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Supreme Court judgment that may impact legislation to transpose the EU Whistleblowing Directive (IR)

CONTRIBUTOR Sarah O'Mahoney*

Summary

On 1 December 2021, just prior to the transposition deadline for Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (the 'Whistleblowing Directive'), the Irish Supreme Court delivered a judgment that may have an impact on the Protected Disclosures (Amendment) Bill, the piece of legislation intended to be enacted in order to comply with the Whistleblowing Directive. The judgment noted that, while the Oireachtas (the Irish parliament) had envisaged that most complaints for which whistleblower protection would be sought would concern matters of public interest, the actual definition of 'protected disclosure' in the Protected Disclosures Act 2014 (the '2014 Act') extends further than that and can cover complaints in the context of employment which are personal to the reporting person. While Ireland has missed the deadline and has yet to enact the Protected Disclosures (Amendment) Bill, one of the intended amendments has been changed since this judgment was delivered.

Legal background

Ireland is one of a small number of EU Member States that had existing legislation protecting whistleblowers already in place in the form of the 2014 Act. The Protected Disclosures (Amendment) Bill 2022 (the '2022 Bill') was published on 9 February 2022, and is intended to amend the 2014 Act to transpose the requirements of the Whistleblowing Directive. Prior to the publication of the 2022 Bill, the government had published the General Scheme of the Protected Disclosures (Amendment) Bill in May 2021 and a private member's Bill of the same name was published on 2 December 2021, one day after the judgment in this case.

Facts

The complainant Mr Baranya had worked for the respondent company as a skilled butcher for 15 years when he left their employment voluntarily. After some time, he asked to recommence work for them and was employed on a new contract. He claimed that on his return he informed the company that he wished to change his role as the work he had been doing caused him pain. Three days later he was dismissed. The complainant claimed that he had been unfairly dismissed for making a protected disclosure. The company's position was that he had not made a protected disclosure, he had raised a grievance, but that even if he had that was not the reason his employment had been terminated.

At first instance, the complainant's claim failed as the Workplace Relations Commission found that he had expressed a grievance as opposed to making a protected disclosure. He appealed to the Labour Court which found against him on the same basis, and relied in its consideration on a statutory Code of Practice (the '2015 Code of Practice'). When the complainant's appeal to the High Court on a point of law resulted in a determination that he had failed to establish any error of law on the part of the Labour Court, he sought leave to appeal directly to the Supreme Court which was granted.

Supreme Court decision

The judgment by Hogan J noted that the first question that arose was whether a complaint made to an employer about workplace safety is capable of being regarded as a protected disclosure for the purposes of the 2014 Act. Section 5 of the 2014 Act provides that, in order for a communication to be a protected disclosure, it has to convey information about a 'relevant wrongdoing'. One of the examples of relevant wrongdoing given in Section 5 is failing to comply with any legal obligation; however, legal obligations 'arising under the worker's

* Sarah O'Mahoney is a General Knowledge Lawyer at Mason, Hayes & Curran, Dublin.

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contract of employment' are explicitly excluded. Another example of relevant wrongdoing is 'that the health or safety of any individual has been, is being or is likely to be endangered'. Hogan J expressed the view that, although the initial exclusion appeared to suggest that private complaints by an employee about work conditions fell outside the scope of the 2014 Act, the fact that there are also statutory obligations on employers that align with their contractual obligations means that that attempted exclusion was "deceptive and, at one level, ineffective". The judge went on to note that a similar issue had been raised by the UK Employment Appeal Tribunal (*Parkins – v – Sodexho* [2002] IRLR 109) and that further legislation had been passed in the UK so that protected disclosures were required to clearly relate to the public interest. As there was no similar legislation in Ireland, it was possible for an employee's complaint that his or her health or safety was being endangered by workplace practices to amount to an allegation of relevant wrongdoing, such that it could be considered a protected disclosure.

When considering the determination of the Labour Court, Hogan J noted that it had made reference to the 2015 Code of Practice, and in particular paragraphs 30 and 31, which made an explicit distinction between a protected disclosure and a grievance, and defined a grievance as "a matter specific to the worker i.e. that worker's employment position around his/her duties, terms and conditions of employment, working procedures or working conditions". The judge noted that, unfortunately, the 2015 Code of Practice did not accurately reflect what the terms of the 2014 Act actually said. Specifically, the Code introduced a distinction between grievances and protected disclosures which was not drawn in the 2014 Act itself.

Hogan J then moved on to consider the Labour Court's findings of fact; particularly as to what the complainant had actually said. He noted that it had been agreed that he had said that he was in pain and wished to be assigned to another role. When taken in isolation it could seem that this did not allege any wrongdoing on the part of his employer, the context of the complaints was an essential consideration, as it could lead to an implied complaint about workplace health and safety. There was a dispute between the parties regarding what had actually been said, as the complainant claimed that he had said that his pain was due to work, while his employer denied that. Hogan J held that the Labour Court's findings were unclear regarding whether the complainant had alleged that he was in pain because of workplace health and safety, or whether he had just said he was in pain, and this failure to make the appropriate finding of fact was an error of law. The complainant's appeal was allowed on the basis of both errors of law set out above, and the case was remitted to the Labour Court to determine whether the complainant's communications amounted to a 'protected disclosure' for the purposes of the 2014 Act. The complainant was awarded his costs in both the High Court and Supreme Court at a later hearing as he had raised an issue of some public importance which was resolved in his favour.

In a concurring judgment, Charleton J said that the conclusion that "a worker, in making a complaint internal to the workplace in relation to his or her own employment conditions", came within the terms of the 2014 Act did not "conform with what the ordinary understanding of the protection of whistleblowers requires".

Commentary

While a decision of the Supreme Court regarding the correct interpretation of a piece of legislation is always welcome, the timing of this judgment, just prior to the transposition deadline for the Whistleblowing Directive and before the government had enacted its transposing legislation, is particularly interesting.

There are many grievances that can be raised by an employee that seem entirely personal to them; however, they are also matters that are covered by workplace health and safety legislation which gives effect to various EU Directives. These include not just matters that would be traditionally considered to relate to health and safety, but also issues such as workplace bullying and harassment. In recital 22, the Whistleblowing Directive leaves it to Member States to decide that "reports concerning interpersonal grievances exclusively affecting the reporting person, namely grievances about interpersonal conflicts between the reporting person and another worker, can be channelled to other procedures". However, the Directive also refers in recital 62 to safeguarding the health and safety of persons being a motivation to provide for external reporting channels and Article 27(3) names "the improvement of the working environment to protect workers' health and safety and working conditions" as a particular area in respect of which it may be necessary to extend the scope of the Directive.

The General Scheme of the Protected Disclosures (Amendment) Bill published in May 2021 contained a proposed amendment which reflected recital 22 and stated that a matter was not a relevant wrongdoing if it concerned grievances about interpersonal conflicts, which could be channelled to other procedures. This proposed amendment intended to remove personal grievances from the remit of the 2014 Act, particularly grievances which could fall under the purview of workplace health and safety legislation. In light of Hogan J's judgment, however, it is notable that some strictly personal workplace health and safety complaints may not be complaints that are 'interpersonal' in nature as they may relate to workplace systems as a whole.

Published two months after the judgments in this case were delivered, the 2022 Bill now contains a new, and broader, proposed exclusion of personal grievances, which includes not only interpersonal conflicts, but any matters that concern a reporting worker exclusively. While this wording is certainly clearer, it is also possible

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that it strays beyond what was contemplated by recital 22 which refers to 'interpersonal grievances' only. It remains to be seen whether this wording will be enacted, and how it will be interpreted by the courts in Ireland. This may be an issue, however, that arises in other jurisdictions as it is difficult to see how a clean line can be drawn between 'personal grievances' and reports relating to breaches of workplace health and safety legislation.

Comments from other jurisdictions

Finland (Janne Nurminen, Roschier, Attorneys Ltd): As in Ireland, the Finnish Act implementing the Whistleblower Protection Directive (Directive (EU) 2019/1937) (WB Directive) did not enter into force by the deadline set out in the Directive, i.e. 17 December 2021. The delay was partly due to the extensive feedback received on the draft government bill issued in early July 2021. At the moment, the government bill is estimated to be presented to the Finnish Parliament in March 2022.

As in Ireland, both EU and national employment law will most likely be excluded from the scope of the whistleblowing legislation in Finland. The proposed legislation for implementing the WB Directive in Finland currently provides protection for whistleblowers reporting on issues in specified areas of law, for example public procurement and consumer safety. In the proposed government bill, HR and occupational health and safety are not included in the list of legal areas covered by the legislation. Thus, issues relating to the determination on whether complaints are personal in nature is not likely to cause problems in the interpretation of the proposed legislation. It is to be noted that the Finnish employment legislation itself already provides relatively strong protection for employees reporting issues related to their workplace or employment.

As reporting related to individual employment is, as far as we know, excluded from the scope of the legislation, companies must themselves consider how to organize a reporting channel related to HR and employment, for example notifications relating to harassment in the workplace. The reporting channels may be organized as one channel for all reporting or as two separate channels for matters falling, on the one hand, within the scope of the whistleblowing legislation and, on the other hand, matters that are HR related.

Regardless of the way in which reporting channels are organized, it is clear that all matters reported must be properly investigated, including those not within the scope of the legislation. According to the draft government bill, the individuals to whom matters are reported will be responsible for ensuring that they are brought to the attention of the correct body within the company so that they can be investigated.

In addition, the national legislation implementing the WB Directive will impose a broad prohibition on retaliatory measures being taken against the whistleblower by the employer. This prohibition includes terminating their employment, weakening the terms of their employment, treating them unfavourably, and taking other measures with adverse consequences for the whistleblower. Any threats or attempts to retaliate against whistleblowers are also prohibited. Lastly, it should be noted that the prohibition on retaliatory measures applies even if the reported matter does not fall within the scope of the whistleblowing legislation. Thus, no retaliation can be taken against the person reporting, for example, discrimination or harassment.

Germany (Susanne Burkert-Vavilova, Luther Rechtsanwaltsgesellschaft mbH): On a general note Germany, like Ireland, has not yet enacted legislation to implement Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. While it remains to be seen what path the legislator will choose, the case at hand is sufficiently covered by existing law and case practice. It is therefore more than unlikely that the law implementing the Directive will have an impact on the legal framework relevant for solving this case if it had taken place in Germany.

The German legal landscape does not know the principle of 'protected disclosure'. In essence, however, the employee is similarly well protected if he or she is looking after his or her legitimate interests in the field of health and safety in the workplace.

According to the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG'), an employee has the right to a workplace that is suitable for his or her condition. This claim follows from a general duty of mutual consideration, which is derived from Section 241(2) of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB'). In a nutshell, if the employee asserts this claim and informs the employer on how his/her obstacles to performance can be removed, the employer must comply with the claim enabling changes in the workplace or provide a more suitable job for the employee if and to the extent this is reasonable and legally possible for him/her. Apart from that, the employer shall – on its own initiative – offer to all employees who are continuously or repeatedly incapacitated for work by illness for more than six weeks within one year occupational integration management (*betriebliches Eingliederungsmanagement*) (Section 167(2) of the Social Code IX (*Sozialgesetzbuch IX*)). This procedure is aimed at identifying measures that are a milder remedy than dismissal on the grounds of illness. Not carrying out the procedure does not render a relevant dismissal void, however, it entails the risk of losing a subsequent dismissal protection case, where the employer will most frequently be unable to prove as required that it has done everything in its power to provide the employee with a workplace that is suitable for his/her condition.

According to German law, employers are banned from taking unjustified measures (*Maßregelungsverbot*) under

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Section 612a BGB as a result of employees exercising their legitimate rights in a permissible manner. This ban is intended to protect employees' freedom of will in deciding whether or not to exercise their legitimate rights. An employer's dismissal violates this ban on unjustified measures if an employee's permissible exercise of his/her rights renders the reason for the dismissal. Hence, a dismissal in answer to an employee's demand to a workplace that is suitable for his/her condition may, depending on the specifics of the case, be invalid in accordance with Section 612a BGB. Such a dismissal could moreover be disproportionate, as a milder remedy could be a reorganization of the previous work area or the continued employment of the employee in another job suitable for his/her condition.

German employment law provides for further relevant prohibitions of employer's unjustified measures. Pursuant to Section 17(2) of the Occupational Safety and Health Act (*Arbeitsschutzgesetz*, 'ArbSchG'), employees may complain to the employer about safety and health protection at work and, if the employer fails to remedy the situation, they may complain to the competent authority and thereby shall not suffer disadvantage. Further relevant prohibitions of disadvantage accompany an employee's general right of complaint (Section 84(3) of the Works Constitution Act (*Betriebsverfassungsgesetz*, 'BetrVG')) and an employee's exercise of rights under the General Equal Treatment Act (Section 16(1) of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG')).

United Kingdom (Bethan Carney, Lewis Silkin LLP): As mentioned in this case report, this is a problem that has already preoccupied the UK government and courts. Under the original public interest disclosure (whistleblowing) legislation, the definition of a 'qualifying disclosure' included breach of any legal obligation. This was deemed by the Employment Appeal Tribunal to be sufficiently broad wording to cover the situation where a whistleblower was disclosing a breach of his or her own contract of employment, despite the fact that this did not seem to have a 'public interest' element (*Parkins – v – Sodexho* [2002] IRLR 109). This was a surprising decision at the time but it was followed by a number of other court decisions until the government changed the statutory wording to try to limit these types of claims. Since June 2013, to be a qualifying disclosure, the worker must reasonably believe that the disclosure is in 'the public interest'. The government made it clear that with this change to the statutory wording it was trying to reverse the *Parkins* decision. But it is still possible for a worker to make a public interest disclosure about a breach of his or her own employment terms, provided it can be shown that there is also an element of public interest.

The Court of Appeal gave guidance about the public interest test in the case of *Chesterton Global Ltd (t/a Chestertons) – v – Nurmohamad* [2017] EWCA Civ 979. In this case, an estate agent blew the whistle on manipulation of the company's accounts which the agent thought had affected his own commission. The Court of Appeal agreed that this was a qualifying disclosure and said that the tribunal had to determine whether the individual subjectively believed that the disclosure was in the public interest and, if so, whether that belief was objectively reasonable. Belief in the public interest need not be the predominant motive for the disclosure or even form part of the motivation. Where the disclosure relates to a matter which is personal to the employee (such as a breach of the employment contract) it still may be reasonable for the individual to regard the disclosure as being in the public interest as well as their own – if so, it could be a qualifying disclosure and protected by the whistleblowing legislation.

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