EMPLOYMENT

# Protected Disclosures – Recent Case Law Address Novel Points (Part I)

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In this two part briefing, we consider two important recent decisions under the Protected Disclosures Act 2014.

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In *Cullen v Kilternan Park Cemetery Limited,* the Circuit Court considered for the first time an application for an extension of the 21 day time limit for interim relief under the 2014 Act. Two weeks later in *Clarke v CGI Food Services Limited* the High Court delivered its decision on a request by an employer to consider for the first time an appeal of a Circuit Court interim relief order made under the 2014 Act. In the first of this two part briefing, we consider the Circuit Court decision in *Cullen* and the lessons from that decision. Part two will be published next week and will consider the High Court decision in *Clarke*.

Part 1

## COURT CONSIDERS EXTENSION OF 21 DAY TIME LIMIT FOR INTERIM RELIEF UNDER PROTECTED DISCLOSURES ACT 2014

An employee who attempted to use a protected disclosure "*as a sword of Damocles*" over his employer has failed to secure injunctive relief under the Protected Disclosures Act 2014. On 16 July 2020, the Circuit Court refused an application of the former General Manager of Kilternan Park Cemetery ("KPC") for an extension of the 21 day time limit to bring interim proceedings under the 2014 Act.

## INTERIM PROCEEDINGS UNDER PROTECTED DISCLOSURES ACT 2014

Mr. Cullen was employed as General Manager from January 2016. His employment ended by reason of redundancy in early February 2020. Some three and a half months later, he issued proceedings in the Circuit Court under the 2014 Act seeking:

1. an order extending the 21 day time limit for making an application for interim relief; and
2. a declaration that his employment contract continued in force pending the resolution and/or conclusion of his claim against the respondent under the Unfair Dismissals Acts 1977-2015.

## BACKGROUND

Following periods of absence due to illness in 2018 and 2019, Mr. Cullen's doctor recommended a phased return to work. The parties were unable however to agree a working time frame for his return to work. In November 2019, Mr. Cullen requested an exit package. At a meeting on 2 December 2019 to discuss this request, Mr. Cullen told the court that he had brought to the attention of KPC's representative, his concerns about what he believed were irregularities concerning the planning status of the

ash burial area in the cemetery. Further meetings were held in January 2020, with some disagreement between the parties as to whether this was to discuss an exit package or, Mr. Cullen's potential redundancy.

In a letter to KPC on **14 January 2020**, Mr. Cullen stated he made a written protected disclosure in relation to what he believed were planning irregularities in the cemetery. He said he was not obliged to mark or label his disclosure as being protected under the 2014 Act. KPC wrote to Mr. Cullen on 17 January 2020, advising that the possible redundancy was not connected to his disclosure but gave an undertaking to investigate the issue. On 3 February 2020, Mr. Cullen was made redundant.

## MR. CULLEN'S POSITION

In order for the Circuit Court to grant interim relief under the 2014 Act, the test was whether the employee had "substantial grounds" for claiming the connection between the dismissal and the protected disclosure (*Clarke and Dougan v Lifeline Ambulances Ltd [2018] 29 ELR 210*).

Comerford J in *Dougan*, referred to *McNamara v An Bord Pleanála (No. 2) [1996] IEHC 60* which stated that "*[i]n order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous.*"

Mr. Cullen argued that it was reasonable to conclude that the decision to dismiss him was "*inextricably linked*" to his raising of the issues relating to the planning permission of the cemetery.

## KPC'S POSITION

The redundancy took place at the end of a range of cost-cutting initiatives of which Mr. Cullen was fully aware. In December 2019, Mr. Cullen was offered an enhanced redundancy package which he declined. He then threatened that he would "*blow the whistle and 'make a protected disclosure about purported planning irregularities' if he did not receive 'multiples' of the package on offer*".

### Information disclosed was not a relevant wrongdoing

If Mr. Cullen could not demonstrate that the information disclosed was a relevant wrongdoing, he was not entitled to the protection of the 2014 Act.

Section 5(5) of the 2014 Act provides that a matter is "*not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer*"

KPC asserted that the information disclosed by Mr. Cullen was not a relevant wrongdoing as:

1. it was Mr. Cullen's role as General Manager to ensure compliance with all relevant legislative requirements (including planning laws) concerning the burial of human remains; and
2. he should have brought his concerns to the attention of the board during the course of his employment.

### Disclosure cannot be a bare allegation or expression of concern

KPC denied that Mr. Cullen made a protected disclosure at the meeting on **2 December 2019**. Authorities were provided to the court to support the position that a disclosure must be a disclosure of information and not merely a bare allegation or an expression of concern. The court was also referred to *Baranya v Rosderra Irish Meat Group* (see our briefing on this case here) in which it was held that there was a spectrum, where, at one extreme exists a grievance and the other a protected disclosure. An employee grievance is not a protected disclosure under the 2014 Act.

### Wholly or mainly responsible for dismissal

Relying on *Dougan*, KPC argued that it was not enough that the protected disclosure contributed to the dismissal or was a factor in its decision. Further, if grounds are going to be wholly or mainly responsible for the dismissal, they must be "*substantial grounds*".

## EXTENSION OF 21 DAY TIME LIMIT – 10 FACTORS TO CONSIDER

This was the first time that a court had considered what constitutes sufficient reason for granting an extension of time beyond the 21 days set out in the 2014 Act. Schedule 1 of the 2014 Act provides that an application for interim relief must be brought within 21 days immediately following the date of dismissal "*or such longer period as the Court may allow.*" No further guidance is provided.

Mr. Cullen made the following points in support of his application to extend the 21 day period.

1. he was awaiting the outcome of his application for a new job. It would have been an abuse of process to request the court to continue his contract of employment when in the employment of another employer; and
2. he was awaiting the outcome of the respondent's appeal process in relation to his redundancy. It would be fair and just for the court to extend the time to commence the 21 day period at the date the internal appeal process ended.

KPC submitted that a good reason for the delay should be furnished to the court before a court entertains an application for interim relief. A good reason should be an objective one and any reasons should both explain the delay and afford a justifiable excuse for it.

The court noted that the test is an objective one to be judged by what is fair and reasonable considering all the circumstances of the case. Judge O'Connor set out the following 10 factors to be taken into account by a court when considering whether to grant an extension of time:

1. The nature of the disclosure involved;
2. The nature of the dismissal involved;
3. The length of time involved since the expiration of the 21 days;
4. The capacity and ability of the applicant to process an application to the court;
5. The nature of the employer and employee relationship;
6. The extent of legal advice afforded to an applicant;
7. The extent to which the applicant may be able to explain the delay;
8. The merits of the case and the issue as to whether the applicant has established an arguable case that there are substantial grounds for contending that there is a link between the protected disclosure and the dismissal to the extent that the dismissal resulted wholly or mainly from the protected disclosure;
9. The prejudice that any party might suffer by reason of the delay in making the application;
10. The extent to which in all the circumstances a court will deem it just and equitable to grant an extension of time to an applicant.

## CIRCUIT COURT DECISION

- Mr. Cullen's request for an order extending the time for making the application for interim relief under the 2014 Act was refused.
- As General Manager the applicant should have taken active steps to address the issues he raised when in his employment, if he felt it was a genuine cause for concern.
- Mr. Cullen had engaged solicitors some 18 months prior to his dismissal and was therefore deemed to be fully aware of the law.
- The reasons for the delay were not objective for granting an extension of time for interim relief.
- Three and half months was an excessive timeframe considering all other circumstances.

- Mr. Cullen had not established an arguable case that there were substantial grounds for contending that there was a link between the protected disclosure and the dismissal to the extent that the dismissal resulted wholly or mainly from the protected disclosure.

## ASSESSMENT

This decision provides helpful guidance on the approach the courts will take to an application for an extension of the 21 day time limit when issuing interim relief proceedings under the 2014 Act.

Any potential applicant would be well-advised not to delay in issuing proceedings as there will be significant hurdles to surmount to secure an extension of time.

From an employer's perspective, this decision stresses the importance of clear and unequivocal communication to employees in relation to the effective date of their dismissal, in particular if the employee appeals their dismissal. It is important to avoid any ambiguity as to when the 21 day time limit starts running.

Judge John O'Connor's judgement in *Cullen v Kilternan Cemetery Park Limited [2020] IECC 2* can be read in full here.

Part II of our briefing "Protected Disclosures - Recent Case Law Address Novel Points" will be published next week and will consider the recent High Court decision in *Clarke v CGI Food Services Limited* in which an employer appealed interim relief granted by the Circuit Court under the 2014 Act.