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Date: 05 October 2017

MAY AN EMPLOYER TAKE DISCIPLINARY ACTION AGAINST EMPLOYEES WHO MAKE DISCLOSURES WHICH ARE POSSIBLY DETRIMENTAL TO AN EMPLOYER?

As any Employer knows, an Employee is placed under a duty to always act in the best interests of his or her Employer for fear of facing disciplinary action, but is this duty one which must be adhered to at all costs or are there limitations? And what if the Employer engages in unlawful or unethical conduct? Can the Employee be disciplined for providing tip-offs relating to underhanded conduct which ultimately prejudice the Employer?

The best way to answer the questions posed herein above is to look at what the Labour Relations Act (LRA) says about an Employee making what is known as a "Protected Disclosure" and also what exactly this entails. The Protected Disclosures Act (PDA) defines same as follows:

> *"A disclosure is a "protected disclosure" under the Protected Disclosures Act if:*
>
> - *the disclosure contains information about "impropriety" and*
> - *the disclosure has been made to the right person, according to the scheme established by the Act"*

It must be noted that the stated purpose of the PDA is to engender a culture of good governance and ethical behaviour within companies and it therefore encourages persons with knowledge of turpitude within a workplace to make such disclosures without fear of repercussions and/or victimisation.

Further to this, the LRA goes on to state that an occupational detriment, other than dismissal, in contravention of the PDA, on account of the employee having made a protected disclosure defined in that Act, is an unfair labour practice. Similarly, the dismissal of an Employee for making a protected disclosure in terms of the PDA, will amount to an automatically unfair dismissal. In both instances, the Employer will be exposed to severe financial risk and/or penalties.

What is of particular importance in relation to this issue are recent amendments to the PDA promulgated on 2 August 2017. Of particular importance for Employers are two new administrative obligations created by the Amendment Act, namely that (1) employers *must* formulate and document internal whistleblowing procedures, and must bring this to the attention of all its employees; and (2) employers are required to respond in writing to a disclosure within 21 (twenty one) days and keep the employee/worker informed of steps being taken in relation to investigating the matter.

What is of particular interests as well is that the Amendment Act introduces the new term "*worker*" in addition to "employee". The definition of 'worker' includes individuals who currently or previously worked for the employer; as

well as independent contractors, consultants, agents and those rendering services to a client whilst being employed by a temporary employment service (TES).

As one can see, the duties & obligations placed upon Employers by the PDA, and more specifically the Amendment Act, are particularly onerous and any protected disclosures made by Employees should be handled seriously and there should be no prejudice to the said Employee, who can be said to actually be acting in the best interests of the Employer.