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The Protected Disclosures Act – What Employers Need to Know

With the Protected Disclosures Act getting increasing coverage as Employees become more aware of the legislation, it is incumbent on Employers not just to ensure familiarity with the legislation, but to ensure they have an appropriate policy and procedure in place.

Enacted on the 15 July 2014, the purpose of the Protected Disclosures Act is to provide a statutory framework within which workers can raise concerns and disclose information regarding potential wrongdoing that has come to their attention in the course of their work in the knowledge that they can avail of significant employment and other protections if they are penalised by their Employer or suffer any detriment for doing so.

What is Whistleblowing in the Workplace?

Whistleblowing is the term used when a worker raises a concern about a relevant wrongdoing such as possible fraud, crime, danger or failure to comply with any legal obligation which came to the worker's attention in connection with the worker's employment. Relevant wrongdoings are broadly defined in the Act and include the following:

- Commission of an offence — has happened, is happening, or is likely to happen;
- Failure to comply with any legal obligation (other than one arising under the worker's contract of employment);
- Miscarriage of justice;
- Health and safety of any individual;
- Misuse of public money;
- Gross mismanagement by public body;
- Damage to the environment;
- Destruction or concealment of information relating to any of the above.

It is important to note that a matter is not regarded as a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the Employer.

What is meant by a Protected Disclosure?

The Act provides that if a disclosure is made by a worker in line with the channels set out in the legislation, a worker is protected from penalisation by the Employer such as dismissal, demotion, suspension and unfair treatment.

Does motivation matter?

The motivation for making a disclosure is irrelevant as to whether or not it is a protected disclosure. What is required is that a worker has a reasonable belief as to the wrongdoing and that this wrongdoing has come to the worker's attention in connection with his/her employment.

Making a Disclosure

The Act sets out a number of distinct disclosure channels for potential whistleblowers. It provides for a tiered or "stepped" disclosure regime with a number of avenues open to workers, internal and external to the workplace. The first tier in the disclosure regime is internal, namely disclosure to the Employer or some other responsible person. However there may be circumstances where this may not always be appropriate. It is in the best interests of all concerned in the workplace — management, workers and their representatives — that disclosures about wrongdoing are managed internally.

The Act provides for direct disclosure to the Employer and the related Code (Code of Practice on Protected Disclosures Act 2014) recognises the strong value to this route. It is on this basis that it is recommended, therefore, that all organisations should have an agreed whistleblowing policy in

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place. While this Code places a strong emphasis on the value of addressing whistleblowing concerns within the workplace, there is no obligation on a worker to disclose to the Employer in the first instance.

There are other channels available to a worker who wishes to make a disclosure including;

- Disclosure to a Minister
- Disclosure made in course of obtaining legal advice (including advice relating to the operation of the Act form a barrister, solicitor or trade union official)

It should be noted that the evidential criteria for making an external disclosure is set at a higher level than that applying to internal disclosure.

Confidentiality

All reasonable steps must be taken to protect the identity of the person making the disclosure and to ensure the disclosures are treated in confidence. The exceptions to this are:

(a) where the worker making the disclosure has made it clear that he/she has no objection to his/her identity being disclosed and
(b) the identity of the person making the disclosure is critical to an investigation of the matter raised.

A disclosure may be made anonymously. It should be noted that a disclosure made anonymously may potentially, of itself, present a barrier to the effective internal investigation of the matter reported on.

Workplace Whistleblowing Policy

It is mandatory for all public bodies and highly recommended for all employers, to have in place an agreed Whistleblowing Policy. As best practice, a policy should be developed and put in place on foot of agreement with all stakeholders in the organisation i.e. management, workers and their representatives.

What protections are afforded under the Act?

Protection from Penalisation

If an Employee feels that the Employer has penalised him/her for making a protected disclosure, the Employee may refer the matter to an Adjudicator of the Workplace Relations Commission. Generally speaking such action by the Employee would encompass any action which could be interpreted as penalisation by the Employer against the Employee for having made a protected disclosure.

An Adjudicator will hear the case and issue a decision. A decision could declare that the complaint was not well founded or if declared well founded, require the Employer to take a specified course of action, including payment of compensation. The decision of an Adjudicator may be appealed to the Labour Court.

Protection from Dismissal

The Act provides that an Employee who is penalised by dismissal following the making of a protected disclosure may claim that he/she has been unfairly dismissed. There are extensive protections set out in the Unfair Dismissals Acts for protection against unfair dismissals. In addition:

(a) there is no minimum service requirement to avail of the Unfair Dismissal Acts arising from making a protected disclosure and

(b) compensation for unfair dismissal on grounds of making a protected disclosure can be up to a maximum of 5 years remuneration.

Furthermore, where an Employee is dismissed on foot of having made a protected disclosure, protection in the form of "interim relief" on application to the Circuit Court is available to prevent an unfair dismissal proceeding in advance of an outcome being determined.

Claims under the Act

Since its introduction in 2014, aside from the high profile public sector whistleblowing allegations, we have continued to witness an increasing number of claims arising in the private and not-for-profit sectors under the Act.

In the first case in this area, Philpott v Marymount University Hospital and Hospice Limited, the Circuit Court concluded that the disclosure made by the Employee did not constitute a protected disclosure as the applicant did not hold a reasonable belief that the information disclosed tended to show one or more of the relevant wrongdoings prescribed in the 2014 Act. The Circuit Court in a separate claim brought forward following the dismissal of two Lifeline Ambulance Service Employees (Dougan & Clarke) in June 2016, granted interim relief. The Court directed the Employer to continue payment of salary pending the outcome of their respective claims for unfair dismissal before the Workplace Relations Commission (the "WRC"). In this case, costs were also awarded against the Employer. More recently, April 2017, we have seen a WRC Adjudication decision awarding two years' salary (€52,416) for the unfair dismissal of a whistleblower who was sacked after making a protected disclosure to HIQA over practices at a nursing home.

Conclusion

It is our view that the introduction of the Protected Disclosures Act is fast becoming one of the biggest employment related challenges for Employers as the majority of Employers are ill prepared or equipped to effectively manage a protected disclosure should one arise.