

Dismissal not always justified for dishonesty during interview or screening process



The unemployment rate in South Africa for the period of October to December 2020 stood at 32,5%, which amounts to 7,2 million people being unemployed (Quarterly Labour Force Survey Q4, Statistics South Africa, 2020).

The South African job market is therefore oversaturated, resulting in competition for employment.

To gain an edge on the competition, it is not unusual for applicants to deceive their prospective employers to improve their employability.

An employer has a right to full and accurate information that is genuinely relevant to the decision to employ an applicant. Applicants are expected to disclose such information truthfully during job applications and to refrain from exaggerating their qualifications.

This article aims to clarify the following questions:

- What information is relevant to the job application?
- What information is a prospective employee expected to disclose?
- When is dismissal of a deceitful employee justified?

Disclosure of relevant information:

- **Section 6(1) of the Employment Equity Act 55 of 1998** prohibits unfair discrimination against an employee on numerous arbitrary grounds, which includes race, gender, pregnancy, colour, age, disability, HIV status and language. However, it is further stated under s6(2)(b) of the same act that it is not unfair to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
- Therefore, employers may ask applicants to disclose information that is regarded as an inherent job requirement or operational requirement in order to determine the applicant's suitability for the specific position. Employees are expected to disclose this information truthfully.

Caselaw *Sylvester v Neil Muller Construction* (2002, 1 BALR113)

- In the case of ***Sylvester v Neil Muller Construction* (2002, 1 BALR113)** the employee was dismissed for his failure to disclose to his employer that he had been granted an ill-health retirement by his previous employer. The dismissal in this case was regarded as unfair by the CCMA as the withholding of information was not relevant to the job suitability and did not prejudice the employer in any way.
- Furthermore, an employer may ask a prospective employee to disclose their prior convictions or transgressions if the nature of the position requires him to do so. The prospective employee must disclose this information if it could cause potential prejudice to the employment relationship or if it could disqualify them from holding the position.

Caselaw *G4S Secure Solutions (SA) (Pty) Ltd v Ruggerio N.O and Others* (2017), 38 ILJ 881 (LAC)

- In the case of **G4S Secure Solutions (SA) (Pty) Ltd v Ruggerio N.O and Others (2017), 38 ILJ 881 (LAC)** the employee was dismissed for his failure to disclose his previous criminal convictions when he applied for a security guard position. The Labour Appeal Court found that the employee was obliged to disclose his previous convictions to his employer as the nature of the position required him to do so. It was further found that his dishonesty and/or failure to disclose this information had led directly to him being employed and therefore the dismissal was regarded as fair.
- Consequently, an employee or prospective employee does not have to disclose information that is not an inherent operational requirement. Information that does not affect the candidate's suitability for a position is not required to be disclosed. Should an employer be deceived by an employee regarding information, that is considered relevant, dismissal is not always justified. Dismissal is only justifiable when the employee in question had deceived the employer by providing false/inaccurate information that caused prejudice to the employment relationship or had directly resulted in the individual being employed.

When is a dismissal justified?

Employers need to be able to prove that the employee had deceived them during the employment process by providing false information pertaining to the operational expectations of the position and their suitability for it. Should an employee present deceptive information resulting in their employment, the employer would also be expected to prove that the employee's dishonesty had negatively impacted the trust relationship.

Section 3(4) of the Code of Good Practice: Dismissal states that it is generally not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes continuation of the employment relationship intolerable.

Caselaw *Autozone v DRC of Motor Industry and others (2019) 40 ILJ 101 (LAC)*

- o In the case of **Autozone v DRC of Motor Industry and others (2019) 40 ILJ 101 (LAC)** it was found that “*an employer relying on irreparable damage to the employment relationship to justify dismissal would be prudent to lead evidence in this regard, unless the conclusion that the relationship has broken down is apparent from the nature of the offence and or the circumstances of the dismissal*”.
- o The courts set a high standard for honesty, trust and good faith in the employment relationship. An act of dishonesty by an employee directly impacts the trust relationship and is likely to result in an irreparable breakdown of the relationship. Should an employer rely on “breach of trust” as justification for dismissal they are advised to have a relevant body of evidence to substantiate their claim of an irreparable breakdown in the employment relationship.

In conclusion

It is of utmost importance that employers have a proper screening process when appointing employees as matters become more complicated when employers fail to ask the right questions and later attempt to *dismiss employees for misrepresentation or operational reasons* without proper proof thereof.

An act of dishonesty is likely to result in an irreparable breakdown of the relationship. When dismissing employees based on a lack of trust, it is always advisable to provide evidence in this regard as it is not an easy task to determine what arbitrators/commissioners regard as ‘intolerable’ or a ‘destruction of trust’.

Our legal team at SERR Synergy specialises in labour law guidance and assists businesses in a practical and supportive way. We empower the employer to determine whether deceitful behaviour merits discipline or dismissal and to minimise exposure to risk when dismissing staff.

About the author: Angelique van der Sandt joined SERR Synergy in March 2017. She is a Senior Labour legal advisor at our Cape Town Branch. She is an admitted attorney of the High Court of South Africa and completed her Bachelor of Arts (BA) in Law and subsequent Bachelor of Laws (LLB) degrees, Law School and post-graduate Certificate in Advanced Labour Law at the University of Pretoria.

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