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EMPLOYMENT LAW

Unfair dismissal: our take on the removal of the compensatory cap

On 16 December 2025, the Employment Rights Bill completed its passage through Parliament, paving the way for it to become law within days. Controversially, the Bill was amended at a late stage to abandon Labour's flagship manifesto pledge to make unfair dismissal a Day 1 right. In its place, Parliament introduced a six-month qualifying period and abolished the long-standing statutory cap on compensation for unfair dismissal.

This change fundamentally reshapes the landscape of unfair dismissal litigation and has been the subject of a lot of debate and commentary by employment lawyers, employers and the media in recent weeks. Ordinary unfair dismissal claims have entered a new remedial universe, placing them alongside discrimination and whistleblowing claims in terms of the financial remedies available to individuals.

As lawyers who act for senior individuals, we consider what the removal of the compensation cap means in practice, who stands to benefit, and how this reform is likely to alter employer behaviour and litigation strategy.

A different remedial universe

With the removal of the cap, ordinary unfair dismissal claims will enter a very different remedial universe. While still distinct from discrimination and whistleblowing claims - injury to feelings, injury to health, interim relief and recommendations will remain unavailable - the financial remedies available to individuals will be broadly comparable.

Commentators suggest that claimants who previously pursued a discrimination or whistleblowing claim may now choose to proceed with an ordinary unfair dismissal claim alone. The burden of proof lies with the employer and these claims are generally simpler to plead and less expensive to litigate. But our view is that where a claimant believes there was a discriminatory reason at play, or they have been dismissed for whistleblowing, they are still likely to pursue that claim as well. Further, where there has been damage to health as a result of discriminatory treatment, it will remain important for discrimination to be pleaded.

Certain unfair dismissal claims will feel much closer to the higher-stakes discrimination landscape. Dismissals arising from employee expression, which have garnered a lot of interest in recent years, will increasingly invite Article 10 (freedom of expression) arguments. As the Employment Rights Act 1996 must be read compatibly with Convention rights, tribunals are likely to ask whether the employer's interference with freedom of expression pursued a legitimate aim and was proportionate. A failure to justify the interference is likely to take the dismissal outside the band of reasonable responses. Employees will expect employers to address these issues carefully and sensitively rather than taking the decision to terminate employment.

Ordinary unfair dismissal claims are more likely to plug some of the gaps in the legislation designed to protect whistleblowers: for example, the lacuna which means that an employee who refuses an employer's instruction to do something unlawful, but who does not make a protected disclosure about that refusal, currently only has recourse to a capped unfair dismissal claim if they are then dismissed.

Rise in claims from higher earners and those with valuable benefits

Employees with remuneration packages above the current compensation cap - particularly those with valuable benefits such as equity-based remuneration, carried interest, bonuses, LTIPs, or final salary pensions - will have a clear rationale for pursuing unfair dismissal claims. Once a tribunal can award full economic loss, the sums

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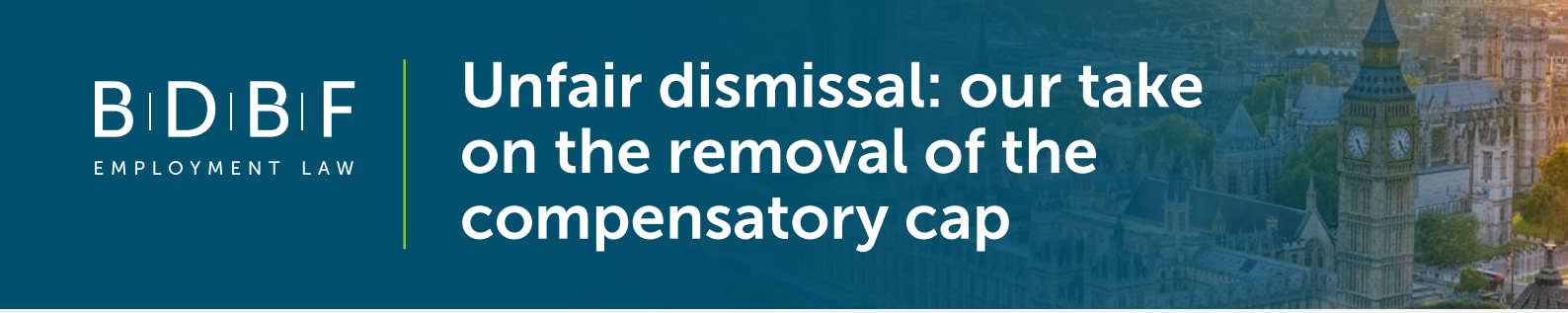

escalate rapidly - sometimes dramatically - especially if unemployment persists. *Micklefield* clauses are typically used in share plans to prevent claims for lost benefits due to termination, but they will not come to an employer's rescue here, since they do not limit the loss recoverable in statutory claims.

Looking ahead, we expect some changes to how remedy is addressed in unfair dismissal claims:

- More ambitious and sophisticated Schedules of Loss, especially around equity and pension valuation.
- Expert evidence becoming routine, for example, actuaries on pension loss, valuation experts on share awards, and specialists on mitigation in competitive labour markets.
- Longer, more complex remedy hearings, particularly where multiple forms of remuneration interact, or vesting schedules are in dispute.

Individuals with high-value claims will have less incentive to settle claims early, especially if a significant element of their loss is not mitigated by finding a new role e.g. unvested LTIPs, shares and discretionary bonuses.

Multi-year and career-long loss claims unlocked

Removing the cap on future loss unlocks further complexity: multi-year and career-long loss arguments. Categories of claimants likely to press this advantage include:

- Older workers who may struggle to re-enter the labour market. The recent decision in *Davidson v National Express Ltd*, which discourages automatic cessation of future loss at age 65, makes this a fertile area.
- Disabled workers, where the dismissal is unrelated to their disability (meaning no discrimination claim is available) but where their disability adversely affects their employment prospects.
- Regulated professionals whose dismissal may operate as a career-ending event, creating a credible route to very substantial future losses.

Of course, claimants will still require cogent evidence of *why* extended future loss is probable, and tribunals will remain alert to mitigation failures. But respondents will have to interrogate mitigation, commission labour-market evidence, and challenge any attempt by claimants to rely on "assumed" disadvantage.

Will the removal of the cap impact the "Johnson exclusion zone"?

The Johnson exclusion zone will continue to operate as a clear boundary between the statutory and common law routes for recovering loss arising out of dismissal. Employees are barred from seeking common law damages based on the manner of their dismissal. The removal of the compensation cap does not change this principle. In fact, because unfair dismissal awards will be able to provide full compensation for financial loss, some claimants may feel less inclined to bring pre-dismissal common law claims to achieve meaningful recovery.

Personal injury damages remain unavailable as part of an unfair dismissal award, notwithstanding the removal of the cap. The statutory unfair dismissal framework does not permit recovery for such injury, and tribunals cannot award it. Only personal injury caused by employer conduct *prior* to the dismissal decision can potentially form the basis of a separate common law claim.

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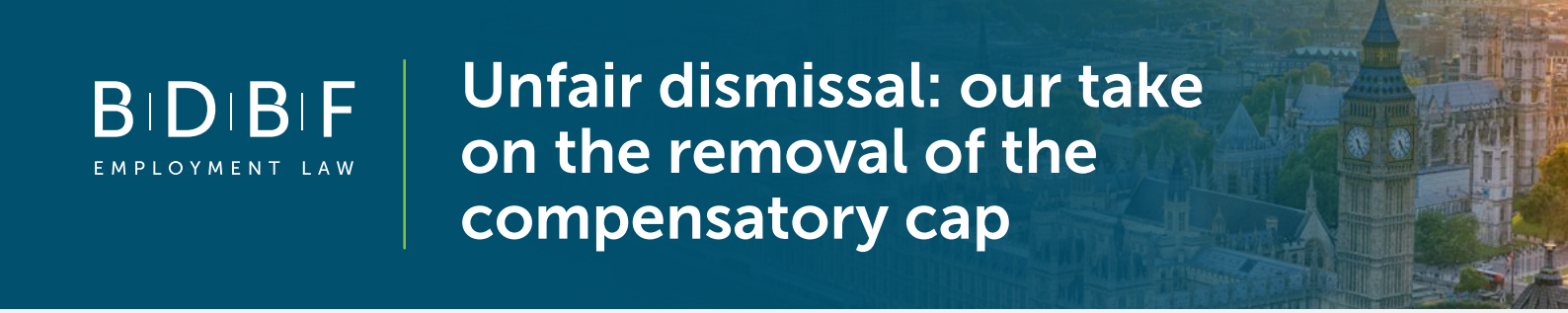

Employment Tribunals under pressure: tougher case management

An uncapped unfair dismissal jurisdiction may well change the character of the employment tribunal system. The combination of higher value claims, more expert evidence, and longer hearings is likely to put the already stretched system under more strain.

Stretched capacity will likely lead to:

- More detailed and prescriptive case management orders.
- Longer delays to final hearings, exacerbating witness-memory issues.
- Extended liability and remedy hearings.
- Greater routine use of experts, placing pressure on timetabling and judicial time.

Will the average worker be crowded out of an overstretched tribunal service? The existing delays in the tribunal system are already creating an impediment to individuals accessing justice.

Settlement: claimants gain the upper hand

Uncapped awards shift the gravitational pull of settlement. Claimants may feel they hold the upper hand, especially when coupled with the forthcoming extension of the limitation period to six months.

Without a non-negotiable cap on compensation, it will be harder to pressure claimants to settle on the basis that an offer is near or above the cap. And some claimants may resist settlement discussions altogether.

Nonetheless, respondents retain several important levers in negotiations, such as contributory fault, failure to mitigate, and *Polkey* reductions; we expect to see a more intense focus on such arguments in appropriate cases.

The considerable financial and personal burdens of litigation will also remain persuasive in settlement negotiations, as well as the confidentiality of settlement compared to tribunal proceedings.

Employer approach to dismissals

The removal of the cap will surely influence employer behaviour in tangible ways.

We expect to see longer and more rigorously enforced probation periods, with closer performance oversight and an increased tendency to exit individuals before reaching the six-month qualifying threshold.

Dismissal processes will need to be executed meticulously, with careful adherence to procedure and the Acas Code. Yes, *Polkey* arguments remain available, but employers should be wary of making unforced errors. Added to which, Acas uplifts for breaches of the Acas Code will be much higher in uncapped cases, though tribunals remain bound to ensure proportionality.

The approach to C-suite exits - which have for so long been addressed with an offer to pay out a lengthy contractual notice period and the carrot of favourable treatment on deferred remuneration and stock (usually far exceeding the unfair dismissal cap in value) - will need to change. What is the solution? Boards are likely to grapple with this.

And what about partners, LLP members and other high-earners, who are not employees and, therefore, cannot

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claim unfair dismissal? Will this change result in a preference to stay in employment rather than accept an offer of partnership? Will employers consider reducing the proportion of their higher earners who are engaged as employees and look at different business models?

Final thoughts

The removal of the unfair dismissal compensation cap marks a major recalibration of risk within UK employment law. What was once a predictable, mid-value statutory claim now has the potential to rival the financial and strategic significance of discrimination and whistleblowing litigation.

For lawyers acting for individuals, this opens new avenues, both in terms of the types of clients now incentivised to bring claims and the scale of loss that can be pursued. For lawyers who act for employers, it heralds a period of heightened uncertainty, increased complexity, and more intense scrutiny of dismissal decisions from the moment they are contemplated.

In this new environment, both sides will need to adapt. But it is employers, and those who advise them, who must navigate the most significant shift in their risk profile for more than two decades.

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