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Fake qualifications and dismissal

Misrepresentation and materiality

by Dawn Norton

Fraudulent qualifications have made headline news intermittently in recent times. In July and August 2014, the *Sunday Times* revealed that Pallo Jordan, a member of parliament and former ANC Minister of Arts and Culture, who went by the title "Dr" had no tertiary qualifications whatsoever. He claimed to have studied at UCT, and later to have obtained a doctorate from the London School of Economics. His claims were simply untrue. He apologised to the nation, and swiftly left public office.

Some months later, in December 2014, Ellen Tshabalala, the chair of the SABC Board resigned under pressure when Parliament's Communications Portfolio found that she did not have a B Comm degree and post graduate diploma in labour relations from UNISA, as she had stated in her CV.

Hlaudi Motsoeneng managed to keep his job as chief operations officer at the SABC even though he lied about passing matric.

In July 2015, PRASA dismissed Daniel Mtimkulu, the Head of Engineering, after his claim to have a doctorate from a German university could not be verified.

Earlier this year, the *Sunday Times* reported that the CEO of Net 1, Serge Balamant, responsible for distributing R20 billion in social grants monthly to indigent South Africans, allegedly bought his PHD from "Burkes University" which was "not a valid UK degree-awarding body".

Of course it is not only persons in high public office who have misrepresented their qualifications, so too have ordinary employees, and they do so for a variety of reasons – to impress a prospective employer, to satisfy the job requirements of a new post, or to edge out competitors vying for the same promotion.

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The views of the Labour Courts

Most reported cases on the topic confirm the basic tenet that misrepresentation of qualifications can lead to disciplinary charges of dishonesty and gross misconduct and that invariably dismissal follows. Our courts have had little hesitation in finding that the sanction of dismissal is substantively fair. Our courts too, when considering the various facts of the cases before them, have stressed the following principles:

- that employers have no obligation to counsel / train an employee to meet the performance standard commensurate with the qualification wrongly represented by the employee;
- that it matters not that the stated qualification did not lead the employer to appointment the employee – the initial dishonesty is sufficient cause for dismissal;
- that a dismissal is particularly justified when the employee misrepresented a qualification which constituted an operational requirement for the post;
- that an employee who persists with the misrepresentation year after year aggravates the misconduct; and
- that it is no defence for an employee to argue that the employer, through minimal investigation (e.g,checking a personnel file) could have established the truth of the situation.

The various reported cases reflecting the above principles are summarised briefly below.

In *Boss Logistics v Phopi* (2010) 31 *ILJ* 1644 (LC), a logistics company hired a manager on the strength of the qualifications and experience stated in his CV. He was exposed very early on, when his work performance fell way short of his representations. He was dismissed. The Commission for Conciliation, Mediation and Arbitration (CCMA) found that the dismissal was unfair because the company did not support the employee to reach the requisite standard of performance. On review the Labour Court set aside the arbitrator's award. De Swardt AJ said -

> *'If an applicant for a position misrepresents his experience and / or qualifications and is appointed to a position on the basis of such a misrepresentation, there is, in my view, no duty on the employer to provide such an employee with counselling, training or assistance. An employee who misrepresents his / her qualifications or experience is dishonest and is not entitled to be appointed to a position in the first place. An employment relationship is based on mutual trust and deceit is incompatible with, as well as destructive of trust. Moreover, if an employer would, in such circumstances, be required to provide counselling, assistance and / or training to the deceitful employee, it wold mean that the employee would in fact be rewarded for his / her dishonesty or deceit while the employer would be penalized." (p 1652)*

The applicant for a position in *Department of Home Affairs & another v Ndlovu* & others (2014) 35 *ILJ* 3340 (LC) claimed that he had been awarded a Bachelor of Technology Marketing when he was still in the process of completing that degree. He was appointed, but charged some months later for gross dishonesty and breaching the SMS Handbook – a policy manual applicable to public sector employees. He was dismissed. The LAC found the dismissal to be fair. The Court commented that it was immaterial whether or not the misrepresentation gave rise to the appointment, in other words whether or not the

employer selected the employee based on his or her claimed qualification. Dlodlo AJA said,

> *'[16] The fact that the misrepresentation in the CV might very well not have induced the first respondent's appointment to the post certainly does not detract from the fact of the employee's initial dishonesty. The dishonesty as contained in the CV is ultimately what underpins the substantive fairness of the first respondent's dismissal.'*

The Court pointed out that the employer remained encumbered with the burden to show that the misrepresentation had caused irreparable damage to the employment relationship to justify the sanction of dismissal.

In *Hoch v Mustek Electronics (Pty) Ltd* (2000) 21 *ILJ* 365 (LC) an applicant for employment claimed to have a teaching diploma and an accounting diploma. She had neither. She persisted over the years with this misrepresentation, although in her work as a debtors clerk she was honest and trustworthy. Basson J found that the misrepresentation was material and destroyed the relationship between the employee and her employer, and that dismissal was justified.

Despite the fact that she was still in the process of completing these degrees the applicant for employment in *Rainbow Farms (Pty) Ltd v Dorasamy NO* (2014) 35 ILJ 3462 (LC), claimed to have a Bachelor of Technology: Quality Management degree, and a Business Administration degree. She was appointed as a quality manager in the employers' laboratory. Over time the employer became aware of the first misrepresentation and gave her an opportunity to rectify her CV. She did so, but persisted with the misrepresentation regarding the Business Administration degree. That came to light when she applied for a promotion as a vaccine manager, and she was dismissed. She argued that her dismissal was unfair because the business degree was irrelevant to the post for which she was applying, and furthermore that, had her employer studied her personnel file carefully, they would have found that the degree was incomplete. The CCMA was persuaded by her argument, and held moreover that the employer bore the onus to show that the employee's misrepresentation was deliberate and calculated, and not simply an error as argued by the employee. On review the Labour Court disagreed. Cele J found that the duty lay with the employee to reflect her qualifications accurately and that the misrepresentation of the business degree gave her an unfair advantage in the selection process, to which she was not entitled. He also held that –

> *'[17] It is not a defence to an allegation of fraud that the person to whom the representation was being made could have, by the exercise of reasonable care, discovered the truth of the misrepresentation and ought never to have been duped by it.'*

The dismissal was found to be fair.

In *South African Post Office Ltd v CCMA* [2012] 1 BLLR 30 (LAC) an applicant applied for the position of internal investigator. One of the job requirements involved travelling to different regions to investigate the alleged misconduct of post office employees. A driver's licence was therefore a prerequisite for the job. The applicant claimed she had one; in fact she only had a learner's licence. This was discovered almost immediately after her appointment and she was dismissed. She claimed that the omission of 'learner's' from 'licence' was a typograph-

ical error; a simple mistake. The CCMA (and the Labour Court on review) found the dismissal to be unfair and ordered her re-employment (she had in the interim obtained her driver's licence). This finding was overturned on appeal by the Labour Appeal Court.

Waglay DJP found that the commissioner failed to analyse the evidence properly and to consider the probability of the employee's version. Waglay commented that the employee,

> *'[31]...knew that a valid driver's licence was a prerequisite for applying for the advertised post and her explanation for submitting a CV with the wrong information was simply so untenable that it ought to have been rejected as being wholly improbable.*

and…

> *[33] Had the commissioner properly considered the evidence, the inescapable conclusion he would have arrived at is that the respondent had deliberately misled the applicant.'*

He found that the employee had secured the post under false pretences, to the detriment of other candidates. He found that ordering re-employment as the CCMA had done amounted to condoning her misconduct. The LAC had no difficulty in arriving at the conclusion that the dismissal was fair.

In *Westonaria Local Municipality v SAMWU* [2009] JOL 24695 (LC), an applicant was appointed to the post of personal assistant to the Mayor of the Westonaria Local Municipality. The job advert stipulated a matric as the minimum academic requirement. She claimed she had a matric when she did not, and this was discovered three years into her employment. When exposed, she pleaded guilty, and was dismissed. The CCMA found the dismissal to be unfair, and so too did the Labour Court on review. The Labour Court found that not every act of dishonesty renders a continued employment relationship untenable, warranting dismissal. In this case the employee had been an excellent performer, she had worked with integrity, competence and efficiency, and the employer had not applied the sanction of dismissal consistently in similar cases. She was reinstated.

Is dismissal always the appropriate sanction?

In the majority of cases, dismissal has followed employees being found guilty of the misrepresentation of their qualifications and, apart from the *Westonaria* case where the employee exhibited strong mitigating factors such as admitting guilt and good work performance and could point to the employer's inconsistent treatment of acts of dishonesty in the workplace, the labour courts have found the sanction to be a fair one.

The courts have pointed to the importance of trust in the work relationship, the undue advantage dishonest applicants enjoy over their competitors, and the operational requirements of particular qualifications for particular posts (e.g. a driver's licence for an investigator). The courts have, rightly so, been unsympathetic to employee's claims of innocent misrepresentation, or to claims that the misrepresentations failed to induce the employment. The courts have, however, not been faced more nuanced situations which employers, particularly large employers, have to contend with, in circumstances in which they conduct standard verification checks on certain classes of employees. (For example over the last year or so the Director

General for the State Security Agency has called on heads of state owned entities to conduct a vetting exercise of employees involved in the supply chain management process).

Consider for example, the following scenarios: employees inflating the names of their qualifications (a one year National Senior Certificate in Public Relations, is reflected as "Higher Diploma"); an employee claiming that a qualification was obtained from, for example, Thames Valley University of London, whilst it was obtained from a local private higher education institution in Midrand; misrepresentations made by personnel / recruitment agencies (motivated by a 3 month salary placement fee) and not by the candidates they represent; or employees who have genuinely lost their certificates, and the institutions where they trained have closed down.

Conclusion

Our courts generally confront cases in which the factors of misrepresentation and dishonesty, coupled with poor performance or misconduct, feed into each other, justifying the sanction of dismissal. Those cases are clear cut - less so though are cases currently facing employers where employees have long, meritorious service, and the misrepresentations happened decades ago. More difficult are those in which the misrepresentation is less material (e.g. the name of the institution or the description of the qualification has been inflated by the employee), or the verification of the qualification is almost impossible.

Dawn Norton

The recovery of monies from pension benefits

Criminal versus Civil Proceedings – which way to go?

by Naleen Jeram

The deduction of monies from an employee's pension benefit in favour of an employer in order to recompense the employer for losses suffered as a result of the dishonest conduct of the employee has been the subject of debate and several rulings by the courts. This contribution examines the possible avenues (and consequences thereof) available to the employer to obtain a court judgment against an employee, thereby allowing the retirement fund to deduct monies from the pension benefit.

The related issue of whether a pension or provident fund may withhold the benefit due to an employee on exit from service to allow the employer to meet the requirements for making a deduction contained in section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 ("the Act") has now been settled in law. In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (2009) 30 *ILJ* 1533 (SCA) the Supreme Court of Appeal (SCA) acknowledged that practical problems threaten the very purpose and remedy afforded by this section, in that in most instances (if not all) employers only suspect dishonesty on the termination of the employee's employment contract, with the result that pension benefits are paid before the suspected dishonesty can be properly investigated, let alone quantified and proven. Furthermore, the employer would not have ob-