

Employment law update: the right to silence in the workplace

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It has come into consideration whether an employee's constitutionally protected 'right to silence' can be implemented within the workplace. The Irish High Court in *Electricity Supply Board v Sharkey* [2024] IEHC 65, held that an employee has the right to silence and may refuse to comply with its employer's request for information if it occurs in conjunction with a criminal investigation.

Background

The ruling is a result of allegations that a number of Electricity Supply Board (ESB) employees received unlawful payments from developers and builders in return for favourable treatment when carrying out works, such as connecting projects to the national grid. These allegations arose when two developers claimed that ESB employees sought unlawful incentives to expedite the completion of building works. When the ESB became aware of the situation, they reported it to An Garda Síochána who commenced an investigation into the alleged corruption and bribery. ESB succeeded with an application of a Norwich Pharmacal Order in *ESB and Anor v Richmond Homes Ltd and Anor* [2023] IEHC 571 against the developers in order to find out further information relating to the alleged crimes.

Thereafter, the ESB wrote to Mr Sharkey (the "**Defendant**") ordering him to provide information relating to any involvement in the alleged offences. The letter referenced the Defendant's contractual obligation to work with the ESB, particularly his obligation to "*obey all reasonable and lawful directions*" given on behalf of the ESB. The Defendant's solicitor noted the ongoing criminal investigation, and that any statements made by the Defendant to the ESB might be relied on in any prosecution. Accordingly, the Defendant refused to respond to the letter, invoking his right to silence.

Without consultation or any form of disciplinary hearing, the ESB considered this silence to be a breach of the Defendant's contract of employment, and summarily dismissed him. According to

the ESB, the Defendant's concern that he may incriminate himself did not have any correlation to his contract of employment and they felt that invoking his right to silence was premature.

Decision

ESB issued the defendant with plenary summons where the High Court considered that the *"principal issue"* between the parties was whether the defendant's right to silence was capable of having a horizontal effect between private parties, in this instance being whether the right to silence also applies in an employment context. The court disagreed with the parties' contention that the situation could be addressed *"by the simple application of a fixed rule, one way or the other"*.

The court referred to ***Meskill v CIE [1973] IR 121*** which demonstrated that forcing an employee to forego their constitutional rights or risk dismissal is an infringement of said rights.

The Court also considered ***Wicklow County Council v O'Reilly [2006] 3 IR 623*** which stated that *'no hard and fast rule as to how contemporaneous civil and criminal proceedings arising out of the same matter should be progressed'*. In this case, Clarke J acknowledged the right to silence as capable of being utilised in civil proceedings which could involve defendants making statements to help protect themselves, but that factor had to be balanced with the importance of allowing civil matters to proceed.

The High Court found that the Defendant was entitled to invoke his right to silence while the criminal investigation was ongoing. However, that entitlement would cease once the criminal investigation is finalised. Further, the Court found that the plaintiff employer can insist that the defendant employee comply with their information requests, or face the consequence of being summarily dismissed.

Key takeaways for employers

This case, although fact specific, can be considered a helpful guide for employers in the context of investigative or disciplinary proceedings which overlap with criminal complaints. Whilst an employer may dismiss an employee for breach of contract as a result of non-compliance with procedures, they cannot interfere with an employee's constitutional rights. However, it is important to note that in this particular case, the right to silence can only be invoked in conjunction with ongoing criminal proceedings. Notably, this entitlement may change depending on the conclusion of the criminal investigation, or if the ESB can carry out a balancing exercise which demonstrates a greater interest in obtaining the requested information.

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