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 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.

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