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The “Whistle-Blowers” Regime in Ireland

Far-reaching “whistle-blower” protections came into operation on 15 July 2014 under the **Protected Disclosures Act 2014** (“the Act”) which protects employees from being penalised if they make a disclosure of information in the public interest.

The Act refers to a “worker” which covers a wider range of persons than those who might commonly be regarded as employees.

“Relevant Information”

A worker will be protected if they disclose “relevant information” in the reasonable belief that it shows “relevant wrongdoings” (the commission of an offence, failure to comply with a legal obligation, miscarriage of justice, endangerment of health and safety, damage to the environment, unlawful or improper use of public funds or resources, oppressive, discriminatory or grossly negligent act of a public body) and if the information came to their attention in connection with their employment. Of particular interest and potentially controversial, is that the Act provides that the protection will apply to disclosures made either before or after the passing of the Act.

The place in which the wrong may be done, even outside the State, is not material.

A matter is not a “relevant wrongdoing” if it is something the worker is employed to detect, investigate or prosecute and is not an act or omission on the part of the employer. A disclosure of information to

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which professional legal privilege may attach is not protected if made by a person to whom the information was disclosed in the course of obtaining legal advice (from a range of people including lawyers and trade union officials). The motivation of the person disclosing the information is irrelevant. There is a rebuttable presumption that a disclosure is protected.

Making a Disclosure

A disclosure is made to an employer if made to the worker's employer or where the worker reasonably believes that the wrongdoing relates to the conduct of someone other than the employer or to something for which someone other than the employer is legally responsible, to that person.

Where a worker uses a procedure authorised by his employer and discloses to someone other than the employer, he will be treated as having disclosed to the employer.

The Minister has appointed some seventy two prescribed person to receive certain protected disclosures related to the sectors in which they operate..

A protected disclosure may be made outside the usual channels if the worker reasonably believes that the information disclosed is substantially true, the disclosure is not for personal gain (excluding any statutory reward), if it is reasonable for the worker to make the disclosure and when making the disclosure the worker reasonably believes that either they will be penalised if they use other channels of disclosure or, where there is no prescribed person, that evidence might be concealed or destroyed if disclosure is made to their employer or other responsible person, or where the worker has previously used the other channels of disclosure or where the wrongdoing is exceptionally serious.

Penalties for Employers

Of particular interest to employers is the fact that the Act amends the Unfair Dismissals Acts by deeming a dismissal to be unfair if it results wholly or mainly from the employee having made a protected disclosure and in addition, the Act increases the potential compensation significantly from the usual 104 weeks to 260 weeks. There is provision for a 25% reduction in what the compensation might otherwise have been if the investigation of the wrongdoing was not the employee's sole or main motivation in making the disclosure.

Circuit Court Procedure

The Act introduces a scheme for interim relief to be granted by the Circuit Court where an unfair dismissals claim is brought arising from a protected disclosure.

Where it appears to the Court that there are likely to be substantial grounds supporting the employee's claim, then the Court will ask the employer whether it is willing to reinstate or re-engage the employee pending determination of the claim. If the employer is willing to reinstate the

employee then the Court will make an order to that effect. If the employer is willing to re-engage the employee then the Court will ask the employee whether they are willing to accept the position on the terms offered and if so, the Court will make an order to that effect. If the employee does not accept the re-engagement offer and if the Court considers the refusal to be reasonable or if the employer does not attend the Court hearing, then the Court must make an order for the continuation of the employee's contract of employment. Otherwise the Court must make no order.

The Court has power to make Orders requiring the employer to make payments to the employee pending the determination of the claim.

The Act contains provisions regarding redress which will be available to affected employees where the Unfair Dismissals Acts do not apply to them. Generally, a complaint must be made within six months or, in exceptional circumstances, up to 12 months from the date of the contravention.

Conclusion

It remains to be seen what affect the Act will have and how often it is relied on by employees but where the Act is invoked, the stakes are raised considerably and employers face potentially serious consequences. In particular, the potential for retrospective effect and dramatically increased levels of compensation make this an area to watch.

- ▣ This article does not attempt to include all relevant information on the Act and does not constitute legal advice. For further information please contact John Doyle at john.doyle@dilloneustace.ie

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