



LLA 1110

Remedies for unfair dismissal

WORKBOOK

OUTCOMES

On completion of this module and the assessment questions you will be able to-

- Understand what a 'remedy' is
- List the remedies available
- Note the provisions of the LRA and the CCMA Guidelines
- Discussion the discretionary nature of the decision
- Advise how a discretion must be exercised
- Explain the preconditions that must exist for a remedy to be granted

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1. Introduction

A 'remedy' is _____ in the _____ by an arbitrator or order of court by a judge which grants the successful party a _____ before the arbitrator or judge as _____ by the Labour Relations Act. The remedies discussed here arise where an employee has been held by an arbitrator (or the Labour Court) to have been _____.

Practitioners should note that this discussion does _____ the guidelines for deciding _____ in the light of the _____ in an arbitration, but is rather aimed at providing Practitioners with _____ as to _____ is and _____ in a particular dispute. The intention is to equip representatives at an arbitration to argue and- where necessary, present relevant evidence in support of a particular remedy, and then to give arbitrators understanding and practical guidance to justify the remedy granted.

2. The development of our law

The LAC explained why these remedies were introduced into the LRA as follows:

[35] Reinstatement, re-employment and compensation, as the exclusive remedies for unfair dismissal (now provided for in s 193(1) of the LRA), were introduced into labour legislation to remedy the absence of satisfactory relief for the unfair termination of the contract of employment by employers.

_____ law the only remedy available to a dismissed employee was an action for wrongful _____. As in all cases of breach of contract, the injured party could elect to sue for _____ or for _____.

A claim for specific performance in terms of a reciprocal obligation will succeed only where the party claiming performance has performed or at least tenders performance. In the context of an employment contract, a claim for specific performance is a claim for reinstatement on the same terms and conditions of employment that existed at the date of dismissal and must be accompanied by a tender by the employee to resume services or at least to fulfil the principal obligation under the contract to make his or her services available. The employee's entitlements under a contract of employment are dependent on the availability of his or her services to the employer and not the actual rendering of services

[36] Prior to the 1980s our courts rarely awarded specific performance of a contract of employment on the ground that it was inadvisable to compel one person to employ another whom he does not trust in a position which imports a close relationship. This meant that an employee in the event of a wrongful termination of employment was restricted to a claim for damages to remedy the breach. Where damages are sought as a surrogate for performance they relate to the monetary value of the performance agreed upon but not received. Such damages in the employment context were normally of a limited amount because of the application of the general principle that an injured party is only entitled to his or her positive interest. The basic principle in the assessment of damages is that the plaintiff should be placed in the position he or she would have been in had the contract been fully performed. All that is required for the lawful termination of a contract of employment, for there to be full performance, is notice of termination in an indefinite term contract and the expiry of the period in a fixed-term contract. Damages for breach in the employment context accordingly will be either the amount payable as notice pay in an

indefinite term contract or the salary payable for the unexpired period of a fixed-term contract, less any sum the dismissed employee earned or could reasonably have earned during the notice period or the unexpired period of the contract, such being the actual loss suffered by him. Hence a plaintiff's damages could never be more than the notice pay due under the contract or the salary owing in respect of the unexpired fixed term.

3. The provisions of the LRA

Section 193 of the Act states:

Remedies for unfair dismissal and unfair labour practice

(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.

This chapter forms an introduction to a discussion and explanation of the remedies for unfair dismissal.

4. CCMA Guidelines on Misconduct Arbitration ¹

Practitioners should take note of the CCMA Guidelines, which state:

109. How to approach remedies

When a dismissal is found to be unfair, the arbitrator must determine an appropriate remedy. Section 193 of the LRA permits an arbitrator to direct an employer who has unfairly dismissed an employee to reinstate the employee, re-employ the employee or pay compensation to the employee. An arbitrator must provide reasons in an award for the remedy that is awarded.

110. Choosing a remedy for substantively unfair dismissals

An arbitrator who finds that a dismissal is substantively unfair must consider whether to order the employer to reinstate, re-employ or compensate the employee.

5. The discretionary nature of the remedies

An award issued by a Commissioner must be '_____. It is vital that Practitioners understand at the outset of this discussion that, although every employee has the right not to be unfairly dismissed (in terms of s 185(a) of the LRA) the infringement of that right _____ confer a right to a remedy.

The LAC has explained that:

[53].....once a finding is made that a dismissal is unfair an arbitrator or the Labour Court _____ as provided in s 193(1). The discretion that is conferred on the arbitrator or the Labour Court by s 193(1) (because of the use of the word 'may' in the commencement of this section which says 'the Court or the arbitrator _____'), limits the decision the arbitrator or the Labour Court may make.

¹ GN R224 in GG 38573 of 17 March 2015 [with effect from 1 April 2015]

In practice, this means that an arbitrator² who has found the dismissal of an employee to be unfair has a discretion:

- To _____ or _____ - remembering that the remedies which could be awarded are _____ to those in s193(1) i.e. reinstatement, re-employment and compensation. This discretion arises from the word 'may' in s193(1).
- To award _____ reinstatement _____ re-employment. This discretion arises from the word 'or' in s 193(1)(b). This means the arbitrator must choose between reinstatement and re-employment, and exercise his discretion when doing so. The parameters of this discretion are set out in s 193(2).
- To award _____. The arbitrator who decides to award compensation for an unfair dismissal needs to take into account s 194(1), and exercise her discretion as to _____ and if she does _____ further exercise her discretion to determine the _____ which can not be more than 12 months remuneration.

It should further be noted that the discretion is the _____. An award which purports to grant an unfairly dismissed employee _____ between, for example, reinstatement and re-employment, is reviewable.

When exercising her discretion in the above situations, the arbitrator must not act _____, or upon the _____, or with _____, or have followed the _____, but be based on _____. The point is that an arbitrator must show that she exercised her discretion, provide reasons for her decision.

Although the LAC in *Kemp* is talking specifically about compensation, the approach followed illustrates the general guiding principles as to how and why a particular remedy is ordered. The Court said:

[22] In my view the ultimate question that the Labour Court or an arbitrator has to answer in order determine whether compensation should or should not be granted is: which one of the two options would better meet the requirements of fairness having regard to all the circumstances of this case? If the court or arbitrator answers that the requirements of fairness, when regard is had to all of the circumstances, will be better met by denying the employee compensation, no order of payment of compensation should be made. If the court or arbitrator answers that the requirements of fairness will be better met by awarding the employee compensation, then compensation should be awarded. When that question is answered, the interests of _____ the employer and the employee must be taken into account _____ all the relevant _____. In my view, where the court or an arbitrator decides the issue of whether or not to award the employee compensation, it does not exercise a true discretion or a narrow discretion. The determination of that question or issue requires the passing of a moral or value judgment. It is decided or determined on the basis of the conceptions of fairness because the court or arbitrator has to look at all the circumstances and say to itself or himself or herself as the case may be: What would be more in accordance with justice and fairness in this case? Would it be to award compensation or would it be to refuse to award compensation? It or he or she would then have to make the decision in accordance with

² This applies to the Labour Court as well, but the context of this discussion is the role and function of the arbitrator.

its, his or her sense of which of the two options would better serve the requirements of justice and fairness.

In *Mathebula* the LAC referred to *Kemp* and stated:

[15] The decision whether to reinstate an employee whose dismissal was found to have been unfair involves an exercise of discretion by an arbitrator in terms of s 193(1) and (2) of the LRA. The exercise of the _____, in which case the Labour Court is required to determine whether the arbitrator, in arriving at the decision as he or she did, took into account all the facts and the circumstances of the case.

6. When do remedies apply?

The remedies apply _____ the court or arbitrator has found that the employee has been _____ or when an employer has been held to have committed an unfair labour practice.

In *Polifin Ltd* the arbitrator found that the employee's dismissal was fair, but nevertheless ordered that re-employment take place 'if a position were to become available'. In a review application of this decision the court said:

In my opinion that was not a course of action available to the commissioner. Section 193 of the Act, which deals with remedies for unfair dismissal, permits an order for re-employment on a finding that the dismissal is unfair. Where a commissioner comes to the conclusion that the dismissal is fair, that is the end of the matter. The commissioner has no power to order re-employment. [My underlining]

These remedies also do not apply to the situation where the parties _____ in a conciliation, before or after a disciplinary hearing or after some other dispute resolution process.

A _____ to the granting of a remedy is that the dispute has been referred to the CCMA or bargaining council in terms of the LRA, and that such r_____. The remedies discussed are only applicable where there is an _____.

While the present discussion concerns remedies for unfair dismissal, Practitioners should not lose sight of a key aspect of labour dispute resolution in terms of the LRA- that parties should be given both opportunity and assistance to settle the dispute themselves before resorting to arbitration. This means that even if an employer has dismissed an employee unfairly, and the employer wishes to reverse that decision, the employer has the 'right to right a wrong'.

It means that the question of which remedy an arbitrator should order, is always subject to the _____ that the parties are _____ the dispute themselves.

7. Other remedies

7.1 An order to pay an arbitration fee

Section 140(2) of the LRA states:

"If, in terms of section 194(1), the commissioner finds that the dismissal is procedurally unfair, the commissioner may charge the employer an _____."

In terms of a notice in the Government Gazette dated the 25 July 2002 the arbitration fee is the sum of R 1125,00 for each day of the arbitration or part thereof.

7.2 Notice pay, leave pay and unpaid wages

Section 74 of the Basic Conditions of Employment Act, 75 of 1997 as amended states:

74 Consolidation of proceedings

(2) If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator investigating the matter may also determine any claim for an amount that is owing to that employee in terms of this Act if-

- (a) the claim is referred in compliance with section 191 of the Labour Relations Act, 1995;
- (b) the amount had not been owing by the employer to the employee for longer than one year prior to the dismissal; and
- (c) no compliance order has been made and no other legal proceedings have been instituted to recover the amount.

This means that the arbitrator who makes an award in terms of s 74 must calculate the amounts owed in respect of notice pay etc. The award must be certain –that is not ‘two weeks notice pay’ but for example, ‘Notice pay of R 2300’.

8. Conclusion

This chapter has set out some of the general principles and guidelines which Practitioners should take note of when arguing or presenting evidence regarding an appropriate remedy where the dismissal of an employee is held to be unfair.