HOUSE OF COMMONS

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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Watch the meeting

Members present: Mrs Maria Miller (Chair); Angela Crawley; Eddie Hughes; Tulip Siddiq.

Questions 60–83

Witness

I: Peter Rukin, Partner, Rukin Hyland and Riggin LLP.

Examination of witness

Witness: Peter Rukin.

Q60 **Chair:** I would like to start our session today by welcoming our witness down the line, and also anybody who is watching online or in the public gallery. This is the second evidence session of our inquiry on the use of non-disclosure agreements in discrimination cases and our second evidence session of the day. We are grateful to Peter Rukin from Rukin Hyland & Riggin LLP for joining us via a video-link from California. I should have worked out what time it is there, but I think it is still good morning.

Peter Rukin: It is still good morning here. Good afternoon to you.

Chair: Thank you very much. Our usual plan of action, Peter, is that we have our Committee members and we ask a series of questions. You will see people coming and going because we have a rather hectic Parliament at the moment with debates happening simultaneously to this Committee session. Please forgive us if it looks like people are leaving the room. It is just literally to try to make sure that everybody is in the right place at the right time.

Perhaps before we start, we should just say who each of us is, just so you can get a sense of who is in the room at the moment. I am Maria Miller. I am a Member of Parliament and Chair of the Committee.

Tulip Siddiq: I am Tulip Siddiq. I am the MP for Hampstead and Kilburn.

Chair: Then these are two Committee clerks.

Angela Crawley: I am Angela Crawley, MP for Lanark and Hamilton East.

Eddie Hughes: Eddie Hughes, MP for Walsall North.

Chair: Wonderful. That is three Members of Parliament and two Committee clerks sitting at the table here. Hopefully that is reasonably easy. Tulip is going start our questioning today.

Q61 **Tulip Siddiq:** Thank you very much for joining us. Before we go on to talk about the forthcoming changes to California law restricting the use of NDAs in certain discrimination cases, I was hoping you could give us an overview of how the system in California works in employment discrimination cases.

For example, if an employee feels they have a sexual harassment complaint against a colleague or manager, what would the system be in taking that forward? I would also appreciate it if you could speak a bit about the normal levels of compensation in California, to put it into perspective a little bit.

Peter Rukin: To tackle the first question first, if an individual has a claim of sexual harassment—they feel they have been victimised by sexual harassment—they have a number of different options. One option is to utilise whatever the grievance procedures are internal to the company that they are working out and see if the issue can be resolved at that stage. These are not mutually exclusive.

The next option that individual would have would be to attempt to settle the claim pre-litigation. That is how we would term it. We would typically be retaining an attorney to raise the issue with the company, if it had not been raised already, and to determine whether there is some resolution that could be achieved through that informal negotiation, without any court action or administrative action being filed. I do not have the statistics, but it is fairly certain that the vast majority of sexual harassment allegations that are raised are resolved prior to litigation. If for whatever reason the claim cannot be resolved pre-litigation, then the individual has the ability to go to court.

Before going to court there is an exhaustion requirement that has to be satisfied. You need what is called a "right to sue" notice from the California Department of Fair Employment and Housing. I am going to be talking a little bit about what we call an administrative complaint or a DFEH complaint. For all practical purposes, that is simply to get the "right to sue" notice, so you can then go to court. The process would be to file a complaint with the DFEH. It pretty much automatically generates a "right to sue" notice. The individual would have a year from the time the harassment occurred to exhaust with the Department of Fair Employment and Housing. Once that "right to sue" notice is obtained, you then have another year to bring the court action. Obviously, in most cases people do not wait that long.

Throughout this whole process, there are opportunities for settlement. A court action may be filed in state or federal board. There is a discovery process that then happens over the course of a year or two years. There are documents exchanged. There are written questions that are answered; we call them interrogatories. There are depositions that occur in both the state and federal court. Ultimately, after the period of discovery is closed and the case is allowed to proceed, such as there is a motion to dismiss the case that is unsuccessful, then the case could go to trial. The trial would be before either a judge or a jury, dependent on what the parties have requested. Again, throughout the whole period and even through appeal, there are opportunities to resolve the case.

In terms of the value of clients in California, it depends. It really depends. Obviously, it depends on the facts of the case. It depends on what jurisdiction you are in. Claims that are filed in the San Francisco Bay area, all other things being equal, are probably going have a greater value than claims that may be filed in other jurisdictions in California. Generally speaking, when we are talking about sexual harassment claims that are meritorious and that would go to trial and potentially obtain a

successful verdict, you are talking about values ranging from tens of thousands of dollars to millions of dollars. There are cases where multi-million dollar verdicts have been given in sexual harassment claims.

Q62 **Tulip Siddiq:** Thank you. That is very helpful. My next question is about how, as a result of Senate Bill 820 from 1 January 2019, California law will prohibit the use of confidentiality clauses in settlement agreements in sexual harassment or sex discrimination cases. In your opinion, what effect do you think this will have on how cases are approached by employers, employees and lawyers?

Peter Rukin: Again, obviously it is hard to say, because we are early in predicting what is going to happen. The Bill is not in effect yet, which you noted, but it is likely to have some impact. As I said, most cases resolve pre-litigation. As you know, under Senate Bill 820, the confidentiality restrictions only apply once a DFEH complaint or court action has been filed. They do not apply at all to pre-litigation settlements that occur before the filing of a DFEH complaint.

There is a likelihood that parties may be incentivised, including employers in particular, to resolve certain claims before the filing of a DFEH complaint or court action, because they then have the ability to obtain confidentiality, if that is something that is of value to them. It will have some impact and to what extent is not clear yet.

Q63 **Tulip Siddiq:** I understand that you cannot fully answer this yet, but it is more that I am asking your opinion on what you think you will see more widely on public attitudes and the discourse around sexual harassment and sex discrimination as a result of this.

Peter Rukin: For this legislation, there is Senate Bill 820 and a companion Bill, Senate Bill 1300, that is restricting the use of non-disparagement clauses in certain types of settlement agreements. These Bills collectively are re-setting the bar a bit in terms of what expectations there are about confidentiality. It is certainly an expression of legislative public policy. It is going to probably be reflected in jurisprudence in an increasing hostility towards secret settlements.

The California public, if they are told that such secret settlements are actually enforceable right now, would be shocked, because there is an underlying sentiment in California and there is public policy in California that really requires open records, open Government and free speech. It is in the California constitution. People would be surprised and have been surprised that such secret settlements could be enforced. There is probably general public support of the legislation.

Q64 **Tulip Siddiq:** Sticking to this new law, I wanted to ask about the fact that complainants will still be able to seek confidentiality clauses to protect their own identity. How will this work? How will their confidentiality actually be protected? Is there a risk that employees will be pressed by employers to request confidentiality clauses?

Peter Rukin: That is not a really significant concern. The reason is that the law only applies once a DFEH complaint or court action is filed. Once that has happened, certainly once a court action is filed, the allegations are in the public record. They are probably searchable on Google. I am certainly aware of a lot of court cases that, once they are actually filed, they are immediately available through various sources on Google. The information is out in the ether.

In my experience, employment cases and sexual harassment cases because the claims are meritorious, the cost of defence may be significant and the exposure that the company faces is very significant. At that stage, it is not really to obtain a secret settlement. I do not envision that there will be lots of pressure on employees to request it.

The other thing that you should be aware of is that there are pretty rigorous sealing requirements in California courts. To put anything under seal, you would have to go to the judge and explain why information that is already in the court record should be sealed. The parties are never going to have any kind of guarantee that the courts are going to allow a sealing of records. It is probably unlikely that you are going to see a lot of pressure on employees to, as you said, request that kind of confidentiality and sealing.

The other thing to be aware of is that the law is designed to be a shield, not a sword. It is to protect the victim and the victim's identity. If there is an agreement that is reached and down the line the employee wants to speak out and wants to share her story, then there is no longer a shield. She is able to do that.

Q65 **Tulip Siddiq:** Under the new law, again referring to the new law, there is an option to reach an early settlement without any restriction on NDAs, before an action has been filed. In your opinion, is there a risk that this will become the new norm and the system of filing actions will be bypassed?

Peter Rukin: No. As I said, the vast majority of cases are settled early, pre-litigation. That is usually because in particular cases the interests of the employee and the employer are to resolve the matter. There are certainly lots of instances where the victim of sexual harassment feels shame, is embarrassed by the situation or is concerned that disclosure of the information will impact her ability to find future employment. There is often currently a desire on all sides to resolve these cases early. Unlike some of the other laws that have been passed recently in the United States, this leaves that door open. It leaves the door to early resolution open without any confidentiality restriction.

Q66 **Tulip Siddiq:** My final question is about the new laws, which apply only to clauses in settlement agreements. Are NDAs widely used in employment and pre-employment contracts in California? Could these still be used to prevent disclosure of sexual harassment or sex discrimination?

Peter Rukin: The answer is complicated. They are not as widespread in California as they may be in other jurisdictions in the US. There are pre-existing rules that would preclude all sorts of non-disclosure provisions. For example, under federal law you cannot prohibit employees from talking amongst themselves, in the workplace, about working conditions. That is what we call protected concerted activity. There are already existing laws that protect employees in that regard. I would say that, going forward, particularly with Senate Bill 1300, there is not going to be any room for what we would call standalone non-disclosure agreements that would preclude an employee from talking about sexual harassment.

We find provisions like that in standalone agreements, but it is pretty rare. The kinds of confidentiality provisions that I see most often are simply in settlement agreements that preclude employees from revealing the terms of the settlement: the amount of money paid. That is unaffected by this legislation. Employers going forward are going to have to be even more careful about how they are drafting non-disclosure agreements to make sure that there is not any kind of prohibition on employees disclosing facts about sexual harassment while they are currently employed. Does that answer the question, or was there another piece to it that I missed?

Tulip Siddiq: No, that is fine. Thank you.

Q67 **Eddie Hughes:** Good afternoon. Was there much debate around the passing of Senate Bill 820? If so, was there much public support for it?

Peter Rukin: There certainly was a lot of debate in the legislature. The process in California, which is probably similar in most legislatures, is that there is notice that is given out to all interested parties including, for example, in this case the California Chamber of Commerce and business groups who are interested in this kind of issue. There was certainly robust debate within the legislature and among lobbyists and interest groups. I would not say there really was a lot of public debate about the legislation. In the public sphere, it did not get that much press, to be honest. I would say, as I said before, there is public support for this kind of legislation. That is certainly my perception; it is popular.

Q68 **Eddie Hughes:** Was there any discussion at the time about extending the provisions to include other types of discrimination? Has there been any discussion about that subsequently?

Peter Rukin: Senate Bill 820 encompasses discrimination claims based on gender. It encompasses retaliation claims based on gender. It precludes confidentiality with respect to certain types of gender discrimination and harassment claim. At the moment, there has not been much debate about extending it beyond gender discrimination and harassment.

Q69 **Eddie Hughes:** Several organisations, we understand, supported the Bill. It was opposed by the California Chamber of Commerce and others on the grounds that it would interfere with the settlement of claims of sexual

harassment or assault by forcing companies to trial in order to protect their image or brand. Do you think that there will be more litigation as a result of the changes because companies avoid settling in order to protect their image or brand?

Peter Rukin: No, I really do not see it having a really significant impact in that sense. Companies settle because there is a very significant cost to defence. Under California law, if the company loses a trial they not only have to pay their own lawyers' fees, they not only have to pay a damage reward to the employee but they also have to pay the employee's lawyers' fees incurred in the litigation of the case. Really, there is significant exposure. If you have got any kind of meritorious sexual harassment claim, there is very significant exposure. In my experience, it is the risk of that exposure that really drives the settlement process.

Q70 **Angela Crawley:** Coming on to the operation of the legal system, specifically in California, for taking forward discrimination cases, it would be helpful for us to understand more about the context in which the new laws on NDAs will operate in California and how easy it would be for employees to get legal advice about potential discrimination. Would they be able to access free legal initial advice on how strong their case it?

Peter Rukin: Employees can obtain legal advice through various avenues. The first is there are non-profit organisations. For example, here in the San Francisco Bay area there is an organisation called Legal Aid at Work that provides employment-related advice to employees who would be classified as low-income employees. Employees can also obtain legal advice from lawyers. There is a pretty strong employee side claims bar in California. The California Employment Lawyers Association now has over 1,000 numbers throughout the state. We are accessible and employees who have experienced sexual harassment at work can, in most instances, attain a free consultation regarding their claim of sexual harassment or the experience they are undergoing in the workplace.

Beyond that, if as a result of that consultation it appears that the employee has a claim that they should be pursuing, either in court, in pre-litigation or simply to get the assistance of a lawyer to resolve an ongoing issue, there are a large number of lawyers who will take on cases on what we call a contingency bases. Only if there is a success for the employee will the lawyer get paid. The employee will not have to pay the fee on an ongoing basis out of their own pocket.

Q71 **Angela Crawley:** That answers my next question. A low-paid employee with a strong case would be able to take forward an action on a no win, no fee basis.

Peter Rukin: Yes, absolutely.

Q72 **Angela Crawley:** What then are the risks for employers of not settling a case, even without a non-disclosure agreement? Are they likely to have to pay out much more if they litigate?

Peter Rukin: Yes, I would say the cost of litigation for either side in a harassment case can run up into easily well beyond the tens of thousands of dollars, into the hundreds of thousands of dollars. If I am taking on a case and I am taking it through discovery and through trial, we are often looking at several hundred thousand dollars in legal fees that the employer would be on the hook for if the claim was successful. In many instances, those fee awards may be larger than the actual damage awards to the employee.

Q73 **Angela Crawley:** If an employer refuses to settle without an NDA, is there a risk that the employees with sexual harassment cases will end up with nothing, because they prefer not to litigate?

Peter Rukin: This is a case in a lot of instances. The employee really wants to resolve the issue prior to litigation. In California, currently and under this new law that will be in effect as of 1 January, they will have the ability to do that with the confidentiality clause in any settlement agreement. It is really going to be in those more rare instances—statistically they are more rare instances—where the employee actually wants to move forward with litigation and files a DFEH complaint, gets a "right to sue" notice and proceeds to court. They are going to be subject to these restrictions on confidentiality. Then again, they have made the informed decision in those instances that they are willing to go public with their case.

It is like a Pandora's Box. It is hard to un-ring the bell. Once the court action is filed, it is in the public record. Confidentiality clauses under those circumstances are more about shutting down the whisper network and preventing women from talking about their experience with other women in the workplace and other people who might be experiencing harassment from a repeat harasser. The new law will preclude an employer from trying to get that kind of confidentiality order once the woman has said, "I want to move forward. I am interested in pursuing this claim".

Q74 **Angela Crawley:** If an employee takes forward a civil action for discrimination, in what circumstances would their name and details of their case be made publicly available, so that, for example, potential employers could find out about their claim? Supplementary to that, how easy is it for an individual to get anonymity?

Peter Rukin: The filing of a DFEH complaint, which again is the pre-condition on court action, is a confidential process. There is no ability for anyone to find out that an employee has submitted a claim to the Department of Fair Employment and Housing. Once a court action is filed, that is a matter of public record.

As I said, in many instances you can probably find the information on Google. There are various services that just pick up filings as they happen and then they become a matter of public record. That is an

increasing concern for people who want to pursue their claim but do not necessarily want the world to know about it. It has become more difficult.

Once the action is filed, you need to erase the internet trail, which is very difficult. It is not impossible. You would need to convince a judge to put filings under seal. There is no guarantee of that. I am sorry; you had a second piece to the question.

Q75 **Angela Crawley:** How easy is it for someone bringing forward a civil action to obtain anonymity?

Peter Rukin: That is very difficult. In other words, what we would call that is a Doe filing, as in Jane Doe. There is the ability to do that in certain types of cases. Certainly cases involving minors are often filed as that. I have represented minors in abuse cases and those are filed under a Doe filing, but typically in a sexual harassment case that would not really be an option. You would be filing it with your name attached to it in most instances.

Q76 **Chair:** I have just got a last few questions, if that is okay. We understand that New York State has recently introduced a law restricting the use of NDAs in sexual harassment cases too. Can you tell us how that compares with the law in California?

Peter Rukin: The New York law is significantly different, in that it applies to all settlements, whether it is pre-litigation or post-litigation. It provides a two-step process, whereby first you need to memorialise the employee's request that there be confidentiality in any settlement. The employee has to request it and then there needs to be a 21-day waiting period, in which the employee and the parties memorialise. It is separately from the actual settlement agreement.

Q77 **Chair:** Could you explain what "memorialise" means? I do not understand what "memorialise" means.

Peter Rukin: There need to be two different agreements. There needs to be, first, one agreement that only addresses the fact that the employee wants confidentiality. Once the employee has had 21 days to revoke or not revoke that agreement, you then move on to the second agreement, which is the confidential settlement agreement. The concern that was expressed earlier about employees being forced to request confidentiality is far more of a concern under the New York law. I have spoken to colleagues in New York who represent employees who are concerned about the way that law is framed.

Q78 **Chair:** Could I just ask another question? What do you think the motivation was of the Senate Bill 820 by those that advocated for it and the state senator involved? What was their motivation for doing it?

Peter Rukin: It is a reaction to what we have seen over the last two years with the Me Too movement and the fact that this came out of California. Harvey Weinstein was operating in California and Los Angeles.

The concern is that multiple women had been harassed by a serial harasser and no one knew about it. It continued because, among other things, there were confidentiality clauses and agreements that these women were signing that precluded them from speaking about their experience.

In my experience, practising law for 25 years, representing both employers and employees, the real impact of a non-disclosure agreement is its intimidatory effect. If you have to sue to enforce a sexual harassment non-disclosure agreement, you have already lost. You are now publicising the harassment by going and trying to enforce the non-disclosure agreement. The value in a non-disclosure agreement is in intimidating women into being silent. That was the concern. Women were being silenced and repeat harassers were continuing to harass, and no one could speak out about it, or they felt that they could not, even though arguably they would not have been enforceable.

Q79 **Chair:** You would characterise the role of an NDA to be intimidating women to be silent.

Peter Rukin: An NDA that is designed not to protect trade secret information or confidential product information but is designed to prevent a woman from talking about sexual harassment is really designed to intimidate a woman into being silent. That is the real effect of an NDA targeting the underlying facts of sexual harassment.

Q80 **Chair:** Yet under the revised system the majority of cases, as you say, settle and therefore will still be able to have a non-disclosure agreement included within them in California, whereas that is not the case in New York. Do you think that is something that might be revised or looked at in the future?

Peter Rukin: It is possible. It is a concern. First of all, even though the primary effect of an NDA is its intimidatory effect, most women who experience sexual harassment and go to see a lawyer want to resolve the claim without litigation, without going public with it. Certainly, they do not want the employer talking about what happened in the workplace to them. They can obtain that kind of confidentiality and in many instances they are happy to agree to a confidentiality provision. In some instances they are not. You are right that this law, in the pre-litigation context, is not going to preclude an employer from saying, "To settle this we need non-disclosure".

Q81 **Chair:** Are you aware that anybody has looked at any other techniques to expose the number of non-disclosure agreements that may still be entered into in pre-litigation procedure? A number of organisations in the UK have suggested things like registering non-disclosure agreements, so that it is clear what is still going on. Has that been debated?

Peter Rukin: That is an interesting idea. No, I have not heard of that. I do not know the actual statistics but I am pretty certain that most cases settle pre-litigation. Many of them may have non-disclosure agreements.

One thing I have seen—and I am not sure what jurisdiction this was—is the development of a form NDA or a form settlement agreement that has a non-disclosure provision. One of the concerns is overreaching that employers may engage in. Having a form settlement agreement that has an NDA that is not overreaching is one thing I have seen at least one jurisdiction look at. I have not heard of anyone registering so that you could develop the statistics on NDAs. They are pretty ubiquitous, I would say, in one form or another.

Q82 **Chair:** They are here, too. The final question is you referred earlier to Harvey Weinstein, a multiple offender in this respect, allegedly, and the incidence of multiple offenders is something we are really concerned about in the UK. Has any consideration been given to how you can highlight that or whether there are any obligations on legal representatives if they are aware that this is a multiple-offence individual? Do you see what I mean? It is trying to capture that so that it can be addressed, either through the legal system or by the individual company.

Peter Rukin: Companies may be looking. They should be looking at ways to capture that information, because they have the supervisor or the manager working there who has now had their fourth or fifth allegation against them. They probably have the statistics. I do not know of any way to really capture it publically. These are all private settlement agreements. Whether or not they have a non-disclosure provision, there is no real way to track them.

Q83 **Chair:** There is no duty on employers that would actually bring that into legal focus.

Peter Rukin: There is no duty to disclose the statistics on repeat offenders within a corporation in any kind of public way. They probably have internal reporting procedures that may address it, but not in a way that would go up to a Government agency, as far as I am aware.

Chair: That is really helpful. Thank you so much. We cannot thank you enough for spending your precious time with us: this morning for you, and this afternoon for us. It has been incredibly helpful.

Whilst I realise that there are huge differences between your legal system and ours, not least of which are the levels of compensation involved, it is incredibly helpful for us to be able to draw from international experience as we try to grapple with the same sorts of issues. I am really grateful to you for your time. On behalf of the whole Committee, thank you.

Peter Rukin: It has been my pleasure. Thank you very much.

Chair: Have a very happy Christmas!

Peter Rukin: Thank you; you too.