Neutral Citation Number: [2024] EAT 90

Case No: EA-2023-000423-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 June 2024

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

MR IAN CLIFFORD **Appellant**

- and -

IBM UNITED KINGDOM LTD **Respondent**

- -
- -

CONOR KENNEDY (instructed by Didlaw Limited]) for the **Appellant**
SIMON FORSHAW KC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **Respondent**

Hearing date: 30 April 2024

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JUDGMENT

SUMMARY

Disability discrimination

The Employment Tribunal ("ET") struck out the claimant's claims for disability discrimination (direct, indirect and disability related discrimination) on the basis that they were precluded by a compromise agreement entered into by the parties in 2013 and on the basis that they had no reasonable prospects of success.

The claimant was continuously absent from work as a result of ill-health from September 2008 and has not worked since. In 2012 he pursued a grievance relating to various matters including the failure to transfer him to the respondent's Disability Plan. Under the terms of the compromise agreement, the respondent agreed that the claimant would move to the Disability Plan and receive disability salary payments at a specified level. The terms of the Plan indicated that an increase in these payments was discretionary. Under the terms of the compromise, the claimant waived the right to bring various specified claims, including disability discrimination claims, whether or not they were or could be in the contemplation of the parties at the date of the agreement. An exception in respect of future claims did not apply to matters connected to the grievance or its appeal or arising from the claimant's transfer to the Disability Plan.

The ET proceedings included complaints of disability discrimination arising from the fact that since his transfer, the claimant had not had annual salary reviews and the level of payments he received had not been increased since he entered into the Plan.

The Employment Appeal Tribunal ("EAT") held that the ET was right to conclude that the compromise agreement precluded the disability discrimination claims. It was accepted that they came within the terms of the waiver; the issue was whether that agreement met the statutory prerequisites for a qualifying settlement agreement within the meaning of sections 144(1) and 147 Equality Act 2010; and, in particular, whether section 147(3)(b) was satisfied in that the parties' contract "relates to the particular complaint". Relying on **Bathgate v Technip UK Ltd** [2023] ICR

191, the claimant submitted that this provision did not extend to claims that arose after the compromise agreement was entered into. However, by the time of the appeal hearing, the Court of Session had overturned the EAT's decision: **Bathgate v Technip Singapore Pte Ltd** [2023] CSIH 48, [2024] IRLR 326, holding that future claims could be validly compromised by a qualifying settlement agreement if the preconditions were met. The EAT rejected the claimant's contention that the Court of Session's decision was wrong and should not be followed, and also his alternative contention that the circumstances were distinguishable because in the present case, unlike in **Bathgate**, the parties had remained in an employment relationship after the compromise agreement. As the disability discrimination claims were precluded by the compromise agreement, the other grounds of appeal were academic. In any event, the EAT dismissed these grounds on their merits on the basis that this was a case where, taking the claimant's case as its highest, none of the discrimination claims had any reasonable prospects of success. The comparison relied upon by the claimant for the purposes of the direct and indirect discrimination claims was not a valid one; the complaint was incapable of amounting to indirect discrimination as it concerned differential treatment of disabled and non-disabled employees, rather than the application of a common provision, criterion or practice; and the disability related discrimination claim sought to identify unfavourable treatment by impermissibly isolating the absence of salary reviews from the beneficial treatment that the claimant received under the Disability Plan.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE:

Introduction

1. This is an appeal from the decision of Employment Judge Housego (the "EJ") sitting at Reading Employment Tribunal (the "ET") promulgated on 24 April 2023, striking out the claimant's claims as having no reasonable prospect of success and on the basis that they were precluded by a compromise agreement entered into by the parties on 10 April 2013. I will refer to the parties as they were known below.

2. The claimant brought claims for disability discrimination contrary to sections 13, 15 and/or 19 of the **Equality Act 2010** ("**EQA**"), unlawful deduction of wages and breach of the **Working Time Regulations 1998** ("**WTR**"). This appeal is only concerned with the decision to strike out the disability discrimination claims.

3. The claimant advances three grounds of appeal, namely that the ET erred in:

   i) Finding that the disability discrimination claims were validly waived by the compromise agreement, in particular as the ET failed to follow the Scottish Employment Appeal Tribunal's ("EAT") decision in **Bathgate v Technip UK Ltd** [2023] ICR 191 ("**Bathgate EAT**") ("Ground 1");

   ii) Striking out the disability discrimination claims in circumstances where no such strike out application was before the ET, so that the ET reached a decision on a point that had not been argued and was not before it ("Ground 2");

   iii) Striking out the claims of indirect discrimination and/or discrimination arising from disability as having no reasonable prospects of success, without having addressed their prospects of success ("Ground 3").

4. Permission to proceed in respect of Ground 1 was granted at the sift stage by Caspar Glyn KC sitting as a Deputy High Court Judge. HHJ Auerbach permitted Grounds 2 and 3 to proceed following a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (as

amended) on 19 December 2023. Subsequent to the sift decision the Court of Session allowed an appeal from Bathgate EAT in **Bathgate v Technip Singapore Pte Ltd** [2023] CSIH 48, [2024] IRLR 326 ("**Bathgate CoS**").

The material facts and circumstances

5. The claimant is employed by the respondent, who provides IT, technology, hardware, software, new business solutions and services. He commenced employment with the respondent on 1 July 2001. His employment transferred pursuant to the **Transfer of Undertaking (Protection of Employment) Regulations 1981** from Lotus Development United Kingdom Limited; his period of continuous employment began on 26 June 2000.

The compromise agreement and the Disability Plan

6. The claimant has been continuously absent from work due to ill-health since 19 September 2008. In 2012 he raised a grievance. His complaints were summarised by the EJ as including: ongoing and proposed deductions from his salary (reduced pension contributions), not having a salary increase since 2008, not receiving holiday pay for the period of his sickness absence and failing to transfer him to the respondent's Disability Plan. It was also said that the allegations relating to the lack of salary increase and to holiday pay were disability discrimination. Following the determination of the grievance and a related appeal, it was agreed that the claimant would be moved to the respondent's Disability Plan, and he was placed on this plan on 6 April 2013.

7. On 10 April 2013, the parties entered into a compromise agreement. The claimant did so having received legal advice from specialist employment law solicitors (Doyle Clayton) who signed the accompanying Adviser's Certificate.

8. The recitals to the compromise agreement included the following:

> "On 25 September 2012, you lodged a formal grievance against IBM United Kingdom Limited… On 23 November 2012, IBM provided its response to the Grievance… On 5 December 2012, you appealed against the Respondent… On 1 March 2013, IBM responded to the Appeal…
>
> In the Grievance, the Appeal and elsewhere you allege that you have or may have potential claims arising from your employment with IBM which include: unlawful deductions from wages, breach of contract, disability discrimination and other claims referred to in the Grievance and Appeal ("Employment Claims").

> This Agreement settles the Employment Claims. In addition, it reflects the intention of you and IBM and all of the Group Companies that this Agreement should also settle any other claims that you may have against IBM or any other Group Company, subject to and in accordance with the terms set out below."

9. Paragraph 1 said that it was agreed that the claimant was eligible for the disability benefit under the terms of the IBM Aligned Sickness and Accident Benefit ("the Aligned Policy") and the Disability Plan, and that he would be treated as an incentive employee. The text continued that under the Aligned Policy, incentive employees have their disability benefit calculated by reference to on target earnings ("OTE") and that, "Therefore whilst you remain eligible for the disability benefit under the Aligned Policy you will be paid 75% of OTE salary less the single person's social security incapacity benefit or employment support allowance. For these purposes, your OTE will be £72,037.44 per annum".

10. Paragraph 3 of the agreement recorded that the respondent agreed to make a payment in relation to the claim for untaken leave without admission of liability.

11. Paragraph 5 provided:

> "It is a condition of this Agreement that you agree:
>
> a. to, and will comply with, the terms of the IBM UK Disability Plan Guidelines Document (the "Disability Plan Guidelines") (as set out in Schedule 2) and
>
> b. that whilst in receipt of the disability benefit described in paragraph 1 above, you will not:
> (i) accrue annual leave; or
> (ii) be entitled to any car allowance, fuel allowance, outer London allowance or any other allowance and such allowances will not form part of your OTE or basic salary."

12. Under clause 8 the claimant acknowledged that he had received legal advice on his rights arising out of and in connection with his employment with the respondent. The wording continued, "and you have been advised that you have or may have complaints or claims arising in relation thereto, whether or not they are or could be in the contemplation of you or IBM at the date of this Agreement. You acknowledge that the terms in this Agreement are offered to you on the basis that you accept them in full and final settlement of all and such claims that you may have against IBM (or any Group Company) and any of its (or their) directors, officers or employees. You waive your rights to pursue such claims including but not limited to the following…" (emphasis added). A list

of claims was then set out. The list included at sub-clause (f) "any claim for discrimination, harassment, or victimisation related to disability, failure to make adjustments or any other claim under the Disability Discrimination Act 1995 or the Equality Act 2010", and at sub-clause (i) "any claim for compensation for entitlement to annual leave, payment in respect of annual leave, refusal to give paid annual leave, daily and/or weekly and/or compensatory rest and/or rest breaks and any other claim under the Working Time Regulations 1998".

13. Paragraph 9 then said:

> "Paragraph 8 does not extend to:
>
> a. Any claim to enforce the terms of this Agreement; or
>
> b. Any claim to enforce any pension rights which you have accrued up to the date of this Agreement under the Lotus Development Pension Investment Plan; or
>
> c. Any personal injury claim of which you are not aware as at the date of this Agreement or any personal injury claim in respect of which you have already made a claim against IBM (or IBM's insurer); or
>
> d. Any claims which arise after the date of this Agreement and which: (i) are not connected to the matters set out in the Grievance or Appeal; or (ii) do not arise out of the Claimant's transfer to the Plan."

14. In paragraph 10 the claimant warranted and confirmed that he had received independent legal advice as to the terms and effect of this Agreement and, "in particular as to its effect on your ability to pursue your rights before an Employment Tribunal, County Court or High Court in respect of each of the claims referred to in paragraph 8 from the Adviser".

15. Paragraph 18 provided that the agreement, the Disability Plan, the Aligned Policy and the Disability Plan Guidelines set out the entire agreement and understanding between the parties.

16. The Disability Plan Guidelines were reproduced at Schedule 2 to the agreement. The eligibility criteria for the Plan included that all reasonable workplace adjustments which might bear upon the employee's fitness had been explored and that the employee's medical condition and its effects were likely to preclude a return to active employment for the reasonably foreseeable future. The Guidelines also said:

> "IBM UK DISABILITY PLAN PAYMENTS
>
> Upon transfer from their current manager's headcount and budget to the Plan the employee

> will become an 'inactive' employee in receipt of a monthly disability salary payment advance on 6th of each month…
>
> The Plan benefit is payable from the date of transfer to the Plan, until the 5th of the month following the employee's 65th birthday. It is payable at the rate of 75% of on target earnings…
>
> From time to time, IBM United Kingdom Limited…may exercise its discretion to award an increase to the disability salary payable to members of the Plan…There is no guarantee of such increases being awarded, either in terms of timing or amount."

The present claim

17. The claimant issued his present claim in February 2022. It is agreed that he is a disabled person for the purposes of the EQA. He alleged that his absence from work and/or being placed on the Disability Plan and/or his inability to perform his duties under his contract was "something arising" from his disability. His grounds of claim pleaded that he had been treated unfavourably because of this "something arising" in that:

i) He had not had an annual salary review in the same way as those employees who were able to carry out their contractual duties;

ii) He had not had a salary increase in line with increases provided to other Band 8 Client Technical Architects;

iii) He had not had a salary increase in line with the average annual increases which employees of the respondent had been awarded; and/or

iv) His annual leave payments would have been paid at a rate of 75% when compared with those not on the Disability Plan. Accordingly, had he been paid for his annual leave (which had not in fact occurred), he would have been paid 25% less for this annual leave.

18. The claimant contended that if he had not been disabled and thus able to continue to perform his role, he would have had an annual salary review and annual salary increases each year since 2013 and would have been paid in full for his contractual annual leave entitlement.

19. I need say no more about the fourth aspect of the section 15 complaint (or the equivalent complaint in respect of indirect discrimination), as Mr Kennedy clarified during the hearing that the disability discrimination claims were now only pursued in relation to the lack of salary reviews and

salary increases.

20. The claimant also pleaded a claim of direct discrimination on the basis that by refusing to annually review his payments under the Disability Plan and/or increase these payments, the respondent had treated the claimant, a disabled person, less favourably than it treated non-disabled employees.

21. In the alternative, the claimant alleged indirect discrimination in that the respondent's practice put disabled employees, including members of the Disability Plan, at a particular disadvantage, in that disabled employees were not given the benefit of an annual salary review and were not given equivalent annual salary increases when compared to their non-disabled comparators.

22. The claimant also brought claims of unlawful deductions from wages and under the WTR in relation to non-payment of annual leave.

23. In its response, the respondent contended that the ET did not have jurisdiction in respect of the claims as they fell within the terms of a legally binding compromise agreement and because they had been presented outside of the prescribed time period. In the alternative, the claims were denied. As regards the merits, the respondent asserted that the position of inactive employees on the Disability Plan was significantly different from regular employees who were temporarily absent from work, whether through sickness or otherwise. The claimant had remained on the Disability Plan and continued to receive 75% of his OTE as set out in the compromise agreement. As regards the section 13 EQA claim, the respondent denied that the claimant was treated less favourably because of his disability. Its decision not to include the claimant and other members of the Disability Plan in the annual salary review process (which did not lead to a guaranteed increase) was due to their different status, as reflected in the terms and conditions of the Plan. An "inactive" employee was not expected to return to work for the respondent and was in receipt of a benefit payment, rather than a salary for work performed, which is a payment of a different nature. The purpose of salary increases included the retention of employees in active service with strategically

valuable skills, rewarding employee's performance and motivating their future career development with the respondent. The same reasoning did not apply to the claimant's payments under the Disability Plan.

24. As regards the indirect discrimination claim, the respondent denied that it had a policy or practice of salary reward reviews that was applied to both active employees and those on the Disability Plan. The respondent adopted an entirely separate approach to its review of plan payments for inactive employees, where it had a discretion to make increases. In the alternative, it was denied that any policy or practice put or would put the claimant or other disabled employees at a particular disadvantage when compared with persons who were not disabled. Active employees were not guaranteed a salary increase every year either. In the further alternative, the respondent averred that any prima facie discrimination was justified.

25. As regards the section 15 **EQA** claim, the respondent contended that the relevant treatment was the respondent's ongoing payment to the claimant of his Disability Plan payments whilst he is an "inactive" employee and unable to work, and that there was nothing intrinsically unfavourable or disadvantageous to the claimant about that. Furthermore, that the factors considered in relation to salary reviews for active employees were not applicable to those in the claimant's position as the claimant was not undertaking his employment duties.

Case Management Hearing, strike-out application and list of issues

26. A Preliminary Hearing for Case Management took place on 12 January 2023 before Employment Judge Boyes. The Judge listed an open Preliminary Hearing ("OPH") for 24 March 2023 to consider the respondent's strike out application. At that stage, the strike out application had not been made. The application was described at para 9 of the order as one to determine, "whether the claimant's claims should be struck out and/or deposits ordered, including on the basis that the claimant's claims fall within the terms of a valid and legally binding compromise agreement dated 10 April 2013". The respondent was directed to file its strikeout application by 26 January 2023. Paragraph 15 of the order noted that the issues to be determined at the OPH were "listed in the Case

Summary below. If you think the list is wrong or incomplete you must write to the Tribunal and the other side by 9 February 2023. If you do not, the list will be treated as final unless the Tribunal decides otherwise". The Case Summary summarised the relevant history and then said at para 42:

> "The respondent position is that the entirety of the claimant's claims should be struck out because the Employment Tribunal has no jurisdiction to hear any of them as there is a legally binding settlement agreement between the respondent and the claimant which compromises all of the contractual and statutory claims pleaded."

27. Paragraph 43 summarised the contentions that the respondent raised in respect of the compromise agreement. Paragraph 44 noted that the parties were agreed that issues relating to time limits should be dealt with at the full merits hearing. Paragraph 46 recorded that, "subject to what is said in the respondent's strike out application and the parties' skeleton arguments, all of which are yet to be filed, the issues to be determined at the preliminary hearing are as follows:

> "46.1 Do each or any of the claimant's claims below fall within the terms of the Compromise Agreement?
>
> 46.2 If so, are such claims compromised by the Compromise Agreement such that the Tribunal does not have jurisdiction to hear them and the claimant is precluded from pursuing them?"

28. The respondent's strike out application was set out in a letter to the ET dated 26 January 2023. Page 1 of the letter included the following:

> "The Respondent applies for strike out on the basis that the Employment Tribunal does not have jurisdiction to consider the entirety of the claim, save for one allegation (see further below), as all other aspects of the claim have been validity compromised by virtue of a compromise agreement entered into by the parties on 10 April 2013…
>
> The one remaining element of the claim is the Claimant's right to accrue statutory annual leave, which cannot be contracted out of by virtue of the… [WTR]. However, as the Claimant remains a member of the Respondent's disability plan, he is not entitled to any payment in lieu of annual leave, as he alleges. Therefore, the Claimant's claim of unlawful deductions from wages in this regard has no or little reasonable prospects of success and therefore should be struck out and/or the Claimant should be ordered to pay a deposit of £1,000 as a condition of him continuing to advance that allegation…" (Emphasis in the original.)

29. The body of the letter then addressed the terms of the compromise agreement and why it was said that the claimant was precluded from pursuing his pleaded allegations.

30. The parties subsequently prepared an "Agreed List of Issues for the Open Preliminary Hearing on 24 March 2023". In its material parts it read:

> "1. Both parties accept that they entered into a valid and legally binding compromise agreement in accordance with…section 147(3) of the…[EQA]…dated 10 April 2013.

A IMPACT OF THE COMPROMISE AGREEMENT

2. What affect do the terms of the Compromise Agreement (and in particular clauses 1, 5, 8, 9 and 18) have on the following:

……

2.5 The Claimant's right to bring future claims relating to his disability benefit being reviewed and/or increased after 6 April 2013?

B CLAIMANT'S CLAIMS

3. Accordingly, do the Claimant's claims (set out below) fall within the terms of the Compromise Agreement.

4. The Claimant brings the following claims: [the discrimination arising from disability, direct discrimination and indirect discrimination claims were then summarised].

5. If the Claimant's claims are within the terms of the Compromise Agreement, are they compromised such that the Tribunal has no jurisdiction to hear the claims and they should be dismissed?

C UNLAWFUL DEDUCTION OF WAGES CLAIM

6. Does the Claimant have no or little reasonable prospects of success in relation to his claims for unlawful deduction from wages given that r13(9)(b) WTR prohibits any amount of annual leave being paid in lieu of untaken leave when the Claimant remains a member of the disability plan?

7. If so, should the Claimant's claim of unlawful deduction of wages be a) struck out or b) subject to a deposit order?"

The Employment Judge's reasoning

31. The OPH was held on 24 March 2023. Following submissions, the EJ reserved judgment. At para 1 of his Reasons, he said: "This hearing was to consider whether to strike out the claim in whole or in part, either as precluded by a compromise agreement of 13 April 2013 [sic], or as having no reasonable prospect of success". The EJ then summarised the compromise agreement, the claims that were now made, the previous Case Management order and the list of issues.

32. At para 15 he noted the following agreed fact:

> "…the Plan is a self-insured scheme run by the Respondent. It is akin to an insurance policy, but the person who is unable to work is not dismissed and remains an employee. It is a particular status, because there is no obligation to work (and only people unable to work can be transferred to the Plan), and no reciprocal obligations. The only significant employment feature of the Plan is that there is a right, until recovery, retirement or earlier death to be paid 75% of agreed earnings at the date of transfer into the Plan, with the Respondent having a discretion to review payments from time to time."

33. The EJ then observed that an aspect of the claimant's grievance was that he had not been transferred to the Disability Plan and that it was "self-evident that being transferred to the Plan

afforded advantage to the Claimant, so that he was better off after 06 April 2013 than before" (para 16).

34. After setting out the parties' submissions at some length and reminding himself of the power to strike out in rule 37 of the **Employment Tribunal Rules of Procedure**, the EJ turned to his conclusions in respect of the compromise agreement. He had referred to **Bathgate EAT, Hinton v University of East London** [2005] IRLR 552 ("**Hinton**") and **Arvunescu v Quick Release (Automotive) Ltd** [2023] ICR 271 ("**Arvunescu**") when summarising the respondent's submissions.

35. The EJ's reasoning and conclusions included the following ("CA" is used as an abbreviation for the parties' compromise agreement):

> "22. The CA was the result of a detailed negotiation…It brought to an end a lengthy process of grievance and appeal. It conformed to all the statutory requirements for compromise agreements to be enforceable. The result was that sought by the Claimant – a transfer to the Plan, based on a salary he agreed.
> …..
> 24. To settle future claims requires the clearest of intentions, on the Respondent's submission, and is not possible on the Claimant's submission.
>
> 25. It cannot be the case that a Claimant can settle, for example, a sexual harassment claim and be bound by a term that sexual harassment claims that may arise in the future are also settled. That would inevitably be contrary to public policy, dooming an employee to suffer future harassment without remedy.
>
> 26. However, I see nothing in case law, and every reason of public policy for a claim that, for example, a claim about holiday pay can be settled for the past and can include a binding agreement about the way holiday pay is to be calculated in future…
> …..
> 28. Accordingly, there are two reasons why the holiday pay claim has not reasonable prospects of success. First, the future claims for holiday pay were expressly settled in the CA. I do not consider that *Bathgate* is contrary to that conclusion. In paragraph 25 the judgment indicates that a future matter cannot be a particular complaint because it has not yet arisen, and so was unknowable. In this case the issue of holiday pay was known – it was one of the subjects of the Grievance and of the Appeal. That distinguishes this claim from that in *Bathgate*…The question of holiday pay was settled for the future as well as for the past.
>
> 29. However, whether future claims can be settled as a matter of principle is an academic dispute in the context of this case. This is because from the documents supplied to me there can be only one conclusion as to the effect of the transfer of an employee to the Plan. It is a consensual variation of contract. The employee becomes an inactive employee, who is expected never again to work for the Respondent…All the normal features of employment contract disappear. There is only the right to be paid 75% of previous salary…The contract was varied so that from 06 April 2013 the Claimant's salary was reduced to 75% of what it was before.
>
> 30. This meets all the requirements for a contractual variation, of invitation to treat, offer and acceptance…
> …
> 36. There is a difference between settling claims that might arise in the future on the same

> basis to new future claims. It would be remarkable if a person the victim of a sexual harassment at work could settle a claim on the basis that no claim could be brought for future sexual harassment. That would leave such an individual at risk of sexual harassment with no remedy. I see it as entirely different to come to an agreement where the Claimant achieved his main aim, to be transferred to the Plan and to settle his holiday pay claim, only for the Respondent to be faced with a new similar claim afterwards. To that extent, I find the carve out from the exception clause in the CA valid. The new holiday pay claims are similar…I find that the statutory conditions for a compromise agreement are met, and that the Claimant is precluded from bringing claims in respect of holiday pay by reason of the CA.
>
> 38. I note that in the Court of Appeal decision of *Arvunescu*…This is clear authority for future claims to be settled by a compromise agreement. *Bathgate* is more recent, but either it was decided per incuriam on this point, or I should prefer the authority of the higher Court.
> …..
> 40. The same logic applies to the claims for not having pay increases since 2013. That claim was part of the Grievance and Appeal: no pay rises while on sick leave from 2008 – 2013. This claim is a repetition of that claim for the subsequent period of 2013 to 2023. The Claimant agreed that he waived any claims of a similar type, which this is, I can see no reason why that was not a valid waiver, as set out above."

36. Whilst the EJ's reasoning was largely focused on the holiday pay claims, it is accepted that his reasoning regarding the compromise agreement also applied to the disability discrimination claims, albeit they were addressed much more briefly.

37. Under the heading "Discussion as to Rule 37 application to strike out" the EJ turned to the merits of the disability discrimination claims. He said:

> "42. The disability discrimination claims are based on the comparator being someone not disabled. This is a flawed comparator. Only someone so affected by a disability that they will never work again at any job for any employer can be eligible to be transfer to the Plan. Disability discrimination occurs when a disabled person is treated less favourably than a comparator who is not disabled. Those who do not have a disability cannot receive 75% of salary for their entire working life without having to do any work. The Plan is a benefit available only to those with severe disability.
>
> 43. It follows that the non-disabled comparator is treated less favourably than those disabled, not the other way round.
>
> 44. That active employees may get pay rises, but inactive employees do not is a difference, but it is not, in my judgment, a detriment caused by something arising from disability. The transition to inactive employee status means that there is no comparison with active employees. The Plan is described as a self-insured plan…Had the Respondent contracted with a major life company for such benefits for its' employees in return for a premium the position would not be in doubt. The Claimant would get whatever benefits were included in the insurance policy, which would not (absent an express term) be connected to the pay of people not in receipt of insurance benefits under such a policy. That the Respondent self-insures does not seem to me to alter that position.
>
> 45. The Claimant points out that over the 30+ year period until he would reach the age of 65 would mean that inflation [sic]. The Bank of England's inflation calculator shows that the value of £50,000 in 1993 is now almost £100,000. The value of the benefit will diminish over time…The Claimant's case is that it is disability discrimination not to review and vary upwards the salary payable under the Plan. The comparators he chooses are those who are active employees who, while not entitled to annual pay rises invariably get one.

> 46. This is not a true comparator. Active employees cannot be transferred to the Plan. The complaint is in fact that the benefit of being an inactive employee on the Plan is not generous enough…
> …..
> 48. The claim is that the absence of increase in salary is disability discrimination because it is less favourable treatment than afforded those not disabled. This contention is not sustainable because only the disabled can benefit from the plan. The disabled transferred to the Plan are treated more favourably than those not disabled, for they do not have to work. That this is by reason of disability does not alter that fact.
>
> 49. It is not disability discrimination that the Plan is not even more generous…
>
> 50. Accordingly, I conclude that the remaining claims about the Plan, have no reasonable prospects of success, and so I dismiss those claims also."

The legal framework

Compromise agreements and future claims

38. The contractual position was summarised by Lord Bingham of Cornhill in **Bank of Credit and Commerce International SA v Ali** [2001] UKHL 8, [2001] ICR 337 as follows:

> "9. A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention…
>
> 10. But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware…"

39. The need for very clear words to be used where a compromise agreement is intended to encompass future claims was also stressed in the context of an employment claim compromised by a COT3 agreement in **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849 ("**Howard**"). Judge JR Reid QC said at para 9:

> "In our judgment, the law as to contracts for release is pretty straightforward. The law does not decline to allow parties to contract that all and any claims, whether known or not, shall be released. The question in each case is whether, objectively looking at the compromise agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction has to be placed on the scope of the release. If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for. We can see no reason why as a matter of public policy a party should not contract out of some future cause of action. But we take the view that it would require extremely clear words for such an intention to be found."

40. However, the parties' freedom to reach agreement is modified in relation to claims brought under the **EQA**, by virtue of sections 144 and 147. Similar provisions appear in other employment

statutes including the **Employment Rights Act 1996** ("**ERA 1996**").

41. Section 144(1) **EQA** provides that, "A term of a contract is unenforceable by a person in whose favour it would operate, in so far as it purports to exclude or limit a provision of or made under this Act". Section 44(4) provides a carve out from sub-section (1) by stating that, "this section does not apply to a contract which settles a complaint within section 120 if the contract – (a) is made with the assistance of a conciliation officer, or (b) is a qualifying settlement agreement".

42. The prerequisites for the existence of a qualifying settlement agreement are set out in section 147(1)-(3) **EQA**, which provides:

> "(1) This section applies for the purposes of this Part.
>
> (2) A qualifying settlement agreement is a contract in relation to which each of the conditions in subsection (3) is met.
>
> (3) Those conditions are that –
> (a) the contract is in writing,
> (b) the contract relates to the particular complaint,
> (c) the complainant has, before entering into the contract, received advice from an independent adviser about its terms and effect (including, in particular, its effect on the complainant's ability to pursue the complaint before an employment tribunal),
> (d) on the date of the giving of the advice, there is in force a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the complainant in respect of loss arising from the advice,
> (e) the contract identifies the adviser, and
> (f) the contract states that the conditions in paragraphs (c) and (d) are met."

43. In the present case, it is accepted that these requirements are met other than the stipulation in subsection (3)(b); the claimant says that his disability discrimination claims are not "the particular complaint" to which the agreement related.

44. **Hinton** concerned a claim for detrimental treatment as a result of making protected disclosures. The claimant had been employed by the respondent university and had raised various grievances. He took voluntary redundancy and a compromise agreement was arrived at, expressed to be "in full and final settlement of all claims…which the employee has or may have against the university…arising out of or in connection with his employment…or otherwise including in particular the following claims". Eleven particular kinds of claim were then listed, but this list did not include a detriment claim under section 47B of the **ERA 1996**. The events giving rise to the protected disclosure claim had occurred before the compromise agreement was entered into. The ET

held that the agreement did not preclude the claim, the EAT reversed this decision, but the Court of Appeal allowed the claimant's appeal. The relevant provision was section 203 of the **ERA 1996**. The statutory wording referred to "particular proceedings" rather than "particular complaint" but was otherwise not materially distinct from the provisions I have set out in respect of the **EQA**.

45. At para 17 Mummery LJ analysed the statutory provision and the policy that lay behind it as follows:

> "(1) The legislative policy is to protect employees from signing away the right to bring employment tribunal proceedings under the 1996 Act except in cases where a number of closely defined conditions are satisfied. The most obvious target of the section is the blanket or sweep-up form of general waiver or release covering all future claims and inserted into a contract of employment issued to an employee on his engagement. The elaborate code of employment protection in the 1996 Act would be worthless if, at the stroke of a pen, it could be removed by a general waiver or release of rights.
>
> (2) As it is the policy of the law to encourage the settlement of disputes an exception to the general rule is made for 'compromise agreements'. In the absence of an exception they would be caught by the general rule of invalidity, as the compromise agreement normally includes an agreement by the employee not to bring proceedings in the tribunal. If such an agreement is always void, employers would be deterred from settling disputes.
>
> (3) …What proceedings are being compromised is, in the first instance, simply a matter of contract. Ordinary principles of contractual interpretation apply. If the compromise agreement does not, on its proper construction, cover the particular proceedings which an employee has brought or later brings, the employee is not contractually precluded from bringing or continuing the proceedings. The statutory safeguards only operate when the employee is contractually precluded from bringing or continuing the proceedings.
>
> (4) The employee's safeguards are to be found in the statutory conditions regulating compromise agreements. They must be satisfied in relation to the agreement. If they are not satisfied the exception does not apply and the agreement is void. On general principles of statutory interpretation the conditions should be construed, so far as possible, to promote the purpose for which they are imposed, that is to protect employees when agreeing to relinquish the right to bring proceedings under the 1996 Act in the employment tribunal.
>
> (5) Although the language of the exception is not as clearly drafted as it might have been, it is reasonably plain that a compromise agreement may be validly made even if there are no actual employment tribunal proceedings…
>
> (6) The dispute centres on the case where there are no actual employment tribunal proceedings at the time of the compromise agreement. It might be though that, if there are no actual proceedings, there could be no "particular proceedings" falling within section 203(3)(b). It was correctly argued by the university, however, that the exception applies to the compromise of anticipated proceedings in relation to a claim or complaint raised between the parties prior to the compromise, though not the subject of any actual proceedings."

46. Lord Justice Mummery went on to hold that that the very general wording of the clause used in this instance was insufficient to cover the claim now brought under section 47B **ERA 1996**. He explained this in the following way:

> "22. …The opening part of clause 9.1 on which the university relied, is very general indeed…It relates to proceedings, but not to 'particular proceedings'. Particularity on this is required but it is missing from clause 9: no particular statute is stated expressly; no particular description is supplied of the legal nature or the factual basis of proceedings 'arising under statute'; no mention is made of public interest disclosures or any determinant suffered by [the claimant] as a result of making them.
>
> 23. This approach to the construction of section 23 is consistent with the policy of the section and its language. Its practical consequences should not give rise to difficulties and it should provide clear guidance to the parties and their legal advisers."

47. Lady Justice Smith agreed with Mummery LJ and added some observations of her own regarding the purpose of the statutory provision and what was required to satisfy it:

> "33. …in my judgment, the purpose of section 203 is clear. It is to protect claimants from the danger of signing away their rights without a proper understanding of what they are doing. In order to achieve that purpose, I consider that section 203(3)(b) must be construed as requiring the particular proceedings to which the agreement relates to be clearly identified. It is not sufficient to use a rolled-up expression such as 'all statutory rights'. In my view Mr Hare went too far when he conceded that it might be sufficient to identify the proceedings only by reference to the statute under which they arise. In my judgment that is not sufficient. Many employment rights arise, for example, under [ERA 1996] and, to comply with section 203(3)(b), the particular proceedings to which the agreement relates must be more clearly identified. In my judgment, in order to comply with section 203 the particular claims or potential claims to be covered by the agreement must be identified… either by a generic description such as "unfair dismissal" or by reference to the section of the statute giving rise to the claim.
>
> 34. That is all that can be required for compliance with section 203(3)(b)."

48. **Hilton UK Hotels Ltd v McNaughton** UKEATS/0059/04 ("**Hilton Hotels**") concerned a claim for exclusion from the respondent's pension scheme during a period of part-time employment. The issue before the EAT was whether the terms of a compromise agreement prevented the claim from being advanced. The EAT dismissed the appeal, the majority agreeing with the Employment Tribunal that the claim could proceed as it was not one to which the compromise agreement applied. The applicable provisions in section 77(3) and (4A) of the **Sex Discrimination Act 1975** ("**SDA 1975**"), also used the expression "the particular complaint" and were in materially the same terms as the **EQA** provisions. The majority's reasoning in respect of the particular compromise agreement is at para 23. The claim could proceed as the agreement said that a claim was only excluded if the claimant believed on the date of signing it that she had such a claim and had raised it with the respondent. Lady Smith commented that "an alternative wording might not have presented such a difficulty" for the respondent (para 23). She summarised the

applicable principles in para 20 (her reference to **Lunt** is to **Lunt v Merseyside TEC Ltd** [1999] ICR 17 ("**Lunt**")), to which I will return:

> "Firstly, no compromise agreement can have the effect of excluding a future claim under the Equal Pay Act unless it complies with the requirements of the provisions of s.77 of the Sex Discrimination Act… Secondly, the statutory requirement that a compromise agreement 'must relate to the particular complaint' does not limit its cover to complaints that have already been presented to an Employment Tribunal (**Hinton**). Thirdly, a 'blanket agreement' simply signing away all an employee's Tribunal rights will not do (**Lunt**, a case which does not however determine, as was suggested by the Claimant, that as a matter of general law, a party can never contractually compromise a future claim of which he as no knowledge). The actual or potential claim must at least be identified by a generic description or a reference to the section of the statute giving rise to the claim (**Hinton**). Fourthly, whilst parties may agree that a compromise agreement is to cover future claims of which an employee does not and could not have had knowledge, to do so effectively, the terms of their agreement must be absolutely plain and unequivocal…[The passage from **Howard** that I cited earlier was then set out]."

49. In **McWilliam & Ors v Glasgow City Council** UKEATS/0036/10/BI ("**McWilliam**") the EAT was also concerned with section 77(4B) **SDA 1975**. Lady Smith held that a "complaint" for these purposes included where there had been an express of dissatisfaction about something, so that the employee's complaint did not need to have reached the stage of a claim presented to a tribunal (para 28). Accordingly, the case was not directly concerned with claims that were unknown at the time when the agreement was signed. Nonetheless, Lady Smith's identification of the reason for the statutory requirement is of value. At para 30 she said:

> "It seems to me clear that the purpose of the 'particular complaint' requirement is to see to it that there is adequate specification in the compromise agreement itself and is nothing to do with specification or communication of any complaint at any earlier stage: the provision is not temporal in nature."

50. I turn then to **Bathgate**, which lies at the heart of the appeal on Ground 1. The claimant was employed by the respondent as chief officer aboard a number of vessels. There came a time when he ceased working on vessels and after a period of working onshore he was placed at risk of redundancy. He raised various grievances and subsequently signed a settlement agreement under which he agreed not to pursue a list of specified claims against the respondent, including for age discrimination. The terms of the agreement extended to claims that could not have been known at the time of signing the agreement. The redundancy payment consisted of an "enhanced redundancy and notice payment" and, secondly, an "additional payment" that was to be paid at a later date. The additional payment was not made as the respondent subsequently decided that those aged over 60 at

the point of redundancy were ineligible for it. The claimant brought proceedings alleging that the failure to make the additional payment amounted to age discrimination. The complaint plainly related to events that post-dated the compromise agreement.

51. In **Bathgate EAT**, Lord Summers found that the age discrimination claim was not precluded by the settlement agreement, as the reference to "the particular complaint" in section 147(3)(b) **EQA** was not apt to cover future claims that the parties were unaware of when the agreement was signed. He considered that construing "the particular complaint" to encompass future claims unknown at the date of the compromise, was contrary to the purposes of the section as identified by Mummery and Smith LJJ in **Hinton**. He then said in para 25 that:

> "…it would appear to me that the inclusion of a claim in a compromise agreement defined merely by reference to its legal character or its section number does not satisfy the language of section 147. The words 'the particular complaint' suggest that Parliament anticipated the existence of an actual complaint or circumstances where the grounds for a complaint existed. I do not consider that the words 'the particular complaint' are apt to describe a potential future complaint…in my opinion the precise of the statutory language excludes this possibility. The Act uses the definite article in the combination with the words 'particular complaint'. I consider this does not permit clauses that list a series of types of complaint by reference to their nature or section number. It does not seem to me that there is any difference in principle between a 'rolled-up' waiver and a waiver which lists a variety of possible claims by reference to their nature or section number. Both are general waivers. All that distinguishes them is the particularity with which they have been drafted. I do not consider that one provides any more protection than the other…"

52. Lord Summers went on to say that Mummery LJ's observations about future claims had to be read in the context of the facts of the particular case; and that whilst Lady Smith had relied upon **Howard** in her summary of the principles in **Hilton Hotels**, **Howard** did not discuss the statutory restrictions imposed on settlement agreements by section 147 **EQA** or its equivalents (para 26). He went on to recognise at para 27 that his conclusion may be inconvenient where there is a mutual desire to avoid future claims and a wish to end the employment relationship.

53. Lord Summers said that he did not consider that the limits Parliament placed on settlement could be elided by contract (para 28). Finally, he relied upon an observation of Morrison J in **Lunt** where he said of the provisions in section 203 ERA:

> "A compromise agreement cannot, therefore, seek to exclude potential complaints that have not yet arisen on the off-chance that they might be raised; it cannot, in other words, be used to sign away all the employee's tribunal rights, as can be done in the case of a negotiated settlement drawn up with the assistance of a conciliation officer."

54. Lord Malcolm gave the Court of Session's judgment. At para 27 he said:

> "In s 144(4)(b) Parliament allowed an exception to the prohibition on contracting out of claims to the tribunal in respect of settlements negotiated by the parties. It follows that there must be room for a compromise agreement to cover future claims of some kind otherwise there is no impact on the terms of s 144(1)."

55. At paras 31 – 32 Lord Malcolm said:

> "31. We have not found support for the EAT's approach in the words of the legislation. One would expect a Parliamentary intention to lay down rules limiting parties' freedom of contract to be expressed in clear and unequivocal terms. For the following reasons we consider that the various protections for the employee built into s 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 requirement that the contract must ' relate to the particular complaint' does not mean that the complaint must have been know of or its grounds at least in existence at the time of the agreement…in our view these words simply require one to ask whether the complaint being made is or is not covered by the terms of the contract. They import no temporal barrier to post-employment claims of the kind now being pursued against the Respondents.
>
> 32. It would seem that the EAT accepted that s 147(3)(b) would be met if, though unknown at the time, the complaint was based on facts and circumstances which pre-dated the agreement. We can identify no logical or principled basis for giving effect to an agreement in these circumstances but not those of a case such as the present."

56. At paras 33 – 35 Lord Malcolm referred to the Court of Appeal's judgments in **Hinton**, noting that the required level of particularity was met in the present instance, as the agreement had specified age discrimination claims. He continued, "There is nothing in the Court of Appeal's judgments which supports the proposition that a future complaint cannot be sufficiently particularised in a settlement. If anything the discussion suggests the contrary". He then referred to passages in **Hilton Hotels** and **McWilliam** that I have already cited and observed: "All that matters is the presence or absence in the waiver of sufficient identification of the complaint being made".

57. Lord Malcolm also considered that the structure of sections 144 and 147 supported his interpretation:

> "37. …Thus a contract of employment cannot prevent an employee from enforcing his rights in the future, but a privately negotiated compromise agreement can do so if the safeguards are met. It is not easy to understand why, in a provision which disapplies a prohibition on the waiver of future claims, one of the safeguards would be that the 'particular complaint' to which the contract must relate is confined to one either known of at the time of the agreement or at least the subject of existing facts and circumstances. And it would be even harder to understand why potential future complaints could be settled where a conciliation officer has assisted, but not by an agreement, which has all the protections regarding independent advice and insurance set out in s 147(3)."

58. Lord Malcolm also addressed Lord Summers' reliance upon **Lunt**, as follows:

> "39. In *Hilton Hotels* Lady Smith said that the EAT decision in [*Lunt*] did not determine that a party can never compromise a claim of which he has no knowledge. In *Lunt* it was said that a compromise agreement cannot exclude potential claims that have not yet arise on the off-chance that they might be raised. However, that was in response to a submission that, in effect, blanket waivers were valid. Having regard to the specific facts of the case, the crux of the decision was that Mrs Lunt had given notice of claims that might be made arising out of the termination of her employment and that the term 'particular complaint' was not restricted to claims that had been presented to a tribunal. The more general remark relied on by the appellant cannot be reconciled with subsequent authority including that of the Court of Appeal in *Hinton* which in our view confirms that a contract can relate to a future complaint if there is a sufficient description of it in the claims waived…"

59. Accordingly, the Court of Session upheld the cross-appeal, finding that the jurisdiction of the tribunal was excluded by the settlement agreement.

Striking out where no reasonable prospects of success

60. Pursuant to rule 37 of the Employment Tribunals Rules of Procedure:

> "At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –
>
> (a) That it is scandalous or vexatious or has no reasonable prospect of success…"

61. Rule 37(2) provides:

> "A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing, or if requested by the party, at a hearing."

62. It is well established that a discrimination claim should only be struck out as having no reasonable prospects of success in the clearest cases and based on taking the claimant's case at its highest. It would only be in an exceptional case that a claim would be struck out where the central facts are in dispute, **Mechkarov v Citibank NA** [2016] ICR 1121 per Mitting J at para 12.

Disability discrimination: disability related discrimination and indirect discrimination

63. Discrimination arising from disability is defined in section 15 **EQA** as follows:

> "(1) A person (A) discriminates against a disabled person (B) if –
> (a) A treats B unfavourably because of something arising in consequence of disability; and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

64. Indirect discrimination is defined in section 19 **EQA** as:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

65. Disability is one of the relevant protected characteristics for these purposes, see section 19(3).

66. The application of these provisions has been considered in a number of cases where disabled employees were provided with benefits pursuant to disability-related schemes.

67. The leading authority is **Trustees of Swansea University Pension and Assurance Scheme v Williams** [2019] ICR 230 ("**Williams**"). In that case the disabled claimant had taken ill-health retirement at a relatively young age. Under the terms of the employer's pension scheme, employees who were unable to continue to work through ill-health were entitled to take their accrued pension benefits immediately without any reduction for early receipt. However, those benefits were enhanced on the basis of the employee's salary at their actual retirement date. The claimant complained that this amounted to discrimination arising from disability, since it led to his entitlements being calculated on the basis of his lower part-time salary, whereas had he not suffered from a progressive illness and become disabled, he would have continued to work full-time and his pension would have been calculated on that basis. The Supreme Court concluded that the treatment complained of was not "unfavourable" within the meaning of section 15 **EQA**. Lord Carnwarth JSC (with whom the other Justices agreed) indicated that the central objection to the claimant's case could be shortly stated:

> "28. …It is necessary first to identify the relevant 'treatment' to which the section is to be applied. In this case it was the award of a pension. There was nothing intrinsically 'unfavourable' or disadvantageous about that…Ms Crasnow's formulation, to my mind, depends on an artificial separate between the method of calculation and the award to which it gave rise. The only basis on which Mr Williams was entitled to any award at the time was by reason of his disabilities. As Mr Bryant says, had he been able to work full time, the consequences would have been, not an enhanced entitlement, but no immediate right to a pension at all…It is enough that it was not in any sense 'unfavourable', nor…could it reasonably have been so regarded."

68. Lord Carnwarth also indicated that he was substantially in agreement with the reasoning of the Court of Appeal. Lord Justice Bean's judgment in the Court of Appeal included the following passage at paras 42 – 43:

> "In the leading cases cited to us the 'treatment' complained of has been an act which itself disadvantages the claimant in some way…
>
> Mr Williams' case does not turn on a question of reasonable perception. His pension is undoubtedly less advantageous or less favourable than that of a hypothetical comparator suddenly disabled by a heart attack or stroke. But it is far more advantageous or favourable than it would be if he had not been permanently incapacitated from his job. The *Shamoon* case is not authority for saying that a disabled person has been subject to unfavourable treatment within the meaning of section 15 simply because he thinks he should have been treated better."

69. **Chief Constable of Gwent Police v Parsons & Ors** UKEAT/0143/18/DA ("**Parsons**") was a case that fell on the other side of the line. The relevant police force operated a voluntary exit scheme for officers, under which a compensation lump sum was payable. The claimants, who were both entitled to retire by reason of disability were in any event entitled at the point of termination of their office to an immediate deferred payment under a disability pension scheme. When the claimants made successful applications under the voluntary exit scheme, a decision was made to apply a cap to the compensation lump sum that was payable to them because they were also entitled to the immediate deferred pension. The EAT (HHJ Shanks presiding) upheld the Employment Tribunal's finding that this constituted "unfavourable treatment" for the purposes of section 15, rejecting the respondent's contention that the effect of the two schemes should be considered together. The EAT concluded that the tribunal had been entitled to consider the two schemes separately as they had separate purposes and were set up at different times (para 19). The EAT held that **Williams** was distinguishable, as the relevant treatment in that case had been the award of pension which the claimant would not have received if he had not been disabled and thus was not capable of amounting to unfavourable treatment. Whereas, in **Parsons**, the relevant treatment was identified as the application of a cap to what would otherwise have been a substantially larger payment under the voluntary exit scheme (para 20).

70. These authorities were discussed by Eady J (President) in **Cowie & Ors v Scottish Fire and**

Rescue Service [2022] EAT 121, [2022] IRLR 913 ("**Cowie**"). The respondent operated a time off in lieu ("TOIL") policy. It also operated a paid special leave policy: where TOIL had been exhausted, employees could request time off to deal with unforeseen matters and emergencies. In the early months of the coronavirus pandemic, the respondent extended paid special leave to address problems faced by staff who were "shielding" at home. Such staff were able to apply for special leave, but they were required to first use any TOIL and accrued leave. One group of disabled claimants who were "shielding" at home brought section 15 **EQA** claims on the basis that they needed to make use of the paid special leave as a result of their disabilities and that compelling them to first use their annual leave and TOIL was unfavourable treatment related to their disability. The Employment Tribunal upheld the claim, but the respondent successfully appealed to the EAT.

71. At para 74, Eady J noted that it was common ground that if the respondent was correct in its contention that there was no unfavourable treatment and the claimants suffered no disadvantage, this would dispose of both the section 15 and the section 19 claims; she said it had not been suggested that there was any distinction to be drawn for these purposes between "unfavourable treatment" in section 15 **EQA** and "disadvantage" in section 19.

72. At para 75 she observed that if the requirement to use TOIL and annual leave was properly to be seen as separate from the claimants' entitlement to paid special leave, then the EAT could see how the circumstances might have been viewed as more akin to **Parsons**. However, the question was whether that was the correct way of defining treatment in this case. The EAT went on to hold that it was not. Eady J explained:

> "78. …there was no general requirement on the claimants to use TOIL and/or leave at a time of the respondent's choosing; rather the specific requirement to exhaust any accrued TOIL and/or leave arose only when, and to the extent that, the claimants sought to access paid special leave. It would be artificial to consider the requirement to use TOIL and/or annual leave separately from the entitlement to paid special leave because the two were thus inextricably linked.
>
> 79. The error made by the ET was…to effectively approach its assessment of the '*treatment'* in this case as if this was to be defined by the claimants' complaint. The claimants may have complained of the preconditions that had been imposed, but the ET was wrong to focus solely on the acts thus identified rather than having regard to the factual matrix it had itself found which included its findings of fact that the acts complained of by the claimants were '*preconditions in obtaining or consequences of paid special leave*', which it had held to be '*clearly favourable'*…Although the policy was subject to conditions for entitlement (the

> prior use of accrued TOIL/annual leave) that could not detract from the favourable nature of that treatment.
>
> 80. Viewing the facts of this case with the guidance in *Williams* in mind, similar points can be made to those identified as relevant in that case. The s 15 claimants were granted an entitlement to paid special leave during the period of time they were unable to work due to their disabilities; that was an advantage they would otherwise not have enjoyed during those periods of absence. The claimants complained of the conditions of entitlement to that paid special leave, but those conditions could not be viewed in isolation from the benefit thus provided: the conditions in question were only applied because the claimants were being granted an entitlement to paid special leave and it would be wholly artificial to separate out the two elements, the benefit and the conditions of accessing that benefit…it did not amount to '*unfavourable treatment'* by virtue of the fact that it could hypothetically have been even more favourable…"

73. A similar approach was applied in **McAllister v Commissioners for Revenue and Customs** [2022] EAT 87, [2023] ICR 483 ("**McAllister**"), a decision of Eady J (President). The claimant was employed as an administrative officer by the respondent. He was absent from work with stress, anxiety and depression for a long period. After he confirmed that he was not fit to return to work in any capacity, he was dismissed under the respondent's attendance management policy. Under the Civil Service Compensation Scheme ("CSCS") he received compensation for loss of employment due to unsatisfactory attendance resulting from disability of 50% of the maximum amount that he could have been awarded. The payments were then increased to 80% by the Civil Service Board on appeal. He brought a claim for disability related discrimination. The Employment Tribunal found that the initial reduction of the compensation payment to 50% was unfavourable treatment within the meaning of the section, but that the 80% payment awarded on appeal was not. In any event, the tribunal found that the treatment was justified. The claimant appealed and the respondent cross-appealed the finding that the 50% payment was unfavourable treatment. The appeal was dismissed and the cross-appeal allowed by the EAT.

74. The core of Eady J's reasoning in relation to the cross appeal appears from the following passage:

> "85. In this case, the employment tribunal had found that the claimant's dismissal for unsatisfactory attendance was related to his disability…
>
> 86. It was, moreover, the claimant's underlying health condition, arising from his disability, that gave rise to his entitlement under the CSCS. As such, the relevant treatment – being treated as entitled to a payment under the CSCS – was not unfavourable treatment; if anything it was more favourable than would have been the position if the claimant had been

> dismissed for a reason other than his disability…on the facts found by the employment tribunal, the claimant's entitlement arose solely by reason of his disability. That, in my judgment, puts this case on all fours with *Williams* and to conclude otherwise, as the employment tribunal did, would be to make the error of artificially separating out the entitlement to the award (the relevant treatment, which did not constitute a disadvantage), from the calculation of that award; the latter would not have arisen but for the initial entitlement."

75. She thus concluded that the tribunal had erred in failing to see this as a case where there was no unfavourable treatment for the same reason as had been identified in **Williams**.

Disability discrimination: direct discrimination

76. Section 13 **EQA** defines direct discrimination as follows:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

77. Section 23 **EQA** states (as relevant):

> "**Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.
>
> (2) The circumstances relating to a case include a person's abilities if-
> (a) On a comparison for the purposes of section 13, the protected characteristic is disability;
> ….."

78. Accordingly, the Employment Tribunal must attribute the same abilities and other relevant circumstances (other than the fact of disability) to the comparator: **High Quality Lifestyles Ltd v Watts** [2006] IRLR 850 EAT at paras 46 – 49.

The parties' submissions

The claimant's submissions

79. As regards Ground 1, in what he acknowledged was a "bold" submission, Mr Kennedy argued that the EAT was not bound to follow **Bathgate CoS** and that it should not do so as the Court of Session had erred in its interpretation of section 147 **EQA**. In the alternative, Mr Kennedy contended that **Bathgate** was distinguishable as it was a "clean break" situation, unlike the present case, as the parties were not in a continuing employment relationship after the compromise agreement was made.

80. In particular Mr Kennedy submitted that the Court of Session failed to appreciate that section 147 provides for a limited exception to the important section 144 prohibition on contracting

out of the protections afforded by the **EQA** and that, as such, it ought to be construed narrowly. Further, he said that the statutory phrase "the particular complaint" served no purpose if the Court of Session's interpretation is followed. He asserted that the Court of Session misapplied Mummery LJ's reasoning in **Hinton**, failing to appreciate that it involved a claim relating to matters that were in existence at the time of the compromise agreement. He also said that the Court of Session's approach undermined the statutory policy identified in **Hinton** and that it would leave employees insufficiently protected as a simple reference to the **EQA** in a compromise agreement could preclude a sexual harassment claim arising in the same employment many years later.

81. Mr Kennedy submitted that I should follow the reasoning of Lord Summers in **Bathgate EAT**, which he said was more persuasive. Accordingly, he said that I should find that section 147 does not extend to future claims that were unknown and unknowable at the time when a settlement agreement is entered into.

82. In terms of the EJ's reasoning in the present case, Mr Kennedy says that he was wrong to characterise the discrimination claim in respect of pay reviews as a repetition of the matters raised in the grievance; the claim relates to the operation of the Disability Plan and given the point in time at which the claimant was moved to the Plan, this is a wholly new claim, which was not in existence or contemplation at the time of the compromise agreement. As such, it is a future claim which is not precluded by the compromise agreement.

83. In relation to Ground 2, Mr Kennedy submitted that the claimant was not given any reasonable opportunity to make representations as to the striking out of the disability discrimination claims. This was not within the agreed list of issues and he had not prepared to address the ET on this basis, either in his written or his oral submissions. Furthermore, he did not accept that the EJ gave him any appropriate opportunity to make submissions on this topic at the OPH and that a brief interchange with the EJ, when Mr Kennedy answered specific questions that he raised, was insufficient. Mr Kennedy said that if the EJ had indicated that he was considering striking out the discrimination claims on their merits, he would have asked for time to consider this and take

instructions. He also submitted that it was inappropriate and premature to strike out the discrimination claims before the disclosure stage and without giving the claimant the opportunity to adduce evidence. He said that evidence regarding the decisions made as to salary reviews, both for those on the Disability Plan and for active employees was pertinent.

84. At para 28 of his skeleton argument, in the course of addressing Ground 2, Mr Kennedy introduced a complaint that the EJ erred in his assessment of the merits of the direct discrimination claim. Specifically, that the claimant remained an employee (although inactive) and he was entitled to compare his situation with that of active employees, who did receive salary reviews, so that the failure to review his salary amounted to, or at least was capable of amounting to, less favourable treatment.

85. In respect of Ground 3, Mr Kennedy submitted that in his analysis of the merits, the EJ failed to deal with the section 15 and section 19 discrimination claims, focusing solely on the direct discrimination claim and, in particular, upon the inappropriateness of the comparator relied upon by the claimant. He said that neither disability related discrimination nor indirect discrimination involve a comparison exercise and that what he describes as a "passing reference" in para 44 of the EJ's Reasons was not sufficient to address the merits of these claims and to support the relatively draconian step of striking them out.

86. He submitted that it was inappropriate and/or unfair for me to reach a view on the merits at this pre-evidence stage and that, in any event, each of the disability discrimination claims had reasonable prospects of success, albeit he acknowledged that the indirect discrimination claim was weaker than the other claims. As regards the disability related discrimination claim, he contended that the absence of salary reviews, and thus salary increases, was the relevant unfavourable treatment (rather than the overall provision made for him under the Disability Plan) and that the circumstances were more analogous to **Parsons** than to **Williams**.

The respondent's submissions

87. The respondent resists the appeal on the basis of the EJ's reasoning and for the additional

reasons that I will summarise.

88. In relation to Ground 1, Mr Forshaw KC submitted that the EJ could not be criticised for failing to follow **Bathgate EAT** in circumstances where that decision has now been overturned by the Court of Session. He said that if the ground of appeal was read literally, that in itself was sufficient to dispose of Ground 1 of the appeal.

89. In any event, Mr Forshaw contended that the Court of Session's decision was cogent, plainly correct and should be followed. He submitted that there is nothing in sections 144 or 147 **EQA** that precludes the settlement of future claims, provided that they are compromised in appropriately clear language. He said that section 147(3) does not constrain the kinds of claims that can be settled, rather it regulates how the parties enter into a statutory settlement agreement. If Parliament had intended to curtail the parties' freedom of contract as to which kind of claims might be settled by compromise, it would be expected that the clearest of language to that effect would have been used in the legislation, as Lord Malcom had observed in the Court of Session. He did not accept that section 144(4) should be viewed as an exception, as opposed to a part of the statutory structure. In any event, there was nothing in the statutory wording that indicated a temporal limitation of the kind that Mr Kennedy suggested.

90. Mr Forshaw also submitted that there was no basis to distinguish **Bathgate**; neither the statutory wording nor the authorities supported any distinction being drawn between a compromise agreement entered into upon the termination of employment relationship and one applying to a continuing employment relationship.

91. Mr Forshaw submitted that Lord Summers' decision in **Bathgate EAT** was out of step with the earlier authorities and that the Court of Session's decision has restored the orthodox position.

92. Mr Forshaw pointed out that the claimant's preferred construction would give rise to an unsatisfactory situation, as it would mean that future claims could be settled by means of a COT3 as in **Arvunescu**, but not by a statutory settlement agreement, in circumstances where there is no apparent basis for the legislature to have drawn such a distinction, especially given that in the later

instance the employee must have obtained legal advice before entering into the agreement, which is not the case in respect of a COT3.

93. Mr Forshaw also submitted that even on the caselaw as it was at the time of the OPH before the EJ, there was, at best, conflicting decisions of the EAT, such that the ET was bound to analyse the law itself and was not bound to apply **Bathgate EAT**, which was inconsistent with the Court of Appeal's decision in **Hinton**. In any event, as **Bathgate EAT** was wrong, as the Court of Session has now confirmed, there was no material error of law in the EJ's decision.

94. In the alternative, Mr Forshaw relied upon the distinction drawn by the EJ; whatever the position in relation to unknown future claims, given the grievance history leading up to the compromise agreement, this was not a situation where the employee had compromised entirely unforeseen claims.

95. Mr Forshaw pointed out that if Ground 1 failed, Grounds 2 and 3 became academic, as the claims would in any event remain struck out, as precluded by the compromise agreement.

96. In relation to Ground 2, Mr Forshaw emphasised that the ET may strike out claims on its own initiative. He suggested that the terms of the respondent's strike out application were sufficiently broad to encompass striking out the disability discrimination claims on their merits and that the ET was not bound by the parties' agreed list of issues. He said that his instructing solicitor's notes of the hearing showed that the EJ had raised the merits of the discrimination claim with Mr Kennedy, who was given an opportunity to address his concerns.

97. In the alternative, he submitted that even if the claimant's arguments in respect of Ground 2 were correct, this could not result in a successful appeal because any procedural failing would be academic in circumstances where the section 15 and section 19 claims are plainly unarguable, so that no injustice was caused by the EJ's approach. He also objected to the claimant now challenging the reasoning of the EJ in respect of the direct discrimination claim and the comparator that was relied upon when this had not been raised as a specific ground of appeal.

98. As regards Ground 3, Mr Forshaw submitted that all the claimant's discrimination claims

were hopeless and fell to be struck out on their merits. He contended that the authorities I have summarised earlier showed that an employer's provision of benefits pursuant to a disability related scheme cannot constitute "unfavourable treatment" for the purposes of section 15 or group disadvantage for the purposes of section 19 merely because there are aspects of the scheme which a disabled person considers to be insufficiently generous or because they result in the payment of lower benefits than the employee might have received in different circumstances if they had remained an employee in active employment. He said that although these authorities were not before the EJ, his decision was entirely consistent with them. It was apparent from the EJ's reasoning, considered as a whole, that he regarded the Disability Plan as providing the claimant with a "very substantial benefit" that amounted to more favourable treatment than he would have received had he not been disabled; that the fact he did not receive annual salary increases whilst in receipt of the benefits under the Disability Plan was simply a feature of the Plan that could not be considered in isolation and separated from the Disability Plan as a whole. In short, that the claimant's treatment was generous and favourable and did not become unfavourable or disadvantageous simply because he regarded the benefits as not being favourable enough.

Discussion and conclusions

Ground 1

99. As Mummery LJ explained in **Hinton** (para 45 above), the first question will be whether, as a matter of contract, the proceedings are precluded by the parties' compromise agreement. In this instance, there is no appeal from the EJ's conclusion that the pleaded discrimination claims came within the terms of the waiver in the compromise agreement. He was plainly correct in this respect. Paragraph 8 of the agreement applied to claims arising out of or in connection with the claimant's employment with the respondent "whether or not they are or could be in the contemplation of you or IBM at the date of this Agreement". The claimant acknowledged that the agreement constituted a full and final settlement of "such claims" and the waiver in terms covered claims for discrimination under the **EQA** 2010. The claimant was not assisted by the paragraph 9 exception for claims arising

after the date of the Agreement, as it did not apply to claims "connected to the matters set out in the Grievance or Appeal" or arising "out of the Claimant's transfer to the Plan".

100. Accordingly, determination of whether the disability discrimination claims were precluded by the compromise agreement turned on whether that agreement complied with the requirements in section 147(3) **EQA**. As I have already indicated, the only issue arises in relation to section 147(3)(b), namely whether "the contract relates to the particular complaint".

101. The Court of Session's decision in **Bathgate** is not binding upon me; however, the EAT of England and Wales will ordinarily expect to follow decisions of the Court of Session "where the point confronting them is indistinguishable from what was there decided": **Caulfield & Ors v Marshalls Clay Products Ltd** [2004] EWCA Civ 422 at para 31. At para 32, Laws LJ went on to observe that although not creating binding precedent, "Comity and practicality are another thing altogether. They exert a wholly legitimate pressure". As Mr Forshaw pointed out, it would be undesirable for the same piece of legislation to mean one thing in England and Wales and something quite different in Scotland.

102. In any event, and for the reasons that I set out below, I consider that the circumstances of **Bathgate CoS** are indistinguishable from the present case, that the Court of Session's reasoning was cogent and that the case was correctly decided.

103. Before setting out my reasoning, I mention for completeness that I have not approached Ground 1 on the narrow basis that Mr Forshaw suggested by way of his first submission (para 88 above). In my judgement, Ground 1 as formulated does raise the broader question of whether the EJ was right to hold that the compromise agreement related to the "particular complaint" of the disability discrimination claims, given they were based on events that post-dated the agreement.

104. I regard the material facts and circumstances as indistinguishable from **Bathgate**; both cases concern future claims that had not arisen at the time when the compromise agreement was signed. I reject Mr Kennedy's suggested basis for distinguishing the earlier authority (para 79 above). Whilst it is factually true that the employment relationship in **Bathgate** had come to an end, whereas the

relationship between the parties continued in the present case, for present purposes this is a distinction without a difference. There is nothing in the wording of the statutory provision or in the way this wording has been interpreted in the authorities (which I have already summarised) that provides a basis for drawing such a distinction.

105. I will next consider Mr Kennedy's submissions that **Bathgate CoS** was wrongly decided. He submitted that the statutory phrase "the particular complaint" had no meaning or purpose if the Court of Session's analysis was correct and that this cannot have been Parliament's intention. I do not accept the premise of this submission. The purpose of section 147(3)(b) **EQA** was identified by Mummery and Smith LLJ in **Hinton** (paras 45 – 47 above). It is to prevent an employer from being able to use a blanket waiver in relation to which an employee could sign away their rights without appreciating the significance of what they were doing. It does so by requiring that the claims or potential claims to be covered by the agreement are identified by a generic description (such as "unfair dismissal") or by reference to the section of the statute giving rise to the claim. It is clear from paras 33 – 35 of Lord Malcolm's judgment, that this approach was endorsed by the Court of Session in **Bathgate**.

106. I reject Mr Kennedy's submission that the Court of Session misapplied **Hinton**. As is apparent from my earlier summary, **Hinton** was not a case, on its facts, that was concerned with claims that had only arisen after the compromise agreement, but there is nothing in Lord Malcolm's judgment that suggests that the Court of Session were under any misapprehension in this respect. Lord Malcolm referred to **Hinton** not because he suggested that it was factually on all fours with **Bathgate**, but because Mummery and Smith LJJ had identified the legislative objective and the particular purpose of section 147(3)(b) (as I have explained in my previous paragraph). Indeed, as is apparent from my citation from his judgment at para 51 above, it was Lord Summers (rather than the Court of Session), who did not apply **Hinton**, as he indicated that there was no material distinction, in terms of protection, between a general waiver and a waiver that lists possible claims by reference to their section numbers.

107. I do not consider that there is force in the complaint that in construing the legislation, the Court of Session failed to keep in mind that sections 144(4) and 147 were exceptions to the general prohibition on contracting out. Section 144(1) and 144(4) are two parts of the same statutory scheme. Furthermore, it was relevant to bear in mind that the statutory provisions were a restriction on freedom of contract, as the Court of Session identified.

108. I do not accept Mr Kennedy's submission that Parliament cannot have intended that an employee could waive their rights to bring claims arising out of future events. If that had been Parliament's intention, it could have said so; however, the statutory provisions introduce no temporal limitation on the kinds of claims that can be settled. Moreover, as Mr Kennedy accepted, it is clear from the Court of Appeal's relatively recent confirmation in **Arvunescu**, that future claims can be settled by means of a COT3, and there is no sensible basis, in terms of the legislative wording or the policy objectives, for drawing a distinction between statutory settlement agreements and COT3s for these purposes. I respectfully agree with Lord Malcolm's observations to this effect at para 37 of **Bathgate CoS** (para 57 above).

109. As Smith LJ said at para 33 in **Hinton** (para 47 above), the legislative purpose of the provision is to protect claimants from the danger of signing away their rights without a proper understanding of what they are doing (emphasis added). It is not to prevent the waiver of all future claims. In seeking to support this aspect of his submissions, Mr Kennedy suggested that if **Bathgate CoS** is good law, then a waiver of future discrimination and harassment claims could arise simply from an employer inserting a reference to the **EQA** in a compromise agreement. However, it is apparent from the passages I have already cited from **Hinton** that this would not suffice (para 47 above), and there is nothing in **Bathgate CoS** that seeks to dilute the requirement to identify claims by reference to a generic description or to the relevant section of the statute. In the latter respect, Mr Kennedy sought to draw support from the penultimate sentence of Lord Malcolm's para 31 (para 55 above), but this needs to be read in the context of his observation earlier in the same paragraph, that the settlement of future claims is not excluded "so long as the types of claim are clearly identified"

and his endorsement of **Hinton** (para 56 above).

110. I agree that there is nothing in the statutory language that precludes the settlement of future claims provided appropriately clear language is employed. I accept Mr Forshaw's submission that section 147(3) regulates how the parties enter into a statutory settlement agreement, rather than it constraining the kinds of claims that can be settled.

111. Whilst the pre-**Bathgate** authorities were not directly concerned with claims that arose after the settlement agreement was signed, the judgments are supportive of the approach taken in **Bathgate CoS**, both as to the legislative purpose of the provision and as to the absence of any temporal limitation as to the kinds of claims that may be compromised. In addition to **Hinton** (which I have already discussed), I have in mind Lady Smith's observations at para 20 in **Hilton Hotels** (para 48 above) and at para 30 in **McWilliam** (para 49 above). As regards **Lunt**, the authority from which Lord Summers derived support in **Bathgate EAT**, I agree with Lord Malcolm's observations at para 39 of **Bathgate CoS** (para 58 above). In addition, as Mr Forshaw pointed out, Morrison J's observation in **Lunt** that was cited in **Bathgate EAT** (para 53 above), relied upon a passage in *Harvey on Industrial Relations and Employment Law* at para T[729] where the editors had observed that. "A compromise agreement cannot… seek to exclude potential complaints that have not yet arisen on the off-chance that they might be raised", whereas the comparable passage in the current text of *Harvey*, contains an important qualification to that statement: "A settlement agreement cannot seek to include, by a blanket waiver, potential complaints that have not yet arisen on the off-chance they might be raised in the future" (emphasis added).

112. Whilst the authorities do not support the distinction drawn by the EJ in the present case (para 35 above); there was no material error of law in him not applying the decision in **Bathgate EAT**, which is now shown to be legally erroneous; and, for the reasons that I have discussed, he was correct in his conclusion that the disability discrimination claims were precluded by the compromise agreement.

113. I therefore dismiss Ground 1. It follows that Grounds 2 and 3 are academic as the disability discrimination claims cannot be advanced. In the circumstances, I will address those grounds more briefly than I otherwise would have done.

Ground 2

114. I agree that striking out the disability discrimination claims on their merits (as opposed to because they were caught by the compromise agreement) was not before the ET at the OPH on 24 March 2023 and that it was undertaken without affording the claimant a reasonable opportunity to address these matters. I arrive at these conclusions for the reasons that follow.

115. Firstly, the order made following the January 2023 Preliminary Hearing for Case Management provided that the issues to be determined at the OPH were those listed in the Case Summary, unless the parties contacted the ET as stipulated. The list that appeared in the Case Summary only referred in terms to striking out the claims on the basis compromise agreement (paras 26 and 27 above). No subsequent attempt was made by the respondent to amend this list.

116. Secondly, the respondent's strike out application sought to strike out only one aspect of the claim on the basis that it had little or no reasonable prospects of success, namely the WTR claim relating to accrued annual leave (para 28 above).

117. Thirdly, the parties' agreed list of issues for the OPH made no reference to striking out the disability discrimination claims on the basis that they did not have reasonable prospects of success.

118. Fourthly, notes of the OPH made by the respondent's solicitors, indicate that there was a discussion at the outset of the hearing as to its scope. Mr Kennedy informed the EJ that there was: "No listing for discrimination claim for prospects" and counsel who then represented the respondent agreed with this position.

119. Fifthly, in these circumstances, I do not consider that the sheer fact that during the course of his submissions, the EJ asked Mr Kennedy a few questions about how the discrimination claims were put (with no indication that the scope of the hearing had now changed), amounted to the ET giving the claimant a "reasonable opportunity to make representations" against the striking out of

these claims on their merits. Accordingly, there was a failure to comply with rule 37(2) of the Employment Tribunal Rules of Procedure (para 61 above) before the disability discrimination claims were struck out on their merits.

120. However, I do not accept that the error was a material one; it is readily apparent that none of the discrimination claims had any reasonable prospect of success, so that the claimant would not have been in any better position if Mr Kennedy had been given an appropriate opportunity to make submissions on this aspect of the case. Accordingly, I do not uphold Ground 2.

121. Given the way that the submissions were advanced, I will address the merits of the indirect discrimination and disability related discrimination claims under Ground 3, whereas I will consider the direct discrimination claim at this stage. I will make some generally applicable observations at this juncture.

122. Whilst it is well-established that a tribunal should be cautious about striking out discrimination claims, in the present case the lack of merit is apparent when the claims are taken at their highest and on the basis of the claims as pleaded by the claimant. Although he was not given the opportunity at the OPH, Mr Kennedy did have a reasonable opportunity to make representations during the appeal hearing, in circumstances where he was aware in advance of the hearing that the respondent argued that none of these claims had reasonable prospect of success and that this was one of the reasons why the appeal should not succeed. Mr Kennedy suggested that there should be disclosure of documents and the hearing of evidence before the merits of the claims were assessed. However, he was unable to identify the evidence that was currently unavailable that would significantly bear on the merits of these claims; he referred to not knowing when decisions were taken regarding annual reviews of active employees' salaries and when decisions were made not to undertake reviews under the Disability Plan and not knowing who made these decisions. I do not consider that such information would materially assist the claimant in circumstances where the difficulties are inherent in and apparent from the formulation of the claims.

123. The grounds of appeal did not assert that the EJ erred in law in concluding that the direct

discrimination claim had no reasonable prospects of success because the attempted comparison with a non-disabled employee who was not under the Disability Plan was fundamentally flawed. This point was first raised in the claimant's skeleton argument for the appeal hearing. I agree with Mr Forshaw that the claimant would need to be granted permission to amend his grounds of appeal to pursue this matter. Mr Kennedy did not accept that an amendment was required, but, in the alternative, made an oral application for permission to amend to pursue this challenge.

124. I decline to grant permission to amend the grounds in this respect. Firstly, because Grounds 2 and 3 are in any event academic in light of my conclusion on Ground 1. Secondly, in order to grant permission to amend Ground 2, I would need to be satisfied that the contention that the EJ erred in law in his approach to the direct discrimination claim was at least arguable, and I do not consider that it is. Thirdly, because the challenge to this aspect of the EJ's reasoning was less than fully developed. It was addressed in just one paragraph in the claimant's skeleton argument and, although Mr Kennedy contended that the EJ was wrong in his analysis of the comparator question, he did not cite any caselaw relating to the identification of the correct comparator in direct discrimination disability cases, nor address how the authorities support his position.

125. I raised the **High Quality Lifestyles Ltd v Watts** approach to comparators with Mr Kennedy during his submissions (para 78 above). It is well-established that the comparator for a direct discrimination claim must have the same abilities and other relevant circumstances as the claimant, other than the fact of disability. Whilst Mr Kennedy maintained that the correct comparison was with an active employee, who was able to perform his work duties and received a salary for doing so, such a position is inconsistent with section 23 **EQA** (para 77 above) and the caselaw. The correct comparison would be with an employee who was not disabled but who was not in active employment. However, the claimant's direct discrimination claim is dependent upon the flawed comparison that he seeks to make (paras 18 and 20 above).

Ground 3

126. I will deal firstly with the way that the indirect discrimination case was pleaded and

advanced (para 21 above). Mr Kennedy is incorrect to submit that indirect discrimination does not involve a comparison. The statutory definition in section 19 **EQA** (para 64 above) requires a comparison to be drawn between the impact of the provision, criterion or practice upon two groups to whom it is applied, namely those persons who share the relevant protected characteristic with the claimant and those persons who do not share the relevant protected characteristic. As with direct discrimination, section 23 **EQA** requires that in an indirect discrimination case, there must be no material difference between the circumstances relating to the two comparator groups (para 77 above). Accordingly, the EJ's analysis as to why it was inappropriate for the claimant to compare himself to those employees who were able to perform their work duties and received a salary for doing so, was fatal for the indirect discrimination, as well as for the direct discrimination case.

127. Additionally, there is an even more fundamental reason why the indirect discrimination claim has no reasonable prospects of success. An indirect discrimination claim can only arise where the alleged discriminator applies, or would apply, the provision, criterion or practice to both the claimant's group and the comparator group who do not share the relevant protected characteristic. However, in this instance the complaint was about the absence of an annual salary review and consequential salary increase <u>for disabled employees who were in the Disability Plan</u>. The whole thrust of the complaint was that disabled employees in the Plan were treated in an adverse way that was <u>not</u> applied to non-disabled employees; complaints of differential treatment are not complaints of indirect discrimination.

128. I turn to the disability related discrimination complaint. I have summarised how that claim was put at para 17 above. In short, the "unfavourable treatment" relied upon was the absence of annual salary reviews (and the consequential lack of increases in the level of disability salary payments). At para 44 of his reasoning, the EJ referred to "detriment caused by something arising from disability" rather than to unfavourable treatment because of something arising in consequence of disability (para 37 above), but it is apparent that he was addressing the section 15 claim at this stage. It is also clear from his reasoning that the EJ rejected the proposition that there had been

detrimental treatment as he considered that, viewed as a whole, the Disability Plan provided the claimant with "a very substantial benefit" and that the matters complained of by him were integral features of the Disability Plan that should not be viewed independently.

129. Accordingly, and contrary to the claimant's contentions, the EJ did address the prospects of success of this claim. The real question is whether there was any error of law in the EJ's approach, which involved looking at the benefits conferred by the Disability Plan as a whole, rather than considering the absence of annual salary reviews in isolation.

130. I have summarised the relevant authorities at paras 67 – 74 above. It is quite clear to me that the present circumstances fell on the **Williams**, rather than on the **Parsons**, side of the line. It would be wholly unrealistic, for the purposes of a section 15 complaint, to isolate the absence of annual salary reviews from the generous provisions of the Disability Plan, an advantage which was only open to the claimant because he met the eligibility criteria as a result of his long-term disability. The terms of the Disability Plan were inextricably interlinked; the discretionary nature of the reviews was a facet of a scheme under which employees who were unlikely to be able to work again received disability salary payments potentially right up until their date of retirement. As in **Williams**, **Cowie** and **McAllister**, this is simply a complaint that the particular provision that was made for disabled employees could have been on an even more generous scale. By contrast, in **Parsons**, it was not the operation of a facet of a disability scheme that was in issue, rather it was the fact that the Chief Constable had tried to disadvantage the claimants in respect of a voluntary retirement scheme applicable to all, because of separate payments that they would receive under the disability pension scheme (para 69 above).

131. Accordingly, neither the indirect discrimination claim nor the disability related discrimination claim had reasonable prospects of success and the ET did not err in striking them out.

Outcome

132. For the reasons set out above, I decline to grant the claimant permission to amend Ground 2

and I dismiss all three of the grounds of appeal. The appeal therefore fails.