

EMPLOYMENT TRIBUNALS

To:
Representatives In Lead Sector Cases
Part-Time Worker Pension Cases

Case Number:

Your Ref:

Date: 7 October 2002

Dear Sir/Madam

Re: Part-time Worker Pension Cases - Directions Hearing 1 October 2002

After hearing submissions, the following directions were given [**N.B.** Mr Macmillan has added further details to some of the points discussed at the hearing where he considered that further clarification or the imposition of more precise dates for compliance was required] :-

1. Cases to be struck out in whole or in part as a result of the decision promulgated on 2 August 2002

Cases which fall into the following categories now fail either in their entirety or as to part:-

- i. Cases where, more than six months before the claim was presented, the employee voluntarily changed employer to a new employer, whether or not the new employer was part of the same over-arching pension scheme.
- ii. Cases where there is a gap in employment because, more than six months before the claim was presented, the employee left the employer's employment but returned at a later date. (This category includes every instance in which the employment relationship came to an end for whatever reason)

In both cases that part of the claim (which may of course be the whole claim) which falls before the change of employer or gap in employment, should now be struck out. Therefore:-

(a) As soon as practicable, and preferably by not later than 31st January 2003, all respondents are to produce a schedule of cases which they claim fall within the above categories and therefore fail. The schedules, which are to be divided into two parts - cases which fail entirely and cases which fail only in part - are to be sent to Mr. Clayton Hayward, the National Pensions Coordinator, at the above address and will be treated as applications to strike out.

(b) Applicants will be required to show cause why their claims (or part claims) should not be struck out.
i. Individual applicants will be required to show cause within 28 days.
ii. Unions and others representing large numbers of applicants will be required to show cause as soon as practicable. If cause has not been shown within four months of the show cause letter and no application for an extension of time has been made, it will be assumed that cause is not to be shown and the application will be struck out.

[**N.B.** This wording differs from that discussed at the hearing as Mr. Macmillan considers it essential in the case of a requirement to show cause, that the compliance date be clearly identified].

(c) If the applicants' appeal on when time runs as against a transferor following a TUPE transfer fails, or if the applicants decide not to appeal the outcome of test issues 5.2(a) and (b) or if such appeal fails, further categories of cases which must fail will arise. The above procedure will also apply to any new categories which will be notified to parties in a letter.

2. Comparators.

A letter is to be sent to respondents in both the public and private sectors which raise the point that an applicant has failed to name a comparator, requiring them to say whether or not they accept that a comparator is identifiable. Only where a respondent contends that there is no identifiable comparator and the applicant is not able to name a comparator, will the case remain stayed pending the outcome of the appeal in **Allonby -v- Accrington & Rossendale College and others [2001] IRLR 364 CA**. Respondents will be required to respond to such letters as soon as practicable and preferably within 42 days.

3. Remedy Issues

(a) The following question is listed for hearing at London Central for the week commencing 31st March 2003:
"How should the amount of the contribution that employees must now make in order to be entitled to access to their employer's occupational pension scheme, be calculated?"

(b) Unless the parties agree that it should be heard by Mr Macmillan sitting alone, the question will be determined by a full tribunal of which he will be the chairman.

(c) The case of *Light -v- Birmingham City Council and Secretary of State for Education* has been identified as a suitable test case. The parties are to agree other suitable test cases chosen to allow representation by all who wish to be heard on the question.

(d) The identification of test cases and agreement on the composition of the tribunal is to be completed by not later than 31st January 2003.

(e) In non-lead sector cases, remedy issues are not to be listed for hearing without the express approval of Mr Macmillan. Mr Macmillan however declined to impose a blanket stay on remedy hearings because of the possibility that in an individual case, the interests of justice might demand that the matter be disposed of without waiting for the remedy hearing listed for 31st March.

4. Cases which remain stayed

All cases in the test case sectors (other than those which fall to be struck out under paragraph 1 above) remain stayed. In the public and banking sectors this is to permit negotiations for settlement to proceed. In the electricity supply sector, the stay is pending the outcome of the remedy hearing mentioned in Direction 3(a). Any party has liberty to apply to lift the stay in any particular case or sector.

5. Atypical Workers

In the context of this litigation, atypical workers are any worker who has been excluded from membership of their employer's occupational pension scheme on any basis other than the number of hours which they work. Although the list is not exhaustive, they include casuals, temps, zero hours contract workers, on call workers etc.

(a) The following questions on atypical workers will be determined by Mr Macmillan sitting alone at London Central on 2nd and 3rd December 2002.

i. An atypical worker can only succeed in a complaint that they have been excluded from an employer's pension scheme in breach of Art 141 EC and/or the Equal Pay Act 1970, if the rules of the scheme which exclude them have a disproportionately adverse impact on women. Is it for the applicant to establish on the balance of probabilities that the rules have such an impact on women or for the respondents to establish on the balance of probabilities that they do not have such an impact?

ii. If the burden is upon the applicant, what directions might be given by a tribunal hearing such a claim requiring the respondent to make discovery of documents or answer written questions with regard to such matters as the gender profile of their workforce and other issues relevant to the question of disproportionate impact.

(b) The parties are to agree one or more test cases which give rise to this issue, the cases to be chosen to permit representations to be made by all parties in the lead sectors who wish to be heard.

(c) The applicants are to serve their skeleton arguments on the respondents by not later than Thursday 31st October 2002.

(d) The respondents will serve their skeleton arguments in reply by not later than Friday 15th November 2002.

6. Principal Civil Service Pension Scheme.

At the conclusion of the hearing of the 2nd and 3rd December, Mr Macmillan will give directions for the disposal of the Principal Civil Service Pension Scheme cases.

Yours faithfully

Clayton Hayward
for Regional Secretary to the Tribunals