

What constitutes "reasonable belief" under the Protected Disclosures Act?

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The Labour Appeal Court of South Africa (LAC) recently considered what constitutes a "reasonable belief" under the Protected Disclosures Act 26 of 2000 (PDA) in the case of *Lou-Anndree John v Afrox Oxygen Limited*.



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The appellant worked in the respondent's (Afrox) human resource department. She had noticed a discrepancy in the re-grading of several employees. What concerned the appellant was that the re-grading was made without consultation and would negatively impact the future salary increases of the affected employees. The re-grading would also distort the accuracy of the employment equity report, in relation to the wage differentials (which is to be submitted to the Department of Labour in terms of the Employment Equity Act No. 55 of 1998 [EEA]).

The appellant reported the discrepancy to the internal audit department, the general manager and the managing director for further investigation.

Afrox thereafter provided the appellant with a termination offer. When it became clear the appellant would not accept the offer, Afrox terminated her employment and the reasons that were given to her was her incompatibility with other colleagues.

The appellant then referred a dispute alleging that her dismissal was automatically unfair.

The issue which the court had to determine was whether the appellant's dismissal related to her making a protected disclosure in terms of the PDA, thus rendering it automatically unfair.

Section 9 vs 6

The court a quo had found that the appellant's disclosure was not worthy of protection under the PDA as she had failed to show the existence of a reasonable belief that Afrox was engaged in conduct that fell within the definition of 'protected disclosure' as envisaged under the PDA, which in this case was that Afrox had failed or was failing to comply with its legal obligations (under the EEA). In coming to the conclusion, the court relied on section 9 of the PDA, which requires the employee 'to make a disclosure in good faith, whereby it was reasonable to make the disclosure and that the employee making the disclosure had previously made the disclosure to his or her employer'.

The LAC in applying the facts, found that the court a quo erred in its decision and held that section 6 and not section 9 of PDA applied as the disclosure was made to Afrox, who was the appellant's employer. Section 6 of the PDA provides protection to disclosures made to an employer 'in good faith, substantially in accordance with the procedures prescribed or approved by the employer or to the employer when there is no procedure prescribed'. Thus, the appellant had to prove whether she had a reason to believe that the information she disclosed showed that Afrox had failed or may in the future fail to comply with its legal obligations and that she was acting in good faith when she made the disclosure, and she followed proper procedure when doing so.

The LAC held that 'reasonable belief' in terms of PDA "is not about the reasonableness of the information, but on the reasonableness of the belief". Putting an onus on the appellant to prove the correctness of the facts relied on in order to enjoy the protection under the PDA would frustrate the operation of the PDA. All that was required was for the appellant to reasonably believe that the conduct was unlawful.

The LAC found further that the appellant did reasonably believe that the re-grading without consultation would be detrimental to other employees and that the re-grading would affect Afrox's employment equity report. The LAC held that her disclosure was made in good faith as the appellant had no ulterior motive.

The LAC upheld the appeal and found that the disclosure was worthy of the protection provided by the PDA and as a result, the dismissal was automatically unfair.

In light of the above, it is important to note that an employee's reasonable belief under section 6 of the PDA does not have to be based on facts that are true and correct. The employee is only required to prove that their belief was reasonable for their disclosure to be protected under the PDA.

Any dismissal associated with or which arose as a result of a protected disclosure will be automatically unfair and may attract an order of compensation of up 24 months' remuneration.

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