Introduction to the CMC

The Civil Mediation Council (CMC) is a registered charity and the trusted authority for mediation in England and Wales, both in promoting mediation use more widely and in settling standards in which users of mediation can have confidence.

As part of its mission to promote mediation as an effective tool for dispute resolution, the CMC welcomes contact with as many mediation sectors as possible, to share thinking and offer mutual support without wishing to usurp the individuality or status of any sector. The CMC believes that as mediation champions and practitioners, we have a great deal that we can learn from and contribute to each other. The CMC therefore aims to embrace all areas of mediation practice in a spirit of openness and cooperation.

The Chair of the CMC is Sir Alan Ward, supported by Chief Executive Paul Adams. Special interest groups and committees work under the CMC board, each with a chair. The CMC’s mediation sectors include commercial, community and restorative justice, family and peer, on-line and technology, and workplace and employment.

The CMC Workplace and Employment Group is chaired by Caroline Sheridan, CMC Board member. The Group is comprised of representatives from academia, mediation providers, employers and the law.

This submission has been written on behalf of the CMC by David Whincup, CMC Workplace and Employment Group member and Partner and London Head of Employment, Squire Patton Boggs (UK) LLP.

The CMC is grateful to the committee for considering its submission to their inquiry, and happy to answer any questions it may have.

The advantages and disadvantages of using non-disclosure agreements in sexual harassment cases, including how inappropriate use of such agreements might be tackled

1. This submission responds to the Committee’s questions concerning the use of confidentiality and non-disclosure wording in settlement agreements arising from sexual harassment allegations. Critics allege that such clauses are abused by employers and legal experts to cover up
wrongdoing and used to buy the silence of victims of harassment and assault. There may be consideration of whether to make such provisions unenforceable.

2. But would that actually be wise or helpful or desirable in any way? No one would condone deliberate harassment (and nothing I say here should be taken as doing so), but it seems to me that any such proposal would be based on a series of quite profound misapprehensions about the nature of harassment, the practical consequences of alleging it or having it alleged against you, and the remedies for it available at law. In particular:

a. Not all harassment is equally serious. The public perception is that it is all about “sex-pest” middle-aged managers chasing younger female staff, but that is to misunderstand the breadth of the concept entirely. The statutory definition of harassment in s26 Equality Act 2010 refers to unwanted conduct which has the purpose or effect of (paraphrased) causing upset to the recipient. The “or effect” wording means that the conduct need have no link to sexual intent at all, nor be driven by any deliberation or malice or ill-will, nor be something which others would necessarily react to in the same way at all. Indeed, it is entirely possible for harassment to arise out of conduct which the perpetrator genuinely believes to be no more than social or courteous. There is an exception in section 26 (4) for cases where it is just not reasonable for the conduct in question to have the upsetting effect contended for, but that is exceptionally difficult to prove since Employment Judges are very properly reluctant to overlay the claimant’s sensibilities with their own view of what is and is not offensive.

b. Any conclusion about the use of confidentiality terms in settlement agreements must therefore reflect the considerable breadth of conduct falling within the scope of harassment at law – at one end the most egregious and unforgiveable, but at the other, the relatively trivial and wholly innocently intended (see 5 below).

c. Nothing in the current law allows an employer to argue that a confidentiality or non-disclosure clause in a settlement agreement prevents the alleged victim of harassment from making any complaint to the Police should it be potentially criminal in nature. To that extent, such clauses are already rightly unenforceable. Once we step away from the criminal end of the harassment spectrum to the far more common civil arena, however, the position is less clear. This is not a one-size issue and any attempt to identify a one-size solution is therefore likely to fail.
3. It is my view for the reasons in the following paragraphs that any suggestion that such terms or clauses should be unenforceable in resolution of any dispute where harassment has been or may be alleged would be misplaced as a matter both of law and practice.

   a. Most harassment claims by themselves are worth very little – unless so serious as to constitute constructive dismissal, compensation will generally be limited to injured feelings, rarely a substantial sum (and often less than the irrecoverable costs of bringing a claim to recover it). However, the ill-will and damage to relationships which harassment claims cause within a workplace is not a function of their cash value, usually being received by their very nature as a personal attack on the alleged perpetrator.

   b. Not all harassment claims are true. It is necessary to acknowledge that some allegations of harassment are factually wrong, whether as a result of genuine misunderstanding of the facts, nervous exaggeration or outright deceit and malice. In addition, the line between unlawful harassment and poor management is a very thin one, perhaps only one word or gesture – for example see Roberts v Cashzone\(^1\) when a manager was held guilty of age-related harassment (in respect of which the underlying law is identical to that for sexual harassment) in calling Ms Roberts in a moment’s temper “a stroppy little teenager” (and this despite the ruling of the Employment Tribunal that she was indeed (i) stroppy; (ii) little; and (iii) a teenager). It is unfortunately very easy for a party to a dispute or contentious situation within the workplace, whether manager or colleague, to do or say something unconsciously reflective of the gender (or age, etc) of the other party to it and thereby be condemned as a harasser in the same legal category as far more deliberate conduct of an overtly sexual nature.

   c. Because the factual line between harassment and other workplace behaviours is so thin, even where allegations of sexual harassment are objectively correct, an investigating employer may still quite reasonably conclude on a balance of probabilities that they are not. It is equally possible that an employer investigating in all good faith could uphold potentially career-ending allegations against someone entirely innocent of them. Neither complainant nor accused could ever be sure how things would turn out, so both carry some risk into grievance process (and still more so into any litigation), however clear the facts seem to them.

   d. Not all severance payments are expressly or tacitly admissions of wrongdoing. Sometimes they are recognition of a less than perfect

\(^1\) Roberts v Cash Zone (Camberley) Ltd and another ET/2701804/2012
case, but equally they can be a reflection of the lost time, cost and stress of a protracted harassment claim or grievance and the knowledge for the business and/or the individual accused that any “acquittal” will never be as well publicised as the allegation. Some reflect the concern of both parties that with the best will in the world, the bringing of the complaint (and whatever its outcome) will create an insurmountable tension in the relationship going forwards such that the employee will fear retaliation and the employer will fear victimisation claims and as a result neither will be able to inter-act effectively with the other. It is in my experience far more often these prospects which the employer seeks to “buy off”, not any real concern about legal liability if the claim goes all the way.

e. But why would an employer make a severance proposal aimed at avoiding all those things (adverse PR especially) if it left the victim free to continue to talk about them anyway? In my view, the naivety of any suggestion that confidentiality or non-disclosure clauses concerning harassment should be void is believing that employers will then still agree to make payments to complainants without legal obligation to do so.

f. Nobody can be forced into a settlement agreement. The whole point of the requirement to take independent legal advice as a condition of such an agreement under section 203 Employment Rights Act 1996 is to avoid the risk of coercion or misrepresentation as to its terms. There may be an element of reluctance and commercial pressures and temptations but that is true for any termination agreement (and many other contracts we enter in the ordinary course of life), not just those covering off harassment claims. The Committee will need to consider whether there is anything so uniquely heinous about sexual harassment (bearing in mind its breadth as above) such as to justify a departure from those usual principles.

g. If you believe that you have a case worth running, you can run it and obtain whatever compensation the Tribunal thinks appropriate. There is no minimum length of service required, no longer any ET fee and no shortage of no-win, no-fee lawyers who will help you do it. The law already provides material remedies for proven harassment, whether just injured feelings or consequential financial losses too. The parameters of such compensation are reasonably clear and prospective claimants are able to find out on-line or through advisers roughly what they might expect if things go their way on the day. It is therefore possible for those individuals to make an informed determination of the value of their claim (if successful) relative to what they are being offered in return for maintaining confidentiality about it
instead and to accept or refused on that basis. Claimants can also ask the Tribunal to make “recommendations” for steps by the employer to minimise the chances of a recurrence if that is their concern, and further compensation is payable if it does not comply.

h. Confidentiality agreements work both ways – bearing in mind the uncertainties in 6 above, they may also stop wrongly-accused managers from publicising the employer’s rejection of the complainant’s case or from belittling his or her allegations in the workplace. Even if the allegation is upheld, workplace gossip or discussion of the details may still be painful or embarrassing to the victim. It cannot be said for a moment that the sole beneficiaries of confidentiality clauses are the alleged perpetrators.

4. So if such clauses are rendered void, we would potentially end up in a situation where there is no route open to the employer to secure, with or without admission, any discreet resolution of a harassment claim, nor any means by which the victim can validly offer one.

5. That would mean:

   a. The victim is compelled either to walk away or to fight for compensation in a (usually) public forum at his or her own cost in a lengthy and hideously stressful process with no guaranteed prospect of success in order to receive a sum likely to be very much less than that obtainable for an agreement to keep things confidential;

   b. Once the harassment allegation is made and investigated, then what? If the conduct of either party justifies summary dismissal, so be it, but in reality that is rarely the case. You are then left with two people, at least one of whom feels sorely mistreated and both of whom loathe each other. That is not a basis for a happy or effective working relationship going forwards. It is a legal but not a practical solution. It would be little surprise if one party wanted or was willing to leave to escape it all;

   c. What you would lose in the end by invalidating confidentiality terms in harassment settlements is the right of the person who may need it most, the victim, to decide what is best for him or her. If they want to make their stand, they can, and maybe that will be what the perpetrator deserves. But maybe they would genuinely prefer to make a new start somewhere else with an ok reference, a decent financial cushion and clear assurances of discretion from the former employer. That way they can most easily put what may have been a traumatic experience behind them. In those circumstances, agreeing not to talk
about something which you have neither need nor wish to talk about seems a very small price to pay for the compensation and one which victims should be free to agree if they want, especially after receipt of the independent legal advice or union input required by s 203 ERA 1996 as a condition of a binding settlement agreement. To deny them that ability would be to subordinate what may well be the victim’s best interests to the exceptionally simplistic view that all harassers of any sort must be put through a public wringer at whatever cost to their careers, lives and families even where there may be no truth at all to the allegations against them.

6. The Committee’s question does not define what it means by “inappropriate use” of non-disclosure agreements in those cases. Leaving aside attempts to block the instigation or prosecution of criminal proceedings, we are left with the basic question of why an adult employee, one who can and does enter legally binding contracts on a less informed basis every day, should not validly be able to trade the right to talk about a particular matter for a sum of money acceptable to him/her for that purpose. Why would an agreement not to talk about the circumstances of one’s unfair dismissal be treated differently at law from an agreement not to talk about some potentially much less serious act by the employer merely because at law it constitutes sexual harassment?

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