



WEST MIDLANDS PENSION FUND

EQUAL PAY CLAIMS & THE LOCAL GOVERNMENT PENSION SCHEME

Does equal pay compensation awarded (back pay/COT 3 payments) via an industrial tribunal count towards pensionable pay?

The Fund has previously had this issue raised by members and employers alike, and has previously stated that it was of the opinion that compensation payments did not form part of a member pensionable pay for the purposes of calculating benefits.

However, an industrial tribunal could make a 'back pay' award. For a back pay award to be considered as LGPS pensionable pay, it must have the characteristics of pay. This means it must be taxable and subject to national insurance (NI) deductions, it must be related to an individual's activity in the year and relate to hours worked set against an hourly rate or appropriate pay scale.

The financial impact for an employing body and individual member of the LGPS are complicated. If an award is pensionable pay, employee and employer contributions will be required, and the individual will need to disclose the arrears of pay to any agency or body from which they have claimed assistance where earnings were used in the calculation of benefit payable, eg, housing benefit.

It may affect future entitlement and there may be a reclaim of benefits, as benefit rules are complicated and can vary between agencies. The relevant agency will need to consider the award within the context of their rules and will advise accordingly on the impact it may have.

If an award is compensation, no pension contributions will be required, but the individual will need to declare the award to benefit agencies and it may affect future entitlement.

An individual who is in continual employment will have their pension calculated on their best 12 months pensionable pay in the last three years, subject to the usual LGPS rules regarding final pay.

The Fund has had its position confirmed recently with counsel's advice, confirming the test is what was actually earned, was certain, or required speculative conditions to be satisfied. If it was the latter, then any award could only be for damages to put the claimants in the position they should have been in had they had 'like' benefits. A lump-sum of £1,000 per year for six years is agreed damages by way of compensation and not arrears of pay. It is not calculated by reference to what the claimant would have earned had they received the same pay as their comparator.

The Fund's position, therefore, remains that any such payments do not form part of a member's pensionable pay for the purposes of calculating benefits, as the payments do not have the characteristics of pay as required.

However, you may have seen the letter issued by the GMB dated 12 March in respect of equal pay and the LGPS. A copy can be found at: <http://www.gmb.org.uk/Docs/1004720LGPS20and20EQUAL20PAY.doc>

This, combined with the recent article on the Professional Pensions website: <http://www.professionalphensions.com/professional-pensions/news/1652407/local-authorities-facing-multi-million-pound-equal-pay-headache> has led to a number of stakeholder discussions to ask if the Fund's position has changed on this issue.

We do not believe the situation has changed. As we are not in possession of the CLG letter quoted in the GMB letter, we are unable to comment on the significance of that letter or the full context of the letter.

Local authorities are facing multi-million pound equal pay headache

Professional Pensions, 3 June 2010
By Tom Selby

Councils could be hit with a multi-million pound bill in additional pension payments following an amendment to Local Government Pension Scheme regulations, a law firm says.

The issue relates to an equal pay deal struck by the unions on behalf of their members.

Prior to the agreement, 'blue collar' male workers in local government were enrolled on a bonus scheme, but female workers were not. This was deemed to be in breach of equal pay legislation.

Following a legally binding out of court settlement female employees were entitled to a compensation payment to reflect the period of employment during which they were excluded from the scheme. However, it first appeared the equal pay compensation payments were not pensionable.

Wragge & Co local government pensions strategist Mike Woodall explained: "Therefore most employers did not deduct contributions from employees or pay employer contributions. However, the CLG appear to have stated that the compensation element relates to distress – not to back pay.

This position was confirmed in a letter from CLG to trade union GMB.

The letter – seen by PP – read: "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."

Woodall said local government employers would face a "massive" bill as a result.

He added: "[The costs] are likely to run into hundreds of millions of pounds. Birmingham has already said this could cost them £30m, at a time when local governments are having to pull their belts in.

"There are going to be two direct impacts – one is it takes money away from frontline services, the other is that all of that period for which back pay has been paid will be pensionable, and therefore pensionable entitlement will increase. And we're talking about six or seven years."

Change in law excludes pensions from equal pay

The Independent, Thursday 6 May 2010
By Sarah Cassidy, Social Affairs Correspondent

Thousands of low paid female council workers could be condemned to an impoverished old age after the Government quietly changed the law to stop them receiving better pensions.

Dinner ladies, cleaners and care assistants are among the workers who will be affected by the change to the local government pension scheme regulations. Under the new rules, women who win equal pay cases will no longer be able to have their pensions upgraded to bring them in line with those of male colleagues.

The change in the regulations has also been backdated to 1 April 2008, meaning that any equal pay claimant who settled their case after this date will lose any pension uplift they had secured. One of the women affected, who did not want to be named, is a clerical worker for South Tyneside council, against which she lodged a successful equal pay claim.

She was paid around £16,000 a year, whereas male refuse collectors and road sweepers judged to be doing comparable work were paid more than £20,000. She settled her claim in 2008 and received a lump sum of around £20,000 for six years of back pay and an agreement that her pension would rise. Because her case was settled after April 2008, she is no longer entitled to a higher pension.

She said: "I just think it is scandalous that a Labour government which is supposed to be in favour of helping the low paid and tackling inequality has chosen to bring this in."

Equal pay cases have become extremely controversial and have pitted trade unions against no-win, no-fee lawyers. One of these is Stefan Cross, who has secured large payouts for his clients - most recently for the 4,000 women in Birmingham who could be entitled to share up to £600 million in compensation.

Mr Cross said: "This is a very significant change. We have been doing thousands of these cases and councils had agreed to increase these women's pensions in line with their settlements. Now the Government has changed the rules, with no consultation. I think it is absolutely staggering that a government that is introducing an equality bill can then do this by the back door."

A spokeswoman for UNISON, the largest public sector union, said: "There is no way that working women should be discriminated [against] on pay in their working lives, and then beyond into their retirement."

A spokesman for the Department for Communities and Local Government said the change was intended to apply only to the damages element of payments made - such as compensation awarded when distress has been caused as a result of unfairness.



Equal pay and the LGPS

Treatment of Equal Pay Settlements for Pension Purposes

Equal pay compensation (back pay) should be treated as pensionable pay for the purposes of the Local Government Pension Scheme.

Doubt Caused by a Recent LGPS Amendment

A recent amendment to the Local Government Pension Scheme which is backdated to apply from 1 April 2008, appears to exclude equal pay settlements from pensionable pay. This only applies to England and Wales; the schemes in Northern Ireland and Scotland do not seem to have replicated this amendment. The revised LGPS (England & Wales) Benefit Regulations now include the following exclusion from pensionable pay:

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

This would mean that members who receive equal pay compensation are not able to count this towards their pension. GMB said this was wrong and raised it with CLG.

GMB Sought Clarity from CLG

Following GMB's correspondence with CLG, they have confirmed that their intention was only to exclude compensation for distress or inconvenience (the damages element that is rarely paid). The new regulation is not intended to stop members incorporating their equal pay compensation into their pensionable pay.

"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."

CLG letter to GMB 5 March 2010