LGE
Local Government Employers

Local Government
House, Smith Square,
London SW1P 3HZ

Tel 020 7187 7373
Fax 020 7664 3030

pay, pensions and
employment solutions

The Local Government Pensions Committee
Secretary: Terry Edwards

CIRCULAR

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

No. 201 – JUNE 2007

PART-TIMER PENSION CLAIMS

Purpose of this Circular

1. This Circular has been issued:
   - to notify authorities of the decision in the "Beswick 2" part-time pension claim test cases, where the Employment Tribunal has found in favour of the Respondents (the employers) and against the Claimants (the employees / ex-employees), and
   - to provide a round-up of other news in relation to part-timer pension claims.

Background

2. On 8 February 2001 the House of Lords decided in the Preston case[1] that it had been discriminatory since 8 April 1976[2] to debar part time staff from access to a pension scheme in circumstances where the scheme was open to a full time (male) comparator. The House of Lords also decided that a claim for retroactive membership of a pension scheme had to be lodged with an Employment Tribunal either whilst still employed under, or within 6 months of the ending of, a stable employment relationship with the employer who had debarred the claimant from membership of a pension scheme.

[1] *Preston and Others v Wolverhampton Healthcare N.H.S. Trust & Others and Fletcher & Others v Midland Bank Plc*

[2] The date of the ECJ's judgment in *Defrenne v Sabena* (case 43/75) [1976] ICR 547

Email info@lge.gov.uk
www.lge.gov.uk
Managing Director Jan Parkinson

3. Following the House of Lords decision, the Employment Tribunal and the Employment Appeals Tribunal considered various issues in relation to a number of test cases. These culminated in a number of Directions Orders (available at www.employmenttribunals.gov.uk).

The Beswick cases

4. In LGPC Circular 176 we reported on what are known as the "Beswick 1" cases. These related to

   - **employees in England and Wales** who were working:

     a) 15 or more but less than 30 hours per week for 35 or more weeks per year or
     b) 30 or more hours per week for less than 45 weeks per year

   and who had the right to join the LGPS from 1 April 1987 (although some authorities anticipated the right to join from as early as 1 April 1985 on the basis of DoE Circular 10/85). If they joined the LGPS prior to 2 October 1987 they could backdate contributions (and membership) to 1 April 1986, or to the beginning of the pay period when they first became eligible to join the LGPS if this was after 1 April 1986 i.e. the later of

     i) the date when they first commenced service that met the criteria in (a) or (b) above, or
     ii) the date they attained age 18, or
     iii) in the case of a manual worker, the date 12 months after the date they met the criteria in (a) or (b) above.

   - **employees in Scotland** who were working:

     a) 15 or more but less than 30 hours per week for 35 or more weeks per year or
     b) 30 or more hours per week for 35 or more but less than 45 weeks per year

   and who had the right to join the LGPS from 1 April 1986.

   Employees who joined the Scheme before 1 April 1988 (before 1 April 1987 in Scotland), either as a full or part time employee, could count as "qualifying service" any service meeting the relevant criteria in (a) or (b) above which they had worked between 1 April 1974 and 31 March 1986 except

     i) service before the age of 18,
     ii) service prior to a break in service of 12 months or more, and

iii) in the case of a manual worker, the first 12 months service at 15 hours or more per week.

"Qualifying service" qualified people for benefits i.e. it determined whether a person was entitled to a benefit under the Scheme and the date when the benefit could be payable. It did not, however, count in working out the amount of the benefit.

From 17 September 1990 (1 April 1990 in Scotland), those who had joined the Scheme before 1 April 1988 (1 April 1987 in Scotland), either as a full or part time employee, had the opportunity to buy-back any "qualifying service" (as defined above) so that it would count as "reckonable service" i.e. so that it would also count in working out the amount of the person's benefits.

Part time "qualifying service" between 1 April 1974 and 31 March 1978 could be purchased (and converted into "reckonable service") at the rate of 6% of pay on 31 March 1986 (or, in England and Wales, the day before the employee joined the Scheme if earlier) and part time service between 1 April 1978 and 31 March 1986 could be purchased at the rate of 12% of pay on 31 March 1986 (or, in England and Wales, the day before the employee joined the Scheme if earlier). Employers could agree to meet up to half of the employees' contributions.

5. The "Beswick 1" issue was whether the 1990 buy-back terms under which the "qualifying service" could be converted into "reckonable service" were sufficient to extinguish any cause of action which the claimants might have had in respect of their former exclusion from the pension scheme and, more precisely, whether the buy-back terms were at least as favourable as the public sector settlement model arrived at following the Preston judgment.

6. Following a hearing, various unions representing claimants in the "Beswick 1" cases confirmed that they would not be pursuing the "Beswick" point. Based on that concession, the stay on such cases was lifted and the cases were to be struck out in whole or in part[3] as appropriate on the basis that:

- the claimants had already been afforded the opportunity to join the LGPS, and
- where appropriate, they had been afforded the opportunity to buy back service under the 1990 buy-back terms, and
- those buy-back terms were no less favourable than the agreed terms of settlement in the "Preston" public sector cases, and

[3] See LGPC Circular 159 (Scotland) and Circulars 160 and 164 (England and Wales) regarding service prior to 6 April 1988 that can succeed i.e. where the contractual hours were less than 15 per week, or the contractual hours were 15 or more (in aggregate) and less than 30 hours per week but for less than 35 weeks per year.

- no detriment had, therefore, been suffered.

7. Subsequently, and as reported in Circular 178, Solicitors acting on behalf of Unison and other unions, wrote to Mr. Macmillan, the Chairman of the Nottingham Employment Tribunal, on 7 November 2005 raising questions as to the interpretation of the LGPS Regulations and the extent of the concession made by Unison in relation to the "Beswick" test case. They suggested that the Tribunal had been in error in concluding that the concession covered not only those who had joined the LGPS before 1 April 1988 (1 April 1987 in Scotland) and who had therefore been offered the subsequent 1990 buy-back terms, but also those who had not joined before the relevant date and had thus not been offered the buy-back terms. They claimed that the latter group, which have become known as the "Beswick 2" cases, should not have been covered by the concession and sought to vary it so that "Beswick 2" claimants could now be offered the opportunity to buy-back under the public sector settlement model. The respondents rebutted this position and asked that the concession should not be varied.

8. Following a hearing on 14 February 2007 the Chairman of the Employment Tribunal issued a judgment finding in favour of the Respondents. He ordered that after the expiration of 8 weeks from 21 February 2007 show cause letters should be sent to all "Beswick 2" claimants i.e. to strike out their claims unless they can show good cause why their claim should not be struck out.

TUPE cases

9. In Circular 176 we notified authorities that the final appeal on the question of when time runs for the purposes of bringing a part-time worker pension claim in cases where a claimant's employment has been transferred under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) was to be heard by the House of Lords on 15 February 2006.

10. The outcomes was that the House of Lords ruled time runs from the date of the transfer. Therefore, that part of a claimant's claim that relates to a period of exclusion from the pension scheme before the date of the transfer is out of time unless it was presented to the tribunal within 6 months of the transfer. If a claim was not made within the relevant time limit, that part of a claim relating to employment before the transfer will fail unless the claimant can give good reasons why their claim should not be dismissed, even though they are out of time.

Employers failing to respond

11. A case has recently been drawn to the attention of the Secretariat in which the respondent, the Governing Body of a school, apparently failed to respond to a claim. Consequently, as the claim was not defended, the Employment

Tribunal issued a default judgment giving the claimant entitlement to retrospective membership of the LGPS.

12. The claim should of course have been dealt with in accordance with normal procedures. That is, it should have been settled, struck out, or stayed (if, at the time of the claim, it fell within a stayed category) in accordance with the agreed procedures. These have been set out in various LGPC Circulars but, in particular, this Circular and Circulars 165, 164, 160, 159, 152 and 143 (see http://www.lge.gov.uk/lge/core/page.do?pageId=58678).

13. Clearly, where employers fail to respond properly to claims there is a real danger that Employment Tribunals may award membership in default where there should, in fact, be no entitlement. This will lead to an increased pension liability falling on the Fund and hence on the employer. Where the employer has an individual employer's contribution rate the cost will eventually be met by that employer via their employer's contribution rate, as assessed under the triennial valuation. However, where an employer is part of a "pool" with a common employer's contribution rate for those employers in the "pool" it will be inequitable if the other employers in the "pool" have to meet a share of the additional pension costs resulting from a successful claim which would otherwise have been struck out in whole or in part had it been contested. Administering authorities may be aware that the Teachers Pensions Agency will bill individual employers who agree to, or fail to defend, a claim that would have been struck out in whole or in part if properly defended. If administering authorities wished to adopt a similar approach for "pooled" LGPS employers they could potentially do so by utilising the provisions of regulation 78(3)(b) of the LGPS Regulations 1997 (or regulation 77(3)(b) of the LGPS (Scotland) Regulations 1998).

Claims relating to current employees

14. Regulations amending the Local Government Pension Scheme Regulations 1997 or the Local Government Pension Scheme (Scotland) Regulations 1998 are not necessary in order to grant retrospective membership to those who have submitted a valid claim to the Employment Tribunals.

15. Indeed, in Scotland it has been agreed that claims from current employees can be processed without the need for the employee to submit an ET claim.

16. However, it is important to note that no such agreement applies in England and Wales and so, currently, only those cases where an ET claim has been lodged can be dealt with. Thus, in England and Wales, employees who believe they were wrongly excluded from membership of the Scheme can only have their case considered if they lodge a valid claim with the ET.

17. In Scotland (assuming a claim has not already been dealt with under paragraph 15 above) and in England and Wales, any employee who leaves or ceases a stable employment relationship[4] will need to submit a claim to the ET within 6 months of leaving or of the cessation of the stable employment relationship (whichever is the earlier) in order to protect their position. There is no intention to amend the LGPS Regulations to cover employees who leave or cease a stable employment relationship and who have not submitted a claim to an ET within the relevant 6 month period.

18. The Secretariat is aware of some cases where, in response to letters received from employees some years back, either the employer or the Pensions Section notified the employee that their claim would be dealt with as and when any relevant amendment regulations were issued but failed to mention to the employee the need to submit an ET claim within 6 months of leaving / ceasing a stable employment relationship in order to protect their claim. A number of these employees have subsequently left[5] and have not submitted an ET claim within the required time limit. We understand that there is no intention to amend the LGPS Regulations to cover these cases. The concern, of course, is that such former employees could seek to claim maladministration and suitable financial redress for the "loss" suffered.

Actions for administering authorities

19. In consequence of the items in this Circular, administering authorities may wish copy this Circular to employers in their Fund (other than to Local Authorities to whom this Circular has already been sent direct) or bring the Circular to the attention of employers by directing them to the Circular on the LGE website at: http://www.lge.gov.uk/lge/core/page.do?pageId=71952

Terry Edwards
Head of Pensions
May 2007

[4] See Circular 164 at http://www.lge.gov.uk/lge/aio/55950 for information on stable employment relationships.
[5] Without, in Scotland, having already been dealt with under paragraph 15 of this Circular.

Distribution sheet

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LGPC
Local Government House
Smith Square
London
SW1P 3HZ

or email:terry.edwards@lge.gov.uk
tel 020 7187 7346
fax 020 7187 7367