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**Compensation for Loss of Pension Rights in Employment Tribunals**

Employment Tribunal Presidents

April 2016

**May 2016**

**BIRMINGHAM LAW SOCIETY
EMPLOYMENT LAW SUB-COMMITTEE PENSION REVIEW**

# Introduction

## The purpose of the current consultation exercise is to implement a review of the way in which Employment Tribunals pension loss. In essence it is proposed that the current Guidance, with which many of us will have worked over the years, is dropped to be replaced by a set of basic principles.

## The consultation paper, from March 2006, contains a relatively detailed background explanation of the various elements of pension loss which fall to be considered namely the basic state pension, additional state pension, defined benefit ("DB") and defined contribution ("DC") and other schemes.

## The aim of the consultation is to have a common, indeed "one size fits all" approach to these issues. It is fair to say that "one size fits all" may result in no one having a particularly good fit, but one can see why the tribunals would want to avoid:

### expensive actuarial evidence being brought in cases either where it is not proportionate (or indeed needed at all); and

### with the decline of DB type benefits they are looking to move to a system where a "simplified" approach leaves the majority of Claimants in the same position i.e. claiming contributions that they would otherwise have lost.

## The consultation paper anticipates that there will in fact be a two-tier system as follows:

### "simple" cases where the loss of future contributions is the sole method of assessment; and

### complex cases (few in number) where, if the parties are unable to agree on settlement of the prospective pension loss, that loss would be assessed separately from any other claim for compensation in a two stage process. The first would be based on the "Ogden" tables and, if that is inappropriate or unsuccessful, then the tribunal would take actuarial evidence from a jointly instructed expert.

## The specific questions in the consultation paper are set out below and I have, for the moment, put forward suggested answers on behalf of the BLS Employment Committee.

**Question 1**

The working group proposes that the tribunal operates a default assumption that the 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 stage. Please say whether you agree or disagree, explaining why.

**Response**

Disagree.

Although statistical evidence suggests that the majority of those retiring from the workforce do so at or about the state pension age it is by no means an absolute position. At present there is every indication of greater flexibility regarding retirement and working past those default ages. It is the committee's view that an assumption on this basis should be avoided. It would be preferable were the tribunal to be allowed to hear evidence from the parties as to the intention (of the Claimant) and the expectation or argument put forward by the Respondent. We do not regard the likely time spent as disproportionate and, even where time is spent on this issue, it would be preferable to have the argument aired rather than people are subjected to an arbitrary report.

Comment to Committee members: Clearly there is a lot to be said for this in practical terms but somehow it feels wrong. Why should we assume that everyone will go at 65? I can see problems over evidencing what might happen on either side so we end in a fight about it and some very "rule of thumb" decisions. If the majority are against me on this let me know.

**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.

**Answer**

Agree.

Although there are circumstances in which an extended period of unemployment could result in a material loss of state pension (even after account is taken of the simplification of the state pension provision). The proportionate loss of accrual over the 35 year working life anticipated in current legislation is unlikely to be proportionate to the number of cases in which the degree of future unemployment is material. As such the suggested assumption will result in a simplified and more straightforward system.

Comment to Committee: The point which tips the balance is really about the marginal impact over 35 years in the state pension.

**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.

**Answer**

Agree.

The revised "single-tier" state pension and the extended qualifying period is in our view unlikely to disadvantage any individual Claimant to a material extent. The position, in our view, should be one of presumption but it should be open to individual Claimants to explain why it is that should not apply in their case.

Comment to Committee: Again a question of proportion. The "additional state pension is being phased out

**Question 4**

The working group proposes that the Tribunal operates the 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.

**Answer**

Agree.

It is our view that a default assumption, the Claimant being allowed an opportunity to displace that assumption, would be an appropriate way forward. The current system allows prospective Claimants to raise arguments about future prospective AVC contributions in circumstances where their ability to make such payments even during continuing employment (and their past record of having done so or not) is open to argument. Even if such evidence is brought before the tribunal there is then the question of the actuarial assumptions as to growth etc. which should be applied to those AVCs. If an individual wishes to make the argument i.e. because their own past conduct gives them clear evidence of having acted in this way, then it remains open for them to do so. We do not believe that many such cases will arise as the future loss of AVCs in our collective experience is rarely litigated.

Comment to Committee: I can see that where someone has a clear history of material AVC contributions there is a live issue – they would probably have continued in that way. How many such cases are there in practice? Again, it can be argued either way and if the majority take the opposite view that is fine.

**Question 5**

The working group proposes that the Tribunal operates the following default assumptions in a simple DC case when a 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; and
		- 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 a 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.

**Answer**

Agree.

As a starting point, and with auto-enrolment being close to mandatory across all sectors, membership at a minimum level is appropriate. It is then open to the Claimant that argue that the loss is not adequately considered or for the Respondent to argue that the position with any known alternative employment is an improvement on the basic.

Comment to Committee: As a starting point this seems fair although I query how much time will be saved.

**Question 6**

The working group proposes that the Tribunal operates the following default assumptions in a simple BB case:

* + - Reliance only on the contributions method, being 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.

**Answer**

Disagree.

This is a complicated area but not one in which we believe this degree of simplification provides an acceptable outcome. Those employed in DB schemes, and who can obtain employment only in less beneficial DC schemes, face a material adverse impact on their long term pension provision. Given the decline in open DB schemes, and the increasing likelihood that those being forced to look for employment will only have DC schemes available to them this is a live issue. We accept that over time, as the number of DB schemes open to accrual declines the issue will be of less concern

As an alternative to the proposal put forward we suggest that the following may represent a more attractive proposition which represents a balanced outcome for all parties:-

### where the Claimant leaves a DB scheme, but obtains alternative employment in another DB scheme then it is assumed that there is no loss.

### Where unemployment is in excess of three months, or it is clear that there is no material prospect of obtaining employment with equivalent DB benefits, then a full loss basis should be used by the Tribunal.

Comment to the Committee: this is a complex issue. The loss of DB benefits and the move to a new employer with only DC benefits is the one scenario where really very material long term damage is going to be done to pension earnings. We cannot compensate for the changes in the market, but individuals should have a proper remedy in terms of their recovery for the loss of the long term growth in value of the DB scheme. Clearly this is going to be capped in unfair dismissal cases by the overall compensation limit leveland in practice there may be very few cases where it is material other than in discrimination

**Question 7**

The working party 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 loss0.
	+ 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 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.

**Answer**

Agree subject to the comments made below.

Within the tribunal context the number of complex cases is in our own view and experience likely to be limited. The upper limit on unfair dismissal awards means that there will be few cases outside discrimination claims where very large awards for pension loss are likely to be made.

The two stage approach is realistic and proportionate in our view. There are material arguments that the Ogden tables do not produce an appropriate discount rate in current market circumstances and it would be preferable in every case (and the number of cases is likely in our view to be extremely limited) where an actuarial approach is taken in any event.

We note and endorse the active consideration of judicial mediation. That said, in the mediation context, it seems likely that the mediator and both parties would benefit materially from clarity around the actuarial approach that is going to be required. If judicial mediation is to be encouraged materially then it is our view that specific additional training ought to be provided for judicial mediators.

Comment to Committee:I think the actual number of cases where any of this is going to be relevant is extremely limited but I am open to arguments to the contrary. There is commentary (which has been passed to me) that the Ogden tables represent an optimistic view as to returns on investment and so actuarial expertise ought to be sought at all times.

**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 use one approach over the other?

**Answer**

Our only suggestion at this stage is to identify in any particular case whether the overall level of compensation likely to be awarded is going to render additional consideration of prospective pension loss as irrelevant. An example might be where, at the point of the hearing, the relatively high earner has already been unemployed for an extended period. In the majority of cases the "simple" approach will be appropriate. It is more likely in our view that the "complex" case scenario will arise, and more detailed actuarial evidence will be required, where discrimination claims are made.

**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 calculate loss of pension rights?

**Answer**

Nothing further to add.



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**John Hughes**

**President**

**Birmingham Law Society**