

Settlement Agreements and Gagging Clauses

There has been a lot of media coverage on settlement agreements and we at the Whistleblowing Helpline thought it would be useful to provide a summary which provides an overview of how settlement agreements work and how they affect whistleblowers.

So-called “gagging clauses” in employment contracts and settlement agreements (previously called compromise agreements) are void insofar as they conflict with the protections provided by the Public Interest Disclosure Act 1998 (PIDA). The Government now requires the inclusion of an explicit clause in settlement agreements to make it clear that staff can make a disclosure in the public interest in accordance with PIDA, regardless of any confidentiality clause.

Settlement agreements are a well established mechanism for ending the employment relationship between an employer and employee. These documents set out the terms and conditions agreed between the employer and the employee when they agree to settle a potential employment tribunal claim or other court proceedings. As such, they may be used in cases where a dispute involving whistleblowing arises. It is important to remember, however, that the majority of whistleblowing cases do not give rise to settlement agreements.

A settlement agreement is used to bring an employment relationship to an end in a manner which is mutually agreed by the parties. In some instances, they may be used where the employee and employer agree that the employment relationship can no longer proceed and must be brought to an end. They may also be used to resolve a dispute or issue, where the employment does not need to be terminated, for example a dispute over pay.

Over the years organisations have asked employees to sign settlement agreements which contain a provision for payment and confidentiality clauses which prevent people from talking about the agreement and the issues behind the dispute and/or dismissal or from making disparaging comments about either party. These types of clauses are commonly called “gagging clauses”.

Although such clauses cannot prevent someone from making a “protected disclosure” under the Public Interest Disclosure Act 1998, where they are used some people may ‘feel’ as though they are prevented from making such a disclosure. It is generally these “chilling effect” type clauses that have proved problematic in the past when used in settlement agreements.

Confidentiality clauses can legitimately be used in a settlement agreement. However, it is important to note that any confidentiality clause between an employer and an employee or ex-employee which seeks to prevent the employee from making a “protected disclosure” in accordance with the Public Interest Disclosure Act 1998 is void and ineffective. This means that settlement agreements can not be used in an attempt to stop employees from whistleblowing.

This factsheet provides an overview of settlement agreements in relation to cases of whistleblowing. Legal advice should be sought prior to commencing any settlement negotiations.