Gareth Brahams gives evidence on use of NDAs in sexual harassment cases to the Women & Equalities Committee

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Gareth Brahams, Managing Partner of BDBF and Chair of the Employment Lawyers Association gave evidence to the UK Parliament's Women and Equalities Select Committee on the use of Non-Disclosure Agreements in sexual harassment cases on 28

March 2018.

Please view the evidence here: https://goo.gl/qPYYPS

The Employment Lawyers Association (ELA) is an apolitical organisation representing the views and interests of just over 6,000 specialist, qualified employment lawyers in the UK.

Membership of the ELA is almost universal amongst employment lawyers. I personally don't recall ever meeting any practicing employment lawyer who is not a member.

Our members are drawn from all branches of the legal profession and include barristers and solicitors who act for employers and employees, trade unions, the voluntary sector, industry, and the judiciary.

ELA's fundamental aims are:

- to promote the best practice of employment law; and
- to support the work and represent the interests of UK employment lawyers

I am a solicitor specialising in employment law and have done so for the last 25 years. I act mainly for employees (usually but not exclusively senior) but also act for a range of employers.

I am managing partner of BDBF which is ranked in the top tier by independent directories and personally I am also ranked in the top tier of employment lawyers.

Sexual harassment and NDAs

The victim's perspective

The starting point needs to be that the vast majority of sexual harassment in the workplace is not reported, is not the subject of a grievance or any complaint for a variety of reasons.

I can comment on this from extensive experience because as a claimant lawyer, I am one of the people victims approach before deciding whether to take things forward.

There are a variety of reasons for reticence and many are understandable:-

- a fear of retribution
- a fear that colleagues will become wary of their interactions with them going forward and the effect it will have on their career
- a lack of trust in their employer to investigate the matter fairly and to keep matters confidential
- an acknowledgment that day to day working with the harasser will become impossible if a complaint is formalised as opposed to acceptance of an apology
- a fear for what the consequences will be for the harasser and their family. they may also fear for the impact of their complaint on their family.
- a (troubling) acceptance that this is just part and parcel of working life
- a belief that they may have encouraged the harasser or been responsible for them getting the wrong end of the stick

If they have decided they are going to go ahead, I have to explain to them

- that notwithstanding formal protections against victimisation, the reality is that they may well be frozen out
- the cost of the ET process
- the public nature of the ET process (exacerbated by the new availability of judgments on the ET online) and what that can mean for their future career and exposure of their personal life
- the “internal publicity” that an ET case would generate at work

- the fear of being cross-examined.
- the time it takes for ET cases to go to trial.
- that the stress of litigation compounds the stress of the events which led to the complaint

Taking all that together, there are relatively few employees that get so far as contacting a lawyer or a union rep or HR. From that there is only a small and brave subset of who are prepared to take things further. Of those, the vast majority, will start the process in the hope it will end up in a settlement and those who don't most will fairly swiftly end up with that aim.

Most of those who settle under confidential terms think they are achieving the benefit of finality and certainty by doing so, and most often they are.

Accordingly anything that is going to make settlement less likely is going to have the unintended consequence of putting more victims off reporting the incident.

I personally feel very wary of anything that will make settlement less likely and trying to limit the use of NDAs in a settlement agreement is absolutely going to make settlement less likely. If a manager feels that there is a risk that the employee will make statements about what went on, that manager will be more likely to say that the case needs to go all the way to the ET to clear their name.

The alleged harasser

I should also say that as a claimant lawyer that I am also often the first port of call for the alleged harasser and that these people can also be victims of allegations which are not raised in good faith, or are untrue.

To be accused of harassment when you are not guilty of it is a very distressing and reputationally ruinous experience.

NDAs do also have the benefit of protecting the wrongly accused too.

The danger of comparisons with the US

I am also of the view that there is a danger of reading across too easily some of what we have seen in the US as just as likely to happen here when I think that is not so for a number of reasons.

Firstly, we do have the rule that employees cannot give up their rights in relation to sexual harassment claims (and indeed most other employment claims) without having the benefit of legal advice.

Secondly, under the Employment Rights Act 1996 an NDA cannot preclude the employee making a "protected disclosure". I agree the definition of that is not broad enough to cover every incident that occurred say in Weinstein but it would certainly cover some and I agree that there is a case to say that the definition should be extended to cover all disclosures to regulators and the police.

Thirdly, we do not put in employment contracts (not least because it would be ineffective) that employment disputes should be resolved by private arbitration. Happily the Employment Tribunal's jurisdiction cannot be excluded in that way.

Yes, we did have the President's Club debacle and the use of NDAs in that case was oppressive. However, it was both unheard of by me and most other employment lawyers, and in all probability legally ineffectual.

Fourthly, practically speaking most NDAs in UK employment cases provide for a right to disclose the circumstances to a court of law, regulators, close friends, family, and professional advisers. I have certainly negotiated all of these terms, sometimes extending to include MPs and

therapists, which shows the realm of possibilities. The main exclusion tends to be the media, friends and colleagues.

So what should change?

Making the duty to take reasonable steps to protect workers from harassment and victimisation mandatory is unobjectionable to my mind, but also unlikely to be particularly effective. The current rule that an employer can defend an allegation of harassment by saying it has taken reasonable steps to prevent it is theoretically powerful, but for whatever reason, rarely relied upon by employers.

Some kind of Government supported anonymous online reporting tool could be of some benefit but I would be concerned that such a tool would need safeguards to protect the wrongly accused, and proper investigation and enforcement mechanisms. What would be done with the reports given the sensitive nature of the data being collected?.

I agree with the Equality Human Rights Commission (EHRC) that it would be appropriate to ban any attempts in NDAs to prevent the disclosure of prospective acts of discrimination but as I said above, this is rare in practice.

So far as past acts are concerned, I think it is right that NDAs should be more limited rather as the EHRC suggest – I think this can be achieved by widening the definition of protected disclosures to cover amongst other things disclosure to regulators and the police. Frankly this needs widening in the context of defining what a whistleblower is in any event. I have already described the range of terms negotiated in practice.

I do have a concern about how the regulators behave when they receive the information. I have personally advised many employees who have risked huge settlement sums in order to inform the authorities of wrong doing both in relation to harassment and other issues such as fraud and I have to say

that the regulators do not seem to recognise or appreciate the risks that they have taken. Further, as in any tribunal system, the focus is inevitably on the accused and not enough is done to protect and support the victim.

I personally think the EHRC's recommendation that public sector bodies should not be permitted to use NDAs in harassment cases will have an even more chilling effect on employees wanting to be bringing these issues out into the open. That would not be in the public interest.

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