PE1495/M

UNISON Scotland submission on Scottish Parliament Petition PE1495

CONSIDERATION OF PETITION PE1495

Calling on the Scottish Parliament to urge the Scottish Government to ban the use of confidentiality, or so called 'gagging', clauses in compromise agreements with NHS staff in Scotland, which may prevent staff speaking freely about matters that affect patient safety and quality of care, as well as employment issues such as workplace bullying.

UNISON Scotland response

UNISON Scotland is sympathetic to the principle behind the petition because we believe that effective whistleblowing procedures are an essential part of good staff governance in the NHS. Health staff should be encouraged to speak out without risk of victimisation. Such an approach benefits the health board, staff and the wider community.

The SPICE briefing on the petition is helpful in clarifying several of the claims made in the background information to the petition. We will therefore clarify how we as a trade union deal with confidentiality clauses within the constraints of the current legislation.

The petition calls for a ban on the use of confidentiality clauses in compromise agreements (now referred to as 'settlement agreements') between NHS employers and their employees.

Settlement agreements are voluntary agreements and the terms of such agreements are the subject of negotiation between the parties. UNISON often assists members in those negotiations and provides legal advice to its members who have chosen to accept a settlement agreement. However, the trade union is not a party to the agreement, which is between the employer and our member.

In UNISON's experience there are a variety of reasons why an NHS employer and an employee will choose to enter a settlement agreement on the termination of the employment relationship. It is often in the interests of both parties that the reasons for ending that employment remain confidential. Confidentiality allows the employee to start afresh in new employment reassured that their former employer is legally bound not to make any disparaging statements against them. Confidentiality may also be required by the employer as a condition of offering settlement terms, which, of course, the employee is free to accept or reject.

However, regardless of the terms of an agreed confidentiality clause, our members in the health service have a professional duty to report concerns regarding patient care, and public interest disclosure legislation renders null and void any agreement that would seek to prevent them from fulfilling that duty. Our members are advised of this as part of the legal service we provide in relation to settlement agreements.

UNISON notes this is also reflected in the revised wording for NHS agreements, which makes clear that protected disclosures are not subject to the confidentiality clause.

Where a UNISON member seeks advice on protected disclosure they are advised what constitutes a protected disclosure and who the appropriate authority to report to would be. If any member suffers a detriment because they have made a protected disclosure, UNISON provides free legal advice and assistance to support the member. UNISON would not, and indeed could not, prevent any member from making a protected disclosure as referred to in the petition.

UNISON also believes that the current UK legislation is complex and in need of reform. In particular, we are concerned about the recent amendment to PIDA (s43B) that introduced a public interest test. We believe that this amendment will lead to further legal uncertainty and discourage whistleblowing. We note that the UK Government called for evidence on the current whistleblowing legislation and their response is awaited.

In summary, while we agree that confidentiality clauses should not be the default position they are appropriate in some circumstances as agreed between the parties to a settlement agreement. However, it should be clearly understood that such clauses cannot be used to prevent a protected disclosure.

Dave Watson
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