

briefing note

Overtime for LGPS members may not lead to pensionable pay

Employment contracts which consist of a number of un-coordinated documents can cause pensions problems, as was shown by a recent High Court case.

In *Newham London Borough Council v Skingle*, the High Court ruled that overtime worked by a Local Government Pension Scheme (LGPS) member, although required by his job description, was not “contractual overtime” and therefore not pensionable pay. The High Court reversed the Pensions Ombudsman’s decision when reaching its conclusion.

The decision has implications for LGPS employers and is also significant for those taking on former LGPS employees in transfers of undertakings. The case highlights the unsatisfactory state of contractual arrangements with essential staff such as, in this case, school caretakers, whose employment contract may consist of a number of un-coordinated documents.

THE FACTS

Mr Skingle was the caretaker of Lister Community School in Newham. His duties were governed by no fewer than three separate documents containing his terms of employment. These were entitled “Site Supervisor - Purpose of Job”, “Job Specification” and “Site Supervisor’s Agreement”. He also had a contract of employment (a fourth document), which mentioned overtime. The dispute was over the time which Mr Skingle spent supervising lettings of the premises to outside bodies: Was the time involved “contractual overtime” (and hence pensionable) or merely voluntary overtime (paid, but not pensionable)?

THE PENSION OMBUDSMAN’S DECISION

On the facts, the new Pensions Ombudsman (Mr David Laverick) came to the conclusion that the overtime pay that Mr Skingle had received for supervising the lettings was contractual overtime. Newham had said that Mr Skingle’s contract of employment did not mean that he was required to work overtime in excess of the 36 hour week set out in his contract.

Under the Local Government Superannuation Regulations 1997, (Regulation 13) non-contractual overtime is excluded from the definition of “pay” for the purpose of calculating the employee’s pension under the Regulations.

APPEAL TO THE HIGH COURT

Newham appealed against the Pension Ombudsman’s decision. The High Court held that the overtime had not been required by Mr Skingle’s contract of employment, which was dated later than the other documents affecting his work. Accordingly, in his judgment, it was not compulsory for Mr Skingle to have worked the overtime in question. This gave it the character of voluntary overtime and excluded it, on the wording of the Regulation, from “pay” and, hence, from pension.

COMMENT

The Pensions Ombudsman and the High Court had a fine line to tread in this case. The degree to which the job specifications were incorporated into the duties of the caretaker was an issue on which they did not agree.

If there is a further appeal, there is likely to be disapproval of a system under which job descriptions have to be ignored in order for the pension benefits to be clear. At “worst” (for the Local Authority), the expectations of the employee arising from the job descriptions will be honoured in disregard of the detail in the contract of employment. But even at “best” (for the Local Authority), a hard-working employee has been confused and disappointed as a result of unsatisfactory employment documentation. Confusion of this sort is never likely to result in a positive outcome.

WHAT ACTION CAN BE TAKEN?

On a practical level, the compelling message from this judgment for all Local Authority employers, and other employers inheriting a Local Authority’s employment contracts, is to ensure that employment contracts are totally consistent with job descriptions. Expectations of employees need to match up with contracts. Where additional duties are voluntary, this has to be clear from both job description and employment contract. The alternative is, in some cases, an unexpected pension cost and almost always a dispute with members about their benefits.

For Local Authority employees who are members of the LGPS, there is a need to be clear about what is contractual overtime. The status of overtime could be significant, as it was for Mr Skingle.

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This is only an outline of the legal position. For more detailed legal advice, please contact your usual Wragge & Co pensions contact or Glyn Ryland, head of pensions, on +44(0)121 213 2392 or e-mail glyn_ryland@wragge.com

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