Employment Law Top Tips - Whistleblowing
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Whistleblowing in the Workplace

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Whistleblowing in the Workplace

4 Years On - Lessons Learned
Whistlestop tour of Protected Disclosures Act 2014

Objective of Act -

Protect persons from penalisation where they make a protected disclosure in the public interest
Disclosure of information by a worker, which, in their reasonable belief, tends to show a relevant wrongdoing.
Relevant Wrongdoings

- That an **offence** has been, is being or is likely to be committed
- That a person has failed, is failing or is likely to fail to comply with any **legal obligation** (other than one arising under the worker’s contract of employment)
- That a **miscarriage of justice** has occurred, is occurring or is likely to occur
- That the **health and safety** of any individual has been, is being or is likely to be endangered.
- That the **environment** has been, is being or is likely to be damaged
- That an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur.
- That an act or omission **by or on behalf of a public body** is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement.
- That information **tending to show** any matter falling within any of the preceding bullet points has been, is being or is likely to be concealed or destroyed.
Penalisation

“Penalisation” means any act or omission that affects a worker to the worker’s detriment, and in particular includes:

- suspension, lay-off or dismissal
- demotion or loss of opportunity
- transfer of duties, change of location of place of work, reduction in ages or change in working hours
- the imposition or administering of any discipline, reprimand or other penalty (including financial penalty)
- unfair treatment
- coercion, intimidation or harassment
- discrimination, disadvantage or unfair treatment
- injury, damage or loss
- threat of reprisal
# Stepped Disclosure Regime

<table>
<thead>
<tr>
<th>Stepped Disclosure</th>
<th>Evidential Thresholds</th>
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<tbody>
<tr>
<td>Disclosure to Employer</td>
<td>None</td>
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<tr>
<td>Disclosure to other Responsible Person</td>
<td>Reasonable belief – Contractor</td>
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<tr>
<td>Disclosure to Prescribed Person</td>
<td>Reasonable belief and substantially true</td>
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<td>Disclosure to Minister</td>
<td>None – but worker must be employed by public body and the Minister must have responsibility for the matter disclosed</td>
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<tr>
<td>Disclosure to legal advisor</td>
<td>None – but disclosure must be made in the course of obtaining legal advice</td>
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<td>Disclosure in other cases (externally to other body or media)</td>
<td>• Reasonable belief</td>
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<td></td>
<td>• Substantially true</td>
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<td>• Not made for personal gain</td>
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<td>• Reasonable for worker to make the disclosure</td>
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<td>• Worker reasonably believes he may be penalised</td>
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<td></td>
<td>• Worker reasonably believes that evidence may be destroyed before disclosure is made to Prescribed Person</td>
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<td>• Where worker has previously made a disclosure of substantially the same information (and where the employer has not dealt with it) and the relevant wrong doing is exceptionally serious</td>
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Redress
Protection from penalisation and dismissal

Workers

• Take a claim to the WRC (five years max compensation);
  or
• Seek interim relief in the Circuit Court if dismissed;
  or
• Bring an action in tort if he/she has suffered detriment
What type of issues are being brought to our attention?
(A) Who is protected under the Act?

- Employees
- Contractors/sub-contractors
- Consultants
- Agency Workers
- Interns and trainees (provided they are not engaged under a contract of employment or on an educational course)
- But not volunteers
(B) What is categorised as Relevant Information?

“Relevant Information” is information that in the reasonable belief of the worker tends to show one or more relevant wrong doings.

The disclosure must be of “information” and not a bare allegation or an expression of concern.
(C) What is categorised as Reasonable Belief?

Reasonable belief (usually subjective) has been held to be objectively reasonable even if it turns out to be wrong does not deprive the whistleblower of protection.
(D) Can a worker who has a complaint about working terms and conditions make a protected disclosure?

- Breach of an employee’s terms and conditions is excluded from the terms of the 2014 Act and can be dealt with under the employer grievance procedure.

- Be aware some disclosure have both a personal and a public interest (National Minimum Wage Act 2000 and Payment of Wages Act 1991 which can constitute a criminal offence).
(E) Does motivation matter?

• There is no explicit requirement under the 2014 Act that a disclosure be made in good faith in order for the worker to protect the protections of the Act.

• However compensation for penalisation can be reduced by up to 25% where the investigation of the relevant wrongdoing was the sole or main motivation for making the disclosure by the worker.
(F) Can a worker make an anonymous disclosure?

- A general obligation not to disclose the identity of the person making the disclosure however not absolute.

- If disclosure required for
  
  a) The effective investigation or the relevant wrongdoing
  
  b) The prevention of a serious risk to the security of the state
  
  c) For the prevention of prosecution of a criminal offence
• In proceedings involving an issue as to whether a disclosure is a protected disclosure or not it is presumed that it is until the contrary is proven.
Whistleblowing Policy & Procedure

Kady O’Connell, Senior Associate, Employment Law & Benefits, Mason Hayes & Curran
Whistleblowing Policy & Procedure

- Do employers have to have a policy?
- What should be included?
- Code of Practice
  - Employer commitment
  - Scope/applicability
  - What’s covered/excluded
  - Procedure
Procedure for raising concerns

What should happen when a worker blows the whistle?

• Initial assessment
• Investigation
• Feedback
• Follow up
The experience so far

• Circuit Court applications
  ➢ Philpott v Marymount University Hospice (2015)
  ➢ Clarke & Dougan v Lifeline Ambulance (2016)

• WRC Cases
  ➢ Employee v Employer (2016)
  ➢ Aidan & Henrietta McGrath Partnership v Monaghan (2016)
What’s next?

• Statutory Review of the Protected Disclosures Act (July 2018)

• EU Directive
Top Tips!

- Put in place a policy
- Train workers
- Ensure compliance with Data Protection Law
- Remember section 19 of the Criminal Justice Act 2011
- Be prepared!
Thank you

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