Compensation for humiliation, loss of dignity and injury to feelings

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Assessing compensation has always presented challenges. How much is too little, enough or too much? How are like cases to be identified and dealt with? To what extent should the parties' individual circumstances be taken into account? And, if identifying the appropriate quantum of compensation poses problems for the Court, what are the challenges faced by litigants in assessing where their potential liabilities and entitlements might lie, so that they can make informed decisions about litigation strategy?

The difficult task of pursuing, responding to, and assessing a claim for compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000, may be easier if it is broken down into a number of steps. The following five-step approach may be helpful:

Step 1 What is the *nature* of the harm that has been suffered?

Step 2 What is the *extent* of the harm that has been suffered and is it *compensatible*?

Step 3 Where do the individual facts of the case sit on the broad spectrum of cases (*low, medium or high level harm*)?

Step 4 Where do the individual facts of the case sit on the *range of awards* for cases involving low level, medium level and high level harm?

Step 5 What is a *fair and just* amount of compensation in this particular case?

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Pre-step 1: The threshold over which every claim must pass …

It is self-evident that the first threshold that must be met is the existence of a personal grievance. That is made clear in the introductory wording of s 123(1) which provides that "where the Authority or the Court determines that an employee has a personal grievance" it may, in settling the grievance, provide for any one or more of a number of remedies. If the claim cannot be made out it cannot form a launching pad for relief, including for non-monetary loss under s 123(1)(c).

Step 1: What is the harm?

The Employment Relations Act specifies a range of remedies which the Court may order in circumstances where a personal grievance has been established. Section 123(1)(c)(i) provides that compensation may be awarded for non-monetary loss, including where a grievant has suffered humiliation, loss of dignity or injury to feelings. Section 123(1)(c)(ii) makes it clear that compensation may also be awarded for the loss of any benefit (whether of a monetary kind or not) that the employee might reasonably have expected to obtain if the personal grievance had not arisen. The circumstances in which relief may be obtained under s 123(1)(c)(ii) have yet to be fully explored.[2]

Each head of damage in s 123(1)(c)(i) (and s 123(1)(c)(ii)) is directed at different things. It pays, as both an applicant and a respondent, to identify what loss is actually being claimed for and why.

What do the three terms in s 123(1)(c)(i) mean? There is a significant degree of overlap, but the following working definitions may be helpful:[3]

- "Humiliation" can be summarised as where a person feels degraded, ridiculed, demeaned, put down or exposed, diminishing or damaging their status and/or self-worth.

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2 See for example the recent discussion in Emma Butcher and Emma Crowley "Remedies: consideration of the employees' path less travelled" [2018] ELB 5.

3 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [105]-[106].

- "Loss of dignity" has been described in the following way by the Supreme Court of Canada in *Law v Canada (Minister of Employment and Immigration)*:[4]

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits … Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued …

- "Injury to feelings" may be experienced in a variety of ways, including sadness, depression, anger, anxiety, stress or guilt.[5]

Note that the categories of relief for non-monetary loss are not expressed in an exhaustive way. Section 123 (Remedies) provides for the payment to the employee of compensation, *including* for humiliation, loss of dignity and injury to feelings and loss of a non-monetary benefit which the employee might reasonably have expected to obtain if the personal grievance had not arisen.[6] Use of the word "including" suggests that there may be other losses which may form the basis for relief. See, for example, the obiter observations of the Court of Appeal in *Ogilvy & Mather*, as to loss of reputation and career (in that case alienation from the advertising industry).[7]

Summary step 1:

What is the harm said to have been suffered? Is it humiliation, loss of dignity and/or injury to feelings? If not, is it another form of non-monetary loss and, if so, does it fall within s 123(1)(c)?

Step 2: What is the extent of the harm and is it compensatible?

The word "may" in s 123(1) is often overlooked. It suggests that while a personal grievance may have been established against an employer the Authority and the Court have a discretion

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4 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53].
5 *Director of Proceedings v O'Neil* [2001] NZAR 59 (HC) at [29].
6 See s 123(1)(c).
7 *Ogilvy v Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641 (CA).

not to award any relief at all.[8] The exercise of discretion against awarding remedies, despite established loss, appears to have occurred in just one Employment Court case.[9] That was a case of particularly egregious behaviour on the part of the employee, but it may be argued that cases involving, for example, negligible injury to feelings as a result of an established breach could appropriately give rise to the exercise of such a discretion.[10] As the Court of Appeal has previously pointed out, it would "plainly" not be appropriate to automatically award compensation whenever a personal grievance has been established.[11]

It is not uncommon for claims to be overinflated or vague in terms of harm suffered. There are significant difficulties in adopting a holis bolis approach to this aspect of the analysis as it can lead to radically distorted results, and unrealistic assessments of likely awards. That, of course, tends to impact on the prospects of an early settlement. A structured approach to determining the actual level of harm suffered and the extent to which it is compensatible is helpful.

There are two fundamental things that a plaintiff must establish when coming to the Court claiming a remedy: loss and liability. It often appears that considerable effort is focussed on liability, and exhaustion sets in by the time remedies fall to be addressed. A lop-sided approach such as this is risky. That is because the Court cannot grant a remedy unless it is satisfied that it is appropriate to do so.

Asking and answering the following two questions might assist:

- What is required to establish the claimed harm?
- To what extent is the loss/injury suffered *causally* linked to the employer's breach?

As to the first question, *evidence of loss* is critical. Preconceptions as to the *sort* of evidence that will suffice should be avoided. It is not, for example, necessary that medical evidence be presented in support of a claim under s 123(1)(c)(i). That is because the three specified heads

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8 See *Harris v The Warehouse Ltd* [2014] NZEmpC 188, [2014] ERNZ 480 at [186]-[187], referring to *Ark Aviation Ltd v Newton* [2002] 2 NZLR 145, [2001] ERNZ 133 (CA) at [41], [45]-[46]; *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [216]. Compare the analysis in *Knapp v Locktite Aluminium Specialties Ltd* [2015] NZEmpC 71, [2015] ERNZ 704 at [22]-[34].

9 *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165 at [320]. See too the discussion in *Knapp v Locktite Aluminium Specialties Ltd*, above n 8.

10 Applying the well-established principle of de minimis.

11 *Department of Survey & Land Information v NZ Public Service Assoc* [1992] 1 ERNZ 851 (CA) at 857 and 861.

of damage are emotional, and personally felt. They may, or may not, manifest in physical harm or a condition requiring medical intervention. The best evidence of s 123(1)(c)(i) harm will often be from the affected person, corroborated by someone who knows them well.

Note that while the evidence must be objectively assessed, it is the *impact on the grievant* that is the focus of the inquiry. Different people experience and manifest harm in different ways. What may be a shocking event for one person may be a minor irritation to another.

Simply establishing that a non-monetary loss has been suffered will not suffice. Whatever the nature of the loss it must be causally connected to the personal grievance. That means that pre-existing or independently existing losses, harm and/or damage must be put to one side. For example, it is not unusual for dismissal on the grounds of redundancy to be accompanied by injury to feelings, loss of dignity and a sense of humiliation. However, if the dismissal is justified, but an unjustified disadvantage is made out, the non-monetary losses suffered as a result of the dismissal will not be relevant to an assessment of relief under s 123(1)(c)(i). The non-monetary losses suffered as a result of the disadvantage will be.

The position becomes more complicated where, for example, the dismissal for redundancy was procedurally unjustified but substantively justified. The only compensation payable will flow from the former, not the latter. This must be accommodated in any assessment of quantum.

Further complications can arise where, for example, an unjustified action is accompanied by other unrelated events which have exacerbated the harm suffered. In these circumstances it is helpful to separate out, as far as possible, the components which are actually attributable to the compensatible breach and those which would have been suffered in any event.

Compare the following scenarios:

Ms A is dismissed following a lengthy disciplinary process which is fatally flawed. She suffers significant levels of stress and anxiety as a result, and her personal relationships deteriorate to the point of disintegration.

Ms B is suffering from significant (non-work related) levels of stress and anxiety and her personal relationships deteriorate. She is dismissed following a lengthy disciplinary process

which is fatally flawed. She suffers further stress and anxiety as a result, and her personal relationships disintegrate.

Mr C is suffering from a severe medical condition which fatally undermines his ability to undertake the core functions of his role. He is dismissed on the grounds of incapacity following a procedurally flawed process.

Step 3: Where on the "harm spectrum" does this case sit?

It may be helpful to apply a band to the circumstances of the case at this stage of the inquiry, and after having considered whether the grievant has actually suffered any harm, the nature of the harm, and the extent to which it was causally connected to the breach. This involves assessing where, on the "harm" spectrum, the case might sit.[12]

In the recent case of *Archibald* three broad bands were identified to assist in the analytical process:[13]

Band 1 – low level loss or injury
Band 2 – mid-range loss or injury
Band 3 – high level loss or injury

Mrs Archibald gave evidence as to the personal impact of the District Health Board's unjustified actions on her. There was no medical evidence presented to the Court. There was, however, other corroborating evidence from colleagues who knew her well and were able to talk about the impact of the employer's breach. In the particular circumstances, the loss/injury suffered by Mrs Archibald was assessed as falling around the middle of the mid-range. She

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12 See recent commentary on banding in employment cases, including Susan Hornsby-Geluk "Putting a price on hurt and humiliation at work" (2 May 2018) Stuff www.stuff.co.nz/business/opinion-analysis/103503391/Authority-has-to-decide-what-hurt-and-humiliation-is-worth; Liz Coats "*Waikato District Health Board v Archibald* – a new approach to assessing compensation for non-monetary loss?" [2018] ELB 2.

13 *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62]. The notion of applying a "bands" approach was first raised in C Inglis and L Coats "Compensation for Non-Monetary Loss – fickle or flexible" (paper presented to the Employment Law Conference, Auckland, October 2016) at 389-391. The bands referred to for discussion purposes were: Nil-$10,000; $10,000-$50,000; more than $50,000.

was awarded $20,000 compensation under s 123(1)(c)(i), twice the amount awarded in the Authority.[14]

The banding approach has subsequently been adopted in a number of Authority determinations, including:[15]

- *Maday v Avondale College Board of Trustees* - assessed as upper end Band 2
- *Cavanagh v Ritchies Transport Holdings Ltd* - assessed as Band 1
- *Anderson v Blue Star Taxis* - assessed as lower middle of Band 2
- *Cheng v Richora Group Ltd* - assessed as middle of Band 2
- *Eaton v Airport Services (Dunedin) Ltd* - assessed as middle of Band 1
- *Dawber v Church Lane NZ Ltd* - assessed as lower end of Band 3
- *Lloyd v Healthy Business Investments Ltd* - assessed as middle of Band 2

Step 4: Where on the "quantum spectrum" does this case sit?

As numerous judgments have made clear, it is desirable for there to be a degree of consistency in awards between like cases. For those practising in the area, it will be important to keep a weather eye on the sort of awards coming out of the Authority and the Court. This will assist in considering where, in comparison to other cases, the individual facts of a case likely sit.

A word of caution - *take care when comparing the figures*.

While it is important to keep an eye on the level of awards that the cases have attracted in the past, it is important not to keep looking back in terms of assessing potential awards. Also look

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14 *Archibald v Waikato District Health Board* [2017] NZERA Auckland 11.

15 *Maday v Avondale College Board of Trustees* [2018] NZERA 131 at [222]-[226] (high end of Band 2, $25,000 per grievance, a total of $50,000); *Cavanagh v Ritchies Transport Holdings Ltd* [2018] NZERA Christchurch 51 (Band 1 - $5,000); *Anderson v Blue Star Taxis (Christchurch) Society* [2018] NZERA Christchurch 41 (lower middle of Band 2 - $15,000); *Cheng v Richora Group Ltd* [2018] NZERA Auckland 28 (middle of Band 2 - $20,000); *Eaton v Airport Services (Dunedin) Ltd* [2017] NZERA Christchurch 224 **(**middle of Band 1 - $7,500); *Dawber v Church Lane NZ Ltd* [2017] NZERA Christchurch 211 (lower end of Band 3 - $25,000 but observing that Authority cannot order more than has been pleaded so ordered $10,000 compensation); *Stojanovich v Remembrance Funerals Ltd* [2017] NZERA Christchurch 201 **(**$15,000); *Lloyd v Healthy Business Investments Ltd* [2017] NZERA Christchurch 188 **(**Band 2 - $15,000 on stated assumption that Band 2 has parameters of $13,000 to $26.000).

forward. Note that an analysis of recent awards (Appendix 2) suggests an *upswing in terms of quantum* of awards for non-monetary loss over the past two years.[16] The average increase across the Authority has been 72 per cent.

The following tables, showing Authority compensatory awards for the periods 2013-2016 and 2016-2018, reflect the percentage changes in quantum over time:

AUTHORITY MEAN AWARDS	2013-2016	2016-2018	% Change
Serious Misconduct (Global)	$7,156.00	$12,500.00	75%
Serious Misconduct (Standard)	$6,155.00	$9,586.86	56%
Suspension (Global)	$1,500.00	N/A	N/A
Suspension (Standard)	$2,833.00	$3,500.00	24%
Redundancy (Global)	$6,875.00	$10,333.33	50%
Redundancy (Standard)	$7,919.00	$7,901.52	0%
Poor Performance (Global)	N/A	$3,000.00	N/A
Poor Performance (Standard)	$5,923.00	$8,942.11	51%
Warning (Global)	$2,500.00	$3,500.00	40%
Warning (Standard)	$2,700.00	$5,300.00	96%
OVERALL AVERAGE	$4,840.11	$7,173.76	48%

AUTHORITY MEDIAN AWARDS	2013-2016	2016-2018	% Change
Serious Misconduct (Global)	$7,750.00	$12,000.00	55%
Serious Misconduct (Standard)	$5,000.00	$10,000.00	100%
Suspension (Global)	$1,000.00	N/A	N/A
Suspension (Standard)	$2,000.00	$3,500.00	75%
Redundancy (Global)	$6,000.00	$12,000.00	100%
Redundancy (Standard)	$6,000.00	$7,000.00	17%
Poor Performance (Global)	N/A	$3,000.00	N/A
Poor Performance (Standard)	$5,000.00	$8,000.00	60%
Warning (Global)	$2,500.00	$3,500.00	40%
Warning (Standard)	$2,000.00	$5,000.00	150%
OVERALL AVERAGE	$4,138.89	$7,111.11	72%

[16] The table in Appendix 2 can be compared to the table contained in the Inglis and Coats conference paper, above n 13, at 415. That table was current as at October 2016.

Further questions appear to arise from the awards emerging from an analysis of figures over the last few years, including:

- The extent to which the *type* of grievance is relevant; and
- Geographical location.

Do different types of grievances sit in different places on the "quantum spectrum"? If so, why?

Interestingly, the awards tables suggest that certain categories of grievance tend to give rise to higher compensatory awards than others. So, for example, based on the figures from the Authority in the two-year period August 2016 – May 2018, an unjustified finding of serious misconduct gave rise to a median award of $10,000; an unjustified finding of poor performance 20 per cent less (at $8,000); an unjustified suspension 65 per cent less (at $3,500) and an unjustified redundancy at 30 per cent less (at $7,000). The variations are broadly reflective of those appearing in the earlier tables prepared for the period 2013 to 2016.

The figures give rise to a number of questions. Is it more likely that a person unjustifiably dismissed for redundancy will suffer less humiliation, loss of dignity and injury to feelings than a person who has been unjustifiably dismissed for serious misconduct?

Geographical location – impact?

The following table, which comprises average awards in the Authority over the last two-year period, suggests that location may be a factor in the quantum of compensatory awards, although it is unclear what might underlie this.

EMPLOYMENT RELATIONS AUTHORITY ONLY (August 2016 – May 2018)					
Auckland		**Christchurch**		**Wellington**	
Mean	*Median*	*Mean*	*Median*	*Mean*	*Median*
$8,860.51	$8,000.00	$9,681.58	$10,000.00	$7,100.00	$6,000.00

In *Archibald*, and by reference to previous cases, the middle of the suggested middle range was said to be "around $20,000". By way of comparison, a recent practice direction from the UK Employment Tribunals set their bands as follows (NZ$ rounded):[17]

Lower	£900 - £8,600	NZ$$ at 1 May 2018: $1,800- $17,000
Middle	£8,600 - £25,700	NZ$$ at 1 May 2018: $17,000 – $51,000
Upper	£25,700 - £42,900	NZ$$ at 1 May 2018: $51,000 - $85,000
Exceptional cases: Exceeding the upper limit		

It is worth retaining a sense of realism at this stage of the inquiry. It is not uncommon to see claims for non-monetary loss which border, in terms of quantum, on the farcical. The highest award made by the Court has been $50,000 under s 123(1)(c)(i).[18] While that figure does not set the outer limit of any award (there being no statutorily prescribed limit) it is highly unlikely that a bog standard disadvantage claim with no evidence other than the employee's say-so that they felt "hurt and humiliated" by the employer's actions will attract an award at this level, or anything close to it.

Unrealistic notions about likely compensatory awards are unhelpful in a jurisdiction in which parties are encouraged to attempt, in good faith, to resolve their differences at an early stage.

Step 5: What is a fair and just amount of compensation to address the actual breaches in this case? What other factors might be relevant?

At this stage of the inquiry it is helpful to stand back and make an overall assessment.

Ultimately the Court must make *an award which is just*. The individual facts of the case and the impact of the established breach/es on the employee will be key to the analysis. A number of issues arise.

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17 Figures taken from Presidential Guidance "Employment Tribunal Awards for injury to feelings and psychiatric injury *following De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879"; see Presidential Guidance Vento Bands First Addendum (23 March 2018). The earlier "Vento bands" notification of 5 September 2017 surveyed the awards given in several UK cases; see Presidential guidance Vento Bands; both Practice Directions can be found at <www.judiciary.gov.uk publications employment-rules-and-legislation-practice-directions> and are attached as Appendix 3.

18 *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 (EmpC) at [140]-[142].

To what extent is *proportionality* relevant to the exercise of the Authority/Court's discretionary powers as to relief? So, for example, where an employee has established three years' lost wages totalling $320,000; a lost bonus totalling $80,000; and an unjustified dismissal resulting from a procedurally and substantively flawed redundancy process, should a "just" award be based on total quantum or the sum of the awards which would otherwise be made in respect of each individual component?[19] Might such an approach run the risk of *under-compensation*?[20] And should compensatory awards for non-monetary loss under s 123(1)(c)(i) be proportionate to awards in other comparable jurisdictions, such as the Human Rights Review Tribunal?[21]

Section 123(1)(c)(i) makes it clear that the Court may award "any one or more" of the remedies specified. To what extent does this allow a "*pick 'n mix*" approach to remedies, ordering reinstatement (for example) but no compensation for established non-monetary injuries suffered?[22]

To what extent, if any, is the employee and/or employer's *financial capacity* relevant to an assessment of compensation under s 123(1)(c)(i)?

To illustrate the latter point:

Hypothetical One

Mr A is subjected to an intolerable pattern of bullying by his employer over several months, resulting in a nervous breakdown and attempted suicide.

Employer 1 is a small-scale owner operator business which struggles to get by.
Employer 2 is a multinational company with significant financial reserves.

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19 See, for example, *Cain v HL Parker Trusts* [1992] 3 ERNZ 777 (EmpC) at 791 (Court would have ordered more by way of compensation but for the level of lost remuneration ordered in favour of the employee).

20 Law Commission *Damages for Personal Injury: Non-Pecuniary Loss* (UKLC 257, 1998) at 3.17.

21 *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66.

22 See, for example, *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431 at [85], where Judge Couch ordered reinstatement but denied other remedies.

The level of harm suffered by Mr A is the same at the hands of both employers. Should Employer 1 pay less by way of compensatory award under s 123(1)(c)(i) than Employer 2? And if so why?

Would the analysis change if even a modest award would almost certainly put Employer 1 out of business, along with three other employees who work there? Should this lead to a nil award? And, if so, why?

Hypothetical Two

Employee A is independently wealthy. He is subjected to an intolerable string of bullying by his employer over several months, resulting in a nervous breakdown and a suicide attempt.

Employee B is impecunious, has numerous personal debts and five dependent children. He is subjected to an intolerable string of bullying by his employer over several months, resulting in a nervous breakdown and a suicide attempt.

Employer 1 is a small-scale owner operator business which struggles to get by.
Employer 2 is a multinational company with significant financial reserves.

Should Employee B receive a higher compensatory award than Employee A and, if so, why?
Should any award against Employer 1 be less than the award against Employer 2 and, if so, why?

In working through these interesting issues, a number of points arise. It may, for example, be noted that the Employment Relations Act confers on the Court (and the Authority) the ability to order compensatory payments by instalment by an employer when the circumstances justify such a step.[23] The Act also specifically provides that the Court must take into account the size of the employer for certain purposes, namely in determining what actions would have been reasonable in the particular circumstances.[24] To put it another way, more is expected from a well-resourced employer in terms of the process they adhere to. Notably absent is any provision directing the Court to take into account the parties' individual financial

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23 Employment Relations Act 2000, s 123(2).
24 Section 103A(3)(a), s 32(3)-(4), s 60A.

circumstances in setting an appropriate *amount* of compensation. Indeed provision for payment by instalment where the financial circumstances of the employer require it (s 123(2)), may be taken as a statutory indication that this is the sole route by which employer financial burden is to be addressed, and that there is no broader power to take such a factor into account in *reducing* (including to nil) what would otherwise be awarded.

The position in relation to setting penalties, costs and fines provides a contrast.[25] And Lord Devlin has previously observed that while the means of the parties are material to an assessment of exemplary damages, they are *immaterial* in assessing claims for compensation.[26]

No doubt the differing purposes of penalties, exemplary damages and costs - as opposed to compensation - go a long way to explaining why a different approach to financial means might be warranted. A penalty is directed at punishment and deterrence. Compensation is not.[27] Compensation is directed at redressing the particular injury or loss suffered by the wronged party. And, unlike costs, there is no principle (such as access to justice) that needs to be balanced.[28]

The position may not, however, be clear cut. Both the Authority and the Court have broad discretionary powers which must be exercised consistently with the underlying purposes of the Act, one of which is to *build productive employment relationships*.[29] Would a crippling compensatory award achieve that end (at least in the narrow party-party sense) in hypothetical 2 above?

Note that the Court of Appeal has previously suggested that a number of factors, including the *impact on the employer*, the current *economic climate* and broader *social expectations*, may be relevant to the exercise of the broad discretion to order compensation.[30]

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25 See, for example, discussion of the employer's ability to pay penalties in *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072 at [181]-[186].

26 *Rookes v Barnard* [1964] 1 All ER 367 (HL) at 411, cited in *McDermott v Wallace* [2005] 3 NZLR 661 (CA) at [94], [99] in discussing the principles to be applied in assessing exemplary damages.

27 See *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) at 710.

28 See *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

29 Section 3.

30 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA). See too *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275 at [281] where Cooke P observed that: "… plainly enough, what is to be aimed at is an award that is fair and reasonable between the parties as a matter of good industrial practice in the current economic climate.".

The role of equity and good conscience

The Authority and the Court are required to exercise their statutory jurisdictions consistently with *equity and good conscience*. In this regard s 189 provides:

> In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

In *Unkovich v Air New Zealand Ltd* Chief Judge Goddard, delivering the judgment for the full Court, observed (when deciding whether to award reimbursement of more than three months' lost wages) that:[31]

> … it is a matter for the exercise of discretion whether to require the employer to pay a sum greater than that which must be awarded under s 41(1). However, the discretion is intended to be for the benefit of the employee aggrieved and is normally to be exercised in favour of that employee unless the employee has foregone the right to favourable consideration by his or her own behaviour, *or unless a higher payment would involve such a degree of hardship for the employer as to render it unjust and inequitable to order the payment, no matter how just or equitable it may seem to the employee to receive it.*
> (Emphasis added)

Chief Judge Goddard returned to the issue in *Trotter v Telecom Corp of New Zealand Ltd*, noting that:[32]

> In this Court, an exception is made to the general rule of full compensation, regard being had to *fairness to the respondent employer, including its ability to pay*. Sometimes this can result in no award being made, sometimes in a diminution of the award that would be made in the absence of this feature.
> (Emphasis added)

While these cases reflect a willingness to have regard to the particular circumstances of the respondent party in setting an appropriate compensatory figure, there does not appear to be any reported judgment of the Court in which that step has actually been taken.

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31 *Unkovich v Air New Zealand Ltd* [1993] 1 ERNZ 526 at 552.

32 *Trotter v Telecom*, above n 27, at 700. The extent of the Court's discretion to award "full" compensation for monetary loss was subsequently doubted by the Court of Appeal in *Telecom v Nutter*, above n 30. Note that financial hardship was also identified as a relevant factor in determining fair compensation for redundancy in *Wellington Caretakers IUOW v GN Hale & Son Ltd* 1990] 3 NZILR 836 at 843, (1990) ERNZ Sel Cas 1024 at 1032.

Research has revealed only one case (a determination of the Employment Relations Authority) in which the financial position of the employer was expressly taken into account in reducing the quantum which would otherwise have been awarded to the employee under s 123(1)(c)(i) – *Narayan v Damasso*.[33] The case involved a genuine redundancy and an employer who was an individual (rather than a limited liability company) and who was in straitened financial circumstances. The Authority would have awarded $5,000 compensation but reduced the amount by 50 per cent in recognition of the impact that a greater award would likely have on Mr Damasso.

The broader approach to what might be called "just compensation as between the parties" adopted in *Narayan* can be contrasted with other cases in the Authority, such as *Madani v Cirrotec Ltd* and *Jemmett v Saunders*.[34] In the latter case the Authority member observed that:[35]

> In the end, it cannot be right and just for Ms Jemmett to be denied a proper award just because her employer has limited means.

While parties frequently refer to equity and good conscience, particularly where they have few other feathers to fly with, the scope and application of the open-textured phrase remains unclear, including (but not limited to) the way in which claims for compensation for non-monetary loss are to be dealt with in cases raising difficult issues of financial hardship.

As already observed, the Court has indicated a willingness to revert to principles of equity and good conscience in assessing remedies, including (in cases of egregious action) declining to award any relief at all or reducing it.[36]

It is notable that courts exercising their equitable jurisdiction have taken and do take into account, as a discretionary consideration, the financial circumstances of parties when determining remedies. See, for example, *Dowsett v Reid*,[37] although the case involved an application for specific performance. As observed in JCF Spry *The Principles of Equitable*

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33 *Narayan v Damasso* [2012] NZERA Wellington 38 at [14].

34 *Madani v Cirrotec Ltd* [2014] NZERA Auckland 239; *Jemmett v Saunders* [2015] NZERA Christchurch 147.

35 At [53].

36 See, for example, *Salt v Fell* [2006] ERNZ 449 (EmpC). Compare the discussion of the role of equity and good conscience in *Ark Aviation*, above n 8.

37 *Dowsett v Reid* (1912) 15 CLR 695.

Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages in respect of equitable damages:[38]

> It is not yet possible, in the absence of authorities, to define all the circumstances in which differences from the legal measure of damages will arise, and it is necessary to refer back to the general principles on which the balance of justice and injustice in granting particular remedies is determined, and especially to those that concern unfairness and hardship as between the parties.

There is room for argument as to what factors ought to be taken into account by the Authority and the Court at the penultimate stage of the quantum-assessment process, when considering what is a fair and just award in the exercise of their broad discretionary powers. The financial position of one or other or both parties might fall for consideration; there may be other factors of relevance too. All of this provides fertile ground for further analysis.

Reduction for contribution and/or mitigation

There is at least one final step in the quantification process, potentially two. The first is prescribed by statute. Section 124 requires the Court, when assessing both the nature and extent of remedies, to consider if those actions so require, whether the actions of the employee contributed to the situation giving rise to the grievance and to reduce remedies accordingly. Simply establishing bad behaviour is not enough. The contributory conduct must be causally connected to the situation giving rise to the grievance. And any reduction must be proportionate to the level of contribution.

It is well established that the Court will take a failure to mitigate into account when assessing a claim for reimbursement of lost remuneration. It is unclear whether the same principle applies to non-monetary loss. What, for example, is the position in relation to an employee who unreasonably fails to access counselling services?

Conclusion

There are numerous challenges in terms of assessing an appropriate quantum of compensation, either at a pre-litigation or post-litigation stage. It is an inexact science. That is not, however,

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[38] JCF Spry *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (4th ed, The Lawbook Company, Sydney, 1990) at 633.

a reason to adopt a finger-in-the-wind approach. Rather, it reinforces the need for clarity as to the factors which have either fed into an assessment or which have been put to one side as irrelevant; and what the ultimate figure (for settlement discussion purposes or ultimately in an award made by the Authority or the Court) is based on and why.

All of this may be said to enhance the prospects of a greater degree of consistency across the spectrum of cases, to support informed settlements and predictability in awards, and to provide a transparent appellate platform.

APPENDIX ONE

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

(d) if the Authority or the court finds an employee to have been sexually or racially harassed in his or her employment, recommendations to the employer—

(i) concerning the action the employer should take in respect of the person who made the request or was guilty of the harassing behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person:

(ii) about any other action that it is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.

(2) When making an order under subsection (1)(b) or (c), the Authority or the court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

APPENDIX 2

Total Awards:[39]
EMPLOYMENT COURT AND EMPLOYMENT RELATIONS AUTHORITY (August 2016 - May 2018)[40]

Type of Award	Total Mean[41]	Total Median[42]	Total Range[43]	Total Mode[44]
Serious Misconduct				
Global[45]	$12,500.00	$12,000.00	$14,000.00	N/A
Standard[46]	$10,105.16	$10,000.00	$25,000.00	$10,000.00
Suspension				
Global	N/A	N/A	N/A	N/A
Standard	$3,500.00	$3,500.00	$3,000.00	N/A
Redundancy				
Global	$10,333.33	$12,000.00	$5,000.00	$12,000.00
Standard	$8,735.71	$7,000.00	$23,000.00	$10,000.00
Poor Performance				
Global	$3,000.00	$3,000.00	N/A	N/A
Standard	$8,714.29	$8,000.00	$20,000.00	$8,000.00
Warning				
Global	$3,500.00	$3,500.00	$7,000.00	N/A
Standard	$5,300.00	$5,000.00	$10,000.00	$5,000.00

39 The award values considered were those decided before contribution was taken into account (if at all) under s 124.

40 The cases surveyed were all Employment Relations Authority and Employment Court decisions between August 2016 and 31 May 2018, where awards of compensation under s 123(1)(c)(i) were made on either a global or standard basis, for: unjustified dismissal for serious misconduct; unjustified dismissal for poor performance; unjustified dismissal for redundancy; unjustified suspension; or unjustified warning. The cases are therefore not a complete list of every award of compensation under s 123(1)(c)(i), because it does not cover cases which fell outside these categories.

41 Mean = average award.

42 Median = the award at the midpoint of all cases surveyed.

43 Range = the difference between the lowest and highest awards in the cases surveyed.

44 Mode = the most common awards of all cases surveyed.

45 "Global award" means a combined award for more than one type of grievance, such as a combined award of $7,000 for an unjustified warning and unjustified dismissal for serious misconduct. "Standard" and "global" awards have been considered separately, as the award associated with each particular type of grievance is not always specified in a decision, and the award amount could therefore skew the data. Where a "global award" has been made in any particular case, that award is referred to only once in the tables, under the award type that tends to see a higher award made. (For example, a global award for an unjustified warning and unjustified dismissal for serious misconduct would appear in the serious misconduct section in the table).

46 "Standard award" means an award made for a single type of grievance.

EMPLOYMENT COURT ONLY (August 2016 - May 2018)				
Type of Award	**Total Mean**	**Total Median**	**Total Range**	**Total Mode**
Serious Misconduct				
Global	N/A	N/A	N/A	N/A
Standard	$17,750.00	$18,000.00	$15,000.00	N/A
Suspension				
Global	N/A	N/A	N/A	N/A
Standard	N/A	N/A	N/A	N/A
Redundancy				
Global	N/A	N/A	N/A	N/A
Standard	$22,500.00	$22,500.00	$5,000.00	N/A
Poor Performance				
Global	N/A	N/A	N/A	N/A
Standard	$6,550.00	$6,550.00	$10,700.00	N/A
Warning				
Global	N/A	N/A	N/A	N/A
Standard	N/A	N/A	N/A	N/A

EMPLOYMENT RELATIONS AUTHORITY ONLY (August 2016 - May 2018)				
Type of Award	**Total Mean**	**Total Median**	**Total Range**	**Total Mode**
Serious Misconduct				
Global	$12,500.00	$12,000.00	$14,000.00	N/A
Standard	$9,586.86	$10,000.00	$25,000.00	$10,000.00
Suspension				
Global	N/A	N/A	N/A	N/A
Standard	$3,500.00	$3,500.00	$3,000.00	N/A
Redundancy				
Global	$10,333.33	$12,000.00	$5,000.00	$12,000.00
Standard	$7,901.52	$7,000.00	$16,000.00	$10,000.00
Poor Performance				
Global	$3,000.00	$3,000.00	N/A	N/A
Standard	$8,942.11	$8,000.00	$20,000.00	$8,000.00
Warning				
Global	$3,500.00	$3,500.00	$7,000.00	N/A
Standard	$5,300.00	$5,000.00	$10,000.00	$5,000.00

APPENDIX 3

JUDGE BRIAN DOYLE
PRESIDENT
EMPLOYMENT TRIBUNALS
(ENGLAND & WALES)

EMPLOYMENT TRIBUNALS
(SCOTLAND)
Judge Shona Simon
President

PRESIDENTIAL GUIDANCE

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

FIRST ADDENDUM TO PRESIDENTIAL GUIDANCE
ORIGINALLY ISSUED ON 5 SEPTEMBER 2017

1. This Addendum updates, but does not otherwise replace, the Presidential Guidance originally issued on 5 September 2017, which remains relevant to claims presented before 6 April 2018. It takes into account changes in the RPI All Items Index released on 20 March 2018.[47]

2. In respect of claims presented on or after 6 April 2018, the Vento bands shall be as follows: a **lower band of £900 to £8,600** (less serious cases); a **middle band of £8,600 to £25,700** (cases that do not merit an award in the upper band); and an **upper band of £25,700 to £42,900** (the most serious cases), with the most **exceptional cases capable of exceeding £42,900**.

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47 The Presidents remain aware of the shortcomings of the Retail Prices Index as a measure of inflation. They will consider at the relevant time any future change to the appropriate index of inflation that might be adopted in the Judicial College *Guidelines for the Assessment of General Damages in Personal Injury Cases* and/or by section 34 of the Employment Relations Act 1999. See: https://www.ons.gov.uk/economy/inflationandpriceindices/articles/shortcomingsoftheretailpriceindexasameasureofinflation/2018-03-08.

3. In respect of claims presented in Scotland, the bands remain subject to paragraph 12 of the Presidential Guidance issued on 5 September 2017.

Judge Shona Simon
President (Scotland)

Judge Brian Doyle
President (England & Wales)

23 March 2018

JUDGE BRIAN DOYLE
PRESIDENT
EMPLOYMENT TRIBUNALS
(ENGLAND & WALES)

EMPLOYMENT TRIBUNALS (SCOTLAND)
Judge Shona Simon
President

PRESIDENTIAL GUIDANCE

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

1. An Employment Tribunal may order a respondent to pay compensation to a claimant[48] if the Tribunal finds that there has been a contravention of a relevant provision of the Equality Act 2010 in respect of which it has jurisdiction.[49] The amount of compensation which may be awarded corresponds to the amount which could be awarded by a county court in England & Wales or a sheriff in Scotland.[50] An award of compensation may include compensation for injured feelings (whether or not it includes compensation on any other basis).[51] An injury to feelings award might also be appropriate in certain claims of unlawful detriment.

2. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318 the Court of Appeal in England & Wales identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower band of £500 to £5,000 applied in less serious cases. The middle band of £5,000 to £15,000 applied in serious cases that did not merit an award in the upper band. The upper band of between £15,000 and £25,000 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000).

3. In *Da'Bell v NSPCC* (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and uprated them for inflation. The lower band was raised

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48 Equality Act 2010 section 124(2)(b).

49 Equality Act 2010 section 124(1) cross-referring to section 120(1) and relating to a contravention of Part 5 (work) or a contravention of sections 108, 111 or 112 that relate to Part 5.

50 Equality Act 2010 section 124(6) cross-referring to section 119.

51 Equality Act 2010 section 119(4).

to between £600 and £6,000; the middle band was raised to between £6,000 and £18,000; and the upper band was raised to between £18,000 and £30,000.

4. The Employment Appeal Tribunal has subsequently stated that the bands and awards for injury to feelings can be adjusted by individual Employment Tribunals where there is cogent evidence of the rate of change in the value of money: *AA Solicitors Ltd v Majid* (2016) UKEAT/0217/15. See also *Bullimore v Pothecary Witham Weld* (2010) UKEAT/0189/10, [2011] IRLR 18 at para 31. However, the bands themselves have not been uprated in general since the decision in *Da'Bell* in 2009.

5. In a separate development in *Simmons v Castle* [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239 the Court of Appeal in England & Wales declared that with effect from 1 April 2013 the proper level of general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit or mental distress would be 10% higher than previously. This followed upon changes to the rules governing the recovery of costs in personal injury litigation in the civil courts in England & Wales.

6. In *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 the Court of Appeal has ruled that the 10% uplift provided for in *Simmons v Castle* should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury in England and Wales. The Court expressly recognised (see footnote 3) that it was not for it "to consider the position as regards Scotland." However, account has now been taken of the position in that jurisdiction by the Scottish President before formulating this Guidance.[52]

7. So far as awards for psychiatric injury are concerned, the Court of Appeal in *De Souza* observed that the Judicial College *Guidelines for the Assessment of General Damages in Personal Injury Cases* now incorporated the 10% uplift provided for in *Simmons v Castle*. If an Employment Tribunal relied upon the Judicial College *Guidelines* in making an award for psychiatric injury then that award would comply with *Simmons v Castle* and *De Souza v Vinci Construction (UK) Ltd*.

8. The Court of Appeal in *De Souza* invited the President of Employment Tribunals in England & Wales to issue fresh guidance which adjusted the *Vento* figures for inflation and so as to incorporate the *Simmons v Castle* uplift. In light of that invitation the Scottish President decided that it was also appropriate that consideration be given to the matter in that jurisdiction.

9. Following consultation with Employment Tribunal stakeholders and users, we have decided to address the issues arising by using our power to issue Presidential Guidance under rule 7 of Employment Tribunal Rules of Procedure.[53] The Presidents may publish guidance for England and Wales and for Scotland, respectively, as to matters of practice and as to how the powers conferred by the Rules may be exercised. Any such guidance shall be published by the Presidents in an appropriate manner to bring it to the attention of claimants, respondents

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52 The Scottish President's reasons for issuing Presidential Guidance in the same terms as that issued in England and Wales are set out in an Appendix to the document recording responses to the Presidents' consultation that preceded this Presidential Guidance. See www.judiciary.gov.uk/wp-content/uploads/2017/07/vento-consultation-response20170904.pdf.

53 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, reg 13(1) and sch 1.

and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.

10. Subject to what is said in paragraph 12, in respect of claims presented on or after 11 September 2017, and taking account of *Simmons v Castle* and *De Souza v Vinci Construction (UK) Ltd*, the Vento bands shall be as follows: a **lower band of £800 to £8,400** (less serious cases); a **middle band of £8,400 to £25,200** (cases that do not merit an award in the upper band); and an **upper band of £25,200 to £42,000** (the most serious cases), with the most **exceptional cases capable of exceeding £42,000**.

11. Subject to what is said in paragraph 12, in respect of claims presented before 11 September 2017, an Employment Tribunal may uprate the bands for inflation by applying the formula *x* divided by *y* (178.5) multiplied by *z* and where *x* is the relevant boundary of the relevant band in the original *Vento* decision and *z* is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the *Simmons v Castle* 10% uplift).

12. So far as claims determined by an Employment Tribunal in Scotland are concerned, if an Employment Tribunal determines that the *Simmons v Castle* 10% uplift does not apply then it should adjust the approach and figures set out above accordingly, but in so doing it should set out its reasons for reaching the conclusion that the uplift does not apply in Scotland.

Judge Shona Simon
President (Scotland)

Judge Brian Doyle
President (England & Wales)

5 September 2017