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Irish Congress of Trade Unions

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Initial Observations and Recommendations

on the

Heads of The

Protected Disclosures in the Public Interest Bill 2012

May 2012

Introduction

The Irish Congress of Trade Unions is the national representative body for unions on the island of Ireland representing over 800,000 workers from all sectors and industries in the private and public sectors. Congress welcomes the publication of the draft Heads of the Protected Disclosures in the Public Interest Bill 2012 as a major step forward in protecting workers who come forward to blow the whistle on wrongdoing. When enacted the legislation will be a huge advancement on the previous piecemeal patchwork of protections that left many workers at risk of falling between the gaps in protection. The draft Heads incorporate many of the recommendations previously made by Congress (copy of previous submission is attached) and are generally in line with international best practice. However Congress has a key concern that the proposed protection against employer reprisals fall short of what is required and compare unfavourably with international and best practice standards.

Congress is disappointed that the proposed legislation will not provide workers in Ireland with the same level of protection given to workers in other jurisdictions. The planned protection against employer reprisals compares unfavourably with what is available to whistle-blowers in the UK; who when they are threatened with dismissal, can apply for interim relief and be reinstated in their employment within five days of the date of their dismissal pending their case being finally decided.

The absence of this essential protection is a major and worrying omission especially as the draft legislation has in all other matters taken the UK as a blue print.

The Congress is urging the Minister to address this deficiency in the Bill and to provide workers in Ireland with credible protection by including interim relief whereby workers can be reinstated pending their case being heard and finally determined. The proposed protections fall far short of what is required by leaving whistle-blowers at risk of financial ruin while they wait literally years for their case to be finally resolved.

Congress Observations and Recommendations on the Heads of Bill

Protected disclosures in the Public Interest Bill 2012

ICTU Recommendation: Include a Statutory Code of Practice and allow workers seek help from their union

We strongly recommend the development of a Statutory Code of Practice to underpin the operation of the legislation at the level of the enterprise. The Code could set out model policies and procedures to be put in place including the measures to be taken to protect the confidentiality of the whistle-blower(s), procedures for making internal disclosures and formats for reporting back on investigations (new head).

Workers must be free to seek help, advice and representation from their union. Disclosures, discussed with trade unions with the object of obtaining information, support or representation when preparing or making a disclosure must be protected disclosures for the purpose of the Act (this could be incorporated into Head 10).

ICTU Recommendation: Include Interim relief so that workers maintain their job pending a hearing

As set out above, there can be no doubt that fear of job loss holds workers back from raising concerns. Losing a job can bring about financial ruin for a family. To be credible this legislation needs to protect workers in reality not just on paper. Congress is very concerned that although the stated aim of the legislation is the protection of workers from reprisals, the draft heads omit an essential element of protection, namely interim relief. The absence is made all the more worrying as the draft heads are modelled on the UK legislation which affords workers this type of protection.

The UK legislation provides that where a whistle-blower is dismissed they can seek interim relief whereby their employment continues or is deemed to continue until their case is heard and finally decided. The necessity of including this type of protection is recognised internationally. Indeed the 2010 Resolution (no 1729) of the Council of Europe¹, urges that

'Relevant legislation should afford bona fide whistle-blowers reliable protection against any form of retaliation through an enforcement mechanism to investigate the whistle-blower's complaint and seek corrective action from the employer, including interim relief pending a full hearing and appropriate financial compensation if the effects of the retaliatory measures cannot reasonably be undone.' (para 6.2.5.)

¹ See Council Resolution 1729 (2010)1 Protection of "whistle-blowers"
<http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm1>

They later set out that:

'As regards the burden of proof, it shall be up to the employer to establish beyond reasonable doubt that any measures taken to the detriment of a whistle-blower were motivated by reasons other than the action of whistle-blowing. - (para 6.3.)

Congress is urging the Minister to provide adequate protection for workers in Ireland and similar to other jurisdictions to provide that workers can apply for interim relief - so that that they are reinstated in their employment within five days of the date of their dismissal pending their case being finally resolved. (this will need a new Head)

There must be no service requirement or qualification period before protection applies, workers should not be forced to keep quiet waiting until they are covered by the legislation.

ICTU Recommendation: Provide for Enduring Protection

Many workers are concerned that they will face long term and enduring discrimination particularly at the recruitment stage. This legislation should also make such discrimination unlawful, this could be addressed by including 'recruitment' in Head 2 and a subsequent new head to deal with the two situations – (i) 'procurement of discrimination' i.e. where the discrimination originates with the employer on whom the whistle was blown and (ii) discrimination originating with the employer doing the hiring on the basis that the worker is known to be a 'whistle-blower' (iii) employment agencies refusing to put whistle-blowers forward for placements. It is worth mentioning again here that Congress has called for employment 'profiling' and 'blacklists' to be unlawful and for adequate measures to be in place to prevent their use in practice.

ICTU Recommendation: Ensure that the employer is vicariously liable for reprisals carried out by employees, contractors, clients and customers.

To ensure that the legislation (head 12) is interpreted as protecting workers from detrimental treatment carried out by fellow workers, contractors, clients and customers, Congress is recommending that the wording in Head 12 be changed or that a new Head making the employer vicariously liable for detrimental treatment suffered by the whistleblower in the course of their employment regardless of whether it is perpetrated at the hands of its employees, contractors, clients and customers be added.

Employment Equality legislation provides a good example of how legislation can hold employers vicariously liable for discrimination and harassment suffered by its employees. That legislation also places obligations on the employer to maintain the workplace free from discrimination and harassment. Similar liabilities and responsibilities are required to adequately deal with 'whistle-blower' situations. Otherwise there is a danger that the legislation will be misconstrued to create an unacceptable situation that it is lawful that others carry out reprisals². From Congress' point of view denying workers protection in circumstances where the employer simply sits back and fails to protect them against acts by co-workers, customers or clients after they have made a disclosure

² See *NHS Manchester v Fecitt and Ors*. Court of Appeal, 2011EWCA Civ 1190

(rather than committing a detrimental act themselves) would be unjust and contrary to the stated purpose of the legislation.

ICTU Recommendation: Disclosures presumed to be protected, Onus of proof, uncapped compensation based on future losses

Where whistle-blowers are penalised or dismissed in breach of the legislation they should be able to claim uncapped compensation for future losses, based on an assessment of the future impact of the loss including the loss up to the point where the employee would be likely to obtain an equivalent job (not an arbitrary 2 years cap) along with an element of aggravated damages in recognition that the effects of some retaliatory actions cannot reasonably be undone.

Congress is concerned about the removal of protection from workers who make the disclosure 'recklessly' without regard to whether it was false or misleading. This underlines the central importance of the Code of Practice setting out the steps workers can take to protect themselves from any such accusations. In all circumstances it is essential that the legislation presumes that the disclosure is a protected one and the onus and burden of proof should fall on the employer to prove otherwise.

Disclosures should always be presumed to be protected disclosures and the worker entitled to protection. The legislation should provide that the onus of proof -that the disclosure cannot avail of protection under the legislation -falls onto the employer.

ICTU Recommendation: Provide protection for invoking rights under the legislation in good faith

The heads do not provide protection for the whistle-blower should they be victimised for pursuing a right under the legislation, regardless of whether they are successful in their case or not.

Under the proposed heads of bill an employee cannot take a case that they are being victimised for relying on the legislation. Head 12 simply provides that the worker will not be penalised for making a protected disclosure, not that they will be protected from reprisal for pursuing their rights under the legislation.

A good example of the type of provision required is in the Employment Equality Act 1998 as amended is Section 74 (2) which provides:

“(2) For the purposes of this Part victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to—

(a) a complaint of discrimination made by the employee to the employer,

(b) any proceedings by a complainant,

(c) an employee having represented or otherwise

supported a complainant,

(d) the work of an employee having been compared with that of another employee for any of the purposes of this Act or any enactment repealed by this Act,

(e) an employee having been a witness in any proceedings under this Act or the Equal Status Act 2000 or any such repealed enactment,

(f) an employee having opposed by lawful means an act which is unlawful under this Act or the said Act of 2000 or which was unlawful under any such repealed enactment, or

Also in *Dublin City Council v McCarthy* EDA2/2002 the Labour Court supported the view expressed by the Equality Officer that “the victimisation of a person for having in good faith taken a claim under the equality legislation is very serious as it could have the impact of undermining the effectiveness of the legislation and is completely unacceptable”.

ICTU Recommendation: Remove Dangerous Loopholes in Heads 5,8 and 12

Inappropriate defence

Head 12 (2) creates a dangerous loophole, and provide employers with a defence in certain circumstances to penalise an employee ‘

(2) Paragraphs (a), (b), (c), (d) and (e) of the definition of “penalisation” in Head 2 shall not be construed in a manner which prevents an employer from

(a) ensuring that the business concerned is carried on in an efficient manner, or

(b) taking any action required for economic, technical or organisational reasons.

The danger is in the practical application of this provision, which will allow employers to claim that the employee was dismissed or suffered the detriment because their employer can no longer pursue the activity. If successful the employee will not be protected from the forms of penalisation in (a) – (e). It defeats the purpose of the legislation if an employee is no longer protected and cannot claim unfair dismissal or redundancy because of business reasons. Employers should be obliged to prove that the dismissal or other detrimental treatment was in no sense whatsoever on the ground of the protected disclosure. Congress is seeking the removal of this section.

Knowing who has legal responsibility

Congress supports the three tier approach in which workers are subject to different evidential thresholds depending on which disclosure channel they use (i) internally within the organisation (ii)

to relevant bodies (iii) others, including the media. We strongly support the approach to allow workers to choose not to use the internal disclosure channel.

We point out that workplaces are increasingly fragmented with complex outsourcing and long contracting chains being much more prevalent than the draft legislation (head 5) anticipates. Provisions in contracts further complicate the picture. In these circumstances knowing who has the 'legal responsibility' may not always be obvious or even easy to ascertain. It is therefore essential that the legislation does not put a hurdle of first establishing where legal responsibility lies before protection for disclosure applies.

Duties of confidentiality

Congress also has concerns about how head 8 will operate in practice, specifically 8.3(d) which operate to remove protection from disclosures made where the 'disclosure is made in breach of a duty of confidentiality owed by the employer of that worker to another person'. It is easy to see the chilling effect this will have on all workers within accounting and audit companies. This specific provision should be removed.

Congress Recommendation: Extend coverage in Head 4 to 'workers providing services to or on behalf of a public body'

The making of disclosures should be made as easy and as simple as possible having due regard to the desirability of such disclosures on the one hand and the preservation of confidentiality of the identity of the worker concerned on the other. Workers who work in small organisations such as GP practices, private nursing homes, etc., by the very nature of the size of the employment, are at greater risk of reprisals. Such workers therefore should be afforded as many options as possible of making disclosures. The proposed amendment affords workers in small private sector organisations the same option for reporting disclosures as those who work in the public sector, i.e. to the relevant Minister, in circumstances where they reasonably believe that they will be subjected to penalisation by the employer if they make a disclosure to their employer. What we seek here is that private nursing homes and private hospitals are covered under this amendment. While not being directly under the regulatory control of the Minister for Health if they provide any health services this amendment will allow the making of disclosures to the Minister for Health. This amendment is necessary to ensure that workers in private healthcare providers engaged in exclusively private practice without any provision of public healthcare have a means of making disclosures in circumstance where the relevant body, e.g. HIQA does not have jurisdiction.

This section should be amended to read as follows:

Provide that –

- (i) *A disclosure made by a worker in a public body, in good faith, in relation to any of the matters set out in Head 4 to a Minister of the Government on whom statutory functions stand conferred for that public body is a protected disclosure for the purposes of this Act.*

- (ii) *a disclosure made in good faith by a worker, not being a worker as defined in subsection (1), in relation to any of the matters set out in Head 4 to a Minister of the Government on whom statutory functions stand conferred for a public body or bodies that provide services on behalf of that public body is a protected disclosure under this section, in circumstances where the worker reasonably believes and he or she will be subjected to penalisation and detriment by his or her employer if he or she makes a disclosure to his or her employer;*

ICTU Recommendation Broadest Possible Definition of 'Workers'

Finally the legislation needs to ensure that all 'workers' are covered including those working in all parts of the Public and Civil service; Semi States; schools and colleges; hospitals and institutions; and include 'interns' and others on work experience programmes; apprentices, freelancers and other economically dependent workers.

Ends

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