

## Part one - discrimination and part-time employees

### Key points

- A part-time worker must not be treated less favourably than a comparable full-time worker doing the same or largely the same job unless the less favourable treatment can be objectively justified.
- This extends to less favourable treatment in respect of the provision of pension benefits.
- A part-time worker can bring a claim for less favourable treatment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
- The other potential claim a part-time worker can bring in relation to pensions discrimination is a claim for indirect sex discrimination under the Equality Act 2010.
- *Preston v Wolverhampton Healthcare NHS Trust* clarified that men or women excluded from their employer's pension scheme on grounds of indirect sex discrimination are entitled to claim access to the pension scheme.
- 'Off-sets' (notional deductions equal to the basic state pension made from a worker's salary to calculate contributions and pension benefits) may be indirectly discriminatory but are capable of objective justification.

### Main sources

- Equality Act 2010
- Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)
- *Preston v Wolverhampton Healthcare NHS Trust* [2001] UKHL 5
- *Uppingham School v Shillcock* [2002] PLR 229
- *O'Brien v Ministry of Justice and Walker v Innospec & others* [2015] EWCA Civ 1000

### Part-Time Workers Regulations

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the "2000 Regulations") provide that an employer may not treat a part-time worker less favourably than a comparable full-time worker (who is employed by the same employer under the same type of contract and is engaged in the same or broadly similar work) on the grounds of them working part-time. Any less favourable treatment is unlawful, unless it can be objectively justified.

This means that in circumstances where a part-time worker receives unjustified, less favourable pension benefits than their full-time comparator on the grounds of being a part-time worker, they may be able to bring a claim for unlawful discrimination in breach of the 2000 Regulations.

---

### More information

Find out more about our Pension team at [gowlingwlg.com/pensions-uk](http://gowlingwlg.com/pensions-uk).

You can listen to or download the other episodes and get additional material at [gowlingwlg.com/pensionpodcasts](http://gowlingwlg.com/pensionpodcasts).

You can also stay up to date with the latest pension developments at [gowlingwlg.com/en/united-kingdom/insights-resources](http://gowlingwlg.com/en/united-kingdom/insights-resources).

# PENSIONS IN 30 PODCASTS

## 23 DISCRIMINATION – part time and fixed term workers

### Sex discrimination

Where the significant proportion of a part-time workforce is female (or male), a pension scheme provision, criterion or practice that puts these part-time workers at a particular disadvantage compared to full-time workers could give rise to a claim for indirect sex discrimination under the Equality Act 2010.

This could include rules that have the effect of:

- denying part-time workers equal rights of access to a pension scheme;
- providing less favourable pension benefits to part-time workers.

Since this could constitute indirect sex discrimination, a discriminatory rule may still be capable of objective justification.

Preston v Wolverhampton Healthcare NHS Trust confirmed that men or women excluded from their employer's pension scheme on grounds of indirect sex discrimination are entitled to claim access to the pension scheme.

Where the claim is in respect of part-time workers being excluded from access to a pension scheme, workers with a successful claim will be obliged to pay the backdated contributions they would have paid if they had been members of the scheme.

### Objective justification

Employers seeking to rely on objective justification to defend less favourable treatment (either in the context of the 2000 Regulations or the Equality Act 2010) will have to consider:

- whether the less favourable treatment amounts to a legitimate aim – a blanket policy that does not take

into account individual circumstances may not meet this test;

- whether the less favourable treatment is a proportionate method of achieving the legitimate aim – employers may need to consider whether the less favourable treatment is the only way to achieve their aim and whether it is appropriate.

It is important to note that currently an objective justification based purely on cost is not acceptable under discrimination legislation.

### Retrospectivity

In *O'Brien v Ministry of Justice* and *Walker v Innospec & others* the Court of Appeal confirmed that a part-time recorder who was claiming retrospective pension benefits could only do so in respect of the date from which the United Kingdom was required to introduce legislation making it unlawful to treat part-time workers less favourably than full-time workers (i.e. 7 April 2000).

This meant that Mr O'Brien's claim in respect of pension benefits for his period of part-time service which built up before 7 April 2000 failed.

### Off-sets

There is scope for 'off-sets' (notional deductions equal to the basic state pension made from a worker's salary to calculate contributions and pension benefits) to be indirectly discriminatory and therefore unlawful.

Since lower-paid, part-time workers are more likely to be female, off-set deductions could have an effect that puts these female workers at a disadvantage amounting to indirect sex discrimination (again capable of objective justification).

---

### More information

Find out more about our Pension team at [gowlingwlg.com/pensions-uk](https://www.gowlingwlg.com/pensions-uk).

You can listen to or download the other episodes and get additional material at [gowlingwlg.com/pensionpodcasts](https://www.gowlingwlg.com/pensionpodcasts).

You can also stay up to date with the latest pension developments at [gowlingwlg.com/en/united-kingdom/insights-resources](https://www.gowlingwlg.com/en/united-kingdom/insights-resources).

However, in *Uppingham School v Shillcock*, the High Court decided that an off-set arrangement was not directly discriminatory, and that it would have been capable of justification had it been indirectly discriminatory to part-time female workers – since it integrated the pension scheme benefits in question with state benefits.

It may be more appropriate for a part-time worker to bring a discrimination claim in respect of an off-set under the 2000 Regulations, showing less favourable treatment in the receipt of lower benefits than their full-time comparators. They would not have to show sex discrimination, but the off-set could potentially still be objectively justified.

## **Part two - Discrimination and fixed-term employees**

### **Key Points**

- Fixed-term employees must not be treated less favourably than a comparable permanent employee doing the same or largely the same job unless the less favourable treatment can be objectively justified.
- This extends to less favourable treatment in respect of the provision of pension benefits.
- A fixed-term employee can bring a claim for less favourable treatment under the Fixed-term employees (Prevention of Less Favourable Treatment) Regulations 2002.
- Employers may be able to defend a specific unfavourable practice by demonstrating that the fixed-term employee's overall benefits package is

comparable to their permanent employee comparator.

- In order to rely on objective justification the employer would have to demonstrate that the less favourable treatment amounted to a legitimate aim and that the less favourable treatment was a proportionate method of achieving that legitimate aim.

### **Main sources**

- The EC Directive 99/70/EC (the Fixed-term Work Directive)
- Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034)

### **Background**

Fixed-term employees are employees who work under a contract of employment that is 'fixed' by reference to:

- time (i.e. a contract that will terminate after a specified period of time);
- a specific task (i.e. a contract that will terminate upon the completion of a project);
- an event (i.e. a contract that will terminate on something happening or not happening e.g. an employee returning from maternity leave).

This contrasts with permanent employees who are employed until their contract of employment is terminated by either the employer or the employee.

---

### **More information**

Find out more about our Pension team at [gowlingwlg.com/pensions-uk](https://www.gowlingwlg.com/pensions-uk).

You can listen to or download the other episodes and get additional material at [gowlingwlg.com/pensionpodcasts](https://www.gowlingwlg.com/pensionpodcasts).

You can also stay up to date with the latest pension developments at [gowlingwlg.com/en/united-kingdom/insights-resources](https://www.gowlingwlg.com/en/united-kingdom/insights-resources).

## Fixed-Term Employees Regulations

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) (the "2002 Regulations") provide that an employer may not treat a fixed-term employee less favourably than a permanent employee who is doing the same or largely the same job.

Any less favourable treatment is unlawful, unless it can be objectively justified. In respect of pensions, less favourable treatment could involve:

- not allowing fixed-term employees to join a pension scheme; or
- allowing fixed-term employees to join a pension scheme but on terms less favourable than their permanent employee comparators.

The 2002 Regulations do not apply to a fixed-term employee who is:

- doing work experience organised by the government or funded by the EU;
- an agency work; or
- an apprentice.

## Comparing fixed-term employees with permanent employees

Employers seeking to ensure that fixed-term employees are not subject to less favourable treatment than their permanent employee comparators can review benefits on either a:

- term-by-term approach (i.e. comparing each and every term and condition and showing that they are no less favourable); or

- overall package approach (i.e. demonstrating that the overall package provided to fixed-term employees is no less favourable than the overall package of benefits provided to permanent employees).

The overall 'package approach' could see an employer offset a less favourable term (e.g. no or limited pension provision) with a more favourable term (e.g. a higher level of remuneration).

In principle, it is straight-forward to determine whether there has been less favourable treatment. However the 'pro rata principle' must also be applied (unless it is inappropriate).

This means that in determining what a fixed-term employee is entitled to, account should be taken of the length of the contract of employment and to the terms on which the pay or other benefit is offered to the permanent employee comparator and the fixed-term employee and the benefits of the fixed-term employee adjusted proportionately.

## Objective justification

Employers seeking to rely on objective justification to defend less favourable treatment will have to consider:

- whether the less favourable treatment amounts to a legitimate aim – a blanket policy that does not take into account individual circumstances may not meet this test;
- whether the less favourable treatment is a proportionate method of achieving the legitimate aim – employers may need to consider whether the less favourable treatment is the only way to achieve their aim and whether it is appropriate.

It is important to note that currently an objective justification based purely on cost is not acceptable under current discrimination law.

---

### More information

Find out more about our Pension team at [gowlingwlg.com/pensions-uk](https://www.gowlingwlg.com/pensions-uk).

You can listen to or download the other episodes and get additional material at [gowlingwlg.com/pensionpodcasts](https://www.gowlingwlg.com/pensionpodcasts).

You can also stay up to date with the latest pension developments at [gowlingwlg.com/en/united-kingdom/insights-resources](https://www.gowlingwlg.com/en/united-kingdom/insights-resources).