SUMMARY

2016/58 First Injunction granted under the new whistleblowing legislation (IR)

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Background

The Protected Disclosures Act 2014 (the 'Act') introduced significant measures to ensure that workers are not penalised for making a 'protected disclosure', often referred to as whistleblowing.

What constitutes a 'protected disclosure' and who constitutes a 'worker' are both widely defined terms under the Act. A 'protected disclosure' is a disclosure of 'relevant information' through a specified disclosure channel. Such information must, in the 'reasonable belief of the worker', show a 'relevant wrongdoing' and must have come to the attention of the worker 'in connection with the worker's employment'. 'Relevant wrongdoings' are defined in an exhaustive list, examples of which include the commission of an offence and non-compliance with a legal obligation.

Under the Act, employees are protected from penalisation, including dismissal, for making a protected disclosure.

Facts

In this case, the two employees, Mick Dougan and Sean Clarke, alleged that they were made redundant by their employer, Lifeline Ambulance Service, as a result of having made a protected disclosure. They issued unfair dismissal proceedings in the Workplace Relations Commission ('WRC') and applied to the Circuit Court under the Act for reinstatement, pending the hearing of their unfair dismissal cases.

Mr Dougan, former assistant managing director and Mr Clarke, former director of ambulance operations stated that they had made a protected disclosure to the Revenue Commissioner in January 2016 in relation to "financial matters and wrongdoing within the company" in which they had alleged that their employer had engaged in certain actions for the purpose of avoiding or reducing tax. In April 2016, Mr Dougan and Mr Clarke were informed that following a review by an external consultant their roles were at risk of redundancy. In June 2016 they were dismissed by reason of redundancy. The two former employees asserted that the real reason for their dismissal was the fact they had made a protected disclosure under the Act.

Lifeline Ambulance Service claimed that the sole purpose of the disclosure was for the employees to protect themselves against a threat to their positions because they knew that the company was conducting an external review that could lead to job losses.

Judgment

Lifeline Ambulance Services did not agree to reinstate the former employees. It offered to allow one employee to remain on gardening leave and the other to be re-engaged as a paramedic, a role he had not been employed in since 2002. The Court found the employees reasonably rejected these offers.

The Court held at the interim stage that it could not find that the employees' dismissal was wholly or mainly due to their whistleblowing, but that they had met the threshold of establishing that there were substantial grounds for contending their dismissal was wholly or mainly due to the protected disclosure.

The Court ordered the employer to pay both former employees' salaries until their unfair dismissal claims are heard by the WRC. Costs were also awarded against the employer.

Commentary

This is the first protected disclosures case which has resulted in an order for interim relief being awarded against an employer under the Act.

The decision clearly demonstrates that if an employer is planning to dismiss an employee who

has made a protected disclosure, it will need to exercise caution. The employer should ensure that it will be in a position to prove that the dismissal is in no way connected to the protected disclosure made. Otherwise the employer may be ordered by the Circuit Court to reinstate, re-engage or pay a former employee until their unfair dismissal case is heard. When the case is heard by the WRC, the employer could be ordered to pay up to five years' remuneration per employee as compensation if it is found to have unfairly dismissed them for having made a protected disclosure.

It is evident that in order to succeed in a claim under the Act before the Circuit Court, all an employee applicant needs to do is show that there are 'substantial grounds' for contending he or she was dismissed due to having made a protected disclosure, as opposed to proving that this is the case. Future litigation before the Circuit Court will be likely to explore the exact parameters of this lower threshold for interim relief.

Comments from other jurisdictions

United Kingdom (Bethan Carney, Lewis Silkin LLP): The UK has a very similar whistleblowing regime to Ireland but in order to obtain interim relief under the UK legislation the claimant must show that they are 'likely' to succeed in the final hearing. The claimant also has to meet strict procedural requirements in order to claim interim relief, including applying for the relief no later than seven days after dismissal.

Interim relief is only available in specified categories of cases (such as whistleblowing) deemed by statute to be deserving of such protection.

Interim relief could be an order for reinstatement (in the old job) or re-engagement (in a suitable new job) pending the full hearing or, alternatively, a 'continuation of contract order', which keeps the employee suspended on full pay until the final hearing.

"Likely to succeed" has been held to mean having "a pretty good chance of success" at the full hearing (Taplin v C Shippam Ltd 1978 ICR 1068, EAT). This seems to be a higher hurdle for the claimant to overcome than that set by the Irish legislation.

Finland (Kaj Swanjung and Janne Nurminen, Roschier Attorneys Ltd): There is no specific employment protection for whistleblowers under Finnish law or a regulated concept of 'a protected disclosure' in the given context. Employees are protected by the constitutional right of freedom of expression and general Finnish labor legislation (including good practice on the labor market) in. By virtue of the employment relationship, employees have a statutory duty of loyalty towards their employer and an obligation not to disclose employer's trade secrets. However, if an employee would be obliged to report a defect/crime occurred at workplace,

such conduct would not qualify as valid termination ground despite it would cause harm to the employer. On the other hand, clearly unfounded and/or disproportionate reporting of crime/defect leading to negative publicity and damage to the employer, could qualify as valid ground for termination of employment, especially if it can be demonstrated that the purpose of the reporting was to harm the employer.The Finnish Supreme Court (KKO 1999:53) has addressed the issue of interim injunctions sought in order to prevent the employer from terminating the employment. Finnish legislation does not recognize an employee's right to maintain the employment in force against the employer's will. The employer may always terminate the employment with or without legal grounds. In the latter case the employer could be obligated to pay compensation for wrongful termination of employment but the employment is still considered expired and claims to reinstate the employment are not enforceable. The employee's right to maintain his/her employment in force cannot be enforced by a judgment which is one of the prerequisites for interim injunction under Finnish law.

Austria (Christina Hiessl, Yonsei University): Whistle blowing is an area that has not yet received much attention in the labour law legislation of most European states. In principle, the necessity to protect whistle blowers also in the context of an employment relationships as a matter of the fundamental freedom of expression has been confirmed by the ECtHR back in 2011 (Heinisch judgment), and this is all the more relevant for Austria, where the ECHR including its Article 11 has the status of constitutional law.

Yet, in the absence of specific legislation on the issue, the level of protection in Austria is currently much lower than under the Irish statute described. Case law has accepted the significance of activities that could be classified as 'whistle blowing' mainly as a defence against extraordinary dismissals without notice. According to that case law, the employer cannot base a termination on the employee's violation of the duty of confidentiality if the employee has merely drawn attention to actions of the employer that were illegal or constituted unfair commercial practice. Such actions can justify a disclosure of information to public bodies or even a competitor, but the employee has to carefully choose the vehicle which is least detrimental for the employer (especially giving priority to internal means of criticism that are not obviously pointless).

With reference to regular dismissal (with notice), the employer is generally not obliged to communicate its reason (such as redundancy) to the employee. Victimisation of whistle blowers is also not among the motives against which Austrian law grants exceptional protection. Consequently, the employee could only rely on the general principle of the invalidity of actions contra bones mores (particularly by invoking the fundamental rights component). Importantly, in contrast to what has been described for the Irish legislation, the

employee bears the full burden of proof for the facts surrounding the disclosure and their role in the employer's decision to dismiss – so as to establish a "completely unobjective and condemnable" motivation, as called for by the courts.

Greece (Panagiota Tsinouli, KG Law Firm): In Greece, although no specific legislation on whistleblowing has been enacted yet, according to quite recent case law (Judgment no. 532/2016 of the Athens First Instance Court), on a claim brought by an employee of one of the largest Greek telecommunication companies, challenging his unilateral demotion as abusive, Greek courts have reached a much similar ruling based on the general principles of good faith and the socio-economic purpose of the employer's managerial rights. More specifically, the Court ruled that the employee's demotion a month and a half following the employee's submitting a non-anonymous complaint through the Company's whistle-blowing scheme on financial wrongdoings in the Company, by simultaneously respecting all procedures and confidentiality rules at all times, is proven to be linked to such complaint. Said demotion, given the facts of the case and the time proximity, constitutes, according to the Court, a unilateral detrimental amendment of the employee's terms and conditions of employment. The Court considered the demotion as invalid and abusive and ordered the Company (i) to reinstate the employee to his previous position and to accept his provided services and (ii) to pay the employee 300 euros for each day of non compliance and 5.000 euros as moral damages.

Subject: Miscellaneous, whistleblowing

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