

## Irish Workplace Relations Commission awards five years salary in whistleblower matter

Insights - 22/11/2023

The Irish Workplace Relations Commission (the "WRC") has made an award of five years' gross remuneration to a massage therapist (the "Complainant") who suffered penalisation when she made a protected disclosure to her previous employer (the "Respondent") in *A Worker v A Massage Therapy Business, ADJ-00043225*. The protected disclosure concerned the requirement for the Complainant to provide sexual services to clients throughout her employment. When the Complainant's employment was terminated, she made a number of complaints to the WRC, including a penalisation claim.

### Background

The Complainant commenced employment with the Respondent in February 2020. She typically worked 40 hours a week, was paid €70 per day in cash and was never provided with written terms of her employment as required under the Minimum Notice and Terms of Information Act, 1973.

Shortly after commencing employment, the Complainant submits that clients began to ask for additional services of a sexual nature, stating that other workers in the Respondent's facility provided such services. When the Complainant raised this with her managers, they brought her for dinner and advised that she "could say no" to these services but that they "could assure her that she wouldn't get more clients." The Complainant's interpretation of this was that the Respondent would cease giving her any clients at all.

Following this conversation, the Complainant began to provide limited sexual services whilst continuing to be pressured to provide an additional range of sexual services. She notified her manager on a number of occasions that she did not want to do this, expressing concerns about her own health and safety and conditions of working. Despite this, her managers continued to pressure her to provide these services to clients. Further, her male manager routinely attended

the premises for free massages, pressuring the Complainant to touch him intimately or to provide him with sexual services.

The Complainant eventually refused to provide her male manager with sexual services and supported another worker in refusing to do the same. Once the managers found out that the Complainant was supporting her colleague, she noticed that their treatment towards her began to change. The Complainant noticed that the female manager became rude, dismissive and derogatory towards her and began to schedule her less for work. The Respondent also implemented a policy where the Complainant would not be paid unless she saw at least 4 clients during the day, which resulted in multiple occasions where she was not paid at all for her day's work.

The Respondent's business closed for a number of months due to the Covid-19 pandemic. When it re-opened, the Complainant took a leave of absence to return to her native country. When she returned to work, the colleague whom she had been supporting had resigned and her own working conditions continued to deteriorate. Directly before the Complainant was dismissed, she took 2 weeks' holidays. When she returned, she was not rostered to work at all. When she queried this with her managers, she was advised that there would not be any more work for her and that she should find another job. The Complainant was dismissed on 17 May 2022.

## Penalisation for having made a protected disclosure

It should be noted that the Complainant attended the WRC hearing with her legal representatives. However, the Respondent failed to appear on the day and did not lodge any submissions to support any defence to any of the Complainant's claims.

**The claim:** The Complainant contends that she made a protected disclosure regarding the nature and safety of her work as well as concerns about her own health, safety and conditions of work (i.e. complaints about being pressured to provide sexual services). The protected disclosure was reported directly to her managers, following which, she suffered penalisation, being that she experienced negative consequences including derogatory behaviour and a reduction of working hours.

**The decision:** The AO considered the Protected Disclosures Act 2014 and the Protected Disclosures (Amendment) Act 2022 (the "Acts") and referred to the case of *Baranya v Rosderra Meats* stating that "*a complaint made by an employee that his or her own personal health or safety is endangered by workplace practices is clearly within the remit [...] of the Acts.*" The AO was satisfied that the disclosure made by the Complainant constituted a protected disclosure under the Acts.

Penalisation for having made a protected disclosure is prohibited under the Acts, which also provide for compensation to be made where an adjudicator makes a finding of penalisation as

s/he "considers just and equitable having regard to all the circumstances."

The AO found that the Complainant was penalised which took various forms including a change in attitude towards her and a reduction in her remuneration arising from being assigned fewer clients. The Complainant was expressly told that she would be assigned less clients if she did not provide sexual services and thus there was a causal link between the protected disclosure and the penalisation.

In the absence of any rebuttal or defence put forward by the Respondent, the AO found that the treatment of the Complainant after having made a protected disclosure "*constituted further penalisation in the form of coercion, intimidation, harassment or unfair treatment.*"

**The award:** The Acts provide for a maximum award of five years' gross remuneration in the event of a breach. The legislative intention in permitting such a high award was to afford a very high degree of protection to persons making protected disclosures. The AO referenced case law from the ECJ which found that such redress "*should not only compensate for economic loss sustained but must provide a real deterrent against future infractions.*"

In reaching his decision, the AO considered the Complainant, who was not a native English speaker, to be an "*exceptionally vulnerable worker*" who came to Ireland to study and work to support herself. As a result of having made a protected disclosure, the Complainant suffered significant emotional stress and humiliation at the hands of the Respondent. The AO made an award of the maximum permissible amount of 5 years' gross remuneration (a sum of €91,000).

## The other claims

In addition to the penalisation claim mentioned above, the Complainant also submitted a number of other claims including the following:

- An unfair dismissal claim;
- A claim for the Respondent's failure to provide her with a statement of written terms of employment;
- A claim for failure to provide notice or payment in lieu of notice when implementing the dismissal;
- A pay claim in respect of holiday entitlements; and
- A claim for the unlawful deductions from the Complainant's salary.

The Complainant was successful in all claims mentioned above except the final claim regarding the unlawful deductions from her salary. In this regard, the Complainant stated that from 1 November 2021 to 31 March 2022 her working hours reduced and her remuneration dropped

from €70 to €20 per day. As the deductions occurred prior to the six month period before the claim was initiated in the WRC, this claim was out of time and was therefore not well-founded.

In total, the AO made an order that the Respondent pay the Complainant a total of €102,550 for the penalisation claim and those listed at (i) to (iv) above.

## **Key takeaways for employers**

It is clear from the case at hand that the Respondent failed to follow any procedures in its treatment of the Complainant which undoubtedly contributed to the substantial award issued by the AO. This decision and the flawed actions of the Respondent highlight the importance of establishing appropriate policies that are followed in the workplace.

Currently under the Acts, all public bodies must establish formal reporting channels and procedures to effectively manage reports of protected disclosures. With effect from 17 December 2023, private sector organisations employing 50 or more employees are required to do so (down from the current threshold of 150 employees). However, employers with less than 50 employees must still be aware of their obligations under the Acts and handle protected disclosures in a serious, reasonable and sensitive manner. Whilst employers with less than 50 employees are not legally obliged to establish formal reporting channels and procedures, it is still advisable that this task is carried out in order to show that the organisation has taken all reasonable steps to address any reports made to it. Failure to do so may result in the organisation facing substantial financial consequences at a later date.

For assistance on implementing a protected disclosures policy or indeed any other workplace policies, please contact Bláthnaid Evans or Marianne Norton via their details below.

### **About Ogier**

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

### **Disclaimer**

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

## Key Contacts



Marianne Norton

Associate

Ireland

E: [marianne.norton@ogier.com](mailto:marianne.norton@ogier.com)



Bláthnaid Evans

Head of Employment and Corporate Immigration

Ireland

E: [blathnaid.evans@ogier.com](mailto:blathnaid.evans@ogier.com)

T: [+353 1 632 3113](tel:+35316323113)

## Related Services

Employment law