MAPLES GROUP

UPDATE

Protected Disclosures: Update for Employers in Ireland

Clarke V. CGI Food Services Limited and CGI Holding Limited

The recent High Court decision of *John Clarke v. CGI Food Services Limited and CGI Holding Limited [2020] IEHC 368* demonstrates the broad scope of the definition of 'protected disclosures' under the Protected Disclosures Act 2014 (the "2014 Act").

The case highlights the importance of:

- vigilance on the part of employers when addressing employees' complaints no matter how innocuous or unconvincing they may seem; and
- the importance of considering whether any complaint may be a protected disclosure such that caution needs to be exercised to protect the employee against retaliation.

The court provided clarity on the interpretation of section 5(5) of the 2014 Act ("Section 5(5)"). A matter will not be considered to be a protected disclosure where it is the function of the employee to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer. The court highlighted the importance of the wrongdoing on the part of the employer to this exemption. Where a person such as a group financial controller discovers fraud or wrongdoing by the employer, which is a relevant wrongdoing and is capable of being a protected disclosure.

The decision reminds employers to exercise caution when initiating performance improvement processes where an employee has made complaints of wrongdoing. Employers should ensure that any such processes are separate and distinct from employees' complaints. Employers should assess whether the complaints made on behalf of the employee may constitute a protected disclosure and take appropriate steps to protect the employee from retaliation or penalisation. Even where an employee does not expressly refer to a protected disclosure or the 2014 Act, they may fall within the protective scope of the 2014 Act.

Background

As outlined above, the plaintiff employee (former Financial Controller in CGI) was dismissed for performance reasons in May, 2019. He challenged that dismissal through the Workplace Relations Commission ("WRC") process as an unfair dismissal and simultaneously, he commenced Circuit Court proceedings seeking the continuation of his contract of employment. On 25 July 2019, Justice Hutton granted a stay pending the hearing of the plaintiff's application to the WRC. Due to delays and more recently COVID-19 related delays, his case remained part heard before the WRC and has not concluded.

The employer appealed the Order of the Circuit Court which maintained the employee's pay and benefits pending the outcome of the WRC unfair dismissal process. The employer failed in

its appeal and the High Court confirmed the Circuit Court Order to continue pay and benefits to the former employee. While the plaintiff employee has secured an interim order under the 2014 Act from the Circuit Court, the final determination of the claim before the WRC remains to be heard.

The High Court decision of Justice Richard Humphreys delivered on 31 July last, addressed a number of key points in respect of the 2014 Act and provides useful guidance in terms of the scope of what types of complaints may be considered to be protected disclosures.

What is a Protected Disclosure?

The Court noted that the disclosures made by the plaintiff related to various matters of concern primarily under the headings of food safety and financial regularities and considered whether the complaints could be categorised as protected disclosures.

The 'wrongdoings' which were reported by the plaintiff to his former employer included:

- The incorrect storage of frozen foods to be consumed by children;
- Incorrectly claiming VAT on personal expenses;
- Irregular invoicing; and
- Use of company monies and company credit cards for personal expenses by directors of the business.

The Court accepted that the above were capable of being protected disclosures. The Court also found that the allegations were based on 'information' rather than 'allegations' and as such qualified as protected disclosures. The Court referred to the decision of *Baranya v. Rosderra Irish Meats Group Ltd [2020] IEHC 56* which demonstrated that a court will not fill in the gaps for a complainant if they communicate something to a relevant individual in a workplace but do not actually make a clear allegation of an act/omission of wrongdoing on the part of the employer. In this instance, the Court held that the employee's complaints were sufficiently informational and specific in nature to constitute protected disclosures. They were not *"merely allegations unharnessed from any factual point"* which might not constitute protected disclosures.

It is also clear that the definition of protected disclosure is very broad and encompasses anything from health and safety breaches to financial irregularity. It also can include complaints where the employee turns out to be incorrect in his suspicion of wrong doing.

What Happens where it is the Employee's Function to Detect or Investigate Wrongdoing? Can They Make a Protected Disclosure?

As outlined above, while a carve out is provided under Section 5(5) where it is an employee's function to detect, investigate or prosecute, this exemption only applies where the matter does not consist of or involve an act or omission on the part of the employer.

Justice Humphreys examined the employer's interpretation of Section 5(5) and held that the employer had incorrectly interpreted the section as they had held that the matter was not a protected disclosure solely based on the fact that the matter was within the function of the plaintiff to detect or investigate. He noted that *"where a person such as a group financial controller discovers fraud or wrongdoing by the employer, that is a relevant wrongdoing; and drawing attention to that is making a protected disclosure".*

Does the Employee have to Formally Make a Protected Disclosure?

The fact that the plaintiff did not formally characterise the complaints as protected disclosure was not a bar to the employee later doing so. The High Court noted that employees do not have to take a 'statutory' approach when dealing with a performance management process or raising allegations of wrongdoing.

Employers must be vigilant for complaints that seem routine but which could be protected disclosures. Employers should respond appropriately to all employee complaints, no matter how dubious they may seem.

What Did the Court Say About 'Penalisation'?

The Court examined whether or not the performance issues were an attempt to *"dress up the dismissal as a performance related dismissal"* and held that there were substantial grounds that the employee was penalised by means of a sham performance improvement policy and ultimately dismissal. The Court had regard to a number of factors which it held supported the argument that the performance issue may have been 'a device' including the fact that the process became 'relentless' with monthly meetings. The Court also appeared to be critical of the fact that the process only emerged after the employee started to ask 'awkward questions' and highlighted the fact that the employee was summarily dismissed as if guilty of gross misconduct with no oral, written or final written warning.

The Court therefore refused the employer's appeal of the Order of the Circuit Court for continuing pay and benefits for the employee pending the outcome of the WRC appeal and upheld the order.

It is important to note this is an interim judgement in the context of the wider proceedings and the matter still needs to be resolved before the WRC.

What Else is Noteworthy?

Interestingly, despite the fact that this was an examination of the Interim Order, the Court directed that the information which was the subject of the protected disclosures be sent to the Revenue Commissioners and the Department of Agriculture, Food and Marine for whatever investigations which they consider appropriate to be conducted.

Key Takeaway Points for Employers

- The financial repercussions in this case are very significant for the employer as the employer must now continue to pay the former employee pending the resolution of this matter before the WRC.

- Further to this, if the employee ultimately succeeds before the WRC, he could then recover up to five years' remuneration in compensation for the retaliatory dismissal which can result in a significant financial burden on an employer where a senior finance or compliance employee is involved.

- An employee does not need to expressly state that they are making a protected disclosure when making the complaint and it may well be the case that an employee does not expressly refer to the 2014 Act until he/she is alleging that they have been penalised.

- Employers therefore need to be extra vigilant when dealing with complaints from employees. It is important to note how broad the definition of a protected disclosure is and respond to any complaints raised in an appropriate manner.

- Employers should also be very careful when initiating a performance improvement plan where employees have recently made any complaints which could be considered to be protected disclosures. In such instances, employers should ensure that they have evidence of the performance issues to date and should demonstrate a clear objective in initiating the process which is separate and distinct from any of the complaints raised by the employee.

- This decision serves as a timely reminder that all employers should have a clear Protected Disclosures/Whistleblowing Policy in place and this policy should be readily available to all employees.

Further Information

If you would like further information, please contact one of the below contacts or your usual Maples Group contact.

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