Resolve Ireland – Protected Disclosure Legal Update – July 2015

1. Labour Relations Commission launches new Protected Disclosure (Whistleblowers) Code of Practice including a draft Whistleblowing policy.

The Labour Relations Commission has drafted a new Protected Disclosure (Whistleblowers) Code of Practice including a draft Whistleblowing policy. The agreed texts on a code of practice and model policy are in the process of being signed into secondary law by the Minister for Jobs, Enterprise & Innovation; Richard Bruton.

It is worth highlighting the key points of the Protected Disclosures Act 2014, which was enacted on 15 July 2014. The chief aim of the act is to protect workers in both the public and private sector in instances where they disclose information about alleged wrongdoing in the workplace based on a reasonable belief.

Of particular significance is the breadth of protections, which extend beyond the usual definition of an employee to include contractors, agency staff, consultants, trainees, and interviewees.

The code of practice and model policy on "whistleblowing" are to be mandatory for all public bodies, and "highly recommended for all employments", to have in place an agreed Whistleblowing Policy "setting out an accessible procedure for making protected disclosures and underpinning a culture of encouraging workers to speak out if they have genuine concerns".

The LRC's new Code of Practice and draft Policy has been developed in consultation with Ibec, ICTU, and relevant Government departments. It is an extensive document and the key points are summarised below.

Channels of Disclosure

The Code of Practice focuses on the "stepped" disclosure regime as laid out in the Act. The LRC state that it is in the best interests of all concerned in the workplace, that disclosures about alleged wrongdoings are managed internally. The COP also details the various channels of disclosure including;

1. Employer
2. Minister
3. Prescribed Person
4. Legal Advisor
5. Other persons (e.g. Media)

Interestingly, the Code of Practice describes a circumstance where a worker seeks advice from a trade union, barrister, or solicitor about the operation of the legislation. All discussions with such parties are also "protected disclosures". Support and advice can be sought at any stage of the process, including in advance of any disclosure.

What is the difference between a Grievance and a Protected Disclosure?

An important point is the distinction between a grievance and a protected disclosure for the purposes of this legislation. Essentially the LRC define a grievance as a matter specific to the worker e.g. the terms and conditions of their employment. Whereas a protected disclosure is where a worker has information about a relevant wrongdoing. Furthermore, they make it clear that employees should have full knowledge of this distinction in order to pursue the correct case in the event of a grievance or relevant wrongdoing.

Development of company polices in line with the code of practice

An interesting aspect regarding the development of company polices to deal with protected disclosures / whistleblowing is highlighted in the LRC code of practice. It states that 'an approved code of practice shall be admissible in evidence and, if any provision of the code appears to be relevant to any question arising in any criminal or other proceedings, it shall be taken into account

in determining that question; and for this purpose "proceedings" includes, in addition to proceedings before a court and under Part VII or under Part III of the Equal Status Act 2000 , proceedings before the Labour Court, the Labour Relations Commission, the Employment Appeals Tribunal, the Equality Tribunal and a rights commissioner'. This underlines the importance of developing company policies based on the LRC code of practice and draft policy.

Labour Relations Commission's Whistleblowing Policy

The LRC's Protected Disclosure Policy is approached in two parts. The first part seeks to introduce employees to the new legislation and the protections it affords. Furthermore, it states a commitment to maintaining an open culture with high standards of honesty and accountability, reassuring workers that all disclosures may be made in confidence.

The second part of the policy deals with the procedural aspects of the legislation. Importantly, the policy must be drafted in appropriate language, avoiding legal complexities. Questions such as "With whom should you raise your concern?" as well as "How we will deal with your disclosure?" are clearly mapped out.

Finally, the policy acknowledges that individuals may seek to make a disclosure externally, but a word of caution is attached in terms of the "more onerous obligations" that apply once a worker makes a disclosure to a party not associated with the organisation.

To access the full text of the LRC code of practice and draft policy please click on relevant documents also located on this page of our website.

2. First Application for Interim Relief under the new Protected Disclosures (Whistleblowing) legislation Rejected

Following the enactment of the Protected Disclosures (Whistleblowing) Act in 2014, described as a "new standard of international best practice", judicial interpretation of the legislation has been anticipated in this new area of employment law. The first of these cases under the new act involved an applicant, formally of Marymount University Hospital in Cork, seeking interim relief from the Circuit Court claiming he was unfairly dismissed as a result of making alleged "protected disclosures".

The claimant, was dismissed from his role after seven months with "significant interpersonal difficulties" between him and other staff members, notably the executive team, being cited.

The Circuit Court judge stated that the application for interim relief was based on his claim that he made allegations of wrongdoing in the workplace. Furthermore, the judge outlined that the applicant was outside the protection of the Unfair Dismissals Act, as his contract was terminated less than 12 months into his tenure.

Significantly, if the "protected disclosures" made by the employee against the employer were accepted by the court, then the applicant would enjoy full protection under the 2014 act.

In ruling against the applicant, O'Donoghue. J said "This court has only to satisfy itself that the beliefs and disclosures were reasonable and although the court accepts without reservation the sincerity of the plaintiff, objectively on the facts, in the court's view, he has not satisfied that test. Accordingly, the court refuses interim relief."

Before analysing the three allegations of wrongdoing made by the claimant, a brief recap of the law as it stands is necessary to provide context to the claims and subsequent rulings of the court.

Under the act, a "protected disclosure" is a disclosure of "relevant information" made by a worker if they believe a "relevant wrongdoing" has taken place in connection with the worker's employment.

The courts noted three allegations of wrongdoing, which they dealt with separately based on the facts presented;

1. **Charity funding being used for needs other than Palliative Care,**

*"*The court rejects this assertion out of hand. It is patently clear that the Marymount Hospice is a registered charity for a considerable length of time and any further money spent from donors is for the good of the community and is fully compliant… there have been no complaints made to any authority,"

Furthermore, the applicant claimed that the board is fully aware of "an inherent lack of transparency" with regards to top-up payments, an allegation refuted by the Court as having no basis in the evidence.

2. **Significant issues with the building which posed and continue to pose critical risk to the health and safety of patients, staff and public**

In finding against the applicant's criticism of the building, the judge noted the building passed two HIQA registrations, calling it a "state-of-the-art facility in a wonderful peaceful setting."

Moreover, witnesses described the claimant's allegations as alarmist and overstated in what was merely considered as a water leak.

3. **Mismanagement of financial resources**

Again finding against the claimant, Judge O'Donoghue says "He (the claimant) cautions against an over-reliance on charity funding as a working capital source and labels the executive committee as disengaged and that the hospice financial control procedures are ad hoc and an inadequate budget planning approach. Again there was no financial information tendered to support these contentions."

Regardless of the applicant being refused interim relief, a number of key themes arise going forward nevertheless. Firstly, the Court was clear in its assertion that the only point of relevance was satisfying itself that the "beliefs and disclosures were reasonable". Reasonable in this instance, although not officially dealt with in the legislation, generally is interpreted to mean a standard for what is fair and appropriate under usual and ordinary circumstances.

Perhaps the fact that the legislation is relatively untested, and indeed governing a new area of employment law, it was important that one of the first cases has helped to bring clarity rather than serving to cloud interpretation in this area of the law. Judge O'Donoghue has, in his judgement, reinforced the requirement for any allegations of wrongdoing to be reasonable, and reminded those seeking relief in the Circuit Court that it will not be a straightforward task.