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Reinstatement as a remedy for unfair dismissal

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Synopsis

This article discusses and explains the law and best practice with regards to reinstatement as a remedy for an unfair dismissal in terms of the Labour Relations Act, 1995, and explains this remedy- a practical way with reference to case law.

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1. The law: the prime remedy -Section 193(2)

In terms of section 193 (2) the remedy of _____ for unfair dismissal, and an arbitrator must require the employer to reinstate or re-employ the unfairly dismissed employee unless:

- “(a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure..

Reinstatement is therefore the appropriate order where a dismissal has been found to be unfair, and is the appropriate remedy- _____ to the contrary.

2. What does an order for “reinstatement” mean?

The CCMA Guidelines state

116. An employer who is ordered to reinstate an employee must place the employee back in employment in the same position and restore the contractual relationship that applied to the employee prior to dismissal.

117. A reinstated employee's service is regarded as unbroken and the contract of employment as uninterrupted. If reinstatement is made fully retrospective the employee is placed in the same position he or she would have been in had there been no dismissal. If an employee is reinstated, any changes in terms and conditions of employment introduced between the dismissal and the order of reinstatement, apply to the employee.

An order for reinstatement _____ that the date of reinstatement is the date on which the employee was dismissed; the word does _____ an implication of _____.

For this reason, once the arbitrator has determined that reinstatement is the appropriate order taking into account the provisions of section 193(2), the _____ is whether the reinstatement should be from the date of dismissal or some other date.

The phrase "from any date not earlier than the date of dismissal" in section 193(1)(a) was held to "clearly confer a discretion upon the Labour Court [or arbitrator] to order _____ and therefore the court or arbitrator "may select as the date for reinstatement _____". The court or arbitrator therefore must _____ which is appropriate in the light of the circumstances of the case.

A court will only interfere with this discretion on appeal or review if the court or arbitrator exercised its discretion _____, upon a wrong principle, was _____ or its conclusion is one to which no court could reasonably have come.

In summary, once an arbitrator has found a dismissal to be unfair, the arbitrator must now use her discretion to decide:

- which available remedy is appropriate, taking into account the facts of the case and the interests of both employer and employee
- If reinstatement is the appropriate remedy to give reasons for that decision; and then
- To decide the date from which the reinstatement takes place, which could be
 - Either from the date of dismissal or
 - some other date.

And give reasons for that decision.

The order of reinstatement is an order that the employee tender his services and for the employer to accept that tender.

3. Reinstatement as the prime remedy for unfair dismissal

Reinstatement is the prime remedy for unfair dismissal.

The Constitutional Court in *Booi* held that:

[40] It is accordingly no surprise that the language, the context and purpose of s 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearable, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in s 193(2), which is to protect substantively unfairly dismissed employees by restoring

the employment contract and putting them in the position they would have been in but for the unfair dismissal.

[42] I hasten to add that the evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all the charges. has been rejected as insufficient to justify dismissal.' (Footnotes omitted.)

4. When reinstatement would not be appropriate

An order for reinstatement of a dismissed employee would not be appropriate in the following circumstances:

4.1 The employee does not wish to be reinstated or re-employed

The CCMA Guidelines state:

112. An arbitrator must ensure that the employee has an _____ during the arbitration whether reinstatement or re-employment is sought as a remedy. If the employee does not want either of these remedies, the arbitrator should clarify that the employee does not in fact wish to be reinstated or re-employed and that the employee has adopted this position with full knowledge of the employee's rights under the LRA. Once the arbitrator is satisfied that the employee has made an _____ not to seek reinstatement or reemployment, it is not appropriate for the arbitrator to interrogate the employee's reason for not seeking this relief any further.

4.2 The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable

The CCMA Guidelines state:

113. _____ who alleges that a continued relationship would be intolerable _____ to the arbitration that demonstrates this on a balance of probabilities. This evidence should establish that there are no reasonable prospects of a good working relationship being restored. An employer may seek to satisfy this burden by leading credible evidence, for example from co-employees who testify that they could not work with the dismissed employee.

114. The _____, including during any disciplinary or arbitration proceedings, may have the result that the employee's reinstatement or re-employment would cause significant disruption in the workplace. For example, it may be intolerable for the employer to reinstate or re-employ an employee in a position of trust where the employee has been found to have been _____ in the disciplinary enquiry, or to reinstate or re-employ an employee if the dismissal which would otherwise have been fair, is found to have been unfair only because the employer acted _____.

4.3 When it is not reasonably practical to do so

Case law _____ on the question of when it would be, or not be, reasonably practical to reinstate an employee.

<i>Elias</i>
<i>Mahawane Country Club</i>
<i>Maepe</i>

Practitioners should take note of the CCMA Guidelines which state:

115. This criterion relates to factors other than the employment relationship which would render reinstatement or re-employment an inappropriate remedy. This criterion will be satisfied if the employer can show that reinstatement or re-employment is not feasible or that it would cause a disproportionate level of disruption or financial burden for the employer. The fact that another employee has been appointed in place of the unfairly dismissed employee is not in itself a reason to deny reinstatement, as the reinstatement of an unfairly dismissed employee may constitute a ground for terminating the employment of the newly appointed employee on the grounds of the employer's operational requirements. If reinstatement is not reasonably practicable, the arbitrator should consider whether ordering re-employment in other reasonably suitable work would provide a fair outcome. The onus is on the employer to present evidence to show that a remedy of reinstatement or re-employment is not reasonably practicable or that reinstatement should not be from the date of dismissal. If the arbitrator is satisfied that reinstatement and re-employment are not appropriate remedies, the arbitrator must direct the employer to compensate the employee in accordance with the provisions of the LRA. Whether the employee took reasonable steps to mitigate the losses caused by dismissal is not a relevant factor in determining either whether reinstatement should be granted or the date from which it should take effect.

4.4 The dismissal is unfair only because the employer did not follow a fair procedure.

The order of reinstatement applies _____ the employee's dismissal is _____ substantively and procedurally unfair

If there was fair reason to dismiss the employee, reinstatement is not the appropriate remedy.

Where an arbitrator reinstates an employee whose dismissal is only procedurally unfair, the award will be set aside on review as it is irregular

4.5 Case study

The award in *Ramsamy* provides a helpful case study as to how this guideline should be applied. The arbitrator asked the following questions and obtained evidence on each, and then evaluated that evidence. The questions are:

Has the employer shown that:

- * Reinstatement or re-employment is not feasible or that it would cause a disproportionate _____ or _____ the employer?
- * Another employee been appointed in place of the unfairly dismissed employee?
- * The applicant's demand to be retrospectively reinstated will not be conducive to the restoration of a workable relationship?
- * That a remedy of reinstatement or re-employment is _____?
- * That reinstatement _____ from the date of dismissal?

5. Reinstatement in different circumstances

There are a number of factual circumstances which impact on a decision to order reinstatement. This section discusses these.

5.1 Reinstatement where the employee's position no longer exists

There are situations where an employer has re-_____ or otherwise changed the organisation of the department or section where the dismissed employee worked prior to his dismissal.

<i>East Rand</i>
<i>Coca-Cola (Pty) Ltd</i>
<i>Myers</i>

5.2 Can reinstatement be ordered to a different position?

The question before the LC in *Broens* was the terms on which reinstatement can be ordered.

In that case the employee was employed by the Department as a principal medical officer. He suffered from mental illness and a psychiatrist recommended that he be placed in a different position. The Department said it was unable to do so and began the medical boarding process during which process it was suggested that an alternative position be found and that he not be boarded. When no alternative was offered, and nor was he boarded, the employee responded by not returning to work. He was then informed that his employment was deemed to be terminated by operation of law due to his absence -as provided for in terms of the Public Service Act. He referred an unfair dismissal dispute to a bargaining council which ruled in his favour. The arbitrator found that there was 'no case against' the employee and that his dismissal was unfair. He ordered the department to reinstate the employee and to appoint him in a non-clinical equivalent post.

The Labour Court held that, on the facts, the employee had not been absent without leave, and that one reason for this was that the department was still considering alternatives and going through the boarding process, and therefore the dismissal was unfair. On review the question of the remedy ordered by the arbitrator was the key issue in dispute. The Department's case was that s 193 of the LRA provides for only three remedies for unfair dismissal, ie reinstatement, re-employment or compensation, an order of reinstatement restores the status *quo ante*, and an the arbitrator cannot order reinstatement and then order the employer to appoint the employee in a different post. The LC said:

[28] It does appear anomalous that s 193(2)(b) specifically gives the court or the arbitrator the power to 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'; yet it is silent on the terms of an order to reinstate. That must be so because, in the normal course, an order for reinstatement is indeed retrospective and is designed to place the employee back into the position that he or she occupied before dismissal. But does that mean that an arbitrator does not have the power to reinstate an employee, and yet to order the employer to place that employee in a different position?

[29] In my view, a purposive interpretation of the Act does not preclude such an order. Reinstatement is the primary remedy in terms of s 193(2). One of the exceptions is where 'it is not reasonably practicable for the employer to reinstate or re-employ the employee'. It is clear that, on the facts of this case, it is not reasonably practicable for the employer to reinstate the employee *in the same position*. That would be defeating the object. The very outcome of his referral to a psychiatrist was the recommendation that he should be placed in a non-clinical position. It cannot be that an arbitrator faced with these facts cannot use his discretion to order the employer to give effect to such a recommendation. The commissioner may make *any appropriate* arbitration award in terms of the Act, including, but not limited to, an award that gives effect to the provisions and primary objects of the Act. One of those objects is the effective resolution of labour disputes. Had the arbitrator in this case simply reinstated the employee, it would not have resolved the underlying dispute.

5.3 Reinstatement after a long delay

Can reinstatement be an appropriate remedy when there has been a long period between the employee's dismissal and the order of reinstatement?

This was the question before the arbitrator in *Ramsamy* who stated:

[103]The fact that many years have lapsed between the date of dismissal and the date of the award (3 May 2012) does not militate against the relief of reinstatement. Authority for this approach is found in the landmark judgment of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

[104] Sidumo was dismissed on 26 June 2000 and reinstated by the Constitutional Court in a judgment handed down on 5 October 2007, some seven years after his dismissal. Since then a

number of applicants have been reinstated by the courts despite the fact that they were dismissed for much longer periods than that. Indeed it is now settled law that the number of years between the date of dismissal and the date of reinstatement does not determine whether reinstatement is appropriate or not — the reasons for the delay are at issue. Once the reasons for the delay have been interrogated and it is found that the inordinate delay cannot be laid at the door of only the applicant, it must follow that it would be unfair to refuse the applicant retrospective reinstatement.

6. The application of an order for reinstatement

6.1 The employee must tender his services

The importance of the requirement that a dismissed employee who is reinstated in his employment must tender his services to his employer can not be overstated.

The Constitutional Court has said that the

governing principle that the contracts of employment of unfairly dismissed employees are terminated by dismissal and revive only when they tender their services pursuant to a reinstatement order and the tender is accepted by the employer. The reinstatement order does not in and of itself reinstate the contract of employment, it is rather directing the employees to tender their services and for the employer to accept those services.

Moreover, and importantly for this discussion, _____ enforce the order in the arbitrator's award by _____ the employment contract _____ and the relationship does not resume. There is no legal basis for any contractual claim for arrear wages until such time as the contract is restored by the agreement of the employer to accept the tender of the employee in respect of future services. ' _____ flowing from the reinstatement order can only arise once the contract is restored. Prior to the employer agreeing to restore the contract pursuant to an order to do so, there is no contract in existence and thus no juridical basis for a claim for arrear wages'.¹ The link between the tendering of services and the right to backpay is clear.

An order for reinstatement means that the reinstated employee must tender or offer his services to the employer. This means that the employee must go back to work; he _____ from the employer to do so. Should the employee not tender his services _____ or from the date specified in the award, the order lapses. If the employee does tender his services, but the employer refuses such tender and therefore refuses to obey the award, the employee's recourse is to have the award enforced by making it an _____

Masinga _____

¹ *Mahlanga NO v Rand Water* (2023) 44 ILJ 569 (LC)

6.2 The question of back pay: how much should be paid?

An order for reinstatement does imply that the employee would be remunerated from the date of reinstatement i.e. would be paid back pay from the date he has been reinstated to the date he actually returns to work. However, it is suggested that in order for the award to be clear and implemented correctly, this should be stated in the award as well as the amount of back pay, and when it is to be paid.

However, as pointed out elsewhere, and as stated by Prinsloo J:

[21] It is clear from the aforesaid authorities that arrear wages or backpay are only due and payable on reinstatement.

[34]The authorities are clear: an employee _____ or her services, _____ he or she _____ and if an employer refuses to reinstate the employee, the contract of employment does not revive. If the contract is not revived through an act of reinstatement, there exists no claim for backpay if the employee did not tender his or her services in accordance with an arbitration award or an order of court.

The issue before the Constitutional Court in *Maroveke* was the amount of backpay due to the employee. The key facts were that the employee had found work two months at Goldfields for substantially less remuneration than from his employer after being dismissed and before the matter was heard at arbitration. The CC noted that the 'established principle [is] that _____ beyond the extent to which he would have been but for the dismissal.' The question was whether the employee's remuneration at Goldfields should be considered when calculating the amount of backpay ordered as part of the reinstatement. The CC held that:

[27]The compensation [i.e. backpay]² to the wronged party is intended to 'offset' the financial loss suffered as a result of a wrongful act. What must be determined is the extent of the loss, while considering the nature of the unfair dismissal. Underlying this is the intent to restore the applicant to the position he would have been in but for the wrongful act by the employer. That restoration must not assume a punitive character. This view is properly enunciated in *Davids* as follows:

'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to _____, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[28] In restoring the applicant to his previous position, this court ought to consider both the amount he would have earned but for his dismissal and what he earned while working at Goldfields.....

[32]] The applicant's salary at Goldfields was substantially less than his previous salary. Whilst employed by the third respondent, the applicant earned R24,730.60 per month. At Goldfields he earned R15,000 per month. The difference between the salaries is R9,730.60 per month. This would mean that the total difference in earnings for the period of ten months is R97,306. In my view, the applicant's diligence and good fortune in finding employment should not

² My editing. While the CC referred to compensation, it is clear that this was in reference to backpay.

prejudice him from receiving what is due to him. Had the Labour Court conducted this exercise, it would have concluded that the applicant earned substantially less at Goldfields. The difference between the two salaries is a substantial amount that cannot be ignored.

[33] The Labour Court should have taken the difference into account when determining the backpay. Therefore, the applicant ought to be compensated for this difference in the remaining ten months for which backpay is permissible. In my view, this would not have a punitive effect, but instead, serve to restore the applicant to the position he would have been in but for the dismissal. [My underlining]

Is there a limit to the amount of back pay?

<i>Latex Surgical Products</i>
<i>Republican Press (Pty) Ltd</i>

An order for reinstatement is therefore _____ to 12 or 24 months.

7. Effect of reinstatement when award taken on review

What happens if an employee is reinstated by an arbitrator, but the arbitrator's award is taken on review? Must the employer reinstate the employee or wait for the review application judgement?

In an arbitration -*Pillay*- the employee argued that reinstatement gave rise to new rights - specifically the right not to be dismissed from his 'new' contract of employment without a fair reason and procedure in terms of the LRA; reinstatement 'resolved' the termination of the first 'period' of employment, and after reinstatement there was, as it were, a fresh start, a new contract of employment, albeit on the same terms and conditions as before. The arbitrator was of the view that the employee could not acquire rights to permanent employment until the dispute system of the LRA had been exhausted. Until that time, the rights of both parties were held 'in abeyance'.

8. The effect of offers to reinstate a dismissed employee

In addition to the above situations when reinstatement is not appropriate is those cases where an offer is made to reinstate the dismissed employee, but that offer is refused.

<i>Kukard</i>
<i>Kemp t/a Centralmed</i>

Zondo JP (as he then was) set out the factors which need to be in place if an arbitrator, or the Court, exercises a discretion not to award an unfairly dismissed employee compensation. These are:

- A _____ offer of reinstatement must have been made to the employee;
- The employee must have r_____ the offer;
- The _____ must have been such that, if the dismissed employee had accepted the offer of reinstatement, the dismissed employee would not have suffered any _____ which she may have suffered as a result of her dismissal;
- _____. An additional factor which arose in the *Kemp t/a Centralmed* case, was that for some time after the employer had made the offer of reinstatement to the employee, she did not even bother to respond. This the LAC said, was 'conduct which is unacceptable, particularly when one of the parties is trying to have the dispute resolved. Such conduct undermines one of the primary objects of the Act which is the effective (which includes expeditious) resolution of disputes: it is better that disputes be resolved through conciliation than through litigation or arbitration or industrial action'.

9. Reinstatement orders in an award

Where the employer's business is sold in its entirety as business as going concern, the order of reinstatement should be made against the new owner.

Based on the above discussion the following is a suggested order for the reinstatement of an employee who is found by an arbitrator to have been unfairly dismissed:

ABC (Pty) Ltd [the employer] is ordered to reinstate Mr A B Ngubane [the employee] with effect from the [date] in its employ on the same terms and conditions as those that governed his employment immediately before his dismissal.

The employer is further ordered to pay Mr A B Ngubane the sum of R XXXXXX back pay on the date on which Mr A B Ngubane returns to work.

Mr A B Ngubane is ordered to tender his services to ABC (Pty) Ltd on the 7 May 20XX or within five working days of receipt of this award.

10. Conclusion

The discretion which an arbitrator has when deciding to reinstate an employee is vast, with some consequences which are not appreciated and understood by the parties. This discussion has shone light on these in what is -hopefully- a practical but thorough manner in light of the aims of the Labour Law Academy, namely to assist Practitioners to apply the law to bring about industrial justice in South African workplaces.