IN THIS ISSUE

EMPLOYMENT

CAN YOU HEAR THE WHISTLE?

Whistleblowing and protected disclosures in the workplace.

Whistleblowing is defined as raising a concern about wrongdoing within an organisation. The Protected Disclosures Act, No 26 of 2000 (PDA) was enacted to protect whistle-blowers and to help combat corruption. The PDA must be viewed in the context of high levels of perceived corruption in South Africa. Evidence of this was given in Transparency International's 2014 Corruption Perception Index which gave South Africa a score of 44 out of a possible 100 (with 100 being perfect non-corruption), ranking us 67 out of 175 countries.

The "test" case for protected disclosures was Grieve v Denel (2003) 24 ILJ 551 (LC), in which the Labour Court gave context to section 3 of the PDA:

"No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure."

Dismissal in breach of the occupational detriment requirement under the PDA is deemed to be automatically unfair under s187 of the Labour Relations Act, No 66 of 1995 (LRA) and could result in a maximum of 24 months' compensation awarded to the employee. Other occupational detriments not resulting in dismissal are deemed unfair labour practices which could give rise to a maximum of 12 months' compensation.

The most cited case in terms of the PDA is the decision of *Tshishonga v Minister of Justice & Constitutional Development 2007 4 BLLR 327 (LC)*, in which the Labour Court introduced a four-stage approach to ascertain whether or not the requirements of the PDA are met:

- Was there a disclosure?
- Was it a protected disclosure? The disclosure will be protected if it was in good faith, if it was subjectively believed to be substantially true and if there was no ulterior motive. In *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd (2013) 34 ILJ 3314 (LC),* the Labour Court stated that protection requires an impropriety from the employer. Further, the company's protected disclosure procedure must be followed by the employee.
- Was the employee subject to an occupational detriment? There must be a causal link between the disclosure and the occupational detriment. In *Independent Municipal & Allied Trade Union & another v City of Matlosana Local Municipality & another (2014) 35 ILJ 2459 (LC)*, the Labour Court gave practical pointers to determine if there is a link between the occupational detriment (in this case a disciplinary enquiry) and the disclosure namely:
  - the timing of the institution of the charges or the occupational detriment;
  - the reasons given by the employer;
  - the nature of the disclosure; and
  - the person responsible for taking the decision to institute the charges.
- What remedies are available?

Since December 2013, there have been 15 reported cases involving protected disclosures. The increase in the number of disputes is attributed to employees becoming more aware of the protections afforded to them under the PDA.

It is thus critical for employers to engage with and understand the PDA and then examine their internal whistleblowing procedures to ensure statutory compliance.

Fiona Leppan and Nick Wright

HOW DOES THE LABOUR RELATIONS ACT IMPACT ON YOU?
CLICK HERE TO FIND OUT MORE.

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm.

How do we continue to give effect to the basic objectives of labour and social security law under these conditions, and how best might those objectives be secured?

These and other questions will inform our order of business.

CLICK HERE FOR MORE INFORMATION.

CONTACT US

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com

Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com

Gavin Stansfield
Director
T +27 (0)21 481 6314
E gavin.stansfield@dlacdh.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Lauren Salt
Senior Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

Anli Bezuidenhout
Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@dlacdh.com

Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@dlacdh.com

Inez Moosa
Associate
T +27 (0)11 562 1420
E inez.moosa@dlacdh.com

Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@dlacdh.com

Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG
1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN
11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

cliffedekkerhofmeyr.com

Cliffe Dekker Hofmeyr is a member of DLA Piper Group, an alliance of legal practices.

DLA CLIFFE DEKKER HOFMEYR