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EMPLOYMENT

ALERT

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WHEN IS AN EMPLOYEE
SAID TO HAVE MADE A
PROTECTED DISCLOSURE

WHAT IS PROTECTED AND WHEN?

WHEN IS AN EMPLOYEE SAID TO HAVE MADE A PROTECTED DISCLOSURE

In the matter of *South African Municipal Workers' Union National Fund v Arbuthnot (JA73/11)* [2014] ZALAC 23, the Labour Appeal Court was faced with the question of whether the dismissal of the employee concerned, the Respondent, was automatically unfair for the reason that she had been dismissed for making a protected disclosure in terms of the Protected Disclosure Act 26 of 2000.

The Appellant, a fund established by the South African Municipal Workers Union (SAMWU) had lost an estimated 250 million rand (R250 000 000) in an investment scheme it had made in the Living Hands Trust, an entity controlled by Fidentia, a company which was placed under curatorship.

The Appellant, after the loss of trust money, instructed an attorney to obtain an opinion from counsel regarding the trustees' liability to the beneficiaries of the fund for the possible breach of their fiduciary duties relating to their decision to invest a substantial sum of the appellant's pension funds in the Living Hands Trust.

On 1 October 2008, the Respondent, who worked for the Appellant as a paralegal, received the email containing the opinion from the Appellant's attorneys.

Upon receipt of the opinion, the Respondent forwarded it to the National Benefit Officer of SAMWU and asked him to keep the information confidential.

The National Benefit Officer was tasked with overseeing the benefit scheme instituted for the benefit of SAMWU members. He was not a trustee and was not entitled to receive the opinion.

The Respondent was questioned several times after receipt of the opinion if she had forwarded it to any other person, which she vehemently denied until she was shown proof of an email indicating that she had forwarded the opinion to the National Benefit Officer.

She then admitted to having sent the email to the National Benefit Officer, was found guilty of misconduct at a hearing and was dismissed.

The Respondent referred an unfair dismissal dispute to the CCMA and later to the Labour Court. At the Labour Court, the Respondent pleaded that she was dismissed for making a protected disclosure, it was held that when the Respondent forwarded the opinion she had indeed made a protected disclosure. Accordingly her dismissal was held to be automatically unfair.



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The matter went to the Labour Appeal Court where the Appellant sought to overturn the Labour Court decision on the basis that the Respondent's disclosure was not qualified by the Protected Disclosure Act for the following reasons:

- She did not act in good faith when she made the disclosure; and
- The disclosure is not compatible with section 9 of the Protected Disclosure Act.

Section 9 reads as follows: General protected disclosure:

(1) Any disclosure made in good faith by an employee—

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true;

...

is a protected disclosure if—

(ii) in all the circumstances of the case, it is reasonable to make the disclosure.

The Labour Appeal Court held that the disclosure is protected if the person making it reasonably believes that the information is true, even if the information later transpires not to be true.

Further, that the Appellant's failure to challenge the correctness of the information meant that the Respondent's reasonable belief could not be doubted.

The Labour Appeal Court held, however, that the disclosure was not made in good faith for the following reason:

- She instructed the National Benefit Officer to keep the information confidential while in cases of protected disclosure it is expected of the recipient to act upon receiving the information.

The Labour Appeal Court held further that the Respondent's disclosure was not reasonable for the following reasons:

- The Appellant had sought the opinion to ascertain the extent, if any, of the liability of the trustees regarding the beneficiaries' fund; and
- That the Respondent disclosed the information prematurely before the Appellant could act on it and without ascertaining what the Appellant planned to do with it.

The LAC then held that the Respondent's dismissal was not automatically unfair.

In terms of this decision, the employer must have the opportunity to act on the information before it can be said that any disclosure of it is in good faith. Further, it must be intended for the recipient of the information to act on it and not simply to have knowledge of it.

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