EAT rules that unknown future claims may not be waived in settlement agreements

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Employers should take note of a recent EAT decision that employees cannot waive the right to pursue claims which are unknown at the time of signing a settlement agreement. Attempts to secure a release from all potential claims by way of blanket or "kitchen sink" style waivers are not effective.

What happened in this case?

The Claimant was employed as a Chief Officer on a number of different vessels. In January 2017, the employer notified the Claimant that he was at risk of redundancy and offered him settlement terms, which he accepted. The Claimant entered into a settlement agreement with the employer, under which he settled all claims against them.

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

The Claimant claimed that the decision not to pay the additional payment amounted to direct and/or indirect 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 the Claimant had entered into a settlement agreement under which he had waived his rights to pursue

claims against them; and
- second, protection under the Equality Act 2010 did not apply to the Claimant as he was a seafarer.

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

The Claimant 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 settlement was limited to claims which were known to the parties. The employer cross-appealed against the decision that the Claimant was entitled to bring a claim under the Equality Act 2010 even though he was a seafarer.

What was decided?

The EAT allowed both appeals, meaning the end result was the same: the Claimant could not proceed with the claim. However, its decision about the scope of settlement agreements is of significant interest for employers.

The EAT held that in order for a settlement agreement validly 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

- even 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 the EAT's view, there was no clear authority for the proposition that the words "the particular complaint" includes a complaint that may or may not 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 may be settled.

Here, the Claimant had entered into a settlement agreement under which he waived his right to pursue a long list of claims, including age discrimination. 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. Blanket waivers of all and any claims are not enforceable. Further, waivers listing all and any type of complaint by reference to their nature or section number (also known as "kitchen sink" waivers) are no better. In fact, the EAT said there is no difference between a blanket waiver and a kitchen sink waiver. Both are general waivers – all that distinguishes them is the particularity with which they have been drafted. Neither are enforceable.

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. Indeed, in this case, the Claimant had purportedly signed away his right to sue for age discrimination before he

even knew whether he had such a claim.

The EAT held that the terms of the settlement agreement did not preclude the Claimant from pursuing a claim. However, the Claimant was thwarted in the end as the EAT also allowed the employer's cross appeal, finding that he was a seafarer at the time of dismissal. This meant that he was precluded from bring a claim. The fact that the claim concerned post-employment discrimination made no difference.

What are the learning points for employers?

In our experience, employers tend to specify the particular claims of concern in settlement agreements and then hedge their bets by including a kitchen sink waiver, a blanket waiver, or both. Employers may continue to do this in the hope that it deters any future claims, however, this decision indicates that such waivers are not enforceable. This means that employees will not be barred from pursuing statutory employment claims which are not known about at the time of entering into a settlement agreement. The EAT acknowledged that this may be inconvenient for parties wishing to have a truly clean break.

However, waivers of unknown claims (save for personal injury claims) may still be still valid from a contract law perspective. Therefore, employers may wish to include a repayment clause under which the employee is required to repay the termination payment in the event of a breach of the settlement agreement. Although this will not prevent them from pursuing a relevant claim before an employment tribunal, it may be enough to deter them from doing so.

It is possible that this decision will be appealed to the Scottish Court of Session.

Bathgate v Technip UK Ltd and ors

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