Confidentiality clauses: bound and gagged

Resource type: **Articles: know-how**

Status: **Published on 30-Aug-2012**

Jurisdiction: **United Kingdom**

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The Walker case

In February 2010, Gary Walker was sacked as chief executive of the United Lincolnshire Hospitals NHS Trust (the trust). The official reason for Mr Walker's dismissal was that he swore openly at meetings, but this was alleged to have been a trumped-up charge, not least since, before his dismissal, Mr Walker had had a serious disagreement with his superiors over the direction of health policies in Lincolnshire, and had allegedly disobeyed an instruction from his superiors to focus his efforts on official government targets for non-urgent medical cases.

At a preliminary hearing, Mr Walker established that he had a prima facie case that he had made protected disclosures for the purposes of the whistleblowing legislation with regard to patient safety, but the matter was resolved before the full hearing (*see box "Protection for whistleblowers"*). The press reports suggested that Mr Walker signed a settlement agreement which included a severance payment and a confidentiality clause that prevented him from talking about the agreement and the issues behind his dismissal. The trust's public statement was that all parties in the case had reached an amicable resolution.

This is not the first time that an employer's wish to include confidentiality clauses in settlement agreements has attracted public comment. In December 2011, the House of Commons Select Committee on Health stated that it did not believe that confidentiality clauses in compromise agreements should extend to concerns about the safety of patients, although the British Medical Association commented at the time that it was unaware of gagging clauses being used to keep clinical concerns quiet.

The clauses in the settlement agreement signed by Mr Walker may not actually have been that unusual in terms of their drafting; it was their context and their effect to keep confidential matters that were potentially of wider public interest that attracted criticism. But this publicity does raise

the issue of what points employers should be considering when drafting confidentiality provisions in settlement and compromise agreements.

Scope of confidentiality

An employer will wish to ensure that the scope of a confidentiality clause is sufficiently broad to protect its position. Confidentiality clauses may simply repeat, reiterate or refine the employee's existing obligations of confidentiality to his or her employer's business information, but they may also extend to personal details of colleagues, the terms of the settlement agreement, or even the fact that the settlement agreement itself exists (to guard against the inference that the existence of a settlement agreement implies some fault on the part of the employer and/or some level of payout).

In certain situations it may be appropriate to restrict the employee more specifically from producing materials for publication based on his tenure with the employer. Most controversial, where wider public interest issues are involved or the individual is concerned about how to explain his departure to a prospective employer, will be a provision prohibiting the employee from making any comment or statement to any third party about the circumstances leading to the termination of his employment or about the substance of any grievances that he may have lodged. As part of a severance arrangement, an employer may also seek the withdrawal of any grievances, complaints, and, indeed, subject access requests made under section 7 of the Data Protection Act 1998.

If the parties are to be allowed to comment on the employee's departure from the employer or resolution of a dispute, it may be appropriate for there to be an agreed statement to which the parties commit, and, in the context of termination of employment, an agreed job reference that the employer agrees to give if it is requested. In this context, the agreement may need expressly to incorporate the agreed wording as well as to identify who will make the announcement, when and how. On occasion, different forms of announcement are appropriate for internal and external purposes.

Issues may come to light after the specific arrangement has been concluded that render the agreed position no longer appropriate or tenable. The employer may therefore wish to be able in these circumstances to decline to give a reference, amend its terms and/or make appropriate disclosures to a regulator. The employee, on his part, may wish to be able to make representations to the employer about any such issues before the employer makes its decision.

Where a compromise agreement is used to terminate the employee's employment, the reason for an individual's departure may also need to be given some thought. Trite and clichéd reasons for leaving (such as to seek new opportunities or to spend more time with one's family) may be the easiest way to describe a difficult departure situation, but because of their very predictability, may in fact raise more questions than they answer.

Extent of obligation

The employer may want specific exclusions from the confidentiality obligation: for example, to permit disclosure of the terms to regulators and others as required by law (such as HM Revenue & Customs), or to disclose the terms to those internally who will be putting the agreement's terms into effect, such as payroll officers and share scheme administrators.

The employee may want to disclose the terms of the agreement to tax or legal advisers and immediate family, and potentially to be able to discuss the circumstances leading to the termination of his or her employment with a prospective employer. The employer may be prepared to accept such exceptions provided that the employee requires the individuals with whom he discusses such matters to keep them confidential; or it may prefer to agree specifically what the employee is entitled to say about the reason for leaving.

Both parties may be content to see the fairly standard qualification that the confidentiality provisions that they agree will apply save as required by law, and this qualification may also be extended to disclosures that are permitted by law. The extension to disclosures permitted by law may allow an employee to argue that a matter of public interest can be disclosed under the whistleblowing legislation without breach of the agreement (*see below*).

Breach of obligation

In many cases, the employer may struggle to take effective enforcement action for breach of confidentiality obligations: proving that a breach has occurred may be difficult; seeking an injunction to enforce confidentiality may be too expensive and unpredictable to be worthwhile; and establishing loss may be too difficult for there to be a realistic prospect of recovering damages.

If the agreement provides that any monies paid are immediately repayable in full in the case of breach by the individual of his confidentiality obligations, one concern may be that the employee will argue that such a provision is an unenforceable penalty clause because the consequence of breach (repayment of the settlement monies) bears no relation to, and is therefore not a genuine pre-estimate of, the loss resulting from the breach.

Whistleblowing

It does appear anecdotally that, in some cases, the way in which the confidentiality provisions of a compromise agreement have been drafted, coupled with the implicit or explicit threat of litigation, have led the employee to observe the confidentiality provisions rather than seek to rely on the whistleblowing legislation to permit disclosure of matters of wider public interest.

Section 43J of the Employment Rights Act 1996, which voids provisions in an agreement that preclude an employee from making a protected disclosure, is likely to apply to confidentiality

provisions which prevent an individual from contacting a prescribed regulator under section 43F. That said, in the absence of any such regulator, disclosure to the media may still be permissible despite any confidentiality provisions.

In any event, the contractual effect of a confidentiality clause is only voided by section 43J if the other elements of a protected disclosure are satisfied (*see box "Protection for whistleblowers"*).

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Protection for whistleblowers

The Public Interest Disclosure Act 1998 (PIDA) (which amended the Employment Rights Act 1996) provides protection for workers who report malpractices by their employers or third parties against victimisation or dismissal. Under PIDA, the dismissal of an employee will be automatically unfair if the reason, or principal reason, for his dismissal is that he has made a "protected disclosure"; this could be information relating to the commission of a criminal offence, a failure to comply with a legal obligation, or a miscarriage of justice having occurred or being likely to occur.

(*For more information, see feature article "Whistleblowers: minimising the risks (www.practicallaw.com/8-200-3818)*".)