

**ASPECTS OF WHISTLEBLOWING IN THE
SOUTH AFRICAN LABOUR LAW**

by

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'History will have to record that the greatest tragedy of this period of social transition was not the strident clamour of the bad people but the appalling silence of the good people.'

Martin Luther King Jr (1929-1968)

DISCLAIMER

I, Nicole Helene Malan, hereby declare that this dissertation is my own, unaided work. It is being submitted in partial fulfilment of the prerequisites for the degree of Masters in Labour Law at the University of Pretoria. It has not been submitted before for any degree or examination at any other University.

.....

Nicole Helene Malan

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SUMMARY

The main focus of this dissertation is to examine the operation of whistleblowing within an organisation. Whistleblowing constitutes an act by an employee to expose perceived unlawful activity by an employer or employee, within an organisation or company, to an authority in the position to redeem the situation. It is based on the presumption that any kind of business or organisation has to be governed by laws in order to protect society from fraudulent and corrupt practices.

In South Africa, the Protected Disclosures Act of 2000 (PDA) sets out a clear and simple framework to promote responsible whistleblowing by reassuring workers that to remain quiet about perceived malpractice is not the only safe option and is aimed at safeguarding the employee who raises concerns. Thus, from a legal perspective, an employee making a disclosure under certain circumstances and prerequisites enjoys full protection of the law.

Whistleblowing is thus not just about anonymously informing, but rather about raising a concern. However, whistleblowers, even if they act in good faith often risk recrimination, victimisation and sometimes dismissal. Therefore, in order to determine whether the PDA is applicable, certain criteria have to be met, pertaining to the definition of disclosures and of occupational detriment.

A number of consequences may follow from the contravention of the PDA. The Act provides mechanisms for the employee to disclose sensitive information regarding alleged improper conduct by the employer. In order to enjoy the protection of the act the employee must have trusted the disclosed information to be true. However, not all disclosures constitute protected disclosures, and for the purposes of the PDA certain requirements have to be met. When it

comes to automatically unfair dismissals, the most difficult issue remains that of causation.

It is a courageous effort to blow the whistle on perceived corrupt or illegal practices by an employer of any kind, and such an action is often met with harsh retaliation. Therefore employees often remain reluctant to speak out about practices that might threaten the higher echelons of their organisational hierarchy. On a personal level, blowing the whistle may have severe consequences for the individual; dismissal being but one of them.

Internationally there is growing recognition that the act of whistleblowing is healthy and necessary for organisations in order to control corruption and illegal practices. The international community has also implemented a variety of whistleblowing laws and procedures for protecting and encouraging those who speak out.

CHAPTER 1

INTRODUCTION

A. GENERAL

Whistleblowing is an issue which spans law and morality.¹ It is also perceived by Dworkin that,

*'[L]aw or a legal system is distinguished from morality or a moral system by having explicit written rules, penalties, and officials who interpret the laws and apply the penalties. Although there is often considerable overlap in the conduct governed by morality and that governed by law, laws are often evaluated on moral grounds. Moral criticism is often used to support a change in the law. Some have even maintained that the interpretation of law must make use of morality.'*²

Whistleblowing is the act of exposing (perceived) organisational wrongdoing, by reporting it to the authorities (complaint recipient) that are in a position to correct the situation. Some theorists locate the whistleblower within the framework of pro-social behaviour within an organisation, for it is behaviour pursued in the interests of the organisation, society or both³

¹ Bowers et al. (1999), *Whistleblowing: The New Law*.

² Dworkin (1986), *Law's Empire (Legal Theory)*.

³ Miceli & Near (1992), *Blowing the whistle*.

While these expositions most certainly are true, it is equally true that the whistleblower is often disliked and even victimised for exposing corruption, fraud and wrongdoing. The whistleblower is thus at risk of suffering damage in terms of reputation, integrity and accountability.

Consequently, potential whistleblowers might be discouraged to disclose information. A company or organisation wanting to cover up irregularities might even retaliate against the whistleblower. This is where the law, and especially the rights of the employee, must be clear.

On the one hand, the law must protect the business community or society as a whole from fraudulent or corrupt business practices, and on the other hand, the individual disclosing such wrongful practices must be protected against any organisational wrongdoing. Whistleblowers can lodge a complaint within the company, take their issue outside of the company, or speak out to the media.⁴

B. THE ORIGIN OF WHISTLEBLOWING

The origin of the term 'whistleblowing' has been explained as follows:

'When British police officers were on patrol and they saw something illegal or threatening taking place they would blow their whistles to alert

⁴ In *Tshishonga v Minister of Justice & Constitutional Development* 2007 ILJ 213 (LC), the following was stated: 'It was contended on behalf of the Applicant that a disclosure to the media was protected in terms of s 9 of the PDA, by submitting that a 'wide and unqualified' meaning should be attributed to the word 'any' in s 9(1)'.

*members of the public and other police officers in the area that they needed help and that something untoward was happening.*⁵

C. WHISTLEBLOWING IN THE SOUTH AFRICAN CONTEXT

1 Introduction

Neither the South African common law nor the statutory law made specific provision for the protection of employees who blew the whistle on suspected criminal, or other irregular conduct of their employers, whether in the public or private sector.⁶ It could be argued though, that according to common law, a dismissed employee could demand compensation or reinstatement by his employer on the basis that any provision in his contract that required him not to disclose crime or other irregular activities by the employer or fellow employees was *contra bones mores* and thus unlawful and invalid.⁷

The Protected Disclosures Act⁸ sets out a clear and simple framework to promote responsible whistleblowing by reassuring workers that silence is not the only safe option and by providing secure protection for workers who raise concerns. The Act⁹ applies to employees raising concerns about crime, failure to comply with any legal duty, miscarriage of justice, danger to health and

⁵ Eaton & Akers (2007) Whistleblowing and good governance.

⁶ Preamble of the Protected Disclosures Act, 26 of 2000.

⁷ Van Rooyen (2004), The Desirability of a Culture of Whistleblowing.

⁸ Act 26 of 2000.

⁹ Ibid.

safety, damage to the environment, discrimination and the deliberate cover-up of any of these.

The Act¹⁰ applies to concerns about past, present and future malpractice. The scheme created by the Act¹¹ can be likened to a person in a room faced by several exit doors. If you choose the right door, you leave the room with special protection provided by the Protected Disclosures Act (PDA)¹². If you do not choose the right door, you do not have any special protection, but must rely on ordinary labour law, criminal law, etc., to protect your rights if anything happens to you as a result of blowing the whistle.¹³

2 Overview of the South African Statutory Protection

The concept of whistleblowing and legal protection is a term which only recently became apparent to most members of the private and public spheres. The Government then attempted to address these shortcomings by introducing the Protected Disclosures Act,¹⁴ recent amendments to the Labour Relations Act,¹⁵ as well as the Financial Intelligence Act.¹⁶ The Constitution of the Republic of South Africa¹⁷ sets out the basic values and principles governing public administration. It states that public administration must be governed by

¹⁰ *Supra* fn. 8.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ National Anti-Corruption Forum, p2.

¹⁴ *Supra* fn. 8.

¹⁵ Act 66 of 1995.

¹⁶ Act 38 of 2001.

¹⁷ Act 108 of 1996, s. 195(1).

democratic values and principles which are enshrined within the Constitution. These principles include practising a high standard of professional ethics, which includes the promotion of efficient and effective use of resources.

The Preamble¹⁸ states that employees bear a responsibility to disclose criminal and any other irregular conduct in the workplace, and that employers have a responsibility to take all necessary steps to protect employees who make such disclosures from reprisals. All of this is located within the constitutional imperative of good, effective, accountable and transparent government in organs of state.¹⁹

The PDA takes its cue from the Constitution of South Africa²⁰, and it affirms the democratic values of human dignity, equality and freedom.²¹ Section 38 of the Constitution of South Africa (also part of the Bill of Rights) makes provision for someone complaining of an infringement of his fundamental rights, to approach a court for appropriate relief, which could include a declaration of rights.²²

In modern society, community ethical considerations, referred to in Africa as 'Ubuntu', are recognised as essential to govern all aspects of living. This includes life in the workplace.²³ South Africa's transition to democratic rule has

¹⁸ *Supra* fn. 6.

¹⁹ *City of Tshwane Metropolitan Municipality v Engineering Council of SA & Another* (2010) 31 ILJ, 322 (SCA).

²⁰ *Supra* fn. 16.

²¹ *Tshishonga v Minister of Justice & Constitutional Development*, (2007) ILJ 195 (LC) 216.

²² *Engineering Council of SA & Another v City of Tshwane Metropolitan Municipality & Another* (2008) 29 ILJ 899, par 104.

²³ Kneale, 200, *Establishing and Implementing a Whistleblowing Procedure*.

been characterised by high levels of crime, including wide-spread corruption.²⁴ As a result of these activities the Protected Disclosures Act²⁵ which protects *bona fide* whistleblowers came into force during February 2001. Several initiatives have been undertaken to promote accountability and fight corruption within the public sector. These efforts include legislation such as the Promotion of Access to Information Act²⁶ and the Protected Disclosures Act,²⁷ as well as the hosting of anti-corruption conferences (November 1998, April 1999 and October 1999).²⁸

Resolutions taken at the National Anti-Corruption Summit in April 1999 made specific reference to 'developing', 'encouraging' and 'implementing' whistleblowing mechanisms, which include measures to protect persons from victimization where they expose corruption and unethical practices.²⁹ One of the key obstacles faced in the fight against corruption is the fact that individuals are often too intimidated to speak out or 'blow the whistle' on corruption and unlawful activities they observe occurring in the workplace, although they may be obliged³⁰ to do so in terms of their conditions of employment.³¹

²⁴ National Anti-Corruption Forum, p 1.

²⁵ *Supra* fn. 8.

²⁶ Act 2 of 2000.

²⁷ Act 26 of 2000.

²⁸ National Anti-Corruption Forum, p 1.

²⁹ *Ibid.*

³⁰ *Tshishonga v Minister of Justice & Constitutional Development* 2007 ILJ 195 (LC) p. 2162. 'The PDA assumes that employers and other recipients of information would investigate complaints but it imposes no obligation on them to do so'.

³¹ National Anti-Corruption Forum, p 1.

A singular cause of the problem is that in South Africa whistleblowers may be confused with ‘impimpis’³² – apartheid era informants who reported on their comrades, often with devastating consequences. The historical context has unfortunately allowed some to stigmatise whistleblowing as an activity to be despised rather than encouraged.³³ It has been said that the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know these.

As a result, a culture of silence, rather than one of openness, would prevail.³⁴ The purpose of the PDA³⁵ is exactly the opposite.

D. PURPOSE AND OBJECTIVES OF THE PROTECTED DISCLOSURES ACT³⁶

1 Introduction

The goal of the PDA is to make provision for procedures in terms of which employees, in both the private and the public sector, may disclose information regarding unlawful or irregular conduct by their employers or

³² Tshishonga v Minister of Justice & Constitutional Development 2007 ILJ 195 (LC) p. 225 ‘Employees who seek to correct wrongdoing, to report practices and products that may endanger society or resist instructions to perform illegal acts, render a valuable service to society and the employer.’

³³ National Anti-Corruption Forum, p 2.

³⁴ City of Tshwane metropolitan Municipality v Engineering Council of SA & Another (2010) 31 ILJ 344 (SCA).

³⁵ *Supra* fn. 8.

³⁶ *Ibid.*

*other employees in the employ of their employers to provide for protection of employees who make a disclosure which is protected in terms of this act and to provide for matters connected therewith.*³⁷

In terms of the PDA³⁸, its purpose is to protect employees who disclose information about improprieties by the employer or other employees, and secondly, to promote the eradication of criminal and other wrongful activities by state and private institutions and entities.³⁹

2 Provisions of the Preamble of the Protected Disclosures Act

In the Preamble of the PDA it is stated that:

- i. The Constitution of the Republic of South Africa⁴⁰, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom.
- ii. Section 8 of the Bill of Rights⁴¹ provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right.

³⁷ The preamble to the Protected Disclosures Act 26 of 2000.

³⁸ *Supra* fn. 8.

³⁹ Van Jaarsveld et al. (2009), Principles and Practice of Labour Law, par. 786.

⁴⁰ *Supra* fn. 17.

⁴¹ *Ibid.*

- iii. Criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state, and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause damage to all levels of society.

The following should, however, be borne in mind:

- i. Neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers.
- ii. Every employer and employee has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure.⁴²

E. OBJECTIVES OF THE PROTECTED DISCLOSURES ACT⁴³

Section 2 of the Protected Disclosures Act⁴⁴ clearly defines the objectives as being to protect an employee from being subjected to an occupational detriment on account of having made a protected disclosure; to provide redress regarding any occupational detriment suffered on account of having made a protected disclosure; and lastly to provide for procedures in terms of which an employee

⁴² Preamble of the Protected Disclosures Act, 26 of 2000.

⁴³ *Supra* fn. 8.

⁴⁴ *Ibid.*

can, in a responsible manner, disclose information regarding improprieties by his or her colleagues, other stakeholders and the employer.⁴⁵

Section 3(1) of the PDA⁴⁶ states as its objective the protection of an employee who makes a protected disclosure from any occupational detriment as a consequence of having made a protected disclosure and the provision of procedures to enable an employee, in a responsible manner, to disclose information concerning improprieties by his or her employer.⁴⁷

From a legal perspective, an employee making a disclosure under certain circumstances and prerequisites enjoys full protection of the law.

⁴⁵ KwaZulu-Natal Provincial Treasury: *Whistleblowing Policy*. Appendix D, The Fraud Prevention Plan.

⁴⁶ *Supra* fn. 8.

⁴⁷ *City of Tshwane Metropolitan Municipality v Engineering Council of SA & Another* (2010) 31 ILJ 338 (SCA), par 33.

CHAPTER 2

FUNDAMENTAL REQUIREMENTS IN TERMS OF THE PROTECTED DISCLOSURES ACT⁴⁸

A. GENERAL

One of the most important goals of the PDA⁴⁹ is to create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosures of such information and protection against any reprisals as a result of such disclosures. In addition, it aims to promote the eradication of criminal and other irregular conduct in state and private bodies.

In order to fully understand this unique concept of whistleblowing, it is important to keep in mind that whistleblowing is not about informing in the negative, anonymous sense, but rather about 'raising a concern about malpractice within a workplace or organisation'⁵⁰. The onus of being prepared to blow the whistle is directly related to the cultural resistance of transparency and accountability in many organisations.

Whistleblowing is therefore a key tool for promoting individual responsibility and organisational accountability. Whistleblowers act in good faith and in the public

⁴⁸ *Supra* fn. 8.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

interest to raise concerns around suspected impropriety within their place of employment. However, often they risk victimisation, recrimination and sometimes dismissal.⁵¹ The trauma that a whistleblower experiences can come to naught if nothing is done to investigate the disclosures or act against wrongdoers. Any reparation ultimately awarded to the whistleblower by a court, is in that instance a pyrrhic victory.⁵²

B. BRIEF OVERVIEW OF THE FOUR STAGES REGARDING THE OPERATION OF THE PDA⁵³

In order to decide whether the Act⁵⁴ is applicable to, a certain person or persons, it is important to explore the following four fundamental factors:⁵⁵

- i. The determination whether the information is in fact a disclosure,⁵⁶
- ii. if it is, the next question is whether the disclosure is protected;⁵⁷
- iii. the next stage is to determine whether the employee was subject to any occupational detriment,⁵⁸ and

⁵¹ National Anti Corruption Forum (2009), Section 1 of the *Guide to the Whistleblowing Act*.

⁵² Tshishonga v Minister of Justice & Constitutional Development 2007 ILJ 195 (LC) 228.

⁵³ *Supra* fn. 8.

⁵⁴ *Ibid*.

⁵⁵ Tshishonga v Minister of Justice & Constitutional Development 2007 ILJ 195 (LC) 227.

⁵⁶ 'Disclosure' in s. 1 of the PDA means any disclosure of information about the conduct of 'any employer by an employee who has reason to believe' that the information 'shows or tends to show' certain improprieties'.

⁵⁷ Van Jaarsveld *et al.* (2010), *Principles and Practice of Labour Law*, par. 786 A (ii).

iv. what reparation should be available in case of any occupational damage.⁵⁹

The decision in *Grieve v Denel (Pty) Ltd*⁶⁰ illustrates how these four stages are integrated. *Grieve v Denel* is one of the first decisions dealing with the application of the Protected Disclosures Act,⁶¹ and illustrates the potential protection it affords employees who are victimised because of their attempts to disclose acts of impropriety committed by an employer, or employees acting on behalf of that employer.⁶² Section 3 of the Act⁶³ states that no employee may be subject to any occupational detriment by his or her employer because, or partly because, of the employee having made a protected disclosure. As a result, a disclosure made by an employee is protected, if such disclosure concerns an act of impropriety⁶⁴ committed by an employer.

An act of impropriety includes a criminal offence, failure to comply with legal obligations, actions that lead to miscarriage of justice or could lead to miscarriage of justice, unfair discrimination and actions that lead to the health and safety of an individual being, or likely to be, endangered.⁶⁵ An 'impropriety'

⁵⁸ *Ibid*, par. 786 A (ii).

⁵⁹ Borak (2005), *The Legacy of Deep Throat*, Univ. Miami LR 619, as cited in Van Jaarsveld *et al.* (2009), *Principles and practice of labour law*.

⁶⁰ 2003 ILJ 551 (LC).

⁶¹ *Supra* fn. 8.

⁶² Le Roux (2003), *Protection for Whistleblowers*, p. 12.

⁶³ *Supra* fn. 8.

⁶⁴ *Tshishonga v Minister of Justice & Constitutional Development* 2007 ILJ 195 (LC) 227. It was stated that: 'The disclosure must be of improprieties. Disclosures about disagreements with the employer's policy is not disclosure of impropriety.'

⁶⁵ Le Roux (2003), *Protection for Whistleblowers*, p. 12.

is defined in section 1⁶⁶ as being conduct in any of the categories in the definition of disclosure.⁶⁷

The court held that disciplinary action against *Grieve*⁶⁸ could constitute an occupational detriment and that *prima facie*, *Grieve* was entitled to relief. *Deneil*⁶⁹ was interdicted from proceeding with disciplinary action against *Grieve*, pending the determination of the dispute between *Grieve* and his employer as to whether the suspension and the decision to institute disciplinary action constituted an unfair labour practice against *Grieve*.⁷⁰

The following aspiration was expressed by Mr Richard Shepherd M.P, who introduced the Private Members Bill (UK) which led to the enactment of the Public Interest Disclosures Act 1998 (PIDA)⁷¹;

'I hope that the Bill signals a shift in culture so that it is safe and accepted for employees....to sound the alarm when they come across malpractice that threatens the safety of the public, the health of a patient, public funds or the savings of investors. I hope that it will mean that good and decent people in business and public bodies throughout the country can more easily ensure that where malpractice is reported in

⁶⁶ *Supra* fn. 8.

⁶⁷ *City of Tshwane metropolitan Municipality v Engineering Council of SA & Another* (2010) 31 ILJ 346 (SCA) par 50.

⁶⁸ *Supra* fn. 50.

⁶⁹ *Ibid.*

⁷⁰ Van Rooyen (2004), *The Desirability of a Culture of Whistleblowing*, p. 24.

⁷¹ Public Interest Disclosures Act 1998, UK.

*an organization, the response deals with the message not the messenger.*⁷²

An aspiration is a goal, objective, aim, target, hope, desire, wish, ambition. It is in fact distressing that a bill has to be passed in order to protect righteous and law-abiding citizens, who feel strongly enough about the maintenance of law and order to take a stand; potentially causing harm and injury to themselves.

The South African legislature researched the United Kingdom's PIDA⁷³ in order to establish its own Protected Disclosures Act. Both the PDA⁷⁴ and PIDA⁷⁵ are similar in their requirements concerning disclosures of information and the definition of a protected disclosure. These requirements are examined closely when a case concerning whistleblowing needs to be decided. In terms of substantiated allegations, it is submitted that regardless of whether you are a whistleblower from the United Kingdom or South Africa, occupational detriments suffered are equal in severity and the reparations available to these employees are also similar.⁷⁶

However, the Public Interest Disclosures Act of 1998⁷⁷ was passed not only to protect the 'whistleblower' but first and foremost to safeguard the public from ruthless manipulation and exploitation by immoral delinquents. Mr Shepherd

⁷² Standing Committee (1998), p. 4.

⁷³ *Supra* fn. 71.

⁷⁴ *Supra* fn. 8.

⁷⁵ *Supra* fn. 71.

⁷⁶ Easthorpe (2009), The other side of the coin.

⁷⁷ *Supra* fn. 71.

states that this bill is supposed to bring about a change in culture, supposedly motivating more mature and self-motivated moral and ethical behaviour. This remains doubtful, since such a bill in itself means that pressure has to be applied to try and ensure that ethical principles are upheld in businesses and the public sector.

Whistleblowing in South Africa is a fairly new mechanism to protect employees, and needs to be implemented by companies and the private sector to protect the employee, and fight for justice for all.

South Africa borrowed from the United Kingdom's Public Interest Disclosures Act of 1998⁷⁸, and hopefully the aspiration expressed by Mr Shepherd will be implemented and applied in our courts.

Following on from the four stages, various key concepts will be discussed.

C. DEFINITION OF 'DISCLOSURE'

1 Introduction

Importance is placed on the phrase '**protected disclosure**' in that Section 3 of the Act⁷⁹ states: 'no employee may be subject to any 'occupational detriment'

⁷⁸ *Supra* fn. 71.

⁷⁹ *Supra* fn. 8.

by his or her employer on account or partly on account, of having made a 'protected disclosure'⁸⁰.

2 Definition of 'general protected disclosure'

Any disclosure made in good faith by an employee:

- i. who has a reasonable belief that the information disclosed, and any, allegation contained in it, are substantially true, and
- ii. who does not make the disclosure for purposes of personal gain, excluding any award payable in terms of any law

is a protected disclosure if-

- i. one or more of the conditions referred to in subsection (2) apply; and
- ii. in all the circumstances of the case, it is reasonable to make the disclosure.

⁸⁰ S 1 (i) of the PDA.

3 Specific requirements for a disclosure to be protected

In general the following requirements should be complied with before an employee would be entitled to protection due to disclosures made about an employer or co-employees.

- (a) Determination whether information is in fact a disclosure.

The *Tshishonga* case⁸¹ refers to the standard of quality that information must meet. Requiring the information 'to show or tends to show' an impropriety implies that it would be sufficient if the impropriety is only 'likely'. This shows that the impropriety can be less than a probability but must be more than a mere possibility. A 'disclosure' is defined⁸² as any disclosure of information, regarding any conduct of the employer or any of his employees made by the employee who has reason to believe⁸³ that the information shows, one or more of the following ('improprieties'):⁸⁴

- i. that a criminal offence has been committed, is being committed or is likely to be committed; employees carry the responsibility to disclose criminal and other irregular conduct in the workplace;
- ii. that the person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;

⁸¹ *Supra* fn. 4.

⁸² S 1(i) of the PDA.

⁸³ *Tshishonga* case *Supra* fn. 4.

⁸⁴ S 9 of the PDA.

- iii. that a miscarriage of justice has occurred, is occurring or is likely to occur;
- iv. that the health and safety of an individual has been, is being, or is likely to be endangered; the case of *City of Tshwane Metropolitan Municipality v Engineering Council of SA & Another*⁸⁵ makes it clear that having regard to the nature of the enterprise and the nature of the work that system operators would be employed to perform it would be likely that the safety of an individual would be endangered by the appointment of a person who did not have the necessary skills to do the job;
- v. that the environment has been, is being or is likely to be damaged;⁸⁶
- vi. unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act;⁸⁷ or that any matter has been, is being or is likely to be deliberately concealed. (In the *Tshishonga case*⁸⁸ the applicant believed that a crime was being committed, that the relevant Minister had committed unfair discrimination, and that these improprieties were likely to be deliberately concealed.)
- vii. that any of the above matters has been, is being or is likely to be deliberately concealed.⁸⁹

⁸⁵ (2010) 31 ILJ 322 (SCA) par 318 A.

⁸⁶ Le Roux (2003), Protection for Whistleblowers.

⁸⁷ In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁸⁸ *Supra* fn. 4.

⁸⁹ Global Technology Business Intelligence (Pty) Ltd v CCMA 2005 ILJ 472 (LC).

- (b) A disclosure will only be protected⁹⁰ if the ‘disclosure’:
- i. is made to certain persons (a legal advisor, his employer, members of Cabinet, public officials, organs of the State, etc) under certain conditions;⁹¹
 - ii. is made in good faith. The core requirement of section 6 of the PDA⁹² is that of good faith. If an employee is not acting in good faith but perhaps trying to settle a personal or workplace score or has an axe to grind, section 6 will not offer the employee any protection. ‘A disclosure made in good faith is not one that is deliberately aimed at embarrassing or harassing the employer.’⁹³ The *Tshishonga*⁹⁴ case sets out good faith as a specific requirement, and points out that an employee may reasonably believe in the truth of the disclosure and may gain nothing from it, but his good faith or motive would be questionable if the information does not disclose an impropriety or if the disclosure is not aimed at remedying a wrong.
 - iii. is made in the reasonable belief that it is substantially true.⁹⁵ *Tshishonga*⁹⁶ points out that the reasonableness of the belief relates to the information

⁹⁰ S. 8 and 9 of the PDA.

⁹¹ S. 5-8 of the PDA.

⁹² *Supra* fn. 8.

⁹³ S.6 of the PDA.

⁹⁴ *Supra* fn. 4.

⁹⁵ *Ibid.*, 364D-E.

⁹⁶ *Supra* fn. 4.

being substantially true. In the MTN case⁹⁷ it was held that if a disclosure is made in good faith, it must also include a reasonable belief that the information is true, otherwise this could amount to rumour or conjecture which is not what the PDA⁹⁸ intended. Therefore, if the employee believes that the information is true, then a *bona fide* disclosure can be inferred.

- iv. is not made for personal gain: 'Gain' has been interpreted in the context of section 30 and section 31 of the Companies Act⁹⁹ to mean, 'A commercial or material benefit or advantage, not necessarily a pecuniary profit, in contradiction to the kind of benefit or result which a charitable, benevolent, humanitarian, philanthropic, literary, scientific, political, cultural, religious, social, recreational or sporting organisation, for instance seeks to achieve'.
- v. was reasonable to make in the circumstances of this case: with reference to the case of *City of Tshwane Metropolitan Municipality v Engineering Council of SA & Another*¹⁰⁰ it is clear that the first three requirements for a disclosure to be protected where met, and that the court was satisfied that it was reasonable to make the disclosure in the particular circumstances of the case.
- vi. was made by an employee who believed when making the disclosure, that he will be subject to an occupational detriment if it is made to his

⁹⁷ *Communication Workers Union v Mobile Telephone Networks, Pty Ltd* (2003) 24 ILJ 1670 (LC) at 1678.

⁹⁸ *Supra* fn. 8.

⁹⁹ Act 61 of 1973.

¹⁰⁰ (2010) 31 ILJ 322 (SCA) par 325A.



employer.¹⁰¹ The court in the *Tshishonga* case¹⁰² was satisfied that the applicant believed that the impropriety would be concealed or destroyed if he made the disclosure to his employer. The Director-General had been reluctant to investigate the allegations and the applicant could reasonably infer from his conduct that he would not act against the Minister to stop or prevent the improprieties.¹⁰³

- (c) 'Protected disclosure' means a disclosure made to-
- i. A legal advisor in accordance with section 5; *Grieve v Denel (Pty) Ltd*¹⁰⁴ points out that any disclosure made to a legal practitioner or to a person whose occupation involves the giving of legal advice and with the objective of and in the course of obtaining legal advice is a protected disclosure. Only a few requirements are applicable in respect of a disclosure given to a legal representative, with the requirements becoming more comprehensive as one moves up the ladder. The most comprehensive requirements are set in respect of making a 'general disclosure';
 - ii. an employer in accordance with section 6. In their own words Calland and Dehn¹⁰⁵ illustrate this as follows: 'at the heart of the act is the notion that prevention is better than cure. It strongly encourages whistleblowers to

¹⁰¹ *Supra* fn. 4. The disclosure related to the Minister, the most powerful person in the department, who was angry with the applicant and had demonstrated his wrath by removing the applicant as head of his unit without following fair procedures.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Grieve Supra* fn. 50.

¹⁰⁵ Calland & Dehn (2004), *Whistleblowing around the world: Law Culture and Practice*, p. 143-144.

disclose first of all to their employer, in order that the employer should have the opportunity to remedy the wrongdoing. Potential whistleblowers need to know that they must first go through this door where the test is that of good faith, rather than making a wider disclosure which would require higher tests’.

- iii. a member of Cabinet or of the Executive Council of a province in accordance with section 7
- iv. a person or body in accordance with section 8; (Following the *Tshishonga case*¹⁰⁶, it is clear that the applicant made disclosures to the Public Protector and the Auditor-General, and they had failed to investigate.
- v. any other person or body in accordance with section 9.

(d) Exclusions

A protected disclosure does not include a disclosure:

- i. in respect of which the employee concerned commits an offence by making the disclosure; and
- ii. a disclosure made by a legal advisor to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5.

¹⁰⁶ *Supra* fn. 9.

D. DEFINITION OF 'OCCUPATIONAL DETRIMENT'

1 Introduction

The PDA¹⁰⁷ is emphatic. No employee may be subject to any occupational detriment¹⁰⁸ by his or her employer on account, or partly on account of having made a protected disclosure. This is the principal protection which the Act¹⁰⁹ envisages. An occupational detriment is largely what one would normally call victimisation. An occupational detriment is confined to the employer and employees in the working environment of the whistleblower.¹¹⁰

2 Definition

In relation to section 1(vi) of the PDA¹¹¹ an 'occupational detriment' in relation to the working environment of an employee means:

- i. being subjected to any disciplinary action;¹¹²
- ii. being dismissed, suspended, demoted, harassed or intimidated;¹¹³

¹⁰⁷ *Supra* fn. 8.

¹⁰⁸ 'Occupational Detriment' as defined in s 1(a), (b) and (1) of the PDA.

¹⁰⁹ *Supra* fn. 8.

¹¹⁰ Landman (2001), *A Charter for Whistleblowers*, p. 42.

¹¹¹ *Supra* fn. 9.

¹¹² *Supra* fn 22.

¹¹³ *Supra* fn. 4, *Tshishonga case*.

- iii. being transferred against his or her will;¹¹⁴
- iv. being refused a transfer or promotion;¹¹⁵
- v. being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- vi. being refused a reference, or being provided with an adverse reference, from his or her employer;
- vii. being denied appointment to any employment, profession or office;
- viii. being threatened with any of the actions referred to paragraphs (i) to (vii) above; or
- ix. being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.¹¹⁶

3 Requirements in respect of an occupational detriment

Section 3 of the PDA is quite clear concerning an employee being subjected to an occupational detriment by his or her employer on account, or partly on

¹¹⁴ Theron v Minister of Correctional Services 2008 ILJ 1275 (LC)

¹¹⁵ Dlamini v Toyota SA Manufacturing (2004) 25 ILJ 1513 (CCMA).

¹¹⁶ *Supra* fn. 4, *Tshishonga* case.

account, of having made a protected disclosure¹¹⁷. There are three basic requirements that have to be satisfied for an employee to establish an unfair labour practice based on occupational detriment:

- i. An employee must have made a protected disclosure within the ambit of the PDA;
- ii. the employer must have taken action against the employee which amounts to occupational detriment within the ambit of the PDA; and
- iii. the detriment suffered must be on account¹¹⁸ of or partly on account of¹¹⁹ having made a protected disclosure – this implies a causal link between the disclosure and the retaliating action by the employer. The wording of the PDA which requires a disclosure only to be ‘partly’ on account of the disclosure is preferable as it allows a wider scope to link the disclosure and the retaliating action by the employer.¹²⁰

Employees making a protected disclosure in terms of the specified procedures are protected from occupational detriment. This could include being subjected to disciplinary action, dismissal, suspension, demotion, harassment, intimidation, being transferred against his or her will, refused transfer or promotion, or otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

¹¹⁷ *Supra* fn. 8.

¹¹⁸ S. 186 (2) (d) of the LRA.

¹¹⁹ S. 3 of the PDA.

¹²⁰ Van Niekerk *et al* (2008), *Law at Work*, p. 193.

This is the principal protection that the Act¹²¹ envisages. An occupational detriment is what one would normally call victimisation and is confined to the working environment of the whistleblower.¹²² The most common remediation available to the whistleblower where an occupational detriment is threatened would be to obtain an interdict preventing the employer from either dismissing or suspending the employee.

In the case of *Grieve v Denel (Pty) Ltd*¹²³ the court looked at how an employee is afforded protection against an occupational detriment and whether the threat of disciplinary action constituted an occupational detriment in terms of section 1(vi) of the PDA¹²⁴. The applicant in this case informally disclosed information regarding unauthorised expenditure, nepotism and financial wrongdoing of the manager to his immediate superior. He was suspended and later received a notice to attend a disciplinary hearing.

The employee sought an interdict to prevent the employer from proceeding with any disciplinary action about the allegations made on the basis that he was entitled to protection not to be subjected to disciplinary action for making disclosures in terms of section 9 of the PDA¹²⁵.

¹²¹ *Supra* fn. 8.

¹²² Landman (2001), *A Charter for Whistleblowers*, p. 56.

¹²³ *Grieve Supra* fn. 50.

¹²⁴ *Supra* fn. 8.

¹²⁵ *Supra* fn. 8.

The court, in granting the order, examined the PDA¹²⁶ to establish how it protects employees who disclose information in a responsible manner and the protection that is afforded them against reprisals. The court held that in terms of section 3 of the PDA¹²⁷, an employee may not be subjected to any kind of occupational detriment by his or her employer on account of having made a protected disclosure. Section 9 of the PDA¹²⁸ stipulates that any disclosure made in good faith and with a reasonable belief that the information disclosed is substantially true and not made for purposes of personal gain is a protected disclosure. If on this basis the employee is subjected to an occupational detriment, then he or she can rely upon section 3 of the PDA¹²⁹ for protection.

A related question appeared in the case of *Theron v Minister of Correctional Services & Another*¹³⁰ where the question 'what constitutes an occupational detriment' was also posed. The applicant was a medical doctor who had provided medical care to prisoners at Pollsmoor Prison for the last 22 years. The applicant complained on numerous occasions about the standard of health care provided in prison. The relevant departments simply turned a deaf ear. After these allegations the applicant was transferred from Pollsmoor to a community health care centre.

The applicant submitted that it was on the basis of his disclosures that he was transferred and that there was a *nexus* between him being transferred and the

¹²⁶ *Supra* fn. 9.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ (2007) 4 BLLR 327 (LC).

disclosure that was made. Following this, the applicant lodged a dispute concerning an alleged occupational detriment.

Based on the definition of occupational detriment, the court found that there was a direct *nexus* between the disclosure made by the applicant and his subsequent transfer from Pollsmoor to a community health care centre. Therefore in terms of section 1(vi) and section 3 of the PDA¹³¹, the court concluded that the applicant had suffered an occupational detriment as a direct result of having made a protected disclosure.

E. SUMMARY

Good faith, reasonable belief and personal gain overlap and are mutually reinforcing. A weakness in one can be compensated for by the other(s). Thus a doubtful motive can be compensated for by a strong belief based on sound information.¹³² The Act¹³³ thus prohibits an employer from subjecting an employee to an occupational detriment on account of having made a protected disclosure.

Should an occupational detriment occur and is found to have been linked to the making of a protected disclosure, the *bona fide* whistleblower would be protected and the employer would not be allowed to dismiss or prejudice the employee for having raised legitimate concerns. This, in effect, is how the law protects whistleblowers.

¹³¹ *Supra* fn. 8.

¹³² *Supra* fn. 4, *Tshishonga* case.

¹³³ *Supra* fn. 8.

CHAPTER 3

LEGAL CONSEQUENCES OF WHISTLEBLOWING

A. INTRODUCTION

A number of consequences may follow from the contravention of the PDA¹³⁴ as far as the positive law is concerned. Some of these consequences will be discussed next.

B. SECTION 23(1) OF THE CONSTITUTION OF SOUTH AFRICA¹³⁵

Section 23(1) of the Constitution guarantees fair labour practices to everyone in the workplace. Any person who is the victim of an unfair labour practice is entitled to legal protection in terms of the Constitution. In *Nehawu v University of Cape Town*¹³⁶ the Constitutional Court stated that 'the concept of fair labour practice is incapable of precise definition', however, the concept 'must be given content by legislation' and thereafter left to gather meaning from the decisions of specialist courts and tribunals to seek guidance from domestic and international experience.

Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provisions of the Labour Relations Act (LRA) (1956) as well as the codification of unfair labour practices in the most

¹³⁴ *Supra* fn. 8.

¹³⁵ *Supra* fn. 17.

¹³⁶ 2003 (2) BCLR 154.

recent LRA.¹³⁷ Prior to 1995, no legal recourse was available against unfair labour practices in any form. Lawfulness and fairness do not always sit comfortably together, and the common law contract of employment confers no inherent right to fairness. It was only after the introduction of the statutory concept of 'unfair labour practice' that the courts began to develop a labour jurisprudence based on equity and fairness.¹³⁸

On the basis of the *Nehawu case*¹³⁹ it is suggested that the meaning intended by the legislature in the phrase, 'Labour Practices' as used in the Constitution¹⁴⁰, is that which was known at the time of its enactment; i.e. the 1991 definition of an unfair labour practice is still of importance and should be used in conjunction with judicial jurisprudence, international conventions, recommendations and other instruments, as guidelines to determine the meaning of the broad parameters of the concept of 'fairness' and 'labour practice' in the context of section 23.¹⁴¹

However, it must be noted that the relationship between the constitutional right in section 23(1) of the Bill of Rights¹⁴² and the unfair labour practice provision in section 186(2) of the LRA¹⁴³ is a controversial issue. In the case of *Naptosa &*

¹³⁷ Act 66 of 1995.

¹³⁸ Christianson *et al.* (2008) *Law at Work*, p. 165.

¹³⁹ *Supra* fn. 136.

¹⁴⁰ *Supra* fn. 17.

¹⁴¹ Van Jaarsveld *et al.*, (2010) *Principles and Practice of Labour Law*, par. 774A.

¹⁴² *Supra* fn. 17.

¹⁴³ *Supra* fn. 137.

Others v Minister of Education, Western Cape Government & Others,¹⁴⁴ the High Court held that direct reliance on the Constitution¹⁴⁵ should be avoided as this would lead to two streams of jurisprudence. The better approach, as suggested by the court, was to pursue legislative amendment. On the other hand, where there is no specific remedy in the LRA,¹⁴⁶ the Labour Court in *Naptosa & Others v Minister of Education, Western Cape Government & Others*¹⁴⁷ has found that there is nothing to prevent the employee from relying directly on the Constitution¹⁴⁸ to enforce the right to fair labour practices.

C. UNFAIR LABOUR PRACTICES

1 Definition

Section 193 of the LRA¹⁴⁹ deals with remedies for unfair labour practices, wherein an 'unfair labour practice' is defined, amongst others, as 'the wrongful suffering of an occupational detriment by an employee because of making a protected disclosure in terms of the Protected Disclosures Act of 2000'. The LRA¹⁵⁰ further defines an unfair labour practice as any unfair act or omission that arises between an employer and an employee, involving an occupational detriment short of dismissal.

¹⁴⁴ (2001) 22 ILJ 889 (C). (See also Du Toit *et al.* (2006), *Labour Relations Law. A Comprehensive Guide*, pp. 484-485.

¹⁴⁵ *Supra* fn. 17.

¹⁴⁶ *Supra* fn. 137.

¹⁴⁷ *Supra* fn. 145.

¹⁴⁸ *Supra* fn. 17.

¹⁴⁹ *Supra* fn. 137.

¹⁵⁰ *Supra* fn. 17, s. 186 (2)(d).

The amendments¹⁵¹ remove the unfair labour practice provision from Schedule 7 to Chapter 8 of the LRA, previously reserved for unfair dismissals only. The expression 'unfair labour practice' was extended with the enactment of the amendments to the Act¹⁵² to include protected disclosures.¹⁵³ This gives effect to the PDA¹⁵⁴, which provides that: 'any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7.'¹⁵⁵

2 Application and case law

From the above it appears that section 186(2) (d) of the LRA¹⁵⁶ provides that the employer's subjecting an employee to an occupational detriment (other than dismissal) in contravention of the PDA¹⁵⁷ may constitute an unfair labour practice if the employee made a protected disclosure as defined in the PDA¹⁵⁸. Neither the common law nor statutory law makes provision for procedures in terms of which employees may, without fear of reprisal, disclose information on suspected criminal or other irregular conduct by their employers.

¹⁵¹ 1995 amendments to the LRA 1956.

¹⁵² *Supra* fn. 137.

¹⁵³ Le Roux (2002), The impact of the 2002 amendments on residual unfair labour practices, p. 86.

¹⁵⁴ *Supra* fn. 9.

¹⁵⁵ Section 4(2) (b).

¹⁵⁶ *Supra* fn. 15.

¹⁵⁷ *Supra* fn. 8.

¹⁵⁸ *Ibid.*

The PDA¹⁵⁹ recognises that such irregularities are detrimental to good governance and are against the economic and social interests of the South African society.¹⁶⁰

More recently, the issue of compensation in terms of an unfair labour practice following a disclosure was considered by the Labour Court in *Tshishonga v Minister of Justice and Constitutional Development*.¹⁶¹ The employee, a Deputy-General of the Masters' Office business unit, employed to eradicate corruption in the administration of insolvent estates, disclosed corruption on alleged appointments of liquidators to the Public Protector and the Auditor-General with no avail. Subsequently the employee met with a journalist and then held a press conference. The employee issued a press statement in which he detailed the alleged improprieties. After being suspended the employee successfully challenged his case in the Labour Court and was reinstated; disturbingly the Department refused to comply with the court order. A disciplinary enquiry was held and the employee was found not guilty. However, the department still refused to reinstate him, negotiations began and the employee's service was terminated by agreement.

The crux of the case was whether the employee's disclosures to the media were protected disclosures in terms of the PDA¹⁶². Having analysed the facts and evaluated the facts against the requirements of section 9 of the PDA¹⁶³, the Labour Court concluded that the employee's disclosure to the media was a

¹⁵⁹ Ibid.

¹⁶⁰ *Supra* fn. 6, The Preamble.

¹⁶¹ *Supra* fn. 4.

¹⁶² *Supra* fn. 8.

¹⁶³ Ibid.

general protected disclosure in terms of the PDA.¹⁶⁴ The court concluded that the employee was the victim of an occupational detriment, and that he was ‘adversely affected in respect of his employment’¹⁶⁵. This meant that the employer had breached section 3 of the PDA¹⁶⁶ and, by doing so the employer had committed an unfair labour practice in terms of section 186(2)(d) of the LRA¹⁶⁷.

If the disclosure is a protected disclosure, the focus shifts to the question of automatically unfair dismissal or an unfair labour practice. Here the pivotal consideration is whether the employee making the disclosure was the dominant reason for the dismissal or whether the employer had some other valid and fair reason for dismissing the employee. The employer could argue that the employee was dismissed for operational requirements or misconduct; from the employee’s perspective, the dismissal was a result of him making a protected disclosure.¹⁶⁸

¹⁶⁴ Mischke (2007), Protected disclosures and compensation.

¹⁶⁵ *Supra* fn. 4.

¹⁶⁶ *Supra* fn. 8.

¹⁶⁷ *Supra* fn. 15.

¹⁶⁸ Mischke (2007), Protected disclosures and compensation, p. 92.

3 Remedies

If the Labour Court or an arbitrator appointed in terms of this Act¹⁶⁹ finds that a dismissal is unfair, the court or the arbitrator may:

- i. order the employer to reinstate the employee from any date not earlier than the date of dismissal
- ii. order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
- iii. order the employer to pay compensation to the employee. In *Tshishonga v Minister of Justice & Constitutional Development & Another*¹⁷⁰, the Labour Court also dealt with the issue of remedy, in the form of compensation. The Court said the purpose of compensation is to redress for patrimonial and non-patrimonial loss. All the developments up to and after the occupational detriment together contribute to the assessment of compensation.

Generally, an employee who is subject to an occupational detriment is in a position similar to one who has been victimised or discriminated against – compensation awards for discrimination therefore serve as guidelines for

¹⁶⁹ *Supra* fn. 15.

¹⁷⁰ *Supra* fn. 4.

compensation claims under the PDA¹⁷¹. The fact that the employee takes a risk in making a disclosure is not without relevance, and how the disclosure was made also impacts on the remedy. In this case the disclosures were intended for the greater good of the employer and society and it was not made for personal gain. More serious occupational detriments attract greater remedies and how the employer conducts itself in resolving the controversy is also relevant.¹⁷²

The order of compensation was awarded in the case of *Tshishonga*¹⁷³ where it became apparent that the suspension of the applicant and the charges of misconduct were found to amount to an occupational detriment or an unfair labour practice.¹⁷⁴ The court awarded the applicant compensation to the amount of the prescribed maximum 12 months remuneration.

D. 'AUTOMATICALLY UNFAIR' DISMISSAL

1 Definition

Section 187 (1) (h) of the Labour Relations Act¹⁷⁵ stipulates a number of reasons for dismissal that, if established are 'automatically unfair'. In other words, section 187 provides that the dismissal of an employee is unfair simply

¹⁷¹ *Supra* fn. 8.

¹⁷² Mischke (2007), Protected disclosures and compensation, pp. 92.

¹⁷³ *Supra* fn. 4.

¹⁷⁴ 'The court held that an employee who is subjected to an occupational detriment is in a position similar to a person who is victimised or discriminated against. Elements of the occupational detriment that the applicant suffered in this instance were that he was insulted, ill-treated and his dignity was impaired'.

¹⁷⁵ *Supra* fn. 15.

by virtue of the reason for the dismissal, and it is not open to the employer to justify its decision to dismiss the employee.¹⁷⁶ The reason for the dismissal causes 'automatically unfair' to appear.

The South-African Legislation stipulates that dismissal after whistleblowing is deemed to be an 'automatically unfair' dismissal. From the above it is clear that section 187(1) (h)¹⁷⁷ renders automatically unfair the dismissal of an employee for making a disclosure protected by the Protected Disclosures Act 26 of 2000¹⁷⁸. The Act¹⁷⁹ provides mechanisms or procedures in terms of which employees may, without fear of reprisal, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers whether in the private or public sector.¹⁸⁰

To enjoy protection, the employee who made the disclosure must *bona fide* have believed that the information disclosed was true. When it comes to automatically unfair dismissals, the most difficult issue remains that of causation.¹⁸¹

A two stage test for causation was formulated in *SACWU & Others v Afrox Ltd*¹⁸² (1999). In this case it was noted that the first stage is to determine factual causation or whether the protected disclosure was a *sine qua non* (or

¹⁷⁶ Christianson *et al.*, (2008) *Law at Work*, p. 220.

¹⁷⁷ *Supra* fn. 15.

¹⁷⁸ *Supra* fn. 8.

¹⁷⁹ *Ibid.*

¹⁸⁰ Grogan, *Workplace Law*, pp. 197.

¹⁸¹ *SACWU & Others v Afrox Ltd* (1999) 10 BLLR 1005 (LAC).

¹⁸² *Ibid.*

prerequisite) for the dismissal, and the next stage focuses on legal causation, and determines the main (dominant or 'most likely') cause of the dismissal.

2 Application and case law

The focus of the enquiry remains on the 'dominant' cause of the employee's dismissal. If the dominant cause of the employee's dismissal is that the employee made a disclosure (that also enjoys the protection offered by the PDA¹⁸³), the employee's dismissal will be automatically unfair¹⁸⁴ in terms of section 187(1) (h) of the Labour Relations Act.¹⁸⁵

A contravention of the PDA¹⁸⁶ by the employer may constitute an automatically unfair dismissal – S187 (1)(h) of the Labour Relations Act.¹⁸⁷ A dismissal would be automatically unfair if the reason for the dismissal relates to the employee having made a protected disclosure. However, not all disclosures constitute protected disclosures, as for the purposes of the PDA¹⁸⁸ certain requirements have to be met. The first question is whether there was a disclosure, and if there was, the second question is whether the disclosure was a protected disclosure as defined by the PDA¹⁸⁹.

¹⁸³ *Supra* fn. 8.

¹⁸⁴ *Pedzinski v Andisa Securities (Pty) Ltd* 2006 ILJ 362 (LC).

¹⁸⁵ Mischke (2007), Protected disclosures and compensation.

¹⁸⁶ *Supra* fn. 8.

¹⁸⁷ *Supra* fn. 15.

¹⁸⁸ *Supra* fn. 8.

¹⁸⁹ *Ibid.*

A recent decision by the Labour Court has shifted the focus away from employees applying for interdicts to employees seeking compensation for an unfair labour practice as a result of making a protected disclosure. The case of *Pedzinski v Andisa Securities (Pty) Ltd*,¹⁹⁰ illustrates this decision. The employee concerned was employed as a compliance manager, and only worked half days because of problems with her back. The applicant's duties included monitoring compliance by the respondent, its officers and all employees with regard to the statutory requirements applicable to the respondent's business, and she was also responsible for the Private Client Business Division.

In the applicant's scope of work she reported irregular trading of shares involving staff members. As a result thereof the applicant was accused of insubordination. She was dismissed and claimed that her dismissal was automatically unfair, the reason being that she had made a protected disclosure. Her employer argued that she was dismissed as a result of operational requirements. The court, however, concluded that the decision to retrench was not genuine – it was a sham. The question in this case was whether the employee was dismissed because she had made a protected disclosure or was she dismissed because of the fact that the Compliance Department needed three full-time employees to deal with the workload?¹⁹¹

The employee's dismissal was found to be an automatically unfair dismissal. The Labour Court held that it was of the view that the applicant had a reasonable belief and the required good faith when she disclosed the

¹⁹⁰ (2006)27 ILJ 362 (LC).

¹⁹¹ Mischke (2007), Protected disclosures and compensation.

information and therefore the disclosure of the information fell squarely under the protection of section 6 of the Protected Disclosures Act.¹⁹²

3 Remedies

An employee who has been the victim of an automatically unfair dismissal is entitled to:

- i. reinstatement or re-employment and/or
- ii. a just and equitable amount of compensation not exceeding 24 months remuneration – calculated at the rate of the employee’s remuneration at the date of his dismissal. In a recent decision of *Cosme v Polisak (Pty) Ltd*,¹⁹³ the applicant was dismissed as a result of age discrimination. Here the court held that the probabilities support the version that the dismissal was motivated by victimisation in contravention of section 187 (1)(d)(i) of the LRA¹⁹⁴. Having arrived at the conclusion that the dismissal of the employee was automatically unfair, ‘I see no reason in the circumstances of this case why he should not be awarded the maximum compensation as provided for in section 194(3) of the LRA.’¹⁹⁵

¹⁹² *Supra* fn. 8.

¹⁹³ (2010) JOL 24957 (LC).

¹⁹⁴ *Supra* fn. 15.

¹⁹⁵ *Ibid.*

The LRA¹⁹⁶ provides special compensatory awards in the case of ‘automatically unfair’ dismissals. If an employee’s dismissal was for an automatically unfair reason, the employee is entitled to reinstatement or compensation to a maximum amount of 24 months remuneration, in contrast with the limit of 12 months remuneration in other cases.¹⁹⁷ A dismissal of a whistleblower constitutes an automatically unfair dismissal.

The Labour Court is entitled to order the reinstatement of the whistleblower or to order compensation not exceeding an amount equal to 24 months remuneration. Lesser occupational detriments are treated as alleged unfair labour practices.¹⁹⁸

¹⁹⁶ Ibid.

¹⁹⁷ Christianson *et al.*, (2008) *Law at Work*, pp. 220.

¹⁹⁸ Landman, (2001) *Charter For Whistleblowers*, p42.

CHAPTER 4

HUMAN RESOURCE PERSPECTIVE ON WHISTLEBLOWING AND ITS IMPACT

A. GENERAL

Courageous efforts of whistleblowing to save organisations from corrupt internal practices are often met with harsh retaliation. Although the organisations, industries and contexts in which whistleblowing has occurred are dissimilar, the responses of victimisation, hostility and general lack of appreciation are consistent in South Africa, as in much of the rest of the world.¹⁹⁹

If organisations retaliate towards whistleblowers, not only is the whistleblower victimised and the opportunity to address the wrongdoing lost, but, importantly, trust in the relationship between the organisation and its employees is affected.

The researcher has included the following extract to make the reader aware as to why some employees choose to blow the whistle and others prefer to stay silent.

Barker and Dawood²⁰⁰ state that the following factors play a role in the whistleblowing process:

¹⁹⁹ Binikos (2008), *Sounds of Silence: Organisational Trust and Decisions to Blow The Whistle*.

²⁰⁰ Barker & Dawood (2004), *Whistleblowing in the organisation: wrongdoer or do-gooder?*

- i. Individual characteristics such as moral development/behaviour (including moral judgement, religious and social responsibility, etc.), personality variables (such as low self-esteem, field dependence, intolerance of ambiguity, etc.), demographics (e.g. age, education, gender, etc.) or job situation (remuneration, job performance, supervisory status, professional status, job satisfaction, organisational/job commitment) to name but a few.
- ii. Situational conditions that can be divided into wrongdoing characteristics (e.g. quality of evidence, type of wrongdoing, wrongdoer low social status, seriousness etc.) and organisational characteristics (e.g. company policies, group size, bureaucracy, organisational culture and climate, incentives for whistleblowing, high performing organisations, etc).
- iii. Power relations and the power that individuals or units have in the organisation.
- iv. Other factors such as loyalty, issues of conformity, social and/or financial support and membership of professional groups.

Employees are often reluctant to share information that could be interpreted as negative or threatening to those above them in the organisational hierarchy. This reluctance to speak up and the silence or information withholding gives rise to, and has the potential to undermine organisational decision making, error correction and damage employee trust and morale.²⁰¹

²⁰¹ Milliken et al. (2003), An exploratory study of employees' silence.

B. INTERVIEW WITH MR MIKE TSHISHONGA

1 Introduction

Tshishonga was employed as Director-General in the Department of Justice in 1978. In 1994 he became a Deputy Director-General when the various Departments of Justice amalgamated. One of his tasks was to eradicate corruption that was prevalent in the administration of insolvent estates, particularly concerning the appointment of liquidators.

After uncovering fraudulent activities, Mr Tshishonga disclosed corruption on alleged appointments of liquidators to the Public Protector and the Auditor-General but to no avail. He then met with a journalist and held a press conference. After this he was suspended and successfully challenged his case in the Labour Court²⁰² and was reinstated, but the department refused to comply with the court order. A disciplinary enquiry was held and the employee was found 'not guilty'. As a result of this enquiry negotiations began and Mr Tshishonga's service was terminated by agreement. There was, in other words, no dismissal.

After evaluating all the facts, the court concluded that the employee had in fact made a protected disclosure in terms of the Protected Disclosures Act²⁰³ and that he was the subject of an occupational detriment. These actions committed

²⁰² *Supra* fn. 4.

²⁰³ *Supra* fn. 8.

by the employer constituted an unfair labour practice in terms of section 186(2)(d) of the LRA²⁰⁴.

The following interview is an interpretation of how whistleblowing affected Mr Tshishonga's life.

2 Interview questions

1. How do you feel now that everything is behind you?

I feel, vindicated, and I feel that it was the right thing to do, and if the opportunity offers itself again I shall do it again. We need a corruption-free country, and I feel that whistleblowers have a big role to play in sorting that out. I also feel that it is the duty of each and every citizen to blow the whistle for the sake of the poor. South Africa has enough resources, but doesn't have enough resources for the greedy.

If the people don't talk or speak against this evil, then the people who are looting would think that they are justified. In fact, they think that they are entitled to do so because it is what they call the 'spoils of Independence'. In the apartheid era, we said that the poor were entitled to a better life, better known by the slogan, 'a better life for all'. The poor are still waiting for the day when they will be supplied with houses, electricity, food and clean water. People, who have everything but are

²⁰⁴ *Supra* fn. 15.

still looting, are doing so simply because they are greedy; I think in these instances we are duty bound to blow the whistle.

2. What do you propose to do now and in the near future?

First, I am finalising my book on whistleblowing which is going to outline the problem, and how we can tackle it. It will also show prospective whistleblowers, that yes, there is pain and a high price for the truth, but this pain, or any pain for a noble cause, is worth it.

3. How were your family/friends affected by your whistleblowing?

My family went through a painful experience, and although they could not feel the pain which, I as the person involved felt, they were emotionally involved. What's more is that I am the breadwinner, and they suffered the consequences.

Most of all, the people that are affected don't respond, they retaliate, and that is what you expect. I was labelled a 'thunderhead', a 'relic of the past', and a 'timid man, that cannot even fight his way out of a wet paper bag', by the Minister on national television, and that was to discourage me from continuing my allegations – the idea being to prevent the information from becoming public. Judge Pillay picked up clearly that if I did not blow the whistle this information would not have seen the light of day. The Department was extremely hostile, and the whole idea was to discredit me, and to put the Minister in a better light.

4. Did you lose support of family and friends at any time?

My friends inched themselves away from me, but understandably so, because they could not be associated with a ‘thunderhead’; they still had bonds to pay.

5. How did you manage to go to work every day, knowing that you were being alienated and marginalised?

When things of this nature happen, your body becomes numb, as the body has a tendency to protect itself from painful emotions. I also felt that I had a right to be at work, because I was not found guilty, whether I was given work or not, that was not the issue. Fortunately they still paid me while I was not working, ‘it was a privilege’. One can get frustrated if it is just a matter of sitting in your office, and that was the result of the book I started to write; I had to keep myself busy to keep sane.

6. How did the whole episode affect your self-esteem and confidence in yourself and others?

I see self-esteem as appreciating the value of self, and that it has got nothing to do with the job that you are in, or with the position you have; it is me beyond all those things. And with that in mind I never lost my true self, I knew that I may lose everything, but what was going to remain, was my self-esteem. But when you start thinking of what other people might be thinking, you are affected in one way or another. Regarding confidence, I remained positive, firstly because the information that I had, had the element of truth, so with this in mind, I never lost confidence in myself. The truth will always set you free, and indeed it did.

- 7. Did you ever feel scared that something really bad might happen to you?**

Yes, but it is one thing if you are prepared, and I was prepared. However, the fear was still real, but it did not overwhelm me.

- 8. During the years prior to the trial what kept you going?**

I am a reader, but my first priority was to acquaint myself with the Act. In reality, I had no idle moments.

- 9. Did you ever want to give up? Were you ever discouraged?**

At times I felt like giving up, especially when you do things which are protected in terms of the Act, you expect people to run around you, and to support you, and when that does not happen, one feels discouraged. But as they say 'nothing venture, nothing win'.

- 10. After you blew the whistle on corruption, how did events affect you personally?**

*After I blew the whistle, a close friend suggested trauma counselling, and that introduced me to a book, *Four Agreements*, which changed my life. It says: first, be impeccable with your words; second don't take anything personally (this helped me a lot, because after ongoing negative comments one tends to doubt yourself); third, don't make assumptions, which I learnt throughout my experience. And the final agreement said do your best, in any circumstances and in any environment, just be the best you can be.*

11. After you blew the whistle on corruption, how did events affect you financially?

Financially, I made demands which I thought my employers might not agree with, but ended up agreeing on, because they wanted to get rid of me. In the settlement agreement, I included a clause to say that this settlement does not affect the claim for an unfair labour practice. This clause was accepted. I think that they thought, because of their generous settlement, I would not proceed with the unfair labour practice claim. This argument was also used against me in the court case, saying that I had already been compensated in terms of the settlement.

12. After you blew the whistle on corruption, how did events affect you socially and morally?

Socially it had an impact which I didn't expect, but it seemed that there were a lot of people supporting me. Morally, breaking the ranks to some of the people who think we are in the same group, they said, you have a moral duty NOT to...., but with me morality was coupled with the principle in which I believe, so my moral duty was enforced or reinforced by the principals that I stand for. The truth sets you free.

13. Presumably your career in government is over. How do you intend to further your career from now onwards?

From now on I am a professional whistleblower!

- 14. Do you believe that your stand against corruption is going to discourage corruption in other departments? In other words, do you believe that some common good will come from it?**

Yes, it is already showing, because when I started this, it was taboo to talk about corruption, but nowadays, although government departments pay 'lip service', at least they say something about corruption. At this stage it is a 'lip service', but in time to come they will definitely have to do something, because, the way it is going, corruption is crippling democracy. People have already started realising this, and acted by way of protest actions and strikes.

The poor are getting poorer and someone is getting R31 million in his pocket. The poor must wait for essential everyday services which they are also not getting, because someone is giving somebody a tender of R500 million.

When the masses become aware, then 'Hell will break loose, and that time is coming; in fact it is here. When I started my case it was unheard of that anybody speaks about corruption, especially if it affects politicians.

- 15. All things considered, will you do it again? If so will you go about in the same manner? If not, how will you approach the same problem next time round?**

Yes, I will do it again, and of course now I am wiser. First, one must do it for the greater nobler course; second, I know now how the Act can protect one, and especially also what the judges are looking for in such a case, so I am in a better position than someone that is just starting. A

big concern for me was whether I was going to find a brave lawyer; it is easy to be brave at a safe distance. But a lawyer that is not afraid of what was going to happen, because he sees the bigger picture. The lawyer that I found to represent me fully met my expectations in this regard.

- 16. Do you think the present legislature and procedures are adequate to protect an employee in your position? If not, what do you recommend?**

This Act has been promulgated to protect the whistleblower, but the people involved had a way of manipulating it. I still think that it was done deliberately, that section 10(4) was not promulgated. This is supposed to be a joint venture between the public service, the Minister of Administration and the Minister of Justice, so that people don't group in the dark, and those guidelines are not there.

While it helps, and it was a plus for me, because I am also legally qualified. Imagine an ordinary person, who gets an ordinary lawyer, what will happen? So definitely I would say that it needs some strengthening. Of course there is a Corruption Act which makes the guidelines clear, but employers concerned find a way of manipulating the Act. Yes, the guidelines are necessary to help the ordinary people to blow the whistle, but my opinion is that it doesn't matter how good the law is, if there is no political will, you have a serious problem.

17. How can the legislature provide in improving the present legislation affecting civil servants?

In the Preamble of the Protected Disclosures Act the legislators have taken note of the fact that there is nothing in the PDA or in the common law which serves this purpose. The case must be dealt with in terms of this Act, but unfortunately in the Act itself there is no section which makes it compulsory that when an allegation has been made, then the person to whom this allegation is made is forced to act.

It must be compulsory that once the allegation is made, it must be a duty on the person of the authority to investigate the allegation. Firstly, it was the duty of the Director General to respond and investigate, and he was not prepared to, and nothing forced him to investigate. The Public Protector is given the mandate by the Act, but he does not do it, because in the Act there is nothing that forces him to. You can report to any MP or Cabinet Minister; that was done, but nothing was done on their side, because there is no section that forces this person to investigate.

18. Any advice to a potential whistleblower?

Yes, first the whistleblower must believe in him/herself, and second they must have principles and focus on the bigger picture, because blowing the whistle is not about blowing your own horn. Steven Covie says in this regard that you must start with the end in mind; you must be proactive, similarly to being in a battle, you must study the strategy of your enemy.

You must identify a journalist that is prepared to cover your story. Have faith in yourself, and be prepared to handle the retaliation, because there will be retaliation; knowing that will cushion you from the trauma. The other important thing is that in your heart you know that you might not succeed but you still go for it. There is a great risk that you must be prepared to take. You can, however, not anticipate the results. Whistleblowing might have a great financial risk and even the potential of bankrupting you. Life is all about risks, but of course one needs to take calculated risks.

C. CONCLUSION

Presumably it is a very difficult decision to blow the whistle on perceived unethical procedures. Without doubt there are bound to be severe consequences. Firstly, in the workplace there are going to be repercussions. Whistleblowing will not go unnoticed. It may cause the demotion of the individual or even dismissal. It may also cause division, anger and outrage amongst employees and possibly do severe harm to individuals, the organisation or company, resulting in loss of credibility, restitution, reputation and money. On a personal level, there are certainly also severe consequences. As is the case with Mike Tshishonga, the act of blowing the whistle on high ranking officials in government most certainly takes its toll.

Generally, the whistleblower is in a position where he or she is exposed to practices that go directly against the moral principles that he or she would subscribe to. Thus the employee is put in a position where he or she has to decide whether to turn a blind eye to perceived malpractices of certain individuals in the company or organisation, or speak out about it.

For many individuals this dichotomy would already cause anguish. Conversely, the whistleblower would probably feel altruistically and ethically obliged to lift the lid on perceived malpractices. However, this act requires that a high personal price is paid for the sake of truth.

The most common physiological signs of stress would involve anxiety, headaches, insomnia, restlessness and irritability.

On a psychological level, the individual would typically experience anger, emotional distress and disillusionment. More specifically, the whistleblower would face loss of status, great uncertainty relating to the future, possibly loss of support from family and /or friends, financial loss and alienation.

Generally speaking, an individual prepared to blow the whistle would be a confident, courageous, well-informed and educated person with a high level of self-esteem, who would be aware of the most likely effects of the act of whistleblowing, taking his or her own position into account. Whistleblowing is thus an act of personal involvement for the sake of fairness, moral values and ethics.

CHAPTER 5

COMPARATIVE SURVEY

A. INTRODUCTION

An increasing number of countries are adopting whistleblowing protection legislation (WPL) to protect whistleblowers in both the private and public sector from any occupational detriment. As the wpl is still in its infancy, little is yet known of its impact and the conditions of effective implementation. There are significant variations across countries where such disclosures are protected. Some legal regimes restrict protection to employees only, while others extend protection to external consultants and contractors.

Some countries such as the UK, New Zealand and South Africa have adopted a single disclosure regime for both the private and public sectors while others limit protection to public servants or private employees.²⁰⁵

Internationally, there is a growing recognition that whistleblowers need protection. Whistleblowing is healthy for organisations. Managers no longer have a monopolistic control over information. They have to be alert to their actions being monitored and reported on to shareholders and the public.²⁰⁶

²⁰⁵ U4 Expert Answer (2009), Good Practice in Whistleblowing Protection Legislation, p. 4.

²⁰⁶ *Supra* fn. 4.

‘Everyone is alive to their loyalty to the organisation, as a safe alternative to silence, whistleblowing deters abuse.’²⁰⁷

It can therefore be concluded that the overarching motive of the PDA²⁰⁸ and similar legislation internationally is to protect employees who disclose information about improprieties by their employers or other employees.

As international communities are increasingly recognising, employees are an invaluable source of information about official corruption. Whistleblower protection laws are intended to make it safe for employees to disclose misconduct that they discover during the course of their employment. Indeed, whistleblower protection is receiving the attention of multinational organisations.²⁰⁹

More than a decade ago, reactions to Ralph Nader’s proposal to encourage whistleblowing as a means to stem organisational wrongdoing, ranged from lukewarm support to strong opposition. Today Congress and state legislatures in the United States embrace whistleblowing as an important tool in the fight against misuse of public funds, abuse of power, and other types of wrongdoing. Indeed, recent corporate scandals and the events of September 11 2001 have increased support for whistleblowing.²¹⁰

²⁰⁷ Ibid.

²⁰⁸ *Supra* fn. 8.

²⁰⁹ Kaplan (2001), *The International Emergence of Legal Protection for Whistleblower*, p. 37.

²¹⁰ Callahan et al. (2004), *Australian, UK and US Approaches to Disclosure in the Public Interest*, p. 880.

The United Kingdom and the Australian states and territories were among the first governments to follow the United States' lead in facilitating whistleblowing.²¹¹ These whistleblowing laws enacted in each of the above mentioned countries that have similar qualifications and objectives also have a legislative body that takes a variety of approaches to disclose information about wrongdoing.

B. UNITED KINGDOM

1 Introduction

In the United Kingdom, like the United States, legislation to protect whistleblowers was enacted in the wake of well-publicised scandals and disasters that occurred in 1980s and early 1990s.²¹² Introduced initially as a Private Member's Bill, the Public Interest Disclosure Act 1998 (PIDA) incorporates new provisions in the Employment Rights Act 1996 (ERA)²¹³. This statute will have the effect of providing protection to the *bona fide* whistleblower. The need to act in good faith and with reasonableness are some critical aspects of the legislation.²¹⁴

The UK is arguably the country that has had the most significant influence on the development of South African society and our legal framework. For many years South Africa was a British colony, and even though South Africa has 11

²¹¹ Ibid.

²¹² Kaplan (2001), *The International Emergence of Legal Protection for Whistleblowers*, p. 39.

²¹³ Employment Rights Act 1996 (UK).

²¹⁴ Feldman (1999), *Protection for Whistleblowers*.

official languages, English is generally used in the business environment and in the courts.²¹⁵

The Public Interest Disclosure Act²¹⁶ became effective in 1999, and whistleblowing is now seen and promoted in the UK as an accountability risk management tool.²¹⁷ Figg refers to the PIDA as '*one of the world's toughest and broadest whistleblower laws.*'²¹⁸

2 Requirements in terms of the PIDA

There are three aspects of the Act²¹⁹ that needs special attention. The most significant is that the legislation renders void the duty of confidentiality that an employee is deemed to owe an employer, or any other 'gagging' clause expressed or implied, that may be in a contract of employment. In other words, an employer against whom a protected disclosure is made may not use the traditional weapon against the employee of suing for breach of contract. Second, the Act²²⁰ protects disclosures of extra-territorial issues, which are discussed below. And finally, it establishes an employee's right not to be

²¹⁵ Smit & Van Eck (2010) International Perspective on South Africa's Unfair Dismissal Law, pp. 46.

²¹⁶ *Supra* fn. 71.

²¹⁷ Figg (2000), Whistleblowing - The Internal Auditor, p. 34.

²¹⁸ *Ibid.*

²¹⁹ *Supra* fn. 71.

²²⁰ *Ibid.*

subject to an occupational detriment for making a protected disclosure. Where detriment is suffered the Act²²¹ allows for full civil damages.²²²

The PIDA²²³ (in England, Scotland and Wales) applies across the private and voluntary sectors as well as to public bodies, and for that reason, affords wider protection to workers than in other countries. However, the Public Interest Disclosure (Northern Ireland) Order 1998²²⁴ had the effect that the PIDA's scope may be extended to Northern Ireland by Order of Council, subject to the negative resolution procedure.²²⁵ PIDA has an international application,²²⁶ which implies that, should an employee in the United Kingdom be concerned about, for instance, tree felling of rainforests in South America or human rights violations in East Timor, that employee will still be afforded protection, regardless of the fact that the concern relates to an alleged impropriety outside of the UK's jurisdiction.²²⁷

3 Framework

The Act²²⁸ sets out a framework for public interest whistleblowing, which protects workers from reprisal because they have raised a concern about

²²¹ Ibid.

²²² Feldman (1993) Protection for Whistleblowers.

²²³ *Supra* fn. 71.

²²⁴ Public Interest Disclosure (Northern Ireland) Order, 1998.

²²⁵ van Rooyen (2004), The Desirability of a Culture of Whistleblowing, p. 34.

²²⁶ *Supra* fn. 213, s. 43B (2).

²²⁷ Ibid.

²²⁸ *Supra* fn. 71.

wrongdoing in the workplace. One of the purposes of the Act²²⁹ is to reassure workers that it is safe and acceptable for them to raise concerns about malpractice.

In addition to employees, it covers workers, contractors, trainees, agency staff, home workers, police officers and every professional in the NHS.²³⁰ A worker or any person covered by this Act²³¹ has the right not to suffer a detriment for making a protected disclosure. In this Act²³² a 'protected disclosure' means a qualifying disclosure as defined in section 43B of the ERA, which is made by a worker in accordance with any of sections 43C to 43H.²³³

The first building block in the wall of protection by the 1998 PIDA²³⁴ is based on the concept of a 'qualifying disclosure.' This focuses on the nature of the information which may attract protection if other conditions set out in the Act²³⁵ are satisfied in the particular case.²³⁶

The PIDA²³⁷ protects an extensive range of disclosures. A 'qualifying disclosure' means any disclosure of information, within the 'reasonable belief' of the worker making it, tends to show that a criminal offence is being, has been,

²²⁹ Ibid.

²³⁰ Public Concern at Work – Public Interest Disclosure Act, 1998.

²³¹ *Supra* fn. 71.

²³² *Supra* fn. 213

²³³ ERA S 43A.

²³⁴ *Supra* fn. 71.

²³⁵ Ibid.

²³⁶ Bowers et al. (1999), Whistleblowing: The New Law, p. 18.

²³⁷ *Supra* fn. 71/

or is likely to be committed, that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which that person is subject, that a miscarriage of justice has occurred, is occurring, or is likely to occur, or that the health or safety of an individual has been, is being, or is likely to be deliberately concealed.²³⁸ A 'qualifying disclosure' therefore extends to a wide range of information, applying to most malpractices about which a whistleblower might feel the need to complain.²³⁹ By listing the topic matters so clearly, the PIDA²⁴⁰ achieves the major advantage of certainty, in contrast to the common law position where the exact parameters of the public interest are not clear.²⁴¹

Under the PIDA²⁴², whistleblowers must use prescribed channels for making disclosures in order to retain protection. In the interests of limiting the disclosure only to those with a need to know, the employee must reasonably believe that the relevant impropriety falls within the jurisdiction of the entity so prescribed and that the information disclosed, and any allegation contained in it, is substantially true.²⁴³

Emphasising the important role whistleblowing can play in deterring and detecting malpractice and in building trust, the Committee²⁴⁴ explained:

²³⁸ Kaplan (2001) *The International Emergence of Legal Protection for Whistleblowers*.

²³⁹ Bowers et al. (1999) *Whistleblowing: The New Law*, p. 18.

²⁴⁰ *Supra* fn. 71.

²⁴¹ van Rooyen (2004), *The Desirability of a Culture of Whistleblowing*, p. 35.

²⁴² *Supra* fn. 71.

²⁴³ Kaplan (2001), *The International Emergence of Legal Protection for Whistleblowers*, p. 39.

²⁴⁴ Committee on Standards in Public Life, UK, as cited by Kaplan, 2001.

'The essence of a whistleblowing system is that staff should be able to by-pass the direct management line, because that may well be the area about which their concerns arise, and that they should be able to go outside the organisation if they feel the overall management is engaged in an improper course.'

One of the advantages of the UK's system is that its provisions encourage employees to create their own procedures to blow the whistle and to respond to allegations of illegal or improper conduct.²⁴⁵

Where a whistleblower is victimised or dismissed in breach of the Act²⁴⁶ he/she can bring a claim to an employment tribunal for compensation.

Furthermore, an employee who is dismissed has the right to seek an interim order, placing him back on the job, during the time the case is pending.²⁴⁷

C. AUSTRALIAN LAW

1 Introduction

In Australia, serious doubts exist whether the Federal Government has the constitutional power to endorse a homogeneous statute on whistleblowing. The

²⁴⁵ Kaplan (2001), *The International Emergence of Legal Protection for Whistleblowers*, p. 39.

²⁴⁶ *Supra* fn. 71.

²⁴⁷ Public Concern at Work – Public Interest Disclosure Act, 1998.

problem in the Public Sector was addressed expediently by Senator Murray who introduced the Public Interest Disclosure Bill in 2001²⁴⁸.

The Australian Competition and Consumer Commission (ACCC) followed on and made it clear that whistleblowing should be promoted and defended. In March 2003, the Australian Stock Exchange Corporate Governance Council published its *Principles of Good Corporate Governance and Best Practice Recommendations*. This document guides employees in terms of disclosures and proposes that such a code 'should enable employees to alert management and the board in good faith to potential misconduct without fear of retribution, and should require the recording and investigation of such alerts.' Standards Australia also issued guidelines in terms of protecting whistleblowers in the middle of 2003.

The above constituted part of a draft corporate governance package and was also a call for the development of a whistleblowing policy, the establishment of a hotline, and the introduction of whistleblowing protection and investigations officers.

Ultimately, the Audit Reform and Corporate Disclosure Bill²⁴⁹ was published in October 2003, which incorporates a proposed new Part 9.4 AAA into the Corporations Act 2001²⁵⁰. These stipulations are in place to encourage employees, officers and subcontractors to report suspected contraventions of

²⁴⁸ Public Interest Disclosure Bill, 2001 (Australia).

²⁴⁹ Audit Reform and Corporate Disclosure Bill, 2003 (Australia).

²⁵⁰ Corporations Act 2001 (Australia).

the Corporations Act²⁵¹ to the Australian Securities and Investment Commission (ASIC). Employers will not be allowed to in any way victimise a person who reports an alleged misdemeanour in good faith and on reasonable grounds. Qualified privilege will be given to those making a protected disclosure.²⁵²

Whistleblowers have been called ‘canaries in the coalmine’. In Australia, the troubles regarding whistleblowing are diverse and the legal issues problematic. In the Public Interest Act 1994²⁵³ whistleblowing is commonly defined as, ‘the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers to persons that may be able to effect action’.²⁵⁴

Whistleblower protection became an issue around 15 years ago, when enquiries into corruption scandals exposed the difficulties that the whistleblower faced as a result of his or her actions. The difficulties arose because the common law was ill-adapted to deal with the issue. Under common law, a duty of trust was implied in the contractual employment relationship. Employees disclosing workplace-related information faced the risk that their disclosure might be construed as an undermining of this duty that might cause their employer to take legal action against them.²⁵⁵

²⁵¹ Ibid.

²⁵² Lewis (2003), Whistleblowing Statutes in Australia: Is it Time for a New Agenda?

²⁵³ Public Interest Act, 1994 (Australia).

²⁵⁴ Parliament of Australia (2005) Whistleblowing in Australia, transparency, accountability, but above all the truth, no 31.

²⁵⁵ Parliament of Australia (2005) Whistleblowing in Australia, transparency, accountability, but above all the truth, no 31.

An examination of whistleblower legislation abroad showed that various efforts to protect whistleblowers were incomplete and required significant strengthening. As a result of these efforts, all Australian states adopted some form of whistleblowing or public interest disclosure protection legislation.

2 Requirements

Most Australian state jurisdictions provide that, for whistleblowers to be protected, the information is to be disclosed internally or to a 'proper' or 'investigating' authority²⁵⁶. Such authorities include the relevant Ombudsman, police, Auditor General, the media or a member of parliament. Internal disclosure structures can be implemented within an entity; this would then provide elements for establishing, implementing and managing effective whistleblower protection programmes.²⁵⁷

In 1991, the Review Committee of Commonwealth Criminal Law accepted the broad principle that:

*'...in a democratic society, the public should have access to as much information as to the workings and activities of government and its servants as is compatible with the effective functioning of that Government.'*²⁵⁸

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Parliament of Australia (2005) Whistleblowing in Australia, transparency, accountability, but above all the truth, no 31.

D. AMERICAN LAW

1 Introduction

Popular culture in the United States suggests that its whistleblowers are held in high esteem. Hollywood films such as *Serpico*, *Silkwood* and *The Insider* tend to glorify the individual who takes on the system at great personal risk.

In real life, however, attitudes may be different. Whistleblowers are often viewed, not as heroes, but as disloyal malcontents.²⁵⁹

‘Employees in the US may be arbitrarily dismissed at the whim of their employer, as there is neither common law, nor statutory protection at federal level, or in the individual states, against arbitrary dismissal. This does not imply that there is no protection for employee whistleblowers.’²⁶⁰

Much of the academic research on whistleblowing is based in the United States and shows that despite Federal and State legislation that should offer protection, the whistleblower remains exposed and isolated.²⁶¹ Theoretically there is sophisticated whistleblower protection in place in the United States. The Civil Service Reform Act of 1978²⁶² was expected to deal with this problem against reprisal for blowing the whistle on corruption, but, unfortunately, this did

²⁵⁹ Kaplan (2001), *The International Emergence of Legal Protection for Whistleblowers*, p. 28.

²⁶⁰ van Rooyen (2004), *The Desirability of a Culture of Whistleblowing*, p. 43.

²⁶¹ Feldman (1999) *Protection for Whistleblowers*.

²⁶² Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 (1979) (USA).

not realise. Then in 1989 Congress passed the Whistleblower Protection Act 1989²⁶³ to further strengthen and improve protection for whistleblowers.

The United States Office of Special Council (OSC) was established in 1979, with one of its primary purposes to protect whistleblowers in the federal employment sector, operating a secure channel through which federal employees and applicants can make disclosures of official wrongdoing, with assurances that their identities will be kept confidential.²⁶⁴ The OSC enforces the whistleblower protection provisions of the Civil Service Reform Act of 1978, as amended by the Whistleblower Protection Act (WPA) of 1989²⁶⁵.

The WPA²⁶⁶ makes it illegal to take or threaten to take personal action.²⁶⁷ A disclosure need not prove ultimately accurate in order to be protected; it is enough if the person making it is acting in good faith and with an objectively reasonable belief in its accuracy. The law was designed to make it easy for a whistleblower to make a *prima facie* case of retaliation.²⁶⁸

²⁶³ Whistleblower Protection Act (WPA) of 1989 (USA).

²⁶⁴ Kaplan (2001), *The International Emergence of Legal Protection for Whistleblowers*, p. 38.

²⁶⁵ *Supra* fn. 263.

²⁶⁶ *Ibid.*

²⁶⁷ 'Personnel Action' is broadly defined to include virtually any employment-related decision that has an impact on an employee at the workplace.

²⁶⁸ Kaplan (2001), *The International Emergence of Legal Protection for Whistleblowers*, p. 38.

2 Requirements

A unique feature of the WPA²⁶⁹ is that a whistleblower is not required to make his disclosure through any particular channel²⁷⁰ in order to benefit from the Act's protection²⁷¹. If the Special Council concludes that retaliation has not occurred, or if OSC does not act within 120 days, whistleblowers can pursue an individual right of action before the Merit System Protection Board (MSPB). If the whistleblower does not prevail, he or she may take an appeal to federal court.²⁷²

Whistleblower law has developed over time from the employment-at-will doctrine to a wide variety of state and federal laws protecting employees from retaliatory discharge. Sarbanes-Oxley Act²⁷³, 2002, section 806 instituted the first federal protection for employees at public companies from retaliatory discharge for reporting violations involving security laws.²⁷⁴ The Act²⁷⁵ allows for civil remedies against employers for retaliatory discharge regardless of

²⁶⁹ *Supra* fn. 263.

²⁷⁰ 'An employee is protected regardless of to whom he makes his disclosure. This includes protection for *employees who take their allegations to the media.*'

²⁷¹ Kaplan (2001) *The International Emergence of Legal Protection for Whistleblowers*, pp. 38.

²⁷² *Ibid.*

²⁷³ The Sarbanes–Oxley Act of 2002 (Pub. L. 107-204, 116 Stat. 745 (USA)).

²⁷⁴ Rubinstein (2008) *Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer*, p. 638.

²⁷⁵ *Supra* fn. 273.

whether the employee makes any attempt to first report alleged violations within the company.²⁷⁶

The Sarbanes-Oxley Act²⁷⁷ was passed in response to the spate of corporate scandals and mismanagement that came to light in 2001. The goal of whistleblower protection under this Act is to correct wrongdoings as quickly and efficiently as possible, and was passed in order to protect investors by requiring increased disclosure from public companies to their shareholders and the public.²⁷⁸

While such protections are undoubtedly necessary in light of recent history in corporate America, Congress failed to adequately balance the competing interests of employee and employer in the context of whistleblower protection. While it is crucial to encourage employees to come forward and report suspected violations without fear of reprisal, this goal would be better served by requiring internal disclosure as a first report in most circumstances. Congress should therefore amend section 806 of the Sarbanes-Oxley Act²⁷⁹ to require internal disclosure in most circumstances unless the employee has a reasonable belief that such a disclosure would prove futile.²⁸⁰

3 Recent developments

²⁷⁶ Rubinstein (2008), Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer, p. 638.

²⁷⁷ *Supra* fn. 73.

²⁷⁸ Rubinstein (2008), Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer, p. 657.

²⁷⁹ *Supra* fn. 73.

²⁸⁰ Rubinstein (2008), Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer, p. 657.

With regard to recent whistleblowing disclosures in the US, a whistleblower by the name of Bobby Maxwell said that poor inspections on the Gulf oil rigs are partly to blame for the spill. Maxwell worked for 22 years as an auditor and audit supervisor for the Minerals Management Service, and he said that the disaster would not have happened if inspectors had done their jobs²⁸¹. He further said that a 'culture of corruption enveloped the agency, and it permeated the whole agency, both the revenue and the inspection side.'²⁸²

E. CONCLUSION

With regard to the above comparative survey it is clear that the international community has begun to implement and adopt a variety of whistleblowing laws and procedures for protecting and encouraging those who speak out.

To date a majority of the nations that have adopted these legal protections are established, rather than emerging, democracies.²⁸³

Globally, the trend is positive, with many modern democracies enacting protection for whistleblowers in recent years.

According to Calland,²⁸⁴ whistleblowing is the coming of age. A critical mass of knowledge and expertise is accruing; we now have a much greater chance of

²⁸¹ CNN, Whistleblower says poor inspections partly to blame for spill, June 9, 2010.

²⁸² Ibid.

²⁸³ Kaplan (2001) *The International Emergence of Legal Protection for Whistleblowers*, pp. 38.

²⁸⁴ As cited in Auriacombe, *Whistleblowing and the law in South Africa*, Politeia, vol. 24 (2) p. 215.



promoting the sort of cultural and social attitudinal change that is necessary if whistleblowers are to become an accepted and respected part of the overall

quest for greater accountability in the use of power, both in the public and private sectors.²⁸⁵ This view is supported by Auriacombe.²⁸⁶

²⁸⁵ Ibid.

²⁸⁶ *Supra* fn. 284.

CHAPTER 6

CONCLUSION

A. INTRODUCTION

South Africa's Protected Disclosures Act²⁸⁷ came into force on 16 February 2001. Apart from this Act²⁸⁸, other pieces of legislation enacted over the past 15 years also point towards a serious attempt to combat corruption and crime in the workplace. The question remains, of course, whether the PDA²⁸⁹ has succeeded (or ever will succeed) in creating a culture of whistleblowing.

A related question is whether any legislative instrument on its own could ever succeed in doing so; given the fact that the corporate culture, a powerful force in these situations, may create the sense of 'what happens in the company stays in the company.' That there are real sensitivities on the part of both the employer and the employees when it comes to blowing the whistle is obvious.²⁹⁰

With regard to this dissertation it is clear that employees still have a legitimate hesitation in making a disclosure; even a real, legitimate and good faith disclosure remains perilous.

²⁸⁷ *Supra* fn. 8.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ Mischke (2007) Contemporary Labour Law. Protected Disclosures and Compensation.

It is important to reflect on the impact of retaliation and victimisation on a person who, in good faith, is thrust into the role of a whistleblower. It must be one of the most self-destructive processes imaginable. Without an understanding of the realities that whistleblowers face, there cannot be effective whistleblowing protection. Procedures and legislation that are introduced to protect whistleblowers ought to encourage disclosure within the organisation. The organisation will be best served by a non-confrontational form of whistleblowing and the whistleblower is best served by ensuring adequate protection to lessen the possibility of retaliation.²⁹¹

B. RECOMMENDATIONS

The enactment of protection for whistleblowers is laudable. The desire to improve on the existing Protected Disclosures Act²⁹² proves that the government is serious in its commitment to tackle corruption without exposing those who bring this to the attention of the authorities to too much risk.²⁹³

After the enactment of the PDA²⁹⁴ in February 2001, the South African Law Reform Commission²⁹⁵ undertook an extensive review in 2004 to improve on the current provisions thereof. The proposed amendments to the Act aim to, *inter alia*, ensure that the protection offered by the PDA²⁹⁶ is extended to a wider

²⁹¹ Feldman (1999), Protection for Whistleblowers.

²⁹² *Supra* fn. 8.

²⁹³ Auriacombe (2005), Whistleblowing and the law in South Africa, p. 23.

²⁹⁴ *Supra* fn. 8.

²⁹⁵ South African Law Reform Commission Report, 2008.

²⁹⁶ *Supra* fn. 8.

group of persons functioning or having functioned within the workplace; that immunity from criminal and civil liability may be granted to employees who disclose criminal offences in contravention of agreements or obligations of confidentiality; that a duty is placed on employers to establish appropriate internal procedures for receiving and dealing with disclosures, and to place a duty on employers to investigate disclosures and to notify employees of the outcome of such investigations.²⁹⁷

Apart from these recommendations, the Open Democracy Advice Centre (2004) has also proposed the following: 'To create a culture which will facilitate the disclosure of wrongdoing by employees in a responsible manner, we submit that the act should place a duty on employers over a certain size to put in place policies and procedures for reporting wrongdoing. This should be supported by a Code of Good Practice which would involve whistleblowing training for all personnel within the business.'²⁹⁸

With reference to an article written by Prof. Henning Viljoen²⁹⁹ the question was asked as to whether the government is serious about protecting whistleblowers, and he concluded that, with reference to the Tshishonga case³⁰⁰, his first hand experience (as the applicant's attorney) convinced him that the government is not serious about its avowed intention to protect whistleblowers.

²⁹⁷ South African Law Reform Commission Report, 2008.

²⁹⁸ As cited in Camerer (2001) Protecting whistleblowers in South Africa.

²⁹⁹ Viljoen (2005) Fluitjieblasers – Is dit die Huidige Regering se Erns, p. 497.

³⁰⁰ *Supra* fn. 4.

A fundamental decision for any legislature is whether to protect all whistleblowers or only those engaged in some form of employment. Clearly if rights are to be extended to citizens generally this must be reflected both in the arrangements made for reporting concerns and in the remedies available if victimisation occurs.³⁰¹

From the above it seems clear that the Protected Disclosures Act³⁰² does not make enough provision for the protection of whistleblowers, and that it needs to implement the suggested recommendations.

‘Finally, in a world where transparency has become a daily used constitutional phrase, it is also true that this ideal has not yet become part of the community’s mindset. In fact, if substantial compensation is not paid to the whistleblower, it is unlikely that whistleblowing will ever become a realistic choice.’³⁰³

Words: 15 667

³⁰¹ Lewis (2001) Whistleblowing at Work: On What Principles Should Legislation Be Based?, p. 191.

³⁰² *Supra* fn. 8.

³⁰³ van Rooyen (2004), The Desirability of a Culture of Whistleblowing, p. 76.

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