

Pensions law – the week in review

27 April 2009

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1 LEGISLATION

1.1 Equality Bill 2009

The Government has today published the Equality Bill 2009, which is designed to “to harmonise discrimination law, and to strengthen the law to support progress on equality”.

Discrimination law in the UK has developed over more than 40 years since the first Race Relations Act in 1965. Legislation has been introduced as a result of national initiatives and sometimes through the implementation of European Directives. The Equality Bill is designed to bring together and re-state a number of anti-discrimination laws which will be familiar to those who operate in the world of occupational pension provision, including:

- The Equal Pay Act 1970;
- The Sex Discrimination Act 1975;
- The Disability Discrimination Act 1995; and
- The Employment Equality (Age) Regulations 2006.

The Bill seeks to harmonise existing legislative provisions, giving a single approach where appropriate.

To view the Equality Bill and draft explanatory notes, please click on the link below:

<http://services.parliament.uk/bills/2008-09/equality.html>

1.2 The Local Government Pension Scheme (Amendment) Regulations 2009

The latest Local Government Pension Scheme (LGPS) amendment regulations have been laid before Parliament. These regulations, which are due to come into force on 15 May 2009, are designed to pave the way for the introduction of arrangements relating to meeting future increases in the cost of the LGPS.

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The regulations introduce amendments to the new LGPS (which came into existence on 1 April 2008) by amending both the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 and the Local Government Pension Scheme (Administration) Regulations 2008, two of the three sets of Regulations which govern the 2008 Scheme. The regulations seek to reflect the policy intentions of maintaining the affordability and sustainability of the LGPS by introducing requirements for the establishment of national cost-sharing arrangements.

To view the regulations and accompanying explanatory memorandum, please click on the links below:

http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091025_en.pdf

http://www.opsi.gov.uk/si/si2009/em/uksiem_20091025_en.pdf

2 FINANCIAL SERVICES AUTHORITY (FSA)

2.1 FSA implements changes to simplify the Financial Services Compensation Scheme (FSCS)

The FSA has announced that it will go ahead with proposed changes to compensation limits for insurance, investment and home finance advice business in the event of a firm failing. This is designed to achieve “greater simplicity and consistency in the Financial Services Compensation Scheme”.

Currently the FSCS provides protection for non-compulsory insurance at a rate of 100% of the first £2,000 of a claim and 90% of the remainder (with no upper limit). This protection, which may be relevant to schemes which have, or are considering, buy-in or buy-out policies, will change with effect from 1 January 2010, so that protection is provided at a rate of 90% across the whole claim (with no upper limit).

To access the FSA’s press release and April 2009 newsletter, please click on the links below:

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/054.shtml>

http://www.fsa.gov.uk/pubs/policy/ps09_07_newsletter.pdf

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3 GOVERNMENT ACTUARY'S DEPARTMENT (GAD)

3.1 GAD launches "e-News"

GAD has published the first edition of its new electronic newsletter: "**e-News from GAD**". This edition of the newsletter, which will be published three or four times a year, includes:

- an introduction to Colin Wilson, recently appointed head of GAD's new "Investment and Risk" service;
- guidance as to how GAD can help with transfers out of the public sector under TUPE¹; and
- brief details on the annual report on the National Insurance Fund (the fund out of which National Insurance benefits are paid).

<http://www.gad.gov.uk/Newsletters/e-Newsletter.pdf>

4 HM REVENUE & CUSTOMS (HMRC)

4.1 Anti-avoidance spotlights: Pensions schemes artificial surplus

HMRC has published "spotlights" on a number of anti-avoidance activities of which it has become aware, including the creation of artificial pension fund surpluses. The spotlight notes that HMRC is aware of "schemes that purport to enable a member of a registered pension scheme to remove funds from the scheme tax-free". These arrangements may entail members surrendering benefits and creating funding surplus. However, payments made by a scheme in these circumstances will be regarded as an unauthorised payment in respect of the member, and will attract tax charges on the member on the amount paid out of the scheme.

¹ The Transfer of Undertakings (Protection of Employment) Regulations 2006

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To access HMRC's spotlights, please click on the link below:

<http://www.hmrc.gov.uk/avoidance/spotlights.htm>

4.2 Updates published to the Registered Pension Schemes Manual (RPSM)

On 21 April 2009, HMRC published a number of updates to the RPSM. Most of these:

- deal with the reform of the appeals system (as a consequence of the transfer of the functions of tax tribunals to the new tribunals established under the Tribunals, Courts and Enforcement Act 2007) which took effect from 1 April 2009; and
- clarify that only benefits crystallised after reaching age 50 before 6 April 2010 can continue as authorised payments after 5 April 2010 where the member is not yet 55. There is an exception for members who have a protected pension age (i.e. as at 5 April 2006 they had an unqualified right to retire between the ages of 50-54, which was set out in the scheme's governing documentation on 10 December 2003).

To view the index of latest updates, please click on the link below:

<http://www.hmrc.gov.uk/manuals/rpsmmanual/updates/rpsmupdate020409.htm>

5 HM TREASURY

5.1 Budget 2009

Whilst the number of pension specific measures in last week's Budget was limited, the country's highest earners face a reduction in the rate of tax relief on their pension contributions.

Restriction on tax relief

Billed as a move which is designed to address the current situation under which "those on highest incomes benefit disproportionately" from tax relief on pension contributions, from 2011 tax relief will be restricted for

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individuals with incomes of £150,000 or more. Tax relief (until now available at an individual's marginal rate) will be tapered away, so that for those earning £180,000 or over it will be worth just £20,000 (i.e. the same as for a basic rate tax payer). These measures will be subject to consultation.

Transitional measures

In order to prevent those at whom the new restriction is aimed from making extraordinary contributions in the meantime, new rules will apply from 22 April 2009 (Budget day) so that the restriction will effectively apply from its announcement.

Those affected by the transitional measures will be individuals who, on or after 22 April 2009:

- have an income of £150,000 or more;
- change the pattern of their normal, regular, ongoing pension savings; and
- whose overall annual pension savings exceed £20,000.

The detail of the transitional measures will be included in the Finance Bill 2009.

Other Budget announcements

The Government also intends to introduce minor changes relating to the tax treatment of pension benefits in the Finance Bill 2009, including legislation that will allow lump sum payments from the Financial Assistance Scheme and the FSCS to be given broadly the same tax treatment as if they had been received from the original pension scheme or insurer.

For more information on the Budget's pension provisions, please see our Sackers Extra Alert - "Budget 2009: Building Britain's Future" - which is available from the client area of our website or from your usual Sackers contact.

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To access the Treasury's Budget microsite, please click on the link below:

http://www.hm-treasury.gov.uk/bud_bud09_index.htm

To access HMRC's technical guidance, Budget Notes and draft legislation, please click on this link:

<http://www.hmrc.gov.uk/budget2009/tax-relief-pen-cont.htm>

6 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

6.1 Working Paper 36: Private Pensions and Policy Responses to the Financial and Economic Crisis

The OECD has published a new working paper which discusses responses to the current financial and economic crisis by regulators, supervisors and policy makers in the area of private pensions.

The paper finds that responses across OECD and non-OECD countries have been quite diverse. It also assesses the changes made to private pensions systems since the crisis began and makes recommendations for strengthening them.

To access working paper 36, please click on the link below:

<http://www.oecd.org/dataoecd/37/54/42601323.pdf>

7 CASE

7.1 Slack & others v Cumbria County Council (Court of Appeal)

*The Preston case*² looked at, amongst other things, how the 6 months time limit for bringing equal pay claims should apply to a succession of short-term contracts where there are breaks in between (such as a teacher might have with his/her employer). Following a reference to the European Court of Justice, the

² *Preston v Wolverhampton Healthcare NHS Trust* [2001] 2 AC 455

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House of Lords held that the time limit would run from the end of the last contract where regular contracts were concluded between the same parties which formed part of a stable employment relationship.

Following the *Preston* decision, the Equal Pay Act 1970 was amended to vary the application of the time limit for claims, where a stable employment relationship had been established.

This recent equal pay decision before the Court of Appeal confirms that the principle extends to successive employment contracts in a stable employment relationship which are concluded *without* breaks in between.

Background

Mrs Slack (Mrs S) had been continuously employed by Cumbria County Council (the Council) as a cook since 25 January 1971. In 2000, she agreed with the Council that her contractual hours would be varied. In other respects her job remained the same, as did her terms and conditions of employment.

Mrs Elliott (Mrs E) had been continuously employed by the Council as a day care assistant since 1 October 1996. In 2000, she also agreed with the Council that her contractual hours would be varied.

Mrs Athersmith (Mrs A) was employed by the Council as a relief home carer from 1 November 2000. From 1 April 2001, she accepted appointment as a permanent home carer. This resulted in a change of status and she became entitled to occupational sick pay. Otherwise her terms and conditions were unchanged.

Mrs S signed a contract dated 29 February 2000 which contained the following wording:

“This Contract of Employment supersedes any previous Contract of Employment”.

Mrs E and Mrs A both signed similar documents.

They all brought equal pay claims to the employment tribunal in 2003.

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The Employment Tribunal (ET) and the Employment Appeals Tribunal (EAT)

The Council argued that the change to the claimant's working arrangements amounted to a termination of their old contracts and the commencement of new contracts. Accordingly, the only "employment" in respect of which the ET had jurisdiction was under their final contracts.

In respect of Mrs S and Mrs E, the ET rejected the Council's argument and concluded that, notwithstanding the express provisions in the contractual documents, there had been only one employment. With regard to Mrs A, the ET held that a new contract had been formed when she became a permanent employee. This was not because of the express term but because the nature of the change in her employment status from a relief to a permanent carer was more fundamental.

However, the EAT found that all three claimants were out of time in relation to the period of employment before the changes in their contractual terms. In its view, given the express wording, the parties' intentions were that the new contracts superseded previous contracts. Therefore, the time limit for a claim started to run when the new contracts were executed.

The Court of Appeal

The main question at issue in the appeal was the time limit for instituting equal pay claims in the ET.

The Equality and Human Rights Commission intervened in this decision and raised a new issue, the "Stable Employment Point" (see above). (This argument had not been put before the EAT where it was common ground that the exception for stable employment did not apply.)

The Court of Appeal was satisfied that the relationship between the Council and both Mrs S and Mrs E was a case of stable employment. "They did the same work...over very many years without any break in the work they did or in the succession of contracts. The only variation made in the new contracts in 2001 was in the reduction of working hours".

However, it considered that the facts in Mrs A's case were not sufficiently clear for it to make a determination.

The Decision

The appeals were allowed.

The decision of the ET was reinstated in respect of Mrs S and Mrs E. Their claims were presented to the ET in time in respect of both of their contracts of employment because both contracts were part of "stable employment". (It was noted that the ET's decision was restored for different reasons than those originally given as this point had not previously been argued).

Mrs A's case was remitted to the ET for it to investigate the facts and consider whether hers was a "stable employment case".

Comment

Although this case does not concern pensions directly, it is relevant to claims of indirect discrimination brought by part-time workers who have been denied access to their employer's pension scheme. It is conceivable that potential claimants who had thought their actions were time barred or whose claims were rejected (as they did not meet the stable employment test) may now be able to bring claims.