EAT makes it clear that future, unknown discrimination claims cannot be settled under a settlement agreement

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Bathgate v Technip UK Ltd et al [2022] EAT 155

The Facts

1. The Claimant was employed by the Respondent for 20 years as a Chief Officer on a number of vessels, which for the most part sailed outside UK and EEA waters. Around the end of 2016 the Respondent decided that there was a need for redundancies at the Claimant's grade, and after a scoring exercise, he was advised that he was at risk. He was offered a settlement by way of a voluntary redundancy agreement which provided for an enhanced redundancy payment, notice and a further sum payable in the future (the 'Additional Payment'). These terms were set out in a settlement agreement ('the Agreement') and the Claimant received advice thereon from a solicitor. The Claimant signed the Agreement and his employment was terminated as of 31 January 2017, at which stage he was 61 years old.

2. The Additional Payment was to be calculated by reference to a collective agreement between the National Maritime Agency and Nautilus Trade Union. This pre-dated the age discrimination legislation. Clause 3 provided that it would only apply to officers who had not reached the age of 61. However, the Claimant had understood that he would be receiving this payment.

3. The Respondent decided on 1 March 2017 that the Additional Payment did not need to be paid to those who were 61 or over at the age of dismissal, and the Claimant was advised of this on 26 June 2017. The Claimant brought a claim alleging that the decision not to pay him this sum constituted either direct or indirect age discrimination. The Respondent argued that by signing the settlement agreement, the Claimant had compromised his ability to bring the claim.

4. In relation to the decision not to pay the Additional Payment, it was common ground between the parties that this decision was made after the Claimant's employment had terminated, and that s108 EQA applied, which deals with post-termination acts which 'arise out of and are closely connected to' the employment relationship.

5. Section 147 EQA sets out the necessary conditions which must be satisfied in order to validly settle a claim, which include the following:

   - The contract must be in writing
   - The contract must relate to a particular complaint
   - The complainant has received advice from an independent adviser before entering into the contract.

6. Clause 6.1 of the Agreement provide that its terms were in full and final settlement of –

   "…the Employee's particular complaints and claims which, however unjustified they may be regarded by the Company, the Employee hereby intimates and asserts against the Company while at the same time acknowledging that they are not to be pursued further, namely, claims ('Claims'): … (j) for direct or indirect discrimination, harassment or victimisation related to: … (v) age, under section 120 of the Equality Act 2010 and/or regulation 36 of the Employment Equality (Age) Regulations 2006."

7. The Agreement also included a general waiver at paragraph 6.1.2 of –

   "…. all claims, demands, costs and expenses of whatever nature (whether past, present or future and whether under contract, statute, regulation, pursuant to European Union Law or otherwise) which the employee has ***or may have*** *against the Company, its directors and employees or any of them or any other Associated Company and/or their directors and/or employees in any jurisdiction arising out of, or in any way connected with, the Employee's employment with the Company, or the holding of any office with the Company and/or the termination thereof…"*

8. It was argued on behalf of the Claimant that the Respondents could not lawfully settle a claim unless it related to a "particular complaint" as defined in s143 EQA, and that those words described a claim that had already been brought *or* was at least possible of being brought under the EQA. It was argued that s147 did not permit settlement of a claim that had not crystallised or whose existence was unknown, and that at the time when the Agreement was signed, no claim for age discrimination had crystallised as no final decision had been made regarding the Additional Payment.

9. Reliance was placed on an excerpt from Hansard in which there was mention of meaning of the words "particular complaint" in what was to become s203 Employment Rights Act 1996. Viscount Ullswater stated that *"We are proposing that these procedures should only*

*be available in the context of an agreement which settles a particular complaint that **has already arisen** between the parties to that complaint."*

10. Reference was made to the Court of Appeal case of University of East London v Hinton [2005] ICR 1260 in which it was held that the words "particular complaint" did not mean that there had to be an actual complaint before the ET, and that settlement was permitted as regards *""anticipated proceedings in relation to a claim or complaint raised between the parties prior to the compromise, though not the subject of any actual proceedings"*. Lady Smith cited this case in Hilton Hotels UK Ltd v McNaughton EATS/0059/04, and concluded that whilst blanket agreements were prohibited [for instance, by simply referring to something generic such as "*all statutory rights"*], it was possible to settle "*an actual or potential claim **by a generic description** or a reference to the section of the statute giving rise to the claim".* As regards future claims, she opined that*:*

    ""Whilst parties may agree that a compromise agreement is to cover future claims of which an employee does not and could not have knowledge, to do so effectively, the terms of their agreement must be absolutely plain and unequivocal."

11. The Respondent argued that given that the waiver referred to "direct or indirect discrimination" as well as "age discrimination", the "particular complaint" had been identified. However, Lord Summers disagreed for the following reasons:

    (i) This would be contrary to the intention of Parliament as the explanation provided in Hansard indicated that only claims which already existed could be settled, not future claims which had not arisen;

    (ii) Such a construction would be contrary to the broad purpose of the section, which is to protect employees when agreeing to relinquish their rights. Here, the Claimant signed away his right to bring an age discrimination claim before he knew whether he had a claim or not. Whilst that might be permissible under the common law, the EQA restricts the ability to do this;

    (iii) The mere inclusion of a reference to a particular statute or section thereof does not satisfy the wording of s147. The words "particular complaint" suggest the existence of an actual claim and are not apt to describe a potential future complaint.

12. Lord Summers also concluded that:

    *"**The Act** uses the definite article in combination with the words "particular complaint". I consider this does not permit clauses that list a series of types of complaint by reference*

to their nature or section number. It does not seem to me that there is any difference in principle between a "rolled up" waiver and a waiver which lists a variety of possible claims by reference to their nature or section number. Both are general waivers. All that distinguishes them is the particularity with which they have been drafted. I do not consider that one provides any more protection than the other"

13. Whilst it was recognised that this may be inconvenient where there is a mutual desire to avoid future claims and a wish to end the employment relationship permanently, it was clear that Parliament did not consider that a settlement of the sort seen in this case was desirable and legislated to prevent them.

Commentary

14. This is an important warning for employers who are having negotiations with an employee regarding the termination of their employment. Whilst it is common for settlement agreements to seek to compromise all claims which someone 'has or *may have*' arising out of their employment contract, this case makes it clear that this would not cover future claims, the underlying facts of which have not yet taken place [NB- this is only in the context of a settlement agreement under s147 EQA as a different result may be reached under common law principles].

15. It does however seem that such an approach is logical, given that the mischief behind s147 EQA is to ensure that employees are protected and understand exactly what it is they are signing away. An unscrupulous employer could seek to hold back the communication of some decision to an employee, or hold off carrying out a specific act, until after a settlement agreement had been finalised in order to give them the opportunity to potentially commit a breach of contract or act of discrimination. That surely is something which ought to be deplored.

16. However, the judgment went much further than excluding future claims from the ambit of s147 EQA. It would now appear that simply including a long list of statutes and stating that claims thereunder could not be brought may be insufficient to compromise claims which are already in existence, which may come as a surprise to many, as this is a very common way to compromise claims. It would thus be prudent to explicitly set out the actual or potential claims that the individual could bring which are being compromised, and ensure that it is tailored specifically for them. One helpful way to ensure that all bases are covered is to include a narrative within the agreement which briefly details the background facts

which have given rise to the agreement in the first place, and make it clear that any claims arising out of those facts have been compromised. However, this would leave the employer with a very real risk that an employee may later seek to bring another claim which did not arise out of those facts, and it would be sensible therefore to include some form of warranty that an employee was unaware of any further claims and/or had no intention of bringing additional claims.

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