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## CIRCULAR

Please pass on sufficient copies of this Circular to your Treasurer/Director of Finance and to your Personnel and Pensions Officer(s) as quickly as possible

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**No. 140 – JUNE 2003**

### **PART-TIMER PENSION CLAIMS**

#### **Purpose of this Circular**

1. This Circular follows on from Circular 138 (see [www.lg-employers.gov.uk/pensions/circulars.html](http://www.lg-employers.gov.uk/pensions/circulars.html)). As confirmed in Circular 138, all employers are required, by not later than **1 August 2003**, to serve by e-mail on the tribunal at [pensions@ets.gsi.gov.uk](mailto:pensions@ets.gsi.gov.uk) a schedule in Excel format of all part-time worker pension ET claims against them, in alphabetical order, indicating whether:
  - a) the claim can now be settled;
  - b) on the information currently available it is not known whether the claim can be settled; or
  - c) the claim is not yet ripe for settlement.

In the last case, (c), any outstanding issues preventing settlement of an ET claim are to be identified.

The schedules will then be forwarded to the unions representing the cases.

2. This Circular sets out the view of the LGPC's Part-timers Working Party as to which cases fall within categories (a), (b) and (c) above in relation to the **Local Government Pension Scheme**. It also provides information on the process to be followed subsequently in relation to cases falling within categories (a) and (b).
3. It is **VITALLY IMPORTANT** that a copy of this Circular is passed to the person (or persons) within your authority who is dealing with the part-time Employment Tribunal claims, if any, lodged against your authority.

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## **View of the LGPC's Part-timers Working Party**

4. In arriving at the views contained in this Circular, the LCPC's Part-timer Working Party has fully considered the determinations issued by the Employment Tribunal in relation to the part-timer test cases and the Directions issued by the Employment Tribunal. These can be viewed at [www.employmenttribunals.gov.uk](http://www.employmenttribunals.gov.uk).
5. The first point to make is that technically, the "Preston" judgement concerns employees who were debarred from membership of the occupational pension scheme. Those employees who on 1 April 1987 (1 April 1986 in Scotland) were contracted to work for:
  - a) 30 or more hours per week (on average) for less than 45 weeks per year (i.e. term-timers), or
  - b) 15 or more (in aggregate) but less than 30 hours per week for 35 or more weeks per year<sup>1</sup> (i.e. part-timers)

have previously been given the opportunity to join and backdate membership of the LGPS (to as far back as 1 April 1974). As such they have not been excluded from membership of the Scheme. It is recognised, however, that a proportion of the Employment Tribunal claims concern such employees who claim, for instance, that they were not informed by their employer of the right to join the scheme and to backdate membership (or not informed at the earliest opportunity). Whilst employers may wish to ask for such cases to be struck out by the Employment Tribunal on the basis that they are not really "Preston" cases, employers should consider the validity of the employee's claim. If the employer accepts that, on the balance of probability, the employee has a valid point, the employer may wish to permit retrospective entry to the Scheme under the same terms applicable to those employees who did join / backdate at the appropriate time.

It should be noted, however, that the fact that some of the employees who originally opted to backdate membership of the LGPS paid a 12% contribution rate to cover part of the backdating period has not been challenged at the Employment Tribunal. As such, whilst it may be arguable that such a contribution rate does not sit comfortably with the "Preston" judgement, the employers' position is that this matter should not to be re-opened unless and until a successful test case on the point is brought before the Employment Tribunal.

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<sup>1</sup> This means that if a person's contract were to last at least a year he / she would be required under the contract to work for 35 or more of the weeks in the year.

6. So, for the purposes of paragraph 1 above, which cases should the employer
  - i) accept,
  - ii) consider whether to accept or ask to be struck out,
  - iii) state that the claim is not yet ripe for settlement (i.e. because there are outstanding legal issues, an existing decision of the tribunal is being appealed, or a new point of law arises), or
  - iv) ask to be struck out (i.e. because it appears that the applicant does not meet the relevant criteria).
  
7. The following represents the view of the Working Party on these points. It should be noted, however, that the dispute is between the appellant (i.e. the employee or former employee) and the respondent (i.e. the employer or former employer). It is, therefore, for the respondent to fully consider the Employment Tribunal determinations in arriving at their response to the ET claims. Respondents may wish to take their own legal advice before deciding whether or not to accede to any particular claim.

#### 8. Cases to accept

For the purposes of paragraph 1(a) above, the Working Party considers that the following cases can be listed as claims that can now be settled:

- A. those employees who on 16 August 1993 (30 December 1993 in Scotland) were contracted to work less than 15 hours per week for 35 or more weeks per year **and**
  - o opted to join the LGPS from 17 August 1993 (31 December 1993 in Scotland) being the date such employees were first eligible to opt to join the LGPS (i.e. the employee opted to join at the first opportunity to do so), **and**
  - o have continued to be employed by the same employer, under a stable employment relationship, since 17 August 1993 (31 December 1993 in Scotland) and are still employed by that employer<sup>2</sup> (or lodged their ET claim within 6 months of leaving that employer) or have statutorily been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving that employer) – but see paragraph 10 below regarding stayed TUPE transfers, **and**
  - o the employer accepts there is a full-time comparator of the opposite sex i.e. in the case of a female applicant there is a full-time male employee also employed by her employer whose work was the same as, or broadly similar to, or of equal value with, her work.

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<sup>2</sup> Where an employee varies their contractual hours within the same job or voluntarily changes jobs with the same employer but without a break it will be necessary to determine whether the stable employment relationship has continued. Where the variation or change results in the termination of one employment contract and the start of another employers might take the view that the stable employment relationship has ceased and so the employee would not be able to claim in respect of the service with the employer prior to the variation in hours or change of job unless the ET claim had been lodged within 6 months of that change in hours or job. Employers will need to come to a decision, based on the circumstances of each individual case. If there is disagreement between the appellant and the respondent on this point, it will need to be remitted back to the Employment Tribunal for a decision.

Notes:

Such employees will be able to backdate membership of the LGPS for any period of continuous employment with the employer **from** the later of

- 8 April 1976, **or**
- in the case of an officer, the date employment started, **or**
- in the case of a manual worker who started employment before 1 October 1988 (before 1 April 1989 in Scotland), 12 months after the date employment commenced, **or**
- in the case of a manual worker who started employment on or after 1 October 1988 and before 1 October 1989, the 1 October 1989 (or, in Scotland, who started employment on or after 1 April 1989 and before 1 April 1990, the 1 April 1990), **or**
- in the case of a manual worker who started employment on or after 1 October 1989 (on or after 1 April 1990 in Scotland), the date employment commenced, **or**
- the date the employee attained age 18 if this fell before 1 October 1989 (before 1 April 1990 in Scotland), **or**
- the date the employee attained age 16 if this fell on or after 1 October 1989 (on or after 1 April 1990 in Scotland)

**to** 31 December 1992 i.e. such employees have already had the right to backdate membership of the LGPS to 1 January 1993

**during which** the contractual hours were less than 30 per week and the contractual weeks were less than 35 per year, or the contractual hours were less than 15 per week.

- B. those employees who on 1 April 1987 (1 April 1986 in Scotland) were contracted to work
- 30 or more hours per week (on average) for 45 or more but less than 52 weeks per year, **or**
  - 30 or more hours per week (on average) for less than 45 weeks per year, **or**
  - 15 or more (in aggregate) but less than 30 hours per week for 35 or more weeks per year, **and**
  - joined the LGPS prior to 1 April 1988 (1 April 1987 in Scotland), **and**
  - paid additional contributions to backdate their LGPS membership to count ALL of their part time “qualifying service<sup>3</sup>” that fell on or after 1 April 1974, **and**
  - have a period of service during which the contractual hours were less than 15 per week, or less than 30 hours per week for less than 35 weeks per year, which fell on or after 8 April 1976 and before the date to which they have already backdated membership under the previous bullet point, **and**

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<sup>3</sup> i.e. service of 30 or more hours per week (on average) for less than 45 weeks per year, **or** 15 or more (in aggregate) but less than 30 hours per week for 35 or more weeks per year that fell on or after 1 April 1974 (excluding service before age 18 and the first 12 months service of a manual worker)

- have continued to be employed by the same employer, under a stable employment relationship, since 8 April 1976 or the date of appointment if later, and are still employed by that employer<sup>4</sup> (or lodged their ET claim within 6 months of leaving that employer) or have statutorily been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving that employer) – but see paragraph 10 below regarding stayed TUPE transfers, **and**
- the employer accepts there is a full-time comparator of the opposite sex i.e. in the case of a female applicant there is a full-time male employee also employed by her employer whose work was the same as, or broadly similar to, or of equal value with, her work.

Notes:

Such employees will be able to backdate membership of the LGPS for any period of continuous employment with the employer **from** the later of

- 8 April 1976, **or**
- in the case of an officer, the date employment started, **or**
- in the case of a manual worker, 12 months after the date employment commenced, **or**
- the date the employee attained age 18

**to** the day preceding that to which they have already backdated membership

**during which** the contractual hours were less than 30 per week and the contractual weeks were less than 35 per year, or the contractual hours were less than 15 per week.

- C. those employees who on 2 May 1995 (1 April 1998 in Scotland) were contracted to work less than 30 hours per week for less than 35 weeks per year **and**
- joined the LGPS from 2 May 1995 (from 1 April 1998 in Scotland) i.e. the date such employees were compulsorily brought into the Scheme (with the right to opt out), **and**
  - have continued to be employed by the same employer, under a stable employment relationship, since 2 May 1995 (since 1 April 1998 in Scotland) and are still employed by that

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<sup>4</sup> Where an employee varies their contractual hours within the same job or voluntarily changes jobs with the same employer but without a break it will be necessary to determine whether the stable employment relationship has continued. Where the variation or change results in the termination of one employment contract and the start of another employers might take the view that the stable employment relationship has ceased and so the employee would not be able to claim in respect of the service with the employer prior to the variation in hours or change of job unless the ET claim had been lodged within 6 months of that change in hours or job. Employers will need to come to a decision, based on the circumstances of each individual case. If there is disagreement between the appellant and the respondent on this point, it will need to be remitted back to the Employment Tribunal for a decision.

- employer<sup>5</sup> (or lodged their ET claim within 6 months of leaving that employer) or have statutorily been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving that employer) – but see paragraph 10 below regarding stayed TUPE transfers, **and**
- the employer accepts there is a full-time comparator of the opposite sex i.e. in the case of a female applicant there is a full-time male employee also employed by her employer whose work was the same as, or broadly similar to, or of equal value with, her work.

Notes:

Such employees will be able to backdate membership of the LGPS for any period of continuous employment with the employer **from** the later of

- 8 April 1976, **or**
- in the case of an officer, the date employment started, **or**
- in the case of a manual worker who started employment before 1 October 1988 (before 1 April 1989 in Scotland), 12 months after the date employment commenced, **or**
- in the case of a manual worker who started employment on or after 1 October 1988 and before 1 October 1989, the 1 October 1989 (or, in Scotland, who started employment on or after 1 April 1989 and before 1 April 1990, the 1 April 1990), **or**
- in the case of a manual worker who started employment on or after 1 October 1989 (on or after 1 April 1990 in Scotland), the date employment commenced, **or**
- the date the employee attained age 18 if this fell before 1 October 1989 (before 1 April 1990 in Scotland), **or**
- the date the employee attained age 16 if this fell on or after 1 October 1989 (on or after 1 April 1990 in Scotland)

**to** 1 May 1995 (to 31 March 1998 in Scotland)

**during which** the contractual hours were less than 30 per week and the contractual weeks were less than 35 per year, or the contractual hours were less than 15 per week.

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<sup>5</sup> Where an employee varies their contractual hours within the same job or voluntarily changes jobs with the same employer but without a break it will be necessary to determine whether the stable employment relationship has continued. Where the variation or change results in the termination of one employment contract and the start of another employers might take the view that the stable employment relationship has ceased and so the employee would not be able to claim in respect of the service with the employer prior to the variation in hours or change of job unless the ET claim had been lodged within 6 months of that change in hours or job. Employers will need to come to a decision, based on the circumstances of each individual case. If there is disagreement between the appellant and the respondent on this point, it will need to be remitted back to the Employment Tribunal for a decision.

## 9. Cases the employer may wish to accept but could reject

The Working Party considers that (other than casual employees who are discussed later) there are possibly two categories under this heading that employers need to consider i.e.

- A. those employees contracted to work:
- 30 or more hours per week (on average) for less than 45 weeks per year, or
  - 15 or more (in aggregate) but less than 30 hours per week for 35 or more weeks per year
- who commenced between 1 April 1987 and 1 May 1995 (between 1 April 1986 and 31 March 1998 in Scotland) and who did not opt to join the LGPS immediately they became eligible to do so i.e.
- in the case of an officer, from the date employment started, **or**
  - in the case of a manual worker who started employment before 1 October 1988 (before 1 April 1989 in Scotland), from the date 12 months after employment commenced, **or**
  - in the case of a manual worker who started employment on or after 1 October 1988 and before 1 October 1989, from 1 October 1989 (or, in Scotland, who started employment on or after 1 April 1989 and before 1 April 1990, from 1 April 1990), **or**
  - in the case of a manual worker who started employment on or after 1 October 1989 (on or after 1 April 1990 in Scotland), from the date employment commenced, **or**
  - from the date the employee attained age 18 if this fell before 1 October 1989 (before 1 April 1990 in Scotland), **or**
  - from the date the employee attained age 16 if this fell on or after 1 October 1989 (on or after 1 April 1990 in Scotland)
- B. those employees contracted to work less than 15 hours per week for 35 or more weeks per year who commenced between 17 August 1993 and 1 May 1995 (between 31 December 1993 and 31 March 1998 in Scotland) and who did not opt to join the LGPS immediately upon commencement of employment.

By virtue of the ET decision in relation to issue 5.2 there is a right of retrospection for the period between the date employees in (A) and (B) first became eligible to join the Scheme and the date they did join, **provided** this was prior to 2 May 1995 (prior to 1 April 1998 in Scotland) **and**

- the employee can prove on the balance of probability that she was unaware of her right to join because of her employer's failure to inform her of the right to join; **or**
- where she believed she might have the right to join she was misled by her employer, intentionally or unintentionally, into believing that she did not have the right; **or**
- the employer denied that she had the right; **or**
- the employee sought to join the scheme but was simply discouraged or dissuaded from joining as the result of a policy of the employer,

aimed at part-timers, which involved the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or there were policies that otherwise amounted in practice to a denial of the right to membership of the scheme.

The reason the Working Party has restricted this potential claim to those who actually opted to join prior to 2 May 1995 (prior to 1 April 1998 in Scotland) is that anyone who opted to join after 2 May 1995 (after 1 April 1998 in Scotland) would have had to have made an earlier deliberate option out if employed on 2 May 1995 (1 April 1998 in Scotland) followed by a later deliberate opting in<sup>6</sup>. The act of opting out would make it very difficult for the employee to prove to the tribunal that they had been discriminated against.

In cases (A) and (B) above it is for the applicant to prove their case. Employers could, if they wish, merely accept the cases (e.g. where the employer considers, on the balance of probability, that it is likely that the employee was not informed of the right to join the Scheme at the correct time) or employers could reject the claims and force the applicants to prove their cases to the tribunal. If the employer accepts a case or the applicant proves the case, the employee would be able to backdate membership of the LGPS for the period of any continuous stable employment relationship with the employer from the date they became eligible to join the Scheme to the date they actually joined the Scheme.

#### *Casual Employees*

With regard to casual employees, it is for the applicant to provide sufficient particulars to demonstrate that the exclusion of casual workers from the LGPS prior to 2 May 1995 (prior to 1 April 1998 in Scotland) had a disproportionate impact (on women). If sufficient particulars are so provided, it is for the employer to disprove that there was a disproportionate impact. However, it is likely that the cases will fail in any event as it is unlikely that a genuine casual employee wishing to backdate membership prior to 2 May 1995 (prior to 1 April 1998 in Scotland) would be able to demonstrate a stable employment relationship (as defined in paragraph 8 of the Tribunals Information Bulletin No 7) both prior to and since that date. Furthermore, there would be no right to retrospective access to cover any period between 2 May 1995 (1 April 1998 in Scotland) and the date the employee actually joined the LGPS unless the employee can prove on the balance of probability that she was unaware of her right to join because of her employer's failure to inform her of the right, or where she believed she might have the right to join but was misled by her employer, intentionally or unintentionally, into believing that she did not have the right, or the employer denied that she had the right. Similarly, there is no right of retrospective access for that period if the employee sought to join the scheme but was simply discouraged or dissuaded from joining unless this was the result of a policy of the employer, aimed at part-timers, and involved the imposition of conditions not imposed on full-timers, or a campaign of deliberate

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<sup>6</sup> i.e. all employees who had not opted out of membership of the LGPS prior to 2 May 1995 (1 April 1998 in Scotland) were required to be automatically entered into the Scheme on that date unless they chose to opt out.

misinformation, or otherwise amounted in practice to a denial of the right to membership of the scheme.

10. Cases that are not yet ripe for settlement (i.e. because there are outstanding legal issues, an existing decision of the tribunal is being appealed, or a new point of law arises)

The Working Party considers that the following cases are not yet ripe for settlement:

- A. those cases where the employer is claiming there is no identifiable comparator who is performing work which is the same or broadly similar or work which is of equal value (such cases being stayed until the outcome of the Allonby case is known);
- B. those cases involving a transfer of undertakings under TUPE where the claim against the transferor authority was lodged more than 6 months after the date of the transfer (such cases being stayed until the outcome of the unions appeal against the determination that these cases fail has been concluded<sup>7</sup>);
- C. those employees who:
  - o on 16 August 1993 (30 December 1993 in Scotland) were contracted to work less than 15 hours per week for 35 or more weeks per year **but**
  - o did not opt to join the LGPS on 17 August 1993 (31 December 1993 in Scotland) i.e. at the first opportunity to do so **but**
  - o did elect to join later **and**
  - o were contracted to work for less than 15 hours per week on 5 April 1988 by the same employer (i.e. at a time when whole-time employees were compulsorily required to be members of the LGPS) and, since that date, have continued in a stable employment relationship with the employer, **and**
  - o have continued to be employed by the same employer, under a stable employment relationship, since 17 August 1993 (since 31 December 1993 in Scotland) and are still employed by that employer<sup>8</sup> (or lodged their ET claim within 6 months of leaving that employer) or have statutorily been transferred to another employer and are still employed by that employer (or lodged their ET

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<sup>7</sup> Note that cases involving a statutory transfer of employment to another employer (e.g. from local government to Further Education Colleges) are not stayed.

<sup>8</sup> Where an employee varies their contractual hours within the same job or voluntarily changes jobs with the same employer but without a break it will be necessary to determine whether the stable employment relationship has continued. Where the variation or change results in the termination of one employment contract and the start of another employers might take the view that the stable employment relationship has ceased and so the employee would not be able to claim in respect of the service with the employer prior to the variation in hours or change of job unless the ET claim had been lodged within 6 months of that change in hours or job. Employers will need to come to a decision, based on the circumstances of each individual case. If there is disagreement between the appellant and the respondent on this point, it will need to be remitted back to the Employment Tribunal for a decision.

- claim within 6 months of leaving that employer) – but see (B) above regarding stayed TUPE transfers, **and**
- the employer accepts there is a full-time comparator of the opposite sex i.e. in the case of a female applicant there is a full-time male employee also employed by her employer whose work was the same as, or broadly similar to, or of equal value with, her work.

The cases in (C) are stayed pending an appeal connected to the fact that membership for whole-time employees was compulsory on (and prior to) 5 April 1988.

If the appeal is rejected then such employees will be able to backdate membership of the LGPS for any period of continuous employment with the employer **from** the later of

- 8 April 1976, **or**
- in the case of an officer, the date employment started, **or**
- in the case of a manual worker who started employment before 1 October 1988 (before 1 April 1989 in Scotland), 12 months after the date employment commenced, **or**
- in the case of a manual worker who started employment on or after 1 October 1988 and before 1 October 1989, the 1 October 1989 (or, in Scotland, who started employment on or after 1 April 1989 and before 1 April 1990, the 1 April 1990), **or**
- in the case of a manual worker who started employment on or after 1 October 1989 (on or after 1 April 1990 in Scotland), the date employment commenced, **or**
- the date the employee attained age 18 if this fell before 1 October 1989 (before 1 April 1990 in Scotland), **or**
- the date the employee attained age 16 if this fell on or after 1 October 1989 (on or after 1 April 1990 in Scotland)

**to** 31 December 1992 (i.e. such employees have already had the right to backdate membership of the LGPS to 1 January 1993)

**during which** the contractual hours were less than 30 per week and the contractual weeks were less than 35 per year, or the contractual hours were less than 15 per week.

Notes:

Technically, the tribunal's answer to issue 5.1(b) would mean that the applicant would only have the

automatic right to pay contributions for service up to 5 April 1988 i.e. up to the date that a whole time employee was compulsorily pensionable. However, the second part of the tribunal's answer to issue 5.1(b) says that whilst there would be no breach of the equality clause during the period from 6.4.88. to the date the person could first have joined the scheme, the tribunal would accept there was a breach if the applicant can satisfy it that she would have joined the scheme during that period if she had been eligible. Thus, if the appeal is rejected, it would appear there will have been an automatic breach on 5.4.88. This would mean that such a person should have been in the scheme on that date (as per their full time equivalent employees). They would clearly have then remained in the scheme and so could easily satisfy the tribunal that they would have been in the scheme during the period from 6.4.88. to the date they first became eligible to join the LGPS under the rules of the Scheme. If the appeal is rejected, employers should err in the favour of the employees in these cases by not restricting backdating to only cover service up to 5.4.88. but instead allow backdating up to the 31 December 1992.

There will be no right to retrospective access to cover the period between 17 August 1993 (31 December 1993 in Scotland) and the date the employee actually joined the LGPS unless the employee can prove on the balance of probability that she was unaware of her right to join because of her employer's failure to inform her of the right, or where she believed she might have the right to join but was misled by her employer, intentionally or unintentionally, into believing that she did not have the right, or the employer denied that she had the right. Similarly, there is no right of retrospective access for that period if the employee sought to join the scheme but was simply discouraged or dissuaded from joining unless this was the result of a policy of the employer, aimed at part-timers, and involved the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or otherwise amounted in practice to a denial of the right to membership of the scheme.

- D. those employees who:
- on 2 May 1995 (1 April 1998 in Scotland) were contracted to work for less than 30 hours per week for less than 35 weeks per year **but**

- did not join the LGPS on 2 May 1995 (1 April 1998 in Scotland) i.e. at the first opportunity to do so **but**
- did elect to join later **and**
- were contracted to work for less than 30 hours per week for less than 35 weeks per year on 5 April 1988 by the same employer (i.e. at a time when whole-time employees were compulsorily required to be members of the LGPS) and, since that date, have continued in a stable employment relationship with the employer, **and**
- have continued to be employed by the same employer, under a stable employment relationship, since 2 May 1995 (since 1 April 1998 in Scotland) and are still employed by that employer<sup>9</sup> (or lodged their ET claim within 6 months of leaving that employer) or have statutorily been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving that employer) – but see (B) above regarding stayed TUPE transfers, **and**
- the employer accepts there is a full-time comparator of the opposite sex i.e. in the case of a female applicant there is a full-time male employee also employed by her employer whose work was the same as, or broadly similar to, or of equal value with, her work.

The cases in (D) are stayed pending an appeal connected to the fact that membership for whole-time employees was compulsory on (and prior to) 5 April 1988.

If the appeal is rejected then such employees will be able to backdate membership of the LGPS for any period of continuous employment with the employer **from** the later of

- 8 April 1976, **or**
- in the case of an officer, the date employment started, **or**
- in the case of a manual worker who started employment before 1 October 1988 (before 1 April 1989 in Scotland), 12 months after the date employment commenced, **or**
- in the case of a manual worker who started employment on or after 1 October 1988 and before 1 October 1989, the 1 October 1989 (or, in Scotland, who started employment on or after

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<sup>9</sup> Where an employee varies their contractual hours within the same job or voluntarily changes jobs with the same employer but without a break it will be necessary to determine whether the stable employment relationship has continued. Where the variation or change results in the termination of one employment contract and the start of another employers might take the view that the stable employment relationship has ceased and so the employee would not be able to claim in respect of the service with the employer prior to the variation in hours or change of job unless the ET claim had been lodged within 6 months of that change in hours or job. Employers will need to come to a decision, based on the circumstances of each individual case. If there is disagreement between the appellant and the respondent on this point, it will need to be remitted back to the Employment Tribunal for a decision.

- 1 April 1989 and before 1 April 1990, the 1 April 1990), **or**
- o in the case of a manual worker who started employment on or after 1 October 1989 (on or after 1 April 1990 in Scotland), the date employment commenced, **or**
  - o the date the employee attained age 18 if this fell before 1 October 1989 (before 1 April 1990 in Scotland), **or**
  - o the date the employee attained age 16 if this fell on or after 1 October 1989 (on or after 1 April 1990 in Scotland)

**to** 1 May 1995 (31 March 1998 in Scotland) i.e. such employees have already had the right to join the LGPS from 2 May 1995 (from 1 April 1998 in Scotland)

**during which** the contractual hours were less than 30 per week and the contractual weeks were less than 35 per year, or the contractual hours were less than 15 per week.

Notes:

Technically, the tribunal's answer to issue 5.1(b) would mean that the applicant would only have the automatic right to pay contributions for service up to 5 April 1988 i.e. up to the date that a whole time employee was compulsorily pensionable. However, the second part of the tribunal's answer to issue 5.1(b) says that whilst there would be no breach of the equality clause during the period from 6.4.88. to the date the person could have joined the scheme (2 May 1995 or, in Scotland, 1 April 1998), the tribunal would accept there was a breach if the applicant can satisfy it that she would have joined the scheme during that period if she had been eligible. Thus, if the appeal is rejected, it would appear there will have been an automatic breach on 5.4.88. This would mean that such a person should have been in the scheme on that date (as per their full time equivalent employees). They would clearly have then remained in the scheme and so could easily satisfy the tribunal that they would have been in the scheme during the period from 6.4.88. to the date they first became eligible to join the LGPS under the rules of the Scheme. If the appeal is rejected, employers should err in the favour of the employees in these cases by not restricting backdating to only cover service up to 5.4.88. but instead allow backdating up to the 1 May 1995 (31 March 1998 in Scotland).

There will be no right to retrospective access to cover the period between 2 May 1995 (1 April 1998 in Scotland) and the date the employee actually joined the LGPS unless the employee can prove on the balance of probability that she was unaware of her right to join because of her employer's failure to inform her of the right, or where she believed she might have the right to join but was misled by her employer, intentionally or unintentionally, into believing that she did not have the right, or the employer denied that she had the right. Similarly, there is no right of retrospective access for that period if the employee sought to join the scheme but was simply discouraged or dissuaded from joining unless this was the result of a policy of the employer, aimed at part-timers, and involved the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or otherwise amounted in practice to a denial of the right to membership of the scheme. Of course, technically, all such employees should have been brought into the Scheme automatically by their employer on 2 May 1995 (1 April 1998 in Scotland), with the right to opt out.

#### 11. Cases to be struck out, etc.

If employers have not already done so (see LGPC Circular 128 at [www.lg-employers.gov.uk/pensions/circulars.html](http://www.lg-employers.gov.uk/pensions/circulars.html)), they should request the tribunal to strike out the following cases:

- A. those employees who lodged their ET claim more than 6 months after leaving employment or more than 6 months after voluntarily transferring to a new employer or more than 6 months after leaving the employment of an employer to which the employee had been statutorily transferred;
- B. that part of an otherwise valid claim that relates to service prior to a break in a stable employment relationship with the employer.

The LGPC's Working Party believes that employers should also request that the tribunal strike out:

- C. any case that does not fall within paragraphs 8 or 10 above on the basis that the claim does not meet the criteria set out in the tribunal's decisions in the test cases.

The employer will also need to inform the Employment Tribunal of any case falling within paragraph 9 that the employer decides to defend.

## Processes to be followed after 1 August 2003

12. The process to be followed after the Excel spreadsheet has been sent to the Employment Tribunal (see paragraph 1 above) was detailed in LGPC Circular 138. To save employers having to cross-refer to that Circular the process is repeated below.
13. Employers will be required, by **1 October 2003**, to issue a questionnaire to each ET applicant under categories (a) and (b) in paragraph 1 above i.e. those claims that can be settled and those claims for which, on the information currently available, it is not known whether or not the claim can be settled. The form of the questionnaire is being agreed between the LGPC and the unions and will be circulated to authorities in due course.
14. The applicant will be required to return the completed questionnaire to the address shown on the questionnaire within 28 days of receiving it from the employer. Any applicant who does not return the completed questionnaire cannot have their claim settled and employers may eventually apply to have such claims struck out.
15. The employer will, upon receipt of the completed questionnaire, need to verify the information provided. If the information supplied by an applicant on a questionnaire is not accepted by the employer as accurate employers should seek to resolve this with the applicant. However, if this cannot be achieved, or if the information provided on the questionnaire suggests that the previous belief that the claim must succeed or may succeed was wrong then, on the application of either party, the claim will be listed for an immediate hearing by the tribunal to resolve the issues.
16. If the information supplied by the applicant is accepted by the employer as accurate, the employer will need to calculate the amount of employee contributions due (see paragraph 19 below) together with the pension and lump sum that would derive from the payment of those contributions and notify these to the applicant. Employers will need to liaise with the pension fund Administering Authority to agree the process for calculating the pension and lump sum figures.
17. The applicant can then either:
  - a) decide not to backdate, or
  - b) pay the arrears of contributions, or
  - c) agree to pay the arrears of contributions
18. In each of these cases, the claim can be settled and the following procedure to withdraw the claim will apply:
  - a copy of the form (at Annex A) is to be sent to applicants by the employer<sup>10</sup> together with the applicant's individualised calculations.

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<sup>10</sup> Although the Bulletin from the Employment Tribunal states that the form is to be issued by the "pension scheme administrators" the LGPC has agreed with the Employment Tribunal that the employer should issue the form (on the basis that it is the employer and not the "pension scheme administrator" that will have the relevant details).

- the form is to be completed by the applicant stating that they wish to withdraw their case. The case number, full name and signature are essential. The applicant's date of birth would also be useful.
- where an applicant is unrepresented, they should send the completed withdrawal form to the National Co-ordinator, Employment Tribunal Service (currently Clayton Hayward) who will forward it to the local ET office for a withdrawal letter to be issued and the file closed. (Where an applicant is represented, withdrawals will be actioned by the National Co-ordinator personally).
- applicants represented by a union are to return the signed form to their union.
- unions will collate their members' withdrawal forms and send monthly schedules to the National Coordinator instructing him to withdraw all cases listed in the schedule.
- cases will be disposed of by the tribunal issuing a letter confirming that the cases have been withdrawn and the files closed. "Dismissed on Withdrawal" decisions will not be issued.
- the named respondent on the withdrawal letter will be The Secretary of State for..... & Others to avoid the complication of adding all named respondents (many ET records show a respondent that no longer exists due to local government reorganisations)
- unions will inform their members that their ET case has been withdrawn upon receipt of the withdrawal letter from the tribunal
- the tribunal will copy withdrawal letters to Treasury Solicitor/Office of the Solicitor who will notify the employing respondents of the withdrawal
- copy of withdrawal letters issued by the National Co-ordinator will be sent to each tribunal office to enable them to close local records

19. The Public Sector employers and unions have agreed in principle the method of calculating arrears of contributions where an employee who has submitted a valid claim opts to backdate membership of the LGPS. An Excel spreadsheet has been developed to perform the calculation. The LGPC is seeking to ensure that, as far as is possible, the options and timescales for paying off the arrears of employee contributions are consistent across both the Local Government Pension Scheme and the Teachers Pension Scheme. This may entail further tailoring of the Excel spreadsheet. Once agreement has been reached and the Excel spreadsheet has been updated, the spreadsheet will be made available to employers by the LGPC so that employers can comply with the requirements of paragraph 16 above. Full details of the timescales for agreeing to backdate membership and the options for paying off the arrears of contributions will be issued to employers in due course.

20. It should be noted that amending regulations are not necessary in order to grant retrospective access to those who have submitted a valid claim to the Employment Tribunal (ET) but will be necessary in other (valid) cases to enable retrospective access to be granted without the need to submit a claim to an ET. It is important that authorities recognise that at this stage only those cases where an ET claim has been lodged are to be dealt with. Those cases where no ET claim has been submitted must await relevant amendments to the LGPS Regulations. Any employee who has not submitted an ET claim and who leaves, or whose stable employment relationship ends, prior to the introduction of any relevant amending regulations will need to submit a claim to the ET within 6 months of leaving, or within 6 months of the stable employment relationship coming to an end, in order to protect their position.

### **Actions for administering authorities**

21. Administering authorities should take **URGENT** action to copy this Circular to employers in their Fund (other than to Local Authorities in England and Wales to whom this Circular has been sent direct) or bring the Circular to the attention of employers by directing them to the Circular on the LGPC website at [www.lg-employers.gov.uk/pensions/circulars.html](http://www.lg-employers.gov.uk/pensions/circulars.html)

Terry Edwards  
Assistant Director (Pensions)  
June 2003



- When a claim is settled, a copy of the form attached is to be completed by the applicant stating that they wish to withdraw their case. The **case number, full name** and **signature** are essential. The applicant's date of birth would also be useful.
- A copy of the form is to be sent to applicants by the pension scheme administrators<sup>11</sup> together with the applicant's individualised calculations
- Where an applicant is unrepresented, they should send the completed withdrawal form to the National Co-ordinator, ETS (currently Clayton Hayward) who will forward it to the local ET office for a withdrawal letter to be issued and the file closed. (Where an applicant is represented, withdrawals will be actioned by the National Co-ordinator personally)
- Applicants represented by a union are to return the signed form to their union
- Unions will collate their members' withdrawal forms and send monthly schedules to the National Coordinator instructing him to withdraw all cases listed in the schedule (N.B. applicants individual withdrawal forms should NOT be sent). If a union represents applicants in more than one public sector, they must send a separate schedule each month for each public sector scheme i.e. health; education; local government
- Cases will be disposed of by the tribunal issuing a letter confirming that the cases in the schedule attached to the letter have been withdrawn and the files closed. "Dismissed on Withdrawal" decisions will not be issued.
- The named respondent on the withdrawal letter will be **The Secretary of State for..... & Others** to avoid the complication of adding all named respondents (many ET records show a respondent that no longer exists due to local government/health service reorganisations)
- Unions will inform their members that their ET case has been withdrawn upon receipt of the withdrawal letter from the tribunal
- The tribunal will copy withdrawal letters to Treasury Solicitor/Office of the Solicitor who will notify the employing respondents of the withdrawal
- Copy of withdrawal letters issued by the National Co-ordinator will be sent to each tribunal office to enable them to close local records

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<sup>11</sup> Although the Bulletin from the Employment Tribunal states that the form is to be issued by the "pension scheme administrators" the LGPC has agreed with the Employment Tribunal that the employer should issue the form (on the basis that it is the employer and not the "pension scheme administrator" that will have the relevant details).

**PART TIME WORKER PENSION CASES :  
WITHDRAWAL OF EMPLOYMENT TRIBUNAL APPLICATION**

To be completed by the employer

**APPLICANT'S FULL NAME**

**APPLICANT'S EMPLOYMENT TRIBUNAL CASE NUMBER**

**APPLICANT'S DATE OF BIRTH**

I wish to withdraw my application to the Employment Tribunal.

**APPLICANT'S**  
**SIGNATURE**\_\_\_\_\_ **DATE**\_\_\_\_\_

The applicant should sign the form above and return it to one of the addresses shown overleaf.

## **ADDRESSES TO RETURN THIS FORM TO**

**If you are represented by one of the following unions, please sign and return this form to the address shown, marking your envelope “Part Time Pension : Tribunal Case Withdrawal”**

**ATL** 7 Northumberland Street, London, WC2N 5RD

**NASUWT** c/o Reynolds Porter Chamberlain, 278-282 High Holborn,  
London WC1V 7HA

**NUT** Hamilton House, Mabledon Place, London, WC1H 9BD

**RCN** 67-69 Harborne Court, Harborne Road, Edgbaston,  
Birmingham, B16 8PE

**UNISON** 1 Mabledon Place, London, WC14 9AJ

**If you are not represented by one of the unions named above please sign and return this form to the address below, marking your envelope “Part Time Pension : Tribunal Case Withdrawal”**

Clayton Hayward, National Pensions Coordinator, ETS, 3rd Floor,  
Byron House, 2a Maid Marian Way, Nottingham, NG1 6HS

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## **Website**

Visit the LGPC website at:  
<http://www.lg-employers.gov.uk/pensions/index.html>

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London, EC1M 5LG

or e-mail [terry.edwards@lg-employers.gov.uk](mailto:terry.edwards@lg-employers.gov.uk)