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“BRIGHT: Building Resilience through Integrity, Good Governance, and Honesty Training”

Handbook on Whistleblowing Jurisprudence

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Summary:

Over the past two decades, whistleblowing has moved from a principally human-rights-based doctrine under Article 10 ECHR to a dual-layer European framework combining (i) the Strasbourg proportionality model and (ii) the EU’s legislative regime under Directive (EU) 2019/1937. The result is a rapidly expanding jurisprudence that is simultaneously constitutional, procedural, and deeply practical: it defines who is protected, under what conditions, and with what remedies when retaliation occurs. This Handbook offers both doctrinal analysis and practical guidance, situating whistleblowing jurisprudence within the broader framework of European rule of law and democratic accountability.

At EU level, infringement proceedings confirm that Member States are under a binding obligation to transpose and implement the Directive effectively. Financial sanctions for non-compliance demonstrate that whistleblower protection is treated as part of the structural integrity of the EU legal order. Emerging preliminary references indicate that the next phase of jurisprudence will clarify key concepts such as reasonable belief, professional privilege, liability for false reporting, proportionality of sanctions, and the relationship between whistleblowing and anti-SLAPP protections. Case law within EU institutions further shows that whistleblower protection extends beyond national employment contexts.

At Strasbourg level, the ECtHR established a proportionality-based framework in *Guja v Moldova*, balancing public interest disclosures against duties of loyalty and confidentiality. In *Halet v Luxembourg*, the Grand Chamber reaffirmed the importance of public interest and recognised the chilling effect of criminal sanctions. However, the Court retained its balancing methodology, creating a dual European system: a Convention model grounded in proportionality and a Directive-based model grounded in statutory criteria and procedural safeguards.

National implementation illustrates both innovation and tension. The Irish experience highlights strong interim relief mechanisms but also reveals challenges concerning burden of proof, interpersonal grievance exclusions, and the absence of a clear public interest test.

Overall, whistleblowing jurisprudence is emerging as a central component of European rule of law and accountability.

Introduction

The protection of whistleblowers has undergone a profound transformation in European law over the past two decades. What began as a jurisprudential development rooted in freedom of expression under Article 10 of the European Convention on Human Rights has evolved into a comprehensive legislative framework at Union level through Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. This Handbook on Whistleblowing Jurisprudence situates that transformation within the case law of the Court of Justice of the European Union (CJEU), the General Court, the European Court of Human Rights (ECtHR), and selected national courts, offering a structured and critical analysis of how whistleblower protection is being shaped through adjudication.

The jurisprudence on whistleblowing now operates across multiple legal planes. At Union level, infringement proceedings such as *Commission v Germany*, *Commission v Luxembourg*, *Commission v Poland*, *Commission v Hungary*, *Commission v Czech Republic*, and *Commission v Estonia* confirm that the timely and effective transposition of Directive 2019/1937 is not. These cases demonstrate the Court's willingness to deploy Article 258 and Article 260(3) TFEU to ensure compliance, including the imposition of lump sums and penalty payments. They underscore that whistleblower protection forms part of the structural integrity of the Union legal order. Alongside infringement actions, preliminary rulings are beginning to give substantive shape to the Directive's provisions. Questions referred in cases such as *Instituut voor bedrijfsjuristen* and *Himov* concern the scope of professional privilege, the conditions for protection, liability for false reporting, proportionality of penalties, the presumption of innocence, and the interaction between whistleblower protection and anti-SLAPP mechanisms. These references reveal emerging doctrinal tensions: between confidentiality and transparency; between good faith and reasonable belief; between national procedural autonomy and the Directive's harmonising aims; and between whistleblower protection and the safeguarding of reputational and commercial interests.

The General Court's judgment in *TU v European Parliament* further illustrates that whistleblowing jurisprudence extends into the EU civil service context, engaging Articles 22a–22c of the Staff Regulations and raising questions of confidentiality, protective measures, and non-material damage. Pending litigation, including actions invoking both the Staff Regulations and Directive 2019/1937, indicates that the institutional dimension of whistleblower protection will remain an area of legal development.

This Union-level jurisprudence exists in parallel with, and in dialogue with, the long-standing case law of the ECtHR. Beginning with *Guja v Moldova*, the Strasbourg Court developed a proportionality-based test balancing freedom of expression with duties of loyalty and confidentiality. That framework was refined in *Halet v Luxembourg*, where the Grand Chamber emphasised the public interest in disclosures relating to multinational tax practices and recalibrated the assessment of harm and good faith. Notably, while the Directive does not replicate the ECtHR's balancing of employer harm, the two systems now coexist, creating a layered European architecture of protection. The interaction between Directive-based protection and Article 10 ECHR jurisprudence represents one of the central analytical themes of this Handbook.

The jurisprudence also intersects with adjacent regulatory fields. Cases arising from leniency programmes in competition law—such as *DHL Express*, *FSL Holdings*, and *Bavaria v Commission*—illustrate how courts assess credibility, corroboration, and incentives for reporting wrongdoing in cartel enforcement contexts. While doctrinally distinct from public-interest whistleblowing, these decisions illuminate judicial approaches to evidentiary reliability, immunity expectations, and the risks of inaccurate disclosures. Similarly, the evolving relationship between whistleblowing and market abuse rules, including journalistic disclosure exceptions, signals broader systemic questions concerning transparency and accountability.

At national level, the implementation of Directive 2019/1937 reveals both innovation and contestation. The Irish experience, examined in this Handbook as a detailed case study, demonstrates how interim relief, penalisation claims, interpersonal grievance exclusions, and the absence of an explicit public interest test generate complex doctrinal and procedural questions. Judicial interpretation of interim relief standards, the allocation of the burden of proof, and the distinction between personal grievance and protected disclosure illustrates how domestic courts act as frontline interpreters of European norms. The Irish jurisprudence further highlights the tension between legislative intent and judicial application, particularly where transposition choices narrow or reconfigure the scope of protection.

This Handbook pursues three principal objectives. First, it documents systematically the developing body of whistleblowing case law. Second, it offers doctrinal analysis. Particular attention is paid to concepts central to the Directive: reasonable belief, good faith, proportionality of sanctions, the reversal of the burden of proof, interim measures, and the prevention of chilling effects. Where national courts diverge or misapply standards, this Handbook identifies those developments and situates them within the broader Union framework. Third, it reflects on the constitutional and normative implications of whistleblowing jurisprudence. Whistleblower protection is not merely an employment law mechanism. It is an instrument of democratic accountability, regulatory enforcement, and the rule of law. By safeguarding those who disclose breaches of Union law, the legal system recognises the epistemic contribution of individuals within organisations to the maintenance of legality and integrity. The courts play a decisive role in ensuring that this recognition is effective in practice.

The jurisprudence analysed in this Handbook demonstrates that whistleblowing law in Europe is no longer embryonic. It is an evolving and increasingly sophisticated field of Union and Convention law, characterised by cross-level interaction, doctrinal refinement, and institutional enforcement. As preliminary references accumulate and national courts engage more deeply with Directive 2019/1937, further clarification will emerge—particularly concerning interim relief, proportionality of penalties, professional secrecy, and the scope of protection in complex organisational settings.

This Handbook is therefore both descriptive and forward-looking. It captures the state of the law as it stands, while recognising that whistleblowing jurisprudence is entering a new phase one in which the CJEU, the General Court, the ECtHR, and national courts collectively shape a coherent, though not yet fully harmonised, European framework of protection. In doing so, it contributes to the consolidation of whistleblower protection as a central component of the European legal order.

Court of Justice of the European Union

Cases Directly Concerning Whistleblowing

A. Directive-Based Infringement Proceedings

The first wave of CJEU case law directly concerning whistleblowing arises from infringement proceedings brought by the European Commission for failure to transpose Directive (EU) 2019/1937. These judgments are constitutional in character: they confirm that whistleblower protection is not merely a policy objective but a binding legal obligation forming part of the structural architecture of Union law.

C-147/23 – Commission v Poland

Judgment of 25 April 2024 (First Chamber)

This was the first judgment in the series of infringement proceedings concerning the Whistleblowing Directive. The Commission brought proceedings under Article 258 TFEU alleging that Poland had failed to transpose and notify the national measures implementing Directive 2019/1937 within the prescribed deadline.

The Court confirmed that Poland had failed to fulfil its obligations under Article 26(1) and (3) of the Directive, which require Member States not only to adopt but also to communicate transposition measures to the Commission. Importantly, the Commission also sought financial penalties under Article 260(3) TFEU, which allows the Court to impose lump sums and daily penalties where a Member State fails to notify transposition measures for a directive adopted under a legislative procedure.

The Court clarified the criteria for calculating penalties. It reaffirmed that the seriousness and duration of the infringement, as well as the Member State's ability to pay, are central factors. In doing so, it applied an "automatic coefficient for seriousness" and considered demographic criteria in assessing Poland's capacity to pay.

Significance.

This judgment established the enforcement baseline for the Directive. It signalled that delays in transposition would attract tangible financial consequences and that whistleblower protection is treated with the same constitutional seriousness as other internal market or regulatory obligations.

C-149/23 – Commission v Germany

Judgment of 6 March 2025 (Sixth Chamber)

In this case, the Commission argued that Germany had failed to fully transpose and notify the measures required by Directive 2019/1937. Germany did not dispute that implementation was incomplete at the expiry of the deadline.

The Court reaffirmed the principles articulated in *Commission v Poland* and confirmed that failure to communicate national measures constitutes an autonomous infringement under Article 260(3) TFEU. It endorsed the methodology used by the Commission to calculate the lump sum, including the automatic application of a seriousness coefficient.

Significance.

The judgment reinforces uniformity in enforcement and confirms that even large and legally sophisticated Member States are subject to strict scrutiny regarding Directive compliance. It consolidates a line of case law treating whistleblower protection as a mandatory and enforceable element of Union governance.

C-150/23 – Commission v Luxembourg

Judgment of 6 March 2025 (Sixth Chamber)

Luxembourg similarly failed to transpose the Directive within the required timeframe. The Court confirmed the infringement and imposed a lump sum penalty.

The judgment reiterates the structured methodology for financial sanctions: seriousness, duration, and deterrence are balanced against the Member State’s economic weight. The Court again applied a seriousness coefficient automatically, emphasising that non-transposition of a directive intended to protect public interest disclosures undermines Union objectives.

Significance.

This decision consolidates the Commission’s enforcement strategy and confirms that smaller Member States are equally subject to financial sanctions. It strengthens the Directive’s normative authority.

C-155/23 – Commission v Hungary

Judgment of 6 March 2025 (Sixth Chamber)

Hungary’s delayed transposition led to infringement proceedings under Articles 258 and 260(3) TFEU. The Court found that Hungary had failed to adopt and communicate the necessary measures and imposed a lump sum penalty.

Significance.

The judgment confirms the Court’s uniform approach across Member States. It also reinforces the idea that whistleblower protection is integral to safeguarding compliance with EU law across sensitive areas such as corruption, public procurement, and financial regulation.

C-152/23 – Commission v Czech Republic

Judgment of 6 March 2025 (Sixth Chamber)

The Czech Republic was found to have failed to communicate its transposition measures. The Court imposed a lump sum penalty consistent with the methodology used in the parallel cases.

Significance.

This judgment further confirms the consolidated enforcement line. The Court's consistent reasoning across these cases establishes a jurisprudential template for future transposition failures.

C-154/23 – Commission v Estonia

Judgment of 6 March 2025 (Sixth Chamber)

Estonia's case differed slightly in that the Commission sought both a lump sum and a daily penalty payment. The Court confirmed the infringement and imposed sanctions reflecting both seriousness and duration.

Significance.

This case illustrates the Court's willingness to calibrate sanctions where delays are prolonged or particularly significant. It underscores that whistleblower protection is not optional or aspirational but enforceable in financial terms.

B. Preliminary Rulings

Beyond transposition, the Directive is beginning to generate substantive interpretative questions.

C-796/24 – Instituut voor bedrijfsjuristen (Pending)

This reference concerns the interpretation of Article 3(3)(b) of Directive 2019/1937, which states that the Directive is without prejudice to the protection of legal professional privilege.

The referring court asks whether Member States must exclude from protection only information covered by legal professional privilege, or whether they may also exclude information subject to confidentiality obligations of other legal professions. It further asks whether limiting privilege protection to lawyers infringes fundamental rights under the Charter.

Significance.

This case addresses the delicate balance between whistleblower protection and professional secrecy. It may clarify whether the Directive mandates a strict hierarchy privileging lawyers or whether Member States retain discretion to extend confidentiality protections to other regulated professions. It also opens a Charter-based equality analysis.

C-114/25 – Himov

This reference raises numerous interpretative questions concerning Articles 15, 21, 22, and 23 of the Directive and their interaction with Directive 2024/1069 (anti-SLAPP measures).

The questions concern:

- Whether protection requires both internal and external reporting;
- The meaning of “no appropriate action”;
- Liability standards for reporting persons;
- The meaning of “reasonable grounds”;
- The presumption of innocence;
- Cost allocation and proportionality;
- Interaction between whistleblower protection and anti-SLAPP safeguards.

The Court indicated manifest inadmissibility due to insufficient information, but the questions themselves highlight doctrinal tensions.

Significance.

The case reveals the emerging intersection between whistleblower protection and anti-SLAPP mechanisms, as well as the centrality of “reasonable belief” and proportionality in liability assessment.

C-797/24 – Čurilla

Order of 18 November 2025

This case concerned Articles 20 and 21 of the Directive, specifically whether national competent authorities must be admitted to judicial proceedings involving whistleblowers as part of support measures.

The Court ultimately declared that there was no need to adjudicate, as the reference had become devoid of purpose following withdrawal of the authority’s application.

Significance.

Although procedurally resolved, the case highlights the institutional dimension of the Directive: support mechanisms, participation rights, and the meaning of “as appropriate” under Article 20 remain open questions.

C. EU Civil Service Context

T-793/22 – TU v European Parliament

Judgment of 11 September 2024 (General Court)

This case concerned an accredited parliamentary assistant whose contract was not renewed after disclosures were made under Articles 22a–22c of the Staff Regulations.

The General Court examined:

- The status of informant;
- Protective measures;
- Confidentiality obligations;

- Claims for non-material damage.

The Court analysed whether the non-renewal constituted retaliation and assessed procedural safeguards under the Staff Regulations.

Significance.

The judgment confirms that whistleblower protection operates within EU institutions independently of the Directive. It also illustrates the evidentiary and causation standards applied in retaliation claims within the EU civil service.

T-620/25 – LJ and Others v Eulex Kosovo (Pending)

Applicants challenge termination of fixed-term contracts and allege violations of Articles 22a–22c of the Staff Regulations and Article 4 of Directive 2019/1937.

Significance.

This case may clarify whether and how the Directive applies in EU external missions and the interplay between institutional staff rules and Union whistleblower legislation.

D. Related Jurisprudence – Leniency and Market Abuse

Although not arising under the Whistleblowing Directive, certain competition and market abuse cases provide important insights into judicial treatment of disclosures.

C-428/14 – DHL Express

The Court held that national competition authorities are not bound by the EU leniency programme when designing immunity rules for cartel whistleblowers.

Significance.

The judgment confirms procedural autonomy in enforcement systems and demonstrates that incentives for corporate whistleblowing may vary across levels of governance.

T-655/11 – FSL Holdings

The General Court emphasised that companies seeking immunity must provide accurate and corroborated information. Inaccuracies risk loss of immunity.

Significance.

This case highlights evidentiary credibility and proportionality in assessing whistleblower statements.

T-235/07 – Bavaria v Commission

The General Court held that a whistleblower statement alone is insufficient to establish cartel participation if contested; corroboration is required.

Significance.

The case underscores the evidentiary limits of whistleblower testimony and the need for supporting evidence.

European Court of Human Rights

The jurisprudence of the European Court of Human Rights constitutes the foundational layer of European whistleblower protection. Long before the adoption of Directive (EU) 2019/1937, the Strasbourg Court developed a structured framework for protecting individuals who disclose wrongdoing, grounding such protection in Article 10 ECHR (freedom of expression). The Court's approach has consistently required a balancing exercise between competing interests: the individual's right to impart information on matters of public concern and the State's or employer's interest in confidentiality, loyalty, and institutional integrity.

The leading cases in this development are *Guja v Moldova* and *Halet v Luxembourg*. Together, they define the contours of whistleblower protection under the Convention and illustrate both continuity and tension between Strasbourg jurisprudence and the subsequent EU legislative framework.

Guja v Moldova (Grand Chamber, 12 February 2008, App. No. 14277/04)

Although earlier judgments had touched upon whistleblower-type disclosures, *Guja* is widely regarded as the first case in which the Court clearly articulated a structured test for the protection of whistleblowers under Article 10 ECHR.

Facts

Mr Guja was the Head of the Press Department of the Moldovan Prosecutor General's Office. He disclosed two letters that revealed political interference in criminal proceedings involving police officers. The letters demonstrated that a high-ranking politician had pressured the Prosecutor's Office to discontinue criminal proceedings. Following the disclosure, Mr Guja was dismissed for breaching internal confidentiality obligations.

He argued that his dismissal violated Article 10 ECHR.

Legal reasoning

The Grand Chamber confirmed that civil servants do not lose their right to freedom of expression by virtue of their employment status. However, it recognised that public servants owe duties of loyalty and discretion. The central question was therefore whether the interference with Mr Guja's freedom of expression was "necessary in a democratic society."

In answering this question, the Court formulated a now-canonical six-factor test for assessing whistleblower disclosures:

1. **Availability of alternative channels** – Whether the applicant had alternative internal mechanisms available before resorting to public disclosure.
2. **Public interest in the disclosed information** – Whether the information concerned matters of significant public importance.
3. **Authenticity and accuracy of the information** – Whether the information was reliable and credible.
4. **Damage caused to the employer** – The extent of harm to the institution’s interests.
5. **Good faith of the whistleblower** – Whether the disclosure was motivated by public interest rather than personal grievance.
6. **Severity of the sanction imposed** – Whether the penalty had a chilling effect on freedom of expression.

Applying these criteria, the Court concluded that the interference was disproportionate. The information concerned improper political pressure on the justice system—an issue of the highest public interest. Mr Guja acted in good faith, the information was authentic, and dismissal constituted a severe sanction likely to deter future disclosures.

Significance

Guja established that whistleblower protection is embedded within Article 10 ECHR. It created a balancing model rooted in proportionality analysis. The judgment also confirmed that exposing misconduct within public institutions is integral to democratic accountability.

However, the Guja framework requires a contextual balancing of interests in each case. It does not establish an automatic protection mechanism. This balancing structure would later become central to debates about the relationship between Strasbourg jurisprudence and the EU Directive.

Halet v Luxembourg (Chamber, 11 May 2021, App. No. 21884/18)

The first instance decision in *Halet* arose from the “LuxLeaks” affair. Mr Halet, an employee of PwC Luxembourg, had transmitted confidential tax documents revealing advance tax rulings granted to multinational corporations. He was criminally convicted in Luxembourg for theft and breach of professional secrecy.

He alleged that his conviction violated Article 10 ECHR.

Chamber reasoning

The Chamber accepted that Mr Halet acted as a whistleblower and that his disclosure contributed to a public debate on tax transparency. However, applying the Guja criteria, the Chamber concluded that no violation had occurred.

In particular, it found:

- The documents disclosed added only limited new information beyond what had already been made public by other whistleblowers.

- The disclosure breached professional confidentiality obligations.
- The domestic courts had carefully balanced public interest and employer interests.
- The sanctions imposed fell within the State’s margin of appreciation.

Accordingly, the Chamber held that the conviction was proportionate.

Significance

The Chamber judgment reaffirmed the Guja balancing test and emphasised employer harm and confidentiality duties. It demonstrated the Court’s cautious approach in cases involving private-sector employment and professional secrecy.

However, the judgment attracted criticism for allegedly underestimating the broader public interest in fiscal transparency. The case was referred to the Grand Chamber.

Halet v Luxembourg (Grand Chamber, 14 February 2023, App. No. 21884/18)

The Grand Chamber reversed the earlier decision and found a violation of Article 10.

Legal reasoning

While reaffirming the Guja criteria, the Grand Chamber recalibrated their application.

It emphasised:

- The **high public interest** in the LuxLeaks disclosures, which contributed significantly to European debates on multinational taxation and fiscal justice.
- The applicant’s **good faith** and absence of personal motive.
- The limited effectiveness of alternative reporting channels.
- The **chilling effect** of criminal sanctions on future whistleblowers.

The Court held that Luxembourg’s courts had given excessive weight to employer confidentiality and insufficient weight to the societal importance of the disclosures. The criminal conviction was therefore not “necessary in a democratic society.”

Significance

The Grand Chamber strengthened whistleblower protection under Article 10. It clarified that disclosures contributing to systemic public debate—particularly in matters of economic governance—deserve robust protection.

Importantly, *Halet* was the first major ECtHR whistleblower case decided after the adoption of Directive 2019/1937. The Court referred to the Directive as part of the evolving European legal context, yet it did not fundamentally alter its analytical framework.

Relationship Between Strasbourg Jurisprudence and Directive 2019/1937

The *Halet* judgments highlight a structural distinction between Convention and Union approaches to whistleblower protection.

Under the ECtHR's Guja framework:

- Protection depends on a **case-by-case proportionality balancing**.
- Employer harm and loyalty duties remain relevant considerations.
- The assessment is structured but flexible.

Under Directive 2019/1937:

- Protection is granted where the reporting person had **reasonable grounds to believe** that the information reported was true at the time of reporting (Article 6).
- The Directive does not require balancing employer damage as a precondition for protection.
- It introduces procedural safeguards such as reversal of burden of proof and protection against retaliation.

Two dissenting judges in the Chamber judgment in *Halet* argued that the Court insufficiently integrated the Directive's more protective logic. However, even in the Grand Chamber decision, the Court maintained the Guja balancing approach rather than adopting the Directive's structured criteria.

This results in a dual-layer European system:

- The **Convention layer**, based on proportionality and balancing.
- The **Union layer**, based on statutory criteria and presumptive protection.

The two systems are complementary but not identical. The ECtHR continues to frame whistleblower protection as a freedom of expression issue requiring contextual balancing, whereas the Directive establishes a legislative regime aimed at legal certainty and deterrence of retaliation.

Ireland: Interim Relief, Interpersonal Grievances and the Public Interest Question

The Irish experience provides one of the most detailed illustrations of how Directive (EU) 2019/1937 interacts with an already existing national whistleblowing regime. Ireland was an early legislator in this field through the Protected Disclosures Act 2014. The transposition of the Directive through the Protected Disclosures (Amendment) Act 2022 has therefore not created a regime from scratch but has reshaped and, in certain respects, complicated an already expansive statutory framework.

This section examines three central areas of Irish jurisprudential development: interim relief, interpersonal grievances, and the unresolved question of a public interest test.

Interim relief

EU Law

Article 21(6) of the EU Whistleblowing Directive provides that reporting persons must have ‘access to remedial measures against retaliation as appropriate, including interim relief pending the resolution of legal proceedings, in accordance with national law.’ The value of interim relief protection for whistleblowers is acknowledged by the Directive, as Recital 96 highlights that interim relief should be made available for workers ‘...in order to stop threats, attempts or continuing acts of retaliation, such as harassment or to prevent forms of retaliation, such as dismissal, which might be difficult to reverse after the lapse of lengthy periods and which can ruin the individual financially, a perspective which can seriously discourage potential whistleblowers.’

Irish Law: Interim relief- unfair dismissal

Prior to the transposition of the Directive, s 11(2) of the Protected Disclosures Act 2014 provided that employees who bring a claim for redress for an unfair dismissal may also make an application for interim relief under sch 1.¹ This is the first time that interim relief had been introduced into an employment law statute in Ireland.²

Legal test

The Circuit Court will make an order if, on hearing the employee’s application for interim relief, it appears to the Circuit Court that it is likely that there are substantial grounds for contending that the dismissal results wholly or mainly from the employee having made a protected disclosure.³

Time limits

¹ Protected Disclosures Act 2014, s 11(2); *ibid* sch 1.

² Injunctions in employment disputes have been granted in Ireland since the decision of Mr Justice Costello in *Fennelly v Assicurazioni Generali SpA* [1985] 3 ILTR 73 (HC).

³ Protected Disclosures Act 2014, sch 1, s 2(1).

An employee must present their application for interim relief before the Circuit Court before the end of the period of twenty-one days immediately following the date of dismissal, whether before, on or after that date.⁴

Powers of the court

If the Circuit Court is satisfied that it is likely that there are substantial grounds for contending that the dismissal results wholly or mainly from the employee having made a protected disclosure⁵ it can make an order that, pending the determination or the settlement of the claim, the employee is reinstated⁶ or is re-engaged in another position on terms and conditions not less favourable⁷ than those which would have been applicable to them if they had not been dismissed.⁸ If on hearing the application, the employer fails to attend before the court or states an unwillingness either to reinstate or re-engage the employee, the court must make an order for the continuation of the employee's contract of employment.⁹

Interim relief-Unfair dismissal: Case law example

Background

On the 28 July 2016, the first interim relief order was granted under the 2014 Act in the matter of *Dougan and Clarke v Lifeline Ambulances Ltd*.¹⁰ It was contended by the applicants, Mr Mick Dougan and Mr Seán Clarke, an assistant manager and a director of ambulance operations respectively, that a protected disclosure was made by them to the Office of the Revenue Commissioners ('Revenue') in January 2016, that the respondent had been involved in 'serious wrongdoing'. This serious wrongdoing was alleged to consist of claims that staff of the respondent had been paid mileage expenses in lieu of taxable pay.¹¹ Both applicants had sought an order from the court for reinstatement in the positions from which they had been dismissed pending the determination by the WRC or settlement of their unfair dismissal claims.

Mr Dougan and Mr Clarke alleged that as a result of their disclosure to Revenue they were subjected to bullying and harassment and were made redundant by the respondent. This assertion was rejected by the respondent who argued that their redundancy arose as a result of a decision by the Board, in circumstances where a review into the company was undertaken by an external consultant, at the behest of the respondent. This review ultimately determined in April 2016 that

⁴ Protected Disclosures Act 2014, sch 1, s 1(2).

⁵ PDA 2014, sch 1, s 2(1).

⁶ *ibid* sch 1, s 2(3)(a).

⁷ *ibid* sch 1, s 2(4).

⁸ *ibid* sch 1, ss 2(3) and 2(5)-2(7).

⁹ *ibid* sch 1, s 2(9).

¹⁰ *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC).

¹¹ Paul Cullen, 'Whistleblowers accuse David Hall of 'serious wrongdoing' after whistleblowing' *The Irish Times* (Dublin, 29 July 2016) <www.irishtimes.com/news/crime-and-law/courts/district-court/whistleblowers-accuse-david-hall-of-serious-wrongdoing-1.2738889> accessed 13 March 2019; Paul Cullen, 'David Hall ambulance firm ordered to keep paying whistleblowers' *The Irish Times* (Dublin, 29 July 2016) <www.irishtimes.com/news/crime-and-law/courts/district-court/david-hall-ambulance-firm-ordered-to-keep-paying-whistleblowers-1.2739356> accessed 13 March 2019.

the roles of the applicants and another employee were no longer required on the basis that there was significant duplication between their roles and other roles in the company.

The respondent asserted that the fact that another employee, who co-signed the disclosure to Revenue, had not been selected for redundancy was indicative that the redundancy of the two applicants was based solely on operational grounds. Further, the respondent alleged that the applicants had planned to establish a rival ambulance company. The respondent contended that the sole purpose of the applicants alleged protected disclosure was to protect themselves against the threat to their positions from the management review and to provide a basis for the applicants' legal proceedings brought against the respondent. The respondent argued that it had acted at all times on the advice of the external consultant who carried out the review into the company and on the Managing Director's own understanding of the needs of the company.

Decision of the court

His Honour Judge Comerford held that he could not find that the applicants' dismissal was wholly or mainly due to the protected disclosure they had made to Revenue on the evidence presented to him. However, he held that the applicants did meet the threshold of establishing that there were substantial grounds for contending that their dismissal was wholly or mainly due to the protected disclosure.¹² His Honour Judge Comerford, in determining whether there were substantial grounds, referred to the decision of Carroll J in *McNamara v An Bord Pleanála* (No. 2) [1996] IEHC 60 which concerned a similar formulation of 'substantial grounds' under the Local Government (Planning and Development) Act 1963, where she stated:

In 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. However, I am not concerned with trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial.¹³

In applying this formulation, the Court held that in order for an argument to constitute a 'substantial ground', it must be reasonable, arguable and weighty and must not be a ground which does not stand a chance of being sustained.¹⁴ The Court identified there were likely to be three substantial grounds in this case for contending that the dismissal resulted wholly or mainly from the employees having made a protected disclosure, the first being that there was a connection in time between the protected disclosure (28 January 2016) and the decision to dismiss (10 April 2016); the second being that there were signs of animus flowing from the protected disclosure; and the third being that although there was a recommendation for three posts to be made redundant, only those occupied by the applicants were subject to redundancy.¹⁵

Order made

¹² *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC) 218.

¹³ *ibid* 217.

¹⁴ *ibid*.

¹⁵ *ibid* 215-216.

The respondent refused to reinstate the two applicants in the positions from which they had been dismissed but offered re-engagement to both. Mr Clarke, who had been a director of ambulance operations with the respondent, was offered re-engagement working as a paramedic on the respondent's ambulances, which he refused on the grounds that he had not worked as a full-time paramedic for fourteen years, he would have to be retrained, and that he would be supervised by persons that he had previously managed.¹⁶ Mr Dougan, who had been an assistant manager with the respondent, was offered re-engagement on 'gardening leave',¹⁷ which was described by the respondent as being a 'zero hours contract with 40 hours pay'.¹⁸ His Honour Judge Comerford held that the rejection of the offer of re-engagement by Mr Clarke was reasonable and that although the offer to Mr Dougan did not require a response, if it did require one, a refusal would also be reasonable.¹⁹ It is clear that the rationale behind His Honour Judge Comerford's acceptance of the applicants' rejection for re-engagement was based on the view that the offers made by the respondent were in contravention of sch 1, s 2(3)(b) of the 2014 Act which provides that the terms and conditions of the position offered in re-engagement must not be less favourable than those which would have been applicable to the employee if he or she had not been dismissed. His Honour Judge Comerford made an order for the continuation of the applicants' contracts of employment from the date of termination until the determination or settlement of the dispute for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and also for the purposes of determining the period of reckonable employment.²⁰

Significance

This case was the first successful interim relief claim under the Act. It demonstrated the extent of the powers of the court in such applications. It also determined the test for 'substantial grounds' in the context of the 2014 Act and it made it clear that the court must not make a final determination of the issues at this stage.²¹ The court established that in such applications, it must first identify the grounds which the applicant could rely upon to contend that the cause of the dismissal was the making of a protected disclosure;²² secondly, decide if those grounds are substantial;²³ thirdly, consider the test of 'likely', meaning that the court must be satisfied that it is more likely than not that there are substantial grounds;²⁴ and fourthly, the court must consider those grounds in the overall context of the case and not in isolation.²⁵

Irish Law: Interim relief- Penalisation

Since the transposition of the EU Whistleblowing Directive, interim relief applications have been extended to penalisation claims, other than unfair dismissal.

Legal test

¹⁶ *ibid* 219.

¹⁷ *ibid*.

¹⁸ 'Hall's ambulance company ordered to continue paying whistleblowers' *The Irish Times* (Dublin, 30 July 2016) 4.

¹⁹ *Dougan and Clarke v Lifeline Ambulances Ltd* [2018] 29 ELR 210 (CC) 219.

²⁰ *ibid*.

²¹ *ibid* 213-214.

²² *ibid* 214.

²³ *ibid*.

²⁴ *ibid* 215.

²⁵ *ibid* 217.

Section 12(7A) provides that the test for an interim relief penalisation claim is whether the employee suffered penalisation ‘wholly or mainly’ for having made a protected disclosure.

Time limits

The application must be made within 21 days immediately following the date of the last instance of penalisation or such longer period granted by the Court.

Powers of the court

Unlike an application for interim relief for unfair dismissal, there is no Schedule to the Act detailing the requirements for making the application and the powers of the Court in such an application.

Interim relief-penalisation: Case law example

Background

In the decision of *O’Reilly v Commissioner of An Garda Síochána*,²⁶ delivered on 17 November 2025, the applicant herein issued a motion for interim relief before the Circuit Court on 7 April 2025. The applicant alleged that he had been penalised by the respondent for having made a number of protected disclosures. He sought an order from the court directing the respondent to cease penalising the applicant for having made a protected disclosure by refusing to classify his injury as an ‘injury on duty’ pursuant to the Garda Síochána Code 11.37.

The applicant was described by the court as being a ‘highly qualified Garda with over 30 years of extensive experience’ of working for the respondent. It outlined that he had an ‘exemplary work record’ and that he was appointed as Acting Head of the Garda National Technical Bureau (‘GNTB’) in August 2016. The court further acknowledged that he is a ‘genuine person’ and that the court process has been ‘very stressful for both him and his family.’

Protected Disclosures

- The applicant and respondent agreed that the applicant had made the following protected disclosures:
 - 26 June 2020: when he emailed a Detective Inspector at the GNTB raising safety and compliance concerns regarding leather holsters acquired by the respondent and used by members of the respondent whilst on duty.
 - 12 April 2021 when he emailed the Chief Superintendent raising concerns about the investigation and its report into the safety and compliance of the leather holsters.
- The applicant continued to raise concerns about the investigation into the safety and compliance of the holsters throughout 2021 and 2022.
- The applicant alleges that he made further protected disclosure to the respondent in relation to:
 - a potential merger between the GNTB and Forensic Science Ireland,
 - the handling of the ammunition by the respondent

²⁶ *O’Reilly v Commissioner of An Garda Síochána*, Circuit Court, 17 November 2025.

- the storage and handling of firearms
- a failure by the respondent to dispose of evidential items
- the unauthorised retention and/or loss of biometric data
- potential loss/suspension of ISO 17025 accreditation for the GNTB

Penalisation

The applicant contended that as a result of these protected disclosures he was penalised by the respondent by its refusal to classify his injury as an ‘injury on duty’ as opposed to an ‘ordinary illness’ pursuant to the Garda Síochána Code 11.37. It was argued by the applicant that the injuries he sustained were ‘work related’ and therefore, he was entitled to enhanced sick pay under the Code. He alleged that he was aware that others in the same position as him had been granted ‘11.37 status’ outside of the terms of the Code.

The applicant had filed a complaint before the Workplace Relations Commission (‘WRC’) alleging that he had been penalised by the respondent. The WRC hearing had been set down for a five-day hearing on 2 October 2024 but that this was postponed by the then representatives for the applicant for reasons, as accepted by the applicant, as being inaccurate. He argued that as a result of this misclassification and delayed WRC proceedings, he was experiencing ‘severely straitened financial circumstances.’

Respondent’s position

The respondent argued that the penalisation issue should be decided by the WRC and that the Circuit Court should not come to a conclusion on these matters. The respondent further argued that as the WRC proceedings were ‘already long underway’ that there was no basis to grant the interim relief sought. The respondent submitted that it was the applicant who had delayed the WRC hearing and that he was out of time to seek interim relief. The respondent also argued that the applicant had not been penalised and could not therefore meet the statutory test for interim relief.

Decision of the court

The court described the applicant as suffering and continuing to suffer ‘financial hardship by not being on full pay.’ However, the court refused the orders sought by the applicant. The court stated that it had to decide if there had been ‘demonstrated substantial grounds for contending that he was penalised for having made a protected disclosure and I believe this case has not been made out. He has not been dismissed.’ The court placed the burden on the applicant, stating that he ‘must prove some connection between the alleged act of penalisation and the protected disclosure’. The court highlighted that even though the applicant was entitled to disagree with the Chief Medical Officer, this ‘does not give an automatic entitlement to mandatory penalisation.’

In respect to the argument made by the respondent that the applicant was out of time to bring his claim the court accepted this point on the basis that ‘If one takes the 20th January 2025 as the date of refusal to allow enhanced payment, there appears to be approximately a six week delay as opposed to the twenty-one statutory days before the motion was issued on the 7th April 2025.’ Taking this into consideration, and the fact that incorrect reasons had been proffered on behalf of the applicant for the adjournment of the WRC hearing are ‘in itself sufficient additional reasons for denying interim relief.’

Significance

The decision of the court in this case represents a misapplication of the legal tests for an interim relief penalisation claim. Firstly, the court applied the statutory test for an unfair dismissal interim relief claim, that being the ‘substantial grounds’ test as opposed to the ‘wholly or mainly’ test for a penalisation interim relief claim. There is no reference to ‘substantial grounds’ in the relevant section pertaining to penalisation interim relief claims. This test solely arises in sch 1 to the 2014 Act which is titled ‘Interim relief pending determination of claim for unfair dismissal’ and has no applicability to a penalisation interim relief claim. Therefore, the court applied the incorrect test to determine the interim relief application.

Secondly, the court imposed the burden of proof in the penalisation interim relief claim on the applicant. The Protected Disclosures (Amendment) Act 2022 amended the burden of proof in penalisation and detriment claims under the 2014 Act to provide that in any proceedings for penalisation or detriment, it will be deemed that they were as a result a protected disclosure being made, unless the employer or person whom it is alleged to have caused the damage proves that the act or omission concerned was based on ‘duly justified grounds’.²⁷ The shifting of the burden of proof is a welcome amendment as it is easier for an employer to demonstrate and substantiate the reason for any alleged retaliation because this should be something peculiarly within their knowledge. However, the 2014 Act is silent on who bears the burden of proof in interim relief claims.

Article 21(5) of the EU Whistleblowing Directive provides that:

In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.

Thus, based on the reference in the Directive to ‘proceedings’ that relate to a detriment suffered by a reporting person, without qualification as to the nature of the proceedings, the reversal of the burden of proof should apply at both the substantive and interim stages. This reversal of the burden of proof at the interim stage should have been applied to both penalisation and unfair dismissal interim relief applications in order to comply with the articles and the spirit of the Directive.

Another concern with this decision is that the court applied the twenty-one-day time limit for filing the interim relief claim from the date of the refusal to allow the enhanced illness payment instead of applying it from the last instance of penalisation. As the court identified, the applicant ‘suffered and continues to suffer financial hardship by not being on full pay’ and therefore, it can be argued that he is still being penalised at the time of the hearing of the interim relief application and therefore he is in time with his application.

Interpersonal grievances

²⁷ PD(A)A 2022, ss 21 and 22(a), inserting PDA 2014, ss 12(7C) and 13(2B).

EU Law

The only reference in the Directive to ‘interpersonal grievances’ is contained at Recital 22, which provides that ‘Member States could decide to provide that reports concerning interpersonal grievances exclusively affecting the reporting person, namely grievances about interpersonal conflicts between the reporting person and another worker, can be channelled to other procedures.’²⁸

Irish Law-pre transposition of the Directive

The 2014 Act includes a defined list in s 5(3) of what types of wrongdoing qualify as a ‘relevant wrongdoing’. Section 5(3)(b) of the 2014 Act provides that a relevant wrongdoing includes ‘that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker’s contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services.’²⁹ A breach of the worker’s contract of employment was explicitly excluded from the scope of the 2014 Act in an effort to prevent the 2014 Act from being used as an alternative to existing grievance procedures for disputes on employment contracts. However, the Supreme Court noted in *Baranya* (discussed below) that ‘Taken on its own, this might suggest that purely private complaints which are entirely personal to the worker making the complaint fall outside the scope of the Act. But even here the apparent width of the statutory exclusion is deceptive and, at one level, ineffective.’³⁰

Irish Law-post transposition of the Directive

Section 5(5A) of the 2014 Act was inserted by the Protected Disclosures (Amendment) Act 2002 and provides that:

A matter concerning interpersonal grievances exclusively affecting a reporting person, namely, grievances about interpersonal conflicts between the reporting person and another worker, or a matter concerning a complaint by a reporting person to, or about, his or her employer which concerns the worker exclusively, shall not be a relevant wrongdoing for the purposes of this Act and may be dealt with through any agreed procedures applicable to such grievances or complaint to which the reporting person has access or such other procedures, provided in accordance with any rule of law or enactment (other than this Act), to which the reporting person has access.³¹

Interpersonal grievances: Case law example

Background to the case

In *Baranya v Rosderra Irish Meats Group Ltd*,³² the appellant was a butcher in the respondent’s meat processing factory from 21 October 2000 to 2 June 2015 and from 6 July 2015 to 18

²⁸ European Parliament and Council Directive 2019/1937/EC of 23 October 2019 on the protection of persons who report breaches of Union Law [2019] OJL305/17, Recital 22.

²⁹ PDA 2014, s 5(3)(b).

³⁰ *Baranya* (Hogan J) [25].

³¹ Protected Disclosures (Amendment) Act 2002, s 6(d), inserting PDA 2014, s 5(5A).

³² *Baranya v Rosderra Irish Meats Group Ltd* [2021] IESC 77, [2022] ELR 73.

September 2015. He alleged that he was dismissed by the respondent, wholly or mainly for having made a protected disclosure in relation to his own health and safety. Section 11(1) of the 2014 Act amends the Unfair Dismissals Act 1977 ('1977 Act') to provide that the dismissal of an employee is automatically unfair if it results wholly or mainly from an employee having made a protected disclosure.³³ Under the 2014 Act, there is no continuous service requirement in order for workers to attract protection. Notably, employees are protected from unfair dismissal from the first day of their employment.³⁴ Normally, for unfair dismissal claims, employees must have one-year's continuous service.³⁵

The appellant had left his employment with the respondent on 2 June 2015 on foot of a compromise agreement for full and final settlement of all claims arising from his employment with the respondent and in particular in relation to an alleged injury sustained in February 2013. His intention was to either return to his home country, Hungary, or pursue employment opportunities in The Netherlands. As his plans to secure alternative employment abroad were not realised, he returned to work for the respondent on 6 July 2015. Baranya argued that, notwithstanding the four-week break from working with the respondent, the contract of employment was ongoing and continuous. He also argued that, until the hearing before the Workplace Relations Commission ('WRC'), he was not aware of a new contract commencing from when he returned to work, and he denied that the signature on that contract was his. He also contended that he was not aware of the true nature of the compromise agreement and therefore it should be rendered null and void.

The appellant's role consisted of scoring a large number of carcasses daily. The appellant alleged that when he returned to work, he advised his supervisor that he did not want to do the back-scoring job as it caused him a lot of pain and that he wanted to change role. He argued before the Labour Court that on 15 September 2015 'the pain had reached such a degree that I repeated my concerns to Mr Dunne (supervisor) that I was in a lot of pain due to the work that I had to perform, and could I move to another job.'³⁶ He contended that he made the same disclosure later that day to the respondent's Health and Safety Manager and also to the HR manager. It was the appellant's case that this was a protected disclosure under s 5(3)(d) of the 2014 Act as it was a disclosure that his health and safety was endangered. It is important to point out that the Supreme Court highlighted in its decision that the exact words uttered by the respondent were at all times a matter of dispute.³⁷

The respondent argued that Baranya's employment had ceased on 2 June 2015, that he had signed a leaver form, and was issued with his P45. The respondent contended that Baranya had signed a new twelve-week contract on his return to work on 6 July 2015 and advised at that time that he was fit to return to work and that his previous shoulder complaints had been addressed. In respect of the compromise agreement, the respondent argued that Baranya had ample time to discuss the compromise agreement with his trade union representative or to obtain legal advice. It contended further that the appellant had not made a protected disclosure and was dismissed for 'walking off the line', which was considered to be gross misconduct, warranting dismissal, under the company/union agreements.

³³ Unfair Dismissals Act 1977 ('UDA 1977'), s 6(ba), as inserted by PDA 2014, s 11(1)(b).

³⁴ UDA 1977, s 6(2D), as inserted by PDA 2014, s 11(1)(c).

³⁵ UDA 1977 s 2(1)(a).

³⁶ *Rosderra Irish Meats Group Ltd v Baranya* UDD1917.

³⁷ *Baranya v Rosderra Irish Meats Group Ltd* [2021] IESC 77, [2022] ELR 73 [4] ('*Baranya*').

Workplace Relations Commission

Baranya argued before the WRC that the true reason for his dismissal was his complaint that had highlighted deficient health and safety practices on the meat boning line.³⁸ He argued further that a breach of any person's health and safety in the workplace is entirely a relevant wrongdoing under the 2014 Act. The respondent contended that Baranya had not made a protected disclosure and that he was not dismissed for having made a protected disclosure but for 'walking off the line'. The respondent denied that Baranya had 'made the alleged communication to the Respondent in relation to a 'relevant wrongdoing'' and asserted further that 'even if the Complainant did raise a complaint regarding a workplace injury this would not constitute a 'protected disclosure'.' The Adjudication Officer found that Baranya had voluntarily entered the compromise agreement and had voluntarily left his employment on 2 June 2015 and therefore did not have the requisite period of employment to bring an ordinary unfair dismissal claim. The Adjudication Officer did accept that in and around 18 September 2015, Baranya had made complaints about the pain he experienced as a result of working on the production line. However, the Adjudication Officer found that Baranya's communication was a workplace grievance around seeking to be transferred to other duties and was not a protected disclosure. The WRC referred to the 2015 Code of Practice in its decision and set out the Code's definition of a grievance and a protected disclosure. The Adjudication Officer ultimately held that Baranya was dismissed for gross misconduct, that being that he had 'walked off the line'.

Labour Court

On appeal, the Labour Court first found that Baranya had voluntarily left the respondent's employment on 2 June 2015 and therefore his claim did not meet the one-year requirement set out in the 1977 Act.³⁹ As regards the second issue, of whether the communication by Baranya was a personal grievance or a protected disclosure, Baranya again argued that he had made a protected disclosure in line with s 5(3)(d) of the 2014 Act to the extent that his health and safety was endangered, whilst the respondent argued that the request by Baranya to be moved because he was in pain was an issue that arose under his contract of employment and 'at best is a Health and Safety issue and cannot by virtue of section 5(3)(b) be a protected disclosure under the 2014 Act' and therefore it was a grievance. The Labour Court referred in its decision to the 2015 Code of Practice and similarly to the WRC, it set out the Code's definition of a grievance and a protected disclosure. The Labour Court rejected Baranya's argument and held that 'The communication did not disclose any wrongdoing on the part of the Respondent. It appears to the Court therefore that the Complainant's communication was in fact an expression of a grievance and not a protected disclosure.'

High Court

The Labour Court decision was appealed to the High Court on a point of law.⁴⁰ There were six enumerated grounds of appeal in the appellant's notice of motion. These grounds included that the Labour Court had erred: (i) by reading into s 5 of the 2014 Act a requirement that a protected disclosure state an allegation of a relevant wrongdoing on the part of the employer; (ii) by

³⁸ *ibid.*

³⁹ *Rosderra Irish Meats Group Ltd v Baranya* UDD1917.

⁴⁰ *Baranya v Rosderra Irish Meats Group Limited* [2020] IEHC 56.

determining that the communication was a grievance rather than a protected disclosure; (iii) in interpreting the 2015 Code of Practice by determining that it prevented the communication from being a protected disclosure, thus reading an ability of the Code to amend the 2014 Act; (iv) in failing to consider the full remit of s 5(3) of the 2014 Act; and (v) by failing to have any due regard to the fact that Baranya had sought out the respondent's Health and Safety Officer to raise his concern.⁴¹ It was also argued by the appellant that the Labour Court had failed to consider the full facts of the evidence given. The issue of Baranya's length of service was not before the High Court. The High Court held overall that the appellant had failed to establish any error of law on part of the Labour Court.⁴² The High Court held specifically that the appellant had failed to demonstrate that the Labour Court misread or misinterpreted s 5 of the 2014 Act by requiring an allegation of a relevant wrongdoing to be stated. It went on to find, as it held that the Labour Court did, that in the absence of any asserted act or omission on the part of the respondent, that the appellant might reasonably believe tends to show more one or more relevant wrongdoings, the communication does not fulfil the concept of 'information'.⁴³ It found further that the Labour Court did not determine that the communication was a grievance 'rather than' a protected disclosure. It did accept that if those words had been used then this 'would possibly demonstrate a view on the part of the Labour Court that a grievance can never be a protected disclosure'.⁴⁴ The High Court also held that the appellant failed to demonstrate that the Labour Court had determined that the 2015 Code of Practice had the ability of amending, whether explicitly or implicitly, the 2014 Act.⁴⁵ The High Court further determined that the Labour Court did consider the communication by Baranya but had found that it was 'more circumspect than asserted by the appellant' and did not reveal any wrongdoing on the part of the respondent.⁴⁶ In addition, in relation to the evidence of the appellant that he had sought out the Health and Safety Officer, the High Court said that there was no error in law by the Labour Court in not placing significance on this as it had made a finding of fact of what was said and that seeking out the officer did not transform the communication into a protected disclosure.⁴⁷

Supreme Court

The appeal came before the Supreme Court by way of a leapfrog appeal pursuant to Article 34.5.4° of Bunreacht na hÉireann 1937. The Supreme Court addressed three key issues before it: (i) Can purely personal complaints by an employee to their employer about workplace health and safety be a protected disclosure under the 2014 Act? (ii) To what extent did the terms of the 2015 Code of Practice influence the Labour Court? (iii) What precisely were the facts found by the Labour Court? The Supreme Court allowed the appeal on two grounds: (i) the Labour Court applied the 2015 Code of Practice which was erroneous in its statement that purely personal complaints in relation to workplace health and safety fell outside the scope of the 2014 Act; and (ii) the Labour Court failed to make sufficiently clear and precise findings of fact as to what exactly Baranya had said. The Supreme Court remitted the matter to the Labour Court so that it could determine afresh if the utterances by Baranya amounted to a protected disclosure and in doing so required the Labour

⁴¹ *ibid* [3].

⁴² *ibid* [32].

⁴³ *ibid* [31(1)].

⁴⁴ *ibid* [31(2)].

⁴⁵ *ibid* [31(3)].

⁴⁶ *ibid* [31(4)].

⁴⁷ *ibid* [31(6)].

Court to take into consideration the conclusions and guidance in the Supreme Court decision. The key issues before the Supreme Court are discussed below.

The Supreme Court in *Baranya* confirmed that the approach adopted in Ireland as regards an exclusionary provision in the 2014 Act for disclosures relating to the worker's contract of employment is unsuccessful, with Hogan J stating 'To that extent, therefore, it might be said that s. 5(3)(b) did not achieve the objective it sought to achieve by excluding only contractual complaints which are personal to the employee concerned and it is, to that extent, anomalous.'⁴⁸ Hogan J stated further that:

The point nevertheless is that many complaints made by employees which are entirely personal to them are nonetheless capable of being regarded as protected disclosures for the purposes of the 2014 Act. This is also true of complaints regarding workplace safety under s. 5(3)(d), a point clearly illustrated by the sheer breadth of the language contained in the sub-section: "health or safety of any individual"... "has been, is being or is likely to be endangered."⁴⁹

Therefore, by extension, the Supreme Court found that when the disclosure concerns the worker's own health and safety, as it did in the case before it, that this can constitute a protected disclosure. It found further that all that is required in such circumstances is that the worker's own health and safety is endangered by reason of workplace practices, without that conduct having to amount to a breach of a legal obligation, whilst acknowledging that this would generally probably be the case. It confirmed that if a worker's own health and safety is affected by being required to work in a particular manner or in respect of a particular task, this can be a protected disclosure.⁵⁰

Although the Supreme Court in *Baranya* quite logically found that a worker making a disclosure about their own health and safety fell within the scope of the 2014 Act, Charleton J in his concurring judgment added his own observations to what he described as being 'how the state of the law clashes with common perceptions of what a whistleblower is' and went on to say that the situation in *Baranya* 'does not conform with what the ordinary understanding of the protection of whistleblowers requires and, furthermore, it may not be sensible.'⁵¹

Significance

Baranya is a welcome decision by the Supreme Court where clarity on the three issues outlined above was very much needed. It did not, however, resolve the matter that personal grievances, that were not intended to fall within the scope of the 2014 Act, being subject to quite robust statutory protections, that would not normally apply except for the wide scope of the 2014 Act.

The amending of the 2014 Act in order to transpose the Directive was an opportunity for the legislature to respond to the criticism of the Supreme Court. The only reference in the Directive to 'interpersonal grievances' is contained at Recital 22, which provides that 'Member States could decide to provide that reports concerning interpersonal grievances exclusively affecting the

⁴⁸ *Baranya* (Hogan J) [25].

⁴⁹ *ibid* [27].

⁵⁰ *Ibid* [28].

⁵¹ *Baranya* (Charleton J) [1].

reporting person, namely grievances about interpersonal conflicts between the reporting person and another worker, can be channelled to other procedures.’⁵² The discretion to deal with interpersonal grievances was included in Head 5 of The General Scheme of the Protected Disclosures (Amendment) Bill 2021 which proposed to amend s 5 of the 2014 Act by inserting s 5(9), which provided that ‘A matter is not a relevant wrongdoing if it is a matter concerning interpersonal grievances exclusively affecting the reporting person, namely grievances about interpersonal conflicts between the reporting person and another worker and the matter can be channelled to other procedures designed to address such matters.’⁵³ This Head was evaluated by the University of Galway, Transparency International Ireland, The Law Society, the Bar of Ireland, Raisea concern, and the HSE, who for various reasons sought its deletion, clarification, or amendment.⁵⁴ The Joint Committee on Finance, Public Expenditure and Reform, and the Taoiseach (‘Joint Committee’), in its pre-legislative scrutiny of the amending legislation, ultimately recommended that this Head not be included in the legislation because it deemed it to be a risk for creating uncertainty or discouraging disclosures. It further stated that this exclusionary ground created additional unnecessary risks that:

... a legitimate protected disclosure of wrongdoing, could be deliberately mischaracterised and miscategorised as relating to another matter (for example: grievance, or respect and dignity in the workplace) or that reference to a grievance or interpersonal process could be used to delay or redirect action in relation to a protected disclosure. This could prevent the wrongdoing from being revealed and afford the discloser less protection and may even create a perverse incentive for the personal targeting of a potential whistleblower.⁵⁵

It appears that the *Baranya* decision was taken into consideration at the time of the drafting of the 2022 Act, as not only was the recommendation of the Joint Committee on this issue ignored, but the scope of provision was broadened even further to exclude matters concerning a complaint by a worker to, or about, their employer, which concern the worker exclusively.⁵⁶

Public interest test

The original iteration of the Irish whistleblowing legislation included ‘public interest’ in its title and was called ‘The General Scheme of the Protected Disclosure in the Public Interest Bill, 2012’. This did not appear in the title of the final version of the 2014 Act. There is no public interest test in the legislation for determining that a disclosure is a protected disclosure. The purpose of the 2014 Act is described in its Long Title as being ‘An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of

⁵² European Parliament and Council Directive 2019/1937/EC of 23 October 2019 on the protection of persons who report breaches of Union Law [2019] OJL305/17, Recital 22.

⁵³ The General Scheme of the Protected Disclosures (Amendment) Bill 2021, Head 5(2).

⁵⁴ Joint Committee on Finance, Public Expenditure and Reform, and the Taoiseach, *Report of the Joint Committee on the Pre-Legislative Scrutiny of the General Scheme of the Protected Disclosures (Amendment) Bill 2021* (33/JF/4, 2021) 39-41.

⁵⁵ *ibid* 40.

⁵⁶ Protected Disclosures (Amendment) Bill 2022, s.6(c), inserting s 5(5A) into the 2014 Act.

certain disclosures in the public interest and for connected purposes.’⁵⁷ The Supreme Court emphasised in *Baranya* that ‘It seems implicit in both the Long Title to the 2014 Act and aspects of its general structure that the Oireachtas envisaged that most complaints for which protection is sought would relate to matters of general public interest.’⁵⁸ However, he noted the definition of a protected disclosure ‘is not so confined’ and as it also covers purely personal complaints then ‘in effect it must be assumed that the Oireachtas considered that the disclosure of those complaints was, in general at least, also a matter of public interest.’⁵⁹

There are only three provisions in the 2014 Act which include a reference to ‘the public interest’, s 8(2)(iii),⁶⁰ s 10(ii)(I),⁶¹ and s19(1)(a)⁶². Section 13 of the Protected Disclosures (Amendment) Act 2022 substituted a new s 10 concerning ‘Disclosures in other cases’. This section transposed Art.15 of the Directive and includes a requirement that in such disclosures the worker must reasonably believe that the relevant wrongdoing concerned may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage.⁶³ This is the only reference to ‘public interest’ in the articles of the Directive. However, it appears on multiple occasions in the recitals, for example, in Recital 1 it states that:

Persons who work for a public or private organisation or are in contact with such an organisation in the context of their work-related activities are often the first to know about threats or harm to the public interest which arise in that context. By reporting breaches of Union law that are harmful to the public interest, such persons act as ‘whistleblowers’ and thereby play a key role in exposing and preventing such breaches and in safeguarding the welfare of society.

A further example arises in Recital 3, which provides that ‘In certain policy areas, breaches of Union law, regardless of whether they are categorised under national law as administrative, criminal or other types of breaches, may cause serious harm to the public interest, in that they create significant risks for the welfare of society.’ Also, in Recital 33, for example, it emphasises that ‘Internal reporting is also the best way to get information to the persons who can contribute to the early and effective resolution of risks to the public interest.’

⁵⁷ Protected Disclosures Act 2014 (‘PDA 2014’).

⁵⁸ *Baranya* (Hogan J) [2].

⁵⁹ *ibid.*

⁶⁰ Disclosure to Minister.

⁶¹ Disclosure in other cases

⁶² Disclosures to the Police Ombudsman. Section 19 of the 2014 Act inserted s 102A Garda Síochána Act 2005. Section 5, schedule 1 of the Policing, Security and Community Safety Act 2024 repeals all provisions of Garda Síochána Act 2005. Section 205(1) provides that ‘Subject to *section 206* (1), the Police Ombudsman may, if it appears to him or her to be in the public interest and without receiving an admissible complaint or a notification under *section 204* (1) of an incident of concern, undertake an investigation into any matter that appears to him or her to be a relevant cause of concern.’ Section 206(1) provides that ‘The Police Ombudsman shall consider, in accordance with section 205(1), any disclosure of relevant wrongdoing relating to An Garda Síochána (a) that is made to him or her in the manner specified in section 7 of the Act of 2014 as the person prescribed under subsection (2)(a) of that section to be the recipient of disclosures of such relevant wrongdoing, or (b) to which a report (within the meaning of the Act of 2014) relates that is transmitted to him or her (i) by the Protected Disclosures Commissioner pursuant to section 10C(1)(b) or 10D(1)(b)(ii) of that Act, or (ii) by another prescribed person (within the meaning of that Act) pursuant to section 7A(1)(b)(vi)(I)(A) of that Act.’

⁶³ This is also a consideration for disclosures to Ministers under s 8(2)(iii) of the 2014 Act.

Introducing an explicit public interest test in the legislation would justify the robust protections that it affords workers and would also ensure that matters which, although may ‘exclusively’ affect the person making the report but which have a wider interest would be disclosed by workers in the expectation of receiving the statutory protections. As discussed above, the UK introduced a public interest test in 2013. In 2017, the UK Court of Appeal in *Chesterton Global Ltd v Nurmohamed*⁶⁴ laid down the approach to this test. The UK Court of Appeal highlighted that as Parliament had not defined the term ‘in the public interest’ it must have been its intention to leave it to Employment Tribunals to apply it as a matter of ‘educated impression’.⁶⁵ Underhill LJ emphasised that the question of whether the disclosure was made ‘in the public interest’ depends on the circumstances of the particular case but that the fourfold classification of relevant factors as set out by Mr Laddie QC, counsel for the claimant, are a useful tool.⁶⁶ Those factors are as follows:

- (a) the numbers in the group whose interests the disclosure served...;
- (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
- (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
- (d) the identity of the alleged wrongdoer... "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far’.⁶⁷

Underhill LJ explained that the correct approach in cases where the disclosure relates to a breach of the worker’s own contract of employment, or some other matter under s 43B(1) where the disclosure concerns a personal interest, there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker.⁶⁸ The UK Court of Appeal also highlighted that the reasonableness of a worker’s belief that their disclosure was made in the public interest can be established by reference to factors that the worker did not have in mind at the time when they made their disclosure.⁶⁹

In its response to the criticism of the 2014 Act levelled by the Supreme Court, the legislature attempted to introduce a panacea to the issue of purely personal grievances falling within the ambit of the legislation and attracting robust protection when, admittedly, it may not be warranted. However, the author herein maintains that this test of ‘exclusivity’ will prove to be calamitous as it will undoubtedly result in potentially serious harms not being disclosed by a worker who fears

⁶⁴ [2017] EWCA Civ 314.

⁶⁵ *ibid* [31].

⁶⁶ *ibid* [37].

⁶⁷ *ibid* [34].

⁶⁸ *ibid* [37].

⁶⁹ *ibid* [29]. The *Chesterton* guidance was given a detailed analysis in *Dobbie v Paula Felton t/a Feltons Solicitors* [2021] IRLR 679 (EAT).

they will suffer retaliation because the focus will be on the number of people affected by it as opposed to the nature of the interests affected or the nature of the wrongdoing itself, for example. In addition, a recipient of a disclosure will be tasked with assessing this issue of ‘exclusivity’ and failure to apply the test correctly could leave an organisation vulnerable. Indeed, the inclusion of a ‘reasonable belief’ element in s 5(5A) could have assisted organisations in this regard. The approach adopted in the UK, of requiring that a worker reasonably believes that their disclosure is in public interest and the guidance from the courts on that test, means that the focus is not on just the number of persons affected by the disclosure but ensures that where there is potentially a wider impact, this is taken into consideration.

The reality is that this new exclusionary provision is nonsensical and will arguably prevent disclosures of serious wrongdoings falling outside of the scope of the legislation, resulting in workers remaining silent about such matters for fear that they will not be protected from retaliation because of the focus being solely on the numbers affected by the wrongdoing. It is suggested that a better approach to this issue would have been the introduction of a public interest test.⁷⁰

⁷⁰ For further information see: Lauren Kierans, ‘It’s nothing personal: The ineffective exclusion of personal grievances in the Protected Disclosures Act 2014- *Baranya v Rosderra Irish Meats Group Ltd*’ (2023) 5 Irish Supreme Court Review 81.