

# WHITE PAPER CONFERENCE

## Off the record allegations

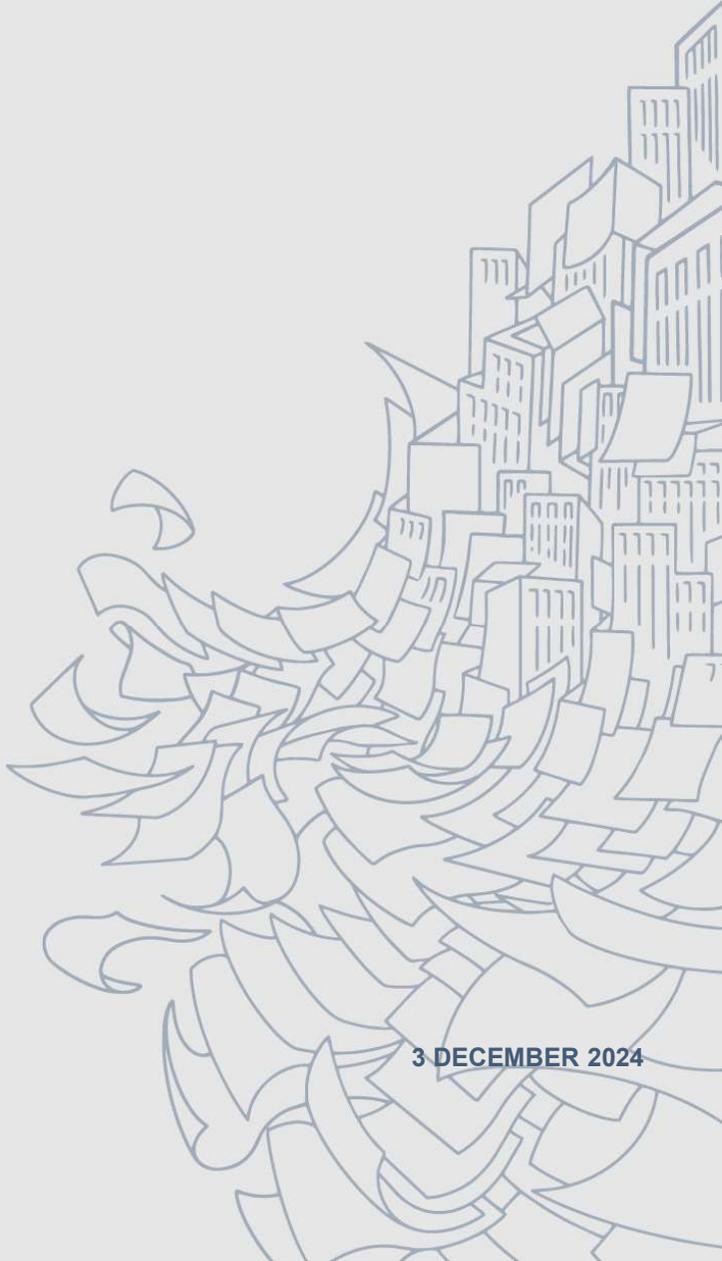
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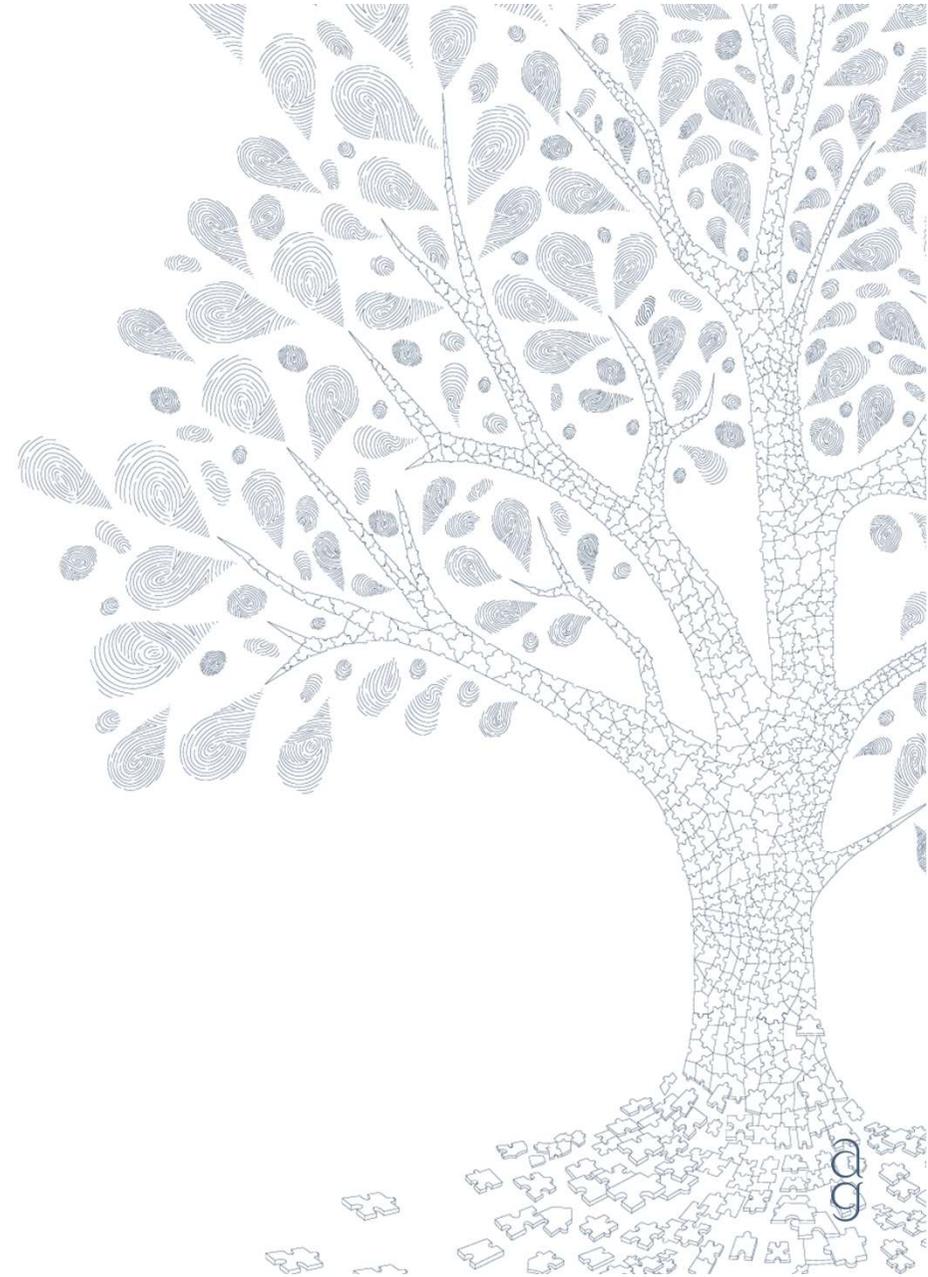
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3 DECEMBER 2024



# INTRODUCTION

- 1 'off the record' allegations from employees
- 2 Anonymous Complaints
- 3 Whistle-blowing



# EMPLOYER LIABILITY FOR WORKPLACE CONDUCT

- Vicarious Liability
- Close Connection Test : -
  - O'Keefe -v- Hickey case:
    - liability does not exclude unauthorised actions
    - Not automatic liability – facts of the case to be reviewed
  - Berber - v - Dunnes Stores case:

"what the employer not only could but should have done"

# LIABILITY FOR DISCRIMINATION

- Employment Equality Acts 1998 to 2021, Section 14A
  - "in the course of his or her employment"
  - harassment or sexual harassment by a co-worker, the employer or by a "*client, customer or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it.*"
  - Wide-ranging responsibility to ensure that:
    - their workplaces are safe; and
    - effective means by which grievances and allegations of harassment or sexual harassment are adequately addressed and resolved.

# NEED FOR PROCEDURES

- Not sufficient to rely on informality

Barbara Atkinson v Hugh Carey and another - "open door policy" operated in practice.

High Court Delahunt J.

*“there were no written procedures in place to provide the plaintiff with an avenue to seek redress. It is not sufficient for the defendants to plead that no amount of paper compliance would have helped in the case of the plaintiff. The failure of the defendants to have in place adequate procedures renders them liable and by reason of their failure to fulfil their statutory obligations they are responsible and cannot plead immunity from same simply because the plaintiff failed to make a complaint.”*

# WORKPLACE ENVIRONMENT

- Generalised allegations
- Hostile Workplace

## Waterford City and County Council -v- a Worker

*“The test is a subjective one in that the impugned conduct need not be directed at having the purpose described by the statute. It is sufficient if it has that effect on the victim.”*

## Store (respondent) v A Worker (complainant/appellant) -

Labour Court: sexual harassment includes conduct that created an “offensive environment for the person”.

# EMPLOYER'S POLICIES

- Section 15 (3) of the Employment Equality Acts show that it took such steps as were reasonably practicable to prevent the employee from doing that act or from doing in the course of his employment acts of that description.
- Effective and compliant policies and procedures
- These policies are implemented and understood by managers and employees in the workplace.
- Fundamental that that the respective rights of all parties involved are respected.

# FAIR PROCEDURES AND THE NEED TO IDENTIFY THE COMPLAINANT

- Procedures depend on nature of complaint or issue
- Fairness to both parties
- Anonymous Complaints – implications for fair procedures
- alternative investigations – IT or financial audits



# FUNDAMENTAL FAIR PROCEDURES AND NATURAL AND CONSTITUTIONAL JUSTICE

- Re Haughey Rights

include the right *“to cross-examine by counsel, his accusers and to address, by counsel the Committee in his defence”*.

- the person who is accused of wrongdoing is entitled to know and challenge the statements of the person who has accused them of wrongdoing.

- Stages in procedure – formal and informal

- Zawelski case - the Supreme Court 2021

*“As long ago as Re Haughey, these features of court proceedings, and in particular, the ability to cross-examine the opposing party, were regarded as fundamental to fair procedures, and the right of cross-examination ... was one of the rights without which no party could hope to make any adequate defence of his good name”*.

# UNFAIR DISMISSALS ACTS

Section 6 (7) provides as follows:

*“Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if [the adjudication officer or the Labour Court], as the case may be, considers it appropriate to do so -*

- (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal, and*
- (b) to the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure referred to in section 14 (1) of this Act or with the provisions of any code of practice referred to in paragraph (d) (inserted by the Unfair Dismissals (Amendment) Act, 1993) of section 7 (2) of this Act.”*

# RELIANCE ON UNIDENTIFIED COMPLAINANTS UNFAIR

*Robert Newton v Go-Ahead Transport Services (Dublin) Limited (2023)*

*“... The subject of any disciplinary process should be provided with a full and fair opportunity to state his or her case as part of the investigation process. It is widely accepted that as part of fair procedures and natural justice that an employee has a right to challenge his or her accusers before any findings are made.”*



# FAIR PROCEDURES

*Iarnrod Eireann – v – McKelvey* Court of Appeal:

*“All that said there is, I believe, only one substantial issue that needs to be addressed in this judgment namely whether, on the facts of the present case, it was clear that Mr. McKelvey could not have a fair hearing in the course of the formal disciplinary inquiry absent legal representation by solicitor and counsel. None of his other rights are in dispute. These include:*

- (i) his right to know the nature of the complaint/allegation made against him;*
- (ii) his right to know the procedure to be followed in the course of the investigation;*
- (iii) his right to know the potential implications of the complaint/allegation should it be established, i.e. the sanction/sanctions that might be imposed;*
- (iv) his right to be heard in relation to the complaint/allegation and to make representations in relation thereto;*
- (iv) his right to challenge such evidence as might be called to establish the complaint/allegation and to cross-examine all witnesses;*
- (v) his right to call witnesses in support of his stated position.”*

# ALTERNATIVES TO WITNESSES

- Records
- Objectively verifiable information
- IT investigation
- Financial audit
- CCTV- subject to GDPR



# BULLYING

- The Industrial Relations Act 1990 (Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work) Order 2020 [S.I. No. 674 of 2020].
- Both formal and informal resolution mechanisms where bullying has been alleged in a workplace.
- Where allegations of bullying are to be formally investigated that in any complaint the name of any complainant and statement of complaint should be formally signed or approved by the complainant.

# RELIANCE ON ANONYMOUS COMPLAINTS

Neil Lavery -v- Cartamundi Ireland Limited February 2024

In the Lavery case the Adjudication Officer reviewed the express scope of the investigation report and the reliance that had been placed on it in the disciplinary process. The Adjudication Officer said:

*“ ... no formal complaints had been received by the Respondent. The Complainant took exception to the report, and to the fact that anonymous complaints had been made about him with no right to question them. He had many counter complaints which he had no opportunity to put forward. The report stated that if the incidents described had been complained about, they would be sufficient to establish if there was a case to answer..... However, the Respondent moved to a disciplinary process involving allegations of inappropriate behaviour and lack of willingness to address concerns, in a context where the Complainant had no knowledge of the identity of those who complained about him or opportunity to question them.”*

# RELIANCE ON ANONYMOUS COMPLAINTS (2)

Social Care Leader -v- Health Care Provider –

anonymous letter making allegations against the Complainant:

*“I note that the Respondent acted upon an anonymous letter of complaint. I note that the Respondent relied upon witness statements that were withheld from the Complainant. I find that in doing so the Respondent failed to provide fair procedure. It is a fundamental right for an individual to confront their accuser. There are mechanisms available to protect such witnesses. ...However, I find that the Respondent's reliance upon an anonymous complaint and withheld witness statements has rendered this dismissal procedurally unfair.”*

# WHISTLEBLOWING COMPLAINTS

- The Protected Disclosures Act 2014 (as amended in 2022)
- Section 5 A - anonymous reports
- Section 16 (1) – Protection of identity of disclosure
- 16(2) *Subsection (1) shall not apply in the following cases:*
  - (a) *where the disclosure is a necessary and proportionate obligation imposed by Union law or the law of the State in the context of investigations or judicial proceedings, including with a view to safeguarding the rights of defence of the person concerned;*
  - (b) *where the person to whom the report was made or transmitted -*
    - (i) *shows that he or she took all reasonable steps to avoid disclosing the identity of the reporting person or any such information referred to in subsection (1), or*
    - (ii) *reasonably believes that disclosing the identity of the reporting person or any such information is necessary for the prevention of serious risk to the security of the State, public health, public safety or the environment;*
  - (c) *where the disclosure is otherwise required by law.*

# WHAT IS AN EMPLOYER TO DO?

- Effective procedures
- Make clear limits of investigation of confidential information
- Fair Procedure Rights
- Consider alternatives
- GDPR considerations – for use of IT or covert surveillance

# CONCLUSION



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