The Protected Disclosures Act 2014: *An Act with teeth but does it bite?*

In 2014 Ireland took the lead in whistleblower protection with the introduction of the Protected Disclosures Act 2014 (the **Act**).

It actively promoted a cultural shift towards encouraging employee whistleblowers by offering them significant protections from penalisation. The Act has teeth: where an employee can connect the dots between their making of a protected disclosure and their dismissal, that employee can seek interim relief from the Circuit Court and potentially be awarded up to five years' remuneration as compensation. While there have been a number of applications before the Circuit Court for interim relief by employee whistleblowers, some of which have been successful, the High Court has only recently had cause to consider this powerful statutory remedy. In doing so, it has laid down the principles that will inform future applications for interim relief.

Case Law

While there was a dearth of case law for the first few years after the Act came into force, fast forward to 2020 and several instructive decisions have been handed down, not only by the Workplace Relations Commission and Labour Court, but by the High Court and Circuit Court. Most recently, on 31 July 2020, a decision on interim relief awarded under the Act was delivered for the first time by the High Court in *John Clarke v CGI Food Services Limited And CGI Holdings Limited*[1]. We take a look at this and other recent decisions and consider the practical implications of this case law for employers.

John Clarke v CGI Food Services Limited And CGI Holdings Limited

The plaintiff, Mr Clarke, was employed as the defendants' group financial controller in January 2017 and was dismissed from his role in May 2019, following a period of suspension. Mr Clarke claimed his dismissal was due to protected disclosures he made, primarily relating to compliance with food safety and financial obligations. He was subjected to performance reviews which led to adverse findings and a disciplinary hearing. Mr Clarke claimed that queries about his performance were only raised after he had made protected disclosures.

Mr Clarke successfully applied to the Circuit Court for interim relief and his employer was ordered to maintain his pay and benefits pending the determination of his unfair dismissal complaint to the WRC. The employer appealed that order to the High Court.

On hearing the case, it appeared to the High Court that the first queries about the plaintiff's performance were only raised after he started raising concerns about compliance with financial and health and safety obligations. The employer argued that Mr Clarke did not make any mention of protected disclosures until after the dismissal, but the High Court determined that one can make a protected disclosure without invoking the Act or using the language of "*protected disclosure*". Humphreys J stated "*it is often only after the victimisation, dismissal or other adverse consequence arrives that one has to "retrospectively" figure out what really happened and analyse it in the statutory language.*"

The High Court held that the evidence presented to it established "*substantial grounds for contending that the performance issues were an attempt … to dress up the dismissal as a performance related dismissal*". The Court accepted it was likely that there were substantial grounds for contending that the dismissal resulted wholly or mainly from Mr Clarke having made a protected disclosure.

[1] [2020] IEHC 368

The High Court therefore upheld the order of the Circuit Court. Interestingly, not only did it restate that the defendants must continue Mr Clarke's pay and benefits from the date of termination up to the date of the WRC determination (and any appeal); it also directed Mr Clarke's solicitors to circulate a copy of the judgment and all associated papers to both the Department of Agriculture, Food and the Marine and the Revenue Commissioners for whatever investigations they consider appropriate.

Tibor Baranya v Rosderra Irish Meats Group

A protected disclosure is a disclosure of information which

a. in the reasonable belief of the worker tends to show a relevant wrongdoing; and

b. came to the attention of the worker in connection with their employment.

There are eight relevant wrongdoings, one of which is that the health and safety of an individual has been, or is likely to be endangered. In *Tibor Baranya v Rosderra Irish Meats Group*[2], the High Court was for the first time tasked with determining whether a communication could qualify as a protected disclosure. In this case Mr Baranya had informed the Health and Safety Officer that he wanted to change roles as he was in pain. The employer argued that this did not disclose a relevant wrongdoing.

The Labour Court in its decision indicated that there is a spectrum; at one end is a grievance and the other a protected disclosure and that between the two extremes there was the possibility for the two to overlap. The Labour Court found Mr Baranya's communication was an expression of a grievance and not a protected disclosure as it failed to outline any wrongdoing on the part of his employer. The High Court found no error of law on the part of the Labour Court and dismissed the appeal.

Paul Cullen v Kilternan Cemetery Park

Applications to the Circuit Court for interim relief under the Act must usually be brought within 21 days. In *Paul Cullen v Kilternan Cemetery Park*[3] the Circuit Court refused an application for interim relief brought by Mr Cullen on the basis that it was out of time and he had failed to adequately justify a delay of around three months in bringing his application. Mr Cullen's employment was terminated by reason of redundancy in February 2020. Prior to that and during talks about a possible exit package, Mr Cullen raised an issue concerning planning irregularities which he contended was a protected disclosure. The Circuit Court commented that a threat to an employer is not a protected disclosure. O'Connor J stated that the applicant had "*attempted to use the protected disclosure as a sword of Damocles over his employer to enhance his negotiating stance*". Though he was entitled to do so, it was not a good reason for the Court to grant him an extension of time to bring his application for interim relief.

Key takeaways for employers

These cases demonstrate a considerable appetite of the part of the courts to conduct an assessment of the causal link between a dismissal and a protected disclosure before granting relief. Likewise the purported disclosure itself will be scrutinised by the court to see if it does in fact tend to show a relevant wrongdoing. Once satisfied on the evidence that the requirements of the Act have been met, the courts appear willing to grant the substantial protections afforded to employees by the Act. Key considerations for employers are as follows:

- Employers should ensure they have a robust whistleblowing policy and appropriate internal reporting lines and procedures in place. While it may arise that an issue raised under the policy might appear to be in the nature of a grievance rather than a protected disclosure, it is important that an employer nonetheless investigates the issue. As the Labour Court made clear in its decision in *Baranya v Rosderra Meats*, there is the possibility for a grievance and a protected disclosure to overlap.
- Employers should note that the Act does not expressly require a protected disclosure to be in a prescribed format e.g. in writing. If an employee makes a disclosure that falls within the prerequisites of the Act i.e. a disclosure of relevant information which tends to show a relevant wrongdoing connected to the workplace, it may constitute a protected disclosure regardless of its format.

[2] [2020] IEHC 56

[3] Circuit Court record no: 2808/2020

- Employers should ensure that any processes conducted with an employee e.g.a grievance or disciplinary process are entirely unrelated to the making of any protected disclosure and can be objectively justified. In so doing, employers should be conscious of proximity to the making of a disclosure, timing, and any sanctions that could be construed by a court as amounting to "penalisation".
- Compensation of up to five years' remuneration may be awarded to employees who bring a successful claim for unfair dismissal or penalisation as a result of their making of a protected disclosure. In addition, the 12 months' service requirement under the Unfair Dismissals Acts does not apply and, as commented on above, an employee may apply to the Circuit Court to restrain a dismissal pending the hearing of their unfair dismissal complaint.

Future developments

We previously provided an overview of the provisions of the new European Union Whistleblowing Directive. EU member states have until 21 December 2021 to implement its provisions. While the Act already covers certain matters provided for in the Directive, it will need to be amended to ensure compliance with the terms of the Directive. Such changes will entail expanding the ambit of relevant wrongdoings; widening the definition of whistle-blower; extending the requirement to have a whistleblowing policy; and the introduction of timeframes for processing protected disclosures. Read more here.

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