THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 532/11

Reportable

In the matter between:

LOU-ANNDREE JOHN **Applicant**

and

AFROX OXYGEN LIMITED **Respondent**

Heard: **02 March 2015**

Delivered: **04 August 2015**

Summary: Automatically unfair dismissal. Protected disclosure in terms of the Protected Disclosure Act. The employee informing the employer that the re-grading of positions was done irregularly because no consultation was held with the affected employees.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] The applicant, in these proceedings, claims that her dismissal by the respondent was automatically unfair based on the alleged breach of the provisions of the Protected Disclosure Act ("PDA").[1]

[2] The respondent does not dispute the dismissal but contends that it was not for the alleged contravention of the PDA but that it was a dismissal based on incompatibility on the part of the applicant.

Background facts

[3] The applicant, who prior to her dismissal was employed as Head of Talent Management, in the HR department of the respondent, was on the version of the respondent dismissed for incompatibility.

[4] The case of the applicant on the other hand is that her dismissal was automatically unfair because of the protected disclosure she made regarding certain irregularities committed by the respondent. The irregularities which the applicant alleges were committed are set out in the statement of case and relates to the following:

> '8.1 restructuring and/or realigning of employees' positions;
>
> 8.2 unilateral changes to employees' grading status;
>
> 8.3 misrepresentations being made in respect of the respondent's employment equity reporting.'

[5] The applicant contends that the disclosure was made in terms of the PDA in confidence, on the advice from her supervisor and the internal audit. She contends that the dismissal was automatically unfair in that it was as a result of the disclosure that she made which she made based on her belief that the structuring of the grading of the positions of the affected employees was done in contravention of the Employment Equity Act ("EEA"). It is for this reason that she claims to have been discriminated against by the respondent.

[1] Act No 26 of 2000.

[6] It is common cause that the respondent issued the applicant with a letter on 14 March 2013 indicating the intention to terminate the employment relationship with immediate effect, due to incompatibility. The letter also contained a mutual separation proposal based on a financial settlement. On the same day, a meeting was held between the parties where the applicant rejected the offer of settlement.

[7] On 19 March 2013, the applicant addressed a letter to the respondent indicating amongst other things that:

> '15.1 she was being victimised as a result of her disclosure.
>
> 15.2 she has not been afforded any protection by the company on making the disclosure.
>
> 15.3 she was discriminated against as a result of the disclosures.'

[8] On the same day the applicant received a letter notifying her of the summary dismissal by the respondent. The disclosure which the applicant claims she made arose subsequent to her proposal that Ms Armstrong be transferred to the position as manager of organisational development ("OD").

[9] Mr Wagner, the group manager, agreed to the proposed transfer of Ms Armstrong except that, according to him, it had to be done on the condition set out in the email dated 28 June 2013, which reads as follows:

> 'Dear Lou- Anndree
>
> Our discussion on Friday (25 January 2013), with regards to the possible salary offer, to be made to above-mentioned employee, if she would be appointed into the OD Manager role, refers.
>
> Please note I would not recommend that we offer any percentage increase to her at this stage. The reason for this is as follows:
>
> - The transfer is lateral (Band 2M into a Band 2M).
> - Her current salary is well established (CR 102%) within the salary band for a Band 2M.
>
> It is important to note that as the custodians of the process, it would not be feasible to act outside our own guidelines.

> If there is still a need for some form of compensation, to encourage the move. I would suggest that you do so within your budget constraints during the April 2013 Salary review process. Alternative approach might be to do so during the April 2014 salary review process, as she would have been exposed to the new role for a period of at least one year already. This will therefore, be based on the performance in the new role.'

[10] The applicant responded to the above email with an email dated 14 February 2013, wherein she, *inter alia*, states:

> 'I will implement the lateral move as per below, but I do not believe that this is the best approach.
>
> Also, according to my records from SAP, the Resourcing Manager was graded at 2H and therefore Aine (Ms Armstrong) was 2H. I am not aware of any changes to the grading for her or her previous role and would be concerned if this was done without any consultations.
>
> Dear Nico,
>
> Please confirm why the comparison is for Band 2M.
>
> Awaiting your advice.'

[11] Mr Wagner responded indicating that the grading for the position to which Ms Armstrong was to be transferred was done before the applicant joined the respondent.

[12] It is apparent that the applicant was unhappy with the answer and, consequently, addressed a further email to Mr Wagner on 1 March 2013 wherein she, amongst other things, stated that she was "extremely unhappy about the lack of integrity of this process."

[13] It is apparent that during the investigation into the grading of the OD position, the applicant discovered that there were other employees affected by that process.

<u>The case of the applicant</u>

[14] The only witness for the applicant was the applicant herself. She testified that re-grading of a position has a negative implication on the future salary increase of the

affected employee and more importantly of the Employment Equity report which has to be made to the Department of Labour ("DOL"). According to her, the re-grading of the positions which was made without consultation distorted the EE report. The distortion of the EE report would according to her occur in relation to the wage differentials.

The case of the respondent

[15] The only witness of the respondent was Mrs Makwela who testified that the dismissal of the applicant had nothing to do with the disclosure but was due to the incompatibility of the applicant with her colleagues. She further testified that the information which the applicant claims to have disclosed was already known to the employees of the respondent working in the HR department.

[16] The other point made by Mrs Makwela was that the changes made in re-grading the positions did not prejudice the affected employees, specifically because their salaries would not be affected. Furthermore, she stated that the reporting on the EE is done on-line, audited and the summary of the report has to be published to the public.

Legal principles

[17] It is apparent from the background facts above that the case of the applicant is that the dismissal was allegedly automatically unfair because of the disclosure made and thus evoking the provisions of section 187 (1) of the LRA read section 4 (2) PDA.

[18] It is apparent from the reading of the objectives of the PDA,[2] that an employee who makes a protected disclosure receives protection at the level of automatically unfair dismissal and from being subjected to any detrimental treatment on account of the disclosure made.[3]

[19] In order for information to be regarded as protected, it must relate to the conduct of the employer or the employee of the employer and it be made by an employee who

[2] The objectives of the PDA reads:*"(a)* to protect an *employee*, whether in the private or the public sector, from being subjected to an occupational *detriment* on account of having made a *protected disclosure*;*(b)* to provide for certain remedies in connection with any *occupational detriment* suffered on account of having made a *protected disclosure*; and *(c)* to provide for procedures in terms of which an *employee* can, in a responsible."
[3] See section 4(2) of the PDA.

has reasonable belief that the employer or the employee of that employer has failed to comply with its legal obligation or committed or likely to commit a criminal offence.[4]

[20] In terms of the PDA, there are seven categories of failure on the part of the employer which would qualify the disclosure for protection. The categories of the failures by the employer are set out in s 1 of the PDA in the following terms:

> '(a) that a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
>
> (d) that the health or safety of an individual has been, is being or is likely to be endangered;
>
> (e) that the environment has been, is being or is likely to be damaged;
>
> (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
>
> (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.'

[21] It is trite that an employee who makes protected disclosure envisaged in section 4 (2) of the PDA is protected from dismissal. Put in another way, employers are prohibited from subjecting an employee who makes a protected disclosure to any occupational detriment on account of such disclosure including dismissal.

[22] The burden to show that the dismissal falls within the confines of the PDA rests with the employee who alleges that the dismissal was as a result of disclosure he or she made.[5]

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[4] See s 1 of the PDA which defines "protected disclosure" to mean: "any disclosure of information regarding any conduct of an *employer*, or an *employee* of that *employer*, made by any *employee* who has reason to believe that the information concerned shows or tends to show one of the categories of failures by the employer or commission or likely commission of criminal conduct by the employer.

[23] In order to satisfy the requirements of a protected disclosure, the disclosure must satisfy the criteria set out in s 9 of the PDA which reads as follows:

> '9(1) Any disclosure made in good faith by an employee—
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> (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
>
> (b) who does not make the disclosure for purposes of personal gain, excluding any reward 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) (ii) in all the circumstances of the case, it is reasonable to make the disclosure.
>
> (2) The conditions referred to in subsection (1)(i) are–
>
> (a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;
>
> (b) that in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if her or she makes the disclosure to his or her employer;
>
> (c) that the employee making the disclosure has previously made a disclosure of substantially the same information to –
>
> (i) his or her employer; or
> (ii) (ii) a person or body referred to in section 8,
>
> In respect of which no action was taken within a reasonable period after the disclosure; or
>
> (d) that the impropriety is of an exceptional serious nature.

[5] See *State Information Technology Agency (Pty) Ltd v Sekgobela* (2012) 10 BLLR 1001 (LAC) at para 17.

(3) Determining for the purposes of section (1)(ii) whether it is reasonable for the employee to make the disclosure, consideration must be given to –

(a) the identity of the person to whom the disclosure is made;
(b) the seriousness of the impropriety;
(c) whether the impropriety is continuing or is likely to occur in the future;
(d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person; and

(g) in the public interest.'

[24] The above requirements are summarised by the Labour Appeal Court (LAC) in *Malan v Johannesburg Philharmonic Orchestra*[6] in the following terms:

> '… there must be a disclosure; the disclosure must be made in good faith; the disclosure must concern an impropriety, either a criminal offence or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; it must be reasonable for the employee to make the disclosure; and, that one or more of the conditions referred to in subsection 9(2) must be satisfied – for present purposes, any one of them is sufficient.Where the disclosure is made to the employer subsection (c) which is relevant for the present purposes provides that the employee making the disclosure must have previously made a disclosure of substantially the same nature to his or her employer.'

[25] In considering whether it was reasonable for the employee to make a disclosure, the court will take into account the following factors:[7]

'(a) The identity of the person to whom the disclosure is made;

(b) The seriousness of the impropriety;

(c) whether the impropriety or is continuing or is likely to occur in the future;

(d) whether the disclosure is made is made in breach of the duty of confidentiality of the employer towards any other person;

[6] (JA 61/11) [2013] ZALAC 24 (12 September 2013) at para 29.
[7] The factors to consider are set out in s 9(3) of the PDA.

(e) in a case falling within subsection (2) (c), any action which the employer or the person or body to whom the disclosure is made, has taken, or might reasonably be expected to have taken, as a result of previous disclosure;

(f) in a case falling within subsection (2) (c)(i), whether in making the disclosure to the employer the employee complied with any procedure which was authorised by the employer; and

(g) the public interest.'

[26] In dealing with whether the disclosure relied on by the employee and impropriety alleged on the part of the employer, qualified for protection under the PDA, Van Niekerk J, in *CWU v MTN*[8] held that:

> 'The disclosure relied on by the second applicant as a protected disclosure was no more than an expression of a subjectively held opinion or an accusation, rather than a disclosure of information. It is clear from the judgment in *Grieve v Denel* (*supra*) that the disclosure considered worthy of protection in that instance was a disclosure of information that, on a *prima facie* basis at least, was both carefully documented and supported. The disclosure was clearly indicative of a breach of legal obligations and possibly criminal conduct on the part of the employer concerned. In the present instance, the only information proffered by the second applicant (and this was conceded by his counsel) was that contained in his e-mail dated 4 April 2003, and in particular his statement to the effect that Thlalefang was being used as a sole agency to supply temporary employees. There is no factual basis, however tenuous, in any of the second applicant's communications to justify the conclusion that they constituted anything other than his personal opinion that what appears to amount to a preferred supplier arrangement was improper. There is no information offered that indicates in the slightest any impropriety on the part of any member of MTN's management.'

[27] In *Grieve v Denel*,[9] the court held that the intention of the PDA was not to protect disclosures that amount to rumours and conjuncture. In other words, for the disclosure together with its allegation to deserve protection, it must be supported by facts.

[28] Whilst accepting that reasonable belief need not be correct, it seems to me that the belief must be based on facts and reasons for the belief to enjoy the protection. It is also apparent from the authorities that, wild and unsubstantiated allegations cannot

[8] (2003) 8 BLLR 741 (LC) at para 22.
[9] (2003) 4 BLLR 366 (LC).

find protection under the PDA. In *State Information Technology*, Mlambo, JP, in dealing with the issue of reasonableness of the belief, held that:

> '[32] …. for a disclosure to qualify for protection it must show that the employee reasonably believed that the information disclosed and any allegation contained in it was substantially true.'[10]

[29] In *SA Municipal Workers Union National Fund v Arbuthnot*,[11] the LAC per Waglay JP found as misconceived the argument on behalf of the employee that:

> '[15] ... The enquiry is not about the reasonableness of the information, but about the reasonableness of belief *vis-a-vis* the truthfulness of the information. The requirement of 'reasonable belief' does not entail demonstrating the correctness of the information, because a belief can still be reasonable even if the information turns out to be inaccurate. In this regard, this court, *in Radebe and Another v Premier, Free State Province and Another (*footnote omitted) held that:
>
> > "The requirement of "reasonable to believe" cannot be equated to personal knowledge of the information disclosed. That would set so high a standard as to frustrate the operation of the PDA. Disclosure of hearsay opinion would, depending on the reliability, be reasonable. A mistaken belief or one that is factually inaccurate can nevertheless be reasonable. A mistaken belief or one that is factually inaccurate can nevertheless be reasonable unless the information is so inaccurate that no one can have interest in its disclosure.'"

[30] The applicant contended in her testimony that the re-grading affected the income differentials which are to be included in the report to the DOL in terms of the EEA. The re-grading affected the EE report because according to the applicant salaries of the affected employees remained unchanged. This, according to the applicant, distorts the report to be made to the DOL.

[31] The report which a designated employer such as the respondent has to make to the DOL in terms of the EEA is governed by s 21 of that Act. Section 21 of the EEA provides a procedure to be followed by the designated employer for the purposes of

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[10] *State Information Technology Agency (Pty) Ltd v Sekgobela (supra)* at para 32.
[11] (2014) 35 *ILJ* 2434 (LAC) at para 15.

employment equity reporting. A designated employer that is a public company is also required by section 22 of the EEA to publish that the report in the summery form in its annual financial report.

[32] Section 27 of the EEA, under the heading “Income differentials and discrimination,” provides:

> ‘(1) Every designated employer, when reporting in terms of section 21(1), must submit a statement, as prescribed, to the Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational level of that employer's workforce.
>
> (2) Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6(4), are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister as contemplated in subsection (4).
>
> (3) The measures referred to in subsection (2) may include
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> (a) collective bargaining;
>
> (b) compliance with sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act;
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> (c) applying the norms and benchmarks set by the Employment Conditions Commission;
>
> (d) relevant measures contained in skills development legislation;
>
> (e) other measures that are appropriate in the circumstances.
>
> (4) The Employment Conditions Commission must research and investigate norms and benchmarks for proportionate income differentials and advise

the Minister on appropriate measures for reducing disproportional differentials.

(5) The Employment Conditions Commission may not disclose any information pertaining to individual employees or employers.

(6) Parties to a collective bargaining process may request the information contained in the statement contemplated in subsection (1) for collective bargaining purposes subject to section 16(4) and (5) of the Labour Relations Act.'

Evaluation and Analysis

[33] In my view, the information disclosed by the applicant has no factual basis to support the existence of a reasonable belief required in order to qualify as protected disclosure envisaged by the PDA. The totality of the facts and the circumstances of this case do not support the contention of the applicant that the information disclosed was of such a nature as to deserve protection.

[34] The information which the applicant relies on for the purpose of the PDA in this matter relates to the report made to officials of the respondent regarding the re-grading of positions of certain employees. The grading system of the respondent provide grades 1 to 11. There are three salary bands within each grade, categorised into High (H), Middle (M) and Lower (L). It seems common cause that in the re-grading process some employees were graded higher and others lower than where they were before the re-grading. As appears from the above, the case of the applicant is that the re-grading of the positions was irregular and the consequence thereof is:

(i) The affected employees were prejudiced because they were not consulted.
(ii) Could have the effect of presenting to the DOL false reports in terms of the EEA; in relation to the income differentiation.

[35] In relation to the issue of the duty to consult the affected employees before the re-grading, the applicant was unable, during cross examination, to show on what basis she was contending that the respondent had a duty to consult with those employees.

She stated that the duty arose from the provisions of the LRA and the Basic Condition of Employment Act (the BCEA) but could not say which sections of those statutes require consultation in grading employees' positions. Her explanation for failing to provide the specific provisions of the BCEA and LRA upon which she relied on was that she is a lay person and not a lawyer. Accepting that to be the case, she, however, is not an illiterate person. She was, prior to her dismissal, a manager in the HR department and thus the basic knowledge of these statutes should have come without much difficulty to her. A simple investigation by a person at her level regarding the provisions of the two legislation would have revealed that there was no basis to claim failure on the part of the respondent to consult before undertaking the grading of employees.

[36] The version of the respondent that not only did the re-grading occur prior to the applicant joining its employ but also that the affected employees were not prejudiced by that was not seriously challenged by the applicant. It should also, in this respect, be noted that there is no evidence presented by the applicant that the respondent falls within a sector governed by sectoral determination regulating wages to be paid to employees or for that matter, the manner in which the grading of employees is to be done by the employer. There is also no evidence of a collective bargaining agreement regulating the same and upon which it could be said that it is reasonable to believe that the respondent had failed to comply with its legal duty because of the manner it went about re-grading the positions of its employees.

[37] The contention of the applicant that the re-grading would affect their future salary increase bears no merit in the context of this matter. Even if that was to be the case, I do not believe that it would be serious enough to elevate the information disclosed to the overriding importance of public interest. It is also important in the evaluation of the reasonableness of the belief, which the applicant had to show in order to enjoy the protection, to note that the information in question was already known to the employees of the respondent in the HR department. The reasonable inference that can be drawn from this is that the information claimed to be protected was already known to the person to whom it was disclosed.

[38] In relation to the EE reporting, the applicant has, in my view, also failed to show that her belief was reasonable. The version of the respondent which was not challenged

was that the EE report is made on-line to the DOL, audited and published in its annual report. In this regard, my view is that the applicant has failed again to provide a factual basis for her belief that because the salaries of the employees would remain unchanged after the re-grading, that would affect the report on the wage differentials to be made to the DOL. There is nothing in s 27 of the EEA that says a report to the DOL has to reflect differences in the salary of each employee of the designated employer. The only requirement of s 27 of the PDA is for the respondent to make sure where there is disproportionate income that measures are put in place to progressively reduce such differentials. I have already indicated somewhere else in this judgment that there is no evidence of a sectoral or collective bargaining agreement governing the sector in which the respondent operates in.

[39] In light of the above, I am of the view that the applicant has failed to make out a case that the information she disclosed to the respondent is worthy of protection envisaged in the PDA. Put in another way, the applicant has on the facts she presented, failed show the existence of a reasonable belief that the respondent had engaged in conduct that falls within the definition of protected disclosure as envisage in the PDA.

[40] It should be apparent from the above that I did not deal with alternative prayer of unfair dismissal which as would appear relates to the dismissal for incompatibility. It is trite that this court does not have jurisdiction to entertain such a claim.

[41] Turning to the issue of costs which is governed by s 162 of the LRA, I am of the view that it would not, in the circumstances of this matter, be fair to order costs consequent to the outcome of the proceedings. Having regard to the importance of the matter the dictates of justice direct that costs should not be allowed to follow the results. The awarding of costs in a matter of this nature would in my view have a chilling effect on other individuals who may wish to raise similar issue in future.

Order

[42] In the circumstances, the applicant's claim of automatically unfair dismissal is dismissed with no order as to costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr J Baloyi of Baloyi Attorneys
For the Respondent:	Advocate H A Van Der Merwe
Instructed by:	Senekal Simmonds Inc.