

SCHEDULE 5

Regulation 43

Validity of contracts, collective agreements and rules of undertakings

Part 1

Validity and revision of contracts

1.—(1) A term of a contract is void where—

- (a) the making of the contract is, by reason of the inclusion of the term, unlawful by virtue of these Regulations;
- (b) it is included in furtherance of an act which is unlawful by virtue of these Regulations; or
- (c) it provides for the doing of an act which is unlawful by virtue of these Regulations.

(2) Sub-paragraph (1) does not apply to a term the inclusion of which constitutes, or is in furtherance of, or provides for, unlawful discrimination against, or harassment of, a party to the contract, but the term shall be unenforceable against that party.

(3) A term in a contract which purports to exclude or limit any provision of these Regulations is unenforceable by any person in whose favour the term would operate apart from this paragraph.

(4) Sub-paragraphs (1), (2) and (3) shall apply whether the contract was entered into before or after the date on which these Regulations come into force, but in the case of a contract made before that date, those sub-paragraphs do not apply in relation to any period before that date.

2.—(1) Paragraph 1(3) does not apply—

- (a) to a contract settling a complaint to which regulation 36(1) (jurisdiction of employment tribunals) applies where the contract is made with the assistance of a conciliation officer within the meaning of section 211 of the Trade Union and Labour Relations (Consolidation) Act 1992⁽¹⁾;
- (b) to a contract settling a complaint to which regulation 36(1) applies if the conditions regulating compromise contracts under this Schedule are satisfied in relation to the contract; or
- (c) to a contract settling a claim to which regulation 39 (jurisdiction of county or sheriff courts) applies.

(2) The conditions regulating compromise contracts under this Schedule are that—

- (a) the contract must be in writing;
- (b) the contract must relate to the particular complaint;
- (c) the complainant must have received advice from a relevant independent adviser as to the terms and effect of the proposed contract and in particular its effect on his ability to pursue a complaint 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 complainant in respect of loss arising in consequence of the advice;
- (e) the contract must identify the adviser; and
- (f) the contract must state that the conditions regulating compromise contracts under this Schedule are satisfied.

(1) 1992 c. 52.

- (3) A person is a relevant independent adviser for the purposes of sub-paragraph (2)(c)—
- (a) if he is a qualified lawyer;
 - (b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union; or
 - (c) if he works at an advice centre (whether as an employee or a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre.
- (4) But a person is not a relevant independent adviser for the purposes of sub-paragraph (2)(c) in relation to the complainant—
- (a) if he is employed by, or is acting in the matter for the other party, or is a person who is connected with the other party;
 - (b) in the case of a person within sub-paragraph (3)(b) or (c), if the trade union or advice centre is the other party or a person who is connected with the other party; or
 - (c) in the case of a person within sub-paragraph (3)(c), if the complainant makes a payment for the advice received from him.
- (5) In sub-paragraph (3)(a) “qualified lawyer” means—
- (a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practising certificate, or a person other than a barrister or solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990⁽²⁾); and
 - (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice), or a solicitor who holds a practising certificate.
- (6) A person shall be treated as being a qualified lawyer within sub-paragraph (5)(a) if he is a Fellow of the Institute of Legal Executives employed by a solicitors’ practice.
- (7) In sub-paragraph (3)(b) “independent trade union” has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992.
- (8) For the purposes of sub-paragraph (4)(a) any two persons are to be treated as connected—
- (a) if one is a company of which the other (directly or indirectly) has control; or
 - (b) if both are companies of which a third person (directly or indirectly) has control.
- (9) An agreement under which the parties agree to submit a dispute to arbitration—
- (a) shall be regarded for the purposes of sub-paragraphs (1)(a) and (b) as being a contract settling a complaint if—
 - (i) the dispute is covered by a scheme having effect by virtue of an order under section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992, and
 - (ii) the agreement is to submit it to arbitration in accordance with the scheme, but
 - (b) shall be regarded as neither being nor including such a contract in any other case.
- 3.—(1) On the application of a person interested in a contract to which paragraph 1(1) or (2) applies, a county court or a sheriff court may make such order as it thinks fit for—
- (a) removing or modifying any term rendered void by paragraph 1(1), or
 - (b) removing or modifying any term made unenforceable by paragraph 1(2);

(2) 1990 c. 41.

but such an order shall not be made unless all persons affected have been given notice in writing of the application (except where under rules of court notice may be dispensed with) and have been afforded an opportunity to make representations to the court.

(2) An order under sub-paragraph (1) may include provision as respects any period before the making of the order (but after the coming into force of these Regulations).

Part 2

Collective agreements and rules of undertakings

4.—(1) This Part of this Schedule applies to—

- (a) any term of a collective agreement, including an agreement which was not intended, or is presumed not to have been intended, to be a legally enforceable contract;
- (b) any rule made by an employer for application to all or any of the persons who are employed by him or who apply to be, or are, considered by him for employment;
- (c) any rule made by a trade organisation (within the meaning of regulation 18) or a qualifications body (within the meaning of regulation 19) for application to—
 - (i) all or any of its members or prospective members; or
 - (ii) all or any of the persons on whom it has conferred professional or trade qualifications (within the meaning of regulation 19) or who are seeking the professional or trade qualifications which it has power to confer.

(2) Any term or rule to which this Part of this Schedule applies is void where—

- (a) the making of the collective agreement is, by reason of the inclusion of the term, unlawful by virtue of these Regulations;
- (b) the term or rule is included or made in furtherance of an act which is unlawful by virtue of these Regulations; or
- (c) the term or rule provides for the doing of an act which is unlawful by virtue of these Regulations.

(3) Sub-paragraph (2) shall apply whether the agreement was entered into, or the rule made, before or after the date on which these Regulations come into force; but in the case of an agreement entered into, or a rule made, before the date on which these Regulations come into force, that sub-paragraph does not apply in relation to any period before that date.

5. A person to whom this paragraph applies may present a complaint to an employment tribunal that a term or rule is void by virtue of paragraph 4 if he has reason to believe—

- (a) that the term or rule may at some future time have effect in relation to him; and
- (b) where he alleges that it is void by virtue of paragraph 4(2)(c), that—
 - (i) an act for the doing of which it provides, may at some such time be done in relation to him, and
 - (ii) the act would be unlawful by virtue of these Regulations if done in relation to him in present circumstances.

6. In the case of a complaint about—

- (a) a term of a collective agreement made by or on behalf of—
 - (i) an employer,
 - (ii) an organisation of employers of which an employer is a member, or

- (iii) an association of such organisations of one of which an employer is a member, or
- (b) a rule made by an employer within the meaning of paragraph 4(1)(b),

paragraph 5 applies to any person who is, or is genuinely and actively seeking to become, one of his employees.

7. In the case of a complaint about a rule made by an organisation or body to which paragraph 4(1)(c) applies, paragraph 5 applies to any person—

- (a) who is, or is genuinely and actively seeking to become, a member of the organisation or body;
- (b) on whom the organisation or body has conferred a professional or trade qualification (within the meaning of regulation 19) which the organisation or body has power to confer; or
- (c) who is genuinely and actively seeking such a professional or trade qualification which the organisation or body has power to confer.

8.—(1) When an employment tribunal finds that a complaint presented to it under paragraph 5 is well-founded the tribunal shall make an order declaring that the term or rule is void.

(2) An order under sub-paragraph (1) may include provision as respects any period before the making of the order (but after the coming into force of these Regulations).

9. The avoidance by virtue of paragraph 4(2) of any term or rule which provides for any person to be discriminated against shall be without prejudice to the following rights (except in so far as they enable any person to require another person to be treated less favourably than himself), namely—

- (a) such of the rights of the person to be discriminated against; and
- (b) such of the rights of any person who will be treated more favourably in direct or indirect consequence of the discrimination,

as are conferred by or in respect of a contract made or modified wholly or partly in pursuance of, or by reference to, that term or rule.

10. In this Schedule “collective agreement” means any agreement relating to one or more of the matters mentioned in section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (collective agreements and collective bargaining), being an agreement made by or on behalf of one or more employers or one or more organisations of employers or associations of such organisations with one or more organisations of workers or associations of such organisations.