

Principles for compensating pension loss

EMPLOYMENT TRIBUNALS PENSIONS COMPENSATION WORKING GROUP

By David Franey



Introduction

Pension rights are an important part of the remuneration package. Employment Tribunals often award compensation for pension loss. In some cases that is a simple matter: the lost value of the employer's contributions is added to loss of earnings.

However, in cases where compensation is not capped (primarily discrimination complaints and whistleblowing complaints), the amounts at stake can be significant. That is particularly likely where the unlawfully dismissed claimant has lost the benefit of membership of a defined benefit scheme (final salary or career average revalued earnings). This sort of benefit is not frequently replicated in new employment, and simply treating the lost employer contributions as the measure of loss is unlikely to lead to a just result. Complexity ensues.

To help Employment Tribunals a committee of Industrial Tribunal Chairmen (as they were then called) first produced guidance on assessing pension loss in 1991. Until last year, that guidance had been unchanged since 2003.

By 2015 that guidance was no longer fit for purpose due to changes in the economy, in pension law and practice. Those changes included the widespread closure of final salary schemes, a new state pension system, the introduction of complex rules for taxation of pension benefits, and earnings growth year on year. In *Griffin v Plymouth Hospital NHS Trust* [2014] IRLR 962, the Court of Appeal expressed the hope that an updated version would be produced. As a consequence, the 2003 guidance was formally withdrawn and the Presidents of the Employment Tribunal in Scotland and in England and Wales convened a Working Group and set them the task of producing new guidance.

The Working Group

The Working Group was composed of nine salaried and fee paid Employment Judges. Its work was carried out through a combination of meetings, emails and the use of a SharePoint site via eJudiciary. Its membership came from all corners of Great Britain: Scotland, England and Wales. During its work three members retired and were replaced.

Importantly there was no funding available for bespoke actuarial input. Such input had been a key feature of the guidance produced between 1991 and 2003. In 2003 the Government Actuary and a member of his department made up two of the four-person committee. The guidance included actuarial tables for use in the Employment Tribunal which recognised differences between the working population and the population generally, the latter being the focus of the Ogden tables used in personal injury litigation. Without such input, the Group had to think creatively about the approach to be taken in complex cases.

There was no funding available for bespoke actuarial input.

Consultation period

The Working Group adopted a two-stage process to consultation. The first stage was 'pre-consultation'. The main bodies representing practitioners (the Law Society and the Employment Lawyers' Association) were invited to consider a draft of the consultation paper and make any preliminary comments. The responses helped the Working Group finalise the consultation paper itself.

The second stage was formal consultation: at the end of March 2016 the Presidents circulated the consultation paper which set out the historical background and made a number of proposals for how the revised guidance might operate. It ended by posing nine specific questions.

Responses were received from a wide range of interested parties. They included representative bodies for lawyers, solicitors and barristers, trade unions and employers' organisations, pensions bodies and actuaries.

The Working Group analysed the responses and fed the results into the final draft of the guidance document, now to be called the '*Principles*'. Further information was sought from some who responded including, in particular, the former Government actuary who worked on the 2003 edition. The Working Group also made contact with the committee responsible for production of the Ogden tables and with the Professional Negligence Bar Association. The process of re-drafting, debating and finalising the Principles took several months. The final version was to run to 153 pages.

Particular challenges

The challenges were many. The Principles had a wide target audience: parties representing themselves, professional

representatives (including lawyers), Employment Judges, and non-legal members. There was a need to strike a balance between guidance useful in simple cases to those with no pensions knowledge, and guidance relevant to complex high value cases with actuarial input.

The absence of bespoke actuarial input (save through the consultation process) meant that the Working Group had to recommend use of the Ogden tables in complex pension cases. We debated long and hard whether to recommend that the age of the claimant be adjusted downwards by two years to reflect the longer life expectancy of members of occupational pension schemes compared to the population at large. In the end we did recommend that Tribunals adopt that approach unless persuaded otherwise.

The Working Group also had to grapple with the impact of the Annual Allowance and Lifetime Allowance tax rules for pension, which overlapped to some degree with the requirement for Tribunals to gross up awards to ensure that after tax the claimant receives the right amount of compensation.

Finally, shortly before publication of the Principles, the discount rate applied by statute in personal injury claims changed. The Working Group had to revise its approach on that issue.

Particular features

To help parties or representatives with no prior knowledge of such matters, the Principles begin with a summary of the historical background and an overview of the different types of occupational pension.

Many of the claims which might result in a significant pension loss element are public sector cases, so the Working Group was able to include an appendix summarising the provisions of the main public sector defined benefit schemes. This is intended to help Tribunals make an appropriate assessment of such loss in cases where the parties have not been able to provide the relevant information.

As well as setting out the broad principles to be applied in appropriate cases, the Working Group also prepared a number of examples of those principles in action. These examples occupy about a third of the overall document.

The Principles also provide parties, representatives and Tribunals with links to website resources, such as the online HMRC calculator for tax purposes. This embodies the hope that the Principles will be a usable and practical tool.

Promulgation

The Principles were formally promulgated in August 2017 under cover of Presidential Guidance issued jointly by the Presidents. The Guidance set out the expectation that Employment Tribunals would have regard to the Principles when calculating compensation for pension loss, although arguments from parties that a different approach should be taken will always be considered. Links were provided in the Presidential Guidance to the online version of the Principles. The Principles began with a Foreword from the Senior President of Tribunals, Sir Ernest Ryder, commending them to litigants and practitioners.

Training

Before publication of the Presidential Guidance, members of the Working Group spoke at meetings of the Employment Lawyers' Association and the Industrial Law Society to raise awareness of the forthcoming Principles and the approach which would be adopted.

The Principles also formed a key component of the training of Employment Judges in the second half of 2017. All Employment Judges attended regional training at which a member of the Working Group delivered a half-day session on the Principles, including group work. Suggested standard Case Management Orders were provided as part of that training.

Importantly, the Working Group also participated in the creation of e-learning modules under the auspices of the Judicial College. There was a day of filming at the RCJ in London. Members of the Working Group explained and discussed different aspects of the Principles, and these video presentations were edited into short modules accessible through the Judicial College Learning Management System. The availability of these modules was highlighted to Employment Judges nationally as part of the regional training, and they remain accessible as a resource for Tribunals to refresh their understanding of the Principles when the need arises. It is anticipated that this approach will become more common and the experience of the Working Group members in the preparation and delivery of such modules will prove valuable in future training matters. Indeed, this experience has led the Employment Tribunal in England and Wales to set up an in-house digital learning team of judges.

The Principles had a wide target audience: parties representing themselves, professional representatives, Employment Judges, and non-legal members.

Ongoing work

The task of the Working Group is not over: it remains a standing committee. There is a commitment to a regular review of the Principles. Because reviews can be done without any significant cost they are intended to occur much more frequently than previously. The Working Group will be able to respond to significant developments in pensions law and practice, such as future changes to the statutory discount rate. The reviews will be informed by feedback from users. The Principles provide a bespoke email address for feedback. Some useful material has already been received from various quarters.

This article provides some insight into the work that went into producing the Principles. For those tempted to learn more about the fruits of our labour, the full document can be accessed at [*Principles for Compensating Pension Loss*](#), which is located at www.judiciary.uk.

David Franey is an Employment Judge, North-West England

[Back to contents](#)