
Legal developments in the protection of environmental whistleblowers in the world of work

Tahmina Karimova

4 October 2019

CONTEXT

- Protection of environmental whistleblowers is part of the environmental rights at work;
- Environmental whistleblowing is a subject of regulation by labour legislation;
- Labour law protection of environmental whistleblowers can also be linked to the legal protection of workers in the field of occupational safety and health;
- Labour law protection of whistleblowers does not distinguish between employees of private or public sector.

ILO INSTRUMENTS 1/2

- **C158 - Termination of Employment Convention, 1982 (No. 158)**

Article 5

The following, inter alia, shall not constitute valid reasons for termination ...

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

ILO INSTRUMENTS 2/2

- **C176 - Safety and Health in Mines Convention, 1995 (No. 176)**

Article 13

1. Under the national laws and regulations referred to in Article 4, workers shall have the following rights:
 - (a) to **report accidents, dangerous occurrences and hazards** to the employer and to the competent authority;
4. National laws and regulations shall ensure that the rights referred to in paragraphs 1 and 2 above can be exercised without discrimination or retaliation.

RECENT DEVELOPMENTS IN PROTECTION AFFORDED BY NATIONAL LABOUR LAWS

France, Labour Code

- *Labour Code* was modified as a result of the Law n ° 2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life - Article 10.
- Now according to Article L1132-3-3 of the Labour Code of France, reprisals against whistle blowers are now prohibited within the framework of non-discrimination prohibition. The new provision stipulates, *among others*, that:
 - No person may be excluded from a recruitment procedure or from access to an internship or a period of training in a company, no employee may be sanctioned, dismissed or subject to a discriminatory measure, direct or indirectly, particularly with regard to remuneration, within the meaning of Article L. 3221-3, incentive or share distribution, training, reclassification, assignment, qualification, classification, promotion professional, transfer or renewal of contract, for having recounted or testified, in good faith, facts constituting an offense or a crime of which he would have known in the exercise of his functions.

RECENT DEVELOPMENTS IN PROTECTION AFFORDED BY NATIONAL LABOUR LAWS

Norway, Working Environment Act

- 11 June 2019, the Norwegian Parliament passed a resolution amending the Working Environment Act Chapter 2 A (entry into force: 1 January 2020).
- Clarifies the personal scope of those protected by whistleblowers provisions.
- Clarifies scope of «censurable conditions» subject to whistleblowing: i.e. currently rules currently stipulate that workers can report "censurable conditions" in the undertaking without clarifying what that includes. The amendment now lists examples of what are considered "censurable " in the new Section 2 A-1 second paragraph including "risk to climate or the environment".
- Clarifies the content of the prohibition of retaliation against workers/whistleblowers. The amendment includes examples of what may be regarded as retaliation such as threats, harassment, undue differential treatment, social exclusion or other improper conduct, warning notices, change in work tasks, relocation or demotion, suspension, wrongful termination, dismissal or disciplinary action.
- WEA as it stands requires that employee's proceed "responsibly" when making notification (blowing the whistle". This term has been removed, instead the legislation provides that the employee can always notify internally or public authorities and on certain conditions the general public.

RECENT DEVELOPMENTS IN PROTECTION OF WORKERS AFFORDED BY NATIONAL LABOUR LAWS

Sweden: the 2017 Act on special protection for workers against reprisals for whistleblowing regarding serious irregularities

- Contains provisions that provide special protection for workers against reprisals for whistleblowing concerning serious irregularities in the employer's activities.
- Irregularities include environmental wrongdoings.
- The term 'workers' refers equally to those performing work as temporary agency workers if the irregularities reported refer to conditions in the activities of the hiring company. In such cases, the hiring company is to be considered the employer.
- The Act differentiates between various types of whistleblowing: internal and external.

PRACTICE OF CEASCR: SWEDEN

Sweden: the 2017 Act on special protection for workers against reprisals for whistleblowing regarding serious irregularities

Observation of CEASCR - adopted in 107th ILC session (2018), in the framework of the Termination of Employment Convention, 1982 (No. 158) - Sweden (Ratification: 1983), Article 5(c), Invalid reasons for termination:

- *The Committee requests the Government to provide information on the reasons for the differentiated standard of protection against reprisals – including dismissals – for internal as opposed to external whistleblowers under the 2017 Act on special protection for workers against reprisals for whistleblowing regarding serious irregularities. The Committee further requests information on the number of complaints of unfair dismissal for whistleblowing, the applicable burden of proof, and extracts of relevant judicial decisions.*

PROTECTION OF WORKERS IN SPECIFIC WHISTLE-BLOWERS' PROTECTION ACTS

Australia, Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 amended the Corporation Act 2001

- 1317AAD Public interest disclosure and emergency disclosure

... (2) A disclosure of information (the emergency disclosure) by an individual (the discloser) qualifies for protection under this Part if: ... (b) the discloser has reasonable grounds to believe that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the natural environment.

- In sections 1317AC and 1317AD, detriment includes (without limitation) any of the following:

(a) dismissal of an employee; (b) injury of an employee in his or her employment; (c) alteration of an employee's position or duties to his or her disadvantage; (d) discrimination between an employee and other employees of the same employer; (e) harassment or intimidation of a person; (f) harm or injury to a person, including psychological harm; (g) damage to a person's property; (h) damage to a person's reputation; (i) damage to a person's business or financial position; (j) any other damage to a person.

PROTECTION OF WORKERS IN SPECIFIC WHISTLE-BLOWERS' PROTECTION ACTS

Namibia, Whistleblower Protection Act 10 of 2017

A disclosure of improper conduct may be made to an authorised person by -(a) an employee in the public or private sector, in respect of his or her employer; (b) an employee, in respect of another employee; or (c) any person, in respect of another person or a public or private body or institution (Article 29).

Improper conduct is conduct which if disclosed and proved shows or tends to show that:...

- (e) in any institution, organisation or entity there has been, there is or there is likely to be waste, misappropriation or mismanagement of resources in such a manner that the public interest has been, is being or is likely to be affected;
- (f) the environment has been degraded, is being degraded or is likely to be degraded (Article 2).

Detrimental action, a person is considered to be subjected to detrimental action if that person - (a) being an employee, is subjected to intimidation, harassment or any action causing personal harm or injury or loss or damage to property or any interference with his or her lawful employment by the employer or a fellow employee or by any other person or an institution (Article 1).

PROTECTION OF WORKERS IN SPECIFIC WHISTLE-BLOWERS' PROTECTION ACTS

South Africa: 2 August 2017 Amendments to Protected Disclosures Act of 2000

- Provides Protection for whistleblowers in the private and public sector, who disclose information regarding unlawful or irregular conduct by their employers or fellow employees.
NB: Irregular conduct includes “damage to the environment”.
- Amendment introduces the new term “worker” in addition to “employee”. Thus, it includes individuals who currently or previously worked for the employer; also independent contractors, consultants, agents and those rendering services to a client whilst being employed by a temporary employment service (labour broker).
- Provides for remedies in the case of occupational detriment including the payment by the employer (jointly with their client if applicable) of compensation, the payment of actual damages and the remedy of the occupational detriment suffered by the employee.
- Additional protection to employees and workers against any civil, criminal or disciplinary proceedings that might otherwise be initiated where the disclosure is prohibited by any other law, oath, contract, practice or agreement requiring confidentiality. This does not protect the employee or worker from the consequences of any participation by them in the impropriety.