Employment Law Brief

with

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There is increasing public scrutiny of the use of non-disclosure agreements – or 'gagging clauses' as the press usually describes them – by public sector employers. The suggestion is that taxpayers' money is being used to prevent former employees from speaking out on matters of public concern. What is often glossed over in this debate is that the non-disclosure agreement is simply one part of a larger deal. In most of the cases that the media has focussed on, the non-disclosure clause was not imposed on the employee against their will – it was a provision in a settlement agreement.

In almost 30 years in employment law I don't think I've ever seen a settlement agreement that didn't include some sort of non-disclosure clause. Typically, the employer has agreed to pay the employee a certain sum of money while making no admission of liability. Part of the agreement is that neither party will disclose the amount of the settlement to any third party (usually with an exception for close family members and professional advisers). But most go further than that - specifying that neither side will discuss the fact of the settlement either. Increasingly common is a 'non-disparagement' clause providing that neither side will say anything negative about the other. We may also find something describing how the employer will respond to requests for a reference.

The point of these clauses is not to 'gag' the employee or sweep wrongdoing under the carpet, it is to ensure that the case that the parties have decided to settle stays settled. The use of a non-disclosure clause does not mean that the employer has something to hide, it is simply a question of good housekeeping. In most cases the non-disclosure clause is far from being the main driver for the employer to settle. That is much more about risk management – balancing the risks of losing the case or paying extensive legal costs in defending it against the cost of reaching an agreement. But if an agreement is to be reached, then some form of non-disclosure clause is likely to be needed. If the employer is accused of acting unreasonably and agrees to settle the case while still denying any wrongdoing, then there needs to be some assurance that the employee will not use that settlement as a vindication of the case.

And we should remember that employees cannot be forced to enter into a settlement agreement. If the main motivation of the employee is to have their complaint heard in public then they have the option of taking the matter all the way to a Tribunal. Of course, they may not feel able to do that. They may have limited resources, find the process upsetting and stressful – or simply not have a watertight case. But we are always hearing from Government that litigation should be a last resort and that it is better if the parties can reach a settlement instead. Clamping down on non-disclosure agreements will simply make it more difficult for cases to settle. If the employer cannot ensure that the employee will treat the matter as closed, then there is little incentive to reach an agreement at all.

In any event, there are limits to how far a non-disclosure clause can go. No agreement can prevent someone from reporting illegal activity to

the police or other regulatory bodies – the courts would never enforce that sort of restriction. Nor can a settlement agreement prevent a worker from whistleblowing – that is, making a public interest disclosure – because the Employment Rights Act specifically outlaws any such agreement.

The Government has just carried out a consultation on reforming the use of non-disclosure agreements, but it is clear this is more about public perception than a genuine legal problem. The consultation does ask for any suggestions that respondents may have for how the law can be reformed but accepts that non-disclosure agreements – and wider confidentiality clauses in employment contracts – are unavoidable. The specific proposals made in the consultation seem reasonable, but modest. Essentially, the Government is suggesting greater clarity in the wording and use of non-disclosure agreements so that employees know what is and what is not covered. This may involve a standard form of wording to be used and a requirement that the right of the employee to report matters to the police or make a whistleblowing allegation should be clearly set out in the agreement itself. That seems like a sensible enough idea. Indeed, it is probably worth getting ahead of any likely legal changes and introducing some explicit limitations on any non-disclosure clauses – even if they would have been implied anyway. A standard clause making it clear that nothing in a settlement agreement prevents the employee from reporting wrongdoing to the appropriate authorities should be enough to make it clear that the non-disclosure clause is being kept within proper boundaries.

For local authorities the decision as to whether to fight or settle a case can never really be just a financial decision based on the legal risks. Using public money to settle a Tribunal claim can easily attract criticism either that a badly behaved or incompetent employee is being rewarded for failure or that the employer has something to hide. This last danger is particularly acute when the employee's claim purports to be based on whistleblowing. It can look as though the employer is simply paying hush money to avoid a scandal. On the other hand, fighting a case to the bitter end when a sensible settlement could have been reached is hardly a good use of public money either.

But in deciding to try and settle a whistleblowing case it is important to be aware that it is impossible to guarantee that the employee will not continue to repeat the allegations – even if the employer considers them to be unfounded. If the employee claims to be a genuine whistle-blower and repeats their accusations, then the only way to enforce the agreement might be to take the employee to court and either seek repayment of the settlement amount or obtain an injunction enforcing the non-disclosure clause. This will be expensive and complicated with no guarantee of a successful outcome (the employee may simply not be able to repay). Crucially, trying to enforce the agreement may simply result in even more publicity. In the current climate, giving any appearance of wanting to suppress allegations can be more damaging than the allegations themselves.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman