

Equality and Human Rights Commission

How to work out the value of a discrimination claim

Adviser's Guide

Quantifying discrimination claims
in non-employment cases

May 2018

Context for this guide

The following Guide aims to assist individuals in understanding how a Scottish Court is likely to quantify the amount that a successful claim for discrimination would be found to be worth. This Guide focuses on non-employment cases, and so deals with those sorts of claims such as in the access of services or goods that people might experience in their day to day life, for example when shopping, visiting a venue (like a theatre, restaurant or hotel) or similar.

The General Approach of the Court

The amount of an award made by a Court will depend very much on the facts and circumstances of each individual case, which the Court will look at carefully. It is important, though, to remember that when you raise a case of discrimination in the Sheriff (or other Scottish) court you will need to specify the amount you consider the court should pay. The Court might award less than the sum you claim for at the end of the case, but it cannot award more than the amount you have specified in the Summons or Initial Writ (that is, the formal document you prepared at the beginning of raising your case, together with any formal amendments to that document that the Court has allowed).

While the facts of every case are different, the principle which the Court will apply in deciding the level of the award of damages is always the same: the Court will try to put you back into the same position (so far as is possible) as you would have been in had the discrimination not happened.

This will always include an amount of compensation for injury to your feelings and may include any other financial loss you encountered as a result of the discrimination in question, for example where a wheelchair user is refused access onto a train and has to get on a later train travelling at peak times (and buy a peak-fare ticket), she would be

entitled to an award for both injury to feelings and for the cost of the peak-fare ticket. In many (if not most) other cases the only award will be for injury to feelings, for example where a shopkeeper refuses to serve someone because of their race.

Injury to Feelings

The Vento Scale

There is a lot of case law (previous decisions of the courts and tribunals) about the appropriate levels of injury to feelings. Whilst there is no formal limit placed upon the amount a Court can award, the senior appeal courts have set out a range of awards for injury to feelings called the “**Vento Scale**” (**Vento** is the name of the case that established the scale). The **Vento Scale** has been changed on occasion to take into account the rate of inflation, and currently the three bands of award are as follows:

Lower Band:	£900 to £8,600
Middle Band:	£8,600 to £25,700
Higher Band:	£25,700 to £42,900

Awards in the most exceptional cases may exceed £42,900.

These figures apply to claims presented on or after 6 April 2018. These bands will be reviewed again in March 2019 by the Presidents of the Employment Tribunal and annually thereafter.

Which band of the Vento Scale applies to you?

In the case of **Vento**, the Court of Appeal explained the differences between the three bands:

- The Lower Band applies to “less serious cases” where the act of discrimination is a one-off or isolated occurrence.

- The Middle Band applies to serious cases that do not fall within the Higher Band.
- The Higher Band applies to the most serious cases, for example where there has been a lengthy campaign of discrimination and/or harassment.

For goods and services like the examples outlined earlier in this Guide, the discrimination is likely to be a one-off incident, and so it is likely that the award will be in the lower band of between £900 to £8,600. This band is itself broad, and the Court will consider the facts of the case (from all the evidence), including the evidence from the claimant about the impact of the discrimination on them, before deciding where on this band the award will be.

In the Scottish case of Purves v Joydisc Ltd 2003 SLT (Sh Ct) 64, the Sheriff Principal (Appeal Sheriff) of Glasgow considered an award of injury to feelings for a one-off incident, where a blind man was told that his guide dog would not be permitted within a restaurant. The Sheriff Principal decided that a sum of £350 (which had been the decision of the Sheriff who heard the case initially) was too low, and instead awarded £1000. He made the following comments:

- The lowest amount to be awarded for injury to feelings in a disability case should be £750
- The discrimination will be considered as less serious where: it did not happen in a public place; where the discrimination did not happen in the presence of the disabled person (who was told about it by a friend)
- An apology will usually be the most effective way of mitigating the seriousness of the discrimination.

Whilst the Purves case was specifically a disability case, and was decided before the **Vento Scale** was created by the Court of Appeal in England, it remains a useful tool for quantification. Awards for similar types of one-off discrimination claims that have been decided more

recently in the sheriff court have been at around the same level of award – for example where a disabled woman was refused entry to a spa with her guide dog a sheriff court awarded her £900 in 2016.

What would justify a higher award?

Whilst the Court will assess the award of damages for injury to feelings in an objective way (being objectively linked to the discrimination complained of), the perception and the individual reaction of the victim of discrimination will be an important factor for the Court to consider. The more upsetting the conduct is (although without exaggerating), then the more seriously the discrimination is likely to be viewed by the Court, and the higher the award for injury to feelings.

Examples might be:

- Where particularly rude or insensitive language is used by the discriminator
- Where the discrimination happens in a particularly public place in front of a number of members of the public, and so more likely to be considered as humiliating
- Whether the matter relates to a private or intimate aspect of the victim's life (for example the bowel habits of a disabled person with Crohn's disease, or matters relating to intimate aspects of the victim's sex life, or parts of their body)
- Where the victim of discrimination becomes depressed or ill as a result of what happened

Whilst there are some examples of 'one-off' incidents being viewed as serious enough to merit an award within the middle band of the **Vento Scale**, the previous decisions show that these tend to relate to matters that occurred between employer and employee, which is a more detailed legal relationship than there is between a customer and service provider. However, there is no rule that an award for injury to feelings in non-employment cases can never be in a higher band. It will always depend

upon the facts of the individual case. Where a one-off act is particularly humiliating, or otherwise serious, and the victim suffers serious consequences as a result of that discrimination then an award in the higher bands could be justified. Usually the Court would require quite detailed evidence about the seriousness of the case before it would be prepared to award a substantially higher figure.

How do you Prove Injury to Feelings?

All conclusions that a Court reaches in any case before it must be based on the evidence that has been put before the Court in the form of documents and/or witness evidence. In general terms the Court will have regard to the following matters to reach a decision about the seriousness of the discrimination (and thus the amount of compensation for injury to feelings):

- The circumstances of the discrimination itself (what was said or done, how it was said or done, whether in public or private)
- The evidence of the victim of discrimination
- Any medical evidence (where appropriate)

The Circumstances of Discrimination

We have covered the general points about the circumstances of the discrimination earlier in this guide.

The Evidence of the Victim of Discrimination

The evidence of the victim about the impact of the discrimination on their feelings and well-being is extremely important. Where a victim is able to give insight to the Court about how their feelings were affected this will likely provide a basis for a higher award. Such insight might include:

- How the incident made you feel as it occurred, and immediately afterwards;

- How long it affected you for
- Whether it caused you to become upset about particular things as opposed to just a general feeling of being upset or disappointed
- Whether it stopped you from doing things that you might otherwise have done, and for how long

Each person is different and may react in a different way from others, and the Court will have regard to that, provided it is satisfied that the victim has not exaggerated their evidence. In some cases the failure of a claimant to provide any detail about the impact of the discrimination on their feelings beyond simple and general words has resulted in the Court only awarding compensation at the very bottom of the lower scale. It may be difficult to speak about your feelings, and the Court should be sympathetic to that, but it is important to remember that the Court can only make decisions on the information that is presented to it, and it cannot guess or speculate about how the incident personally affected the victim. The true value of the case can only be decided by the Court having as complete a picture as possible about the incident and its impact.

Medical Evidence (Where Appropriate)

Medical evidence will generally not be necessary unless the victim says that they developed symptoms as a result of the discrimination they suffered, such as depression. Whilst it is possible for a victim to tell the Court about this in their own evidence, Courts generally prefer to have some material or information that confirms what a victim might say. Often this can simply be in the form of a letter from a GP confirming that after the incident the victim had certain symptoms, or was prescribed certain medication, or attended counselling sessions or other treatment. The more serious the symptoms, generally the more evidence the Court will want to have about it before it considers a more substantial amount of damages. In serious cases this might require reports from any specialist doctors or other health professionals that have been treating

the victim, and there should also be some obvious link between the symptoms and the act of discrimination itself. It is also important that a victim of discrimination does not exaggerate the extent of the impact of the discrimination they suffered. Often this can be seen from what doctors or other professional people have to say about the severity and the duration of any symptoms and any treatment. If there is a conflict between what the victim says about the impact of discrimination in their own evidence and what is said about it by a doctor, that will often result in the Court concluding that the impact has been exaggerated and will affect the amount of any award of compensation.

Contacts

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