

LGPC CIRCULAR NO. 96 - MARCH 2001

PLEASE PASS ON SUFFICIENT COPIES OF THIS CIRCULAR TO YOUR TREASURER/DIRECTOR OF FINANCE AND TO YOUR PERSONNEL AND PENSIONS OFFICER(S) AS QUICKLY AS POSSIBLE

PART TIMER'S PENSION RIGHTS - UPDATE

Purpose of the Circular

1. The purpose of this Circular is to inform authorities of the current position in respect of Employment Tribunal cases in respect of part-timers' pension rights i.e.
 - other than the test cases (which have yet to be heard), and those cases where the IT1 claim form was lodged more than 6 months after the employment relationship ended, all English and Welsh part-time Employment Tribunal cases have been stayed pending the outcome of the test cases
 - the Solicitor to the Scottish Executive has written to the Central Office of the Employment Tribunals (Scotland) seeking to confirm that Scottish part-time Employment Tribunal cases will be dealt with on the basis of the test cases in England and Wales.

Actions to be taken

2. As a result of paragraph 1, no action should, at present, be taken by authorities other than
 - in England and Wales, where a tribunal requests an authority to enter a Notice of Appearance, to refer that tribunal to the Employment Tribunals Information Bulletin Number Six (see Annex A) i.e. it is the Secretary of State for the Environment, Transport and the Regions who, as respondent, is required to enter the Notice of Appearance and not the authority
 - in England, Wales and Scotland, to consider, on the basis of good employment practice (and to avoid any potential claims to the Pensions Ombudsman of maladministration), whether to remind all employees, as they leave, and all

employees who have left within the last 6 months, of the need to lodge an IT1 claim with the Employment Tribunal within 6 months of the termination of their employment if they think they may benefit from the ruling of the House of Lords that access to pension schemes for part-timers may be backdated to, at the most, 8 April 1976. This may be the case if, by reason of sex discrimination which cannot be objectively justified, they have been excluded from membership of the pension scheme (or have been discriminated against in some other manner which contravenes the House of Lords judgement) during the employment relationship in question. You should ensure that you do not imply that employers have a duty of care to inform employees of their statutory rights. Employees should be informed that, if they lodge an IT1 claim, they should not name their union as their representative without first checking that the union is happy to act for them.

3. In Scotland, the Central Office of the Employment Tribunals has not followed the line taken in England and Wales and, at least at present, no cases remain stayed. The Solicitor to the Scottish Executive has, however, written to the Central Office seeking confirmation that they will, in fact, deal with cases on the same basis as in England and Wales. Until clarification of the position in Scotland is received, authorities should not submit a Notice of Appearance. Authorities that are asked to enter a Notice of Appearance, and are not being permitted a period of 3 months to do so, should bring such cases to the attention of David Lauder at the Scottish Public Pensions Agency¹.

Employment Tribunals Information Bulletin Number Six - England and Wales

4. The Employment Tribunals Bulletin Number Six (England and Wales) is attached to this Circular for information (see Annex A).
5. It sets out at paragraph 2 the process that the Employment Tribunals in England and Wales will follow when dealing with cases where the IT1 claim form was sent to the tribunal more than 6 months after the employment relationship ended. The majority of these cases will be struck out although if, exceptionally, the Chairman of the Tribunal decides that a particular case should proceed, the parties to the case will be informed by letter. A party who is dissatisfied with the Chairman's decision may appeal, on a point of law only, to the Employment Appeal Tribunal.
6. Paragraph 3 of the Bulletin confirms that the stay on the cases listed in appendix 2 to the Bulletin (which includes the Local Government Pension Scheme) has only been lifted in respect of
 - a) the test cases shown in the said appendix 2, and
 - b) any cases where proceedings were commenced more than 6 months after the employment relationship ended.
7. The Secretary of State for the Environment, Transport and the Regions must, within 3 months of the 9 February 2001, enter a Notice of Appearance in respect

¹ Scottish Public Pensions Agency, Room 506, St. Margarets House, 151 London Road, Edinburgh, EH8 7TG, tel 0131 244 3218.

of the test cases at the Nottingham Regional Office of the Employment Tribunal. The Secretary of State will also submit a list of all cases which he considers should be struck out on the basis that the IT1 claim form was sent to the tribunal more than 6 months after the employment relationship ended. The Treasury Solicitor will act as the representative for the Secretary of State.

Guidance Note from the Central Office of the Employment Tribunals (Scotland)

8. The Guidance Note from the Central Office of the Employment Tribunals (Scotland) is attached to this Circular for information (see Annex B).
9. It sets out the process that the Employment Tribunals in Scotland will follow when dealing with cases where the IT1 claim form was sent to the tribunal more than 6 months after the employment relationship ended. The majority of these cases will be struck out although if, exceptionally, the Chairman of the Tribunal decides that a particular case should proceed, the parties to the case will be informed by letter. A party who is dissatisfied with the Chairman's decision may appeal, on a point of law only, to the Employment Appeal Tribunal.
10. The Guidance Note, which is simply dated February 2001, states that respondents must enter a Notice of Appearance within 3 months.
11. Each respondent need enter only one appearance, unless it intends to take different points of defence to different groups of applicants, or concedes some claims and not others. Where this is the case, a separate appearance is required for each group.
12. Each Notice of Appearance must have appended to it a schedule of the claims to which it relates giving the case number, surname and initials of each applicant. Notices of Appearance should:
 - a) state which of the cases listed in the schedule are conceded, subject to such things as agreement as to the length of service or agreeing the amount of contributions to be made to the pension scheme
 - b) give full particulars of any defence of objective justification for the exclusion of part-time workers from the scheme
 - c) give full particulars of any other defence to be raised against all applicants in the schedule or some or none of them

d) be entered at the Central Office of the Employment Tribunals, Eagle Building, 215 Bothwell Street, Glasgow, G2 7TS.

13. However, any Scottish authority that is requested to enter a Notice of Appearance is advised not to do so at the present time (see paragraph 3 of this Circular).

14. Scottish authorities will be advised before May 2001 whether they need to enter Notices of Appearance.

Clarification of Circular 94

15. The LGPC has been asked to clarify the meaning of the following words contained in the fourth bullet point to paragraph 4 of Circular 94 i.e.

" but any pension benefits payable in respect of that [backdated] service will only be those that would be due to be paid in respect of the period after the date of the application to the Employment Tribunal."

Paragraph 35 of the House of Lords judgement would appear to say that where, for example, an employee retires and, say, lodges an IT1 claim with the Employment Tribunal 3 months after retiring and, due to sex discrimination which cannot be objectively justified, backdates membership of the LGPS upon payment of the relevant pension contributions, the additional retirement benefits in respect of that backdated membership would only be payable from the date the IT1 claim was lodged. No arrears of pension benefits would, in this example, be payable for the first 3 months of retirement.

Distribution of this Circular (i.e. Circular 96)

16. Administering authorities are asked to copy this Circular to employers participating in their Fund other than those to whom the Circular has already been sent by the LGPC Secretariat (see the LGPC distribution list below).

Terry Edwards, LGPC Pensions Consultant
March 2001

Distribution:

Chief Executives of local authorities in England & Wales (3 copies)

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Officer Advisory Group

Local Government Pensions Committee

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Visit the LGPC website at <http://www.lg-employers.gov.uk/pensions.html>

EMPLOYMENT TRIBUNALS

PART TIME WORKER PENSION CASES
INFORMATION BULLETIN NUMBER SIX**Introduction**

The House of Lords has now given judgment in the appeals on the preliminary points of law affecting cases brought by part time workers who have been excluded from occupational pension schemes because of their part time status. In the first part of the Bulletin I summarise the effect of the judgment. In the second part, I explain what will now happen to those cases affected by the judgment. In the third part, I describe the steps which must now be taken to move forward the cases which are unaffected by the judgment. I have made those steps the subject of formal Directions which the parties (in the next phase this means the respondents) must comply with. I understand of course that every applicant is anxious to know when their case will be concluded, but I regret that until respondents have entered their appearances and explained what, if any, defences they now wish to raise in relation to the merits of individual claims, it is impossible to say. May I please ask for your continued indulgence while we proceed with the massive task of case managing in excess of 50,000 applications. We recognise the need for speed, but we equally recognise the necessity of doing justice even handedly between the parties in what remains highly technical and complex litigation. Might I respectfully ask you to refrain from making telephone contact either with the tribunal office in which your claim is proceeding, or the tribunal's helpline, to enquire about the progress of your claim. As it becomes available, you will receive further information in writing either from your representative or from the tribunal direct. Please also remember that tribunal staff are not permitted to give legal advice.

1. The judgment

The judgment deals only with jurisdictional issues concerning time limits for bringing claims, and the length of time which claims may be back dated. Their Lordships ruled that

- Claims must be brought not later than 6 months after the ending of the employment relationship in question
- If brought within that time, the claim may be back dated to the start of the employment relationship or the 8th **April** 1976 whichever is the later **but** because the object is to put part time workers in to the position they would have been in had they not been excluded from the scheme, a successful applicant must make, as a condition of admission to the scheme, the same pension contributions which they would have made had they been members of the scheme all along
- In those cases where the employment relationship has been broken or because, by its nature, is intermittent (normally but not exclusively this will apply to supply teachers and those on termly or academic yearly contracts), the six month time limit runs from the end of each period of employment unless there subsists a stable employment relationship between the parties which bridges those periods when no work being done, in which case the six month limit runs from the end of that stable relationship. The question of whether a stable

employment relationship exists or, if not, when it came to an end, can only be resolved by an employment tribunal hearing evidence on a case by case basis, unless the point is conceded by the respondent.

2. Cases affected by the House of Lords judgment.

As a result of the judgment, any case where the form IT1 was sent to the tribunal more than **6** months after the employment relationship ended, is doomed to fail and steps will now be taken to dispose of those cases as quickly, but fairly, as possible. This part of the Bulletin explains what will happen.

- a) Letters will be sent to those applicants inviting them to show cause - i.e.- to explain in writing - why their case should not be struck out. The letters (which will be copied to the respondent) will set a limited period within which an applicant will be able to write to the nominated Chairman of the region in which their case is proceeding, explaining why they do not agree that their case must fail.
- b) If no reply is received to that letter, a formal Order striking out the claim will be issued. Where a reply is received, the nominated Chairman will exercise his or her discretion as to how to proceed. Normally, the Chairman will be able to reach a decision without the need for further information or a hearing. In a few cases the Chairman may need to ask for further information. If the Chairman decides that the case will fail, a striking out Order giving reasons will be issued. If the Chairman decides that the case should proceed, the parties will be informed by letter and the respondent will be asked to enter a Notice of Appearance.
- c) Exceptionally, before reaching a decision the Chairman may need to hold a brief hearing at which both parties will be allowed to make representations. If that happens, whatever the outcome, the parties will be notified of it in the form of a formal Order, again supported by reasons.
- d) A party who is dissatisfied with the Chairman's decision may appeal, **on a point of law only**, to the Employment Appeal Tribunal.
- e) It would be of immense assistance if any applicant who accepts that their case will inevitably fail as a result of the judgment, would write in and withdraw as promptly as possible.
- f) If within 6 months a respondent has not received a copy of a show cause letter in any case which it believes must fail as a result of the judgment, they should notify the Regional Office in which the case is registered, even if it is not the office where they have been told to enter their Notice of Appearance.

3. Cases NOT affected by the House of Lords judgment

This part of the Bulletin explains what will happen in respect of the remaining cases. Very few respondents have so far entered a Notice of Appearance but they will now

be required to do so. In it, they will set out their future intentions with regard to all of the cases brought against them. Because some respondents have many hundreds of cases, and a few have several thousand cases, the following steps have been designed to take us to the next stage of these proceedings as quickly as possible but with the minimum of bureaucracy.

Once received, the Notices of Appearance will be served on representatives and unrepresented applicants only. If you have named a representative in your originating application it will be their responsibility to keep you informed of any developments that apply to you. If you have not named a representative, you may **wish** to seek the assistance of a trade union of which you either are or at the relevant time were, a member. Appendix 1 is a list of some of the unions involved together with an indication of whether, and if so on what conditions, they might be prepared to be named as representative. If you are eligible for assistance from a trade union it would greatly assist the management of these cases if you would be willing to nominate that union as your representative. If you are willing, **please ask your union to notify the Regional Office where your case is held that they are now acting for you.**

Decisions about the future handling of cases against any particular respondent can only be taken once their Notice of Appearance has been received. Further information will be sent to representatives and unrepresented applicants in due course.

Directions

1. On the Direction of the President, HH Judge Prophet, the stay is lifted:
 - a) in the sectors from which the lead cases are drawn, only in the lead cases and any case where proceedings were commenced more than 6 months after the employment relationship ended. Appendix 2 is a list of the current lead cases. If a lead case is no longer appropriate, applications to lift the stay in other named cases within the sector may be made to me,
 - b) in all other cases.

I make the following Directions

2. Except as indicated below, Respondents are required to enter an appearance, or amended appearance, **within three months** of the date of this Bulletin. Each respondent need enter only one appearance, unless it intends to take different points of defence to different groups of applicants, or concedes some claims and not others, when a separate appearance is required for each group.
3. Each Notice of Appearance is to have appended to it a schedule of the claims to which it relates, grouped region by region, giving the case number, surname and initials of each Applicant.
4. As a cross-check to the tribunal's own records, a separate appearance should be entered listing all cases which a respondent believes must fall as a result of the house of Lords judgment.
5. **Notices of Appearance will, inter alia:**
 - a) state which of the cases listed in the schedule are conceded, subject to such things as length of service or agreeing the amount of contributions to be made to the pension scheme
 - b) give full particulars of any defence of objective justification for the exclusion of part-time workers from the scheme

- c) give full particulars of any other defence to be raised against all applicants in the schedule or some or one of them.

6. Where the Secretary of State is a respondent but not the direct employer, the direct employer is not required to enter an appearance in the case of any applicant in respect of whom the Secretary of State is raising a defence of objective justification or other common points defence. [N.B. the Secretary of State has been automatically joined as a respondent in all appropriate cases even if not specifically named by the applicant)

7. Notices of Appearance are to be entered as follows:

- a) in the lead cases, at the Nottingham regional office. (N.B. if a respondent is unsure whether they fall within one of the lead sectors, they should contact the appropriate representative named in Appendix 2)
- b) in the marriage gratuity cases, at the Nottingham regional office
- c) in the retained fire-fighters cases, (other than those brought by members of the Fire Brigades Union which are being managed separately) both old cases and new cases, at the Nottingham regional office
- d) where all cases against a respondent have been registered at the same office of the tribunal, at that office
- e) in all other cases, respondents will be notified individually within one month. If no notification is received please write to me at the Nottingham regional office.

8. Directions hearings at which detailed consideration will be given to the future management of cases against individual respondents will then be arranged.

John K Macmillan
Regional Chairman
Employment Tribunals
Nottingham
9th February 2001

Appendix 1

Unions which have agreed to act for former members

Association of University Teachers.

KFAT

NASUWR

Royal College of Nursing

Unions which have agreed to act for those who were members at the relevant time but not those who have subsequently become members

Association of Teachers and Lecturers'

Unions which will act only for those who were members at the relevant time and have remained in membership ever since

MSF

NUT

T&GWU

UNIFI

Unions which will consider acting for former members in some circumstances

Chartered Society of Physiotherapists

GMB

UNISON

Please note that the question of representation is entirely a matter between an applicant and his or her union and you must approach the union before naming them as representative. The tribunal cannot become involved.

Appendix 2

The lead cases

Case No	Name	Respondent	Lead Respondent representative
Health Sector			
507497/95	Preston	Wolverhampton Healthcare NHS Trust Secretary of State for Health	The Treasury Solicitor, Queen Anne Chambers, 28 Broadway, London SW1H 9JS
Education Sector			
500393/95	Brack	Manchester City Council Secretary of State for Education	The Treasury Solicitor
504275/95	Light	Birmingham City Council Secretary of State	The Treasury Solicitor
504442/95	Maltby	Birmingham City Council Sutton College Secretary of State	The Treasury Solicitor
507029/95	Harris	Lancashire County Council Preston College Secretary of State	The Treasury Solicitor
507817/95	Jones	Stockport Metropolitan Borough Council Secretary of State	The Treasury Solicitor
509968/95	Cockrill	Wolverhampton Metropolitan Borough Council Secretary of State	The Treasury Solicitor
513866/95	Fox	Humberside County Council Grimsby College Hull College Secretary of State	The Treasury Solicitor
525455/95	Ham	Birmingham City Council Secretary of State	The Treasury Solicitor

Local Government Sector

514614/95	Mannion	Stockport Metropolitan Borough Council Secretary of State for the Environment	The Treasury Solicitor
514631/95	Kynaston	Stockport Metropolitan Borough Council Secretary of State	The Treasury Solicitor

Private Sector - Non-Contributory (Banking)

529030/95	Nuttall	Midland Bank plc	Mr T Flanagan Stephenson Harwood, Solicitors 1 St Paul's Churchyard London F-04M BSH
525353/95	Fletcher	Midland Bank plc	
525356/95	Baron	Midland Bank plc	
525368/95	Foster	Midland Bank plc	
525369/95	Glibert	Midland Bank plc	
525372/95	Harrison	Midland Bank plc	
525374/95	Walker	Midland Bank plc	
525378/95	Winsborough	Midland Bank plc	
525447/95	Culley	Midland Bank plc	

Private Sector - Contributory (Electricity Supply)

517955/95	Guerin	Southern Electric plc	Mr H Lewis
52631695	Lee	Southern Electric plc	Eversheds Solicitors. Senator House, 85 Queen Victoria Street London EC4V 4JL

EMPLOYMENT TRIBUNALS (SCOTLAND)

Central Office

Eagle Building, 215 Bothwell Street, Glasgow G2 7TS

Tel:'0141 204 0730 - Fax: 0141 204 0732

DX:580003 - Glasgow 17

President: Colin M Mllne

HOUSE OF LORDS JUDGMENT - PART TIME PENSION CASES

I enclose, for information, a guidance note that outlines the judgment given by the House of Lords and explains what action we now propose to take on these cases.

A copy of this note has been sent to all applicants, respondents and representatives.

It will, as you will see from the enclosed note, take time to progress these applications.

I would ask that applicants refrain from making telephone contact with this office to enquire about the progress of the cases. As it becomes available they will receive further information either from their Representative or the tribunal direct,

D J Easton
Secretary of the Tribunals

EMPLOYMENT TRIBUNALS (SCOTLAND)

The House of Lords has now, in a decision dated 8 February 2001, given judgment in the appeals on the preliminary points of law in the cases of Preston & Others -v- Wolverhampton Healthcare NHS Trust & Others and Fletcher & Others -v- Midland Bank Plc. The judgment affects, cases brought by part time workers who have been excluded from occupational pension schemes because of their part time status.

The judgment, which deals only with jurisdictional issues concerning time limits for bringing claims and the length of time which claims may be back dated, was that:

- Claims must be brought not later than 6 months after the ending of the employment relationship in question
- If brought within that time, the claim may be back dated to the start of the employment relationship or 8 April 1976 whichever is the latest **but** because the object is to put part time workers in to the position they would have been in had they not been excluded from the scheme, a successful applicant must make, as a condition of admission to the scheme, the same pension contributions which they would have made had they been members of the scheme all along
- In those cases where the employment relationship has been broken or because, by its nature, is intermittent (normally but not exclusively this will apply to supply teachers and those on term or academic year contracts), the six month time limit runs from the end of each period of employment unless there subsists a stable employment relationship between the parties which bridges those periods when no work is being done, in which case the six month limit runs from the end of that stable relationship. The question of whether a stable employment relationship exists or, if not, when it came to an end, can only be resolved by an employment tribunal hearing evidence on a case by case basis, unless the point is conceded by the respondent.

Cases affected by the House of Lords judgment.

Applications received more than 6 months after the employment relationship ended

As a result of the judgment any case where the form IT1 was sent to the tribunal more than 6 months after the employment relationship ended is unlikely to succeed and, unless representations are made to the contrary, steps will now be taken to dispose of those cases as quickly as possible.

- Letters will in the course of the next weeks, be sent to those applicants failing into this category inviting them explain in writing why their case should not be struck out, The letters (which will be copied to the respondent) will set a limited period within which an applicant will be able to write to the office dealing with the application explaining why they do not agree that their case must fail.

- If no reply is received to that letter a formal Order striking out the claim will be issued. Where a reply is received, the Chairman will exercise his ' or her discretion as to how to proceed, Normally, the Chairman will be able to reach a decision without the need for further information or a hearing. In a few cases the Chairman may need to ask for further information. If the Chairman decides that the case will fail, a striking out Order giving reasons will be issued. If the Chairman decides that the case should proceed, the parties. will be informed by letter and the respondent will be asked to enter a Notice of Appearance if they have not already done so.
- Depending on the submissions made, before reaching a decision the Chairman may need to hold a brief hearing at which both parties will be allowed to make representations. If that happens, whatever the outcome, the parties will be notified of it in the form of a formal Order, again supported by reasons.
- A party who is dissatisfied with the Chairman's decision may appeal, on a point **of law only**, to the Employment Appeal Tribunal.
- if any applicant accepts that their case will inevitably fail as'a result of the judgment they should write to the tribunal office dealing with their claim and ask that the application be treated as having been withdrawn.

Cases NOT affected by the House of Lords judgment

Respondents who have not, as yet entered a Notice of Appearance will now be required to do so.

Those respondents who have previously declared their intention to resist the applications will now be required to provide details of the grounds upon which they intend to resist the applications brought against them.

Because some respondents have many hundreds of cases the following steps have been designed to take us to the next stage of these proceedings as quickly as possible but with the minimum of delay,

Once received, the Notices of Appearance will, where people are represented, be served on representatives. Those applicants who are not represented will be sent a copy of the Notice of Appearance.

Decisions about the future handling of cases against any particular respondent can only be taken once their Notice of Appearance has been received. Further information will be sent to representatives and unrepresented applicants in due course.

Respondents are required to enter an appearance, or amended appearance, **within three months** of the date of this letter, Each respondent need enter only one appearance, unless it 'Intends to take different points of defence to different groups of applicants, or concedes some claims and not others, when a separate appearance is required for each group.

Each Notice of Appearance is to have appended to it a schedule of the claims to which it relates giving the case number, surname and initials of each applicant.

Notices of Appearance should:

- a) state which of the cases listed in the schedule are conceded, subject to such things as length of service or agreeing the amount of contributions to be made to the pension scheme
- b) give full particulars of any defence of objective justification for the exclusion of part-time workers from the scheme
- c) give full particulars of any other defence to be raised against all applicants in the schedule or some or one of them.
- d) Notices of Appearance are to be entered at the Central Office of the Employment Tribunals in Glasgow.

Directions hearings at which detailed consideration will be given to the future management of cases against individual respondents will then be arranged.

I understand of course that every applicant is anxious to know when their case will be concluded, but I regret that until respondents have entered their appearances and explained what, if any, defences they now wish to raise in relation to the merits of individual claims, it is impossible to say.

May I ask for your patience while we proceed with the massive task of case managing these applications and ask you to refrain from making telephone contact either with the tribunal office in which your claim is proceeding, or the tribunal's helpline, to enquire about the progress of your claim.

As it becomes available, you will receive further information in writing either from your representative or from the tribunal direct. Please also remember that tribunal staff are not permitted to give legal advice.

D J Easton
Secretary of the Tribunals