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Legal Services Board – Call for Evidence on the Misuse of NDAs

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Introduction

Protect, the UK whistleblowing charity, was established in 1993 and has individually advised more than 50,000 whistleblowers to date. Protect aims to make whistleblowing work for individuals, organisations, and society.

Every year, we support around 3,000 whistleblowers who call our Advice Line. In addition, we work with organisations on improving their speak up arrangements and campaign for better legal protection of whistleblowers.

Protect believes confidentiality clauses and NDAs can serve a useful and legitimate purpose. This is so particularly where they protect commercially sensitive information, but also because an appropriately drafted confidentiality clause can benefit both employee and employer when reaching settlement agreements.

Protect does not support the call for an outright ban on NDAs. NDAs are, however, too often used to prevent workers from whistleblowing. NDAs should be better regulated and only be used where appropriate and necessary. The law needs to be clearer on this and workers need to be better informed of their rights.

This note provides Protect's view on three key issues relating to whistleblowing and the LSB Review of the misuse of NDA's:

1. Section 43J Employment Rights Act 1996;
2. the use of COT3 Agreements; and
3. whistleblowing as an in-house lawyer.

Whistleblowing and NDAs

Section 43J of the Employment Rights Act 1995 ('ERA 1996') states that any provision in an agreement between a worker and their employer (whether a worker's contract or not) is void in so far as it purports to preclude the worker from making a protected disclosure. We often advise on circumstances where workers have signed a settlement agreement but are unaware of the existence of section 43J or its material impact on conflicting provisions. Most workers do not have a legal background and find a detailed explanation of conflicting rights confusing at the best of times. This may also be because solicitors or employers who draft the settlement agreement do not advise them on its existence or its application in real circumstances. This is exacerbated by low awareness among the general population of their rights, according to Protect and YouGov research in 2021 only 43% of people think there is a law that protects whistleblowers.

Settlement agreements tend routinely to have a non-disparagement or non-derogatory terms. As S43J applies more generally to any contractual provision in an agreement between a worker and employer it would therefore also apply to a non-disparagement term. This means that workers may make a protected disclosure – which may necessarily contain information that is disparaging about the employer – to a regulator without breaching the terms of the agreement. But "making a protected disclosure" is a legal term that does not make much sense in common language. Not all disclosures are protected and workers need to satisfy various legal requirements for their disclosure to be protected, which is an additional confusion.

Most clients do not understand that this is the effect of section 43J and call us with concerns about breaching terms in their agreements. Since January 2021 we have advised 71 clients on gagging clauses, the terms of their settlement agreements, or the potential misuse of NDAs. Clients are understandably reluctant to take the risk to go to Court to find out whether or not their NDAs are unenforceable.

Many NDAs seen by Protect are also inherently ambiguous. We have set out examples below:

Example 1

> *Clause 5.4 Nothing in this clause 5 shall prevent the Employee from making a protected disclosure under section 43A of the Employment Rights Act 1996, making a disclosure to a regulator regarding any malpractice, reporting a criminal offence to any law enforcement agency or assisting with a criminal investigation or prosecution, and nothing in this clause shall prevent the Company from making such disclosure as it is required by law to make.*
>
> *" The Employee agrees to accept the terms of this agreement and the payments provided for herein in full and final settlement of:*

6.4.1 the Alleged Claims;
6.4.2 the matters raised by the Employee [in previous complaints]
6.4.3 all other claims and rights of action (whether under common law or otherwise) in any jurisdiction in the world, howsoever arising, (including but not limited to the statutory claims detailed at Schedule 1, contractual claims, breach of contract and tort) which the Employee has or may have against the Company, any Group Company or its or their officers, employees or shareholders, arising from or in connection with the Employee's employment and/or the termination thereof

7.3 The Employee agrees that the Company is not required to undertake any further investigation or steps in respect of the matters raised by her [in previous complaints] and that the employee agrees that all such matters have been responded to and resolved by the Company. Subject to clause 5.4, the Employee agrees that [they] will not submit any further complaints, grievances or appeals (whether formally or informally) to the Company.

7.4 The Employee agrees that [they] do not require the Company to provide her with any additional documents or information in respect of her data subject access requests submitted. The Employees agrees not to submit any further data subject access requests to the Company under the UK General Data Protection Regulation, and they agree not to submit any complaint(s) to the Information Commissioner's Office."

Issues

The wording in clause 5 is ambiguous. In reality, the effect of section 43J is that no clause in this agreement will prevent the employee from making a protected disclosure under section 43A of the ERA 1996. The wording of this term implies that nothing in clause 5, and only clause 5, will prevent the employee from raising concerns, when legally it should state nothing in this *agreement* shall prevent the employee from making protected disclosures. Clause 5 has the effect of implying that all other clauses take primacy over the right to make a protected disclosure and discourages speaking up. The public policy effect here is that such clauses can deter a whistleblower from approaching a regulator, MP or press with their concerns.

Clause 7.3 may go against the SRA's guidance on settlement agreements. Clause 7.3 refers to a protected disclosure previously made and states that the worker agrees not to raise these concerns again. This suggests the agreement is trying to prevent them from making further disclosures linked to the concerns they have already raised. Again, this term would be made void by S43J and so should not have been included in the agreement.

Clause 7.4 conflicts with section 43J as a complaint to the Information Commissioner's Office may amount to a protected disclosure as they are a prescribed regulator. We do not believe it is necessary to waive rights under GDPR for this settlement to have effect. Again, this is contrary to the SRA's Warning notice and ICO's guidance on settlement agreements.

In these circumstances, following our advice, the client did not agree to sign the settlement agreement.

An innovation that would assist claimants is to advise or require lawyers to draw up settlement agreements to include clear wording that no clause in the agreement can prevent someone from making a protected disclosure, and the agreement must clearly stipulate what type of disclosures can be made and to whom. This could be provided in the form of a short statement that sits with the wider settlement agreement and makes it quite clear what issues are to remain confidential (e.g. the reasons for the breakdown of the employment relationship) which are separate from public interest issues (e.g. whistleblowing concerns that the claimant believes have not been addressed). This would enable those signing settlement agreements to escalate concerns about wrongdoing or malpractice to the relevant authorities.

This is something that the Financial Conduct Authority and the Prudential Regulatory Authority require from the financial services sector via their whistleblowing rules. All firms must include in settlement agreements the following section:

"For the avoidance of doubt, nothing precludes [name of worker] from making a "protected disclosure" within the meaning of Part4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures made about matters previously disclosed to another recipient."

Example 2

> *Subject to clause 6.4, for the avoidance of doubt, both parties are permitted to communicate freely and without restriction about the facts [relating to the terms of the dispute]*
>
> 6.4 *Neither party will make any unfounded adverse or derogatory comment about the other.*

Issues

Essentially this clause gags the client from talking about the facts that led to them making protected disclosures unless they are positive or non-derogatory. This term may be caught by section 43J, but it also has the effect of discouraging the client from discussing their concerns as such discussion would necessarily involve some derogatory comment about the organisation who committed the wrongdoing. It may also breach the SRA's warning notice not to use NDAs to cover up wrongdoing. Being able to talk openly about the wrongdoing, and advocating for change, was a specific requirement our client had tried to negotiate into the agreement. But, because of this non-derogatory clause, they felt unsure and rather worried about sharing her story for fear of breaching the agreement.

Example 3

We advised a client who wanted to raise concerns that related to information which was subject to a confidentiality clause in their employment contract. The client sought advice about what their liability would be in going to a regulator with information about wrongdoing that related to the information subject to the confidentiality clause. The client's whistleblowing policy, and the contract of employment, did not mention the existence or effect of S43J. We advised the client that S43J applies to confidentiality clauses in contracts of employment, and that they could raise their concerns to a regulator in a legally compliant way.

There is no legal requirement for a contract of employment to be reviewed by a lawyer in the same way as a settlement agreement would be. There is even less clarity for workers regarding breaching confidentiality clauses in their employment contracts to make protected disclosures.

The LSB could produce further guidance on confidentiality clauses in employment contracts, or pre-employment NDAs. One other suggestion is for the LSB to recommend that workers are provided with the whistleblowing policy before they commence employment as is currently the case with other workplace conditions and rights set out in Section 1 ERA 1996.

Perils of COT3 agreements

ACAS COT3 agreements are a form of settlement agreement recording the terms of settlement of an Employment Tribunal claim (or future claim). Unlike settlement agreements governed by section 203(2)(f) ERA 1996 there is no requirement for the parties to obtain independent legal advice for the agreement to be binding. This is a significant disparity between the different types of agreement, which often clients do not understand. This is relevant because usually solicitors should advise clients on the effect and impact of S43J when advising on the terms of a settlement agreement. This safety net does not exist for COT3s.

Example 1

One of our clients had a dispute with their employer, which settled under a COT3 agreement. The client continued to work at the employer. They were concerned that the employer had settled their legal dispute with them, but that other workers were entitled to the same right subject to the dispute. The client was not aware of section 43J or what a protected disclosure was. The COT3 agreement included the following clause:

> *Clause 7. The Claimant undertakes to keep the fact of, and the terms of, the settlement and the negotiations with the Respondent leading up to settlement strictly confidential (save where to his legal adviser, his immediate family who shall also keep this confidential, and as required by law). For the avoidance of doubt, the confidentiality clause does not affect or otherwise prevent the Claimant from making a public interest disclosure under the Public Interest Disclosure Act 1998*.

Because our client didn't receive legal advice on the terms of the settlement agreement, they did not understand what a public interest disclosure was, or how that might relate to the confidentiality clause.

Our client raised their concerns about other workers being entitled to a workplace right (conferred by ERA 1996) internally to the employer. The intention was to bring awareness to the fact that the employer was breaching its legal obligations to other staff, showing the disparity between the employer's actions towards them and other staff. In doing so, they mentioned the fact that they had signed a settlement agreement. The client also did not raise the concerns in such a way as to reach the legal definition for a qualifying protected disclosure set out in section 43B ERA 1996.

Our client was dismissed as a result of this breach. Had they received legal advice it is likely they would have understood what a protected disclosure was, and how to raise concerns in a legally compliant way. At the very least they would have known to seek further advice.

Example 2

In a contrasting case – which further evidences how crucial independent legal advice is – a client who had signed a settlement agreement understood that they were not prevented from raising public interest concerns to a prescribed body. They had been advised by a Solicitor that concerns could be raised in a legally compliant way without mentioning the fact of the settlement agreement or breaching confidentiality terms. They were also advised that the non-disparagement and confidentiality clauses did not prevent whistleblowing. They sought advice from us which enabled them to raise concerns safely.

The difference was that the latter client settled under a settlement agreement, rather than a COT3 agreement. We believe that the ACAS COT3 agreement should be subject to the same stipulations of section 203(2)(f) ERA 1996 in that they are only legally enforceable once the claimant has obtained legal advice on its terms. The ACAS Early Conciliation process is mandatory for claimants bringing Employment Tribunal proceedings. Many clients do not understand the difference between a COT3 agreement and settlement agreement. They also feel they are doing the right thing by conciliating and settling through the statutory body set up to do this. It is worrying that that statutory body leaves workers at a disadvantage to those who choose to settle outside of the ACAS structure and more exposed to the misuse of NDAs.

<u>Whistleblowing as an in-house lawyer</u>

Section 43B(4) of The Public Interest Disclosure Act 1998 expressly excludes disclosures that breach legal privilege from qualifying for protection in law. This places in-house lawyers at disadvantage as the instances where they will be protected are significantly limited. It also presents the risk that wrongdoing may lay undetected if this group of workers are unable to escalate concerns beyond their employer.

An in-house lawyer specifically is doubly bound if they sign a settlement agreement because they cannot rely on Section 43J if the information they want to raise concerns about is subject to legal advice privilege.

Our proposed solution is to provide in-house lawyers with a means of raising concerns, while preserving legal privilege, by allowing in-house lawyers to raise protected disclosures with the SRA or LSB. In turn, the SRA or LSB could pass on relevant information to the appropriate regulators or law enforcement bodies for consideration, investigation, and enforcement. For example, an in-house lawyer for a bank who becomes aware of breaches to financial services regulation, where they are unable to prevent the breaches via providing advice, would be able to raise concerns with the SRA who in turn could decide whether the concerns should be referred to the Financial Conduct Authority or the Prudential Regulatory Authority.

<u>Conclusions</u>

Protect believes well drafted NDAs are appropriate. It is, however, clear that workers are unclear about what their legal rights are. All settlement agreements should be subject to effective legal advice and scrutiny that correctly identifies the existence of the section 43J carve out, and what this means in the context of other competing terms in an agreement.

We make the following suggestions:

1. The LSB should advise, or even require, lawyers to insert a clear clause in settlement agreements stating that confidentiality clauses or non-disparagement terms do not not apply when making a qualifying protected disclosure.
2. Lawyers should be required to advise on what “making a protected disclosure” means, and what the impact of any Section 43J ERA 1996 carve out term is.
3. Lawyers should explain what workers may legally do when two terms of an agreement appear to compete.
4. COT3 agreements should be subject to the requirements set out in section 203(2)(f) ERA 1996 and ACAS advisers should be trained to highlight section 43J and its effect.
5. The LSB should advise, or even require, lawyers to provide a statement to whistleblowers where a confidentiality or non-disparagement clause is part of settlement agreement outlining what information is to remain confidential.
6. The LSB could recommend that whistleblowing policies are provided to workers before commencing employment in line with provisions included in Section 1 ERA 1996.

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