



# Farore Law

- Mini Guide -

## SETTING ASIDE SETTLEMENT AGREEMENTS

### What is a settlement agreement?

A settlement agreement is also known also as a non-disclosure agreement (“**NDA**”) or confidentiality agreement (but in fact the NDA is usually one of a number of terms in a settlement agreement). It is a contract between two or more parties aimed at settling disputes and often involves restricting the disclosure of specific information. They are regularly used in employment law and discrimination matters.

### What kind of rights can be waived by a settlement agreement?

- ‘Blanket’ agreements that sign away all an employee's rights will generally be ineffective.<sup>1</sup>
- Only actual or potential claims raised at the time the settlement agreement is reached may be validly settled. Such claims must be identified within the settlement agreement, at the very least, by a **generic description** (e.g. ‘unfair dismissal’), or a **reference to the relevant section of the statute giving rise to the claim**.<sup>2</sup> Claims which have not been raised in this way cannot be validly settled.<sup>3</sup>
- It may be possible to contract out of future claims, but establishing such an intention will require “*extremely clear words*”.<sup>4</sup> In the absence of clear language, the courts will

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<sup>1</sup> *Lunt v Merseyside TEC Ltd* [1999] IRLR 458, EAT; *Hinton v University of East London* [2005] EWCA Civ 532

<sup>2</sup> *Hinton v University of East London* [2005] EWCA Civ 532

<sup>3</sup> *Lunt v Merseyside TEC Ltd* [1999] IRLR 458, EAT; *Hinton v University of East London* [2005] EWCA Civ 532

<sup>4</sup> See [20] of *Hilton UK Hotels Ltd v. McNaughton* EATS/0059/04, citing *Royal National Orthopaedic Hospital Trust v Howard* [2002] IRLR 849: “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

be very slow to infer that a party intended to surrender rights and claims of which they were unaware and could not have been aware.<sup>5</sup>

## On what grounds may a settlement agreement be set aside?

A settlement agreement may be set aside due to incapacity, mistake, illegality, fraud/misrepresentation, or duress/undue influence:

- **Incapacity:** If a signatory lacks capacity (e.g. they are a child or mentally disordered or otherwise very vulnerable), the settlement agreement may be set aside.
- **Mistake:** A settlement agreement may be set aside if it contains a fundamental mistake which makes the agreement impossible to perform.
- **Illegality:** If the settlement agreement is illegal in law, it can be set aside (for example, an agreement with a criminal purpose).
- **Fraud/misrepresentation:** Settlement agreements can be set aside on the basis of fraud. This is so even if there is some knowledge that the claim is fraudulent before entering into the agreement and the fraud only became clear after the conclusion of the agreement.<sup>6</sup> Strong evidence is required before fraud should be pleaded/alleged.
- **Duress/undue influence:** If it can be shown that a settlement agreement was entered into because of duress or undue influence, it may be set aside. Note that evidence of this can be difficult to ascertain. Where it is alleged that there were threats, any such comments should constitute actual threats rather than being a mere suggestion of ‘what might happen’.<sup>7</sup> Undue influence between two parties to an agreement may occur where one party has an extreme ‘hold’ over another person, which can occur in certain cases involving sexual abuse. Where the party wanting to set aside the agreement had full use of independent legal advice when they signed it, it will be difficult to set it aside.

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*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** [emphasis added]. But we take the view that it would require extremely clear words for such an intention to be found.”*

<sup>5</sup> *BCCI v Ali* [2001] IRLR 292

<sup>6</sup> Note the case of *Hayward v Zurich Insurance Company plc* [2016] UKSC 48. Here, an insurer had doubts about the claim prior to settlement – the fraud induced the insurer to settle for a greater amount than it would have done had there been no fraud.

<sup>7</sup> *Holyoake v Candy* [2017] EWHC 3397 (Ch)

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