

Non-disclosure, basis for disciplinary action or not?

Most of us know the infamous Imelda Marcos quote: “I have no skeletons in my closet, only shoes.” Hmm! Yes her shoes were her skeletons. So how does this relate to a prospective employer or employee? When can an employer claim Non-disclosure and how much does a candidate have to volunteer?

During our recruitment and selection process, we try to find out as much about a candidate as we can. We document, reference and cross reference this information during various processes including but not limited to interviews, panel interviews and PPA’s. That makes us feel fairly secure in our “rational” decision that we made the right choice.

The candidate wants the job, so how much he / she discloses as misconduct or performance issues at previous employers may jeopardise the chances of being appointed. So the candidate tells us how good they are, how well they perform and that they get along with fellow employees and management.

A few months down the line the employer finds out this employee did not disclose that he / she was under performance management, or resigned two hours before the disciplinary hearing etc. What to do now? We feel justified to haul the employee and start our own disciplinary proceedings for non-disclosure because the trust relationship is broken.

Beware! The Arbitrators and Courts have various interpretations about Non-disclosure. In Oracle Corp. SA (Pty) Ltd v CCMA & others (2005), the Court concluded that the respondent deliberately concealed pertinent information from the applicant thus the dismissal was fair. In Laltoparasat v Webber Wentzel Bowens (2004) the CCMA concluded that the employee’s non-disclosure did not constitute operative misrepresentation because there is no duty on the employee to disclose such, unless asked.

So how do we navigate this quagmire? We cannot expect the candidate to use an interview as confession time, we are not Dr. Phil. They are within their rights not to disclose certain information if not asked. Thus, we need to make specific changes to our interview questions to incorporate questions of misconduct or poor performance. That way, if a prospective employee lies, employers have grounds for disciplinary proceedings based on dishonesty.

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Sources: Contemporary Labour Law publications.

Labour Law Handbook

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