
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

No. 158 - MAY 2004

PART TIMER PENSION RIGHTS

Purpose of this Circular

1. This Circular follows on from the earlier Circulars regarding the part-time pension claims¹ and the e-mail issued to all local authority Chief Executives on 8 August 2003 which included:
 - a) a letter from the Employment Tribunals dated 8 August 2003, and
 - b) a note from the LGPC explaining the reasoning behind Circulars 140, 140A and 140B.

2. The purpose of this Circular is:
 - a) to bring to the attention of authorities in England and Wales the directions contained in Employment Tribunal Information Bulletin Number 9 and to set out the LGPC Secretariat's view on the impact of that Bulletin;
 - b) to identify, if possible, authorities in England and Wales who are willing to act as co-respondents with the Secretary of State in a number of new test cases; and
 - c) to solicit assistance from authorities in England and Wales in identifying the number of part-time Employment Tribunal claims against them and the categories those claims fall / fell into.

Employers' Organisation for local government
Layden House, 76-86 Turnmill Street, London EC1M 5LG
Tel 020 7296 6745 fax 0207296 6739 www.lg-employers.gov.uk/pensions/index.html
Email terry.Edwards@lg-employers.gov.uk

Executive Director: Charles Nolda
Registered in England No 2676611 Registered office: Local Government House, Smith Square, London SW1P 3HZ



INVESTOR IN PEOPLE

¹ Circulars 85, 94, 96, 101, 104, 108, 125, 128, 138, 140, 140A, 140B, 143 and 152 are available at www.lg-employers.gov.uk/pensions/circulars.html

3. This Circular does not apply to employers in Scotland; nor does it apply to part time pension claims relating to teachers / lecturers.

Employment Tribunal Information Bulletin Number 9

4. Paragraphs 49 to 53 of Circular 152 confirmed that the Employment Appeal Tribunal had delivered its judgment on the issues that had been appealed following the initial Employment Tribunal decisions. Circular 152 advised that the stay on the cases covered by the EAT judgments remained in place until the Employment Tribunal lifted the stay by issuing Employment Tribunal Information Bulletin Number 9 (hereinafter referred to as 'the Bulletin'). The Bulletin was issued on 31 March 2004 and a copy is attached at Annex 1.
5. All outstanding cases (but see paragraph 11 below) can now be dealt with in accordance with the instructions in the Bulletin, other than those cases identified in paragraph 2 of the Bulletin which remain stayed (i.e. those cases involving a transfer of undertakings under TUPE² where the claim against the transferor authority was lodged more than 6 months after the date of the transfer).
6. Authorities should note the deadlines within which they must act in accordance with the Directions contained in the Bulletin.
7. Paragraph 7.1 of the Bulletin extends the categories that can succeed by making it clear that a claim can succeed in respect of any applicant who
 - o has 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 6 April 1988, **and**
 - o has 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 is still employed by that employer³ (or lodged their ET claim within 6 months of leaving that employer) or has statutorily been transferred to another employer and is still employed by that employer (or lodged their ET claim within 6 months of leaving that employer) – but see paragraph 5 above regarding stayed TUPE transfers, **and**
 - o the employer accepts the Secretary of State's concession regarding a comparator.

² Note that cases involving a statutory transfer of employment to another employer were not, and are not, stayed.

³ 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. 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 between the later of

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

and 5 April 1988 (both dates inclusive) **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.

8. By extending the cases that can succeed (as shown above), paragraphs 7.1 and 7.2 of the Bulletin mean that the cases identified in Categories A, C and D of paragraph 10 of Circular 140 can now be issued with a questionnaire (see LGPC Circular 143) and then be dealt with in accordance with LGPC Circular 152. However, to reflect the wording of the Bulletin the notes to Categories C and D in Circular 140 have been updated. The revised versions are set out in paragraphs 9 and 10 below.

Category C – cases that can now succeed

9. Those employees who:
 - o on 16 August 1993 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 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 (i.e. at a time when whole-time employees were compulsorily required to be members of the LGPS) and, since that date, have continued to be employed by the same employer, under a stable employment relationship, and are still employed by that employer (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 5 above regarding stayed TUPE transfers, **and**
 - o the employer adopts the Secretary of State's concession regarding a comparator.

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

- o 8 April 1976, **or**
- o 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 5 April 1988 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:

Paragraph 7.1 of the Bulletin means that the applicant only has the automatic right to pay contributions for service up to 5 April 1988 i.e. up to the date after which whole time employees' service ceased to be compulsorily pensionable.

Paragraph 7.2 of the Bulletin means that, because the person did not opt to join the LGPS on first becoming eligible to do so (i.e. on 17 August 1993), the applicant will not be able to backdate membership of the Scheme for the period between 6 April 1988 and 16 August 1993 unless the applicant can satisfy the Tribunal that she would have joined during that period had she been eligible to do so.

Paragraph 7.3 of the Bulletin means that there will be no right to retrospective access to cover the period between 17 August 1993 and the date the employee actually joined the LGPS unless the applicant can show that, on seeking to join the LGPS, she was denied the right to join or discouraged or dissuaded from joining as the result of a policy of the employer, aimed at part-timers, and involving the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or which otherwise amounted in practice to a denial of the right to membership of the scheme. Authorities should note the further information contained in paragraph 7.3 of the Bulletin regarding a potential breach of contract claim.

Category D – cases that can now succeed

10. Those employees who:

- on 2 May 1995 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 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 (i.e. at a time when whole-time employees were compulsorily required to be members of the LGPS) and, since that date, have continued to be employed by the same employer, under a stable employment relationship, and are still employed by that employer (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 5 above regarding stayed TUPE transfers, **and**
- o the employer adopts the Secretary of State’s concession regarding a comparator.

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

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

to 5 April 1988 **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:

Paragraph 7.1 of the Bulletin means that the applicant only has the automatic right to pay contributions for service up to 5 April 1988 i.e. up to the date after which whole time employees’ service ceased to be compulsorily pensionable.

Paragraph 7.2 of the Bulletin means that, because the person did not opt to join the LGPS on first becoming eligible to do so (i.e. on 2 May 1995), the applicant will not be able to backdate membership of the Scheme for the period between 6 April 1988 and 1 May 1995 unless the applicant can satisfy the Tribunal that she would have joined during that period had she been eligible to do so.

Paragraph 7.3 of the Bulletin means that there will be no right to retrospective access to cover the period between 2 May 1995 and the date the employee actually joined the LGPS unless the applicant can show that, on seeking to join the LGPS, she was denied the right to join or discouraged or dissuaded from joining as the result of a policy of the employer, aimed at part-timers, and involving the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or which otherwise amounted in practice to a denial of the right to membership of the scheme. Authorities should note the further information contained in paragraph 7.3 of the Bulletin regarding a potential breach of contract claim.

Potential further test cases

11. As mentioned in paragraph 5 of Circular 140 and paragraph 54 of Circular 152 there are a considerable number of ET claims that relate to employees who were working

- a) 15 or more but less than 30 hours per week for 35 or more weeks per year or
- b) 30 or more hours per week for less than 45 weeks per year

and who had the right to join the LGPS from 1 April 1987 (although some authorities anticipated the right to join from as early as 1 April 1985 on the basis of DoE Circular 10/85). If they joined the LGPS prior to 2 October 1987 they could backdate contributions (and membership) to 1 April 1986, or to the beginning of the pay period when they first became eligible to join the LGPS if this was after 1 April 1986 i.e. the later of

- i) the date when they first commenced service that met the criteria in (a) or (b) above, or
- ii) the date they attained age 18, or
- iii) in the case of a manual worker, the date 12 months after the date they met the criteria in (a) or (b) above.

Employees who joined the Scheme before 1 April 1988, either as a full or part time employee, could count as "qualifying service" any service meeting the criteria in (a) or (b) above which they had worked between 1 April 1974 and 31 March 1986 except

- i) service before the age of 18,
- ii) service prior to a break in service of 12 months or more, and
- iii) in the case of a manual worker, the first 12 months service at 15 hours or more per week.

"Qualifying service" qualified people for benefits i.e. it determined whether a person was entitled to a benefit under the Scheme and the date when the benefit could be payable. It did not, however, count in working out the amount of the benefit.

From 17 September 1990, those who had joined the Scheme before 1 April 1988, either as a full or part time employee, had the opportunity to buy-back any "qualifying service" (as defined above) so that it would count as "reckonable service" i.e. so that it would also count in working out the amount of the person's benefits.

Part time "qualifying service" between 1 April 1974 and 31 March 1978 could be purchased (and converted into "reckonable service") at the rate of 6% of pay on 31 March 1986 (or the day before the employee joined the Scheme if earlier) and part time service between 1 April 1978 and 31 March 1986 could be purchased at the rate of 12% of pay on 31 March 1986 (or the day before the employee joined the Scheme if earlier). Employers could agree to meet up to half of the employees' contributions.

12. The employees identified in paragraph 11 above who joined, or who could have joined, the LGPS prior to 1 April 1988 have already been afforded the opportunity of purchasing their previous part time service under the agreed 1990 buy-back terms (or would have been afforded the opportunity to do so if they had taken up the option to join the LGPS prior to 1 April 1988). The effect of paragraph 7.1 of Employment Tribunal Information Bulletin

Number 9 would appear to be that an application from such employees would now be able to succeed in respect of service up to 5 April 1988 (i.e. up to the date after which whole time employees' service ceased to be compulsorily pensionable) thereby affording them a second opportunity to purchase the service. However, in arriving at the decision in paragraph 7.1 of Bulletin 9 the Employment Tribunal had not been asked to consider the situation that applied under the LGPS where nationally agreed buy-back terms had previously been agreed and applied. The line that we have taken up to now is that claims from applicants who joined or could have joined the LGPS prior to 1 April 1988 and who are either requesting a further opportunity to buy-back or are contesting the amount of contributions paid under the original 1990 buy-back terms should not, in relation to that part of their claim, be acceded to unless a successful test case is brought before the Employment Tribunal.

13. In consequence of the large number of applicants pressing these points the Treasury Solicitor wrote to the Employment Tribunal in March 2004 requesting that the issues involved in these cases should now be dealt with on a test-case basis.
14. Where an applicant's claim or a part of their claim falls into one of the groups in paragraph 15 below, the claim (or that part of the claim which relates to the issue yet to be tested) should be placed in the stayed category and the respondent should inform the Office of the Employment Tribunal where the case is lodged accordingly i.e. that the case is to be stayed pending the outcome of a further test case or cases, namely Mrs. J. Beswick v Trafford Metropolitan Borough Council and others (case number 2404289/1998) and other test cases that are currently being identified.
15. There appear to be a number of potential scenarios that should be dealt with via test cases and these are listed below.

Group 1 (those who could have joined the LGPS before 1 April 1998 but who chose not to and so missed out on the original backdating and buy-back terms)

This Group covers those employees who have employment of the type detailed in categories (a) or (b) in paragraph 11 above prior to 2 October 1987 but who did not opt to join the LGPS until after 31 March 1988. Even though they were informed of the relevant deadlines for joining the LGPS they did not do so and so missed the opportunity to buy-back the period between 1 April 1986 and 1 October 1987 (because they did not join before 2 October 1987) and also missed the opportunity to count service prior to 1 April 1986 as "qualifying service" which could subsequently have been bought back under the 1990 buy back terms (because they did not join before 1 April 1988).

Group 2 (those who could have joined the LGPS before 2 October 1987 but who chose not to and so missed out on the original backdating terms)

This Group covers those employees in categories (a) or (b) in paragraph 11 above who joined the LGPS on or after 2 October 1987 and before 1 April

1988. They did not join the LGPS prior to 2 October 1987 (even though told of the need to do so if they wished to backdate their contributions to 1 April 1986) and so missed the opportunity to backdate contributions for the period between 1 April 1986 and 1 October 1987. They did, however, retain the opportunity to buy-back their "qualifying service" prior to 1 April 1986.

Group 3 (those who joined the LGPS before 2 October 1987 but who chose not to backdate their contributions to 1 April 1986)

This Group covers those employees in categories (a) or (b) in paragraph 11 above who joined the LGPS before 2 October 1987 and who did not elect to buy-back the period between 1 April 1986 and the date they joined the LGPS. They did, however, retain the opportunity to buy-back their "qualifying service" prior to 1 April 1986.

Group 4 (those who joined the LGPS before 1 April 1988 and who chose not to buy back any pre 1 April 1986 service)

This Group covers those employees in categories (a) or (b) in paragraph 11 above who joined the LGPS before 1 April 1988 and who did not opt to buy back any of their pre 1 April 1986 "qualifying service" under the 1990 buy back terms.

Group 5 (those who joined the LGPS before 1 April 1988 and who chose to buy back only part of their service at the agreed 6% contribution rate)

This Group covers those employees in categories (a) or (b) in paragraph 11 above who joined the LGPS before 1 April 1988 and who only opted to buy back part of their "qualifying service" between 1 April 1974 and 31 March 1978 (or the date they joined the LGPS, if earlier) at 6% under the 1990 buy back terms.

Group 6 (those who joined the LGPS before 1 April 1988 and who chose to buy back only part of their service at the agreed 6% contribution rate and the employer agreed to meet part of the employee's contributions)

This Group is the same as Group 5 but where the employer agreed to meet part of the employee's contributions (up to a maximum of half of the employee's contributions).

Group 7 (those who joined the LGPS before 1 April 1988 and who chose to buy back all of their service covered by the agreed 6% contribution rate)

This Group covers those employees in categories (a) or (b) in paragraph 11 above who joined the LGPS before 1 April 1988 and who opted to buy back all of their "qualifying service" between 1 April 1974 and 31 March 1978 (or the date they joined the LGPS, if earlier) at 6% under the 1990 buy back terms.

Group 8 (those who joined the LGPS before 1 April 1988 and who chose to buy back all of their service covered by the agreed 6% contribution rate and the employer agreed to meet part of the employee's contributions)

This Group is the same as Group 7 but where the employer agreed to meet part of the employee's contributions (up to a maximum of half of the employee's contributions).

Group 9 (those who joined the LGPS before 1 April 1988 and who chose to buy back all of their service covered by the agreed 6% contribution rate and part of their service covered by the agreed 12% contribution rate)

This group covers those employees in categories (a) or (b) in paragraph 11 above who joined the LGPS before 1 April 1988 and who opted to buy back all of their "qualifying service" between 1 April 1974 and 31 March 1978 at 6% and only part of their "qualifying service" between 1 April 1978 and 31 March 1986 (or the date they joined the LGPS, if earlier) at 12% under the 1990 buy back terms.

Group 10 (those who joined the LGPS before 1 April 1988 and who chose to buy back all of their service covered by the agreed 6% contribution rate and part of their service covered by the agreed 12% contribution rate and the employer agreed to meet part of the employee's contributions)

This Group is the same as Group 9 but where the employer agreed to meet part of the employee's contributions (up to a maximum of half of the employee's contributions).

Group 11 (those who joined the LGPS before 1 April 1988 and who chose to buy back all of their service covered by the agreed 6% contribution rate and all of their service covered by the agreed 12% contribution rate)

This Group covers those employees in categories (a) or (b) in paragraph 11 above who joined the LGPS before 1 April 1988 and who opted to buy back all of their "qualifying service" between 1 April 1974 and 31 March 1978 at 6% and all of their "qualifying service" between 1 April 1978 and 31 March 1986 (or the date they joined the LGPS, if earlier) at 12% under the 1990 buy back terms.

Group 12 (those who joined the LGPS before 1 April 1988 and who chose to buy back all of their service covered by the agreed 6% contribution rate and all of their service covered by the agreed 12% contribution rate and the employer agreed to meet part of the employee's contributions)

This Group is the same as Group 11 but where the employer agreed to meet part of the employee's contributions (up to a maximum of half of the employee's contributions).

16. It is recognised, of course, that some claims may fall into more than one of the above Groups. For example, a claim could fall into both Group 2 and Group 7.
17. The LGPC and the Secretary of State wish to identify test cases that fall into the categories detailed in paragraph 15 above. If authorities in England and Wales have outstanding claims against them that fall into any of the above categories and would be willing to act as co-respondent with the Secretary of State in a test case please write to the LGPC providing details of the case. It is clearly important that authorities acting in the test cases are able to demonstrate that they provided correct and timely information to the applicants in connection with their joining and buy back rights under the Local Government Superannuation Regulations 1986.

Questionnaire

18. The LGPC has been asked by the Treasury Solicitor and the Office of the Deputy Prime Minister to provide statistics on the number of part-time Employment Tribunal claims against authorities in England and Wales (excluding teachers and retained firefighters) and the categories those claims fall / fell into.
19. I would be grateful, therefore, if you could complete and return the questionnaire at Annex 2 to me, at the address shown on the questionnaire, **by no later than 30 June 2004.**

Actions for administering authorities

20. Administering authorities in England and Wales should take **URGENT** action to copy this Circular to employers in their Fund (other than to Local Authorities 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

Terry Edwards
Assistant Director (Pensions)
May 2004



Annex 1

PART-TIME WORKER PENSION CASES

INFORMATION BULLETIN NUMBER 9

1. Introduction

I am pleased to be able to report significant progress in these cases within the last few weeks, so much so that only two categories of cases continue to be stayed pending further appeal. In Bulletins Number 7 and 8 (available on the ETS website www.employmenttribunals.gov.uk – click on ‘p/t worker pensions cases’) I explained that as a result of my decisions on the test issues, the cases now fell into five categories – those which must succeed, which must fail, which could be listed for hearing, which remain stayed, and those where the employer required more information about the applicant’s employment history. I gave directions for disposing of those cases which must fail and explained how the agreed settlement in the public sector would be implemented. (The settlement process in the public sector has taken longer than expected but I understand that the final problem has been resolved and that settlement of individual cases has begun). As a result of the latest round of appeals, more cases can be identified as ‘must succeed’ and ‘must fail’. The purpose of this Bulletin is to explain what those cases are, to give some illustrations of what the rulings mean in practice and to give further directions. I will also bring you up to date on the important question of the remedy which the tribunal can give when a claim succeeds and some miscellaneous issues.

2. Cases which remain stayed

One of the test issues concerns cases against **private sector employers** where there has been a transfer of the undertaking of the business from one owner to another. My ruling (which can be found at paragraph 5 of Bulletin Number 7) was overturned on appeal, but there is to be a further appeal to the Court of Appeal. Until that appeal is heard any case in which the employer claims there was a transfer of the undertaking of the business during or after the period of claim, must remain stayed. Cases brought by **retained fire fighters** in 1994 and 1995 continue to be stayed pending an appeal to the Court of Appeal in cases brought by their unions on slightly different grounds in 2000/01.

3. Remedy

It is now clear that our powers are limited to granting a declaration that an employee is entitled to be a member of her employer’s pension scheme between specified dates and to require the employer to obtain figures from the pension fund trustees for the contributions which both parties must make to the scheme. But if either party disputes those figures they must refer the matter to the Pensions Ombudsman. If your employer is prepared to settle your claim but can’t find your records, or you can’t agree about when your employment began or whether it was continuous, you can

ask the tribunal to hear your case and resolve the dispute, but we cannot decide how much you will then have to pay into the scheme. Even if the only dispute is about how much has to be paid into the pension scheme, the parties must still ask the tribunal to make a declaration about the dates (which can be done without a formal hearing) before the Ombudsman will investigate. Details of how to refer cases and of the Pensions Ombudsman's powers can be obtained from his website www.pensions-ombudsman.org.uk or by writing to 11 Belgrave Road, London SW1V 1RB.

4. Comparators

As I have explained before, these cases are not about fair pay but about ensuring equality of pay between men and women. In another case relating to pensions the European Court of Justice was asked to say whether there were any circumstances in which a woman could succeed in her claim if she could not name a comparator, that is a male colleague who was permitted to be a member of the pension scheme who was doing work which was broadly similar to or the same value as the work which she was doing. The Court has ruled that, if the scheme in question is a state scheme, a comparator is unnecessary. The Treasury Solicitor has now conceded on behalf of the Secretary of State that where a claim is against a local authority, an NHS Trust, a college of further education or any other employer which offers its *full-time* employees access to one of the state occupational pension schemes, a claim can succeed without the need to identify a comparator. However, the impact of this ruling will be limited as comparatively few public sector employers were relying on the absence of a comparator as a defence. Any who still wish to take this point are now to comply with the direction at para. 4.1 below. The European Court's ruling does not affect the private sector so that a claim can still only succeed against a private sector employer if the claimant can show that a male colleague who was doing work which was broadly similar to or the same value as her work was eligible to join the pension scheme. In 2002 all private sector employers were asked whether they accepted that a comparator existed in respect of each case brought against them, even if one had not been named by the applicant. A significant proportion said no.

4.1 Directions: Public sector

- a) *By not later than the 4th June 2004, employing respondents in the public sector who do not adopt the Secretary of States concession are to enter a Notice of Appearance (or if they have already entered an appearance, an amended appearance) at the office of the tribunal handling their cases, giving sufficient details of why they say it remains necessary for an applicant to identify a comparator to enable a Chairman to determine whether they have an arguable case. If no appearance (or amendment) is entered within that time, the Respondent will be deemed to have adopted the concession.*
- b) *If the Chairman does not accept that such a respondent has an arguable case, a decision supported by extended reasons will be issued striking out the Notice of Appearance or amendment. If the case appears to be arguable, it will be listed for hearing.*

4.2 Directions: Private sector

- a) *By not later than the 4th June 2004 private sector employers are to write to the tribunal office handling their cases identifying those which they say must fail because no comparator exists.*
- b) *The tribunal will then write to these applicants or their representative asking them to give a reason why their claim should not be struck out. Unrepresented applicants will have 28 days to reply. Representatives (to allow them time to consult with what may be a large number of applicants) will be given 3 months.*

- c) *Unless an applicant names a comparator or says that her work was equal to some other, named, category of work which was done by men (although not necessarily only by men) who were eligible to join the pension scheme, or raises some other arguable point, her claim will be struck out.*
- d) *Where a male applicant or a comparable job category is named, the employer will be asked if they agree or, if not, to explain why the jobs were not equal. The applicant will then be asked if in view of the employer's explanation she still says the jobs were equal.*
- e) *If she says yes, the question of whether the jobs are in fact comparable will be listed for hearing before a tribunal.*

5. Further education colleges

In Bulletin Number 7 I explained that I had had to rule on the effect of the re-organisation of further education in the early 1990's when control of colleges passed from local authorities to the colleges (FEC's) themselves. The FEC's had accepted that where a teacher was actually under contract on the day of the transfer, they became liable for the exclusion of that teacher from the pension scheme during that particular contract only. But I ruled that they were also liable for earlier contracts which, together with that contract, formed a stable employment relationship between the teacher and the local education authority. The FEC's lodged an appeal against that decision but later withdrew it so that my ruling stands. This means that where a teacher who transferred to a college as a result of the re-organisation had previously worked for a local authority on a succession of termly or academic yearly contracts or who otherwise had a stable employment relationship with the authority (for the meaning of which see below), the college became liable for the teacher's exclusion from the pension scheme for the whole of that relationship, even if on the date of the transfer the teacher was between contracts. Except where a college does not accept that a stable employment relationship existed, or has identified some other grounds of defence in respect of a particular teacher, I understand that all cases affected by this ruling will now be settled without further intervention from me.

6. Stable employment relationship

In my decision on the test issues I was asked to define "stable employment relationship". I did so. The appeal against my ruling has now been dismissed and there is to be no further appeal. I can therefore give directions for the cases in which this point arises. Its significance is this. The time limit for beginning employment tribunal proceedings about exclusion from a pension scheme is 6 months from the end of the employment in question, and that time limit cannot be extended. Under UK law the 6 months runs from the end of each contract of employment between the employer and the employee, so that if someone worked regularly or intermittently for the same employer under a succession of different contracts, separate tribunal proceedings would have to be brought within 6 months of the ending of each contract or the right to claim is lost. But as a result of the ruling of the European Court of Justice, where that succession of contracts gives rise to a stable employment relationship, it is only necessary to bring one set of proceedings which must be commenced not later than 6 months after the relationship has come to an end. My task was to identify when a series of periods of employment gives rise to a stable employment relationship. My answer was as follows.

6.1 Creating the relationship: regular contracts

In this case a stable employment relationship arises (and only arises) when an employee is employed - by the same employer - on a succession of contracts - punctuated by intervals without a contract - on the same or broadly similar terms - to perform essentially the same work - under the same pension scheme - provided that the sequence of contracts and the pattern of intervals between them is dictated either by the nature of the work itself or the employer's requirements for employees to

perform it - and (subject to 6.2 below) the contracts and the intervals between them are sufficiently regular for it to be apparent without the benefit of hindsight to determine when the sequence is broken, that being the moment from which time begins to run. A good example of this kind of stable employment relationship is a teacher who regularly worked for the same college, teaching essentially the same subject, on a succession of termly or academic yearly contracts.

6.2 Creating the relationship: intermittent contracts

Where the sequence of contracts is intermittent rather than regular, the intention of the parties both as to the inception and the cessation of the working arrangement which is said to give rise to the stable employment relationship outweighs the absence of a pattern of strict regularity. In crude terms, the question could be said to be, was the applicant part of the employer's 'first team', not merely a name on a list of people to whom the employer might offer work? Where a stable employment relationship has arisen in such circumstances, it remains in being until the parties intend otherwise, notwithstanding changes in the frequency of the work, provided that any such changes arise exclusively from the nature of the work. The effect of this ruling is that the great majority of supply teachers and home tutors will not have had stable employment relationships with the local authorities for whom they worked and will therefore only be able to bring claims in respect of days actually worked within the six months immediately preceding the presentation of their claims.

6.3 Ending the relationship

A stable employment relationship ceases and time for commencing proceedings therefore begins to run when:

- (a) a party indicates that further contracts will either not be offered or not accepted if offered
- (b) a party acts inconsistently with the continuation of the relationship
- (c) a further contract is not offered when the pattern of the preceding cycle of contracts indicates that it should have been offered
- (d) a party no longer intends to treat an intermittent relationship as stable
- (e) the terms of the contract or the work to be done under it alters radically; e.g. a succession of short term contracts is superseded by a permanent contract.

6.4 What the applicant must prove

The burden of proving not merely the pattern of work but also any of the other factors necessary to demonstrate the existence of a stable employment relationship, is on the applicant.

6.5 Directions

- a) *By not later than the 28th May 2004, all employing respondents in both the public and private sectors other than the NHS Pensions Agency, are to send to the office of the tribunals at which the cases against them are held, a list of the cases which they say must fail in whole or in part, because the proceedings were commenced more than 6 months after a stable employment relationship ended or because no stable employment relationship ever existed. Where the claim is in time in respect of some work done by the applicant, the list should state the number of days of work in respect of which, or the date from which, the claim is conceded.*
- b) *By not later than 11th June 2004, the NHS Pensions Agency is to send the same information by e-mail to Clayton Hayward, the National Pensions Co-ordinator at pensions@ets.gsi.gov.uk in respect of health sector employers.*
- c) *A letter will then be sent by the tribunal to each applicant so identified, or to their representative, inviting them to give a reason why their claim should not be struck out. Where the claim is in time in respect of a specified number of days of work, the applicant will be asked to say whether the claim is to be withdrawn in respect of those days if the*

remainder of the claim is struck out. Applicants will be given 28 days to reply to letters. Representatives will be allowed 3 months.

- d) *It will not be sufficient to prevent a claim from being struck out for an applicant simply to assert that a stable employment relationship existed when proceedings were commenced or had ended less than 6 months before. The applicant must give sufficient particulars of their working pattern and dealings with the respondent to enable the Chairman to determine, by reference to the criteria set out at 6.1, 6.2 and 6.3 above, that there is an arguable case that such a relationship existed. If the Chairman cannot so determine, the case will be struck out without a hearing but the Chairman will give reasons for doing so.*
- e) *If an applicant can give sufficient particulars to suggest that a stable employment relationship might have existed and had ended less than six months before proceedings were commenced, the case will be listed for hearing.*

7. Applicants who failed to join a scheme when they became eligible

This so called 'opters' question gave rise to three appeals, one of which was successful. Rather than set out the various rulings in full, I will briefly explain their effect (for the precise state of the law see Bulletin Number 7 paras. 7.2 and 7.3. but disregard numbered paragraphs 1 and 2 under 7.3). The position remains complex and even if you never joined your employer's scheme despite becoming eligible to do so, your claim could succeed in part, albeit in small part. But it is important to bear in mind that your SERPS pension might be affected if you now decide to join your employer's scheme, and your attention is drawn to paragraph 3.2 of Bulletin 7 and paragraph 4 of Bulletin 8.

7.1 Membership for full-time employees compulsory – part-timers excluded

Your claim can succeed in respect of any period of time during which part-timers could not join their employer's scheme but full-time employees had to join, even if you would not have joined had you had the option to do so and did not join when the rules of the scheme changed. This is because had you been treated equally with the full timers, you would have had to be a member of the scheme until you could opt out and would in due course have received a pension for that period of service.

7.2 Membership for full-time employees not compulsory – part-timers excluded

Your claim will not succeed in respect of this period of time if you did not join the scheme when the rules later changed to allow you to do so or you only did so after significant delay. This is because your failure to join the scheme when you were allowed to, suggests that had you been a full-timer you would not have joined the scheme during this earlier period of time anyway and therefore you have lost nothing. However, there is an exception for applicants who can satisfy a tribunal that they would have joined during the earlier period had they been eligible. This is to allow for special cases such as those where by the time the rules were changed to enable part-timers to join, an applicant was so near to retirement that joining was pointless, or she had already taken out a private pension plan.

7.3 Part-timers always eligible to join or who did not join on becoming eligible

A part-time employee who was in fact always eligible for membership of her employer's scheme (i.e. although part-time she always worked more than the minimum qualifying hours) or who did not join the scheme after a rule change made her eligible to join, normally cannot succeed in her claim. There is one exception - if on seeking to join the scheme she was denied the right to join or discouraged or dissuaded from joining as the result of a policy of her employer, aimed at part-timers and involving the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or which otherwise in practice amounted to a denial of

the right to membership of the scheme. Where no such policy existed but the employer failed to draw the change in the rules governing eligibility to a part-time employee's attention, although her equal pay claim cannot succeed (because the rule change in fact removed the discrimination between full-timers and part-timers) she may be able to bring a breach of contract claim. However, if she only does so more than 6 years after she was refused the right to join or became aware of the right to join, the claim might be out of time. In any event, such a claim can only be brought in the Employment Tribunal after the applicant's employment with the relevant respondent has ended and must be brought within three months of that date.

7.4 Directions

- a) *By not later than **4th June 2004**, the NHS Pensions Agency is to send by e-mail to Clayton Hayward*
 - i. *where a trade union or professional body has been named as a representative, a schedule of the opters cases affecting that union or body [i.e. one schedule per union or professional body], identifying in separate lists those cases which must fail in full and those which must fail in part as a result of the applicant's failure to opt into the scheme. In the case of those which fail only in part, the period in respect of which the claim is now admitted is to be identified;*
 - ii. *a similar schedule in two parts listing all the unrepresented applicants.*
- b) *By not later than **4th June 2004**, other public sector employing respondents and private sector respondents are to send similar schedules to the tribunal office responsible for the cases against them – not to Mr Hayward.*
- c) *One letter per employing respondent will be sent by the tribunal to each representing union or professional body inviting them to give a reason why all of the claims on the schedule should not be struck out in whole or in part on the basis that they must fail because of the applicant's failure to opt into the scheme. Where the claim fails only in part representatives will be asked to say whether each applicant wishes to withdraw the part which is admitted by the respondent if the remainder of her claim is struck out.*
- d) *Within **4 months** representatives are to respond with one letter per employing respondent. Because of the very limited nature of the exceptions to the basic principle that a failure to opt in will defeat a claim in respect of the period after the date on which membership was open to the applicant, it is anticipated that the majority of cases against a respondent are likely to stand or fall together. Representatives are therefore only required to list in their reply those cases where it is to be alleged either that a policy existed or that paragraph 7.2 (above) applies. The remaining cases will be deemed to be withdrawn in whole or in part as the case may be. Where the existence of a policy is alleged, the particulars mentioned in (h) below must be given. Where paragraph 7.2 is said to apply a very brief explanation is to be given for each case.*
- e) *As soon as reasonably practicable, but in any event within **5 months** of receiving the letter mentioned in (c) above, unions and other bodies are to inform the tribunal in respect of each case which fails only in part, whether the part that succeeds is to be withdrawn or pursued. Claims which are to be pursued are to be dealt with by the parties as 'must succeed' claims to that extent.*
- f) *A letter will be sent to each unrepresented applicant whose claim is identified as failing, inviting them to give a reason why their claim should not be struck out in whole or in part on the basis that it must fail because of their failure to opt into the scheme. Where the claim fails only in part*

*the applicant will be asked to say whether she wishes to withdraw the part which is admitted by the respondent if the remainder of her claim is struck out. Applicants will be given **2 months** to reply to letters.*

- g) Where it is claimed that paragraph 7.2 above applies the respondents will be asked if they concede the claim. If they do not, the case will be listed for hearing.*
- h) If it is alleged that the failure to join the pension scheme was as a result of a policy by the employer, the case will not be listed for hearing unless the allegation is supported by sufficient particulars to lead the Chairman to conclude that it is arguable. For example if an applicant alleges the existence of such a policy but it is clear that other part-time employees of the same employer did join the scheme at the time the applicant became eligible to join, her case is likely to be struck out. If a large number of applicants employed by the same employer allege the existence of such a policy and explain the circumstances in which they continued to be denied membership of the scheme, those cases are likely to be listed for hearing unless the respondents concede the existence of the policy. However, it will be for the Chairman considering the reply to the letter to exercise his or her discretion in each case.*

8. Principal Civil Service Pension Scheme

These cases are largely unaffected by the recent changes, other than the removal of the requirement for a comparator, although they give rise to a wide range of other issues. I have recently held a case management discussion on these cases and given directions designed to bring a selection of them on for hearing. Details will be sent to all affected applicants who are unrepresented.

9. Progress in the private sector

Many private sector cases have settled or are in the course of settlement. The implementation of the settlement reached in the **banking sector** is proceeding slowly although I understand that the **marriage gratuity cases** brought against the HSBC (formally Midland Bank) are to be withdrawn in those cases where the gratuity was paid prior to April 1976. The union representing the great majority of the applicants has written to each of its members to explain why. If you are involved in these cases but are not represented by Unifi, you may obtain a copy of the letter by applying to Clayton Hayward at the address below. A basis for the settlement of cases in the **electricity supply sector** has now been reached and should be on our website by the time this Bulletin is published. However about 25% of cases in this sector remain stayed pending the appeal on the transfer of undertakings question. All private sector cases which are not affected by that appeal and which will not be struck out as a result of the directions I have given in this Bulletin should now be either settled or listed for hearing.

Please – Don't telephone the tribunal to ask for more information as this Bulletin describes the latest position. If you need to tell us something about your case please write to the tribunal office where it is registered, quoting the case number which is shown on the address label on the envelope in which you received this Bulletin and on all letters you have received from the tribunal.

John K Macmillan
Regional Chairman.
31st March 2004

Regional Office of the Employment Tribunals
3rd Floor
Byron House
2a Maid Marian Way
Nottingham
NG1 6HS

Type of authority:	Please tick
London Borough	
English County Council	
English District Council	
English Unitary Authority	
English Metropolitan Authority	
Welsh County Council	
Welsh County Borough Council	
	Please enter numbers
How many part timer ET claims have been lodged, in total, against the authority?	
Of these, how many, in aggregate, relate to applicants who would fall within the cases identified in paragraph 13 of LGPC Circular 157?	
How many claims have been struck out in full?	
How many claims have been struck out in part / accepted in part?	
How many claims have been accepted in full?	
How many claims are still stayed on the TUPE point?	
How many claims are stayed for some other reason?	
How many claims, if any, do you intend to continue to defend on the comparator point?	
How many claims have you asked to be struck out in whole or in part which are currently the subject of a challenge from the applicant?	

Name of authority

Completed by (name in full)

Designation Date

Please return the completed questionnaire by no later than 30 June 2004 to LGPC, Employers' Organisation for Local Government, Layden House, 76-86 Turnmill Street, London, EC1M 5LG.

Distribution

Chief Executives of Local Authorities (3 copies)
Pension Managers of Administering Authorities
Pension Managers (outsourced) and Administering Authority Client Managers
Officer Advisory Group
Local Government Pensions Committee
Trade Unions
ODPM
COSLA
SPPA
Private Clients

Website

Visit the LGPC website at:

<http://www.lg-employers.gov.uk/pensions/index.html>

Copyright

Employers' Organisation for Local Government (the EO). This Circular may be reproduced without the prior permission of the EO provided it is not used for commercial gain, the source is acknowledged and, if regulations are reproduced, the Crown Copyright Policy Guidance issued by HMSO is adhered to.

Disclaimer

The information contained in this Circular has been prepared by the LGPC Secretariat, a part of the Employers' Organisation. It represents the views of the Secretariat and should not be treated as a complete and authoritative statement of the law. Readers may wish, or will need, to take their own legal advice on the interpretation of any particular piece of legislation. No responsibility whatsoever will be assumed by the Employers' Organisation for any direct or consequential loss, financial or otherwise, damage or inconvenience, or any other obligation or liability incurred by readers relying on information contained in this Circular. Whilst every attempt is made to ensure the accuracy of the Circular, it would be helpful if readers could bring to the attention of the Secretariat any perceived errors or omissions. Please write to:

LGPC
Employers' Organisation for Local Government,
Layden House
76 - 86 Turnmill Street
London, EC1M 5LG

or e-mail terry.edwards@lg-employers.gov.uk