

## LEGAL TORQUE

# Misleading or Misunderstanding?

*When can an employer terminate an employee for incorrect information given in the recruitment process?*

Exaggerating on a CV is not uncommon. In a competitive job market, employees could be forgiven for wanting to paint themselves in the most flattering light. On the other hand, the employment relationship heavily depends on the trust and confidence the employer has in the employee.

The recent case in the Employment Relations Authority, ***Richardson v Fonterra Co-Operative Group Limited***, highlights the significance of certain clauses in employment agreements and reinforces the importance for employers in the integrity of the decision making process when it comes to carrying out a disciplinary process or terminating an employee in the context of misleading or false information provided in the recruitment process.

The case concerned a claim by Mr Richardson for unjustified dismissal. When considering Mr Richardson for employment, Fonterra conducted a three-stage recruitment process. As part of that process, Mr Richardson was required to advise of any criminal and/or driving convictions. Mr Richardson passed at each stage of the process on the basis that he disclosed no criminal convictions.

Well, it turns out that Mr Richardson did have previous convictions and had been imprisoned in relation to a dishonesty offence. He had mistakenly believed that those convictions were covered by the Criminal Records (Clean Slate) Act 2004. However, the Clean Slate Act does not

apply when an offender has been sentenced to imprisonment.

In the online application, Fonterra had warned recruits that providing misleading or false information may be grounds for dismissal.

Having successfully completed the recruitment process, Mr Richardson was offered a position of employment with Fonterra on 2 October 2012. He accepted the job, gave permission for Fonterra to obtain his criminal record from the Ministry of Justice and signed a collective employment agreement. The letter of appointment was unconditional.

Mr Richardson began working for Fonterra on 8 October 2012. On 9 November 2012 Fonterra received his criminal record, which disclosed eight convictions between 1997 and 2004.

Fonterra then went through a process of putting the allegation to Mr Richardson with a view to dismissing him. Mr Richardson's story was that he believed he was covered by the Clean Slate Act. His wife had assisted him at stage three of the process, by checking the Ministry of Justice website. It was only after he was talking to a colleague about it that Mr Richardson started to wonder whether he was in the clear. Fonterra, however, believed that he had "deliberately" misrepresented himself to get the job.

## November 2013 Issue 45

Unfortunately, during the investigation process, the decision-maker for Fonterra didn't put it to Mr Richardson that he believed Mr Richardson had "deliberately" misrepresented himself. In fact, the decision-maker had taken pains to **avoid** explaining to Mr Richardson that the company thought the omission was deliberate. The decision-maker made comments during the investigation meeting to the effect that he did not doubt Mr Richardson's version of events and that "[he had] no doubt that under the right leadership [Mr Richardson could] become an asset to the company".

In the proceedings, Fonterra sought to rely on the Contractual Remedies Act to further their argument that Mr Richardson made a deliberate misrepresentation when entering into the agreement and therefore the "contract" or employment agreement could be voided. They also relied on the warning during the recruitment process regarding false or misleading information.

However, the offer of employment made to Mr Richardson was unconditional. There was no reference to misrepresentation and the consequences that could arise from it in either the collective employment agreement or the letter of offer. To add insult to injury, there was a provision in the collective employment agreement that stated that the collective agreement constitutes a complete agreement between the parties and supersedes all other documents.

The Employment Relations Authority held that Mr Richardson had been unjustifiably dismissed. The Employment Relations Authority did, however find that Mr Richardson had contributed to his own demise and the amount of compensation and lost wages was reduced accordingly.

Lessons we can take from *Richardson v Fonterra*:

- The employee is entitled to know what they are being accused of if that allegation is being relied on to

terminate the employment relationship. In other words, cut to the chase! If you think that your employee's version of events does not add up, say so, but explain why. An employee cannot provide an explanation or response to an allegation if the employer is dancing around the issue.

- The disciplinary process is a two-fold exercise: carrying out a fair process (in accordance with the terms of the employment agreement if so prescribed) and making a decision that can be justified in the circumstances. A hunch or an inkling is not enough to discipline or terminate. Even a very strong feeling by an employer must be supported by evidence and must be sound.
- The employment agreement reigns supreme. Once the parties have entered into an employment agreement, the terms of that agreement bind the parties. In Fonterra's case, the employment agreement could have contained a condition that Mr Richardson's employment was subject to the Ministry of Justice check giving him the all clear.

If you are uncertain about how to make a conditional offer of employment, it would pay to seek legal advice.



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