PART-TIME WORKER PENSION CASES

INFORMATION BULLETIN
NUMBER 7

Part One

1. Introduction.

This Information Bulletin is in three parts. Part Two is based on the Executive Summary of the Decisions on the test issues which I gave on 2nd August 2002: Part Three is based on the Directions which I gave on 1st October which carry forward those decisions and deal with some outstanding issues. This part is a more general explanation of what is to happen next and some reminders. The full text of the Decision, the Executive Summary, the Directions letter and previous Information Bulletins are available on the Employment Tribunals website at www.employmenttribunals.gov.uk

2. Where are we now?

2.1 The last few months have seen a number of significant developments in these cases and broadly speaking, they now fall into four categories. As a result of the Decision of 2nd August some cases will fail in whole or in part. They are identified in paragraph 9.1 in Part Three of this bulletin and how they will now be dealt with is explained.

2.2 Some cases will now succeed. The government has announced that it will shortly be putting forward detailed proposals to settle the public sector cases. This is certain to be a lengthy process because of the very large number of cases and the likely complexity of the discussions. To ensure that there is an end to the process I have, with the agreement of the Secretary of State and the unions, fixed a hearing for the 31st March 2003 to determine how the amount which an employee is to pay into their employer's pension scheme is to be calculated. It is hoped that settlement in principle will be reached before that date, although it is likely to take somewhat longer to work out the details of individual cases. The government's offer will not of course bind private sector employers but it is hoped that they will also find it an acceptable basis for settling claims. If they do not, then the hearing on the 31st March will provide the answer. (See paragraph 9.3 in Part Three of the Bulletin for more details of the remedy issues. See paragraph 3 below for some reminders about remedies).

2.3 The third category is cases which are stayed pending either an appeal from my Decision by one of the parties or the determination of one of the outstanding issues mentioned in paragraphs 9.2, 9.5 and 9.6 in Part Three. I have indicated in Part Two of the Bulletin the points which have been or might in future be appealed. Although it is hoped that the appeals can be heard quickly, this process is out of the hands of the staff at the employment tribunals and I would be grateful if you would not telephone or write to them about it. I will arrange for a letter or short Information Bulletin to be sent to you as soon as the appeal to the Employment Appeal Tribunal has been heard. This will explain the outcome of the appeal, its consequences for your case and whether there is likely to be a further appeal. Apart from questions of remedy, the outstanding issues are whether an applicant can identify a comparator (that is a male colleague doing work which is the same or broadly similar work as her, or work which is of equal value to hers) and the management of cases where employers claim that an applicant was excluded from a pension scheme for a

reason other than that she was a part-timer. As soon as these issues are resolved, cases can then be moved into either the 'must win' or 'must fail' categories. It should be clear from the copy of your employer's Notice of Appearance (i.e. their defence to your claim), which has previously been sent to you, (or, if you have named one, to your representative), if they are taking any of these points against you.

2.4 There are two categories of cases which remain stayed for other reasons. Cases brought by retained fire fighters in 1994 and 1995 continue to be stayed pending appeals in cases brought on slightly different grounds in 2000/01 by the two unions which represent retained fire fighters. The so-called marriage gratuity cases brought by female employees of HSBC (formerly Midland Bank) remained stayed pending settlement talks.

2.5 The fourth category of cases is those which can now be listed for hearing. They are private sector cases where the only issues are whether the employer is claiming that the exclusion of part-timers from the pension scheme can be objectively justified, or that the reason for the non-provision of the pension was unrelated to the hours worked (other than in the case of atypical workers – see paragraph 9.5 in Part Three of the Bulletin) or the employer disputes the details of the applicant's employment history.

3. Remedies

3.1 Where you are applying for membership of a contributory scheme, you will, if your claim succeeds, be required to make a payment into the scheme to reflect the contributions you would have made had you been a member of the scheme all along. How this amount is to be calculated if an applicant and her employer disagree will be decided on the 31st March next year, although many cases in the private sector have already been settled by the parties simply agreeing the figure between them.

3.2 Concern has been expressed in some quarters that some applicants may not in fact benefit if their claim succeeds. This is because membership of an occupational pension scheme affects their entitlement to SERPS, the higher state pension. The Department of Work and Pensions has produced a booklet explaining what happens and offering to provide a pension forecast. This is designed to help applicants decide whether it is financially worth their while opting for their employer's occupational scheme as opposed to remaining in SERPS. It is believed that some 16,000 applicants have asked for the DWP's information pack. If you have any queries about how your state pension might be affected if you were to succeed in your claim, please direct them to the DWP and not to the employment tribunal. If, as a result of receiving a pension forecast from the DWP, you decide not to proceed with your claim in the tribunal, please write to the tribunal office where your case is registered and withdraw it.

Part Two

4. The first round of test cases which completed their appeals in February 2001 focussed on two main points, one of which was the time limit for bringing a claim to the tribunal. It was eventually established that a claim had to be brought within six months of the ending of either the contract of employment in respect of which the claim is made or, where an employee was employed under a broken series of contracts which created a stable employment relationship, within six months of the ending of that relationship. There is no power to extend the six months time limit in any circumstances. The second round of test cases has been concerned with identifying the moment when time starts to run in a variety of circumstances where there has been either a break in employment or a change in the identity of the employer. In this part of the Bulletin, I will briefly explain the outcome of these test cases and give some illustrations of how they apply to some common employment histories. I will also explain which points of

the decision are under appeal and which factual circumstances those appeals affect. [Test Issues 1 and 2 are not dealt with as the outcomes were inconclusive]. I should emphasise two points. Although I have tended to use the word 'she' to describe applicants, this does not mean that claims by men cannot succeed [see test issue 2]. Secondly, this is not a legal document but an attempt to describe the effect of a legal document in non-technical language. If, in attempting that exercise, I appear to have over-simplified some aspects of the Decision this has been done consciously and does not of course affect the Decision itself.

5. Issue 3 Transfers of undertakings

5.1 This issue considered what happens in two circumstances where the identity of an applicant's employer has changed during their employment.

5.2 The first is where there has been a transfer of the undertaking (the business) of one employer to another employer. It can apply in the private sector or to the contracting out of local authority or other public sector employer's services. All employees affected should have been informed at the time by their employers that their contracts were being transferred under the TUPE Regulations to the new employer and so you should know if this has happened to you and, most importantly, when. The difficulty arises because the TUPE Regulations expressly exclude from the transfer the right to be a member of a pension scheme. I was asked to decide what happens in the following circumstances: Mrs A worked part-time for X Ltd but was excluded from their pension scheme because she was part-time. X Ltd transferred its business to Y Ltd which at first did not admit Mrs A to their pension scheme but later did so (although it does not matter for this purpose when or if Y Ltd allowed her to join their scheme). More than 6 months after the transfer but while Mrs A is still employed by Y Ltd she brings a claim in the tribunal against both X Ltd and Y Ltd claiming the right to join their respective pension schemes. The claim against Y Ltd is in time and so there is no problem. But what about the claim against X Ltd? Everyone has accepted that any liability which X Ltd has to Mrs A does not transfer to Y Ltd. The unions wanted me to say that the time for bringing a claim against X Ltd didn't start to run until Mrs A eventually left the employment of Y Ltd. I did not agree and ruled that time ran from the date of the transfer so that Mrs A's claim against X Ltd was out of time and had to fail. The unions are appealing this ruling and in consequence all cases where there was a transfer of an undertaking during the period of claim (i.e. the period of time for which the applicant is asking the tribunal to award her membership of a pension scheme) must remain stayed until the appeal is concluded.

5.3 The second set of circumstances concerns the re-organisation of further education – when control of colleges passed from local authorities to the colleges (FECs) themselves - and the re-organisation of the health service when Health Authorities were abolished and NHS Trusts established. In this case, the problem is different because the Acts of Parliament which brought about the re-organisations provide that rights under pension schemes *were* preserved and transferred. In the health sector everything seems to be straightforward so, if you used to work for a Health Authority which then became an NHS Trust and your period of claim covers service with both, your claim is in time if it was brought before your employment with the Trust ended or within 6 months of it ending [N.B. this is not the case if you have moved from one Health Authority to another or one NHS Trust to another or broken your service voluntarily: see below under Issue 4]. The problem arises in the education sector because of the pattern of working prevalent among part-timers which saw many of them working on a succession of termly or academic yearly contracts with breaks during academic holidays. Such a sequence of contracts may have created a stable employment relationship between the teacher and the local authority [see Issue 6; below]. The FECs conceded that where a teacher was actually under contract on the day of the transfer from the local authority, liability for excluding the teacher from the pension scheme during that particular contract passed to the FEC. I was

asked to decide whether liability also passed in respect of earlier contracts which formed part of a stable employment relationship between the teacher and the college. I ruled that it did but the FEC's are appealing that ruling. This means that cases where the period of claim includes employment under a series of termly or academic yearly contracts prior to the transfer of control of a college to an FEC (you should have received notification of when this was from the College at the time) are stayed until the appeal is dealt with.

6. Issue 4 Overarching pension scheme

6.1 The question for me here was what happens if an employee moved voluntarily between two employers who were both members of the same pension scheme. Did the existence of the common pension scheme stop time running against the first employer? This situation seems to have occurred in all of the public sectors, but in particular where part-time nurses moved from one Health Authority or NHS Trust to another or teachers and lecturers moved from one education authority to another. I ruled that the existence of the common pension scheme was irrelevant; the employee's decision to change employer broke the contract and time started to run for the purposes of bringing a claim against the first employer from the date of the move. This ruling has not been appealed. This means that if Mrs A worked for X NHS Trust but left them to work for Y NHS Trust (for whatever reason) any claim against X NHS Trust had to be started in the tribunal within six months of her leaving X. What happens now in respect of these cases is dealt with in paragraph 9.1 in Part Three of this Bulletin.

7. Issue 5. Opting in

7.1 Under most pension schemes, at least for part of the time, the rules for joining the scheme were different for full-timers and part-timers. In some cases, membership for full timers was compulsory while part-timers were either excluded altogether or had to opt-in (i.e. apply to join) the scheme. Sometimes, full-timers were automatically made members of the scheme but could opt-out while part-timers were still required to opt in. Some part-timers did not opt into the scheme even though they were always eligible to join or became eligible to join. I was asked to decide a number of questions involving these issues. I'm afraid that because of the detailed nature of some of the questions and the sometimes quite complex answers, summarising them could be misleading. I have therefore set out below the questions and answers as they appear in the decision, simplified as far as possible. Several refer to 'a breach of the equality clause'. This is the clause implied into every contract of employment by the Equal Pay Act. It requires women to be paid the same as men for doing the same work or work which is of equal value to a man's. Pensions are pay for this purpose. A claim to the employment tribunal cannot succeed unless there has been a breach of the equality clause.

7.2 Issue 5.1(a) Must a claim brought by a part-timer fail merely because she did not join her employer's pension scheme as soon as she qualified to do so?
Issue 5.1(b) In what circumstances can an applicant succeed in respect of the part of her claim which predates her becoming eligible to join the scheme, if she didn't join the scheme when she became eligible.

1. An applicant's claim in respect of a period when she was excluded from a scheme will not fail just because she did not join the scheme as soon as she became eligible to join.

2. There is a breach of the equality clause, for which an applicant will normally be entitled to a declaration of entitlement to membership of the scheme, for any period during which she was excluded from membership because of her part-time hours but membership for full-timers was compulsory, even if she did not join when she later became eligible to do so. [This ruling is being appealed]

3. There is no breach of the equality clause (and claims will therefore fail) for any period during which an applicant was excluded from membership of the pension scheme because she worked part-time and membership of the scheme for full-timers was *not* compulsory, if she did not join the scheme on becoming eligible to do so, or only joined after a significant delay. An applicant who can satisfy the tribunal that she would have joined the scheme during the period of exclusion had she been eligible, will however be able to establish a breach of the equality clause for the period of exclusion. (This is to allow for cases where the failure to join on becoming eligible was because of a change of circumstances e.g. the applicant had taken out a private pension or was now so close to retirement that joining was not worthwhile).

7.3 Issue 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 claim succeed in respect of the period after she became eligible to join where:

(a) she did not opt into the scheme;

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, she has no claim in the employment tribunal beyond the date on which she became eligible to join. A requirement to opt into a scheme does not breach the equality clause. [The applicant's representatives in the test cases have indicated that they are likely to appeal this ruling]

(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.

1. There is a continuing breach of the equality clause, and therefore an applicant's claim can succeed beyond the date on which she became eligible to join her employers pension scheme, if, after that date her continued failure to join the scheme (a) is directly referable to her status as a part-time employee; (b) the circumstances do not apply to full-time employees and (c) is to her detriment.

2. This would be the case where an applicant, on becoming eligible to join a pension scheme, did not do so because she continued to be unaware of her right to join because of her employer's failure to inform her that she could now join: or where an applicant who believed she might have the right to join was misled by her employer, intentionally or unintentionally, into believing that she still did not have the right, or where an applicant's employer continued to deny that she had the right.

3. There would not be a breach of the equality clause (and therefore that part of the claim would fail) if on seeking to join the scheme an applicant was simply discouraged or dissuaded from joining, unless this was as a result of a policy of the employer, aimed at part-timers and involved the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or otherwise amounted in practice to a denial of the right to membership of the scheme.

7.4 Issues 5.3 and 5.4 If an applicant can establish a breach of the equality clause, is she entitled to a declaration of access to the scheme as of right or only in the exercise of the tribunal's discretion?

An applicant is not entitled to a declaration of entitlement to access to the pension scheme as of right upon establishing a breach of the equality clause, but only in the tribunal's discretion. The tribunal may, if appropriate, insert dates in a declaration which are not the same as either the period of claim or the period during which the equality clause was breached.

8. Issue 6 Stable employment relationship

8.1 Time for presenting a complaint to a tribunal runs from the end of a contract of employment or the end of a stable employment relationship. I was asked to define a stable employment relationship. Those parts of my ruling which are being appealed are indicated by an asterisk*

1. 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 employers requirements for employees to perform it* - and (subject to 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.

2. Where the sequence 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 employers 'first team', not merely a name on a list 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 if unmodified on appeal 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 only be able to bring claims in respect of days actually worked within the six months immediately preceding the presentation of their claims].

3. 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.*

4. 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 upon the applicant.

Part Three

9. Directions

9.1. Cases which fail in whole or in part

1.1. 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.

1.2. 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 employees employment, either under a contract of employment or a stable employment relationship as defined in the answer to Issue 6, came to an end for whatever reason with the probable exception of gaps for statutory maternity leave)

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 address at the end of this Bulletin and will be treated as applications to strike out.

(b) Affected applicants will be sent copies of the schedules and invited 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.

(c) If the applicants' appeal on when time runs as against a transferor following a TUPE transfer fails (Issue 3), 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.

9.2 Comparators.

A letter is to be sent to both public and private sector respondents 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.

9.3 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) In non-lead sector cases, remedy issues are not to be listed for hearing without my express approval. However, I have refused 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.

9.4 Cases which remain stayed.

All cases in the test case sectors (other than those to be struck out under paragraph 9.1 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.

9.5 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 me 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?

9.6 Principal Civil Service Pension Scheme.

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

John K. Macmillan,
Regional Chairman.
15th October 2002

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Any correspondence, unless specifically stated otherwise in this bulletin, should be sent in the first instance to the Tribunal office dealing with your case.