

# Periodical payments and indexation

## Bad news for defendants

Following Mrs Justice Swift's judgment in *Thompstone v Tameside & Glossop Acute Services NHS Trust*, there have been three further High Court judgments on indexation:

- *Corbett v South Yorkshire Strategic Health Authority* (in which Kennedys were instructed by the NHS Litigation Authority);
- *RH v United Bristol Healthcare NHS Trust* (in which Kennedys were instructed by the NHS Litigation Authority); and
- *Sarwar v Kamran Ali and the Motor Insurers' Bureau*

In all three cases, the court had to consider whether the annual increases in the claimant's periodical payments would vary by reference to an earnings related index rather than the retail prices index (RPI).

### The Corbett and RH cases

Both claimants suffered brain injury following admitted obstetric negligence. In *Corbett*, all heads of loss were agreed and capitalised, except future care and case management as the claimant sought a periodical payment. In *RH*, the parties agreed a conventional lump sum of £4,713,100 and annual multiplicands, subject to indexation. The claimant sought a periodical payment, although there was no agreement as to the appropriate division between lump sum and periodical payments in respect of his heads of loss. The claimant agreed that all other heads of loss, except future care and case management, should vary by reference to the RPI. Periodical payments and indexation Bad news for defendants Both claimants asked the court to exercise its discretion to disapply or modify the effect of section 2(8) of the Damages Act 1996 (which provides annual increases to periodical payments by reference to the RPI) and substitute an earnings-related index.

The claimants argued indexation by reference to the RPI was inappropriate, as it did not relate to the purchase of labour. Both claimants argued care costs are rising faster than the RPI, and other related indices provide a more reliable and accessible means of calculating annual periodical payments. If their future care costs were awarded by way of periodical payments but linked to the RPI, and the discrepancy between earnings and prices continued, this would inevitably lead to massive under-compensation.

Both claimants asked the court to apply indexation by reference to either:

- (1) the average earnings index (AEI) - the mean level of pay for all employees;
- (2) the annual survey of hours and earnings (ASHE) median - earnings data for all occupations; or
- (3) ASHE 6115 - a specific index measuring levels of earnings of care assistance and home carers. The index is published at 10 percentile intervals, with a range of hourly earnings being identified for each percentile.

The RH case addressed a number of additional issues, which were not ventilated in either Thompstone or Corbett:

- (1) The defendant relied on care market evidence from Barbara Scandrett, managing director of Complete Personal Assistance (CPA). The defendant provided data to show that carers employed for a five-year period had annual increases in their rates of pay between 2003 and 2007 of 1.95%, in comparison to the RPI average rate of increase annually of 2.58%. It was argued the carers identified and tracked from the CPA data were far more likely to mirror the claimant's carers.
- (2) There was no agreement as to which heads of loss would be capitalised and which would be paid annually by periodical payment. The periodical payment was not restricted to care and case management.

### **Judgments in Corbett and RH**

**RPI.** In both cases, Judge Bullimore (in Corbett) and Mr Justice MacKay (in RH) accepted RPI-linked periodical payments would not meet the claimant's care costs. Judge Bullimore had "no difficulty in concluding that the RPI is not a fair and appropriate indexation measure in this case". Similarly, Mr Justice MacKay said "that indexing future care costs to RPI will result in a significant and possibly substantial shortfall".

**AEI.** Both judges accepted that AEI was not a reliable and accurate indicator of the growth of carers' earnings, as it is based on the mean level of pay for all employees, which exceeds the pay for carers. It was accepted that, over the long term, there is likely to be overrecovery. Mr Justice MacKay did, however, say that "if the only choice was between the RPI and AEI, [he] would have been tempted to order its application notwithstanding the degree of bias".

**ASHE median.** This earnings measure was also rejected by Judge Bullimore who concluded that, as it included data from all occupations, it again could lead to

overcompensation. However, Mr Justice MacKay thought it was a better uprating measure than either RPI or AEI.

**ASHE 6115.** Both judges accepted the lead set by Mrs Justice Swift in *Thompstone* and modified section 2(8) with ASHE 6115 replacing the RPI as the appropriate measure to vary the annual increases of the claimant's periodical payments in respect of care and case management.

Judge Bullimore said he was looking for "a measure which will best ensure the costs of the claimant's care continue to be met in the future, namely one which, on grounds of logic and common sense, is likely to do so".

Mr Justice MacKay concluded: "I regard 6115 as the most accurate match to the target expenditure; it is of undoubted authority, coming from the ONS; it is statistically reliable as all agree, with tight CVS; it is freely accessible, albeit with a lag problem which I believe can be overcome; it is consistent over time past, although it does not go beyond 1997, not a serious flaw in my view; it is reproducible in the future...and is markedly superior to RPI."

Both judges rejected the defendant's objections to ASHE 6115, which included compositional changes, volatility, difficulties with reclassification and the workability of the earnings-related measure. Mr Justice MacKay was also not persuaded by the CPA data, saying that "the CPA evidence provides me with no justification for finding that the claimant's carers will not require wage increases in excess of RPI".

As to the format of the award in RH, the judge ordered that the claimant's proposed format regarding the appropriate division of certain heads of damage between lump sum and periodical payments should apply.

### **The Sarwar case**

The claimant was seriously injured at the age of 17 in a road traffic accident, which rendered him tetraplegic. Liability was admitted with a reduction of 15% for contributory negligence, as the claimant was not wearing a seatbelt. Mr Sarwar initially argued that his loss of earnings and care and case management costs should be met with a periodical payment, linked to an earnings-related index. Subsequently, and before the end of the trial, he argued in favour of a lump sum award.

**Loss of earnings.** All the experts agreed that average earnings generally increase at a faster rate than prices and that, on the balance of probabilities, average earnings growth is likely to exceed growth in prices in the future. On the basis of historical data, linking periodical payments for loss of earnings to the RPI would

under-compensate the claimant. There was a consensus among all the experts that RPI is not an appropriate index for periodical payments in respect of future loss of earnings and that an earningsbased index or measure should be applied.

Mr Justice Lloyd-Jones concluded that “the index most likely to secure that the periodical payments maintain their value is ASHE aggregate for male full-time employees at the 90th percentile”.

**Care and case management.** The judge accepted there is no series or measure which specifically relates to the earnings of employees who provide home care in the private sector, let alone in the locality where the claimant lives. He considered it appropriate to identify an index or measure that is most likely to match future movements in the costs of future home care which are likely to be incurred by the claimant.

Mr Justice Lloyd-Jones considered the advantages and disadvantages of the various options and concluded that indexation “on the basis of RPI would fail to meet the objective of ensuring, so far as possible, [that] the periodical payments would meet the claimant’s costs of future care”. He was persuaded there was a ‘real danger’ that, if AEI were used, it would result in an increase in periodical payments beyond that required to meet actual growth for carers. As regards aggregate ASHE median, he thought that, in this case, it would result in under-compensation. He concluded there were a number of “real advantages in the use of ASHE 6115 (90) for indexation for periodical payments in respect of costs of care in the present case”. He did not consider the practical difficulties arising from the use of ASHE 6115 to be particularly problematic, and the increased complexity in using ASHE 6115 was “entirely justified by the achievement of greater precision which is in the interest of both the claimant and second defendant”.

Interestingly, the claimant favoured a lump sum but Mr Justice Lloyd-Jones felt there was a “compelling case in favour of an award of periodical payments as opposed to a lump sum”. He concluded that periodical payments in respect of the claimant’s future loss of earnings should be indexed by reference to ASHE aggregate (90) and ASHE 6115 (90) for the claimant’s future care and case management costs.

## **Conclusion**

Following the Court of Appeal’s recent judgment in *Flora v Wakeham* (Heathrow) Ltd [2007] 1WLR 482, there are now in fact four judgments in favour of an earnings-related measure, ASHE 6115, when calculating the annual increases of the claimant’s future care and case management costs.

Thompstone, Corbett and RH are all being appealed, with the Court of Appeal hearing commencing on 13 November 2007. At the time of writing, it is uncertain whether the Sarwar case will also be appealed. A directions hearing is taking place on 30 July 2007 and will involve all those cases which will form part of 'the basket of cases' before the Court of Appeal in November. The NHS Litigation Authority and Insurers have taken a proactive and collaborative approach in identifying relevant issues and suitable cases to proceed to an indexation trial to join Thompstone on Appeal and this should be commended.

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