



TRIBUNALS
JUDICIARY

JUDGE BRIAN DOYLE
PRESIDENT

EMPLOYMENT TRIBUNALS (ENGLAND & WALES)



**EMPLOYMENT TRIBUNALS
(SCOTLAND)**

Judge Shona Simons
President

20 July 2017

JUDICIAL CONSULTATION

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 the 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

2. An injury to feelings award might also be appropriate in certain claims of unlawful detriment.

3. 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

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).

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).

4. 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.

5. 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.

6. 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.

7. Finally, 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.”

8. 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*.

9. So far as awards for injury to feelings are concerned, the Court of Appeal in *De Souza* invited the Presidents of the Employment Tribunal in England & Wales and in Scotland to issue fresh guidance which adjusted the *Vento* figures for inflation and, at least so far as England and Wales was concerned, so as to incorporate the *Simmons v Castle* uplift.

10. We accept that invitation to do so by using our power to issue Presidential Guidance under rule 7 of Employment Tribunal Rules of

Procedure.⁵ 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. The guidance issued by the President in Scotland will address how the *Simmons v Castle* uplift may be addressed in that jurisdiction.

11. We have reached the provisional view that the appropriate measure of the rate of inflation is the Retail Prices Index (RPI) All Items Index (January 1987 = 100) published by the National Statistics Office,⁶ rather than the Consumer Prices Index (CPI) or the Consumer Prices Index with housing costs (CPIH). Our reasoning is that RPI continues to be used as the appropriate rate of inflation in the Judicial College *Guidelines for the Assessment of General Damages in Personal Injury Cases*. It is also the basis upon which various statutory sums for employment rights purposes are indexed annually.⁷ However we seek views on whether this is indeed the correct measure to be applied.

12. We further consider that the correct approach is to uprate the *Vento* bands as they were originally set by the Court of Appeal on 20 December 2002 (RPI value = 178.5), first by taking account of the rate of inflation as at 1 April 2013 (RPI value = 249.5); then by applying the 10% uplift at that point; and then uprating again to take account of the rate of inflation as at the date of the Presidential Guidance (RPI value as at 18 July 2017 = 272.3). Again we seek views on this proposed approach.

13. The new bands would apply to any claim presented on or after the date of the Presidential Guidance. The bands would then be uprated every 12 months thereafter without further consultation by Presidential Guidance and based upon the most recent RPI value available. The bands would be rounded up or down to the nearest £1,000.

14. On that basis, as at 18 July 2017 the new bands for awards for injury to feelings would be: lower £1,000 to £8,000; middle £8,000 to £25,000; and upper £25,000 to £42,000.

- 1. Do you consider that RPI is the appropriate index in connection with up rating of awards? If not, please explain why you disagree.**
- 2. Do you agree with the proposed approach to uprating of the *Vento* bands? If not, please explain why you disagree.**

⁵ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, regulation 13(1) and Schedule 1.

⁶ <https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/chaw/mm23>.

⁷ Employment Relations Act 1999 section 34 (guarantee payments, unfair dismissal awards, a week's pay, etc).

Responses in England & Wales should be made by email to:
Presidents_Office_Employment_E&W@hmcts.gsi.gov.uk

Responses in Scotland should be made by email to:
glasgow.president@hmcts.gsi.gov.uk

Responses should be received by Friday 25 August 2017.



Judge Shona Simon
President (Scotland)



Judge Brian Doyle
President (England & Wales)