

Employment



## Employment Tribunal general damages uplifted by 10%

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The Court of Appeal has finally resolved the vexed question of whether the *Simmons v Castle* uplift on general damages, intended to counterbalance costs reform in the civil courts, should apply to injury to feelings and personal injury awards in the employment tribunals. In *De Souza v Vinci Construction* [2017] EWCA Civ 879 the Court of Appeal has held that all damages for non-pecuniary loss awarded by the employment tribunal should also be uplifted by 10%.

Back in 2009, Sir Rupert Jackson's Review of Civil Litigation Costs: Final Report proposed the abolition of the right to recover success fees and insurance premiums in civil proceedings. Recognising the disadvantage to claimants, Sir Rupert recommended that general damages in tort cases should be increased by 10%. In *Simmons v Castle* [2013] 1 WLR 1239, the Court of Appeal gave effect to the proposed uplift by declaring that "the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress, will be 10% higher than previously."

This was all well and good in the civil courts, but what about claims in the employment tribunals where awards of general damages are made, but the rationale for uplifting general damages did not apply? This question has troubled the EAT on at least five occasions, resulting in divergent views and uncertainty. Both the current President, Simler P, and her immediate predecessor, Langstaff J, held that the language of s.124 of the Equality Act 2010 anchored employment tribunals to the approach adopted in civil claims. S.124(6) required "amount of compensation [awarded by the Tribunal] corresponds to the amount which could be awarded by the county court".

HHJ Serota QC and Slade J disagreed. Both judges held that the rationale for a *Simmons v Castle* uplift simply did not apply to proceedings in the employment tribunal, and there was nothing in Sir Rupert's report or in the Court of Appeal's declaration in *Simmons* which should be treated as importing the uplift to employment proceedings. Neither judge saw the provisions of the Equality Act as requiring precise equivalence between county court and employment tribunal awards.

The Court of Appeal has now resolved the issue definitively. Delivering the lead judgment, Underhill LJ viewed the issue as principally a matter of statutory construction. The language of the Equality Act 2010 required awards in civil and tribunal proceedings to "correspond". While the Court of Appeal accepted that the rationale for a *Simmons* uplift did not apply to tribunal proceedings, this could not "justify qualifying the plain words of the statute." Nor, the Court noted, does the rationale for an uplift in general damages apply to all civil claims.

The decision in *De Souza* will not apply in Scotland, where awards are anchored to general damages awarded by the Sheriff, not the English county courts.

Awards for personal injury in the employment tribunals are assessed by reference to the Judicial College Guidelines, which already reflect the *Simmons v Castle* uplift. The current injury to feelings brackets in light of *De Souza* are:

- Lower band (one-off or isolated incidents of discrimination) - up to £6,600

- Middle band (serious cases not meriting the highest band) - £6,600 to £19,800
- Top band (for the most serious cases) - £19,800 - £33,000

The time is approaching for the EAT to again review injury to feelings awards in light of inflation. Underhill LJ has urged the President of the Employment Tribunals or the President of the EAT to publish guidance on injury to feelings, taking into account the De Souza uplift as well as inflation.

**Thomas Cordrey** acted for Vinci Construction.

**Jesse Crozier** has a broad employment practice, acting for both claimants and respondents/defendants. His workload covers the full range of employment rights, whistleblowing and discrimination, restrictive covenants and confidentiality issues, collective rights and industrial action, contractual claims, and TUPE. Jesse's employment work overlaps with his commercial practice, and he is often instructed in claims arising from agency/consultancy contracts and employment-related aspects of insurance law. The majority of Jesse's practice is litigation based, but he also undertakes non-contentious advisory work and investigations/internal appeals.