



**Catriona Stirling** comments on the implications of the Supreme Court decision in *Edwards v Chesterfield* and *Botham v Ministry of Defence*. This article was first published in the Solicitors Journal ([solicitorsjournal.com](http://solicitorsjournal.com))

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The Supreme Court decision refusing a dismissed employee compensation for the way he was sacked provides a further prompt to review the interaction of employment legislation with common law remedies, says Catriona Stirling

Employees may not recover damages for loss suffered as a result of a breach of an express contractual term in the way they were dismissed, the Supreme Court has ruled in a much-anticipated decision in the cases of *Edwards v Chesterfield Royal Hospital* and *Botham v Ministry of Defence* [2011] UKSC 58. Seven justices held by a majority that damages will only be awarded if the loss can be shown to have preceded and be independent of the dismissal. The judgment had been long-awaited by employment lawyers, who were surprised by the Court of Appeal's decision in the case. They will hope that past arguments about whether employees can go behind the unfair dismissal legislation and obtain a remedy at common law for the manner of their dismissal can now be laid to rest.

Following *Edwards*, where there is a breach of contract, dismissed employees who cannot show that the reason for their legal action arose prior to and independently of their dismissal are left reliant on the statutory remedy of unfair dismissal, with its attendant exclusions and limitations on compensation. This is significant because damages for breach of contract under common law are theoretically unlimited.

Unfortunately this ruling is unlikely to lay to rest the debate about using the common law to obtain compensation in these types of cases because there were three dissenting judgments, as well as differences in the reasoning of the majority. Lady Hale was in almost complete disagreement with the majority - and previous House of Lords authority. Lords Kerr and Wilson differed from the majority regarding whether Mr Edwards had a cause of action independent of his dismissal. This level of disagreement between judges is unwelcome and the debate about whether the decision of the majority was correct is likely to continue.

## **Reading parliament's intention**

Furthermore, while it is accepted that the unfair dismissal legislation was originally enacted for the protection of employees it seems that the courts actually feel constrained by its existence to stop the further development of common law in employees' favour. Indeed it seems the courts are prepared to go much further and use the existence of unfair dismissal legislation to deny employees rights which they would have under ordinary common law principles. It is questionable whether parliament ever intended its enactment of the unfair dismissal legislation to be interpreted in this way and it is likely people will continue to argue and lobby for parliamentary intervention.

The majority view was that there was no common law right to claim damages in respect of the manner of a dismissal at the time the legislation was enacted and thus the legislation did not limit any such rights at that time. However, it is worth noting that most employment contracts at that time did not include terms governing how disciplinary procedures which may lead to dismissal should be carried out. Parliament may not, therefore, have given much consideration to this issue. Furthermore, this response does not address whether common law rights have subsequently been curtailed. The argument evident in some of the majority judgments that parliament and contracting parties do not intend contractual disciplinary procedures to found an action at common law is, at best, unconvincing.

The argument in a number of the majority judgments that parliament has decided to give employees a less generous remedy than would ordinarily be available at common law is not persuasive either. The statutory remedy given initially was far better than the available common law remedy, which was limited to any notice pay due. Parliament has given no express indication that it has since changed its intention and is deliberately providing a less generous remedy in cases of unfair dismissal than would be available at common law.

## **In search of a principled solution**

The state of the law in this area is therefore unsatisfactory. It causes some employees grave injustice and Parliamentary intervention is needed. However, it is difficult to find a principled solution governing the interaction of the statutory right with the common law.

Lady Hale's view that the statutory remedy was intended to provide a minimum level of protection and should not reduce common law rights is, at first sight, an attractive one. It is difficult to see why the remedy available for breach of an employment contract should be more limited than for other contracts. However, allowing claims of this nature at common law would be highly problematic. Claims would be heard outside the employment tribunal system, which is the most appropriate forum for resolution of such disputes, and the whole statutory scheme of unfair dismissal would be undermined.

A better solution would be to ameliorate the present system's injustices by removing the cap on compensation for unfair dismissal. The cap is difficult to justify. If it is for the protection of employers, why do they merit such protection? If they have acted in breach of a contractual disciplinary procedure they are at fault. The risk of injustice to employees under the current system outweighs any prejudice that may be caused to employers in terms of increased financial burden if the cap is removed.

Removing the cap would not meet criticism of the current system as not being in accordance with contractual orthodoxy. Moreover, employees with, for example, insufficient length of service would remain without remedy and may still be tempted to try to circumvent the legislation. However, the proposed solution would be a proportionate response to the problem. Unfortunately, given the current political climate, the chances of such a solution being implemented in the foreseeable future would seem to be remote.