EHRC contributes to the crackdown on NDAs

Charles Wynn-Evans looks at guidance recently issued by the Equality and Human Rights Commission (EHRC) on the use of confidentiality agreements

Charles Wynn-Evans is a partner at Dechert LLP

'In issuing this guidance, the EHRC seeks to promote cultural change so workers feel able to discuss their experiences and expose sexual harassment and other forms of discrimination.'

As no employment lawyer can fail to be aware, employers' use of confidentiality provisions and non-disclosure agreements (NDAs) has come under severe scrutiny as a result of the #MeToo movement. The use and content of NDAs has been the subject of a warning notice from the Solicitors Regulation Authority (SRA) as well as advice issued by the Law Society of England and Wales (which has faced intense criticism from some commentators). NDAs have also been reviewed by the House of Commons Women and Equalities Committee (WEC), culminating in detailed recommendations for their regulation and increased duties on employers. The government's response to this review was published on 29 October 2019.

In addition, the government has consulted on proposals to prevent the misuse of NDAs in situations of workplace harassment or discrimination. In its response to this consultation published in July 2019, the government accepted that NDAs can have a legitimate place in employment agreements. This will be the case when they protect commercially sensitive information, prevent employees sharing information with competitors and provide a 'clean break' for both employer and employee on termination. Nonetheless, the government confirmed that it will introduce a 'package of measures' to seek to stop employers from using NDAs to silence and intimidate victims of harassment and discrimination. Detailed draft legislation has not yet been published and it is not certain that the momentum for reform will survive into the next Parliament. However, the proposed measures would:

- provide that no provision included in an employment contract or settlement agreement can prevent an individual from making a disclosure to the police, regulated health and care professionals or legal professionals;
- make clear the limitations of NDAs to those signing them;
- clarify the nature of the independent legal advice that an individual should take before signing a settlement agreement;
- provide guidance on the drafting requirements for NDAs; and
- introduce new measures (including possible financial penalties) to deal with NDAs that do not comply with the legal requirements.

EHRC guidance

On 17 October 2019, the EHRC published its own guidance on the use of confidentiality agreements in discrimination cases. This guidance does not have statutory force and

Solomon v University of Hertfordshire & anor [2019] UKEAT/0258/18/DA and [2019] UKEAT/0066/19/DA

therefore employment tribunals are not required to take it into account. However, it is of value to employers in outlining the EHRC's view of good practice and in identifying areas where challenges (including potential litigation and reputational damage) may arise in relation to the confidentiality aspects of resolving difficult employment situations.

In issuing this guidance, the EHRC seeks to promote cultural change so that workers feel able to discuss their experiences and expose sexual harassment and other forms of discrimination. It recognises that NDAs can be legitimate where confidential information needs protecting or employees wish to keep what they have gone through confidential. Nonetheless, the EHRC considers, in the context of the #MeToo movement, that NDAs form 'part of the problem', particularly when they have been used to cover up the worst instances of discrimination.

The EHRC guidance discusses the legal issues around settling claims, gives sources of advice which will be helpful to employers and workers alike and provides numerous good practice recommendations.

Use of NDAs

The EHRC guidance indicates that employers should consider including confidentiality provisions in settlement agreements on a case-by-case basis and only use them as required. Examples of when confidentiality agreements could be appropriate include if:

- the victim of discrimination seeks confidentiality; and
- after a full investigation and hearing, the employer finds the worker's allegations to be false.

In assessing whether to include confidentiality provisions in a settlement agreement, employers should consider the reason for the provisions, the intended benefit, the impact on the worker and the organisation's culture.

The suggestion that employers should not always apply confidentiality provisions does not reflect the general approach in the private sector. However, the WEC has commended the increasing tendency in the public sector not to use NDA provisions in settlement agreements.

NDA drafting

The EHRC guidance indicates that employers should carefully consider the wording of confidentiality provisions to make clear what a worker can and cannot discuss. The relevant provisions should not stop the worker from speaking about any discrimination and should be limited to what is necessary and appropriate in the circumstances. Confidentiality provisions should normally apply to both parties. The employer should not delegate responsibility for the drafting of the agreement entirely to its lawyers.

The EHRC guidance on drafting NDAs is nothing like as detailed as the examples quoted in the SRA's warning notice as common examples of NDA provisions. Nonetheless, it indicates that confidentiality agreements should:

- not prohibit whistleblowing or compliance with any regulatory or legal duty;
- permit discussions with appropriate third parties such as regulators, medical professionals and counsellors, the police, HMRC, immediate family members, the individual's trade union and, to the extent necessary to address the reasons for leaving employment, a future employer; and
- not include warranties that the worker is not aware of any criminal offence or protected disclosure, which might have the same 'silencing effect' as a confidentiality provision.

The EHRC guidance indicates that employers should consider including confidentiality provisions in settlement agreements on a case-by-case basis and only use them as required.

The guidance also warns that using a confidentiality provision to seek to prevent a worker from speaking to the police could constitute a criminal offence such as attempting to pervert the course of justice or preventing the apprehension or prosecution of an offender.

Process

The EHRC considers that employers should share the rationale for confidentiality with the worker so that they can consider its reasonableness with their adviser. This does not reflect current practice on the basis that the adviser will advise the individual on the provisions proposed.

As is entirely uncontroversial, the EHRC indicates that workers should be allowed to take advice on a proposed settlement agreement and that the employer should meet the reasonable costs of that advice. The cost will vary depending on the circumstances but should be discussed with the worker's adviser. Consistent with the WEC's recommendations, the EHRC considers, in contrast to most current practice, that the employer should meet the worker's costs even if agreement is not

Employee references

An area not addressed by the EHRC guidance is the issue of references. However, in the WEC's view, employers derive significant bargaining power from their ability to choose whether to provide a reference for a departing employee. It therefore called on the government to legislate to require employers to provide, as a minimum, a basic reference for any former employee confirming that they worked for the organisation and the dates of their employment. On 29 October 2019, the government announced that it would consult on this issue.

reached. It will be interesting to see to what extent employers follow this recommendation in the absence of a legislative obligation enforcing it.

Coincidentally, in the recent decision in *Solomon v University of Hertfordshire* [2019], the Employment Appeal Tribunal (EAT) ventured some comments on an offer of £500 plus VAT to a claimant to obtain legal advice on a settlement agreement. These comments were made in the context of a claim for costs against the claimant based on her failure to accept a settlement offer made by the employer after she had won her tribunal claim. The EAT considered that:

> The advice which the claimant could expect to receive for this sum (or any sum remotely like it) would only relate to the terms and effect of the proposed settlement and its effect on her ability to pursue her rights thereafter...

The worker should have a reasonable period of time – no less than ten days other than in exceptional circumstances – to consider a proposed confidentiality agreement.

> Any advice as to the merits of the claimant's claim and the likely award of compensation would require reading and consideration on a quite different scale.

The EAT viewed the employer's offer of £500 plus VAT – which the employment tribunal had found was made to advise on the merits of a settlement' – to be 'wholly unrealistic'. Employees may now rely on these observations, along with the recommendations made in the EHRC guidance, in commercial negotiations about the employer's contribution to the individual's legal fees incurred in taking independent legal advice on a settlement agreement.

The EHRC indicates that the worker should have a reasonable period of time – no less than ten days other than in exceptional circumstances – to consider a proposed confidentiality agreement. This is consistent with the recommendations of the Acas Code of Practice on settlement agreements. Employers should not put workers under pressure to sign confidentiality agreements and should always give them a copy of the agreement for their records.

The EHRC also recommends that confidentiality agreements should be signed off by a director or senior manager who was not involved in the issue or in hearing any grievance. Presumably, this is to ensure that those involved in what happened do not brush it under the carpet.

Investigation

Even if a claim has been settled, the EHRC guidance urges employers to investigate the issues in question if possible to address any discrimination and take reasonable steps to prevent a reoccurrence. This echoes the WEC's recommendation that the government should consider requiring employers to investigate all discrimination and harassment complaints, whether or not a settlement is agreed, and its concern that some employers are using NDAs to avoid holding perpetrators of harassment to account. The guidance notes that, where an employer fails to investigate allegations and a similar incident then occurs, it will have difficulty defending any discrimination claim. This is because, to avoid vicarious liability, s109(4) of the Equality Act 2010 provides that the employer must show it took all reasonable steps to prevent the discrimination.

Monitoring

The EHRC considers that employers should monitor discrimination complaints and their use of confidentiality agreements. This will enable them to identify systemic

issues and the measures needed to tackle them and to avoid the overuse or misuse of NDAs. In its view, larger employers with multiple sites should (subject to data protection rules) maintain a central record covering issues such as:

- when they have used confidentiality agreements;
- what type of claims they have settled using confidentiality provisions;
- who allegations of discrimination were made against;
- what type of confidentiality provisions were agreed; and
- why confidentiality provisions were applied.

The employer's board of directors or equivalent should have oversight of this central record.

This recommendation echoes but does not go as far as the WEC's suggestion that the government should consider requiring employers to collect data and report annually on these issues.

In its recent response to the WEC's recommendations, the government sympathised with the desire to have better information about the use of NDAs. However, it doubted that simply knowing the number of NDAs used by a company would be useful. It considered that requiring employers to submit all confidentiality clauses for scrutiny would be burdensome and might not be meaningful without details of why the employee left their job. It also expressed concern that a requirement to report would discourage the use of NDAs in cases when they would be welcome and beneficial for employees.

The WEC also considered that the government should require companies to nominate a director to:

- oversee the use of NDAs and ensure that their use is appropriate;
- review settlement sums and monitor whether they are an appropriate use of company resources;
- oversee anti-discrimination and harassment policies, procedures and training; and
- learn lessons from how cases have been handled.

Again, this recommendation has found little favour with the government. Its view is that the board of directors as a whole should be responsible for overseeing anti-discrimination and harassment matters. It has justified that position by reference to s172 of the Companies Act 2006, pursuant to which directors must already take account of:

> ... the interests of the company's employees [and] the desirability of the company maintaining a reputation for high standards of business conduct.

This duty has been reinforced, the government believes, through its reforms of the UK Corporate Governance Code and the introduction of the Wates Corporate Governance Principles for Large Private Companies.

Wider management issues

The EHRC guidance indicates that employers' induction processes should make clear how workers can report discrimination and explain that complaints will be taken seriously. Also, managers should be required to escalate concerns about workplace culture, systemic discrimination and repeated or serious discrimination by one individual.

Comment

Pending legislation or the awareness-raising programme that the WEC advocates, the publication of the EHRC's guidance may increase employers' and workers' knowledge of the issues more directly than the lawyer-focused materials issued by the SRA and the Law Society. While employers should have been considering much of what the EHRC addresses in any event, the guidance does provide a timely and comprehensive briefing on the issues presented by NDAs.

That said, in determining their approach, employers should note that the EHRC guidance reflects its own view of best practice rather than organisations' legal obligations. The guidance therefore encourages employers to adopt an approach to NDAs which goes further in certain respects than the government's current proposals for their regulation.

What is clear is that developments in this area are far from over. Accordingly, employers and their advisers will wish to keep an eye out for any further regulatory guidance issued by the SRA and the promised legislation regulating NDAs. ■

Employers should note that the EHRC guidance reflects its own view of best practice rather than organisations' legal obligations.

Reference point

SRA warning notice on the use of NDAs: www.legalease.co.uk/nda-warning

WEC inquiry and government response: www.legalease.co.uk/wec-ndas

Government response to its consultation on preventing misuse of confidentiality clauses in situations of workplace harassment or discrimination: www.legalease.co.uk/confidentiality-clauses

EHRC guidance, *The use of confidentiality agreements in discrimination cases*: www.legalease.co.uk/ehrc-confidentiality

Government announcement on references: www.legalease.co.uk/references