

CONFIDENTIALITY AGREEMENTS IN DISCRIMINATION CASES

Introduction

This bulletin contains advice about new guidance issued by the Equality and Human Rights Commission (EHRC) guidance on the use of confidentiality clauses in settlement agreements where discrimination has occurred.

The guidance has been issued in the wake of the MeToo movement that has exposed the scale of sexual harassment problem in all types of workplaces.

Employers' duty

Employers must provide a safe working environment for all staff. It is therefore important employers create cultures in which workers feel able to discuss their experiences and expose sexual, or other, harassment and all forms of discrimination (See EQA/02 and EQA/03 for definitions of types of discrimination).

Ensuring workers can report discriminatory behaviours will help employers identify patterns of discrimination and to then take effective action to tackle their root causes. If people are dissuaded from speaking up, this masks systematic discrimination and can have a

detrimental impact on a worker's health and well-being as well as their ability to pursue their rights.

Reasons not to speak up

The EHRC has previously identified many reasons why workers may not feel able to speak up about discrimination, including:

- a belief the complaint will not be taken seriously
- fear of victimisation
- fear the alleged perpetrator will be protected
- a lack of appropriate reporting procedures.

In addition, confidentiality clauses in settlement agreements can be an important part of the problem.

Use of confidentiality clauses

EHRC recognises confidentiality agreements (also known as non-disclosure agreements or NDAs) have some legitimate uses. For example, they can legitimately be used to protect confidential information.

However, evidence collected by them has suggested that in sometimes confidentiality agreements have been

used to cover up instances of discrimination.

Indeed, evidence collected during the commission's own enforcement work has shown that confidentiality agreements in terms or conditions or settlement agreements has become commonplace.

This can – and does – prevent workers from speaking out about their experiences, can create confusion about what they can and cannot say, and make them fearful about what will happen if they do speak up. Often confidentiality clauses come with an enhanced settlement offer which has the effect of allowing some employers to pay for the right to continue to discriminate.

Impact of confidentiality agreements

The use of confidentiality agreements to silence workers about discrimination impacts on the culture of an organisation as a whole, and not just on the individual workers.

Workers will be encouraged to share their experiences if others have done so first. That much is clear from the MeToo movement.

Silencing those who have felt able to raise their concerns will, in contrast, deter others from coming forward.

The purpose of the Equality Act 2010 (EQA) is to protect people from discrimination at work and to support progress in equality. It is important that confidentiality clauses are used lawfully and in a way that supports equality while reducing discrimination.

EHRC guidance

The EHRC guidance provides a useful explanation of how confidentiality clauses can legally be used in terms and conditions of employment, and settlement agreements being used for dispute resolution.

It goes on to provide excellent advice about best practice in the use of confidentiality clauses.

An important element in best practice is that templated settlement agreements, often used by employers, should not contain a standard confidentiality clause, but employers should consider for each proposed settlement whether a clause is necessary. Certainly, in most cases where discrimination is in issue, a confidentiality clause will not be appropriate.

Reps action

Reps will find it useful to access a copy of the full EHRC guidance from their website at www.equalityhumanrights.com

On a collective level, company council reps can request the issue of settlement agreements be added to the next agenda, with a further request for the provision of the company's template settlement agreement to be provided in advance of the meeting. The template can then be checked for compliance with the EHRC guidance and any issues dealt with at the meeting.

When dealing with an individual members' case where a settlement agreement is the outcome, reps should tell the member of the service which comes free to them from our solicitors to provide the necessary independent

legal advice before they sign the agreement.

The member can send a copy of the agreement by email to settlementagreement@morrishsolitors.com together with their contact details, and a solicitor will be assigned to deal with it and advise the member on the consequences of them signing the agreement (see reps bulletin EMP/118).

Acknowledgments and further information

More information on this and other employment rights matters is available from:

- Val Stansfield, Employment Rights Adviser at stansfieldv@tssa.org.uk or 020 7529 8046
- TSSA Helpdesk – 0800 328 2673