

The Local Government Pensions Committee
Secretary: Terry Edwards

CIRCULAR

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No. 239 – JULY 2010

PENSIONABILITY OF EQUAL PAY SETTLEMENTS IN ENGLAND AND WALES

Purpose of this Circular

1. This Circular has been issued to provide authorities with guidance on the pensionability of equal pay settlements in England and Wales.

Background

2. Authorities will be aware, following the 2004 pay agreement, of the need to find a way to deal fairly and equitably with staff who may have a valid equal pay claim. These claims may potentially go back over a number of years. Authorities may be in negotiation with unions to decide whether a full salary claim over the period should be pursued, or whether a compromise agreement should be offered to affected staff. Information on equal pay claims is available at <http://www.lge.gov.uk/lge/core/page.do?pagelD=119695>
3. On 31 December 2009 an amendment was made to regulation 4(2) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 which now provides that an employee's pensionable pay does not include:

'(g) any payment by way of compensation for the purposes of achieving equal pay in relation to other employees'.

4. That amendment, although introduced on 31 December 2009 by the Local Government Pension Scheme (Miscellaneous) Regulations 2009 [SI 2009/3150], had retrospective effect to 1 April 2008.
5. Communities and Local Government (CLG) have confirmed that the intention behind the amendment is that the back-pay element of any payments made in respect of an equal pay claim is pensionable and that only a damages element (if any) should be non-pensionable.
6. LGE has, in conjunction with Unison, GMB and Unite, prepared the attached guidance which has been checked with Eversheds.

Executive summary of the guidance

7. The attached guidance concerns the treatment, for the purposes of the Local Government Pension Scheme (LGPS), of payments made following equal pay claims. The guidance is based on the understanding of LGE, Unison, GMB and Unite of the relevant regulations and communications from CLG and HMRC. It sets out our joint views on whether payments made in respect of equal pay claims fall within the LGPS definition of pay and should therefore be counted for pension purposes.
8. The effect of the definition of pay for LGPS purposes is that there is a distinction between:
 - (i) a payment (or a part of a payment) made in settlement of an equal pay claim where the payment represents arrears of pay. In general terms, we believe such a payment in respect of arrears of pay is pensionable; and
 - (ii) any payment (or any part of a payment) which is pure compensation. Such compensation payments are not pensionable.
9. This has been confirmed in communications with CLG further to the introduction of regulation 4(2)(g) into the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007.
10. Payments may be made in different contexts; for example, back-pay agreed and calculated by an authority, an award made by the Employment Tribunal following a successful equal pay claim, or a claim which is settled by way of a compromise agreement or a COT3 agreement.
11. In practice, it will be necessary to allocate any pensionable settlement payment to the specific years covered by the claim to avoid any doubt as to how it should be treated for the purposes of the LGPS and to avoid an employee maintaining that the total payment should count toward their final pay for pension purposes. If the relevant claim is to be settled by a compromise or COT3 agreement, this matter should be clarified within the terms of the agreement.

12. Where a payment is pensionable, employee contributions should be deducted at the relevant rate for the relevant years and paid to the LGPS Fund. The payment of employer contributions also needs to be agreed with the Pension Fund administering authority.
13. We are aware that there are cases which have already been settled by a compromise or COT3 agreement and such payments have not been treated as pensionable. Unless there are compelling reasons for doing so we do not suggest that they need to be reopened.
14. Further detail is set out in the attached guidance.

Conclusion

15. Any authorities who have yet to finalise equal pay claims will need to be cognisant of the guidance.
16. Clearly, each equal pay claim will need to be considered on its own merits and the pensionability of the payment, with the attendant employer's and employee's pension contributions, will need to be considered by employers when agreeing on the amount of the compromise payment.
17. If an authority decides, having considered the guidance, the merits of the case and any legal advice obtained, that a payment in respect of an equal pay claim should not be pensionable, the authority will need to be aware of the longer term pension cost implications. If the employee's rate of pay is increased as a result of the equal pay claim, his or her pensionable pay going forward will also have increased. When the employee leaves, his / her pension benefits will be based on (normally) the final years' pensionable pay and the whole period of membership in the Scheme. Thus, the pensionable pay upon which the benefits will be payable will have increased as a result of the equal pay claim but no employer or employee contributions will have been paid to the Fund on all or some of the payment made in respect of the equal pay claim. This 'shortfall' in contributions to the Fund will, in effect, eventually fall to be met by the employer via the employer's contribution rate set following each Fund valuation. Put simply, the tab for the non-payment of employee and employer contributions on the payment made in respect of the equal pay claim will eventually all be picked up by the employer.

Actions for administering authorities

18. Administering authorities may wish consider copying 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 at: <http://www.lge.gov.uk/lge/core/page.do?pagelId=4280609>

Terry Edwards, Head of Pensions, July 2010

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Guidance - Equal pay claims in England and Wales

1. Authorities will be aware, following the 2004 pay agreement, of the need to find a way to deal fairly and equitably with staff who may have a valid equal pay claim. These claims may potentially go back over a number of years. Authorities may be in negotiation with the unions to decide whether a full salary claim over the period should be pursued, or whether a compromise agreement should be offered to affected staff. Information on equal pay claims is available at <http://www.lge.gov.uk/lge/core/page.do?pagelid=119695>

The pensionability of payments made following equal pay claims

2. An amendment has been made to regulation 4(2) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 which now provides that an employee's pensionable pay does not include:

'(g) any payment by way of compensation for the purposes of achieving equal pay in relation to other employees'.

3. That amendment was introduced on 31 December 2009 by the Local Government Pension Scheme (Miscellaneous) Regulations 2009 [SI 2009/3150] and had retrospective effect to 1 April 2008.
4. On 5 March 2010 CLG issued the letter attached to this note to explain the intention behind the amendment.
5. The following guidance sets out the implications of that amendment. It deals with payments yet to be made and payments that have already been made following the settlement of a claim. The advice is based on our understanding of the provisions of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, the letter from CLG dated 5 March 2010, and a letter from HMRC dated 12 May 2005. It sets out our views on whether payments, as set out in this note, would fall within the exclusion from pensionable pay specified in regulation 4(2)(g) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007. To fall into the exclusion, the payment would need to be within the meaning of 'compensation' under regulation 4(2)(g) and the view is that back-pay payments would not fall into that meaning and **are** therefore pensionable.
6. The regulations referred to in this document can be viewed at: <http://timeline.lge.gov.uk/LGPS2008Regs/BATidx.htm>

Should future payments made following equal pay claims be pensionable?

Authority calculates actual back-pay

7. If an authority calculates and pays actual back-pay (arrears of pay), that payment would not be a compensation payment for the purposes of regulation 4(2)(g) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007. Therefore the element of the back-pay that would have been pensionable had it been paid at the correct time would be pensionable under the terms of regulation 4. The most common claims that have been made relate to bonus payments, shift premia and increments, all of which in our view are pensionable if paid in the ordinary course of employment. Any element of the back-pay that relates to a non-pensionable item (e.g. arrears on non-contractual overtime) would be non-pensionable. In essence, this is treating the payment in the same way as a retrospective regrading. When an employee leaves or retires it will be necessary, in order not to distort the final pay calculation for pension benefits, to only include in the final pay calculation that part (if any) of the pensionable back-pay that actually relates to the final pay period for pension purposes. For example, if a scheme member leaves or retires within 12 months of receiving the back-pay, and the period used for final pay calculations under the LGPS is the scheme member's pensionable pay for the last 12 months of pensionable employment, only that part of the back-pay which relates to the final 12 months should be included in the final pay calculation and not the whole of the arrears (much, if not all, of which will relate to a period prior to the last 12 months). It has been held on appeal on a number of occasions that it is not the amount of pay *received* in the final pay period that is used in the final pay calculation, but only the pay *due* in respect of the final pay period.

Example

A scheme member retires on 30 June 2010.

Her pensionable pay rates prior to the outcome of the equal pay claim were:

1 April 2004 – 31 March 2005: £12,000
1 April 2005 – 31 March 2006: £12,500
1 April 2006 – 31 March 2007: £13,000
1 April 2007 – 31 March 2008: £13,500
1 April 2008 – 31 March 2009: £14,000
1 April 2009 – 31 March 2010: £14,500

After the equal pay claim, which was settled in April 2010, with the new rate of pay being paid from April and arrears of pay being paid in April, her pay rates became:

1 April 2004 – 31 March 2005: £12,300
 1 April 2005 – 31 March 2006: £12,900
 1 April 2006 – 31 March 2007: £13,500
 1 April 2007 – 31 March 2008: £14,100
 1 April 2008 – 31 March 2009: £14,700
 1 April 2009 – 31 March 2010: £15,300
 1 April 2010: £15,500

Arrears of pay (paid in April 2010):

1 April 2004 – 31 March 2005: £12,300 - £12,000 = £300
 1 April 2005 – 31 March 2006: £12,900 - £12,500 = £400
 1 April 2006 – 31 March 2007: £13,500 - £13,000 = £500
 1 April 2007 – 31 March 2008: £14,100 - £13,500 = £600
 1 April 2008 – 31 March 2009: £14,700 - £14,000 = £700
 1 April 2009 – 31 March 2010: £15,300 - £14,500 = £800
 £3,300

Final pay for pension purposes:

1 July 2009 – 31 March 2010: £15,300 x 9/12 = £11,475 (including £600 arrears)
 1 April 2010 - 30 June 2010: £15,500 x 3/12 = £ 3,875
 £15,350

Although £3,300 in arrears was paid in April 2010, only the £600 that related to the final pay period (i.e. 1 July 2009 – 31 March 2010: £15,300 - £14,500 x 9/12 = £600) can be included in the final pay calculation.

Employment Tribunal makes an award of arrears of pay or damages

8. Following a successful equal pay claim at an Employment Tribunal, the most common remedy will be an award by the Employment Tribunal of arrears of remuneration or damages.
9. In addition to establishing a claimant's right to equal pay for the future, a successful equal pay claim will generally result in payment of the back-pay the claimant should have been receiving. Section 2(5)(a) of the Equal Pay Act 1970 provides that pay can be backdated no further than the 'arrears date'. In a standard case, this is the date falling six years before the date on which proceedings were instigated or the date of the breach whichever is the most recent; and in a concealment case or disability case, the arrears date is the date of the breach of the equality clause under the Equal Pay Act. The terms 'standard case', 'concealment case' and 'disability case' have the meaning given in section 2ZB of the Equal Pay Act 1970.

10. Where an employee successfully demonstrates that she is entitled to equality with regard to a non-pay term (e.g. holiday entitlement) the tribunal will have to calculate the damages to which she is entitled as a result of the employer's breach of contract.
11. Any part of the award which is in respect of arrears of remuneration (back-pay) would be pensionable under the terms of regulation 4 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (to the extent that the element of the back-pay that would have been pensionable had it been paid at the correct time would have been pensionable) and any element of the back-pay that relates to a non-pensionable item (e.g. arrears on non-contractual overtime) would be non-pensionable. The view taken by CLG, which we share, is that any part of the award which represents "back pay" is not 'compensation' for the purposes of regulation 4(2)(g) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 and **is** therefore pensionable.
12. As per the previous heading ('Authority calculates actual back-pay'), when an employee leaves or retires it will be necessary, in order not to distort the final pay calculation for pension benefits, to only include in the final pay calculation that part (if any) of the pensionable back-pay that actually relates to the final pay period for pension purposes.

Authority reaches settlement through a compromise agreement or via a COT3 compromise settlement

13. To reach a settlement without having to calculate actual back pay, and to avoid the need to involve an Employment Tribunal, the parties may settle the equal pay claim through a compromise agreement or via a COT3 compromise settlement. If they do so, the pensionability of the payment needs to be considered, as does the question of how much of the payment constitutes back-pay. **Clearly, each case will need to be considered on its own merits and the pensionability of the payment, with the attendant employer's and employee's pension contributions, will need to be considered by employers when agreeing on the amount of the compromise payment.**
14. In deciding whether or not the payment (or part of it) is pensionable, employers will need to have regard to the provisions of regulation 4 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007. Regulation 4(1) defines pensionable pay as follows:

'an employee's pensionable pay is the total of –
(a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and
(b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.'

15. Sub-paragraph (a) is the appropriate sub-paragraph. As far as any compromise payment is concerned, the three relevant elements to the definition are:

Is it an 'other payment'? - the logical answer has to be 'Yes'

Is it for his own use? - again, the logical answer has to be 'Yes'

Is the payment in respect of his employment?

16. Insofar as the payment is to compensate for past unequal pay, the answer to that final question has to be yes. The claim is for compensation for breach of the term of the contract modified by the equality clause that, by operation of the Equal Pay Act, is deemed to be written into the employee's contract of employment.

17. Some cases are settled on the basis that a lump sum payment is made that is not calculated as the sum of a series of back-payments, but is derived from a matrix which allocates "points" with an agreed monetary value to a Claimant, where the number of points allocated depends in part on the number of years in the period over which loss is being assessed. The fact that the basis of the settlement is such a matrix does not change the fact that the payment made is a payment to settle a claim for back-pay. Any part of the lump sum payment that is pensionable should be notionally allocated to each year in the settlement period and treated as pensionable pay in that year.

18. As, for the reasons stated above, a back-pay award from an Employment Tribunal or an actual back-pay calculation performed by an authority would be pensionable, it is entirely logical that back-pay under a compromise agreement should equally be pensionable (i.e. those elements of the back-pay that would have been pensionable had it been paid at the correct time).

19. HMRC are of the opinion that, as confirmed by them on 12 May 2005:

- payments made under compromise agreements are in partial settlement of potential claims that are pecuniary in nature, and
- the appropriate redress under the Equal Pay Act 1970 is the payment of arrears (back-pay), and
- as such, the payment is subject to PAYE and NI contributions.

20. Although not in itself conclusive, the HMRC opinion adds weight to the view that, as some or all of the payment is for loss of past earnings, that part which is not compensation for something other than lost earnings should be pensionable. HMRC's usual practice is to treat payments made under an equal pay settlement as payments of back-pay, even if the lump sum paid is described as a compensation payment. It is this practice that underlies the PAYE settlements that

authorities have reached with HMRC in connection with equal pay settlements.

21. Where any part of a compromise payment is pensionable, it will be necessary to specify in the agreement the period that pensionable back-pay element of the compromise payment relates to. Clearly, if the pensionable payment is, say, £2,000 it would be inappropriate to include all of the payment in the final pay calculation of a person leaving within 12 months of the date of payment as this will hugely distort the pay for that year. To overcome this, any agreement ought to specify the period that the payment relates to e.g. the £2,000 payment is in settlement of the claim for equal pay (the back-pay element) and covers the period A to B. The amount attributable to each year within that period should also be specified. This is consistent with the treatment of a backdated pay award or backdated regrading as described earlier in this note i.e. the payment is allocated / apportioned over the period to which the payment actually relates and only that part of the back-pay payment that actually relates to the final year is included when calculating the final years pay for the purpose of pension benefit calculations. It is also consistent with HMRC's requirements (where a PAYE settlement has not been agreed with HMRC).

Is it permissible for the parties to a compromise agreement to make the back-pay element of the compromise payment non-pensionable by calling it compensation and thus circumventing the intention behind the regulation?

(i) Regulation 4(2)(g)

22. On one interpretation of regulation 4(2)(g) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 there is an argument that this might be possible. Regulation 4(2)(g) provides that 'a payment by way of compensation for the purposes of achieving equal pay in relation to other employees' is non-pensionable. Therefore if a payment under the compromise is defined as a lump sum 'payment by way of compensation for the purposes of achieving equal pay in relation to other employees' the payment would on the face of it fall within the meaning in regulation 4(2)(g) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 and thus be non-pensionable.
23. However, this would clearly run counter to the intention behind the regulations and if an element of the payment was in fact back-pay, then it would be treated as back-pay (and thus be taxable and pensionable), despite it being labelled as a lump-sum compensatory payment in the compromise agreement.

24. Communities and Local Government have issued the attached letter setting out their view of the meaning to be attributed to regulation 4(2)(g). They say that the introduction of regulation 4(2)(g) was only meant to exclude from pensionable pay 'the damages element of payments made – for example, compensation awarded because the employer recognises that distress has been caused as a result of a particular example of unfairness.' However, case law¹ has established that injury to feelings distress payments are not recoverable under the Equal Pay Act 1970. Any such payment is a payment of compensation under the Sex Discrimination Act 1975 and is not therefore pay at all.
25. CLG's clear intention is that the 'back-pay' element of a compromise agreement should be pensionable and only a damages element (if any) should be non-pensionable. Unfortunately, the wording of regulation 4(2)(g) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 does not distinguish between back-pay and damages, but merely refers to 'compensation'. Thus, to meet the intention behind the regulation it is recommended that compromise agreements should clearly distinguish between the sums payable in settlement of the claim for equal pay (the back-pay element, which is pensionable) and any damages payment (which is not pensionable).
26. Ultimately, the legality of making the back-pay element non-pensionable will depend on the interpretation of the meaning 'compensation', and whether back-pay falls into that meaning. Taking into account HMRC's view of payments under compromise agreements and CLG's interpretation of the meaning of 'compensation', it is probable that a court would take the view that back-pay does not fall within the meaning of a compensatory payment under regulation 4(2)(g) and is therefore pensionable.

(ii) The effect of a compromise agreement

27. Subject to paragraph 26, as the law currently stands a compromise agreement will not be an effective waiver of the individual's right to have that back-pay treated as pensionable. A compromise agreement is effective to compromise certain statutory rights, as allowed in the respective legislation (for example section 77(4)(aa) of the Sex Discrimination Act 1975 allows a party to contract out of their rights under that Act and the Equal Pay Act 1970) but, according to the current case-law it is not effective to waive all or a part of an entitlement or right to a future pension. The employee can rely on section 91 of the Pensions Act 1995 and claim that it was not

¹ In Council of City of Newcastle upon Tyne v Allan and Degnan v Redcar & Cleveland Borough Council, the EAT held that compensation for non-economic loss, such as injury to feelings, is not recoverable under the Equal Pay Act.

permissible for them to surrender a right for the payment to be pensionable². Section 91 of the Act says:

91 Inalienability of occupational pension

(1) where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme -

(a) the entitlement or right cannot be assigned, commuted or surrendered,

(b) the entitlement or right cannot be charged or a lien exercised in respect of it, and

(c) no set-off can be exercised in respect of it,

and an agreement to effect any of those things is unenforceable.

28. The *HR Trustees* case referred to above is under appeal but in our view any attempt to make the back-pay element of a payment under a compromise agreement non-pensionable may be unenforceable by the employer.

29. If, therefore, the payment is described in a compromise agreement as non-pensionable, an employee who subsequently sees that it may be to their advantage to have the payment made pensionable (e.g. they are coming up to retirement and part of the period covered by the payment would fall within the final pay period to be used to calculate their pension benefits) could seek to remedy this by making a claim under the internal dispute resolution procedure (IDRP), as set out in the LGPS (Administration) Regulations 2008.

30. Given this, and the fact that if the pay had been paid at the correct rate throughout or true back-pay had been calculated it would have been pensionable, we believe that that the back-pay element of the compromise agreement should be pensionable, and not be described as compensation in the hope that it would be non-pensionable.

What employee contribution rate is payable on the pensionable back-pay element of a compromise agreement, or on arrears of pay resulting from an actual back-pay calculation or on an Employment Tribunal award of back-pay?

31. The pensionable back-pay should be attributed to the period of time that the back-pay relates to. For that part which relates to a period prior to 1 April 2008, the standard employee contribution rate (6%, or 5% for certain protected manual workers) should be applied. For that part which relates to a period after 31 March 2008, the appropriate employee contribution rate or rates should be applied (i.e. the rate or

² See *HR Trustees v German (IMG Pension Plan)* - High Court: Chancery Division, 10 November 2009 - [2009] 076 PBLR [2009] - EWHC 2785 (Ch) which found that compromise provisions in agreements entered into by scheme members with their employers under which defined benefits entitlements are waived constitute an unenforceable surrender under section 91 of the Pensions Act 1995.

rates from the banded employee contribution rates table). This would be equally true where arrears of pay resulting from an actual back-pay calculation are paid. It should be noted that if the back-pay moves the employee into a higher contribution band, arrears of contributions would also be due on the pay already received by the employee.

What about claims that have already been settled and paid?

32. We are aware that many thousands of cases have been settled by making compromise agreements or COT3 settlements, and unless there are compelling reasons for doing so we do not suggest that they need to be reopened.

33. In some cases, the authority will have agreed an equal pay claim and calculated and paid actual back-pay. Such payments are not compensation payments and should have been treated as pensionable.

34. Some cases will have been settled by making a compromise agreement or a COT3 settlement before the Local Government (Benefits, Membership and Contributions) Regulations 2007 came into force on 1 April 2008. The governing regulations at the time were the LGPS Regulations 1997, and regulation 13 would have determined whether any part of the settlement was pensionable. Other cases will have been settled after 1 April 2008 but before 31 December 2009, when the governing regulations were the Local Government (Benefits, Membership and Contributions) Regulations 2007 but regulation 4(2)(g) had not yet been retrospectively inserted. Some cases will have been settled after 31 December 2009 when regulation 4(2)(g) was in force and known to be in force.

35. In our view the result is the same in all cases. The relevant wording of former regulation 13 and of regulation 4 (before the amendment) is substantially the same. The three relevant elements to the definition are:

Is it an 'other payment'? - the logical answer has to be 'Yes'

Is it for his own use? - again, the logical answer has to be 'Yes'

Is the payment in respect of his employment?

36. Insofar as the payment is to compensate for past unequal pay, the answer to that final question has to be yes. The claim is for compensation for breach of a term of the contract of employment that is modified by the operation of the equality clause, provided for by the Equal Pay Act.

37. Any element of the compromise payment that did not relate to back-pay would not have been pensionable under former regulation 13, as

that element would not have been a payment 'in respect of his employment'. It was not pay. That point is intended to be clarified for post-1 April 2008 settlements by the insertion of new regulation 4(2)(g). The new regulation refers to compensation and not damages but as outlined above the intention of the new regulation is that any element of a settlement that is by way of a compensation payment (such as a payment for injury to feelings or future unequal pay) is excluded from the definition of pensionable pay.

38. If, therefore, the compromise agreement treated the back-pay element of the settlement payment as pensionable, but other elements of the settlement payment (if any) as non-pensionable, then no problems arise provided all of the back-pay element related to pay that would be pensionable under the LGPS. Any element that related to back-pay on non-pensionable pay (e.g. non-contractual overtime) should not have been pensionable.
39. If the agreement made the back-pay element non-pensionable, then even if the employee had agreed in the compromise agreement that the payment should be non-pensionable, the agreement would appear to have been made in contravention of the requirements of regulation 13 of the Local Government Pension Scheme Regulations 1997 or regulation 4 of the Local Government (Benefits, Membership and Contributions) Regulations 2007. For the reasons outlined above, the current state of the law is that the compromise is ineffective to waive all or part of an entitlement or right to a future pension. An employee who subsequently sees that it may be to their advantage to have the payment made pensionable (e.g. they are coming up to retirement and part of the period covered by the payment would fall within the final pay period to be used to calculate their pension benefits) could seek to remedy this by making a claim under the internal dispute resolution procedure (IDRP), or could issue proceedings in the courts for breach of statutory duty, as outlined above. In those circumstances, if a member now claims that, despite the agreement, the back-pay element should be treated as pensionable, her back-pay should be treated as pensionable provided that the member is prepared to pay the arrears of contributions due.

Is there any case law?

40. The only case we are currently aware of concerning regulation 4(2)(g) of the Local Government (Benefits, Membership and Contributions) Regulations 2007 is an employment tribunal level case *Ms D.M. Birch & others v Walsall M.B.C. & Housing 21 Ltd (case nos: 1303297/2008 & others)*.
41. In that case the Employment Judge commented that regulation 4(2)(g) "states that a compensation payment for the purposes of achieving equal pay is not included in pensionable pay. Depending on how those words are to be interpreted, they may have the effect that if a woman is

awarded arrears of pay in respect of earlier years of service, and wishes to rely on the salary she should have earned in one of those years as her final salary for pension purposes, the arrears of pay attributable to that year would not count for pension purposes because of Regulation 4(2)(g). Consequently her final salary would be calculated at a lower rate than would have been the case if the woman had received the pay when she should have done i.e. at the same time when it was paid to her male comparator. If that is the effect of those words, then it is troubling because it perpetuates inequality of pay by its impact on the pension ultimately received It remains to be seen whether that interpretation will be adopted by the LGPS [employing authorities] I suspect that the question of interpretation of Regulation 4(2)(g) will, at some point, have to be determined by the higher courts."

Conclusion

42. Parties involved in equal pay claims will need to take account of the information in this note and any legal advice they may obtain.
43. Each case will need to be considered having regard to the relevant provisions of the Local Government Pension Scheme Regulations, the wording of any compromise agreement, and any legal advice obtained.

Terry Edwards
Head of Pensions
July 2010

Brian Strutton
National Secretary
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Our Ref:
Your Ref: BS/as

5 March 2010

Thank you for your letter of 25 February to the Rt Hon Rosie Winterton MP about the Local Government Pension Scheme (Miscellaneous) Regulations 2009. I have been asked to reply.

You explain in your letter that you have a number of concerns with regard to the potential impact of Regulation 9, which amended Regulation 4 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007. In particular you suggest that the amendment will lead to members who have been denied equal pay needing to lodge legal claims to ensure that they are not disadvantaged in terms of their pension and you have a number of related questions.

Can I first assure you that the amendment is not intended to have any material impact on 'pay', but is rather a clarification of the way that Regulation 4 should have been applied from the outset, with such payments not inflating pay in a single year. The amendment is not intended to exclude from the definition of pensionable pay any increases in salary, even those which have been awarded to achieve equality. Rather, the amendment was intended to apply only to the damages element of payments made – for example, compensation awarded because the employer recognises that distress has been caused as a result of a particular example of unfairness.

It is not felt there is difficulty for all concerned to differentiate between such compensation and pay, since the latter should always be apportioned and attributed to the appropriate years and suitable deductions made for income tax, National Insurance and LGPS contributions. The back-pay apportioned to the final year of service does, of course, increase the figure to be used as 'final pay' in calculating the member's pension. We would expect cases of 'compensation' – as opposed to payments which are actually backdated

salary increases – and which appear to be relatively rare and therefore for the impact of the amendment to be minimal.

The amendment was suggested by stakeholders, within the statutory consultation period, as an addition to the original amendment to Regulation 4. CLG would not have been required to re-consult stakeholders on this addition to the original draft SI. The amendment was brought to Ministers' attention in the usual way and was mentioned in the Explanatory Memorandum.

I am copying this reply to Terry Edwards and Glyn Jenkins and have no objection to this reply being made more widely available if you consider that it would assist in giving reassurance to the members concerned. Of course, the department would not rule out the need to make further change if it transpires that this provision has not in fact delivered what is intended.

T B J CROSSLEY