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# Protected Disclosures legislation shows its teeth with first 'statutory injunction' granted


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## INTRODUCTION

Just under two years since the Protected Disclosures Act 2014 (the "**2014 Act**") came into force, it has been widely reported in the last few days that the first order for interim relief under the 2014 Act has been made by the Circuit Court in a case brought by two former employees of Lifeline Ambulance Service Limited ("**Lifeline Ambulances**"), a company owned by David Hall, the high profile mortgage campaigner.

In their proceedings, the two former employees, who had been made redundant by Lifeline Ambulances, sought reinstatement to their roles or the continuation of their salary until their unfair dismissal proceedings are heard by the Workplace Relations Commission. They did so in reliance on a provision of the 2014 Act whereby interim relief can be granted if an employee can show substantial grounds for contending that his/her dismissal was wholly or mainly due to having made a protected disclosure.

Employers should take note of this judgment as it demonstrates the strength of the protections for employee whistleblowers provided for in the 2014 Act.

## STATUTORY POSITION

Section 11(2) and Schedule 1 to the 2014 Act provide for interim relief in cases where a claim is brought for unfair dismissal by reason of having made a protected disclosure. Such an application must ordinarily be brought within 21 days of dismissal. Following the hearing of an application, the Circuit Court can find it is likely there are "*substantial grounds for contending that dismissal results wholly or mainly from the employee having made a protected disclosure.*" The Court can then ask the employer if, pending the employee's claim for unfair dismissal being determined or settled, the employer is willing to:

(a) re-instate the employee; or

(b) re-engage the employee in another position on terms and conditions not less favourable than those which would have been applicable if the employee had not been dismissed.

If the employer is not willing to re-instate the employee, and the Court is of the opinion that it is reasonable for the employee to refuse to accept an offer of re-engagement made by the employer, the Court will make an order for the continuation of the employee's contract of employment.

An order to this effect is akin to an equitable order from the High Court for an interlocutory injunction, hence why it is colloquially referred to as a 'statutory injunction'. If such an order is made by the Court, the employee is entitled to receive remuneration and accrue service until his/her claim for unfair dismissal is determined or settled. In other words, the effect of the order is, in practical terms, to reverse the effect of the dismissal on an interim basis pending the outcome of the employee's unfair dismissal claim.

#### WHAT IS A PROTECTED DISCLOSURE?

A disclosure of "relevant information" through a specified disclosure channel qualifies as a protected disclosure under the 2014 Act. Relevant information is information which a worker reasonably believes tends to show one or more "relevant wrongdoings" and which came to his/her attention in connection with his/her employment. The 2014 Act sets out an exhaustive definition of "relevant wrongdoings" which includes:

- the commission of a criminal offence;
- the failure to comply with a legal obligation;
- the occurrence of a miscarriage of justice;
- the endangerment of the health or safety of an individual;
- damage to the environment;
- misuse of public funds;
- mismanagement by a public body; and
- the concealment or destruction of information tending to show any of the above.

A disclosure must be made via a protected disclosure channel for it to constitute a protected disclosure (e.g. to a worker's employer, to a person prescribed by the Minister for Public Expenditure and Reform, to a relevant minister, to a legal adviser or, in certain circumstances, to third parties such as the media). It should be borne in mind that there is no requirement in the 2014 Act for a worker to label a disclosure of relevant information a 'protected disclosure' in order for the protections of the 2014 Act to apply.

#### PREVIOUS CASE LAW

In *Philpott v Marymount University Hospital and Hospice Limited*[1] the Circuit Court considered a claim for interim relief from a former employee who claimed he had been dismissed because he had made a protected disclosure. Specifically, he sought an order for the continuation of his contract of employment pending the determination of his unfair dismissal proceedings. In considering his application, the Court examined each of the claimed protected disclosures set out in a document sent by the applicant to the Board of his employer. The Court, having heard evidence from both parties, concluded that the disclosure made by the applicant did not constitute a protected disclosure as the applicant did not hold a reasonable belief that the information disclosed tended to show one or more of the relevant wrongdoings prescribed in the 2014 Act.

#### CIRCUIT COURT GRANTS CONTINUATION ORDER

The reported backdrop to the proceedings taken by the two former employees of Lifeline Ambulances was that they had made a protected disclosure to the Revenue Commissioners a few months prior to their dismissals, in which they had alleged that Lifeline Ambulances had engaged in certain actions for the purpose of avoiding or reducing tax. They also separately alleged that they had been subjected to bullying and harassment by the Managing Director, Mr Hall.

The two former employees were made redundant following a review by an external consultant but in their proceedings, they asserted that the real reason for their dismissal was the fact they had made a protected disclosure. Lifeline Ambulances maintained that the disclosure to the Revenue Commissioners made by the two former employees had been made for the sole purpose of protecting themselves against the threat to their positions from the external review and to provide a basis for legal proceedings in the future.

The Circuit Court held that, on the evidence it considered, it was not satisfied that the employees' dismissal was wholly or mainly due to the protected disclosure they had made, but that they had met the threshold of establishing that "*there were substantial grounds for contending [their dismissal] was wholly or mainly due to the protected disclosure*". Significantly, and unlike in the *Philpott v Marymount University Hospital* case, Lifeline Ambulances did not dispute that the employees had made a protected disclosure (e.g. it did not dispute that the information disclosed to the Revenue Commissioners constituted a protected disclosure within the meaning of the 2014 Act).

In circumstances where Lifeline Ambulances was unwilling to reinstate the former employees and they were found to have reasonably rejected the offers of re-engagement made (which, for one of the two, was an offer to remain on "gardening leave") the Court ordered Lifeline Ambulances to pay the former employees' salaries until their unfair dismissal claims are heard by the Workplace Relations Commission, which is likely to be in a number of months' time.

#### IMPLICATIONS FOR THE FUTURE

On the enactment of the 2014 Act, it had widely been predicted that there would be a deluge of litigation brought by employee whistleblowers. In our experience, this has not come to pass. However, now that the first statutory injunction under the 2014 Act has

1 [2015] IECC 1.

been granted, it should be anticipated that this will serve as a catalyst for future applications being brought by employee whistleblowers who have been dismissed and believe there is a nexus between their protected disclosure and their subsequent dismissal. It is clear that in order to succeed in a claim under the 2014 Act before the Circuit Court, all an employee applicant needs to show is that there are "*substantial grounds*" for contending he or she was dismissed due to having made a protected disclosure, as opposed to proving that this is the case. The precise parameters of this lower threshold for interim relief are likely to be explored in future litigation before the Circuit Court.

#### MOTIVATION NOT RELEVANT

This judgement serves as a warning to employers of the very real risks of dismissing an employee who has made a protected disclosure, even if the employer believes the protected disclosure has not been made for *bona fide* reasons. The 2014 Act is clear that an employee's motive for making a disclosure is irrelevant in determining whether or not that disclosure is a protected disclosure. An employee's motivation for making a protected disclosure is however relevant when it comes to awards of compensation under the 2014 Act, in that awards can be reduced by up to 25% where the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure.

#### CONCLUSION

If an employer is contemplating dismissing an employee who has made a protected disclosure, prior to doing so, it should ensure it is satisfied that it can, if called upon to do so, establish that the reason for dismissal is entirely unrelated to the fact of a protected disclosure having been made. In the absence of being in a position to do so, the employer could, in a worst case scenario, end up being ordered to pay the dismissed employee until his or her unfair dismissal case comes on for hearing and thereafter, be ordered to pay the employee up to 5 years' remuneration as compensation.

In light of the very serious consequences of it being found that an employer has dismissed an employee because he or she has made a protected disclosure, employers should tread very carefully, and take appropriate advice, before dismissing an employee who has made a disclosure that could constitute a protected disclosure.

## OUR TEAM

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