The Protected Disclosures Bill 2013

Enabling whistleblowers to speak out openly

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- Amending the parental leave provisions
New legislation is likely to have a significant impact on how employers deal with the issue of whistleblowing or ‘good faith’ disclosures by their employees. Published in July, the Protected Disclosures Bill 2013 aims to provide a consolidated framework for the protection of employees who make certain types of disclosures, placing further obligations on employers to ensure compliance.

Ironically, this coincides with a move in the opposite direction in the UK, where recent amendments in fact reduce the scope of whistleblower protection in that jurisdiction and may provide some interesting guidance to the Oireachtas before the Bill is finally passed into law.

Whistleblowing in Ireland

Whistleblowing is a term used to describe an individual reporting or disclosing a wrongdoing within an organisation. However, employees are often reluctant to make such disclosures where they involve co-workers or superiors. Some level of whistleblower protection is therefore generally regarded as desirable so that employees are free to disclose wrongdoings within their organisation without fear of penalisation by their employer.

In Ireland, protection for whistleblowers has traditionally arisen on a piecemeal basis under separate legislative regimes relating to specific sectors. This has led to an unsatisfactory position where employees in certain sectors are protected from making disclosures which are not the subject of protection in other sectors. Moreover, the level of protection provided is inconsistent across different sectors and is, in any case, largely inadequate.

The current government committed to address these inconsistencies by putting in place a comprehensive statutory framework for the protection of whistleblowers across all sectors, as part of an overarching mandate of anti-corruption and transparency. A product of this commitment, the Protected Disclosures Bill 2013 (the ‘Bill), was published on 3 July 2013.

Key features of the Bill

The purpose of the Bill is to provide a comprehensive statutory framework for the protection of whistleblowers across all sectors. The Bill sets out the persons to whom protection applies, the specific types of disclosure which are protected, the appropriate disclosure channels and the protections available to employees. The Bill applies to all workers, not just employees.

The Bill sets out a list of specific protected disclosures. A worker may not be penalised for disclosing information about another person within his organisation in relation to:

- the commission of an offence
- non-compliance with a legal obligation
- a miscarriage of justice
- endangerment of health and safety
- damage to the environment
- misuse of public funds
- mismanagement by a public body
- concealing or destroying information relating to any of the above.

The motivation for making such a disclosure is irrelevant as long as an employee has a reasonable belief that the disclosure he is making is true. As it stands, there is no requirement that a disclosure be made in the public interest for it to be protected.
The Bill also sets out the protections given to whistleblowers. The Bill will amend the Unfair Dismissals Act 1977 so that it will be unlawful to dismiss an employee wholly or mainly because he has made a protected disclosure. A worker dismissed for making a protected disclosure will be entitled to far greater compensation in the value of up to five years’ salary.

The Bill further provides that a worker may not be penalised in any other way for making a disclosure, provides for a right of action in tort against any person who causes detriment to a worker for making a disclosure, protects for the anonymity of whistleblowers and provides immunity from civil and criminal liability in making a protected disclosure.

**Implications for employers**

The new law creates new causes of action against employers both under the Unfair Dismissals Act and in the civil courts.

Employers will need to be careful in how they handle disclosures to ensure they do not find themselves exposed. Employers must be able to provide an environment in which employees can voice concerns to their employer and allow those concerns to be sufficiently investigated and addressed, while at the same time protecting the identity of employees who raise concerns and ensuring that they do not suffer any detrimental treatment.

Experience of the similar UK legislation indicates that the management of poor performance or disciplinary issues can be significantly complicated by an employee raising a concern which may fall within the category of a protected disclosure. It will be important to be able to demonstrate that any sanction levied against an employee was not linked with the raising of the concern by the employee.

Given this multitude of new potential legal pitfalls, employers would be well advised to put a robust whistleblowing policy in place and, as in any other contentious employment context, be able to demonstrate that that policy is adhered to rigidly.

Any whistleblowing policy should provide procedures which give comfort to employees that their concerns will be dealt with adequately and confidentially while also promoting an environment of transparency across the business within which good faith disclosures are accepted and encouraged.

**The UK position**

Irish legislative reform in this area happens to coincide with reform in the UK. However, in contrast with the move in Ireland to step up whistleblower protection, the UK has sought to narrow the scope of its whistleblower legislation, which it was felt had gone too far.

In particular, the legislation has been widely interpreted by the UK courts as extending to disclosures made with no public interest element at all. This meant that employees were protected in making disclosures about breaches of individual employment contracts which had consequences for nobody but the whistleblower. This led to a high level of uncertainty as to what could constitute a protected disclosure and an excessive number of allegations.

A recent survey carried out by Eversheds in the UK demonstrates these shortcomings: 40% of employers surveyed felt that whistleblowing legislation was not working, with one-third of employers having experienced allegations of whistleblowers being victimised for making disclosures. The survey also found that one-third of employers who experienced whistleblowing allegations believed that personal motivations for making these allegations were a factor in every case.

To address these concerns, the UK legislation has now been amended to include a requirement that a whistleblower must reasonably believe that a disclosure is in the public interest in order for it to be protected. As a consequence, it is likely that employees will no longer be protected in making disclosures relating to personal employment issues with their employer, as this would involve no public interest element. Although the Bill in Ireland similarly excludes protection of disclosures, it does not include any public interest requirement.

The timing of the UK reform is particularly ironic given that the new legislation in Ireland has been largely based on the UK model, which Minister Brendan Howlin described as the “gold standard” for whistleblower protection. It remains to be seen to what extent the Oireachtas might consider these lessons from the UK before the Bill is passed into law.

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At the end of September, the European Court of Justice gave an opinion that an Irish woman had not been discriminated against by her employer when she was refused paid maternity or adoptive leave after her child was born through a surrogate. This was in contrast to a separate opinion of the ECJ in relation to a UK case, also given last month, where it expressed the view that mothers whose children are born through surrogacy are covered by EU maternity protection rules.

These cases, referred to as the ‘Z’ case and the ‘C.D. v S.T.’ case respectively, highlight the level of uncertainty surrounding the legal position of mothers whose children are born through surrogacy, as well as reminding us of the complexity that can surround maternity entitlements in certain unusual scenarios.

Some of the more problematic and difficult scenarios we have encountered are discussed, from an employment law perspective, in the following Q&A.

Is a mother whose child is born through a surrogate entitled to maternity leave?

It does not appear so, but the issue is far from clear. Although the opinion of the ECJ in the ‘Z’ case suggests that mothers of children born through surrogacy arrangements are not covered by the maternity protection legislation, the actual implications of this opinion may not go as far as that. The ECJ in this case was only asked whether the mother was discriminated against on the grounds of sex or disability under the Employment Equality legislation. It was not asked specifically whether the maternity protection legislation covers mothers in surrogacy situations. On the facts, the ECJ came to the view that the mother had not been discriminated against on the grounds of sex because any male parent of a child born through a surrogate would not be entitled to leave either. The ECJ was also of the opinion that the mother was not discriminated against on the grounds of disability (being her inability to carry a child) as that disability in no way impeded her full and effective participation in her professional life.

Given the ECJ’s separate opinion in the UK case of ‘C.D. v S.T.’, where the specific question was asked as to whether the Maternity Directive (1992/85/EC) covers mothers of children born to a surrogate, it seems likely that if an Irish Court referred the same question to the ECJ, it would follow that opinion. As it stands, however, a refusal to provide a mother with maternity leave where her child was born through a surrogate is not a discriminatory act, so it appears that a mother effectively has no right to it in this scenario.

Is a mother whose child is born through a surrogate entitled to adoptive leave?

No, as it stands a mother would not be entitled to adoptive leave in these circumstances. In its opinion in the ‘Z’ case, the ECJ concluded that there is nothing in EU law that would entitle a mother in a surrogacy arrangement to adoptive leave and that it is therefore up to the national courts to consider whether a refusal to give same would be discriminatory.

In Ireland, the Adoptive Leave Act 1995 provides a minimum period of 24 weeks’ adoptive leave for an ‘adoptive mother’, which is defined as “a woman in whose care a child (of whom she is not the natural mother) has been placed or is to be placed”. The qualification that the mother is not the natural mother of the child would most likely preclude mothers in surrogacy situations, as in these circumstances the mother is in fact the genetic mother, but the child is simply carried by a surrogate.
Is a surrogate herself entitled to maternity leave?

Yes. The Maternity Protection Act 1994 provides a maternity entitlement to any “pregnant employee” to be taken no later than two weeks before the end of the expected week of confinement and to finish no earlier than four weeks after the expected week of confinement. As the timing of the entitlement is triggered by reference to the week of confinement, and no reference is made to the relationship between the child and the surrogate following confinement, it follows that a surrogate mother is entitled to take maternity leave by virtue of the fact that she is pregnant, regardless of whether or not she cares for the child following its birth.

This was also the view of the ECJ in the ‘C.D. v S.T.’ case in the UK, which considered that a surrogate mother is entitled to maternity leave under the Directive both as a pregnant worker (under Article 2(a) of the Directive) prior to giving birth, as well as a worker who has recently given birth (under Article 2(b) of the Directive).

Is a surrogate entitled to maternity benefit?

It appears so. Section 47(1) (a) of the Social Welfare Act Consolidation 2005 provides that an employee will be entitled to maternity benefit if it is medically certified that she is expected to go into confinement on a given date and will remain entitled to maternity benefits for the duration of the period of maternity leave to which she is entitled under the Maternity Protection Acts. The fact that the child subsequently comes under the care of its genetic mother does not affect the surrogate’s entitlement to maternity leave and it would also not affect her entitlement to maternity benefits.

Is a mother whose child dies following birth entitled to the remainder of her maternity leave?

Yes. The reason for this is the same reason that an employee who miscarries or gives birth to a stillborn child after 24 weeks of pregnancy is also entitled to full maternity leave. The minimum maternity leave entitlement under the Maternity Protection Act 1994 is allocated by reference to the date of confinement, the key element of which is that the employee gives birth to a child, whether alive or dead (if after 24 weeks). The definition does not contain any requirement that a child born must survive for a certain period of time for the period of confinement to have occurred. As the mother’s maternity leave entitlement is triggered by reference to the period of confinement, there is nothing in the legislation to suggest that her entitlement can be subsequently revoked due to events following confinement, such as the death of the child.

What happens if a mother dies during her maternity leave?

Where a mother dies within 40 weeks of giving birth, the father of her child is entitled to take over the remainder of her maternity leave period. Where the mother dies within 24 weeks of giving birth, the father is entitled to the remainder of that 24 week period and is entitled to additional leave of 16 weeks. Where the mother dies later than 24 weeks following the birth of her child, the father is entitled to leave up to 40 weeks following the birth.

Future developments

The discrepancy between the opinions of the ECJ in both of the recent cases highlights the uncertainty surrounding this area of law. In both opinions, however, the ECJ was of the view that a degree of deference needs to be given to member states to legislate for surrogacy situations.

The Government’s autumn legislative programme includes a new Family Leave Bill, expected to be published in late 2014. The drafters therefore have a good opportunity to address the uncertainty in the law relating to surrogacy through this bill, but the extent to which this will be addressed, if at all, remains to be seen.

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This report comes after the
Government increased the qualifying
age for State pension from 65 to
66 from 1 January 2014. This will
increase to age 67 in 2021 and then
to age 68 in 2028.

For many employers in Ireland, the
normal contractual retirement age
for their employees is 65. The UK and
Ireland are now aligned as Ireland
does not have a statutory retirement
age and the UK government has
phased out its default retirement age
so that people can now work as long
as they want to.

With the increase in the State pension
age in Ireland, many employees will
now face a gap between the age at
which they are expected to retire
from work and the age at which
they will receive a State pension.

All employers must now ask if their
normal retirement age is appropriate
and examine why an employee who
has been doing the same job up to
65 cannot continue to do that job
beyond that age.

In light of this ‘gap’ issue, employers
can either: choose to ignore the
increase in the age for State pension
and keep the status quo (which
raises issues from an employment
and equality law perspective); or
take steps to amend their contractual
retirement age to bring it in line
with the increased State pension age
(which raises issues from both an
insurance and pensions perspective).

The UK approach
According to a survey conducted by
our colleagues in Eversheds UK, only
4% of employers reported an increase
in equality claims (specifically age
discrimination) since the abolition
of the statutory retirement age.
However, the survey also says that
less than 3% of employers now have
compulsory retirement provisions in
their employment contracts.

This suggests that the overwhelming
approach taken by employers in
the UK is to absolve themselves
of any potential liability for age
discrimination claims by not enforcing
a contractual retirement age at all.
In this way, they do not have to
demonstrate that their contractual
retirement age is objectively justified
to achieve a legitimate business aim.

This Summer, the Organisation for Economic Co-operation and
Development (the “OECD”) just published its review of the Irish
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sufficient income for a decent standard of living on retirement”. 
The consensus among employers in the UK appears to have been based on a fear of no longer having a specific legal provision to rely on when enforcing compulsory retirement. As a result, many employers reported that the change in the law had negative effects for their organisation:

- Difficulties in succession planning (reported by nearly two-thirds of those who took part in the survey).
- Opportunities being blocked for younger workers (reported by just under half).
- Increased costs of redundancies and/or providing benefits (reported by 37%).
- More management time having to be spent on performance management (reported by 29%).
- An increase in ill-health absence (reported by just over a fifth).

This is clearly not a desirable option for employers in Ireland who are now faced with the somewhat similar situation imposed by the increase in State pension age.

**Next steps ...**

As the Unfair Dismissals Acts in Ireland do not apply where an employee reaches the contractual (or normal) retirement age in the workplace, many employers will be hesitant to abolish compulsory retirement ages entirely. If employers choose to align themselves with the qualifying age for State pension, they may want to consider taking some of the following steps:

- Review the current workforce to ascertain who will be affected after 1 January 2014. This way an employer will know how many employees are likely to be impacted and can now plan how it will best communicate this change to these employees.
- Any pension scheme and insurance policy (for example, permanent health insurance, medical and car insurance) in operation would have to be carefully reviewed to consider the additional costs that would be incurred. Employers will also have to assess whether the change requires the agreement of other third parties, such as the pension trustees for an occupational pension scheme.
- Introduce a retirement policy which clearly sets out the contractual retirement age for all employees. However, where an employer enforces this, the most likely legal challenge is an equality claim on the grounds of age discrimination. When drawing up a retirement policy, employers need to be able to demonstrate that their contractual retirement age is objectively justified to achieve a legitimate business aim. Justifications which have been accepted by the courts include ensuring a high quality of service, ensuring the health and safety of other employees, creating opportunities in the labour market and promoting access of young persons to professions.

> In addition, a retirement policy could also contain potential options for employees to stay in employment past the employer’s contractual retirement age. For example and subject to employment and tax law considerations, employers may want to enter into a fixed term contract or a consultancy arrangement with older workers as in practice older workers generally have less desire to continue on a full-time basis but with this type of arrangement employers can continue to benefit from their experience and knowledge.

Although this change is still some months away, it should be addressed sooner rather than later as ignoring it is not a viable option.

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Can indirect AGE DISCRIMINATION ever be justified?

The implications of the Labour Court recommendation in Hospira v Roper and others

According to UK research, ageism is the most prevalent form of discrimination. Some 50% of individuals surveyed believed they were written off as “old” once they reached 50. In Ireland, the aim of the Employment Equality Acts 1998–2011 (the ‘Acts’) is to prevent both direct and indirect discrimination in relation to employment based on age and eight other grounds outlined in the Acts.

Until recently, the Irish Court’s have been reluctant to allow an employer to justify a decision which would otherwise lead to indirect age discrimination. In the recent landmark decision of Hospira v Roper published last month, the Labour Court (the ‘Court’) overturned a decision of the Equality Tribunal and allowed an employer to justify caps on redundancy payments which impacted most closest to retirement age.

Background

The complainants in the case had been employed by Hospira for between 16 and 25 years. They were made redundant when the plant in which they worked was closed. The negotiated redundancy terms provided for a payment of five weeks’ pay per year of service in addition to statutory redundancy payments. However, where an employee was close to retirement age, they would receive either the terms of the agreed package or the salary which they would have earned had he remained employed until the normal retirement age of 65, whichever was the lesser. Each of the complainants fell within the second category. They would receive an amount equal to their potential earnings up to age 65 which, in their case, was less than the amount paid to younger workers. They complained to the Equality Tribunal, claiming that they had been discriminated against on grounds of their age.

The Equality Officer found that the decision to provide different redundancy packages based on an employee’s proximity to retirement constituted age discrimination. He rejected the employer’s argument that section 34(3) (d) of the Acts permitted the employer to calculate the payments in this way. He upheld the complaint and his decision was appealed to the Labour Court.
Employment Update Summer 2013

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THIS DECISION CONTRASTS AUTHORITIES IN BOTH IRELAND AND EUROPE ON THE REQUIREMENT FOR AN EMPLOYER TO OBJECTIVELY JUSTIFY ANY PERCEIVED INDIRECT DISCRIMINATION IN CASES INVOLVING AGE DISCRIMINATION

Preliminary Issue

A preliminary issue arose in the appeal regarding whether the employees were entitled to bring the claim. They had each signed a discharge agreement confirming that the sum paid to them was in full and final settlement of all claims under both statute and common law. The Court did not give a concluded view on the point, but stated that it considered that the employees had made it clear that they did not accept that they could lawfully be paid a reduced sum because of their age, and that the respondent employer was aware of that. The Court allowed the appeal to proceed.

Determination of the Court

The Court determined that the underlying EU Directive provides that Member States, rather than individual employers, can provide for differences in treatment on grounds of age where those differences can be objectively justified by a legitimate business aim. The Court found that the Oireachtas had made express provision for differences in treatment based on age in respect of severance payments through section 34(3)(d).

The Court stated that the rationale for this provision is that workers close to retirement are in a “substantially different position” to those who expect to remain in active labour for a longer period. The Court stated that as a matter of social and labour market policy, the difference can be legitimately referred to in determining redundancy packages. The Court said that it appeared that the Oireachtas considered it reasonably and objectively justifiable, to provide for the differences in treatment allowed for by section 34(3)(d) of the Acts.

Accordingly, the Court found that the method of calculating the redundancy packages was permitted by Irish law and overturned the decision of the Equality Tribunal.

Significance of the decision

This decision contrasts authorities in both Ireland and Europe on the requirement for an employer to objectively justify any perceived indirect discrimination in cases involving age discrimination. The case shows a keenness by the Court to recognise the justification arising from social and labour market policies. It is likely that the case will have implications for employers not only in relation to the calculation of severance payments, but also in the context of justifying specific retirement ages.
Non-compete clauses are commonly included in employment contracts and can be an effective way of protecting an employer’s commercial interests.

However, the recent High Court decision in Hernandez v Vodafone casts some doubt on the extent to which an employer can rely on such clauses.

In this case, the High Court granted an injunction restraining Vodafone from enforcing a non-compete clause in a former employee’s contract when the employee was offered a position with O2. The Court accepted that the enforceability of Vodafone’s non-compete clause was open to challenge and that it should be prevented from enforcing it until the trial of the action as it would restrict the employee’s ability to provide for his family.

*Protecting your commercial information*

*Employers should always tailor their non-compete clauses as an overly restrictive non-compete clause might only defeat its own purpose*
Background

The employee worked for Vodafone for seven years and subsequently left his employment after being offered a position with O2. Vodafone sought to enforce the non-compete clause in the employee’s contract so that he would be prevented from taking up employment with O2 (a direct competitor) for six months after leaving Vodafone. Following some negotiation between lawyers for Vodafone and O2 regarding the employee’s notice period and proposed start date with O2, it was agreed that the restriction period in question was approximately three months.

The employee brought proceedings to challenge the enforceability of the non-compete clause and sought an injunction preventing Vodafone from enforcing it so that he could take up his employment with O2 immediately. The injunction was granted.

The decision is interesting for two reasons. First, it demonstrates the Court’s willingness to grant an injunction against an employer on the basis that damages are not an adequate remedy in circumstances where an employee is suffering only financial loss by being restricted from working. Secondly, the Court accepted that a non-compete clause of only three months duration is open to challenge in the Courts.

Injunction

In granting the injunction, the Court was satisfied that damages would not be an adequate remedy for the employee on the basis that if the clause was enforced, it would result in a lack of cashflow for the employee for the duration of the restricted period. The Court took the view that this would cause hardship to the employee and his family and that, although this hardship would be purely financial, it could not subsequently be remedied by an award of damages.

The Court’s view appears to be that a lump sum reimbursement of income at some point in the future could never remedy the hardship that would actually be endured during three months with no income.

Interestingly, the Court came to this conclusion notwithstanding the fact that the employee left his employment with Vodafone voluntarily and was in no way prevented from working in any other capacity during those three months or from obtaining jobseeker’s benefits.

The Court also found that it was irrelevant that the employee was fully aware of the consequences of the non-compete clause when he entered into the contract with Vodafone and that the contract he entered into with O2 contained virtually the same non-compete restrictions.

This High Court decision differs from most employment injunction scenarios in that the injunction sought was merely to restrict the former employer enforcing a non-compete clause, rather than forcing a former employer to allow an employee to return to work or pay his salary.

However, this recent decision gives greater weight to the potential financial hardship not only to the employee but to his family in assessing adequacy of damages when granting employment injunctions.

Non-compete clauses

In granting the injunction, the Court was satisfied that there was a fair issue to be tried regarding the enforceability of the non-compete clause.

This decision indicates the Court’s readiness to cast aside non-compete clauses in favour of employees and, therefore, provides some key learnings for employers as follows.

> Employers should review their non-compete clauses to ensure that they are as narrow in scope as possible in order to protect their commercial interests without causing undue hardship to employees.

> One size does not fit all. Non-compete clauses should be drafted in light of the specific circumstances of an employee’s position – while a strict non-compete clause may be appropriate for some employees, such as those who handle sensitive commercial information or intellectual property, it may not be for others.

> One way of ensuring that a non-compete clause is not overly restrictive is to allow any period of garden leave following an employee’s termination to be offset against the restricted period or even provide for continued payment to the employee during the period of proposed restriction.

In summary, employers should always tailor their non-compete clauses as an overly restrictive non-compete clause might only defeat its own purpose.

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Time for change


The changes made by the Regulations to parental leave entitlements are as follows:

**Categories of employees**

The definition of ‘employee’ has been amended to include part-time employees and fixed term employees. As such, categories of workers are now expressly included as employees for the purposes of the Acts, they are entitled to avail of parental leave in accordance with the terms of the Acts.

**Increase in period of parental leave**

The Regulations extend the period of Parental Leave from 14 weeks to 18 weeks. As a result of this increase, parental leave for each child is now 18 working weeks per child. If an employee has more than one child, parental leave is limited to 18 weeks in a 12 month period (but this can be longer if the employer agrees). Parents of twins or triplets can take more than 18 weeks of parental leave in a year.

**Child with long-term illness**

The entitlement to parental leave applies to parents of children under eight years of age or children under 16 years of age in the case of a child with a disability. For a child adopted between the age of six and eight, parental leave may be taken up to two years after the date of the adoption order.

The Regulations now provide for parental leave in respect of a child with a long-term illness until that child reaches the age of 16 or the illness ceases.

**Transfer of parental leave for parents working for same employer**

Although both parents have an equal and separate entitlement to parental leave, if both parents are employed by the same employer, one parent can, subject to the consent of the employer, transfer part of their period of parental leave to the other parent (up to a maximum of 14 weeks).

**Right to request change in working hours or working patterns**

The Regulations provide that parents returning to work after parental leave can request a change in their working hours or patterns for a set period of time. An employee must make such a request in writing to his/her employer “as soon as reasonably possible”, but at least six weeks prior to the proposed commencement of the set period concerned. This written request must specify the nature of the requested changes, the date of commencement of the set period and its duration.

Employers must consider such a request, but they are not required to grant it. Employers must respond to the employee within four weeks of receiving the request either informing the employee that the request has been refused or, if granted, the employer must prepare and sign an agreement with the employee. This agreement must set out the changes to the employee’s working hours or patterns or both. The agreement must also set out the date of the commencement and duration of the set period.

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