



PART-TIME WORKER PENSION CASES

INFORMATION BULLETIN NUMBER 8

1. Introduction.

In the last Information Bulletin¹ I told you (paragraph 2.2) that on the 31st March I would be hearing a further test case to decide how the contributions which successful applicants will have to make to their employer's occupational pension scheme, should be calculated. This hearing has not taken place, but for the very best of reasons. The government has agreed to settle the majority of the public sector claims and settlement talks are also well advanced in the only remaining private sector test cases, those involving the electricity supply industry. In this Bulletin, I will explain how this affects cases in those sectors and what is to happen now in other private sector cases where an employer has said that it needed to see my decision on the contributions question before making an offer to settle its cases.

2. Who is affected?

Not everyone who has made a claim in respect of a public sector pension scheme – education, health and local government – will be receiving an offer as a result of the settlement. Following my Decision of the 2nd August 2002 as I explained in the last Bulletin some cases must succeed and it is only in those cases that an offer will now be made. The offer of settlement does not include cases which will fail as a result of my Decision unless appeals against the Decision are successful. For an update on the progress of these and another important appeal please see paragraph 9 at the end of this Bulletin.

3. When will the offer be made?

Agreement has been reached in principle in the public sector on a complex formula, but the final details – in particular any adjustments required to reflect the differences between the three public sector schemes – are still being discussed. However, I am assured that no difficulties are expected and that the final version of the formula should be ready for publication by Easter when it will appear on the tribunal's web site. In the electricity supply cases, negotiations are a little less well advanced and the parties are working on a different formula from the one agreed in the public sector. When finally agreed this formula will also appear on the website. In the public sector more information will be required from many applicants before their claims can be processed and the computer software which will actually work out the figures will not be ready before June. All these complications have been taken into account in the mechanism for disposing of the cases which was agreed at a Case Management Conference which I held on the 31st March and which is set out in paragraph 6 below. Because of the large number of claims to be processed it is likely to be the late autumn at the earliest before individual offers are made and some offers may not be made until well into next year.

¹ If you have lost your copy of Bulletin No. 7 you can access it together with all of the previous Bulletins and other information about these cases at www.employmenttribunals.gov.uk and click on 'pensions'

4. What will the offer be?

It is very important to remember what these cases are about and what remedies the tribunal has at its disposal. The basis of each claim is that the applicant has been unlawfully excluded from membership of her employer's occupational pension scheme because she worked part-time. The only remedy which the tribunal has when such a case succeeds is to order the employer to admit the employee to the scheme for the period when she was unlawfully excluded. There is no power to order the employer to pay compensation. However, where the pension scheme in question was contributory, both the employer and the employee will have to pay into the scheme a sum of money to reflect the contributions they would have made had the employee not been unlawfully excluded. The offer which you receive therefore will not be to pay you a sum of money but to tell you that the employer concedes your right to be admitted to the scheme between specified dates and telling you how much you will have to pay into the scheme if you wish to accept the offer to admit you. The offer will also explain to you the pension you will receive once these payments are made. Because you will be required to withdraw from the State Earnings Related Pension Scheme (SERPS) if you enter your employer's scheme, before deciding whether to accept the offer it would be wise to compare the pension you will receive from your employer with the pension you would receive (or are already receiving) under SERPS. You can do this by asking the Department of Work and Pensions to give you a pension forecast.²

5. What can I do if I don't like the offer?

A tribunal may have power to order an employer to put a different offer to you, but whether such a power does in fact exist and the basis on which it might be exercised are very unclear. It seems to be accepted by all of the representatives in the test cases that the tribunal would have no power to intervene simply because you can't afford to pay the employee's contributions or because you think the amount is too high. Where an offer to settle is based on figures supplied by the pension fund trustees, it is unlikely that it could be challenged unless the offer is based on facts about your length of service or earnings which you dispute, or the figures are wrong in law. However, it won't be acceptable for employers to ask an employee to make contributions which are not supported by their pension fund trustees. At the Case Management Conference, the public sector unions made it clear that they have such confidence in the fairness of the agreed formula that they will not support any of their members who might wish to challenge an offer made to them.

6. What happens now?

In this paragraph I set out the mechanism agreed at the Case Management Conference for handling the public sector cases which will now be settled³. Items (a) to (e) are formal Directions issued under Rule 4 of the Employment Tribunal's Rule of Procedure 2001 and a failure to comply with them may lead to sanctions against a defaulting party. The remaining items are the agreed practical steps to be followed.

² a letter explaining how to apply for a forecast was sent to you last summer. For further information please contact the Pensions Information Orderline on 0845 7 31 32 33, not the Employment Tribunal, and ask for leaflet BMO1, *Backdating membership of an occupational pension scheme : what this might mean for you*

³ it is hoped that a similar model will eventually be adopted to deal with the electricity supply sector cases but that will be the subject of a separate notification to the parties involved. The full directions agreed at the Case Management Conference are available on the Tribunal's website

(a) By not later than the 1st August 2003 all employing respondents in the education and local government sectors are to serve by email on the tribunal at **Pensions@ets.gsi.gov.uk**, a schedule in Excel format of **all** part-time worker pension claims against them, in alphabetical order, indicating whether

- i the claim can now be settled, or
- ii on the information currently available it is not known whether the claim can be settled, or
- iii the claim is not yet ripe for settlement

and in the last case identifying any outstanding issues preventing settlement. The schedules will then be forwarded to the unions representing in the test cases.

(b) By not later than the 1st October 2003, on behalf of all employing respondents in the health sector, the NHS Pensions Agency is to serve a similar schedule.

(c) A standard form of questionnaire, for the purpose of ensuring that all relevant information is available to enable a settlement figure to be produced, is to be agreed between the applicant's and respondent's representatives.

(d) By not later than the 1st October 2003 in the case of education and local government, and by not later than the 1st November in the case of health, a copy of the questionnaire is to be sent by the employing respondents or the NHS Pensions Agency as appropriate, to all applicants in the 'can settle' and 'not known' categories in Direction (a).

(e) Applicants are to return the completed questionnaire within 28 days of receiving it to the address shown on the form. **NB please note, that if you fail to return the completed questionnaire not only can your claim not be settled, it may eventually lead to your claim being struck out.**

(f) If the information supplied by an applicant on a questionnaire is not accepted as accurate by the employer or NHS Pensions Agency, or suggests that the previous belief that the claim must succeed or may succeed was wrong, the claim will be listed for an immediate hearing to resolve those issues.

(g) Following receipt of a completed questionnaire, the pension fund administrator will send to the applicant as soon as possible the formal offer to settle the claim plus a tribunal case withdrawal form.

(h) If the offer is accepted the applicant is to sign the offer form and return it to the pension fund administrator. If the applicant decides not to accept the offer e.g. because it is better for them to remain in SERPS, they must inform the fund administrator

(i) Whether the offer is accepted or not, unless the applicant intends to challenge the offer, the tribunal case withdrawal form must be signed by the applicant and sent to the appropriate address which will be indicated on the form.

(j) Once the signed withdrawal form has been returned by the applicant they will be informed by their employer or the pension fund administrator when and how their contribution is to be paid.

7. Comparators

These cases are about equal pay, not fair pay and under UK law, a part-time worker is not entitled to be admitted to her employer's pension scheme unless she can point to a full time male colleague who was a member of the scheme and who was either employed to do work which was the same as or broadly similar to her work, or was of equal value to her work. Such male colleagues are known as comparators. The question of whether the need to

identify a comparator is compatible with European law has been referred to the European Court of Justice in the case of *Allonby –v- Accrington and Rossendale College*. Since the last Information Bulletin, I have asked all public sector employers whether they accept that they employed a comparator for all or some of the applicants who have brought cases against them. Whilst the majority have said yes, a significant minority have said no, which means that on the current state of the law, claims against them cannot yet be settled. However, the question has arisen whether the correct place to look for a comparator is only within the workforce of, say, a particular NHS Trust, or within the whole of the NHS. I have been asked to decide this question in a further test case which I will hear in London on the 20th and 21st October 2003.

8. Remedy

As the anticipated remedy hearing did not take place, something must now be done about those private sector cases which have been put on hold pending a decision from me on remedy. I am uncertain just how much guidance I can give to help parties reach agreement on the contributions which they both must make to a pension scheme. It seems to me that certain matters, such as questions relating to income and corporation tax and National Insurance contributions are not within the jurisdiction of the Employment Tribunal. Information on how both tax and NIC might affect the contribution figures can be obtained from the Inland Revenue website www.inlandrevenue.gov.uk/pensionschemes/ps0131.pdf. Alternatively, employers can call the Inland Revenue occupational pension schemes helpline on 0115 974 1600. Applicants with queries should contact their normal tax office. The starting point for settling pension claims is for the employer to ask their pension fund trustees to produce figures for the contributions which they require both the employee and employer to pay into the fund. All employers who are awaiting guidance from a remedy test case before settling their claims are therefore now required, by not later than Friday 11th July 2003, to obtain those figures and copy them to the applicants. If such figures cannot be obtained they should write to the office of the tribunal handling their cases explaining why not. If an employer is not willing to settle their cases on the basis of such figures they must also write to the office handling their claims explaining why not and identifying any issues which an employment tribunal might be able to resolve to allow the claims to be settled.

9. Appeals

Unfortunately, no date has yet been fixed for the Employment Appeal Tribunal to hear the appeals brought against my Decision of 2nd August 2002 and the possibility of a further appeal to the Court of Appeal cannot be ruled out. The appeal by the Further Education Colleges referred to in paragraph 5.3 of the last Bulletin has now been withdrawn and my decision on that point therefore stands. The judgment of the European Court of Justice in *Allonby* may not be published until the autumn. I regret that further delay for the cases which are stayed pending the outcome of these appeals is therefore unavoidable.

10. Please Don't telephone the tribunal to ask for more information as this Bulletin describes the latest position. If you need to tell us something about your case please write to the tribunal office where it is registered quoting the case number shown on the address label on the envelope.

John K Macmillan
Regional Chairman, Nottingham
April 2003