



Presidential Guidance

EMPLOYMENT TRIBUNALS: PRINCIPLES FOR COMPENSATING PENSION LOSS

This Presidential Guidance is issued by the President of Employment Tribunals (England and Wales) and the President of Employment Tribunals (Scotland) in accordance with Rule 7 of the Employment Tribunals Rules of Procedure, which are set out in the Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

As such, Employment Tribunals must have regard to this Guidance although they are not bound by it.

This Guidance has effect from 10 August 2017.

Background

It had become clear that the guidance contained in the third edition of the booklet on Compensation for Loss of Pension Rights, published in 2003 and last revised in 2004, was no longer reliable for calculating pension loss in Employment Tribunal cases. The guidance was withdrawn in 2015.

A working group of Employment Judges was tasked by the President of Employment Tribunals (England and Wales) and the President of Employment Tribunals (Scotland) to produce a fourth edition containing guidance for tribunals and parties. The fourth edition is presented in a separate document entitled “Employment Tribunals: Principles for Compensating Pension Loss” (referred to as the “Principles”). It is available at these locations:

- <https://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions> (for England and Wales)
- <https://www.judiciary.gov.uk/publications/directions-for-employment-tribunals-scotland> (for Scotland)

The Principles will be revised from time to time with the agreement of the Presidents. It is important that parties and tribunals ensure that they are referring to the latest version of the Principles when calculating pension loss.

The Principles: key concepts

The Principles are guided by five concepts: justice; simplicity; proportionality; pragmatism; and flexibility. More particularly:

1. The Principles provide a framework for establishing the age at which a claimant will retire from the workforce where that is relevant to the calculation of their compensation. In broad terms, where a claimant has not accrued significant occupational pension rights, the tribunal will assume retirement at state pension age. By contrast, if a claimant has accrued significant occupational pension rights in a scheme with a normal retirement age (and entitlement to an unreduced pension) below state pension age, the tribunal will assume retirement at the scheme's normal retirement age. The tribunal will normally decide, based on the facts of each case, what level of accrued benefits is "significant" for this purpose. This approach can be displaced by evidence from the parties.
2. The Principles explain the difference between gross income and net income, which is relevant when assessing both loss of earnings (and how this is affected by the tax relief on pension contributions and the types of pensions tax that might be applied) and loss of pension rights. The Principles also explain how awards of compensation are grossed up in accordance with the so-called "Gourley principle".
3. The Principles explain the operation of the new state pension system that launched in April 2016. They provide a framework for calculating loss of state pension rights under this new system. It involves use of the Ogden Tables in the small number of cases where such an award may be appropriate.
4. Insofar as loss of occupational pension rights are concerned, the Principles identify a category of "simple" cases. In such cases, the tribunal will exclusively use the contributions method to assess a claimant's net pension loss. This method requires the tribunal to aggregate the contributions that, but for the dismissal, the employer would have made to the claimant's pension scheme during the period of loss that has been identified. This approach will invariably be adopted in cases where the claimant's lost pension rights relate to a defined contribution scheme, including a scheme into which the claimant was automatically enrolled. It will also be adopted in some cases where the lost pension rights relate to a defined benefit scheme; for example, those cases where the period of loss relates to a relatively short period or where the application of the monetary cap on compensation or a very large withdrawal factor means that it will be disproportionate to engage in complex analysis.
5. The Principles identify a category of "complex" cases. These are cases for which the contributions method is not suited. In general, a case will be a "complex" one if the claimant's lost pension rights derive from a defined benefit scheme (including final salary schemes and CARE schemes) and the loss relates to a longer period. "Complex" cases include, but are not

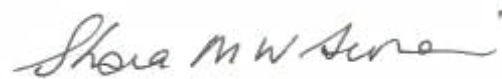
limited to, career loss cases. Such cases will benefit from a more tailored approach to case management. For example, liability issues and remedy issues will be considered at separate hearings.

6. The Principles describe a “seven steps” model by which loss will be ascertained in these “complex” cases. The model incorporates the Ogden Tables (with a bespoke age-related modification). The outcome will be imprecise but ought still to be just. Alternatively, the parties may call expert actuarial evidence, with the tribunal’s preference being for a jointly-instructed expert. There is also scope for a blended approach, with expert evidence on a limited number of points rather than the overall assessment of loss.
7. In some “complex” cases, it may also be appropriate for the remedy hearing to proceed in two stages. At the first stage, the tribunal would decide the more straightforward (non-pension) aspects of the compensation and issue a judgment to that effect. It would also make findings of fact on those matters that, in consultation with the parties, were thought relevant to calculating pension loss in the circumstances of the individual case. The parties would then be given a time-limited opportunity to agree the value of pension loss. In the absence of agreement, pension loss would be decided at the second stage and set out in a further judgment. The underlying idea is that the parties are encouraged to agree the amount of pension loss (with the benefit of the tribunal’s findings of fact where appropriate) and only bear the cost of expert actuarial evidence where it is proportionate to do so in view of the compensation at stake.
8. Finally, to give the parties as much assistance as possible, the Principles contain links to useful websites, either throughout the text or in footnotes. There are also substantial appendices. Appendix 1 summarises the benefits of the main public sector defined benefit pension schemes. Appendix 2 contains “at a glance” extracts from the Ogden Tables. Appendix 3 contains numerous examples of the Principles in operation.
9. The Principles do not have the force of law. They are not rigid rules. If the parties wish to advance arguments for using their own calculations, rather than following the Principles, the tribunal will consider them.

The Presidents expect that Employment Tribunals will have regard to the Principles when calculating compensation for pension loss.



Judge Brian Doyle
President, Employment Tribunals
(England and Wales)
10 August 2017



Judge Shona Simon
President, Employment Tribunals
(Scotland)
10 August 2017