

## CONSOLIDATION OF TEACHERS' PENSIONS REGULATIONS 1997 ("TPR97"): CONSULTATION ON DRAFT REGULATIONS

Topic: Pensionable Employment

Reference points in TPR97: Regulation A3, Part B and Schedule 2

Commentary on the draft regulations:

### General

1. Part B has been re-worked to put everything that is pensionable employment in one regulation (*regulation 2*), everything that takes a person out of pensionable employment into one regulation (*regulation 4*) and all elections for employment to be pensionable are now in one regulation (*regulation 7*).
2. The other main points to note are:
  - *Regulation 3* is new and deals with "Preston" claims (i.e. claims from individuals who are still within time to lodge a claim). This will enable employers to settle successful claims without the need for an applicant to lodge a claim with the Employment Tribunal.
  - *Regulation 5* is the new provision (due to come into force with the next set of amending regulations on 1 April 2008) whereby a period of pensionable employment will be disregarded in circumstances where employee contributions have not been paid.
  - *Schedule 2* is "work in progress" and will remain so until the regulations are ready to be laid.
3. In the light of the substantial re-working, a table of derivations has been prepared that provides the links with TPR97 (see **Annex A**).
4. Explanations about changes of effect and technical changes are as follows:

### Interpretation of "pensionable employment"

5. *Regulation 1* replaces the current definition in Schedule 1.

### Pensionable employment: general

6. *Regulation 2* incorporates the general provisions of regulation B1 and includes the residual provision for certain local authority organisers who elected (under regulation B1A(4) of the TPR97) for their current employment to be pensionable in the TPS.
7. Other than local authority organisers, all categories of employment that come within the scope of the TPS are detailed in *Schedule 2* (see below).

8. *Regulation 2(5)* is in square brackets and will only be carried forward into the consolidated regulations if TP establish that there are still some local authority organisers in pensionable employment by virtue of an election made under the 1976 Regulations.

### **Pensionable employment: claims in respect of part-time employment before 1<sup>st</sup> May 1995**

9. *Regulation 3* has been drafted to enable employers to settle new claims brought 'in time' in respect of pre-1 May 1995 part-time employment that was excluded under the regulations in force at that time. Employers will not be able to consider claims from an individual whose Employment Tribunal claim did not succeed. These will be (i) claims from individuals where the relevant employment ended within six months of the date the consolidated regulations come into force and (ii) claims from individuals still in employment for whom the six month time limit has not yet started to run.

10. The purpose here is to replicate the arrangements agreed by the Employment Tribunal and to continue to rely on the Treasury Model Agreement for calculating the employee contribution and for dealing with the employer contribution. However, consideration is being given to making additional provision that would prescribe a time limit for using the Model Agreement. There would be a reasonable period for claims to be brought (most likely a year from the date the consolidated regulations come into force) but after that, successful claims would be dealt with under the terms of the teachers' pensions regulations. This would require immediate payment of employer contributions and the calculation of employee and employer contributions (plus interest) would be calculated on the same basis as other cases involving backdated scheme membership by part-timers.

### **Employment not pensionable: general**

11. *Regulation 4* replaces regulation B4 of the TPR97 and brings together all other employments that are non-pensionable which are scattered across regulations B1, B3 and B4 (see **Annex A**).

12. *Regulation 4(13)* defines the categories of non-pensionable employment that comprise "excluded employment". The term "excluded employment" is referred to in other parts of the regulations.

13. The only change of effect is in *Regulation 4(2)*: The provisions for adoption, maternity, parental and paternity leave are brought into line with the treatment of sick leave. Regulation B4(1) of the TPR97 was deficient in not specifying a minimum rate of pay for contractual adoption, maternity or paternity leave. *Regulation 4(2)* provides that a period of adoption, maternity, parental or paternity leave is not pensionable employment unless a person is in receipt of at least half pay or (in the case of adoption, maternity or paternity leave), statutory pay.

14. *Regulation 4(11)* is in square brackets and will only be carried forward into the consolidated regulations if TP establish that there are still some local

authority teachers contributing to LGPS in continuation of earlier provisions.

### **Employment not pensionable: contributions not paid**

15. *Regulation 5* is the new provision that will be inserted into the TPR97 when amending regulations come into force on 1 April 2008. This provides the Secretary of State with power to disregard a period of pensionable employment in cases where a person has not paid arrears of contributions within three years of the Secretary of State's demand. It is intended that this will only be applied in exceptional cases once all avenues for recovery of the arrears have been exhausted.

16. Notably, no provision is made to waive the employer contribution under any circumstances. There are good reasons for this. First, unless a person has formally opted out, a person is in pensionable employment and an employer is statutorily obliged to remit employer and employee contributions. Secondly, retention of the employer contribution is consistent with the Scheme's repayment provisions. Thirdly, the regulations as a whole are framed in such a way that pensionable employment is paramount, and the Secretary of State will decide at retirement whether a deduction of contributions from a person's retirement lump sum would be appropriate.

17. There would also be practical difficulties. Discretion to waive employer contributions could lead to disputes from employers unwilling to pay the employer contribution arrears (even though a scheme member is prepared to pay). And discretion to waive employer contributions could act as an incentive to employers to treat employment as non-pensionable even though a person has not formally opted out.

### **Election for employment not to be pensionable**

18. *Regulation 6* replaces most of regulation B5. There are no changes of substance.

### **Election for employment to be pensionable**

19. *Regulation 7(1)* and *(2)* prescribe who can elect to opt in to pensionable employment.

20. *Regulation 7(3)* and *(4)* deal with the effective date of the election. Regulation 7(3) maintains the position whereby an election to resume pensionable employment following an election to opt out takes effect from the beginning of a period of employment if the election is made within 3 months of the start of the employment. On the grounds of consistency and simplification, the same rule will apply to Schedule 2 employments that require an election. TPR97 are silent on this point and backdating the start date of an election has had to be decided on a discretionary basis.

### **Backdating elections for employment to be pensionable**

21. *Regulation 8* puts together all the provisions relating to the backdating of elections to opt in to pensionable employment (other than that provided in

regulation 7(4)). There is no change of effect but there is a change of terminology. Regulation 8 does not provide for an election to 'take effect from an earlier date' (which is how the 1997 Regulations work). It is now the case that the effective date is the date determined by the date of the election and a period of retrospection is called "the back period".

22. *Regulation 8(1)* is the general provision which enables a back period to be treated as pensionable.

23. *Regulations 8(2) to (7)* serve to determine the "back period" in the particular circumstances. In the light of the new construction, a table has been provided that sets out how the regulations interface with each other (see **Annex B**).

24. It remains the case that:

(i) Except in the case of post-retirement employment (where backdating is only a matter of discretion on the part of a person's employer(s)), agreement to backdate an election is at the discretion of the Secretary of State. (*Regulation 8(1)(b)*)

(ii) In **all** cases, agreement is subject to payment of employer and employee contributions within prescribed timescales. And if there is more than one employer involved in the back period, then the back period cannot be earlier than the date from which all employers agree to pay the contribution. (*Regulation 8(5) and 8(7)*)

25. *Regulations 8(9) and (10)* replace the provisions of regulation B1(7A), which provide that a "back period" awarded to a post-2007 entrant or a person with mixed service counts as service with a normal pension age of 65.

### **Accepted schools**

26. *Regulation 9* deals with the procedure for accepting independent schools as accepted schools and for schools ceasing to be accepted. The exclusion of a person with a financial interest (other than salary) is in (regulation B3(1)) is in *regulation 4*.

27. There are some additional grounds for removal of accepted status. These are:

(i) Where a school's accepted status relies on the existing of a guarantee, failure to keep the guarantee in place and failure to maintain the value of the guarantee. (*Regulation 9(6)(d)*)

(ii) If the proprietor or school goes into administration. (*Regulation 9(6)(f)&(g)*). This puts accepted schools on the same footing as accepted function providers.

(iii) Failure to notify the Secretary of State of a change of ownership. (*Regulation 9(7)*)

28. Pensionable employment in an accepted school is now listed in *Schedule 2 (paragraphs 3 and 28)*.

### **Accepted function providers**

29. *Regulation 10* replaces regulation B3A. There are no changes of effect. Pensionable employment by an accepted function provider is now listed in *Schedule 2 (paragraph 4)*.

### **Meaning of “employer” in certain cases**

30. *Regulation 11* replaces regulation A3.

### **Schedule 2**

31. The Schedule has now been divided into three parts: Part 1 (employment automatically pensionable, unless a person opts out), Part 2 (employment pensionable on election) and Part 3 (employment pensionable on election with employer consent).

32. The Schedule now includes all categories of pensionable employment except the special provisions for local authority organisers that are dealt with in *regulation 2*. Existing categories have been refreshed and updated (and deleted where appropriate) in the light of research. This work will continue until the regulations are ready to be laid.