



EMPLOYMENT

Not Every Employee Is a Whistleblower (And Not Every Disciplinary Hearing Is Up for Debate)

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by Bradley Workman-Davies – Director

The Labour Court's judgment in *Modika v Industrial Development Corporation of South Africa* and another serves as an important corrective to a growing misconception in disciplinary practice: that section 188A of the Labour Relations Act provides a general mechanism for employees to derail or defer internal disciplinary proceedings. It does not. The Court makes it clear that section 188A(11) is a targeted, whistleblower specific intervention, not a procedural escape hatch available in every contested disciplinary enquiry.

Section 188A(11) exists for a very particular reason. It was introduced to address the unique risk faced by employees who allege that disciplinary action is being taken in retaliation for having made a protected disclosure under the Protected Disclosures Act. In that limited context, the legislature elected to substitute the employer's internal disciplinary process with an independent, pre dismissal arbitration conducted under the auspices of the CCMA. The purpose is not to suspend discipline, but to remove it from the control of the employer where retaliation is plausibly alleged.

The Court was careful to emphasise that this mechanism is triggered only where an employee alleges, in good faith, that the holding of a disciplinary enquiry itself constitutes an occupational detriment arising from a protected disclosure. Absent that allegation, section 188A(11) has no application. Ordinary disciplinary proceedings remain precisely that: ordinary. Employers are not required to justify internal discipline merely because an employee objects to it, raises grievances, or disputes the charges.

This distinction matters. The judgment reinforces that section 188A(11) is not concerned with fairness in the abstract, nor with whether an employer has acted reasonably in instituting discipline. Its reach is confined to alleged whistleblowers and the specific mischief the provision was enacted to cure. Attempts to generalise it beyond that context are misplaced.

Crucially, the Court also dispelled the notion that invoking section 188A(11) immunises an employee from discipline. It does not. What changes is the forum, not the substance. If the CCMA arbitrator accepts jurisdiction, the arbitrator proceeds to determine the misconduct charges on their merits and, if proven, to impose an appropriate sanction. Dismissal remains firmly on the table. Indeed, where dismissal follows from a section 188A arbitration, section 188A(12) expressly provides that the outcome cannot later be characterised as an occupational detriment. Finality is built into the scheme.

Equally important is what the arbitrator does not decide. A section 188A(11) arbitrator does not adjudicate a protected disclosure dispute, nor does the arbitrator rule on whether the employer acted unlawfully or unfairly by instituting discipline. The protected disclosure allegation serves only as the jurisdictional gateway. Once through that gate, the enquiry becomes a conventional misconduct hearing, conducted independently.

The Court also confirmed that section 188A(11) does not permit parallel processes. Where the provision is properly invoked, internal disciplinary proceedings must pause pending the arbitrator's jurisdictional ruling. This is not a reflection of distrust in internal processes generally, but a recognition that whistleblower cases are different by design.

Perhaps most telling is the Court's implicit warning against overuse. Section 188A(11) is not a blunt instrument for delay. It is a narrow statutory remedy, with defined consequences. Employees who invoke it unsuccessfully simply return to internal discipline. Those who invoke it successfully face an expedited, tightly managed arbitration that may well end their employment with no further recourse.

For employers, the lesson is straightforward. Section 188A(11) does not undermine disciplinary authority. It confines itself to alleged whistleblowers, and even then, it substitutes rather than suspends accountability. Properly understood, it is not an obstacle to discipline, but a reminder that retaliation and accountability are not the same thing – and the law treats them differently for good reason.



Bradley Workman-Davies

Director

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