WHISTLEBLOWERS: WHAT IF YOUR DISCLOSURE IS FACTUALLY WRONG?

For many years now the “Whistleblower’s Act” (actually the Protected Disclosures Act or “PDA”) has been providing protection to employees who report unlawful or improper conduct by their employers or fellow employees.

Recent updates to the PDA have extended protection to independent contractors, consultants, agents and workers employed by labour brokers. There is also a new requirement for employers to put in place “internal procedures for receiving and dealing with information about improprieties”.

Reprisals against a whistleblower (in the form of any type of “occupational detriment”) will land an employer in very hot water indeed. For example if the reprisal takes the form of a dismissal, it is “automatically unfair” and that carries substantial risk such as a compensation order of up to 24 months’ salary.

A case of incompatibility or retaliation?

An employee of a large organisation came to believe that several of her subordinates’ positions had been re-graded to a lower grade, without their knowledge or consultation, and that this both negatively impacted on their future salaries and distorted the accuracy of the company’s employment equity report. She reported this to her immediate superiors, then to the company’s internal audit department and to senior executives, but received no feedback.

Out of the blue she was presented with a termination offer, and when she didn’t accept it she was summarily dismissed for “incompatibility with colleagues”.

Her claim for automatically unfair dismissal in terms of the PDA was rejected by the Labour Court, but on appeal to the Labour Appeal Court her claim was upheld and she was awarded compensation of 18 months’ salary, with her employer ordered to pay all legal costs.

In reaching this decision, the Court considered several important questions -

Was the whistleblower’s disclosure made in good faith, in accordance with procedure, and based on a reasonable belief that it was substantially true? If so, the disclosure is a protected one. Importantly, said the Court, the whistleblower need not prove a factual basis for the belief “because a belief can still be reasonable even if the information turns out to be inaccurate.”

Was it reasonable in all the circumstances for the whistleblower to have made the disclosure? On the facts, held the Court, the whistleblower had acted reasonably and the employer’s contention that the dismissal was based on incompatibility was “nothing short of fiction and the only probability is that the appellant’s dismissal was in retaliation for her disclosure of the irregularities in the re-grading process.”

The lesson for whistleblowers

The PDA provides you with strong protections if you follow the correct procedures; just be sure you will be able to pass the tests posed by the above questions.

The lesson for employers

Don’t take action against a whistleblower just because a disclosure is factually incorrect – it is the reasonableness or not of the employee’s belief, and the “good faith” requirement, that you should concentrate on. Make sure also to have a whistleblower policy in place and to tell all your employees about it – not only is that now a legal requirement, but your business can only benefit from uncovering any improper or criminal conduct going on behind your back.

As always, with our labour laws being so complicated, and the penalties for breaching them so severe, take specific advice on your particular situation.