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Insights

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SETTLEMENT AGREEMENTS, WHISTLEBLOWING, REDUNDANCY AND GENERAL NEWS ROUNDUP

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SUMMARY

Our November update includes new case law on settlement agreements, particularly the extent to which they can prevent future claims, satisfying statutory requirements for protected disclosures in whistleblowing cases and an interesting case on redundancy consultation featuring a "pool of one". It also includes a news roundup on new proposed "strike-breaking" legislation, more news on employment and the menopause, and important employment guidance from the ICO on the monitoring of employees.

SETTLEMENT AGREEMENT CANNOT BE USED TO SETTLE FUTURE UNKNOWN CLAIMS

While parties are free to settle contractual employment claims by agreement, there are specific statutory provisions which limit an employer's ability to settle statutory employment claims. These include section 147 of the Equality Act 2010 which applies to the settlement of discrimination claims and section 203 of the Employment Rights Act 1996 (ERA) which applies to the settlement of claims under the ERA such as unfair dismissal. In both cases, the relevant section sets out the conditions which must be met for a settlement agreement to be valid and statutory claims settled. Importantly, this includes a requirement for the agreement to "relate to the particular [statutory] complaint".

The Scottish EAT recently considered the meaning of "particular complaint". The case concerned a claimant who had entered into a settlement agreement on his voluntary redundancy. As well as notice and an enhanced redundancy payment, the claimant understood he would receive an additional sum six months after the termination of his employment, paid under a collective agreement. However, the collective agreement stated that the payment would only apply to individuals who were under 61 and the claimant was 61 at the date of his dismissal. A month after

the claimant entered into the settlement agreement, the respondent decided not to pay the additional sum. The claimant claimed this refusal to pay was an act of age discrimination. The respondent relied on the terms of the settlement agreement - the claimant had settled all future claims for age discrimination through the settlement agreement and could not now make a claim based on age discrimination for the additional sum.

At first instance, the Employment Tribunal agreed. It held that the settlement agreement did indeed prevent the claimant from bringing the claim. However, the EAT disagreed and held that a settlement agreement could not be used to settle a future claim unknown to the claimant when the settlement agreement was entered into. It reached this conclusion relying on three particular points. First, it held it was contrary to Parliamentary intention. It referred to a discussion recorded in Hansard where it was stated that a settlement agreement can only settle a particular complaint which has already arisen. Secondly, it held that preventing the claimant's claim was contrary to the broad purpose of the legislation, which was to prevent employees from signing away their rights without understanding what they were doing. Thirdly, the EAT held that the requirement to settle "the particular complaint" was not satisfied by a clause which lists a series of types of complaint by reference to their nature or section number (in this case the agreement referred to "age, under section 120 of the Equality Act 2010 and/or regulation 36 of the Employment Equality (Age) Regulations 2006").

The EAT considered previous case law but felt that there was nothing in those decisions which precluded this finding. It noted that the outcome was potentially "inconvenient" for parties who want certainty at the end of an employment relationship, but that this did not override parliamentary intention or express statutory requirements.

Ironically, the claimant was unable to bring his claim anyway on other jurisdictional grounds.

WHY THIS MATTERS

This decision is notable in that, despite the EAT's comments, it appears to reach a conclusion which is out of step with previous case law, which stated that there were circumstances where a future claim could be settled even where the employee did not and could not have knowledge of it. The EAT found however that this finding did not relate to statutory claims.

While situations where entirely new claims arise after termination are unusual, employers need to be aware of this issue and also be aware that, at least until there is a decision from a higher court on the point, there is a risk that settlement of a future statutory claim not in existence at the time a settlement agreement is entered into (as in this case), will not be valid.

Potentially of more significance, the case also suggests that the settlement of claims by the use of a list by reference to their nature or section number may not be sufficient to amount to the settlement of a particular complaint. This gives rise to an increased risk of employees arguing that a settlement agreement has not validly waived all claims, particularly in the case of claims which

were less obviously in contemplation at the point the agreement was entered into. This approach is common practice, however, and seems unlikely to change without further case law - the ambit of the EAT's finding is not clear and appears to contradict earlier decisions.

Bathgate v Tecnhip UK Limited (2) Technip FMC PLC (3) Technip Singapore PTE Limited

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WHISTLEBLOWING - ALLEGED "PROTECTED DISCLOSURES" STRUCK OUT FOR NOT MEETING STATUTORY TESTS

The claimant was employed by the respondent at its London office for around twenty years. He was a journalist covering natural gas, carbon and power and was committed to reducing climate change and carbon emissions. The claimant alleged that the respondent, a leading international news outlet, was deliberately under-reporting stories relating to climate change and also alleged that, when the claimant highlighted this, the respondent retaliated by placing him on a performance improvement plan and ultimately dismissing him.

The claimant brought a whistleblowing claim. The respondent applied to strike out the protected disclosures made by the claimant. The respondent's case was that the disclosures should be struck out because they failed to meet the statutory tests set out in section 43B(1) of the Employment Rights Act 1996 (ERA).

As a reminder, s43B(1) lies at the heart of the law of protected disclosures. It states that:

> "*..a [protected] disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one of the following…*"

The phrase "*…one of the following…*" refers to sub-paragraphs (a) to (f) of the section, which set out what the disclosure is about. In this case the disclosures were mostly concerned with (e) and (f). (e) is about damage to the environment and (f) is about concealing that (e) is going on. With regard to retaliation by the respondent, the claimant relied on (b), which is that the respondent failed to meet a legal obligation by unlawfully retaliating. The claimant brought a claim under (f) again, alleging that the respondent had concealed its retaliation.

The EAT examined the claimant's disclosures. It focused on the two main objective tests which are:

- there must be a disclosure of **information** (as opposed to, for example, opinion); and
- the employee must reasonably believe the disclosure is in the **public interest**.

The first test is sometimes overlooked. When deciding whether a disclosure is information, as opposed to opinion or general sentiment, the authority is the 2018 case of *Kilraine –v-London Borough of Wandsworth*. In *Kilraine*, it was held that the disclosure (a) must be information and (b)

must be information that has enough factual content and specificity to show one of the matters listed in (a)-(e). In this case most of the disclosures had to show that the respondent was damaging the environment and concealing the damage it was doing.

Satisfying the test proved more difficult that the claimant perhaps believed. The claimant had to show that the respondent, a news organisation, was responsible for damage to the environment. Few people will doubt that there is damage being done to the environment, but did the claimant's disclosures tend to show the respondent was damaging the environment?

No. The EAT refused to accept that the respondent's climate change coverage was damaging the environment. It accepted the claimant's argument that he believed the respondent should be covering climate change more than it was but this was a matter of opinion, not information and even as a matter of opinion the claimant's disclosures did not pass the legal test because they were not factual/specific enough.

The claimant was equally unsuccessful on proving (f), which was that the respondent was deliberately concealing the damage it was doing to the environment. The EAT again was very clear - there was no information tending to show that the respondent had deliberately concealed anything.

On (b), the claimant was more successful, as the EAT said that his disclosures about employer retaliation might contain enough information to show unlawful actions on the part of the respondent. However, the other point that sometimes gets overlooked is that the claimant has to prove both that the disclosure contains enough factual information to pass the *Kilraine* test **and** that it passes the "public interest" test.

This led the EAT to examine the second test, the public interest test, and satisfying this proved just as difficult for the claimant. The claimant may have believed that climate change was obviously in the public interest, but the EAT was clear that it is not the subject matter that counts, it is the disclosure itself. As the environmental damage and concealment disclosures did not pass the information test then it did not matter whether they passed the public interest test as they had already failed. This is because the disclosures have to pass both tests. However, with regard to the retaliation disclosures under (b) it was important as the first information test had been passed.

Unfortunately, the claimant failed the public interest test for his (b) disclosures. The leading authority on the public interest test is the 2018 case of *Chesterton Global –v- Nurmohamed*. In broad terms, to pass the *Chesterton* public interest test, the claimant had to show he was not the only employee affected by the respondent's retaliation - he had to show that other employees (as well as him) were affected. He could not show this. None of the claimant's disclosures contained anything to indicate than anyone other than the claimant had been affected – it was the claimant alone who had suffered retaliation.

Even on the "environment" disclosures, which did not pass the information test, the claimant could not satisfy the public interest test. It was clear that climate change in itself was a matter of public

interest, but were the claimant's disclosures? The claimant's disclosures were not about climate change, they were about a news organisation allegedly under-reporting stories about climate change, and this failed to satisfy the public interest test as set out in *Chesterton*. The EAT drew a very clear distinction between the issue of climate change, and the claimant's individual disclosures.

The EAT struck out the claimant's protected disclosures which brought an end to his claim. He could only be dismissed for whistleblowing (making protected disclosures) if the disclosures passed the statutory tests in s43B(1) – and in this case they did not.

WHY THIS MATTERS?

This case is a reminder of just how rigorous the law of whistleblowing is. In particular, disclosures have to pass the relevant statutory tests before being classified as protected disclosures and this is not easy. It is also a reminder that even if the disclosures concern a matter of worldwide significance, it does not automatically confer whistleblowing protection on them.

Lastly, and returning to the first point, it confirms that any disclosure must not only pass the "information" test, it must also has to pass the "public interest" test. It may not be the exciting side of whistleblowing, but it shows how cases can fail at the first fence if the disclosures themselves do not pass the relevant legal tests.

Carr -v- Bloomberg LP

REDUNDANCY - DISMISSAL WAS UNFAIR WHEN CLAIMANT PLACED INTO A 'POOL OF ONE' WITHOUT CONSULTATION

The claimant was a nurse employed under a series of fixed term contracts. Her close colleague was also a nurse employed in a similar role under a similar series of fixed-term contracts. The claimant (only) was invited to a meeting at which she was informed of the respondent's financial difficulties and its need to cut costs. Shortly after the meeting the claimant was told that she alone was at risk of redundancy. This was despite the fact that the claimant and her colleague carried out very similar work and were at the same level. The claimant was not placed in a pool for redundancy selection with her close colleague. The respondent's rationale for this was that, because the latest of the claimant's series of fixed-term contracts expired before that of her colleague, the claimant should, of the two, be "selected" for redundancy. She would now be consulted with.

However, "consultation" consisted only of attempts to find the claimant alternative employment. There was no alternative employment and the claimant was duly dismissed by reason of redundancy. She brought a claim for unfair dismissal at the Employment Tribunal (ET).

The ET dismissed the claim. It held that decisions about how an employee was selected for redundancy were subject to the "*band of reasonable responses*" test under section 98(4) of the Employment Rights Act 1996 (ERA). The ET was "quite satisfied" that the respondent's decision to dismiss the claimant, based on her fixed-term contract expiring before that of her colleague (and effectively placing her in a pool of one), fell within the band of reasonable responses open to a reasonable employer. This was despite the fact that the respondent conceded that the earlier expiry of a fixed-term contract was the only reason for selecting the claimant for redundancy over her colleague, and that no alternative to this was considered or made the subject of consultation. It was also admitted that redundancy consultation for the claimant was limited to a search for alternative employment. The claimant appealed.

The EAT, in a judgment that criticised for ET for not exploring sufficiently the issue of reasonableness, allowed the appeal and found the dismissal to be unfair.

The EAT found the decision to use the expiry date of a fixed-term contract as a reason to dismiss the claimant by reason of redundancy to be (a) arbitrary, (b) outside the reasonable band of responses and (c) made without any form of consultation. It was held that consultation is a fundamental part of any fair redundancy procedure. It was noted that for consultation to be "genuine and meaningful", it must take place at an early stage and, possibly most importantly, when the employee still has the ability to potentially influence, have some input into, or at least have some form of dialogue about the outcome. What is the point of meaningful consultation if, as far as the employee is concerned, it has no effect and the decision to dismiss has already been made?

The EAT went so far as to say that the decision to select the claimant for redundancy on such an arbitrary basis, and without consultation, was a potential breach of the implied term of mutual trust and confidence.

WHY THIS MATTERS

This decision emphasises the importance of both redundancy consultation and pooling.

In terms of consultation, the ET was very clear that the process should have started earlier and at a stage where the employee could have some influence or input into the outcome.

This seems to be saying that employers need to consult in advance about (a) who is pooled and (b) selection criteria. However, employers should also should bear in mind that the facts of this case are very unusual. A pool of one will by definition be unusual and likely to be unreasonable. If the pool had been larger than one, which is normally the case, the decision may have been different. The EAT said it would only interfere in an employer's decision regarding redundancy processes and pooling in unusual circumstances. It seems to follow from the EAT's reasoning that, in most cases, an employer's decision to pool multiple employees and to choose specific selection criteria will not necessarily require prior consultation, although notification might be advisable. The reason is that, if there is more than one employee in the pool, consultation after the pooling stage will **not** be

meaningless, and there will still be a potential for employees to affect the ultimate outcome. In this case the employer had contrived to reduce the pool down to one and, once that was done, dismissal was inevitable and consultation meaningless.

In terms of pooling, the case reinforces the point that a pool of one is problematic. The EAT seemed to acknowledge that a pool of one can be fair in appropriate circumstances, but they did not elaborate as to what circumstances that could be. The circumstances would surely be very rare, and in this case a pool of one was found to be both unfair and outside the band of reasonable responses, which is not encouraging.

Mogane v Bradford Teaching Hospitals NHS Foundation Trust

NEWS ROUNDUP

GOVERNMENT INTRODUCES BILL TO FORCE MINIMUM SERVICE LEVELS DURING RAIL/TRANSPORT STRIKES

The Government has introduced the Transport Strikes (Minimum Service Levels) Bill, which will make provision for compulsory minimum service levels in specified transport services during periods of strike action. In addition, if the Bill becomes law, it will provide that that trade unions will lose their immunity from liability for industrial action if they fail to take reasonable steps to ensure that the persons required to work to ensure minimum service levels do not take part in the strike.

APPG PUBLISHES REPORT INTO IMPACTS OF MENOPAUSE

On 12 October, the All-Party Parliamentary Group on Menopause (APPG) published a report on the impacts of menopause and the case for policy reform. The APPG was established in 2021 by Carolyn Harris MP to tackle the lack of understanding around menopause among policymakers, the public and employers. The report marks the conclusion of its inquiry and contains a section dedicated to menopause in the workplace, which the APPG confirms was one of the issues that attracted the most interest during the inquiry.

ICO GUIDANCE ON MONITORING AT WORK

The Information Commissioner's Office (ICO) has published its draft guidance on monitoring at work. The guidance is open for consultation until January 2023. The ICO is publishing its draft guidance on employment practices in stages with this guidance being the first. It covers areas such as:

- webcams and screenshots;
- monitoring of timekeeping;

- keystroke monitoring to capture and log keyboard activity;
- productivity software that logs how employees spend their time; and
- tracking internet activity and keystrokes.

We published a summary of this guidance earlier this month.

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