

@PPLAAF

www.pplaaf.org



#OCCUPATIONAL DETTRIMENT101:

What it really looks like for
whistleblowers and the costs



Occupational Detriment



Rapporteur:

Chantelle de Sousa, Attorney

In South Africa, **The Protected Disclosures Act (PDA)** protects an Employee or Worker (including an independent contractor, consultant or agent) against Occupational Detriment on account of having made a Protected Disclosure. **Below is a list of categories of Occupational Detriment suffered by whistleblowers.**

However, the PDA does not envisage the level of retaliation outside of the workplace and the legal and costly entanglement whistleblowers may find themselves in. **Non-listed retaliation against whistleblowers include:**

- **Criminal charges** which may or may not be related to the protected disclosure such as fraud/theft/money laundering.
- **Claims for defamation** as a result of the disclosure: urgent interdicts and damages claims;
- **Anton Pillar orders:** permitting the inspection of the whistleblower's house or other related property and search and seizure of materials and documents including that of anyone present on the property.
- **Claims for damages** which may or may not be related to the protected disclosure such as damages relating to fraud or negligence in performance of duties.
- **Claims for a delinquent director** if the whistleblower was a registered director of the entity.
- Withholding the whistleblower's **pension fund** pay out: The Employer will lay criminal and/or civil claims and inform the pension fund to withhold the pay out of the pension pending finalisation of these matters.

#01

#OccupationalDetriment101

Being subjected to any disciplinary action

- Fabricating evidence.
 - Delaying the holding on the disciplinary hearing.
 - Holding the disciplinary hearing in the whistleblower absence despite a valid reason for being absent.
 - Not providing the whistleblower with sufficient time to prepare.
 - A sham disciplinary such as appointing a chairperson who is biased.
- Fabricated or false charges.
 - Trumped up charges relating to a matter the whistleblower either had nothing or little to do with.
 - Intimidating the whistleblower's witnesses so that they do not testify.
 - Denying the whistleblower access to evidence that may be crucial to their case.

Being Dismissed

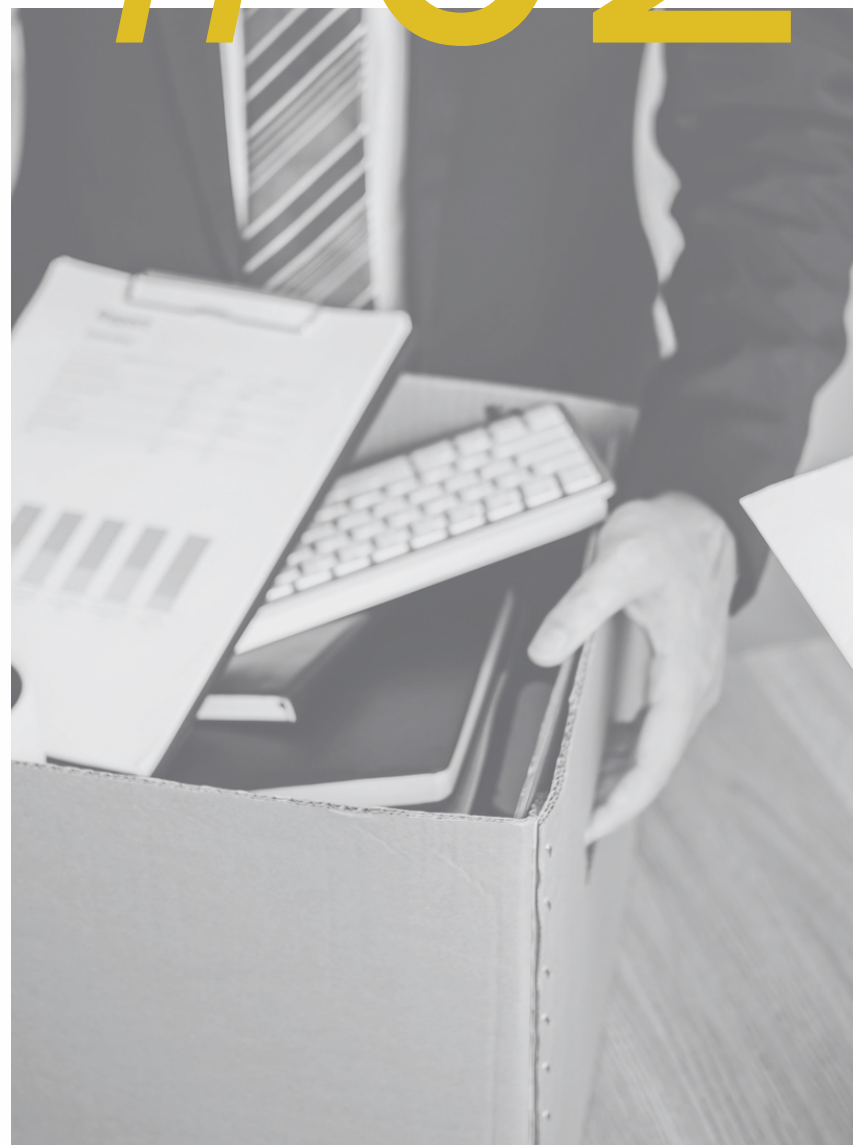
Unfairly dismissed (substantively and procedurally unfair) such as:

- Dismissed shortly after making a protected disclosure;
- Dismissed without a disciplinary hearing and simply on notice.
- Dismissed without reason or no good reason.

Delaying the arbitration at the CCMA or Bargaining Council such as:

- Adopting an aggressive approach to the arbitration.
- requesting postponements;
- not appearing at hearings;
- changing legal representatives frequently;
- including irrelevant documentation that may be embarrassing to the whistleblower;
- leading irrelevant witnesses to tarnish the whistleblower's character;
- Subpoenaing irrelevant witnesses to drag the arbitration.
- Using cross-examination of the whistleblower as an opportunity to intimidate and attack them, and/or raise irrelevant personal information.

#02



If a decision is granted in the favour of the whistleblower, then taking the decision on review to the Labour Court and:

- bringing urgent stays of execution of the award;
- interlocutory applications; and
- not prosecute the matter within the time frames.
- Taking the decision on Appeal

#03



Being Suspended

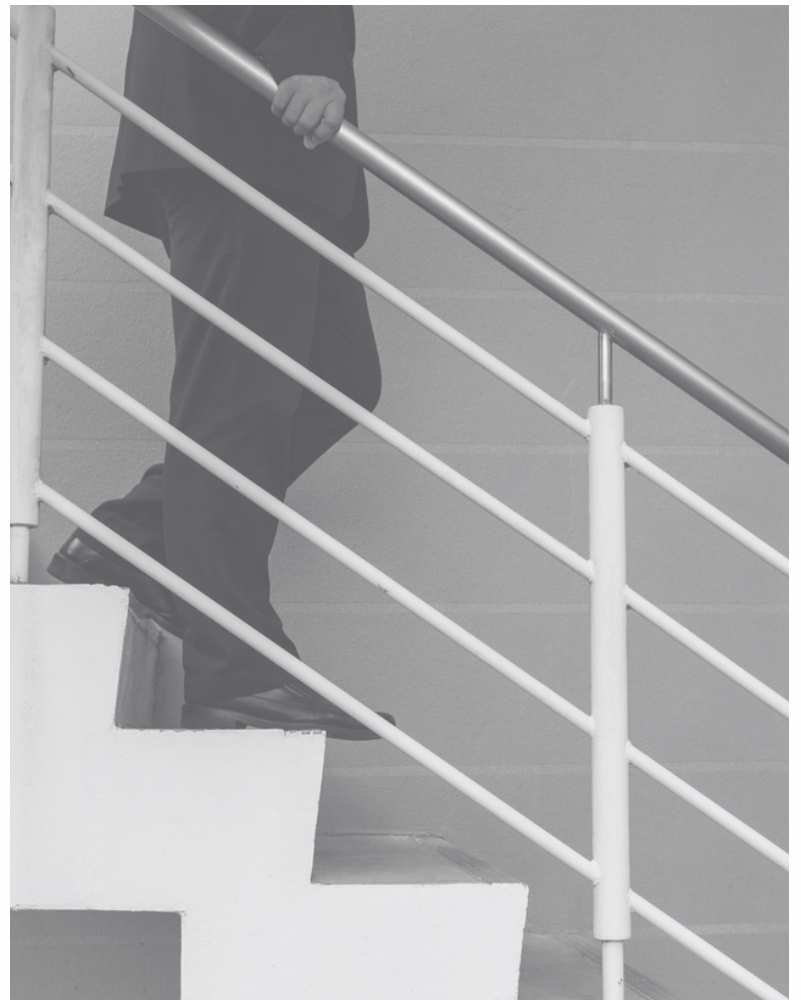
- Suspended when there is no reason to believe the Whistleblower was involved in the alleged misconduct.
- Suspended when the alleged misconduct is not serious.
- Suspended when there is no reasonable apprehension that the whistleblower will interfere with investigations or pose some or other threat.
- Suspended without pay.
- Suspended without providing reason.

#04

#OccupationalDetriment101

Demotion, transfer, refusing a promotion

- Being demoted or transferred against their will
- Being refused a transfer or promotion
- Ensuring that the Whistleblower no longer has access to critical information to the protected disclosure.
- Isolation from colleagues.
- Office gossip.



#OccupationalDetriment101

Harassment and intimidation

- Anonymous text messages or phone calls with threats.
- Hacking of your e-mail accounts.
- Criminal and civil claims.

#05



#06

#OccupationalDetriment101

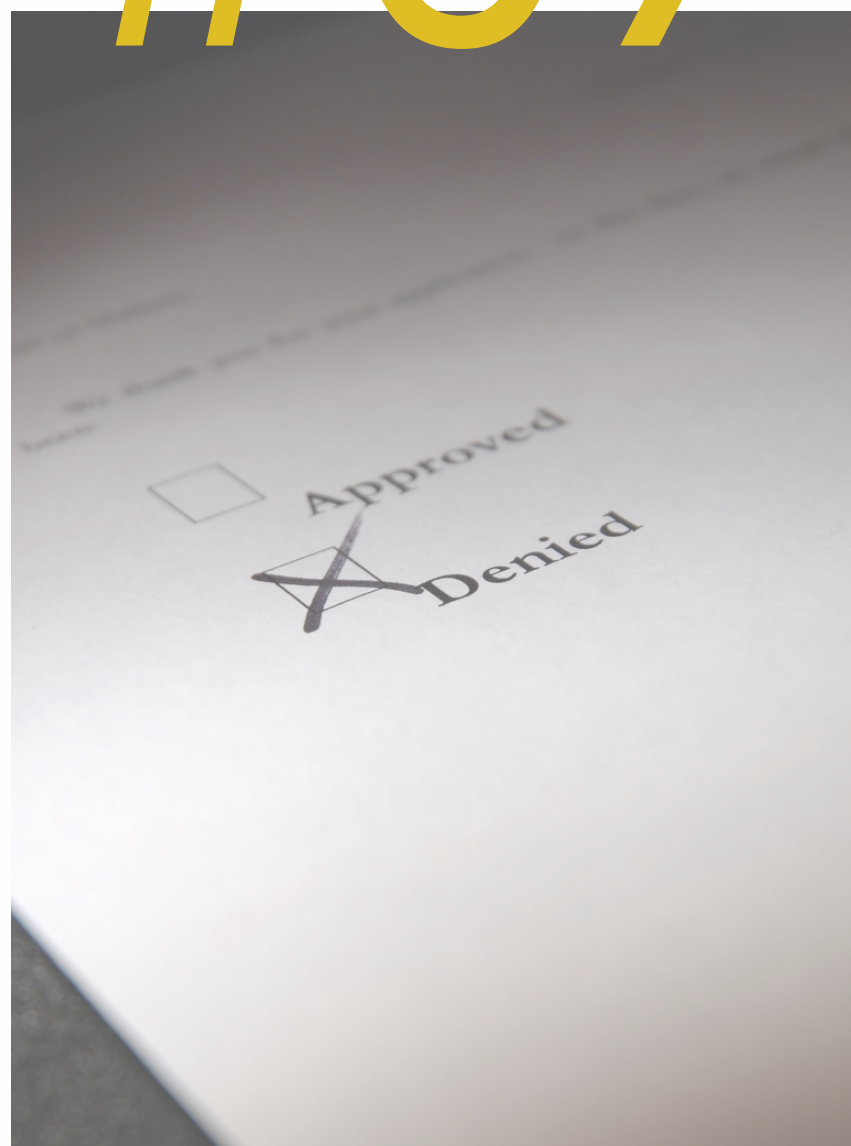
Terms of Employment

- Being subjected to a term or condition of employment or retirement which is altered or kept altered to t disadvantage
- Relying on the retirement age in the contract of employment even though the whistleblower has passed the age.

Being denied appointment to any employment, profession or office

- Criminal charges appearing on background checks due to charges by the Employer.
- Employers not wanting to employ you due to reputation of being a “trouble maker” in the workplace or criminal charges.
- Poor references by former employer.
- Complaints to professional bodies such as the South African Institute for Chartered Accounts (SAICA) or the Legal Practice Council (LPC).

#07



#08

#OccupationalDetriment101

Civil Claims

Being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of a disclosure of:

1. A criminal offence; or
 2. Information which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur.
- Mutual separation agreements or Non-Disclosure Agreements between Employer and Employee. A sum of money paid over for the Employee's silence.
 - Litigation over the breach of the mutual separation agreement when the Employee blows the whistle.
 - Employer dismissing the Whistleblower for breach of trust or confidentiality clause of employment contract.



#OccupationalDetriment101

#09



Being threatened
with any of the actions
referred to above

#10

#OccupationalDetriment101

Other adverse effects

Being otherwise adversely affected in respect of their employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform or render services.

- Being blacklisted as a service provider.
- Criminal charges appearing on background checks.



#OccupationalDetriment101

- #01 — Disciplinary Action
- #02 — Dismissal
- #03 — Suspension
- #04 — Demotion, transfer, promotion refusal
- #05 — Harassment and intimidation
- #06 — Terms of Employment
- #07 — Being denied appointment to any employment, profession or office
- #08 — Civil Claims
- #09 — Being threatened with any of the actions referred to above
- #10 — Other Adverse Effects



P P L A A F

@PPLAAF

www.pplaaf.org



**FRIEDRICH NAUMANN
FOUNDATION** For Freedom.