EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/67 New Whistleblowing Law in Ireland – the Protected Disclosures Act 2014 (IR)

<p>The Protected Disclosures Act 2014, enacted in July 2014, introduces a new regime in Ireland protecting whistleblowers in the workplace. The Act mirrors a trend across several European jurisdictions to introduce legislation to protect whistleblowers. The Act seeks to protect workers from penalisation who make disclosures of wrongdoing and matters of public interest which the Act calls “protected disclosures”. The Organisation for Economic Co-operation and Development (OECD) has advised the Irish government that the Act is the “strongest whistleblower legislation in Europe.”</p>
<p>The Act is extensive, protecting all workers in both the public and private sectors, including contractors, trainees and agency staff. Workers who are penalised for raising concerns of potential wrongdoing in the workplace can avail of significant protections.</p>

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What are protected disclosures under the Act?

Protected disclosures under the Act are disclosures of information about matters such as the commission of an offence, a failure to comply with a legal obligation (other than one arising out of an employee's contract of employment), health and safety or environmental breaches and improper conduct or use of funds by a public body.

Channels for making protected disclosures under the Act

The Act provides a number of distinct channels for whistleblowers to make protected disclosures. It encourages employees to report matters internally within an organisation at the outset. If the employer fails to act on the information, or if the worker feels they would be penalised for making the protected disclosure, then other external channels are provided for in the legislation. These channels include making the protected disclosure to a person prescribed by the Minister, a Minister (if the worker works for a public body), or in limited circumstances, other external disclosure. In order to make the protected disclosure other than internally to a prescribed person or to the Minister, the worker must pass a higher evidential threshold, in that he must be in a position to demonstrate that he did not act for personal gain and demonstrate a reasonable belief that he would be penalised by his employer if he made the protected disclosure internally.

How are workers protected?

The legislation protects workers who make protected disclosures from penalisation. Penalisation can take many forms, including suspension, dismissal, demotion, unfair treatment or intimidation. If the worker successfully takes an unfair dismissals claim (where it is established that they were dismissed for making a protected disclosure), the worker can be awarded up to **five years' remuneration** which is significantly higher than the normal maximum amount of two years' remuneration (limited to loss) for unfair dismissal in Ireland. In certain circumstances, a dismissed employee may be able to secure interim interlocutory relief from the Circuit Court. Such interlocutory relief will take the form of an order restoring

the employee to his or her role pending the outcome of an unfair dismissals claim.

How does the Irish Act compare to other jurisdictions?

According to a 2013 report by Transparency International comparing whistleblowing legislation throughout Europe, there are four countries with "advanced" legislation for protecting whistleblowers, based on a number of factors. Ireland now joins this list, and the Act has been described by that organisation as "*a comprehensive approach similar to that adopted in the UK, New Zealand and South Africa*".

The Irish legislature has also learned from the experience of the UK, where employees had sought to rely on Public Interest Disclosure Act 1998 as a means of blowing the whistle on their employers for alleged failures to follow legal obligations under their employment contracts. This avenue has since been closed off in the UK, and the Irish legislature has followed suit, prohibiting employees from using the Act to complain about breaches or perceived breaches of employment- related obligations.

Employees in the UK have also attempted to use the law as a means of 'bringing employers down from the inside.' For instance, in the leading case of *Bolton School* v *Evans* the English Court of Appeal ruled that the dismissal of a teacher who had deliberately hacked his school's computer security system was fair. The Court said that his employer was not penalising him for making a protected disclosure, but rather had legitimately dismissed him for misconduct. It remains to be seen if Irish courts will take a similar line.

In the United States there are several government schemes which pay whistleblowers a percentage or bounty of any money recovered from employers in the wrong. The Irish Act does not provide for US-style financial incentives for whistleblowers.

Conclusions

The Act will require Irish employers, who may not have considered the issue of whistleblowing in detail, to react to its introduction to ensure compliance. Indeed, public bodies are required by the Act to provide written internal procedures for workers to make protected disclosures. It will be interesting to see how the Act will be embedded in workplaces and whether, over time, it will contribute to fostering a culture of openness and transparency in the Irish workplace.

Comments from other jurisdictions

Belgium (Isabel Plets and An Van Doorselaer): As referred to in footnote 1, Belgium has recently somewhat strengthened its whistleblower rights, but the fact remains that whistleblowing in

the private sector is not regulated in Belgium (there are some specific rules in the public sector).

The Belgian Privacy Commission issued a Recommendation on 29 November 2006 stating that whistleblowing systems must be privacy- proof and comply with the Data Protection Act of 8 December 1992. Employers are advised to follow this Recommendation when setting up a whistleblowing system.

The Recommendation does not state what kind of irregularities can be disclosed, provided they are 'seriously substantial' and relevant. However, as the whistleblowing system must be proportionate, the number and type of irregularities are – in practice – limited. Financial and accounting fraud and criminal offences are examples of irregularities that would fall within scope.

According to the Recommendation, whistleblowers should be protected against acts of reprisal (such as disciplinary sanctions or dismissal) or discrimination. Belgian law does not provide any specific protection for whistleblowers against acts of reprisal. Some protection can be found in general labour law. As from 1 April 2014, every employee has the right to know the reasons for his or her dismissal. If the courts consider the dismissal manifestly unreasonable, compensation of between 3 and 17 weeks' remuneration will be payable. This penalty could be applied if the whistleblower was dismissed as an act of reprisal.

It is common to provide for a specific system of protection of whistleblowers in a whistleblowing policy. This protection could, for instance, be an obligation to justify any act of reprisal following a whistleblowing report during a certain period and/or payment of compensation in cases of non-compliance.

However, Belgium does not have a tradition of granting high compensation for whistleblowers. For example, a financial director of a company with a monthly salary of € 8,000 was dismissed after whistleblowing several cases of financial fraud, and yet was granted a compensation of no more than € 6,000 (Labour Court of Liege 26 November 2012).

Additionally, whistleblowers will only be protected if their report was made in accordance with the whistleblowing procedure and in good faith. Those who abuse the system are not protected and are exposed to disciplinary sanctions.

If a person is victimised as a result of an abusive report and suffers damage, this person could claim compensation from the whistleblower.

Germany (Paul Schreiner): In Germany a legal basis for the protection of whistleblowers has

not yet been established, but the Bundestag is currently debating legislation that will contain a provision regulating the circumstances under which an employee can involve the authorities if he suspects that the law is being breached by the company. Before doing so, he must try to solve the issue internally, unless there are circumstances making this unreasonable for the employee, for example, if the conduct of employer is criminal.

Poland (Marcin Wujczyk): In contrast to Ireland, Polish law lacks a definition of whistleblowing, both with regard to the employment relationship and other branches of law. Although whistleblowing has not been regulated in Polish labour law, this does not mean that the obligations following from this concept cannot be inferred from current law.

Pursuant to Article 100 § 2 point 4 of the Labour Code, employees are obliged to care for the good of their workplace and to protect its property. There is debate as to whether the concept of workplace' should be understood subjectively, as an organisational unit of the employer in which the employee renders work, for example, a branch or office, or objectively, as identified with the employer.

The first of these interpretations was favoured by the Supreme Court, which pointed out that "the good of the workplace" specified in Article 100(2)(4) of the Labour Code should be understood subjectively as the good of the organisational unit and, at the same time, it should cover the common good, that is, not only the good of the employer but of all employees (Supreme Court 9 February 2006, II PK 160/05, OSNAPiUS 2007 No 1-2, item 4, page 10).

Based on that judgment it can be said that the Labour Code provides an obligation on employees to care, not only for the place in which they work, but also for the good of the workplace as a whole. This obligation should be understood broadly as referring to the interests of the employee and those of the staff as a whole, but it cannot be required from a party to the employment relationship to give priority to the good of the employer over their own interest.

The obligation to care for the good of the employer includes an obligation to act in the interests of and for the good of the workplace. The second part of that includes activities such as whistleblowing.

The Supreme Court held in one case that an employee who saw another employee taking money from the cash box, resulting in significant harm to the workplace, in circumstances where they both had jobs involving financial responsibility, but the first employee failed to report this to management, that employee had committed a gross infringement of his basic duties as an employee (Supreme Court 1 December 1965, III PO 40/65, OSNCP 1966 No 6, item 93). In the context of whistleblowing, it can be argued that the employee is under a duty

to disclose any information that might reveal harm to the employer.

Article 100(2)(6) of the Labour Code stipulates a duty to observe the principles of community life. In Polish labour law, this is understood to be a duty on employees to maintain appropriate relationships between colleagues, including relationships with their managers. It is also a duty to adhere to the moral principles that apply at a given time and place with regard to relations with others. Thus, it could be said that this also constitutes a legal basis for whistleblowing duties and that failure to make appropriate disclosures would infringe the principles of community life. In one Supreme Court case, an employee gave false testimony after a workplace accident and this was deemed to be an infringement of the employee's obligation to adhere to the principles of community life (Supreme Court 12 January 1998, I PKN 458/97, OSNAPiUS 1998, No 22, item 655). Although whistleblowing is not regulated in Polish law, it is often catered for in practice (particularly in large international corporations) by internal regulations and practices of employers.

Article 18(3)(e) of the Labour Code requires employers to adhere to the principle of equal treatment and to not treat employees disadvantageously for exercising their rights.

In terms of whistleblowing, paragraph 2 of the Article referred to above is of particular importance, as it provides that an employee who supports another employee in exercising their equal treatment rights has the same rights. Supporting another employee could include, for example, testifying in court proceedings, providing documents as evidence or making a direct complaint on behalf of the other employee. This last action is typical of whistleblowing. The protection given by the the Article not only prohibits termination of the contract based on the employee's conduct, but also taking any action against the supporting employee.

The function of whistleblower is often performed by trade union members. The act on trade unions clearly specifies that no one should suffer negative consequences from the performance of their functions.

In terms of confidentiality, if whistleblowing is likely to expose the employee to harm, the Labour Inspector may order that the identity of the whistleblower should be kept confidential. In such situation, the report of the interview with the whistleblower can only be made available to the employer in a way that ensures there is no disclosure of personal details.

Having said that, there is no penalty, as there is under Irish law, in situations where an employee is dismissed for whistleblowing. The general rules apply in such situations, i.e. the employee may be reinstated or awarded compensation (up to three months' pay) in the event the court finds the dismissal unlawful (i.e. not justifiable).

Slovakia (Beáta Kartíková): The law in Ireland is in accordance with the global trend set by recently published cases of whistleblowers involving massive illegal or undesirable activity by state authorities and large corporations. We believe this trend to be a good one in terms of societal values and believe it can be viewed as another step towards the protection of employees. It should also enhance the transparency of employers' activities more generally.

The Slovak Republic has not been immune from this trend and has enacted similar legislation to deal with employees wishing to whistle blow about the antisocial activities of their employers. Slovak Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing became effective on 1 January 2015. Contrary to the new Whistleblowing Law in Ireland, the Slovak Whistleblowing Act only protects people employed by entrepreneurs and the state, excluding, for example, trainees. Another restriction is evident from the nature of the information that, entitles an employee to whistleblower protection. The information must be connected with an antisocial activity, i.e. either an offence under the Slovak Criminal Code or an administrative offence. Employees willing to disclose this kind of information are given both internal and external channels to enable them to do so.

The most obvious difference between the Slovak Act and the Irish Act lies in the way employees are protected from retaliation for disclosure. Acts or decisions made by the employer that have a legal effect, have to be approved by the Labour Inspectorate. For example, if the employer wishes to terminate a whistleblower, it will need to obtain such approval. Despite these differences, and particularly the more restrictive character of the Slovak legislation, we believe the Slovak Whistleblowing Act is a huge step forward. We are hopeful that a more open and transparent work environment will result from it.

Creator:
Verdict at:
Case number: