TUC
Changing the world of work for good

Confidentiality clauses

Consultation on measures to prevent misuse in situations of workplace harassment or discrimination

Written evidence submitted by the TUC

Introduction

The TUC is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

The Trades Union Congress (TUC) welcomes the opportunity to contribute to the BEIS inquiry into confidentiality clauses and measures to prevent their misuse in situations of workplace harassment or discrimination.

Trade union experience of the use of confidentiality clauses in situations involving workplace harassment or discrimination relates mainly to their use in settlement agreements. However, trade unions also have experience of advising and assisting members who have been asked to enter into such confidentiality agreements before an event, or have confidentiality clauses in their contracts of employment.

Trade unions have been involved for many years in significant efforts to establish workplaces free of all types of discrimination and harassment. We see appropriate and ethical use of confidentiality clauses as an important step towards achieving this goal. The TUC strongly supports the current public debate that is taking place in relation to the human impact of confidentiality clauses in cases involving discrimination and harassment at work and we welcome the prospect of reform in this area of the law.

Executive summary

The TUC emphasises the importance of drawing a distinction between pre-event confidentiality agreements, confidentiality clauses in employment contracts and the variety of different confidentiality clauses (such as those relating to non-disclosure, non-derogatory statements and references) used in settlement agreements (including COT3 agreements). The different contexts present different issues and therefore, different solutions are required.

In relation to pre-event confidentiality agreements restricting rights relating to disclosure of information regarding discrimination or harassment, or attempting to restrict the right to pursue future claims of this nature, the TUC believes these should be banned and that their use is never justified.

In relation to confidentiality clauses of this type in contracts of employment, the TUC does not foresee any circumstances in which it would be appropriate or ethical for an employer to require a prospective worker to agree to such obligations. Therefore, the TUC suggests that the use of confidentiality clauses in this context is also banned.

However, the TUC does not advocate a ban of the use of confidentiality clauses in settlement agreements. The TUC believes a balance should be sought between introducing new measures to ensure confidentiality clauses in settlement agreements are only used in an appropriate, clear and ethical manner, and protecting the right of the individual to enter into confidentiality obligations, or require them from their employer, as long as they freely and willingly chose to do so and receive appropriately legal advice to inform their choice.

We propose this balance could be achieved through a series of reforms relating to settlement agreements (including COT3 agreements), which we have elaborated below. In summary, these include:

- A legal requirement for a standard form of wording to be included on the front of all settlement agreements, clarifying the application of confidentiality clauses by expressly stating which disclosures can still be made in accordance with whistleblowing legislation and the common law. Should additional legislation be put in place to protect disclosures to other groups, these should also be referred to in the statement.
- A legal requirement that an adviser under S.203 of the Employment Rights Act certifies that advice has been given both on the clarifying statement and any confidentiality clauses.
- Legislation (in addition to current whistleblowing law) to expressly exclude certain groups from the ambit of non-disclosure clauses relating to discrimination and harassment, and to provide protection from detriment where disclosures to these groups are made. We agree this legislation should include the police, but also trade unions, therapists, counsellors and all regulators, as well as all disclosures for the purposes of disciplinary and grievance proceedings. This additional legislation would have the advantage of providing protection for disclosures which may not necessarily fall under the Public Interest Disclosure Act 1998, but which merit protection nonetheless.
- Additions to the prescribed list of bodies in the Public Interest Disclosure Act 1998, including trade unions and all professional regulators.
- Effective regulation of the use of confidentiality clauses by way of a statutory code of practice and guidance (produced by EHRC and/or ACAS), to include:
  - a recommendation that confidentiality clauses are only used in exceptional circumstances, to bring to an end automatic use of precedent clauses which may not be at all relevant to the individual circumstances.
  - recommended confidentiality clauses for different situations such as a standard non-disclosure clause and non-derogatory statement clause.
  - a requirement that where a non-disclosure clause restricts disclosures to family, friends, and colleagues, this will not restrict disclosures to immediate family members and close friends and that all such obligations will be reciprocal.
  - a suggestion that as a matter of good practice employers themselves provide specific in-house guidance for managers on the use of confidentiality clauses, including that they should only be used in exceptional, clearly justified circumstances.
- Enforcement measures to include uplifts to tribunal awards where an employer has failed to follow the statutory code of practice and/or has failed to include a clarifying statement on the front of the agreement, with additional penalties where there are repeat infringements.

The TUC urges the government to go beyond the proposals in this consultation and to carry out more significant reform in this area.

The TUC also emphasises the pressing need to resolve the fundamental problem of discrimination and harassment in the workplace and strongly advocates a new, easily enforceable, preventative duty on employers to stop discrimination and harassment before it occurs, a statutory right to time off for trade union equalities representatives and the reintroduction and strengthening of S. 40 of the Equality Act 2010 by removing the requirement that an employer needs to know that an employee has been subjected to two or more instances of harassment before they become liable.

We also wish to highlight the unique and valuable role that trade unions have to play in securing workplaces free of harassment and discrimination. They provide a mechanism for collective voice and obtain through communication with their members an awareness of where particular workplaces manifest a pattern of discrimination and harassment. This in turn enables trade unions to raise the alarm on discrimination and harassment and to work with employers and individuals to eliminate discriminatory behaviour.

Please note that unless stated otherwise, reference to confidentiality clauses in this consultation response is only with respect to confidentiality clauses in situations of workplace discrimination or harassment.

TUC response

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.

Pre-event confidentiality clauses

Some of our affiliates, particularly those with members in the media and entertainment sector, report very occasional use of confidentiality agreements in a pre-event context, such as those used in the Presidents club scandal. These confidentiality agreements seek to limit the ability to make disclosures relating to any future acts of discrimination and harassment.

Although it is strongly arguable that any confidentiality clauses relating to discrimination and harassment used in such a context are in any event unenforceable, the TUC is of the view that there should be a statutory ban on the use of pre-event confidentiality clauses relating to discrimination and harassment. This would ensure absolute clarity for workers that such clauses are unlawful and should never be used. If backed up with suitable enforcement measures, such a measure should also act as an effective deterrent to organisations considering use of such agreements.

In addition, the TUC consider it important that individuals are provided with statutory protection against detrimental treatment suffered as a result of refusing to enter into any such pre-event confidentiality agreements.

Contracts of employment

The TUC does not foresee any circumstances in which it would be appropriate to include a confidentiality clause in a contract of employment restricting the right to disclose information relating to discrimination and harassment, or to pursue related legal claims, and so would support a ban of any such clauses.

Our affiliates do not report widespread experience of misuse of confidentiality clauses of this type in contracts of employment. However, affiliate unions do report employers including clauses in employment contracts which seek to restrict individuals from disclosing their salary details. Provisions of this nature are clearly in potential contravention of the Equality Act 2010 (c. 15 Part 5 Chapter 3 Section 77). However, we ask the government to consider legislating to render all such clauses unenforceable, regardless of whether the disclosure of salary information relates to a connection between pay and protected characteristics.

Settlement agreements

Some of our affiliates report widespread, unnecessary and inappropriate use of confidentiality clauses in settlement agreements. In some sectors, confidentiality clauses in settlement agreements are used in almost every single agreement. The general experience amongst our affiliates is that a standard confidentiality clause in settlement agreements drafted by employers will restrict the individual from disclosing any information to any third

party, save for professional advisors, about the background and circumstances surrounding the agreement.

Trade unions also routinely receive draft settlement agreements from employers that appear to be a precedent document produced by a law firm, containing much that is irrelevant and inappropriate to the particular circumstances.

Use of confidentiality clauses seeking to prevent members from obtaining professional help relating to discrimination and harassment, including from counsellors and therapists, is of particular concern to our affiliates.

The TUC strongly believes that no confidentiality clause should seek to limit an individual's right to disclose information in order to obtain any form of professional advice and assistance. For example, from a legal advisor, accountant, therapist, counsellor or trade union officials and representatives.

Confidentiality clauses restricting the right of individuals to speak about experiences relating to discrimination and harassment to their immediate family and close friends and colleagues are also of concern to the TUC, unless it is clear that the individual does not object to this restriction. Where an individual wishes to retain the right to discuss the circumstances and background with a friend or family member or colleague, we feel it is important they can do so.

Affiliate unions report that confidentiality restrictions of this nature can have a negative psychological impact on the individuals and employer involved, hindering change, improvements, learning and perpetuating feelings of oppression and power imbalance. Unions may also be unable to publicise a case which would be of public interest.

The TUC has received reports of employers inserting confidentiality clauses intended to restrict individuals who are not party to the settlement agreement, such as trade union representatives, from discussing the background to the agreement.

We also wish to highlight the importance of reciprocity of obligations in confidentiality clauses. Where an individual accepts confidentiality restrictions, we are of the view that there should be reciprocal obligations from the employer written into the agreement. Our affiliates report to us that reciprocity is not always offered by employers and that sometimes individuals are faced with a choice between either accepting a confidentiality clause they are not happy with or losing the choice of a settlement agreement with a termination payment.

Some of our affiliates have also reported the use of confidentiality clauses seeking to limit individuals' ability to report incidents of discrimination and harassment to regulators. It is not always clear whether disclosure to a regulator will fall under whistleblowing legislation. For example, education unions have highlighted that there is not clear case law on whether a confidentiality clause in a settlement agreement or COT3 can prevent an employee from giving witness evidence in Teaching Regulation Agency (England) or Education Workforce Council (Wales) proceedings. The TUC would argue that proceedings through such regulatory bodies are quasi-judicial and as such any confidentiality clause restricting disclosure to them is unenforceable. However, we consider it is important to legislate in

order to expressly clarify the exclusion of all regulators and professional conduct bodies from the ambit of confidentiality clauses.

As well as reciprocal obligations under confidentiality clauses, there are other types of confidentiality clauses which confer a benefit for individuals. For example, an agreed reference may be provided for under the terms of a settlement agreement and a non-derogatory statement clause may also restrict the employer from making any derogatory statements about the individual. The TUC wishes to preserve the right of individuals to negotiate such clauses.

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

Yes, all disclosures to police should be clearly excluded from all confidentiality clauses. As outlined above, we consider pre-event confidentiality agreements and confidentiality clauses relating to discrimination and harassment in employment contracts should be banned in their entirety. In relation to confidentiality clauses in settlement agreements, although confidentiality clauses seeking to restrict disclosures to the police will almost certainly be unenforceable, the TUC believes all disclosures to the police should be clearly excluded from the ambit of any confidentiality clause.

The reason we support this proposal is to provide absolute clarity for individuals entering into a confidentiality clause. The application of whistleblowing law is complex and protection under the Public Interest Disclosure Act 1998 is not an automatic right, with not all disclosures relating to discrimination and harassment meeting the test of a "qualifying disclosure". Further, in order to assert any rights under the Act, an individual would be required to institute legal proceedings, with all the financial and time cost that this would entail. Therefore, it is important that the position is clarified for individuals from the outset so that they are not left in any doubt as to their rights and are not required to pursue legal proceedings in order to establish their rights beyond doubt.

Where there is any doubt in an individual's mind about the applicability of a confidentiality clause, this may suffice to put them off reporting matters to the police. It is vital that potential victims of crime are not prevented in any way from reporting the crime to the police. Clearly, for reasons of public interest and protection of both the individual and society at large, it is important for acts of a criminal nature to be reported to the police.

However, we highlight the importance of avoiding the legitimacy of a disclosure to the police being challenged on the basis that it does not result in conviction for a crime. It is important that individuals are clear that they are free to make all disclosures to the police relating to discrimination and harassment, regardless of whether these ultimately prove to amount to a crime. We emphasise the importance of the legislation being drafted in such a way to make this clear.

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

Positive consequences should include a higher reporting rate to the police and therefore, increased likelihood of harassment and discriminatory behaviour being uncovered and perpetrators apprehended. In addition, a higher conviction rate would hopefully act as a

deterrent to this type of behaviour and contribute towards the elimination of discrimination and harassment from the workplace.

However, to avoid the potential negative consequence of individuals being subjected to a detriment as result of reporting matters to the police, it is important that there is clear statutory protection against any detrimental acts and that this applies to all disclosures relating to discrimination and harassment made to the police (see para above).

Should disclosures to any other people or organisations be excluded?

The TUC is of the view that save for exceptional circumstances, employers should refrain from using confidentiality clauses in order to restrict the ability of individuals to make disclosures about discrimination and harassment to any third party.

In some sectors, such as the Civil Service, it is very rare for any confidentiality clause at all to be used in settlement agreements. This fall in the use of confidentiality clauses appears to have been largely in response to employer guidance on use of these clauses being introduced coupled with the need for senior level sign-off of any decision to use a confidentiality clause. The guidance requires managers to consider a set of values and principles when assessing whether or not a confidentiality clause is necessary, as well as an obligation to report up the management chain when in use. The requirement for senior sign off has ensured that those seeking to use confidentiality clauses have had to have clear and justifiable reasons which comply with the guidance and that the default position is not to use these types of clauses. The drop of use in confidentiality clauses in the Civil Service demonstrates that despite their widespread use, they are in all likelihood rarely justifiable or appropriate.

This general point aside, we consider disclosures relating to discrimination and harassment made to other people and organisations, aside from just the police, should also be excluded from confidentiality clauses. For example, disclosures to all regulators and disclosures for the purposes of disciplinary and grievance proceedings (from beginning to end, including investigation, hearing and appeal) should be expressly excluded from the ambit of confidentiality clauses. Further, so also should disclosures to all professional advisors including legal advisors, therapeutic advisors including counsellors, and trade unions officials and representatives.

In relation to disclosures to family, friends, colleagues and future employers, we question whether such restrictions are ever appropriate and suggest that such groups should be excluded from confidentiality clauses unless it is clear that an individual willingly enters into such an agreement, disclosures to immediate family and friends are still possible, and there are reciprocal obligations on the part of the employer.

As well as expressly excluding these groups and people from confidentiality clauses, we also suggest adding additional bodies to the prescribed list of organisations to which individuals can make protected disclosures under whistleblowing law. In particular, we recommend that government adds trade unions and all regulators to this list.

We also emphasise the importance of legislating to protect individuals from suffering detriment as a result of making disclosures relating to discrimination and harassment to any of these excluded groups.

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

Pre-event confidentiality agreements

As outlined above, we support a ban of these agreements.

Employment contracts

As outlined above, we suggest that use of confidentiality clauses in employment contracts seeking to restrict the right to make disclosures about discrimination and harassment are banned.

Settlement agreements

As outlined above, we do not support a ban on use of confidentiality clauses in settlement agreements, but do support a series of measures to clarify the application of confidentiality clauses and regulate their use.

In addition to the measures highlighted above, we strongly support heightened regulation of the use of confidentiality clauses by way of a statutory code of practice and specific guidance on confidentiality clauses from the ECHR and ACAS. We emphasise the importance of any statutory code and guidance being formulated with full input from all social partners including trade unions.

In relation to content of a statutory code of practice, we strongly recommend that the following measures are included:

- a recommendation that confidentiality clauses are only used in exceptional circumstances, to bring to an end automatic use of precedent clauses which may not be at all relevant to the individual circumstances.
- recommended confidentiality clauses for different situations such as a standard non-disclosure clause and a standard non-derogatory statement clause.
- a requirement that where a non-disclosure clause restricts disclosures to family, friends, and colleagues, this will not restrict disclosures to immediate family members and close friends and that all such obligations will be reciprocal.
- a suggestion that as a matter of good practice employers themselves provide specific in-house guidance for managers on the use of confidentiality clauses, including that they should only be used in exceptional, clearly justified circumstances.

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?

Given the complexity of whistleblowing law, we strongly support providing as much clarity as possible for individuals as to which disclosures confidentiality clauses cannot prohibit.

We suggest this could be achieved by way of a statutory requirement for a statement on the front of every settlement agreement, confirming the protection provided by

whistleblowing and the common law, as well as any new legislation arising from this consultation.

A positive statement of this type would reverse the current negative mode of expression in confidentiality clauses, which is to set out what an individual cannot disclose, rather than to express the obligation in terms of what they can still do. A positive mode of expression is far easier for individuals to understand and provides far more clarity.

In addition, we suggest a requirement that all advisors under S.203 of the Employment Rights Act are required to sign an advisor's certificate confirming the statement has been discussed with the individual and that advice has been given on this, along with any confidentiality clauses.

As outlined above, we do not support the use of confidentiality clauses in contracts of employment.

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

Use of a specific set of words would have the advantage of consistency and clarity. If the government proceeds with this proposal, we suggest that any such wording is formulated in consultation with social partners, including trade unions, ACAS and EHRC and that the wording and requirement could be included in a statutory code of practice.

However, we also emphasise the need for flexibility so that confidentiality clauses can be drafted to suit individual circumstances and requirements. We suggest that if standard wording is used, this is only in relation to the express statement confirming the circumstances in which a confidentiality clause will not apply. We suggest that the parties are free to agree the specific wording of any confidentiality obligations they enter into, but that there is clear guidance in this respect from a statutory code of practice and guidance produced by ECHR and /or ACAS. As outlined above, we also suggest that any such code provides recommended standard wording for the different types of confidentiality clauses.

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

In accordance with S.203 of the Employment Rights Act, in order for a settlement agreement to be effective, the individual entering into the agreement must have received advice on the terms and effect of the agreement from an independent advisor. Therefore, we consider that there is already an obligation under S.203 for the adviser to provide advice on any confidentiality clauses.

However, this obligation could be emphasised by imposing a requirement that all such advisers must sign an advisor's certificate which confirms advice has been given on the confidentiality clause and which types of disclosures can still be made. We also refer to paragraph 49 in which we set out the possibility of including reference to the clarifying statement at the front of the agreement.

We also highlight the need to consider the use and regulation of confidentiality clauses in COT3 agreements negotiated by ACAS. We emphasise the importance of individuals receiving independent legal advice on any confidentiality clauses in a COT3 and suggest that the S.203 requirements highlighted above are expressly extended to use of COT3

agreements, along with the same recommended requirements in relation to an advisor's certificate and a statement of clarification.

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?

The danger of this proposal is that even a very minor error in drafting may result in an entirely void agreement, leading to an individual losing all their rights under that agreement, including for example, the right to a termination payment and an agreed written and oral reference.

We suggest that a requirement to include particular wording, such as the statement of clarification we have suggested, could be set out in a statutory code of practice.

Any breach of the principles relating to confidentiality clauses set out in a statutory code of practice could then result in an uplift of compensation in related employment tribunal proceedings, in the same way that there is an uplift to awards for breaches of the ACAS disciplinary and grievance code of practice.

An alternative would be a standalone employment tribunal claim with a fixed penalty for failure to include standard wording, such as the clarifying statement we have recommended. Additional penalties could be imposed for repeat contravention of the requirement.

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

As outlined above, the TUC does not see any justification for use of confidentiality clauses relating to discrimination and harassment in contracts of employment.

Conclusion

In our view, although being a step in the right direction, the BEIS proposals are limited and inadequate and if implemented without additional measures will constitute a missed opportunity to carry out more significant reform in this area.

The TUC also emphasises that although misuse of confidentiality clauses is an important issue to be addressed, we must not overlook the need to resolve the fundamental problem of discrimination and harassment in the workplace. To this end, the TUC strongly advocates:

- the introduction of a new preventative duty on employers to stop discrimination and harassment before it occurs. A breach of the duty should constitute an unlawful act for the purposes of the Equality Act 2010 and be enforceable by the EHRC. This would create a clear and enforceable legal requirement on all employers to safeguard their workers and help bring about cultural change in the workplace.
- a statutory right to time off for trade union equalities representatives
- the reinstatement and strengthening of S. 40 of the Equality Act to address liability for third party harassment, including the Removal of the requirement that an employer

needs to know that an employee has been subjected to two or more instances of harassment before they become liable.

The TUC also wishes to highlight the unique and valuable role that trade unions have to play in securing workplaces free of harassment and discrimination, as well as in advising and informing individuals of their rights relating to confidentiality agreements and their use in settlement agreements. Trade unions listen and respond to workers concerns, provide a mechanism for collective voice and in doing so make a vital contribution to securing safer and fairer working environments.

In addition, when members share with their trade union representatives reports of discrimination and harassment, trade unions acquire important insights into individual workplace cultures and can identify workplaces manifesting a pattern of discrimination and harassment. In this manner, trade unions are uniquely placed to work with employers in order to eliminate discriminatory workplace cultures and to do so a collective basis, rather than exposing individuals to the pressure of stress of individually pursued grievances.