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Alarming Supreme Court Decision on Employee Whistleblowing Claims

The Supreme Court recently issued two very important Judgments (Hogan J and Charleton J) in the case of **Tibor Baranya v Rosderra Irish Meats Group Limited**. The case involved the interpretation of the **Protected Disclosures Act 2014** ("the Act") and in particular whether a claim by an employee that he was concerned that his duties were causing him pain and a request that he be assigned to alternative duties could be considered to be a protected disclosure – commonly referred to as 'whistleblowing'.

Hogan J, in the principal Judgment, in reliance on the principles of statutory interpretation, interpreted the Act as potentially applying to a situation where an employee makes a mere complaint indicating a health and safety concern regarding his own situation rather than one affecting fellow employees more generally. The particular claim had progressed from the Workplace Relations Commission to the Labour Court and the High Court, all of which had ruled that the complaint made by the employee did not constitute a protected disclosure for the purposes of the Act. The Supreme Court stopped short of holding that it did, in fact, in the particular case, amount to a protected disclosure but it ruled that it could potentially be a protected disclosure and that the Labour Court should revisit the claim to make rulings on the factual position in respect of which there was a conflict of evidence. If the Labour Court decides that the employee did make a protected disclosure then it would have to consider whether the employee's dismissal was wholly or mainly brought about by virtue of the protected disclosure and therefore unfair.

Given the potential for a dismissal wholly or mainly due to an employee having made a protected disclosure to attract compensation up to five years' remuneration rather than the two year maximum for an unfair dismissal not having a protected disclosure aspect, this judgment may see allegations of protected disclosures becoming an element in even more unfair dismissals claims – a trend which was already happening with the protected disclosure aspect creating a risk of increased compensation.

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In his judgment, Charleton J, while concurring with the logic of Hogan J's analysis of the Act, observed that "the state of the law clashes with common perceptions of what a whistleblower is" and "does not conform with what the ordinary understanding of the protection of whistleblowers requires and, furthermore, may not be sensible." Charleton J notes the "extreme protections" provided by the Act including the increased penalties where a protected disclosure is held to have been the whole or main motivation for a dismissal.

The hook upon which the protected disclosure aspect of Mr Baranya's claim hangs is contained at Section 5 (d) of the Act which refers to a claim that "the health or safety of any individual has been, is being or is likely to be endangered". Section 5 of the Act expressly excludes as a 'relevant wrongdoing' claims that a person has failed to comply with a legal obligation arising under the worker's contract of employment. This exclusion is given a narrow interpretation in the Supreme Court decision. If one looks at the other examples of "relevant wrongdoing" as defined in section 5 of the Act, one will see that they include such matters as: miscarriages of justice; environmental damage; improper use of funds of a public body and oppressive, discriminatory or gross negligent acts or gross mismanagement of a public body. These are matters in which there is clearly a significant level of public interest which goes beyond routine complaints about working conditions. While complaints about health and safety concerns at work could, in certain situations, be extremely serious so as to be considered protected disclosures, no distinction is made in the Act between such serious concerns and an individual's own complaint that they have health and safety concerns. There are other legal avenues open to employees having routine complaints to make about health and safety. For example, employees can raise such concerns pursuant to the Safety, Health and Welfare at Work Act, 2005 or could invoke the reasonable accommodation provisions of the Employment Equality Act 1998.

Conclusion

The judgment of Hogan J in Baranya may result in whistleblowing becoming a standard allegation in an increasing number of unfair dismissals claims, placing employers at very significant risk of increased compensation for unfair dismissal. It is submitted that the Act, as correctly interpreted by the Supreme Court, is flawed in that it creates the unintended consequence of a routine complaint about a workplace health and safety issue potentially triggering the extreme and special protections of the Act, as identified by Charleton J. The application by the WRC of the 'wholly or mainly' element of the test as regards a dismissal decision will take on even greater significance.

The whistleblower legislation is due for an overhaul in light of the implementation in Ireland of the Whistleblowing Directive. It is submitted that the Oireachtas should take the opportunity to address what is a disproportionate burden on employers and one which goes against the grain of the overall scheme of the Act which, it submitted, is designed to deal with the serious issues identified in Section 5, rather than routine ones.

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