



### Equality Act 2010 briefing 3: Stripping the rhetoric out of Pay Secrecy clauses



**Daphne Romney QC, a leading member of Cloisters' equal pay team, cuts through the PR spin to explain how section 77 of the Equality Act reclassifies what is enforceable when it comes to preventing employees from disclosing their remuneration to their colleagues.**

In the run up to the Equality Act 2010, nothing received more publicity than the introduction of a provision regulating pay secrecy clauses - and no provision was more misconstrued. In a recent article in the *Daily Mail*, even Dragons' Den guru Duncan Bannatyne thought that employers were to be compelled to disclose pay information. So what are the facts behind the rhetoric?

In 2004, the Equal Opportunities Commission (EOC) estimated nearly one in four employers forbade employees from sharing pay information with their colleagues. It felt that this was a major reason why the gender pay gap persisted and more particularly why women in the City were hitting a glass ceiling. When the Labour Government published its White Paper "**Framework for a Fairer Future**" in June 2008, it cited the EOC estimate and pledged "**We will ban secrecy clauses which prevent people discussing their pay**". However, s. 77 does not ban anything and it does not prohibit pay discussion as such. Instead secrecy clauses are rendered unenforceable in so far as the disclosure is a "**relevant pay disclosure**" within the meaning of the section.

An employer can still enforce secrecy clauses in the context of general pay discussions between employees or the disclosure of confidential pay information to competitors and contrary to Mr. Bannatyne's fears, s. 77 does not compel employers to disclose pay information. The section is concerned only with disclosures by employees, not employers, and then only if the express purpose of the enquiry is to elicit information linking pay to one of the protected discrimination characteristics.

Pay secrecy clauses are unenforceable only in so far as it seeks to prevent or restrict the employee (P) from making "**a relevant pay disclosure**" concerning his or her own pay (s. 77(1)) or from seeking a disclosure which is "a relevant pay disclosure" from a colleague or a former colleague (s. 77(2)). A "**relevant pay disclosure**" is defined as one "**made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic**" (s. 77(3)).

A “**colleague**” is not defined but presumably anyone who is a “**comparator**” in an equal pay case under section 79 would be a “**colleague**” for the purposes of s. 77. This includes someone working for the same employer, or an associate employer in the same establishment or working for the same or associated employer in a different establishment, with common terms and conditions between A and B or generally. It will also apply to the holder of a personal or public office where the same person pays A and B, Parliamentary staff and police constables. The section is not restricted to enquiries actually made to colleagues by colleagues, so that for example, trade union officials are also covered.

The following would be excluded from the ambit of the section:

- A boasting to B about how much he is paid after one too many down the pub. This is because A’s boast is nothing to do with whether B might receive less pay because he or she has one of the protected characteristics, but is because A is showing off. A could therefore be disciplined.
- C passing pay information onto D, an employee in a competitor company (for whatever purposes). C could never be protected under the Act both because C is not making a “**relevant pay disclosure**” and D is not a “**colleague**”.

On the other hand, the following would fall within the ambit of the section:

- E asking F how much he is paid because they are the same grade and she suspects that F gets a bonus whereas she does not.
- G asking H how much he is paid because he did her job before he was promoted and she suspects that he got more because he is a man;
- I, a trade union official, asking J, one of his members, about his pay because he has been asked to do so by K, another of his members, who suspects race discrimination affects his own pay.

In these circumstances, E, G, I and K cannot be penalised for asking for the information and F, H, and J cannot be penalised for giving it. They are exchanging information in exactly the circumstances envisaged by the section. If the employer chooses to take disciplinary proceedings or impose any other form of penalty, (for example withholding a bonus or a promotion), all of them can claim victimisation in an employment tribunal with the potential to receive unlimited damages. It would make no difference if these enquiries showed that the level of P’s pay had nothing to do with any protected characteristics. If the enquiry is aimed at eliciting whether or to what extent pay was influenced by a protected characteristic, it is protected.

This leaves an unresolved issue, which is how could P show that s/he was seeking or imparting information which is covered by the section? The courts have long recognised that it is very difficult to discern intention. If P engages someone in conversation about pay, how is the employer to distinguish whether this is a genuine enquiry linked to detecting discrimination? For example, does P to have to explain why the enquiry is being made? Or if P is the person being asked for the information, does s/he first have to enquire why it is being made? If P asks a colleague about his pay with the definite intention of finding out whether P’s pay is influenced by a protected characteristic but doesn’t tell the colleague that this is the reason for the enquiry, P would seem to be protected by the section. But is the colleague?

The wording “**made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic**” would seem to protect both of them because it would be iniquitous if X were to be penalised because of P’s subterfuge, albeit in a good cause. But the language is ambiguous. Is it enough that one party to the conversation had the requisite motive if the other did not? It leaves one party dependent upon the other’s unknown or unexpressed motive.

There is nothing in the Act that **compels** employees to answer the questions posed of them. They are perfectly free to decline, but it is now *their* choice, and not the employer’s. A colleague might be reluctant to answer until s/he establishes why the question is being asked.

The fact that the legislation has left secrecy clauses in place, but has rendered them unenforceable in the case of relevant pay enquiries also presents employers with a problem. Leaving a generally-worded clause in the employment contract or Company Handbook could act as a deterrent to employees to exercise their statutory rights. Few employees will know that they are protected by s. 77 and those that do may well find its wording opaque. Even if they do know about the section, many will not know what the nine protected characteristics are, let alone whether one or more of them affects their pay, or whether their enquiry is protected under the Act. However, an employment tribunal could take the view that the clause was a device to cover up discrimination or to frighten off employees from asking questions.

The safest course would be for employers to review these clauses in order to ensure that their effect is limited to situations other than “**relevant pay disclosures**”. Disclosure of confidential information is often protected by restrictive covenants governing the position both during and after the employment and these clauses should also be reviewed. Further, employers should not attempt to discipline P for seeking, making or receiving information from such a relevant disclosure or to impose any other detriment as this will lead to an employment tribunal claim and the potential for unlimited compensation.

Employees on the other hand need to beware of being lulled into a false sense of security by the initial claim in the drafting of the act that pay secrecy will be banned – one thing that is clear despite the ambiguity of s 77 – it doesn’t declare open season for all on pay discussions.