

EMPLOYMENT TRIBUNALS

Case Number:
Your Ref:
Date: 29 November 2001

REPLACEMENT OF LETTER SENT ON 22 NOVEMBER 2001

ATTENDEES AT DIRECTIONS HEARING ON 21 NOVEMBER 2001

Dear Sir/Madam

Re: Part-time Worker Directions Hearing - 21 November 2001

At the directions hearing held before Mr Macmillan at London Central on 21 November, issues were identified as being appropriate for determination in the next round of test cases and directions were given.

The Test Case Issues

1. Where a respondent does not admit that the qualifying hourly threshold for admission to the pension scheme has a disproportionate impact on women, is the burden of proof on the applicant to prove disproportionate impact or upon the respondent to disprove disproportionate impact.

2. Can a male applicant succeed in any event or only where a female applicant in the same employment has previously succeeded.

3. Transfers of undertakings. Where there has been either a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) or a statutory novation under Section 6 of the National Health Service and Community Care Act 1990 or under Section 26 of the Further and Higher Education Act 1992 or under any other relevant statutory provision
 - (a) does the transferor's liability transfer to the transferee;

 - (b) if not, does time run against a transferor from the date of transfer;

 - (c) if neither the regulations nor the statutory provisions stop time running against the transferor, is time nonetheless prevented from running if the applicant had a stable employment relationship with the transferor which continued with the transferee;

 - (d) what principles are to be applied when construing an originating application so as to ascertain whether or not a person or body has been named as a respondent;

 - (e) on what principles may an applicant be granted permission to amend her originating application so as to name a different respondent.

4. Overarching pension schemes.
 - 4.1 Where an applicant has voluntarily changed employer but both employments are covered by the same pension scheme, does time run as against the first employer (and any subsequent employers) from the date the applicant left their employment, or does time begin to run against all of the employers only from the date on which the applicant left the last in such a series of employments?

 - 4.2 Having regard, inter alia, to Regulation L4 of the NHS Pension Scheme, do the rules with regard to stable employment relationships apply equally to changes of employment under an overarching pension scheme as they do to a series of contracts of employment with the same employer?

5. Opting in

5.1 Will a claim brought by an applicant who had been excluded from membership of her employer's pension scheme because she worked less than the minimum qualifying hours threshold, necessarily fail merely because she did not join the scheme at the earliest possible moment after qualifying to do so.

5.2 Where an applicant was always eligible to join a pension scheme but did not do so, or did not do so after becoming eligible to join, can her cause of action in the employment tribunal extend beyond the date on which she became eligible to join where

- (a) she did not opt into the scheme
- (b) her reason for not opting into the scheme was because of her employer's failure to alert her to the possibility of doing so
- (c) she attempted to opt into the scheme but was either discouraged from doing so, persuaded not to do so or continued to be denied the opportunity to do so

5.3 In what circumstances, if any, may the remedy ordered by the tribunal involve a declaration of access to the pension scheme which applies in respect of any period after the date on which an applicant became eligible to join the scheme.

6. Stable employment relationship. What factual circumstances give rise to a stable employment relationship.

Directions

The following directions were given in respect of the issues and generally:-

1.1 In the lead sectors, all cases other than those identified as test cases remain stayed. [N.B. The banking lead sector covers only the old clearing banks]

1.2 Where any case which is not part of a lead sector raises one or more of the test case issues, the determination of those issues shall be stayed pending the outcome of the test cases and, at the discretion of the chairman with management responsibility for that case, the whole claim may be stayed.

2. In any claim in which a respondent takes the point that the applicant has not named or cannot name an appropriate comparator, that issue, along with any related issue as to disparate impact, shall be stayed pending the decision of the Court of Appeal in the case of *Allonby -v- Accrington and Rossendale College & others* [2001] IRLR 364 on the points referred by it to the European Court of Justice, save that:

- (a) the issue as to where the burden of proof lies on disparate impact is to be listed as a test issue, and
- (b) the above stay does not apply to
 - (i) the banking sector, and
 - (ii) any claim in relation to the NHS Pension Scheme in so far as it relates to a period during which the applicant was employed by a family doctor's general practice

3. All complaints brought by nurses and other staff employed by family doctor general practices are to be struck out.

4. The question of whether atypical workers, other than part-timers, are covered by the current litigation and, if so, which of the test case issues apply to them, is adjourned for further directions to allow live issues to be identified. As the majority of these cases are thought to be in the banking sector, this point will be revisited at the banking sector directions hearing mentioned below.

5. The parties are to agree approximately six cases illustrating the broadest possible range of factual circumstances that are said to give rise to a stable employment relationship. In so far as it is possible to do so, the facts of each case are to be agreed. The parties are asked to bear in mind that if this test issue is to have any validity, the cases selected for determination must include at least one which is more likely to fail than to succeed.

6. Further directions for the disposal of any group of "opting-in" cases which survive the determination of the test issues at 5.2, (a), (b) or (c) will be given at the conclusion of the hearing.

7. The remedy issues raised in paragraph 11 of the respondent's notice of appearance in *Guerin -v- South Wales Electricity* are not matters over which the employment tribunal has jurisdiction.

8. Further directions will be given at the conclusion of the test cases in respect of any remedy issue which has then been identified as being both suitable and ready for judicial determination with a view to listing any such hearing in the autumn of 2002.

9. By not later than Friday 18 January 2002, UNIFI is to serve its proposed list of test cases on the respondents in the banking sector.

10. There will be a further directions hearing for banking sector cases only on Thursday 14 February 2002 at the Employment Tribunals, London Central Regional Office, 19-29 Woburn Place.

11. By not later than Friday 1 March 2002, the parties are to agree suitable test cases for determining the test case issues.

12. If required, there will be a further directions hearing to deal with any outstanding issues on Friday 8 March at London Central. The parties are to inform Mr Macmillan by not later than Monday 4 March of those issues which require determination at this further directions hearing.

13. The test cases will be heard by Mr Macmillan sitting alone at London Central between Monday 24 June and Friday 19 July 2002. The parties are to agree the running order between themselves.

Principal Civil Service Pension Scheme

As soon as possible, the Treasury Solicitor is to advise Mr Macmillan whether a further directions hearing is required in respect of cases brought under the Principle Civil Service Pension Scheme. The Treasury Solicitor will also write to Mr Macmillan to identify all other cases brought by applicants seeking access to other Government sponsored pension schemes and to indicate whether a further directions hearing is required in respect of them.

Of those cases already notified to Mr Macmillan as having been brought against the Principle Civil Service Pension Scheme, the cases identified as the Bolton series and the Bonner series are to have show cause letters sent to them as these applicants were always eligible to join the pension scheme.

Yours faithfully

CLAYTON HAYWARD
for Regional Secretary to the Tribunals

cc Nominated Chairmen & The Presidents of England & Wales; Scotland; Northern Ireland

Regional Office, 3rd Floor, Byron House, 2a Maid Marian Way, Nottingham, NG1 6HS
Tel: 0115 947 5701 Fax: 0115 950 7612 Website: www.employmenttribunals.gov.uk