

Key Points

- Calculating pension loss can be complex, especially where the employee was in a defined benefit pension scheme.
- The Employment Tribunal service published a 2003 guidance note which suggested two methods for approximating pension loss without the need for actuarial advice, but this guidance has now been withdrawn.
- During April and May 2016, the President of the Employment Tribunals (England and Wales) consulted on a new approach to calculating pension loss. The response to this consultation is awaited.
- In higher value cases, the parties may wish to take actuarial advice on pension loss.
- In the context of a negotiated exit, there are several ways to compensate for pension loss. The cooperation of the pension scheme administrators or trustees may be required to implement some of these.

Main sources

- Employment Tribunal guidance: "Compensation for Loss of Pension Rights (Third edition)" (2003) [now withdrawn]: [link](#)
- Griffin v Plymouth Hospital NHS Trust [2014] EWCA Civ 1240: [link](#)

The Employment Tribunal's approach to calculation of pension loss

In cases where a compensatory award is payable, this may include a sum for loss of pension.

The Employment Tribunal Service published guidance (dated 2003) on calculating pension loss. However, following the recent case of Griffin v Plymouth Hospital NHS Trust, this guidance has now been withdrawn. Under the 2003 guidance there were two methods of calculation – the simplified approach and the substantial approach.

Both of these approaches set out a method for calculation of pension loss which the Tribunal viewed as suitable for most cases, by using certain actuarial methods and assumptions based on age and the benefit structure of the pension scheme. The simplified method was based on contribution levels (and was therefore most appropriate for money purchase pension benefits) while the substantial loss approach was more tailored to final salary benefits.

The Guidance was not binding on Tribunals and where the parties could advance good arguments to support their own calculations, the Tribunal could substitute these for the simplified or substantial loss approach.

Griffin v Plymouth Hospital NHS Trust [2014] EWCA Civ 1240

The Court of Appeal noted in Griffin that whilst the simplified approach would apply in the majority of cases, depending on the facts of the case, the substantial loss approach might be appropriate.

The case concerned an employee who appealed on the grounds that her loss should have been calculated under the substantial loss approach. The Court of Appeal agreed due to the fact that her job was highly specialised and that her chances of

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relocating to find work in her field were severely negatively affected by the fact that she suffered from a debilitating illness, which was worsening. The court also commented that the 2003 guidance was out of date.

As mentioned above, the 2003 guidance has now been withdrawn by the government. The Government's website says that "these guidelines are now out of date and have been withdrawn."

In April 2016, the President of the Employment Tribunals (England and Wales) consulted on a new approach to calculating pension loss. The consultation closed in May 2016 and the response has not yet been published.

The proposed new approach to pension loss would adopt two different calculation methods, depending on whether the case was "simple" or "complex".

Under the proposals, compensation in "simple" cases involving either defined contribution or defined benefit schemes would be based on a "contributions method", whereby compensation would be based on the employer contributions to the scheme.

In "complex" cases (which are expected to be rare) a two-stage process is proposed with the parties being encouraged to agree quantum of pension loss in the first instance. In the absence of agreement, the consultation proposes that there would be a second-stage hearing and pension loss would be calculated based on either the Ogden tables, or expert actuarial evidence.

So how will pension loss be calculated going forwards?

In the absence of any updated Tribunal Guidance, parties to a claim often agree amongst themselves what payment should be made in respect of pension loss suffered. In cases where pension loss makes up a significant proportion of the potential

compensation (in particular, where the compensation cap does not apply) specialist actuarial advice may be advisable.

Normal principles such as mitigation of loss apply equally to compensation for loss of pension, but Tribunals will be conscious of the fact that, particularly in the private sector, employees may be unlikely to find new employment which provides final salary pension benefits.

Effect of termination of employment on pension scheme membership

Payment into a registered pension scheme can be tax efficient for both the employee and employer and is therefore a popular method of paying compensation as part of a negotiated termination of employment.

If such a payment is proposed, it is important to check the rules of the scheme permit such payments and whether the consent of the trustees of the pension scheme is required.

Generally speaking, tax relief is only available while the employee is in employment – care should therefore be taken to ensure that payment is made before the termination of employment.

If paying in lieu of notice (PILON), whether pension contributions are payable for the notice period will generally depend on how the PILON clause is worded. As a starting point, pension contributions normally cease to be payable from the effective date of termination, although some PILON clauses may specify that compensation is payable for loss of pension during the notice period.

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