

Schedules of Loss: Format, Optimisation and Pension Calculations

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What's it for?¹

1. The schedule of loss is C's primary tool for quantifying their loss and expense. It is a form of communication and persuasion; however, it may also be a stumbling block. If drafted carefully and properly the schedule of loss and expense is short, neat, powerful, unanswerable and relied on by the trial judge to calculate the award. If drafted excessively, carelessly or improperly it becomes a tool for cross-examination or a document which turns the trial judge off.
2. The claimant's schedule has one sole purpose: to persuade the respondents or the trial judge of the appropriate quantum of the claimant's loss and expense.
3. To achieve that purpose effectively the schedule and counter schedule need to be drafted in form and in substance with that purpose in mind. So the schedule must explain the claimant's case clearly and shortly. It must show how sums are calculated and it must give explanations for the sources of the figures, it must have totals for each head of loss. The use of phrases such as "TBA" shorthand for "to be assessed" or "details to be provided in due course" is to be avoided if at all possible.
4. Judges prefer reasonable moderation in the presentation of the claim rather than grasping exaggeration. The safest route to a reasonable award is for the claimant's lawyers to take upon themselves the task of moderating the inclusion and the level of the claimant's heads of claim. This task is usually refreshingly straight-forward with a claimant in whom trust has been established. For those claimants who are less able to establish the bond of trust, "moderating" the claim can be fraught and difficult. The claimant has the final say on what shall and what shall not go into the schedule and if the lawyer's clear instructions are to include a head of damage or a level of claim which is

¹ This section taken from *Kemp & Kemp: The Quantum of Damages*

unlikely to be proven the lawyer is bound to do so despite contrary advice, unless the head is not sustainable in law or in fact.

First steps: the introductory information

5. It's a massive help to everyone if, at the start of the schedule, there's a table with the basic information on which the figures are calculated:
 - a. C's gross and net weekly pay
 - b. C's age at termination, dates of service and length of service

The Basic award

6. The calculation is the same as for a redundancy payment. You can manually do it using s. 119 ERA 1996, or use an online redundancy calculator (<https://www.gov.uk/calculate-your-redundancy-pay>)
7. The statutory cap on a weeks' pay applies as at the time of the EDT, not the date of the schedule of loss or the final hearing. The statutory cap on a weeks' pay is at s. 227 ERA 1996 (currently £525)
8. A week's pay must be calculated per ss. 220-229 ERA 1996:
 - a. If C has normal working hours, no shifts and pay doesn't vary with the amount of work done then base it on the contract: s.221(2)
 - b. If C has normal working hours and the amount of pay varies with the amount of work done (e.g. commission) then use a 12-week average: s.221(3)
 - c. If C has normal working hours but is paid different hourly rates from time to time (e.g. shift work) then use a 12-week average to get the average of hours worked and hourly rate: s.222
 - d. If C has no normal working hours then use a 12-week average: s.224
9. A week's pay for the basic award has to be on the statutory formula, even if the 12-weeks before the EDT has depressed earnings (for example, if C was suspended or R

was diverting work away from C: *Georgiou v Tony & Guys (St Paul's) Ltd* [2013] ICR 1356.)

10. The date for calculating the length of service and a week's pay can sometimes be later than the EDT: if R dismissed with less than the statutory notice then the date is taken to be when the statutory notice would have expired (s.97(2) ERA 1996)

The Compensatory award: General principles - Causation

11. For all of the compensatory award the tribunal is empowered to award such sum as it considers just and equitable in all the circumstances having regard to the loss sustained by C in consequence of the dismissal in so far as that loss is attributable to action taken by R (s.123(1)).
12. The starting point is causation: did the dismissal cause the loss? There are three possibilities:
 - a. The unfair dismissal was the sole cause of the lost earnings: the losses would normally be awarded in full (subject to the duty to mitigate)
 - b. The unfair dismissal was not a cause of the wage loss: no award is due
 - c. The unfair dismissal is one of two or more concurrent causes of the wage loss: the tribunal will normally award less than the full amount of wage loss.
13. The 'just and equitable' test is the basis on which *Polkey* reductions can be made, as well as reductions on the basis that C had committed misconduct which was unknown at the date of the decision to dismiss but which comes to light later (as in *W Devis & Sons v Atkins*)

Loss of statutory rights

14. This is usually claimed as a separate head of loss within the compensatory award in any dismissal case where C had qualifying service. It is intended to represent the fact that C will need to work for the qualifying period before regaining the right to be unfairly dismissed.

15. These days it's usually claimed at £400-£500.

Compensatory award - Past loss of earnings and mitigation

16. Unlike the basic award, loss of earnings is not limited to the statutory formula, nor is it limited to things C is contractually entitled to. For example: if C regularly received a Christmas bonus then it can be part of the claim even if C doesn't have a contractual entitlement to it. Likewise with tips.

17. Overtime ought to be included: If C has regular hours without overtime then it should be straightforward to use any payslip. If C does overtime, either on a set pattern or irregularly, then the easiest thing to do is use an average of net earnings for the 12 weeks pre-EDT.

18. If C's regularly-paid expenses represent a profit in C's hands then these can be included.

19. If C would, on the balance of probabilities, have received a pay increase between the dismissal and the tribunal hearing then this should be included.

Mitigation

20. If C has obtained a new job with equal or higher pay than he had with R then the schedule should have the losses simply stopping on the date that C began the higher paid job. The exception is if C loses that job before the date of the tribunal hearing.

21. If C obtains and then loses a new job between dismissal and the tribunal hearing then R will undoubtedly argue that the losses stop when C got the new job. That's not always the case though: it will be for the tribunal to determine whether the unfair dismissal can be regarded as a continuing cause of loss when C was subsequently dismissed from his/her new employer with no right to compensation (see *Dench v Flynn & Partners* [1998] IRLR 653)

22. C's general obligation to mitigate is a point R will raise; there's no need to account for it in the schedule of loss (subject to the point made at the outset: be realistic with the schedule!)

Compensatory award - Loss of Fringe Benefits

23. For a company car C should only be awarded compensation for the private use of the car.
24. The tribunal can have regard to running costs produced by the AA or RAC.
25. For the remaining benefits they will usually be pleaded on the basis of the cost to C of replacing the benefit.

Compensatory award - Future loss of earnings

26. This is ultimately a speculative question of fact for the tribunal. It is calculated the same way as the past loss of earnings will have been calculated (old income less current income, pleaded for the period of time C believes it will take to fully mitigate). It should plead it at a reasonable amount/for a reasonable period of time. If there are specific factors relevant to C's job market then make sure this is covered in C's witness statement (e.g. the area in which C works has high unemployment in C's type of role).
27. Equally if there are factors specific to C which make getting new employment more difficult (childcare, disability, age and lack of transferable skills etc) then make sure that these are in C's witness statement.

8. Loss of pension rights

28. This is the usually part which everyone finds most complicated.
29. The key guide to take you through it is the "*Principles for Compensating Pension Loss (4th edition, August 2017)*"
30. In reality it's a time-consuming task, but one which can be broken down into a number of simple steps.
 - a. What type of pension scheme did C have: Defined Contribution ("DC") or Defined Benefit ("DB")? How long is the pension loss likely to last? Does the statutory cap apply?

- b. Based on the above, is this a “simple case” or a “complex case”? (DC schemes or cases with relatively short periods of loss are usually simple cases; for longer DB losses the case is more likely to be complex. The guidance suggests that 6 months is very likely to be a “short period”, 12 months will probably still be “short”, 18 months will probably not be short. If a lot of money is at stake then it’s more likely to be complex)

Simple cases

- c. Calculate the amount which the employer contributed to the pension scheme (the “*contributions method*”). This represents C’s loss, on a very broad-brush basis.
- d. The period of assessment is whatever period the tribunal award other compensatory losses for. For example: if the tribunal find that C obtained comparable new employment after six months (or C should have done so if he had reasonably mitigated) then six months’ of employer contributions are allowed.

Complex method

- e. Your choices to calculate the losses:
- i. Obtain an actuarial report
 - ii. Instruct counsel to work it out
 - iii. Have a go at using the “7-steps” model in the guidance (para 5.55 onwards)

31. The seven steps are as follows:

- i. Identify what C’s pension would have been at retirement age if dismissal had not occurred
- ii. Identify what C’s pension will be at retirement age in light of dismissal
- iii. Deduct (ii) from (i) to give a net annual pension loss
- iv. Identify the period of loss using the Ogden Tables
- v. Multiply (iii) and (iv)

- vi. Check the lump sum position (if a lump sum is provided for)
- vii. Gross up the award

Compensatory award - Expenses incurred as a result of the dismissal

- 32. This will usually be travel etc costs of attending interviews. It can include telephone and postage costs, for those that still use if anyone still uses 'normal' mail and pays for calls on a per-call basis. It can also include removal costs if C moves home to take up a new job.
- 33. This can include the costs of setting up as self-employed. The test will be the usual mitigation test: C must act as a reasonable person would if he or she had no hope of seeking compensation from his or her previous employer. C must take all reasonable steps to mitigate the loss. The burden is on R to prove that C has failed to mitigate.
- 34. It can also include short training or re-training courses. If the training course is too long then the tribunal may find that C has voluntarily taken himself out of the job market (e.g. *Hilroyd v Gravure Cylinders Ltd* [1984] IRLR 259)

Injury to feelings

- 35. Such awards are only available in appropriate cases (discrimination or detriment).
- 36. The schedule of loss ought to plead a bracket of the *Vento* guidelines. If you feel able, plead a part of the bracket (e.g. "bottom half of the middle bracket"). Putting "TBC" is of little help to anyone, and it's contrary to the Presidential Guidance (See *Presidential Guidance: General Case Management*, at Guidance Note 6, paragraph 22)

ACAS uplift or reductions

- 37. S.207A TULR(C)A 1992 allows for uplift of up to 25% if there is an unreasonable failure to comply with a relevant code of practice.

38. This most common in conduct dismissals. If there's been a departure from a code of practice then it's usually pleaded at 25%. The tribunal will award what is just and equitable, which will largely depend on how the evidence has played out and how bad the failings have been.

Apply the appropriate deductions in the right order!

39. The correct order is:

- a. Payments made by employer as compensation for dismissal
- b. Sums earned in mitigation (or sums which should have been earned in mitigation)
- c. *Polkey* and any other just and equitable reductions (s.123 ERA 1996)
- d. Any adjustments for accelerated receipt
- e. Uplifts/reductions for breach(es) of the ACAS code (s.207A TULR(C)A)
- f. Reduction under s.123(6A) ERA 1996 for disclosures not made in good faith
- g. Award for lack of s.1 statement of employment particulars (s. 38 Employment Act 2002)
- h. Reduction for contributory fault (ERA 1996 s.123(6))
- i. Grossing up (if applicable)
- j. Statutory cap (ERA 1996 s.124)



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