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EMPLOYMENT

An employee's duty to disclose information when applying for employment

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Issue

Whether an employee who fails to disclose information that *might* have affected the employer's decision to employ him / her commits misconduct warranting dismissal. The key issue is whether an obligation rests on employees to disclose why he / she had been dismissed by a previous employer.

Summary

A duty rests on an employee to disclose to his / her future employer information which may affect the employer's decision to employ him / her. The failure to disclose such information constitutes misconduct.

Facts

In the case of *Intercape Ferreira Mainliner (Pty) Ltd v McWade and others [2020] 2 BLLR 199 (LC)* the Labour Court had to deal with the above issue. The facts of the matter are briefly as set out below.

The employee, Rory McWade, ("McWade"), was employed by Intercape Ferreira Mainliner ("Intercape") as a general manager in May 2015. At the time of his employment, it was anticipated that he would be groomed for and in due course be appointed as Intercape's chief executive officer.

However, Intercape subsequently dismissed McWade in June 2016 for, among other reasons, failing to disclose the circumstances surrounding his departure from his prior employment. McWade had been employed by the Cargo Carrier Group ("CCG") in Zimbabwe. CCG levelled a number of allegations of bribery, corruption and the use of company assets without permission against McWade. McWade was suspended. Subsequent negotiations resulted in a settlement agreement being reached with McWade.

During his interview for employment with Intercape, McWade was asked, on more than one occasion (in the initial interview meeting, by the CEO of Intercape and the Board), about his departure from his previous employer. He did not mention any of the circumstances surrounding his departure. He gave reasons such as "difference of opinion" on ethical matters and "new owners, Zim Economy". When asked by the Board if there was anything to be concerned about regarding his departure from previous employment, he once again did not mention the circumstances surrounding his departure.

McWade referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The arbitrator found that his dismissal was unfair because, among others, Intercape failed to establish that it had sought specific information from McWade regarding the circumstances surrounding his departure from his previous employer and that no response given by McWade was false.

Court's evaluation

Intercape subsequently approached the Labour Court to review the decision of the CCMA. Intercape argued that the arbitrator incorrectly interpreted the law and that the finding was unreasonable. The Labour Court upheld the review. The Labour Court held that the arbitrator did not seem to:

> *"recognise that outside the category of deliberate, false representations of fact, a prospective employee may nonetheless be required to disclose information not specifically requested, if that information is material to the decision to employ; or where (as in the present instance) a question is asked, that a less than honest and complete answer might form the basis for a dismissal when the truth is ultimately discovered."*

The Labour Court cited the case of *Galesitoe v CCMA and others [2017] 7 BLLR 690 (LC)* where the Court held –

> *"Accordingly, it is not unreasonable to ensure that a person applying for the senior level of post in question would have realised that the nature of his relationship with his former employer was a material consideration for his prospective new employer and could affect his employment prospects. This would give rise to an obligation to disclose..."*

The Labour Court held that the failure to disclose must pertain to material information, "at least in the sense that the prospective employer would have conducted its own enquiry into the relevant facts and determined eligibility or sustainability for employment as a consequence."

McWade argued that considering he was never found guilty of misconduct he had no contractual duty to disclose. The Court rejected this line of argument and noted that although a settlement agreement had been concluded, what "*matters for present purposes are the factual circumstances that led to the signature of the agreement, not the agreement itself or its contents.*" The court found that this was an issue of ethics and not a contractual issue. In other words, the "*lawfulness of the non-contractual non-disclosure [is] premised on what would be mutually recognised by honest men in the circumstances.*"

The court took into account the seniority of McWade's position and held that despite the settlement agreement reached between him and his previous employer and that he resigned and was never found guilty of misconduct, there was still a duty to disclose the circumstances that led to his departure from his previous employment. The non-disclosure in the circumstances was material and any reasonable employer would have wanted to investigate the facts before concluding the recruitment process. The court set aside the arbitrator's award and found that the McWade's dismissal was substantively and procedurally fair.

Importance of the case

Where there is material information that may impact upon an employer's decision to appoint an employee this must be disclosed by the employee. Failure to disclose in such circumstances will constitute misconduct which may lead to dismissal. Employer's should expressly mention this obligation to applicants for employment and cater for issues of non-disclosure in their contracts of employment.



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