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Ireland Update: Clarity and Change for Whistleblowing

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The recent Supreme Court decision in *Baranya v Rosderra Irish Meats Group Limited* [2021] has important implications for employers addressing protected disclosures made in the workplace.

The timing of the Supreme Court decision is particularly apt with the imminent deadline for implementation of Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law ("Directive").

Baranya v Rosderra Irish Meats Group Limited

The background to the *Baranya* decision featured a communication by an employee of a meat processing plant who was required to undertake a large amount of "scoring" work which he alleged caused him a great deal of pain. The employee contended that he was unfairly dismissed following this communication and that his complaint regarding the work causing him pain constituted a protected disclosure under the Protected Disclosures Act 2014 ("2014 Act") The employer denied that this communication was a protected disclosure and instead considered it to be a grievance. The employer also denied that the employee's dismissal was due to the communication.

In order to qualify for protection under the 2014 Act, a worker must report a "relevant wrongdoing". In the *Baranya* case, the employee alleged that his communication reported the following relevant wrongdoings under the 2014 Act:

- that the employer had failed, was failing or was likely to fail to comply with legal obligations, other than one arising under the employee's contract of employment; and
- that the health or safety of any individual had been, was being or was likely to be endangered

The Supreme Court noted that it appeared from the 2014 Act that the legislature had intended to exclude purely personal complaints from its scope. However, the 2014 Act had failed to do this and many complaints made by employees which are entirely personal are capable of being regarded as protected disclosures. This was especially so in the case of health and safety concerns which may relate to "any individual".

The Supreme Court also held that the communication could not be taken in isolation and instead must be considered in the context of the complaints made in the preceding months. This will have an important implication to employers assessing whether complaints from employees constitute protected disclosures. Employers should consider whether previous communications or complaints made by an employee are relevant to the subject matter of complaint when assessing whether the employee has made a protected disclosure.

Grievances or Protected Disclosures?

The Code of Practice on the Protected Disclosures Act 2014 ("Code of Practice") draws a distinction between grievances and protected disclosures. It provides that a grievance is a matter specific to the worker, their duties, terms and conditions of employment, working procedures or working conditions. The Code of Practice is not legally binding but is admissible as evidence before the Workplace Relations Commission ("WRC") or Labour Court and should be taken into account when making relevant determinations.

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The Supreme Court held that the 2014 Act contains no such distinction between grievances and protected disclosures and that as it is clear that purely personal matters may constitute protected disclosures, the Code of Practice had misstated the law in this regard.

Ultimately, the Supreme Court made no determination whether the communication by the employee was a protected disclosure. It held that the Labour Court (whose decision was the subject matter of the appeal to the Supreme Court) had erred in law by drawing a distinction between grievances and protected disclosures and had failed to make the appropriate findings of fact on what was stated precisely by the employee and whether the communication made by the employee amounted to an allegation of "wrongdoing" on the part of his employer. The *Baranya* case has been remitted back to the Labour Court to determine these questions.

Judicial Criticism of the 2014 Act

The Supreme Court judgment was delivered by Justice Hogan. Justice Charleton concurred with Justice Hogan's judgment but wished to add further comment on the 2014 Act, of which he was critical. He noted that the common perception of "whistleblowing" limits the term to matters of public interest. He further commented that the Directive addresses reporting breaches of EU law which are "harmful to the public interest" and that the extraordinary protections available under the 2014 Act indicated that it should be applied only to those who make public some significant information about an organisation which discloses wrongdoing within its confines that impacts on public safety or on the public interest in matters of safety, compliance or tax paying.

Justice Charleton stated that the 2014 Act failed to draw any distinction between a public minded individual deserving of special protection and an ordinary internal workplace situation. One suspects that this omission may be addressed when the full text of the Protected Disclosures (Amendment) Bill ("Bill") is published.

Key Changes Required by the Directive

Substantial changes to protected disclosure law are required under the Directive.

The definition of "workers", "penalisation" and "wrongdoing" will all be substantially broadened.

Public employers, private employers who employ over 50 employees, and employers who are subject to EU law relating to financial services, products, markets, prevention of money laundering and terrorist financing will be required to establish reporting channels within their organisation for workers who wish to report breaches of EU law. Reporting channels may be internal or provided by an external third party.

Strict deadlines for acknowledging receipt, following up and providing feedback will apply to financial services employers in their handling of protected disclosures. Unless the disclosure can reasonably be considered minor enough not to warrant a formal process, receipt of a protected disclosure must be acknowledged within seven days. The disclosure itself must be "diligently followed up" within three months. Feedback must be provided within three months, or six months in duly justified cases.

Acknowledging receipt is self-explanatory. "Follow up" is defined as any action taken to assess the accuracy of the allegations made and, where relevant, address the breach reported, including, by way of internal enquiry, investigation, prosecution, action for recovery of funds, or the closure of the procedure. "Feedback" is defined as informing the worker who made the protected disclosure of the action envisaged or taken as follow-up and the grounds for such follow-up.

Implementation of the Directive

The deadline for Ireland to implement the Directive is 17 December 2021.

In preparation, the General Scheme of the Protected Disclosures (Amendment) Bill 2021 ("General Scheme") was published in May 2021 and was subject to pre-legislative scrutiny and debate by the Joint Committee on Finance, Public Expenditure and Reform ("Committee"). Drafting of the full text of the Bill is said to be at an advanced stage. The Minister for Public Expenditure and Reform ("Minister") recently confirmed that, unfortunately the legislation will not be enacted before the 17 December deadline. Instead, the Committee will publish a report of its recommendations and the Bill will be published "before the end of 2021". The Minister emphasised the need for parliamentary debate to allow the legislature to have meaningful input into its drafting. He indicated that the Bill will not be enacted until the end of Q1 2022.

The Minister also stated that the upcoming legislation will not be confined to merely implementing the Directive, but also presents an opportunity to reflect on the lessons learned from the 2014 Act. It is possible that this will include much needed clarification on the distinction between grievances and protected disclosures arising from *Baranya*. The Minister described the proposed legislation as "overhauling" existing whistleblowing legislation in Ireland. There have also been suggestions that the Irish legislation will include further obligations on employers than are required by the Directive and specified criminal sanctions for employers who breach their obligations to whistleblowers.

Statutory guidance for handling protected disclosures will also be comprehensively overhauled. The current statutory guidance includes the Code of Practice which was declared partially incompatible with the 2014 Act in *Baranya*. The new guidance will include guidance for private sector employers on establishing and operating internal reporting channels and will be published when the legislation is enacted.

Public employers will be required to establish internal reporting procedures from the date of enactment of the legislation. It is proposed that the obligation to establish internal reporting procedures shall not apply to private employers who employ between 50 and 249 employees until 23 December 2023.

It is not entirely clear when private employers who are subject to EU law, including financial services providers will similarly have to establish internal reporting procedures. The General Scheme commented that EU law already obliges such employers to have internal reporting systems in place.

Interim Period

To cover the interim period between the Directive coming into force and the enactment of legislation, interim guidance will be published "as soon as possible" after the Bill is published.

The effect of the delay in implementing the Directive means that private sector employers who would have been required to establish internal reporting procedures by 17 December 2021 may not be required to do so until the legislation is enacted. Similarly, the Directive's other obligations may only be binding upon those employers once the Bill is enacted.

EU Directives are binding on Member States as to the result to be achieved but are not directly applicable in EU countries until they are transposed into national law. Even so, private individuals may have a cause of action against the State in certain circumstances for its failure to implement a Directive by its implementation deadline.

A risk arises for employers during the interim period as a result of the Court of Justice of the European Union's ("CJEU") ruling in *Minister for Justice and Equality and the Commissioner of the Garda Síochána v Workplace Relations Commission & Others*. In that case, the CJEU held that the WRC has the authority to disapply or ignore national law that is contrary to EU law. The CJEU held that the WRC is required, due to the primacy of EU law, to ensure that individuals receive their full legal protections and entitlements under EU law and that it is not required to await incompatible provisions of national law to be set aside. Therefore, it is possible that employers could subsequently be held by the WRC to have failed to provide the required protections and entitlements to employees who make protected disclosures in the interim period.

Key Takeaways for Employers:

- unless this is addressed in the Bill, a complaint made by an employee that their own personal health is being affected by being required to work in a particular manner or in respect of a particular task can, in principle, amount to a protected disclosure;
- the distinction between grievances and protected disclosure contained in the Code of Practice can no longer be relied upon to determine that an employee's complaint is not a protected disclosure and should instead be addressed through a grievance procedure. It is possible this distinction will be refined and partially restored by the upcoming legislation. The Directive and the General Scheme exclude interpersonal conflicts and grievances from triggering protected disclosure obligations.
- careful consideration should be given by employers when assessing whether an employee's complaint constitutes a protected disclosure, a review should be undertaken of whether any previous similar or relevant complaints have been made by the employee which taken together could constitute a protected disclosure;
- no full text of the Bill has been published so there is still great uncertainty about how the Directive will operate in Ireland;

- the Directive provides for employers to designate one or more staff members as responsible for receiving protected disclosures. Specific training on handling protected disclosures will be required. Consideration should be given before selecting these individuals to reduce the risk of any inference of penalisation. For instance, individuals in management positions or certain reporting lines could be conflicted; and

- employers should familiarise themselves with the Directive's obligations in advance of the Directive's implementation and the subsequent enactment of legislation and plan for how the required reporting channels could be operated to rebut any presumption of penalisation.

Key Contacts

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