

# All the Rage – Should Confidentiality Agreements in Harassment Cases Be Allowed?

By [David Whincup](#)

Allegations of harassment in workplaces around the world are rarely out of the headlines at the moment. It is timely, therefore, that a committee of MPs recently agreed to look into workplace harassment, and in particular the use of confidentiality wording in settlement agreements arising from harassment allegations. Critics allege, says the BBC News online, 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 well be pressure to make such provisions unenforceable or even unlawful.

But would that actually be wise or helpful or desirable in any way? No one would condone deliberate harassment (and nothing here should be taken as doing so), but it seems 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 have it alleged against you and the remedies for it available at law. In particular:

- 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. However, the ill will and damage to relationships that harassment claims cause within a workplace is not a function of their cash value, being received, by their very nature, as a personal attack on the alleged perpetrator.
- Not all harassment claims are believed. 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. Even where they 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 career-ending allegations against someone entirely innocent of them. Neither complainant nor accused could ever be sure how things would turn out.

- Not all severance payments are expressly or tacitly admissions of wrongdoing. Sometimes they are recognition of a less than perfect 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 that any “acquittal” will never be as well publicised as the allegation. But why would an employer make a severance proposal aimed at avoiding all those things if it left the victim free to continue to talk about them anyway? The naivety of any suggestion that confidentiality 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.
- Nobody can be forced into a settlement agreement. The whole point of the requirement to take independent legal advice is to avoid the risk of coercion or misrepresentation as to its terms. There may be commercial pressures and temptations, but that is true for any termination agreement, not just those covering off harassment claims. If you believe that you have a case worth running, you can run it and obtain whatever compensation the Employment Tribunal (ET) thinks appropriate. There is no minimum length of service required, no longer any ET fee, and no end of “no-win, no-fee” lawyers who will help you do it. The law already provides remedies for proven harassment, whether just injured feelings of consequential financial losses too.
- Confidentiality agreements work both ways – bearing in mind the uncertainties noted 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. If the allegation is upheld, the details may still be painful or embarrassing to the victim. It cannot be said for a moment, though this is the thrust of the BBC report, that the whole beneficiaries of confidentiality clauses are the alleged perpetrators.

So, 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. That means:

- The victim has to fight for compensation in a 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 agreement to keep things confidential.

- Once the harassment allegation is made and investigated, then what? If the conduct of either party justified summary dismissal, so be it, but that is very rarely the case. You are then left with two people, one of whom justifiably feels sorely mistreated and both of whom loathe each other. That is not a basis for a happy or effective working relationship, so it would be little surprise if one wanted or was willing to leave to escape it all.
- What you would lose in the end 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 so as to 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 and one which victims should be free to agree if they want. 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. Easy to say until it is your own husband or father or key employee in the frame, maybe.

For any employment law related queries, please contact [Annabel Mace of Squire Patton Boggs](#), an Expat Academy Training Partner.

## Contacts

### **Annabel Mace**

Partner, London

T +44 207 655 1487

E [annabel.mace@squirepb.com](mailto:annabel.mace@squirepb.com)