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Settling unknown future claims under the Equality Act?

Charles Melvin Bathgate v Technip Singapore PTE Limited [2023] CSIH 48 XA18/23; December 29, 2023

The Inner House of the Court of Session in Scotland (CSIH) has handed down judgment in a case dealing with post-employment age discrimination and whether a settlement agreement can include complaints unknown to the parties which could arise in the future. The EAT decision was first reported in *Briefings*, [2023] Briefing 1043[1].

Facts

Mr C Bathgate (CB) was the chief officer of a vessel which operated mainly outside UK or EEA waters. He brought a complaint of post-termination age discrimination related to an additional pension payment. The primary question explored was whether an unknown future complaint under the Equality Act 2010 (EA) can be settled by way of a settlement agreement (the Agreement).

At the EAT it was found that at the time of entering the Agreement, CB did not, and could not, have known that the respondent would discriminate against him on the basis of his age. The words 'the particular complaint', under s147(3)(b) EA limited settlement to claims which were known to the parties at the time of entering the agreement. His right of action did not accrue until after he had left employment and, on this basis, the Agreement did not compromise his claim and he was free to pursue this.

This reversed the ET decision on this point, which found that common law principles provided that parties can settle claims of which they have, and can have, no knowledge at the time of settlement through language that is plain and unequivocal.

The EAT also made a finding the CB was a seafarer under s81 of the EA. Accordingly, the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 (the Regulations) applied which exclude certain persons, including seafarers, from the scope of the EA so as to give effect to the United Nations Conventions on the Laws of the Seas which prevents the UK from applying its laws to vessels flying another country's flag. In light of this finding, CB could not pursue his claims under the EA, by virtue of his status as a seafarer.

This reversed the ET decision that he was not a seafarer, finding that s81 EA had no application where employment has ceased, as in CB's case.

Finally, the EAT found s108 EA (relationships that have ended) would not apply to CB as he did not have the right to bring a claim of discrimination during employment due to his status as a seafarer, and as such his post-employment rights could be no greater than they had been during employment.

This again reversed the ET decision which had found that he was not a seafarer, and had the discriminatory act occurred during employment, it would have contravened the EA.

Court of Session Inner House

Both parties appealed the EAT decision. CB appealed the EAT decision that he had no right to bring a claim because he was a seafarer, and the respondent cross-appealed the decision that the Agreement could not be used to settle unknown future claims.

1 See [2023] Briefing 1043 for a full account of the background and the ET and EAT decisions.

The CSIH focused primarily on the issue of whether the Agreement satisfied section 147(3) EA in that it relates to '*the particular complaint*'.

On this point, the CSIH relied upon the legal principles set out in *Hilton UK Hotels Ltd v McNaughton* [2005] UKEAT. This established that if the wording in the agreement is plain and unequivocal, a future claim of which an employee can have no knowledge can be compromised. This is in contrast to a generic description or a rolled-up expression such as '*all-statutory rights*' such as was the case in *University of East London v Hinton* [2005] ICR 1260, where it was found there was no particularity in the waiver and as such it did not sufficient relate to the claim it sought to compromise. As such, the actual or potential claim must at least be identified by a generic description or reference to the section of the statute giving rise to the claim.

The CSIH found that the level of particularisation required was met in the current case, as the list of claims waived in the Agreement included those based on age discrimination under s120 EA (clause 6.1.1), even if they could not be known of at the time of the agreement (clause 6.2).

Finally, with reference to *McWilliams and Others v Glasgow City Council* 2011 UKEATS/0036/10/BI, it was confirmed that the provision is not temporal in nature and as such privately negotiated compromise agreements could settle future claims.

The CSIH therefore upheld this appeal on broadly the same reasons as the ET and confirmed that a settlement agreement can relate to an unknown future complaint if there is a sufficient description of the claims waived.

On the point of whether CB was a seafarer, the CSIH agreed with the EAT that CB was a seafarer and therefore beyond the protection of the EA.

On the point of s108, the CSIH again reached majority agreement with the EAT (Lord Malcolm dissenting). As CB was found to be a seafarer, and without protection of the EA, his post-employment rights could be no greater than they had been during employment.

The CSIH therefore upheld the cross appeal and found that the jurisdiction of the tribunal was excluded by the terms of the Agreement. The other points were academic.

Implications for practitioners

It is established in this judgment that claims under the EA, which do not exist, and which have not been contemplated at the time of entering into agreements, can be settled if they are sufficiently particularised in the agreement.

In light of this, parties should give considerable thought to circumstances where there is likely to be any type of future relationship, or the agreement relies on future performance. In these circumstances careful drafting will be required to take account of this and ensure potential future claims are not settled inadvertently.

However, it should be remembered that general waivers which are unparticularised remain unenforceable.

Whilst a Scottish judgment, this will be extremely persuasive in English and other UK courts. It is not known at the time of print whether this will be appealed further.

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