A&L Goodbody

EMPLOYMENT

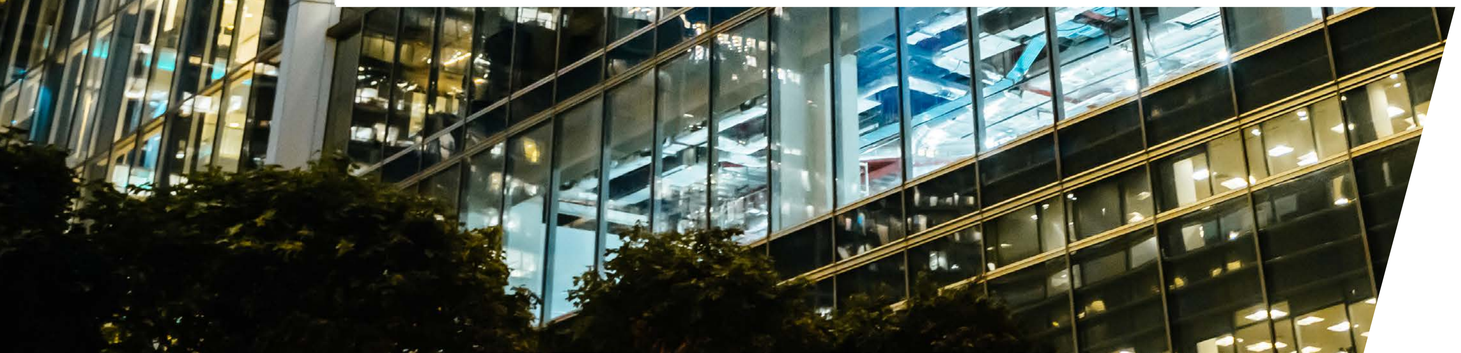
Protected disclosure or workplace grievance

- The Supreme Court clarifies the law

With Ireland due to implement the EU Whistleblowing Directive very shortly, there is currently a lot of attention focussed on the area of whistleblowing and the protections afforded to whistleblowers under Irish law.

Against this backdrop, the Supreme Court has recently issued a pivotal decision regarding what constitutes a protected disclosure under the Protected Disclosures Act 2014 (**the 2014 Act**).

6 MIN READ



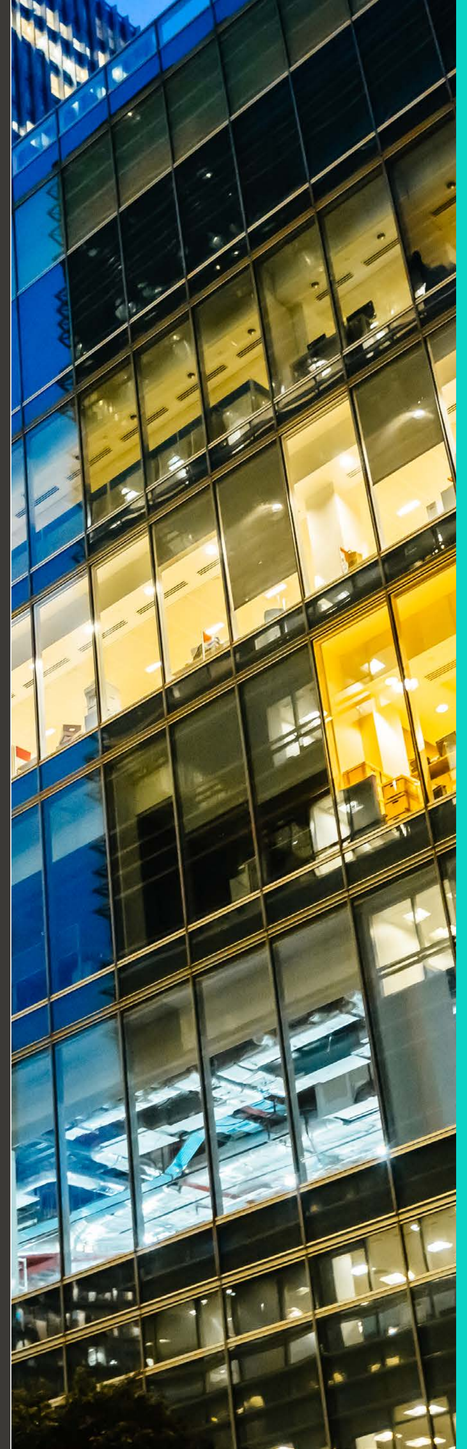
The 2014 Act provides that a 'protected disclosure' is a disclosure of information which:

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, two of which are relevant in this case: (i) endangerment of the health or safety of any individual; and (ii) failure to comply with any legal obligation, other than one arising under the contract of employment, or other contract whereby the worker undertakes to do or perform personally any work or services.

The 2014 Act has teeth: an employee who is dismissed as a result of having made a protected disclosure does not need the usual minimum one year's service to bring a claim for unfair dismissal and may be awarded up to five years' remuneration as compensation, rather than the usual maximum of two years.



What happened in Baranya v Rosderra Irish Meats?

Mr Baranya worked as a butcher for Rosderra Irish Meats, scoring carcasses on a production line. On a return to work in 2015, he indicated to his supervisor that he was in pain and that he wanted a change of role. The exact words uttered were a matter of dispute. Mr Baranya maintained that he said he was in pain as a result of work. Rosderra argued that Mr Baranya simply said that he was in pain. Three days later he was dismissed. Rosderra maintained this was because he walked off the production line.

Mr Baranya brought a claim for unfair dismissal to the Workplace Relations Commission (WRC) in which he maintained he was dismissed as a result of having made a protected disclosure.

What did the WRC decide?

The WRC drew a distinction between a workplace grievance and a protected disclosure. While the WRC found that Mr Baranya did make complaints about the pain he was experiencing while working on the production line, the WRC found Mr Baranya's communication amounted to a grievance and not a protected disclosure and did not uphold his claim for unfair dismissal.

What did the Labour Court decide?

Mr Baranya appealed the decision of the WRC to the Labour Court. The Labour Court found the communication did not constitute a protected disclosure *"because it did not disclose any wrongdoing on the part of Rosderra"*, that it was an expression of a grievance and not a protected disclosure.

What did the High Court decide?

Mr Baranya appealed the Labour Court's decision on a point of law to the High Court, but the High Court found no error of law on the part of the Labour Court.

What did the Supreme Court decide?

The Supreme Court examined the meaning of 'protected disclosure' under the 2014 Act. In that regard the Supreme Court commented that the wording *"other than one arising under the workers' contract of employment.. "* is deceptive.

The Supreme Court gave the following example: every contract of employment contains obligations regarding pay, but there seems no reason why a complaint made by an employee regarding an alleged failure on the part of an employer to comply with the Payment of Wages Act 1991 could not be regarded as a protected disclosure. The exclusion of contractual complaints which are personal to the employee concerned might be said to not achieve its aim.

The Supreme Court commented that many complaints made by employees, which are entirely personal to them, are capable of being protected disclosures for the purposes of the 2014 Act.

This is also true of complaints regarding workplace safety. The Supreme Court said it is perfectly clear that the complaint does not have to relate to the health or safety of other employees or third parties; a complaint made by an employee that their own personal health and safety is endangered by workplace practices is clearly within remit. Therefore, a complaint made by an employee that his or her own personal health was affected by being required to work in a particular manner or in respect of a particular task can amount to a protected disclosure.

The Supreme Court then turned to examine the decision of the Labour Court. The Labour Court referred to the Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015 ("**the 2015 Code**"). The 2015 Code states that complaints specific to the worker in relation to "duties, terms and conditions of employment, working procedures or working conditions" are personal grievances which cannot amount to protected disclosures. The Supreme Court found the 2015 Code does not accurately reflect the terms of what the 2014 Act says. The 2014 Act does not distinguish between a grievance and a protected disclosure. In fact, it makes no reference to the concept of a grievance.

The Supreme Court found that the 2015 Code erroneously misstates the law. Purely personal complaints in relation to the issues of workplace health or safety can in fact be regarded as coming within the rubric of protected disclosures. In relying on the 2015 Code the Labour Court fell into legal error.

The Supreme Court also found there was insufficient clear finding of fact on the part of the Labour Court in respect of what Mr Baranya actually said and whether it amounted to an allegation of "wrongdoing".

The Supreme Court therefore allowed Mr Baranya's appeal and has remitted the matter to the Labour Court so that it can determine afresh whether the utterances of Mr Baranya amounted to a protected disclosure. If it does, it will then need to decide if Mr Baranya's dismissal was as a result of the protected disclosure.

What does this mean for employers?

The decision outlines that, under the 2014 Act, a complaint of a failure to comply with a legal obligation that is personal to the employee may be a protected disclosure. In addition, a complaint regarding the endangerment of the health or safety of any individual may be a protected disclosure, notwithstanding that it relates to the employee's own personal health.

The 2014 Act states at the outset that it is an Act to make provision for the protection of persons from the taking of action against them in respect of the making of certain disclosures *in the public interest*, but according to the Supreme Court's decision the definition of protected disclosure in the 2014 Act is not so confined.

Charleton J delivered an interesting concurring judgment which notes the fact that the EU Whistleblowing Directive references whistleblowers as those who report illegal situations "harmful to the public interest" yet it is inescapable that personal interests are covered by the 2014 Act. Charleton J concludes *"the thrust of the 2014 Act does not conform to what might ordinarily be considered to define a whistleblower as a public minded individual deserving of special protection".*

The Supreme Court's decision might be regarded as timely. The deadline for transposing the EU Whistleblowing Directive is 17 December 2021, a deadline which is not going to be met. However, it is anticipated that the transposing legislation, the Protected Disclosures (Amendment) Bill (**the Bill**) will be published shortly. The General Scheme of the Bill[1] provides that grievances about interpersonal conflicts between a reporting person and another worker, which could be channelled through another HR procedure will be expressly excluded from the definition of relevant wrongdoing.

Will the legislature now go further to try to bring complaints which are specific to the reporting person outside the scope of a protected disclosure? With the publication of the Bill expected shortly and there being significant time pressure to enact it, the answer to this question should become clear very soon.

In the meantime, employers should give careful consideration to all employee complaints in order to assess whether they could constitute a protected disclosure.

For further information in relation to this topic, please contact Triona Sugrue, Knowledge Lawyer, Duncan Inverarity, Partner or any member of ALG's Employment team.

[1] *Read our briefing here.*

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