UK Pensions.
Part-time and agency workers.

Preston - more on part-timers

The latest decision in the Preston test cases on part-time workers’ pensions rights has been handed down by the Employment Appeals Tribunal (’EAT’).

Change in time limit for claims?

The EAT has reversed a ruling of the Employment Tribunal which decided that, on a TUPE\(^1\) transfer, an applicant could bring a claim against the transferor only within 6 months of the transfer. The EAT decided that, since continuity of employment was preserved under TUPE, a claim can be brought against the transferor at any time until 6 months after employment with the transferee ended. Many claims against employers who transferred their business under a TUPE transfer will therefore no longer be time-barred.

However the EAT’s decision is not the last word on this issue, since we understand that the employers have been given leave to appeal to the Court of Appeal.

Criteria for scheme membership

The EAT also confirmed that excluding part-timers’ from a scheme where membership is compulsory for full-time employees amounts to less favourable treatment. Views of individual applicants as to whether they were treated less favourably were not relevant considerations - the question should be decided objectively by looking at the different terms offered to full-time and part-time employees.

By contrast, if membership of a pension scheme is compulsory for full-time employees, but optional for part-time employees, then that does not amount to less favourable treatment.

---

\(^1\) i.e. a business transfer where the transferred employees’ rights are protected under the Transfer of Undertakings (Protection of Employment) Regulations 1981.
Failure to inform - a matter of policy?
The EAT considered whether an employee would have a claim under the Equal Pay Act 1970, if an employer failed to tell a part-time employee of the removal of a barrier to membership of a pension scheme. The EAT decided that there would only be a claim of that sort if the employer had a policy of not informing part-time employees of such a change. However, the employee would have a claim against the employer for breach of an implied duty to inform employees of the change in benefits.

Stable employment relationship - clarification
Finally, the EAT clarified the circumstances in which a “stable employment relationship” arises.

An employee who has been employed on a series of short term contracts can, if there is a stable employment relationship, bring a claim in respect of all of those contracts, provided the claim is submitted within 6 months of the end of the stable employment relationship.

In deciding whether a stable employment relationship exists, the intentions of the parties must be considered. If there was an expectation on both sides that work would continue to be offered to and accepted by the employee, this could amount to a stable employment relationship. But if there was no such intention, the fact that the employee had continued to work for the same employer in a series of short-term contracts would not be sufficient.

A fundamental change in the terms of the relationship between employer and employee could mark the end of a stable employment relationship.

Agency workers and equal pay
The ECJ has given its ruling in the case of Allonby v Accrington & Rossendale College, which concerned a claim for equal pay by an agency worker.

The facts
Ms Allonby was a part-time lecturer whose contract of employment with the college had been terminated. She was invited to register with an agency that had been appointed to provide part-time lecturers to the college. Ms Allonby did so and continued to lecture at the college although the agency paid less than the college. After becoming an employee of the agency, the statutory rules of the Teachers’ Superannuation Scheme prevented her from remaining an active member.

To establish her claim that she ought to receive equal pay for work of equal value under the Equal Pay Act 1970, Ms Allonby compared her position to that of a full-time male lecturer employed by the college (her “comparator”).
Questions for the ECJ

The Court of Appeal referred two questions to the ECJ:

− **Contracts with different employers**

  Can two people working in the same place but under contracts with two different employers, still be regarded as working in the same employment? If so, could Ms Allonby, as an employee of the agency, use a male comparator employed by the college to establish an equal pay claim?

  The ECJ decided that where a difference in pay between workers performing equal work, or work of equal value, does not result from the action of one employer, no single employer is responsible for the inequality. The work and the pay of two workers with different employers cannot be compared. However, the ECJ decided that had the agency's independence from the college been notional and merely disguised a true employment relationship, then this would have allowed Ms Allonby to use a male comparator employed by the college.

− **Eligibility for scheme membership**

  Can Ms Allonby claim that she should be eligible for membership of the scheme even though she is not employed by the college, which the scheme rules require?

  The ECJ decided that if Ms Allonby had been able to establish a claim for equal pay then the requirement to be employed by the college as a pre-condition of scheme membership (even for a statutory scheme) would breach the principle of equal pay - it would be indirect discrimination against women. The national court would then have to consider the objective justification defence as well.

The UK’s representations on the legal differences between workers who are employees, self-employed and agency employees were rejected. The ECJ said that the simple fact that Ms Allonby was an employee of the agency under UK law would not be sufficient to prevent a finding of indirect discrimination. Where state legislation is at issue, it is not necessary to find a relevant comparator. It need only be shown statistically that more women than men are adversely affected by the rules - i.e. the state cannot hide behind the formal legal categorisation of the worker where an employer could not.
Comment

Many employers form part of a wider group of companies and share workplaces. Such employers should consider whether they offer, as a matter of course or policy, different benefits to employees of different group companies who could be performing equal work, or work of equal value. Similarly, it is important to consider this case when planning changes for the future such as group reorganisation, joint ventures and transactions.