**EMPLOYMENT LAWYERS GROUP**

**22 MAY 2019**

**Compromise Agreements**

Non-disclosure clauses and other problem areas

“Weinstein NDA solicitor referred to disciplinary Tribunal by the Solicitors Regulation Authority – March 2019.

<https://www.legalfutures.co.uk/latest-news/weinstein-nda-solicitor-referred-to-disciplinary-tribunal>

Universities misusing “gagging orders described by the Higher Education Minister as “an outrage”

<https://www.bbc.co.uk/news/education-48166884>

As Employment lawyers a Compromise Agreement is part of the nuts and bolts of settlement/termination discussions and what we do.

We are not used to finding ourselves in front of House of Commons Committees and elsewhere, let alone the subject of disciplinary action due to the contents.

The agreement in the Harvey Weinstein example does seem somewhat extreme – it can be found at <https://www.parliament.uk/documents/commons-committees/women-and-equalities/Correspondence/Zelda-Perkins-SHW0058.pdf>

This was with Zelda Perkins, his former PA. The clauses run to 4 pages. It included the following:-

* A clause returning all documents, computers etc – so far, so normal
* It went on to deal with confidential information – again not unreasonable –
* The Claimant would not personally retain a copy of the Agreement and the original would be held by her Solicitor.
* It had a non-disclosure clause whereby the Respondent could contest any legal challenges/requests on the Claimant’s behalf.
* It provided that any tax queries would be dealt with through the company’s lawyers.
* It provided that in the event she required treatment from an appropriate medical practitioner she would use all reasonable endeavours not to disclose the name of any party, the practitioner should be qualified and a member of recognised medical body prohibiting disclosure of information.
* She would require the medical practitioner’s written confirmation of agreement to confidentiality
* In the event the medical practitioner disclosed anything she would take steps including commencement of proceedings at the Company’s expense to prevent further disclosures.
* There was a detailed clause about not disclosing the negotiation or the allegations made including without limitation to any entertainment company and a whole list of people.

Overall, and in the, @Me Too context this has been characterised as big money and big law firms gagging victims.

* Most Compromise Agreements are perfectly straightforward

resulting from redundancy, restructure, disagreement between parties and an understanding/agreement for the parting of ways. Within this is a clause is to protect genuine confidential information. Protecting genuinely confidential information is clearly legal and appropriate – for example the secret Pepsi Cola formula, sensitive internal financial data, customer lists etc.

* The second part tends to be about not disclosing the fact or terms of the Compromise Agreement, or the circumstances leading to the Compromise Agreement. The difficulty comes about when the reason for the Agreement is because the employee is alleging unlawful/improper behaviour on the part of the employer or its employees/agents. Clearly the most public current examples relate to alleged sexual harassment and whistleblowing, but of course this can cover discrimination harassment on other unlawful grounds such as religion, race, disability etc.

**Law Society of Northern Ireland**

Despite repeated attempts by telephone and email to obtain advice/information as to the current position and any plans in this area in Northern Ireland at time of writing on 21st May I have not been able to obtain any reply, let alone any information. Most of what is set out below therefore relates directly to England and Wales and not to us practicing here. However, I would suggest that as with many other regulatory matters our Law Society and professional discipline bodies etc. are likely to have some regard to the GB position. I suggest that we would be unwise simply to disregard it.

**Recent Actions**

* In G.B. the Solicitors Regulation Authority has issued a Warning Notice: <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Use-of-non-disclosure-agreements-(NDAs)--Warning-notice.page> This is to ensure that Solicitors do not behave improperly in preparing compromise agreements/NDA’s:-
* You must not use NDAs in circumstances such that the subject/employee may feel unable to notify the SRA or other Regulator or Law Enforcement Agencies of conduct which might otherwise be reportable.
* You must not fail to notify the SRA of misconduct or a series of breaches of regulatory requirements by any person or firm: including wrong-doing by the firm or harassment or other misconduct towards others such as employees or clients.
* It is important to realise that increasingly there is a positive obligation on professionals such as lawyers, accountants, bankers doctors etc. to report to the Regulator significant breaches. You may need to advise your employer client to consider whether the alleged behaviour/investigation findings are such as to warrant reporting to the Law Society, or other professional body.
* Of course doing this may rather undercut the point of having an agreement in the first place. A lot of the public comment tends to ignore the fact that often the allegations are strongly contested by the accused individual.
* You must not use NDAs as a means of improperly threatening litigation or other adverse consequences.

It is common to see a clause requiring repayment of monies in the event of proceedings being issued. You need to be careful about how such clauses are phrased, and in particular how these are discussed with the individual.

* The SRA Warning Notice also refers to a Practice Note issued by the Law Society of England and Wales on 7th January 2019: [www.lawsociety.org.uk/support-services/advice/practice-notes/non-disclosure-agreements-and-confidentiality-clauses](http://www.lawsociety.org.uk/support-services/advice/practice-notes/non-disclosure-agreements-and-confidentiality-clauses).

The Practice Note makes the point that, while solicitors have a duty to act in their client’s best interests, that duty is subject to the duty to the Courts and administration of justice. In England and Wales it covers the SRA Code of Conduct. The essential problem is that the interests of the client may come into conflict with the mandatory principles in the Code.

* See for example the Law Society of England and Wales practice note-

*“Outcome 10.4 You report to the SRA promptly, serious misconduct by any person or firm authorised by the SRA, or any employee, manager or owner of any such firm.”*

The implication is that you may need to consider reporting if the other party’s solicitor is engaging in serious misconduct

Section 3 of the Practice Note provides a helpful list of disclosure exceptions that are common, as follows-

* for the purpose of making a protected disclosure within the meaning of Part IVA of the Employment Rights Act 1996 (Protected Disclosures), provided that the disclosure is made in accordance with the provisions of that Act;
* for the purpose of reporting misconduct, or a serious breach of regulatory requirements, to an appropriate regulator;
* for the purpose of reporting an offence to the police or other law enforcement agency and/or cooperating with a criminal investigation or prosecution; and/or
* to tax authorities in respect of personal or other tax-related matters;
* for the purposes of reporting, in the public interest, any serious wrongdoing to a law enforcement agency or a relevant regulator or an equivalent person or entity which has a proper interest in receiving that information in the public interest;
* to spouse, civil partner or close family provided that such individuals agree to keep that matter confidential;
* for the purposed of seeking tax, medical or other professional advice;
* as required by law or regulatory obligation;
* for the purpose of representing themselves at any investigation/proceedings brought by their regulatory/professional bodies relating to matters arising from their employment;
* in compliance with an order of, or to give evidence to, a court or tribunal of competent jurisdiction;
* to a prospective employer or recruitment agent provided that any such disclosure is limited to the agreed reason for leaving (without providing details of the circumstances leading to the employee’s departure and/or the terms or existence of the settlement agreement).

You may wish to consider including some or all of these in your standard template Compromise Agreement.

There is some discussion in GB about producing statutory/approved wording. If this goes through, it would make sense to follow it.

* Section 4 deals with Whistleblowing/Protected Disclosures.
* It is increasingly common, and I would suggest essential, to expressly set out that any confidentiality clause does not prevent the employee from making protected disclosures, whether using the employer’s internal processes or if appropriate or externally.

See for example the Financial Conduct Authority rules covering accountants and others-

SYSC 18.5 Settlement Agreements with Workers.

*18.5.1 A firm must include a term in any settlement agreement with a worker that makes it clear that nothing in such an agreement prevents a worker from making a protected disclosure.*

*18.5.2 Firms may use the following wording, or alternative wording which has substantively the same meaning in any settlement agreement:*

*“For the avoidance of doubt, nothing precludes [name of worker] from making a “protected disclosure” within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures made about matters previously disclosed to another recipient.”*

*18.5.3 Firms must not request that workers enter into warranties which require them to disclose to the firm that:*

*(a) they have made a protected disclosure: or*

*(b) they know of no information which could form the basis of a protected disclosure.*

*(2) Firms must not use measures intended to prevent workers from making protected disclosures”*

**Reporting illegal activity:-**

* Clauses that suggest the reporting of any criminal offence is prevented by an NDA are not only likely to be unenforceable, but they are also likely to be a disciplinary offence on the part of the lawyers.
* It is unlikely to be legitimate to ask a person to sign an Agreement not to disclose an unlawful act that has not yet happened.
* Preventing the reporting of information that is relevant to regulators is unlikely to be acceptable. In this context many professional bodies/regulators now have rules on the point.
* In Northern Ireland, see Section 5 of the Criminal Law Act (Northern Ireland) 1967. This little-known provision makes it a requirement where a person has committed an offence of a certain seriousness to give this information within a reasonable time to a constable.
* There is in section 5(2) an exception where the person makes reasonable recompense.

You may need to consider with your client whether there is a legal obligation to report an apparent offence.

**The Public Sector**

There has been considerable guidance in recent years. See for example the general Report by the Comptroller and Auditor General for Northern Ireland-2016 at 3.28. <https://www.niauditoffice.gov.uk/sites/niao/files/media-files/General%20Report%202016.pdf>

*“Confidentiality Agreements put the key public sector principles of openness, transparency and accountability at risk.”*

*“As a point of principle, confidentiality agreements should not be used anywhere in the public sector in Northern Ireland”*

*“Agreed approvals for the use of confidentiality clauses are not always obtained.”*

The Department of Finance has issued a Circular to Finance Directors in January 2016.

Effectively the Accounting officers for any public body may have to be ready to defend the use of a non-disclosure agreement. They may also have to defend the amount of any settlement, and that it is in keeping with the requirements for best value. This is not an idle threat- I understand the Audit office has challenged this on occasion.

Some public sectors have specific provisions – for example NHS Employer sets out guidance on the use of Settlement Agreements and Confidentiality Clauses, updated in February 2019.

**Charities**

If dealing with a Charity then under the Charities (Northern Ireland) Act then in the event of serious misbehaviour there may be an obligation to make a Serious Incident Report to the CCNI.

If you are dealing with a substantial pay off to, for example, a Chief Executive in the context of serious allegations then the Trustees may need to consider making a Serious Incident Report. Where there is a substantial pay off above contractual entitlement, this may also trigger an independent obligation on the Charity’s Auditor to make a Report directly to CCNI. If the payment is substantial proportionate to the Charity’s assets, and substantially beyond any contractual entitlement, then trustees may be well advised to obtain legal advice in writing before agreeing to a payment. In some circumstances a payment may also be ultra-vires the power of the Charity.

Where there are existing proceedings then a Solicitor’s/Counsels Opinion in terms of risks, outcome, potential quantum and the proposed settlement should normally be sufficient.

In GB the Government is currently consulting further on Regulations imposing a cap on public sector payments.

**Does the client need an NDA at all?**

As employment lawyers we tend to assume that an NDA is standard and required. Often when included they work both ways-imposing an obligation of confidentiality on the employer as well, together perhaps with an agreed reference. You may want to consider with your client the increasing PR risk of such a clause. In addition, the employer may want to be able to comment publicly in the event the employee makes a protected disclosure etc. and/or matters reach the press. A standard clause about confidential information should not cause a problem, but how far do you need to go beyond that? We know that normally the Equality Commission will not accept a non-disclosure clause in settlements of cases it supports. Lawyers tend to suggest that this discourages settlement- but is that really true? Will a clause actually create bad publicity/ regulatory problems?

If there is to be a clause, you may want to discuss limiting it. In the private sector you might for example suggest that only the amount, and not the fact of, any settlement is confidential.

There are of course circumstances where the employee is keen for confidentiality, linked to the wording of a reference. In that case it may be sensible to make clear in the agreement that the employee is requesting this.

**The Solicitor’s Certificate**

Strictly speaking the only requirement is that the employee has had independent advice from someone satisfying the conditions in Article 245 of The Employment Rights (NI) Order 1976, and discrimination/ other legislation, and there is no mention of a certificate. However, occasionally an employee subsequently disputes that there was appropriate independent advice, which has led to the practice of employers requiring a certificate as a condition of the offer. Where there is a Non-Disclosure clause which may be contentious later then you may wish to insert a clause in the Certificate to the effect that the solicitor has given the employee specific advice on the non-disclosure clause, and on the limits of the clause in not preventing reporting to proper authorities, making a protected disclosure etc.

**Improper Behaviour and Negotiating Settlements**

Lawyers tend to assume that legal advice and settlement discussions, including about Compromise Agreements, are covered by legal privilege or litigation privilege. However, there is a problem that litigation privilege only applies where there is a dispute. In attempting to open a conversation with an employee about termination there may not yet be an actual dispute. In GB there was an attempt to deal with this by introducing “protected conversations”. I would refer you to the extensive ACAS Guidance on protected conversations <http://m.acas.org.uk/media/pdf/f/k/11287_CoP4_Settlement_Agreements_v1_0_Accessible.pdf> (pages 9-14)

which does not apply in Northern Ireland. However, I would suggest that in some circumstances some of our Employment Judges when considering what is appropriate or reasonable in an argument about the validity of a Compromise Agreement might have regard to the ACAS Code – which for example refers to allowing the employee a period of up to 10 days for consideration of the Settlement Agreement once given to the employee. How often when acting for an employee are we told the offer is conditional upon being signed in the next couple of days?

In addition, there are a whole series of exceptions relating to protected conversations, such that personally I would not care to rely on the provisions on protected conversations in any event.

Even when legal advice/without prejudice privilege applies it can, in some limited circumstances, be overruled. Normally, this will be where there is some “unambiguous impropriety”, or the protected conversation is being used to cloak unlawful discrimination.

The EAT Decision in **X v Y Limited UKEAT/0261/17** <https://assets.publishing.service.gov.uk/media/5b6c232740f0b640c3b1cf61/X_v_Y_Ltd_UKEAT_0261_17_JOJ.pdf>

provides a useful example. In that case there were ongoing issues with an in-house solicitor with a disability, who had lodged a tribunal claim. The client had made an enquiry about how they should deal with the employee in the context of some possible restructuring/redundancy. The solicitor had written back indicating – I am para-phrasing here so please read the full decision – to the effect that the redundancy might be an opportunity to get rid of a troublesome employee. Unfortunately, the solicitor subsequently overheard two lawyers in a pub discussing this. As part of the Tribunal proceedings the Employee’s lawyers sought discovery of the email containing the legal advice. The EAT concluded that the email went beyond giving advice could amount to clear impropriety and ordered disclosure of the advice.

Para 32.

*“The key question in interpretation of the email is whether the advice recoded simply points out the risk of claims if the claimant were selected for redundancy or whether it goes further and advises that the redundancy can be used as a cloak for dismissing the Claimant who was troublesome to the Respondent because of his continuing allegations of disability discrimination.”*

The case points up the difference between giving legal advice as to what is or may be legal or illegal on the one hand, and suggesting courses of action for an employer to avoid legal obligations.

**Personal injury claims and Compromise Agreements**

This is an increasingly common problem. Where there is a claim alleging disability discrimination on mental health grounds, and that the employer has caused/contributed to the mental health breakdown then this can be covered by either an LRA COT3 Agreement or a Compromise Agreement. However, outside of specific circumstances relating to DDA the LRA takes a view that its statutory jurisdiction does not extend to including personal injury claims when settling, for example, unfair dismissal complaints/claims. As I understand it employers may ask for a clause to be put in, but the LRA does not consider that a COT3 would cover it on a statutory basis so you will be reliant on common law/contract law.

It is clear from the case of PCCI v Ali [2001] HL8 that in principle it is possible to settle an existing personal injury claims as part of a Compromise Agreement. As those of you present who do personal injury work as well as employment will know better than I, there is no specific statutory required wording or formula to settle a personal injury claim, which can even be an oral contract. It is however likely to be sensible to make specific reference in the Compromise Agreement to particular heads of claim if it is intended to cover these – most typically this will relate to claims for stress, depression, mental health issues arising from the difficulties leading to the Compromise Agreement itself.

The case law is unclear as to the extent to which it is possible to compromise future personal injury claims where the injury is not yet apparent, for example asbestosis. Attempts to compromise this situation may well be a breach of the Unfair Contract Terms Act. It is common to draft the settlement/waiver of claims to exclude personal injuries which could not reasonably be known about by the employee at the time of signing.

**Mental Capacity**

In the last couple of years we have had a number of enquiries from employees who signed Compromise Agreements, but who now argue that they were not in a fit state and did not have mental capacity at the time. At least one enquirer was also alleging that the employee was brow-beaten by the independent solicitor suggested by the employer into signing the agreement. Of course most of the time this will not really be a problem, but particularly in cases involving disability and/or where it is alleged that the employee is suffering from serious mental health issues then you may have to consider whether the employee has capacity to sign. This is a problem for both the employer’s solicitor and the employee’s solicitor – if only because either might get sued for negligence if it is subsequently suggested they should have made further enquiry.

It is clear from the case of **Glasgow City Council v Dahhan UKEATS/0024/15/JW** [http://employmentappeals.decisions.tribunals.gov.uk//Public/Search.aspx](http://employmentappeals.decisions.tribunals.gov.uk/Public/Search.aspx)

that the question is whether or not the employee had at time of signing, the mental capacity to do so. If the employee did not then the Compromise Agreement is likely to be voidable/void. The general principles are no different from in other areas of law and you may want to consider Law Society advice, for example in relation to capacity to make a Will. Where the amounts/risks are substantial it may be appropriate for the employer to require a report from a GP or, in more difficult cases, an appropriate medical expert. This may raise wider issues that the employee’s solicitor should be considering with the employee/family/court. It is difficult to see how the Employer can be protected in this situation, unless the circumstances are such that the family makes an application to the Office of Care and Protection**.**

**Exemption from £30,000 tax free limit**

HMRC may in limited circumstances at its discretion grant an exemption to the £30,000 limit after which tax is due on a termination payment. This would usually involve a situation where the employee has become permanently unfit for any paid work in future, and where on health grounds, often being no health insurance, the employer wishes to make a larger payment. In practice this will only arise very occasionally. I would suggest it will be in the private sector, often in a family-owned business where there is an employee with long service who cannot carry on working, and where the employer wishes to be generous. This will probably require a Consultant’s report, and often accountancy advice in approaching the Revenue.

**Future Events**

There is some case law to suggest that a Compromise Agreement cannot cover off future unforeseen events. This is unlikely to include, for example, an agreement that the employee will retire at a particular date, say some 12 months ahead, because this is clearly anticipated and agreed as part of the Compromise Agreement. However, although the agreement may be expressed as full and final settlement etc, there is some doubt that it would cover unforeseen events – for example unlawful sexual harassment at the subsequent Christmas party. Where the anticipated termination date is some way in the future this is increasingly dealt with by including in the Compromise Agreement a reaffirmation letter. This is a letter signed at or near the termination date, often with a certificate from the solicitor, confirming at that time that there are no other claims as at the date of termination.

**Re-employment after termination.**

Employers sometimes seek to insert a clause preventing re-employment. The case-law is unclear as to whether or not such a clause would be enforceable. It may depend on the circumstances, and potentially about how the reason is set out. The wider/longer the clause the more risk it is unenforceable.

One situation where this may be enforceable is where the restriction follows on from a substantial redundancy payment, and the restriction is designed to prevent the Employee from taking redundancy and then immediately applying for a new job with the employer, or in the public sector with a similar employer, resulting in a substantial windfall to the Employee. In discrimination claims it has been suggested that this may amount to victimisation, although so far any case-law I have seen does not seem to support this.

It seems likely that a proportionate clause requiring some payment back of any “windfall” element would be reasonable. This may be the subject of further government legislation in due course.

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None of the above is intended as specific legal advice on particular facts/ circumstances, and is confined to a discussion of general problems/principles, not definite answers. If in doubt, do your own research.