TRIBUNALS JUDICIARY

Employment Tribunals (Scotland)

COMPENSATION FOR LOSS OF PENSION RIGHTS IN EMPLOYMENT TRIBUNALS

WORKING GROUP RESPONSE TO CONSULTATION PAPER

10 August 2017

Background

The booklet entitled "*Compensation for Loss of Pension Rights*" was first published in 1990. It was written by a panel of Chairmen of Industrial Tribunals (as they were then called) with actuarial tables supplied by the Government Actuary's Department (GAD). The second edition appeared in 1991 and the third edition appeared in 2003 (with a revision in 2004)[1]. Having not been updated since 2004, the third edition took no account of the many significant changes to the pensions landscape that have occurred since, a point emphasised by the Court of Appeal in *Griffin v. Plymouth Hospital NHS Trust* [2014] IRLR 962. It was withdrawn in May 2015.

Following the Court of Appeal's decision in *Griffin*, the Presidents of Employment Tribunals for Scotland and for England and Wales jointly convened a working group of Regional Employment Judges and Employment Judges to consider what approach tribunals should adopt in future to calculating pension loss.

The working group produced a first draft of a consultation paper, which they "road tested" before a group of selected practitioners, drawn from the national user groups, in January 2016. There followed a public consultation period from 30 March 2016 to 20 May 2016[2].

The consultation produced 24 high quality responses, from solicitors and barristers, employers and trade unions, academics and members of the actuarial profession. The

[1] It was then subject to a revision in 2004. The revised third edition is still available here: https://www.gov.uk/government/publications/compensation-for-loss-of-pension-rights-employment-tribunals-third-edition

[2] The consultation paper is available here: https://www.judiciary.gov.uk/publications/compensation-for-loss-of-pension-rights-in-employment-tribunals

members of the working group are grateful to all who took time to contribute. A full list of responders is provided in an appendix to this document.

The working group's members have produced joint Presidential Guidance, which will be issued separately but simultaneously by the Presidents in England and Wales and in Scotland. This will be accompanied by the fourth edition, now entitled "Employment Tribunals: Principles for Compensating Pension Loss". To avoid confusion with the joint Presidential Guidance, the shorthand term for the fourth edition will not be the "Guidance" but the "Principles". The joint Presidential Guidance and the Principles will be released alongside this consultation response. To avoid expense, the fourth edition will not be published by the Stationery Office.

General observations

The responses persuaded the working group's members that they were "on the right track" but that their proposals could not simply be rolled out without amendment. The working group met on further occasions during 2016 and 2017. With the agreement of the two Presidents, their approach has been altered in several regards. The changes are briefly summarised in this document.

The working group wishes to provide clarification on one point: the consultation exercise was not an official Ministry of Justice exercise. It was an exercise, sponsored by the two Presidents, to ensure that their approach to the calculation of pension loss had broad support within the tribunal's user community and the legal and actuarial professions.

In general terms, the members of the working group have recognised that the use of the phrase "default assumption" in the consultation paper had the capacity to mislead. Some responders described these assumptions as "arbitrary", "elevated" points of principle, or "absolute positions". The phrase "default assumption" was not intended to imply rigidity in application, but to identify an easily understandable "starting point" for the tribunal's assessment which could be displaced (often very easily displaced) by evidence. Accordingly, the members of the working group hope that many of the objections to their operation, as voiced by responders, can be met by reassuring parties that they are free to adduce evidence to displace them.

To this end, the working group has removed the phrase "default assumption". This is to make more clear their intention to set out a series of *starting points*. In the absence of evidence adduced by parties, a *starting point* may become a *finishing point* – but this is simply because the tribunal may face a situation where it has no evidence to assist it, and it needs a steer as to the approach that it should take.

To clarify the approaches that they recommend, the working group's members have provided a series of worked examples in an appendix to the Principles.

A number of responders made comments about the difficulty in obtaining clarity about levels of pension loss at a sufficiently early stage in the proceedings to encourage settlement. The members of the working group have prepared *pro forma* orders and directions to promote early disclosure, which will be used in judicial training later in 2017. In addition, the case management agenda questionnaire (used in advance of

preliminary hearings) will be amended with effect from 11 August 2017 to include this brief question on pension loss:

> *In cases involving dismissal, please confirm whether the claimant was a member of an occupational pension scheme. If so, was it a defined benefit scheme or a defined contribution scheme?*

The working group remains a standing committee. They intend to produce revisions of the fourth edition on a regular basis, in response to feedback from Employment Judges and non-legal members, feedback from users (and a bespoke email account has been set up for this purpose), developments in relation to the Ogden Tables and decisions of appellate courts on the valuation of pension loss. It is possible that the working group will add further worked examples to assist the parties, developed from cases and scenarios as they arise from time to time.

We turn now to the specific questions asked in the consultation paper.

Question 1

The working group proposes that the tribunal operates a default assumption that claimants will retire at state pension age, with the onus on the parties to persuade the tribunal to depart from it by terminating loss before or after that age. Please say whether you agree or disagree, explaining why.

Responders were split evenly in terms of whether they supported this proposal. Those who supported it were attracted to its simplicity. Those who disagreed thought that a "default assumption" would be interpreted by parties as too inflexible; we have noted this above, and have removed that phrase. We agree with the submission of the Bar Council that the assumption should not be treated as too high a standard: "*even limited evidence should be capable of rebutting the assumption provided the tribunal is satisfied on the balance of probabilities*". We also agree with the submission of the Bar Council that some would find talk of rebuttable default assumptions confusing and (like some of the responders) equate them with rigid rules.

The working group's members agree with the view expressed by many responders that a person's choice of pension age is likely to be influenced at least as much, if not more, by the normal retirement age in their occupational pension scheme (i.e. the age at which they can retire with an unreduced pension) than by their state pension age. The Principles have been amended to reflect this.

The working group's members have also taken on board comments of responders that an increasing number of people are choosing to work past state pension age. The tribunal will be able to make a decision about the likelihood of a claimant working past state pension age based on the evidence it has heard.

An actuarial responder suggested that the state pension age would likely continue to rise as a result of the Government's five-yearly reviews. The members of the working group will monitor developments in this regard and capture them in further editions of the Principles. There is reference to the Government's recent proposal to bring forward the increase in state pension age to 68.

Question 2

The working group proposes that the tribunal operates a default assumption that claimants will suffer no loss to their state pension, with the onus on claimants to persuade the tribunal otherwise. Please say whether you agree or disagree, explaining why.

Question 3

The working group proposes that the tribunal operates a default assumption that claimants will suffer no loss of additional state pension rights, with the onus on claimants to persuade the tribunal otherwise. Please say whether you agree or disagree, explaining why.

Like many responders, we deal with these questions together. To a certain extent, the situation has moved on since the consultation exercise, since the new state pension (nSP) came into effect on 6 April 2016 and has now operated for over a year. It has been necessary to amend the Principles significantly to reflect the new state pension rules, which have become clearer since the consultation exercise, for example as to how additional state pension rights are reflected in a new starting amount of nSP.

Most responders agreed that compensation of state pension rights added complexity to the task of calculating pension loss following dismissal and that, in most cases, dismissal will not interrupt an individual's NI record to the extent that they will suffer a reduced state pension. It remains the view of the working group's members that few cases will require an evaluation of state pension loss because most people will still have sufficient time left to accrue 35 qualifying years.

However, the working group's members were persuaded that such cases may not be as infrequent as they originally thought. Specifically, the working group's members accept the submission of a trade union responder that, in the early years of the nSP's operation, a significant number of people will not qualify for the full amount because of gaps in their NI record (and, if these gaps result from periods of time engaged in childcare, this might include a greater proportion of women). We also accept that the deduction from the starting amount of nSP to reflect previous periods of contracting out (now called a COPE deduction) will affect a group of claimants who, in the few years after the introduction of the nSP, will not have time to "burn off" that deduction (a phrase explained in the Principles). Finally, we have noted the recent growth in low paid self-employment, which can impact on a person's ability to accrue full nSP. The Principles have been amended to reflect these concerns, and they contain a worked example of the sort of case where an award of compensation for loss of state pension would be considered appropriate.

In response to suggestions from some responders, the Principles now highlight the importance of claimants obtaining a statement of the starting amount of their nSP, or checking their NI record through government online services, to see if a claim for loss of state pension is viable. The Principles provide weblinks and the working group will regularly review them to ensure that they remain live.

Question 4

The working group proposes that the tribunal operates a default assumption that claimants will suffer no loss by reason of losing the facility to make employee contributions (including AVCs), with the onus on claimants to persuade the tribunal otherwise. Please say whether you agree or disagree, explaining why.

Almost all responders agreed with this proposal; indeed, one suggested that it was so obvious a statement of principle that they queried whether claimants should even have the opportunity to argue against it as a default position.

The members of the working group remain of the view that this will be a valid starting point, as opposed to a default assumption, in most cases. Two responders strongly argued that claimants should be able, as a matter of principle, to claim loss associated with the higher administrative charges of a personal pension, having lost the ability to pay contributions into a group scheme with lower charges: a low-cost savings vehicle may have been replaced by a high-cost savings vehicle. The members of the working group certainly have not ruled this out, but the Principles emphasise that, in most cases, this will be a disproportionately complex exercise – requiring considerable effort to identify what is likely to be minimal loss. The Principles do not provide an example of this sort of situation for the simple reason that the members of the working group, despite their combined experience, have never sat on a case where such loss was claimed.

Question 5

The working group proposes that the tribunal operates the following default assumptions in a simple DC case where the contributions method is deployed:

- **The claimant was an eligible jobholder in the job from which he or she was dismissed and was therefore entitled to be auto-enrolled.**
- **The claimant did not opt out of the scheme into which he or she had been auto-enrolled.**
- **In the context of any successful mitigation of loss through finding future employment, the claimant would remain an eligible jobholder entitled to be auto-enrolled.**
- **The claimant would not opt out of that scheme either.**
- **In the context of assessing future pension loss, the claimant would need to give credit for employer contributions from the hypothetical future employer at the mandatory minimum level.**
- **If the claimant wishes to claim additional pension loss, for example by contending that the respondent would have paid more than the mandatory minimum level of contributions, as a result of membership of a more generous DC scheme, he or she bears the onus of persuading the tribunal.**

Please say whether you agree or disagree, explaining why.

The contributions method will apply in DC cases. Most responders agreed, or broadly agreed, with the proposal to assess contribution levels by reference to the auto-enrolment regime in the absence of evidence to the contrary. However, observations expressed by a minority of responders contained points of validity that the members of the working group believe justify a clarification of our approach. This is a good example of where use of the phrase "default assumption" risked overstating the number of occasions when this approach would need to apply. We accept that, in many cases, the tribunal will have before it sufficient evidence to identify the precise level of contributions into a DC scheme paid by the employer prior to dismissal; similarly, when examining the extent to which the claimant has mitigated this loss, there will be many cases where the precise level of contributions paid by the claimant's new employer will be apparent. Where there is evidence of contribution levels on which the tribunal can base more accurate loss calculations, there will be no need to rely on features of the auto-enrolment regime.

The Principles have been amended to make clear that such reliance is likely to be limited to cases where there is simply no evidence available; for example, because a respondent has failed to defend the claim and the claimant has produced no evidence on the point. Even then, the tribunal should check that the claimant's earnings in the old employment exceeded the lower level of the qualifying earnings band and, if they did, assume (in the absence of any basis on which to infer the contrary, including the tribunal's knowledge of the local labour market and the type of work performed by the claimant) that the respondent's contribution rate was at the minimum required by auto-enrolment. The members of the working group are alert to suggestions that this might result in under-compensation but, in our combined experience, we believe that a more likely outcome is that some pension loss will be awarded to many claimants who would not normally ask for it (which, in the past, may have led the tribunal to overlook it).

Question 6

The working group proposes that the tribunal operates the following default assumptions in a simple DB case:

- **Reliance only on the contributions method, meaning no award for loss of enhancement of accrued pension rights.**

- **If the claimant successfully mitigates loss through finding future employment with comparable DB benefits, or the tribunal expects the claimant to do so, there will be no loss of pension rights beyond the start date of the new employment.**

- **If the claimant successfully mitigates loss through finding future employment with inferior DC benefits, or the tribunal expects the claimant to do so, then (unless a complex approach is merited) the tribunal will adopt the same assumptions about auto-enrolment as set out in relation to DC schemes.**

Please say whether you agree or disagree, explaining why.

There was general acceptance from responders that a simple contributions method was appropriate for DB cases only where the period of loss was short and/or there was clear evidence of a move to a truly comparable scheme. There was debate, however, as to what constituted a short period of loss in this context.

The view was commonly expressed that the proportion of claims where a contribution-based approach would be appropriate would be low because few individuals would be able to transfer to truly comparable schemes. As one law firm put it: "*We find it difficult to envisage any more than 10% of cases involving DB schemes as being appropriate for "simple" cases when assessing the claimant's loss. Outside of the public sector, the majority of claimants with access to DB schemes are members of schemes which are now closed to new members … The reality is that, when members leave these schemes, their future employment in this sector is unlikely to lead to access to a DB scheme and so if they find new employment with broadly similar benefits but a DC rather than DB scheme, there is significant continuing loss*".

The members of the working group accept that "simple" DB cases will be rarer than they originally envisaged, and have amended the Principles to make clear the sort of cases they have in mind. The working group's members accept that the contributions method will be inappropriate where there is an element of significant ongoing pension loss. As for what is a "short" period in this context, the members of the working group have declined to offer a defined "cut-off" point, since so much will depend on the facts as found by the tribunal.

In response to a submission from the Institute and Faculty of Actuaries, the members of the working group agree that another relevant factor is the potential application of the statutory cap on the compensatory award for unfair dismissal. We agree that it would be disproportionate to expect the parties to spend time and money calculating a large sum in respect of pension loss, only to find that it exceeds the cap, especially in a case where the employment from which the person was dismissed carried a modest income.

There was substantial concern about how the contribution rate for such a calculation should be ascertained. An actuarial responder emphasised that the contribution rate payable by an employer to a DB scheme in respect of the cost of accrual should be the average across active members of the scheme. In most cases, that is likely to be right, but the working group has proposed that tribunals should use contribution rates relating to a claimant's age and gender if the parties have been able to produce them.

Some responders expressed concern about the proposal not to compensate for loss of enhancement of accrued pension rights. A trade union warned that "*enhancement to defined benefit pensions come in many forms … These can include early access to pension based on age or preferential early access terms based on employment status. These can be convoluted and not well publicised, and it should not be assumed that an applicant is aware of them*". The Principles now make even clearer that, where a claimant has experienced loss by being deprived of the enhancement of accrued pension rights, then the tribunal is more likely to accept that the contributions method will not be appropriate. We emphasise that parties are free to put arguments before

the tribunal that are different to the working group's recommendations, just as they were in respect of previous editions of the Guidance.

In summary, a case involving ongoing DB pension loss will typically point towards the "complex" approach unless the loss is relatively short-lived or the application of the statutory cap or a very large withdrawal factor renders the exercise disproportionate.

Question 7

The working group proposes that the tribunal adopts the following approach in complex cases:

- **Cases with a realistic prospect of the tribunal making a significant award for loss of pension rights would be identified at an early stage, through a telephone preliminary hearing, and have a split liability/remedy hearing.**

- **If the claimant succeeded at the liability stage and there remained a realistic prospect of a significant award for loss of pension rights, there would be a two-stage remedy hearing:**

  - **The purpose of the first remedy hearing would be to enable the tribunal to set the figures for non-pension loss and to make findings on areas relevant to the calculation of pension loss (following which the parties would be given a time-limited opportunity to agree the quantum of pension loss).**

  - **In the absence of agreement, the tribunal would proceed to a second remedy hearing to finalise the figures for pension loss. There would be two preferred approaches: (a) the Ogden tables approach using a discount rate of 2.5%; or (b) more rarely, the actuarial expert approach.**

- **There would be active consideration of judicial mediation.**

Please say whether you agree or disagree, explaining why.

There was broad consensus among responders that the proposed proactive approach to case management would assist in identifying cases requiring complex pension loss calculations and that splitting the remedy hearing in the manner proposed would provide parties with the key findings that they need either to reach terms of settlement or to instruct a joint actuarial expert.

There was also a broad consensus that the Ogden Tables would provide a sufficient platform for calculating pension loss in the absence of bespoke new tables and multipliers, but subject to certain variations that were proposed. In response to observations from actuarial responders, the working group has recommended a two-year age adjustment when selecting the Ogden multiplier, to reflect the increased longevity of people who were members of occupational pension schemes.

The proposed use of the 2.5% discount rate was controversial. However, this issue has been overtaken by recent events. The Lord Chancellor has since announced that

the discount rate would be reduced from 2.5% to minus 0.75%, with effect from 20 March 2017. Accordingly, the discount rate of minus 0.75% will apply.

One responder queried whether the tribunal would be able to make an order that the respondent credits the claimant with additional membership of a DB scheme. The members of the working group have rejected this suggestion. First, the tribunal, as a creature of statute, has no power to make an order of this nature (although, feasibly, it might issue a recommendation to this effect under the remedy provisions of the Equality Act 2010). Secondly, such a course of action would normally require the consent of the scheme trustees, and the trustees will not normally have been a party to the proceedings. That said, it would be open to the parties to agree such a course of action and for it to be recorded in a consent judgment issued under Rule 64.

The Principles have been amended to acknowledge the need for a "blended" approach to expert evidence, alongside the application of the Ogden tables.

The Principles have been amended to reflect the fact that the tribunal may offer not only Judicial Mediation but also a process called Judicial Assessment. Following the Supreme Court's judgment in *R (Unison) v. Lord Chancellor* [2017] UKSC 51, there will no longer be a £600 fee for mediations.

Question 8

Do you have anything further to say about the working group's proposal for a distinction between "simple" and "complex" cases? What additional guidance do you believe should be given about when to choose one approach over the other?

There was a broad consensus among responders that the distinction between simple and complex cases was appropriate.

There was a difference in approach discernible between those responders who mainly represent employers and those who mainly represented employees. Many of the former suggested that the simple approach should be adopted unless the claimant could establish cogent reasons pointing towards the complex approach, while the latter thought that there were only limited circumstances in which the simple approach would offer adequate compensation. The members of the working group have drawn a clearer distinction between the two approaches and have provided worked examples and further commentary that will assist parties in delineating between them.

Question 9

What examples would you like to see in Presidential guidance to assist parties and unrepresented litigants in understanding the proposed revised approach to calculating loss of pension rights?

All responders were unanimous in seeking worked examples covering a range of common scenarios. The members of the working group have produced examples in an appendix of the Principles and will consider adding to them in revisions to the fourth

edition. Feedback from users in this regard is always welcome and an email address for this purpose (pensionprinciples@ejudiciary.net) has been created.

Other matters raised in the consultation process

Matters pertaining to tax

Many responders asked for further guidance on the application of tax to compensation for pension loss. The Principles have been amended to include this. Pension loss, as with earnings loss, is calculated on a net basis and must be grossed up. As it is a form of future loss, it does not attract interest.

Matters pertaining to Scotland

Some responders raised issues about Scottish-specific points. One responder asked if the members of the working group (which includes Scottish judges) intended that the Presidential Guidance document for Scotland would continue to apply after devolution of the functions of the Employment Tribunal in Scotland to the Scottish Government. The answer is yes.

Another responder made the point that, in Scotland, respondents are often not ordered to produce a draft bundle until 14 days before the hearing. The members of the working group emphasise that their recommended approaches presuppose an early and interventionist form of case management to ensure that pension loss is picked up, especially in cases where a complex approach is or may be required.

Summary of benefits of main public sector DB pension schemes

One responder asked the members of the working group whether the Principles could include an appendix that summarises the principal benefits of the main public sector DB pension schemes that the tribunal will encounter when dealing with complex pension loss cases. The group's members have adopted this helpful suggestion.

Appendix – List of those responding to consultation paper

Colin Sara, retired Employment Judge
Chris Daykin, independent consultant, former Government Actuary
Government Actuary's Department
Pensions Advisory Service
The Bar Council
Law Society of England and Wales
Law Society of Scotland
Institute and Faculty of Actuaries
Employment Lawyers Association
Association of Pension Lawyers
Discrimination Law Association
Pensions and Lifetime Savings Association
Birmingham Law Society
EEF – The Manufacturers' Organisation
Professor Owen Warnock (University of East Anglia)
RMT
Prospect
Transport for London
British Telecommunications plc
Eversheds, solicitors
Thompsons, solicitors
Burness Paul LLP, solicitors
PJH Law, solicitors
NPLAW, solicitors