

Written evidence from the Independent Society of Musicians on the use of NDAs in the music sector [MiM0054]

BACKGROUND

1. The Independent Society of Musicians (ISM) is the UK's largest non-union representative body for professional musicians. Founded in 1882, the ISM champions the importance of music and protects the rights of those working in the music sector. The ISM has over 11,000 members who work across all genres and disciplines of the profession. They are supported through a range of services, resources, professional development and legal advice. The ISM is a wholly independent, non-profit making organisation with no political affiliation.
2. ISM members include 'freelancers', the genuinely self-employed, workers, and employees. Their work is arranged and performed in diverse ways and they face a range of issues in the places where they work. The ISM provides support to members through an in-house legal team who provide advice on various issues facing musicians including settlement agreements, COT3s and other agreements which may include confidentiality or non-derogatory clauses.
3. Since 2018, the ISM has published two reports that expose the extent of discrimination within the music sector.¹ With Equity and the Musicians' Union the ISM also published a report which looked at the experiences of those studying creative subjects at higher education institutions.² The research consistently found discrimination to be pervasive throughout higher education and in the music profession. The ISM's most recent report (September 2022) surveyed 660 respondents who work across the music sector and showed that 66% of respondents have experienced some form of discrimination. The most prevalent form of discrimination experienced by the music workforce surveyed was sexual harassment, accounting for 58%. At the time of the incident(s) of discrimination, 52% of respondents were self-employed, 33% were employed and 15% were either both employed and self-employed or volunteers. 77% overall did not report the incident(s) officially. Of self-employed people who experienced discrimination, 88% did not report the incident(s), while 59% of employed people did not report. Of the 23% who reported officially, 10% were offered a settlement.
4. The ISM welcomes the opportunity to provide evidence to the Committee on this subject.

THE USE OF NDAS

5. The ISM provides advice on NDAs to members in both employment and non-employment related situations.
6. In employment related situations the NDAs normally form part of a settlement agreement or COT3 agreement which has been negotiated to bring an employment relationship to an end or to settle claims which have been submitted to the ACAS conciliation process or made to the Employment Tribunal.
7. There is little understanding amongst musicians of when they might be signing an NDA and that they are normally included in wider agreements such as COT3 and settlement agreements.

¹ [Dignity at work: A survey of discrimination in the music sector \(published April 2018\)](#) and [Dignity at work 2: Discrimination in the music sector \(published September 2022\)](#)

² [Dignity in study: A survey of higher education institutions \(2018\)](#)

8. COT3 agreements are the result of the pre-court ACAS conciliation process which has been compulsory for most types of employment dispute since 2014. If employees and employers reach an agreement through ACAS this is recorded on an official document called the "Central Office of Tribunals Form 3", commonly known as a COT3 agreement. This acts a legally binding, full and final settlement of the dispute, and often involves payment as part of the final agreement between the parties.
9. Settlement agreements were originally introduced into UK law in 1993 with the aim of providing an alternative route to out-of-court settlement which did not involve the ACAS conciliation process. For a settlement agreement to be valid and binding, it must comply with certain statutory requirements. These include the employee taking independent legal advice on the contents of the agreement before they sign it, to ensure they have properly understood all its terms. These additional rules are designed to prevent employers from taking advantage of their position of power and forcing employees to sign disadvantageous agreements which they do not understand. The additional rules do not apply to COT3 agreements, as the employee theoretically already has some protection from this imbalance in power with the involvement of ACAS, which acts as a neutral mediator in the early conciliation process.
10. The use of NDAs in settlement and COT3 agreements in an employment context is prevalent and all such agreements on which the ISM legal team advises contain confidentiality and non-derogatory clauses meaning that every agreement contains an NDA. These are now seen as standard clauses in such agreements and are unlikely to be removed even if they are challenged.
11. Since the Solicitors Regulation Authority issued a warning notice on the use of NDAs in March 2018 (updated in November 2020) the drafting of confidentiality and non-derogatory clauses has improved. The clauses normally now allow for the employee to talk about the contents of the agreement to their immediate family and professional advisors. The agreements normally also allow whistleblowing, to report matters to the police or other law enforcement agencies or for disclosure during any form of legal proceedings.
12. In our experience few employers, or employer advisors will ask the fundamental question whether a confidentiality or non-derogatory clause is needed in an agreement. Such clauses will appear as standard clauses and requests to have those clauses removed will be refused. It is recognised that these clauses can also protect the employee to prevent the circumstances which lead to the agreement being released to a wide audience. It would be better if parties recognised that there should be a discussion about these clauses rather than an insistence in all circumstances for them to be included in agreements.
13. There is an imbalance in power in employment situations where settlement and COT3 agreements might be used. Some employees feel that they have no other choice than to complete an agreement otherwise they might be left with lengthy legal proceedings where there is a risk that litigation will not be successful.
14. ISM members are fortunate in that they can access free legal advice as part of their membership benefits. However, there will be musicians who are not members of any organisation that they can turn to for advice. For those people it may be too costly to seek advice at an early stage of negotiations or when some form of discrimination occurs. This might also mean that they feel that they do not have any other choice but to complete an agreement which contains these types of clauses. This exacerbates the imbalance of power between an employer and employee.

15. Often the situation that gives rise to the need for a settlement agreement has an impact on the individual who signs. If that person has suffered from discrimination or harassment, or there has been a breakdown in the employment relationship then this can have deleterious impact on a person's health and wellbeing. It is possible that signing a settlement agreement which contains an NDA may exacerbate a person's already potentially poor health and wellbeing if it does not allow them to speak to others or speak out about an injustice which they feel that they have suffered.
16. A settlement agreement invariably involves a person ceasing to be employed and this can have an impact on their future opportunities. Whilst confidentiality and non-derogatory clauses can assist an individual in reaching some form of closure it does have an impact on their career. They are left not being able to explain why they may have left a particular employer and there is always the chance that a prospective employer will guess that any reference has been agreed as part of a settlement agreement. Whilst this is not a consequence of an NDA it is linked.
17. As noted above ISM members can access legal advice at an early stage of negotiations of any agreement that might contain elements of an NDA. We are able to provide members with support in ensuring that inappropriate wording is not used and attempt to remove unethical elements of an NDA.
18. Whilst the ISM is able to inform and support members, we have met resistance from other parties when seeking to negotiate the need for restrictive confidentiality and non-derogatory clauses or to ensure that both parties are bound by such clauses. This resistance can come from HR professionals as well as legal professionals who are seeking to protect their employers or clients. This is despite the guidance from the Equality and Human Rights Commission (EHRC)³ and ACAS⁴
19. Whilst guidance appears to have helped to a degree, there is further action which could be taken to ensure that legal professionals question the use of NDAs. Employees should not be excluded from speaking out if they wish to ensure that inappropriate behaviour by employers or senior managers cannot be hidden. Legal professionals should play a role in challenging employers to justify the inclusion of NDAs if the other party does not wish such clauses to be included in an agreement.

CONCLUSION

20. NDAs, beyond their original use of protecting confidential business information and copyright, are now prevalent with standard clauses appearing in contracts of employment, COT3 agreements and settlement agreements. Employers do not wish to remove confidentiality or non-derogatory clauses as they want to protect their public image and at their worst such NDAs can be used to cover up poor behaviour. Whilst there has been improvement with the wording of such clauses the fundamental questions about whether they should be included in agreements or whether other action should be taken to address poor behaviour remain unanswered. The issue will continue to be that NDAs in an employment context tend to arise in dispute situations where an employer tends to hold most of the power.

³ [EHRC Guidance on the use of confidentiality agreements in discrimination cases \(published October 2019\)](#)

⁴ [ACAS Guidance on non-disclosure agreements \(published February 2020\)](#)

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