



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L Perkins

**Respondent:** British Airways PLC

**Heard at:** Via CVP

**On:** 1 February 2022

**Before:** EJ Milner-Moore

## Representation

Claimant: No attendance

Respondent: Ms H Cooper

# RESERVED JUDGMENT

1. The settlement agreement dated 28 August 2020 is a valid settlement agreement satisfying the conditions as to settlement agreements set out in section 230(3) of the Employment Rights Act 1996 and section 35(3) of the Working Time Regulations 1998.
2. The Tribunal has no jurisdiction to consider claims of unauthorised deduction from wages and/or breach of contract in relation to non-payment of contractual flying pay. Such claims have been compromised by the settlement agreement and are dismissed.
3. The Tribunal has no jurisdiction to consider claims of unauthorised deduction from wages and/or under regulation 16 of the Working Time Regulations 1998 in relation to pay in lieu of untaken annual leave. Such claims have been compromised by the settlement agreement and are dismissed.
4. The Employment Tribunal has jurisdiction, under the Employment Tribunals (Extension of Jurisdiction (England and Wales) Order 1994, to consider a complaint of breach of contract in relation to the respondent's alleged failure to pay the sums due under the settlement agreement in respect of untaken annual leave.

# REASONS

1. The claimant has brought a claim in which she alleges that the respondent has failed to make payment of sums due to her in two respects (1) that contractual flying pay of £26.95 a day was not included in a redundancy payment that she had received (the claimant values the amount due at £2,500) and (2) that the respondent was not paid for her banked annual leave from previous seasons (the amount claimed is not specified). These appeared to be claims of unauthorised deduction from wages, and/or breach of contract/ and or under regulation 16 of the Working Time Regulations. The respondent asserts that the claimant cannot pursue these complaints because she entered in to a settlement agreement on 28 August 2020 which was in full and final settlement of such claims. This case was listed for an open preliminary hearing which took place via CVP. The notice of hearing identified the purpose of the hearing as being to consider “*whether the Tribunal has jurisdiction to consider the claims in view of the settlement agreement dated 28 August 2020*”.
2. On 15 July 2021, the Tribunal made an order that, within 4 weeks of the date of its order, the claimant should “*set out in writing what **remedy** the Tribunal is being asked to award. The claimant shall send a copy to the respondent. The claimant shall include any evidence and documentation supporting what is claimed and how it is calculated. The claimant shall also include information about what steps the claimant has taken to reduce any loss (including any earnings or benefits received from new employment).*” The claimant failed to do so.
3. The respondent has produced a bundle for today’s preliminary hearing containing the settlement agreement made on 28 August 2020. The respondent also produced a helpful skeleton argument. The respondent’s position is that the settlement agreement represents a complete and effective compromise of all the claims contained in the ET1 such that the Tribunal has no jurisdiction to hear the claims. Alternatively, the respondent contends that the claimant has received all the payments due to her. In relation to holiday pay, in particular, the respondent contends that she would have been rostered to take any accrued annual leave in the run up to the termination date and would have been paid in lieu for any outstanding days. The respondent argues that, if the claimant is alleging that the respondent has failed to pay sums due under the settlement agreement, this is not a claim that the Tribunal has jurisdiction to hear.
4. The claimant did not attend today’s hearing. The clerk contacted her and received a message that the claimant would not be attending but was content for the hearing to proceed in her absence. On that basis I exercised discretion under rule 47 of the Tribunal’s procedure rules to proceed in her absence.

## Facts

5. The claimant was employed by the respondent in its Inflight Customer Experience Department. After the pandemic hit, staff in that Department

were placed on furlough. In April 2020, the respondent consulted the Trade Unions representing staff in the Inflight Customer Experience Department regarding a proposed voluntary redundancy scheme. The claimant applied for voluntary redundancy under that scheme. She received an offer of voluntary redundancy which indicated that she would receive an enhanced redundancy payment and a notice payment and that she would be expected to take any outstanding annual leave before her employment terminated but, if she was unable to do so, she would be paid in lieu for untaken leave.

6. On 28 August 2020, the claimant and respondent signed a settlement agreement (“the Agreement”). The Agreement is a lengthy and detailed document and includes the following provisions:
- a. The claimant’s employment would terminate on 31 August 2020 by reason of redundancy.
  - b. *“2.3 In the payroll following the Termination Date, the Employee will be paid the Employee’s outstanding holiday pay less any statutory deductions for income tax and national insurance for the periods between 1 April 2019 and the Termination Date”*
  - c. *“2.4 The Employee will take any outstanding annual leave before the Termination Date. If the Employee’s accrued holiday entitlement is greater than the period to the Termination Date, the Employee will be paid in lieu of any excess outstanding annual leave entitlement at the Termination Date.”*
  - d. *“4. Other than the sums and benefits which are referred to in this Agreement, the Employee agrees that no further sums or benefits are due or owed to the Employee by the Company or any associated Company”.*
  - e. Clause 13 provided that the Agreement was in full and final settlement of the “particular claims” listed at paragraph 13.2 and the various statutory employment claims listed in the annex to the agreement and any other claims. The settlement was not expressed as being conditional upon the payment of the money payable under the settlement agreement.
  - f. Clause 13.2 lists the “particular claims” which include claims of *“breach of contract”* and *“any claim in respect of outstanding pay, holiday pay (whether under the Working Time regulations 1998 or otherwise), sick pay, overtime, bonuses, incentives, commissions and benefits in kind”* and *“unlawful deduction from wages”*.
  - g. Clause 13.3 sets out the claims which are excluded from the scope of the settlement agreement and explicitly excludes *“any claim to enforce the terms of this Agreement”*.
  - h. Clause 14.3 records that the conditions regulating settlement agreements contained in Section 203(3) of the Employment Rights Act and regulation 35(3) of the Working Time Regulations 1998 are satisfied.
  - i. The Agreement contains a certificate by a relevant independent adviser (a named solicitor employed by Thompsons). That certificate was signed on 25 August 2020. It confirms that the claimant had been provided with independent legal advice as to whether she might have any claims against the Respondent and as to the terms and effect of the Agreement. It confirms that the legal adviser is covered by a policy of insurance.

Law

7. Section 203(3) of the Employment Rights Act 1996 (ERA) and regulation 35(3) of the Working Time Regulations 1998 (WTR) set out the conditions which must be met in order for a settlement agreement to effect a binding compromise in relation to statutory rights arising under the ERA and the WTR respectively. Those conditions are that:

- (a) the agreement must be in writing,*
- (b) the agreement must relate to the particular proceedings,*
- (c) the employee or worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal,*
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice,*
- (e) the agreement must identify the adviser, and*
- (f) the agreement must state that the conditions regulating settlement agreements under this Act are satisfied.*

8. The Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994 (“the Order”) and section 3 of the Employment Tribunals Act 1996, define the circumstances in which a Tribunal can hear a complaint of breach of contract. Under section 3 of the Act, the claim must be

- (a) a claim for damages for breach of a contract of employment or other contract connected with employment,*
- (b) a claim for a sum due under such a contract, and*
- (c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,*

*if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.*

In addition, the Order requires that the complaint must be one that “*arises or is outstanding on the termination of the employee’s employment*”.

9. The respondent’s skeleton argument states that if the claimant is alleging breach of contract,(e.g. because she is saying that she has not been paid the untaken annual leave which the Agreement indicated would be paid to her) then the Tribunal has no jurisdiction to hear such a complaint. The

respondent argues that it is not a complaint that “arises or is outstanding” on the termination of employment because the payments under the Agreement only fell due after the termination date.

10. The application of the Order to the enforcement of a settlement agreement has been considered in two decisions of the Employment Appeal Tribunal, **Rock-It Cargo Ltd v Green** [1997] IRLR 581 and **Miller Bros & FBP Butler Ltd v Johnston** [2002] ICR 744. The decision in the **Rock-It** case is very brief but establishes that a payment due under a settlement agreement will fall within the scope of the Order where the settlement agreement is an agreement as to the terms on which employment is to be brought to an end (i.e. was concluded before employment terminates). In such a case, the settlement agreement will be a contract which was “*connected with*” the contract of employment and any claim under that agreement will be one that “*arises or is outstanding on the termination of the employee’s employment*”. As the decision in the **Miller** case makes clear, the position will be different where the settlement agreement is entered in to after employment has already terminated. In such a case the claim under that agreement will not be one that arises, or is outstanding, on the termination of employment and so the claim will not fall within the scope of the order.

### Submissions

11. Ms Cooper reiterated that the Agreement represented a complete and effective compromise of the claimant’s claims of unauthorised deduction from wages, or breach of contract or under section 16 of the Working Time Regulations. Ms Cooper accepted that the Agreement explicitly stated that payment would be made for any accrued but untaken annual leave and that, if the respondent had failed to make such payment, it would be in breach of contract. The respondent’s position is that any claim for breach of contract would need to be brought in the county court because the it was not a claim that would fall within the scope of the Order, given that the payments under the agreement would fall due after termination.
12. I made Ms Cooper aware of what I understood to be the legal position under **Rock-It** and **Miller** in relation to the Tribunal’s jurisdiction to hear breach of contract claims relating to the breach of a settlement agreement. I explained that what appeared to be critical was when the settlement agreement was concluded (pre or post termination) and not when payments under the agreement would fall due. On that basis, she accepted that the Tribunal would, in principle, be able to consider a breach of contract complaint relating to non-payment of sums due under the Agreement. However, she made clear that the respondent’s position remains that the claimant would have been required to take any accrued but untaken leave before 31 August 2020 and that, if this had not been possible, she would have been paid for any untaken leave as provided for in the agreement. It would appear that the claimant does not accept this given that she has filed an ET claim seeking payment for untaken annual leave. However, the claimant has failed to comply with the Tribunal’s order that she explain exactly how much she is claiming and how she has calculated this amount and that she provide the documents relied on in support of her claim.

## Conclusions

- 13.** I have reviewed the Agreement and consider that it correctly states that it satisfies the requirements of 203(3) of the Employment Rights Act 1996 (ERA) and regulation 35(3) of the Working Time Regulations 1998. The Agreement is in writing, it relates to particular proceedings, it states that the claimant has received advice on the Agreement from an identified legal adviser, who has issued a certificate confirming that she has advised on the terms and effect of the agreement and its impact on the claimant's ability to pursue an employment tribunal claim and that she is covered by indemnity insurance.
- 14.** The Agreement is therefore a valid settlement agreement for the purposes of section 203(3) of the Employment Rights Act 1996. The Agreement specifies the sums that the claimant is to receive. In doing so it makes no reference to contractual flying pay and, at clause 4, it explicitly states that *"Other than the sums and benefits which are referred to in this Agreement, the Employee agrees that no further sums or benefits are due or owed to the Employee by the Company or any associated Company"*. Clause 13.2 makes clear that the Agreement will settle any claims for *"breach of contract"* and *"any claim in respect of outstanding pay, holiday pay (whether under the Working Time regulations 1998 or otherwise), sick pay, overtime, bonuses, incentives, commissions and benefits in kind"* and *"unlawful deduction from wages"*. The Agreement therefore effectively compromises any claims of unauthorized deduction from wages or breach of contract in relation to the contractual flying pay. The Agreement is also an effective compromise of any claim for unauthorized deduction from wages or under the Working Time Regulations 1998 in relation to non-payment of holiday pay.
- 15.** However, the Agreement also provides that payment will be made for any outstanding untaken holiday (clauses 2.3 and 2.4). If the Respondent acts in breach of the Agreement, by failing to make payments in respect of untaken leave which it is contractually obliged to make, the claimant's remedy is bring a breach of contract claim in relation to the breach of the Agreement. She cannot reinstate the statutory claims that she has compromised because the settlement of those claims is not expressed to be conditional on the payment of the money due under the agreement.
- 16.** I have concluded that the Tribunal has jurisdiction, under the Order, to hear a complaint of breach of contract in relation to any non-payment of sums due under the Agreement. I considered that any such complaint was one that was connected with the contract of employment and that it arose or was outstanding on the termination of employment given that the Agreement was entered into on 28 August 2020, that it governed the terms on which the claimant's employment was to terminate and that the claimant's employment did not terminate until 31 August 2020.
- 17.** On that basis, I considered that, if the claimant is asserting that she has not been paid the holiday pay due to her under the Agreement, she can bring a breach of contract claim for such sums in the Tribunal. However, the claimant will need to explain how much she considers to be owing, how she has arrived at that amount and to provide documentary evidence in support of her claim. She will need evidence to show the number of days annual

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leave to which she had accrued entitlement as at the date of termination, the number of days leave that she had taken and the number of days in respect of which payment was due but not made. The claimant has been asked to produce such information but has failed to do so. She has also failed to attend today's hearing to pursue her claim. I have therefore directed that she should be sent a strike out warning letter. I will review the case file once the claimant has either replied to that letter, or the time for doing so has passed. As the letter makes clear, if the claimant does wish to pursue a claim for breach of contract she will need to provide the information identified above before the case is listed for a further hearing.

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Employment Judge **Milner-Moore**

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Date 1 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22 March 2022

FOR EMPLOYMENT TRIBUNALS