

# BLAKE-TURNER

## *EMPLOYMENT BULLETIN*

### November 2010

#### EQUALITY ACT 2010

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You may or may not be aware that the Equality Act 2010 which came into force on 1 October 2010 has replaced nearly all of the preceding legislation, including such statutes as the Sex Discrimination Act 1975, the Race Relations Act 1975 and the Disability Discrimination Act 1995, the Equal Pay Act 1970 as well as a number of other Acts which we will not go into here.

The Equality Act 2010 consolidates all of the provisions from that previous legislation into the new Act and makes some additional provisions. However, one thing to draw to your attention is a problem which has recently emerged with regard to a provision of the Equality Act 2010.

Section 147 of the Equality Act (“the Act”) sets out the requirements that must be fulfilled in order to have a qualifying compromise contract to settle claims between employers and employees arising under the Act. Most importantly the complainant must receive advice from an “independent advisor” about its terms and effect.

The way this section is currently drafted suggests that a solicitor who was instructed by the employee prior to the production of the final agreement for consideration will be precluded from acting any further.

The Law Society has been in touch with the Government Equalities Office which has stated that “*the situation which existed prior to the passage of the Act*” remains unchanged and, by implication, that a solicitor who had advised the client in respect of an action would also be able to provide advice on a compromise agreement.

However, the Law Society has taken Counsel’s advice which disagrees with that view. That disagreement is shared by the majority of practitioners. The advice indicates that a Court or Tribunal would construe Section 147 (5) (d) as meaning that a solicitor who was instructed by the employee prior to the production of the final contract for consideration; or who has acted in any way for the employee during the course of his complaint – even in a supporting role to the lead adviser as holiday cover – will be precluded from acting any further as an independent legal adviser in that compromise contract. Advice from Counsel also indicates that a solicitor to whom the client was referred solely for the purpose of advising on the agreement would not be able to provide such advice. The Law Society takes the view that the effect of this is that there is no way in which compromise agreements under the Equality Act can remain enforceable. Other practitioners share the view that there is a drafting error in the Act which could affect the enforceability of compromise agreements intended to settle claims.

Practitioners hope that an Employment Tribunal faced with interpreting this section would agree that its meaning does not accord with the responding sections of other legislation such as Section 203 of the Employment Rights Act 1996 and therefore conclude that this could not have been the Government's intention.

However, there is clearly a risk that compromise agreements will be unenforceable. The advice therefore is to either use the Conciliation Service ACAS to settle disputes (but that only applies where there are Tribunal proceedings on foot) or to use "claw back" provisions in any settlement to prevent later Equality Act claims against the terms of settlement. Part of the settlement payments could also be delayed until a period within which an ex-employee could make a claim (three months from the effective date of termination).

The drafting of Section 147 is clearly an error as it was intended that there should be no change in the legislation under the consolidation of this statute. Until that time or until the Courts are required to make a declaration as to the meaning of this provision, employers are left in the uncomfortable position that there is a risk that their compromise agreements can be challenged as unenforceable.

Rupert Farr is a commercial litigation solicitor of 20 years experience. He qualified and worked at Freshfields for some 7 years before moving on to spend some time outside the law in business. Upon his return to private practice he has worked with leading global law firms and has been with Blake-Turner since 1996.

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**IMPORTANT:** This update is only intended as a general statement of the law. No action should be taken in reliance on it without specific legal advice.