

THE WHISTLEBLOWERS ACT 2014

15 JULY 2014

THE PROTECTED DISCLOSURES ACT 2014 (THE ACT), IS DESIGNED TO FACILITATE AND PROTECT A WORKER WHO DISCLOSES INFORMATION RELATING TO WRONGDOING IN THE WORKPLACE. THE PURPOSE OF THIS NOTE IS TO ALERT PUBLIC BODIES AND PRIVATE ENTERPRISES TO THE CONTENTS OF THE ACT.

IMPORTANT DEFINITIONS

“Worker” includes an employee, a contractor, a contract agency worker and a trainee.

A “protected disclosure” is a disclosure of relevant information.

“Relevant information” is information which in the reasonable belief of a worker, tends to show one or more relevant wrongdoings and which came to the attention of the worker in connection with his/her employment.

“Relevant wrongdoing” includes the following matters:

- the commission, or likely commission, of a criminal offence;
- the failure, or likely failure by a person to comply with a legal obligation, other than one arising under the worker’s own contract of employment or other contract for services;
- a miscarriage, or likely miscarriage, of justice;
- a threat to the health and safety of an individual;
- the unlawful, or otherwise improper use of funds;
- actual or potential environmental damage;
- an act or omission by a public body which is oppressive, discriminatory, or grossly negligent; and
- the concealment or destruction of any information relating to any of the foregoing.

PROTECTIONS FOR A WHISTLEBLOWER

The Act provides a worker (whistleblower) who makes a protected disclosure with six specific protections in respect of it:

1. protection against dismissal;
2. protection from penalisation and civil immunity from actions for damages by the employer;
3. civil immunity from actions for damages and a qualified privilege under defamation law;

4. the right to take legal proceedings against the perpetrator where the whistleblower, or a member of his/her family, is the victim of coercion, intimidation, harassment or discrimination;
5. the imposition of an obligation on the party to whom the protected disclosure is made to take all reasonable steps to ensure the identity of the whistleblower is not revealed; and
6. immunity from criminal liability for making a protected disclosure.

These six protections will still be available to the whistleblower where, on examination, the information disclosed does not in fact reveal actual wrongdoing. Deliberate false reporting which does not meet a “reasonable belief standard” will not be protected.

CHANNELS OF DISCLOSURE

The five channels through which a worker can make a protected disclosure are:

1. to his/her employer where he/she reasonably believes that the information shows, or tends to show, wrongdoing; or if a worker reasonably believes that the wrongdoing relates to the misconduct of some person other than his/her employer, or to something for which some other person has legal responsibility, then the disclosure can be made to that person;
2. to a list of persons prescribed by the Minister with responsibilities defined by law who are, in the opinion of the Minister, appropriate to receive and investigate whistleblowing matters. Provided that where a worker elects to make a disclosure to a prescribed person, he/she must reasonably believe that the content of his/her disclosure is substantially true;
3. in the case of a public sector worker, to the relevant Government Department;
4. in order to obtain legal advice, to a solicitor, barrister, or trade union; and
5. to third parties, including the media, where the worker:
 - reasonably believes that the content of his/her disclosure is substantially true;
 - is not making the disclosure for the purpose of personal gain;
 - and the making of the disclosure must for all intents and purposes be reasonable, provided that one of the following conditions must also be met:
 - the worker must reasonably believe at the time of making the disclosure, that were the disclosure made to his/her employer, he/she would be penalised, or suffer some detriment;
 - where there is no prescribed person (see number 2 above) to whom the disclosure should be made, it is reasonable for the worker to believe that evidence pertaining to the disclosure will be destroyed or concealed, were the disclosure made to his/her employer;
 - the worker has previously made a disclosure of similar wrongdoing to his/her employer, which was either ignored or was not acted upon; and
 - the relevant wrongdoing is of an exceptionally serious nature.

MOTIVE FOR DISCLOSURE IRRELEVANT

The motive for making the disclosure will be irrelevant once the basis for making a disclosure is reasonable belief. Good faith is not an issue under the Act. The reason for this is that the element of good faith which was a requirement under UK Whistleblowing legislation, proved to be a significant impediment to the effective working of the legislation.

REMEDY FOR UNFAIR DISMISSAL OF A WHISTLEBLOWER

The court can award compensation of up to five years remuneration against an employer in an unfair dismissals case where the reason for dismissal was the making of a protected disclosure. Furthermore, a worker is not obliged to have completed even one year's continuous employment in order to avail of this remedy (which is usually required under Unfair Dismissals legislation). The Act provides for the reduction of compensation payable under the legislation by up to 50% where the primary motive for the making of the disclosure was not the investigation of the relevant wrongdoing.

In addition, an employee who claims to have been dismissed by his/her employer wholly or mainly for having made a protected disclosure may apply to the Circuit Court for interim relief. The Court can make an order directing the reinstatement or reengagement of the employee if it comes to the conclusion that the dismissal resulted from the making of a protected disclosure.

NO CONTRACTING OUT

Any attempt to limit or exclude the operation of the Act through contractual terms will be void.

ADVANTAGES AND DISADVANTAGES OF THE ACT

Advantages

It is generally to the advantage of an enterprise that wrongdoing for which it may be responsible or with which it may be associated is brought at the earliest opportunity to the attention of the persons most appropriate to take remedial action.

At present, the channels in an enterprise through which a worker can report wrongdoing are often weak and he/she may risk serious loss if he/she speaks out. The Act encourages public bodies and private enterprises to ensure that robust channels of communication exist to provide workers with a safe and discreet method through which organisational wrongdoing can be reported.

A conscientious worker will be able to report wrongdoing confidentially through the protected channels, safe in the knowledge that he/she will be protected against victimisation arising from the reporting of the wrongdoing.

An important amendment from the Bill stage is that the Minister may give guidelines for public bodies to assist them regarding the procedures to be adopted and maintained. Furthermore, every public body must publish an annual report containing information about protected disclosures dealt with during the year.

Disadvantages

Establishing effective whistleblowing policies and procedures may entail additional costs to an employer. The Act contains no statutory sanctions against a private employer who fails to implement whistleblowing policies and procedures.

REQUIRED ACTION

Public bodies

Under the Act, a public body must establish and maintain policies and procedures for dealing with protected disclosures by its workers, and inform workers in writing of those procedures and issue an annual report in anonymised form on whistleblower incidents.

Private enterprises

The Act does not specifically oblige a private enterprise to set up such policies and procedures, or inform its workers accordingly. But in order to deal with whistleblower responsibility, it will be necessary for private enterprises to adopt similar policies and procedures. This will involve the establishment of appropriate structures, the preparation of staff guidelines and the training of staff.

CONTACT INFORMATION

For further information, including assistance on drafting whistleblower procedures, please do not hesitate to contact us.



URSULA TIPP

Partner

Tel: +353 1 254 3432

M: +353 86 1703405

utipp@tipp-mcknight.com

MICHAEL O'CONNOR

Partner

Tel: +353 1 254 3432

M: +353 86 8592838

moconnor@tipp-mcknight.com

DISCLAIMER

The above is intended as a general guide to the law only. It is not intended as a full statement of the law on any point. Before taking action in relation to any matter, full professional advice should be obtained.