

Corporate Governance Individual Assignment: Whistleblowing

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1. Introduction

The Protected Disclosures Act was formulated to ensure the protection of employees in both private and public sector who may disclose information concerning unlawful or irregular conduct by employer or other employees in the employ of their employers.

2. Analysis of the Act and 2017 Amendments

Whistle blowing is a risk that whistleblowers take for standing up for what is unethical, illegal and irregular. Whistleblowing becomes even more complicated if the culprit holds a position senior to that of the whistleblower or has influence. As I unpack the matter further below, I will cover on the types of protection provided to whistle blowers by law, requirements for s disclosure to be protected and procedures to follow for particular methods of disclosure and the actual content of the protections.

In terms of the Act, protection was only provided to employees as defined in the Act. Employee definition in the Act excluded independent contractors. The 2017 amendments introduce a new definition called worker. The definition of a worker includes any person who provides a service on a temporary employment services, independent contractor, agent and consultant. The 2017 Amendment acknowledges

With regards to occupational detriment in relation to the working environment, the Act only provided protection to employees as defined. The 2017 amendments include “worker” as part of the persons protected. The 2017 amendments further expand the definition of occupational detriment to include *“being subject to any civil claim for the alleged breach of duty of*

confidentiality or a confidentiality agreement". This is important because a company may use its financial muscle to silence whistleblowers by subjecting them to civil claim processes. However, this inclusion is only confined to a disclosure of information which amounts to a criminal offence or shows a failure to comply with the law. This is important to protect companies against employees or workers who might disclose negative information which does not constitute unlawfulness to settle issues with employers. So, this inclusion protects companies against that.

The 2017 Amendment has included under occupational detriment, "*the retention or acquisition of contracts to perform work or render services*". This covers service providers who might suffer as a result of a disclosure by one of their employees or the service provider itself.

The 2017 has introduced a new concept of joint liability should an employee or worker as defined be subjected to occupational detriment after making a protected disclosure. This means, if an employee of a service provider is subjected to an occupational detriment after making a protected disclosure, the service provider and the client that the services provider was contracted to may be jointly liable. The whistleblower may approach the courts for relief.

The 2017 Amendment has also introduced a responsibility on the person to whom a protected disclosure has been submitted to, within 21 days, acknowledge receipt of the full disclosure and advise if it has been decided to investigate, or refer the matter to another person or body or if the decision is not investigate, furnish the employee with reasons for that decision.

The protected disclosure to the employer was expanded in the 2017 Amendment. The section now included workers as defined. The section further places a responsibility on employers to develop and implement "*appropriate internal procedures for receiving and dealing with information about improprieties*" and "*take reasonable steps to bring internal procedures to the attention of employees*". The 2017 Amendment further states that a protected disclosure made by an employee to "*a person other than his or her employer, is deemed, for the purpose of the Act, to be making the disclosure to his or her employer*". This empowers workers and employees as defined to be able to make disclosures outside the employer. This is important in an instance where an employer does not have proper internal procedures for dealing with disclosures.

3. Suzanne Daniels article

The 2017 Amendment to the Protected Disclosures Act, 26 of 2000 has resulted into more protection for the whistleblower. The question that remains is its sufficiency as a tool to encourage more people to make protected disclosures. In terms of the amended preamble of the Act, *“every employer, employee and worker has a responsibility to disclose criminal and any other irregular conduct in the workplace”*. This is what the law expects of us, as to whether it will translate into people making disclosures is another discussion. Suzanne understood the importance of reporting what she saw at Eskom and decided to make a disclosure in the form of a report.

Following her disclosure, acts of intimidation were unleashed on her. These acts sometimes are aimed at only intimidating the disclosing party, but they can also result in casualties in the form of loss of life for the disclosing party or their immediate family members. The law allows for a citizen whose life is in danger to apply to the police for protection. Upon receipt of such request, the police would conduct a threat analysis and they will take a decision based on the results of the threat analysis. The article does not specify if Suzanne had applied for protection but what is touched on is on the way her life changed after the disclosure. She could not walk freely like she used to. The Protected Disclosures Act must make provision for a special protection of whistleblowers. For such protection to be activated, an application would have to be made detailing all potential threats.

Another aspect that appeared on the article is not knowing where the information disclosed would end up. Eskom argued during her case that the information that she disclosed was already in the public through the report from the office of the Public Protector, so her disclosure did not qualify to be classified as a protected disclosure. The problem with Eskom's position is that instead of looking at the issues raised, they tried to use a technicality to frustrate the process. Had their argument won, they would have been given an opportunity to deal with Suzanne the whistleblower. Luckily, she was reinstated.

Suzanne gave her disclosure through her testimony in parliament. The amended Act allows for a disclosure to be made to any party other than his or her employer and such disclosure will be deemed as having been made to the employer. This is another tool that protects employees or workers working in a highly hostile environment.

Suzanne's suspension constituted an occupational detriment. The amended Act has expanded the meaning of occupational detriment to include being *“subjected to a civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of a disclosure”*

4. Whistleblower Policy Analysis

SAPPI Policy

Assessment of Policy

The policy allows for employees of Sappi and anyone *“including Sappi contractors, suppliers, and customers”*. This is in line with the amendments to the Act. This means that anybody can report a matter should they deem it to be a matter that has to be disclosed.

The policy has acknowledged that for the *“policy to be successful, it must be supported by a structured training, education, communication and awareness program”*. The act requires employers to develop *appropriate internal procedures for receiving and dealing with information about improprieties*, and the Act further requires the employer to *“take reasonable steps to bring the internal procedures to the attention of every employee and worker”*

The policy does not have timelines for acknowledging receipt of disclosures or for investigating them. The Act requires the employee or worker as defined to be issued with an acknowledgement letter once a disclosure is made and an indication of whether an investigation will be made. If no investigation will be made, reasons have to be furnished for the non-investigation.

The personal safety of disclosing employees is not provided for in the policy. Suzanne Daniels’s safety and that of her family was compromised following the disclosure. The policy allows for an application to be made to the police if the employee believes that his or her life is under threat.

Sappi has given assurance that disclosing employees will not be subjected to retaliation. The policy states that *“any form of retaliation or victimization is itself a violation of company policy and possible the law”*.

The Sappi policy gives the disclosing parties an option between disclosing anonymously or with their identities. Disclosing anonymously may help hide the identity of employees thereby guarantee their safety or no occupational detriment. It can also work against the investigation especially if the evidence is only held by the disclosing party.

IMPROVEMENTS

The Sappi policy must make reference to the fact that upon receipt of a complaint, they must within 21 days reply to the person that has disclosed. Their response must be an acknowledgement of receipt of the disclosure, an indication of whether the issues disclosed will be investigated or whether they will be handed to another person or institution for investigation. Should Sappi decide not to investigate, they must inform the disclosing party and furnish reasons for that decision. The reference number released when a disclosure is made is not sufficient.

The Sappi policy is silent on the possibility of civil action being taken against the disclosing party. In terms of the amendments to the Act, occupational detriment has been expanded to include *“any civil claim for the alleged breach of a duty of confidentiality or confidentiality agreement”*. The Sappi policy only refers to retaliation which has not been defined in the policy.

The policy must also give an option for a disclosure to be made with a party outside the organization as per the amended Act.

Sappi must consider updating employment contracts of employees on the confidentiality clause to ensure that it does not scare off potential whistleblowers.

5. Bibliography

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