

NDAs and sexual harassment by third parties

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Employment analysis: Following the Presidents Club scandal, Nicholas Lakeland, an employment partner at Laytons LLP examines the extent to which non-disclosure agreements (NDAs) prevent workers from speaking out and whether there is a lack of awareness about what is and what is not legally binding in an NDA.

To what extent can NDAs signed in advance prevent workers speaking out about misconduct which occurs in an employment setting, eg things they see or hear or things that happen to them?

An NDA is intended to keep confidential information confidential. At a high-powered dinner, the identities of the attendees and any conversations they may be having between themselves represent information which is clearly confidential and which more importantly can be restricted from being disclosed in the public domain.

Business connections and discussions are often made at social occasions, with either business information being discussed or conversations taking place which may be of a more personal nature where family or other sensitive matters are discussed. Where a considerable amount of drink is flowing the risk of something being said which a guest may not want to be revealed to the outside world increases exponentially.

In short, it is sensible and perfectly understandable that an NDA should be sought. The difficulty for the Presidents Club, which reportedly required hostesses to sign NDAs prior to an event at which they were working, arises from the nature of the conduct which the NDA is seeking to keep confidential.

Section 43J of the Employment Rights Act 1996 (ERA 1996) states that:

‘Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.’

The provisions in ERA 1996 were inserted by the Public Interest Disclosure Act 1998 and it is quite clear that in so far as an employee or worker makes a public disclosure in the public interest with a reasonable belief that:

- a criminal offence has been committed
- there is a failing or likely failing on the part of a person to comply with a legal obligation they are subject to
- a miscarriage of justice has occurred or is occurring or is likely to occur
- the health and safety of an individual has been, is being or is likely to be endangered
- the environment has been, is being or is likely to be damaged
- information tending to show one of the above has been, or is likely to be deliberately concealed

A worker's right to make a disclosure of the kind described above is protected by the law and a worker making such a disclosure cannot be pursued for a breach of the NDA.

Broadly speaking the categories of unwelcome sexually harassing behaviour reported as having taken place were:

- touching or groping or holding of hands
- a grossly lewd act
- invitations for hostesses to participate in sex

Each of the three above categories of behaviours, depending upon the circumstances, are capable of being criminal acts such as assault on the person, outraging public decency or even hate crimes as well as being civil breaches of the law contrary to the Equality Act 2010 (EqA 2010).

Deciding whether a disclosure is protected, and therefore not a breach of an NDA, requires a careful analysis of the acts committed and/or words used.

Do you think there is a problem in relation to the awareness people have about what is and what is not legally binding in an NDA, in particular where the person asked to sign it is in a more vulnerable bargaining position?

By all accounts the hostesses were asked to sign a five page NDA and not provided with a copy. It is unlikely that in such circumstances they will have understood much more than they were expected to keep what they saw and heard confidential.

Without proper legal advice and an understanding of what a protected disclosure is, the hostesses, in common with most people, will not really be aware of the extent to which they could breach the NDA and complain about what happened to them.

The complexity surrounding whistleblowing will often leave employees or workers worried that if they say something they could be sued and it is clear that there is insufficient awareness by people. In more organised workplaces there will be whistleblowing policies and HR departments available to guide employees but at a one-off event of this nature no such assistance will be available and it does put these sorts of workers in a particularly vulnerable position.

Following the Presidents Club scandal, the Prime Minister is reviewing the operation of NDAs. What changes do you think would improve the current situation? What changes, if any, do you think are likely to be implemented?

NDA's could specifically be required to state that they cannot prevent a protected disclosure being made (a common clause found in settlement agreements) although a better option would be to ensure the use of plain language spelling out what cannot be protected, namely any criminal act or a form of harassment on the grounds of a protected characteristic. Spelling out that sexual or racial or other forms of harassment cannot be kept quiet would assist the worker or employee to realise that they can speak out even after signing an NDA.

Another obvious measure that could be implemented is the right of the worker or employee to actually be given a copy of the NDA some time before they are asked to sign it so they could read it and, if necessary, seek legal advice as to its terms. In this case, the hostesses were clearly ambushed with the NDA and would be unlikely to have been able to remember its contents having had little time to consider what they were being asked to sign.

At the Presidents Club event it is alleged that attendees sexually harassed hostesses. What protection do workers have in relation to acts of third parties (ie those who are not co-workers for whom their employer is vicariously liable)?

Although the express liability of employers for harassment of employees by third parties was removed from EqA 2010 in 2013, employers such as the Presidents Club may still be liable for acts of

harassment committed by third parties in these circumstances. Under EqA 2010, s 111 it is illegal to cause or induce contraventions of the Act and the Presidents Club's actions may fall within that definition since they clearly encouraged the creation of an event in which such behaviour was being promoted. Arguably they also failed to protect the hostesses' health and safety and civil claims could be mounted on the back of this for the failure of the Presidents Club to comply with their statutory duties as well as for any personal injury which might have been caused to the hostesses as a result of the groping which they were allegedly subjected to.

Does this limited protection make NDAs more effective in keeping confidential the misconduct of third parties in comparison to the acts of an employer or co-workers?

An NDA cannot be used to cover up illegal or criminal behaviour no matter who is committing it. Therefore, those seeking to make a protected disclosure, and doing so with reasonable belief and in the public interest, will always benefit from that protection even if they don't themselves realise it because of their unfamiliarity with the law.

Interviewed by Diana Bentley.

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