SLAUGHTER AND MAY

Employment Bulletin

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Regulation of confidentiality agreements – latest developments

Summary: The Equalities and Human Rights Commission (EHRC) has issued detailed guidance for employers on the use of confidentiality clauses in settlement agreements and employment contracts. The recommendations go further than both the current law and the proposals for legislation in this area.

Background: In recent months there have been two separate reviews of confidentiality clauses/non-disclosure agreements (NDAs):

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- the inquiry by the House of Commons Women and Equalities Select Committee into the use of NDAs in discrimination cases; and
- the Government's consultation on regulation of the use of confidentiality clauses in employment contracts and settlement agreements.

The Select Committee published the results of its report in June 2019 and the Government announced the outcome of its consultation in July 2019 (see our Employment Bulletin dated August 2019). Under those Government proposals:

- Confidentiality clauses will not be able to prevent disclosures to the police, or to regulated health and legal professionals.
- The limitations on confidentiality clauses will have to be set out clearly in a written statement of employment particulars and in settlement agreements.
- For a settlement agreement to be valid, the individual will have to receive independent legal advice on the confidentiality provisions.
- There will be enforcement provisions for confidentiality clauses that do not follow the new requirements.

On 29 October 2019, the Government confirmed these proposals in its formal response to the Select Committee's inquiry report. No draft legislation has yet been issued. At the same time, the Government, recognising that the failure to provide a reference can pose a problem for victims of discrimination, announced that it will also consult on whether to introduce a statutory obligation on employers to provide a basic factual reference for any former employee. (The Select Committee's proposal was that the reference should, as a minimum, confirm that the employee worked for that employer and the dates of their employment.)

However, earlier in October, the EHRC published its own guidance on the use of confidentiality agreements in discrimination cases. The guidance is not legally binding and, unlike the EHRC Code of Practice on Employment, does not have to be taken into account by Employment Tribunals. Nevertheless, it can still be referred to in discrimination proceedings if relevant.

The guidance makes a number of what it terms "good practice" recommendations:

- Confidentiality agreements in workers' terms and conditions should make it clear that they do not prevent the individual from speaking about discrimination (for example, by excluding this from the definition of confidential information). Workers should not be put under pressure to sign and should be given time to seek advice. They should be given a copy of the confidentiality agreement.

- In a settlement agreement, confidentiality clauses should be used on a case-by-case basis, not as standard. In most cases, it will not be necessary or appropriate to use confidentiality agreements that stop a worker discussing an act of discrimination with others, although some possible exceptions are listed (such as where the worker/victim asks for confidentiality, the complaint has been found to be false, or an internal investigation is ongoing).

- The standard carve-outs from the confidentiality clause for disclosures to police, regulators etc. should be extended to include discussion with a potential employer about the circumstances in which their previous employment ended.

- Any confidentiality agreement should be mutual - the employer should be obliged to require other workers not to discuss the issue.

- Employers should meet the reasonable costs of advice on the proposed settlement agreement, even if agreement is not reached. The employer can impose a reasonable limit on costs. The worker should be given not less than 10 days (not specified as working or calendar days) to consider the agreement, unless there are exceptional circumstances. Workers should be told the reason for the confidentiality obligations so that they can consider their reasonableness with their adviser.

- Even if a claim is settled, the employer should still investigate the allegations. It should take reasonable steps to address any discrimination identified and prevent it happening again. The guidance says (without any authority or source) that the employer must do this in order to be able to rely on the statutory defence to a discrimination claim (that it took all reasonable steps to prevent discrimination).

- Employers should keep track of discrimination complaints and their use of confidentiality agreements. Large employers who use a significant number of settlement agreements (and employers who operate across multiple sites) should keep a central record of confidentiality agreements. The board should have oversight of this central record.

- The use of a confidentiality agreement should be signed off by a director/designated senior manager – where reasonably possible someone not involved in the discrimination or in hearing any grievance related to it.

- The board should ensure that company policies require managers to escalate concerns about "*the workplace culture, systemic discrimination or repeated or highly serious acts of discrimination by one individual*".

The guidance notes that penalty clauses (where workers have to pay compensation if they breach a confidentiality agreement and the compensation is out of all proportion to the damage caused) must not be used. It also states that it is good practice not to use warranties that the worker is not aware of anything that would be a protected disclosure or criminal offence.

Analysis/commentary: It is surprising that this guidance has been issued before draft legislation to implement the Government's response to consultation. A number of the recommendations go further than the law, the Government's proposals and even the Women and Equalities Select Committee recommendations – for example, in relation to allowing a worker to discuss an act of discrimination with anyone else (not just other alleged victims). Despite this, employers should bear the guidance in mind and comply where possible (certainly in discrimination complaints). This is a sensitive, fact specific and fast-moving area, so employers should seek advice at an early opportunity to ensure that they are taking the best approach.

On the issue of paying the employee's costs of advice on a settlement agreement (which is not legally required, but which the EHRC regards as good practice), a comment by the EAT in a recent case, *Solomon v University of Hertfordshire*, is of interest. The EAT rejected the claimant's discrimination claims. However, it found that the Tribunal had not taken the correct approach in ordering the claimant to pay £20,000 towards the employer's costs because she had rejected the employer's settlement offer of £50,000. The EAT commented that the employer's offer of £500 plus VAT to the claimant's independent adviser, to allow the claimant to seek advice on the proposed settlement agreement, was insufficient. Although it might have been enough for the "terms and effect" of the agreement, it was a "*wholly unrealistic*" amount to cover advice on the merits and the likely award of compensation.

Supreme Court: judge was a "worker" for the purposes of whistleblowing protection

Summary: The Supreme Court held that the exclusion of a district judge from the definition of a "worker" for the purposes of UK whistleblowing legislation was a breach of the European Convention on Human Rights and the legislation should be interpreted to give the judge whistleblower protection (*Gilham v Ministry of Justice*).

Key practice point: This decision, overturning the Court of Appeal, appears to be a significant extension of whistleblowing protection to non-contractual office holders. Employers should ensure their whistleblowing policies protect all individuals, not just those whom they employ directly.

Facts: District Judge Gilham (G) raised concerns, amounting to protected disclosures, about cuts made to local services in 2011. She alleged that she had been subjected to detriments because of those disclosures. The Employment Tribunal, Employment Appeal Tribunal and Court of Appeal all decided that she was not covered by the whistleblower provisions in the Employment Rights Act 1996 (ERA), as she did not come within the definition of a "worker". G appealed.

Decision: The Supreme Court allowed the appeal. The Court confirmed that G was not a "worker", because her work was not performed under a contract with the recipient of that work. However, the failure to extend the whistleblowing protection of the ERA to judicial officers was a breach of G's right, under the European Convention on Human Rights, not to be discriminated against in the exercise of her freedom of expression rights. Therefore, the ERA had to be interpreted to give G whistleblowing protection.

Analysis/commentary: The decision raises a doubt about individuals excluded from ERA protection because of the need for a contractual relationship, such as board members and company secretaries (if they do not have a service contract). On the same basis, consultants, volunteers/interns and potentially even job applicants could also claim protection. There is a new European Whistleblowing Directive, which protects workers, the self-employed, volunteers and any person working under the supervision of contractors. The Government is not transposing the Directive into UK law, because of Brexit, but has said it will review the UK's whistleblowing framework, taking account of legislation in other countries.

Employer failed to show dismissal was not race discrimination

Summary: The Court of Appeal confirmed that an employer was liable for racial harassment in relation to the dismissal of an employee. The Employment Tribunal had been entitled to infer that a false reason given to the employee for her dismissal at the time (redundancy) had been because the actual reason given in the Tribunal (suspected theft) had been based on a stereotypical prejudice (*Base Childrenswear Limited v Otshudi*).

Key practice point: The shifting burden of proof can be difficult for an employer to deal with in the Tribunal, so it is important that the correct reason for dismissal is given at the time, even if it is tempting to avoid problems by masking the real reason.

Facts: The claimant, O, worked for the employer for three months before she was called into a meeting without notice and summarily dismissed by G, the managing director. G gave the reason as redundancy. O believed (and said at the time) that it was because of her race. Following her dismissal, she submitted a grievance and appeal against her dismissal. The employer did not respond to the grievance or the appeal. O, who did not have the two years' service necessary for an unfair dismissal claim, brought a claim of racial harassment. Shortly before the Tribunal hearing, the employer alleged that O was dismissed because of suspected theft, although these allegations had never been raised with her. G said that the true reason had not been given at the time because the employer had not wanted a confrontation.

The Tribunal found that O had established a prime facie case of discrimination, so, under Section 136 of the Equality Act 2010, the burden of proof shifted to the employer to show that there was no discrimination. The employer had failed to do that. The Tribunal's decision was upheld by the EAT and the employer appealed.

Decision: The Court of Appeal confirmed the Tribunal's decision. There was a sufficient basis for an inference of racial discrimination, going beyond the simple fact of O's ethnicity. Although the Court said that they would not have come to same conclusion, the question of what inferences should be drawn from the facts was a question for the Tribunal. Their analysis was that G had believed that O had stolen but that he had been influenced in coming to that conclusion, precipitately and on little evidence, by a stereotypical prejudice based on her race.

Analysis/commentary: As it is unusual for an employee to be able to show direct evidence of discrimination, the burden of proof is important in discrimination cases. An employer's inconsistent explanations for treatment can lead to a shift in the burden of proof, although the Court admitted that this case was near the borderline – the Tribunal had not actually rejected the employer's explanation for initially giving an incorrect reason for dismissal. The way Section 136 works is that, if an employer fails to show that the protected characteristic played no part in its motivation, the Tribunal is not obliged to make a positive finding as to whether or how it did so. The rationale behind the reversal of the burden of proof is that it can often be very difficult for a claimant to prove what is going on in the mind of the putative discriminator.

Removal of evaluative conclusions from draft investigation report did not make dismissal unfair

Summary: The EAT found that changes to an investigatory report, made at the suggestion of an in-house lawyer, did not make a disciplinary process unfair. The changes were made in order to remove evaluative conclusions (*Dronsfield v The University of Reading*).

Facts: D was a University professor who admitted to having a relationship with one of his students. Under the statute governing the University, D could only be dismissed for conduct of an "immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment".

Two people – a University head of department and an HR partner - were appointed to investigate the allegations against D. They produced a joint investigation report. Initial drafts were reviewed by the University's in-house lawyer. The final version omitted some material that would have been favourable to D, including a statement that there was no evidence that his conduct had been immoral, scandalous or disgraceful, or that it was an abuse of power or breach of duty.

Following a disciplinary hearing, D was dismissed for gross misconduct. His appeal was heard by an external barrister who had sight of the previous drafts of the investigation report. D's appeal was dismissed and he brought a claim of unfair dismissal, in part on the basis that the disciplinary investigation was unfair. The Employment Tribunal found that he had been fairly dismissed. D appealed.

Decision: The EAT dismissed the appeal. The draft investigation report had been amended on the advice of the University's lawyer that it should not set out evaluative conclusions and the investigators had accepted that those judgments should properly be left to the disciplinary panel that was subsequently appointed.

There was no suggestion that any evidential material had been withheld from the investigation report and therefore not put before the disciplinary panel. Submissions about the changes to the investigation report were made and considered at the internal appeal stage. The barrister who carried out the internal appeal reviewed the draft investigation reports, rejected the submission that the report was changed in order to make D's dismissal more likely, and found that no pressure had been put on the investigators to change the report. It was clear that the Tribunal had considered these points and the overall fairness of the whole process followed by the University.

Analysis/commentary: Employers need to ensure that those conducting a disciplinary investigation are clear about their role. Investigators must be able to explain and justify any changes made to the report following advice received from HR/legal teams, especially if conclusions favourable to the employee are omitted from the final report. If the advice is so extensive that the investigatory report is no longer the product of the investigator, there is a risk that a subsequent dismissal will be unfair.

Horizon scanning

What key developments in employment should be on your radar?

9 December 2019	Extension of the SMCR to FCA solo-regulated firms
12 December 2019	General Election
31 January 2020	European Union (Withdrawal) Act 2018 expected to take full effect
April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees
6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *B v Yodel Delivery Network Limited* (CJEU: whether couriers have worker status under the Working Time Directive); *Uber v Aslam* (Supreme Court: whether drivers are

workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers)

- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee)

- **Discrimination / equal pay**: *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Ibrahim v HCA International* (Court of Appeal: public interest)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits)

- **Vicarious liability:** *Barclays Bank plc v Various Claimants* (Supreme Court: whether employer vicariously liable for assaults by doctor engaged to carry out pre-employment assessments).

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