Police Federation
Of England and Wales

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FROM THE DEPUTY GENERAL SECRETARY'S OFFICE

SS/sg

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JBB CIRCULAR NO : 006/2014

To: The JBB Chairman and Secretary

Dear Colleagues

REGULATION A19 – EMPLOYMENT TRIBUNAL - HARROD & OTHERS V CHIEF CONSTABLE OF WEST MIDLANDS POLICE & OTHERS

The purpose of this circular is to update Joint Branch Board (JBB) Chairmen and Secretaries following the decision of the employment tribunal in the case of Harrod & Others v Chief Constable of West Midlands Police & Others regarding the officers' compulsory retirement under Regulation A19.

Accordingly the contents of this Circular are confidential and should not be circulated beyond JBB Secretaries and Chairmen and are to assist JBB Officials when speaking with members who were affected by A19.

Q: Does the decision mean that it is unlawful to use A19 in response to cuts?

A: No.

We do not yet know whether the Forces will appeal, and, strictly, the decision of a tribunal is not binding. However, the tribunal did not find:

(a) that A19 was inherently unlawful age discriminatory; nor

(b) that the use of A19 in response to cuts was inherently unlawful.

Q: Why then did the claim succeed?

A: The Tribunal found that the way the Respondent Forces had used A19 was not a proportionate means of achieving a legitimate aim under the indirect age discrimination provisions of the Equality Act 2010.
The Tribunal accepted that the efficiency of the Force was a "legitimate aim". However they considered that A19 was not a proportionate means of achieving that aim in light of:

(a) statistics which showed that 80 – 95% of officers in PPS 1987 would have retired at the 30 year pensionable service point in any event;

(b) there was insufficient consideration of alternative means of making savings on staff costs, in particular, they did consider:

- exploring whether more officers could work part-time;
- exploring whether more officers could take career breaks; and
- asking officers whether they intended to retire in the near future;

(c) if A19 had to be used, it could have been used more selectively, taking into account individual's skills, rather than on a more or less blanket basis.

Q: Why did PFEW not fund these claims?

A: There were two important reasons:

1. our legal advice, supported by two leading counsel as well as the opinion circulated by forces, was that A19 was not unlawful in principle and that, in a time of clear austerity, forces ought to be able to justify its use in response to age discrimination cases; and

2. in the context of the Winsor Review, which included proposals for compulsory severance, PFEW did not want to argue that A19 could not be used in response to cuts in public funding. Our concern was that if A19 were found to be age discriminatory it would strengthen the argument for compulsory severance to be applicable to <u>all</u> police officers. We consider it clear that A19 is by far the lesser of two evils – as at least officers who are subject to it receive immediate full pensions.

   While the tribunal rejected the Claimants' argument that A19 could not be used at all on financial grounds. If that argument had succeeded it would have significantly increased the risk of a wider power of compulsory severance being introduced. It would have been difficult to argue in the discussions about compulsory severance and in relation to the PAT that A19 was one of the factors which rendered compulsory severance unnecessary while supporting claims which were (in effect) arguing that A19 could not be used at all in the current financial climate.

Q: What will happen next in the cases to which the ET decision related?

A: The first point is that the relevant forces will have to consider whether they are going to appeal.

If there is no appeal, then, unless settlements are reached, there will be further hearings. Quite how these will be conducted is not clear from the decision. On the face of it, it will be necessary to consider each individual member's case, to assess whether they

would have stayed in the force in any event (in circumstances where an important element of the tribunal's reasoning was that 80 – 95% of members would have gone at 30 years anyway).

The decision refers to further argument being necessary as to whether informing officers who would have retired anyway that they had to retire was in itself a detriment.

Q: How will compensation be assessed?

A: This remains to be seen, but the main points are:

- We would expect forces to seek to rely on the tribunal's finding that 80-95% of officers retire at 30 years.
- We would also expect forces to argue that even officers who stayed after 30 years would not or probably would not have stayed for very long.
- Compared with staying, any officer who left will have "lost" pay, but (by definition) have had a 2/3 pension, so subject to any pay increases, on the face of it, the maximum loss will therefore have been 1/3 of pay for such (arguably generally limited) time as they would have stayed on.
- From this would need to be deducted any alternative earnings in the relevant period (or possibly, if there was no attempt to find alternative employment and that was regarded as unreasonable, a deduction for that).
- There is then the possibility of an award for injury to feelings.

Q: What is the position of members who left under A19 but who have not brought claims?

A: A discrimination claim needs to be brought in the employment tribunal within 3 months of the date of the act about which complaint is made, or within such other period as the tribunal thinks just and equitable. The relevant act might well be the decision to terminate service under A19 rather than the last day of service.

It seems clear that most if not all members who left under A19 who have not already commenced proceedings will be well outside the 3 month limit at this stage. They would therefore only be able to proceed if the tribunal accepted that it was just and equitable to allow them to do so.

Any member (or ex-member) who wants to attempt to bring a claim at this stage ought to lodge a claim promptly, as any further delay can only weaken the position.

It is possible that the tribunal may consider some of the following factors in deciding whether to allow late claims to proceed in those forces covered by the decision:

- the length of time that has now passed;
- the fact that the decision in the test case has only now been given;
- on the face of it, forces covered by the decision are no worse off in defending claims brought only now;
- members in such forces would probably have been aware of the action, and the tribunal might consider they could have joined it had they so wished; and

- whether forces not covered by the decision can argue that it is harder for them now, in 2014, to defend claims relating back to 2010 – 12.

Q: Will PFEW change its position in relation to funding A19 claims in the light of the decision?

A: While the Home Secretary has recently announced that she is not seeking to implement compulsory severance "at this time", she went on to say that the government and police service should keep it under review.

As a result, we will not fund any claim which seeks to argue that A19 is unlawful in principle or that it cannot be used in response to cuts in public funding. This is because, as explained above, we consider that a successful challenge to A19 in principle would make a wider compulsory severance power more likely and while we do not welcome the use of A19, it is considerably less bad than a general power of compulsory severance.

Beyond this, any application for funding in relation to an A19 claim will be considered in the same way as any other application for funding.

At the moment, we are unlikely to fund any cases which fall within the scope of the test cases. This is because we are concerned about the prospect of forces appealing and/or of a cross-appeal by the claimants arguing that A19 cannot be used on financial grounds.

We are also unlikely at the moment to fund any cases which fall outside the scope of the test cases for similar reasons.

We will reconsider the position in the light of developments, including in particular:

1. whether there is an appeal and cross-appeal;

2. the terms of any appeal and cross-appeal; and

3. the outcome of any appeal and cross-appeal.

Members who left under A19 should however not be encouraged to believe that PFEW will or is likely to fund employment tribunal claims.

Q: Will PFEW encourage members who left under A19 to bring claims out of time?

A: No.

If retired members wish to bring claims they can do so. As explained above, such claims will be out of time unless commenced within three months of the relevant act, which will probably be the date of decision to retire the member under A19. It will be for tribunals to decide whether it is just and equitable to allow claims to proceed out of time.

Members who commence proceedings could write to the tribunal asking for the claim to be stayed pending a decision whether the test cases decision will be appealed. However, they will need to meet their own fees and once proceedings are commenced, they have their own dynamic. Tribunals may refuse stays and give directions which will need to be complied with.

As explained above, we are unlikely to fund any cases in relation to A19 at the moment. While we will reconsider the position in the light of developments, members should not be encouraged to believe that PFEW will or is likely to fund claims.

I will keep you updated as this matter develops and if you require further information regarding this circular please make contact with this office.

Yours sincerely

STEPHEN A. SMITH
Deputy General Secretary