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Response to the Tribunal's Judiciary and Employment Tribunals (Scotland) Working Group consultation – Compensation for Loss of Pension Rights in Employment Tribunals

Submission by Prospect to the Working Group of Employment Judges

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Introduction

Prospect is a trade union representing more than 110,000 members who are employed in professional, technical and managerial roles in diverse areas of the UK economy, including civil service, energy, communications and scientific research.

As a strong trade union, campaigning to ensure a fair deal for working people we play an active role in working with policy makers and in representing individual members in employment matters, including in Employment Tribunals. As such we welcome the opportunity to contribute towards this consultation.

Prospect members place an exceptionally high value on workplace pensions. This value is well founded as many remain in defined benefit pension schemes; and where defined contribution pensions are prevalent, these tend to be of a relatively high standard.

Whilst we appreciate moves to simplify the process by which compensation for loss of pension rights is calculated; we believe it is imperative that any reform should not lead to any dilution of these rights.

We accept that there has been a reduction in workers covered by defined benefit or final salary schemes, but not to the extent seemingly assumed in the consultation paper. Within Prospect membership areas there is still a high proportion of defined benefits schemes for our members, both in the public but also private sectors.

In dismissal cases however it is increasingly rare for members having been dismissed from a defined benefit scheme to take up new employment with a defined benefit pension scheme and they are much more likely to move to a defined contribution scheme. So the existing guidance with an element for loss of enhancement is extremely important to ensure that they are compensated appropriately.

It is with all of this in mind that we are submitting responses to the consultation questions.

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.

We note that state pension ages are in a state of flux with changes legislated for and with ongoing reviews in place. We are also keenly aware that in the short terms, state pension ages remain unequalised, meaning that the Tribunal could exacerbate this aspect of gender discrimination until November 2018.

The presumption of retirement age is important for two reasons – firstly it dictates the potential length of employment over which pension loss is measured. Secondly, it can dictate the value of the pension, particularly for a defined benefit pension. For example, if someone was a member of a pension scheme which allowed for retirement at, say, 60 then it could be argued that the value of that pension would be diminished if it was not taken until state pension age (e.g. 66), albeit with 6 years additional service being accrued.

This dichotomy of use of retirement age should be appreciated in applications for defined benefit schemes, which have pension ages which differ from state pension age. For the purposes of assuming how long an applicant remains in work, state pension age seems appropriate particularly in view of statistics on the average at which people leave the labour market[1]. However for someone participating in a defined benefit scheme, tribunals do need to take into account the fact that earlier retirement on a full pension is both possible and highly likely for members. These views also inform our position in respect of question 6.

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.

Prospect disagrees. This is a potentially dangerous assumption to make and could lead to significant detriments. Prospect appreciates the fact that working lives may be as high as 50 years and that under the new state pensions system, new workers will only need 35 years of National Insurance to qualify for the full state pension. However, we are mindful of the fact that under the transition from the old system to new, many people who have a long history of having been contracted out (with even more than 35 years of National Insurance payments), their “Starting Amounts” will be of the order of £120 per week and they will need another nine years of National Insurance payments to reach the full new state pension of £155 per week.

This complexity, which many (including the Dept for Work and Pensions Select Committee) agree has not been well communicated to the public, means that assumptions that long serving workers have maximised their state pension entitlement is erroneous.

If an individual check on National Insurance record and consequential state pension entitlement is not to be automatically made as part of the tribunals process, Prospect believes that the tribunal should ensure that applicants are in receipt of a recent DWP State Pension Statement, so that they can appreciate their position and make a claim if National Insurance gaps exist.

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.

Given that additional pensions are no longer accruing, since April 2016, it seems fair to eliminate considerations of this benefit in respect of applications which cover later periods. However where applications extend back to periods before April 2016, then consideration of additional state pension should be taken into account.

Question 4

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1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444419/6__Average_age_of_WITHDRAWAL.xls

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.

We disagree. The applicant should be in a position to ensure that any compensation for lost pension can be paid towards the workplace pension scheme they would have had access to. There are two main reasons for this – one is because employers will often secure group personal pension arrangements which have been scrutinised by the employer and their advisers, and which will often have a preferential charging structure. The other reason is to ensure consistency of pension provider –individuals can become overwhelmed by having a vast array of disparate pensions. If the intent of any tribunal is to compensate for loss of pension provision, then it is only fair that this should include the benefits of an employer's selected pension provider.

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.

The default assumption here seems to be that lost employer pension contributions are set at the statutory minimum level. Given that average contributions to defined contribution pensions[2] exceed the statutory minimum, one would conclude that the default position would not recover the loss. It would seem to be more pertinent to factor in the rate of contribution that was being paid in respect of a claimant prior to dismissal (and also before any change in payments arising from the onset of any medical condition that affected earnings capacity). The future projection of such rates could be underpinned by the statutory minimum rates.

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[2] http://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/pensionssavingsandinvestments/bulletins/occupationalpensionschemessurvey/2015-09-24#contribution-rates-in-private-sector-occupational-pension-schemes

Furthermore in respect of defined contribution schemes, we believe that account should be taken for the loss of investment returns seen in light of pension contributions having been effectively paid “late”. Tribunals should have regard to such loss in making determinations.

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.

Enhancement to defined benefit pensions come in many forms and it seems all are being ignored under the proposed new default approach. These can include early access to pension based on age or preferential early access terms based on employment status. These can be convoluted and not well publicised, and it should not be assumed that an applicant is aware of them, particularly when they are significantly younger than pension age. Any defined benefit scheme should be asked to provide full details of pension age and any early pension ages and what terms apply, in order to assess the full value of the pension.

In many cases when we come to calculate the loss of enhancement element this can come to a considerable sum, often £10,000 to £30,000. Whilst the artificially low cap on compensatory awards for unfair dismissal will often mean that the exact calculation of the pension loss becomes irrelevant, many cases will be where the claim is for discrimination or whistleblowing and the cap does not apply, the enhancement in these cases will be an important factor. Even in ordinary unfair dismissal cases, it will often be important to fully calculate the pension loss even if it takes the compensation above the maximum, because there can be significant percentage reductions to the overall compensation (for Polkey or contributory fault).

We therefore disagree with the proposals in question 6, because the loss of enhancement is a significant and valid part of the loss and should be compensated.

We also believe that the simple approach should be limited to cases where there is evidence that the claimant has found comparable employment or is likely to do so very quickly. Sadly in many cases we believe it can take the claimant a long time (if ever) to find new employment, this will be particularly for disabled or older workers and for those with geographical limitations or specialised skills, and therefore we believe the complex cases should not be so rare as the consultation paper seems to envisage.

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.

We broadly agree with the proposals on split remedy hearing as set out in question 7, although in our experience tribunals will often adopt a similar approach currently.

We are however unclear about the impact of the proposal to have split remedy hearings on the requirement on the claimant to produce a schedule of loss. This is usually at a very early stage of the procedure. While it is always helpful to set out a detailed schedule of loss at this stage, we are concerned with the comment in paragraph 7.3 of the consultation paper which states that the tribunal would 'discourage' claimants from using the phrase 'to be confirmed' in the schedule. This suggests that it will be for the claimant to do the work in analysing exactly the pension at a much earlier stage, even though it is not envisaged that the Respondent or tribunal would be required to consider this until much later on. We believe there should be more leeway for the claimant to identify the broad outline of their claim for pension loss, but to be able to reserve the right to present a detailed calculation at the later stages.

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?

Prospect believes comprehensive guidance and worked examples will be crucial to the understanding of these complex cases. Indeed the Working Group should consider further consultation on these examples to aid understanding of the complex cases.

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?

As noted in this response, applicants will need clear guidance particularly if the proposed default positions are adopted. This will include guidance on state pension calculations, including National Insurance payments from earnings, how the state pension is calculated (including Starting Amount), voluntary National Insurance options and a requirement to obtain a State Pensions Statement.

Guidance is also needed on the approach to assumed retirement age in respect of future working life and on default assumptions on when an individual draws a pension. Whilst these are clearly interrelated, it is important that applicants can gain an appreciation of what each means. Those in defined benefit schemes should also be able to gain an appreciation of what retirement age provisions are in place.

Finally, we note that the consultation document makes reference to the tax system applicable to pension saving; namely the existences of the Annual and Lifetime Allowances. We acknowledge the Working Group's view that a changing tax regime can make it difficult to produce guidance. However we would appreciate confirmation of a view that Annual Allowance payments should not be triggered solely by virtue of the timing of any compensation payments. The Tribunal should commit to ensuring that any tax liability arising from the delayed payment of pension contributions is not borne by a successful claimant, if such a liability would not have arisen in the event of employment having continued.