

Employment Update: The Perils of Protected Disclosures

Case Law Review: Cullen -v- Kiltarnan Cemetery Park Limited¹

On 16 July 2020, the Circuit Court handed down a seminal decision, which sets out the factors the Court will consider for granting an extension of time beyond the 21 days when seeking interim relief under the Protected Disclosures Act 2014 (the “2014 Act”).

In this case, Justice O’Connor dismissed the claim for interim relief under the 2014 Act on the grounds that the delay in bringing the claim was deemed excessive and as a result, had failed to establish 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.

Background

Cullen, (the “Applicant”) had commenced employment as General Manager of Kiltarnan Cemetery Park Limited (the “Respondent”) in January 2016. Following a period of absence due to illness, the Applicant’s doctor advised that he return to work on a phased basis, however the parties were unable to agree on a working time frame. In November 2019, the Applicant requested that the Respondent consider offering him an exit package and the parties engaged in discussions.

On 2 December 2019, the parties had a meeting to discuss the exit package. At this meeting, the Applicant stated that he brought to the Respondent’s attention, concerns he had regarding what he believed were irregularities concerning the planning status of the area in the Respondent’s cemetery.

Over a month later, the Applicant was informed that his role was at risk of redundancy. The Applicant subsequently submitted a written protected disclosure regarding a suspected planning irregularity concerning the cemetery managed by the Respondent. On 3 February 2020, the Applicant’s redundancy was confirmed. The Applicant submitted that it was reasonable to conclude that the decision to dismiss the him was “*inextricably linked to his raising of the issues relating to the planning permission of the cemetery.*” This was denied in full by the Respondent, citing a range of cost-cutting initiatives.

On 14 May 2020, approximately three and a half months after his dismissal, the Applicant brought a claim to the Circuit Court under the 2014 Act requesting the following reliefs:

- An order extending the time for making his application for interim relief; and
- A declaration that the Applicant’s contract of employment with the Respondent would continue in force pending the resolution and/or conclusion of the Applicant’s claim against the Respondent pursuant to the Unfair Dismissals Acts 1977-2015 (the “2015 Act”).

Decision of the Circuit Court

Application for extending the 21-day time limit

The 2014 Act states that the Circuit Court shall not entertain an application for interim relief unless it is presented to the Court before the end of the period of 21 days immediately following the date of dismissal (whether before, on or after that date) or such longer period as the Court may allow.

In requesting an extension of the 21-day time limit, the Applicant argued that his application was delayed as he was awaiting the outcome of his application for new employment. In this regard, he submitted it would have been inappropriate for him to have applied to the Court for interim relief while an application for alternative employment was pending. He contended as it was his duty to mitigate his loss by seeking alternative employment under the 2015 Act, it would have been an abuse of process to request the Court to continue his contract of employment with the Respondent when he was employed by another employer.

The Applicant further argued that as he was awaiting the outcome of the Respondent’s Appeal Process in relation to his termination of employment, he wanted to ascertain the outcome of the internal appeal process before embarking

¹ [2020] IECC 2, [available here](#).

on an application for interim relief to the Court. In this regard, he stated that it would be fair and just for the Court to extend the time to commence the 21-day period at the date that the internal appeal process was terminated.

Justice O'Connor stated that each case is to be considered on its own facts, with the objective test *"to be judged by what is fair and reasonable considering all the circumstances of the case."* In this regard, the Court set out a non-exhaustive list of factors which may require careful consideration in deciding whether to extend the time for bringing an application for interim relief: -

- (i) *"The nature of the disclosure;*
- (ii) *The nature of the dismissal;*
- (iii) *The length of time involved since the expiration of the 21 days;*
- (iv) *The capacity and ability of the applicant to process an application to the court;*
- (v) *The nature of the employer and employee relationship;*
- (vi) *The extent of legal advice afforded to an applicant;*
- (vii) *The extent to which the applicant may be able to explain the delay;*
- (viii) *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;*
- (ix) *The prejudice that any party might suffer by reason of the delay in making the application; and*
- (x) *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."*

Taking the above factors into account, the Court refused to accept the Applicant's reasons for the delay as objective reasons for granting an extension of time for interim relief, describing the delay as *"excessive"*.

The Court further noted that as the Applicant had engaged solicitors for a period of 18 months prior to his dismissal, he should have been aware of the law and hence the reasons provided were not sufficient for the Court to grant an extension of time. In this regard, the Court stated that the Applicant attempted to *"use the protected disclosure as a sword of Damocles over his employer to enhance his negotiating stance with his former employer. He was entitled to do so. However, it is not a good reason as to why this court should grant an extension of time."*

Application for Interim Relief

Regarding the alleged protected disclosure, the Court held that the information disclosed by the Applicant did not amount to a relevant wrongdoing. In this regard, Mr. Justice O'Connor stated that the *"nature of the disclosure was one in which he, in his role as General Manager should have taken active steps to address when in his employment, if he felt it was a genuine cause for concern."* In this regard, Section 5 of the 2014 Act states: *"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."*

Finally, Justice O'Connor held that the Applicant 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.

Key Considerations

This case serves as a stark reminder on the strict time limits that employees must meet when seeking interim relief under the 2014 Act. While an employee retains the right to use a protected disclosure to negotiate a more favourable exit package, if used precariously, it may result in diminishing or in this case, eliminating the prospect of successfully making such a claim.

A further noteworthy point in this case was the reference by the parties to *"without prejudice"* discussions. While the financial details of the exit package were not disclosed in the written judgement, it may be argued that a reference to the existence of such discussions may be permitted in subsequent legal proceedings where they can be said to have a significant bearing on the facts of the dispute. As such, caution should be exercised when deciding to engage in without prejudice discussions. Optically, the credibility of a redundancy may be called into question where it comes to light that the parties engaged in without prejudice discussions a short period prior to the redundancy.

For advice on how to manage a protected disclosure in the workplace, please contact Bláthnaid Evans or Sheila Spokes of our Employment & Corporate Immigration team on +353 1 639 3000 or visit www.leman.ie.