

EQUALITY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 10: Contracts, Etc.

Section 142: Unenforceable terms

Effect

457. This section makes terms of contracts which discriminate against a person or would otherwise lead to conduct prohibited by the Act unenforceable in that respect. But a person who would have been disadvantaged by any such term will still be able to rely on it so as to obtain any benefit to which it entitles him.
458. For disability alone, this section also applies to terms of non-contractual agreements relating to the provision of employment services (within section 56(2)(a) to (e)) or group insurance arrangements for employees. These terms are referred to in the section as “relevant non-contractual terms”.
459. This section does not apply to a term of contract modified by an equality clause under Part 5, Chapter 3, because once the term is modified it is no longer discriminatory. Nor, as a result of section 148, does it deal with contractual terms which may breach the public sector equality duty (Part 11, Chapter 1) or the public sector duty regarding socio-economic inequalities (Part 1), to which different enforcement mechanisms apply.

Background

460. The section replaces provisions in previous legislation which had a similar effect including the specific protection for certain non-contractual provisions in the Disability Discrimination Act 1995.

Example

- A term in a franchise agreement which included a requirement that the franchisee should only employ Asian people (which would be unlawful direct discrimination because of race unless an exception applied) could not be enforced by the franchisor. But the franchisee could still obtain any benefit he is due under the term, for example he could continue operating the franchise. However, if the franchisee complied with the discriminatory term, a person discriminated against under it could make a claim against the franchisee for unlawful discrimination under other provisions in the Act.

Section 143: Removal or modification of unenforceable terms

Effect

461. This section allows a county court (or a sheriff court in Scotland) to modify or remove a contractual (or relevant non-contractual) term which is made unenforceable under section 142, when asked to do so by a person who has an interest in the contract (which

*These notes refer to the Equality Act 2010 (c.15)
which received Royal Assent on 8 April 2010*

includes anyone affected by it). The court may also decide that the term is to be treated as having been removed or modified during the period prior to the making of the order.

462. The court must first ensure that anyone who would be affected has been told of the proceedings and given an opportunity to make his or her views known. Rules of court determine what the court must do to meet this obligation.

Background

463. This section replaces similar provisions in previous legislation.

Example

- A person renting an office in a serviced office block could ask for a term in the rental contract to be amended if the term discriminated indirectly, for example by including an unjustified requirement that people entering the premises remove any facial covering (thus discriminating against Muslim women). The term could be adjusted by the court or sheriff to allow special arrangements to be made to satisfy both genuine security needs of other users and the religious needs of Muslim women visiting the claimant.

Section 144: Contracting out

Effect

464. Under this section, contractual and relevant non-contractual terms which try to exclude or limit the operation of any provision in the Act (which includes those dealing with equality of terms) or a provision of secondary legislation made under the Act (for example regulations made under section 81 (ships and hovercraft)) are unenforceable by the person in whose favour the term operates. There are exceptions to this to allow negotiated settlement of claims in the following circumstances:
- a contract settling a claim in an employment tribunal (including an agreement settling a claim for a breach of an equality clause) that has been negotiated with the help of a conciliation officer or which meets the standards set out in section 147 (meaning of qualifying compromise contract). This includes an arbitration agreement made in accordance with a scheme under section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992 (where the parties agree to submit a dispute to arbitration);
 - a contract settling a county or sheriff court claim.

Background

465. This section replaces similar provisions in previous legislation.

Examples

- A woman who thinks she may have a claim for unlawful discrimination upon being made redundant may give up any right to pursue the claim under the Act in return for payment. She will not then be able to ask a court to modify or remove that term so as to pursue the claim at a later date.
- However, if the agreement was not reached with the assistance of a conciliation officer or was not a qualifying compromise agreement, it would be unenforceable (and thus would not prevent the claimant pursuing the claim before an employment tribunal).

Section 145: Void and unenforceable terms

Effect

466. This section deals with collective agreements (which are defined in the Trade Union and Labour Relations (Consolidation) Act 1992).
467. It also deals with rules of undertakings of employers, trade organisations and qualifications bodies (which are defined in Part 5).
468. Any term of a collective agreement is rendered void to the extent that it discriminates against a person or would otherwise lead to conduct prohibited by the Act. Terms of collective agreements are made void rather than unenforceable because making them unenforceable would be of no help to those affected, since they are unenforceable in any case unless incorporated into a contract. The term is therefore made of no effect at all, leaving the interested parties to renegotiate.
469. A rule of an undertaking which discriminates against a person or would otherwise lead to conduct prohibited by the Act is made unenforceable. A rule of an undertaking is defined in section 148 as a rule made by a qualifications body or trade organisation in relation to membership or conferral of a qualification, or a rule made by an employer for application to employees and prospective employees.

Background

470. This section replaces similar provisions in previous legislation.

Examples

- A collective agreement which required jobs in a particular part of a factory to be given only to men would be void, so a woman who applied could not be refused on those grounds.
- An indirectly discriminatory rule of a qualifications body (providing for example a professional qualification for plumbers) which required that applicants must have two years' previous experience with a British firm would be unenforceable against a person who had the equivalent experience with a foreign firm. It would still be enforceable against a person who did not have the required experience at all (provided it was justified).

Section 146: Declaration in respect of void term, etc.

Effect

471. This section enables an employment tribunal to declare a term of a collective agreement void, or a rule of an undertaking unenforceable, as set out in section 142, when a person thinks that it might in the future have the effect of discriminating against him or her. Because collective agreements apply to many people in many (possibly varying) situations, it is not appropriate for a tribunal to modify them and so they are made void, rather than subject to modification or amendment, and the parties are left to renegotiate, bearing all those potentially affected in mind.
472. The section sets out who can make a complaint in each instance. Terms of discriminatory collective agreements can be challenged by employees or prospective employees. Rules of undertakings of employers can be challenged by employees or prospective employees; those of trade organisations by members or prospective members; and those of qualifications bodies by persons seeking or holding relevant qualifications (as defined in section 54).

Background

473. This section replaces similar provisions in previous legislation.

Example

- A person who is studying for an engineering qualification who is told he will only be eligible for it if he passes a test of his ability to write English can ask a tribunal to declare that the rule requiring the test is indirectly discriminatory and therefore, if unjustified, unenforceable.

Section 147: Meaning of “qualifying compromise contract”

Effect

474. This section sets the conditions under which a compromise contract settling a case can be lawful, even though it seeks to limit the application of the Act under section 144.
475. It must be a written contract which meets each of the following conditions: the contract must be tailored to the circumstances of the claim, the complainant must have received independent advice from a named person who is insured or indemnified against the risk of a claim against him arising from that advice, and the contract must state that the conditions about independent advice and insurance have been met.
476. The section describes who can be an independent adviser and includes a power to add new descriptions of people who may be independent advisers in the future. It makes clear that a conflict of interest prevents a person being an independent adviser.

Background

477. The section replaces provisions in previous legislation which had the same purpose. The power to add to the kinds of person who may be independent advisers could be used to add, for example, Fellows of the Institute of Legal Executives employed by a solicitors' practice.

Examples

- An employee who settled a claim at an employment tribunal on the advice of a lawyer who works for the employer he was seeking to sue would still be able to pursue the claim (assuming a conciliation officer was not involved in the settlement). The settlement agreement would be unenforceable because the lawyer had a conflict of interest and therefore the agreement would not be a qualifying compromise contract.
- An employee who settled a claim of harassment in a contract which also provides that she will forego all other claims arising under the Act in exchange for a fixed sum would still be able to pursue a claim for damages because of a discriminatory failure to promote her. The term of the contract precluding all claims would be unenforceable in respect of the discrimination claim because it is insufficiently tailored to the circumstances of the claim and therefore is not a qualifying compromise contract in respect of it.

Section 148: Interpretation

Effect

478. This section explains what is meant by various terms used in this Part of the Act, or applies definitions provided elsewhere. These are referred to in the notes on earlier sections.