

**EXPLANATORY MEMORANDUM TO  
THE EQUALITY ACT 2010 (AMENDMENT) ORDER 2012**

**2012 No. 334**

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
  - 2.1 This instrument clarifies the meaning of part of section 147 of the Equality Act 2010 (“the Act”). That section sets out the conditions under which a compromise contract settling a case brought under the Act can be lawful. The instrument maintains the effect of the current drafting, but makes its meaning more transparent to address a perception that the section is currently defective.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None.
4. **Legislative Context**
  - 4.1 The Act replaces previous discrimination legislation, such as the Race Relations Act 1976 and the Sex Discrimination Act 1975, some of which contained provisions equivalent to Section 147.
  - 4.2 Section 147 is a provision within Part 10 of the Act (Contracts etc). It sets out the conditions that must be fulfilled in order for a compromise contract settling a dispute under the Act to be legally valid. This Order is intended to clarify, through an amendment to subsection (5) of section 147, that a complainant may use their lawyer as the independent advisor who must, under the Act, advise on a contract prior to it being signed. Section 147 came into force in October 2010, along with most of the Act.
5. **Territorial Extent and Application**
  - 5.1 This instrument applies to Great Britain.
6. **European Convention on Human Rights**

The Home Secretary, the Rt Hon Theresa May MP, has made the following statement regarding human rights:

*“In my view the provisions of The Equality Act (Amendment) Order 2012 are compatible with the Convention rights”.*

## **7. Policy background**

- **What is being done and why**

7.1 The Act is intended, among other things, to provide employers and employees with a choice of effective dispute resolution mechanisms. It also implements the requirements of Council Directives 2000/78/EC, 2000/43/EC, 2004/113/EC and 2006/54/EC. These require member States to introduce judicial or administrative procedures which, where deemed necessary by the Member States, include conciliation procedures for the enforcement of the requirements under the principle of equal treatment. They also provide that all terms in a contract which are contrary to the principle of equal treatment are or may be null and void. Section 147 is specifically concerned with an option which Member States may adopt, to permit prohibited terms not to be made null and void.

7.2 The Order addresses the perception of some lawyers and employers that there is a problem with the current drafting of section 147. The proposed amendment should ensure that in cases of alleged discrimination, employers and employees feel confident in using compromise contracts as a means of dispute resolution and lawyers feel confident in recommending such contracts to clients.

7.3 Compromise contracts are one of two methods (the other being the Advisory, Conciliatory and Arbitration Service (Acas) “COT 3” procedure) of resolving employment disputes without the need to go through the formal Employment Tribunal process. They can also be used as an alternative means of resolution after a case has entered the tribunal stage. Such contracts are very similar to compromise agreements that are used to resolve employment rights disputes (for example, unfair dismissal). Compromise contracts are a means of settling disputes concerning alleged discrimination, harassment or victimisation by an employer against an employee. Often they are used to resolve cases involving a combination of employment and discrimination claims.

7.4 A key principle of compromise contracts is that the complainant must seek independent advice when drawing one up with their employer, to ensure that their interests are fully safeguarded in the process. Section 147 sets out who can be an independent adviser for this purpose, and it also states who is excluded from being such an adviser. In the autumn of 2010 members of the legal profession and the Law Society publicly expressed the view that on their reading, section 147 was defective because it did not allow a complainant to use their lawyer as an independent adviser prior to signing a contract. They specifically drew attention to sub-section (5) (d) of section 147, which, if read out of context, appears to stipulate that a person acting for the complainant (e.g., their lawyer) cannot be their independent adviser. If this were so it

would not be a logical or desired outcome since a complainant's lawyer would in most cases be the logical choice to provide the requisite independent advice.

7.5 The Government maintains that section 147 works in the way intended. Subsection 147(4) sets out who can be an independent advisor for a complainant. Subsection 147(5) then sets out who, irrespective of subsection 147(4), cannot be an independent advisor. Subsections 147(8) and (9) then set out who would be considered persons involved in or parties to a dispute and so not suitable to be an independent advisor.

7.6 However, despite Government reassurances, there is anecdotal evidence as well as evidence from recent consultation (see below) that people in the legal profession and business continue to lack confidence in using compromise contracts to settle discrimination cases. There is some corresponding evidence of an increase in referrals to Acas which might be attributable to the uncertainty, but in the absence of data collection on the use of compromise contracts, it is not possible to be definitive about this.

7.7 Given that compromise contracts are likely to constitute an increasingly important means of dispute resolution in future, the Government is proposing to amend the legislation to restore confidence in the system, which currently appears to be lacking. We are doing this by amending section 147(5), to put it beyond doubt that a person acting for the complainant (e.g. their lawyer) is not disqualified from advising him or her in relation to a compromise contract.

## **8. Consultation outcome**

8.1 No specific consultation was undertaken on this order. However, a more general consultation was carried out in 2007 – “*A Fairer Future: Proposals for a Single Equality Bill for Great Britain*”, which proposed the harmonisation and simplification of existing equality legislation. It also had the aim of ensuring “*that people can resolve their disputes in ways that are accessible, proportionate and effective.*” Compromise contracts were not specifically covered as part of the consultation because the then Department for Business, Enterprise and Regulatory Reform (BERR) ran a concurrent “Dispute Resolution Review” on workplace disputes. The BERR review found that compromise agreements were viewed as a valuable means of alternative dispute resolution by business.

8.2 More recently, the Department for Business, Innovation and Skills completed a further review on resolving workplace disputes, a consultation on which closed in October 2011. A number of respondents, including a range of organisations representing business expressed concern about the uncertainty surrounding the legal status of compromise contracts.

## **9. Guidance**

9.1 No guidance has been specifically published alongside this instrument. Guidance for employers and employees on compromise agreements is

available both on the Government Equalities Office page of the Home Office website and from the Equality and Human Rights Commission, as part of wider guidance on the Act.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies as a whole is minimal, but those in dispute with their employees will potentially benefit if their preferred means of settling the dispute is through a compromise contract.

10.2 The impact on the public sector as a whole is minimal, but with the same potential benefits explained above.

10.3 A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available at from the Home Office at <http://homeoffice.gov.uk/equalities> and is published with the Explanatory Memorandum alongside the instrument on [www.legislation.gov.uk](http://www.legislation.gov.uk).

## **11. Regulating small business**

11.1 This instrument applies to small business.

11.2 No steps have been taken to minimise the impact of the requirements on firms employing up to 20 people because this instrument is clarifying existing law in a way that does not burden business.

11.3 A range of guidance on the Act has been prepared and published by bodies including the Equality and Human Rights Commission, Acas and the British Chambers of Commerce, some of which is tailored particularly for small businesses. No guidance is planned to assist small businesses with this particular instrument for the reason given above.

## **12. Monitoring & review**

12.1 As with the Act, the effect of this instrument will be monitored and reviewed on an ongoing basis by the Government and the Equality and Human Rights Commission.

## **13. Contact**

Mr Matthew King at the Government Equalities Office (Tel: 0207 035 8092 email: [Matthew.king2@homeoffice.gsi.gov.uk](mailto:Matthew.king2@homeoffice.gsi.gov.uk)) can answer any queries regarding this instrument.