Global Workplace Law & Policy

Protected Disclosures – where to from here?

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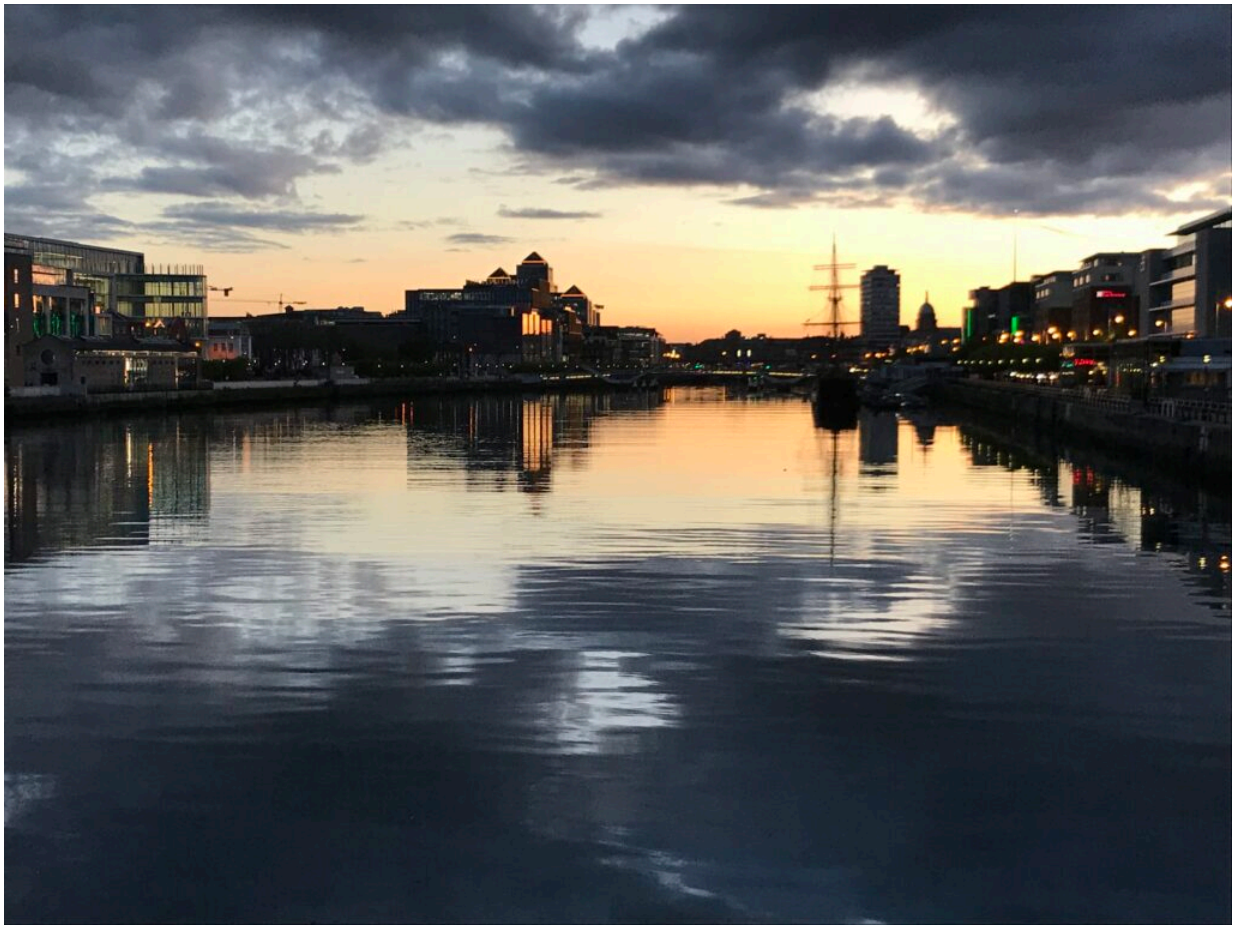

Protection for Whistleblowers is not a new concept in Ireland, but recent developments both in terms of the legislation and a case decided by the Supreme Court mean that this is topical once again.

On the case law front, the Supreme Court late last year issued a very interesting, and what at least appears an expansive, judgment on what constitutes a protected disclosure. Coincidentally on the legislative front, the Government has published the long-awaited Protected Disclosures (Amendment) Bill 2021.

Both the Bill and the judgment could serve to enhance the whistleblowing protections offered to employees, so both developments should be of interest to employers and employees alike.

The current Legislative position

When enacted the Protected Disclosures Act 2014 ("the Act") was a relatively radical piece of legislation which provided protections for whistleblowers in Ireland for the first time. It was introduced following various public scandals involving whistleblowers, including the prominent case of former Garda Sergeant Maurice McCabe.

Under the Act, an employee who makes a protected disclosure is protected from workplace penalisation including dismissal. If an employee can show they were unfairly dismissed due to their making a protected disclosure, they may be awarded up to 5 years' pay. The Act provided for enhanced protection when compared to redress for "normal" unfair dismissal cases where the maximum compensation is two years' pay and an employee must be employed for 12 months before they may bring a claim. The Act was intended to be a serious deterrent against any employer who considered penalizing a whistle-blowing employee. Whether it has been such a serious deterrent remains to be seen.

The general position since 2014

Following on from the enactment of the Act there have been many cases taken to both the WRC, and appealed to the Labour Court, as well as to the Circuit Court.

The WRC, and the Labour Court deal with claims relating to alleged breaches of the penalisation provisions of the legislation including anything from denial of promotion, exclusion from certain tasks or teams to employees being *sent to Coventry* following their making of a protected disclosure, or disclosing information which would be a protected disclosure. These cases usually are decided on their specific facts, but, on the whole probably have not been the game changer in the employment relationship which many employees may have thought or hoped.

The Circuit Court under the Act has a very specific role relating to the granting of interim injunctive relief for terminations arising wholly or mainly from the making by the dismissed employee of a protected disclosure. In essence, the Court has to be satisfied that "but for" the protected disclosure the dismissal would not have occurred. There are various different reliefs the Court can order, but, unlike the High Court in wrongful dismissal injunction actions, the Circuit Court order is not one to restrain the dismissal but rather one to order what occurs pending the determination by the WRC of the substantive case. This can, in certain circumstances, include reinstatement, reengagement or, more likely, an order for the continuation of the employee's contract of employment.

The Supreme Court *Baranya* judgment

As set out above, cases under the Act have mostly been dealt with in the WRC, on appeal to the Labour Court or in the Circuit Court. The case of *Baranya v Rosderra Irish Meats Group Limited [2021] IESC 77* went all the way to the Supreme Court.

Background

Mr Baranya was a skilled butcher who had returned to employment with Rosderra Meats having previously worked for it for some 15 years. Shortly after his return he informed his employer that he wished to change the work he had been doing as it caused him pain. Within days of this, Mr Baranya's employment was terminated. Mr Baranya asserted that his dismissal was because he had

made a protected disclosure, and consequently he did not need 12 months continuous service to bring his claim for Unfair Dismissal. The company not only denied that a protected disclosure had been made but asserted that even if his complaint had been a protected disclosure (which it strenuously denied) then the reason for dismissal was because Mr Baranya had walked off the production line without affording management any opportunity to address his complaint.

The Decisions

Both the WRC and the Labour Court held in favor of the Company finding, *inter alia*, that his complaint was not a protected disclosure but a grievance. The Labour Court in its decision placed reliance on SI464/2015 ("the 2015 Code"). On appeal, by Mr Baranya, to the High Court it was held that no error of law in the decision of the Labour Court had been identified and consequently the appeal was dismissed.

The Supreme Court

In a judgment delivered by Mr Justice Hogan, the Supreme Court held in favor of Mr Baranya holding that his complaint could have amounted to a protected disclosure. A plain reading of an employee's statement that the work they are doing is causing them pain would likely lead most to conclude that this is a common workplace grievance, and not a protected disclosure. Instinctively therefore, the decision of the Supreme Court seems like an expansive judgment and one which broadens entirely the scope of protected disclosures to a level not envisaged. A closer read of the judgment however shows it to be entirely consistent with the Act.

As noted above, in arriving at its decision the Labour Court reviewed the 2015 Code. While the Supreme Court determined that the Labour Court was entitled, and perhaps obliged, to take cognizance of the 2015 Code in determining the matter, unfortunately the Code did not accurately reflect the provisions of the Act. Hogan J noted that the 2015 Code made a distinction between grievances and protected disclosures which simply did not exist in the Act. In placing reliance therefore on provisions of the 2015 Code which were not contained in the Act the Labour Court had erred. Despite what many would have considered the purpose of the Act, the legislature had not made the distinction between a protected disclosure and a grievance, and, consequently what would ordinarily be viewed by many as a grievance could fall under the scope of the Act.

In addition, Hogan J held that the Labour Court had not discharged correctly its role as a fact finder. In the case there was a dispute as to what precisely Mr Baranya had said regarding being in pain. What precisely was said, Hogan J determined, was crucial as whether Mr Baranya merely stated he was in pain or stated that he was in pain because of workplace health and safety issues went to the heart of whether his complaint was a grievance or a protected disclosure. The Supreme Court has remitted the matter to the Labour Court to determine whether Mr Baranya's complaint does indeed amount to a protected disclosure under the Act.

The EU Whistleblowing Directive

As mentioned above, while the Irish legislation governing and protecting whistleblowing has been in place since 2014 as a result of the Act, the EU introduced Directive 2019/1937 ("the Directive") as an attempt to harmonise measures and set minimum standards of protection for whistle-blowers across Member States.

The Directive was introduced in October 2019 and was to be transposed in all Member States by

17 December 2021. The Directive is seen as a significant enhancement from the Act of the protections afforded to whistleblowers. The main provisions are provided for in the Protected Disclosures (Amendment) Bill 2021 ("the Bill"), which will be discussed below, but the Directive makes an internal reporting system mandatory from certain dates for certain employers. In addition to employees, former employees, subcontractors, shareholders, suppliers and third parties are covered. The precise nature of the internal reporting channels are matters for the national legislatures, but confidentiality and anonymity must be incorporated. In addition, the Directive obliges all Member States to impose effective and proportionate sanctions on those companies and public bodies that do not adhere to the reporting system and/or hinder attempts to report breaches.

Protected Disclosures (Amendment) Bill 2021

The Bill, if enacted in its current form, will significantly enhance protection of employees, and others as set out above, who make protected disclosures.

This is done in a number of ways, notably the extension of who is covered, the expansion of the definition of relevant wrongdoings and penalisation and, importantly in regard to penalisation, the expansion of the role of the Circuit Court to order interim relief for acts of penalisation short of dismissal. This is a crucial change to the legislation and one which, in theory at least, could see many more actions being brought by employees to the Circuit Court. To what extent the Circuit Court will be willing to interfere in an ongoing employer-employee relationship is something which will be interesting to observe.

Also importantly for enhancing the rights of whistleblowers is the fact that the Bill reverses the burden of proof. Now an employer must prove that any act or omission of theirs against an employee was not based on the making of a protected disclosure by that employee. This is in contrast to the position under the Act which places the burden of proof on the person who alleges the wrongdoing.

The Bill includes new offences that carry with them criminal sanctions of both fines and terms of imprisonment and, interestingly, provides for the establishment of the Office of the Protected Disclosures Commissioner.

From a practical point of view the Bill sets out that private entities with more than 50 employees will be required to establish internal reporting channels for the making of protected disclosures. While a derogation for companies with between 50 and 249 employees to December 2023 is provided for, this is something that companies are going to face and should address sooner rather than later.

Finally, in terms of the questions which arise from the aforementioned *Baranya* decision, the Bill, and the subsequent Act, provides the Government with a ready-made opportunity to correct the flaws identified. Very rarely does it occur that the legislature has issues identified to it by the Supreme Court in respect of legislation it is in the process of passing. Oftentimes when the Supreme Court identifies issues such as it has in *Baranya* there is a rush to legislate that inadvertently creates further issues. Here the issues in respect of the Act have clearly been identified at a time when the Government is in the process of legislating in the very area. Whether or not the Bill in its current form fully addresses all of the issues raised though has been the subject of some discussion. While the final text will only be known after the passage of the legislation through the Oireachtas, as it stands, the Bill provides that a matter which exclusively concerns an

interpersonal grievance effecting a person is not a relevant wrongdoing, and therefore not a protected disclosure. The Bill also provides that such a grievance should be dealt with through internal grievance procedures. On a first reading this would seem to address one of the primary issues raised in *Baranya* but it is not inconceivable to see a circumstance where an employee can raise what would seem to be a grievance but elevate it to the level of a protected disclosure by showing that it impacted others, and not just them exclusively, even if the others have not complained of the issue.

In addition, in *Baranya* the Supreme Court commented that the Act is not in line with what most people would consider to be the definition of a whistleblower because of the absence of any reference to a *"public-minded"* individual who is deserving of special protection. There is limited reference in the Bill to this public interest point, which could lead to further issues in the future.

Conclusion

The Act may not have altered the employee-employer relationship to the extent some believed (and others perhaps hoped) since 2014 but it has had a significant impact. The passing of the new legislation, whenever that occurs and in whatever final form the Bill takes, will only increase this. Employers must be mindful of this and prepare accordingly, starting sooner rather than later. Whistleblowers have, and continue to, play an important role and in the employment context deserve protection. Clarification on the distinction between grievances and protected disclosures, as identified by the Supreme Court, is necessary and the final draft of the Bill must get this right, or else there will be further cases like *Baranya* arising. We will watch the passage of the legislation with interest, as we will the *Baranya* case on its return to the Labour Court.

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