SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

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SETTLEMENT AGREEMENT COVERED FUTURE CLAIMS

Summary: The Court of Session in Scotland has decided that Section 147 of the Equality Act 2010, which allows employment discrimination claims to be compromised by way of a settlement agreement that "*relates to the particular complaint*", does not prevent the settlement of future claims unknown to the employee at the time the agreement was concluded, so long as the types of claim are clearly identified in the settlement agreement and the objective meaning of the words used covers settlement of the claim. The settlement agreement in this case related to the particular complaint because, although a future claim, it was identified in the agreement in plain and unequivocal terms (*Bathgate v Technip Singapore PTE Limited*).

Key practice point: The Court of Session's decision is not binding on English tribunals but will be persuasive. Prior to this decision, the position seemed to be that it might be possible to settle statutory claims based on facts which had already occurred before the settlement agreement (even if those facts were unknown to the employee, if the drafting made this clear), but it would not be effective to seek to settle statutory claims based on facts which had not yet occurred when the settlement agreement was entered into. It now appears that the employee's knowledge of the claims may not be crucial - a settlement agreement can, if the wording is sufficiently particularised, protect an employer from future claims.

Another way of reducing the risk of possible future claims may be to include a warranty that the employee has identified to the employer all claims they believe they may have, or to withhold part of the settlement sum until the time limit for the employee to lodge a claim has expired. It is advisable to execute the settlement agreement as near as possible to the termination date, to minimise the risk of claims arising after the agreement is signed. If there is a need to execute the agreement before termination, the employer should consider requiring the employee to enter into a second settlement agreement, to ensure the waiver of any claims that may have arisen in the interim period before termination.

Facts: The claimant accepted voluntary redundancy and entered into a settlement agreement. The agreement stated that its terms were in full and final settlement of "*the Employee's particular complaints and claims … namely claims … for direct or indirection discrimination, harassment or victimisation relating to … age, under Section 120 of the Equality Act 2010 and/or Regulation 36 of the Employment Equality (Age) Regulations 2006*". Over a month after the agreement was signed, the employer decided that "additional payments" in the redundancy package should not be made to employees, including the claimant, who were aged 61 or over. The Employment Tribunal rejected the claimant's age discrimination claim, on the basis that it had been settled, but the Employment Appeal Tribunal (EAT) allowed the appeal, finding that the claim had not been settled because the settlement agreement did not "*relate to the particular complaint*", as required by Section 147. The employer appealed.

Decision: The Court of Session allowed the appeal, restoring the Tribunal's decision that the claim had been settled. The Court said that the protections for the employee built into Section 147 do not exclude the settlement of future claims "*so long as the types of claim are clearly identified and the objective meaning of the words used is such as to encompass*

settlement of the relevant claim". The test set out by the Court of Appeal in *Hinton v University of London* - that the particular complaint had to be adequately identified "*by a generic description such as 'unfair dismissal' or by reference to the section of the statute giving rise to the claim*" – was met; the waiver in the settlement agreement contained sufficient identification of the age discrimination complaint.

Analysis/commentary: COT3 agreements negotiated through Acas are not subject to the same restrictions as those regulating settlement agreements. A recent EAT case, *Ajaz v Homerton University Hospital NHS Foundation Trust*, confirmed that the terms of a COT3, which settled whistleblowing detriment claims brought in 2017, prevented a claimant from raising new whistleblowing detriment claims in 2021 even though they were based on the same protected disclosures.

DISMISSAL UNFAIR BECAUSE EMPLOYER DID NOT CONSIDER SELECTION POOL

Summary: The Employment Appeal Tribunal (EAT) confirmed that a redundancy dismissal was unfair because the employer had failed to consider whether the employee should be placed in a pool of one or in a wider pool (*Blackdown Hill Management Limited v Tuchkova*).

Key practice point: This decision is the latest in a series of cases where the EAT has regarded the absence of proper consideration of selection criteria or pools as indicative of an unfair redundancy process. It is a reminder of the need to consult on redundancy dismissals even where the outcome appears inevitable. Although employers still have a degree of discretion when deciding on the appropriate selection pool, they must be able to justify their decision.

Facts: The claimant was employed as a legal project manager. Although she was the only person employed in the office who had a legal qualification, in practice she had a wide-ranging role, including administration and project management. Shortly after a period of maternity leave, she was placed in a pool of one for selection purposes and made redundant. The Employment Tribunal found that the redundancy was unfair because of the employer's failure to conduct an evaluation and selection exercise; in particular it was not reasonable to have concluded that her role was unique and had disappeared without carrying out further assessment. The employer appealed.

Decision: The EAT confirmed the finding that the dismissal was unfair. The employer had failed to consider whether the claimant should be placed in a pool of one or in a wider pool. The EAT noted that, as illustrated by other recent cases, even where a job appears to be uniquely at risk, it does not necessarily follow that it would be fair to place the employee in a pool of one.

The EAT found that the employer's conclusion that the claimant's role was unique and had disappeared had been materially influenced by the fact that she had been on maternity leave, during which time all her work had been divided up amongst five other staff. The employer should have considered whether to place her in a pool with some or all of the five colleagues, even though one was the finance director, two were contractors and the remaining two were in lower paid roles which the Tribunal had found the claimant was not interested in taking. Although there had been a diminution in the work being done by the claimant, it would have been reasonable for the employer to have carried out a wider analysis of who was doing what in the office and the extent to which her role had been absorbed. It would not necessarily have been wrong for the employer to have arrived at a pool of one; the unfairness lay in that question not having been adequately considered.

TRIBUNAL INCORRECTLY ASSESSED WHETHER CHANGES TO INCENTIVE PLAN WERE UNLAWFUL AGE DISCRIMINATION

Summary: The Employment Appeal Tribunal (EAT) decided that an Employment Tribunal had made an error in its analysis when it found that there had been no unlawful age discrimination in the use of a cut-off date after which departed employees could not benefit from rule changes to a long-term incentive plan (LTIP). The EAT also found that the parent company which administered the LTIP was not acting as agent for the employer and could not therefore be liable for discrimination under the Equality Act 2010.

Key practice point: The case illustrates the need for employers making changes to any employee benefit arrangements to assess whether any discrimination might arise and to consider whether it could potentially be justified. This can be a complex exercise, as it involves identifying the precise "provision, criterion or practice" (PCP) that might cause discrimination and a legitimate aim or aims to justify it. The employer in this case should have been asked to justify the

use of the cut-off date rather than the overall changes to the LTIP. An added difficulty for employers is that case law has indicated that a "costs alone" justification for discrimination is not likely to be sufficient.

Facts: The claimant was a senior employee and eligible to participate in his employer's LTIP, which had been approved by shareholders of the employer's parent company and was administered by the parent company's remuneration committee. He was awarded shares and options under the LTIP for 2017 with vesting dependent on the performance of the parent company's shares over the three years 2017 to 2019. On 30 June 2019 he retired as a "good leaver". Under the LTIP he remained entitled to a pro-rated amount of the 2017 award that would ordinarily vest at the end of 2019. In 2019 it became clear that the performance of the parent company's shares was such that no part of the 2017 awards would vest. On 18 September 2019, the remuneration committee changed the terms of the 2017 award to allow it to vest in part notwithstanding the performance of the shares, with the aim of retaining existing senior employees of the group. The remuneration committee made it a condition of benefitting from this rule change that an employee was still employed as at 18 September 2019. This meant that the claimant did not benefit from the rule change and he received nothing in respect of his 2017 award. He brought a claim for indirect age discrimination.

The Tribunal dismissed the claim. The Tribunal decided that the requirement that LTIP participants had to be employed on 18 September 2019 in order to benefit from the amended terms was a PCP for the purposes of assessing whether there was indirect age discrimination under the Equality Act 2010. The PCP put people over the claimant's age (57) at a particular disadvantage compared with those under 57 and put the claimant at that disadvantage. However, the Tribunal found that the PCP was a proportionate means of achieving the legitimate aim of retaining staff and was therefore justified.

The Tribunal also found that the parent company was acting as agent for the employer when providing the LTIP for its employees and amending its terms and both companies were therefore potentially liable. Section 109 of the Equality Act 2010 provides that anything done by an agent "with the authority of the principal" is treated as also done by the principal.

The claimant appealed against the finding that the age discrimination was justified; the parent company and employer appealed against the decision on agency liability.

Decision: The EAT upheld the Tribunal's decision that the claim failed but on a different basis to that relied on by the Tribunal.

The EAT found that the Tribunal's decision on justification of indirect age discrimination was "clearly wrong". Although the changes to the LTIP were a means of achieving the legitimate aim of retaining staff, it was the PCP - the requirement that a participant should have been employed on 18 September 2019 - which had to be justified, not the overall changes to the LTIP. The PCP could not advance the aim of retaining staff, since those no longer employed at the cut-off date were clearly not candidates for retention. Therefore, it was not a means of achieving that aim at all, let alone a proportionate means. The EAT commented that the only real justification for the PCP was to avoid unnecessary payments to former employees (who could not, by definition, be retained); in other words, to save money. However, the employer and parent company had not contended that the legitimate aim of the PCP was to save money or that they could not afford to pay the awards.

The claim failed, however, because the EAT found that the parent company was not acting as agent for the employer in imposing the PCP. As a result, neither the parent company nor the employer could be liable for any discrimination. There was no basis for the Tribunal's finding that the parent company had been authorised by the employer and that it was acting on the employer's behalf in relation to the LTIP. The mere fact that the parent company's actions affected the legal relationship of the employer with the claimant could not make it the employer's agent. The employer had no control over the parent company's actions or decisions in relation to the LTIP. The Tribunal could not extend the meaning of Section 109 to fit with what might be perceived to be the overall objective of the legislation.

Analysis/commentary: The agency issue might be the subject of an appeal to the Court of Appeal; the EAT commented that the result of finding that there was no liability under Section 109 was "*unpalatable*" and "*it may be that there is a lacuna in the law that Parliament ought to be looking at*". Neither the Tribunal nor the EAT appear to have considered the provisions of Section 111 and 112 of the Equality Act 2010 which impose liability for discrimination where a company or individual instructed, caused or induced contraventions of the Equality Act (Section 111) or aided them (Section 112). In a previous EAT case, it was accepted as arguable that a former employee's claim that his former employer had engineered the rejection of his job application by a connected company because he had brought discrimination proceedings while in employment potentially gave rise to a claim under Section 112.

NON-FINANCIAL MISCONDUCT IN THE FINANCIAL SECTOR

Last year the Financial Conduct Authority (FCA) consulted on proposals to introduce a new regulatory framework on diversity and inclusion in the financial sector, including clarity on the regulators' approach to the treatment of non-financial misconduct (NFM), such as sexual harassment, as misconduct for regulatory purposes. Final rules are expected in the second half of this year. Using a survey issued under its powers to gather information, the FCA is now asking some insurers for information about all incidents of work-related NFM, including those that they have not already reported to the FCA. For more on this action by the FCA, please see the Briefing prepared with our Financial Regulation colleagues.

HORIZON SCANNING

What key developments in employment should be on your radar?

April 2024	Right to request flexible working becomes a "day one" right
April 2024	Amendments to the Working Time Regulations, including to provide that employers do not have to keep a record of daily working hours and to allow the use of rolled-up holiday pay
April 2024	Regulations under the Protection from Redundancy (Pregnancy and Family Leave) Act 2023, to extend the circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy
April 2024	Carer's Leave Act 2023: entitlement to one week's unpaid leave per year for employees caring for a dependent with a long-term care
April 2024	Changes to paternity leave to allow it to be taken in two separate blocks of one week, and at any time in the first year after birth or placement for adoption
Spring 2024	Final version of Code of Practice on Dismissal and Re-engagement expected to be issued
July 2024	Employment (Allocation of Tips) Act 2023 expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and keeping records
July 2024	Amendment to Reg 13A TUPE to allow small employers, and all employers where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives
July 2024	Employment Relations (Flexible Working) Act 2023 expected to come into force: amendments to the flexible working request process
September 2024	Workers (Predictable Terms and Conditions) Act 2023 expected to come into force: right to request a more predictable working pattern
October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 expected to come into force: duty to take reasonable steps to prevent sexual harassment of employees
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care

Date uncertain	• Proposed three-month limit on non-compete clauses in employment and worker contracts • Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations

We are also expecting important case law developments in the following key areas during the coming months:

Employment status: *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes

Discrimination / equal pay: *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *The Royal Parks Ltd v Boohene* (Court of Appeal: whether end-user had indirectly discriminated against contract workers on grounds of race by paying them a lower minimum level of payment compared to direct employees); *Bailey v Stonewall Equity Limited* (EAT: whether a campaigning group had instructed, caused or induced religion or belief discrimination by the employer); *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *Haycocks v ADP RPO UK Ltd* (Court of Appeal: whether redundancy dismissal is fair in absence of workforce consultation at formative stage)

Industrial action: *Secretary of State for Business and Trade v Mercer* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown); *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing)

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