

AGE DISCRIMINATION

Are unfair terms in contractual redundancy schemes void?

Stephen Brown and Kathryn Donovan consider how the courts might interpret apparently contradictory wording in the Age Regulations



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'It is not clear which part of the Age Regulations applies to an age discriminatory provision contained in a redundancy scheme.'

The Employment Equality (Age) Regulations 2006 (the Age Regulations) are now a significant feature on the employment law landscape. Employers are becoming increasingly conscious of them, and many are changing or seeking to change their practices to comply with them. One aspect causing headaches for employers and their legal advisers is the effect of the Age Regulations on benefits provided to employees, such as enhanced contractual redundancy schemes.

While case law is emerging to aid practitioners in identifying provisions of schemes that potentially infringe the Age Regulations, there has been virtually no discussion – in case law, articles or practitioner texts – of the consequences for contractual redundancy schemes if a tribunal were to find that they are age discriminatory.

It might be assumed that parts of the scheme that are discriminatory and cannot be justified will be void. However, Schedule 5 to the Age Regulations, which sets out the relevant provisions, is not the easiest piece of legislation to interpret. Schedule 5 contains two parts: one for age discriminatory contractual terms, and another for age discriminatory provisions in collective agreements. Both contain provisions that refer to age discriminatory terms that cannot be objectively justified as being 'void'. However, the

practical consequences of Schedule 5 are far from clear, as both parts contain apparently contradictory paragraphs that refer to the term or provision being not 'void' but 'unenforceable' against the 'victim' of the discrimination, or being without prejudice to employees' rights under the scheme.

This article considers:

- which part of Schedule 5 applies to a term of a collective agreement that becomes incorporated into employees' contracts of employment;
- whether Schedule 5 gives 'victims' or 'beneficiaries' of discrimination a right to elect to enforce otherwise void age discriminatory benefit schemes; and
- if Schedule 5 gives employees a right to enforce age discriminatory benefit schemes, the implications of this for the employer.

The scheme

These questions are perhaps best considered using a hypothetical redundancy scheme derived from a collective agreement that has been imported into employees' contracts of employment. Under the scheme, redundancy payments are determined on the basis of a person's age and length of service, as described in the box on p14.

The scheme is *prima facie* directly age discriminatory and, for the purpose of this article, it is assumed that the scheme cannot be objectively justified.

Contractual term derived from a collective agreement

Schedule 5 to the Age Regulations contains two parts: Part 1, 'Validity and revision of contracts', and Part 2, 'Collective agreements and rules of undertakings'. Unlike Part 1, which simply refers to 'contracts', Part 2

On the face of it, therefore, it is not clear which part applies to the age discriminatory provision contained in the scheme: should Part 1 apply because the scheme is incorporated into the employees' employment contracts, should Part 2 apply because the scheme is derived from a collective agreement, or should both parts apply and, if so, what happens if they conflict?

There has, to our knowledge, been no case law on the point.

... it provides for the doing of an act which is unlawful by virtue of these Regulations.

Therefore it would appear that the scheme is void, and so perhaps the statutory redundancy scheme applies, but only after a court has declared the scheme void on the application of 'a person interested in [the] contract' under paragraph 3(1). In our example, the 54-year-old may wish to complain to a court that their redundancy payment would have been higher (by 2.5 times their weekly wage) had they been the same age as their 56-year-old colleague at the date of dismissal.

However, the matter is complicated by paragraph 1(2), which appears to provide that a discriminatory term is not void in so far as it applies to the 'victim' of the discriminatory term (in this instance, the 54-year-old), but rather is unenforceable against that person. The effect of paragraph 1(2) is not clear, and government guidance does not shed much light on the issue. In our example, the effect of this may be that the 54-year-old can enforce their entitlement to an enhanced redundancy payment under the scheme, rather than only being entitled to a statutory redundancy payment.

If the scheme is governed by Part 2
If the scheme should instead be dealt with by Part 2 of Schedule 5 (because it is derived from a collective agreement), paragraph 4(2) provides that the term is void where the term:

... provides for the doing of an act which is unlawful by virtue of these Regulations.

On the face of it, therefore, as with Part 1, the scheme is void. However, paragraph 9 of Part 2 qualifies this:

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

Both parts of Schedule 5 to the Age Regulations refer to age discriminatory terms that cannot be objectively justified as being 'void'.

contains a description of the provisions to which it applies, those being, broadly:

- any term of a collective agreement, including terms of collective agreements which are not legally enforceable contracts;
- any rule made by an employer for application to all or any of the people it employs; and
- any rule made by a trade organisation for application to all of its members.

However, the Incomes Data Services' *Employment Law Supplement on Age Discrimination*, published in August 2006, considered that:

... where a collective agreement forms part of a legally binding contract, it will be caught by para [sic] 1 of Schedule 5.

A 'right of enforcement'?

If the scheme is governed by Part 1
The relevant provision for the purposes of the scheme in Part 1 of Schedule 5 is paragraph 1(1)(c), which provides that a term of a contract is void where:

Hypothetical contractual redundancy scheme

- Redundant employees who have accrued more than two years' service are entitled to the larger of either a redundancy payment calculated in accordance with the statutory scheme or a payment under the scheme.
- Under the scheme, employees are entitled to payment based on their salary at the date of their dismissal, calculated by reference to their age and length of service as follows.
- Redundancy payment = [age multiple] x [weekly wage] x [years of accrued service].
- The age multiple is either 1, for employees aged 54 or younger, or 1.5, for employees aged 55 or over.

Therefore an employee made redundant at the age of 56 after five years' service would be entitled to a redundancy payment equal to 7.5 times their weekly wage. An employee with the same length of service but who is 54 years old at the date of redundancy would be entitled to a payment equal to five times their weekly wage.

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.

One interpretation of this paragraph is that if the scheme is declared void by a court by reason of paragraph 4(2) of Part 2 (and not paragraph 1 of Part 1):

- a victim of the discrimination, such as the 54-year-old in our example, may still claim a payment under the scheme; and
- a person who profits from the discrimination, such as the 56-year-old, may still claim a payment under the scheme; but
- neither the victim nor the beneficiary of the discrimination could elect to enforce a scheme which (unlike the scheme in our example) provides for a defined pot of money to be shared out in portions calculated on an age discriminatory basis, so that the effect of the beneficiary of the discrimination electing to enforce this scheme when claiming their payment would mean that there is less in the pot for the victim's payment.

A second interpretation might be that the collective agreement itself is void by reason of paragraph 4(2) but, pursuant to paragraph 9, the terms incorporated into the individuals' contracts of employment are not affected by Part 2. If this is the correct interpretation, what is the impact of the Age Regulations on the discriminatory terms incorporated into the employment contracts? Does paragraph 9 mean that an

employee can enforce the terms against the employer even if the employee benefits from the discrimination in the scheme (in our example, the 56-year-old)? Or are the contractual terms subject to the effect of Part 1 of Schedule 5, in which case only the victim (the 54-year-old) can enforce the terms?

For the employer in our hypothetical scheme, it would be better if the effect of Part 2 were that contractual terms are still dealt with under Part 1 (and therefore only the victim can enforce

them), but that may not be the most natural interpretation of paragraph 9 of Part 2.

Implications for the employer

If the first interpretation of paragraph 9 set out above is correct, this could cause some surprising results:

- The scheme that is 'void' under paragraph 4(2) is not, in practical terms, void at all if any employee elects to enforce it.
- This would result in a levelling-up of payments under the scheme. The 56-year-old employee could, even if the scheme is declared void under paragraph 4(2), choose to enforce their rights under it. The 54-year-old employee could bring a claim against the employer based on the disparity between their redundancy payment and the 56-year-old employee's. The effect is a levelling-up of payments for the entire workforce.
- This would leave the employer with little option but to dismiss and re-engage each employee to whom the scheme applies on new terms and conditions if it wished to stop the age discriminatory scheme from applying to its retained workforce.

The courts' interpretation

Thus far, there do not appear to have been any reported cases that have considered the effect of these provisions. Counsel for the employer in *Rolls-Royce plc v Unite the Union* [2009] briefly referred to Schedule 5 (as recorded in paragraph 27 of the judgment) as rendering void a term in a collective agreement that provided for unlawful discrimination on the grounds of age.

The High Court in *Rolls-Royce* was not called on to consider which part

Counsel for the employer in Rolls-Royce plc v Unite the Union briefly referred to Schedule 5 as rendering void a term in a collective agreement that provided for unlawful discrimination on the grounds of age.

of Schedule 5 applies to collective agreements that import contractual terms into employment agreements, as the collective agreements in question were non-contractual. As the Court found that the scheme in *Rolls-Royce* pursued a legitimate aim, the question of the impact of paragraphs 4(2) and 9 was not considered.

In other cases considering whether contractual redundancy schemes infringe the Age Regulations, there is little discussion of the effect of a benefit scheme that is void because of age discrimination. In *MacCulloch v Imperial Chemical Industries plc* [2008], for example, the appeal court referred the matter back to the employment tribunal, which would determine the effect if it found that the scheme infringed the Age Regulations.

It therefore seems that the answers to all three of our questions remain uncertain. This is surprising, given the potentially significant (and expensive) implications, and it will be interesting to see the results. ■

MacCulloch v Imperial Chemical Industries plc [2008] UKEAT 0119/08/2207
Rolls-Royce plc v Unite the Union [2009] EWCA Civ 387