

## Calculating the Compensatory Award: Pensions

Employment tribunals undoubtedly find it difficult to assess pension loss. Their task has been made easier by the booklet "Compensation for loss of pension rights", now in its 3rd edition, produced by a committee of Employment Tribunal Chairmen. These Compensation Guidelines offer two approaches for assessing future pension loss ie *the simplified approach* and *the substantial approach* (see Chapter 9.85). In the light of this Compensation Guidance, the EAT in the recent case of *Greenhoff v Barnsley Metropolitan Council* [2006] UK EAT 0093\_06\_3105 recommended that Employment Tribunals should address pension loss by:

- i. identifying all possible benefits that the employee could obtain under the pension scheme;
- ii. setting out the terms of the pension relevant to each possible benefit;
- iii. considering in respect of each such possible benefit first the advantages and disadvantages of applying the simplified approach or the substantial loss approach and also any other approach that might be considered appropriate by the Tribunal or by the parties;
- iv. explaining why they have adopted a particular approach and rejected any other possible approach; and
- v. setting out their conclusions and explaining the compensation they have arrived at in respect of each head of claim so that the parties and the EAT could then ascertain if they have made an error.

While the EAT made plain this five-stage process is mandatory, they were of the view that the problems that arose in the particular case would not have occurred had this process been followed. In the case, the Tribunal had omitted to compensate the Claimant for loss of a lump sum benefit and had not explained the approach to quantification of loss of pension rights they had adopted.

Choosing between *the simplified approach* and *the substantial loss approach* can make a material difference in the amount of compensatory award. Generally speaking, *the substantial loss approach* will produce the higher award. However, the Compensation Guidelines state that *the simplified approach* will be appropriate in most cases. The recent case of *Network Rail Infrastructure Limited v Booth* [2006] UK EAT 0071\_06\_2206 upheld an Employment Tribunal's selection of *the substantial loss approach*. This is of some interest because the facts of the case did not fall four-square within the circumstances where the Compensation Guidelines suggest *the substantial loss approach* should apply.

Paragraph 4.13 of the Compensation Guidelines states *the substantial loss approach* may be chosen "in cases where the person dismissed has been in the Respondent's employment for a considerable time, where the employment was of a stable nature and unlikely to be affected by

the economic cycle and where the person dismissed has reached an age where he is less likely to be looking for new pastures." As the Claimant was 36 it might be thought she could not be said to have reached an age where she "is less likely to be looking for new pastures". However, the Employment Tribunal decided that *the simplified approach* would not be just and equitable, in that it would produce a loss of pension benefit which is substantially smaller than they considered to be the Claimant's real loss. The EAT would not overturn that conclusion since they considered it was an approach open to the Tribunal because it was more likely than not to lead to a just determination of the issues before the Tribunal. Another Tribunal might have reached a different conclusion but that did not make this Tribunal's decision perverse.

Nonetheless, the Tribunal had gone awry through a slavish adherence to "the substantial loss approach". *The substantial loss approach* draws a distinction between where the Claimant has joined (or is expected to join) a defined benefits scheme and a defined contributions scheme (ie money purchase scheme). In the former scenario, broadly speaking, the Tribunal deducts the actuarial value of the pension with the new employer from the actuarial value of the loss arising from not continuing in the old employer's pension scheme. However, where the new employer is only providing a defined contribution scheme no deduction is made. Instead, paragraph 18 of the Compensation Guidelines states that the Tribunal should, when assessing loss of earnings, compare the difference between net earnings in the old job and net earnings in the new job, including the employer's pension contributions to the defined contribution scheme. Unfortunately, in the *Booth* case it seems that because the Tribunal did not have to compare the difference between net earnings in the old job and the new job, the result was that no account was taken of the provision of the money purchase scheme by the new employer. Unsurprisingly, the EAT held this was wrong. The case was remitted back to the Tribunal to determine what credit for future pension benefits should be. No guidance was given as to how the Tribunal might make this assessment.