Employment: Non-disclosure agreements in discrimination cases

James Tunley

On 11 June 2019 the House of Commons' Women and Equalities Committee published its report on the use of non-disclosure agreements (NDAs) in discrimination cases. Whilst the benefits are recognised, the use and scope of NDAs require improvements.

Within settlement agreements, NDAs offer employees closure on a situation without fear of 'blacklisting' or being maligned as troublemakers. Confidentiality enables employers to settle cases without admitting liability and to protect their reputations. However, there is no doubt that in some instances NDAs are misused and they risk covering up unlawful misconduct and allowing it to go unchallenged. This is particularly so if employers simply enter into NDAs without taking steps to properly investigate and address it.

Prohibiting NDAs outright would be wrong because those who have experienced discrimination or harassment ought to be able to have the freedom to seek a confidential resolution if they wish.

The Committee is correct that clearer drafting of, and more thorough advice about, NDAs is needed so that employees have a greater understanding of their choices and the scope of confidentiality. Section 203(3)(c) Employment Rights Act 1996 is likely to be strengthened to specifically cover advice on the nature and limitations of any confidentiality clause.

In order to redress the power imbalance in negotiations, the Committee has proposed employers be responsible for the costs of employees being advised on the agreement, but also of any negotiations. This is regardless of whether an agreement is ultimately concluded. Will employers be less incentivised to settle cases? It may not be ideal but unless the fees are disproportionate it is unlikely to derail an otherwise commendable settlement.

The Committee also looked at why employees felt deterred from pursuing claims and instead opted to settle. Cost was an obvious factor. One proposal is one-way costs shifting whereby there is a presumption that the employer will pay the employee's costs in a successful sexual harassment case. It seems a far from convincing way of offsetting the risks and the burdens of litigation. The litigation risks will still be present. Why should such a presumption be limited to sexual harassment claims? Should there be some reciprocal provision requiring unsuccessful employee pay the employer's costs (similar to fundamental dishonesty disapplying cost-shifting provisions in personal injury cases)?

Personal injury: Woodward & Anor v Phoenix Healthcare Distribution Ltd [2019] EWCA Civ 985

Dominic Bright

When is it appropriate to allow a potential defendant to take advantage of a mistake on the part of a would-be claimant giving rise to defective service, where any new claim would be statute-barred?

Procedural history

The respondent's solicitors did not notify the appellants that they were authorised to accept service. They had not been asked. After taking instructions, the respondent's solicitors deliberately did not inform the appellants that they were not authorised to accept service, until after expiry of the deadline for service.

The appellants applied for retrospective validation of service under the court's discretion because the respondent could have informed the appellants, so that the appellants could have served proceedings in time. The Master granted the application on the basis of the respondent solicitor's duty to assist the court to achieve the overriding objective, rather than engage in "technical game playing". On appeal, this decision was reversed.

Grounds of appeal

There were two main grounds of appeal: 1) the respondent's conduct was not contrary to the duty of the parties to help the court to further the overriding objective, through failure to notify the appellants before the claim form expired that their solicitors were not authorised to accept service on their behalf; and 2) such conduct was not "game playing".

Discussion

The Court of Appeal analysed *Barton v Wright Hassal LLP* [2018] UKSC 12, [2018] 3 All ER 487. Asplin LJ – handing down the leading judgment – identified the "nature of the exercise to be undertaken" by an appellate court. A decision in relation to the service of documents is discretionary, based upon an evaluative judgment of the relevant facts. "Accordingly, it is not for us … to seek to substitute our own exercise of evaluative judgment [but rather] to determine whether the Master erred in principle or reached a conclusion which was plainly wrong."

"Simply conditions on which the court will take cognisance"

Asplin LJ found that "the facts of *Barton* were all but indistinguishable from the ones with which the Master and the Judge were dealing and the Supreme Court had distilled the appropriate principles to be applied." Lord Sumption said that the rules governing the service of a claim form are "simply conditions on which the court will take cognisance of the matter". They "do not impose duties, in the sense which, say, the rules governing the time for the service of evidence, impose a duty."

Outcome

The CPR does not require a solicitor who has in no way contributed to a mistake on the part of his opponent, or his opponent's solicitors, to draw attention to that mistake. Even if there is still time for the opposing party to cure that error. "It is hard to see that taking the point that service was invalid, as in *Barton,* together with acting in a proper professional manner in researching the position, advising the client and taking their instructions can be recast as 'technical games.'" Nicola Davies and Bean LJJ concurred.

Commercial: Freezing injunctions in aid of execution can prohibit the use of assets for business purposes.

Alex Cunliffe

Where there is a risk of dissipation between judgment and execution, post-judgment freezing injunctions are an increasingly common tool to facilitate execution, although, crucially, they are not a part of execution themselves.

In *Emmott v Michael Wilson & Partners Ltd* [2019] EWCA Civ 219, a freezing injunction had been obtained following an arbitration award which had been unsuccessfully appealed and which had been converted into a judgment of the court. Originally, the injunction contained what is known as an *Angel Bell* exception, which meant that the debtor company was not prohibited from 'dealing with or disposing of any of its assets in the ordinary and proper course of business'. In 2017, the injunction was varied to remove the exception, and the Court of Appeal upheld this decision.

In *Emmott,* the Court of Appeal held that although a freezing injunction would, as an unavoidable result of their design, put pressure on a Defendant to pay a judgment, this did not, by itself, make the injunction illegitimate. Further, the court did consider that it would sometimes (and perhaps usually) be inappropriate to include the *Angel Bell* exception in a post-judgment freezing injunction, since to do otherwise would permit the judgment to be ignored, whilst the debtor continued to carry on business. Of course, anybody applying for a freezing injunction must take account of the fact that it is already a draconian step, and the more draconian the relief, the greater the need for its justification. However, the check on the potential damage to the debtor's business was that a risk of dissipation had to have been demonstrated, for the injunction to have been granted in the first place.

The court was unwilling to lay down a rule that refusal of the *Angel Bell* exception in such circumstances was either the starting point or a presumption, but neither was it "a remedy of last resort". Thus, although the appropriateness of the *Angel Bell* exception in a post-judgment freezing injunction is a question turning on all the facts in the case, and a discretionary exercise on the part of the judge, creditors should now be confident that the debtor will have fewer ways to hide its assets from enforcement.