



TRIBUNALS
JUDICIARY

JUDGE BRIAN DOYLE
PRESIDENT
EMPLOYMENT TRIBUNALS
(ENGLAND & WALES)



**EMPLOYMENT TRIBUNALS
(SCOTLAND)**
Judge Shona Simon
President

PRESIDENTIAL GUIDANCE

Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879

1. An Employment Tribunal may order a respondent to pay compensation to a claimant¹ if the Tribunal finds that there has been a contravention of a relevant provision of the Equality Act 2010 in respect of which it has jurisdiction.² The amount of compensation which may be awarded corresponds to the amount which could be awarded by a county court in England & Wales or a sheriff in Scotland.³ An award of compensation may include compensation for injured feelings (whether or not it includes compensation on any other basis).⁴ An injury to feelings award might also be appropriate in certain claims of unlawful detriment.

2. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318 the Court of Appeal in England & Wales identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower band of £500 to £5,000 applied in less serious cases. The middle band of £5,000 to £15,000 applied in serious cases that did not merit an award in the upper band. The upper band of between £15,000 and £25,000 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000).

¹ Equality Act 2010 section 124(2)(b).

² Equality Act 2010 section 124(1) cross-referring to section 120(1) and relating to a contravention of Part 5 (work) or a contravention of sections 108, 111 or 112 that relate to Part 5.

³ Equality Act 2010 section 124(6) cross-referring to section 119.

⁴ Equality Act 2010 section 119(4).

3. In *Da'Bell v NSPCC* (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and uprated them for inflation. The lower band was raised to between £600 and £6,000; the middle band was raised to between £6,000 and £18,000; and the upper band was raised to between £18,000 and £30,000.

4. The Employment Appeal Tribunal has subsequently stated that the bands and awards for injury to feelings can be adjusted by individual Employment Tribunals where there is cogent evidence of the rate of change in the value of money: *AA Solicitors Ltd v Majid* (2016) UKEAT/0217/15. See also *Bullimore v Potheary Witham Weld* (2010) UKEAT/0189/10, [2011] IRLR 18 at para 31. However, the bands themselves have not been uprated in general since the decision in *Da'Bell* in 2009.

5. In a separate development in *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239 the Court of Appeal in England & Wales declared that with effect from 1 April 2013 the proper level of general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit or mental distress would be 10% higher than previously. This followed upon changes to the rules governing the recovery of costs in personal injury litigation in the civil courts in England & Wales.

6. In *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 the Court of Appeal has ruled that the 10% uplift provided for in *Simmons v Castle* should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales. The Court expressly recognised (see footnote 3) that it was not for it “to consider the position as regards Scotland.” However, account has now been taken of the position in that jurisdiction by the Scottish President before formulating this Guidance.⁵

7. So far as awards for psychiatric injury are concerned, the Court of Appeal in *De Souza* observed that the Judicial College *Guidelines for the Assessment of General Damages in Personal Injury Cases* now incorporated the 10% uplift provided for in *Simmons v Castle*. If an Employment Tribunal relied upon the Judicial College *Guidelines* in making an award for psychiatric injury then that award would comply with *Simmons v Castle* and *De Souza v Vinci Construction (UK) Ltd*.

8. The Court of Appeal in *De Souza* invited the President of Employment Tribunals in England & Wales to issue fresh guidance which adjusted the *Vento* figures for inflation and so as to incorporate the *Simmons v Castle* uplift. In light of that invitation the Scottish President decided that it was also appropriate that consideration be given to the matter in that jurisdiction.

9. Following consultation with Employment Tribunal stakeholders and users, we have decided to address the issues arising by using our power to

⁵ The Scottish President's reasons for issuing Presidential Guidance in the same terms as that issued in England and Wales are set out in an Appendix to the document recording responses to the Presidents' consultation that preceded this Presidential Guidance. See: ****

issue Presidential Guidance under rule 7 of Employment Tribunal Rules of Procedure.⁶ The Presidents may publish guidance for England and Wales and for Scotland, respectively, as to matters of practice and as to how the powers conferred by the Rules may be exercised. Any such guidance shall be published by the Presidents in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.

10. Subject to what is said in paragraph 12, in respect of claims presented on or after 11 September 2017, and taking account of *Simmons v Castle* and *De Souza v Vinci Construction (UK) Ltd*, the *Vento* bands shall be as follows: a **lower band of £800 to £8,400** (less serious cases); a **middle band of £8,400 to £25,200** (cases that do not merit an award in the upper band); and an **upper band of £25,200 to £42,000** (the most serious cases), with the most **exceptional cases capable of exceeding £42,000**.

11. Subject to what is said in paragraph 12, in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula x divided by y (178.5) multiplied by z and where x is the relevant boundary of the relevant band in the original *Vento* decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the *Simmons v Castle* 10% uplift).

12. So far as claims determined by an Employment Tribunal in Scotland are concerned, if an Employment Tribunal determines that the *Simmons v Castle* 10% uplift does not apply then it should adjust the approach and figures set out above accordingly, but in so doing it should set out its reasons for reaching the conclusion that the uplift does not apply in Scotland.



Judge Shona Simon
President (Scotland)



Judge Brian Doyle
President (England & Wales)

5 September 2017

⁶ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, regulation 13(1) and Schedule 1.