A&L Goodbody

Our thoughts and insights after 18 months of the new whistleblowing regime

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Over 18 months has passed since Ireland transposed the EU Whistleblowing Directive, with the Protected Disclosures (Amendment) Act 2022 coming into force on 1 January 2023. This Act brought about material changes to Ireland's existing whistleblowing regime, which we have commented on in several publications previously:

The EU Whistleblowing Directive: Blowing the whistle means added compliance for employers
Whistleblowing in Ireland – the next batch of employers soon to be in scope!
A year in review – top ten whistleblowing queries in 2023

As whistleblowing has now entered the mainstream lexicon of employers in Ireland, we thought now was the ideal time to look back on the past 18 months and highlight some of our key takeaways from advising employers during this time.

Cases are on the rise!

There has been a substantial increase in the number of whistleblowing claims. In 2023, the Workplace Relations Commission (WRC) reported a 201% annual increase in the number of complaints made under the Protected Disclosures Act. 301 whistleblowing complaints were made to the WRC in 2023, compared to 96 in 2022, 69 in 2021 and only 58 in 2020.

The new regime introduced greater scope for employees to apply for interim relief to the Circuit Court to restrain alleged acts of penalisation. Previously, this interim relief was only available in the context of an alleged dismissal for having made a protected disclosure. While there is no reported data on the number of such applications made to the Circuit Court, anecdotal evidence suggests interim relief applications are now regularly being made in dismissal cases. In such an application, there is no requirement for an employee to give an undertaking as to damages and the employee does not need to succeed in the substantive penalisation claim before the WRC in order to recover their legal costs in the Circuit Court. These factors have undoubtedly contributed to the willingness of on the part of employee litigants to pursue this remedy when they might previously have been unwilling to pursue civil litigation as a precursor to the pursuit of a statutory claim.

The retention of centralised reporting channels

The most common query from our international clients is whether they can retain their centralised reporting channel at parent company level and just use that. In short, where Irish employers are part of a larger group company structure, it remains an understandable preference to retain pre-existing centralised reporting channels.

While the statements of the Commission Expert Group on the EU Whistleblowing Directive caused significant concern, as they suggested that each legal entity had to have its own internal reporting channels and procedures, this concern seems to have abated somewhat. While the position remains that a centralised channel alone is not sufficient to comply with the requirements of the Irish regime, in practice we have worked with many employers to implement reporting channels that permit the retention of a centralised group reporting channel, and indeed to promote the centralised channel as the primary channel via which Irish based whistleblowers should make protected disclosures.

An investigation headache!

Fair procedure requirements in Ireland have always meant that workplace investigations can be complex and indeed often more difficult to conduct than in other jurisdictions in which our clients operate. However, the overlay of the whistleblowing regime, and in particular the confidentiality requirements and anonymous reporting, have only served to compound that complexity.

Employers are now faced with having to triage complaints upon receipt, to determine whether the complaint might be a protected disclosure and if so, what information can or cannot be disclosed; what form an investigation should take and who can conduct the investigation, in all cases with the statutory clock ticking.

In our experience to date, employers with well-developed and communicated whistleblowing policies and those who have provided internal training have found this decision-making process far more straightforward than those employers who need to make decisions as they go, without a playbook to follow. Hence our very strong recommendation that employers develop and roll out whistleblowing policies, especially given all employers with 50+ employees are now required to communicate certain prescribed whistleblowing related information to their workforce in writing.

Exclusion of interpersonal grievances

The 2022 Act purports to exclude interpersonal grievances from the protected disclosures regime, however in practice allegations are often far reaching and multi-layered and it can be difficult to conclude an allegation is simply a grievance and not a protected disclosure. What may appear to a manager to be a run of the mill grievance could, on more careful examination, be more properly considered a protected disclosure.

Interpersonal grievances are defined as interpersonal conflicts between the worker raising the concern and another worker, or a complaint by the worker raising the concern to, or about, their employer which concerns them exclusively. Unfortunately, this wording leaves open the possibility that an interpersonal grievance can be a protected disclosure once it affects others and not solely the worker raising the concern. The lines between ‘interpersonal grievances’ and ‘protected disclosures’ remain blurred. Notwithstanding the best intentions of the legislature, and where a complaint is made by one worker to the effect they are being bullied and the person allegedly bullying them presents a health and safety risk

or is creating a hostile/intimidating environment for others, a careful assessment needs to be undertaken to correctly label the complaint made, to ensure it is dealt with under the correct policy.

A powerful weapon

Whistleblowers in Ireland now enjoy very considerable statutory protection and rightly so. However, the legislation does not distinguish between the whistleblowers who are blowing the whistle for public interest reasons and those who blow the whistle for purely personal reasons, often solely so they benefit from the extensive and powerful statutory whistleblower protections.

We are seeing an increasing trend of underperforming employees and those in disciplinary process raising protected disclosures. While the fact an employee raises a protected disclosures does not prevent an employer addressing performance issues or progressing a disciplinary process, it undoubtedly makes it more complicated and riskier to do so.

While the 2022 Act has undoubtedly brought new challenges and risks for employers, if our experience is anything to go by, employers are more informed and better equipped to deal with whistleblowing complaints than they were in the past. Decisions from the WRC and Labour Court are also bringing helpful clarity on what constitutes the making of a protected disclosure (and perhaps more importantly what does not) and also on what the reversal of the burden of proof in penalisation claims means in practice. Our next publication will be a case law roundup and will highlight the key decisions and learnings from employee claims before the WRC and Labour Court under the new regime.

For further information in relation to this topic, please contact Michael Doyle, Partner, Aoife Clarke, Senior Associate, Emer Murphy, Senior Associate, Tara Smyth, and Colm Byrne, Associates or any member of the ALG Employment team.

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