



P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

**Judicial Consultation on Employment Tribunal awards for
injury to feelings and psychiatric injury following De Souza
v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**

Response from the Employment Lawyers Association

23 August 2017

**ELA Response to Judicial Consultation on Employment Tribunal awards for
injury to feelings and psychiatric injury following De Souza v Vinci
Construction (UK) Ltd [2017] EWCA Civ 879**

INTRODUCTION

The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment. Our membership includes those who represent and advise both employers and employees. It is not our role to comment on the political merits of proposed legislation, rather we make observations from a legal standpoint.

ELA's Legislative and Policy Committee is made up of both Solicitors and Barristers who meet regularly for a number of purposes; including to consider and respond to proposed new legislation.

METHODOLOGY

A survey was conducted of ELA members where they were asked to agree or disagree with the following two questions posed by the judicial consultation:

- 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**

The consultation was chaired by Arpita Dutt of BDBF LLP.

The survey results were analysed by Lindsey Woods of ELA, Arpita Dutt and Nick Wilcox of BDBF LLP and are set out below.

RESPONSE

Question 1: Do you consider that RPI is the appropriate index in connection with up rating of awards? If not, please explain why you disagree.

- a) Of the 165 survey responses received 87.88% of ELA members agreed with the use of RPI, with 12.2% disagreeing that RPI is the appropriate index.
- b) Several respondents were critical of the use of RPI as a credible and reliable benchmark. It was considered that the continued use of RPI could result in discrimination awards increasing at a disproportionate rate to wages and that the award should reflect both the damage caused to the individual and the value of the award to the individual rather than the current value of goods and services, or commodities.

- c) Whilst it was recognised that RPI continues to be used in Judicial College Guidelines for the Assessment of Damages in Personal Injury Cases and for calculating increases in other statutory employment rates (a week's pay, unfair dismissal awards, guarantee payments etc), and whilst consistency is worthwhile, it is not viewed by those disagreeing as the best overall measure.
- d) The majority of those in disagreement considered the more reliable measure would be the CPI (Consumer Prices Index) or CPIH (Consumer Prices Index with Housing Costs) instead of RPI, and that this would be the opportunity to opt for CPI or CPIH as the best overall measure rather than the established measure.

Question 2: Do you agree with the proposed approach to uprating of the Vento bands? If not, please explain why you disagree

- a) Of the 165 survey responses received 86.67% of ELA members agreed with the proposed approach to uprating, with 13.33% disagreeing.
- b) A minimum award of £1,000, being the bottom of the lower Vento band, was considered by some to be too high, particularly for small employers.
- c) A third of those in disagreement felt that the bands for awards to injury to feelings would be too wide and uncertain, and members cited that the middle band in particular would be too broad given the difference between £8,000 and £25,000. Alternative proposals include having a greater number of bands, or sub-bands within the bands accompanied by statutory guidance providing examples of the degree of harm that could fall within the bands or sub-bands.
- d) A third of those in disagreement were also opposed to the rounding up of the bands to the nearest £1,000. Instead, it was suggested that rounding up should be to the nearest £500 or £250.
- e) Of those that disagreed, some considered that whilst the 10% uplift should apply immediately, the uprating should not apply to discrimination claims which have already been issued so as to ensure certainty in any ongoing settlement negotiations.

Arpita Dutt
BDBF LLP
23 August 2017