Appeal No. UKEAT/0328/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 8 January 2015
Judgment handed down on 20 March 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MS E PEREIRA DE SOUZA — APPELLANT

VINCI CONSTRUCTION UK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

Revised

APPEARANCES

For the Appellant	MS EURIDES PEREIRA DE SOUZA (The Appellant in Person)
For the Respondent	MR THOMAS CORDREY (of Counsel) Instructed by: Magrath LLP Solicitors 66-67 Newman Street London W1T 3EQ

SUMMARY

DISABILITY DISCRIMINATION – Compensation

At a remedy hearing the Employment Tribunal awarded compensation to the Claimant for injury to feelings and personal injuries in a claim for discrimination on the grounds of disability. The Employment Tribunal determined that the Claimant should receive an award of £9,000 in respect of injury to feelings and £3,000 in respect of the personal injury, which was to be subject to the 10% increase directed by the Court of Appeal **Simmons v Castle** [2012] EWCA Civ 1039, [2013] 1 All ER 334. The Employment Tribunal did not consider it appropriate to make such an increase in respect of the injury to feelings the Claimant appealed on the basis that the 10% uplift should have applied tot the compensation for injury to feelings. The Respondent cross-appealed on the basis that the uplift had no application at all to awards for compensation in the Employment Appeal Tribunal.

The Employment Tribunal held that the decision in **Simmons v Castle** to apply a 10% uplift for compensation was confined to civil proceedings and did not apply to claims in the Employment Tribunal. The uplift was designed to compensate litigants in actions who would lose the right to recover as part of their costs, if successful, any success fee payable to their legal representatives and the cost of After the Event Insurance Premiums which rights were abrogated by **Legal Aid, Sentencing and Punishment of Offenders Act 2012**; **Sash Windows Workshop v King** (UKEAT/0057 and 0058/14) and **Cadogan Hotels v Ozog** UKEAT/0001/14 not followed.

Appeal dismissed; cross appeal allowed.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimant and a cross-appeal by the Respondent from a decision of the Employment Tribunal sitting at London (Central). The Tribunal was presided over by Employment Judge Charlton, who sat with Mrs Woods and Mr Graham as lay members at a Remedy Hearing. The Judgment is dated 26 November 2013 and was sent to the parties on that date.

2. I heard this matter on 8 January 2015; after conclusion of submissions. I did not consider that I had sufficient time to prepare and deliver a considered Judgment. I did, however, give my reasons but rather more briefly than I would have wished for dismissing the appeal and allowing a cross-appeal. But, by reason of the importance of the issues, and because the parties were anxious to know by decision and I wished to deliver a Judgment in greater detail, the order records that I had given brief reasons and would in due course hand down a reserved Judgment, as I now do.

3. The Employment Tribunal had found that the Claimant had been discriminated against on the grounds of disability and awarded her compensation of £9,000 for injury to her feelings and £3,300 for psychiatric injury. She was also awarded outstanding wages and interest, making a total award of £14,820.28. The Employment Tribunal rejected claims for loss of earnings and exemplary damages. The Notice of Appeal runs to some 61 paragraphs and 35 pages. The Notice of Appeal was originally disposed of under Rule 3(7) of the **Employment Appeal Tribunal Rules of Procedure** by Lewis J. However, the matter was referred to HHJ Richardson pursuant to Rule 3(10) and came before HHJ Richardson on 17 September 2014,

who referred to a Full Hearing two grounds only of the Notice of Appeal, as set out in paragraphs 55 and 60 (save for the last sentence of paragraph 60). On 10 October 2014 HHJ Clark referred a cross-appeal from the Respondent to a Full Hearing.

4. Throughout these proceedings and numerous related proceedings the Claimant has been represented by her husband, Mr O'Cathail. There has been a volume of applications and appeals and a substantial amount of documentation, so I am bound to observe that the number of applications, appeals and the volume of documentation is wholly disproportionate to the issues that have been permitted to go forward.

5. There have been at least five sets of proceedings. The first three proceedings related to claims for discrimination on the grounds of disability as between 31 January 2011 and 5 July 2012. These were summarised by HHJ Richardson as comprising allegations of bullying, harassment, isolation on a floor with restricted duties, grievances being raised and not dealt with satisfactorily, detrimental treatment including incorrect payment of salary, failure to provide pay slips, the sending of inappropriate correspondence. Further proceedings have been issued relating to discrimination said to have taken place after 2 July 2012 and up to the date of the Claimant's dismissal. I do not have details of the current status of proceedings, but I note that HHJ Richardson noted that the latest ET1 ran to no less than 78 pages.

6. In the proceedings before the Employment Tribunal some 41 individual issues were identified, and liability for certain matters was accepted by the Respondent.

7. On 19 February 2014 Employment Judge Pearl at a Preliminary Hearing granted an adjournment of a hearing listed for 14 March so the Claimant could travel to Brazil for

treatment. The case was relisted for 14 September. The Claimant appealed against a case management order and against the refusal of the Employment Tribunal to vary the same.

8. So far as I am aware there are at least four further appeals awaiting "the sift" or further determination. One appeal relates to the refusal of the Employment Tribunal to recuse itself. The second appeal relates to a refusal to grant an adjournment. There is a third appeal against a further refusal on the part of the Employment Tribunal to recuse itself and to impugn certain evidence placed before the Employment Tribunal, which again refused an adjournment. There is then a fourth appeal, this time against an order of the Employment Tribunal setting a matter down for a Preliminary Hearing on 15 January 2015 and for a Full Hearing between 12 and 19 February 2015.

9. There had been various applications for adjournment of hearings in the Employment Appeal Tribunal.

10. I mention these matters by way of background and say no more in order to avoid confusion.

The Factual Background

11. I shall deal with this very briefly. The Claimant is a Filipino national employed by the Respondent as a cleaning operative. She was originally employed by Rentokil from 1 May 2005 until 29 April 2012 when there was a TUPE transfer to the Respondent. I understand that the Claimant has been dismissed, but I am not aware of the date of dismissal.

12. It is accepted that the Claimant has longstanding disabilities including problems with her shoulder and depression. She has received outpatient treatment in the UK and physiotherapy and is in receipt of analgesics. She has received cognitive behavioural therapy and medication for her psychiatric condition. I am aware that she has been involved in proceedings in the county court against Rentokil, but I have no details of these.

13. I refer to the decision of the Employment Tribunal. There has obviously been some considerable concern about case management and the Claimant's failures to comply with orders as well as issues as to her health. The Claimant made a number of different kinds of allegations against the Respondent including corrupt practices, interference with witnesses in relation to an internal appeal hearing, corrupt collusion with Rentokil. It does appear (see page 21 of the Employment Tribunal Decision) that the evidence suggests that any discrimination was "at a low level". The Employment Tribunal directed itself correctly as to the law and referred to the appropriate authorities on the level of compensation to be awarded for injury to feelings; **Vento v Chief Constable of West Yorkshire Police No 2** [2003] ICR 318 and **Da'Bell v National Society for Prevention of Cruelty to Children** [2010] IRLR 19. In relation to personal injury, it again referred itself to the relevant authority of **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] IRLR 481 (not **Sheriff v the Client Thugs Lowestoft** as appears in the judgment of the Employment Tribunal). The Employment Tribunal then referred to the power to increase or reduce awards by up to 25% where there has been an unreasonable failure to comply with the ACAS Code insofar as concerns disciplinary and grievance procedures.

14. Mr O'Cathail, who has represented the Claimant throughout, was unfortunately indisposed at the hearing on 8 January but he had prepared a full Skeleton Argument. I concluded that I should not adjourn the hearing. And as the parties were anxious to know the

result I did give a Judgment on the basis that it would be replaced by a reserved Judgment, which is now being handed down.

15. In essence principal issue in the Grounds of Appeal that are before me and the cross-appeal relate to the question as to whether the uplift in damages in civil proceedings introduced by the Court of Appeal in **Simmons v Castle** [2012] EWCA Civ 1039 applies to awards in the Employment Tribunal for personal injuries or injury to feelings. The Employment Tribunal at paragraph 27 referred to the decision of the Court of Appeal in **Simmons v Castle,** which the Employment Tribunal stated:

> **"… provides that with effect from April 2013 the proper level of general damages in all civil claims for pain or suffering will be 10% higher than previously. …**
>
> **Whilst the arguments on which the case both relate to the funding of personal injury claims, the Judgment makes it clear that pain and suffering awards in such cases should be subject to the 10% increase and, insofar as the Tribunal is required to make an award in relation to pain and suffering rather than injury to feelings, it is not unreasonable to follow that guidance."**

16. It is this reasoning that is at the core of both appeal and cross-appeal. The Employment Tribunal at paragraph 29 determined that the Claimant should receive an award of £9,000 in respect of injury to feelings and £3,000 in respect of the personal injury, which was to be subject to the 10% increase following **Simmons v Castle**. The Employment Tribunal did not consider it "appropriate to make such an increase in respect of the injury to feelings". In relation to the uplift for breach of the ACAS Code I refer to paragraph 31 of the decision of the Employment Tribunal.

> **"Neither do we award any uplift for a breach of the ACAS code. The code undoubtedly applied to the grievance procedures and whilst a number of complaints about those procedures have been accepted as acts of discrimination by the Respondent, a consideration of the evidence shows that the Code was not in fact breached in handling the grievances at the centre of this case. Meetings were held to discuss the grievances, the right to be accompanied was acknowledged and indeed Mr O'Cathail attended, the decision was made in respect of the grievance and then the necessary appeal procedures were implemented. The only possible breach we can see was in relation to the appeal which Ms de Souza sought to bring against the dismissal of her 2008 grievance but as this was so long after the event we do not criticise the employer for its response. It is within our discretion to decline to make any uplift and so we decline."**

The Notice of Appeal

17. This is over 35 pages and runs to some 61 paragraphs. I will only make passing reference to those grounds which have been held not to disclose reasonable grounds for bringing the appeal. These include (i) absence of a fair hearing, (ii) perversity, (iii) failure to award aggravated or exemplary damages, and (iv) various challenges to factual findings.

18. In relation to the failure to grant an uplift in respect of injury to feelings it is said by the Claimants that I should follow two earlier decisions of the Employment Appeal Tribunal, to which I shall come shortly: **The Cadogan Hotel Partners v Ozog** (UKEAT/0001/14 HHJ Eady QC) ("Ozog") and **The Sash Window Workshop v King** (UKEAT/0058/14, Simler J) ("Sash Windows"). The Respondent maintains that the 10% uplift should not have been applied to the award of compensation for personal injuries and that **Ozog** and **Sash Windows** were wrongly decided.

Notice of Appeal and Claimant's Submissions

19. As I have noted, Mr O'Cathail was indisposed and unable to represent the Claimant as he has done frequently both before the Employment Tribunal and in the Employment Appeal Tribunal and has prepared voluminous documentation. Mr O'Cathail had prepared a detailed Skeleton Argument and I was unwilling, therefore, to adjourn the hearing, but I obviously prepared close regard to his Skeleton Argument. The Claimant did address me but was able to add very little to the Skeleton. I took account of her inability to address me further. In my earlier Judgment I had this to say:

> **"… I have to record that Ms de Souza has not been able really to present her case and has been at a considerable disadvantage. I have done my best to consider the points in her favour and have taken into account all of the matters raised in the Skeleton Argument prepared by Mr O'Cathail and the Notice of Appeal. …"**

20. The principal ground of appeal permitted to go to a Full Hearing relates to the failure of the Employment Tribunal to uplift the award for injury to feelings by reason of the decision in **Simmons v Castle**.

21. It is said that the Employment Tribunal was bound to uplift the award. For reasons of convenience I will dispose of this point now. If the **Simmons v Castle** uplift applies, its application is not a matter of discretion on the part of the Employment Tribunal whether to apply to some parts of the award but not to others. The submission stands or falls by an answer to the question as to whether or not the decision in **Simmons v Castle** has any application to awards in the Employment Tribunal, including in particular awards for injury to feelings. Injury to feelings is a tort and thus would fall to be "uplifted" assuming the application of **Simmons v Castle**.

22. The Claimant's case is that there are two decisions of the Employment Appeal Tribunal in which it has been held that the uplift does apply; I have referred to them in passing, **Ozog** and **Sash Windows**. I shall refer to them in detail shortly.

23. It was submitted to me that these cases should be regarded by me as binding authority and I should not act as a court of appeal in relation to those cases.

Claimant's Case on the ACAS Uplift

24. The Claimant has not gone beyond pointing to a series of matters said to be unfair; the Claimant has not demonstrated any further breaches of the ACAS Code by reference to any relevant provision or beyond those considered by the Employment Tribunal.

25. I regard it as convenient to dispose of this ground now before turning to deal with the more difficult point of the effect of **Simmons v Castle**.

26. The Employment Tribunal, at paragraphs 31 and 32 which I have referred to earlier, has disposed of the issue of the ACAS uplift on the basis of the relevant facts that it found and in the exercise of its discretion. The decision is one to which the Employment Tribunal was entitled to come on the facts, and in the absence of some evidence of other relevant breaches, the decision of the Employment Tribunal cannot properly be challenged. I therefore dismiss this ground of appeal.

Respondent's Submissions and Cross-appeal

Uplift

27. Mr Cordrey firstly submitted that it is made clear in **Simmons v Castle** that the purpose of the uplift to compensation provided for in that case was compensation for the loss of a right of Claimants, particularly in personal injuries cases in the civil courts, to recover success fees and ATE (After The Event) insurance premiums as part of their costs, if awarded such costs against defendants; it was submitted that the Court of Appeal did not intend to apply the principle to litigation in Employment Tribunals because to do so would enable successful litigants to get both "the penny and the bun"; that is to say an uplift on their compensation when they did not have to forgo a right to recoup success fees and ATE premiums as part of their costs. It was submitted that no reference was made to the **Vento** guidelines nor did the Court of Appeal have any mandate to vary those guidelines. The **Ozog** and **Sash Windows** cases were wrongly decided. Mr Cordrey further submitted that I should look at the appeal on its merits and, if I concluded that the earlier decisions were wrong, I should decline to follow **Ozog** and **Sash Windows**. Were I to dismiss the appeal (i.e. follow **Ozog** and **Sash Windows**

Workshop) it would mean that the decision of the Court of Appeal would affect thousands of claims in Employment Tribunals each year without there ever having been a mention of discrimination claims or compensation for injury to feelings in the Employment Tribunals. Mr Cordrey submitted that it was unthinkable the Court of Appeal would make a decision affecting those claims in the Employment Tribunal without clearly referring to the matter.

28. The position was to be compared with **Vento** in which the Court of Appeal had given clear guidance to Employment Tribunals and the effect of the decision was made entirely clear. The entire rationale of **Simmons v Castle** had no application to Employment Tribunals; there was no quid pro quo for giving up the right to recover success fees and ATE insurance premiums. It was simply inapplicable.

29. The importance of the "quid pro quo" underlay the decision in **Simmons v Castle**, and the Court of Appeal rejected the suggestion there should be a general 10% uplift. That should not extend to benefit those litigants whose proceedings were already under way and therefore retained the right to recover success fees and ATE insurance premiums.

30. Mr Cordrey referred to **Secretary of State for Trade and Industry v Cook** [1997] IRLR 150 in which Morison J, the former President of the Employment Appeal Tribunal, held that the Employment Tribunal could depart from previous decisions of the Employment Appeal Tribunal only in exceptional circumstances or where there are previous inconsistent decisions. Mr Cordrey submitted that the circumstances in this case were in fact exceptional.

31. None of the submissions in relation to the purposes of the uplift provided for in **Simmons v Castle** were advanced to Simler J in **Sash Windows Workshop**. The argument put forward

was that **Da'Bell** had already provided for a 10% uplift and that therefore the **Simmons v Castle** uplift was not necessary to bring compensation in the Employment Tribunal up to date in line with inflation, that argument it is submitted was wrong and the decision in **Sash Windows Workshop**, it is submitted, was plainly wrong because Simler J had not been referred to the relevant material in relation to **Simmons v Castle**, to which Mr Cordrey took me in considerable detail and to which I shall come in due course.

Respondent's Submissions on ACAS uplift

32. I have already dismissed this claim, but I agree with the submissions made by Mr Cordrey that the Employment Tribunal in its Judgment of 26 November 2013 had correctly directed itself as to the law at paragraph 25 (which I have already referred to) and at paragraphs 31 and 32 that it had held the appropriate meeting without unreasonable delay. The Remedy Judgment found that the meeting had been arranged within weeks; see paragraph 12. There is no appeal against this finding and it was open to the Employment Tribunal to conclude as it did that the fact the Respondent had admitted some delay did not prevent the Employment Tribunal finding that there had been no unreasonable delays.

The Law

33. The appeal and cross-appeal raise an important point, namely whether the 10% uplift in general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit, mental distress, laid down in **Simmons v Castle** [2013] 1 WLR 1239, apply to claims in the Employment Tribunal for personal injury or injury to feelings. There are two decisions in this Tribunal which have held that the uplift does indeed apply, but arguments have been addressed to me that were not addressed to the Appeal Tribunal in those cases.

34. I shall start with a consideration of **Simmons v Castle**, which I need to address in considerable detail. The Judgment was delivered by Lord Judge LCJ in pursuance of the principle derived from the speech of Lord Diplock in **Wright v British Railways Board** [1983] 2 AC 773 and the Judgment of Lord Woolf MR in **Heil v Rankin** [2001] QB 272 that the Court of Appeal had a responsibility to issue and keep up to date guidelines on the level of damages for personal injuries.

35. The Court of Appeal made clear:

> **"On 1 April [2013], the reforms to civil costs contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will come into force. Part 2 of the Act provides for the implementation of recommendations 7, 9, 14 and 94 of the Final Report on Civil Litigation Costs by Sir Rupert Jackson. These recommendations form part of a coherent package of reforms, one element of which is that general damages should rise by 10%: see recommendations 10 and 65 (i). The Lord Chief Justice, with the unanimous support of the Judicial Executive Board, has previously announced the judiciary's support for this package of reforms, as has the Government following a consultation exercise. The 2012 Act has been introduced by the executive and enacted by the legislature on the basis that the reforms are a coherent package, and that the judiciary will give effect to the 10% increase in damages."**

36. This was, therefore, a Judgment intended to give effect to a previously agreed package of reforms. Lord Judge continued at paragraph 15:

> **"15. … As already explained, the increase was recommended by Sir Rupert as an integral part of his proposed reforms, which were unconditionally endorsed and supported as such by the judiciary publicly, and it was plainly on the basis that the 10% increase would be formally adopted by the judiciary that the 2012 Act was introduced and enacted.**
>
> **16. This is, no doubt, an unusual basis on which to rest a judgment or to adjust guidelines. However the recommendation to adjust the level of damages arises from a report prepared by a judge, which was initiated by the judiciary (as it was Lord Clarke, who, as Master of the Rolls, initiated Sir Rupert's report) and which contains policy recommendations, which is itself unusual (and, we would add, can only be justified in relation to a topic as closely concerned with the administration of, and access to, justice, as legal costs). With the exception of the 10% increase in general damages, the great bulk of those policy recommendations have been adopted in full by the legislature in an Act sponsored by the executive, on the clear understanding that the judges would implement the 10% increase. It would therefore be little short of a breach of faith for the judiciary not to give effect to the 10% increase in damages recommended by Sir Rupert."**

As Lord Judge went on to point out, Sir Rupert Jackson had consulted widely before publishing his interim report and before publishing his final report. The Ministry of Justice subsequently consulted on Sir Rupert's main proposals which had thereafter been debated in (and out of)

Parliament. After delivering its Judgment an application was made by the Association of British Insurers:

> **"… to invite the court to reconsider whether, to summarize the point shortly, the 10% increase should only apply to cases where the claimant's funding arrangements for his or her legal costs had been agreed after 1 April 2013. For the CA the ABI argued inter alia that it would therefore be wrong to permit CFA claimants who are entitled to recover the success fee to benefit from the 10% increase."**

The Court of Appeal later said:

> **"On the face of it, at any rate, it is hard to challenge that contention: such claimants would have the penny and the bun."**

As a result of the reforms contained in **the Legal Aid Sentencing and Punishment of Offenders Act 2012** ("LASPO") 1 April 2013 was the cut-off date for the right of Claimants to recoup, as part of their costs, success fees and ATE insurance premiums. It is significant that the Court of Appeal had made clear that the 10% uplift was intended to be a quid pro quo for the loss of those rights. The Court of Appeal referred to Sir Rupert's report and recommended that the 10% uplift be implemented in order to assist personal injury claimants in meeting the success fees out of damages. The Court of Appeal also referred to various observations of Sir Rupert Jackson, that he:

> **"… was persuaded to recommend that the uplift] be given to personal injury claimants as a quid pro quo for losing recoverability of success fees and ATE premiums".**

The Court of Appeal continued:

> **"In our view, it is clear from these observations that both Sir Rupert and the MoJ envisaged and intended the primary purpose of the 10% increase in damages would be to compensate successful claimants, as a class, for being deprived of the right which they had enjoyed since 2000 to recover success fees from defendants, in cases where a claimant was funding the legal costs of pursuing his or her claim by a CFA."**

37. I have already referred to the Court of Appeal reminding itself that one of its functions was to set guidelines for the appropriate level of damages in different cases. General uplifts were unusual, but the Court of Appeal also reminded itself that a general uplift in damages

might be appropriate and that guidelines should be altered if circumstances relevant to the particular guideline changed. The Court of Appeal specifically quoted Lord Woolf in **Heil v Rankin** at page 86:

> **"Our starting point is that it would only be appropriate to interfere with the existing levels of award if we were satisfied that there was a clear need established for this to be done." (my underlining)**

38. It is now necessary to refer to the two decisions of the Employment Appeal Tribunal in which the **Simmons v Castle** uplift has been applied to Employment Tribunal awards in discrimination cases. The first in point of time is **Cadogan Hotels v Ozog**. This is a decision of HHJ Eady QC (UKEAT/0001/14). The Employment Appeal Tribunal was considering an award for compensation for injury to feelings. It is clear from the report that the Respondent accepted that there should be a 10% uplift on the **Vento** guidelines following **Simmons v Castle**. HHJ Eady QC said:

> **"For those cases in which an injury to feelings award was made after 1 April 2013, it is also right to note that there is a requirement to apply the 10% uplift laid down in *Simmons v Castle* [2012] EWCA Civ 1039. Here that should have been done by the Employment Tribunal and, although there is no cross-appeal to that effect, it is common ground that this would necessarily fall to be done by this EAT if making an award for general damages in substitution for the award by the Tribunal."**

39. I would make the following observations about this case: (i) the applicability of the 10% uplift was conceded; (ii) there was no argument addressed to HHJ Eady QC as there had been before me that the uplift was not intended to awards in the Employment Tribunal; (iii) Judge Eady gave no reasons for her decision.

40. The second authority is that of Simler J in the **Sash Windows Workshop v King** (UKEAT/0057 and 0058/14). In this case the Claimant appealed against the decision of the Employment Appeal Tribunal in relation to an award for compensation for injuries to feelings and a discrimination claim. The Claimant sought the benefit of the **Simmons v Castle** uplift,

which was opposed by the Respondent, but not on the ground that the uplift was a quid pro quo to which litigants in the Employment Tribunal were not entitled but on the basis recorded by Simler J:

> **"… Mr Rees contends that injury to feelings awards in Employment Tribunals can be distinguished from awards for torts in other jurisdictions because of the decision in *Da'Bell* uprating the *Vento* bands in line with inflation and significantly in excess of 10%. He submits that these guidelines are unique to the Tribunal jurisdiction and that accordingly the *Simmons v Castle* uplift is already accounted for. Moreover he submits that the justification for the 10% uplift included the fact that the level of general damages was generally low (see *Simmons v Castle* at 27 and 37) and that this is not the case for Tribunal awards. Finally he submits that the Court of Appeal did not have Employment Tribunals in mind in *Simmons v Castle*."**

41. Simler J went on to hold that the Employment Tribunal had erred by failing to apply a 10% uplift to the award by reference to the uprated **Vento** guidelines. She gave no reasons beyond accepting the Claimant's submissions that discrimination is a statutory tort and, by reference to section 124 of the **Equality Act 2010**, the amount of compensation that may be awarded for the statutory tort corresponds expressly by virtue of section 124(6) to the amount which could be awarded by a county court.

42. Simler J said that there was some support for the proposition that the 10% uplift applied to awards made in the Employment Tribunal by reference to the decision in **Ozog** which I have just referred to. She noted that the point had been conceded in the Employment Appeal Tribunal, but HHJ Eady QC had stated that the concession was rightly made.

43. I would make the following observations about the **Sash Windows** case. Although it was submitted to Simler J that the Court of Appeal did not have Employment Tribunals in mind in **Simmons v Castle** and, as she referred in her Judgement to **Simmons v Castle**, she will have had in her mind the explanations given by the Court of Appeal for the 10% uplift and the Court of Appeal's reluctance to give Claimants who did not give up a right to recover success fees from ATE premiums insurance premiums both "the penny and the bun", but she makes no

reference to the point in her Judgment. Simler J does not appear to have been asked to consider the point raised in this appeal and, as I have just said, she did not refer to it in her Judgment and was not specifically referred to the report of Sir Rupert Jackson to which I was referred in some detail and to which I shall return shortly.

44. I need to refer to the jurisdiction of the Employment Tribunal to award compensation in respect of injury to feelings to be found in the **Equality Act 2010** at sections 119 and 124.

> ***"119. Remedies***
>
> **(2) The county court has power to grant any remedy which could be granted by the High Court -**
>
> **(a) in proceedings in tort;**
>
> **…**
>
> ***124. Remedies: general***
>
> **(2) The tribunal may-**
>
> **…**
>
> **(b) order the respondent to pay compensation to the complainant;**
>
> **…**
>
> **(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court or the sheriff under section 119."**

45. I note that guidelines for the award of compensation for injury to feelings in discrimination cases was set out by the Court of Appeal in **Vento v Chief Constable West Yorkshire Police (No 2)** [2003] IRLR 102 and brought up to date to allow for inflation in **Da'Bell v NSPCC** [2009] IRLR 19 (EAT HHJ McMullen QC). I would refer also to **Bullimore v Pothecary Witham Weld** [2011] IRLR 18, a decision of the Employment Appeal Tribunal presided over by its then President, Underhill J. Underhill J considered the updating of awards for compensation for injury to feelings and guidelines such as those given in **Vento**:

> **"31. As a matter of principle, employment tribunals ought to assess the quantum of compensation for non-pecuniary loss in 'today's money'; and it follows that an award in 2009 should - on the basis that there has been significant inflation in the meantime – be higher than it would have been had the case been decided in 2002. But this point of principle does not require tribunals explicitly to perform an uprating exercise when referring to previous**

> **decided cases or to guidelines such as those enunciated in *Vento*. The assessment of compensation for non-pecuniary loss is simply too subjective (which is not a dirty word in this context) and too imprecise for any such exercise to be worthwhile. Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. 'Uprating' such as occurred in *Da'Bell* is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision referring to such a case which has not itself expressly included an uprating was wrong."**

I derive from this that there is no need for there to be a specific uplift across the board in awards for inflation in Employment Tribunals because the Employment Tribunals are themselves responsible for uplifting awards to take account of inflation where appropriate to do so.

Conclusions

46. I am persuaded by the argument that the Court of Appeal cannot have intended the declaration of the 10% uplift in **Simmons v Castle** to apply to claims in the Employment Tribunal in respect of the statutory tort of discrimination.

47. There is no reference at all in any of the documentation relating to the reform package which was the subject of Sir Rupert Jackson's reports and subsequent statements or any consultation documents or in the Judgment in **Simmons v Castle** as to the applicability of the 10% uplift to awards in the Employment Tribunal. As I have already observed it would be highly unlikely if it was intended to apply the principle outside awards of damages in the civil courts and in particular to providing an uplift to the **Vento** guidelines.

48. Had the Court of Appeal intended to extend the uplift to proceedings in Employment Tribunals, in my opinion it would have said so clearly.

49. It is also evident from the fact that the Court of Appeal revised the terms of its decision after its first Judgment to as far as possible exclude a class of litigants from the benefit of the

10% uplift, which had retained its right to recoup ATE insurance premiums and success fees, because of the date when their proceedings were commenced.

50. I accept that the rationale of the Jackson reforms was to review and amend the law relating to costs in civil proceedings and that as part of that package the rights conferred on successful litigants to recover as part of their costs fees incurred in respect of ATE insurance premiums and success fees were abrogated.

51. It is clear to me from reading the Judgment in **Simmons v Castle** and the other documents to which I have referred that the 10% uplift in damages was to compensate those Claimants who had lost those rights and now had to bear the costs themselves. Sir Rupert Jackson was reporting in relation to "civil proceedings". Proceedings in Tribunals are not properly classified as "civil proceedings", and litigants in Employment Tribunals have never had any right to recover ATE insurance premiums nor success fees. So far as I am aware the provision of ATE insurance has never been a requirement in litigation in the Employment Tribunal (although it may have been available) and has never been regarded as an element of costs; similarly with success fees.

52. It is also of significance that nowhere in **Simmons v Castle** nor in the Jackson report is there any mention of awards in Employment Tribunals or the **Vento** guidelines. It is not that Sir Rupert Jackson did not have Tribunals in mind because he made clear that:

> **"any proposed reform of Tribunals falls outside my terms of reference" (my underlining; see footnote 33)**

The Court of Appeal had no mandate to vary the tariff of awards in Employment Tribunals as set out in **Vento** from Parliament or the government.

53. Sir Rupert did consider the availability of contingency fees in Tribunals and matters such as costs shifting, and I refer to his report. He specifically drew attention to the distinction between the culture in the courts and Tribunals in relation to costs shifting:

> **"The culture of the courts is that costs shifting promotes access to justice; therefore costs shifting is the norm or the default rule in most forms of litigation. The culture of tribunals is that costs shifting inhibits access to justice; therefore no costs shifting is the norm or the default rule in most tribunal proceedings."**

54. It cannot be said that there are circumstances relevant to the **Vento** guidelines that have changed nor that a clear need for change has been established. As made clear in **Bullimore** the effect of inflation is always a matter for consideration by Employment Tribunals in individual cases.

55. I am unable to accept that by virtue of section 129(2)(b) and section 124(6) of the **Equality Act** that Employment Tribunals are required to award precisely the same compensation as a county court. As Mr Cordrey pointed out to me, in **Vento** the Court of Appeal had approved a dictum of Smith J in **HM Prison Service v Johnson** [1997] ICR 275:

> **"Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.**

The most difficult point that I have had to consider is whether or not I should depart from the decision of Simler J in **Sash Window Workshop**. I repeat what Morison J had said in **Secretary of State for Trade and Industry v Cook**. The Employment Appeal Tribunal is not bound by its previous decisions although they will only be departed from in exceptional circumstances or where there are previous inconsistent decisions.

56. It may possibly be that Morison J set the bar rather high, because it is generally considered that decisions of Judges of co-ordinate jurisdiction are persuasive rather than

binding and the Judge will make his decision on the merits of the case, save in cases where there are two inconsistent decisions and the earlier case has been considered and not followed in the second; see note 12-54 in the current edition of the *White Book* (2014) and the decision in **Colchester Estates (Cardiff) v Carlton Industries Plc** [1984] 3 WLR 693. I also draw attention to the reference in **In Re Taylor (A Bankrupt)** [2007] 2 WLR 148 of HHJ Kershaw QC, who preferred the view that:

> **"As decisions of coordinate courts are persuasive and not binding, the Judge should make his decision on the merits of the submissions, giving appropriate weight but no more to the conflicting authorities …"**

Regardless of whether or not Morison J may have set the bar too high, I consider that there are exceptional circumstances that justify my declining to follow the decision of Simler J. I consider that **Sash Window Workshops** should not be followed for the reasons I have given. I also bear in mind that the Employment Appeal Tribunal has a responsibility to give guidance to Employment Tribunals and awards of compensation for injury to feelings must be an almost everyday occurrence. The point is of general application and clearly of importance in Employment Tribunals up and down the country (including in Scotland). I regard it as important in order to minimise the number of other appeals and to ensure consistency that this guidance should be given even though I recognise that the point will have to be decided in due course by the Court of Appeal and I have already given permission to both parties to appeal to the Court of Appeal.

57. For those reasons the appeal is dismissed and the cross-appeal is allowed. My decision is, therefore, that the 10% uplift provided in **Simmons v Castle** has no application in the Employment Tribunal and that the decision in **Sash Window Workshop** should no longer be followed. I am fortified in my conclusion by the judgment of Slade J in **Chawla v Hewlett**

Packard Ltd[1] UKEAT/0280/13 and UKEAT/0427/13 in which she has reached a similar conclusion as to the effect of **Simmons v Castle**.

[1] Slade J does say that she preferred my decision in **De Souza** to the decision in **Sash Windows Workshop**. At the time Slade J handed down her judgment in **Chawla** I had not handed down my judgment, but Slade J had been supplied with a draft to which she was referring.