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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. 160 – AUGUST 2004

## PART-TIME PENSION CLAIMS – ENGLAND AND WALES

### Purpose of this Circular

1. This Circular has been prepared in response to a request from authorities to detail, within a single Circular<sup>1</sup>, the cases which in the view of the LGPC Secretariat, may fail, succeed in whole or in part, or are stayed.
2. The Circular takes account of the new Directions issued by the Employment Tribunal on 3 August 2004 (see copy at Appendix 1).
3. This Circular does not apply to authorities in Scotland; neither does it apply to part-time pension claims relating to teachers / lecturers.

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<sup>1</sup> Earlier Circulars were Circulars 85, 94, 96, 101, 104, 108, 125, 128, 138, 140, 140A, 140B, 143, 152, 158 and 158A which are available at: [www.lg-employers.gov.uk/pensions/circulars.html](http://www.lg-employers.gov.uk/pensions/circulars.html) Please note that there was a typographical error in Circular 158A. The reference to "1.5.77." in the final sentence of paragraph 7 of Circular 158A should have read "1.5.78."

## Background

4. On 8 February 2001 the House of Lords decided in the Preston case<sup>2</sup> that it had been discriminatory since 8 April 1976<sup>3</sup> to debar part time staff from access to a pension scheme in circumstances where the scheme was open to a full time (male) comparator. The House of Lords also decided that a claim for retroactive membership of a pension scheme had to be lodged with an Employment Tribunal either whilst still employed under, or within 6 months of the ending of, a stable employment relationship with the employer who had debarred the claimant from membership of a pension scheme.
5. Since the House of Lords decision, the Employment Tribunal and the Employment Appeals Tribunal have considered various issues in relation to a number of test cases. These have culminated in a number of Directions Orders (available at [www.employmenttribunals.gov.uk](http://www.employmenttribunals.gov.uk)).
6. It should be noted that regulations amending the Local Government Pension Scheme Regulations 1997 are not necessary in order to grant retrospective membership to those who have submitted a valid claim to the Employment Tribunals. However, it is important to recognise that at this stage only those cases where an ET claim has been lodged can be dealt with. Employees who believe they were wrongly excluded from membership of the Scheme can only have their case considered if they lodge a claim with the ET or amending regulations are introduced to permit their case to be dealt with without the need to submit an ET claim. It is not certain at this stage whether, when or in what form such amending regulations might be made<sup>4</sup>. Any employee who has not submitted an ET claim and who ceases a stable employment relationship prior to the introduction of any relevant amending regulations will need to submit a claim to the ET within 6 months of the cessation of the stable employment relationship in order to protect their position.

## History of membership conditions

7. In order to be in a position to determine which part-time pension claims can succeed in full, which can succeed in part, and which must fail, it is necessary to understand the history of membership conditions applying to the LGPS in England and Wales.

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<sup>2</sup> *Preston and Others v Wolverhampton Healthcare N.H.S. Trust & Others and Fletcher & Others v Midland Bank Plc*

<sup>3</sup> The date of the ECJ's judgment in *Defrenne v Sabena* (case 43/75) [1976] ICR 547

<sup>4</sup> If made, regulations could either be in the form of general overriding regulations or regulations specifically amending the Local Government Pension Scheme Regulations 1997.

8. A simplified summary of the membership conditions is set out below:

<p>1 April 1974</p>	<p>Casual employees and employees appointed for a period of not more than 3 months could not join the LGPS. The following categories of employee, aged 18 or over, were compulsorily pensionable:-</p> <p><b>Whole-time Officers</b> appointed for more than 3 months.</p> <p><b>Whole-time Manual Workers</b> appointed for more than 3 months who had previous Local Government service for which they had not received a refund and who had not had a break in service of more than 12 months.</p> <p><b>Other Whole-time Manual Workers</b> after 12 months continuous whole-time employment.</p> <p><b>Part-time employees</b> pensionable on 31 March 1974 who remained in continuous employment with the same employer. No other category of part-time employee was pensionable but see note 3 in the table entry for 1 April 1987.</p> <p>Note: "whole time" was defined as where the "contractual minimum hours of employment regularly or usually amount to 30 or more in each week".</p>
<p>1 April 1987</p>	<p><b>Optional membership</b> was introduced for some part-time employees. On this date the general rules for membership became:-</p> <p>(i) Employees employed for 30 or more hours per week (on average) for 45 or more weeks per year were automatically pensionable provided, in the case of Manual Workers they had completed 12 months at 15 hours or more per week.</p> <p>(ii) *Employees working 30 or more hours per week for less than 45 weeks per year and employees working 15 or more (in aggregate) but less than 30 hours per week for 35<sup>5</sup> or more weeks per year were able to opt to join the LGPS provided, in the case of Manual Workers, they had completed 12 months at 15 hours or more per week.</p> <p>Notes:</p> <p>1. If the contractual hours of an employee in the Scheme were reduced from 30 or more to less than 30 per week, or from 15 or more to less than 15 per week, the employee remained in the Scheme unless he / she opted out.</p>

<sup>5</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.

	<p>2. * Employees working 30 or more hours per week for less than 45 weeks per year whose employing authority, prior to 1 April 1987</p> <p>a) had permitted them to join the Scheme remained in the LGPS but could now elect to opt out</p> <p>b) had not permitted them to join the Scheme could now elect to join.</p> <p>3. *Employers who, prior to 1 April 1987, had on or after 1 April 1974 permitted employees working 15 or more (in aggregate) but less than 30 hours per week to join the LGPS were given retrospective sanction for doing so.</p> <p>4. NB. Some authorities gave category (ii) and (iii) employees the option to join the LGPS from April 1985 (in the light of DoE Circular 10/85 dated 10 April 1985).</p> <p>(iii) Whole-time Manual Workers who had opted in 1973 not to join the LGPS were now able to opt to join.</p> <p>(iv) Employees appointed for a period of not more than 3 months and casual employees could not join the LGPS.</p>
1 October 1987	1 April 1987 category (ii) and (iii) employees who joined the LGPS before 2 October 1987 could backdate their date of entry to 1 April 1986 or the beginning of the pay period when they first became eligible to join the LGPS if this was after 1 April 1986.
31 March 1988	Employees in the 1 April 1987 categories (i) to (iii) who joined the LGPS before 1 April 1988 could count any "continuous" previous part-time employment of 15 hours or more per week between 1 April 1974 and 31 March 1986 as qualifying service (but breaks of less than 12 months did not disbar previous service from counting). The first 12 months at 15 hours or more did not count as qualifying service for Manual Workers.
6 April 1988	<p>Membership of the LGPS was no longer compulsory for new starters and existing members could opt out. New staff who wished to join the Scheme had to opt to do so apart from new whole-time employees who had formerly been pensionable on 5 April 1988 for whom membership of the LGPS was still automatic on starting (with the right to opt out).</p> <p>The definition of whole-time was amended i.e. the reference to having to work 45 or more weeks per year was removed.</p>

1 October 1989 (see reg 42 of SI 1992/172)	The age of entry was reduced from 18 to 16. The manual workers 12 month waiting period was abolished.
1 April 1990	Automatic membership was re-instated (with the right to opt out) for employees working 30 or more hours per week. Membership for all other employees working 15 or more hours per week for 35 or more weeks per year was still by option.
17 September 1990	Employers had to notify all employees with part time qualifying service (see entry at 31 March 1988) by 16 September 1991 of the right to buy-back any or all of their qualifying service so that it would count as reckonable service in calculating the amount of their retirement benefits. Those employees who wished to buy-back had to elect to do so within 6 months of being notified by their employer of the right to buy-back. The employee contribution rate for pre 1.4.78. service being bought back was 6%, and for any post 31.3.78. service being bought back it was 12%, of the pay at the "relevant date" (see SI 1990/1709). The employer could agree to meet up to half of the employee contributions on behalf of the employee.
17 August 1993	The minimum 15 hours per week rule was abolished. The Scheme was now open to all employees other than casual employees, those contracted to work for 3 months or less, and those part-time employees (i.e. working less than 30 hours per week) whose contractual weeks were less than 35 per year.
16 February 1994	Employees contracted to work less than 15 hours per week who opted to join the LGPS before 17 February 1994 could backdate their date of entry to the date they first commenced part-time employment (i.e. less than 30 hours per week) or 1 January 1993, whichever was the later date.
2 May 1995	<p>All existing employees, including those whose appointment was for a period of 3 months or less and those part timers whose contractual weeks were less than 35 per year, other than casual employees, who were not already in the scheme and had not previously opted out of membership of the scheme were automatically brought into the scheme with the right to opt out. Casual employees could opt to join the Scheme.</p> <p>All new employees, other than casual employees, were automatically brought into the Scheme with the right to opt out. Casual employees could opt to join the Scheme.</p>

## Which cases can be accepted

9. It is the view of the LGPC Secretariat that the cases set out below can be accepted to the extent described. In arriving at the views expressed, the Secretariat has taken the above table into account and has fully considered the determinations issued by the Employment Tribunals in relation to the part-timer test cases. The dispute is, however, between the appellant (i.e. the employee or former employee) and the respondent (i.e. the employer or former employer) and it is, therefore, for the respondent to fully consider the Employment Tribunals 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. Furthermore, it should be noted that the views expressed in this Circular are only of direct relevance to "scheduled bodies". "Resolution bodies" (i.e. those bodies that have to pass a statutory resolution specifying which employees or class of employees are to be offered membership of the LGPS) and "admitted bodies" (i.e. those bodies that participate in the LGPS under an admission agreement and who nominate employees or a class of employees for membership of the LGPS under the admission agreement) will need to carefully consider the relevance to them of the Preston judgement and the ET decisions in relation to the test cases before making their response to the Employment Tribunal.
10. The Secretariat considers that the following cases can now be settled by "scheduled bodies":
- I. those employees who on 6 April 1988 were contracted to work
    - o 30 or more hours per week (on average) for 45 or more weeks per year, **or**
    - o 30 or more hours per week (on average) for less than 45 weeks per year, **or**
    - o 15 or more (in aggregate) but less than 30 hours per week for 35 or more weeks per year, **and**
    - o have a period of service during which the contractual hours were less than 15 per week, or the contractual hours were 15 or more (in aggregate) and less than 30 per week but for less than 35 weeks per year, which fell on or after 8 April 1976 and before 6 April 1988, **and**
    - o 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>6</sup> (or lodged their ET claim within 6 months of leaving

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<sup>6</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.

- / ceasing a stable employment relationship with that employer) or have statutorily<sup>7</sup> been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) – but see paragraph 12 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; or the employer adopts the Secretary of State's concession regarding a comparator (i.e. that there is no need for the applicant to identify a comparator).

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

- 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 15 per week, or
- the contractual hours were 15 or more (in aggregate) and less than 30 per week but for less than 35 weeks per year.

II: those employees who on or after 6 April 1988 and before 17 August 1993:

- o increased their contractual hours from less than 15 per week to 15 or more but less than 30 per week for 35 or more weeks per year, **or**
- o increased their contractual weeks from less than 35 to 35 or more per year and their contractual hours were 15 or more (in aggregate) and less than 30 per week, **or**
- o increased their contractual hours from less than 15 per week to (on average) 30 or more per week, **and**
- o joined the LGPS on and from the date the contractual hours or the contractual weeks were increased as mentioned above (i.e. the employee joined when first eligible to do so), **and**
- o have continued to be employed by the same employer, under a stable employment relationship, since the date the contractual hours were increased to 15 or more per week or the

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<sup>7</sup> i.e. where there has been a statutory novation.

- contractual weeks were increased to 35 or more and are still employed by that employer<sup>8</sup> (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) or have statutorily<sup>9</sup> been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) – but see paragraph 12 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; or the employer adopts the Secretary of State's concession regarding a comparator (i.e. that there is no need for the applicant to identify a comparator).

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

- 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 who started employment before 1 October 1988, 12 months after the date employment commenced, **or**
- o 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**
- o in the case of a manual worker who started employment on or after 1 October 1989, the date employment commenced, **or**
- o the date the employee attained age 18 if this fell before 1 October 1989, **or**
- o the date the employee attained age 16 if this fell on or after 1 October 1989

**to** the day before the date the contractual hours were increased to 15 or more per week or the day before the contractual weeks were increased to 35 or more per year

**during which**

- the contractual hours were less than 15 per week, or
- the contractual hours were 15 or more (in aggregate) and less than 30 per week but for less than 35 weeks per year.

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<sup>8</sup> See comment at footnote 6.

<sup>9</sup> i.e. where there has been a statutory novation.

- III: those employees who on or after 6 April 1988 and before 17 August 1993
- o increased their contractual hours from less than 15 per week to 15 or more but less than 30 per week for 35 or more weeks per year, **or**
  - o increased their contractual weeks from less than 35 to 35 or more per year and their contractual hours were 15 or more (in aggregate) and less than 30 per week, **or**
  - o increased their contractual hours from less than 15 per week to (on average) 30 or more per week, **but**
  - o did not join the LGPS on and from the date the contractual hours or the contractual weeks were increased as mentioned above (i.e. the employee did not join when first eligible to do so), **but**
  - o did elect to join later **and**
  - o were contracted to work for less than 15 hours per week, or for 15 or more and less than 30 hours per week but 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<sup>10</sup> (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) or have statutorily<sup>11</sup> been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) – but see paragraph 12 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; or the employer adopts the Secretary of State's concession regarding a comparator (i.e. that there is no need for the applicant to identify a comparator).

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

- 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**

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<sup>10</sup> See comment at footnote 6

<sup>11</sup> i.e. where there has been a statutory novation.

- o the date the employee attained age 18

**to** 5 April 1988

**during which**

- the contractual hours were less than 15 per week, or
- the contractual hours were 15 or more (in aggregate) and less than 30 per week but for less than 35 weeks per year.

Paragraph 7.1 of the Employment Tribunal Bulletin No 9 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, the applicant will not be able to backdate membership of the Scheme for the period between 6 April 1988 and the date she became eligible to join the Scheme 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 the date the applicant became eligible to join the Scheme and the date she actually did so 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.

IV: those employees who on 16 August 1993:

- o 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, 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 and are still employed by that employer<sup>12</sup> (or lodged their ET claim

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<sup>12</sup> See comment at footnote 6.

within 6 months of leaving / ceasing a stable employment relationship with that employer) or have statutorily<sup>13</sup> been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) – but see paragraph 12 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; or the employer adopts the Secretary of State's concession regarding a comparator (i.e. that there is no need for the applicant to identify a comparator).

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

- 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 who started employment before 1 October 1988, 12 months after the date employment commenced, **or**
- o 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**
- o in the case of a manual worker who started employment on or after 1 October 1989, the date employment commenced, **or**
- o the date the employee attained age 18 if this fell before 1 October 1989, **or**
- o the date the employee attained age 16 if this fell on or after 1 October 1989

**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 15 per week, or
- the contractual hours were 15 or more (in aggregate) and less than 30 per week but for less than 35 weeks per year.

V: Those employees who on 16 August 1993:

- o were contracted to work less than 15 hours per week for 35 or more weeks per year **but**

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<sup>13</sup> i.e. where there has been a statutory novation.

- 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, or for 15 or more and less than 30 hours per week but 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<sup>14</sup> (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) or have statutorily<sup>15</sup> been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) – but see paragraph 12 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; or the employer adopts the Secretary of State's concession regarding a comparator (i.e. that there is no need for the applicant to identify a comparator).

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:

- 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 15 per week, or
- the contractual hours were 15 or more (in aggregate) and less than 30 per week but for less than 35 weeks per year.

Paragraph 7.1 of the Employment Tribunal Bulletin No 9 means that the applicant only has the automatic right to pay contributions for service up to, at the latest, 5 April 1988 i.e.

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<sup>14</sup> See comment at footnote 6

<sup>15</sup> i.e. where there has been a statutory novation.

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.

- VI: those employees who on 2 May 1995:
- o were contracted to work for less than 30 hours per week for less than 35 weeks per year **and**
  - o joined the LGPS from 2 May 1995 i.e. the date such employees were compulsorily brought into the Scheme (with the right to opt out), **and**
  - o have continued to be employed by the same employer, under a stable employment relationship, since 2 May 1995 and are still employed by that employer<sup>16</sup> (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) or have statutorily<sup>17</sup> been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) – but see paragraph 12 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; or the employer adopts the Secretary of State's

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<sup>16</sup> See comment at footnote 6.

<sup>17</sup> i.e. where there has been a statutory novation.

concession regarding a comparator (i.e. that there is no need for the applicant to identify a comparator).

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

- 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 who started employment before 1 October 1988, 12 months after the date employment commenced, **or**
- o 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**
- o in the case of a manual worker who started employment on or after 1 October 1989, the date employment commenced, **or**
- o the date the employee attained age 18 if this fell before 1 October 1989, **or**
- o the date the employee attained age 16 if this fell on or after 1 October 1989

**to** 1 May 1995

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

VII Those employees who on 2 May 1995:

- o were contracted to work for less than 30 hours per week for less than 35 weeks per year **but**
- o did not join the LGPS on 2 May 1995 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 30 hours per week and 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<sup>18</sup> (or lodged their ET claim within 6 months of leaving / ceasing a stable employment relationship with that employer) or have statutorily<sup>19</sup> been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a stable employment

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<sup>18</sup> See comment at footnote 6

<sup>19</sup> i.e. where there has been a statutory novation.

- relationship with that employer) – but see paragraph 12 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; or the employer adopts the Secretary of State's concession regarding a comparator (i.e. that there is no need for the applicant to identify a comparator).

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:

- 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.

Paragraph 7.1 of the Bulletin means that the applicant only has the automatic right to pay contributions for service up to, at the latest, 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.

## Casual Employees

11. 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 had a disproportionate impact (on women). If sufficient particulars are so provided, it is for the employer to seek 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 will be able to demonstrate a stable employment relationship (as defined in paragraph 6 of the Tribunals Information Bulletin No 9) both prior to and since that date. Furthermore, there would be no right to retrospective access to cover any 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 Tribunals Information Bulletin No 9 regarding a potential breach of contract claim.

### **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)**

12. Paragraph 2 of the Employment Tribunal Information Bulletin No 9 draws attention to those cases that remain stayed pending the outcome of an appeal to the Court of Appeal i.e. those cases involving a transfer of undertakings under TUPE that occurred during the period covered by the claim.
13. Authorities will wish to note, however, that there are a number of further test cases being considered in relation to 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.

14. The employees identified in paragraph 13 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 31 March 1986 (i.e. up to the date during which such employees were excluded from the Scheme on normal contribution terms but membership for whole time employees was compulsory) 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 service of 15 or more but less than 30 hours per week for 35 or more weeks per year, or service of 30 or more hours per week for less than 45 weeks per year, 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.

15. In consequence of the large number of applicants pressing these points the Treasury Solicitor wrote to the Employment Tribunal in England and Wales in March 2004 requesting that the issues involved in these cases should now be dealt with on a test-case basis.

16. A case management hearing was held on 29 July 2004 to consider the issues raised. It was agreed at the hearing that any claim in the local government sector in which:

- a) the Applicant's claim includes a period of service before 1 April 1986, and
- b) the question of the Applicant's failure to buy-back "lost years" or the terms on which the Applicant bought back those "lost years" arises,

should be stayed until further order (see Appendix 1). Thus, claims including a period of service before 1 April 1986 where the period (or part of the period) before that date includes service of:

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

are stayed until further notice.

It was also agreed that any claim in the local government sector in which:

- a) the Applicant's claim does not include a period of service before 1 April 1986, and
- b) the Applicant failed to opt into the Scheme at the earliest opportunity

is to be dealt with under the strike out arrangements for non-opters.

### **The process for dealing with claims**

17. The process for dealing with claims was detailed in LGPC Circular 152 (see [www.lg-employers.gov.uk/pensions/circulars.html](http://www.lg-employers.gov.uk/pensions/circulars.html)).

## **Actions for administering authorities**

18. Administering authorities in England and Wales should 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](http://www.lg-employers.gov.uk/pensions/circulars.html)

Terry Edwards  
Assistant Director (Pensions)  
3 August 2004



## APPENDIX 1

### EMPLOYMENT TRIBUNALS

Penelope Kempe  
The Treasury Solicitor  
Queen Anne's Chambers  
28 Broadway  
London  
SW1H 9JS

**Case Number:** 2404289/1998

**Your Ref:**

**Date:** 3 August 2004

Dear Madam

#### **PART-TIME WORKER PENSION CASES; BESWICK CASES**

The case management discussion on Beswick cases was heard by Mr Macmillan at London Central on 29 July 2004. Mr Dan Stilitz QC appeared for the local authority trade unions; Mr Nicholas Paines QC and Mr Raymond Hill for the Secretary of State; Mr John McHugh for Trafford Metropolitan Borough Council and Mr Terry Edwards for the Local Government Pensions Committee.

The definition of a Beswick case was agreed as follows:

One in which either the arrangements on which an applicant bought back past years or the Applicant's failure to buy back past years is either the whole or part of the cause of action or the whole or part of the defence.

Mr Paines explained the Secretary of State's position with regard to these cases. The Secretary of State does not accept that, where an Applicant was offered the chance to buy back past years but did not do so, this is merely a matter which the Tribunal should take into account when exercising its discretion whether to grant a Declaration of Entitlement to membership. It is the Secretary of State's view that such claims should be struck out on the basis that any breach of the Equality clause was cured by the offer to buy back because, as the terms of the offer were at least as favourable as the terms of settlement agreed in the public sector cases in 2002 in at least the great majority of cases, the applicants have not suffered a detriment. For the same reason, the absence of detriment is a complete answer to any claim brought by an Applicant based wholly or in part on the buy back arrangements.

Whilst not conceding that the correct comparison was between the terms of the buy back offer and the 2002 public sector settlement terms, Mr Stilitz agreed that the next steps to be taken in the management of these cases could proceed on that basis.

By consent, the following directions were given:

1. Any claim in the local government sector in which
  - a) the Applicant's claim includes a period of service before 1 April 1986 and
  - b) the question of the Applicant's failure to buy back lost years or the terms on which the Applicant bought back those lost years arises,is stayed until further order.
2. Any claim in the local government sector in which
  - a) the Applicant's claim does not include a period of service before 1 April 1986 and
  - b) the Applicant failed to opt into the scheme at the earliest opportunity,is to be dealt with under the strike out arrangements for non-Opters.
3. As soon as reasonably practicable:
  - a) The Treasury Solicitor is to serve on all lead Unions in the local government sector the Government Actuary's Department's paper and/or tables on the comparison of the buy back arrangements with the 2002 settlement terms.
  - b) The Unions are thereafter to inform the Treasury Solicitor:
    - i) whether the Paper and the conclusions reached in it are agreed, and if so,
    - ii) the consequences for the Beswick cases.

Mr Macmillan would be grateful if the parties could keep me informed of the progress of disclosure and consideration of the Government Actuary's Report and of any discussions consequent thereon. Mr Macmillan does not at this stage need to see a copy of the Report and/or the Tables.

Mr Edwards kindly agreed to publicise the outcome of the directions hearing in a special bulletin of the Local Government Pensions Committee.

I am copying this letter as indicated below.

Yours faithfully

**CLAYTON HAYWARD**

National Coordinator

Part time Worker Pension Cases

For Secretary to the Tribunals

cc: Nicole Brown, UNISON    Peter Smith, T & G    Mr J McHugh, Trafford MBC  
Barry Smith, GMB            Terry Edwards LGPC

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