

Waiver of future claims in a settlement agreement was effective resulting in the strike out of disability discrimination claims

In *Clifford v IBM UK Ltd* an Employment Tribunal Judge has ruled that a waiver of future claims contained in a settlement agreement was effective, meaning that the claimant's claims were struck out.

What happened in this case?

The claimant, Mr Clifford, started working for IBM in 2001. He was disabled and began a period of extended sick leave in 2008. In 2012, he raised a grievance about the fact that IBM had not increased his salary or paid holiday pay to him during his sickness absence. He said this amounted to disability discrimination and he asked to be moved onto IBM's disability plan (the Plan). Under the Plan, Mr Clifford would be paid 75% of his former salary until the earlier of recovery, retirement or death.

In 2013, Mr Clifford and IBM entered into a settlement agreement under which IBM agreed to:

- pay £8,685 to settle the complaint about the unpaid holiday pay, however, no payment was to be made in respect of the unawarded pay rises;
- place Mr Clifford on the Plan, under which he would receive around £54,000 per year until retirement (and the terms of the Plan stipulated that any pay increases were to be at IBM's discretion); and
- pay employer pension contributions based upon his full salary of around £72,000.

In exchange, Mr Clifford agreed:

- to waive his rights to bring claims about the matters raised in his grievance or any other claims that he had against IBM;
- to waive his rights to bring a long list of other possible claims;
- not to raise any further grievances where such grievances were "substantially similar" to the original grievance; and
- to waive his rights to bring any future claims connected to the matters set out in the grievance or the transfer to the Plan.

Yet, in 2022, Mr Clifford brought claims against IBM, alleging that it was discriminatory (and also a breach of working time rules) to have paid only 75% of his previous salary to him throughout the year. He said he was entitled to 100% of pay in respect of periods of annual leave, which meant that IBM owed him around £69,000. He also claimed that it was discriminatory not to have awarded pay increases to him while he was on the Plan. He argued that the Plan was intended to give security to disabled employees, but inflation had reduced the real value of the benefit.

IBM applied to have the claims struck out arguing, amongst other things, that they were precluded by the waivers contained in the settlement agreement, which extended to future claims concerning similar matters raised in the grievance or the transfer to the Plan. Mr Clifford sought to resist the strike out, pointing to the recent EAT decision in [Bathgate v Technip UK Ltd](#), which said that settlement agreements *cannot* settle future claims which had not arisen at the date of the agreement and that both blanket waivers (which purport to waive all and any claims) and kitchen sink waivers (which purport to waive all claims set out in a long list of claims) were ineffective. Therefore, Mr Clifford said that the waivers in the settlement agreement were invalid and did not prevent him from pursuing the claims.

What was decided?

The Employment Tribunal Judge struck out the claims, concluding that they had no reasonable prospect of success.

As far as the claims concerning holiday pay were concerned, the transfer of Mr Clifford to the Plan amounted to a consensual variation of contract, under which all the normal features of the employment contract disappeared, and he only had the right to be paid 75% of his previous salary throughout the entire year. Therefore, pay for any holidays would have been at the rate that he was actually paid.

As to the claim concerning the failure to award a pay increase, the Employment Judge said that, properly understood, this was a complaint that the benefit was not generous enough. The Plan conferred no right to a pay increase, only a *discretion* to award an increase. However, Mr Clifford had not sought to argue that IBM had exercised its discretion in a capricious or arbitrary way – his only claim was for disability discrimination. The Judge said that the terms of something which is *only* given as a benefit to disabled workers, and not to non-disabled workers, cannot amount to less favourable treatment related to disability. Rather, it is *more* favourable treatment.

In any event, future claims about holiday pay and pay increases had been expressly waived in the settlement agreement and that waiver was effective. The Judge distinguished the decision in Bathgate, which was directed at future claims which had not yet arisen and were truly unknowable. By contrast, in this case, the issues of holiday pay and pay increases were known about at the time of entering into the settlement agreement and had been raised in Mr Clifford's grievance and subsequent appeal. The settlement agreement was clear that he could not bring future claims arising out of similar matters to those that had been settled.

What are the learning points for employers?

It is worth noting that the Judge did not go as far as saying that *all* types of future claims could be waived in settlement agreements. Indeed, he said that whether or not future claims could be settled as a matter of principle was an “*academic dispute*” in the context of this claim. Here the “future claims” which were held to have been validly waived arose out of matters which were well known to the parties and had been the subject of a grievance, appeal and settlement agreement. This put them in a different category to claims concerning matters which had not yet arisen, and which were truly unknown.

The Judge also sought to introduce public policy considerations into the debate. He drew a distinction between settling a future holiday pay claim and settling a future sexual harassment claim. There was every reason of public policy for the settlement of past holiday pay claims to extend to future claims on the same issue, otherwise the employer would be compelled to litigate rather than settle. By contrast, it would “*inevitably be contrary to public policy*” if a claimant settling a sexual harassment claim was prevented from bringing a future sexual harassment claim, since this would doom them to suffer future harassment without remedy.

Where does this leave employers entering into settlement agreements?

- **Actual** claims and complaints can be settled and must be identified in the settlement agreement either by a description of the claim or reference to the relevant statutory provision.
- Future claims that are **known and in existence** at the point of settlement (but about which no complaint had been raised) may be settled, provided that a description of the claim or the relevant statutory provision is included in the settlement agreement.
- The recent decision of the Court of Appeal in *Arvunescu v Quick Release (Automotive) Ltd* suggests that future claims that are **unknown but in existence** at the point of settlement may also be settled. However, that case concerned settlement by way of a COT3 agreement, where blanket waivers are permitted. You can read more about the Arvunescu decision [here](#).
- This latest decision suggests that future claims that are a **known risk but not in existence** may also be settled provided that they are expressly addressed in the settlement agreement and there are no public policy reasons why that should not be the case. However, this is a first instance decision and does not bind other Tribunals so it is possible that a case with similar facts would be decided differently by another Tribunal.

- Claims which are **unknown and not in existence** are truly unknowable and may not be settled according to the decision in Bathgate.

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

[Clifford v IBM UK Ltd](#)

Some further details published on proposal to limit non-compete clauses to three months

On 12 May 2023, the Government released some further details about its plans to limit the use of non-compete clauses in employment contracts. In this briefing, we round up the key points to note.

On 10 May 2023, the Government announced plans to legislate to limit the use of non-compete restrictions in employment

contracts to three months. You can read our detailed briefing on that announcement [here](#), where we outlined a number of “known unknowns” about the proposals. Since then, the Government has published its response to the consultation on reform of non-competes (Response), which closed on 26 February 2021. The Response provides more information about the proposals and answers some, but not all, of the known unknowns.

The Response confirms the following points:

- **The proposed reforms will apply to workers engaged under a worker contract.** The initial announcement referred to “employment contracts” and “employees” only and made no reference to individuals classified as “workers” who worked under a contract to work or perform services for the employer. The Response confirms that the proposed reforms will apply to worker contracts.
- **The proposed reforms will not apply to wider types of workplace contracts.** It was unclear whether the proposed reforms would apply to other types of agreements connected to the workplace e.g. LLP agreements, shareholders’ agreements or long-term incentive plans. The Response confirms that the limitation will not apply to non-compete clauses used in such agreements, on the basis that the bargaining power between the parties is different. However, it is worth noting that the Response is silent about whether the limitation will apply to a non-compete restriction

contained in a settlement agreement. The Response also appears to overlook the fact that LLP members can be classified as workers depending on the circumstances.

- **The proposed reforms will apply to non-compete clauses only and not to other types of covenants.** The initial announcement suggested that the limitation would not apply to other types of post-termination restriction, such as non-solicitation, non-dealing or non-poaching clauses. The Response clarifies that this is the case. Therefore, other types of post-termination restriction may run for longer than three months and will be upheld provided that they are reasonable and go no further than necessary to protect the employer's legitimate business interests. The logic for this distinction is that such restrictions do not have such a significant impact on an individual's ability to earn a living in their chosen profession.

- **Guidance to be published.** The Response also states that the Government plans to enhance transparency by producing guidance on the use of non-competes and the law underpinning them.

However, there are still a number of questions yet to be answered:

- **Will the law apply to existing employment contracts?** It is still not clear whether the new law will apply retrospectively or only to new contracts. In the event that it applies retrospectively, will an existing non-compete restriction which is in excess of three months be deemed to be void in its entirety? Or will it be potentially enforceable, but only up to the three-month cap? If it would be deemed void, employers will either need to agree changes to the employment contracts of affected employees or accept the loss of the non-compete protection.
- **How will the new law work alongside garden leave clauses?** The initial announcement says that the reforms will not affect an employer's ability to use paid notice periods or place employees on garden leave. However, the risk is that employers will respond to the loss of longer non-competes by extending periods of notice in order to place the employee on garden leave and keep them out of the market that way. Further information about the interplay between non-competes and garden leave is awaited.
- **When will the reforms come into force?** The Government has said the legislation will be introduced "*when Parliamentary time allows*". At the time of writing, no timeline for the introduction of the new law has been given. With a General Election looming, it remains to be seen whether the proposal will ever make its way on to the statute books.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Managing Associate Tom McLaughlin (tommclaughlin@bdbf.co.uk), Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

[Non-compete clauses: Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment – 12 May 2023](#)