

## Employees who blow the whistle are protected



The Protected Disclosures Act no. 26 of 2000 (PDA) protects employees from reprisals as a result of having blown the whistle on the employer. This applies whether the disclosure in question is made to authorities within or outside of the company/organisation concerned.

Under the PDA both employees and employers are protected. That is, employees are protected from reprisals when making disclosures in good faith; and employers are, to a limited extent, protected from employees who make unfounded and malicious disclosures. Therefore, while the PDA encourages genuine disclosures it requires the employee, when making an external disclosure, to at least hold a genuine belief that the employer has acted wrongly.

Whistle blowing employees are also protected by sections 186(2)(d) and under section 187(1)(h) of the Labour Relations Act (LRA). The former section classifies as an “unfair labour practice” any employer conduct short of dismissal resulting in “an occupational detriment” to an employee who has made a protected disclosure as per the PDA. The maximum compensation awarded to an employee successful in such a claim would be 12 months’ remuneration.

The latter section of the LRA makes it automatically unfair for an employer to dismiss an employee for having made a disclosure protected in terms of the PDA. While few such cases have been reported in labour law it appears that the courts are trying to look after the interests of both employers and employees.

In the case of *City of Tshwane Metropolitan Municipality vs Engineering Council of SA & another* (2010,

3 BLLR 229) the municipality's management rejected the job applications of white applicants chosen by the municipality's selection panel. Management's rejection of the white applicants was on the grounds that the posts were to be given to black applicants despite the fact that those black people who applied all failed an approved test. The managing engineer objected to the management's decision to appoint the candidates who had failed the test and sent a letter to this effect to his superiors and then to the Department of Labour. He expressed his concern that the appointees who had failed were not qualified to do dangerous electrical work.

In response to this the management disciplined the managing engineer and found him guilty of distributing his objection letters without due permission. He applied to court for an interdict against any form of sanction being implemented by the municipality. The Supreme Court of Appeal later found that the employer was not entitled to discipline the employee who had blown the whistle and ordered the employer to pay the employee's legal costs.

In the Case of Jane Arbuthnot vs SAMWU Provident Fund (2011, case number JS575/09) the employee was found to have been dismissed by the fund for having disclosed to the trade union's National Benefits Officer the contents of a legal opinion document rendered by two advocates to the management of the fund. According to the case report the opinion advised the fund on the potential liability of its trustees flowing from the so called "Fidentia scandal". The fund had invested money in a trust that was controlled by Fidentia and had thus lost a great deal of money. The trust's beneficiaries were minors. According to the case report the employee interpreted the legal opinion to state that the trustees ought to have monitored the performance of the trust properly and that such failure amounts to breach of fiduciary duty of the trustees.

The fund alleged that the employee had made the disclosure in bad faith contrary to her fiduciary duty to the fund.

The Labour Court found that:

A key reason for the dismissal was the applicant's disclosure to the union's benefits officer

The employee had good reason to so disclose the document

She did not do so for personal gain

She believed the information to be substantially true

The PDA cuts across the fiduciary duty of the employee making the disclosure

The employee had the interests of the fund's beneficiaries at heart

The employee's decision to disclose the opinion to the union was a reasonable one

The disclosure was protected in terms of the PDA

The dismissal was automatically unfair

The Court therefore ordered the fund to pay the employee 12 months' remuneration amounting to over R 287 000,00 plus costs.

In view of the above employers are advised to tread very carefully before acting against any employee who makes allegations involving employer wrongdoing.