The – "WHISTLEBLOWERS" - Protected Disclosures Act 2014 – For Good or for Bad?

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Brian Morgan, Litigation and Employment Law Solicitor with Morgan McManus Solicitor explains the provisions of the Protected Disclosure Act 2014, opining that it can be used for good or bad. He also advises separately both employees and employers as to how they should act in the event that a situation arises where a Protected Disclosure is necessary.

In this Article I will cover issues such as:

- What is a Protected Disclosure and the strict manner in which it must be activated by a worker;
- The fact that a worker need only have a "*reasonable belief*" that a wrongdoing has occurred within his place of work;
- Where the legislation differs from the Northern Ireland Act;
- That the protections afforded under the Act are not restricted to employees;
- That an employee can attain compensation of up to 5 years` Loss of Earnings if he is unfairly dismissed as a consequence of making a Protected Disclosure;
- That an employee can issue an Injunction Application to the Circuit Court to have himself restored to the workplace pending the substantive Hearing of his Claim before the Workplace Relations Commission;
- That family members, who may suffer repercussions as a result of a spouse, sibling, parent or child having made a Protected Disclosure, are entitled to issue Civil Claims for Compensation against the employer;
- How the provisions of the Act could be abused by employees;
- What a worker should do, in the event that he wishes to make a Protected Disclosure;

- What precautions an employer should now have in place to ensure compliance with the Act;
- What an employer should do where a worker makes a Protected Disclosure;
- What an employer should do where an employee issues an Application before the Circuit Court claiming that he was unfairly dismissed as a consequence of making a Protected Disclosure.

1. The Act and its provisions

Under the Protected Disclosures Act, employees who are unfairly dismissed due to making Protected Disclosures - "whistleblowing" - could be awarded up to 5 years' salary. This is a major development in protection afforded to employees in certain circumstances. Employers need to be aware of their obligations under this Act.

The Protected Disclosures Act 2014 was enacted on the 15th July 2014. The introduction of this legislation follows legislation enacted in other jurisdictions, such as Northern Ireland, for the protection of workers in the public, private and non-profit sectors. It aims to protect workers who disclose information that, in their reasonable belief, tends to show a relevant wrongdoing.

What is a "Protected Disclosure"?

Section 5(1) of the Act states that "*Protected Disclosure*" means generally "*a disclosure of relevant information*" made by a worker, provided the disclosure is made under the strict conditions defined under the Act. These strict conditions are important and are explained later in this Article. "*Relevant information*" is defined in Section 5(2). In summary, if a worker has a "*reasonable belief*" (that is, the worker is not required to be definite in his belief) that there have been one or more "*relevant wrongdoings*" (as defined in Section 5(3) of the Act) which have arisen "in *connection with the worker`s employment*" (this is important) then the worker will be afforded the protections provided under the Act in the event that he reports his concerns to the employer; albeit that those concerns turn out subsequently to have had no substance.

Motivation for Disclosure is irrelevant – Section 5(7) of the Act

Unlike the legislation in the UK / Northern Ireland, the motivation of the worker in making the disclosure is irrelevant to the question of whether the disclosure is a Protected Disclosure. However, where an employee is dismissed partly because he made a Protected Disclosure his motivation is relevant in assessing the amount of compensation due (Section 11(1)(e) of the Act). Where it transpires that the sole or main motivation for making the disclosure was not the investigation of the relevant wrongdoing the compensation may be reduced by up to 25%.

Presumption that the Disclosure is a Protected Disclosure – Section 5(8)

Where Proceedings are issued under the terms of the Act, where a question arises as to whether a disclosure is a Protected Disclosure it shall be presumed, unless the contrary is proved, that it is. This means for instance that, where a worker issues Proceedings claiming that he was prejudiced for making a disclosure, that disclosure shall be deemed to be a Protected Disclosure until the employer proves otherwise.

Definition of "worker"

There may be an assumption that the Act only benefits "employees". This is not correct. Section 5 of the Act, which defines "*Protected Disclosures*", very clearly states that the Act applies where a disclosure is made by a "worker". The "worker", as opposed to an "employee", is referenced throughout the Act. There is a broad definition of "worker", and this includes employees, contractors, consultants, agency staff, former employees, temporary employees, and interns/trainees.

An amendment was made at Report stage to extend the definition of "*employee*" to cover members of An Garda Síochána, including members of An Garda Síochána Reserve, and civil servants who do not work under formal contracts of employment. No doubt this was done in view of "whistleblowing" activities within the ranks of the Garda Siochana in the cases of Sergeant Maurice McCabe and retired Garda John Wilson which were concurrent with the enactment of the legislation.

The Act protects workers who report a "relevant wrongdoing".

Circumstances in which disclosure can be made - "relevant wrongdoing"

The scope of "*relevant wrongdoing*" under the legislation is quite comprehensive and includes: criminal offences; failure to comply with legal obligations (excluding the workers terms of employment); miscarriages of justice; health and safety matters; environmental damage; unlawful or improper use of public money; an act or omission by a public body that is oppressive, discriminatory, grossly negligent or constitutes gross management; and if information in relation to any of the above is concealed or destroyed.

To whom can disclosure be made? – Sections 6 to 10 of the Act

There is a stepped disclosure regime provided under the legislation. It is important that the worker complies with this stepped regime: otherwise he loses the protections afforded by the Act. A worker is encouraged to make the disclosure internally first to either their employer or other responsible person. If, having made a disclosure internally, the employer fails to act on the information disclosed, or the worker does not wish to avail of the internal disclosure channel, alternative channels are provided for under the legislation, albeit with additional requirements.

Alternatively, workers can make their disclosure externally from their employer to a person prescribed by the Minister; a Minister (if the worker works for a public body); to a legal advisor in the course of obtaining legal advice (a "legal advisor" includes a barrister, solicitor, trade union official, or official of an excepted body); and to disclosure recipients in other cases.

In order to make the disclosure to disclosure recipients in other cases, there are a number of extra requirements that must be satisfied by the worker. For example, the disclosure must not be made for personal gain and the worker must prove that he or she reasonably believed that he or she would be subjected to penalisation by their employer if they had made the disclosure to their employer, a prescribed person, or to a Minister.

The requirements of these sections are very detailed and a closer reading of the provisions of the Act is advisable, should an employee be considering making a Protected Disclosure.

Protection for employees who make a Protected Disclosure – Part 3 of the Act, Sections 11 and 12

It is important to bear in mind that this section of the Act is framed to protect "employees", as opposed to the wider defined "worker". The legislation provides protection for employees who make a Protected Disclosure from penalisation, which includes, but is not limited to, suspension, dismissal, demotion, and unfair treatment.

In a case for unfair dismissal, compensation of up to a maximum of five years remuneration may be awarded to an employee who was dismissed for having made a Protected Disclosure. This exceeds the normal maximum compensation of two years remuneration for unfair dismissal. The level of compensation awarded to an employee who has been dismissed for having made a Protected Disclosure may be reduced by up to 25 per cent if the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure.

Interim relief before the Circuit Court – where employee dismissed – Schedule 1 of the Act

Employees will also have the option of applying for Interim Relief through the Civil Courts under the legislation where the employee claims to have been dismissed by his employer wholly or mainly for having made a Protected Disclosure. This is the first time that Interim Relief has been introduced into an Employment Law statute in this jurisdiction. An employee will have up to twenty-one days to make the application for Interim Relief before the Circuit Court. It is very important that the employee makes the application within that 21 day period (although that period may be extended by the Court) and it must be made on notice to the employer. While specific Court Rules have not yet been enacted to cover this procedure, generally this is done by way of a Motion Application to the Court supported by a detailed Affidavit of the employee setting out the circumstances in which the employee believes that he was dismissed as a consequence of making a Protected Disclosure.

There are detailed provisions in Schedule 1 of the Act as to how the Court must deal with such Applications and the manner in which a Determination of the Application is reached by the Judge. It is important to bear in mind that the Circuit Court Judge is merely being asked to decide at this point in time whether it is likely that the employee was dismissed for making a Protected Disclosure and to grant Interim Relief in that event, pending the substantive Hearing at a later date. It is in effect an Injunction Hearing. For instance, the Court may order that the employee is reinstated or order that the employee is re-engaged in another position on terms and conditions

not less favourable than those which would have been applicable to the employee if he or she had not been dismissed. In circumstances where an employer has not complied with the Circuit Court Order the Court shall make an order for the continuation of the employee`s contract of employment and order the employer to pay compensation. Again, a detailed reading of the provisions of Schedule 1 of the Act is advisable.

A successful employee will also be entitled to an Order for Costs, which could be quite substantial in view of the nature of the work involved in bringing such an Application before the Court in this limited 21 day period.

Very importantly, the employee must also have filed his Unfair Dismissal Application with the Workplace Relations Commission before he submits his Court Application.

Bear in mind that, unless the matter is resolved amicably between the employee and the employer at this stage, this is merely an Application for Interim Relief and ultimately the decision by way of a substantive Hearing as to whether the employee was actually dismissed for making a Protected Disclosure will be made by an Adjudication Officer of the Workplace Relations Commission (the WRC). The Adjudication Officer may require the employer to take a specified course of action and also impose on the employer an Order to pay compensation of up to a maximum of 5 years remuneration if the Adjudication Officer makes a finding on favour of the employee.

No *One Year Service* requirement for Employee?

In the normal course, an employee who has less than one year`s continuous service is precluded, under Section 2(1)(a) of the Unfair Dismissals Act 1977, from bringing an Unfair Dismissal Claim. However, Section 11(1) (c) of the Protected Disclosure Act inserts Section (2D) into Section 6 of the Unfair Dismissal Act 1997, thus allowing for the worker to be protected from the first day of their employment. Therefore, under the Protected Disclosure Act, an employee penalized under the Act is not obliged to prove the *One Year Service* requirement to bring an Unfair Dismissal Claim.

Deemed Unfair Dismissal Section 11(1)(b) of the Act

In the normal course, under section 6 of the Unfair Dismissal Act 1977, a Dismissal shall not be deemed to be an Unfair Dismissal where the employer can demonstrate that there were "*substantial grounds justifying the dismissal*". However sub-section 6(2) goes on to define circumstances in which certain dismissals are deemed to be an Unfair Dismissal; such as dismissals arising solely from an employee`s membership of a Trade Union or for instance the employee exercising certain statutory rights. Added to Section 6(2) of the 1977 Act is the Protected Disclosure provision. Therefore, where it is found that an employee was dismissed for making a Protected Disclosure, this shall be deemed under Section 6(2) of the Unfair Dismissal Act to be an Unfair Dismissal.

What about Disclosures made before the passing of the Act?

A disclosure made before the date of the passing of the Act may still be a Protected Disclosure provided the penalization, detriment or negative consequences for making the disclosure are suffered by the worker subsequent to the enactment of the legislation; namely the 15th July 2014.

Civil Claims for Compensation – Section 13 of the Act

Workers, employees and third parties have a cause of action in tort (a Claim for Compensation) against a person who causes detriment to them because they, or another person, has made a Protected Disclosure. A tort action cannot be brought in conjunction with an application for unfair dismissal or penalisation under the legislation. "Detriment" is defined under the legislation as including: coercion, intimidation or harassment; discrimination, disadvantage, or adverse treatment in relation to employment (or other prospective employment); injury, damage or loss; and threat of reprisal. This provision, therefore, provides protection to persons such as family members who may suffer repercussions as a result of a spouse, sibling, parent or child having made a Protected Disclosure.

Immunity from Civil and Criminal liability – Sections 14 and 15

A worker will be immune from Civil and Criminal liability for the making of a Protected Disclosure. This immunity includes benefitting from Qualified Privilege under the Defamation Act 2009. Immunity from Criminal liability for any offence prohibiting or restricting the disclosure of information extends to a disclosure that the worker reasonably believes was a Protected Disclosure.

The important aspect to note here is that the immunity provided for under this section is far-reaching as the worker will attract immunity from Criminal prosecution not only for the making of a Protected Disclosure but also for the making of a disclosure that does not satisfy the requirements of a Protected Disclosure under the Act but insofar as the worker reasonably believed it was a Protected Disclosure.

The protections in the legislation will not apply, however, to false disclosures deliberately made, thus protecting employers from malicious claims.

Identity of the worker protected – Section 16

The identity of the worker making the disclosure is protected to the extent that the person, to whom the disclosure is made or referred, must not disclose to another person information that might identify the person who made the Protected Disclosure. This protection is not absolute, however, and disclosure of identity can occur in specific circumstances, such as where

- it is necessary for the effective investigation of the relevant wrongdoing concerned;
- it is necessary for the prevention of serious risk to the security of the State, public health, public safety or the environment;

- it is necessary for the prevention of crime or prosecution of a criminal offence;
- it is in the public interest; or it is required by law.

A failure by the disclosure recipient to comply with this section is actionable by the person who made the Protected Disclosure if that person suffers any loss by reason of the recipient's failure to comply. However, the disclosure recipient will have a defence in such an action if they can prove that he or she took "all reasonable steps" to avoid disclosing any such information to another person.

Specific Requirements on Public Body employers – Part 5, Sections 21 and 22

Every public body is required to establish and maintain internal procedures for the making of Protected Disclosures by workers who are or were employed by the public body. Written information in relation to these procedures must be given by the public body to all workers employed by it. The Department of Puplic Expenditure & Reform has issued a Guide for the purpose of assisting public bodies in establishing and maintaining these procedures and public bodies are required to have regard to this guidance. Further, by the 30th June each year, every public body is obliged to prepare and publish a report detailing the number of Protected Disclosures made to the public body in the immediately preceding year and any action taken in response to those Protected Disclosures. The report must also include any information in relation to the Protected Disclosures and the action taken as requested by the Minister. The report must be such a form that it does not enable the identification of the person involved in the matters included in the report.

Employer cannot by Agreement restrict rights of Disclosure – Section 23

It is important for employers to note that any provision in an Agreement (for instance, in a Settlement Agreement drawn up after the resolution of an Unfair Dismissal or Redundancy Claim) that intends to prohibit or restrict the making of a Protected Disclosure; exclude or limit the operation of any provision of the legislation; preclude a person from bringing any Proceedings under or by virtue of the legislation; or preclude a person from bringing Proceedings for Breach of Contract in respect of anything done in consequence of the making of a Protected Disclosure, is void.

What if the Disclosure turns out to be untrue?

Remember where I referred at the start of the Article, under the sub-title "*What is a "Protected Disclosure"?***"** to the "*reasonable belief*" of the worker? Even where it transpires that the information underlying the disclosure is not substantiated, the worker will be protected provided he reasonably believed that the information disclosed or any allegation made was substantially true.

How the Act could be abused

I have no doubt that the Act will provide protection for many workers who have genuine concerns about wrongdoings in the companies where they work. They will be able now to disclose those wrongdoings in the knowledge that there should be no reprisal by their employer, or indeed by fellow-workers. Having however also advised both employers and employees on Employment Law for many years the cynic in me suspects that there will be many occasions when this legislation could be abused,

particularly by employees willing to use some of the provisions in the Act to their advantage.

Take the situation of an employee who is aware that, in view of his lack of performance or in view of anticipated Redundancies, he could be dismissed in the short term. He decides in the circumstances to disclose to his employer a wrongdoing in the company, of which he has been aware for some time; a wrongdoing which he could never have been bothered reporting before had the potential for his subsequent dismissal not now have arisen. He makes his disclosure in the knowledge that the employer may not now be able to take any further action to dismiss him as such action might now, in light of the recent disclosure, be deemed at a later date by a Court to be an Unfair Dismissal arising as a result of the reporting of a Protected Disclosure by that employee.

In fact, take the scenario of a small-time employer who has no knowledge of the Protected Disclosure Act (yes, there are many of them!) and has no Protected Disclosure Policy. Suspecting that the employee has taken a cynical move (which he probably has) in anticipation of his dismissal and has now demonstrated a further act of disloyalty to the company (which might be a reasonable opinion in the mind of the employer) the employer decides that this last act of disloyalty should now be punished by an immediate dismissal. The employee, having probably already taken advice from his Union or legal representative, then consults his solicitor and then issues an Application to the Circuit Court for Interim Relief, seeking an Order to compel his employer to reinstate him pending the substantive Hearing by the WRC. The employer, faced with a potential Award of substantial Compensation at a later date (up to 5 years` wages) and an Order for Costs in the Circuit Court is advised to settle the Claim outside the door of the Circuit Court.

Now some would say that this employee took a cynical advantage of the Act! The proponents of the Act would however reply that ignorance of the law is no excuse and that the employer should have implemented the Disclosure Act Policy.

Conclusion

This legislation provides protection to workers who make disclosures in a manner that is unprecedented in this jurisdiction. Prior to enactment of the Act it was hailed by Minister Brendan Howlin who, at the final stage of the enactment of the Bill, stated about Ireland that: "*It is regarded as being among the best international whistleblowing protection regimes which we can all be proud of*". It was hoped that workers who had information of wrongdoing could now come forward with information in the knowledge that there would be no retribution by the employer.

I have no doubt that the Act will work to the benefit of those workers who have genuine concerns about wrongdoings in the workplace. I have no doubt however that some workers will use the provisions of the Act cynically to create the impression of a Protected Disclosure in order to create a smokescreen on a case where they might otherwise have been justifiably have been dismissed by their employer.

Only time will tell!

2. What should a Worker / an Employee do under the Protected Disclosure Act?

While the Act does not require that a Disclosure should be made in writing, if for instance an employee has concerns that he will be penalized or dismissed for making a Protected Disclosure then it is advisable that the Disclosure is made in writing and that the employee is in a position to prove the date of the Disclosure. Delivery of the Disclosure by email would generally put the date beyond doubt.

The reason why putting the Disclosure in writing is advisable is in view of the Decision of the Adjudication Officer of the WRC in a Case heard under Case No ADJ-00003371 *Complainant v Authorized Insurance Company* (Decision issued 20th October 2016) – where, on the facts of the case, the Adjudication Officer refused to believe that the employee had been penalized as a result of making a Protected Disclosure. Part of the Adjudication Officer`s reasoning was that the employee could not prove in writing that she had made a Disclosure before the alleged penalization.

Reporting the Disclosure

Make sure that you report the Disclosure in strict accordance with the provisions of Sections 6 to 10 of the Act: otherwise you might lose the protections afforded by the Act.

The Investigation

Make sure to co-operate fully in any subsequent Investigation by the employer. Remember, you cannot be penalized for making a Disclosure, but likewise you must provide all relevant information to prove that your belief of the commission of a relevant wrongdoing within the workplace was reasonable.

Hearings and Representation

Check the Protected Disclosure Policy & Procedure to ensure that there are provisions to allow you avail of representation at any Investigation meetings. Under no circumstances should you attend any meetings without representation. If the employer does not have a Protected Disclosure Policy then take legal advice immediately. Insist on agreeing the typed Minutes of any meetings.

If you are penalized or dismissed as a result of making a Protected Disclosure?

Consult your solicitor immediately. Remember, if you are dismissed as a result of the disclosure and wish to make an Application to the Circuit Court for Interim Relief (seeking to have your job restored pending the Hearing by the WRC) your solicitor will need to file the Application with the Circuit Court within 21 days. There will be a substantial amount of work to be done, including instructing Counsel – which can

only be done after all documentation and facts have been gathered. The solicitor will need as much time as possible to prepare your Claim.

And finally – the paperwork!

If you have made a genuine Protected Disclosure there is no reason why you should not retain copies of all documents which come to your attention and proof of how you reported your Disclosure. You are going to need this documentation in any case for the purpose of the employer`s investigation. More importantly, if you are dismissed by your employer this could happen very suddenly where you may have no opportunity to gather your documentation together. While your solicitor may ultimately be able to obtain some documents under the provisions of the Data Protection Acts, these documents will only be available at earliest 40 days after formal Request and will not necessarily relate to the "relevant wrongdoing" as this may not constitute data about you. The documents will certainly not become available within the 21 days required to file the Court Application. Therefore, take precautions!

3. What should an Employer do under the Protected Disclosure Act?

Create a "Protected Disclosure" Policy

Although the term 'whistleblowing' is often associated with high profile cases in the media, a disclosure may be made in any industry at any level. Fraud and business malpractice can cause major damage to a company's reputation and could also give rise to Criminal Prosecutions in certain circumstances. It is imperative therfore that the employer should create a Protected Disclosure Policy. Under this Policy, employees should clearly understand what they should do if they come across relevant wrongdoing, as defined in Section 5(2) of the Act, in their place of work.

The company should outline in the Policy that they take such wrongdoing seriously. Clear examples of wrongdoing should be outlined, such as:

- Unauthorised use of Company money
- A criminal offence
- Failure to comply with any legal obligation

It is probably best to stick with the examples of "relevant wrongdoings" as defined at Section 5(3) of the Act.

How employees can raise a concern in the workplace should also be stated and the relevant contact person's details should be included in the Policy.

Having a procedure in place also aims to prevent staff from discussing sensitive information with unsuitable parties. In turn the company will treat disclosures in

confidence and will not reveal the identity of the person making the allegation, so long as it does not hinder or frustrate any investigation. It is important to state in the Policy that the company will not tolerate the victimisation of any person who discloses a wrongdoing under the procedure and that victimisation will be treated as a disciplinary offence. Therefore, if an incident occurs the employee will feel protected and may be more likely to make the disclosure.

Implementing the Policy

Drafting the Policy document is the easy part: implementing it may be a lot more difficult. There have always been negative connotations associated with the term "whistleblowing". The idea of 'tell-tale' or 'informer' tends to creep into employee`s minds. Employees need to be advised that "whistleblowing" is in place to protect them, the company and, at times, the public interest. They also need to be assured that the Policy is fully supported by the management of the company. Management must take all disclosures seriously and when necessary undertake an investigation into the matter. It is also important for employees to be aware that there will be no negative consequences for making Protected Disclosures.

Ensure that, once the Policy has been created, that there is a proper Induction process; that workers are informed in writing of the Policy, are brought to a meeting where the terms of the Policy are explained and that subsequently, as in all Induction processes, the worker signs an Acknowledgment to confirm that they understand the terms of the Policy.

What if my employee makes a Protected Disclosure?

If an employee makes a Disclosure then investigate. There is no reason to panic. It is only if an employer dismisses or prejudices a worker for making a Protected Disclosure that the full rigours of the Act come in to play.

Of course there can be times when allegations are untrue or malicious. At times, allegations can be made in good faith but sometimes, after investigation, they may be found untrue. However it may be discovered that the allegations are malicious or vexatious. If this is the case, disciplinary action may be taken against that individual.

When the Investigation has been completed make sure to keep the worker in the loop by reporting back to him the conclusions of the Investigation.

What if I dismiss my employee and he brings an Application for Interim Relief before the Circuit Court?

Consult your solicitor immediately. It is very important that your solicitor is in a position to prepare a defence to any such Application and he will need adequate time to do so. Often such Applications will arise on only a few days notice before a Court Hearing. The solicitor will need to speak to witnesses in your company and gather relevant documents. He will need to consult Counsel. Preferably, an Affidavit should be prepared for swearing by the employer in advance of the Court to disprove the allegations made by the employer.

The provisions of the Protected Disclosure Act are complicated, both for worker and for employer. The consequences of a disclosure, whether valid or invalid, can be devastating for both sides. Employers should check their Employer`s Liability Insurance Policy to ascertain if they have Insurance Cover for such Claims.

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