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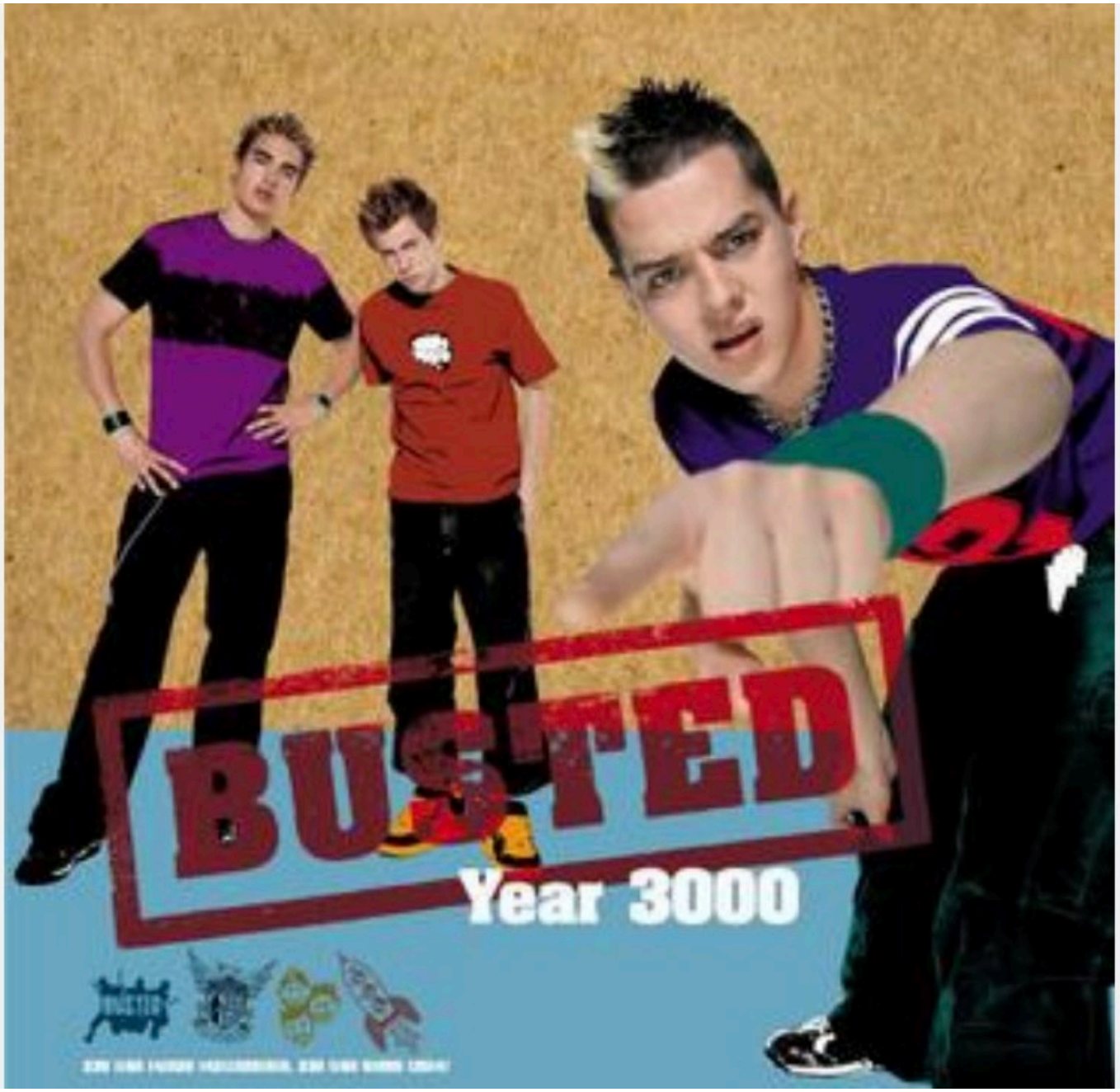
“Year 3000” – future proof settlement agreements, compromising future claims – Heather Platt



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Why future proof?

1. Ongoing working relationships
2. Whistleblowing complaints
3. Post termination detriments
4. Post termination discrimination and harassment
5. Post termination victimisation

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Compromising claims

- s203 ERA 1996 /s144 EqA 2010. A contract is unenforceable where it excludes or limits the claims that can be brought pursuant to statute.

Advisory, Conciliation and Arbitration Service

Agreement in respect of an Actual or Potential Claim to the Employment Tribunal

Claimant	Respondent
Name: [redacted]	Name: [redacted]
Address: [redacted]	Address: [redacted]

CASE NUMBER: [redacted]

Settlement reached as a result of conciliation action.

We the undersigned have agreed:

The Respondent agrees to pay the Claimant, without any admission of liability, the sum of £5,000 (Five Thousand Pounds) in full and final settlement of all claims under or in connection with which the Claimant has brought or could bring against the Respondent arising out of the Claimant's conduct of employment with the Respondent and its termination.

It is agreed that the above sum will be paid to the Claimant within 21 days of the Respondent receiving this Agreement signed by the Claimant or the Claimant's Representative.

Both parties agree that the fact and terms of this Agreement will remain confidential between the parties and their representatives, including the Claimant's immediate family (who shall be bound by an identical duty of confidentiality), and will not be revealed to any third party except as required by law.

The Claimant will write to the Glasgow Tribunal within 7 days of receiving the settlement sum to withdraw her claim under Case Number: [redacted] and will confirm that she has no objection to any request made by the Respondent to dismiss the Claimant's claim in terms of Rule 52 (4) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (Schedule 1).

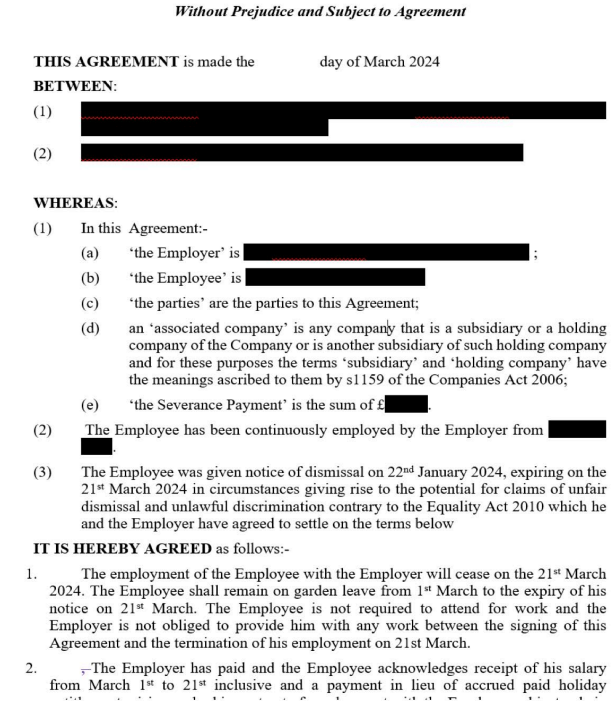
Both parties agree not to indirectly or directly make, publish or otherwise issue or cause to be made, published or issued any statement or the party's concerned concerning any matters set out in the Claimant's claim or any matters relating to the other party (including in respect of the Respondent any matters relating to present or former officers, directors, employees, agents, investors or trustees of the Respondent) nor will the Claimant do any act or thing which it might reasonably be expected would damage the Respondent's business interests or reputation.

This agreement does not affect any rights the Claimant may have in relation to personal injury claims. The Claimant, in executing this Agreement, warrants that she presently does not know of any circumstances which might give rise to any such claim.

By or on behalf of the Claimant: [redacted] Date: 15/01/24

By or on behalf of the Respondent: [redacted] Date: 15/1/2024

COT3 AGREEMENTS



Without Prejudice and Subject to Agreement

THIS AGREEMENT is made the day of March 2024

BETWEEN:

(1) [redacted]

(2) [redacted]

WHEREAS:

(1) In this Agreement:-

(a) 'the Employer' is [redacted];

(b) 'the Employee' is [redacted]

(c) 'the parties' are the parties to this Agreement;

(d) an 'associated company' is any company that is a subsidiary or a holding company of the Company or is another subsidiary of such holding company and for these purposes the terms 'subsidiary' and 'holding company' have the meanings ascribed to them by s1159 of the Companies Act 2006;

(e) 'the Severance Payment' is the sum of £[redacted].

(2) The Employee has been continuously employed by the Employer from [redacted].

(3) The Employee was given notice of dismissal on 22nd January 2024, expiring on the 21st March 2024 in circumstances giving rise to the potential for claims of unfair dismissal and unlawful discrimination contrary to the Equality Act 2010 which he and the Employer have agreed to settle on the terms below

IT IS HEREBY AGREED as follows:-

1. The employment of the Employee with the Employer will cease on the 21st March 2024. The Employee shall remain on garden leave from 1st March to the expiry of his notice on 21st March. The Employee is not required to attend for work and the Employer is not obliged to provide him with any work between the signing of this Agreement and the termination of his employment on 21st March.

2. The Employer has paid and the Employee acknowledges receipt of his salary from March 1st to 21st inclusive and a payment in lieu of accrued paid holiday

SETTLEMENT AGREEMENTS

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Can it be done?

- Yes – via a COT3 - It is possible to waive future statutory employment claims (both existing and unknown) where a settlement is reached through conciliation with Acas and is recorded in an appropriately worded COT3

- Yes – settlement agreement. There has been much debate in case law about whether it is possible to use a settlement agreement to waive future statutory employment claims.

- No - it is not thought to be possible to waive future claims for personal injury.

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COT 3 Agreements

Advisory, Conciliation and Arbitration Service

Agreement in respect of an Actual or Potential Claim to the Employment Tribunal

Claimant	Respondent
Name: Miss Nina Cravens Address: Flat G/2 125 Lochbrae Road Glasgow G42 9HQ	Name: Central Bank of Caledonia (Scotland) plc Address: 240 Caledonia Street Glasgow G4 6PD

CASE NUMBER: 1301235/2009

Settlement reached as a result of conciliation before...

We the undersigned have agreed:

The Respondent agrees to pay the Claimant, without any admission of liability, the sum of £5,000 (Five Thousand Pounds) in full and final settlement of all claims under arising as a consequence of which the Claimant has brought or could bring against the Respondent arising out of the Claimant's contract of employment with the Respondent and its termination.

It is agreed that the above sum will be paid to the Claimant within 21 days of the Respondent receiving this Agreement signed by the Claimant or the Claimant's Representative.

Both parties agree that the fact and terms of this Agreement are entirely confidential between the parties and their representatives, including the Claimant's immediate family, and that it will be treated by an absolute duty of confidentiality by, and will not be revealed to any third party except as legally required to do so.

The Claimant will withdraw the Glasgow Tribunal Claim 7 days of receiving the Settlement Sum in addition to any other claim under Case Number: 1301235/2009 and will confirm that she has no objections to any request made by the Respondent to dismiss the Claimant's claim in terms of Rule 25 (4) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 thereafter.

Both parties agree not to instruct(s) or directly make, publish or otherwise bring or cause to be made, published or issued any statement or the author's statement concerning any matters set out by the Tribunal Claim or any matters relating to the other party (including all matters of the Respondent and members including its present or former officers, directors, employees, agents, contractors or assignees of the Respondent) nor with the Claimant do any act or omit any which it might reasonably be expected would damage the Respondent's business interests or reputation.

This agreement does not affect any rights the Claimant may have in relation to personal injury claims. The Claimant, by executing this Agreement, intends that she presently does not have all any circumstances which might give rise to any such claims.

By or on behalf of the Claimant: [signature] Date: 13/01/10

By or on behalf of the Respondent: [signature] Date: 15/1/2010

- Involves ACAS Conciliation Officer
- Usually after a claim is commenced.
- Doesn't require either party to obtain legal advice.
- It will only compromise Tribunal claims within the presumed contemplation of the Parties unless expressly widened (*Livingstone v Hepworth Refractories plc [1992] IRLR 63, EAT*).
- It can cover disputes that have not yet arisen yet (*Bank of Credit and Commerce International SA v Ali [2001] IRLR 292, HL)*

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Howard

- **Royal National Orthopaedic Hospital Trust v Howard [2002] IRLR 849 -** held that a form of general release was not effective to exclude the claimant from bringing a victimisation claim under the SDA in respect of an act that occurred some two years after the date of the agreement.

- The clause:

  - *"That the respondent will pay to the applicant within 28 days the sum of £12,000 in full and final settlement of these proceedings and of all claims which the applicant has or may have against the respondent (save for claims for personal injury and in respect of occupational pension rights) whether arising under her contract of employment or out of the termination thereof on 29 November 1998, or arising under the Employment Rights Act 1996, the Sex Discrimination Act 1975 or under European Community law. This payment is with no admission of liability."*

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Unknown Existing Claims

"If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for. We can see no reason why as a matter of public policy a party should not contract out of some future cause of action. But we take the view that it would require extremely clear words for such an intention to be found."

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Arvunescu

- In Arvunescu v Quick Release (Automotive) Ltd [2022] EWCA Civ 1600 an employee can waive a statutory claim which exists at the time a COT3 is signed, even if the claim is not discovered until afterwards, as long as the specific wording of the waiver is sufficient to include the relevant claim.

- The COT3 agreement purported to settle all claims that Mr Arvunescu:

"has or may have against [Quick Release] … arising directly or indirectly out of or in connection with [his] employment with [Quick Release], its termination or otherwise. This paragraph applies to a claim even though [he] may be unaware at the date of this agreement of the circumstances which might give rise to it or the legal basis for such a claim."

- Although *Arvunescu* concerned a COT3, in the absence of any contrary authority, it is also likely to apply to settlement agreements.

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Arvunescu

- This was not a case so much about the ability of a settlement agreement to waive future claims, as about whether a particular claim (which had arisen before signing the COT3) fell within the scope of the drafted waiver of claims.
- As such, it is difficult to draw general conclusions, although employers should review their standard settlement wording to ensure that, if they are seeking to waive future claims, this is abundantly clear.
- The distinction between claims arising "out of" employment and claims "in connection with" employment also suggests that employers would be well-advised to include both alternatives in their settlement wording.

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Unknown future claims

- *Bathgate v Technip Singapore PTE Ltd [2023] CSIH 48*, the Inner House of the Court of Session held that a settlement agreement meeting the relevant statutory requirements can be used to settle unknown future employment rights claims under the Equality Act 2010, that is, a claim which did not exist and was not known about by the parties at the time the settlement agreement was signed.

- Section 147 of the Equality Act 2010 (EqA 2010) lays down conditions for settling a claim using a qualifying settlement agreement. One of the specified conditions is that "the contract relates to the particular complaint" (section 147(3)(b), EqA 2010).

- Decisions of the Court of Session are binding on all inferior courts in Scotland. In England and Wales, they are merely highly persuasive.

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Review of case law

- Blanket settlement agreements are unlawful (***Lunt v Merseyside [1999] IRLR 458***). Although blanket agreements are prohibited, an agreement that identifies an actual or potential claim by a generic description or a reference to the section of the statute giving rise to the claim is lawful (***Hinton v University of East London [2005] IRLR 552***).

- While parties may agree that a settlement agreement is to cover future claims of which an employee does not and could not have knowledge, to do so effectively, the terms of the agreement must be absolutely plain and unequivocal (***Royal National Orthopaedic Hospital Trust v Howard [2002] IRLR 849***).

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Bathgate

- Took early retirement subject to ongoing detriments.
- claim of age discrimination alleging that his treatment amounted to direct or indirect age discrimination. Post-employment discrimination under section 108 of the EqA 2010.
- Tribunal – settled the claim
- EAT – not settled the claim
- INCS – settlement agreements can be used to settle future claims
- so long as the types of claim are clearly identified and the objective meaning of the words used encompasses settlement of the relevant claim: The requirement under section 147(3)(b) that the contract must "relate to the particular complaint" did not mean that the complaint must have been known of, or its grounds at least in existence, at the time of the agreement. The words "the particular complaint" simply required consideration of whether the complaint being made was or was not covered by the terms of the contract. They imported no temporal barrier to post-employment claims.

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Clifford v IBM

- Happily, the position in England and Wales has been resolved (subject to any appeal) by the EAT's decision ***in Clifford v IBM United Kingdom Ltd [2024] EAT 90***, which followed the Court of Session's decision in Bathgate.
- The EAT rejected Mr Clifford's contention that the Court of Session's decision in Bathgate was wrong and should not be followed. It agreed with the Court of Session's analysis that there was nothing in the relevant statutory language that precludes the settlement of future claims provided that appropriately clear language is used.
- the EAT considered that the statutory provisions include no temporal limitation on the kinds of claims that can be settled. If parliament had intended that employees could not waive their rights to bring claims arising out of future events, it could have said so (but it did not).

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Effective waiver

- a. As a matter of contract, the wording of the waiver must be sufficient to cover the relevant claims.
- b. The settlement agreement containing the waiver must satisfy the statutory requirements.
- c. The waiver must also comply with the other relevant principles from case law. That is, it must specifically identify the relevant claims by a generic description or a reference to the section of the statute giving rise to the claim and must be "absolutely plain and unequivocal" in relation to future claims. In practice, this means that the intention to waive future claims must be clearly and explicitly stated; any ambiguous or vague wording will not do.

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Ongoing employment

- In ***Clifford v IBM United Kingdom Ltd [2024] EAT 90***, the EAT held that an employment tribunal was correct to strike out disability discrimination claims on the basis that they were precluded by a settlement agreement entered into by Mr Clifford during his ongoing employment.
- Applying the Court of Session's decision in Bathgate, the EAT held that future claims could be validly compromised even if unknown to an employee at the time of concluding a settlement agreement. Unlike Mr Bathgate whose employment had ended, Mr Clifford's employment continued as an "inactive" employee in receipt of benefits under IBM's Disability Plan. However, the EAT found that this distinction was a distinction without a difference in this case. Both cases concerned future claims that had not arisen at the time the settlement agreement was signed.
- What about in active employment? **Unknown.**

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Public Policy?

- The initial employment judge in *Clifford* noted that it could not be the case that a claimant could 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. This would inevitably be contrary to public policy, dooming an employee to suffer future harassment without remedy.

- Hansard debate

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In practice…

- Regardless of the legal position on enforceability, it is unlikely that an employee who has received the independent legal advice required to create a binding settlement agreement will be willing to sign a wide-ranging waiver of future claims while employment is ongoing, or at least not without being provided with significant compensation specifically in return for doing so.

- It is therefore likely that the scope of any future claims waiver will become a more significant and potentially problematic negotiation point for parties to settlement agreements.

- Practitioners acting for both employers and employees must ensure they provide clear advice to their clients on exactly what is and is not covered by any waiver and the prospects of enforceability.

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Draft wording

- In full and final settlement of all claims whether under [insert potential claims such as the ERA 1996, TULR(C)A 1992, the EqA 2010], common law, tort (personal injury) or under EU law or under any other statute or in equity of whatsoever nature that exist or may exist which the claimant may have against the respondent arising from his employment with the respondent or out of its termination.

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- *"[Clause] The claimant undertakes and agrees, subject to the exclusions from the waiver of claims in para [??] hereof, that she will not reactivate by any process whatsoever the issues/complaints set out in informal or formal grievances, these proceedings or issue any further and/or new claim or claims of any nature against the respondent or any of its current or former officers or employees in any forum arising directly or indirectly from or in relation to the issues/complaints in the proceedings or her employment to the date of this agreement.*
- *[Clause] The claimant further agrees to withdraw and not reinstate any of her past or current grievances and/or appeals howsoever arising against the respondent and/or any current or former non-executive directors, employees, officers or agents of the trust …"*
- *[Clause] The terms of this agreement are without any admission of liability and payment is by the claimant in full and final settlement of the proceedings and any other claims anywhere in the world she may have and howsoever arising in connection with her employment up to the date of this agreement. This paragraph applies to a claim even though the claimant may be unaware at the date of this agreement of the circumstances which might give rise to it or the legal basis for such a claim.*

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- *[Clause] For the avoidance of doubt, the settlement in paragraph [??] includes but is not limited to:*
  - *the claimant's claim presently before the employment tribunal case number 2700958/2014;*
  - *any other statutory claims whether under the Employment Rights Act 1996,the Working Time Regulations 1999, the Equality Act 2010,the Employment Relations Act 1999, or otherwise;*
  - *any claims arising under any EU directive or any other legislation (whether originating in the UK, EU or elsewhere) applicable in the UK; and*
  - *any claim for any payment in lieu of notice, expenses, holiday pay or any other employee benefits or remuneration accrued during the period of the claimant's employment by the respondent but excludes any claims by the claimant to enforce this agreement, any latent personal injury claims which have not arisen and/or the claimant could not reasonably have been aware of as at the date of this agreement and any claims in relation to the claimant's accrued pension rights/entitlements."*

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Heather has built an impressive reputation in Employment Law, Discrimination Law and related areas.

She is ranked in the latest Chambers and Partners Directory: "Experienced in representing everyone from individuals to multinational corporations at any level of court"; and in the Legal 500: “She is quick to grasp the key issues and has strong client engagement skills.’

Heather has extensive experience representing and advising local authorities, schools and public bodies in all manner of employment related disputes, in particular those involving disability discrimination, whistleblowing and TUPE.