



LLA 1130

Re-employment as a remedy for unfair dismissal

Synopsis

This short discussion looks at re-employment in comparison to reinstatement, and then discusses the CCMA Guidelines with respect to re-employment

Details

Author: Sean Molony

Pages 3

Words 1104

Reference

LLA 1130

Copyright: Labour Law Academy (Pty) Ltd and Sean Molony

Order copies from sean@labourlawacademy.co.za

Book

This article is an extract from "A Practitioner's Guide", by Sean Molony, available from

www.labourlawacademy.co.za

Training

A training course is in the process of being developed. Go to www.labourlawacademy.co.za

Updated on 20 May 2025

Table of Contents

1.	Reinstatement and re-employment: what's the difference?	2
2.	The CCMA Guidelines	3

1. Reinstatement and re-employment: what's the difference?

The SCA¹ has described the difference between reinstatement and re-employment as follows:

[27] If an employee is reinstated, he or she resumes employment on the same terms and conditions that prevailed at the time of dismissal. The period during which the employee was out of work is regarded as a suspension of the employment contract. The original contract simply revives. This much was said in *Nel v Oudtshoorn Municipality*:

'From the provisions of the [Labour Relation Act] and the cases I have cited, it is clear that by reinstating a dismissed employee, the employer does not purport to conclude a fresh contract of employment. The employer merely restores the position to what it was before the dismissal.'²

[28] Re-employment, on the other hand, entails new terms and conditions of employment contracts. Benefits arising from the past employment relationship are not extended to the new employment relationship. Re-employment is not a defined term. Re-employment would also occur where it is decided to regard the previous employment relationship as terminated and the replacement thereof with new employment, which may or may not be on different terms.³

In *Mashaba v Citibank NA SA Branch & others*,⁴ the court defined re-employment as follows: Re-employment does not require the restoration of the status quo ante as if a dismissal has not happened. Re-employment is relief that in effect affords the employer greater flexibility where it comes to taking the employee back to work. Examples of where re-employment, as opposed to reinstatement, would be competent are:

25.1 Where there had been operational changes to the employee's position in the interim, or a change in conditions of employment, which do not go so far as to render taking the employee back into employment impracticable, but which make a complete restoration of the status quo ante as required by reinstatement impossible, re-employment would be appropriate. In simple terms, the employee is returned to work in an alternative position. The court or the arbitrator however still retains the discretion to decide the retrospectivity of such an award of re-employment, so it does not follow that all re-employment awards necessarily mean that it must be new employment with no retrospectivity.

25.2 Also, re-employment, as opposed to reinstatement, can have conditions and/or terms attached to taking the employee back to work, not contemplated by the employee's original employment and/or employment terms. For example, it may be ordered that an employee is re-employed on a different medical aid. . . .

25.3 Re-employment would also occur where it is decided to regard the previous employment relationship as terminated and the replacement thereof with new employment which may or may not be on different terms.'

In *Tshongweni*⁵ the LAC defined re-employment as:

¹ *SA Municipal Workers Union National Provident Fund (Pty) Ltd v Dihlabeng Local Municipality & others* (2023) 44 ILJ 1479 (SCA)

² [2013] ZASCA 37; (2013) 34 ILJ 1737 (SCA) para 10.

³ *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) para 37.

⁴ (2019) 40 ILJ 2762 (LC) at para 25.

⁵ *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at para 37.

'Re-employment implies termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms both as to period and the content of the obligations undertaken.'

An order that the employer re-employ an unfairly dismissed employee means that a new employment contract is entered into and on terms and conditions which differ from that of the former contract between the parties which was terminated by the employee's unfair dismissal. Contrary to an order for reinstatement, an order of re-employment means that the employer may place the employee in a different job with less remuneration, and status than the employee enjoined previously.

2. The CCMA Guidelines

The CCMA Guidelines explain re-employment as follows:

118. An arbitrator may order the re-employment of an employee if the employee's dismissal consists of a failure by the employer to re-employ the employee as contemplated by section 186(1). In addition, an arbitrator may order the re-employment of an employee if it is not appropriate for the employee to be reinstated. The arbitrator may order the employer to reemploy the employee in either the work in which the employee was employed prior to the dismissal or in other reasonably suitable work. The LRA contemplates two broad situations in which it is appropriate to order re-employment. These are-

118.1 the arbitrator directs the employer to re-employ the employee in the work the employee previously performed but an order of reinstatement is inappropriate because, for example, the evidence indicates that the employee should be employed on different terms and conditions of employment;

118.2 the arbitrator directs the employer to re-employ the employee in work which is reasonably suitable. An order of re-employment in reasonably suitable work is appropriate where there are circumstances which prevent the employer taking the employee back in the position held prior to the dismissal.

119. The power to order re-employment gives arbitrators a broad discretion to fashion an appropriate remedy in cases in which reinstatement is not appropriate or feasible but fairness dictates that the employee should return to work with the employer.

120. An arbitrator may only order re-employment into work that is reasonably suitable. This should be ascertained with reference to all relevant factors including-

120.1 the skills and experience required to perform the job;

120.2 the remuneration and benefits in the new position compared to those received in the previous position;

120.3 the status attached to the new position when compared with the previous position.

121. An arbitrator who orders an employer to re-employ a dismissed employee must indicate precisely the terms and conditions under which the employee is to be employed. The arbitrator must stipulate in the order of re-employment-

121.1 the extent to which terms and conditions of employment are changed or remain the same;

121.2 the extent to which the employee's service is to be regarded as continuous or interrupted;

121.3 what benefits, if any, the employee should receive in respect of the period between dismissal and re-employment.

122. In general terms, an order of re-employment is more likely to be appropriate in cases in which the reason for dismissal was the employee's incapacity or the employer's operational requirements. However, there may be cases in which it is an appropriate remedy for a misconduct dismissal.