



The Law of Embellished Credentials

Peter Bowal and Michael Khodosko

Introduction

Human resources professionals say up to 30% of claims on resumes of job applicants have been exaggerated. Job seekers, inclined to present themselves in the best possible light, are tempted to inflate their credentials, especially during recessionary times when jobs are scarce and competition is fierce.

According to a recent anonymous survey, over 80% of all resumes are misleading, 20% list fraudulent degrees, 30% show altered employment dates, 40% have inflated salary claims, 30% have inaccurate job descriptions and 27% falsify references. Popular websites are specifically designed to help job seekers fake their resumes.

All occupational categories see resume misrepresentation, but few cases get detected and publicized. Recently, the CIO of Yahoo stepped down because he lied about having a degree in computer science. The former CEO of RadioShack claimed a fictional college degree. Bausch & Lomb's chairman falsely reported an MBA.

What are the possible legal consequences of overstating your employment qualifications?

Crime

Theoretically, resume padding could be prosecuted as criminal fraud, but such charges are virtually never laid in Canada. Few employers, if they detect serious misrepresentations, go further than disqualifying the candidate. They do not take the matter to the police and, even if they did, the police are not likely to view the matter as a serious public interest concern.

At least 11 U.S. states make misrepresentation of employment qualifications a criminal offence; half of them classify this as a felony punishable by several years in prison.

Should a potential employee disclose his criminal past when applying for a job? Human rights legislation in a few Canadian provinces deem it illegal to discriminate against anyone with a criminal record for crimes unrelated to performance of a job. Those employers cannot ask about unrelated criminal convictions. However, today it is probably safe for convicts to self-disclose serious records when applying for most jobs. Employers generally rely on the honesty of the applicants but often take some steps such as Internet searches to verify applicants' backgrounds, especially for key positions.

Robert Sarvis was hired to teach ethics (ironically) and business law at the University of Vermont. Shortly after, the University was notified by Sarvis's parole officer that Sarvis had been previously convicted on five counts of bank fraud with over \$12 million in restitution and sentenced to 46 months in prison. The University terminated Sarvis's employment with cause. The professor sued for wrongful dismissal in 2001 and the court agreed with the University that the dismissal as justified, given the seriousness of the crimes and the misrepresentation.

Theoretically, resume padding could be prosecuted as criminal fraud, but such charges are virtually never laid in Canada. Few employers, if they detect serious misrepresentations, go further than disqualifying the candidate.

Employer Lawsuit for Damages

In addition to being cause for firing, an employee may also be successfully sued in civil court by an employer for damages resulting from the misrepresentation. Employees who are fundamentally deceptive about their qualifications can be considered in a breach of the duty of trust implied in every employment contract. The false or non-disclosure could be an intentionally fraudulent misrepresentation of important fact that induced the employer to hire the worker. Employer compensation might include the costs of finding a replacement employee, recruitment agency fees and any training costs incurred, but no cases of this kind have been found in Canada. Most employers will not sue the dishonest former employee, often seeing this as a private embarrassment and 'throwing further good money after bad.'

Sufficient Cause for Firing

If the deception is discovered only after an employee is hired, it might constitute cause to fire him or her. Both the lack of the employee's integrity and the materiality of the misrepresentation contribute to cause. If one of the main qualifications for the job is found lacking, such as a professional designation, the employee may be fired for failing to satisfy the pre-conditions for the job.

Employees who are fundamentally deceptive about their qualifications can be considered in a breach of the duty of trust implied in every employment contract.

In the 1999 Saskatchewan case of *O'Donnell v. Bourgault*, the court concluded O'Donnell significantly overstated his qualifications when he applied for work at Bourgault, and misrepresented his capability for the work he was hired to do. O'Donnell claimed in his resume that he was a team player and a very skilled HR professional. He was dismissed after just five months. His manager testified that after receiving numerous complaints about O'Donnell's work style from colleagues, he determined O'Donnell was not a "team player." The judge said, "Bourgault had a right to expect that O'Donnell was qualified to do the things his resume held him out as capable of." The fact that he could not perform to the degree stated in his resume was "grounds for dismissal."

The most common misrepresentation during the interview process is rounding up one's salary 10% - 15%. This overstatement is minor and, if detected, might lead to being passed over for the job but will not be enough to support a dismissal. In the 2002 *Islip v. Coldmatic Refrigeration of Canada Ltd.* case, the employee was dismissed for overstating his previous employment salary during the salary negotiation phase. The employer argued that the dishonesty alone provided sufficient cause for dismissal. The court found that the salary amount was not a critical factor in the hiring decision made by Coldmatics, and accordingly, the dismissal could not be justified. This result was affirmed on appeal.

Embellishment of credentials might be used later to justify dismissals. An employee might be fired for an unrelated reason such as absenteeism or bad behaviour. Employers might then attempt to strengthen their position by rigorously checking the former employee's resume for deception. Although this might not have contributed to the dismissal decision, it can make a useful negative impression against the employee. In the 2005 wrongful dismissal case of *Zadorozniak v. Community Features*, Zadorozniak was fired from his general manager position for being dishonest. At trial, the employer presented evidence that Zadorozniak was dishonest during the interview process when he did not mention the circumstances under which he left his previous employer – he had forged a receipt and had an affair with the wife of one of the other managers. The judge dismissed this evidence because it did not contribute to the dismissal and was not given as a reason for it at the time.

However, this result is contrary to established law that if sufficient cause existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Firings can be

The most common misrepresentation during the interview process is rounding up one's salary 10 to 15%. This overstatement is minor and, if detected, might lead to being passed over for the job but will not be enough to support a dismissal.

Embellishments of credentials might be used later to justify dismissals. An employee might be fired for an unrelated reason such as absenteeism or bad behaviour. Employers might then attempt to strengthen their position by rigorously checking the former employee's resume for deception.

justified with facts ascertained subsequent to dismissal and on grounds differing from those known and stated at the time. This was set out as early as 1960 by the Supreme Court of Canada in *Lake Ontario Portland Cement Co. v. Groner*.

More recently, in *Clark v. Dube Management Ltd.*, the employee was dismissed in 1995 from the Vice-President of Finance position at Dube Management for being engaged in a side business. Clark and his wife owned a few stores in Saskatchewan. Although Clark was not directly involved in these stores' daily operations, he was dismissed for breaching his contract of employment by not "devoting his full time to the business (Dube Management)." At trial, it became clear that Clark had not disclosed other important, relevant facts. The wrongful termination suit was dismissed. The judge said "an employer's after-acquired knowledge of misconduct can stand as justification for the earlier dismissal of an employee." This principle can be applied to post-dismissal detection of resume misrepresentation.

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary in Calgary, Alberta, and Michael Khodosko obtained his MBA from the Haskayne School of Business in 2012.