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Penalisation Under the Protected Disclosures Act 2014*

The case of Andrew Conway and The Department of Agriculture, Food and the Marine 2020 IEHC665 is a judgement given by Ms Justice Hyland on the 14 December 2020.

This was an appeal from a decision of the Labour Court.

There were two questions as to whether the Labour Court acted lawfully in holding that a failure by an employer to act upon a Protected Disclosure under the Protected Disclosures Act 2014 did not constitute penalisation within the meaning of the 2014 Act and whether the Labour Court erred in failing to take account of the Respondent's compliance with his obligations under the 2014 Act and the Code of Practice established by Statutory Instrument 464 of 2015 on Protected Disclosure and the guidance to employers adopted pursuant to Section 21 (1) of the Act in determining penalisation and the Respondent's own policy.

The High Court found that in respect of the first question the Labour Court found as a matter of fact that the appellant had not suffered detriment and had not been penalised for having made a Protected Disclosure and in respect of the second question that the Labour Court was correct in holding that the treatment by the Respondent of the Protected Disclosure were not matters within its jurisdiction where it had already concluded no penalisation as defined by Section 12 had been suffered by the Appellant. The High Court pointed out that the Act does not confer a jurisdiction on the Labour Court to evaluate the adequacy of the employer's response where penalisation has not been established.

This is an important decision of the High Court as it does deal with the issue of what is required.

The case makes it clear that a worker must demonstrate that they have suffered harm or damage as a result of making a Protected Disclosure. If that cannot be shown then the worker cannot succeed in a penalisation claim.

In this case the Court set out the provisions of the Act of 2014 in particular Section 3, Section 12 and Section 13.

The Court pointed out that it was worth noting what is not in the Act. The Act does not contain any provision in respect of the obligations of the employer who has received the Protected Disclosure. There are no time limits within which action must be taken. The Court held there are no obligations to take action at all or to communicate with the person making the disclosure. The Court pointed out that limited obligations are placed upon public bodies under Section 21 to establish and maintain procedures for the making of a Protected Disclosure and to provide written information in respect of those procedures and to have regard to guidance issued by the Minister but the Court pointed out that that is the height of the obligation. The Court held there are no sanctions in the Act for failure to comply with these obligations.

In relation to the Code of Practice the Court pointed out that paragraph 15 covers the issue of assessment and investigation. At paragraph 15.7 the Court pointed out that it is noted that the incorporation of a detailed and prescriptive investigative process in the procedures may impeach a public bodies ability to respond flexibly and in a responsible way. At paragraph 15.9 it provides that each public body should also ensure that any complaint of penalisation for breach of confidentiality is assessed and/or investigated as appropriate. Paragraph 18.2 suggests a worker making a Protected Disclosure should be provided with periodic feedback.

In relation to Statutory Instrument 464 of 2005 the Court pointed out in relation to paragraph 49 it states

"It is important that the worker making the disclosure has a sense that the complaint is being dealt with seriously and that action is being taken, not least with a view to ensuring that the concerns raised as dealt with internally. The organisation should ensure that as much feedback as possible is given having regard to sensitivities around, for example, confidentiality. Information in regard to timelines times for responses/actions should be communicated to the discloser"

It was noted by the Court that the Appendix contains a modern whistle blowing policy.

The High Court set out at paragraph 71 that unlike the UK legislation there is no separate obligation in the Act to inquire into detriment. The Court pointed out that rather the obligation is to consider

whether penalisation has taken place and the cause of same. The Court held this exercise sometimes takes place in a number of steps being to identify the act of omission, to consider whether it constitutes detriment and then to examine whether the cause of such detriment was the making of a Protected Disclosure. The Court pointed out that the wording of the Act identifies that what is prohibited is penalisation for having made a Protected Disclosure. The Court held that to reach a conclusion as to whether Section 12 had been breached all three concepts identified above must be considered.

The Court at paragraph 72 stated that the next thing the Labour Court had to do was to identify the definition of penalisation and to evaluate whether Section 12 had been breached by which the Court said whether an act or omission on the part of the Respondent that affected the Complainant to his detriment had occurred at all or as a consequence of the Protected Disclosure made. The Court pointed out that Section 12 requires penalisation being an act or omission that affects a worker to their detriment. The Court stated that the ordinary and natural meaning of the word detriment is harm or damage. Thus, the legislature requires that the detriment must be of a nature as to harm or damage the person making the disclosure. The Court pointed out that a person could understand the frustration and annoyance with replies to emails related to the investigation had not been responded to. The Court however stated there was no evidence that this lack of response impacted on the Appellants situation either in the workplace or elsewhere. The Court held that the types of detriment identified as Section 3 of the Act or indeed at Section 13(3) were entirely absent. Those lists are non-exhaustive.

At paragraph 78 the Court pointed out that the Labour Court was not entitled to adjudicate upon the adequacy of a response to a Protected Disclosure in the absence of penalisation of a complainant.

As regards failing to comply with Statutory Instrument at 464 of 2015 the Court stated that the Labour Court had not been given that role by the legislature relating to compliance with the obligations under that Statutory Instrument.

This decision is very helpful.

There is a lot of confusion around concerning the issue of penalisation. It is very helpful that we have a decision like this, from the High Court.

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