IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

CASE NO: PS32/19

In the matter between:

VUYELWA THELMA TANDA **Applicant**

and

MEC, DEPARTMENT OF HEALTH **Respondent**

Heard: 18 August 2022

Delivered: This judgment was handed down electronically by circulation to the Applicant's and Respondent's Legal Representative by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 15h45 on 26 August 2022.

JUDGMENT

LALLIE J

[1] The legislature continues to increase the volume of legislation which promotes good governance and eradicate corruption and other acts of improper conduct

at the work place. The Protected Disclosures Act[1] hereinafter referred to as the PDA forms part of that legislation. The applicant approached this court seeking protection in terms of the PDA on the basis that she suffers occupational detriment as a result of making a protected disclose.

[2] The applicant is an employee of the Department of Health of the Eastern Cape Province, hereinafter referred to as the department. She was employed by the department as a data capturer on 1 August 2008. She was placed at the Motherwell Community Health Centre, hereinafter referred to as the MCHC. Her main responsibility was to collect and collate data generated by clinics for statistical purposes. Towards the end of 2013 the department embarked on a recruitment process in an attempt to fill 50 posts. Because of the magnitude of the recruitment the applicant was asked to assist for a period of 3 months. In January 2014 the applicant then moved to the District Office Human Resources Department with the permission of her manager at MCHC, Mrs Njalo (Njalo) and commenced her duties in the recruitment. The department continued recruiting for other posts. It later placed a moratorium on the recruitment of non-clinical posts as a result when 2 employees left the Human Resources District Office hereinafter referred to as the HR office, owing to natural attrition the need for the applicant's assistance continued. Consequently she remained at the HR office for years.

[3] At the HR office the applicant worked with two other employees. They performed similar functions with each employee taking responsibility for the

[1] Act 26 of 2000.

recruitment of posts allocated to her. Their main duties included managing the recruitment and selection process placing advertisements for posts, appointing and managing the selection panel and the chairperson for the shortlisting process. The applicant and her colleagues reported to Mrs Jaggers (Jaggers) the Deputy Director Human Resources Management, who reported to Mr Njalo, the Director Human Resources Management. Mr Njalo is Mrs Njalo's husband whom the applicant reported at MCHC.

[4] In January 2018 the applicant posted an advertisement for administrative clerk posts. The department received a large number of applications for the posts. The applicant convened the selection panel which elected Mrs Njalo as its chairperson. On 1 February 2018, the panel completed the shortlisting process and the applicant took the shortlisted applications for purposes of arranging interviews. The following day the applicant was asked by Ms Makhuluma (Makhuluma) her colleague to locate the application of her niece Ms Mtshayi (Mtshayi) as she wanted to make its copy. The applicant obliged. When Makhuluma realised that Mtshayi had not been shortlisted se got upset and queried the omission.

[5] On 5 February 2018 the applicant was told by Makhuluma to take a phone call from the latter's office. Upon taking the call, the applicant was told by Mrs Njalo that owing to an oversight in the shortlisting process an applicant, Mtshayi, had been overlooked. Mrs Njalo then instructed the applicant to add Mtshayi's application to the shortlisted batch. The applicant refused and told Mrs Njalo that HR policies and procedures did not permit her to comply with her

instruction. She explained that the correct procedure was to reconvene the selection panel so that it could deal with the oversight.

[6] The applicant reported the incident to Jaggers who expressed her discomfort at intervening because it involved someone within the HR department. Jaggers advised the applicant to call a meeting of the selection panel and to advise her of its decision. The meeting was held on 8 February 2018 but the issue was not resolved as it was only Mrs Njalo who wanted to appoint Mtshayi. Mrs Njalo then instructed the applicant to seek the intervention of her seniors. The applicant reported the outcome of the meeting to Jaggers who again expressed her unwillingness to intervene and asked the applicant to finalise the matter. The selection panel took a final decision not to shortlist Mtshayi.

[7] The applicant testified that shortly after the incident involving Mtshayi's application she attended a nurse's memorial service on behalf of the HR office with the permission of Jaggers. One of her colleagues, Ms September (September), called her during the memorial service but she missed her call. The following day Jaggers confronted the applicant for not taking September's call who had been instructed by Jaggers to make enquiries about files the applicant was working on. She reprimanded her for taking the files home. The applicant informed her that she did not take the files home. At a meeting of the HR staff that was held on 16 February 2018, Jaggers asked the applicant to hand over all the applications she was working on and told her to leave the meeting.

[8] On 19 February 2018 the applicant addressed a letter to Jaggers complaining about the matter in which she treated her after reporting Mrs Njalo's conduct. She expressed the view that Jaggers had intimidated her and treated her unfairly. She received no response to the letter. After the meeting of 16 February 2018 the applicant was chased out of and excluded from the HR department meetings. The applicant was told by Jaggers that because of her actions she could not be trusted and that she was not a team. Her files were removed from her and she was not permitted to work on them. The files were allocated to her colleagues, Makhuluma and September. The applicant's details to log into the persal system were revoked and she was unable to complete her tasks. She was micro managed and Jaggers removed her from the HR department's WhatsApp group in which work related issues were discussed.

[9] The applicant launched a grievance against her ill-treatment and victimization by Jaggers. The grievance was handled by Mr Peyi who, in a report dated 18 January 2019, made a number of recommendations. The one relevant to this matter is that management should remove the applicant from the HR section and send her back to Motherwell clinic where she was appointed with immediate effect. In a letter dated 18 February 2019, Mr Nako informed the applicant that her failure to report for duty the following day at MCHC, NU12 or NU8 clinic would be regarded as dereliction of duty which constitutes serious misconduct. The applicant left the HR department on 28 March 2019 after receiving a letter informing her to leave. She works as a data capture at the information section of the district office.

[10] The applicant testified that her removal from the HR office constituted an occupational detriment as a result of having made the protected disclosure of reporting Mrs Njalo. She enjoyed working at the HR department. She developed from the experience. She stated that returning to her work as a data capturer has hampered her development. She sought compensation and an order that she resumes her duties at the HR department.

[11] The respondent denied that the applicant made a protected disclosure. It was submitted on behalf of the respondent that the applicant did not suffer any occupational detriment. Although Jaggers attempted to deny part of her involvement in the events leading to the institution of these proceedings, her denial cannot stand. The parties have, in their pre-trial minute agreed on facts that are common cause. As the pre-trial minute is binding on the parties, Jaggers may not be permitted to deviate from its contents.

[12] Jaggers denied having ill-treated or victimized the applicant after reporting Mrs Njalo's conduct. She testified that the applicant got rebellious and failed to perform her duties properly. She reacted to her conduct by asking the applicant to leave from HR department meetings and she took away her files because the applicant's incompetence retarded urgent recruitment.

[13] It was argued on behalf of the respondent that the report the applicant made to Jaggers did not constitute a protected disclosure as envisaged in section 1 of the PDA. Both parties were in agreement that the correct approach to be adopted in determining whether a protected disclosure was made in expressed

in the following *dictum* which was referred to with approval in *Luthuli v South African Blood Service and Another* an unreported judgment of the Labour Court under case number J1914/19 which was handed down on 30 October 2019:

> '[19] The approach in a determination of whether a disclosure, if any, is protected was aptly summarised in TSB Sugar RSA Ltd (now RCL Food Sugar LTD) v Dorey as follows:
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> "The proper approach to the primary question in this appeal is: first to determine whether the various disclosures of information constiute disclosures as defined in s1 of the PDA; secondly, to decide if the disclosures are protected disclosures, as contemplated in s 1, read with s 6 of the PDA; and thirdly, whether Dorey was subjected to an occupational detriment (discipline and dismissal) by RCL on account, or partly on account consideration of the evidence regarding the reason for the dismissal to establish if the disclosure causally accounted or partly accounted for the dismissal'.

[14] It was argued on behalf of the respondent, based on the *Luthuli* judgment that a disclosure made in fulfilment of an employee's duty in the normal scope of his or her work cannot be protected. It was the respondent's case that the applicant had, in the course of filling the administrative clerk positions, to report to Jaggers the progress of the recruitment process. When she reported Mrs Njalo's conduct to Jaggers, she was acting within the scope of her duties. It was further argued that Jaggers correctly told her to reconvene the selection panel and let its members deal with the issue. The panel dealt with the issue to finality and it was never referred to Jaggers again.

[15] It was argued on behalf of the applicant that the report she made was in fact a protected disclosure. It was further argued that the respondent's version that she made the report in the scope of her duties was not put to the applicant. The common cause facts, so it was argued, support the applicants version.

[16] section 1 of the PDA defines a disclosure as:

> '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 or more of the following:
>
> (a) ...
>
> (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;'.

[17] The argument advanced on behalf of the respondent to the effect that there was no protected disclosure is not supported by the evidence. It is common case that when Mrs Njalo instructed the applicant to add Mtshayi's application to the shortlisted batch she was failing to comply with her legal obligation to chair the recruitment process in accordance with the department's recruitment procedure. She was in fact internationally acting in breach of the procedure and attempting to give Makhuluma's niece an unfair advantage over other applicants and undermining the decision of the panel not to shortlist her. The conduct, on the evidence that is common cause, constitute a disclosure as envisaged in section 1 of the PDA.

[18] In reaching the decision I considered the argument on behalf of the respondent to the effect that the report was made while the applicant was fulfilling her duties and did, for that reason, not constitute a disclosure. That aspect of the respondent's case was not put to the applicant and the respondent may therefore not rely on it as the applicant was not afforded an opportunity to deal with it. Further, the facts of the *Luthuli* case are distinguishable in that the employee in that matter failed to follow the authorised procedure for making disclosures. It is made abundantly clear in that judgment that a general rule was not being made that a disclosure may not be made by an employee in the fulfilment of his or her duties. It was expressly stated that 'whether a report or disclosure of notorious information could or could not constitute the substance of a protected disclosure will be dependant on the circumstances of each case and the nature of the information disclosed'.

[19] The decision in *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and Another*[2] the respondent sought to rely on also supports the applicant's case. In the circumstance of this case the report that Mrs Njalo was instructing the applicant to be complicit in nepotism in violation of the recruitment policy constituted a protected disclosure. The report was made in good faith to Jaggers who, in her capacity as the Deputy Director Human Resources Manager is an employer as envisaged in section 6 of the PDA.

[2] (532/08) [2009] ZASCA 151 (27 November 2009).

[20] The respondent's further defence was that the applicant failed to prove that she suffered an occupational detriment as a result of reporting Mrs Njalo's conduct. In section 1 (i) of the PDA occupational detriment is defined as 'being otherwise adversely affected in respect of his or employment, profession or office, including employment opportunities and 'work security'.

[21] It was argued on behalf of the respondent that the relationship between the applicant and Jaggers changed because the applicant became rebellious and failed to perform her duties. The applicant's grievance against Jaggers was attended to and she did not raise the issue of the disclosure. It was further argued that nothing was hidden after the applicant made the report as the matter got resolved.

[22] It is common cause that Jaggers refused to intervene in a matter involving HR staff members after the applicant made the disclosure. The applicant gave a detailed account of how Jaggers victimized her shortly after she made the disclosure. I cannot accept the respondent's version that the relationship between the applicant and Jaggers changed because of the applicant's misconduct and incompetence. Jaggers gave no details of the applicant's conduct. She made reference to an incident involving the applicant's failure to report for duty earlier than the usual time and consequences of the applicant's unavailability when she had attended a memorial with her permission. The applicant had worked at the HR office for 4 years without any compliant from Jaggers about her conduct and competence. She tried to resolve her differences with Jaggers in a letter the latter did not reply to. She filed a

grievance regarding her ill-treatment and victimization by Jaggers. The out come of that grievance was that she should leave the HR office, return to Motherwell and perform her duties as a data capturer. The applicant was eventually moved to the regional office and worked as a data capturer.

[23] Occupational detriment is defined in wide terms in section 1 of the PDA. It is common cause that the applicant had worked as an HR practitioner. She enjoyed her work. Her evidence that she developed as an HR practitioner and that the development was thwarted when she was removed from the HR office was not refuted. The applicant's version that she was removed from the HR office as punishment for making the disclosure is more probable that the respondent's version for removing her. As the Deputy Director HR Management, Jaggers knew the procedures to be followed in dealing with an employee who committed misconduct or who displayed incompetence. She did not follow them because the applicant was neither incompetent nor rebellious. Our labour legislation requires employers to treat employee who commit misconduct and those who are incompetent, fairly. Employees are protected from indignity and humiliation. Jaggers punished the applicant for making the disclosure at a time she was unwilling to take action against Mrs Njalo and Makhuluma, members of her section. She instead abused her seniority over the applicant by humiliating her even in the presence of her co-employees. She denied her the opportunity of developing her knowledge and skills as an HR practitioner. The denial constituted an occupational detriment in that it affected the applicant adversely and retarded her development at work. The respondent's argument that removing the applicant from HR did not affect her

grade and remuneration is of no moment. Performing an HR practitioner's duties is materially different form collecting and collating data for statistical purposes.

[24] As relief the applicant sought compensation and an order that she resumes her duties as an HR practitioner. Section 3 of the PDA protects employees from being subjected to occupational detriment as a result of having made protected disclosures. The applicant proved that *solatium* is due to her as a result of the humiliation, hurt and the violation of her right to dignity which she suffered in the hands of Jaggers for making the protected disclosure.

[25] Consistent with the purpose of the PDA, I could find no reason for not granting the relief the applicant sought. Her evidence that there is still a need for her services at the HR office was not refuted. Jaggers testified that owing to a marotorium in the employment of non-clinical staff the 2 staff members who had left the HR office owing to natural attrition had not been replaced. There is no reason why the wrong of subjecting the applicant to an occupational detriment should not be corrected by granting the relief she seeks.

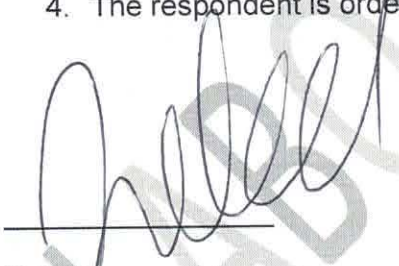
[26] I have taken into account the indignity, humiliation, bullying and hurt the applicant was subjected to for making the protected disclosure and deem it fair and just to order the respondent to pay the applicant compensation equivalent to remuneration she would have earned over a period of 10 months calculated at her rate of her remuneration when the protected disclosure was made in the gross amount of R 162 402. 20 (R162 402.22X10).

[27] Both the law and fairness justify a costs order against the respondent because the applicant should not be out of pocket as a result of the respondent's unlawful conduct which compelled her to instituted these proceedings.

[28] In the premises, the following order is made:

Order:

1. The respondent committed an occupational detriment in breach of section 3 of the Protected Disclosure Act 26 of 2000 against the applicant.
2. The respondent is ordered to pay the applicant compensation in the amount of R162 402, 20 minus lawful deductions.
3. The respondent is ordered to restore the duties the applicant performed at the Human Resources Section of the District Office before making the protected disclosure.
4. The respondent is ordered to pay the applicant's costs.



Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Unwin of Kaplan Blumberg Attorneys

For the Respondent: Advocate Dala

Instructed by The State Attorney