Whistleblowing in Ireland

Preparing for change

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AIB whistle-blower takes unfair dismissal case

Patient advocate reinstated after whistleblowing row

Whistleblower’s dire warnings silenced by senior Finance chiefs

Vatican defends whistleblower’s transfer to US
The context

- Why do people find it so difficult to report wrong doing at work?
  - **Culture** – being seen as a “tell tale”
  - **Easier** to go along with a wrong decision
  - **Loyalty** to individuals or to an organisation
  - **Fear** of reprisal/damage to career
Background to whistleblowing laws

• Public Interest Disclosure Act, 1998 (UK)
• Whistleblower Protection Bill, 1999 (private members’ bill)
• Whistleblower Protection Bill, 2010 (private members’ bill)
• Various sectoral whistleblowing provisions:
  − Child abuse; ethics in public office; health and safety; competition; health
A change of mindset

- Company Law Review Group, 2007
  - "One cannot say that there is any evidence of endemic failure in relation to corporate governance or its enforcement in Ireland that negatively affects the investment climate and which requires enhanced ‘whistleblowing’ provisions”.

- Interventions by DPP and Governor of Central Bank
- High profile media cases
- Financial scandals
- Programme for Government, 2011
  - Whistleblowing legislation to protect public servants exposing maladministration by Ministers
The new regime

- Feb 2012 – announcement of the General Scheme of the Protected Disclosures in the Public Interest Bill 2012
- Precursor to a Bill – Q2 2012?
- Subject to consultation, submission and debate before enacted
- Would involve retention of existing sectoral laws
What is the purpose of this new legislation?

• 4 stated objects
  – Promote in the **public interest** disclosure relating to unlawful conduct or other misconduct of employer
  – Provide **procedures** for disclosure
  – **Protect** workers from occupational detriment
  – Provide for **remedies and redress**
What disclosures are protected?

- **Exhaustive list of 9 “improprieties”**
  - Actual or likely commission of a criminal offence
  - Failure or likely failure to comply with a legal obligation
  - Miscarriage of justice
  - Threat to health and safety
  - Damage to health and safety
  - Misuse of public funds
  - Gross mismanagement by a public official
  - Concealment of any of these matters

- **Some criticism of the list**
  - Suggestion by ICTU it should include “violation of labour standards”
The “stepped” approach

- **Several potential disclosure channels**
  - To the employer
  - To a relevant body eg Central Bank, Competition Authority, Revenue
  - To a Minister (only relates to public sector workers)
  - Wider public disclosure eg the media
  - Exceptionally serious impropriety
  - To a legal adviser

- Different standards and conditions in each case
- No general requirement that a worker use one channel before another (except for wider public disclosure)
Disclosure to the employer

- Must relate to one of the **listed improprieties**
- Disclosure must be made in **good faith**
- Worker must have a "**reasonable belief**" that the allegation is true
Disclosure to a relevant body

- Must relate to one of the **listed improprieties**
- Disclosure must be made in **good faith**
- The worker must believe that the allegation is **“substantially true”**
- Why the difference in standard?
- What does “substantially true” mean?
Disclosure to a Minister

- Must relate to one of the **listed improprieties**
- Disclosure must be made in **good faith**
- Only relates to a disclosure by a worker in a **public body** to the appropriate Minister for that body
- No reference to “reasonable belief” or “substantially true”
Wider public disclosure

- Must relate to one of the listed improprieties
- Disclosure must be made in good faith
- The worker must believe that the allegation is “substantially true”
- The worker is not making the disclosure for financial gain
- The worker has good reason for not disclosing to the employer, Minister or relevant body
  - Reasonable belief will be subject to penalisation if made to employer
  - Believes evidence will be destroyed if made to employer
  - Previous disclosure ignored
- Disclosure must be reasonable in all the circumstances
Disclosure of exceptionally serious impropriety

• Must relate to one of the listed improprieties
• Disclosure must be made in good faith
• The worker must reasonably believe that the allegation is “substantially true”
• The worker is not making the disclosure for financial gain
• The impropriety is of an exceptionally serious nature
• In all the circumstances it is reasonable to make the disclosure, having particular regard the identity of the person to whom the disclosure is made
Disclosure to a legal adviser

- Disclosure to a **legal practitioner**
- With the object of and in the course of obtaining **legal advice**
- No requirement for good faith or reasonable belief
Protections for the worker

- **Protected from penalisation by the employer**
  - Covers all dismissal or disciplinary measures
  - Explanatory note makes clear it includes “more subtle forms of reprisal, retaliation and discrimination”

- **Claim to Rights Commissioner, appeal to the Labour Court**
  - Re-instatement, re-engagement or compensation of up to 2 years’ remuneration

- **No service threshold**
Additional points

- Immunity from civil liability and criminal proceedings
- Note that anonymous disclosures are not protected
  - Source of controversy/criticism
  - Standard confidentiality provisions
Impact of new regime/Open items

- Main purpose – **change the mindset** and culture of employers and employees about public interest disclosures
  - Can legislation do this?
- More **bureaucracy** for small companies
- Introducing whistleblower protection **procedures**
  - Currently not a defence but of practical assistance?
- Updating **contracts** eg confidentiality provisions
- Scope for **abuse**?
  - Better definitions of the improprieties
  - Managing the “vexatious” disclosures
Whistleblowing in the UK

Impact, experiences and developments

Gareth Wadley
Eversheds
29 May 2012
The Public Interest Disclosure Act 1998

- Came into force in 1999
- **Two core aims:**
  - Encourage workers to raise, and employers to address, whistleblowing concerns using appropriate internal channels
  - Protect workers against dismissal and any detriment occurring as a consequence of making a “protected disclosure”
Questions for the tribunal

• Has there been a disclosure of information?
• What is the subject matter of the disclosure?
• What is the nature of the worker’s belief?
• Has the disclosure been made in good faith?
Disclosure of information

- **Cavendish Munro Professional Risks Management Ltd v Geduld (EAT 2009)** – there must be a disclosure of information; simply setting out an objection or raising an issue is not sufficient
Subject matter of disclosure

- Criminal offence
- Failure to comply with a legal obligation
- Miscarriage of justice
- Endangering health and safety
- Damage to environment (wide scope)
- Concealing any information relating to the above
Subject matter of disclosure

• Includes alleged failures *outside* the UK

• **Failure to comply with a legal obligation:**
  
  *Parkins v Sodexho (EAT 2001)* – breach of a legal obligation under a contract of employment fell within the ambit of a relevant failure

• **Hibbins v Hesters Way Neighbourhood Project (EAT 2008)** – protection is afforded if disclosure concerns any person, not just employer or person for whom the employer is responsible
Nature of the worker’s belief

- **Babula v Waltham Forest College (CA, 2007)**
  Provided the tribunal considers the workers’ (subjective) belief that the relevant malpractice has occurred is (objectively) reasonable, it does not matter that the belief subsequently turns out to be wrong.

- **Bolton School v Evans (CA, 2006)**
  School teacher who hacked into school computer system not protected under PIDA. CA said PIDA applies to disclosure itself and does not extend to actions designed to demonstrate a reasonable belief in the disclosure.
Disclosure made in good faith

- **Street v Derbyshire Unemployed Workers’ Centre (CA 2004)** – good faith *unless* dominant or predominant purpose for disclosure is an ulterior motive

- **Bachnak v Emerging Markets Partnership (Europe) Ltd (EAT 2005)** – disclosures made primarily by the Claimant to strengthen his hand in negotiations for a new contract not made in good faith

- **Lucas v Chichester Diocesan Housing Association Ltd (EAT 2005)**
  - Burden of proving disclosure made in bad faith lies with employer
  - High burden of proof; must be evidence of bad faith
Protection for the whistleblower

- **Unlimited compensation** for both unfair dismissal and detriment short of dismissal
- **Contractual terms** - any term in contract (including settlement agreements) seeking to prevent disclosure under PIDA is **void**
Protection for the whistleblower

• How long does the protection last?
• **Protection may extend post-employment:**
  
  *Woodward v Abbey National (CA 2006)*
  
  – claimant alleged that ex-employer victimising her for disclosures she made during her employment by providing poor references and failing to consider requests for alternative employment. CA held act could apply to post termination victimisation.
## Tribunal statistics

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Tribunal Powers

- **Employment Tribunals** (Constitution & Rules of Procedure) (Amendment) Regulations 2010
  - Tribunals have the power to send details of whistleblowing claims to appropriate regulators.
Whistleblowing policy – why have one?

- Compliance and internal control
- Promote trust and confidence
- Avoid external disclosures
- Minimise litigation risk
- Avoid criminal liability
- Public bodies
- Listed companies
- US companies
An effective policy should...

- Encourage **concerns** to be raised early
- Provide **guidance** on what issues may be raised under procedure
- **Encourage openness** in the disclosure of relevant failures (but also provide safeguards on confidentiality)
- **Prohibit reprisals** against whistleblowers
- Prohibit the making of **malicious/bad faith disclosures**
An effective policy should...

- Allow for disclosers to be given feedback on the disclosure (subject to confidentiality)
- Avoid unduly complex or legalistic language and procedure
- Make provision for preliminary confidential “helpline” or other independent internal advice for potential discloser
- Not deter individuals from making external disclosures
Potential problem/risk areas

- **Identifying whistle blowing**
  - Rarely will disclosures be labelled ‘whistle blowing’ or ‘protected’ disclosures
  - Whistleblowing disclosures in context of other internal procedures
  - Disentangling grievances and potential whistle blowing – worker may opt to raise concern as a grievance or as a disclosure
Potential problem/risk areas

- **External disclosures**
  - one aim of whistleblowing policy is to keep disclosures ‘in house’, **but**
  - employer must not be seen to deter or discourage external disclosures (for example by expressly requiring disclosures to be raised internally first)
  - **risk of:**
    - triggering protection for wider disclosure
    - breaching anti-gagging provisions in legislation
Potential problem/risk areas

- Anonymous disclosures
- Data protection issues
- Sarbanes-Oxley requirements