

Minister promises wider application of new 'whistleblower' law

ANDY PRENDERGAST

The Protected Disclosures (Amendment) Bill 2022 is being drafted to provide protections for whistleblowers who have been penalised before the new law is in place, but have yet to take proceedings.

Minister for Public Expenditure & Reform Michael McGrath has said that the new PD bill will be amended so as to give retrospective application to whistleblowers who have made protected disclosures and suffered retaliation before the enactment of the new law.

It will stop short, however, on providing retrospective application to whistleblowers who have had proceedings already initiated. Such an application would run into a major Constitutional difficulty.

The Minister provided an update to the progress of the new Bill in the Dail last week. The Bill has now moved to the Seanad, to implement more amendments, before returning to the Dail to be finalised. The bill is to transpose EU Directive 2019/1937, enhancing protections for whistleblowers.

Chief amongst the new measures will be an expanded list of the types of penalisation that are encompassed, the right to seek an injunction against these forms of penalisation and the reversal of the burden of proof in a penalisation claim.

Retrospective application of the new law is considered to be the most significant outstanding issue of the bill. However, there are still "several substantial issues concerning the application of the protections from civil and criminal proceedings, the right to confidentiality and data protection", the Minister advised.

The DPER Minister noted that it will be possible to provide protections for persons who have reported prior to enactment but have suffered retaliation after enactment.

LIMITS TO RETROSPECTION

A further step of providing protection to persons who are already within the personal scope of the 2014 Act and have reported and suffered retaliation prior to enactment – but have yet to initiate proceedings against their employer at the WRC or the courts – is also possible,

according to the Minister, who has asked the Attorney General to draft amendments to the Bill in this regard.

However, any retrospective application that goes beyond this, “where proceedings have been initiated or completed, would run into constitutional difficulties.”

“In particular, Article 15.1.1° of the Constitution provides that the Oireachtas shall not declare acts to be infringements on the law which were not so at the date of their commission. We must accept and respect the limits that are placed on us by Bunreacht na hÉireann”, the Minister said.

Nevertheless, where a person is in this situation, “there is nothing to stop them from making a new protected disclosure in respect of any new or outstanding matters and the full protections of this legislation will apply. Similarly where a person in this situation is subjected to a new act of penalisation after the Bill is enacted, the retrospective provisions when introduced will give them protection.”

ADVANCED STAGE

While it was intended to bring the retrospection amendments to the Bill during the Dail fifth stage it was not possible to do so, which means the amendments will be introduced in the Seanad phase to follow.

While drafting “is at a very advanced stage”, the Minister warned that “several substantial issues concerning the application of the protections from civil and criminal proceedings, the right to confidentiality and data protection have arisen.”

The Attorney General has informed the Minister that “he needs more time to get to the bottom of them.”

To ensure the provisions are properly and correctly drafted, the Minister agreed with the Attorney General to defer their introduction until the Bill reaches Committee Stage in the Seanad.