Baranya decision points to need for public interest test in whistleblower law

The recent Supreme Court judgment in Baranya found personal workplace disputes could come under the protections of the Protected Disclosures Act. With this law due for amendment this year, Des McDermott* outlines why there needs to be more debate around the 'public interest' dimension in Ireland's 'whistleblower' legislation.

The Protected Disclosures Act 2014 provides significant protections from retaliation for whistleblowers. The law protects workers who speak up about wrongdoing in the workplace from unfair dismissal and from being otherwise victimised by the employer.

Recognising that whistleblowers are exposed to unusual risks, the Act awards compensation of up to five years' pay to a worker if successful in a claim for unfair dismissal. The Act also dispenses with the normal minimum 12 months' continuous service before a worker may bring such a claim.

The law is open to abuse from speculative claims

But the Supreme Court has found that these "extreme and special" protections could be made available to workers prosecuting purely personal disputes without any public interest.

In the recent case of *Baranya v. Rosderra Meats Ltd.*, Judge Charleton concluded that "the thrust of the 2014 Act does not conform to what might ordinarily be considered to define a whistleblower as a public-minded individual deserving of special protection." [i]

If the purpose of the 2014 Act was to protect whistleblowers who act 'in the public interest' it is deficient and probably ineffective. Curiously, an Act that was set up to safeguard the public interest does not demand that any disclosure claiming its protections is made in the public interest.

It was not for the Supreme Court to rewrite a law passed by the Oireachtas but *Baranya* raises the unavoidable question as to why our whistleblowers' legislation does not include such an obvious test.

'DECEPTIVE, INEFFECTIVE'

Mr Baranya was a butcher and had informed his employer that he no longer wanted to undertake a particular type of work – scoring carcasses – as it caused him a good deal of pain. Three days later Mr Baranya was fired.

His employer maintained that he had effectively walked off the production line, having not waited for management to address his request to change jobs. Mr. Baranya claimed that he had been dismissed because he had made a protected disclosure.

In the Labour Court, his claim for unfair dismissal failed. Guided by a distinction made in the 2015 Code of Practice on Protected Disclosures (SI 464 of 2015), the Court found that his complaint was a grievance and not a protected disclosure. The difference is defined in the following way:

"30. A grievance is a matter specific to the worker i.e. that worker's employment position around his/her duties, terms and conditions of employment, working procedures or working conditions. A grievance should be processed under the organisation's Grievance Procedure.

A protected disclosure is where a worker has information about a relevant wrongdoing..."[ii]

When the matter came before the Supreme Court, the words of s.5 of the 2014 Act, which sets out the meaning of protected disclosure, were closely parsed. A worker needs to make a disclosure of *relevant information*. Information is relevant if, in the *reasonable belief* of the worker, it tends to show one or more *relevant wrongdoings*, and it came to the attention of the worker *in connection with the worker's employment*. Relevant wrongdoings are then defined in s.5(3) to include:

".....(b) 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, ...*

(d) that the health or safety of any individual has been, is being or is likely to be endangered."

Judge Hogan found that the exclusionary provisions of s. 5(3)(b), which seek to exclude complaints which relate to the worker's contract of employment, were "deceptive and, at one level, ineffective."

In his opinion, "... 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."[iii]

The Supreme Court also found that a complaint made by an employee under s.5(3)(d) that his or her own personal health was being affected by being required to work in a particular manner can, in principle, amount to a protected disclosure.[iv]

MISSTATED THE LAW

Critically, the Code of Practice erroneously misstated the law:

"...the 2015 Code does not accurately reflect the terms of what the 2014 Act actually says. Specifically, the 2015 Code introduces a distinction between 'a grievance' and 'a protected disclosure', even though no such distinction is drawn by the 2014 Act itself, which makes no reference at all to the concept of a personal grievance." [v]

The Code of Practice had effectively rewritten the Act and contravened a key fundamental constitutional principle – that primary legislation can only be amended or varied by the Oireachtas itself and not by any other subordinate body.

Mr. Baranya's appeal was allowed for two reasons:

(i)the Labour Court applied the mistaken Code of Practice and

(ii)it failed to make sufficiently clear and precise findings of fact as to what exactly was said.

The matter was remitted to the Labour Court so that it can look again as to whether what was said amounted to a protected disclosure. *(For a more detailed report on the decision see Andy Prendergast, "'Whistleblower' IR code 'clearly wrong and misleading' – Supreme Court", IRN 44/2021*)

OPEN TO ABUSE

This situation leaves our legislation open to abuse from speculative claims, and risks creating uncertainty for employers.

There are a number of interests in play – those of the whistleblower in being protected, the public at large in having disclosures about serious wrongdoings made public, and the legitimate interest of employers in their reputation.

The original objective of the Act can be better achieved by expressly requiring any disclosure to have a public interest element before it receives the protection of the Act.

There is an opportunity at hand because the 2014 Act is due, or in fact overdue, for amendment. Ireland is obliged to transpose the EU Whistleblowing Directive[vi] into Irish law.

The Directive is designed to harmonise a community-wide approach to protection for whistle-blowers across a wide range of sectors. The deadline for transposition passed in December 2021, so there is an urgency to the detailed drafting work on the new Bill.

We have some idea of the Bill's probable content. A public consultation on the implementation of the Directive was carried out in the summer of 2020. The General Scheme of an amending Bill was published in May 2021.[vii] The Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach carried out pre-legislative scrutiny and the Committee issued its report in December 2021.[viii] So far, the question of a public interest test has not been addressed.

Confusingly, the EU Directive states that Member States could decide to provide that reports concerning *interpersonal grievances* exclusively affecting the reporting person, can be pursued through other procedures.

Interpersonal grievances are defined as "grievances about interpersonal conflicts between the reporting person and another worker".[ix] This option was taken up in the General Scheme by the insertion of a new s.5(9) into the 2014 Act.[x]

However, the Oireachtas Committee has recommended that the proposed exclusions in relation to "interpersonal grievance" would not be included, as it could create uncertainty or discourage disclosure.

This may be intended to redirect claims that fall into the category of bullying and harassment but it is not at all clear that such interpersonal grievances relate to the kind of distinction between grievances and protected disclosures referred to in *Baranya*.

UK LEGISLATION

The passing reference in *Baranya* to the corresponding UK legislation should not be ignored.[xi]

The Public Interest Disclosure Act 1998 was ground-breaking at the time of its introduction. This was against the background of a series of scandals and disasters (notably the Zeebruge ferry disaster, the rail crash at Clapham Junction, the explosion on Piper Alpha and the financial scandals involving BCCI, Maxwell, Barlow Clowes and Barings) where it became clear that staff were well aware of the risk of serious physical and financial harm but were frightened to raise their concerns or did so in the wrong way or with the wrong person.[xii]

The UK law did not originally contain a test of public interest but this was changed, through a 2013 amendment. While the phrase 'in the public interest' has not been defined by parliament, the courts have taken a nuanced, pro-employee interpretation of the test.

These developments are pertinent, not least because the findings in *Baranya* mirror a decision reached by the UK Employment Appeal Tribunal (UKEAT) before the UK legislation was amended.

In *Parkins v. Sodexho* [xiii] a worker had made an application for interim relief [xiv] on the ground that he had been dismissed after raising a matter of health and safety. He claimed that he had made a protected disclosure under the provisions of the corresponding UK Act, the Employment Rights Act 1996 (ERA) as amended by the Public Interest Disclosure Act 1998. Section 43B(1) of the ERA defined a qualifying disclosure as:

"… any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show … (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

Note the absence of any express exclusion for employment contractual matters.

An employment tribunal dismissed Mr Parkins' claim, holding that a breach of contract was not a failure to comply with any legal obligation within the meaning of s.43B(1)(b).

But the UKEAT upheld an appeal, saying "we can see no real basis for excluding a legal obligation which arises from a contract of employment from any other form of legal obligation. It seems to us that it falls within the terms of the Act. It is a very broadly drawn provision."

In other words, a protected disclosure could apply to a failure to comply with the individual's own contract of employment. However, that was not understood to have been the original intention of the Act and the then Coalition government responded by inserting the words "is made in the public interest" into the definition of a qualifying [i.e. protected] disclosure.[xv]

NARROW INTERPRETATION

The UK Court of Appeal has interpreted this public interest test quite narrowly. In what is now considered to be the leading case of *Chesterton v. Nurmohamed*, it allowed that in a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment, there may 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.

The claimant had been dismissed by his employer, a well-known estate agency, after making disclosures about alleged financial irregularities, which had an effect on the earnings of himself and about 100 other employees across several branches.

The employer resisted his claim under the whistleblower legislation on the basis that the disclosure concerned personal matters which used to be covered by *Parkins* but were now not sufficient.

The employment tribunal held that on the facts there was a public interest here. They took into account the effects on the other managers and also possibly on anyone else wanting to rely on the company accounts (while accepting that the claimant's primary concern was the effect on his own earnings).

The UKEAT rejected an appeal, pointing out that it was not a case of the tribunal itself determining public interest, but of determining whether the individual had had a reasonable belief in public interest.

It was of the view that as the 2013 amendment was for the relatively narrow purpose of reversing Parkins, it did not follow that protection was out of the question if any personal interest was involved, especially in the case of a group of people.

ABSOLUTE RULES

On further appeal to the Court of Appeal, Lord Justice Underhill expressed his strong support for the view that this is not an area susceptible to resolution by clearly defined rules or standards:

''The statutory criterion of what is 'in the public interest' does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract … may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest." [xvi]

As guidance for employment tribunals, the court set out the following criteria as to whether a disclosure might be in the public interest:

i. the numbers in the group whose interests the disclosure served;

ii. 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;

iii. 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;

iv.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'.

Chesterton is now seen as taking a relatively liberal and pro-worker approach to the 2013 change to the UK law. [xvii]

NEED FOR DEBATE IN IRELAND

In the long title to the Protected Disclosures Act 2014, the Irish law was introduced as being "to make provision for … the protection of persons from taking actions against them in respect of making certain disclosures in the public interest and for connected purposes."

As Judge Charleton said in *Baranya*, "[w]hile the long title might anticipate confining the protection of disclosures exclusively to those made with a public interest in mind, that is not what the 2014 Act does." [xviii]

Some might fear that a public interest test could rule out or discourage genuine claims for protection.

The UK experience with claims of mixed private and public interests shows that there need not be a hard and fast distinction between personal and public interest which would rule out statutory protection for claimants showing any element of private interest.

To address the shortcomings of our legislation evident from *Baranya*, there is now a clear need for a debate as to why we should not include a test of public interest in the forthcoming amendment to the 2014 Act.

Des McDermott is a former Assistant Editor of IRN.

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i Judgment of Charleton J. in *Baranya v. Rosderra Meats Ltd.* [2021] IESC 77, (Unreported, Supreme Court, 2 December 2021) at para.9. Available at https://courts.ie/judgments and at http://www.bailii.org/.

ii. Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, S.I. No. 464 of 2015.

iii. Judgment of Hogan J. in *Baranya v. Rosderra Meats Ltd. [*2021] IESC 77 at para. 25.

iv. Ibid. at paras. 27-28.

v. Ibid. at para. 35.

vi. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

vii. Available to download at https://www.gov.ie/en/publication/e20b61-protected-disclosures-act-guidance-for-public-bodies/#eu-whistleblowing-directive.

viii. Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach, Report of the Joint Committee on the Pre-Legislative Scrutiny of the General Scheme of the Protected Disclosures (Amendment) Bill 2021, December 2021. Report available for download at https://www.oireachtas.ie/en/committees/33/finance-public-expenditure-and-reform-and-taoiseach/.

ix. Recital 22 of Directive (EU) 2019/1937

x. General Scheme, Head 5 – Material scope at p.40.

xi. Judgment of Hogan J. in *Baranya v. Rosderra Meats Ltd.* [2021] IESC 77 at para. 26.

xii. *Smith, Harvey on Industrial Relations and Employment Law,* section CIII.1.A

xiii. *Parkins v Sodexho Ltd* [2002] IRLR 109.

xiv. Usually meaning reinstatement or reengagement pending resolution of a claim.

xv. Section 43B of the ERA (as amended by s.17 of the Enterprise and Regulatory Reform Act 2013) now reads "…a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following (relevant failures). The inserted words are in square brackets. The relevant failures more or less approximate to the list of relevant wrongdoings in the Irish Act.

xvi Chesterton v. Nurmohamed [2017] EWCA Civ 979, [2018] 1 All ER 947 at pp.959-60.

xvii. Public Interest—The 2013 Reforms' in Harvey on Industrial Relations and Employment Law, section C.III.5.B.

xviii. Judgment of Charleton J. in *Baranya v. Rosderra Meats Ltd.* [2021] IESC 77 at para. 3.