third-party administrator costs, there will be operational costs to the FRA. This might be additional resources, a change in payroll processes, additional data cleansing requirements, or implementing new processes. Experience of the 2014 options exercise showed that this was largely a manual employers' project rather than a pension project. Calculators were provided via an Excel spreadsheet and calculations were run on a manual basis per member and were a considerable burden for those FRAs with high numbers of retained staff.
- 33.2. The overlap with implementation of Sargeant will mean resourcing this project will be difficult and FRAs may need to fund additional resource beyond expectations.
- 33.3. Increased employer contributions are likely to impact on FRA budgets in the next valuation, with rates being implemented from 1 April 2024.
- 33.4. The 2020 actuarial valuation will only assess the cost of employer contributions for the 2014 options exercise. The employer contribution cost of the 2023 options exercise will not be known until the results of the 2024 valuation. The current consultation on the appropriate methodology for the discount rate could also affect these employer contributions.
- 33.5. It is highly likely that there will be increased take up due to the extended service which can be purchased, which will increase both the operational costs of the exercise and the actuarial costs.
- 33.6. There are other costs that also occur due to the 2023 options exercise, including but not limited to the extended scope of the exercise to include more individuals who would be eligible to join, and any compensation costs for tax losses to members that are borne by employers before suitable funding mechanisms are in place.

## Mitigations

34. Despite the considerable challenges, there are several positives which can be drawn from the experience of the 2014 options exercise:
- 34.1. The Home Office has initiated early project-management engagement with the LGA and GAD on the data and calculation requirements.
- 34.2. The communications resources from the first options exercise can be reutilised following review.
- 34.3. A more robust central support and governance framework is in place, via the LGA and Scheme Advisory Board. Additionally, Local Pension Boards are now more firmly embedded to provide local governance.
- 34.4. Communications and resources for both employers and employees can be made more accessible using the suite of FPS websites.

34.5. The majority of eligible retained firefighters will have been identified in 2014.

## **Board actions**

35. Due to the early stage and the wide-ranging scope of the project, the Board is asked to:

35.1. Note the contents of the paper.

35.2. Consider the formation of a working group comprising an equal number of employer and member representatives, with sector-support drawn from the existing SAB committees.

35.3. Volunteers are sought from the Board for this group or will be nominated by the chair and vice-chairs.

Board Secretary

March 2022