

The Local Government Pensions Committee
Secretary: Terry Edwards

CIRCULAR

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No. 220 – DECEMBER 2008

“CASUALS” AND THE LGPS IN SCOTLAND

Purpose of this circular

1. The Local Government Pensions Committee (LGPC) issued Circular 218 in October 2008 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 “casuals¹” to join or retain membership of the LGPS in England and Wales. The purpose of this Circular is to set out the LGPC’s understanding of the corresponding provision which will apply in Scotland from 1 April 2009.

Eligibility for membership of the LGPS in Scotland

2. As readers will be aware, the New Look LGPS in Scotland comes into effect on 1 April 2009. All existing contributors at 31 March 2009 who still have a contract on 1 April 2009 will be transferred over to the New Look Scheme, except some “casuals” (see below).

Email info@lge.gov.uk

www.lge.gov.uk

Managing Director Jan Parkinson



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Registered office: Local Government House, Smith Square, London SW1P 3HZ

¹ Throughout this Circular we use the term “casuals”. The Secretariat appreciates that in employment law there are two distinct categories i.e. casual workers and temporary employees. However, for ease of reading we merely refer throughout this Circular to “casuals”. Those with a contract with mutuality of obligation between periods of work are temporary employees for the period of the contract; whilst those with no mutuality of obligation between periods of work are casual workers but may become temporary employees for those days on which they are offered and accept work.

3. The main change to the eligibility criteria for employees from 1 April 2009 is that a person will only be able to be an active member of the Scheme if they have a contract of employment of more than three months' duration². This requirement will effectively exclude some employees (particularly "casuals") who would previously have enjoyed the right of membership.

"Casuals"

4. The technical position of existing "casuals" who are members of the Scheme on 31 March 2009 will, in the view of the LGPC Secretariat, be as follows from 1 April 2009:
 - "Casuals" where there is, on 31 March and 1 April 2009, a mutuality of obligation will remain in the Scheme (regardless of whether or not they actually work on 1 April and/or 31 March).
 - "Casuals" where there is no mutuality of obligation and who are not offered, or are offered but do not accept, work on 31 March 2009 will cease to be active members of the Scheme from 1 April 2009.
 - "Casuals" where there is no mutuality of obligation but who are offered and accept work on 31 March 2009 will remain in the Scheme only for so long as there is 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 2009 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:

² Although the Regulations are worded "more than three months' duration" an amendment is to be made so that the appropriate regulation makes reference to "three months or more duration". This is to ensure that employers do not have to facilitate a stakeholder pension for staff employed for exactly three months. Thus, throughout the rest of this Circular, all references to "more than three months" will, once the appropriate regulatory amendment has been made, need to be read as "three months or more"; and all references to "three months and a day" will need to be read as "three months".

Type of "Casual"	31 March	1 April	Member on 1 April 2009?
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 "casuals", will only be able to be scheme members if they enter into a mutual obligation contract of employment which is for more than three months duration² (or have no mutuality of obligation but are offered and accept work every day for at least three months and a day² 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 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 individuals described as "casuals" are in fact full or part-time temporary employees or employees with "zero hours" contracts and should not, therefore, be classified as having no-mutuality of obligation.

Pension Implications of the House of Lords and EAT Decisions – position from 1 April 2009

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 the person in question will be an employee and, if the contract is for a fixed term of more than three months² or is open ended, the person will be eligible for membership of the LGPS.
13. Where there is a lack of mutuality of obligation, the clear implication of the House of Lords decision is that a contract of employment can only exist when work is offered by the employer and is accepted by the person and any such "casuals" who are appointed on or after 1 April 2009 will not be eligible for membership of the LGPS (unless they are offered and accept work every day for at least three months and a day² or they are able to succeed with the argument referred to at paragraphs 18 and 19).
14. For those existing no-mutuality of obligation cases who had opted into the LGPS prior to 1 April 2009 the change in the pension scheme rules from that date (which will require that only employees with a contract of employment for more than three months² will be eligible to join the Scheme) will technically mean that those cases will not be eligible, in accordance with the above table, for continued membership of the Scheme at some point on or after 1 April 2009. The easiest way to perhaps view this is that they are not being removed from the Scheme; but rather, based on the Carmichael decision, their "contract of employment" will end on the last day they are offered and accepted work. When they are first again offered and accept work on or after 1 April 2009 they will have a new "contract of employment". The rules of

the Pension Scheme from 1 April say "Is that contract for more than three months?" 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 three months and a day² in order to pass the more than three months test² (unless they are able to succeed with the argument referred to at paragraphs 18 and 19).

15. The LGPC is aware that in some cases where an employer removes no mutuality of obligation "casuals" from the Scheme some of those affected might seek to claim that a unilateral variation has been made to their "terms and conditions" without prior notice, consultation, or agreement from them.
16. Will there have been a unilateral variation and is the agreement of the "casual" needed? Taking the line in the Carmichael case, if there is no mutuality of obligation a contract of employment only exists when work is offered and accepted. Thus, when work is first offered and accepted on or after 1 April 2009, that would constitute a new contractual relationship, with new terms. It will not, therefore, be a variation to a contract and so no agreement is needed.
17. Is the change being made without prior notice or consultation? The changes to the LGPS that come into effect from 1 April 2009 were consulted upon by the Scottish Public Pensions Agency. The review of the Scheme's provisions commenced in 2004 and resulted in consultation documents, draft regulations and finally actual regulations. Various bodies (e.g. Pension Funds, employers) will be issuing, or will have already issued, Newsletters to Scheme members informing them of the changes being made to the Scheme.
18. The LGPC is also aware that no mutuality of obligation "casuals" who, on or after 1 April 2009, are removed from the Scheme or who are 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" could seek to claim continuity of employment between contracts under sections 210 and 212 of the Employment Rights Act ("the Act"), it is the 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 3(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008 does not specify that whether a person "is employed under a contract of employment of more than three months' duration²" 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 more than 3 months¹ 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 Statutory Instrument (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 SPPA are using an objective justification reason to keep those with fixed term contracts of less than three months and a day² out of the scheme.

Actions for administering authorities

21. Administering authorities in Scotland may wish copy this Circular to employers in their Fund or bring the Circular to the attention of employers by directing them to the [Circular on the LGE website](#).

Terry Edwards
Head of Pensions
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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