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Insights

UNCAPPED COMPENSATION: WHY EMPLOYERS NEED TO RETHINK ORDINARY UNFAIR DISMISSAL

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Summary

Following on from our webinar on November 16 2026, we have summarized the key considerations for employers ahead of the removal of the cap on the compensatory award for ordinary unfair dismissal claims.

From January 1 2027, the statutory ceiling is due to be removed, alongside a reduction in the qualifying service requirement from two years to six months.

For many employers, the cap (currently the lower of £123,543 or 52 weeks' gross pay) has provided a safety net when assessing the commercial risk of an unfair dismissal claim. Removing the cap does not mean every successful claimant will receive a substantial award. However, it does mean that there is an increased commercial risk which requires consideration on a case-by-case basis.

High earners are only part of the exposure

Senior executive exits have attracted particular attention in the context of this change. With base salaries often higher than the existing cap, plus additional complex benefits packages (e.g. bonuses, health benefits, pensions and share incentive plans), senior exit strategies are about to be flipped on their head.

But this is not exclusively a high-earner issue. Removing the ceiling also matters to employees on lower salaries who suffer longer periods out of work (whether due to the nature of their roles or their personal circumstances). A highly paid executive who quickly finds a comparable role could end up with a less significant loss than a lower-paid employee facing a difficult employment market.

The starting point should therefore be a realistic assessment of the whole remuneration package and the duration of loss. Equity and incentive arrangements may require particular attention to vesting conditions, valuation and the prospect that an award would have been earned.

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Employers are also reminded that the cost of losing an unfair dismissal claim is not restricted to the sums that the employee will receive. Most compensation sums awarded, arising from a dismissal and exceeding £30,000, will be subject to a process of grossing up to ensure that HMRC receives the relevant tax. For higher earners who are awarded large sums that could mean an additional 45% uplift.

Upwards adjustments to compensation (e.g. 25% uplift for failure to comply with the ACAS Code of Practice on Disciplinary and Grievances) will also rise along with higher compensation awards.

Uncapped does not mean unsubstantiated

Without a ceiling, disputes about remedy (rather than liability) are likely to become the main battleground in high value cases. The following issues are therefore relevant:

1. **Has the employee taken reasonable steps to mitigate their loss?** The removal of the cap means we need to consider remedy alongside liability from an early stage. Waiting until a claim has progressed to examine the jobs market, reward arrangements or likely duration of loss may have expensive consequences.

   Employers should prepare for a more evidence-led discussion about what an employee has actually lost. An assertion that a senior executive "should have found something by now" is not enough. Employers need evidence of realistic opportunities and the steps reasonably open to that individual. A failure to mitigate must be substantiated, not presumed. It is worth bearing in mind that in a specialist or regulated sector, the availability of comparable roles may be as significant as the level of remuneration. Employers may need to start gathering this evidence even before a claim lands, and even proactively supporting past-employees to gain suitable alternative employment.

2. **What would have happened following a fair process?** Painting a compelling hypothetical story of what would have happened if a fair process had been followed will also become a staple strategy for employers in seeking to reduce the value of claims (i.e. they would have been dismissed either way). Employers need evidence to support such arguments.

3. **What else may affect future loss?** Career and market uncertainty will be a factor. Employers should avoid speculative assessments and consider potential future loss based on collated, and potentially expert witness, evidence.

Making probationary periods more meaningful

The shorter qualifying period places a greater emphasis on early assessment of performance. Focusing on an end-of-probation review is likely to be too late and instead employers should actively manage performance throughout the probationary period. If there are performance

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concerns, there should be a clearly evidenced basis for those concerns, and an identified decision-maker by months four to five.

For senior hires, this requires more than a general expectation to “provide strategic leadership”. Employers should identify what success looks like, what resources are available and how progress will be tangibly measured. Concerns should be raised while the individual has a meaningful opportunity to improve and if action is taken quickly to mitigate the risk of an uncapped unfair dismissal claim, this should be balanced with the risk of the day-one protections the employee already has.

Should employers be introducing “employment prenups”?

An emerging solution to the above problems is this notion of agreeing an exit payment at recruitment, often described as an “employment prenup”. The commercial attraction is evident as this would involve a pre-quantified payment which is triggered on exit, in certain circumstances in exchange for an agreement not to pursue a claim of unfair dismissal.

We explored these recently in a separate article. However, in summary it is possible, in certain circumstances, for employees to waive future unfair dismissal claims. The challenges will be how to value that “insurance policy”, and assessing the impact this approach would have on recruitment and on the employer’s wider reputation in the market. There is also a risk that the payment made under the prenup could be used by the employee to pursue complex claims which remain unsettled. Given these concerns, it remains unclear whether this solution will be viable in practice and but for now it remains an option to be considered.

What should employers do now?

It will be important for employers to take action early. Consider the following:

- **Review of existing contracts**: Review relevant provisions, particularly probationary periods.
- **Performance management**: Train managers in active performance management, including the importance of (i) raising concerns early; (ii) holding regular check-ins throughout the probationary period; and (iii) giving clear and substantiated reasons for any decisions taken. Consider adapting performance management policies to make clear that shortened processes can be used during probationary periods.
- **Test liability and loss**: Collate relevant material and build a realistic picture of potential loss for the business. Consider how this affects decisions on alternatives to litigation.
- **Retain evidence**: Record and retain the decisions made and the reasons for them. Keep all relevant material which supported any decisions taken.

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- **Act fast:** Employers who are looking to bring an employment relationship to an end before the new regime on January 1 2027 will need to carefully consider the mechanics of serving notice and the legal principles around the “Effective Date of Termination” – which we covered in detail in our recent webinar!

Register for the remaining Employment Rights Act 2025 webinars for practical guidance on the reforms and a chance to put your questions to our lawyers.

For advice on how the reforms affect your organization, speak to your BCLP Employment contact in the UK.

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