

EMPLOYMENT ALERT

IN THIS ISSUE

IS THERE A DUTY TO DISCLOSE PREVIOUS CONVICTIONS AND CAN YOU DISMISS AN EMPLOYEE FOR NOT DISCLOSING SUCH INFORMATION?

In a recent case before the Commission for Conciliation Mediation and Arbitration (CCMA) *Bhembe / Independent Development Trust (IDT)* - (2015) 24 CCMA 7.17.1 also reported at [2015] 11 BALR 1149 (CCMA), the Commissioner had to consider whether the dismissal of an employee for failing to disclose that she had charges against her in Swaziland and that she had been dismissed by her previous employer for fraud and dishonesty was fair.

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The issues before the CCMA was whether the dismissal was conducted in a fair procedure and whether there was a valid and legitimate reason for the dismissal of the employee.



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The employee commenced employment with IDT in October 2010 as a Senior Manager and was promoted to Regional General Manager in 2012. The applicant was employed on a fixed term contract which was renewed several times until her employer heard that she had failed to disclose at her pre-employment interview that she had a pending criminal case against her in Swaziland and that she had allegedly been dismissed by her former employer.

The employer charged the employee with five charges which all related to two incidents of alleged misconduct. Four of the charges related to dishonesty. This amounted to duplication of charges which was found to be unfair.

The employer invited the employee for a disciplinary hearing which was postponed on several occasions. Subsequent to the postponements, the employer dismissed the employee without a disciplinary hearing.

The issues before the CCMA was whether the dismissal was conducted in a fair procedure and whether there was a valid and legitimate reason for the dismissal of the employee.

The Commissioner looked at s188 of the Labour Relations Act, No 66 of 1995 as amended (LRA) and noted that a dismissal is unfair if the employer fails to prove that there is a fair reason for dismissal and that

the dismissal is effected in accordance with fair procedure. The Commissioner also looked at the term 'dishonesty'. The Commissioner pointed out that dishonesty must be intentional and is a term that should not be loosely used.

In determining whether the employer had a fair reason for dismissing the employee, the Commissioner considered the issue of disclosure of the criminal charges as one of the reasons. The Commissioner found that in general, there is no obligation on an employee to disclose anything in his or her past which might prejudice him or her, however, in certain circumstances there may be a duty on an employee to disclose previous misconduct especially when it is of such a nature that it disqualifies him or her from the new appointment.

The Commissioner cited cases where the courts and the CCMA held that the employee had an obligation to make a disclosure. The Commissioner cited a case where an employee who was a mine manager was required to disclose that he was an alcoholic. The failure of the employee to make this disclosure was seen to be a breach of contract and the employee was summarily dismissed. In another case an employee failed to disclose during an interview that he had been dismissed for gross negligence for performance of his duties despite being asked by the employer. This was accepted as a fair reason for dismissal.

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CONTINUED

Employers should ask all the pertinent questions in the interview as the courts and other forums will not always accept that the employee was required to make the disclosure.



The Commissioner in the *Bhembe* case held that the employee had no obligation to disclose any criminal charges against her or reasons for her dismissal by her previous employer because she was not convicted of the criminal offence and she was not asked about any charges levelled against her during the interview process. The Commissioner further explained the constitutional principle that all persons are innocent until proven guilty. The Commissioner also found that there was no evidence to show that the allegations of criminal offence were true.

Employers should ask all the pertinent questions in the interview as the courts and other forums will not always accept that the employee was required to make the disclosure.

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Tricia Tsoeu and Ndumiso Zwane

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OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Anli Bezuidenhout
Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Khanyisile Khanyile
Associate
T +27 (0)11 562 1586
E khanyisile.khanyile@cdhlegal.com



Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com



Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com



Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



Jaydev Thaker
Associate
T +27 (0)11 562 1281
E jaydev.thaker@cdhlegal.com



Samiksha Singh
Director
T +27 (0)21 481 6314,
E samiksha.singh@cdhlegal.com



Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@cdhlegal.com



Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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