The Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

Episode 9: Waiving future claims in settlement agreements and outsourced workers

Colin

Hello and welcome to our latest In-House Employment Lawyers Coffee Break with me, Colin, and with David too. Each month we talk you through the latest developments and practical takeaways that you need to know this time round.

David

Yes, thanks Colin, and what a month it's been! A general election win for Labour and lots in the pipeline by way of employment law changes. So it looks like us employment lawyers are going to be busy keeping up with it all.

Colin

Is there an election? I completely missed that! No, you're absolutely right, David. A lot of change coming down the line, but we're not talking about that today, but do keep an eye out - or should that be an ear out - because there will be another Lewis Silkin podcast coming very soon with details of all of Labour's proposed changes, after which I suspect we'll all be writing lots of lovely new policies. Anyway, David, what are we talking about today?

David

Well, we've got two exciting things to chat through. One is Clifford v IBM which is about settling future claims under a settlement agreement. And the second is a quite novel attempt to use equality law, that might give us a clue to Labour's plan for outsourcing.

Colin

On that note, I'll start us off with Clifford. Is there a dog called Clifford? A comedy dog? That sort of seems to ring a bell with me…

David

Yeah, he's big and red, think. Like the landslide election result!

Colin

That's it! So earlier this year, in fact in January, you might remember we had the Bathgate case, a case which always makes me think of The Proclaimers' "Letter from America" song for those of you of a certain era. That was decided by the Scottish Court of Session and helpfully held that a settlement agreement can be used to settle future claims, as well as existing employment claims, even where those claims only arise after the agreement has been signed.

David

But course, we all had a bit of uncertainty, didn't we, about how far we could rely on this because it wasn't technically binding outside of Scotland?

Colin

Yeah, that's right. Persuasive not binding - I think that's the term we use, isn't it, for decisions from the senior courts in Scotland. But here in England and Wales, we have to wait for a decision from the EAT to come along. And we've got one with Clifford v IBM, this is the case we've been waiting for! What happened in it?

Well, it is somewhat fact specific, and that might limit the wider implications of it. But Mr Clifford raised several grievances with his employer, and as a result, he was moved, I think by agreement, to their PHI scheme. And before doing so (and kudos to the IBM in-house employment team for recommending this) he signed a settlement agreement which had express wording which excluded generic future claims from the scope of the waiver - but not any which were connected with his grievances or which arose out of his transfer to the PHI scheme.

What happens, scroll forward several years, Mr Clifford brings new claims of discrimination. His complaint is that “I didn't receive salary reviews or increases like other employees had and if I had done, that would have had knock-on implications in terms of what I got under the PHI scheme”. The respondent, IBM, goes to the tribunal and waves the settlement agreement around and says, hold on a minute, these claims should be struck out and the tribunal agrees.

He goes off to the EAT and makes two points. One, he says Bathgate was wrongly decided. And second, he says, well anyway, my situation is different because my employment is carrying on. But the EAT didn't agree with him on either of those points. It said, well, the fact that employment is continuing doesn't make any difference. And the statutory conditions which regulate settlement agreements don't impose any restrictions on the types of claims or the timing of claims which could be settled provided clear language is used and the agreement relates to the particular complaint.

David

You know, my first thought when I read this case was about how glad the respondent will have been that they got a settlement agreement in place before moving the employee onto the PHI scheme benefits.

Colin

Yeah, absolutely. The drafting of that settlement agreement was watertight and kudos again to the lawyers involved for that one. And that's the lesson I think we learn from this case. That waiver of future claims, it's important to note, wasn't that generic. It didn't seek to exclude all future claims. It just had a carve out for anything related to the PHI scheme or his grievances. And you can see how the argument could be made that arguments about future pay rises and then knock on implications for PHI payments sort of fell into that bucket. I do think the temptation for all of us when we're drafting settlement agreements sometimes is to try and exclude as much as you can. But sometimes you're more likely to be successful in cases where you've properly specified claims and circumstances which claims may arise from.

David

Yeah, absolutely. A useful drafting reminder as if it were needed, to be clear, to be specific and to focus in on what you really want to exclude. And what you said at the start, Colin, about not getting carried away with this case is super important too. It's realistically not a green light to the idea that all future claims can be settled. Obviously, the facts of this case, as you said are fairly rare and potentially quite unsympathetic as well. You've got a claimant complaining that a hugely generous PHI scheme wasn't generous enough. That isn't a great claim.

Colin

Yeah, I think that's exactly right, David. And I think the point the claimant made about trying to distinguish his case from Bathgate because of his continuing employment was interesting. I do wonder whether the EAT would have felt that that argument held more sway if his employment had been actively continuing rather than just continuing in order to allow him to benefit from the PHI payments.

David

And that's a real kicker. Look, it's easy to agree with this decision on the facts, but the direction it goes in maybe becomes a bit more uncomfortable if you push it further. Does it mean, for example, a new claim

relying on new acts of say, sexual harassment would be waived on the basis that an earlier settlement agreement had been signed which waives future sexual harassment claims?

Colin

Yeah, and there's been sort of interesting commentary and speculation around this, hasn't there, already in the employment law community. If you have a manager who's in the habit of behaving in various inappropriate ways, we can all guess what those ways are, could you just get the employee to sign the settlement agreement so that they can carry on behaving in that way with impunity? Could you even go as far as getting someone to sign a settlement agreement on day one of their employment and breach all of their rights arising from their employment? We can probably all agree that would be pretty absurd and I guess also good luck with finding the independent lawyer who would sign off on that. But in principle, you know, the door is at least slightly ajar to these sorts of arguments as a result of this case.

David

Yeah, exactly. So look, the long and short of it is it's a good decision for employers, but certainly isn't authority to start thinking you can waive all and any future claims. And on that point, important to think about what practical difference it's going to make to all of us day to day. Well, for starters, in situations where you have a settlement agreement and employment is continuing, we really all do need to pay close attention to the future claims wording you're using in settlement agreements.

And don't just go as far and wide as you possibly can without thinking it through. One of the other things I've been wondering about is whether employers should now be asking employees to sign settlement agreements as a condition of receiving benefits under PHI schemes. I think it's certainly worth thinking about. I mean, obviously it's not going to be appropriate in all circumstances, but perhaps where there's a level of mistrust or there's some underlying grievances or where remaining in the PHI scheme might not be a long-term thing, it would be sensible.

Colin

Yeah, I think interesting ideas but they're going to be very fact specific. And for example, if the employee has a right contractually to get the benefits under the PHI scheme, in any event, it might be difficult to justify saying, well, you need to sign a settlement agreement first in order to do so. But I think a lot of employers do rightly worry about how to deal with employees in PHI situations. Do you include them in redundancy situations? Do they transfer under TUPE? What's the correct holiday pay to pay them and so on. And you can see that those worries can all be diminished if you have any signed settlement agreements in place.

My other practical thought is does this change anything for confirmatory settlement agreements? That's, you know, where you have someone sign a settlement agreement, they work out their three month notice period or maybe they go on garden leave and then you get them to sign a confirmatory agreement at the end. I don't think this case necessarily changes the approach fundamentally. And ultimately, that is a question of risk appetite and tolerance because you do sometimes want the certainty that you've caught all the claims up to and including the termination date but perhaps in those sort of shorter periods of time maybe where the employee's gone on garden leave, it is something that you could now be a little more relaxed about.

David

Let's talk about outsourcing and Labour's plans. Before we jump straight into that, there was a really interesting Court of Appeal decision that forms the context for this conversation. It was about outsourced workers, and it was handed down this month. It centred around the fact that the outsourced workers in that case weren't paid the London Living Wage and the particular group of claimants were from minority ethnic backgrounds. So, they brought this pretty novel case, which was hailed as the kind of first of its kind, landmark use of equality law to challenge the practice of outsourcing some elements of work, allowing the

outsourced groups to be paid less. It was essentially an attempt to claim pay parity with a directly employed workforce.

Colin

And that would have had a huge impact if they'd succeeded.

David

Well, yes, but spoiler alert, they did not. The Court of Appeal just didn't agree with them. They found that outsourced workers can only bring discrimination claims against the principal, which is the client for outsourced services, in a limited set of circumstances. Claims about pay rates were found not to be in scope because pay practices fundamentally were decided upon by the employer, not the principal. So that was the end of the road for that case but not the end of the road from a political perspective.

Colin

Yes, that's right. Because while we said this podcast wasn't about all of Labour's plans, and it isn't, given we've talked about this case, it would be remiss of us not to mention that Labour has plans to ensure that outsourced workers are included in gender pay gap reports, which is going to be quite material for a fair few employers. Obviously, this case was on the basis of indirect race discrimination, and Labour also has plans to introduce mandatory ethnicity pay gap reporting.

And while we don't know, because they haven't said, whether that will be extended to outsourced workers too, I'd imagine it will be on the cards eventually if they're going to include them in gender pay gap reporting. And just to mention, Labour also have this, in our view, strange, bit bonkers, idea to extend the right to equal pay, To ethnicity and disability as well. And indeed there's been some press coverage overnight as we record this suggesting that that's going to feature in the King's speech. We've written about why we think that's not the right way to go when it's going to significantly increase costs and complexity for claimants and employers in ethnicity and disability claims. Do read our article about that if you're interested. But it does look like that's something that's on the way and I can't wait for the consultation, David, I have to say, if there is one, to submit our response to that!

David

I love the idea, Colin, of you hovering over your keyboard like a kid at Christmas when those proposals come out for consultation. Well, that very wholesome image is as good a place as any to stop as that's all we've got time for today. A reminder that our next IHELC meeting is the member-led forum on the 18th July so do come along and we'll see you there. If you're listening to this after the 18th July, our events calendar will be back in full swing in September after a break to allow you all to watch the Olympics.

Also, we're on a break from the Coffee Break podcast until September. So our next episode will drop then.

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