Protected Disclosure Act 2014*

There has been some commentaries recently in relation to a case before the WRC relating to a nursing home employee who was dismissed after making a Protected Disclosure to the Health Information and Quality Authority (HIQA). The employee was awarded 2 years’ salary.

We are not proposing to comment on the actual case itself. The Adjudication Officer confirmed that a Protected Disclosure had been made under the 2014 Act. The Adjudication Officer found that the nursing home had commenced the disciplinary procedure in an attempt to dismiss the employee before she accrued 12 months service as a result of her Protected Disclosure. The Adjudication Officer found that had it not been for the Protected Disclosure made by the employee she would not have been dismissed. Her dismissal was deemed to be unfair and she was awarded 2 years’ salary amounting to €52,416 in compensation.

This decision is important. An individual employee does not need 12 months service to bring an Unfair Dismissal where the individual is dismissed for having made a Protected Disclosure. The Unfair Dismissal Act has a number of protections where employees do not require 12 months’ service and this is one of them. This is an issue which employers need to keep in mind.

The compensation under the 2014 Act increases the compensation which can be awarded for an Unfair Dismissal as a result of making a Protected Disclosure to a maximum of 5 years remuneration. Normally under the Unfair Dismissal Legislation it is 2 years. The Act of 2014 refers to compensation for infringement of employees’ rights. In this case the compensation was awarded as compensation not subject to Tax.

There are two issues which now arise in relation to this.
The first is what is “compensation” under the 2014 Act. There is an argument that the compensation is linked to the Unfair Dismissal Act. On that basis there is an argument that the award can only be for the economic loss. Therefore if an individual is on a net salary and it will be the net pay that has to be taken into account under the Unfair Dismissal Legislation as the 2014 Act amends the Unfair Dismissal Act of say €52,000 per annum and they are dismissed and 6 weeks later get a new job on the same salary the compensation which can be awarded for having been dismissed is, in our view, not to €260,000 but rather €6,000. By this we mean 6 weeks wages. In relation to the taxation of any such compensation, against, it is covered by the Unfair Dismissal Legislation. Section 192A TCA does not exempt any payment from Tax which is in the nature of remuneration. All awards under the Unfair Dismissal Acts, and this would include the Protected Disclosure Act 2014, are deemed remuneration and are therefore taxable, in our view.

Clearly we and the Adjudication Officer have a different view in relation to this case. We are perfectly happy to admit that we may well be wrong. There is confusion in relation to this Act. There are some commentators and colleagues who specialise in Employment Law who would take the same view as we do in relation to what can be awarded for Protected Disclosure which results in the dismissal and the Tax treatment of same. In a recent lecture to the Dublin Solicitors Bar Association both Mr. Tom Mallon BL and Richard Grogan of this office spoke. Mr. Mallon was of the view that compensation is only for the “economic loss” and we agree with him. There are others who would disagree with us.

We would anticipate at some stage that this issue is going to be litigated in the Labour Court on the questions of:

1. How is the compensation calculated, by which we mean is the Act limited only to economic loss or whether there is a compensation element on top of the economic loss the very fact of having been dismissed from making a Protected Disclosure?;
2. Whether such awards are taxable or not. It may well be that at some stage this issue will go to the High Court on either the Point of Law or Judicial Review. In the interim it would be useful if the Revenue gave some guidance as to how they will
treat an award for a dismissal under the Unfair Dismissal Legislation for having made the Protected Disclosure.

The issue of the Tax treatment is extremely important for employers. If an award is made by the WRC and marked “Exempt from Tax” that does not necessarily mean that it is exempt from Tax. If an employer pays the amount without deducting Tax and the Revenue subsequently seek the Tax on that payment effectively they will gross up the award because of the way the Tax System works effectively it works out as a doubling up so that additional €56,000 would have to be paid to the Revenue. It would be no defence if the Revenue seeks Tax and it is subsequently found that the award should be taxable for the employer to say that they were simply complying with a WRC ruling.

There is a converse problem. An employer against whom an award is made if they have a concern that the incorrect Tax treatment has applied have the choice of having to run an appeal to the Labour Court or issue Judicial Review proceedings. Both are costly.

We are raising no criticism of the Adjudication Officer in this case. The Legislation is complex for a non specialist. It does require a definitive ruling by the Labour Court coupled probably by a Statement of Practice from the Revenue Commissioners as to how they believe such awards should be treated for tax purposes.

It is unsatisfactory that there would be a lack of clarity on such an important piece of legislation. Once we have a case which goes to the Labour Court we will receive clarity from the Labour Court as to their interpretation of the Legislation. Taking into account the way in which the Labour Court address issues it would be normal that the Legislation would be reviewed and that they would set out how the compensation could be awarded, in that it would be clear whether it was being awarded as economic loss/economic loss into the future which is also allowed or is just straight compensation and equally that the Labour Court would deal with the Tax treatment of same. It may take some time for a case to get to the Labour Court and in the interim it would be useful if the Revenue took the step of giving clarification as to their reading of what the Tax Law on such compensation payments is.
We have written to the Employment and Equality Law Committee and the Taxation Committee of the Law Society asking that they would request the Revenue to give a Statement of Practice on same.

*Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.

**In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.