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Whistleblowers Enjoy Layers of Protection Under Act

by **Jennifer O'Neill**

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Employees can bring a claim under the 2014 Act from the first day of their employment.

Workers who make protected disclosures gain extensive protection under the Protected Disclosures Act 2014 which came in to force in July of this year.

To constitute a protected disclosure there must be a disclosure of information, which, in the reasonable belief of the worker, shows relevant wrongdoing and which came to the workers attention in connection with his employment.

The definition of relevant wrongdoing is extremely broad and includes criminal offences and failure to comply with legal obligations, other than ones arising under the workers contract of employment.

Notwithstanding that the maximum award under existing unfair dismissal legislation is two years remuneration, the Act provides for maximum awards of five years remuneration.

Also, unlike the unfair dismissals acts, employees can bring a claim under the 2014 Act from the first day of their employment. In addition to the potential for extremely high awards, employees alleging dismissal on the grounds of a protected disclosure have the added protection of being entitled to apply to the Circuit Court for interim relief requesting the continuation of their employment pending the hearing of their claim. Such a claim could take in the region of one year (or longer) to come on for hearing.

This extraordinary level of protection has caused considerable concern amongst employers that workers will make pre-emptive disclosures for the purpose of gaining protection under the Act in circumstances where there may be other reasons why the employer believes it is justified in dismissing the employee.

As the motivation of the worker is irrelevant as to whether the disclosure will be regarded as a protected disclosure or not, it is understandable that employers have raised such concerns.

Wrong information

Another worrying factor for employers is the fact that workers are likely to be entitled to protection in circumstances where they wrongly believe particular information is true and even where the matter to which the information relates would not amount in law to an offence.

The UK Court of Appeal decision of Babula v Waltham Forest College, which could well be followed in Ireland, provides clarification. In this case the worker resigned from his employment as a lecturer following his disclosure to the college, the Metropolitan Police, the CIA and the FBI that a previous lecturer was inciting racial hatred.

The court held that the worker was entitled to protection under the UK whistleblowers legislation as it would not be reasonable to expect workers to have sufficient knowledge of criminal law to enable them to decide if particular facts which they reasonably believe to be true could, as a matter of law, constitute a criminal offence. Therefore an employee may in fact be protected in circumstances where the information he discloses is untrue and also where the matter to which the information relates would not amount in law to a criminal offence.

The above makes stark reading for employers, many of whom have asked whether the Act gives workers protection regardless of how they behave and even when the disclosure relates to their own personal position.

Personal grievance

Although the Act aims to protect whistleblowers it does not provide workers with carte blanche to behave in any manner. The UK case of Bolton School v Evans illustrates this point well. The case involved a teacher, Mr Evans, who deliberately hacked into his school's computer system to test and demonstrate its inadequacy. After the hacking, the school disciplined Mr Evans for his unlawful interference with the computer system but Mr Evans alleged the disciplinary action was to penalise him for whistleblowing. The Employment Appeals Tribunal held however that the whole course of the worker's conduct is not regarded as an act of disclosure and Mr Evans was disciplined for his irresponsible actions and not his disclosure about the failings in the IT security systems. Therefore although the legislation will protect the worker who reasonably believes that something is wrong, it does not protect the actions of a worker directed at establishing or confirming the reasonableness of that belief.

Helpfully, the Act specifically excludes failure to comply with legal obligations arising under the workers contract of employment. Therefore if a disclosure relates to a workers' own contractual position it will not be protected. This will hopefully minimise use of the legislation by workers to argue that detrimental treatment by their employer was as a result of a previous disclosure by them of a breach of a personal contractual right.

To benefit from this proviso properly however it will be important that employers carefully consider all employee grievances and complaints to ensure that private matters relevant to the employee are dealt with under the grievance process and any matters which may be capable of constituting a protected disclosure are dealt with under a clear company policy in relation to protected disclosures. The distinction between personal grievances and public interest disclosures may not always be clear and having a clear whistleblower policy providing examples of protected disclosures and how they differ from personal grievances will be important. Circumstances may arise where personal grievances are linked to broader workplace concerns and having proper systems in place which distinguish these matters and provide for clear investigations which separately record matters and any steps taken by the employer is vital in such circumstances. Lack of clarity in this area will result in uncertainty as to the basis for any actions taken by an employer and will make it more difficult to defend against a claim for penalisation arising from a protected disclosure.

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