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pay, pensions and
employment solutions

The Local Government Pensions Committee
Secretary: Terry Edwards

CIRCULAR

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CASUAL EMPLOYEES IN ENGLAND AND WALES

Purpose of this circular

1. The Local Government Pensions Committee (LGPC) has received a number of queries concerning regulation 2(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (as amended) [SI 2007/1166] and its effect on the eligibility of casual employees to join or retain membership of the LGPS in England and Wales. The purpose of this Circular is to set out the LGPCs understanding of the position.

Eligibility for membership of the LGPS in England and Wales

2. As readers will be aware, the New Look LGPS in England and Wales came into effect on 1 April 2008. All existing contributors at 31 March 2008 who still had a contract on 1 April 2008 were transferred over to the New Look Scheme, except some casuals (see below) and councillor members. Councillor members remain in the Career Average Revalued Earnings (CARE) Scheme.
3. The main change to the eligibility criteria for employees from 1 April 2008 is that a person can only be an active member of the Scheme if they have a contract of employment of three months or more duration. This requirement effectively excludes some employees (particularly casual employees) who would previously have enjoyed the right of membership.

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Casual employees

4. The technical position of existing casuals on 1 April 2008 was, in the view of the LGPC, as follows:
- Casual members where there was, on 31 March and 1 April 2008, a mutuality of obligation would remain in the Scheme (regardless of whether or not they actually worked on 1 April and/or 31 March).
 - Casual members where there was no mutuality of obligation and who were not offered, or were offered but did not accept, work on 31 March 2008 would cease to be active members of the Scheme from 1 April 2008.
 - Casual members where there was no mutuality of obligation but who were offered and accepted work on 31 March 2008 would remain in the Scheme only for so long as there was no break in service i.e. they will cease to be active members of the Scheme on the first day on or after 1 April 2008 when they are either not offered, or are offered but do not accept, work.
5. The following chart plots the above bullet points in an easy to see way:

Type of Casual	31 March	1 April	Member on 1 April?
Has Mutuality on [date]	Yes	Yes	Yes
No Mutuality – but actually worked on [date]	Yes	No	No
No Mutuality – but actually worked on [date]	No	Yes or No	No
No Mutuality – but actually worked on [date]	Yes	Yes	Yes (until next time doesn't work)

6. Thereafter, any of those casuals who are removed from the Scheme, together with any new casual employees, will only be able to be scheme members if they enter into a mutual obligation casual contract for at least 3 months (or have no mutuality of obligation but are offered and accept work every day for at least 3 months or they are able to succeed with the argument referred to at paragraphs 18 and 19).

7. The above is based on our understanding of the position of casuals in accordance with the House of Lords Decision in the Case of Carmichael and Others v. National Power Plc (see [LGPC Circular 87](#) for a copy of the Decision).
8. The case concerned two women recruited to provide guided tours of a power station on a "casual as required basis".

The House of Lords looked at how the agreement between the parties had operated in practice. It was found that there were no provisions governing when, how or with what frequency work would be offered and that the women were not obliged to take work offered to them; they faced no disciplinary action if offers of work were refused.

The Law Lords found that as a matter of fact the claim from the two women "foundered on the rock of absence of mutuality". The agreement that the tour guides had entered into merely provided a framework for a series of successive ad hoc contracts. When they were not working as guides they were not in a contractual relationship. The findings demonstrate that the nature of the recruitment process and the terms and conditions offered and subsequently established are important elements in establishing mutual obligations between the parties.

9. [In the case of St Ives Plymouth Limited v Haggerty](#) the EAT found that, in the circumstances of the case in question, the earlier decision of the Employment Tribunal had not erred in law when finding that there existed sufficient mutuality of obligations in the gaps when no work was performed to infer the existence of an umbrella or overarching contract.
10. The important principle of both these decisions was to re-affirm the need to judge each case on its individual merits in determining whether or not mutuality of obligation exists which, in turn, will determine whether and when a contract of employment exists. It is important to stress, as discovered in the past when surveying local government employers, that significant numbers of employees described as casuals are in fact part-timers, and should not, therefore, be classified as having no-mutuality of obligation.

Pension Implications of the House of Lords and EAT Decisions

11. Many "casuals" in local government will be engaged on an "as and when required" basis. Each case will need to be determined on its own merits.
12. Where there is a mutuality of obligation contract that is for a fixed term of 3 months or more or is open ended, the employee will be eligible for participation in the LGPS.
13. Where there is a lack of mutuality of obligation, the clear implication of the House of Lords decision for such casuals is that a contract of

employment can only exist when work is offered by the employer and is accepted by the employee and any such casuals will not be eligible for membership of the LGPS (unless they are offered and accept work every day for at least 3 months or they are able to succeed with the argument referred to at paragraphs 18 and 19).

14. For those no-mutuality of obligation cases who had opted into the LGPS prior to 1 April 2008 the change in the pension scheme rules from that date, which required an employee to have a contract for 3 months or more to join the Scheme, technically meant that they were not eligible for membership of the Scheme on or after 1 April 2008 in accordance with the above table. The easiest way to perhaps view this is that they were not being removed from the Scheme; rather, based on the Carmichael decision, their "contract" ended on the last day they were offered and accepted work. When they were first again offered and accepted work on or after 1 April 2008 they had a new "contract". The rules of the Pension Scheme from 1 April say "Is that contract for 3 months or more?" and only if the answer is "Yes" can the person rejoin the LGPS. In a situation where there is no-mutuality of obligation the person would have to be offered and accept work every day for 3 months in order to pass the 3 months test.
15. The LGPC is aware that in some cases where an employer has removed "no mutuality of obligation" casual employees from the Scheme some of those affected are seeking to claim that a unilateral variation has been made to their terms and conditions without prior notice, consultation, or agreement from the "employee".
16. Has there been a unilateral variation and was the agreement of the "employee" needed? Taking the line in the Carmichael case, if there was no mutuality of obligation the contract came to an end on the last day that work was offered and accepted. When, thereafter, work was offered and accepted on or after 1 April 2008, that would constitute a new contractual relationship, with new terms. It was not, therefore, a variation to the contract and so no agreement was needed.
17. Was the change made without prior notice or consultation? The changes to the LGPS that came into effect from 1 April 2008 were consulted upon over a period of several years by the Government Department responsible for the Scheme (Communities and Local Government). The review of the Scheme's provisions commenced in 2001 and resulted in various consultation documents, draft regulations and finally actual regulations. The national unions, employer organisations and numerous other interested bodies were involved throughout the whole process. Various bodies (e.g. Pension Funds, employers, unions) would have issued Newsletters to Scheme members informing them of the changes being proposed and of the actual changes being made.
18. The LGPC is also aware that "no mutuality of obligation" casual employees who have been removed from the Scheme or who have been

debarred from joining the Scheme might seek to draw a parallel with provisions in sections 210 and 212 of the Employment Rights Act 1996 which provide that:

210. Introductory.

(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.

(3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question—

(a) whether the employee's employment is of a kind counting towards a period of continuous employment, or

(b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,

shall be determined week by week;

(4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.

(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

212. Weeks counting in computing period.

(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—

(a) incapable of work in consequence of sickness or injury,

(b) absent from work on account of a temporary cessation of work, or

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,

counts in computing the employee's period of employment.

(4) Not more than twenty-six weeks count under subsection (3)(a) between any periods falling under subsection (1).

19. However, whilst a "no mutuality of obligation" casual employee could seek to claim continuity of employment under sections 210 and 212 of the Employment Rights Act ("the Act"), it is LGPC's view that those sections should only apply for the purpose of determining continuity for

provisions under the Act. Sections 210 and 212 of the Act do not specify that they also apply for the purposes of determining continuity of employment for the purposes of the Local Government Pension Scheme; and, equally, regulation 2(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 does not specify that whether a person "is employed under a contract of employment for at least three months" should be determined in accordance with the Act. The two pieces of legislation do not cross refer to each other and, in that sense, they are arguably mutually exclusive. This leaves employers to fall back on the outcome of the Carmichael case when determining eligibility for membership of the LGPS. However, this interpretation has not yet been tested in a tribunal or court.

Is debarring employees who do not have a contract for 3 months or more (many of whom will be casual employees) in breach of the Fixed Term Workers Directive?

20. In the recent ECJ case of Impact v Minister for Agriculture and Food (Ireland) [Case C-268/06] it was held that the non-discrimination rules in the Fixed Term Workers Directive 99/70/EC have direct effect, meaning they can be enforced directly irrespective of national laws, and that the principle of non discrimination against fixed term workers extends to pension entitlements. As a response to Directive 99/70/EC, Parliament passed the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 [SI 2002/2034]. This SI gives fixed-term contract employees the right to be treated no less favourably than a, "comparable permanent employee". Under regulation 3(3)(b) of that SI, employers can treat fixed-term contract employees less favourably if the less favourable treatment can be "justified on objective grounds". It is understood that CLG are using an objective justification reason to keep those with fixed term contracts of less than 3 months out of the scheme in England and Wales and that the objective justification argument for this is that as the scheme has a 3 month vesting period, not providing access to the scheme to those who will leave with less than 3 months employment will not be discriminatory.

Actions for administering authorities

21. Administering authorities in England and Wales 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](#).

Terry Edwards
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October 2008

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