



# EMPLOYMENT TRIBUNALS

**Claimant:** (1) Mr T Jeurninck  
(2) Mr M Scatena

**Respondent:** Piatto (London) Ltd (in liquidation)

**Before:** (1) Employment Judge A.M.S. Green  
(2) Ms G Mitchell  
(3) Ms L Lindsay

## JUDGMENT ON REMEDY

1. The unanimous judgment of the Tribunal is that the respondent will pay the **FIRST CLAIMANT £41,732.30** broken down as follows:

- a. £28,000 for injury to feelings caused by direct discrimination and harassment based on sexual orientation.
- b. £9,966.46 interest on injury to feelings.
- c. £786.73 for wrongful dismissal.
- d. £1,720.92 for accrued but untaken holiday pay on termination of employment.

2. The unanimous judgment of the Tribunal is that the respondent will pay the **SECOND CLAIMANT £83,102.66** broken down as follows:

- a. £36,000 for injury to feelings caused by direct discrimination and harassment based on sexual orientation.
- b. £30,775.93 financial loss caused by direct discrimination and harassment based on sexual orientation.
- c. £12,814.02 interest on injury to feelings.
- d. £2,578.11 interest on financial loss caused by direct discrimination and harassment based on sexual orientation
- e. £934.60 for wrongful dismissal.

# REASONS

## Introduction

1. For ease of reference we refer to the claimants as Mr Jeurninck and Mr Scatena and the respondent as Piatto.
2. On 9 September 2022, the Tribunal issued a liability judgment upholding the following claims:
  - a. Mr Jeurninck and Mr Scatena's claims for direct discrimination based on sexual orientation and harassment based on sexual orientation.
  - b. Mr Jeurninck and Mr Scatena's claims for wrongful dismissal.
  - c. Mr Jeurninck's claim for holiday pay.
  - d. Mr Scatena's claim for unlawful deduction from wages.
3. The liability judgment was sent to the parties on 20 September 2022. Written reasons were requested and were sent out to the parties thereafter (the "Written Reasons").
4. Mr Jeurninck and Mr Scatena agreed that it would not be necessary for there to be a remedy hearing and that a decision could be made on the papers, and they provided a remedy bundle for the Tribunal to consider. Piatto opted not to be present or represented at the liability hearing and has not made any representations regarding remedy (having been copied in with the remedy bundle).
5. The Tribunal deliberated on remedy on 9 November 2022.

## The Applicable law

### *Discrimination*

6. The Equality Act 2010 ("EQA") creates the right not to be discriminated against where the reason for the discrimination is one of a number of protected characteristics. These are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation (sections 4 and 5 to 12 EQA).
7. Discrimination may take different forms, and the types of conduct prohibited by EQA include direct discrimination (section 13) and harassment (section 26).

8. If a Tribunal finds that an employer has discriminated against an employee, there are three types of remedy available (section 124 EQA). The Tribunal may:
- a. make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
  - b. order the respondent to pay compensation to the complainant;
  - c. make a recommendation that the respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant or any other person.

Each of the remedies is discretionary.

9. Any award of compensation will be assessed under the same principles as applied to torts (sections 124(6) and 119(2) EQA). The central aim is to put the claimant in the position, as far as is reasonable, that he or she would have been had the tort not occurred (**Ministry of Defence v Wheeler [1998] IRLR 23** and **Chagger v Abbey National plc [2010] IRLR 47**). The sum is not determined by what the Tribunal considers just and equitable in the circumstances as it would do in an unfair dismissal award (**Hurley v Mustoe (No 2) [1983] ICR 422**), though the two approaches will often generate the same result. One impact is that certain items for which credit must be given by an employee are treated differently under the two awards, such as earnings from a new job during a notice period.
10. Causation and remoteness limit the damages available to a claimant; only those losses caused by the unlawful act will be recoverable, so for example where an individual would have lost their job at some point in any event, and if the discriminatory dismissal they have suffered has not altered their job prospects, the losses suffered after the date when the individual would have been dismissed anyway have not been caused by the discriminatory dismissal. Further, in the general law of tort losses that are too remote and unforeseeable will not be recoverable. However, in **Essa v Laing Ltd [2004] ICR 746** the Court of Appeal held that this principle does not apply to all statutory torts including discriminatory harassment, such that any loss proved to flow directly from the discriminatory act will be recoverable. It may be that the principle applies to other forms of discrimination.
11. The types of financial loss that are recoverable are in general the same as for an unfair dismissal compensatory award, and will include the value of lost earnings and benefits. The calculation of the financial losses the claimant has suffered will also be broadly similar to awards for unfair dismissal.
12. The central matters the Tribunal will need to determine are the 'old job' facts and the 'new job' facts. It will need to compare the financial benefits had the claimant not been treated unlawfully with the financial benefits the claimant has been able to obtain or will be able to in the future (**Chagger v Abbey**

**National plc [2010] IRLR 47**). Factors that will be considered include whether the employment would have terminated anyway, whether the individual would have been promoted or received a pay rise, what employment has been or will be obtained, what the financial rewards will be and whether these will increase to meet the losses currently being suffered at some point in the future. The Tribunal can take into account the chance of the original employment not continuing, and the chance of any particular employment arising in the future.

13. Injury to feelings awards are available where a tribunal has upheld a complaint of discrimination (section 119(4) EQA) or unlawful detriment. The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. Tribunals have a broad discretion about what level of award to make, which can only be overturned on appeal if the figure chosen is obviously wrong. This will only occur very rarely. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (**Komeng v Creative Support Ltd UKEAT/0275/18/JOJ**).
14. The general principles that apply to assessing an appropriate injury to feelings award have been set out by the **EAT in Prison Service v Johnson [1997] IRLR 162**, para 27:
  - a. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award.
  - b. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.
  - c. Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the entire range of such awards.
  - d. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings.
  - e. Tribunals should bear in mind the need for public respect for the level of awards made.
15. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, and depression (**Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102**).

16. In **Vento**, the Court of Appeal identified three broad bands of compensation for injury to feelings and gave the following guidance (however, see below for revised figures):
- a. The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
  - b. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
  - c. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

Within each band there is considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable, and just compensation in the particular circumstances of the case.

17. The boundaries of the bands have been revised in several subsequent cases, culminating in the decision in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, which held that the 10% uplift in **Simmons v Castle [2012] EWCA Civ 1288** should apply to awards for injury to feelings.
18. Following this, the Presidents of the Employment Tribunals in England & Wales and Scotland issued 'Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd.' The applicable Guidance in this case is for 2018. The bands are as follows:
- a. Lower band – £900 to £8,600 for less serious cases.
  - b. Middle band –£8,600 to £25,700 for cases that do not merit an award in the upper band.
  - c. Upper band – £25,700 to £42,900 for the most serious cases.
  - d. Exceptional cases – £42,900 or above
19. These bands applied to claims presented on or after 6 April 2018 and will be reviewed annually.
20. It is not inevitable that the Tribunal will award an injury to feelings award where it is permitted to, though it is very unusual for no such award to be

made. It is necessary for the individual to prove the nature of the injury to feelings and its extent, though this could be at its simplest the fact that a claimant has stated he was upset by his dismissal (**Murray v Powertech (Scotland) Ltd [1992] IRLR 257** and **Ministry of Defence v Cannock [1994] ICR 918**). The evidence a claimant will want to produce is the material which shows the impact of the discrimination on any subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, and depression. For example, this might include evidence about the impact the discrimination has had on relationships with colleagues, friends and family and any particular difficulties caused by the discrimination. Such evidence might include medical evidence, but where the injury to feelings amounts to a mental illness such as depression, the claimant might well consider seeking an award for personal injury in addition to injury to feelings.

21. The Tribunal is able to award interest on awards of compensation made in discrimination claims brought under section 124(2)(b) EQA, to compensate for the fact that compensation has been awarded after the relevant loss has been suffered. The Tribunal may award interest to the following types of discrimination award:
  - a. Past financial loss
  - b. Injury to feelings.
  - c. Aggravated and exemplary damages.
  - d. Physical and psychiatric injury.
22. Interest is calculated as simple interest accruing from day to day. The interest rate applied is 8%. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (Reg 6(1)(a) IT(IADC) Regs 1996).
23. Interest is awarded on all sums other than injury to feelings awards from the mid-point of the date of the act of discrimination complained of and the date the tribunal calculates the award (Reg 6(1)(b) IT(IADC) Regs 1996). The mid-point date is the date half way through the period between the date of the discrimination complained of and the date the tribunal calculates the award (Reg 4 IT(IADC) Regs 1996).

#### *Wrongful Dismissal*

24. If an employee gives or is given notice of termination of their employment, they will usually be entitled to their normal pay during this period of notice. One scenario that can arise is where the employee does not work during the notice period and does not get paid all or some of their normal wage for the notice period. The employee may be entitled to compensation for breach of the obligation to be paid under the contract.

*Unlawful deduction from wages*

25. A worker has the right not to suffer deductions from wages except under prescribed circumstances, none of which apply in this case. Where the Tribunal finds a complaint under the Employment Rights Act 1996, section 23 (“ERA”) well founded, it will make a declaration to that effect and will order the employer to pay the worker the sum found to have been deducted unlawfully (section 24(1)). The Tribunal may also make such award as it considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the unlawful deduction (section 24(2)). The sums awarded ought to be calculated on a gross basis. There is no statutory cap on the sums that may be awarded by the Tribunal, but sums can only be claimed for the previous 2 years before the claim was made.

*Holiday pay*

26. Holiday and holiday pay claims may arise in a number of circumstances including where the worker has left their employment without having taken the leave to which they were entitled and seeks pay in lieu of that holiday.

27. Claims for unpaid statutory holiday pay may be made under Reg 30 Working Time Regulations 1998 and, where the right is contractual, under section 13 ERA 1996. Where the right is contractual, a claim for unpaid holiday pay may be made under section 13 ERA 1996.

28. Tax should be paid either by the employer through payroll or by the employee under Self-Assessment where this has not been done.

The Tribunal’s Award

*Mr Jeurninck*

<b>Head of claim</b>	<b>Amount (£) with reasons</b>
Direct discrimination based on sexual orientation	<u>Injury to feelings</u>  £28,000  Mr Jeurninck states in his schedule of loss:  <i>I was devastated to lose a job in the business I created. It affected my confidence even after I started my new job. I was suffering from anxiety and work- related stress</i>  Relevant findings of fact in the Written Reasons:

	<p>Paragraph 29(a) Paragraph 29(b) Paragraph 29(c) Paragraph 29(d) Paragraph 29(e) Paragraph 29(f) Paragraph 29(j)</p> <p><u>Financial loss</u></p> <p>No award – past loss is attributable to unlawful deduction from wages and not from unlawful discrimination.</p> <p>Future loss – employment ended on 18 December 2018. He was entitled to 2 weeks’ notice. This would take him to 31 December 2018. He started his new job on 23 January 2019. This is 16 days loss of earnings. Weekly pay was £393.36. He worked 5 days per week. A day’s pay is £78.67. His future loss £1,258.72</p> <p>Income in subsequent employment is greater than earnings at Piatto.</p> <p><u>Interest</u></p> <p>£9,966.46</p> <p>Date first act of discrimination complained of: 1 June 2018 (paragraph 28 of the Written Reasons).</p> <p>Date on which the Tribunal calculates interest: 11 November 2022</p> <p>Period: 1624 days</p> <p>Interest rate: 8%</p> <p><math>1624 \times 0.08 \times 1/365 \times 28000</math></p>
Harassment based on sexual orientation	<b>Included in the compensation awarded for direct discrimination</b>



Wrongful dismissal	£786.72  The contract of employment states Mr Jeurninck is entitled to two weeks' notice of termination of employment. His weekly pay was £393.36 x 2
Holiday pay	£1720.40  5.06 x 40 x £8.50
<b>Total</b>	<b>£41,732.30</b>

*Mr Scatena*

<b>Head of claim</b>	<b>Amount (£) with reasons</b>
Direct discrimination based on sexual orientation	<p><u>Injury to feelings</u></p> <p>£36,000</p> <p>Mr Scatena states in his schedule of loss:</p> <p><i>I was devastated to lose a job in the business I created. It affected my confidence even after I started my new job. I was suffering from anxiety and work-related stress</i></p> <p>Paragraph 29(h)(i) of the Written Reasons. The WhatsApp messages which are reproduced in paragraph 30 of the Written Reasons. The impact of these is set out in paragraph 31 of the Written Reasons. The resignation letter as set out in paragraph 37 of the Written Reasons. The period of unemployment caused by his stress as set out in paragraph 39 of the Written Reasons and his delay in issuing proceedings as set out in paragraph 41 of the Written Reasons and the impact on his health.</p> <p><u>Financial loss</u></p>

	<p>£30,775.93</p> <p>Comprising:</p> <p><i>Past loss</i></p> <p>£14,486.30</p> <p>Period of loss: 1 March 2018 to 18 December 2018 = £14,486.30 (31 weeks x £467.30). This was caused by unlawful discrimination as set out in his resignation letter.</p> <p><i>Future loss</i></p> <p>Period of loss starts on 12 May 2019 (i.e. two weeks after he resigned. He was entitled to two weeks' notice, and this has been accounted for in the wrongful dismissal award. The period of loss ends on 1 December 2019 when he started employment.</p> <p>Period of loss is 214 days</p> <p>Net weekly pay £425 (£1700/4)</p> <p>£18,190 - £1900.61 JSA = £16,289.39</p> <p><u>Interest</u></p> <p><i>Injury to feelings</i></p> <p>£12,814.02</p> <p>Date first act of discrimination complained of: 1 June 2018 (paragraph 28 of the Written Reasons).</p> <p>Date on which the Tribunal calculates interest: 11 November 2022</p> <p>Period: 1624 days</p>
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	<p>Interest rate: 8%</p> <p><math>1624 \times 0.08 \times 1/365 \times 36000</math></p> <p><i>Financial loss - Past</i></p> <p>Period of loss: 1624 days Past loss: £14,486.54 Interest rate: 8%</p> <p><math>1624 / 2 \times 0.08 \times 1/365 \times 14,486</math></p> <p>£2,578.11</p>
Harassment based on sexual orientation	<b>Included in the compensation awarded for direct discrimination</b>
Wrongful dismissal	<p>£934.60</p> <p>The contract of employment states Mr Scatena is entitled to two weeks' notice of termination of employment. His gross weekly pay was £467.30 x 2</p>
Unlawful deduction from wages	<b>Included in the compensation awarded for direct discrimination</b>
<b>Total</b>	<b>£83,102.66</b>

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Employment Judge A.M.S. Green  
11 November 2022