Compensation for Loss of Pension Rights in Employment Tribunals
Discrimination Law Association response

Introduction

The Discrimination Law Association ("DLA"), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information, and the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

The DLA is a national association with a wide and diverse membership. The membership currently consists of over 100 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

The DLA is disappointed that the paper on compensation for loss of pension rights in employment tribunals was sent out for consultation without an equality impact statement, or equivalent, showing clearly that the Working Group had indeed given due regard to its PSED by setting out its views on the potential impact on protected groups.

In deciding compensation claims under the Equality Act 2010 as well as under other jurisdictions, a tribunal exercises public functions. The consultation paper bears no sign that the Working Group gave thought to the potential impact of its proposals on any of the protected characteristics.

The DLA, drawing on the work of the House of Commons Work and Pensions Committee, has identified that people with existing gaps and predictable gaps in their employment history are likely to be affected adversely. In particular, the impact on those with fewer than 10 qualifying years who are excluded from the new state

pension has not been addressed. Women and disabled people are most likely to be affected. In the case of women, this is also due to the end of derived pension rights: they can no longer rely on using their spouse's contributions but must depend on their own contribution record. Others with shortened UK working histories will be affected also, the likely candidates being people coming to the UK from abroad, ie foreign nationals and refugees.

It is disappointing that this Working Group did not integrate or demonstrate that it had integrated equality into its work. That failure inevitably makes the consultation exercise less effective.

Legitimate expectation - transitional provision

The calculation of substantial pension loss, particularly for members of final salary pension schemes, is a significant part of compensation for acts of discrimination. Where claimants have run their cases on the basis of the 2003 Guidance, as shown in a schedule of loss, or equivalent contemporaneous indications of reliance on the 2003 Guidance, prior to the availability of this consultation paper, it would be unfair to switch to the new guidance. In cases funded by legal expenses insurance, the resulting change in the cost / benefit analysis may mean that it is no longer proportionate to continue funding. If a claim has been case managed and run on the basis of a significant pension loss, as calculated under the 2003 Guidance, the default assumption should be that the 2003 Guidance continues to apply.

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.

Whilst on the face of it the proposal appears to have merit, the DLA is concerned that the proposals place an additional burden on claimants who intend to work beyond normal retirement age, and there is a risk of indirect discrimination. We consider that there is a real risk that the proposed approach will have an adverse impact on some claimants, and for some of those it will be substantial. We consider that the use of an assumption of a fixed retirement age will impact not just on people nearing retirement age who do not wish to retire at 65, or at their actual state pension age where that is lower, but also on those claimants who have missed out on the opportunity to accrue the requisite maximum number of years contribution to a workplace pension scheme. These claimants are more likely to be women who have taken time out of work to look after children or disabled people whose health may have prevented them from working.

The assumption of retirement at the individual's state pension age will place an additional evidential burden on these claimants. The proposal sounds simple but is not because of variable state pension ages as women move towards the common

state pension age of 65 years by November 2018. Thereafter state pension ages for both sexes increases by further steps to 68 years by 2044-46.

We would suggest that the current obligation upon a claimant to set out the basis upon which they claim loss in a schedule of loss, including their expected retirement date, is sufficient.

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.

This repeats the assumption made in the 2003 Guidelines at 2.13. It is too sweeping a claim. Unpicking it requires engaging with the building blocks of both the old and new pension schemes. Understanding is essential to any determination of loss.

Onus on claimants

The most likely evidence a claimant will, or should, adduce is the pension statement and/or forecast produced by the DWP's Pension Service. Given that the Work & Pensions Select Committee is 'extremely concerned' at the evidence that pension statements and forecasts are confusing, sometimes contradictory and do not provide people with essential information, it is not sufficient to leave the onus on claimants. Tribunals also need some assistance.

The new guidelines should set out the basis of each assumption made and identify the factors relevant to a tribunal's decision on pension loss.

That is important because the consultation paper reflects common misunderstandings about the pre- and post-6 April 2016 state pension schemes.

Problems not recognised

There is no sign from the paper that it recognizes that the problem with the building blocks of the old state pension continues with the new state pension.

The lay out of the paper, by the headings, implies that the basic building blocks of LELs, UELs, qualifying years, and other technicalities too detailed for a tribunal to trouble itself over, are important only for the old pre-6.4.16 state pension. However, amendments made by the Pension Act 2014, Schedule 12, mean that the building blocks for the new basic state pension remain essentially the same. Qualifying years do become 'pre-commencement qualifying years' and 'post-commencement qualifying years' but the substance of each is unchanged.

If a tribunal does not understand the concepts, and has little help towards understanding the concepts, to say that the onus lies on the claimant is meaningless.

New and old

For those retiring on or after 6 April 2016 (but not women born between 6 April 1951 and 5 April 1953 who stay in the old scheme, unlike men of the same age) the pension accrued under the previous schemes is compared to the 'starting point' of £155.65 (the full amount of the new State Pension (nSP) as at 6.4.16).

This requires first working out entitlement under the old state pension on the basis that the person retired at 6.4.16. That figure includes the earnings related elements of graduated retirement benefit, earnings related supplement and state second pension.

Next, reconsider the history of qualifying years under the nSP rules. Although the basic pension remains the same, earnings related additions disappear.

Whichever is the higher is the foundation starting amount.

An individual's starting amount is the higher of what they accrued under the old system or what they would have accrued under the new system had it been in place at the start of their working life, with deductions for periods of reduced NI contributions while contracted-out of the additional state pension.

Thereafter:

> Each full qualifying year a worker adds to his or her NI record from 6 April 2016 results in an extra £4.44 (£155.65/35) per week extra up to a maximum of the full level of the new State Pension.
>
> But
>
> For each year in which the worker was 'contracted-out', £4.44 is deducted from the starting amount.

Qualifying years - who is affected?

The building blocks problem impacts on low paid, zero hours and part-time workers. Identifying the actual impact depends on analysis of the composition of these groups. However, women and people with disabilities are more likely to be disadvantaged, being likely to experience such gaps because of pregnancy, maternity, child care and illness. Those coming or returning from abroad, as well as refugees and EU or other foreign nationals are also likely to be affected. Moreover, gaps in employment because of discrimination in relation to all of the protected characteristics also occur.

Fewer than 10 qualifying years

The exclusion from the nSP of people with fewer than 10 qualifying years (unlike the old SP) also means that for those with under 10 qualifying years, the loss of a single year has a greater potential impact than it does for those who have already satisfied the minimum condition. The DWP has projected that in the years to 2020 around 20,000 people in GB will reach state pension age with fewer than 10 qualifying years. As a proportion, twice as many women as men are affected.

Thereafter, as a reduced rate nSP is paid at 1/35 x the number of qualifying years, the loss of just one qualifying year would lead to the loss of nSP amounting to £4.44 a week, or £230.88 a year, at current rates.

Derived rights

The end of derived rights to a pension based on the NI contributions record of a spouse or civil partner mainly impacts upon women. In working out their starting amount, derived rights are excluded (except where they had retained their 1977 right to pay a reduced 'married woman's' rate of NI). The DWP estimates that in the years to 2030, some 290,000 people will be affected adversely.

The effect is that where people have relied on the ability to get a 60% state pension (full rate on bereavement), they will already have made choices sensible in that context. For them, the loss of a single qualifying year has a greater potential impact. The 'plenty of time' comment in paragraph 41 of the paper is simply unreal. Women and civil partners in this group face a real loss that should be recognized.

Loss of flexibility

Thinking more broadly about loss, it is not just a measurable impact on the value of the ultimate state pension that counts. There is also a real current loss: the cut to the number of years now available in which to satisfy the contribution conditions. This reduces flexibility. The cut in the number of possible qualifying years before state pension age reduces ones options regarding future choices (say, to return to full-time education to re-train) and increases the prospect of the exigencies of life affecting the ability to satisfy the contribution conditions. This perspective also has to take account of age and the number of qualifying years already gained.

Future disability, or the deterioration of existing conditions may cut the number of years available in which to satisfy the contribution conditions. For women, the prospect of past or future time out for child or elder care is also realistic.

Credits

The conditions for contribution credits are changeable and cannot be relied upon to plug any gaps in a contribution record. Credits for time on Statutory Sick Pay must

be claimed. Given the cut backs in entitlement to contributory benefits for those whose working ability is affected by disability or a health condition, credits for those who do not meet the new benefit tests cannot be guaranteed. Mental impairment has long been recognized as leading to difficulty in doing all that is required to maintain rights to contributory benefits. There are all too many ways in which people can fall through safety nets.

Variable but real risks

These risks may be variable, but they are real. Ironically, the approach taken in paragraphs 41 and 42 of the paper reflects the 'there's lots of time to think about a pension, so no point in doing anything now' head-in-sand approach to pensions the government is trying to change. There is no reason why the risks cannot be reflected fairly in current compensation.

A notional amount, akin to the standard claim for 'loss of statutory rights' in unfair dismissal, would be a sensible starting point.

Qualifying years –myth and reality

At 20.1 the paper defines a qualifying year as one in which the individual has 'earned more than a specified amount'. It then gives the figure that would have been 52 x the Lower Earnings Limit (LEL) for 2015-16 had two figures not been transposed. The correct figure is £5,824. However, that cannot be assumed to be the worker's actual earnings in that tax year; nor in 2016-17 (the LEL remains unchanged).

First, only earnings on which national insurance contributions (NICs) have been paid or treated as paid (credited) count for the purpose of satisfying the contributions conditions for contributory benefits. In the 2015-2016 and 2016-2017 tax years earnings count only if they are at or above £112 - the lower earnings limit (LEL) for these years. Earnings below the LEL in a week do not attract a notional class 1 national insurance contribution and do not count towards retirement pension or any other contributory benefit. An individual could earn £5,823.99 during a tax year (52 x £111.99 pw) and not have that count as a qualifying year.

Second, that calculation is valid only if earnings are actually paid weekly. If other earnings periods are involved, the picture is different. It depends on the effect of the 'prescribed equivalent' calculated in accordance with reg 11 of the Social Security Contributions Regulations 2001, ie on the effect of the pattern of earnings and on how actual earnings are averaged.

The prescribed equivalent for monthly paid employees is currently £486, or £5,832 a year. Earnings of £485.99 in a month do not count. A monthly paid worker paid that amount each month could earn £5,831.88 in the year and not have the year count as a qualifying year.

Third, where non-weekly earnings periods and low pay are coupled with an intermittent pattern of work, with no or few hours in some weeks, that gap brings down the average. If the average falls below the prescribed equivalent, none of those earnings count towards the contributions conditions.

> For example, work for 33 hours in a week at £7.20 ph amounts to £237.60. An employee paid weekly would pay NIC on all earnings above £155 (the primary threshold) and would be treated as having paid NIC on earnings between the LEL and the primary threshold (£43).
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> If that employee was paid on a 4-weekly basis, working only 2 of those weeks, earnings of £475.20 would be above the prescribed equivalent of £448 (4 x LEL). So all four weeks would count.
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> If, the employee was monthly paid, also working only 2 weeks in the month, earnings of £475.20 fall below the prescribed equivalent of £486 (4 1/3 x LEL)

Conversely, as well as being treated as having paid contributions on £198 (the difference between the LEL and the primary threshold for a monthly paid employee), a higher paid employee could pay sufficient contributions on earnings in a short period. Liability to pay NICs starts at the primary threshold, currently £155 a week or £672 a month. Payment is a percentage of the earnings *between* the primary threshold and the upper earnings limit (UEL), currently £827 a week and £3,583 a month.

Take someone on earnings of £30,000 a year, paid at £2,500 per month. S/he would pay or be treated as having paid contributions on earnings of £2,014 a month (with £198 being treated as paid, the remainder actually paid). It would take just under 3 months at that rate to make the tax year a qualifying year for pension purposes. Lower paid workers, particularly where their work is intermittent, take longer.

Rules of thumb

Thus, there are some fairly simple general rules of thumb:

- the further into the tax year employment terminates, the more likely it is that the year will already be a qualifying year for pension purposes.
- If a tax year already counts as a qualifying year, one must look ahead to the following tax years and predict what is likely to happen
- Whether any pension loss is possible depends on how long unemployment is expected to last.
- If someone signs on and gets contribution-based Jobseekers Allowance, they will also get contribution credits. However, when that ends after 6 months, the credits will also end if they do not continue to sign on to get just credits or to also claim income-related JSA.

- Not everyone will qualify for contribution-based and/or income related JSA. Recent entrants or returners to paid employment and those with gaps in their employment history are less likely to satisfy the contribution conditions.
- If JSA (and / or credits) continue without a gap, the tax year will almost certainly be a qualifying year for pension purposes. The difficulty lies in the risk of sanctions – loss of JSA for just 1 week makes it more likely that the tax year will not be a qualifying year.

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.

The DLA does not agree with this proposal. Where there is a loss, however small, the claimant should be compensated for it if they are found to have been unfairly dismissed or discriminated against. We see no reason for effectively abandoning a head of loss.

The proposal affects the calculation of the old state pension, past loss only. There is nothing in the paper that sets out a principled basis for omitting applying the accrual factors given in the 2003 Guidance.

We note that for those with gaps in their contribution record, more likely to be women who have cared for children or other dependants or those who are disabled, the amount for additional state pension rights may well be a significant part of their pension, giving them more than under the nSP.

We propose that the required simplicity is achieved by the Working Group identifying the equivalent of a notional sum that is seen as fairly reflecting this loss – akin to the sum for loss of statutory rights. Departing from the notional sum could then fairly be seen as being based on a claimant proving that they have suffered a greater loss.

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.

The DLA is neutral on this issue as posed by the paper. However, this should not be presented as a simple default assumption of no loss. If someone has already been

making extra contributions, it should be assumed that that position would have continued or resumed, ie a measurable loss. It is only where no extra contributions have ever been made, or planned, that the paper's default assumption could be appropriate.

Further, the paper does not address the effect of the loss of employment on the ability of the worker to make additional Class 3 NI contributions to help plug gaps in their past contribution record. The deadline for paying voluntary NICs in respect of the years between 2006-07 and 2015-16 has been extended to April 2023.

The ability to make voluntary contributions continues under the nSP. With each qualifying year worth 1/35 of the full nSP, £4.44 a week during 2016-17, plugging a gap in one's contribution record may be sensible.

For example, paying class 3 NICs of £14.10 pw for the whole of the 2016-17 tax year would amount to £733.20. The return on that, based also on 2016-17 rates, would be at least £230.88 a year, recouping the investment within 4 years of taking nSP. If fewer class 3 NICs are required to make 2016-17 a qualifying year, it makes good sense to invest now for the longer-term gain to one's nSP. With 6 tax years in which to decide to pay voluntary NICs, this is an area of potential loss the working group should address.

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.

We consider that these are reasonable assumptions about future pension contributions and scheme membership to make .We would suggest alternative wording in that the that the claimant is required to "take account of" future employer pension contributions.

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.

Response: These assumptions are reasonable ones to make.

Question 7

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.

Whilst we accept that most cases which come before the ETs will not be complex we would emphasise that in discrimination cases pension loss is often a significant element of damages, and in our experience will fall into this category regularly. We are concerned to ensure that the wording of the guidance does not lead to a situation where a claimant with potential substantial pension loss has an additional litigation hurdle placed before them. We consider that the wording of the proposals is sensible, but would urge that it is specifically recognized in the guidance that pension loss, and future pension loss is likely to be significant in some types of case, and that where the claimant identifies this it is accepted that the two stage process will be adopted.

We would also note that the level of any pension loss may not be large in financial terms but may still be a significant amount of the actual loss suffered. A 'significant' award for loss of pension rights is not necessarily more difficult. It depends on the precise issues involved.

We recommend a simple default option of using Ogden tables in all cases where pension loss is likely to continue for 2 or more years.

We have concerns that splitting off liability and remedy at too early a stage may inhibit settlement. There needs to be some pressure as well as practical help to produce reasonable schedules and counter-schedules of loss. We suggest standard directions that

- Claimants should be encouraged to produce schedules of loss that include realistic estimates of pension loss, setting out the factual assumptions made.
- Counter schedules of loss, identifying clearly the factual matters at issue that divide the parties should be encouraged.

We are concerned about the suggestions for the paying of experts, and in particular the suggestion that a claimant may be required to pay for an expert from the award made in respect of other damages by the ET. Whilst on the face of it this is a reasonable suggestion, we remind the ET of research which shows that payment of ET awards to claimants is unreliable at best. We assume that any guidance will take this fully into account.

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?

We consider that an important part of the role of this Guidance should be to help parties and tribunals knowing what questions to ask and why, and what to do with the answers when assessing pension loss. We would like to see guidance in the form of statements about what the claimant or respondent must do as a step by step process.

We would recommend the use of pro forma schedule(s) and/or mini-schedules of pension loss, setting out the elements required for each of the main types of pension loss claim, or for the main components of such claims

We are concerned about the inequality of arms and the additional costs implications of the proposed two stage remedies hearing. Claimants are more likely to be unrepresented and less likely to have access to experienced legal advice and assistance.

We would welcome guidance which specifically addresses the unrepresented litigant. We would also suggest that if the proposal for split hearings is adopted following consultation, that it is clarified in the guidance that the question of the type of hearing can be reconsidered at any time in the proceedings of the judges own volition. For example it may become obvious during a hearing that a claimant has a pension claim which is potentially valuable, and which has been underestimated by all, or even overlooked.

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?

- The Guidance should ideally offer a practical toolkit aimed helping the parties and minimizing judicial time. It should give parties and tribunals the basic tools to tackle pension loss effectively and proportionately.
- This is likely to involve a simple and direct approach to information. (for example the approach of IDS, rather than the more discursive approach taken in Harvey).
- Discussion and history, although interesting, should be kept separate from practical ‘how to do it’ guidance.
- Offering help on case management issues would be useful – eg draft directions and a list of the most obvious relevant questions to ask and answer in particular cases.
- The Guidance needs to remind readers that a balance of probabilities approach is not the only one. A percentage reflection of the chances of a particular loss or event occurring may be fairer in a particular case.
- Although career loss cases may be rare, we consider it wrong to view complex cases as ‘complex’ and as ‘rare’.

- To describe something as ‘complex’ is to encourage people to see and experience the exercise as complex. Once the right tools are in place, the result becomes easier.

- The Ogden tables are straightforward to use once the principles are understood. It is routine to use them in simple personal injury cases; practitioners have little difficulty.

- For CARE schemes, so long as the pension provider has been asked the right questions, it should be simple to work out the career average earnings at the relevant date. In all cases, identify the loss, the period and the discount rate.

- Examples, while useful, are insufficient on their own. Even more helpful is the outline of the principal civil service pension scheme at paragraphs 102 and 103 of the paper.
- To assist parties and tribunals, it would be helpful to compile and include equivalent information for the main public sector pension schemes – the Local Government Pension Scheme, the Teachers’ Pensions scheme, and the NHS Pension Schemes

Discrimination Law Association
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