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The fall from grace of non-disclosure agreements

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A non-disclosure agreement (NDA) – sometimes known as a confidentiality clause or “gagging” clause - is an agreement which controls what information an individual can share with others. Often, they prevent people from talking about allegations or making adverse comments about organisations (also known as a non-derogatory comments clause).

For years, confidentiality clauses have featured as standard in agreements to settle disputes without ever receiving much attention. That changed in 2017, following allegations about Harvey Weinstein, when it came to light that he had inappropriately used NDAs to prevent his victims from speaking publicly about his alleged conduct. Some of the NDAs he used contained express restrictions on when his victims could speak to legal advisers, medical professionals and the police. Harvey Weinstein wasn’t alone in using NDAs in cases of alleged abuse and harassment.

Since then, the public and political backlash against NDAs has been significant, as this article highlights. The position now is that employers across all sectors need to consider carefully whether to use NDAs at all when resolving any case of harassment, discrimination or abuse (amongst others), and if NDAs are to be used they must be carefully drafted and all parties properly advised.

NDAs – looking back

In the employment context, NDAs are often known as confidentiality clauses (in settlement agreements). These are agreements used to settle an employment dispute and/or agree the departure of a worker (this article uses the term “worker” to refer to any individual protected by the work provisions of the Equality Act 2010). Settlement agreements tend to involve an employer agreeing to pay money to a worker, in return for which that worker agrees not to bring claims against the employer and often to keep both the agreement and the details of the dispute confidential.

Although fortunately NDAs as extreme as those used by Weinstein are rare, looking back it is fair to say that even in the least restrictive of settlement agreements, the scope of the confidentiality clauses tended to be very broad and the carve outs limited. Certainly most NDAs didn’t make it clear what a worker could or couldn’t say to avoid breaching the provisions. So, although clauses didn’t expressly tend to prevent workers reporting matters to the police or regulators, the fact that they were silent over whether workers could do so had the same deterrent effect.

Almost as significant as the drafting was the way these clauses tended to be presented to workers. Employers – (and lawyers) – tended to see confidentiality clauses as integral to a settlement agreement, so much so that they were included without discussion or negotiation and it was often made clear that settlement couldn’t be reached without them.

Where are we now?

In June 2019, the Women and Equalities Select Committee (WESC) published a highly critical report on the use of NDAs in discrimination cases (see our post here). In

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particular, it condemned the way that allegations of discrimination were routinely covered up by "legally sanctioned secrecy" in the form of NDAs. The WESC's report put a spotlight on the "detrimental effect an NDA can have on the lives of ordinary people", emphasising that for individuals the process of signing an NDA is not "benign", and can have a long-term "gagging or chilling effect".

The report highlighted how many workers struggled with the lack of clarity about what they were or were not allowed to say. This was particularly difficult when it came to future employment, where people reported feeling extremely restricted in what they could say in future interviews, "with some suggesting that this had cost them several potential jobs". And note that in many cases these workers had been the victim of sexual harassment. Some had suffered psychological damage as a result of their experiences; many believed the NDA prevented them from disclosing information to medical practitioners.

Proposed action

The last couple of years have seen a shift in the way NDAs are drafted, with more agreements now including a much more explicit list of carveouts for workers. But the fact that there is more to be done was acknowledged by the government in its response to the WESC's report, published in October 2019. Following consultation, the government has committed to taking forward a number of the WESC's recommendations. This includes a plan to legislate to ensure NDAs clearly set out their limitations and do not prevent workers disclosing matters to the police or regulators, as well as an intention to ensure that workers receive independent legal advice on the limitations of NDAs. There is, however, no timeframe for when this legislation will be brought forward, and no mention was of it was made in December's Queen's Speech.

Even if legislation is forthcoming, arguably the government's proposals do not move us very far forward. Some of the WESC's more radical proposals, which might have led to significant change in this area, were rejected by the government (such as a punitive damages, a presumption that employers would pay workers' costs in successful harassment claims, or making it a criminal offence to propose NDAs without sufficient carveouts).

But change does not only come about by means of legislation. In October 2019, the Equality and Human Rights Commission (EHRC) published its own guidance on the use of confidentiality agreements in discrimination cases. Although this is not a statutory code, it may still be used as evidence in legal proceedings or for example in investigations into cases, and so it is not something organisations should ignore.

Given the EHRC's broad remit (to ensure compliance with human rights law and the Equality Act 2010), although its guidance is aimed at employers, it is also of clear relevance to those who work in safeguarding. As the EHRC explains, employers are under a duty to provide a safe working environment to all staff. An important step in achieving this is to create a culture in which individuals feel safe to speak about their experiences to the right people about potential harassment discrimination and to expose abuse. The EHRC identifies NDAs as being part of the problem in silencing people who try to raise concerns, by preventing them from speaking out and making them fearful about the consequences if they do, and in turn deterring others from coming forward. The aim of its guidance is to ensure that NDAs no longer play a detrimental role in masking discrimination or other abuse.

As such, the EHRC's good practice recommendations go much further than the government's proposals and place onerous expectations and obligations on organisations. For ease, a full summary of the EHRC's recommendations is included below. The general message though is that a conscious decision should be made in each case as to whether it is reasonable to include an NDA in a settlement agreement (or

other agreement to settle a dispute). Even if a clause is used, it will rarely be appropriate to prevent a worker from discussing an act of discrimination other than in limited circumstances. Where settlement is reached, organisations should not treat it as the end of the matter and should continue to investigate allegations where it is possible to do so.

Of course, it should also be remembered that it very much remains the case that NDAs can be challenged in the courts and stuck out for being unenforceable and in breach of the Equality Act and Employment Rights Act. Another reason why it is important to think carefully about whether and what to include in an NDA.

Where to go from here?

The EHRC guidance sends a very clear message about the direction of travel regarding NDAs, something which is reiterated in its recent technical guidance on sexual harassment and harassment at work. Here are a few thoughts about how this might impact on their use:

• The trend for including carveouts in NDAs will continue. To ensure these are suitably clear and specific about what can and cannot be shared, organisations may need to start considering some of the softer issues that affect workers after an agreement is signed, such as clearer guidance on what they might be allowed to say in a job interview, to family or friends, or to a counsellor or other medical professionals etc;

• Lawyers and employers may need to make a mental shift away from the belief that confidentiality clauses are an intrinsic part of agreements to settle disputes. They may find themselves having to explain the inclusion of an NDA and face challenge as to whether it is or was reasonable to include. More thought should therefore be given to why confidentiality is being requested and whether it is needed at all;

• When seeking to settle a matter on a confidential basis, organisations should consider whether it could be construed as an attempt to “cover up” unlawful behaviour or to avoid tackling a serious issue. There is a balancing act to be had between the risk of damage if the allegations leak out versus the reputational implications of having tried to keep the information quiet in the first place;

• Even without legislative change, organisations may find themselves under pressure from various sources (eg shareholders, clients, stakeholders or regulators) – to ensure compliance with their corporate governance responsibilities, which might include greater senior level oversight into how discrimination and abuse allegations are handled in the workplace, when they are settled and the use of NDAs in such matters;

• It is also possible that the groundswell for change could come from below, rather than from the government. Organisations may start to see workers (and their solicitors) becoming more hesitant or even resistant to agreeing to an NDA clause without the inclusion of sufficient carve-outs or clarity about what can or cannot be said.

Although these are just ideas, what is clear is that this issue is unlikely to go away, nor indeed should it. The misuse of NDAs to cover up unlawful discrimination has had a detrimental effect on individuals who were required to sign them and perpetuated a damaging culture of cover-up in organisations. Taking a step towards changing this, will help employers create safer organisations for staff.

Equality and Human Rights Guidance – a summary

The EHRC has made the following good practice recommendations for the use of confidentiality agreements in settlement (or other) agreements:

1. Employers should consider in each case if an NDA is actually needed. It should not simply be included as standard in a precedent;

2. When considering whether to use a confidentiality clause, the EHRC lists factors that should be weighed up, such as the benefit vs the impact. Clauses should be worded to deal with the particular circumstances of the case and go no further than necessary (eg if an employer's concern is that the worker doesn't reveal the amount of compensation received, the clause could be limited to that);

3. In most cases it will not be appropriate to stop a worker from discussing an act of discrimination unless: i) requested by the worker / victim; ii) evidence clearly shows the accusation of discrimination was false; or iii) for legitimate business reasons, eg to avoid proceedings being prejudiced;

4. Employers should inform the worker why they have decided to use an NDA, so that the worker can consider this with their independent adviser;

5. The guidance includes a list of people who workers should always be permitted to have discussions with, including the police, regulators or medical professionals. The guidance goes further than the government's response to the WESC (see above), in saying disclosure should be allowed to the worker's spouse, partner and immediate family;

6. Confidentiality obligations should be mutual, or at least place no more onerous obligations on the worker than the employer;

7. The EHRC advises that the amount of any legal fees contribution should "be sufficient to allow the worker to take advice from an independent adviser on the settlement agreement, including any confidentiality agreement, and to ask their adviser to seek changes if necessary";

8. The employer should give the worker a reasonable amount of time to seek independent advice. The EHRC suggests that normally this should be no less than 10 days;

9. Employers shouldn't just delegate the drafting of confidentiality agreement to lawyers. Instead, they should ensure they provide proper instructions on their use and wording;

10. The EHRC advises that, where settlement is reached, employers should not treat that as the end of the matter. It says: "the employer must still investigate allegations where is it possible and reasonable to do so, take any reasonable further steps to address the discrimination and take reasonable steps to prevent discrimination occurring again";

11. The EHRC emphasises the importance of employers keeping track of discrimination complaints and monitoring the use of confidentiality clauses. It suggests that large employers should keep a central record of confidentiality agreements, including, for example, when they've been use, why and for what type of claim;

12. To avoid misuse of confidentiality agreements, the EHRC advises that the board of directors (or equivalent) should have oversight of the central record of confidentiality agreements. Moreover, their use should be signed off by a director or delegated senior manager and the board should ensure that concerns about acts of discrimination are escalated;

13. It should be made clear to the worker that the confidentiality clause does not prevent them making a protected disclosure, reporting a criminal offence or doing anything required by law / a regulatory duty;

14. Employers should not ask workers to warrant that they are unaware of anything that would be a protected disclosure or criminal offence.