Acas response

Confidentiality Clauses

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

May 2019
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Acas response

1. Acas (Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the Government’s consultation on measures to prevent misuse of confidentiality clauses in situations of workplace harassment or discrimination.

2. Acas is a statutory, non-departmental public body with a duty to improve employment relations in Great Britain. It has considerable practical experience of the dynamics of the workplace and of issues experienced by workers and employers in situations of workplace harassment or discrimination. In 2018/19, Acas handled approximately 800,000 calls from individuals and employers to its national helpline and over 400,000 queries online. It provided conciliation in approximately 600 collective disputes, received around 130,000 notifications to its early conciliation service, and its network of locally-based advisers trained around 36,000 individuals on a wide range of workplace-related topics. Of particular relevance to the issues addressed in this consultation is that:

- Acas has a statutory duty to endeavour to promote settlement between parties in potential and actual employment tribunal claims. This conciliation duty includes facilitating written agreements (known as COT3s) to settle claims without their being determined by an employment tribunal. Such agreements often include confidentiality clauses.
- Acas provides a statutory code of practice and associated non-statutory guidance on settlement agreements. These agreements also often include confidentiality clauses.
- Acas provides impartial guidance and advice to help employers and workers understand the framework of employment law and how it applies to them, and to explain and encourage good practice to foster good employment relations. This includes guidance on all forms of workplace harassment and discrimination.
- Acas is currently developing standalone guidance on confidentiality clauses in the contexts of both employment contracts and settlement agreements.

Question 1: Misuse of confidentiality clauses in working relationships

3. Acas shares the Government’s and the wider public concern that confidentiality clauses can be used in some cases to intimidate or silence victims of harassment or discrimination, and to protect perpetrators, for instance by purporting to limit a worker’s disclosure rights beyond the existing legal protections for certain disclosures.
4. Acas’ approach during conciliation offered in potential and actual claims to the employment tribunal system includes a number of safeguards against the misuse of confidentiality clauses. These are summarised below and may be useful for the Government to consider in the context of this consultation.

5. Acas’ impartial role in the conciliation process means that the proposed terms and wording of a conciliated settlement are always a matter for the parties to agree, and never for Acas to impose. The presence and wording of proposed confidentiality clauses therefore vary from case to case depending on, for instance, the wishes and needs of the parties, the complexities of the dispute and the nature of the confidential information that the worker may have been party to during their employment.

6. In all cases where a draft conciliated settlement has been proposed, the conciliator’s role is to provide independent and impartial assistance to the parties to help them understand the terms, wording and implications of the proposed agreement so that they can reach an informed decision as to whether they wish to agree to it, reject it, or propose alternative terms or wording. The conciliator must be satisfied that both parties clearly understand the meaning and effect of the proposed terms, and that they have confirmed that understanding to the conciliator, prior to the agreement being concluded.

7. More specifically, where a confidentiality clause is proposed Acas’ policy is that the conciliator must draw the parties’ attention to its legal limitations (under section 43J Employment Rights Act 1996) to make sure the parties understand that such a clause cannot prevent a worker from making a protected disclosure under whistleblowing law. If an employer were to insist that they would not settle unless the agreement included a confidentiality clause that expressly sought to prevent a worker from making a protected disclosure, and if following explanation of the law and discussions with the conciliator that position remained unchanged, then Acas’ policy is that it will not conclude a settlement that is known to be legally unenforceable.

8. Acas will continue to review its conciliation policy on COT3s in light of further emerging evidence of how confidentiality clauses are used, and will consider any appropriate changes as a result of the outcomes of this consultation to further safeguard against the misuse of such clauses.

Questions 2–5: Putting more limitations on confidentiality clauses in working relationships

9. Acas agrees that uncertainty about the extent of protection provided under whistleblowing law can deter people from reporting wrongdoing even if they are aware that a confidentiality clause cannot affect their whistleblowing rights. Acas therefore agrees with Government’s proposal to make clearer in law the people and organisations to whom an individual can make a disclosure, whatever the terms of a confidentiality clause.
10. Acas agrees with the Government’s proposal to legislate to provide that no provision in an employment contract or settlement agreement can prevent someone making any kind of disclosure to the police, regardless of whether the issue or disclosure meets any legislative whistleblowing tests. The Government might similarly consider clarifying in law that no provision in an employment contract or settlement agreement can prohibit assisting with police or other relevant law enforcement investigations or prosecutions. One positive consequence of such legislation would be that workers could be sure that they could always report a crime or discuss a matter with the police or other law enforcement bodies without breaching a confidentiality clause.

11. Acas notes that such legislation may not, however, address the wider issue acknowledged in the consultation document, that it can be difficult for workers to understand what constitutes a protected disclosure under whistleblowing law. Unless this wider issue is also addressed, providing certainty about being able to make “any kind of disclosure” to the police, as the Government proposes, may result in some workers reporting concerns to the police that would be more appropriate to report to other prescribed persons or bodies.

12. While noting the Government’s caution with regard to creating too broad a list of prescribed persons/bodies under whistleblowing law, in Acas’ view the Government’s concerns about workers being intimidated into silence about wrongdoing in the workplace make a strong case for appropriate extensions to this list. Acas welcomes the Government’s acknowledgment, in its response to the Women and Equalities Committee’s report on ‘Sexual harassment in the workplace’, that there is clear value in having the Equality and Human Rights Commission (EHRC) prescribed.

13. The Government might also consider prescribing other regulatory bodies that have powers to investigate misconduct and to take action against employers and legal professionals (who are commonly involved in drafting confidentiality clauses). In addition to the EHRC, examples of such bodies include the Solicitors Regulation Authority (in England and Wales) and the Law Society of Scotland.

14. In Acas’ view, there is also a case for considering legislation, distinct from whistleblowing legislation, which provides that confidentiality clauses cannot lawfully prevent an individual from disclosing the existence and relevant terms of an agreement to medical, healthcare and similar professionals or to those providing advice, guidance and/or support relating to the particular agreement, such as lawyers and trade union representatives and officials.

15. A further safeguard that the Government might consider is to make clear in law that confidentiality clauses in settlement agreements relating to harassment or discrimination can only be used where it is clear that both parties have agreed to the confidentiality clause freely and without undue pressure. The Government might also consider, in cases where there is a public interest reason for disclosing the name of a perpetrator of harassment or discrimination, because a case is particularly serious and/or there is a real risk of repetition of harmful conduct,
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whether confidentiality clauses which protect the perpetrator should be made unlawful.

16. Acas notes that one of the fundamental issues that the consultation is seeking to address is the potential imbalance of power where a confidentiality clause is proposed to a worker by an employer and the worker has no option in practice but to accept. In this regard, Acas cannot envisage any valid reason why an employment contract should seek to protect information about work-related harassment or discrimination. This is an issue on which the Government may wish to consider legislation.

17. For similar reasons, legislation might also be considered to make it clear that employment contracts should not state or suggest that workers are prevented from exercising certain rights which cannot be excluded by contract. For instance, terms should not state, or give the impression, that they restrict statutory employment rights as set out in the Employment Rights Act 1996, override anti-discrimination law under the Equality Act 2010, or prevent a worker from bringing an employment tribunal claim.

Questions 6 & 7: Wording for all confidentiality clauses

18. Confidentiality clauses can in some instances be drafted unethically in such a way as to lead individuals to believe that they are prevented from disclosing certain information, or exercising certain rights, even where they remain legally entitled to do so. Acas notes that this outcome can also happen as a result of the way a confidentiality clause is drafted even where there is no unethical intention to mislead an individual. For instance, template agreements can be used unthinkingly rather than being adapted to each particular case. These can include standard ‘catch all’ confidentiality clauses that may be more expansive than is required in a particular case and/or may be taken to suggest confidentiality restrictions greater than those that the law permits.

19. Acas considers that it is important that confidentiality clauses should clearly set out the circumstances in which they do and do not apply. Encouraging greater standardisation of wording can help to achieve this. However, Acas is not convinced that legislating to require the use of standard confidentiality clauses presents a practicable solution for this objective.

20. Acas is concerned that a statutorily prescribed form of wording that clearly highlights all disclosures that confidentiality clauses cannot prohibit, in any potential situation in which a confidentiality clause might be used, might in practice require quite complex and/or lengthy wording. There are several different limitations that might be relevant in different situations that confidentiality clauses may be used:

- As the consultation document notes, limitations include that a confidentiality clause cannot prevent a worker making a protected disclosure, as well as other relevant statutory obligations such as disclosing information to a court.
As noted at paragraph 17 above, further important limitations, especially relevant to preventing the misuse of confidentiality clauses in situations of workplace harassment or discrimination, include that a confidentiality clause cannot remove a worker's statutory employment rights as set out in the Employment Rights Act 1996, override anti-discrimination law under the Equality Act 2010, or prevent an individual from bringing an employment tribunal claim unless it forms part of an Acas conciliated settlement or other valid settlement agreement.

21. Standard prescribed wording that set out a complete list of all such limitations may have to rely on technical legal terms (such as shorthand citations of relevant legislation as above) and therefore may be too complex for many to understand. Alternatively, standard wording providing an explanation in plain English of all such limitations may need to be very lengthy.

22. An alternative that the Government may wish to explore is a statutory code of practice setting out relevant considerations and guidance around the use of confidentiality clauses in relation to discrimination or harassment at work. This might include recommended wording for using confidentiality clauses to achieve different objectives and varying degrees of confidentiality in various types of situation, including those that cover issues other than disclosure, such as clauses prohibiting ‘derogatory comments’. A statutory code might also provide guidance on wider good practice principles – for example, that any documentation that includes a confidentiality clause should draw attention to it, and its limitations, in a prominent place. Employment tribunals and courts could be obliged to take such a code into account when deciding relevant cases. A range of remedies might be made available where a breach occurs, including deeming the clause void, compensation awards and/or penalties.

23. Acas notes that the EHRC is currently developing a statutory code of practice on sexual harassment at work, which may cover the use of confidentiality clauses in that specific context. A statutory code with a broader focus might also provide guidance on the use of confidentiality clauses in the context of other forms of discrimination and harassment at work. Should the Government legislate to prevent the use of such confidentiality clauses in employment contracts (see paragraph 16 above) then the focus of such a code may be on the use of confidentiality clauses in settlement agreements. Acas already provides a statutory code on certain issues related to settlement agreements under section 111A of the Employment Rights Act 1996. There may be an opportunity to explore how this existing code might fit with the objectives of any new statutory code covering confidentiality clauses. Acas would be willing to work with the Government and other stakeholders to either lead on or to support the development of such a code of practice.

24. There is also a wider role for non-statutory guidance in encouraging good practice in this area. Acas’ existing non-statutory guidance on settlement agreements currently provides some guidance on appropriate use and drafting of confidentiality clauses. This includes a model settlement agreement with suggested wording where a confidentiality clause is to be included. Acas will
review this guidance in light of the outcomes from this consultation. Acas is also currently exploring the development of separate, standalone guidance on confidentiality clauses covering both employment contracts and settlement agreements.

25. Acas is aware that other stakeholders are also currently engaged in developing good practice guidance in this area. Acas held a roundtable event earlier this year which brought together a range of stakeholders to discuss issues and concerns around the use of confidentiality clauses and areas where clearer guidance is needed. Acas will continue to liaise with the Government and other stakeholders in the interests of ensuring that its guidance and that being developed elsewhere are consistent and effective for employers and workers.

**Question 8: Independent advice on settlement agreements**

26. As the consultation document notes, for a settlement agreement to be valid, section 203(3) of the Employment Rights Act (ERA) 1996 requires that the worker has received advice from an independent adviser (such as a lawyer, trade union official or advice centre worker) as to the terms and effect of the agreement. Acas notes that it is already an implicit requirement under s.203(3)(c) ERA 1996 that the independent advice that a worker receives on a settlement agreement must cover the terms and effect of any proposed confidentiality provisions in the agreement. Given evidence of misuse of confidentiality clauses, it seems sensible to amend the law to clarify this point specifically.

27. Acas suggests that a further safeguard could be achieved by amending the associated statutory requirement, under s.203(3)(f) ERA 1996, for settlement agreements to state that the conditions regulating such agreements under ERA 1996 have been satisfied. Such an amendment might require that that statement must specifically confirm that independent advice has covered the meaning, effect and limitations of any confidentiality provisions in the agreement. In situations where there is a cost involved in receiving independent advice, the Government might also wish to consider whether employers should be required to pay any such cost, or a reasonable contribution towards it, in the interests of ensuring that the worker gets the necessary advice on any confidentiality provisions in a proposed agreement.

**Question 9: Enforcement of confidentiality clauses within settlement agreements**

28. Acas notes that making void in its entirety a confidentiality clause that does not meet any new wording requirements might, in some cases, result in unintended consequences. For instance, in cases where a confidentiality clause includes mutually binding provisions, i.e. where confidentiality is desired by both the worker and the employer, the voiding of the clause in its entirety would also result in the loss of the worker’s protection of confidentiality.
29. The Government might wish to consider whether there should be an additional or alternative legal remedy of a penalty and/or compensation ordered by an employment tribunal or court where an employer is found to have deliberately used inappropriate wording for a confidentiality clause in a settlement agreement. Tribunals and courts might also be empowered to make a ruling on which elements of an inappropriate confidentiality clause should be deemed void and which it may be just and equitable to uphold in a given case.

**Question 10: Enforcement of confidentiality clauses within employment contracts**

30. Acas has limited insight on enforcement of contractual terms in civil courts but offers the following observations that the Government may wish to consider in relation to this question.

31. Acas notes that the current enforcement mechanism for the right to a written statement of particulars is not necessarily a complete solution for the enforcement of any statutorily required wording for such clauses.

32. The current mechanism for enforcing the right to a written statement is not currently available as a standalone complaint to an employment tribunal. Rather, enforcement is only available where it arises as a matter in the context of another claim. The consultation document therefore correctly notes that, for this enforcement mechanism to be effective, it must be assumed that workers are unlikely to bring tribunal claims solely in relation to a confidentiality clause not meeting any new standard wording requirements, i.e. that claims are more likely to be related to other complaints to which the confidentiality clause might be relevant. However, the consultation document does not state an evidence base for this assumption. Acas suggests it would be prudent to take an evidence-based approach to the question of whether, and in what circumstances, there may be a legitimate need for workers to pursue a standalone complaint to a tribunal or court where they believe they have been misled by inappropriate wording in a confidentiality clause.

33. Acas notes further the well-known research into the payment of tribunal awards commissioned by the former Department for Business, Innovation and Skills in 2013, which found that only 53% of successful claimants surveyed received full or part payment without enforcement action, and that 35% had not received any payment at all. As the Government has also recently acknowledged in its Good Work Plan, the powers that employment tribunals have to impose additional penalties where an employer has breached its obligations are also not currently used as widely as they could be. Acas recognises that the Government introduced a penalty scheme for unpaid tribunal awards in 2016, and that its Good Work Plan includes further measures to improve the effectiveness of employment tribunal awards. However, while the proportion of unpaid awards and use of existing tribunal additional powers remains relatively low, this may limit how effective the proposed enforcement mechanism may be in encouraging the
use of standard wording for confidentiality clauses in employment contracts and written statements.

Further comments

34. Acas notes that the focus of this consultation is primarily on making the law clearer about the legal limitations on confidentiality clauses, and ensuring that such clauses are written in a way that makes those limitations clear, so that workers are not misled about when they retain rights and protections to speak out about concerns in the workplace. While welcoming this focus, Acas notes that whistleblowing protections are limited to circumstances in which someone reasonably believes that a disclosure is in the public interest. It is unlikely that this will cover all situations of discrimination or harassment in the workplace where a confidentiality clause may be proposed.

35. There are a number of broader concerns around the use of NDAs that go beyond the issue of disclosure of information. In particular, the consultation document notes heightened public concerns around the repetitive use of confidentiality clauses in settlement agreements to hide patterns of harassment or discrimination by a particular person or at a particular organisation, potentially putting other workers at risk. The issue here is not only to ensure that victims are not inappropriately silenced, but also to encourage organisations to take action to tackle the root causes of repeated misconduct in the workplace. Further measures, including making available appropriate remedy or remedies, might be considered to address this issue more directly. In particular, the Government may wish to consider measures such as introducing a preventative duty on employers, the reintroduction of s.40 of the Equality Act 2010 (employers’ liability for third party harassment) and a statutory right to time off for equalities representatives.

36. Acas welcomes the Government’s commitment, in its response to the Women and Equalities Committee’s report on ‘Sexual harassment in the workplace’, to carry out further awareness raising work with Acas, the EHRC and employers on how to prevent and address sexual harassment at work. This is one important part of tackling the issue of serial use of confidentiality clauses to hide patterns of wrongdoing in organisations. However, this is an issue that extends also to other forms of harassment and discrimination, as well as to other forms of wrongdoing in the workplace. Awareness raising efforts on all these forms of misconduct is also important.

37. Addressing these broader issues will also require further measures focused on tackling the types of workplace environments where power imbalances exist that allow these types of behaviours to occur. Such measures might include:

- ensuring that workers have access to independent advice and support in the workplace, including where appropriate through independent trade unions or other workplace representatives;
- developing and promoting principles of good governance that can help organisations achieve and maintain transparency around their use of
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confidentiality clauses, including good practice guidance on how to report and monitor the use of such clauses, so that organisations can understand how to identify and act on any patterns;

- promoting the importance of fairness, respect and agreement on acceptable and unacceptable conduct in the workplace, so that more individuals feel confident to raise concerns without fear of reprisal;

- promoting the value that managers and worker representatives, such as trade unions, can play in identifying and highlighting patterns of behaviour through their involvement in handling concerns raised in the workplace;

- improving the quality of leadership and people management skills in workplaces across the UK, so that leaders and managers feel empowered to deal effectively with any issues about wrongdoing that are brought to their attention, and to challenge any inappropriate conduct they may observe in their workplaces.

38. Acas has previously welcomed the Government’s recognition of ‘People’ as one of the five foundations of its Industrial Strategy, as well as its broader policy emphasis on the benefits of ‘good work’ for individuals, organisations and for productivity across the economy. Workplace cultures that minimise the potential for harassment and discrimination, and which take effective action on them where they do occur, are essential to any vision of good work. Acas would welcome working with the Government along with other stakeholders to support the further development and implementation of this component of the industrial strategy.

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