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Insights

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CAN SETTLEMENT AGREEMENTS PROHIBIT FUTURE UNKNOWN CLAIMS, DOES DELAYING A RESIGNATION TO COMPLETE A GRIEVANCE PROCESS STOP A CONSTRUCTIVE DISMISSAL CLAIM, AND A GENERAL NEWS ROUND-UP

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SUMMARY

Our January update includes a new Court of Session case giving (a degree of) certainty on settlement agreements prohibiting future unknown claims and a new case on constructive dismissal focusing on the rules around delaying a resignation and affirming the employment contract. We also feature a news round-up relating to an updated EHRC Code of Practice and Guidance to accompany the new law on sexual harassment due to come into force in October, the new ACAS Code of Practice on Flexible Working (including day one requests) and changes to the Paternity/Adoption leave rules.

CAN A SETTLEMENT AGREEMENT PROHIBIT FUTURE CLAIMS UNKNOWN AT THE DATE OF SETTLEMENT?

It is best first to try and clarify what is meant by "unknown future claims". These can perhaps be broken down into three categories:

- Claims that exist at the date of settlement, or where the facts necessary to bring the claim exist, but the employee is unaware of either or both (type A claims);
- Claims that do not exist at the date of settlement, and where the facts necessary to bring the claim only arise after the settlement date (type B claims); and
- Claims that do not exist at the date of settlement, but new legislation or legal decisions/cases after the date of settlement enable a new claim to be brought (type C claims).

In this case, heard by the Scottish Court of Session, the claim was a type B claim, but the decision covers A and B, and possibly C, although a C claim, which is likely to be very rare, is not expressly

covered.

The claimant was a seafarer who spent at least half his 20-year career as a Chief Officer aboard a vessel operating in foreign waters. As a result of a redundancy exercise in late 2016, the claimant was dismissed and, at the age of 61 on 29 January 2017, entered into a settlement agreement (SA).

The SA waived a large number of statutory and other employment claims, including claims for direct and indirect age discrimination under section 120 of the Equality Act 2010 (EqA). Under clause 6.2 of the SA, the waiver of claims applied "*irrespective of whether or not, at the date of [the agreement], [the claimant] is or could be aware of such claims or have such claims in his express contemplation (including such claims of which [the claimant] becomes aware after the date of [the agreement] in whole or in part as a result of new legislation or the development of common law)*". The claimant had settled, at least under the wording of the SA, future age discrimination claims referred to above as being in type A, type B and type C.

Under the SA, the claimant was paid an initial payment on the date of the agreement but was due a second payment in June 2017. In March 2017, the respondent decided that the second payment could only be made to employees who were 60 or under. The claimant was 61 at the date of the SA (and termination of employment) so he could not receive the second payment, entirely because of his age. As a result, the claimant brought a new claim for age discrimination for the second payment. The respondent argued that any such claim was prohibited by the SA.

The claimant argued that future unknown claims were not covered by the SA. He referred to the wording of s147 of the EqA, which regulates settlement agreements, in particular s147(3)(b), which requires that the SA must relate to "*…the particular complaint*". The claimant argued that a generic reference to age discrimination claims under s120 of the EqA was not "*the particular complaint*" he was bringing. How could "*the particular complaint*" be covered by an agreement entered into before the complaint, or the facts enabling that complaint (the respondent's decision of March 2017), existed?

The tribunal sided with the respondent and followed the 2005 case of *Hilton UK Hotels Limited -v- McNaughton*. The settlement did relate to the particular complaint, which was clearly identified in the SA as being an age discrimination claim under s120 of the EqA, and it was also made clear that the waiver extended to future unknown claims. The claimant appealed to the EAT.

The EAT disagreed with the tribunal. The requirement for the SA to relate to "*the particular complaint*" prohibited settlement of an unknown future claim. The EAT said that, at the very least, the circumstances giving rise to the future complaint had to exist at the time the SA was entered into (type A claims). The EAT referred to Hansard and comments made by Viscount Ullswater at the inception of SAs in 1993. Viscount Ullswater said:

> *"the procedures [settlement agreements] should only be available in the context of an agreement which settles a particular complaint that has already arisen"*

The EAT held that the wording "*…the particular complaint…that has already arisen*" did not permit settlement of claims by reference to generic names and/or section numbers. The EAT appreciated this might be inconvenient in a "clean break" termination scenario but the EqA was clear. Type B and type C claims could not be settled, although arguably the EAT would have permitted a type A claim to be settled. The respondent appealed to the Court of Session.

The Court of Session disagreed with the EAT. It referred to the previous 2005 Court of Appeal case of *University of East London -v- Hinton*. In *Hinton*, the waiver wording was less specific and referred only to all possible claims "*arising under statute*", both present and future. It was held that this was not specific enough to comply with the statutory requirement for the SA to relate to "*the particular claim*". However, it was also made clear that "*a generic description such as "unfair dismissal" and/or a reference to the section of the statute giving rise to the claim*" would suffice. The Court of Session was quick to point out that, had the SA in this case been before the Court of Appeal in *Hinton*, it would have permitted the settlement of unknown future claims under type B and type C. This approach was also followed in the 2011 case of *McWilliams and Others -v- Glasgow City Council*, and in *McWilliams* it was made clear that there was no bar on future claims as long as the SA was clear about it.

The Court of Session also emphasised the practical need for certainly and a clean break on termination of employment, which this more robust approach permitted. It was held that the claimant's new claim was covered and prohibited by the SA of 29 January 2017.

The decision makes clear that, to exclude future claims of type A, type B and type C above, the SA must:

- Refer to the claim by reference to the name of claim and the section number of the legislation it is brought under. This will satisfy the need for the SA to relate to "*the particular claim*";
- Be specific that all future unknown claims are covered, so that the employee is clear about what they are signing up to.

A point that is not covered explicitly in the judgment but is strongly implied, is that these principles would apply to SAs entered into on termination of employment, but not necessarily to SAs entered into during employment. An example would be settling an ongoing discrimination claim where employment continues after settlement.The Court of Session said, referring back to the 1993 comments of Viscount Ullswater that SAs can only settle complaints that have "*already arisen*", that Viscount Ullswater was concerned with settlements entered into during the employment relationship, not "clean break" arrangements on termination, such as in this case.

WHY THIS MATTERS

Although these issues have been raised in previous cases, this is possibly the clearest decision on settlement agreements and unknown future claims. It is helpful to those advising on SAs and

makes clear what the legal requirements are. It covers the requirement for a “clean break” on termination of employment, and (impliedly) distinguishes SAs entered into whilst employment is still ongoing, as there might be uncertainty if it were possible to prohibit any future unknown employment claims in an SA entered into during employment.

The judgment does not expressly cover type C claims, but these will be very rare, and wording excluding type C claims is commonplace in SAs.

Bathgate -v- Technip Singapore PTE Limited

DOES AN EMPLOYEE AFFIRM A CONTRACT OF EMPLOYMENT BY GOING THROUGH A GRIEVANCE PROCESS

A constructive dismissal occurs where, in response to a repudiatory breach of contract on the part of the employer, an employee resigns and bring the employment contract to an end. For example, the employer unilaterally reduces the employee’s salary by 50% - a breach of contract that strikes at the very heart of the employment relationship, and this entitles the employee to resign and claim constructive (unfair) dismissal. However, there is a timing issue. If the employee continues for 3/4 months working at 50% of salary and does not in any way protest, the employer can argue that the employee, by their conduct, has accepted the repudiatory breach as part of a varied employment contract. In legal terms, rather than bringing the contract to an end in the face of a repudiatory breach, the employee has **affirmed** the contract/employment relationship and can no longer bring a claim based on employment ending via a constructive dismissal.

The principle of affirmation was examined in this case.

The claimant was a long-standing employee of the respondent, a call centre selling resort holidays. The majority of the claimant’s income was based on commission, depending on how many resort holidays she was able to sell each year.

The tourism industry was hugely and adversely affected by the COVID-19 national lockdowns. During the first UK lockdown in early 2020, the respondent asked the claimant to move to a different, homeworking team. The claimant asked the respondent in a WhatsApp group how her pay would be structured if she moved teams, given that the bulk of her pay came from commission and no sales were being made due to COVID-19 restrictions. The respondent did not respond and even removed the claimant from the WhatsApp group.

In April 2020, the claimant raised a grievance about the respondent’s conduct and explicitly stated she wished to reserve all rights. The claimant then decided to resign with immediate effect - she brought a claim based on the respondent’s actions (ignoring her and removing her from the WhatsApp group) being a repudiatory breach of the implied term of mutual trust and confidence. She claimed this breach entitled her to treat herself as constructively dismissed.

The tribunal agreed that the respondent removing the claimant from the WhatsApp group and not responding to her query about pay amounted to a repudiatory breach of contract. However, the tribunal also found that the claimant, rather than ending the contract, had affirmed it. She had not resigned after the repudiatory breach and continued under her employment contract, accepting payment for another three months. The tribunal found that the claimant, by delaying her resignation and continuing to accept payment, had affirmed her employment contract by not bringing her employment to an end in response to the respondent's repudiatory breach of contract. The tribunal dismissed her claim for constructive unfair dismissal.

Both parties appealed. The respondent appealed the finding that there had been a repudiatory breach of the contract. The claimant appealed arguing the tribunal had not taken into account the fact that she did not resign for three months because she had already raised a grievance and wanted to see if the grievance procedure could resolve her issues with the respondent. She had also reserved her rights. She had not affirmed the contract, she was just awaiting the outcome of the grievance.

The EAT confirmed that the respondent's actions in removing the claimant from the WhatsApp group and the context around it, in that she was removed without any explanation because she had raised concerns over her pay if she moved to a new team, amounted to a repudiatory breach of the implied term of mutual trust and confidence.

The EAT then turned to the issue of affirmation. It considered the 2018 case of *Kaur v Leeds Teaching Hospitals NHS Trust*. In *Kaur*, it was held that the use of a grievance procedure would generally be no more than "*continuing to work and draw pay for a limited period of time*" while the grievance was investigated, giving the employer an opportunity to correct the issues in question. This meant that continuing in employment and continuing to receive pay in these circumstances (generally) would not amount to an affirmation of the employment contract.

The EAT agreed. It held the tribunal had erred in holding that the claimant had affirmed her employment contract following the respondent's repudiatory breach. The fact that the claimant had raised a grievance and had explicitly reserved her rights was central and should have been taken into account by the tribunal when considering the issue of affirmation.

The EAT remitted the case to the tribunal to reconsider, in particular, whether the claimant was entitled to wait for a grievance to be concluded, even if this involved continuing employment for three months, without affirming her contract of employment.

WHY THIS MATTERS

This judgment gives useful guidance to employers. It is clear about what the outcome of ignoring an employee and/or removing an employee from a WhatsApp group might be, and also reinforces the Kaur judgment that, in certain circumstances, delaying a resignation might not amount to an affirmation of the employment contract.

It is also worth noting that the claimant seemed to reserve her rights in relation to the respondent's breach, which in itself have been enough to prevent any affirmation. This express reservation of rights was also remitted back to the tribunal for reconsideration.

Brooks -v- Leisure Employment Services Ltd

NEWS ROUNDUP

EHRC CONFIRMS UPDATE ON CODE AND GUIDANCE TO REFLECT NEW DUTY ON EMPLOYERS TO PREVENT SEXUAL HARASSMENT

The Equality and Human Rights Commission has confirmed that its Code of Practice and Guidance on sexual harassment and harassment at work will be updated (as opposed to being replaced) to accompany the Worker Protection (Amendment of Equality Act 2010) Act 2023, due to come into effect in October of this year – see our last edition and recent blog "Employers will have positive duty to prevent sexual harassment"on this new legislation, which is concerned exclusively with sexual harassment.

The amendments to both the Guidance and the Code will be subject to full consultation, although there is not yet a timescale for this. However, as the Act is due to come into force in October, it seems likely it will be updated in the next 6/7 months.

The Code of Practice and Guidance will reflect the new mandatory duty on employers to take reasonable steps to prevent sexual harassment in the workplace and should provide guidance to employers on what steps should be taken to comply with the new rule. It should also cover issues relating to the potential maximum 25% uplift on tribunal awards in case where the duty has been breached.

ACAS STATUTORY CODE OF PRACTICE ON REQUESTS FOR FLEXIBLE WORKING AND FLEXIBLE WORKING AWAITS PARLIAMENTARY APPROVAL

On 11 January 2024, ACAS published its draft Code of Practice on requests for flexible working, together with an explanatory memorandum. They now await parliamentary approval.

On 6 April 2024, it is anticipated that section 1 of the Employment Relations (Flexible Working) Act 2023 will come into force. This will make the right to request flexible working a "day one" right (abolishing the need for 26 weeks' service) and make changes to the statutory flexible working request procedure, broadly in favour of employees, who (for example) will be able to make two requests in any 12-month period rather than one, and make them from day one of employment.

PATERNITY LEAVE CHANGES LAID BEFORE PARLIAMENT

The draft Paternity Leave (Amendment) Regulations 2024, which introduce (small) changes to the statutory paternity leave scheme and are due to come into force on 8 March 2024, have been laid before Parliament. These will implement changes to the statutory paternity leave scheme announced by the government in July 2023.

The main changes to be introduced are as follows:

- Fathers and partners will be allowed to take their leave and pay as two non-consecutive blocks of one week, rather than only in one block of either one or two weeks;
- Fathers and partners will be allowed to take their leave and pay at any point in the first year after the birth or adoption of their child, rather than only within the first eight weeks after adoption or birth;
- In most cases, the notice period required for each period of leave and pay will be shortened. Employees will be required to give 28 days' notice of each period of leave. They can decide when to take their leave at shorter notice to accommodate the changing needs of their families;
- For domestic adoption cases, the notice period for leave will remain within seven days of the adopter having received notice of having been matched with a child, as the domestic adoption process is less predictable than birth and children may be placed at short notice following being matched with their adoptive parents; and
- Fathers or partners will be allowed to give notice to vary any dates given, if they give 28 days' notice of the variation, enabling them to change planned dates at a later stage to best suit the needs of their families.

The amendments will take effect in relation to children whose expected week of childbirth is after 6 April 2024 and children whose expected date of placement for adoption or expected date of entry into Great Britain for adoption, is on or after 6 April 2024.

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