Employment relationships: Shedding light on confidentiality

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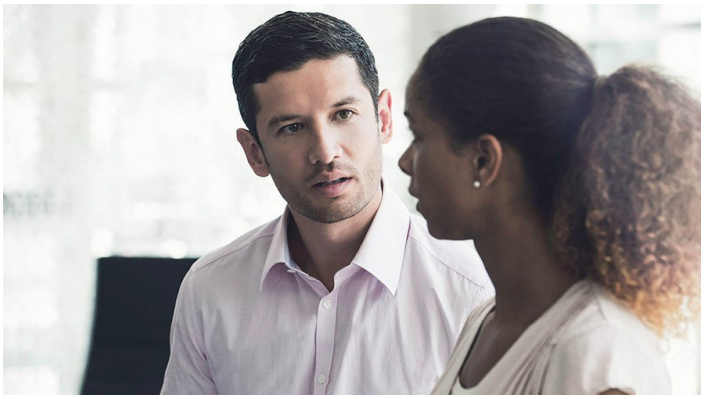

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Imagine a scenario: There is a terrible row. Sharp words are exchanged and things are said which aren't easily un-said. But time passes, and heals, and eventually we agree to draw a line under the matter, part ways and never speak of it again. Would it, or should it, make a difference if I were your employer? How far can, or should, you go to place confidentiality restrictions around the end of an employment relationship and agree to say no more about it? In the modern world, should we be embracing transparency?

Of course, many elements of an employment relationship are already covered by confidentiality. You expect your pay and benefits to remain confidential and that your employer will comply with the principles of the GDPR in controlling and processing that personal data. And every employer, is entitled to protect its confidential information.

But it is primarily when things go wrong and the employment relationship ends that the inequality inherent in every employment relationship comes to the fore. For example, sexual harassment in the workplace is a form of abuse of power. After the Presidents' Club scandal and the Harvey Weinstein case, there has been a renewed focus on pre-employment non-disclosure agreements and 'gagging clauses' in settlement agreements. The BBC has just reported that the House of Commons has spent £2.4m keeping former staff silent since 2013 . We are now increasingly questioning the use of confidentiality restrictions.

The Solicitors' Regulation Authority also recently issued a warning to lawyers not to use non-disclosure provisions to deter the reporting of misconduct, an offence, or cooperation with a criminal investigation or prosecution. This builds on the existing statutory framework, that any provision preventing someone from making a valid whistleblowing complaint will be void.

Much, of course, depends on how and why employment ends. Sometimes, it will unfold naturally and very simply: a resignation, a handshake and a parting of ways that is easy to talk about. However, at other times, there is an element of dispute: allegations of wrongdoing; counter-arguments that such allegations are mistaken, misconceived, and even vexatious. Litigation may show who's 'right' and who's 'wrong', but at a cost (in time, money and stress).

Perhaps it's time for us to take a step back and consider whether we need to shroud every dispute in confidentiality. The trend in many areas has been to throw open the shutters and let the sunlight in. The Gender Pay Gap Regulations and Freedom of Information Act are two examples of this.

The recent debate is an opportunity to rethink how confidentiality should work when employment ends in difficult and not so difficult circumstances. Clearly, there is a balance to be struck. So before reaching for a confidentiality clause let's think more deeply about whether and why we want one:

- As an employee you may want to talk about your own experience publically or you may feel that the issues you have raised are so sensitive that you do want them kept confidential;
- As an employer, you may be quite happy to tell other employees that you have settled a difficult matter and that the parties concerned are moving on. Or, you may want confidentiality to protect your reputation and business, particularly from allegations you consider unfounded;
- So rather than a blanket use of confidentiality clauses, lets approach them with care and be specific about what is in scope (the values of payments, say) and what is not (the fact of settlement or potentially criminal allegations, say);
- And occasionally, it may be radical but perfectly sensible to agree no confidentiality at all.