RGA | Richard Grogan & ASSOCIATES

Protected Disclosure – What is it?

Put simply a protected disclosure will arise where you have a situation where an employee has knowledge of corruption, fraud or some other wrongdoing within their workplace and they intend to expose this to the relevant authority, which may be the employer in order for it to be remedied. The workplace can be in the public, private or non-profit sector. Given the nature of the disclosures that can be made it is quite likely to make an employee more vulnerable to being penalised by their employer and so employees need greater protections in order to enable them to speak out and expose any wrongdoing.

This led to the enactment of the Protected Disclosures Act 2014, as the single overarching framework for the protection of workers in all sectors.

In order to avail of the protections afforded to employees under the 2014 Act, there is a procedure that should be followed under the Act when making a protected disclosure. If an employee does not make the protected disclosure in the prescribed manner, they will be unable to avail of these protections. Given the nature of protected disclosures an employee taking the wrong step in reporting it can cause significant damage to their own employment. It would therefore be a wise move for an employee if they find themselves in a situation where they feel they have to make a protected disclosure, to seek legal advices in relation to same. Of note is that if it is the worker or the workers employers' function to detect a wrongdoing they will not come within the protection of the Act.

The basics under the Protected Disclosure Act 2014:

Under the 2014 Act a "protected disclosure" is a disclosure of "relevant information" made in a specified manner.

Section 5 sets out what is "relevant information". It is regarded as information which, in the reasonable belief of the worker, tends to show one or more relevant wrongdoings and which came to the workers attention during the course of their employment. Clearly when you read that statement your eyes are drawn to the words "reasonable belief" therefore if it was to transpire that what you had disclosed was not actually a protected disclosure you won't be

precluded from the protections afforded under the Act, so long as the employees belief was based on reasonable grounds.

Section 5 (3) (a) – (h) inclusive sets out what is regarded as relevant wrongdoings. On reading this section it would appear quite broad and that a protected disclosure can fit under more then one heading.

Section 6 – 10 sets out to whom a disclosure should be made to. The 2014 Act provides for a stepped disclosure regime and failure to abide by it will lose the person making the disclosure the protections under the Act. The stepped disclosure regime contains three distinct steps for disclosure. The first step is making the disclosure to your employer, a Minster or a legal adviser; the second step covers disclosures to a prescribed person; and the third step covers disclosures in other cases. The higher the step the worker uses to disclose the more requirements they have to meet, in order to be protected under the Act. The Act has been framed in this way in order to allow for the possibility of the disclosure to be dealt with internally within an organisation, to prevent further damage occurring. The Act does allow for instances where the employer has been given the relevant information but fails to act in accordance with it or where an employee does not want to disclose to the employer, the Act provides alternatives under Sections 7,8,9 and 10.

Section 6 covers disclosures made to your employer or other responsible person. This is the preferred Section to disclose under, as the employee must only meet the criteria as laid out under Section 5 when making the disclosure. It has been argued that a disclosure to an employer encompasses any person senior to the worker who has been authorised by the employer, as having management responsibility over the worker. Section 6 also allows for the scenario where the organisation has in place a particular "designated third party" for receiving a protected disclosure. If the employer has in place a procedure that involves disclosing of information other than to the employer themselves, and the employee follows this procedure in making a protected disclosure, than in those circumstances the employee will be making their disclosure under Section 6 and not under Section 7, and so again they must only meet the criteria as laid out under Section 5.In other words it is easier for employees to meet the bar for gaining protection under the 2014 Act if they make a disclosure under Section 6 as opposed to the other relevant Sections.

Section 7 covers disclosures made to prescribed persons. In order for a worker to gain the protections under the 2014 Act, they need to meet a higher threshold than if they made the disclosure under Section 6 as outlined above. Prescribed persons under this section are designated as "recipients of disclosures". The Section covers 72 regulatory bodies, such as the Pension Authority, the Data Protection Commission and a full list of prescribed persons can be found in the Protected Disclosures Act 2014(Section 7(2)) Order 2014. When a worker makes a disclosure under this Section, the worker must reasonably believe that the wrongdoing is a matter which falls within that prescribed persons remit. The worker must also under this Section reasonably believe that the information disclosed, and any allegations contained therein, are "substantially true" to warrant investigation. In such cases the worker must disclose to the relevant person named or to the relevant position holder and not just to the entity itself.

Section 8 covers disclosures to the Minister, where a worker is employed by a public body, the Minister to whom the disclosure is made must have a statutory function in relation to the relevant public body.

Section 9 covers disclosure to a legal advisor such as a barrister, solicitor, trade union official or official of an excepted body. It is important to note that although a trade union is listed within this Section, a trade union official is not entitled to claim "legal professional privilege".

Section 10 covers disclosures in all other cases. This Section covers disclosing to persons outside of those listed in SS.6-9. This section requires three tests to be met when making a disclosure in order to gain protection under the Act.

Protections under the Act:

Under Section 11 the Unfair Dismissals Act 1977 is amended to provide for a situation where an employee has been dismissed due to their making a protected disclosure. This amendment to the Unfair Dismissal Act 1977 gives far better relief to an employee who finds themselves in this situation in comparison to any other type of Unfair Dismissal. There is no need to have one year's continuous service in

these type cases, and there is an increase in compensation up from a ceiling of two years remuneration to five years gross remuneration. It is important to note that this compensation relates to financial loss attributable to the dismissal. As in all Unfair Dismissal cases where the maximum compensation is capped at 2 years, it is very rare that the 2 year compensation would be awarded. We would consider it similar in these type of Unfair Dismissal cases, that it would be extremely rare that 5 years would be awarded. The compensation will be reduced by up to 25 percent if it is found that the relevant wrongdoing was not the sole or main motivation of the employee for making the disclosure. In these Unfair Dismissal cases, the employee still has a duty to mitigate their loss.

In case *An Employee v A Nursing Home ADJ-00000456* the claimant a nurse claimed she was dismissed for having made a number of protected disclosures. The AO had to look at the facts and firstly determine if there was a protected disclosure within the relevant legislation. The claimant hadn't 12 months service, and the AO had to determine if the dismissal was related to the protected disclosures. The AO determined that there was protected disclosures made and that there was a link between the dismissal and the disclosure made. Additionally, the Act makes provision for "interim relief" that can be applied for in the Circuit Court, once an employee has been Unfairly Dismissed. The Circuit Court Order is similar to an injunction and it does appear as if the Circuit Court Order does not require as high a threshold to be met in order to be granted it in comparison to the bar that would ordinarily need to be reached to be successful in obtaining an injunction. In order to be granted the interim relief an employee is required to show that the dismissal results wholly or mainly from the employee having made the protected disclosure.

Importantly as I said above the Circuit Court Order is similar to an injunction, and that being said it is quite a fast-moving approach that is required in order to have it granted. You need to be ready to apply within 21 days of your dismissal. The benefits of being granted the Circuit Court Order is that the Court can grant for "the continuation of the employee's contract of employment" where an employee is awaiting the determination of an Unfair Dismissal case in the WRC. The employee in these circumstances will continue to be paid what they would be entitled to while they were working during the time of the dismissal until the determination of their Unfair Dismissal case. It

is important to note while the wording in the Act is ambiguous. It is argued should the employee be successful in their Unfair Dismissal case, the amount that the employer pays to the employee if they obtained this interim relief Order would be taken into account when calculating the amount that the employee will receive following the Unfair Dismissal in the WRC.

The Act also has provision under Section 12 for protection for employees who have been penalised for having made a protected disclosure. The test for determining whether a worker has been penalised is laid out in *Aidan & Henrietta McGrath Partnership v Monaghan* PDD 2/2016. It is important to note that an employee cannot claim for penalisation and also bring an Unfair Dismissal claim.

Section 13 sets out that workers, employees, and third parties, have a cause of action in tort against a person who causes them detriment because they or another person made a protected disclosure. Significantly this is the only protection which a person, who is a worker but is not an employee for the purposes of the Act, can avail of, as they are precluded from seeking relief under Section 11 for Unfair Dismissal or under Section 12 for penalisation. A person who is bringing a claim under Section 11 or Section 12 is also precluded from bringing a claim in Tort, to prevent a person from availing of two causes of action against the same person in respect of the same matter. The redress under Section 13 is not as restrictive as it is under Section 11 and Section 12.
Section 16 of the Act provides for protecting the identity of the person who made the protected disclosure. This safeguard is not absolute and this Section sets out the circumstances that may give rise to the identity being revealed.

Misconceptions:
One of the biggest misconceptions in relation to protected disclosures is that if an employee makes a protected disclosure, the employee then mistakenly believes that they are completely protected from being disciplined or dismissed within their workplace. This protection that employees have will only occur if they are being disciplined or dismissed and it is due to the making of the protected disclosure. For example, take Minnie, Minnie works for Mickey. Minnie makes a protected disclosure, if Minnie has followed the making of the

protected disclosure under the 2014 Act, Minnie will be able to rely on the protection that is afforded to employees under the 2014 Act. Minnie will be protected against Mickey from dismissing her or otherwise penalising her on the basis of her having made a protected disclosure. But if Minnie then during this period of time decides she is going to start stealing from work or turning up late, then in that situation Mickey would be able to put Minnie through a disciplinary procedure and could potentially dismiss her. Mickey would be able to do this due to the fact it is unrelated to the protected disclosure Minnie would have made.

The take home here is that the protection afforded to employees under the 2014 Act will apply only as it relates to detriment suffered due to the protected disclosure being made. It is not a flat-out protection all round, and the employee can therefore be dismissed for other behaviour that may constitute grounds of dismissal even if they have made a protected disclosure as it would be unrelated.

Another misconception is thinking a grievance is the same as a protected disclosure. They are two distinct matters.

A grievance is a more personal matter relating to that specific employees' terms and conditions of employment, their duties, or promotion etc. An employee would raise a grievance in the workplace themselves using the grievance procedure where for example they had an issue over the selection criteria used for promoting a staff member over them.

A protected disclosure is where an employee has information about a relevant wrongdoing, for example information relating to the misuse of funds or fraud.