

Women and Equalities Committee

Oral evidence: [The use of non-disclosure agreements in discrimination cases](#), HC 1720

Wednesday 19 December 2018

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Members present: Mrs Maria Miller (Chair); Sarah Champion; Angela Crawley; Jess Phillips; Tulip Siddiq.

Questions 1–59

Witnesses

I: Rosalind Bragg, Director, Maternity Action; Joeli Brearley, Founder, Pregnant Then Screwed; Séamus Dooley, Assistant General Secretary, National Union of Journalists; Emma Webster, Joint Chief Executive and Senior Solicitor, Your Employment Settlement Service.

Written evidence from witnesses:

- [Maternity Action and Your Employment Settlement Service \(YESS\)](#)
- [Pregnant then Screwed](#)

Examination of witnesses

Witnesses: Rosalind Bragg, Joeli Brearley, Séamus Dooley and Emma Webster.

Q1 Chair: Good morning. Can I welcome our witnesses this morning, as well as those watching online or joining us in the Public Gallery? This is our first evidence session in our inquiry into the use of non-disclosure agreements in discrimination cases. This follows on from the work that the Committee has done looking at sexual harassment in the workplace. This morning we have an extremely interesting panel before us. Before we go any further, perhaps you could just say your name and the organisation that you represent.

Emma Webster: My name is Emma Webster. I am joint CEO of Your Employment Settlement Service, or YESS Law.

Séamus Dooley: I am Séamus Dooley. I am the assistant general secretary of the National Union of Journalists in the UK and Ireland—no hard borders.

Joeli Brearley: Joeli Brearley, founder of Pregnant Then Screwed.

Rosalind Bragg: Ros Bragg. I am the director of Maternity Action.

Chair: Brilliant. Jess is going to kick us off with our first set of questions, and I know, Séamus, that you have to leave at 11.30. I am really grateful to you for juggling things around and being with us first thing. Thank you for that.

Q2 Jess Phillips: Hello, everybody. How common is the use of confidentiality clauses or non-disclosure agreements to prevent disclosures, specifically of discrimination?

Rosalind Bragg: I can answer that. There are very limited stats in this area. Maternity and pregnancy discrimination is very common. Roughly three quarters of pregnant women and new mothers in the workplace will experience some form of pregnancy/maternity discrimination. Very few will take action. Roughly one in four will raise it with their employer. Three per cent. will pursue a formal grievance. Fewer than 1% will go to the tribunal.

The proportion who are most likely to have considered a confidentiality agreement, or indeed a settlement agreement, are those who have lost their jobs, and that amounts to 54,000 women each year, which is 11% of all pregnant women and new mothers in the workplace. We do not actually know what proportion of those women have entered into an agreement. It seems likely to be very small and to measure a few thousand, rather than anything larger than that.

Q3 Jess Phillips: Out of 54,000, you say that a couple of thousand might have an agreement.



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Rosalind Bragg: A few thousand. The reason why it is a few thousand is because it is common practice to put them in, for instance, enhanced redundancy agreements, rather than necessarily a settlement agreement about discrimination specifically. Some of those 54,000 women have been unfairly made redundant and so it has been included in what would be a standard enhanced redundancy agreement.

Q4 **Jess Phillips:** Is non-disclosure commonplace amongst those who get an agreement from that couple of thousand?

Rosalind Bragg: It is standard.

Jess Phillips: It is standard.

Rosalind Bragg: If you have a settlement agreement, it is standard practice. I am sure there are some exceptions, but it is standard practice to do that.

Joeli Brearley: The lawyers we work with say that 100% of the settlement agreements that they do contain non-disclosure agreements. We do not know how many women sign non-disclosure agreements, because you cannot disclose them. They are secret and they are done behind closed doors, so I could not tell you how many women have signed them.

Q5 **Jess Phillips:** From Facebook groups and from the chatter you hear amongst your networks, people presumably are telling you that they are signing up.

Joeli Brearley: Yes, people tell us in confidence that they have signed them. They tell us the companies they have signed them with and the detail of what has happened but, of course, we do not talk about that publicly because we cannot. Of the 390,000 women who encounter some form of pregnancy or maternity discrimination, I would guess that less than 1% sign a non-disclosure agreement. They are the lucky ones; they are the women who are getting some form of compensation. The majority of women do not have the privilege to do anything about this; they just walk away with humiliation and no compensation whatsoever.

Séamus Dooley: The National Union of Journalists deals with media companies across all platforms—print and broadcasting. We also represent freelance staff, and freelance is obviously a particular issue in relation to protection. I can say that there is only one national media organisation in the UK that does not insist on confidentiality.

Jess Phillips: There is only one that does not.

Séamus Dooley: There is only one that does not.

Q6 **Jess Phillips:** Would you mind telling us which one it is? Do not feel you have to.

Séamus Dooley: It would probably shock you that it is the *Guardian*. The fact of the matter is that, of course, there are also a number of non-



unionised or anti-union firms. Union firms give greater protection in terms of what the reality is—that non-disclosure agreements are part of the landscape of our industry.

Emma Webster: Settlement agreements, as standard across any sort of resolution of any employment dispute, have non-disclosure agreements in them. They are twofold. They are confidentiality around the terms of the agreement, and that will sometimes extend to the fact of an agreement and the circumstances surrounding the termination of employment. That is the sort of range that you get within that. However, there is also the other bit, which is a non-derogatory comments clause, which means that, even if you have the fact of the agreement, and the confidentiality clause just says that you have to keep the terms of this agreement confidential, a second clause will say, “Both parties agree not to make horrible statements about each other.”

Q7 **Jess Phillips:** People would agree to that because they also do not want horrible things said about them.

Emma Webster: Exactly, there is that. It is an absolute standard. It is a standard not just in discrimination. If you have an enhanced redundancy package, it is part of that.

Q8 **Chair:** What do you mean by “standard”? Is it issued by the SRA or somebody else?

Emma Webster: No.

Q9 **Chair:** Why is it standard?

Emma Webster: It just is. If you look at any settlement agreement that crosses my desk, given that that is what we do all day, every day, they are included in every single agreement. I do not think I have seen one without it.

Q10 **Jess Phillips:** Just going back to the idea of both sides having to sign up to not being derogatory about each other—perhaps signing that here, at the moment, would be a sensible option—what in that agreement provides protection? Say you are a mother who has been fired because of pregnancy discrimination; what recourse do you have in that agreement if they are derogatory about you and they go around saying, “She is a troublemaker; do not employ her again”?

Emma Webster: If you know about it—and that is the issue—then it is technically a breach of the agreement and you have the right to enforce a breach of the agreement if you suffer loss as a result of it. If, for example, somebody phones up for a reference and your past employer says, “They are a troublemaker; do not employ them,” you have lost your job and you have suffered loss as a result. Actually, though, the ability to enforce that is so extraordinarily difficult. Sometimes those non-derogatory comment clauses are about as good as the bit of paper they are written on.



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Q11 **Chair:** Would non-derogatory clauses usually apply to both parties or sometimes only to one party?

Emma Webster: If a resolution is achieved and an amount of money has been agreed, it is frequently the employer's lawyers or the employer's HR department that will draft the first draft of the settlement agreement. It is then given to the employee to go away and get advice on. It is very common that the non-derogatory comments and the confidentiality clauses are only worded to protect the employer at that stage, and it is very common for employees' solicitors to then say that they have to be made reciprocal. That is usually agreed to, but the onus is on the individual to have someone to advise them on that.

Q12 **Jess Phillips:** What if you do not have a lawyer to tell you that?

Emma Webster: You need to have a solicitor or a union rep sign off on a settlement agreement. Otherwise they are not legally binding.

Séamus Dooley: It is not, of course, an equal relationship. The context of this has to be remembered because these "agreements" are frequently negotiated on the basis of a negative experience of an employee who has experienced horrible things and is now required to sign an agreement not to say horrible things about the people who have done horrible things to them. In terms of harassment, in particular, it is a huge problem. The idea of an employer who has effectively managed out a "troublemaker" or managed out a problem then turning around and saying, "And we are going to insist on a secrecy agreement so that you will not say horrible things about the horrible things we are doing to you," is in itself quite traumatic for an employee.

Q13 **Jess Phillips:** I suppose this is for Séamus and Emma to answer because you deal specifically with maternity discrimination. Is there any sort of discrimination that most commonly has non-disclosure agreements?

Emma Webster: No, like I have said, it is standard across the board. You would need to look at the figures around the specific types of discrimination and who goes to enforce their rights.

Q14 **Jess Phillips:** In your experience, in the use of both your union and your services, what would you say was the most common discrimination that comes forward to you?

Emma Webster: For me, it is pregnancy and maternity discrimination.

Séamus Dooley: I would probably need to refer back to our legal and equality officer and write in to you about this, but our experience is that, in a trade union environment, pregnancy would be less prevalent, though it is still there, than harassment. There is a culture within the industry that we represent of bullying and harassment. It is very much a macho culture.

Q15 **Jess Phillips:** Would you say sexual harassment as well?



Séamus Dooley: Yes. In our evidence to previous inquiries, which we have referenced in our submissions, including our well-publicised submissions to Leveson, the issues of harassment, sexual harassment and gender discrimination come up again and again. Of course, there is a link between that and the attitude towards pregnancy as well, but the issue is that the culture within our industry is particularly problematic, and that is the blanket that covers all the cases that we deal with.

Q16 **Jess Phillips:** You are saying that these are standardised services, but can you give a flavour of the kind of restrictions imposed on people? We heard about people not being able to talk to councillors and health advisers.

Emma Webster: My experience is that there is usually a carve-out to them, which is that you are allowed to speak to your professional advisers. My advice is that that includes medical professionals. I would suggest that that is not always excluded.

Q17 **Jess Phillips:** Do you think that needs to be more explicit?

Emma Webster: Probably, yes. You are allowed to speak to professional advisers, as required by law, and your immediate family, although sometimes that is restricted to spouse or partner. It is meant to be that nothing in the agreement—and they are meant to make it explicit—prevents you from bringing a whistleblowing claim. The problem with the whistleblowing legislation is that you have to jump through a lot of hoops in order to be able to satisfy the conditions to be making a whistleblowing claim. In pregnancy and maternity, that is very difficult because you have to show that it is in the public interest. What is in the public interest is pretty vague, and you do not have a situation, such as in sexual harassment, where you have a potential crime being committed. That is not the case. If those are your carve-outs, it is going to be very difficult for you to talk about it afterwards if it is a pregnancy and maternity case.

Q18 **Jess Phillips:** Joeli, do you have any evidence of really stringent or restrictive things you have seen?

Joeli Brearley: Most of them just allow you to talk to your spouse, your lawyer and your accountant, and that is it. We would never advise anybody to speak to anybody outside of that because they would risk breaking their non-disclosure agreement, and the consequences of that would be terrifying.

Q19 **Sarah Champion:** I am rather shocked that you can only tell your spouse. In a hypothetical situation, you have told your child and your child has gone on to social media ranting about it. Are there any examples where enforcement has actually been applied for or has been successful?

Emma Webster: Not that I have come across, but often you get to tell your “immediate family”. If I am advising an employee, I would put that as opposed to “spouse or partner”. However, it is usually on the condition



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that you tell them as well that it is confidential. Have I come across people blatantly breaching it? No.

- Q20 **Sarah Champion:** Joeli, I get your point that people would be too terrified to tell their children, but are you aware of any company that has then tried to enforce when someone has breached it?

Joeli Brearley: I am not aware of anybody breaching a non-disclosure agreement.

Sarah Champion: Because they are too scared to.

Joeli Brearley: Because they are too terrified.

- Q21 **Chair:** Who polices whether or not part of an agreement is too restrictive? To what extent would somebody be able to call out that someone has overstepped the mark, whether you are a trade union official or a lawyer? Is there any sort of comeback if these restrictions are too onerous—for instance saying you cannot even tell your spouse, or you cannot talk to your doctor?

Séamus Dooley: It is probably an unfortunate analogy in the circumstances, but you cannot be half-pregnant. It is either a secrecy clause or it is not. The context, again, is everything. These agreements come at the end of what is generally a difficult period. Trade unions, as well as any lawyer, would of course challenge what would be perceived to be onerous, but this comes at the end of a negotiation session and comes at a time where, effectively, not signing or getting caught up in a lengthy debate about signing a non-disclosure agreement can actually be represented as, "Take it or leave it. That is what is on the table, and if you do not like that, there is not going to be an agreement." That puts pressure on the employee but also on the solicitor or the trade union official.

- Q22 **Chair:** Emma, have you ever reported anybody to the SRA for having put something into an agreement that was unprofessional?

Emma Webster: No, but I do not know that I have come across it. I do not know that I have come across a situation where I have said to an employee client, "Look, this is ridiculous. You cannot sign this because there is no way you could comply with it." I am very clear with my clients, for example, that, "If you were to tell your doctor, how would anybody know?" It is covered by doctor-patient privilege. Like I said, a lot of the time, you have to be pragmatic with these things. The point is that, if you disclose it to your immediate family, provided they do not go on social media, nobody is going to know about it. The same goes the other way, though. If the employer tells somebody about it, are you, the individual, ever going to know about it?

It is worth pointing out that a lot of my clients want these confidentiality clauses themselves. They want to be able to move on. They want to be able to draw a line under this situation. They want to be able to continue



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their careers without being blacklisted and without being cast as a troublemaker and without being the person who has raised the fact that their previous employer has discriminated against them. The point is that, if they do not have an equal footing to be able to move on from and they start saying, "My past employer discriminated against me," inevitably the employer disagrees. These things are not happening because an employer is sitting back and saying, "Yes, that is what we did. We are really sorry; here you go." There is a disagreement. There is a dispute. The employer will then use that situation to come back and discredit the individual. It is almost more in the individual employee's interests to be able to say, "Actually, we want to be able to move on."

Is there a wider problem, whereby there is a culture that means that women are getting discriminated against? Absolutely. However, the point is that, if you remove NDAs and you remove a woman's individual opportunity to be able to move on, you are effectively saying that that individual has to put herself above the parapet and take on her employer at a point when she is incredibly vulnerable and probably does not have any money to be able to pay lawyers because she is on maternity leave or has just come back from maternity leave, and you are preventing that individual from being able to find a solution.

In the meantime, you have an employer around whom there is a huge amount of machinery and a huge number of people who will be facilitating, or who understand or know, the numbers of pregnant women and the numbers of women on maternity leave who are being dismissed. There is this idea that there are repeat offenders; yes, there are, but there are a lot more people than just that one repeat offender who know about it, who are not calling them out and who are not holding them to account.

Q23 Tulip Siddiq: I am just asking this out of interest. I recently had a surgery case on almost exactly what you are describing, where a woman who has been discriminated against came to me. She was very wary of speaking about it because of what she had signed. In the end, she did tell me because she said it was MP-constituent privilege, which I am not sure exists. I do not think it does. Either way, I listened to her. What is the scope for MPs to make representations in these situations without, effectively, getting the constituent into trouble? Is there anything we can do? I have been pondering this case for a while now, which is why this session is so relevant. It is a disgraceful case, and it should be known. She obviously came to me because she felt she had to tell someone, but she is also wary about going against the terms of her contract. At that point, what do MPs do? That is the question.

Emma Webster: If you know that there is an industry in particular, or an organisation in particular, where this is happening a lot, you might ask the right questions rather than indicating that you are aware of individual circumstances. That might be a way around it.

Q24 Tulip Siddiq: If I did do that, which is what I am thinking of, can the



employer at that point come back and say, "I have realised you know about this?" because they could easily link you? Does that then get that person into trouble as well?

Emma Webster: Potentially. You would have to see the terms of the agreement to be able to properly understand, but, potentially, yes.

Q25 **Tulip Siddiq:** Even in spite of that, do you still think it is a positive thing for employees to have?

Emma Webster: It can be, because it means that they can achieve an amount of money that hopefully will compensate them accordingly and enable them to move on with their lives, while also allowing them to avoid having to go through a potentially lengthy, difficult and stressful tribunal process.

Séamus Dooley: What you are talking about there in some respects is the conflict between whistleblowing and inappropriate behaviour. I do not know the details of the individual case and the secrecy. If this is such an egregious case that the employee or former employee concerned feels that they have to go to their MP, you would look at the potential for using whistleblowing legislation in that regard.

I would not disagree with what Emma described. I can imagine that there are circumstances where non-disclosure agreements are perceived by individuals themselves as protection. It may be a question of being tough not just on NDAs but on the causes of non-disclosure agreements, because what we are talking about is a situation where there is a culture whereby women who are subject to any form of discrimination feel that they are the ones that need protection—Emma is absolutely right in this—in case they get a bad name as being a troublemaker for asserting their rights or to vindicate their legal right to be treated with dignity and respect.

Rosalind Bragg: There is a tension here between the individual case and the broader question of what is happening in a business. On the one hand, we have a solution for an individual woman, which is generally the NDA agreement if they are able to negotiate one, but, within the company that they are working in, they are probably not the only one who has been having a very poor experience. We know that a significant proportion of women will just leave their jobs without raising any concerns.

We have been recommending that greater visibility be given to maternity and pregnancy discrimination by having public reporting on maternity retention rates, so that employers who have to report on the gender pay gap also have to report on the number of women who have remained in post a year after they would have returned from maternity leave. By looking at those numbers, you will be able to see employers who are performing poorly, and that will be a lot of employers. You will also have a greater focus on this issue within the organisation because the public



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reporting will be much more scrutinised and there will be some more work done to attempt to reduce that.

Q26 Tulip Siddiq: They are not under any obligation; you said it was just a recommendation.

Rosalind Bragg: That should be obligatory. We have made a submission on this to the Welsh Assembly, and they are considering incorporating that into their procurement strategy and their Fair Work strategy. That is the only place where we have seen any moves towards making this a requirement. In our view, it should be a requirement.

Q27 Jess Phillips: This goes on to the next question. While the compelling case for the individual is made, what does the use of the non-disclosure agreements do to improve the culture of a particular organisation that knows it can lean on a non-disclosure agreement? What effect do you think it has on general workplace culture?

Emma Webster: It is very difficult to know, because a lot of organisations will use, like I said, the standard NDA in a settlement agreement. For example, a bank makes 50 employees redundant and they offer everyone a couple of months' extra pay. That will be included. Just looking at settlement agreement figures does not necessarily mean that an organisation has some sort of endemic sex discrimination problem. It can be problematic, but what is problematic is that organisations' HR departments will see, time and time again, the same issues coming before them, and they will not take any good management action against either the individual perpetrator or the organisational culture.

Do settlement agreements, and NDAs within that, enable that? I suppose so, but there is an awful lot that has gone before that that is enabling it. Yes, I suppose it hides it, but so do all sorts of other things. I do not see the NDA as the problem per se. What is a problem is the fact that organisations refuse to tackle bad behaviour for all sorts of different reasons, such as where an individual is financially useful, if they are the head of the company or all sorts of different reasons.

Q28 Jess Phillips: If a solicitor, for example, gives advice to an organisation and helps them draft NDAs that are specifically about repeat sexual harassment by an individual, is there an ethical problem with that?

Emma Webster: With the solicitor?

Jess Phillips: Yes.

Emma Webster: If I was advising an organisation and I had several coming across my desk, I would try to find somebody within the organisation who would be recognising that this was clearly a problem. I do not think I have the ability, as a solicitor, to disclose that to any larger organisation or anything else. Would my advice be that they ought to be



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stopping that behaviour in order to stop exposing themselves to that risk? Absolutely.

Q29 **Jess Phillips:** What about not representing them?

Emma Webster: I do not represent very many employers at all.

Jess Phillips: No, I am not talking about you. If it were me, I would say, "I am sorry. It is twice now. You are out."

Emma Webster: Everybody has the right to legal advice and legal representation. In fact, if you are getting good legal advice, the legal advice ought to be that you stop behaving in this way. If you take away good legal advice from either party, you end up in a much bigger mess.

Q30 **Jess Phillips:** Is it ethical for a solicitor's firm to repeatedly represent the same organisation again and again for the same issue, where they are clearly breaking employment law, such as with sexual harassment and maternity discrimination?

Emma Webster: If their advice is that you ought not to be doing this, and they are not putting pressure on the other side in a way that is unethical, then no, because they are advising their clients to do the right thing. They are not doing something that is unethical. If they are not putting pressure on the other side, and they are not doing something that is wrong, there is no harm in a bad organisation getting good legal advice.

Jess Phillips: Okay. What do the others think?

Séamus Dooley: It will not surprise you to hear me say—and this would be the view of the NUJ and the TUC—that the real key to this is a change in workplace culture and a greater recognition of the role of trade unions in this. Where we have worked very effectively is in encouraging companies to put in place coherent and consistent policies, with the emphasis on "consistent". That includes a policy statement that spells out zero tolerance to sexual harassment, as well as a clear and independent investigation system, preferably with someone external to the organisation. The use of an external independent investigation of harassment cases does exactly what you are talking about, where someone calls in to the HR director and says, "I am quite prepared to take money to continue these investigations. Would you as a company have a problem? It is much bigger than X or Y." My own view is that secrecy is the friend of inappropriate behaviour. Harassment occurs in the dark. The only way that you can actually stop it is by shining a light on it and doing that consistently.

Q31 **Chair:** How many cases might involve an external investigation, in your experience?

Séamus Dooley: I will ask our head office to furnish you with that figure, but that would be standard in a lot of companies, both unionised and non-union, but not as often as I would like. What frequently happens



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at a company is that they carry out an internal investigation and then the appeal may be independent. A more sensible approach would be to have a clear understanding that, when a complaint is lodged, it will be investigated independently. That would enable workers, particularly women, to have confidence in coming forward and making a complaint at an early stage. There is still an old boys' club in most companies, and if you make a complaint against Mr X, and it is Mr Y, who plays golf with him or goes for a jar with him on a Friday evening after work, who is going to carry out that investigation, it should not be any surprise that a worker is reluctant to make a complaint in those circumstances.

- Q32 **Jess Phillips:** I will just flip the question around slightly, before I let Rosalind and Joeli answer, and just put this to you again, Emma and Séamus. I understand workplace culture and that NDAs are not going to change sexism, the patriarchy and all those things—I gave up hope that there was a single bullet for that a long time ago—but do you think that a person immediately taking to Twitter after signing a deal and saying, “No one ever go and work here because this is what this organisation is like” would change the culture?

Emma Webster: Bearing in mind that they had the right to do that before they signed the NDA, subject to any confidentiality agreements within their contract of employment and potentially breaching their contract of employment—there are lots of people even going through tribunal cases that have already issued claims against their employers who settle settlement agreements and all the rest of it—I do not think it would. I do not think most people want to be that person. It takes a very specific, very brave and very well-resourced individual to be willing to do that.

- Q33 **Jess Phillips:** I agree with all of that, and I understand that, but do you think that, if people did not have silence put upon them with a figure of money attached to it and could speak out and did speak out—not mitigating that 1% of people do—that would change the culture of an organisation?

Rosalind Bragg: The short answer is no, because the vast majority of women leave their jobs without getting a compromise agreement, without an NDA agreement or any obligations of any kind, and they do not go public about the way they have been treated. It is unlikely that those who have signed an agreement will then be on Twitter.

- Q34 **Jess Phillips:** Other providers are available, like Facebook.

Rosalind Bragg: Yes, whichever social media you prefer. There is this very well-founded fear amongst women that, if they talk about having had problems at work, even if their problem is not of their own making, they will be labelled as a troublemaker and they will find difficulties getting new employment. Some industries are worse than others. Within that, we find that, even when a woman has had appalling treatment by



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their employer, they are very reticent to speak publicly about it because it is seen as them rather than the employer.

Joeli Brearley: Companies care about their reputation more than the money that they are paying out, so if somebody were to slander them on Twitter, it would absolutely change the workplace culture, because they would be forced to investigate it. The likelihood of a woman going on Twitter and slandering that company is slim, for the reasons that we have explored. However, being able to say publicly, "This company has done this to me" would be incredibly powerful.

- Q35 **Jess Phillips:** This moves me on to my final question, which is specifically for you, Séamus. This gives credit to what Joeli has said. The case of equal pay in journalism specifically has changed something. People came forward and spoke up, and nothing would have changed if not for Carrie Gracie and others. Do you think that NDAs make it more difficult to ensure that equal pay requirements are being met?

Séamus Dooley: There is conflict between the notion of equal pay and NDA agreements. There are real issues there. There are frequently companies who, for instance—this is not so much on NDA clauses but on other contracts—attempt to impose secrecy around pay, in that you cannot tell your colleagues what you are earning. That is not only a problem; it is illegal.

- Q36 **Jess Phillips:** Is it illegal to say, "You cannot tell people what you earn," or is it just what your parents tell you—because it is impolite?

Emma Webster: You can have pay secrecy clauses within contracts, and you can have a clause that says, "Do not tell anybody, including your colleagues, about how much you earn." However, they are unenforceable if it prevents people talking about it for discrimination purposes. If Séamus and I worked for the same organisation, and I said, "I need to know because I want to know whether or not you are paid the same as me," that would be fine. If I just wanted to know for when I go for another job, that would not be fine.

Séamus Dooley: On the issue of reputational damage, first of all, it is okay to have an untweeted thought and it is probably safer. I would not advise anyone that they should rush on to Twitter or any other social media. However, the issue of reputational damage to companies that get a bad name should not be underestimated. Both shareholders and customers have an obligation here as well. As someone who believes in the power of the consumer and the power of the shareholder, I would say that, yes, an odd reference on Twitter might be embarrassing, but having it raised at a shareholder meeting, affecting the share price or having a reputation as an unethical company is far more powerful.

I am a firm believer in the concept of demanding social justice from large employers and small employers. The notion of companies who do not recognise trade unions and who treat workers badly but simultaneously



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sponsor international awards for media freedom in other countries makes my blood boil, but that is very common. We have to call out the hypocrisy in many corporations that are not prepared to treat workers with a basic sense of decency but that gain good publicity for works of philanthropy. You have to try to twist that around.

Q37 **Chair:** But how can people like us call out those companies when you are all saying that it is absolutely fine to have non-disclosure agreements?

Séamus Dooley: I am not saying that it is fine. Emma and myself disagree on that. We have come to the conclusion as a union that, on balance, despite some benefits, non-disclosure agreements do more harm than good.

Q38 **Chair:** You think that non-disclosure agreements do more harm than good.

Séamus Dooley: Yes, and Emma and myself disagree on that.

Joeli Brearley: In order for a settlement agreement to happen, you have to have non-disclosure agreements. There is no reason for a company to settle.

Q39 **Chair:** There is nothing in law that says that is the case.

Joeli Brearley: There is no reason for a company to settle before going to tribunal without a non-disclosure agreement. That is their carrot because it means their reputation is protected. Otherwise, why would you not wait until a tribunal and hopefully get off the hook? You may as well settle and know that you are going to protect your reputation. That is why they have to exist. Women have to be able to settle, because they are so vulnerable if they are pregnant or they have just had a baby.

Q40 **Chair:** If it was against the law to have a non-disclosure agreement, you do not think companies would ever settle.

Joeli Brearley: No, I do not. Very few would, because they would not have a reason to.

Emma Webster: They would be far less likely to. They are far more likely to put you through the process of having to go all the way to a tribunal and wait a year, especially if you do not have access to legal advice or legal support. There is no legal aid that supports anybody through the tribunal process.

Q41 **Chair:** Is buying silence against discrimination a price worth paying, Rosalind?

Rosalind Bragg: In focusing on the NDAs, we are looking at the individual, and it is much more helpful to be able to point to bad practice by looking in the aggregate. The maternity retention rate reporting that I suggested is a very useful mechanism to be able to pick up bad practice. It picks up the bad practice that leads to compromise agreements and settlement agreements being signed, but it also picks up the bad practice



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that does not end up there; it picks up women who have left because they have found their workplace untenable but who have not taken action. That is a much more helpful direction to pursue, because it looks at the broader practice within the organisation. It is a very big ask for individual women to give up what is quite an important mechanism for resolving disputes for the greater good of reducing maternity discrimination, much as I would like to see that happen.

Emma Webster: There is no shame attached to pregnancy and maternity discrimination; it is an acceptable form of discrimination as far as most businesses are concerned. Going on to Twitter and talking about it will not harm their reputation that much, because there is an awful lot of misinformation, an awful lot of ignorance and an awful lot of feeling amongst an awful lot of people that, if you take a year off, you are fair game. I do not think that naming and shaming has sufficient negative impact to mean that you take away the rights of individual women to be able to get compensation and move on with their lives.

Q42 **Angela Crawley:** Emma, the point you made earlier about access to legal advice neatly brings me to my question around whether you think there is sufficient access to good legal advice on NDAs for employers and employees.

Rosalind Bragg: I can answer that from a Maternity Action perspective. There is a huge shortage of affordable legal advice for women who experience pregnancy and maternity discrimination. There is essentially no legal aid support here. There is a very minimal provision, and it is wholly inadequate for women who wish to pursue a case. They do not have access to support at tribunal.

Falling short of casework support, there is very limited advice available that allows them to clarify whether they have in fact experienced discrimination and what their options are. We answer about 2,000 calls a year on our advice line. For every call we answer, there will be five people who cannot get through. Our advice service alone is massively overstretched. Of the people we speak to, 30% have spoken to other agencies, whether that be Acas or Citizens Advice, and have been unable to get an answer to their question. While there may be local advice services that have a generalist brief, very few of them have the expertise to answer more complex questions that arise in pregnancy and maternity discrimination and, as a result, there is a vast majority of women who essentially have no access to the advice they need.

Joeli Brearley: We run a free legal advice line and we answer every call we get. We run a mentor scheme where we support women who are taking legal action against an employer. It is not to replace lawyers or Acas; it is a peer-to-peer support programme where someone who has been through that process can act as a friend and comrade through the process.

What we have touched on is the real crux of the problem, which is that



there is advice available at the beginning of the process to understand whether you have been discriminated against, and then there is this void, and it is about a year before you get to tribunal. Either you employ a lawyer and it costs you about £5,000, or perhaps more, or you do that process on your own. Both options are encouraging you to settle. The longer it goes on, the more it costs you. If you do not have a lawyer, you do not have that support and you do not know what is going on. The stress mounts. You have just had a baby. You are totally confused. Lots of people drop the case because the stress is just too much before they get to tribunal. The lack of available free advice during that period is encouraging people to settle and sign non-disclosure agreements.

Séamus Dooley: We have an internal legal department and an external one, so any NUJ member looking for advice in this area has access to either our own legal advice or Thompsons Solicitors, if need be. Michelle Stanistreet is the first female general secretary of the NUJ. The majority of our senior industrial officials, and our legal and equality officer, are women. On that basis, I would hope that pregnant women coming to the NUJ for advice would be welcome. I feel that they would get a good service.

The issue here is that being pregnant and at work should not be seen as a legal problem and, among all of the other issues involved, it should not be seen as a legal issue. Once the lawyers get involved, there is inevitably an added stress there that is entirely unnecessary. It is a bit strange, as we head into 2019, that we are talking about pregnant women still needing to have access to legal advice rather than an informed HR service that allows for working out what should be a very routine part of life in the workplace.

Emma Webster: There is very little access to either free or affordable legal advice, certainly that which has any expertise. What is routinely allowed for in a settlement agreement is a contribution towards legal fees that ranges from £200 to £500 as standard. The employer making that contribution is doing so because it is not legally binding unless it is looked over and an employee is talked through the settlement agreement and its meaning is explained.

However, unfortunately, for most lawyers even £200 to £500 does not go very far. When I was in private practice, for example, if somebody came to me with a settlement agreement for less than £500, it would mean that I would be charging them extra in order to be able to give them a proper advice service taking them through that settlement agreement. We do not do that now, because I work for a charity and we do not have to make a profit. If you are going to a high street lawyer that does not have employment law expertise, they may not understand the nuances of that settlement agreement. I am not trying to do lawyers a disservice, but that can be the case.

Q43 **Angela Crawley:** What are the options for individuals who cannot afford a solicitor? Séamus, you implied that there is more of a role for HR and



trade unions.

Séamus Dooley: My advice is to join a trade union, because you then have trade union laws. That is the obvious solution. If you want to give workers the opportunity to assert their rights, they should have the right to trade union representation. However, I also believe that there is a particular role for those involved in what is now called “human resource management”—sometimes it is called “change management” or “people management”, but it is the same nonsense. There is a failure to recognise that what you need is a workplace practice such that this does not become an issue. By the time you go to a solicitor, you have already hit the problem. You cannot overestimate the negative impact that that has not just on the individual but also on other women workers in the workplace who may consider becoming pregnant and who are looking at the experience of a colleague having to go to a lawyer as a result of being pregnant.

Q44 **Angela Crawley:** In terms of the other options, then, there are trade unions and HR. Are there any others?

Rosalind Bragg: There are the free advice services. Charities are well placed to be able to provide good independent advice and to develop the expertise. We find that there are plenty of private lawyers that put themselves out as having expertise in this area but really do not. That specialist advice is particularly important around pregnancy and maternity, and legal aid provision would also be extraordinarily helpful.

Séamus Dooley: I would support that.

Q45 **Angela Crawley:** Joeli, you touched on this, but we have heard from individuals who have said that they felt bullied into signing a non-disclosure agreement even when they had legal representation, and you mentioned how the cost and the stress and pressure that it can cause can be prohibitive. How common do you think it is for individuals to say that they felt bullied into signing NDAs?

Joeli Brearley: We have just done some research on this. We had 260 women respond who had experienced pregnancy and maternity discrimination and had signed non-disclosure agreements. Ninety-one per cent. of them said that they felt forced to sign that non-disclosure agreement and that they did not have another choice. Sixty-nine per cent. of them said that signing that agreement has had a long-term impact on their mental health. Sixty per cent. said they signed because they felt that that would be better for their career. It is put to them as if it is a choice, but it is not a choice; there is no other option—there is nowhere else for them to go. Having a lawyer and going through to tribunal means that you are going to have to be put out there as a troublemaker and that your career will be ruined for the rest of your life, so signing a non-disclosure agreement protects you.

Many of these women are in horrendous, vulnerable states. They have just had a baby. They are trying to get used to motherhood, and they are



going through this awful experience with their employer. They just want it over. They are exhausted. They are sleep-deprived. We have heard some stories from women that are devastating: women who have had stillborn children who are then returning to work and are just being kicked out of their job. They do not have the strength to fight at that point, so they are given a non-disclosure agreement: "There you go. Shut up and go away."

We know of companies—household brands that win awards for gender equality—who, as soon as a woman gets pregnant, tell her she has lost her job, when she is confused and does not know what is going on. They say, "Here is a small amount of money. We will give you a good reference if you sign this non-disclosure agreement," and she is out of the door. None of her colleagues know that this is going on. The women then cannot tell any of their colleagues or friends. There is the silence and the secrecy. It damages women for a really long time.

Q46 Chair: Can I just intervene here? Emma said earlier that some women wanted confidentiality agreements. You are saying that your research is identifying that the vast majority of women you spoke to saw this as something that potentially damaged them. Do they actually still want to have that confidentiality agreement even though it is damaging?

Joeli Brearley: "Wanting" would mean that there is a choice. There is not a choice. Their only other option is to take employers to tribunal. As I have just said, if you have just had a baby, that is not an option. It is so difficult to take them through that process. You just want it over and done with, so the non-disclosure agreement is the only other option besides taking them to tribunal. Women want it in that sense because they want it over.

Séamus Dooley: I think it is the White Rabbit in *Alice in Wonderland* who says, "You might as well say that 'I get what I like' is the same as 'I like what I get'." The fact that you sign it does not mean that you want to sign it; it is that you have had no other choice.

Q47 Angela Crawley: Emma, you mentioned earlier that NDAs are normally just standard practice as part of settlements. We have heard from a number of lawyers that employers will not settle cases without non-disclosure agreements. However, should lawyers not be pushing harder to get settlements without confidentiality clauses for employees who would not want them?

Emma Webster: Yes, there is definitely space for that. There are a lot of settlement agreements with NDAs that are completely unnecessary, where there is not even really a dispute. For example, where it is a straightforward mass redundancy situation and you are getting an enhanced redundancy package, I am not really clear as to why an NDA is relevant in those situations, beyond, perhaps, people not wanting to talk about how much they have actually received. Beyond that, I do not understand why it would be necessarily relevant.



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As Joeli has already said, the quid pro quo for the employer is that they get some form of anonymity, as does the individual. Otherwise, what is the point in settling? They will end up in a tribunal process if that is not signed. Therefore, there is very little benefit to the employer in paying out an amount of money in that situation unless they have some sort of anonymity.

Q48 Angela Crawley: Should lawyers do more to ensure that confidentiality clauses are not overly restrictive?

Emma Webster: Yes, a standard settlement agreement with a very standard confidentiality clause that is limited to the amount of money that is changing hands would be a good thing. Apart from anything, it would reduce legal fees massively if there was just a standard set of clauses. I spend an awful lot of my time going through what are effectively boilerplate agreements, but they are all slightly different. Why, if I know that it is just the same agreement that is universally accepted? Yes, it needs to be tweaked to fit the individual circumstances, but there really is no need for me to have to read the same things over and over again, but worded slightly differently, and therefore incur additional legal costs for both sides. Yes, there is that.

Angela Crawley: Does anyone have anything to add?

Séamus Dooley: I would agree.

Q49 Sarah Champion: I am finding this absolutely fascinating. Thank you for being so open and honest. Some states in the US, such as California, are banning the use of non-disclosure agreements and settlement agreements regarding sexual harassment cases. Do you think that we should be considering something similar here when it is about sexual harassment or other forms of discrimination?

Joeli Brearley: Not for discrimination cases, because there is then no incentive for the company to settle. The NDA is their incentive to settle. Our proposal is that all non-disclosure agreements are reported to a body that is set up to monitor the use of non-disclosure agreements. Every time one is used, an employer has to report to that body and say what it was used for. The body then has the jurisdiction to act and investigate if they feel that they are being used to mask abhorrent behaviour such as sexual harassment and discrimination. We would suggest that, when they investigate, they then force that company to put into place procedures, systems, processes and training to prevent it ever happening again, and that then they are very closely and carefully monitored. This means that companies can still use non-disclosure agreements, so the women still have access to settlement agreements rather than going to tribunal, but it means that there is somebody watching what is going on. At the minute, nobody is watching what is happening.

Sarah Champion: Emma, could that work?

Emma Webster: Having some sort of oversight body is a really important step because you are then removing the onus from the



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individual, who is in a very vulnerable situation regardless of the type of discrimination, to enforce what are individual rights, and having some sort of oversight body that is looking at whether these are repeat offenders and whether there is a bad culture within organisations. As Joeli said, nobody is watching. That does not mean that the benefit of NDAs and the benefit of settlement should be removed. It just means that somebody needs to be watching.

The problem with reporting all NDAs is that it captures organisations that want to pay 1,000 people an enhanced redundancy. There needs to be something a bit more nuanced than that. From the point of view of maternity and pregnancy discrimination, the retention rates that Ros has referred to already would offset that. A huge number of my clients are women who are returning from maternity leave, so they are back at work. They do not have the regulation 10 protection that gives them a slight protection against redundancy, although not a particularly great one, and within week one or two they are coming back to work and they are being taken into a room and being told, "Look, here is a settlement agreement." They would not be caught necessarily; they are told they are being made redundant. They are probably not, and the retention rates beyond just maternity leave, six months or a year down the line, would stop that.

I also think there is room for some sort of idea. Employees now have to go to Acas in order to bring a tribunal claim. That is not seen as a barrier to access to justice, and I do not think it is, but why should an employer not have to report every time they dismiss somebody who is pregnant or on maternity leave? It is not a judgmental process; it is just that there is somebody watching and, "I am reporting this". It seems to me that that would be a beneficial situation as well.

Q50 **Chair:** Do you mean report it to Acas?

Emma Webster: Or the EHRC or any NGO—someone somewhere that keeps an idea of what those figures are.

Q51 **Sarah Champion:** Can I put the flipside of that question to Ros and Séamus? This retrospectively has the potential to flag up a problem within an organisation. If, for example, you could not have NDAs on sexual harassment or bullying cases, that would mean that there would be more likelihood of colleagues getting together, finding out similar patterns of behaviour and bringing forward a much stronger case against an individual employer who was repeatedly bullying, harassing and attacking staff members. Can you see, in sexual harassment cases particularly, or other forms of discrimination, that removing NDAs, full stop, would have a benefit?

Séamus Dooley: There are a few points. I am not opposed in principle to the idea of an Acas register, but I do not need such a register to know that this is a problem in our industry. Maybe I will put the context to my answer. There is an organisation called Creating Without Conflict, which



was a campaign of the Federation of Entertainment Unions, comprising the National Union of Journalists, BECTU, Equity, the Musicians' Union, the Professional Footballers' Association, the Writers' Guild of Great Britain and our sister union, Unite. A survey of 4,000 workers revealed the creative industries to be a hotspot of bullying. More than half of those questioned—56%—said they had been bullied, harassed or discriminated against, and 81% of those who reported bullying, harassment and discrimination said that their gender was a factor.

You can say that the absence of non-disclosure agreements might be a problem. I might flip it again. I might say that the presence of non-disclosure agreements may well help conceal a pattern of behaviour and that the threat of not having non-disclosure agreements should give companies pause for thought. The fact is that, if we do not deal with this as a consistent issue, that will be a problem. It could also act as a disincentive.

It would be wrong not to acknowledge that some women would probably also feel, "Hold on a moment. Am I going to enter the public domain?" We have discussed this as a union. We have looked at it up and down, and we have come to the conclusion, as I said earlier, that the benefits outweigh the disadvantage. That then means providing a very high level of support for women on that issue.

Sarah Champion: Ros, do you have anything to add?

Rosalind Bragg: We would not support removing NDAs for pregnancy and maternity discrimination. I do not take the view that we extend it to other forms of bullying and harassment, and sexual harassment in particular, because I do not feel we have the expertise to speak to that. For pregnancy and maternity discrimination, however, it would be a great loss for NDAs to be prohibited for this group of women.

There are other ways in which you can have that collective action. In unionised workplaces, there is a significantly lower rate of pregnancy and maternity discrimination. There is the capacity to have much more effective joint action through union structures. Similarly, other measures like maternity retention rates give you much more public exposure of poor practice and allow other actors to intervene, rather than relying on the individual women who are dealing with pregnancy or a new baby and trying to balance work and family responsibilities, and who, consequently, are not the people you want to be trying to lead the charge for change in a particular organisation. That would be a more constructive approach for this group of women.

Q52 Sarah Champion: One of the things that the Equality and Human Rights Commission has suggested is that NDAs while settling cases should only be allowed at the request of the employee. What are your thoughts on that? Could that work, or could that be open to exploitation?



Joeli Brearley: I can see why they have made that recommendation. However, the employee would request it because they want to settle, and the employer would say, "That is the only way I am settling," so it does not really deal with the problem, and it goes back to your point again.

Emma Webster: I totally agree. It is a really interesting way of doing it, and I know that that is what they are suggesting in California as well. It gives pause for thought, but it would just lead to a slightly artificial situation where an employer is simply saying, "Ask me for that and then I will give you a reference," or, "Ask me for that and I will pay you an extra month's money." You will just get into a slightly surreal cat-and-mouse situation.

Séamus Dooley: In a sense, while I think it is a well-meaning intention or proposal, it is almost a pretend proposal, because the reality of the workplace relationship is that this is not an equal relationship. As I said earlier, it occurs in a situation of great conflict and tension, so there is really no great choice involved in that. In some respects, it might, ironically, put greater pressure on the employee.

Emma Webster: Sexual harassment is very different because there is potentially a criminal act there, and therefore there is the potential to at least involve the police. There is an obligation on the individuals who are aware of it to report, in a way that pregnancy and maternity discrimination does not have those kinds of legal obligations already. It is very difficult to conflate sexual harassment with maternity and pregnancy discrimination.

Séamus Dooley: In relation to sexual harassment—and it is no coincidence that it emerged in California—we are talking about the lies of silence here. We are talking about a culture when suddenly, after 20 or 30 or 40 years, facts start to emerge. Why was that? Why did it happen? It happened because of the culture of secrecy, so we are back again to the issue of how we tackle that. It would be very foolish to think that either outlawing or threatening non-disclosure agreements on its own is going to solve that issue.

Q53 **Tulip Siddiq:** Pregnant Then Screwed suggested that employers should have to report the number of NDAs that they use to a central body and that those with a high number of NDAs could be referred to a relevant body for investigation. I wonder what the panel thinks of that. Joeli, I probably know what you think of this.

Joeli Brearley: It is a great idea.

Emma Webster: Like I said, oversight is a really important step. The way to tackle this is to remove it from being an individual who has to stick their head above the parapet. Therefore, if there is an external body that is in some way considering the numbers of people leaving and why they are leaving an organisation, that would be good thing. Like I said, my issue with blanket NDA reporting is that it captures the situation



where an organisation has negotiated with a union and might want to be able to make 200 people redundant and offer them an enhanced redundancy package, in a genuine situation that perhaps is not catching anyone who is on maternity leave or pregnant. This might remove a company's willingness to enter into some sort of enhanced redundancy package in a genuine redundancy situation, because they are not going to get some form of confidentiality about the amounts they pay out or something like that.

Q54 Chair: Sorry, you have mentioned that before. Why would people need to keep that confidential? I do not understand. Why would a company want to keep secret what they are paying individuals?

Emma Webster: A lot of companies feel that they want to retain confidentiality about their financial situation and how much they are paying to employees to say "goodbye", and a redundancy situation is part of that. There will be arguments around wanting to disclose their financial affairs to anybody else.

Séamus Dooley: Commercial confidentiality is used to cover a multitude of things, such as where you negotiate settlement terms in collective redundancies. I agree with you on that. I cannot see the logic in a non-disclosure agreement when the terms have been negotiated.

I find the suggestion of a company having to register a particularly high number as intriguing. I am obviously in a minority view on this panel in relation to NDAs, but the very fact that we are talking about companies reporting a very high number, by definition, seems to me to be a suggestion that there is something wrong with non-disclosure agreements. If they are a normal part of the workplace and are acceptable, why would you need a register and why would a significant number be some kind of a trigger? That is a genuine question.

Emma Webster: It does not need necessarily to be around a specific number. It needs to be around this idea that you have to tell somebody—a third party or an oversight body—why you are dismissing people. I gave the example of a woman who has just come back from maternity leave. The problem is that the employer is going to say that she is genuinely redundant. They are not going to say, "We offered her an NDA because we were discriminating against her." That is not going to happen. They are not going to give the genuine reason, and sometimes they will not even acknowledge that it is the genuine reason. Again, if you are just blanket reporting NDAs or settlement agreements, it will not give you a true picture of what is really happening.

Séamus Dooley: In the workplace, there is another problem in that sometimes there may be an agreed resignation. It may be presented as a resignation as part of a cosmetic exercise.

Emma Webster: Yes, absolutely.



Séamus Dooley: That is a real issue.

Rosalind Bragg: For pregnancy and maternity, it is not sufficiently specific to be able to pick up the issues for this group of women. If you are looking at NDAs generally, you will be picking up everything from the enhanced redundancy packages right through to every form of discrimination. If we want to look at what is happening with this group of women, we need to be much more targeted.

Q55 **Tulip Siddiq:** We have had some discussion about access to tribunals. I want to just pick up on that a bit more. It has been suggested that increased access to tribunals would make it more difficult for NDAs to be abused. For example, it has been suggested that the employment tribunal process could include access to shorter without-prejudice hearings that could take place in private. I want to know your views on such an approach, if it was adopted. Do you think it would reduce the settlements with NDAs?

Joeli Brearley: Anything that makes the tribunal process easier is a good thing because they are brutal. As I said before, these women are very vulnerable. They do not want to go through that. Making it easier is therefore a good thing.

Doing it without prejudice does not deal with the problem, because without prejudice means that you cannot tell anybody. At the moment, at least when somebody takes an employer to tribunal, we can publicise that and talk about what that employer has done, and perhaps that employer, being publicly chastised, will then go on and investigate. Without prejudice, however, adds an extra layer of secrecy.

There are other things we can do to make the process easier for women and to make access to justice easier for women. We can extend the tribunal time limit, because three months is nowhere near long enough. That would make a huge difference. Only 0.6% of women who encounter discrimination even raise a tribunal claim. It is a tiny percentage. Extending the tribunal time limit would increase that number, from the research that we have done. Yes, making it easier and less brutal is a good thing but without prejudice just adds to the problem.

Séamus Dooley: I agree that anything that can improve the tribunal system would be good for workers. I wrote down a note as you were asking the question, giving exactly the same answer, which was that this is adding another layer to an already tortuous process. The idea of adding another tribunal layer and a hearing in secret in order to avoid secret agreements does not make sense to me, and it could be more complex. An employer is absolutely at liberty to have an informal discussion either with a solicitor or a trade union official who is acting on behalf of the employee. I do not think you would need to have another layer of a tribunal. What Joeli has suggested in relation to expediting the tribunal and changing and reforming the tribunal would be a much better solution.



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Tulip Siddiq: Emma?

Emma Webster: I cannot comment on the tribunal process.

Rosalind Bragg: Work that can be done to make the tribunals more affordable, less stressful and faster would be incredibly helpful. However, the primary result of that is that you would have more women able to settle prior to the tribunal, because it would be a genuine option for women, and consequently the employer would be more nervous of the women taking such a claim. It would really increase women's ability to negotiate agreements. The result would really be seen outside the tribunal system.

The most useful thing in improving the tribunal is access to legal advice, which is a key thing, as well as reducing delays. On top of that, our discrimination laws are difficult to pursue for many women, because of the nature of their discrimination. For instance, it could be poor health and safety management. Four per cent. of pregnant women and new mothers leave their job because of poor health and safety management. However, the way the health and safety laws operate is such that, essentially, you need to run a discrimination claim in order to sort out a problem of being told to lift boxes that are too heavy for you to lift during your pregnancy, which is discrimination but should be solved through other means. It is also useful to go back and look for other ways to reform the law to simplify the claims that women be bringing, so that, while it could be a discrimination claim, it could also be a breach of health and safety obligations, which is a much simpler case to pursue.

- Q56 **Tulip Siddiq:** That makes sense, thank you. In its 2016 report on pregnancy and maternity discrimination, the Committee recommended that the Government implement systems similar to one that is used in Germany, under which pregnant women and new mothers can be made redundant only in specified circumstances for up to six months after the end of maternity leave. Do you think that the use of such a system would reduce the need for NDAs? Do you know whether NDAs are commonly used in the settlement of pregnancy and maternity discriminations in Germany? Would it be worth adopting an approach like the one that the Germans use?

Rosalind Bragg: I can comment on that. We did a report on redundancy in which we were recommending the German approach to redundancy protections. The German one prohibits redundancy for pregnant women and new mothers except in very limited circumstances. It applies during the pregnancy and for a short period after the birth. Our view, and the Committee's recommendation, I believe, was for it to extend for a longer period because, as Emma has already mentioned, there is a significant risk of unfair redundancy on return from maternity leave, not just during the first few months after giving birth.

This is one of the examples of improving the legal protections to minimise women's need to use the more complex discrimination provisions. We



know that one in six pregnant women and new mothers in the workplace is made redundant. That is quite high. The EHRC was of the view that only 1% of pregnant women and new mothers have been unfairly made redundant, but their methodology for determining that was quite restrictive. Our view is that it would be significantly higher than that.

This approach would mean that a lot of women who were in very vulnerable situations—pregnancy, newly given birth, newly returned to work—would have a very simple recourse if their employer did try to make them redundant, which is to say you can only do it in certain circumstances. Having said that, there will be circumstances where employers will still enter into agreements to have women leave. However, I imagine the pay-off for that would be significantly higher because they are very clearly breaching the law and it would have to be very much in the woman's interest for her to accept such an offer. Again, it would significantly improve women's negotiating abilities, which, again, is a good thing.

Q57 Tulip Siddiq: Does anyone want to add anything on the German approach?

Joeli Brearley: I was very disappointed to see that that was the only recommendation that the Government were willing to take forward. Solving pregnancy and maternity discrimination is not just about making little tweaks here and there to the law and papering over the cracks. This is a hugely systemic problem. We will need to extend properly paid paternity leave. We need subsidised or free childcare. We need better access to flexible working. These are all the things that underpin the reasons why we see pregnancy and maternity discrimination happen. I am not saying that it would be futile to extend the protections, but if you also look at the Equality and Human Rights Commission report, 1% were made redundant whilst pregnant, 3% were made redundant whilst on maternity leave and 2% were made redundant on their return. More women are made redundant when those enhanced protections exist than when they do not. It is not about the law. The law is not working. It is about a culture that needs radical changes in order for women and mothers to be valued in the workplace.

Emma Webster: I would second everything that Ros and Joeli have just said. My understanding of the German model—and this is not based on a huge amount of experience—is that it is extremely uncommon for women in Germany to be dismissed for any reason during maternity or pregnancy, and that is because of that legislation. It has helped the culture shift because, if you think about it, rather than a woman having to show that any dismissal is related to her being pregnant or on maternity, it is flipped so that the employer has to show that they fit within one of very few limited circumstances in order to be able to dismiss that person. You are reversing the shift, and that is an incredibly important step.

I second Joeli: there are all sorts of other problems that Germany



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probably does not have in terms of flexibility and access to childcare and things like that, but it is an important shift and it will help shape the culture because it is reversing the burden, if you like.

Séamus Dooley: I agree. The emphasis on childcare and on improved paternity is vital.

Rosalind Bragg: The recommendation to enhance protection for pregnant women and new mothers facing redundancy was actually one of the recommendations from the Women and Equalities Select Committee that was accepted by the Government. The commitment was to review those protections. That commitment was given in January 2017. We are now in December 2018. We have had a more recent repeat of the commitment to review these protections, but we have yet to see a consultation document being released. It is of grave concern that this, which is the only significant commitment given by the Government following the release of the EHRC research, has not been acted upon after such a long period.

Tulip Siddiq: Yes, I agree, and the Committee will have to discuss that.

Chair: It was indeed an issue that I raised directly on the Floor of the House with the Secretary of State two days ago, and I was given an assurance that there was something forthcoming.

Rosalind Bragg: Thank you.

Q58 **Tulip Siddiq:** My final question is about whether there is anything else that you would like to add in terms of safeguards or new systems that would mean that the abuse of NDAs is reduced. It is really a chance for you to add anything if you had not had an opportunity to say it at this panel. Emma, I will start with you.

Emma Webster: There needs to be clarity within the agreements themselves. I referenced the carve-outs, but they are often quite opaque. For example, take section 43 of the Employment Rights Act in terms of whistleblowing. Understanding what you have to do in order to satisfy the whistleblowing legislation is complex in and of itself. Clarity around what the exceptions are would be helpful. Having a standard settlement agreement wording that can only be tweaked so far would be helpful.

Like I said, you need to have legal advice before you can sign a settlement agreement and it is binding, and that is why employers often—but not always—make a contribution towards the legal costs of the employee in those circumstances. It would be helpful to recommend a minimum amount that would be paid, so that the person can get access to good legal advice at that point, without it being conditional on the signing of the settlement agreement. You might get £500, but only if the settlement agreement is signed. A mandate on access to legal advice that is freely given, if you like, and that is payable by the employer, would be a way that an employee could have access to legal advice that is not tied



to that, and would mean that they can access expert legal advice not out of their own pocket. That could prevent some abuse.

Séamus Dooley: I would agree with most of what Emma has said. At the risk of being accused of making a single transferable speech, I would also say that access to trade union representation at every level, and reform of trade union legislation, would address many of these issues.

Joeli Brearley: We should make it clear that women can talk to their counsellor about it. With 69% of women saying that it is having a long-term impact on their mental health, the least we can do is let them talk to a counsellor. As Emma said, these things should also be monitored.

Rosalind Bragg: This is one aspect of the much larger problem of pregnancy and maternity discrimination, and it would be really good to see the Government take this issue on as a priority and to be able to do the whole range of interventions that would reduce women finding themselves in a position where they have to consider a compromise agreement or NDA.

Q59 **Chair:** Can I just ask one final question? We have talked a lot about repeat offenders. Would there be any way of indicating if allegations that were coming forward were actually being made against the same person more than once? Is there any way legally that you could do that?

Emma Webster: Only from internally, because, obviously, the individual who is being harassed, for example, may not go to the same lawyer, and there is no reason why they ought to. Trade unions would form a very valuable part in that. If the trade unions are aware that somebody has been complained about several times, they ought to be speaking up. A management board or the HR department internally ought to be raising that and ought to be under some form of legal obligation, or obligation, to do that. There ought to be reporting to the board level, so that management and directors do not get away with it by simply dismissing it as an employment expense or a settlement expense, and saying, "They were just difficult" or "We had to make them redundant" or whatever. There needs to be oversight within organisations, but I do not think, externally, there is a way of doing that easily.

Séamus Dooley: In our daily work, we would do that. Of course, the greatest support that any vulnerable worker who is the subject of any form of inappropriate behaviour can get is from colleagues—not just from the HR department, but also from those around them. Frequently, where we have encountered companies where there is inappropriate behaviour, one complaint will inevitably—particularly in relation to harassment—lead to other complaints from colleagues. The greatest assurance that anyone can get is to know that, if their colleague has made a complaint, they were treated with dignity and respect.



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Emma Webster: Can I just add one thing? That means that the women who are on maternity leave are particularly vulnerable because they are completely isolated. They are not sitting next to their colleagues. They have no way, necessarily, of getting in touch with those people or making things more widely known, and that is why they are so vulnerable.

Chair: It has been such an incredibly helpful discussion this morning. Thank you very much indeed for your very practical suggestions as well. It has been extremely helpful in our deliberations. I would like to close this witness session with all of our thanks to you for spending your time with us this morning. Thank you very much.