Court of Session rules that unknown future claims may be waived in settlement agreements

Overturning a decision of the Scottish EAT, the Court of Session has ruled that unknown future claims arising under the Equality Act 2010 may be waived in a settlement agreement provided that the types of claim are clearly identified.

What happened in this case?

Mr Bathgate was employed as a Chief Officer on a number of different vessels. In January 2017, his employer notified him that he was at risk of redundancy and offered settlement terms, which he accepted. Mr Bathgate entered into a settlement agreement, under which he settled all claims against his employer. His employment terminated on 31 January 2017.

Under the settlement agreement, the employer had agreed to pay notice pay, enhanced redundancy pay plus an "additional payment". The additional payment was to be calculated by reference to the terms of a maritime collective agreement and paid in June 2017. The collective agreement stated that additional payments were only due to officers under the age of 61. However, Mr Bathgate was aged 61 on the date that his employment terminated. Therefore, the employer decided not to pay the additional payment to Mr Bathgate after all. He was notified of this on 26 June 2017, around five months after his

employment had terminated.

Mr Bathgate claimed that his employer's decision not to pay the additional payment to him amounted to post-employment age discrimination. The employer accepted that the reason the additional payment was not paid was age. However, it sought to defend the claim on two jurisdictional grounds:

- first, that Mr Bathgate had entered into a settlement agreement under which he had waived his rights to pursue claims against them, including for age discrimination; and
- second, protection under the Equality Act 2010 did not apply to Mr Bathgate as he was a seafarer.

Decisions of the Employment Tribunal and EAT

The Employment Tribunal held that the settlement agreement constituted a full and final settlement of Mr Bathgate's claims. It had listed various types of claim, including age discrimination, and it also included a blanket waiver which had excluded *"all claims…of whatever nature (whether past, present or future)".* Although the Tribunal held that the claim would *not* have been precluded by virtue of the fact that Mr Bathgate was a seafarer (on the basis that the claim concerned post-employment discrimination), the overall result was that the claim could not proceed as a result of the

waiver.

Mr Bathgate appealed against the decision that the claim had been validly settled. He argued that the Equality Act 2010 did not permit the settlement of claims *before* they had arisen, and that the waiver was limited to claims which were known to the parties, or at least in existence at the time of entering into the settlement agreement. The employer cross-appealed against the decision that Mr Bathgate was entitled to bring a claim under the Equality Act 2010 even though he was a seafarer.

The EAT allowed both appeals, meaning that the end result was the same: Mr Bathgate could not proceed with the claim. However, its decision about the scope of settlement agreement waivers was significant for employers. The EAT held that in order for a settlement agreement to settle a claim under the Equality Act 2010 it must relate to a "particular complaint". The EAT noted that previous case authorities had said that:

- *actual complaints* must be identified in a settlement agreement either by a description of the claim or reference to the relevant statutory provision;
- *known potential claims* may be settled provided that a description of the claim or the relevant statutory provision is stated, although this could not be achieved by the use of a blanket form of waiver; and
- *unknown claims* could be settled provided that the

language was absolutely plain and unequivocal.

However, the EAT took issue with the last of these principles. In their view, there was no clear authority for the proposition that the words "particular complaint" included complaints that may occur at some point in future. Rather, on a proper reading of the authorities, they only went as far as saying that *known complaints* which had not yet been brought before an employment tribunal could be settled.

The EAT concluded that the words the "particular complaint" indicated that the parties must anticipate the existence of an actual complaint or circumstances where the grounds of the complaint already existed. It also concluded that general waivers of all and any claims, and waivers listing all and any type of complaint by reference to their nature or section numbers, were unenforceable.

The EAT went on to say that it was apparent that Parliament's intention had been that the ability to waive statutory employment claims would *only* be available in respect of complaints that had already arisen between the parties. To extend this further would expose claimants to the risk of signing away their rights without understanding what they are doing.

Therefore, the EAT held that the settlement agreement waiver did not preclude Mr Bathgate from pursuing a claim. However, the EAT also allowed the employer's cross appeal, finding that he *was* a seafarer at the time of dismissal, meaning he was

precluded from bringing a claim. The fact that the claim concerned post-employment discrimination made no difference.

Decision of the Court of Session

Once again, both parties appealed. Mr Bathgate appealed against the EAT's decision that he was not was entitled to bring a claim under the Equality Act 2010 because he was a seafarer. At the same time, the employer cross-appealed the decision that the waiver in the settlement agreement did not extend to unknown future claims.

Taking the settlement agreement waiver issue first, the Court allowed the employer's appeal for the following reasons.

- The requirement that a settlement agreement must relate to a "particular complaint" does not mean that the complaint must have been known of, or its grounds at least in existence, at the time of the agreement. There was no logical or principled basis upon which to conclude that a waiver would only settle future claims based on facts and circumstances in existence at the time of entering into the settlement agreement.

- It also made no sense to maintain that a potential future claim could be settled by way of a COT3 agreement (to which no "particular complaint" requirement applies), but not by way of settlement agreement, to

which provisions regarding independent legal advice and insurance applied.

- The correct approach was that set out in the EAT's decision in *Hilton UK Hotels Ltd v McNaughton*. In that case, the EAT decided that a future claim of which the employee does not, and could not, have knowledge would not be effectively waived by a blanket-style waiver. To be effectively waived, a future claim must be identified by either a generic description (e.g. unfair dismissal) or a reference to the section of the statute giving rise to the claim (e.g. s.94(1) of the Employment Rights Act 1996). Provided that the wording used is *"plain and unequivocal"* an unknown future claim *may* be settled.

- The Court also agreed with earlier authorities which had said the "particular complaint" requirement was not temporal in nature. The Court held that all that matters is *"…the presence or absence in the waiver of sufficient identification of the complaint being made".*

- The Explanatory Notes to the Equality Act 2010 state that the settlement agreement must be tailored to the circumstances of the claim, not that it must settle an existing claim. Comments made in a Parliamentary debate on predecessor legislation did not change the position since they concerned a different statute (and, in any event, the comments did not suggest that settling future claims in the context of a clean break settlement was prohibited).

In conclusion, the Court held that the Equality Act 2010 does not exclude the settlement of future claims provided that *"the types of claim are clearly identified"* and *"the objective meaning of the words used is such as to encompass settlement of the relevant claim".* In Mr Bathgate's case, the settlement agreement waiver *had* referred to future age discrimination claims. That being the case, the Employment Tribunal did not have jurisdiction to hear the claim.

For completeness, the Court considered the seafarer issue briefly. The Court agreed with the EAT, holding that Mr Bathgate *was* a seafarer at the time of dismissal and was, therefore, precluded from bringing a claim. The fact that the claim concerned post-employment discrimination made no difference – he was still outside the scope of protection of the Equality Act 2010.

What are the learning points for employers?

This decision underlines the importance of particularising claims of concern in settlement agreements. Only the particularised claims will be effectively waived, even where the claims are not known about or in existence at the time of entering into the settlement agreement. Therefore, employers should consider what, if any, potential claims could arise in the future and ensure that these are addressed in the settlement agreement, either by way of a generic description or reference to the relevant statutory provision. However, employers cannot circumvent this exercise by way of a general waiver of all claims – these continue to be unenforceable.

The Court of Session's decision is not binding on Employment Tribunals and the EAT in England and Wales, but it will be regarded as highly persuasive. It is not yet known whether Mr Bathgate will seek permission to appeal to the Supreme Court.

Bathgate v Technip Singapore PTE Ltd

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 Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.