

## Response ID ANON-VN93-WE5M-E

Submitted to **Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination**  
Submitted on 2019-04-15 09:45:25

### About you

#### What is your name?

**Name:**

James Turner

#### What is your email address?

**Email:**

info@birminghamlawsociety.co.uk

#### What is your organisation?

**Organisation:**

Birmingham Law Society

#### Are you happy for your response to be published?

Yes

#### Would you like to be contacted when the consultation response is published?

Yes

#### (optional) How did you hear about this consultation?

#### Where did you hear of this consultation?:

#### Other (please specify):

### Purpose of confidentiality clauses, their legal limitations, and misuse

#### 1 Do you have any examples of confidentiality clauses, in employment contracts or settlement agreements, that have sought to cloud a worker's right to make a protected disclosure, or overstretch the extent to which information is confidential? If so, please describe these.

**Comment here:**

We have not seen any examples of these types of clause proposed in negotiations, and have not proposed their use ourselves.

We are aware of the recent example, widely reported in the media, of the inappropriate confidentiality provisions used in the Zelda Perkins/Harvey Weinstein settlement agreement. However, the decision by the Solicitors Regulation Authority to prosecute the solicitor responsible for drafting this settlement agreement demonstrates that a) this type of provision is not widely used; and b) the profession's regulator will take enforcement action when they are.

We are of the view that properly drafted confidentiality provisions are of benefit to both employees and employers. In the recent case of ABC and others v Telegraph Media Group Ltd [2018] EWCA Civ 2329, the Court of Appeal recognised " ..... the importance and legitimate role played by non-disclosure agreements in the consensual settlement of disputes, both generally but in particular in the employment field" and that " ...employees may themselves wish to maintain confidentiality"

### Putting more limitations on confidentiality clauses in working relationships

#### 2 In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?

**Comment here:**

We agree that disclosures to the police should be excluded from confidentiality clauses. However, we believe that the appropriate method for doing so would be by way of an amendment to the whistleblowing provisions of the Employment Rights Act 1996 ("ERA").

Firstly, this will ensure that legislation in respect of confidentiality clauses is grouped together logically. Secondly, this will mean that disclosures to police will benefit from the mechanism set out in section 43J of the ERA. This section renders void confidentiality provisions which attempt to prevent disclosures under the whistleblowing provisions of the ERA.

#### 3 What would be the positive and negative consequences of this, if any?

**Comment here:**

The key positive consequence of this approach is that settlement agreements would be unable to be used as a method of covering up criminal behaviour. This

will help ensure that other employees of the same organisation are not left at risk of criminal harassment, and will help to improve workplace culture in organisations where this is an issue.

There is a potential negative consequence, in that it may act as a deterrent to settlement. Employers often enter into settlement agreements in order to achieve a "clean break" with an employee, and confidentiality provisions play a key part in this.

#### **4 Should disclosures to any other people or organisations be excluded?**

**Comment here:**

We believe that the following disclosures should be given additional statutory protection:

- for the purpose of reporting misconduct, or a serious breach of regulatory requirements, to appropriate regulatory bodies; and
- for the purposes of obtaining medical advice.

#### **5 Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?**

**Comment here:**

No.

### **Ensuring the limits of confidentiality clauses are clear to the worker**

#### **6 Do you agree that all confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit?**

**Comment here:**

There are two distinct documents referred to in this question settlement agreements and employment contracts.

We consider though that the answer should be the same - no. There is a risk that any description of confidentiality clause exclusions could become very convoluted. Plus often employers will want to draft their contracts in their own style.

If as we have recommended the exclusions from confidentiality provisions are all included in the whistleblowing provisions of the ERA it will be sufficient to say that "nothing in these provisions will prevent the employee from making a disclosure that would be protected by the public interest disclosure act".

The Government could address concerns about the accessibility of information explaining statutory disclosure rights by having good publicly available guides. For example, ACAS could develop an appropriate guide to disclosures protected by the public interest disclosure act.

#### **7 As part of this requirement, should the Government set a specific form of words?**

**Comment here:**

See above.

#### **8 Do you agree that the independent advice a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions?**

**Comment here:**

Section 203 ERA requires advice to be given as to the "terms and effect" of the agreement. That can be taken as being limited to the fact that signing an agreement waives all (or most) claims against the employer. Most advisers however would review the entire agreement and explain what most, if not all, the provisions mean. It would be beneficial if ACAS were able to offer guidance confirming that when advising on the settlement agreement advisers should review and explain the entire agreement including confidentiality provisions.

Having said this, previously no particular emphasis has been placed on explaining the meaning and effect of the confidentiality provision, but that may change simply because of "market forces". As a further consideration, if a specific requirement were included, might it not raise an issue as to whether all employees will need to be given detailed advice about confidentiality clauses in other circumstance (for example in contracts of employment)? In terms of the practicalities and cost for every contractual confidentiality provision to be subject to legal advice, that could be significant.

### **Enforcement**

#### **9 Do you think a confidentiality clause within a settlement agreement that does not meet any new wording requirements should be made void in its entirety? What would be the positive and negative consequences of this?**

**Comment here:**

No. We would argue that such clauses should not be void in their entirety. However, they should be unenforceable to the extent that they go further than is currently permitted by law and this is inconsistent with section 43j ERA which states:

"Any provision in an agreement to which this section applies is void insofar as it purports to preclude the worker from making a protected disclosure".

We note that the "new wording requirements" are unclear at this stage. However, a minor breach in drafting may have major consequences to the employer, and possibly to the employee, if the whole confidentiality provision were to be rendered void and/or unenforceable. The damage to commercial or intellectual property rights could be significant and indeed an employee may not wish the details of his or her issue to become public knowledge.

As to the suggestion that there should be some form of criminality, we reject that suggestion entirely. How would that be managed? Would it encourage malicious complaints to cause problems to an employer? Who would be liable? Would the HR Director be culpable? Would the legal advisors for the company (not the employee of course!) be complicit in some criminality? In our view this is not a place that we would like companies, individuals or legal advisors to have to go.

**10 Do you agree with our proposed enforcement mechanism for confidentiality clauses within employment contracts? What would be the positive and negative consequences of this?**

**Comment here:**

It is proposed that in the case of employment contracts the limits of any confidentiality clause should be clearly stated. The reference is to the "Statement of Particulars" that must be given to all employees under statute (although this is not always the case as all practitioners know). Presumably that would be extended to executives who had been the subject of more detailed contracts or service agreements. Subject to clear guidance on drafting, we see no reason why such clauses should not be limited expressly although, as we have noted previously, such contractual provisions usually relate only to commercial matters and trade secrets. We have not previously seen a confidentiality clause that in any way hints at improper behaviour being confidential or in some way protected.

As to enforcement, there is of course the right to apply to a tribunal for a declaration of particulars, and the consultation paper refers to the right of an employment tribunal to enhance an award if, attached to another claim (e.g. discrimination) it is found that a Statement of Particulars does not correctly include a clear account of certain terms. However, that is a remedy which is rarely sought and in our experience very rarely ordered by the tribunal and, therefore, is probably not adequate as a remedy.

As to what would be an appropriate enforcement, it might be possible for an employee to apply to a tribunal for clarification but, with respect to the drafters, we feel it is very unlikely that anyone would take such a claim on a stand-alone basis. In conclusion, this is probably a provision that needs no enforcement mechanism because, with respect, it is not a real issue.

In reality the ultimate sanction for a poorly drafted confidentiality clause within an employment contract, is the risk that it is not enforceable by the Court.