PART-TIME WORKER PENSION CASES

INFORMATION BULLETIN
NUMBER 9

1. Introduction

I am pleased to be able to report significant progress in these cases within the last few weeks, so much so that only two categories of cases continue to be stayed pending further appeal. In Bulletins Number 7 and 8 (available on the ETS website **www.employmenttribunals.gov.uk** – click on 'p/t worker pensions cases') I explained that as a result of my decisions on the test issues, the cases now fell into five categories – those which must succeed, which must fail, which could be listed for hearing, which remain stayed, and those where the employer required more information about the applicant's employment history. I gave directions for disposing of those cases which must fail and explained how the agreed settlement in the public sector would be implemented. (The settlement process in the public sector has taken longer than expected but I understand that the final problem has been resolved and that settlement of individual cases has begun). As a result of the latest round of appeals, more cases can be identified as 'must succeed' and 'must fail'. The purpose of this Bulletin is to explain what those cases are, to give some illustrations of what the rulings mean in practice and to give further directions. I will also bring you up to date on the important question of the remedy which the tribunal can give when a claim succeeds and some miscellaneous issues.

2. Cases which remain stayed

One of the test issues concerns cases against **private sector employers** where there has been a transfer of the undertaking of the business from one owner to another. My ruling (which can be found at paragraph 5 of Bulletin Number 7) was overturned on appeal, but there is to be a further appeal to the Court of Appeal. Until that appeal is heard any case in which the employer claims there was a transfer of the undertaking of the business during or after the period of claim, must remain stayed. Cases brought by **retained fire fighters** in 1994 and 1995 continue to be stayed pending an appeal to the Court of Appeal in cases brought by their unions on slightly different grounds in 2000/01.

3. Remedy

It is now clear that our powers are limited to granting a declaration that an employee is entitled to be a member of her employer's pension scheme between specified dates and to require the employer to obtain figures from the pension fund trustees for the contributions which both parties must make to the scheme. But if either party disputes those figures they must refer the matter to the Pensions Ombudsman. If your employer is prepared to settle your claim but can't find your records, or you can't agree about when your employment began or whether it was continuous, you can ask the tribunal to hear your case and resolve the dispute, but we cannot decide how much you will then have to pay into the scheme. Even if the only dispute is about how much has to be paid into the pension scheme, the parties must still ask the tribunal to make a declaration about the dates (which can be done without a formal hearing) before the Ombudsman will investigate. Details of how to refer cases and of the Pensions Ombudsman's powers can be obtained from his website **www.pensions-ombudsman.org.uk** or by writing to 11 Belgrave Road, London SW1V 1RB.

4. Comparators

As I have explained before, these cases are not about fair pay but about ensuring equality of pay between men and women. In another case relating to pensions the European Court of Justice was

asked to say whether there were any circumstances in which a woman could succeed in her claim if she could not name a comparator, that is a male colleague who was permitted to be a member of the pension scheme who was doing work which was broadly similar to or the same value as the work which she was doing. The Court has ruled that, if the scheme in question is a state scheme, a comparator is unnecessary. The Treasury Solicitor has now conceded on behalf of the Secretary of State that where a claim is against a local authority, an NHS Trust, a college of further education or any other employer which offers its *full-time* employees access to one of the state occupational pension schemes, a claim can succeed without the need to identify a comparator. However, the impact of this ruling will be limited as comparatively few public sector employers were relying on the absence of a comparator as a defence. Any who still wish to take this point are now to comply with the direction at para. 4.1 below. The European Court's ruling does not affect the private sector so that a claim can still only succeed against a private sector employer if the claimant can show that a male colleague who was doing work which was broadly similar to or the same value as her work was eligible to join the pension scheme. In 2002 all private sector employers were asked whether they accepted that a comparator existed in respect of each case brought against them, even if one had not been named by the applicant. A significant proportion said no.

4.1 Directions: Public sector

a) *By not later than the **4th June 2004**, employing respondents in the public sector who do not adopt the Secretary of States concession are to enter a Notice of Appearance (or if they have already entered an appearance, an amended appearance) at the office of the tribunal handling their cases, giving sufficient details of why they say it remains necessary for an applicant to identify a comparator to enable a Chairman to determine whether they have an arguable case. If no appearance (or amendment) is entered within that time, the Respondent will be deemed to have adopted the concession.*

b) *If the Chairman does not accept that such a respondent has an arguable case, a decision supported by extended reasons will be issued striking out the Notice of Appearance or amendment. If the case appears to be arguable, it will be listed for hearing.*

4.2 Directions: Private sector

*a) By not later than the **4th June 2004** private sector employers are to write to the tribunal office handling their cases identifying those which they say must fail because no comparator exists.*

b) The tribunal will then write to these applicants or their representative asking them to give a reason why their claim should not be struck out. Unrepresented applicants will have 28 days to reply. Representatives (to allow them time to consult with what may be a large number of applicants) will be given 3 months.

c) Unless an applicant names a comparator or says that her work was equal to some other, named, category of work which was done by men (although not necessarily only by men) who were eligible to join the pension scheme, or raises some other arguable point, her claim will be struck out.

d) Where a male applicant or a comparable job category is named, the employer will be asked if they agree or, if not, to explain why the jobs were not equal. The applicant will then be asked if in view of the employer's explanation she still says the jobs were equal.

e) If she says yes, the question of whether the jobs are in fact comparable will be listed for hearing before a tribunal.

5. Further education colleges

In Bulletin Number 7 I explained that I had had to rule on the effect of the re-organisation of further education in the early 1990's when control of colleges passed from local authorities to the colleges (FEC's) themselves. The FEC's had accepted that where a teacher was actually under contract on the day of the transfer, they became liable for the exclusion of that teacher from the pension scheme during that particular contract only. But I ruled that they were also liable for earlier contracts which, together with that contract, formed a stable employment relationship between the teacher and the local education authority. The FEC's lodged an appeal against that decision but later withdrew it so

that my ruling stands. This means that where a teacher who transferred to a college as a result of the re-organisation had previously worked for a local authority on a succession of termly or academic yearly contracts or who otherwise had a stable employment relationship with the authority (for the meaning of which see below), the college became liable for the teacher's exclusion from the pension scheme for the whole of that relationship, even if on the date of the transfer the teacher was between contracts. Except where a college does not accept that a stable employment relationship existed, or has identified some other grounds of defence in respect of a particular teacher, I understand that all cases affected by this ruling will now be settled without further intervention from me.

6. Stable employment relationship

In my decision on the test issues I was asked to define "stable employment relationship". I did so. The appeal against my ruling has now been dismissed and there is to be no further appeal. I can therefore give directions for the cases in which this point arises. Its significance is this. The time limit for beginning employment tribunal proceedings about exclusion from a pension scheme is 6 months from the end of the employment in question, and that time limit cannot be extended. Under UK law the 6 months runs from the end of each contract of employment between the employer and the employee, so that if someone worked regularly or intermittently for the same employer under a succession of different contracts, separate tribunal proceedings would have to be brought within 6 months of the ending of each contract or the right to claim is lost. But as a result of the ruling of the European Court of Justice, where that succession of contracts gives rise to a stable employment relationship, it is only necessary to bring one set of proceedings which must be commenced not later than 6 months after the relationship has come to an end. My task was to identify when a series of periods of employment gives rise to a stable employment relationship. My answer was as follows.

6.1 Creating the relationship: regular contracts

In this case 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 employer's requirements for employees to perform it - and (subject to 6.2 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. A good example of this kind of stable employment relationship is a teacher who regularly worked for the same college, teaching essentially the same subject, on a succession of termly or academic yearly contracts.

6.2 Creating the relationship: intermittent contracts

Where the sequence of contracts 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 employer's 'first team', not merely a name on a list of people 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 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 therefore only be able to bring claims in respect of days actually worked within the six months immediately preceding the presentation of their claims.

6.3 Ending the relationship

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.

6.4 What the applicant must prove

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 on the applicant.

6.5 Directions

a) *By not later than the **28th May 2004**, all employing respondents in both the public and private sectors other than the NHS Pensions Agency, are to send to the office of the tribunals at which the cases against them are held, a list of the cases which they say must fail in whole or in part, because the proceedings were commenced more than 6 months after a stable employment relationship ended or because no stable employment relationship ever existed. Where the claim is in time in respect of some work done by the applicant, the list should state the number of days of work in respect of which, or the date from which, the claim is conceded.*

b) *By not later than **11th June 2004**, the NHS Pensions Agency is to send the same information by e-mail to Clayton Hayward, the National Pensions Co-ordinator at **pensions@ets.gsi.gov.uk** in respect of health sector employers.*

c) *A letter will then be sent by the tribunal to each applicant so identified, or to their representative, inviting them to give a reason why their claim should not be struck out. Where the claim is in time in respect of a specified number of days of work, the applicant will be asked to say whether the claim is to be withdrawn in respect of those days if the remainder of the claim is struck out. Applicants will be given 28 days to reply to letters. Representatives will be allowed 3 months.*

d) *It will not be sufficient to prevent a claim from being struck out for an applicant simply to assert that a stable employment relationship existed when proceedings were commenced or had ended less than 6 months before. The applicant must give sufficient particulars of their working pattern and dealings with the respondent to enable the Chairman to determine, by reference to the criteria set out at 6.1, 6.2 and 6.3 above, that there is an arguable case that such a relationship existed. If the Chairman cannot so determine, the case will be struck out without a hearing but the Chairman will give reasons for doing so.*

e) *If an applicant can give sufficient particulars to suggest that a stable employment relationship might have existed and had ended less than six months before proceedings were commenced, the case will be listed for hearing.*

7. Applicants who failed to join a scheme when they became eligible

This so called 'opters' question gave rise to three appeals, one of which was successful. Rather than set out the various rulings in full, I will briefly explain their effect (for the precise state of the law see Bulletin Number 7 paras. 7.2 and 7.3. but disregard numbered paragraphs 1 and 2 under 7.3). The position remains complex and even if you never joined your employer's scheme despite becoming eligible to do so, your claim could succeed in part, albeit in small part. But it is important to bear in mind that your SERPS pension might be affected if you now decide to join your employer's scheme, and your attention is drawn to paragraph 3.2 of Bulletin 7 and paragraph 4 of Bulletin 8.

7.1 Membership for full-time employees compulsory – part-timers excluded

Your claim can succeed in respect of any period of time during which part-timers could not join their employer's scheme but full-time employees had to join, even if you would not have joined had you had the option to do so and did not join when the rules of the scheme changed. This is because had you been treated equally with the full timers, you would have had to be a member of the scheme until you could opt out and would in due course have received a pension for that period of service.

7.2 Membership for full-time employees not compulsory – part-timers excluded

Your claim will not succeed in respect of this period of time if you did not join the scheme when the rules later changed to allow you to do so or you only did so after significant delay. This is because your failure to join the scheme when you were allowed to, suggests that had you been a full-timer you

would not have joined the scheme during this earlier period of time anyway and therefore you have lost nothing. However, there is an exception for applicants who can satisfy a tribunal that they would have joined during the earlier period had they been eligible. This is to allow for special cases such as those where by the time the rules were changed to enable part-timers to join, an applicant was so near to retirement that joining was pointless, or she had already taken out a private pension plan.

7.3 Part-timers always eligible to join or who did not join on becoming eligible

A part-time employee who was in fact always eligible for membership of her employer's scheme (i.e. although part-time she always worked more than the minimum qualifying hours) or who did not join the scheme after a rule change made her eligible to join, normally cannot succeed in her claim. There is one exception - if on seeking to join the scheme she was denied the right to join or discouraged or dissuaded from joining as the result of a policy of her 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 in practice amounted to a denial of the right to membership of the scheme. Where no such policy existed but the employer failed to draw the change in the rules governing eligibility to a part-time employee's attention, although her equal pay claim cannot succeed (because the rule change in fact removed the discrimination between full-timers and part-timers) she may be able to bring a breach of contract claim. However, if she only does so more than 6 years after she was refused the right to join or became aware of the right to join, the claim might be out of time. In any event, such a claim can only be brought in the Employment Tribunal after the applicant's employment with the relevant respondent has ended and must be brought within three months of that date.

7.4 Directions

a) *By not later than **4th June 2004**, the NHS Pensions Agency is to send by e-mail to Clayton Hayward*

- ***i.*** *where a trade union or professional body has been named as a representative, a schedule of the opters cases affecting that union or body [i.e. one schedule per union or professional body], identifying in separate lists those cases which must fail in full and those which must fail in part as a result of the applicant's failure to opt into the scheme. In the case of those which fail only in part, the period in respect of which the claim is now admitted is to be identified;*
- ***ii.*** *a similar schedule in two parts listing all the unrepresented applicants.*

b) *By not later than **4th June 2004**, other public sector employing respondents and private sector respondents are to send similar schedules to the tribunal office responsible for the cases against them – not to Mr Hayward.*

c) *One letter per employing respondent will be sent by the tribunal to each representing union or professional body inviting them to give a reason why all of the claims on the schedule should not be struck out in whole or in part on the basis that they must fail because of the applicant's failure to opt into the scheme. Where the claim fails only in part representatives will be asked to say whether each applicant wishes to withdraw the part which is admitted by the respondent if the remainder of her claim is struck out.*

d) *Within **4 months** representatives are to respond with one letter per employing respondent. Because of the very limited nature of the exceptions to the basic principle that a failure to opt in will defeat a claim in respect of the period after the date on which membership was open to the applicant, it is anticipated that the majority of cases against a respondent are likely to stand or fall together. Representatives are therefore only required to list in their reply those cases where it is to be alleged either that a policy existed or that paragraph 7.2 (above) applies. The remaining cases will be deemed to be withdrawn in whole or in part as the case may be. Where the existence of a policy is alleged, the particulars mentioned in (h) below must be given. Where paragraph 7.2 is said to apply a very brief explanation is to be given for each case.*

e) *As soon as reasonably practicable, but in any event within **5 months** of receiving the letter mentioned in (c) above, unions and other bodies are to inform the tribunal in respect of each case which fails only in part, whether the part that succeeds is to be withdrawn or*

pursued. Claims which are to be pursued are to be dealt with by the parties as 'must succeed' claims to that extent.

f) *A letter will be sent to each unrepresented applicant whose claim is identified as failing, inviting them to give a reason why their claim should not be struck out in whole or in part on the basis that it must fail because of their failure to opt into the scheme. Where the claim fails only in part the applicant will be asked to say whether she wishes to withdraw the part which is admitted by the respondent if the remainder of her claim is struck out. Applicants will be given* ***2 months*** *to reply to letters.*

g) *Where it is claimed that paragraph 7.2 above applies the respondents will be asked if they concede the claim. If they do not, the case will be listed for hearing.*

h) *If it is alleged that the failure to join the pension scheme was as a result of a policy by the employer, the case will not be listed for hearing unless the allegation is supported by sufficient particulars to lead the Chairman to conclude that it is arguable. For example if an applicant alleges the existence of such a policy but it is clear that other part-time employees of the same employer did join the scheme at the time the applicant became eligible to join, her case is likely to be struck out. If a large number of applicants employed by the same employer allege the existence of such a policy and explain the circumstances in which they continued to be denied membership of the scheme, those cases are likely to be listed for hearing unless the respondents concede the existence of the policy. However, it will be for the Chairman considering the reply to the letter to exercise his or her discretion in each case.*

8. Principal Civil Service Pension Scheme

These cases are largely unaffected by the recent changes, other than the removal of the requirement for a comparator, although they give rise to a wide range of other issues. I have recently held a case management discussion on these cases and given directions designed to bring a selection of them on for hearing. Details will be sent to all affected applicants who are unrepresented.

9. Progress in the private sector

Many private sector cases have settled or are in the course of settlement. The implementation of the settlement reached in the **banking sector** is proceeding slowly although I understand that the **marriage gratuity cases** brought against the HSBC (formally Midland Bank) are to be withdrawn in those cases where the gratuity was paid prior to April 1976. The union representing the great majority of the applicants has written to each of its members to explain why. If you are involved in these cases but are not represented by Unifi, you may obtain a copy of the letter by applying to Clayton Hayward at the address below. A basis for the settlement of cases in the **electricity supply sector** has now been reached and should be on our website by the time this Bulletin is published. However about 25% of cases in this sector remain stayed pending the appeal on the transfer of undertakings question. All private sector cases which are not affected by that appeal and which will not be struck out as a result of the directions I have given in this Bulletin should now be either settled or listed for hearing.

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 which is shown on the address label on the envelope in which you received this Bulletin and on all letters you have received from the tribunal.

John K Macmillan
Regional Chairman.
31st March 2004

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