

## INTERNATIONAL ASSOCIATION OF JUDGES

### FOURTH STUDY COMMISSION

#### RESPONSES TO QUESTIONNAIRE ON BEHALF OF THE IRISH DELEGATION

1. Does your country have any legislation, or rules, that deal with fraud and corruption in the workplace? If so, please briefly describe them.
  - a. Fraud and corruption in the workplace are generally dealt with through internal disciplinary procedures, or taking criminal action, primarily through the Criminal Justice (Theft and Fraud Offences) Act, 2001, and the Criminal Justice (Corruption Offences) Act 2018.
  - b. Upon discovering such an offence being carried out by an employee, the employer can make a complaint to the Garda Síochána and have a criminal prosecution carried out.<sup>1</sup>
  - c. The employer can pursue a civil claim against the employee to recover the value of the fraudulent activity. The employer may proceed with the employment disciplinary procedure, unless it was manifestly unfair, even if the criminal prosecution against the employee has not been concluded.<sup>2</sup>
  - d. Employees wishing to report fraud or corruption in the workplace are facilitated by the Protected Disclosures Act 2014.
  
2. Do you have one example of fraud or corruption in the workplace and its consequences on employees?
  - a. Cases of fraud and corruption in the workplace are many and varied, with comparators being often of little practical assistance due to the wildly differing circumstances present. Thus a meticulous analysis must be carried out by the courts in each individual case in order to arrive at an appropriate sentence. The recent Court of Appeal decision in the *Director of Public Prosecutions v Maguire*<sup>3</sup> includes an analysis of many cases concerning fraud, theft and misappropriation and identifies common threads of similarity. In his judgment, Mr Justice Edwards refers to a maximum potential penalty of imprisonment for ten years as being typical for fraud type offences (although the actual potential maximum is dependent on the exact offence charged), and notes that frequently the sentence ultimately imposed will be significantly less than that, based on proportionality rules which require both an assessment of the gravity of the offending conduct and of the mitigating circumstances in the case of the individual accused. Cases of fraud exhibit trends in terms of the accused person – very often they will have no previous convictions and be of otherwise good character. These accused persons often plead guilty at a very early stage, and will have co-operated with the investigation and made full admissions, which is of particular aid in cases of fraud. The risk of re-offending in such cases is generally low in the absence of addiction problems. Although the sums concerned are frequently markedly high, such cases are rarely initiated with criminal intent and more often arise from pressure and opportunism. It may be inferred from the sentencing trends in such cases that specific deterrence does not play a significant

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<sup>1</sup> Terry Gorry, 'How to Deal With Fraud in the Workplace from an Employment Law Perspective', <<https://employmentrightsireland.com/how-to-deal-with-fraud-in-the-workplace-from-an-employment-law-perspective>> accessed 20 February 2020.

<sup>2</sup> *ibid.*

<sup>3</sup> [2018] IECA 310.

role due to the lack of previous convictions of the accused persons, and that general deterrence is satisfied by the imposition of a custodial sentence and is served little by the length of the sentences. It may also be inferred that sentencing judges are keen to incentivise rehabilitation through their leniency, particularly through the partial suspension of sentences.

- b. In the *Maguire* case, the Court of Appeal examined the sentence of four years' imprisonment imposed on a secretary/personal assistant to two professionals, from whom she fraudulently lodged €1,187,616.07 to her own personal account over the course of 14 years. The two injured parties were compensated somewhat by the banks, but this fell short of the full sum, leaving a total deficit of €325,759.40. The appellant was a single mother who began misappropriating the money due to urgent financial pressure with the intention of repaying, until this became unrealistic. The Court of Appeal concluded that the mitigation afforded to the appellant could not have been less than 50%, and thus the headline sentence identified by the sentencing judge would have been excessive. Nevertheless, the offending was of a very serious nature, and would necessarily warrant a custodial sentence. The sentence of four years' imprisonment was quashed, and the appellant was re-sentenced to three years' imprisonment with the final year suspended for a period of two years. In arriving at this sentence, the court took into account the seriousness of the offending and the need for general deterrent, while noting the minimal need for specific deterrence, and outlined a headline sentence of six years. This was reduced by the significant mitigating factors present, bolstered by reports of the appellant's overwhelmingly positive reports from her time in prison.
3. Do you have any specific laws protecting whistleblowing by employees, and, if so, what are they? Do these laws cover wrongdoing, fraud and corruption by third parties (who are not employers?) What remedies are available to whistleblowers?
    - a. As of the 15<sup>th</sup> of July, 2014, whistleblowers have been afforded some protection under the Protected Disclosures Act 2014. The Act provides for redress for employees who face negative consequences for their reporting of wrongdoing in the workplace.
      - i. Workers are protected when disclosing relevant information in a manner covered by the Act.
      - ii. Wrongdoing is defined in broad terms and includes:
        1. Commission or likely commission of criminal offences;
        2. Failure to comply with legal obligations;
        3. Endangering the health and safety of individuals;
        4. Damaging the environment;
        5. Miscarriage of justice, misuse of public funds;
        6. Oppressive, discriminatory, grossly negligent or grossly mismanaged acts or omissions by a public body;
        7. Concealment or destruction of information in relation to any of the above.
      - iii. The Act does not extend to corruption by third parties.
      - iv. The protection afforded by the Act still stands regardless of whether the information is correct, as long as the reporter had a reasonable belief in the information.
      - v. The receiver of a protected disclosure must not reveal any information which could identify the whistleblower, unless their identification is essential to the effective investigation of the matter, or is necessary to prevent crime or risks to State security, public health, or the environment.

- vi. Once a protected disclosure has been made, the onus is on the employer to prove that it is not protected within the confines of the Act.
  - vii. The dismissal of an employee due to their making of a protected disclosure is regarded as an unfair dismissal, and may be remedied under the Unfair Dismissals Acts 1977-2015.
  - viii. An employer is prohibited from penalising or otherwise threatening the reporter of a protected disclosure. An employee facing such threats or penalisation may complain to the Workplace Relations Commission. Alternatively, they may sue the employer instead.
  - ix. The Act grants immunity to reporters from most civil actions from damages as a result of a protected disclosure.
  - x. If a reporter is charged with unlawfully disclosing information, they may pursue the defence that they reasonably believed the information to be a protected disclosure.
- b. Prior to the coming into force of the 2014 Act, some sectors were covered by specific protected disclosures legislation.<sup>4</sup>
  - c. The European Union is currently in the process of enacting legislation which would broaden the scope of the 2014 Act to account for the reporting of breaches of EU law. Once enacted, the legislation must be brought into effect within 2 years.
  - d. Public bodies must maintain a whistleblowing policy that allows for the making of protected disclosures. Information relating to these policies must be provided to employees in written form, and annual reports detailing the number of protected disclosures and action taken on the foot of such must be published. There is no such obligation on employers in the private sector. However, the Workplace Relations Commission has published the Code of Practice on Protected Disclosures Act 2014, which provides a sample policy for how employers should handle disclosures.<sup>5</sup>
4. Do non-government agencies, such as civil society organisations, play any part in fighting corruption in the workplace, and if so, how do they interact with the administrative agencies or courts in your country?
- a. The Transparency Legal Advice Centre (TLAC) offers free legal advice for anyone seeking to disclose wrongdoing or corruption, and maintains a dedicated whistleblower's helpline. They have also published a guide book for people wishing to bring corruption and fraud to light.<sup>6</sup>
  - b. Such organisations are not overly integrated with administrative agencies. The Department of Justice and Equality have established a 'Tackling Bribery and Corruption' website with the mandate of raising awareness of Ireland's commitments to tackle corruption through inter-collaborative efforts between government agencies, but does not implement any non-governmental organisations.<sup>7</sup>
  - c. The 2011 Eurobarometer Report on 'Attitudes of Europeans towards Corruption' found that 86% of Irish people surveyed believe that corruption is a major problem in

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<sup>4</sup> For example, The Health Act 2004, as amended by the Health Act 2007, gives protection to both employees and members of the public who disclose possible wrongdoing within the health sector; The Protections for Persons Reporting Child Abuse Act 1998 provides protection from victimisation and civil liability for people reporting the abuse of children; The Charities Act 2009 provides for the protection of people who report alleged breaches of the legislation to the Charities Regulatory Authority.

<sup>5</sup> Code of Practice on Protected Disclosures Act 2014 (Declaration) Order 2015.

<sup>6</sup> Transparency Ireland, 'Speak Up Safely', <[transparency.ie](http://transparency.ie)> accessed 21 February 2020.

<sup>7</sup> The Department of Justice and Equality, 'Tackling Bribery and Corruption', <<http://www.anticorruption.ie>> accessed 24 February 2020.

Ireland, and 70% believe that the government has failed to do enough to combat corruption.<sup>8</sup>

- d. This is reflected in a survey conducted by the private company Deloitte amongst their executives. This survey indicated that too few companies utilised modern systems for the early identification of bribery and corruption, and that most instances of bribery or corruption were discovered by chance, confession or tip-offs, rather than systemic safeguards.<sup>9</sup>

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<sup>8</sup> European Commission, 'Attitudes of Europeans towards Corruption', Eurobarometer, 2011.

<sup>9</sup> Shawn Pogatchnik, 'Irish business need to do more to combat bribery and corruption, warns report', *Independent*, 19 June 2019 <<https://www.independent.ie/business/irish-business-need-to-do-more-to-combat-bribery-and-corruption-warns-report-38234384.html>> accessed 24 February 2020.