



## EMPLOYMENT TRIBUNALS

### Claimant

### Respondent

Ian Clifford

v

IBM United Kingdom Ltd

**Heard at:** Reading (virtual hearing)

**On:** 24 March 2023

**Before:** Employment Judge Housego

### Appearances

**For the Claimant:** Conor Kennedy, of Counsel

**For the Respondent:** Alice Mayhew KC

## JUDGMENT

The claims are struck out as having no reasonable prospect of success.

## REASONS

### Introduction

1. 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, or as having no reasonable prospect of success. The Respondent raised a variety of issues about the claim set out in an agreed list of issues. There is no issue about disability, at all material times and to the knowledge of the Respondent, which is conceded.
2. I was provided with clear written submissions from both Counsel, to which they both spoke. I was provided with an agreed bundle of documents and a bundle of authorities. I have considered all the material, whether expressly referred to in this judgment or not.

### Background

3. The chronology is as follows:



26 June 2000 – Claimant started work for Lotus Development UK Ltd;  
01 July 2001 – Claimant tupe transferred to Respondent;  
19 September 2008 – Claimant commenced sick leave;  
25 September - 2012 Claimant raised grievance;  
23 November 2012 – grievance outcome;  
05 December 2012 – appeal;  
01 March 2013 – appeal outcome;  
06 April 2013 – Claimant moved to disability plan;  
13 April 2013 – Compromise agreement signed;  
28 February 2022 – this claim was lodged.

4. The grievance was lengthy. It included:
  - 4.1. ongoing and proposed deductions from salary (reduced pension contributions);
  - 4.2. not having salary increases since 2008;
  - 4.3. holiday pay for the period of sickness absence;
  - 4.4. a request to be transferred to the IBM Disability Plan (“the Plan”); and
  - 4.5. assertions that this was disability discrimination.
5. The Claimant had been on sick leave for 5 years by the time of the grievance. He had been remunerated on the basis of his 2008 salary. He said that he should have been awarded pay rises, and that not doing so was disability discrimination. He claimed holiday pay for the years he had been away. He said that the terms of the Lotus employee benefit: “IBM Aligned Sickness and Accident Benefit (effective 01/12/2000)” (“the Plan”) had been transferred with him and he had not received the benefits to which he was entitled. He asked to be transferred to that Plan.
6. A compromise agreement (“CA”) dated 13 April 2013 settled the Claimant’s claims:
  - 6.1. The matters to be settled were set out, specifically and generically, by reference to the grievance and appeal.
  - 6.2. It was expressed the intention of settling any other claims the Claimant might have against the Respondent.
  - 6.3. It recorded that the Claimant had been transferred (as was his request) to the Plan.



- 6.4. It recorded that he would be treated as an incentive employee (meaning that benefits would be assessed on the basis of “*on target earnings*” (“OTE”) and the figure, £72,037.44 a year, was agreed.
  - 6.5. He would be paid 75% of OTE salary (less Employment Support Allowance or single person’s social security incapacity benefit) from 06 April 2013 until he retired or otherwise ceased to be on the Plan.
  - 6.6. He would remain an “*Active Member*” of the pension fund (and so he has been credited with full contributions to his pension entitlement).
  - 6.7. He was paid £8,685.60 to settle his claims to holiday pay.
  - 6.8. There was no payment in respect of salary rises not awarded.
  - 6.9. He agreed that he would not accrue annual leave.
  - 6.10. He waived his rights (paragraph 8) to a long list of possible claims (in the usual way, most of which had never been intimated).
  - 6.11. Excluded from that waiver (paragraph 9) were claims to enforce the CA, claims in respect of pension, and any personal injury claim.
  - 6.12. Excluded from the exclusion (paragraph 9 d) were claims arising after the CA which were not either connected to matters set out in the grievance or the appeal, or did not arise out of the transfer to the plan. The necessary implication is that claims in respect of such matters were waived by the terms of paragraph 8.
  - 6.13. It was stated to be intended to cover all complaints or claims against the Respondent.
  - 6.14. The Claimant agreed (paragraph 13) that he would not:  
  
*“raise any further grievances or complaints arising out of: (i) the matters set out in the Grievance or Appeal; or (ii) the Disability Plan Guidelines where such grievances or complaints are substantially similar to the complaints in the Grievance or the Appeal.”*
  - 6.15. The CA, including the Plan, the Aligned Policy [the IBM and Lotus benefits] and the Disability Plan Guidelines (“the Guidelines”) was said to be the entire agreement between the parties.
7. The Guidelines were attached to the CA as a schedule.
    - 7.1. An employee on the Plan was described as an “*inactive*” employee, in receipt of “*a monthly disability salary payment advance*”.



- 7.2. The Guidelines state that from time to time IBM “*may exercise its discretion to award an increase to the disability salary payable to members of the Plan*” and “*There is no guarantee of such increases being awarded, either in terms of timing or amount.*”
- 7.3. National Insurance was deductible from payments.
- 7.4. Payments were reduced by the amount of single person’s incapacity benefit or employment support allowance received.
8. The negotiations leading to the CA resulted in the Claimant being moved to the Plan, and the terms agreed for him to do so were set out in the CA. His salary was set out in the CA. There was no provision in the CA linking his salary to those who were in work and not on the Plan. In the grievance outcome the Claimant’s salary had been increased by 1.7% backdated to July 2011. In the CA his salary for the Plan was agreed to be as an “*incentive employee*” and so his “*on target earnings*” figure was used to calculate the benefit he would receive. This was 75% of £72,037.44 a year (less state benefits).

The claims now made

9. The Claimant’s ET1 claims disability discrimination in a variety of forms (S13, S15 and S19 of the Equality Act 2010, S13 Employment Rights Act 1996 and Working Time Regulations 1998:
- 9.1. The “*something arising*” from his disability was his absence from work and that he was paid under the Plan.
- 9.2. He was treated unfavourably because:
- 9.2.1. he had no salary review since joining the Plan on 06 April 2013;
- 9.2.2. he had no salary increase since 2013;
- 9.2.3. for holiday entitlement he had been paid at 75% of salary, and he should have been paid at 100% of salary for such holiday entitlement.
- 9.3. He cited a hypothetical comparator, a non-disabled employee who would not be a member of the Plan.
- 9.4. Being paid 75% all year was indirect discrimination as a non-disabled employee would be paid 100% of salary during holiday.
- 9.5. Not being paid holiday pay was an unlawful deduction from pay, totalling £69,543.84 since April 2013.
- 9.6. Not being given holiday pay breached the Working Time Regulations 1998.



10. The Respondent's Grounds of Resistance state:
  - 10.1. Much of the claim is out of time;
  - 10.2. The CA contained a waiver of claims which barred these claims because:
    - 10.2.1. they were expressly referred to in the CA;
    - 10.2.2. exclusions to the waiver expressly did not include matters connected to those set out in the Grievance and the Appeal;
    - 10.2.3. the CA contained an express provision that as an inactive employee the Claimant would not accrue annual leave;
    - 10.2.4. the Aligned Policy expressly stated that an inactive employee would not be eligible for any other employee benefits, save as under the Plan;
    - 10.2.5. there was a discretion to review payments under the Plan, which did not confer any rights on the Claimant (or the other members of the Plan), and there had been no Plan wide review or increase since the Claimant was transferred to the Plan;
    - 10.2.6. any claim before 19 October 2021 was out of time;
    - 10.2.7. any deduction from wages prior to 28 February 2020 was barred as there was a two-year limit on such claims;
    - 10.2.8. claims under the Working Time Regulations 1998 prior to 19 October 2021 were out of time;
    - 10.2.9. in so far as there was a PCP about pay to those in the Plan, and in so far as it was indirectly discriminatory it was the pursuit of a legitimate aim (rewarding and retaining employees contributing to the success of the business) and was proportionate;
    - 10.2.10. the comparator could not be someone not in the Plan but was someone not disabled who was absent from work for an extended period, or who might never return to work;
    - 10.2.11. it was appropriate to treat those in the Plan as a separate group from those actively working;
    - 10.2.12. active employees had no right to a pay rise every year either.
    - 10.2.13. as to holiday pay there was no entitlement to holiday pay as the Claimant was not a worker, because he did not undertake work for the Respondent;



- 10.2.14. alternatively, he was not prevented from taking holiday, so untaken holiday could not be carried forward;
- 10.2.15. if he was prevented from taking it he was required to do so within 18 months of its accrual;
- 10.2.16. if he was due holiday, and could not take it, and was allowed to carry it forward, pay was due at 75% of OTE at 13 April 2013, and he had been paid for the whole period at that rate;
- 10.2.17. there was no disadvantage to the Claimant, but if there was the treatment was a proportionate means of achieving a legitimate aim; and
- 10.2.18. in any event payment could be made for holiday pay only at the end of employment, and that had not occurred.

### The issues

- 11. The Claimant is a worker. He is an employee, and so falls within the definition of worker contained in Regulation 2 of the Working Time Regulations 1998. The Grounds of Resistance relied on the definition of workers who are not employees. The Respondent accepts that this is the case, and that those parts of the Grounds of Resistance stating otherwise are not correct.
- 12. In a Case Management Hearing on 12 January 2023 the Respondent made application for the claims to be struck out, and that application was listed for today, and is the subject of this hearing. It was ordered that a strike out application be filed and served by 26 January 2023. That application was not in the bundle of documents provided to me, because helpfully the parties had agreed a list of issues for this hearing.
- 13. That list of issues can be summarised as follows:
  - 13.1. What is the effect of the CA on these claims?
  - 13.2. Is the Claimant entitled to contractual holiday leave?
  - 13.3. If so, can he carry it forward, and to what extent?
  - 13.4. If he is entitled to be paid for holiday pay, at what rate?
  - 13.5. In particular did the CA preclude future claims for holiday pay?
  - 13.6. And did it preclude claims for reviews and increases in benefits payable under the Plan?
  - 13.7. In short is the effect of the CA to preclude the claims made now?



- 13.8. Does Regulation 13(9) of the Working Time Regulations mean that the holiday pay claim has no reasonable prospect of success because money can be paid in lieu of holiday only at the termination of employment and the Claimant remains employed by the Respondent.
- 13.9. Should the claim or parts of it be struck out either as precluded by the CA or because they have no reasonable prospects of success?
- 13.10. If not struck out, should a deposit order or orders be made in respect of all or any part of the claims remaining?
14. Although in the list of issues it was agreed that issues of whether any part of the claim is out of time are not the subject of this hearing.

Agreed fact

15. It is agreed that 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 at all 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 at 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.
16. It is not clear to me (as it was not in the documents supplied nor referred to in submissions) what the situation was concerning pay from 19 September 2008 to 06 April 2013. Since the Claimant's grievance was that he had not been transferred to the Plan, it is 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.

Submissions for the Respondent

17. The Respondent's submissions are as follows. This is a summary of a lengthy document, and of oral submissions of about 1½ hours.
- 17.1. The terms of the CA are clear. This claim is in effect a repeat of the matters settled by the CA. While new matters can later be raised by a person who has entered a compromise agreement, the same matters (those settled by the compromise agreement) cannot be raised in a new claim.
- 17.2. While the statement in the CA that the Claimant agreed that he would no longer accrue holiday entitlement was invalid (because this is not a right from which an employee cannot exclude himself by contract), it was clearly in mind that in future the Claimant would be transferred to the Plan and would get 75% of his earnings all year, and no more.



- 17.3. That meant that the claim for deduction from wages (S13 Employment Rights Act 1996) should be struck out, because there was no deduction. The Claimant's salary was 75% of what it was when he worked, and he was paid it until retirement age without having to work. That was the contract after 13 April 2013, and the Respondent had deducted nothing from that contractual amount (save state benefits as agreed).
- 17.4. The CA covered all the other claims, and so they should all be struck out.
- 17.5. The backdated salary increase (1.7% from 2011) placed the Claimant in the middle of his job banding, which was bench marked to the industry, and so his salary at the date of transfer to the Plan was objectively fair.
- 17.6. The sections of the CA set out above clearly purported to settle all claims, both historic and future. This was in the context of continued employment. The CA set out an agreed framework for the future. It was not envisaged by either party that the issue of holiday pay would ever be raised again. It had been settled for the whole of the Claimant's employment, by transferring him to the Plan, on the same terms as every other person transferred to the Plan (with individual calculation of salary).
- 17.7. The waiver of all claims contained exceptions for claims not waived. That exception had carved out of it all matters connected with the Grievance, the Appeal and the CA. As those matters were removed from the exception it followed that they were expressly waived by the CA.
- 17.8. Case law was clear that future claims could be waived, and although that was described in case law as "*an extravagant result*" for which the clearest terms were required, this was such a case. The terms were clear. The Claimant had got that for which he had asked – to be transferred to the Plan and be paid 75% of salary until he reached retirement age (when he would receive a full pension). This set out the future course of employment permanently. No-one who had been transferred to the Plan had ever left it other than by retirement, or earlier demise. It was not envisaged that the Claimant could relitigate the same issue of holiday pay throughout his time on the Plan (and he was born on 16 July 1972, so would be in receipt of 75% of salary from 06 April 2013 to 16 July 2047, 34 years).
- 17.9. The CA set out that it, the Plan and its' Guidelines were the "*entire agreement*" between the parties, and the Guidelines were appended to the CA in a schedule. The Claimant was bound by those terms – he had expressly agreed this – and so he was precluded from bringing the claims he now brought.
- 17.10. The statutory and caselaw framework indicated that parties who complied with the offer and acceptance provisions of a contract which complied with the statutory requirements of a compromise agreement were bound by that contract/





- 17.11. In so far as the case of Bathgate v Technip UK Ltd EAT(Sc) [2023] ICR 200 decided that future claims could not be compromised this was not an authority which should be followed.
- 17.12. Hinton v University of East London [2005] IRLR 552 required a compromise agreement to refer to the particular proceedings being compromised. It did not matter how that complaint was articulated (McWilliam v Glasgow City Council [2011] IRLR 568 (EAT) as long as it was clear what the complaint was, and that it could not be litigated in future.
- 17.13. In Arvunescu v Quick Release (Automotive) Ltd [2023] ICR 271 the Court of Appeal considered Royal National Orthopaedic Hospital Trust v Howard [2002] and Hilton UK Hotels v McNaughton [2015] EATS/0059/04. The Court of Appeal cited *Howard*:
- “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 into existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what 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.”*
- This was Court of Appeal authority supporting the Respondent’s position about the Claimant’s holiday and other claims.
- 17.14. Holiday pay could not in any event be carried forward.
- 17.15. The CA was analysed, the terms set out above being stressed, and it being submitted that it resolved the claims now made. That the clause stating that the Claimant would not accrue holiday leave was unenforceable did not detract from the fact that the CA was intended by both parties to effect a solution to the dispute between the parties about holiday pay by moving the Claimant to the Plan with no obligation to work and 75% pay permanently with no holiday pay.
- 17.16. Likewise, disability discrimination claims arising from the way the Claimant had been treated were settled.
- 17.17. The carve out from the exclusion clause meant that all claims to do with the issues leading to the CA were waived.
- 17.18. The inevitable conclusion was that the CA meant that the Claimant could not raise the same issues in future.
- 17.19. The holiday pay claim ought in any event to be limited to four weeks a year but there could be no extra pay for holiday as that would infringe Regulation 13(9)(b) of the Working Time Regulations. More fundamentally



the Claimant had been paid his full pay, of 75% of his salary when working, and so had suffered no deduction from his pay.

### Submissions for the Claimant

18. In reply Counsel for the Claimant submitted as follows:

- 18.1. *Bathgate* was the most recent authority. It was an EAT decision. It had reviewed all the cases, including those cited by Counsel for the Respondent. It stated that a compromise agreement could not settle claims which had not arisen at the date of the compromise agreement. It was not for an Employment Tribunal to decline to follow precedent.
- 18.2. Claims about the way the Plan had been implemented by the Respondent self-evidently could not be settled by the CA, as they could only arise after 06 April 2013 when the Claimant transferred to the Plan.
- 18.3. While the Plan referred to discretion to review payments under the Plan, not giving a right to a review or an increase, it was disability discrimination not to increase the payments in the years since 2013. With inflation now running at over 10% the value of the payments would soon wither. The point of the Plan was to give security to employees not able to work. That was not achieved if payments were for ever frozen.
- 18.4. It was not possible to form the view that the claims had no reasonable prospect of success at a Preliminary Hearing such as this. That was a matter for a full hearing.
- 18.5. *Bathgate* correctly laid stress on the words “*the particular complaint*”. As a matter of logic that could not encompass something that had not occurred at the date of a compromise agreement. Therefore, anything purporting to do so was outwith the statutory framework and so was ineffective. That could not be evaded by “*rolled up*” or generic terminology.
- 18.6. Lord Summers in *Bathgate* explained the reference in *Hinton* as referring to a potential claim as one that was known to the parties but not brought to the Tribunal.
- 18.7. Stringer and Or’s v Revenue and Customs Commissioners; Shulz-Hoff v Deutsche Rentenversicherung Bund [2009] ICR 932 made it clear that employees away from work by reason of long-term sickness accrued holiday entitlement. Failure to make the appropriate payments could be a S13 Employment Rights Act 1996 deduction from wages (the House of Lords decision in *Stringer*).
- 18.8. Only in the most exceptional cases should discrimination cases be struck out as having no reasonable prospect of success: Mechkarov v Citibank NA [2016] UKEAT 0678\_15\_0902 (9 February 2016) , reported at



[2016] ICR 1121. There should not be an impromptu trial of the facts. The Claimant's case must be taken at its highest.

- 18.9. While the Claimant was transferred to the Plan as a resolution of the Grievance and Appeal, the complaints were about how the Plan was administered so far as the Claimant was concerned. Even on the Respondent's reading of the case, the CA was not about how the Plan was administered after the Claimant joined it. Annual reviews would not occur for a year after he joined the Plan.
- 18.10. Nothing in the CA superseded the Claimant's right to annual leave at 100% of his OTE earnings before he moved to the Plan.
- 18.11. There was no contractual term varying the salary to 75% of what it was before the Claimant moved to the Plan. The definition of a week's pay refers to pay before ceasing work through illness.
- 18.12. If there was any contractual variation, it was not sufficiently clear to bear the burden placed on it by the Respondent. The Claimant continued to receive the benefit of pension contributions from the Respondent based on 100% of his OTE earnings pre- Plan.

#### The law concerning strike out applications in discrimination cases

19. The power to strike out cases is contained in Rule 37:

*"Striking out*

*37.—(1) 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 ... has no reasonable prospect of success;*

20. As a general principle, discrimination cases should not be struck out, save in the clearest circumstances. The Claimant's case is to be taken at its highest. There are sound public interest reasons for the test being a high threshold. Ahir v British Airways Plc [2017] EWCA Civ 1392 which cites previous cases (Anyanwu v South Bank Student Union [2001] UKHL 14, [2001] ICR 391, and Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, [2007] ICR 1126). This case provides clear guidance to be applied in applications such as this. I have read and considered that guidance in coming to my conclusions. I note paragraph 16:

*"...Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full*



*evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."*

21. The case law concerning compromise agreements is set out in Counsels' submissions and in the cases in the authorities bundle.

#### Discussion as to Compromise Agreement

22. The CA was the result of a detailed negotiation. That it was such is clear from the provision in it by which the Respondent agreed to pay £5,000 towards the Claimant's costs in respect of it. 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.
23. The CA contained a provision that was ineffective: that the Claimant would no longer accrue holiday entitlement. I do not agree with the Claimant's submission that this robs the provision of all effect. The whole point of the CA was to settle matters of dispute permanently. There was a large claim then for holiday pay, and over £8,000 was paid to him to settle that claim. It could not, at that point, ever have been in the Claimant's mind or the Respondent's mind that there would ever be an issue of holiday pay ever again.
24. To settle future claims requires the clearest of intentions, on the Respondent's submission, and is not possible at all 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. If instead of the case of Harpur Trust v Brazel [2022] UKSC 21 being litigated it had been settled, including a term that Ms Brazel's future holiday pay claims were also settled, that term would of course be valid. Otherwise Ms Brazel could have brought a new claim every year even though saying in a compromise agreement that she would not do so. That would compel the parties to litigate as settlement for the future would be impossible. The CA did



this, expressly in paragraph 13. Issues about holiday pay were settled for the future.

27. It could be argued that the example given above would be to reflect a consensual change of contract and not settlement of future claims. If so, then that is also the effect of what happened in this case, even if not expressed as a contractual variation.
28. Accordingly, there are two reasons why the holiday pay claim has no reasonable prospect 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*. In short, had an officious bystander, present as the CA was signed, asked “*And is Mr Clifford going to get holiday pay in addition to his 75% of previous salary?*” both would have replied “*Of course not.*” 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 claim. This is because from the documents supplied to me there can be only one conclusion as to the effect of 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 (or for anyone else in any capacity). All the normal features of an employment contract disappear. There is only the right to be paid 75% of previous salary, and to benefit from pension contributions based on 100% of previous salary. There was no scenario in which was considered remotely likely that the Claimant would do other than receive the lower amount until age 65. 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. The grievance was the invitation to treat, as a result of which the Respondent offered to transfer the Claimant to the Plan, and the Claimant accepted that offer. There is consideration for that offer: the Respondent agreed to pay the reduced salary until the Claimant reached the age of 65. At over £50,000 a year for over 30 years, this is in excess of £1.5m.
31. That pension contributions remained based on the previous salary does not undermine that conclusion. It was a more generous pension provision than afforded active employees.
32. Since the Claimant was paid at that rate the entire time it is irrelevant whether or not particular dates are designated as holiday. Pay in holidays would have been at the rate the Claimant was actually paid.



33. This was not articulated in quite this way by Counsel for the Respondent, but the conclusion, that the Claimant had been paid in full throughout the year is clear from the submission (e.g. at 35(d)).
34. Counsel for the Claimant referred to the fact that holiday pay is to be calculated by reference to pay prior to the person going on sick leave. This is not relevant. The Claimant was not on sick leave. He was an inactive employee, in receipt of the equivalent of benefits under a permanent health policy, permanently, and not an active employee on sick leave.
35. This means that the claims related to holiday pay also fall to be considered under Rule 37, in addition to the Respondent's assertion that they are precluded by the CA.
36. However, and in any event, the terms of the CA were clearly intended to preclude any further claim for holiday pay. That meaning is entirely apparent from the document. The framework was changed so that it was intended that there should be no further holiday pay claims.
37. 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 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. In the CA the Claimant agreed that he could not bring claims arising out of similar matters to those settled. His holiday pay claim was settled. The new holiday pay claims are similar. They are identified with particularity in the CA. 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*, also a 2023 case, sets out the quote above. 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.
39. However, while the Respondent's submissions are dealt with in the order they were made, the primary reason I decide that claims relating to or based on holiday pay should be dismissed is under Rule 37.
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.

Discussion as to Rule 37 application to strike out

41. For the reason set out above, the disability discrimination claims and claims under the Working Time Regulations 1998 and that there have been unlawful deductions from the Claimant's pay in respect of underpaid holiday pay have no reasonable chance of success. The Claimant was paid for all 52 weeks of every year at his reduced full salary.
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 transferred 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 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 – the very term “*plan*” supports this. 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. 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 (and on this example likely to halve in value in 30 years). 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, because the payments have been at a fixed level since 06 April 2013, now 10 years, and may remain so.



47. The Plan expressly states that there may be reviews and there may be increases. There is no right to a review or an increase. There is a discretion to review and increase. It is not submitted that the absence of either was the capricious or arbitrary exercise of a discretion (as is the test for discretionary bonus claims). There is not said to be any cause of action from there being no upward review of salary payable under the Plan other than a disability discrimination claim arising.
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. Even if the value of the £50,000 a year halved over 30 years, it is still a very substantial benefit. However, this is not the issue for, fundamentally, the terms of something given as a benefit to the disabled, and not available to those not disabled, cannot be less favourable treatment related to disability. It is more favourable treatment, not less.
50. Accordingly, I conclude that the remaining claims, about the Plan, have no reasonable prospect of success, and so I dismiss those claims also.

**Employment Judge Housego**

Dated: 28 March 2023

Sent to the parties on:

24 April 2023

For the Tribunal: