



Equality Act 2010 briefing 2: Compromise Agreements



Head of Cloisters, Robin Allen QC, details the potential changes to advising on compromise agreements under the Equality Act 2010

The Equality Act 2010 prohibits contracts which seek to exclude the operation of the Act in the field of claims to Employment Tribunals unless the contract is a qualifying compromise contract or is made with the assistance of an ACAS conciliation officer: section 144. One of the first apparent problems to emerge with the drafting of the Equality Act 2010 concerns section 147 which defines the meaning of a “qualifying compromise contract”.

The text of section 147(5) seems at a first read to suggest that a claimant’s representative, whether a lawyer or union representative, although otherwise qualified and insured, cannot advise on a compromise agreement so as to make the agreement a binding

contract of compromise to exclude or terminate rights under the Equality Act 2010. As a result much time and effort could be expended in getting ACAS to arrange for the parties to enter into an agreement on ACAS’s form COT3.

Is this reading correct and is that effort necessary? There is good reason to think that this is not what the Act intended to happen and that the old system that prevailed under the old legislation still applies. Lawyers and others will of course need to be careful about the new law but below we explain why we think that the Equality Act can be read as meaning no change. Certainly the Explanatory Notes¹ to the Act have not suggested that any change was intended to the previous provisions on compromise agreements: [482] – [485].

Read by itself it appears from section 147(5)(d) that a complainant’s solicitor is a person “who is acting for a person” who is, per section 147(5)(a) and (b), either “a party to the contract or the complaint” or “connected to” such a person. On that basis section 147 (5)(d) would prohibit them from being an “independent adviser”.

¹ See http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen_20100015_en.pdf

The new section 147 says -

147 Meaning of “qualifying compromise contract”

- (1) This section applies for the purposes of this Part.
- (2) A qualifying compromise contract is a contract in relation to which each of the conditions in subsection (3) is met.
- (3) Those conditions are that—
 - (a) the contract is in writing,
 - (b) the contract relates to the particular complaint,
 - (c) the complainant has, before entering into the contract, received advice from an independent adviser about its terms and effect (including, in particular, its effect on the complainant’s ability to pursue the complaint before an employment tribunal), (d) on the date of the giving of the advice, there is in force 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 from the advice,
 - (e) the contract identifies the adviser, and
 - (f) the contract states that the conditions in paragraphs (c) and (d) are met.
- (4) Each of the following is an independent adviser—
 - (a) a qualified lawyer;
 - (b) an officer, official, employee or member of an independent trade union certified in writing by the trade union as competent to give advice and as authorised to do so on its behalf;
 - (c) a worker at an advice centre (whether as an employee or a volunteer) certified in writing by the centre as competent to give advice and as authorised to do so on its behalf;
 - (d) a person of such description as may be specified by order.
- (5) Despite subsection (4), none of the following is an independent adviser in relation to a qualifying compromise contract—
 - (a) a person who is a party to the contract or the complaint;
 - (b) a person who is connected to a person within paragraph (a);
 - (c) a person who is employed by a person within paragraph (a) or (b);
 - (d) a person who is acting for a person within paragraph (a) or (b) in relation to the contract or the complaint;
 - (e) a person within subsection (4)(b) or (c), if the trade union or advice centre is a person within paragraph (a) or (b);
 - (f) a person within subsection (4)(c) to whom the complainant makes a payment for the advice.
- (6) A “qualified lawyer”, for the purposes of subsection (4)(a), is—
 - (a) in relation to England and Wales, a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation;
 - (b) in relation to Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practicing certificate.
- (7) “Independent trade union” has the meaning given in section 5 of the Trade Union and Labour Relations (Consolidation) Act 1992.
- (8) Two persons are connected for the purposes of subsection (5) if—
 - (a) one is a company of which the other (directly or indirectly) has control, or
 - (b) both are companies of which a third person (directly or indirectly) has control.
- (9) Two persons are also connected for the purposes of subsection (5) in so far as a connection between them gives rise to a conflict of interest in relation to the contract or the complaint.

This would seem to be a very surprising result since it would overturn (contrary to the Explanatory Notes avowed intentions for the provision) well established and uncontroversial practice.

However this is a reading which does not take account of the full context. The key to understanding this apparent paradox lies in appreciating the sequential nature of the provisions in section 147. Section 147(3)(c) makes clear that the complainant and the independent adviser are separate people. Subsections 147(4) and (5) are concerned only with who can and cannot be an “independent adviser”; therefore they are not concerned with the complainant.

So subsections 147(5)(a) and (b) must not be read as referring to the complainant at all; they can only be referring to “a party to the contract or the complaint” who is not the complainant, or someone connected to such a person. Accordingly, section 147(5)(d) cannot be referring to a person acting for the complainant; it only prohibits a person who is acting for another party or for a person connected with another party from being an independent adviser. Section 147(5) is concerned only to prohibit persons who are otherwise within section 147(4) from being an “independent adviser”. This makes sense since it will prohibit apparent or real conflicts of interest which would undermine the “independence” of the adviser.

If, for instance, a person who was “qualified lawyer” within section 147(4)(a) was a party to the contract of compromise, they would fall within section 147(5)(a) and would therefore be prohibited from being an independent adviser; if they were acting for a party (other than the complainant) to the contract of compromise, section 147(5)(d) would also prohibit such a person from being an “independent adviser”.

It is understood that the Government Equalities Office is considering publishing information on its website to make this clear before long.

What to do?

Only a court or tribunal can authoritatively determine this point of course, so until that happens, in a case in which a huge amount is at stake it may be that the cautious approach is to have the certainty of an ACAS COT 3. However, as all advisers are aware, speed can often be of the essence at the point when the parties have reached agreement to compromise claims in the discrimination field. The argument above which is consistent with the Explanatory Memorandum also provides a common sense outcome consistent with past practice. Despite the apparent awkwardness of the wording of section 147(5)(d) there would seem to be little risk in continuing as before.