LOCAL GOVERNMENT PENSIONS COMMITTEE
Secretary, Charles Nolda

LGPC CIRCULAR NO. 85 - MAY 2000

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PART TIMER'S PENSION RIGHTS

DECISION OF THE EUROPEAN COURT OF JUSTICE IN THE CASE OF SHIRLEY PRESTON AND OTHERS v WOLVERHAMPTON HEALTHCARE NHS TRUST AND OTHERS AND DOROTHY FLETCHER AND OTHERS v MIDLAND BANK PLC

Introduction

1. Authorities will no doubt be aware that on 16 May 2000 the European Court of Justice reached its long awaited decision in respect of the above pensions for part-time workers case. A copy of the ECJ judgement is available on the Employers' Organisation website at www.lg-employers.gov.uk

2. This Circular has been issued to inform authorities of the background to the case, the decision of the ECJ and the implications for the Local Government Pension Scheme. It also seeks to provide guidance on the information that should be given to scheme members who raise questions with authorities following the widespread reporting of the ECJ decision in the national press.

Background

3. On 28 September 1994 the European Court of Justice held, in the *Vroege* and *Fisscher* cases [see footnote] that the right to join an occupational pension scheme fell within article 119 of the Treaty of Rome.

4. It also held that the exclusion of part-time workers from access to such pension schemes constituted indirect sex discrimination contrary to Article 119 if the exclusion affected a much greater number of women than men, unless the employer could show that there were objective and justifiable reasons for doing so which were unrelated to discrimination on the grounds of sex.

5. Furthermore, the Court held that the limitation of the effects in time of the *Barber* case [see footnote] did not apply to the right to join an occupational pension scheme. The direct effect of Article 119 could be relied upon in order to retroactively claim the right to join an occupational pension scheme on the grounds of equal treatment, and might be so relied upon as from
8 April 1976, the date of the *Defrenne* judgement [see footnote].

6. Following the *Vroege* and *Fisscher* judgements, some 60,000 part-time workers in the United Kingdom in both the private and public sectors commenced proceedings before industrial tribunals (now Employment Tribunals). Relying on Article 119, they claimed that they had unlawfully been excluded from membership of their occupational pension schemes.

7. The claimants' case was that

   a) section 2(4) of the Equal Pay Act 1970, which requires that any claim in respect of the operation of an equality clause must be brought within a period of six months following the cessation of employment, and

   b) regulation 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 which requires that, in any proceedings in respect of a failure to comply with an equality clause, a woman shall not be entitled to be awarded any payment by way of arrears of remuneration or damages in respect of a period earlier than 2 years before the date on which the proceedings were instituted,

were incompatible with Community law for the following reasons:

i) the above provisions made it excessively difficult or virtually impossible for them to exercise the rights conferred on them by Article 119, (*the principle of effectiveness*), and

ii) the procedural requirements were less favourable than those applicable to similar actions of a domestic nature and, in particular, actions based on the Sex Discrimination Act 1975 or the Race Relations Act 1976 (*the principle of equivalence*).

8. In its decision of 4 December 1995, the Industrial Tribunal in Birmingham held, in respect of the test cases it considered, that the procedures did not make it excessively difficult or virtually impossible for the claimants to exercise the rights conferred on them by Community law (i.e. the procedures conformed with the *principle of effectiveness*).

9. That decision was confirmed by the Employment Appeal Tribunal on 24 June 1996 which also held that the *principle of equivalence* was also satisfied in that the procedures were not any less favourable than those applicable to similar actions of a domestic nature.

10. The judgement of the Employment Appeal Tribunal was in turn upheld by the judgement of the Court of Appeal of 13 February 1997.

11. The matter eventually came before the House of Lords which considered itself bound to refer the case to the European Court of Justice because it raised issues which had to be resolved before it could pass judgement.

12. The House of Lords referred three questions to the European Court. Essentially these were:

i) are the national procedural rules which require that

- a claim for membership of an occupational pension scheme must
  be brought before an Employment Tribunal within six months of ceasing employment to which the claim relates, and

- a claimant's pensionable service can be calculated only by reference to service after a date falling no earlier than two years prior to the date of the claim

incompatible with Community law i.e. do they make it excessively difficult or impossible in practice for a claimant to exercise her rights under Article 119?

ii) what are the criteria the House of Lords should use in determining whether a procedural rule which implements Community law is any less favourable than a procedural rule applicable to similar proceedings of a domestic nature?

iii) whether a procedural rule, which requires a worker employed under a string of separate contracts to lodge a claim for retroactive membership of an occupational pension scheme within 6 months of the cessation of **each** contract to which the claim relates, is incompatible with Community law?

The European Court of Justice Decision

13. In its ruling of 16 May 2000, the ECJ determined that:

i) with regard to the first question

- the procedural rule that requires that a claim for membership of an occupational pension scheme must be brought before an Employment Tribunal within six months of ceasing employment to which the claim relates does not breach Community law "**provided, however, that that limitation period is not less favourable for actions based on Community law than for those based on domestic law**", and

- the procedural rule that requires that a claimant's pensionable service can be calculated only by reference to service after a date falling no earlier than two years prior to the date of the claim is in breach of Community law (based on the decision in the *Magorrian* case [see footnote]).

ii) with regard to the second question

- in order to determine whether a right of action under domestic law is a domestic action similar to proceedings to give effect to Community law, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics, and

- in order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules.

iii) with regard to the third question

- Community law precludes a procedural rule which has the effect
of requiring a retroactive claim for membership of an occupational pension scheme to be brought within six months of the end of **each** contract of employment to which the claim relates **"where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies".**

What is the Next Step Following the ECJ Decision?

14. The ECJ has ruled on the questions put to it by the House of Lords. The House of Lords now needs to determine:

i) whether the six month time limit for lodging a claim after leaving for retroactive membership of an occupational pension scheme still stands, and

ii) what the relevant period is in respect of which a person can claim retroactive membership of an occupational pension scheme.

What are the Implications for the LGPS?

15. If the House of Lords decides that the six month time limit for lodging a claim after leaving still stands, a number of claims already lodged with the Employment Tribunals will be time barred i.e. they were lodged more than six months after ceasing the employment to which the claim relates.

16. With regard to those employees who lodged a claim within 6 months of leaving or who are still current employees, it would appear that:

    i) there are no implications in respect of those part time employees working 15 or more hours per week who were permitted to join the LGPS from 1 April 1986 as they were given the option to backdate membership to as far back as 1 April 1974;

    ii) part time employees working less than 15 hours per week have already been given the option of backdating membership to 1 January 1993. Whether they will be entitled to further retroactive membership will depend on the decision the House of Lords takes concerning the period to which retroactive membership of an occupational pension scheme can be claimed. This could go back as far as 8 April 1976, the date of the *Defrenne* judgement [see footnote]. If, however, the House of Lords were to limit retroactive membership to 6 years, in line with contract law, there would be minimal effect on the LGPS. Only those employees who had lodged a claim prior to 31 December 1998 could benefit from any retroactive membership and then only to the date six years prior to the date the claim was lodged;

    iii) the position with regard to casual employees who were first able to join the LGPS on and from 2 May 1995 is not certain.

17. If the House of Lords decision requires a further retroactive period of membership to be allowed, the ECJ judgement made it clear that the employees would be required to pay the employee pension contributions relating to the relevant period of service concerned.

Advice to be Given to Employees

18. If an employee (or a leaver) asks what action is being taken to allow retroactive membership of the LGPS following the ECJ decision, they should be informed that the matter of time limits has now been referred back to the House of Lords for determination. Until that determination is made and, if necessary, amendments to the LGPS Regulations are made, the administering authority is not in a position to take any action. It would be wise, however, to inform an employee that should he / she leave before the relevant decisions are taken, he / she would be best advised to lodge a claim with the Employment Tribunal. A person who has already left should be advised to lodge a claim, particularly if they are able to lodge the claim within six months of leaving. A claim form can be obtained from the local Citizen's Advice Bureaux or from local offices of the Department of Employment.

Further Information

19. If you require further information on items contained in this Circular please contact Terry Edwards 020 7296 6744/01954 202 787; Elaine English 020 7296 6745. For further information on the EO and related matters please visit our website www.lg-employers.gov.uk

Terry Edwards
LGPC Pensions Consultant

Footnotes:

Vroege v NCIV Instituut voor Volkshuisvesting and Stichting Pensioenfonds [1994] ECR I-4541 Case C-57/93

Fisscher v Voorhuis Hengelo and Stichting Bedrijfspensionenfonds voorde Detailhandel [1994] ECR I-4583 Case C-128/93

Barber v Guardian Royal Exchange Group [1990] ECR I-1889 Case C-262/88

Defrenne v SABENA [1976] ECR 455 Case 43/75

Magorrian and Cunningham v Eastern Health and Social Services Board [1997] ECR I-7153 Case C-246/96