EAT holds that future discrimination claims may be waived in a settlement agreement

In *Clifford v IBM UK Ltd* the EAT upheld a decision to strike out a discrimination claim, holding that a waiver of future discrimination claims contained in an earlier settlement agreement was effective.

What happened in this case?

The claimant, Mr Clifford, started working for IBM in 2001 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 a sum 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 any *future* claims that he may have connected to the matters set out in the grievance and/or the transfer to the Plan; and

- to waive his rights to bring a long list of other possible claims;

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 EAT's decision in Bathgate v Technip UK Ltd, which said that settlement agreements *cannot* settle unknown future claims. Mr Clifford also argued that both the blanket waiver (which purported to waive all and any claims) and the kitchen sink waiver (which purported 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.

The Employment Tribunal Judge struck out the claims, holding that 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 EAT's 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.

Mr Clifford appealed to the EAT.

What did the EAT decide?

It is worth noting that between the Employment Tribunal and EAT hearings in this case, the EAT's decision in Bathgate(which had been relied upon by Mr Clifford) was overturned by the Scottish Court of Session. The Court of Session held that the Equality Act 2010 permitted the settlement of unknown future claims, provided that the claims are clearly particularised and the objective meaning of the word used encompasses settlement of the relevant claim. However, a general waiver of all claims would not be sufficient. You can read our full briefing on the Court of Session's decision here.

The EAT dismissed Mr Clifford's appeal, holding that his claims were precluded by the waiver in the settlement agreement. The EAT reached the following conclusions:

- The EAT agreed with the Court of Session in Bathgate that there was nothing in the Equality Act 2010 which precluded the settlement of unknown future claims, provided that clear language was used. Here, the waiver wording *had* clearly covered future discrimination claims connected to Mr Clifford's grievance and/or transfer to the Plan.

- Although the Equality Act 2010 stipulates that settlement agreements must relate to "particular complaints", Bathgate (and previous authorities) had made it clear that this requirement does not mean the parties must have known about the complaint or that its

grounds were in existence at the time of entering into the agreement. If Parliament had intended to prevent the settlement of unknown future claims then it could have spelt this out in the Act, but it had not done so.

- Nor was there any basis for distinguishing Bathgate from Mr Clifford's case – both concerned future discrimination claims that had not arisen at the time the settlement agreement was entered into. The fact that Mr Bathgate's employment had ended, and Mr Clifford's employment was continuing, was not pertinent.

- The EAT also noted the Court of Appeal's decision in Arvunescu v Quick Release (Automotive) Ltd, where it held that future claims may be settled by way of a COT3 agreement. The EAT held there was no sensible basis upon which to distinguish COT3 agreements and settlement agreements in this respect. You can read our full briefing on the Court of Appeal's decision in Arvunescu here.

In any event, even if the waiver had not been valid, the claims had no reasonable prospect of success on the basis that a failure to increase an already very generous benefit would not have amounted to discriminatory treatment.

What are the learning points for employers?

This decision makes it clear that unknown future discrimination claims may be settled by way of a settlement agreement, provided the claims are particularised in the agreement, either by way of a generic description of the claim or by reference to the relevant statutory provision. Helpfully for employers, this decision is binding on Employment Tribunals, whereas the similar decision of the Scottish Court of Session in Bathgate was only persuasive.

However, employers should take care not to rely on general waivers of all claims – these continue to be unenforceable.

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.

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