SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 48
XA18/23

Lord Justice Clerk
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Appeal

by

CHARLES MELVIN BATHGATE

Appellant

against

TECHNIP SINGAPORE PTE LIMITED

Respondents

Appellant: Briggs; Anderson Strathern LLP
Respondents: Napier KC; Burness Paull LLP

_____

29 December 2023

Introduction

[1] The appellant presented a claim in the Employment Tribunal (ET) against his former employer for post-employment age discrimination. The claim was defended on a number of jurisdictional grounds of which, after the matter was appealed to the Employment Appeal Tribunal (EAT), only two remain relevant. The issues for determination in the appeal to this

court relate to (a) the proper interpretation of "seafarer" in section 81 of the Equality Act 2010, in particular the circumstances in which that status may be acquired or lost; and (b) whether an exception from discrimination protection arising from section 81 of the Act and the regulations thereunder continues to apply in respect of post-employment claims under section 108. A cross-appeal by the respondents concerns whether a settlement agreement which regulated the appellant's redundancy ousts the tribunal's jurisdiction in respect of the discrimination claim, and in particular whether it meets the section 147(3) requirements for a "qualifying settlement agreement".

The statutory provisions

[2] Part 5 of the 2010 Act prohibits various forms of workplace discrimination. Section 81 applies this to work on ships and hovercrafts and "seafarers":

> "(1) This Part applies in relation to—
>
> (a) work on ships,
> (b) work on hovercraft, and
> (c) seafarers, only in such circumstances as are prescribed.
>
> (2) For the purposes of this section, it does not matter whether employment arises or work is carried out within or outside the United Kingdom.
>
> …
>
> (5) 'Seafarer' means a person employed or engaged in any capacity on board a ship or hovercraft.
>
> (6) Nothing in this section affects the application of any other provision of this Act to conduct outside England and Wales or Scotland."

[3] The circumstances in which section 81 will apply to a seafarer, as referred to in subsection (1)(c), are prescribed by the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011. Part 5 applies to a seafarer on board a UK flagged ship which operates in UK waters (reg 3(1)). It may also apply to a seafarer working on a UK flagged ship

operating in non-UK waters, or an EEA flagged ship operating wholly or partly in UK waters, provided that a close connection test is met, namely that "the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link to Great Britain" (reg 4 and 3(2)). Part 5 does not apply in the case of a seafarer on board an EEA flagged ship operating outside UK waters, nor in the case of a non-UK/EEA flagged ship whether it operates inside or outside UK waters.

[4] Section 108 permits the bringing of discrimination claims after termination of employment. It extends the prohibition of discrimination to "relationships that have ended". In so far as relevant, it provides:

> "(1) A person (A) must not discriminate against another (B) if—
>
> (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
> (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.
>
> …
>
> (3) It does not matter whether the relationship ends before or after the commencement of this section.
>
> …
>
> (6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended."

[5] Section 120 confers jurisdiction upon the ET to determine complaints relating to, amongst other things,

> "(1)(a) a contravention of Part 5 (work);
> (b) a contravention of section 108, 111 or 112 that relates to Part 5."

[6] Section 144 deals with contracting out. It provides:

> "(1) 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.
>
> …
>
> (4) 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."

[7] Section 147 defines a "qualifying settlement agreement". A qualifying settlement agreement is a contract which meets the conditions set out in subsection (3), namely:

> "(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."

Subsection (4) provides that an independent adviser includes "a qualified lawyer".

The background circumstances

[8] Between April 1997 and January 2017 the appellant was employed by the respondents as Chief Officer aboard a number of vessels. The contract of employment stated that it was governed by the Employment Rights Act 1996 and the laws of Scotland. From 2008 he worked on the "Deep Blue", a vessel registered in the Bahamas, which, except for a short period in 2015, operated outside UK or EEA waters. The appellant's tours of duty on board the Deep Blue lasted six weeks at a time. He travelled from his permanent residence in Scotland to various international locations in order to board.

[9] The appellant ceased working on the Deep Blue on 8 June 2016. He undertook a variety of onshore tasks in the months that followed. The appellant understood that he would be working on board another vessel, but this never materialised. In the latter half of 2016 the respondents undertook a redundancy scoring exercise with a view to reducing their fleet of Chief Officers. In January 2017 the appellant was placed at risk of redundancy. The appellant accepted the redundancy terms on offer. On 29 January 2017, having received independent legal advice, he signed a settlement agreement. Therein he agreed not to pursue a long list of claims against the respondents, which included direct or indirect discrimination on the grounds of age under section 120 of the Act (clause 6.1.1). Clauses 6.1.2 and 6.2 set out waivers in more general terms. In particular, clause 6.2 provided that the waiver applied

> "irrespective of whether or not, at the date of this Agreement, the Employee is or could be aware of such claims or have such claims in his express contemplation (including such claims of which the Employee becomes aware after the date of this Agreement in whole or in part as a result of new legislation or the development of common law)."

Clause 6.3 contained an acknowledgement that the agreement satisfied the conditions under section 147(3) of the Act and other legislation. Clause 7.13 confirmed that the appellant received independent advice as to the effects and terms of the agreement.

[10] The redundancy payment consisted of two sums: an "enhanced redundancy and notice payment" payable with the appellant's final salary and an "additional payment" to be paid in June 2017. Clause 4.2 provided that the additional payment would be calculated by reference to a collective agreement between the National Maritime Agency and Nautilus Trade Union, known as "the Summary of Agreements". Discussions between the appellant and respondents during the redundancy process led him to believe that he would receive the additional payment. However, at the date of redundancy, 31 January 2017, he was aged

61 years old. Clause 3 of the Summary of Agreements stated: "This agreement applies to all Masters, officers and cadets of 18 years and over who have not attained their 61st birthday…"

[11] In the months that followed the respondents were uncertain as to how clause 4.2 should be interpreted. Ultimately, in March 2017 the respondents decided that those over the age of 60 at the point of redundancy were ineligible for the additional payment. The appellant was notified of this decision on 26 June 2017. He submitted a claim form to the ET alleging that this amounted to discrimination, either direct or indirect, on grounds of his age. This decision having come after the date of termination, the claim was for post-employment discrimination in terms of section 108 of the Act.

The decisions of the ET and EAT on the settlement agreement and section 147

[12] The issue was whether, properly interpreted, the legislation invalidated the settlement of claims based on discriminatory conduct yet to occur. The appellant argued that "the particular complaint" to which the contract had to relate, as per section 147(3)(b), could not include post-settlement claims. The ET disagreed (4106364/2017). The waiver covered claims whether or not in the contemplation of the parties. The approach in *Hilton UK Hotels Ltd* v *McNaughton* [2005] UKEAT 0059 04 2009 (para 20) was followed. The settlement "related to the particular complaint" in the sense that, although a future claim, it was identified therein in plain and unequivocal terms.

[13] The EAT held that the legislation did not permit waiver of a future claim ([2022] EAT 155). While the parties intended this result, the need for a qualifying settlement to "relate to the particular complaint" excluded cases of the present kind. *University of East London* v

Hinton [2005] ICR 1260 could be distinguished in that the circumstances giving rise to the claim had occurred before the settlement agreement.

The decisions of the ET and EAT on sections 81 and 108

[14] According to the respondents, until his redundancy the appellant was a seafarer working on a foreign vessel. This excluded him from making workplace discrimination claims under the Act while he was so employed. Section 108 was predicated on claims being available during employment, thus it followed that post-employment claims were similarly barred.

[15] The appellant argued that, properly interpreted, section 108 did not carry over the section 81 prohibition. In any event he was only a "seafarer" when on board a vessel.

[16] The ET held that section 81 had no application to claims under section 108. They were distinct claims, see section 120.

[17] The EAT considered it absurd that the appellant's status as a seafarer would come and go depending on whether he was or was not on a vessel. The status was intended to attach to anyone who habitually works aboard ships. Throughout his employment, the appellant remained a seafarer working on foreign vessels thus the Act did not apply to him. The right to make a claim under section 108 was contingent upon the rights enjoyed while in employment. It followed that the tribunal had no jurisdiction to address the current claim.

The submissions for the appellant

Sections 81 and 108

[18] The EAT's interpretation of a seafarer as someone who "habitually works on board a ship" would prove problematic in certain cases, for example cleaners for a contracting company who split their time between the regular cleaning of ships and onshore commercial

properties. They habitually worked on a ship and so would be seafarers and thus deprived of discrimination protection when ashore cleaning commercial properties. The appellant's interpretation, whereby the cleaners ceased to be seafarers any time they disembarked the ship, would avoid this. Such an interpretation would also give effect to the *Marleasing* principle (*Marleasing SA* v *LA Comercial de Alimentación* [1990] ECR I-4135) that a class of workers should not be excluded from the scope of anti-discrimination law without good reason.

[19] Section 108 was enacted to address the House of Lords decision in *Rhys-Harper* v *Relaxion Group plc* [2003] IRLR 484. Its purpose is apparent from the terms of that decision:

> "The preferable approach is to recognise that in each of the relevant statutory provisions **the employment relationship is the feature which triggers the employer's obligation not to discriminate** in the stated respects. This is the connection between two persons which Parliament has identified as requisite for those purposes. Once triggered, **the obligation not to discriminate applies to all the incidents of the employment relationship**, whenever precisely they arise. For the reasons already given, this obligation cannot sensibly be regarded as confined to the precise duration of the period of employment if there are incidents of the employment which fall to be dealt with after the employment has ended. Some benefits accrue during the period of employment, some afterwards. For the purpose of discrimination, there is no rational ground for distinguishing the one from the other. They all arise equally from the employee's employment." (appellant's emphasis)."

[20] Thus section 108 conferred an additional right of action. Parliament's intention was to prohibit certain forms of conduct. Section 108(1)(b) was concerned with prohibited conduct, not the prior relationship between the parties, and the words "if it occurred during the relationship" had to be interpreted in that context. The status of the former employee fell to be assessed as at the time of the alleged discrimination. Were it otherwise, the purpose of section 108(3) would be defeated. There was no dispute that at the date of the alleged discrimination the appellant was not a seafarer thus section 81 did not apply.

The settlement agreement and section 147

[21] The appellant submitted that the approach of the EAT was sound. The parties' contract was no more than a blanket compromise and thus ineffective (*Lunt* v *Merseyside TEC Ltd* [1999] ICR 17; *Hilton Hotels*). Generic references were sufficient in *Hinton* because the claims were, or ought reasonably to have been, in contemplation at the time of the agreement.

The submissions for the respondents

Sections 81 and 108

[22] The meaning of "seafarer" was a matter of statutory construction. It denoted a person's status or profession. Cessation would only occur through retirement or career change. It followed that the appellant remained a seafarer until his employment was terminated. The appellant's interpretation would create widespread uncertainty. A shore-based cleaner working on a vessel would not be a seafarer.

[23] Section 108 was to be read with section 81. References to "the relationship" in section 108(1)(b) and (6) referred to the appellant's previous relationship with the respondents as a seafarer. Any discrimination against the appellant during the course of the employment relationship could not have contravened the Act because of section 81 and the 2011 Regulations. Neither could it do so now that the relationship has ended. It remained outside the scope of the Act.

The settlement agreement and section 147

[24] The correct approach was that set out in *Hilton Hotels*; a future claim of which an employee does not and could not have knowledge may be covered by a waiver where it is plain and unequivocal that this was intended. Agreements under section 147 fell to be

construed according to the same principles as any other contract. Here it was clear that the agreement was intended to cover claims of which the parties were unaware and which had not accrued.

[25] Finality in litigation was important. If the EAT's interpretation were correct, settlement of all claims and potential claims would become impossible. The purpose of section 147 was to provide a mechanism for parties to achieve a negotiated binding agreement. The terms of the settlement agreement were sufficiently clear. Age discrimination claims under section 120, which conferred jurisdiction on the ET in respect of claims under both part 5 and section 108, were specified. By contrast, the agreement in *Hinton* was in much broader terms, referring to "all claims in all jurisdictions".

Analysis and decision

Cross appeal

[26] Should the cross appeal succeed, the issues in the appeal would not arise for determination. For that reason we begin with consideration of the cross appeal, and in particular whether the contract satisfies the requirements for a "qualifying settlement agreement" set out in section 147(3) of the 2010 Act. The only question concerns whether sub-paragraph (b) is met, namely that "the contract relates to the particular complaint."

[27] In section 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 section 144(1). The appellant argues for a restricted interpretation under which only issues specifically in dispute or contemplation at the time can be compromised. The respondents adopt a broader approach which looks at

the claim now being made and asks whether it is covered by the terms of the settlement? Is the waiver of the present age discrimination claim part of the *quid pro quo* for what the employee received in return? If the answer is yes, the contract relates to the particular complaint, i.e. that now being made.

[28] The complaint which the ET is being asked to address is a section 108 post-employment age discrimination claim arising from the respondents' decision to deprive the appellant of the additional payment otherwise due had he been younger at the date of redundancy. Section 120 expressly confers jurisdiction on the ET in respect of such a claim. On the broad approach just mentioned, if the claim is sufficiently identified in the waiver incorporated into the agreement, it will be covered by the settlement and the contract will relate to it.

[29] The list of claims waived in the agreement included those based on age discrimination under section 120 (clause 6.1.1), even if they could not be known of at the time of the agreement (clause 6.2). In agreement with the ET's conclusion, the EAT accepted that on ordinary principles of contractual interpretation the current future claim was covered by the terms of the waiver. Nonetheless it took the view that the settlement fell foul of section 147(3)(b) in that the contract did not relate to the claim. In particular it failed to identify the particular complaint because at the time of the agreement between the parties the alleged discrimination had not happened. The appellant had thus signed away his right to sue for age discrimination before he knew he had such a claim. At common law such a waiver was valid, but here Parliament had intervened in the shape of section 147(3)(b). As a result potential future complaints cannot be settled. According to the EAT, at the very least the circumstances giving rise to the complaint must have existed at the time of the agreement.

[30] At para 25 of the EAT judgment reliance was placed on an excerpt from Hansard with regard to the debate on the part of a bill which became section 203 of the Employment Rights Act 1996. It records Viscount Ullswater stating that "the procedures should only be available in the context of an agreement which settles a particular complaint that has already arisen ---" (Hansard [House of Lords Debates] vol. 545, 6 May 1993, col 904). For the EAT the use of the definite article in the words "the particular complaint" did not permit settlement of a series of types of complaint by reference to their nature or section number. It was appreciated that the outcome "may be inconvenient when there is a mutual desire to avoid future claims and a wish to end the employment relationship permanently" (para 26).

[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 section 147 do not exclude the settlement of future claims so long as the types of claim are clearly identified and the objective meaning of the words used is such as to encompass settlement of the relevant claim. The requirement that the contract must "relate to the particular complaint" does not mean that the complaint must have been known of or its grounds at least in existence at the time of the agreement. The EAT suggested that the words "the particular complaint" were not apt to describe a potential future complaint (para 25). However 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 section 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.

[33] In *University of East London* v *Hinton* [2005] ICR 1260, a case concerning similar statutory provisions (section 203 of the Employment Rights Act 1996), Mummery LJ explained that the overall legislative intention was to prevent the contracting out of workers' rights in contracts of employment. However, subject to certain safeguards, the law promotes the resolution of disputes, thus the possibility of an enforceable "compromise agreement" (the equivalent of a "qualifying settlement agreement" in the 2010 Act). The agreement in *Hinton* stated that it settled all possible claims "arising under statute" both present and future. The question was whether the agreement did "relate to the particular proceedings" being brought, namely a complaint of detrimental treatment following the making of protected disclosures. The key question was: how does the agreement relate to those particular proceedings? The agreement in question did not satisfy the statutory requirements because there was no "particularity" in the waiver: no particular statute was mentioned; there was no particular description of the nature or basis of the claims being settled; and no mention of claims of the kind actually being made (para 22).

[34] Smith LJ observed that the statutory purpose was to protect claimants from signing away rights without a proper understanding of what they were doing. Thus a rolled-up expression such as "all statutory rights" was insufficient. The "particular proceedings" (the equivalent of "particular complaint" here) must be adequately identified "by a generic description such as 'unfair dismissal' or by reference to the section of the statute giving rise to the claim"(para 33).

[35] Applied to the appellant's complaint and the agreement between the parties in this case, the level of particularity desiderated by the Court of Appeal is met. There is nothing in

the Court of Appeal judgments which supports the proposition that a future complaint cannot be sufficiently particularised in a settlement. If anything the discussion suggests the contrary.

[36] In *Hilton UK Hotels Ltd* v *McNaughton* [2005] UKEAT 0059 04 2009 the EAT set out the relevant legal principles in cases of this kind. It was accepted that a "blanket agreement" simply signing away all an employee's tribunal rights will not do. "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*)". If the wording is plain and unequivocal a future claim of which an employee can have no knowledge can be compromised (para 20). In *McWilliams and Others* v *Glasgow City Council* 2011 UKEATS/0036/10/BI Lady Smith noted that it was clear that "the purpose of the 'particular complaint' requirement is to see to it that there is adequate specification in the compromise agreement itself ---"(para 30). She added that the provision is not temporal in nature. We agree. All that matters is the presence or absence in the waiver of sufficient identification of the complaint being made.

[37] Some support for this can be gained from the structure of sections 144 and 147. The prohibition on contracting out of employment rights suffers an exception in the case of settlements of work related complaints if (a) they are made with the assistance of a conciliation officer or (b) meet the requirements for a qualifying settlement agreement (see section 144(4)). 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 section 147(3). The Explanatory Notes to section 147 state that the contract must be tailored to the circumstances of the claim, not that it must settle an existing claim. Indeed they offer an example of a future claim being unenforceable, not because it is a future claim, but because the type of claim is not mentioned in the waiver.

[38] There remain Viscount Ullswater's observations in the 1993 debate concerning predecessor legislation. The government was introducing measures designed to assist termination settlements reached by parties to a dispute without the involvement of ACAS and to safeguard the employee when the agreement included a prohibition on the right to bring proceedings regarding the dispute. The minister was concerned to emphasise that the prohibition on contracting out in advance of any dispute, most obviously in a contract of employment, would continue. That was the context for the comments that there would have to be a settlement of a particular dispute and that matters not the subject of the agreement could not be waived. The safeguard was the requirement for the employee to have the benefit of independent advice covered by professional negligence insurance. The minister was focussing on protections for employees settling a particular issue during the parties' relationship, not on clean break agreements of the present kind. He was not addressing the question posed in a case such as the present. In any event the court requires to address the words used in the current legislation, not comments during a debate in respect of different provisions in an earlier statute.

[39] In *Hilton Hotel*s Lady Smith said that the EAT decision in *Lunt* v *Merseyside TEC Ltd* [1999] ICR 17 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 complaints that have not yet arisen on the off-chance that they might be raised. However this 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. We note that in his judgment Mummery LJ expressed the view that the decision in *Lunt* was not aimed at the point he was addressing (para 28).

[40] Accordingly, and for broadly the same reasons as those expressed by the ET, we uphold the cross appeal. The jurisdiction of the tribunal is excluded by the settlement agreement. It follows that the age discrimination claim cannot be pursued. This renders the appeal redundant, however we shall address it, albeit more briefly than might otherwise have been the case.

The appeal

The "seafarer" issue

[41] We have no difficulty with the decision of the EAT that throughout his employment the claimant was a seafarer and that under section 81 and the relevant regulations he was beyond the scope of the protections afforded by the Act. The term "seafarer" is a reference to the nature of the person's employment, and we agree that this does not change every time the individual steps on or off a vessel. It is striking that the claimant spent some months

ashore before being made redundant, but having regard to the particular circumstances the EAT made no error in concluding that during that period his status remained that of a seafarer.

[42] We are reluctant to endorse the EAT's definition of a seafarer as someone who habitually works aboard a ship. That may cause more problems than it solves. There was some discussion as to the position of shore-based workers employed to clean berthed vessels. In our view it is clear that they are not seafarers within the meaning of section 81.

Section 108

[43] Section 108(1) prohibits discrimination against a former employee if (a) "the discrimination arises out of and is closely connected to a relationship which used to exist between them" and (b) "conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene the Act.

[44] A majority of the court (the Lord Justice Clerk and Lady Wise) agree with the EAT on the correct approach to this provision. The effect of Section 108(1) is to deem that an employment relationship continues for limited purposes. It has no application unless there was a relevant employment relationship included within the "work" provisions in part 5 of the Act. The relationship to which section 108(1)(b) is directed is the "relationship which used to exist between" the parties. In consequence of the decision that the appellant was a seafarer excluded from the protections of the Act, he could not in that relationship acquire rights as a former employee that he did not have during the course of his employment. However unpalatable it may be to conclude that any form of discrimination was therefore permissible, moral justification in this context does not always give rise to legal remedy (*Butterworth* v *Police and Crime* Commissioner's *Office* [2016] ICR 100, at paragraph 19). On

balance, therefore the words "if it occurred during the relationship" in subsection (1)(b) of section 108 support an interpretation that whether treatment is unlawful requires to be tested against whether it would have been actionable had it occurred during the period of employment.

[45] One member of the court, namely Lord Malcolm, would accept the appellant's submissions on this issue. At the time of the alleged discrimination he was no longer a seafarer working on vessels outside the jurisdiction of the UK. The reasons for excluding him from the Act's protection, most notably compliance with the UN Convention on the Laws of the Seas, no longer applied. Section 108(1)(b) does no more than provide that the post-employment complaint must fall within one of the categories of workplace discrimination set out in part 5 of the Act. It was not designed to rule out a complaint of the current kind once the section 81 exception fell away. It can be noted that application of the EAT's approach may be problematic in a case where a claimant fell in and out of the scope of that exception during their employment.

Disposal

[46] The court upholds the cross appeal. The jurisdiction of the tribunal is excluded by the terms of the settlement agreement and thus the claim is dismissed. In these circumstances the appeal is academic and no order is made in respect of it.