



## **Bar Council response to the Ministry of Justice consultation on “Compensation for Loss of Pension Rights in Employment Tribunals”**

1. The General Council of the Bar of England and Wales (the Bar Council) welcomes the opportunity to respond to the Ministry of Justice consultation on “Compensation for Loss of Pension Rights in Employment Tribunals”

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board

**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.**

4. We agree with the proposal that the Tribunal operates a default presumption that claimants will retire at state pension age. However, we consider that the default assumption should be treated as readily rebuttable *by either party* and that the assumption should not be treated as too high a standard. It is possible to envisage a wide range of situations in which losses would continue after or cease before state retirement age and even limited evidence should be capable of rebutting the assumption provided the Tribunal is satisfied on the balance of probabilities.

5. We consider that it is necessary for any guidance to explain this point in clear terms. There is a risk that some unrepresented parties (particularly those nearing state retirement age) will hear of the default assumption and presume that they cannot get losses after a certain age.

6. The guidance should also make clear that the assumption only operates in respect of pension loss and that there is no such assumption in respect of losses generally.

**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.**

7. We agree with this proposal. The rationale provided in the consultation document and in particular at paragraph 41 is sound.

8. Taking into account the need to mitigate losses, the circumstances in which a party will fail to accrue 35 years national insurance contributions due to the actions of a Respondent will be extremely limited indeed.

**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**

9. We agree with this proposal for the reasons given at paragraphs 43 & 44 of the consultation document.

**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.**

10. We understand the rationale behind this proposal but express a degree of caution.

11. Paragraph 58 states "*...those contributions are deducted from the employee's own salary and her or she is still free to make contributions of the same amount to a personal pension from what ever sum the tribunal awards in respect of salary loss.*"

12. Insofar as the working group recognises that where AVCs are contingent upon employer contributions then plainly the above point does not hold good: the employee cannot simply match a sum which he or she would otherwise have entitled to pay in.

13. Further, the working party's approach requires frequently unrepresented parties to understand a significant nuance when drafting a schedule of loss.

14. At present, the vast majority of schedules of loss will be drafted on the basis of 'net pay' in the compensatory element. 'Net pay' is seen as the amount in the bottom right hand corner of the payslip and the sum received by the employee in their pocket. Pension loss is then dealt with under a separate sub-heading within the compensatory award.

15. Where the case is of a larger value and the drafter has appreciated that there may be tax implications, the drafter will include gross pay as part of the calculation of the schedule of loss. We have experience of a number of cases that fall within this category and yet the schedules have been drafted on the basis of net loss as the taxation point has not been appreciated; the point being that many people operate on a simple notion of gross pay for basic awards and net pay for compensatory awards, without realising that their approach may be incorrect.

16. If paragraph 58 is right, in a situation whereby there is no taxation issue then the correct figure to be used in the schedule of loss to calculate a week's pay for compensation purposes will be net pay plus the employees' pension contributions. There is a risk that unless this nuance is clearly explained in simple terms in the guidance, claimants will lose out as they will be compensated on the basis of 'net pay' and the employee contributions will fall to be made from a smaller (and incorrect) figure of the sum in the bottom right hand corner of the payslip.

**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.**

**Please say whether you agree or disagree, explaining why.**

17. We agree the assumptions are sensible in a straightforward case.

18. We consider that in order for these assumptions to operate effectively, sensible and prompt disclosure of relevant information is required to enable a claimant to have access to the correct figures. The necessary information is often disclosed late in the day, which is one of the factors that leads to the unhelpful 'TBC' statement on schedules of loss.

19. We would also welcome clarity as to whether employer contributions under a defined contributions scheme count will be treated as part of a 'week's pay' in s.221 ERA 1996 for the purposes of calculating the statutory cap.

**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.**

20. While we accept that an assumption that enhancement is not possible is not perhaps a safe one to make, noting paragraphs 93 and 94 in particular, we disagree that reliance on only the contributions method should be the (effectively reversed) default position. However, this does not automatically lead to the conclusion that the value should be zero. In other parts of the consultation whereby the value of something has altered over time or an assumption is made, the basis for it appears to be on a sound footing. In this respect, the reasoning in the consultation is that the assumption is more risky therefore the value is likely zero rather than the assumption is more risky and 'this is the way to reflect that risk'. With defined benefit schemes, it may be that some stand the test of time and that those schemes which do survive have a robustness for the future.

21. We agree that successful mitigation should result in no loss of pension benefits. We consider that in any guidance document, guidance should be given to Judges that any finding in respect of a party joining a similar scheme in the future should be clearly reasoned. It should not be assumed that someone leaving a defined benefit scheme would most likely be in a defined benefit scheme in their future employment. It is right to say that some individuals leaving a defined benefit scheme will be able to enter a further such scheme, but there will be

a significant number of cases in which an individual who has the stigma of dismissal behind them will be more likely to obtain employment where the pension is based on defined contributions.

22. We agree that where the mitigation is an inferior scheme, the assumptions stated in question 5 should be applied.

**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.**

23. We agree that on the face of it, this approach appears sensible. However, upon consideration we have struggled with practical points in respect of the first stage of this process. We consider that Tribunals may struggle to correctly identify those cases which genuinely fall within this category.

24. It is inevitable that a number of claimants will say that a case is appropriate for the complex approach and that no respondent will agree that a case is appropriate for the complex approach.

25. Indeed, it is difficult to envisage circumstances in which a respondent will agree to this approach given the increased cost and the implicit acceptance that there is a risk of career loss. At an early stage in the litigation the respondents default position (irrespective of the facts) is that there is no prospect of significant loss. To accept otherwise would be to make a concession that will embolden the claimant.

26. We consider that the present proposals are likely to lead to even more 'costs threats' as both parties will be looking to entrench their position and to put pressure on the other side at an early stage. Each will accuse the other of increasing cost on an 'unreasonable basis within the meaning of the costs rules. Such 'threats' or 'warnings' are common to an extent possibly unappreciated by the judiciary who would not be aware of such correspondence.

27. At present, schedules of loss are produced following preliminary case management hearings or as a result of the standard orders given upon receipt of the form ET 1. The consultation document is unclear as to what is meant by an 'early stage of case management' and what is meant by 'realistic prospect'. There is a risk of creating 'hearings about hearings'.

28. We consider that in many cases there is a real benefit to having split liability and remedy hearings and experienced tribunals are used to exercising their discretion as to how to conduct such hearings in the circumstances of any given case. Parties with the benefit of a reasoned judgment in respect of liability are often able to make clearer and more well prepared submissions in respect of matters that go to remedy such as the period over which a claimant should be compensated.

29. In the most straightforward unfair dismissal cases (i.e. two days or less) we consider that it is likely to be proportionate and save time to have remedy hearings immediately follow liability hearings. However, in cases which last more than two days, which have greater uncertainty regarding timetabling and the amount of time that the panel have to deliberate in order to make a judgment, we consider that it would be sensible for the default position, where pension losses are claimed, to be that the time estimate for the case is to deal only with matters of liability unless the parties agree otherwise.

30. Once a Tribunal has heard a case, it will be in a better position to understand whether this is potentially a case with significant pension loss and to provide directions regarding expert evidence. The parties can be invited to agree figures on paper, failing which a joint expert is instructed and a remedy hearing takes place. We do not consider that two remedies hearings are necessary in all but the most unusual of cases.

31. A competent professional adviser advising a claimant with a genuinely significant pension loss claim (in cases where the statutory cap doesn't apply) is likely to seek specialist advice at an early stage in order to understand their client's losses. If the case were to settle, they would not wish to undervalue their client's losses. A number of respondents will have access to pension specialists through their professional advisers to advise them in respect of settlement.

32. We also invite the working group to take the following points into consideration:

32.1 In the present standard directions upon receipt of an ET 1, a claimant is ordered to prepare a schedule of loss. There is no order for a counter schedule

of loss. Given the scope for disagreement over pension calculations, we consider that it is sensible that whenever a schedule of loss is ordered either at a hearing or on paper, a respondent is ordered to produce a counter schedule of loss 14 days thereafter.

32.2 We consider that it is important that any joint expert instructed is jointly paid for and that joint payment is an inherent part of a joint expert. There should either be an absolute rule or a strong presumption in favour of this point. If only one party is paying for an expert then it is hard to see how an expert is truly jointly instructed.

**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?**

33. We consider that there is a risk of putting too few cases into the 'complex' category. Our experience of the 'substantial loss' approach under the old guidance is that whilst there are a lot less substantial loss cases than simple loss cases is not apt to describe them as 'rare'. Rather, a majority of cases will give rise to the 'simple' approach and minority of cases will give rise to the 'complex' approach.

34. We consider that where a claimant opts for the complex route, they should also be obliged to include a calculation under the simple approach. That way, if the Tribunal disagrees at the remedy stage as to the correct approach, the simple figures are available.

35. We reiterate what we have said in respect of question 8 and the respondent being obliged to provide a counter schedule of loss.

**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?**

36. We consider the following points would assist:

36.1 The guidance must require any pension calculation to set out how pension is calculated to enable to the Tribunal to see the method of calculation. A simple bold figure is unacceptable.

36.2 We consider that it is essential that the principles of *Polkey* and mitigation are clearly explained in any guidance. Whilst professional advisers have a good understanding of these principles so as they relate to compensation generally, we have experience of advisers not realising (for example) that pension loss was subject to the employee making reasonable attempts to mitigate their loss and enter a new pension scheme.

- 36.3 The government is currently consulting in respect of the taxation provisions that apply to compensation arising out of the termination of employment under the Income Tax (Earnings and Pensions) Act 2003. Any such guidance should identify to the parties the application of taxation where appropriate and be updated when the position changes should the government legislate in this area as a result of the consultation.
- 36.4 The overview of the types of pension available which appears in the consultation document in plain language is likely to assist litigants and advisers alike and we would invite the working party to include some of this valuable information in the preamble to any such guidance.
- 36.5 It may be useful to provide sample / model schedules of loss including pension losses.

**Bar Council**  
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