EMPLOYMENT

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

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Two important decisions were delivered in July under the Protected Disclosures Act 2014.

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In part one of our two-part briefing published last week, we considered the first Circuit Court judgment on an application for an extension of the 21 day time limit for interim relief under the 2014 Act. This week in the second part of our briefing we consider the first High Court judgment on interim relief under the 2014 Act.

Part II

HIGH COURT CONSIDERS APPEAL OF CIRCUIT COURT INTERIM RELIEF ORDER FOR THE FIRST TIME

Clarke v CGI Food Services Limited [2020] IEHC 368

Mr. Clarke was employed as CGI Food Services' financial controller. In September 2017 he raised concerns as certain payments to directors seemed to exceed the agreed limits with the bank. In January and February 2018 he raised further issues regarding personal spending on company credit cards, a false invoice, unvouched expenses, Revenue issues and other issues, including in relation to food safety. Following this he says difficulties arose in his working relationships. He submitted a formal grievance in October 2018. There were performance reviews in December 2018 and January, February and March 2019, which he described as arbitrary. Following an investigation, he was suspended in April 2019. There was a disciplinary hearing in May 2019 that was chaired by the investigator and this led to his dismissal.

July 2019 the Circuit Court had granted the employee interim relief under the 2014 Act, ordering the employer to maintain the employee's pay and benefits pending the determination of his complaint to the Workplace Relations Commission. After a number of adjournments of the WRC hearing, the employer sought to appeal the Circuit Court interim relief order. The appeal was dismissed by the High Court on 31 July 2020.

In so doing, the High Court made a number of important observations on:

1. interpretation of the 2014 Act; and
2. the factors a Court will take into account in considering a performance based dismissal.

THE CRUCIAL "AND"

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.*"

The employer asserted that a matter is not a *relevant wrongdoing* if detecting or investigating such a matter is within the functions of the employee in question, in

this case the employee being the financial controller and the matters raised being financial in nature. The Court held that by failing to have regard to the word "and" in Section 5(5), the employer fundamentally misinterpreted the 2014 Act. The Court held that, even if a complaint was made in the discharge of the employee's duties, it would not cause the complaint to fall outside of the definition of a protected disclosure if it involved an act or omission on the part of the employer as was the allegation in this case.

No necessity for disclosure to be stated to be a protected disclosure

The employer sought to rely on the fact that the employee did not make any mention of a *protected disclosure* until after the dismissal. The employer claimed that the employee was attempting to *retrospectively characterise matters*. In rejecting this argument, the Court observed that there was no necessity for an employee to consider the situation in statutory terms until after adverse consequences materialised.

Performance Based Dismissal – Eight Factors to Consider

In considering the reasons given for a performance based dismissal, as part of the decision as to whether interim relief should be granted, the Court quoted from the recent UK Supreme Court's decision in *Royal Mail Group Ltd. v. Jhuti*[1] "*If a person in the hierarchy of responsibility above the employee … determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination.*"

The High Court held that the following eight factors were relevant in determining whether the reason given by the employer for Mr. Clarke's dismissal was an invention:

1. when the performance related issues emerged;
2. the intensity – in this case the Court noted that the monthly meetings about performance related issues were quite relentless;
3. the form of dismissal – in this case the employee had been summarily dismissed as if guilty of gross misconduct rather than a procedure for suboptimal performance;
4. following through with proposed methods – in this case the proposal to have an independent barrister as chair of the disciplinary hearing was not followed through;
5. the independence of the disciplinary hearing – in this case the employer appointed as chair of the disciplinary hearing the same person who had already made adverse findings against the employee;
6. affidavits of those involved in disciplinary hearings – and lack thereof in this case;
7. the need to tease out issues at a disciplinary meeting – in this case the evidence was that there were no questions asked; and
8. accountability – in the present case there was no answer as to who made the decision to dismiss the employee.

ASSESSMENT

This case demonstrates the willingness of the Courts to grant interim relief under the 2014 Act, it clarifies the interpretation of an important provision in the 2014 Act and demonstrates the Courts willingness, in an interim relief application, to engage with the detail of the dismissal in respect of which the interim relief is sought.

Both the High Court decision in *Clarke* and the Circuit Court decision in *Cullen v Kilternan Park Cemetery* provide useful guidance on aspects of the 2014 Act that have not previously been litigated. Part one of this briefing is available here.

1 [2019] UKSC 55