
CIRCULAR

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No. 165 – OCTOBER 2004

PART-TIME PENSION CLAIMS - SCOTLAND

Purpose of this Circular

1. This Circular details a further category of part timer claim that, in the view of the LGPC Secretariat, may succeed in whole or in part. The additional category is in addition to those listed in paragraph 11 of LGPC Circular 159 and relates to applicants who have lodged a claim but have never joined the LGPS.
2. The Circular also brings to the attention of respondents a letter from the Employment Tribunals in England and Wales dated 23 September 2004 concerning stable employment relationships (see copy at Appendix 1). The information contained in the letter will be of equal relevance in Scotland.
3. This Circular does not apply to authorities in England and Wales; neither does it apply to part-time pension claims relating to teachers / lecturers.

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: Rob Pinkham
Registered in England No 2676611 Registered office: Local Government House, Smith Square, London SW1P 3HZ



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Which additional cases can be accepted

4. It is the view of the LGPC Secretariat that the additional cases set out below can be accepted to the extent described. These are in addition to the cases set out in paragraph 11 of LGPC Circular 159. In arriving at the views expressed, the Secretariat has fully considered the determinations issued by the Employment Tribunals in relation to the part-timer test cases. The dispute is, however, between the applicant (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”. “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.
5. The Secretariat considers that the following additional cases can now be settled by “scheduled bodies”:
 - VIII. those applicants who have lodged a claim but have never joined the LGPS and who
 - o have a period of service during which the contractual weeks were less than 35 per year or the contractual hours were less than 15 per week, 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 continuous unbroken contract or under a stable employment relationship, since 8 April 1976 or the date of appointment if later, and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a continuous unbroken contract or a stable employment relationship with that employer) or have statutorily¹ been transferred to another employer and are still employed by that employer (or lodged their ET claim within 6 months of leaving / ceasing a continuous unbroken contract or a stable employment relationship with that employer) – but see paragraph 13 of LGPC Circular 159 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 Scottish Ministers’

¹ 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:

1. Such employees will be able to backdate membership of the LGPS for any period of continuous employment with the employer **from** (at the earliest) 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 (at the latest) 5 April 1988

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

2. Paragraph 7.1 of the Employment Tribunal Bulletin No 9 means that the applicant only has the automatic right to pay contributions for any period of employment with the employer under a continuous unbroken contract or under a stable employment relationship which fell before 6 April 1988² and during which the contractual weeks were less than 35 per year or the contractual hours were less than 15 per week. However, from a practicable point of view it can be argued that, **unless** the applicant (who has, to date, not joined the LGPS) decides to join the LGPS in a current employment (if any), the respondent should only accede to claims where the applicant (who has never joined the LGPS) has 5 or more years relevant service falling within note 1 above. The reasoning behind this is that the applicant's pensionable service, assuming they backdate membership, would have ceased on 5 April 1988 (at the latest) and the applicant has not been a member of the LGPS since that date. The only option³ for a person with less than 5 years scheme membership on 5 April 1988 was a refund of contributions. There would, therefore, be little point in acceding to the claim and collecting arrears of pension contributions only to have to subsequently make a refund of contributions to the applicant (less the statutory deductions⁴). However, to be strictly correct, respondents should accede to such claims but then point out to the

² This is the date when whole time employees' service ceased to be compulsorily pensionable.

³ A transfer of accrued rights to another pension scheme would not have been an alternative for an optant out with 5 or more years scheme membership on 5 April 1988 [see SI 1989/802(S.80)]

⁴ i.e. a contributions Equivalent Premium and 20% tax

applicant that they may nonetheless wish to withdraw their claim on the basis that even if they pay back the contributions due only a refund of contributions would then be due to them, less the statutory deductions (**unless** the applicant joins the LGPS in a current employment).

3. 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.
4. Paragraph 7.3 of the Bulletin means that there will be no right to retrospective access to cover the period after the date the applicant became eligible to join the Scheme 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.

Stable employment relationship

6. The LGPC Secretariat has been asked by the Employment Tribunals in England and Wales to bring their letter of 23 September 2004 to the attention of respondents (see Appendix 1). The letter contains important information for respondents in England and Wales regarding stable employment relationships but will be of equal relevance to respondents in Scotland. The Employment Tribunal has, at the request of the LGPC Secretariat, provided the following additional clarification:

“Stable Employment Relationships (SERs) can only arise where there is a series of contracts separated by periods of time, e.g. school or college holidays.

A continuous, unbroken contract cannot be an SER⁵. This includes a single contract in which hours are changed from part-time to full-time.

Time runs when the SER ends and is replaced by a single contract.

The test cases have not addressed and are therefore not authority for the proposal that a change from part-time hours to full-time hours within an otherwise unbroken contract causes time to run. Mr Macmillan⁶ can only conclude that if any respondent in the test cases had thought this proposition to be arguable it would have been the subject of one of the test cases."

Actions for Administering Authorities in Scotland

7. Administering Authorities in Scotland should copy this Circular to all 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)
9 October 2004

⁵ In common parlance, of course, we would view such employees as being in a stable employment relationship and LGPC Circular 159 was written with this in mind. However, paragraph 113 of the EAT decision of 19 December 2003 stated 'any permanent job can be described as a stable employment relationship. But in the context in which it is coined by the EC, it is there to rescue employees who do not have a permanent job.' Thus, to be strictly correct, all references in paragraph 11 of LGPC Circular 159 to 'a stable employment relationship' should be to 'a continuous unbroken contract or a stable employment relationship'.

⁶ The Chairman of the Employment Tribunal.



EMPLOYMENT TRIBUNALS

Appendix 1

To
**All Preston test case
representatives
LGPC
Association of Colleges
NHS Pensions Agency
Teachers Pensions**

Case Number:

Your Ref:

Date: **23 September 2004**

Dear Sir/Madam

PART-TIME WORKER PENSION CASES

Re: Stable Employment Relationships – Public Sector

I am writing to you as a matter of urgency on the instructions of Mr Macmillan in connection with the implementation of the public sector settlement. Mr Macmillan has asked that you bring the contents of this letter to the attention of those that you represent and to advise them accordingly.

It has come to Mr Macmillan's attention that a large number of employing respondents appear to have fundamentally misunderstood the concept of stable employment relationship and in particular when time begins to run against an applicant. Some respondents are writing direct to applicants informing them that they have no claim for that reason. Whether or not a respondent has a valid ground for believing that a claim must fail, Mr Macmillan's directions require that an application to strike out is made to the tribunal who will scrutinise it and, if appropriate, require the applicant to show cause. Mr Macmillan is very concerned that writing directly to applicants may cause them to abandon what, on the current state of the law, are in fact legitimate claims, and directs that this practice must cease forthwith.

Many respondents are seeking to strike out claims on the basis that they are out of time merely because an applicant has not commenced proceedings within 6 months of moving from part-time to full-time employment. They rely on one of the indices for determining that a stable employment relationship has come to an end, namely that the terms of the contract of employment alter radically.

Such a change is only relevant for the purposes of determining when time begins to run in the context of a stable employment relationship. But a stable employment relationship can only arise when an employee is or was

employed on a series or succession of separate contracts - it does not arise where an employee was engaged under a single contract, even where the terms of that contract change e.g. from part-time to full-time hours.

The concept of the stable employment relationship was created by the European Court of Justice as the single exception to the rule that time runs for the purpose of bringing an equal pay claim from the ending of the contract in respect of which the equality clause is said to have been breached. The Court recognised that in the case of teachers and others who were engaged on a series of termly or academic yearly or similar contracts that the application of the normal rule would make it excessively difficult or impossible in practice for such employees to enforce their rights to equal pay (because they would have to bring a separate claim in respect of each successive contract) and in that context the rule was contrary to European law.

The ruling in the test cases therefore contemplates the situation where an applicant moves from a series of e.g. termly or academic yearly contracts to a permanent contract. It does not contemplate a mere change from part-time hours under a continuing contract to full time hours under a continuing contract. The test cases cannot therefore be relied upon as authority to strike out a claim if that is the only change in the nature of the contractual relationship between the parties.

If either the Secretary of State or any employing respondent wishes to contend that such a change does cause time to run against an applicant, then a further test case or cases will have to be identified and heard.

Yours faithfully

CLAYTON HAYWARD
National Coordinator
Part Time Worker Pension Cases
For Secretary to the Tribunals

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

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