EAT split on 10% uplift to discrimination awards

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In the past six months, four different divisions of the EAT have considered whether the 10% Simmons v Castle uplift applies to employment tribunal discrimination awards. There is currently a 2v2 split.

The background: funding reforms

The final Jackson Report into the reform of civil litigation costs was published in January 2010. It arose from concerns that 'no win, no fee' conditional fee agreements had fostered a culture of litigiousness and inflated costs. To tackle these problems Lord Justice Jackson proposed a number of interlocking measures. The recommendations included abolishing the right of successful claimants to recover CFA success fees and ATE insurance premiums. He also proposed the introduction of US-style, damages-based agreements, entitling the claimant's lawyers to a cut of any winnings.

The benefit of these changes was an increased focus for both claimant and lawyer on achieving maximum damages at minimum cost. However, there were also concerns that if the reforms were too drastic they would deter lawyers from taking the risk of running some claimant cases, thus inhibiting access to justice for poorer litigants. The Jackson Report therefore recommended a sweeping 10% increase to all civil awards of general damages. Lord Justice Jackson surmised that a 10% uplift would compensate claimants for their loss of the right to recover success fees and ATE premiums, and would provide some incentive to lawyers to continue to take on claimant cases, including the riskier ones.

Simmons v Castle

Most of the proposals in the report were implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, but the 10% uplift was entrusted to the Court of Appeal. This task was discharged in *Simmons v Castle.* The Court of Appeal declared that as of 1 April 2013 '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'(para 50).

EAT round 1: Ozog

Clearly considering that an injury to feelings award was a civil award for 'pain and suffering', 'social discredit' or 'mental distress', the President of the Employment Tribunals issued guidance on 13 March 2014 stating that the *Simmons v Castle* uplift would apply to discrimination awards. Support for that position was received when the matter first came before the EAT in *Ozog*. In a judgment handed down in August 2014, HHJ Eady QC outlined that uplifting injury to feelings awards by 10% was now a 'requirement'. No detailed explanation was given for this conclusion, not least because both the claimant and respondent in the case agreed that the uplift was applicable.

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EAT round 2: Sash Window

Further analysis of the issue was given in *Sash Window,* a judgment of Simler J, handed down on 1 December 2014. The EAT concluded again that the uplift did apply to tribunal compensation for discrimination. Quoting from *Simmons v Castle* that 'the increase in general damages we are laying down here extends to tort claims other than personal injury actions' (para 14), the EAT reasoned that the uplift must apply to the statutory tort of discrimination. Simler J also referred to s.124 EqA, under which the amount of compensation that may be awarded in tribunal discrimination claims corresponds with the amount that could be awarded by a county court.

Both *Sash Window* and *Ozog* concerned an uplift to an injury to feelings award. Neither case addressed the issue of a tribunal award for personal injury flowing from discrimination. However, *Simmons v Castle* was itself a personal injury claim and, if the 10% uplift was applicable to tribunal awards, it seemed to follow that it would bite on tribunal awards for personal injury as well.

EAT round 3: De Souza

At first instance in *De Souza* the tribunal had awarded a 10% uplift on the claimant's personal injury award but had declined to award the uplift on the claimant's injury to feelings award. The claimant appealed against the latter decision and the respondent cross-appealed against the former.

Before the EAT the respondent submitted that the presidential guidance and decisions in *Ozog* and *Sash Window* were wrongly decided, pointing out that in those two cases the *Simmons v Castle* point had been a side-issue to wider appeals and had not received full argument. The respondent drew the EAT's attention to the rationale behind *Simmons v Castle:* an uplift specifically provided as a quid pro quo for claimants' loss of the right to recover success fees and ATE premiums. As litigants in the tribunal had never had a right to recover success fees or ATE premiums, the respondent contended that the whole rationale of the uplift had no application to tribunal awards.

While expressing reluctance to depart from the approach of such recent decisions of the EAT in *Ozog* and *Sash Window*, HHJ Serota QC nevertheless accepted the respondent's arguments. In a judgment delivered on 8 January 2015 he dismissed the appeal and allowed the cross-appeal, holding that the 10% uplift did not apply to any tribunal discrimination awards, whether injury to feelings or personal injury.

EAT round 4: Chawla

In a judgment handed down on 25 February 2015, Slade J in *Chawla* had the opportunity to consider the conflicting EAT decisions on the *Simmons v Castle* issue. After observing (at para 91) that tribunal claims were not included on the list of the types of litigation dealt with by the Jackson Report, Slade J concluded that she preferred the decision of HHJ Serota QC in *De Souza*. She therefore held that the 10% uplift had no application to injury to feelings awards in tribunals.

The state of play

So, after more rounds than David Haye against Audley Harrison, there is currently a tied decision in the EAT. While contradictory decisions within a court of coordinate jurisdiction are undesirable, HHJ Serota QC observed in *De Souza* that judicial comity is no basis on which a judge should follow an earlier decision if he or she is convinced that it was wrongly decided. It is, however, hard to think of another example in which four different constitutions of the EAT have reached polarised positions on a point of law in such a short space of time.

Practitioners will be relieved to know that the EAT in *De Souza* recognised the unsatisfactory situation created by the conflicting authorities and gave permission to the claimant to appeal to the Court of Appeal. As a result it is hoped that an authoritative decision on the application of the *Simmons v Castle* uplift in tribunals will be received by the end of the year.

KEY:

Simmons v Castle	*Simmons v Castle* [2012] EWCA Civ 1288
Ozog	*The Cadogan Hotel Partners Ltd v Ozog* UKEAT/0001/14/DM
Sash Window	*The Sash Window Workshop Ltd v King* UKEAT/0058/14/MC
De Souza	*De Souza v Vinci Construction UK Ltd* UKEAT/0328/14/KN
Chawla	*Chawla v Hewlett Packard Ltd* UKEAT/0280/13/BA; UKEAT/0247/12/BA