

Employment Lawyers Group NI

Pension Loss in Employment Tribunal Claims

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- Introductions
 - Nicola Niblock
 - Stephen Burns
- History of pension loss
- Current position
- Different types of pension schemes
- Ogden Tables
- Grossing up
- Financial loss in other types of employment cases
- Questions

- Compensation for Loss of Pension Rights – Employment Tribunal - 3rd Edition
 - Applied up to 2 – 3 years ago
 - Case of *Griffin –v- Plymouth Hospital NHS Trust* [2014]
 - Main issues with 3rd edition
 - Out of date, issued in 2003
 - Assumed wage inflation was greater than general inflation
 - Couldn't be used for new CARE pension schemes

- Consultation paper issued in March 2016
“Compensation for Loss of Pension Rights in Employment Tribunals”
 - Considered 7 questions / recommendations, the main ones were:
 - No loss in respect of state pension
 - No opt out of auto-enrolment in either but for or alternative employment
 - The applicant would have to demonstrate that they would have got more than the minimum contribution in defined contribution schemes
 - No loss of enhanced pension benefits due to salaries rising faster than general inflation

- It is anticipated that the results of the Consultation paper will be published in April 2017
- At present, and recommended in the Consultation paper, pension loss is calculated:
 - By applying the Ogden Tables and using a discount rate of 2.5% (in line with civil personal injury cases); or
 - More rarely by an actuarial approach (which requires actuarial evidence)
- Need to consider what type of pension scheme is involved:
 - Defined contribution; or
 - Defined benefit (CARE scheme or final salary)

- The employer makes a fixed (usually a % of salary) pension contribution
- Loss then equates to the loss of these contributions over the likely period of employment, less any residual employment

■ Example

- Pension scheme - employer's contribution 5% of basic salary
- Female age 40 at date of hearing of 31 March 2017 (which is also assumed to be the date of dismissal)
- Would have worked to age 65
- Basic salary of £40,000 with an increase to £50,000 in 5 years
- Degree qualification
- Not disabled

Defined contribution - example

Ogden Tables

Table 10 Multipliers for loss of earnings to pension age 65 (females)

Age	-2.0%	-1.5%	-1.0%	-0.5%	0.0%	0.5%	1.0%	1.5%	2.0%	2.5%	3.0%	Age
35	40.30	37.11	34.26	31.70	29.40	27.32	25.45	23.76	22.23	20.84	19.57	35
36	38.51	35.58	32.93	30.56	28.41	26.47	24.71	23.12	21.67	20.35	19.15	36
37	36.76	34.06	31.62	29.42	27.42	25.61	23.96	22.47	21.10	19.86	18.72	37
38	35.05	32.57	30.32	28.28	26.43	24.74	23.21	21.81	20.52	19.35	18.28	38
39	33.38	31.10	29.04	27.16	25.44	23.88	22.44	21.14	19.93	18.83	17.82	39
40	31.73	29.66	27.76	26.04	24.45	23.00	21.68	20.46	19.33	18.30	17.35	40
41	30.12	28.24	26.51	24.92	23.47	22.13	20.90	19.77	18.72	17.76	16.86	41
42	28.55	26.84	25.26	23.81	22.48	21.25	20.12	19.07	18.10	17.20	16.37	42
43	27.01	25.46	24.03	22.71	21.50	20.37	19.33	18.36	17.46	16.63	15.85	43
44	25.49	24.10	22.81	21.62	20.51	19.48	18.53	17.64	16.82	16.05	15.33	44

Defined contribution - example

Table C Loss of Earnings to Pension Age 60 (Females – Not disabled)						
Age at date of trial	D	Employed GE-A	O	D	Not employed GE-A	O
16-19		0.81	0.64		0.77	0.59
20-24	0.89	0.82	0.68	0.84	0.76	0.60
25-29	0.89	0.84	0.72	0.83	0.75	0.61
30-34	0.89	0.85	0.75	0.81	0.75	0.63
35-39	0.89	0.86	0.78	0.80	0.74	0.63
40-44	→ 0.89 ←	0.86	0.80	0.78	0.72	0.60
45-49	0.87	0.85	0.81	0.72	0.64	0.52
50	0.86	0.84	0.81	0.64	0.55	0.43
51	0.85	0.84	0.81	0.60	0.51	0.40
52	0.84	0.84	0.81	0.56	0.46	0.36
53	0.83	0.83	0.81	0.50	0.41	0.32
54	0.83	0.83	0.82	0.44	0.35	0.27

Defined contribution - example

Calculation of multipliers

Discount rate 2.5%

	Non adjusted	But for Employed D Not disabled 0.89 11.00%			
Loss for life (Table 2)	27.76				
Loss of earnings to age 65 (Table 10)	18.30	16.29			
Loss of pension from age 65	9.46	8.42			
		No. of years	Table 28 Cum	Mult	But for
Splits - loss ER pension					
01-Apr-17	31-Mar-22	5.00	4.70	4.70	4.11
01-Apr-22	31-Mar-42	25.00	18.65	13.95	12.18
				18.65	16.29
Discount factor - Table 27					
01-Apr-17	31-Mar-42	25.00	Table 27 0.5394		

Defined contribution - example

Loss of employer's pension contributions

Future - 2.5% discount

From	To	Annual gross £	Annual employer's pension contribution		Multiplier	Total in period £
			%	£		
01-Apr-17	31-Mar-22	40,000	5%	2,000	4.10	8,209
01-Apr-22	to age 65	50,000	5%	2,500	12.18	30,456
					16.29	
Future loss of employer's pension contributions						38,665

- Two main types
 - Final salary scheme
 - “Old” public sector schemes
 - Pension based on salary at date of retirement and years of pensionable service
 - Typically an annual pension and lump sum on retirement
 - CARE scheme
 - “New” public sector schemes – since April 2015
 - Pension is based on salary throughout career
 - Annual pension, but with an option to commute
 - Much more complex to calculate

■ Example

- Female age 40 at date of hearing of 31 March 2017 (which is also assumed to be the date of dismissal)
- Would have worked to age 65
- Commenced employment at age 25, has current salary of £40,000 increasing to £50,000 in 5 years
- Degree qualification
- Not disabled

Defined benefit - example

■ Final salary scheme

HSC/ NHS Pension - final salary scheme (illustrative example only)

1995 section scheme

	£
Annual pension	
Rate of pay on retirement	50,000
Pensionable years	40.00
Scheme	<u>80</u>
Expected annual pension from age 65	25,000
Tax	<u>4,359 *1</u>
Total net annual pension	20,641
Multiplier from age 65	<u>8.42</u>
Total annual pension	173,782
Lump sum	£
Lump sum entitlement ($£25,000 \times 3$)	75,000
Discount to 31 March 2017	<u>0.5394</u>
Total lump sum pension	40,455

*1 - Assumes tax personal allowance set against state pension income first

Defined benefit - example

■ CARE scheme

HSC/ NHS Pension - final salary and CARE scheme

Future - 2.5% discount

1995 section scheme

Pension scheme to 31 March 2015

Annual pension	£
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Rate of pay on retirement	50,000
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Pensionable years to 31 March 2015	13.00
Scheme	<u>80</u>

Expected annual pension from age 65	<u>8,125</u>
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Lump sum	£
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Lump sum entitlement ($£8,125 \times 3$)	24,374
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Discount to 31 March 2017	<u>0.5394</u>
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Total lump sum pension	13,147
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Defined benefit - example

2015 CARE scheme

Pension scheme from 1 April 2015

								Cumulative
From	To	Pensionable pay £	Accrual factor 1/54	No. of years £	Actual pension accrual		Revalue	Revalued
					2015 scheme	Pension @	rate @	2015 scheme
					pension £	31-Mar £	31-Mar CPI + 1.5%	pension £
Past accrual								
01-Apr-15	31-Mar-16	40,000	741	1.00	741	741	1.5%	752
01-Apr-16	31-Mar-17	40,000	741	1.00	741	741	2.5%	1,530
Future accrual								
01-Apr-17	31-Mar-18	40,000	741	1.00	741	741	1.5%	2,305
01-Apr-18	31-Mar-19	40,000	741	1.00	741	741	1.5%	3,091
01-Apr-19	31-Mar-20	40,000	741	1.00	741	741	1.5%	3,889
01-Apr-20	31-Mar-21	40,000	741	1.00	741	741	1.5%	4,700
01-Apr-21	31-Mar-22	40,000	741	1.00	741	741	1.5%	5,522
01-Apr-22	31-Mar-23	50,000	926	1.00	926	926	1.5%	6,545
01-Apr-23	31-Mar-24	50,000	926	1.00	926	926	1.5%	7,583
01-Apr-24	31-Mar-25	50,000	926	1.00	926	926	1.5%	8,636
01-Apr-25	31-Mar-26	50,000	926	1.00	926	926	1.5%	9,705
01-Apr-26	31-Mar-27	50,000	926	1.00	926	926	1.5%	10,791
01-Apr-27	31-Mar-28	50,000	926	1.00	926	926	1.5%	11,892
01-Apr-28	31-Mar-29	50,000	926	1.00	926	926	1.5%	13,011
01-Apr-29	31-Mar-30	50,000	926	1.00	926	926	1.5%	14,146
01-Apr-30	31-Mar-31	50,000	926	1.00	926	926	1.5%	15,298
01-Apr-31	31-Mar-32	50,000	926	1.00	926	926	1.5%	16,467
01-Apr-32	31-Mar-33	50,000	926	1.00	926	926	1.5%	17,654
01-Apr-33	31-Mar-34	50,000	926	1.00	926	926	1.5%	18,858
01-Apr-34	31-Mar-35	50,000	926	1.00	926	926	1.5%	20,081
01-Apr-35	31-Mar-36	50,000	926	1.00	926	926	1.5%	21,322
01-Apr-36	31-Mar-37	50,000	926	1.00	926	926	1.5%	22,582
01-Apr-37	31-Mar-38	50,000	926	1.00	926	926	1.5%	23,860
01-Apr-38	31-Mar-39	50,000	926	1.00	926	926	1.5%	25,158
01-Apr-39	31-Mar-40	50,000	926	1.00	926	926	1.5%	26,475
01-Apr-40	31-Mar-41	50,000	926	1.00	926	926	1.5%	27,812
01-Apr-41	31-Mar-42	50,000	926	1.00	926	926	1.5%	29,169
				27.00				

Defined benefit - example

Annual pension:

	£
1995 Section pension	8,125
2015 CARE pension	<u>29,169</u>
Total gross annual pension	37,294
Tax	<u>6,936</u> *1
Total net annual pension	30,358
Multiplier from age 65	<u>8.42</u>
Total annual pension	<u>255,593</u>

*1 - Assumes tax personal allowance set against state pension income first

- Points to consider
 - When is this likely to commence
 - What type of employment and pension scheme
 - Even if public sector very unlikely to be a final salary scheme
 - As a minimum they are likely to be eligible for auto-enrolment (if salary is over £10,000) with employer pension contribution increasing to 4%

- In all but simple cases will need to use Ogden Tables
 - Tables are provided for retirement ages of 50, 55, 60, 65, 70 and 75 for both male and female
 - For most people currently in employment the state pension age is between 66 – 68 (therefore have to interpolate)
 - Have to calculate for actual age at date of hearing e.g. 40.27 years of age (therefore have to interpolate)
 - Need to apply additional discount for other contingencies in life

- Review of the discount rate to be applied, announcement expected by the Lord Chancellor by 31 January 2017
- Current rate of 2.5%

➤ Example of the impact a reduction in this rate could have

	2.5% discount			2% discount			Increase in loss
	Annual cost * £	Multiplier	Future loss £	Annual cost * £	Multiplier	Future loss £	£
Loss of ER's pension contributions							
future - to age 65	2,374	16.29	38,665	2,379	17.20	40,933	2,268
Pension but for the cause of action (NHS final salary)							
future - annual - from age 65	20,641	8.42	173,782	20,641	10.15	209,420	
future - lump sum - at age 65			40,455			45,713	
			214,237			255,133	40,896
Pension but for the cause of action (NHS final salary & NHS CARE)							
future - annual - from age 65	30,358	8.42	255,593	30,358	10.15	308,008	
future - lump sum - at age 65			13,147			14,856	
			268,740			322,864	54,124

* Average – minor rounding differences

- Is pension loss taxable?
 - Ongoing review by HMRC on this and other areas of employment related compensation
 - Recent cases would indicate it is taxable:
 - *Patricia Flanagan –v- Belfast Metropolitan College*
[case ref 1085/15]
 - Therefore pension loss should be included in the grossing up calculation
 - Grossed up value cannot be more than statutory cap where this applies
 - In a lot of cases it can only be accurately calculated at the end of the tax year

Grossing up - example

- Total compensation (before grossing up) is £40,000 (employee continues in same employment)
- Applicant's other taxable income in the year is £40,000

Current Gross £	Current net £	Required additional net £	Total required net £	Annual gross £	Tax £	NIC £	Annual net £	Additional gross required £
40,000	30,480	40,000	70,480	113,193	37,116	5,597	70,480	73,193

Summary of pension loss

- 3rd edition is now irrelevant except in exceptional circumstances
- Ogden Tables should be used except for simple cases where loss is for a very short period of time
- Most public sector and large private sector schemes are now defined benefit CARE schemes which will require a “full” calculation
- Remember the effect of auto-enrolment
- Don’t forget about the loss or delay of promotion - it could be significant

- Loss of earnings
 - Deduction for pension contributions
 - Defined benefit schemes
 - Delay in career / loss of promotion
 - Risk of periods out of work/having to leave work early
 - Loss of employment or unable to return full time
 - Alternative employment
 - Is it more risky
 - Chances of promotion
 - Loss of benefits e.g. company car / other allowances
 - Loss of overtime
 - Variable earnings
 - Comparable employees

- Care
 - If sizeable may require a care expert
 - Deductions for care provided by family
- Case Management
- Aids and equipment
- Motor vehicles/adaptation
- Accommodation/special adaptations
 - *Roberts -v- Johnston* rule (additional income tied up in a more expensive property and wasted costs)

- Therapies
 - Speech and Language Therapy (“SALT”)
 - Physiotherapy
 - Hydrotherapy
 - Assistive Technology (“AT”)
- Private medical costs/prosthesis costs
- Loss of services, DIY, housework
 - Adjustment from “old” age

- Deputyship costs
 - *Whiten -v- St Georges Healthcare NHS Trust*
 - *KD (a minor) -v- Belfast Social Health and Care Trust*
- PPO
 - In large cases now very common
 - Usually not appropriate if there is significant contributory negligence

Any questions

