



LLA 1140

Compensation as a remedy for unfair dismissal

Synopsis

Context: This article discusses compensation as a remedy for the unfair dismissal of an employee in the light of case law and the CCMA Guidelines. The approach is practical- to show how representatives should present evidence and argument as to the amount of compensation which should be awarded in a particular case. Suggestions and guidelines are presented based on best practice to assist representatives as well as arbitrator.

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Outcomes

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

- Define what compensation means
- Understand the nature of the remedy: what it is and what it is not
- Argue for or against an award of compensation with motivation
- Understand what 'just and equitable' means in the debate about compensation for an unfair dismissal
- Locate and use relevant evidence and present this to an arbitrator
- Know when no compensation need be ordered
- Apply the context in argument for or against compensation
- Understand what is included and excluded in an award for compensation
- The role of taxation and interest in an award of compensation

1. Section 194(1)

Section 194(1) of the LRA states as follows:

194 Limits on compensation

(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the

circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

2. What is compensation?

An award of compensation as envisaged in ss 193 and 194 read together constitutes a _____ such as the right to be “treated fairly, with care and concern and to enjoy the benefits of an adequate consultation process, as provided for in the LRA”. An impairment of _____ arising from the _____ may lead to an award of compensation. For example, if an employee’s right to a procedurally fair disciplinary hearing is impaired, the remedy is an award of compensation.

Another way to understand what compensation is, is to compare it to what it is not. To understand what it is not it is necessary that Practitioners draw a distinction between compensation and some other forms or types of legal claim and redress. Thus, compensation is not:

Non patrimonial loss
Patrimonial loss.
Delictual damages:
Contractual damages
Backpay.

3. Compensation is not the prime remedy

Section 193(2) of the LRA states:

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the *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.

The effect of this section is that _____ regarding the appropriate remedy in a particular dispute _____ by the parties, and an arbitrator should _____ to do so.

An arbitrator should ask the parties, or their representatives, what remedy would be applicable. An arbitrator should, for example, ask:

In the event that I find the dismissal of [Mr X] to be unfair what remedy would be appropriate? I would like both parties to present evidence and or argument on this question.

It may be useful, particularly where parties are not represented, or where the dispute is arbitrated in default, for the arbitrator to make this enquiry in an inquisitorial manner. An example of how this may be done on conclusion of the evidence on the merits of the dispute is the following:

I need to advise the parties that if I find that the dismissal of Mr X is unfair, I am required by section 193(2) of the LRA to reinstate Mr X.

[Addressing Mr X or his representative] Do you want to be reinstated in your employment if I find that your dismissal was unfair?

Mr X: Yes.

[Addressing the employer or his representative] Are there circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable? Or are there any reasons why it is not reasonably practicable for the employer to reinstate or re-employ Mr X?

The arbitrator should also ask the employee or his representative to respond or reply to any argument or evidence that the employer presents regarding allegation that continued employment would be intolerable, or reasonably practicable.

If the employee says 'No', then the appropriate remedy can only be compensation.

4. The discretion to award -or not award- compensation

It is often thought that if an employee has been found to have been unfairly dismissed then a remedy- whether of reinstatement or compensation - must follow.

However, this understanding is not correct. The Constitutional Court has ruled on this question in the matter of *McGregor*. It is important for Practitioners to note the logic implicit in the court's finding. The Constitutional Court noted that:

Once a finding is made that a dismissal is unfair, an arbitrator or the Labour Court _____ exercise a discretion as provided in s 193(1) of the LRA, according to which it _____ award compensation.

Note the wording- 'must' and 'may'.

Once an arbitrator has decided that compensation is warranted in terms of s 193(1)(c), the arbitrator must then apply itself to the question of _____ which _____ because s 194(1) states:

‘The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee’s conduct or capacity or the employer’s operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may _____ than the equivalent of 12 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal.’

Section 194(1) is the _____ beyond which an arbitrator may not go, but within which bounds they may make any decision considered to be the correct one.

5. When can compensation be ordered?

In terms of section 193(1)(c) of the LRA, an order that the employer pay an employee who has been unfairly dismissed compensation is a competent order. That section makes no distinction between a substantively unfair dismissal and a procedurally unfair dismissal, a distinction which existed in section 194 but which fortunately has been removed by the amendments to the Act in 2002. The situation now is that an arbitrator can award compensation, provided that the arbitrator has found the employee’s _____ – whether substantively or procedurally or both does not matter.

6. When is compensation appropriate?

Compensation is appropriate in the event that:

- The employee _____ to be reinstated; or
- The _____ surrounding the dismissal are such that a continued employment relationship would be _____; or
- It is not _____ for the employer to reinstate or re-employ the employee; or
- The dismissal is _____ because the employer did not follow a fair _____

7. Amount of compensation

The Constitutional Court has approved the statement by the Labour Court in *Le Monde Luggage cc* where the Court said:

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 _____ for a court is to determine the _____, 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. See MSM Brassey Commentary on the Labour Relations Act A8-155; also *Ferodo (Pty) Ltd. v De Ruiter* (1993) 14 ILJ 974 (LAC).

Section 194(1) which applies to both substantively unfair and procedurally unfair dismissals provides that the amount of compensation must be “_____” and is

_____calculated at the employee's rate of remuneration on the date of dismissal".

The amount of compensation:

- Is based on the employee's _____. The term 'remuneration' has been defined¹ in such a way as to include salary and ancillary benefits, as well as commission. Evidence must therefore be heard as to what the employee's remuneration was.
- Is based on _____ of the dismissed employee's remuneration, up to a _____
- Is derived from the employee's remuneration _____
- Must be '_____. This is discussed below.

There has been a school of thought that the approach to be followed is to take each manner or example of an unfair act by the employer and allocate compensation accordingly. Following this approach an arbitrator would, for example, allocate an award of three months to the unfair procedural act of not giving the employee sufficient time to prepare for a disciplinary hearing, another two months to not giving the employee the right to be represented by another employee, and so on adding each act or omission to a final award. This is not the correct approach.

8. "Just and equitable" compensation

Section 194(1) of the LRA states:

The compensation awarded to an employee whose dismissal is found to be unfairmust be *just and equitable* in all the circumstances,

It is the consideration of what amount of compensation is just and equitable which is the most difficult aspect which the arbitrator must consider. While an arbitrator has a _____ to award the amount which s/he considers to be just and equitable, this discretion must be _____. Cohen suggests that:

...the introduction of a judicial discretion to award 'just and equitable compensation' requires arbitrators and adjudicators. While an arbitrator has a _____ to award the amount which s/he considers to be just and equitable, this discretion must be _____. This assessment would be incomplete without establishing _____ suffered by the employee, _____ and _____ related factors such as the _____ and his or her efforts to find alternative employment and thereby _____. Similarly, in assessing whether an employer has made an attempt at substantial redress for the procedural unfairness, it will be necessary to establish the _____ incurred and the reasonableness of the employer's attempts at making such redress.

Arbitrators should _____ for granting a particular amount of compensation, not simply state the amount. Without reasons, an arbitrator is not able to show that he exercised his discretion, let alone did so 'judicially'. Where the arbitrator had not demonstrated how he arrived at that figure of compensation, the award was set aside on review and the matter was sent back to the CCMA for fresh determination.

9. Evidence needed so that the amount of compensation can be determined

Representatives should ensure that they are _____ as to the amount of compensation that should be awarded, in the event that the employee's dismissal is held to be unfair.

What follows is a practical application of the law that an award of compensation must be 'just and equitable'. The following evidence should be presented:²

- The employee's remuneration at the date of dismissal. A _____ would be sufficient, or if that is not available then proof of payment by the employer into the employee's bank account;
- The _____ since the employee's dismissal.

This evidence is usually common cause. The parties should during the 'narrowing of the issues' phase of the arbitration submit the relevant documents or make admissions on these.

Evidence and argument on the following should be presented by each representative where applicable:

- Has the employee secured alternative employment? If so, when and at what rate of remuneration? If not, why not?
- What steps has the employee taken to attempt to _____ his or her losses by, for example, finding alternative employment?
 - A dismissed employee has an obligation to mitigate his or her losses. This includes the obligation to find new employment. Some evidence regarding what the employee did, or did not do, in this regard is relevant.
- The _____ during the disciplinary hearing – did the employee fail to use the opportunity to state a case at a disciplinary investigation or enquiry?
 - The argument here is that the chairperson's finding may well have been different if the employee had not waived his right to attend or participate in the disciplinary process.
- What are the employee's _____?
 - This is interconnected to the above enquiry. The employee's chances of finding future employment may be affected by factors such as age, experience, level of education, qualifications and the availability of suitable job opportunities;
- What is the _____ suffered by the employee?
 - While this is a relevant factor in determining compensation, the absence of loss does not prevent an award of compensation;
- Was the _____ unreasonably delayed? and which party or their representatives was responsible for such delay?
 - This speaks to any condonation, or 'default' arbitration that took place prior to the arbitration. A delay in referral may be taken into account even though condonation for a late referral was granted.

² What follows is largely an attempt to apply the CCMA Guidelines in a practical manner. It forms a list of questions to be asked when leading a witness and opens up ideas for cross examination.

- The _____ Was the dismissal both substantively and procedurally unfair. This speaks to the question of a 'just and equitable' award of compensation.
- What was the _____ of the employee's dismissal?
 - This refers to the difference in degree of unfairness where the employee committed no misconduct, as opposed to an employee committing some misconduct for which dismissal was not a fair sanction.
- Were any _____ by the employee from the employer for example in an attempt to settle the matter prior to the arbitration. Amounts paid because they were due in terms of any law, collective agreement or the contract of employment such as notice pay, severance pay, or from the Unemployment Insurance Fund, are not included in any award of compensation.
- Did the employee _____ of reinstatement?
 - Was that offer reasonable or unreasonable? In general, employers should not be penalised if they have offered to reinstate an unfairly dismissed employee. However, an employee may refuse such an offer, and be entitled to appropriate compensation, if the offer is not made in good faith or if the trust relationship between the employee and the employer has broken down as a result of or following the dismissal. Similar considerations may come into play if the employee refuses a reasonable offer of re-employment in circumstances in which reinstatement is not feasible.
 - Did the employee refuse other attempts by the employer to make substantial redress for the unfair dismissal such as securing employment with another employer or making an offer of payment;? Was such refusal unreasonable?
 - This is discussed below. See section 11.
- Did the _____ leading to the employee's dismissal cause the _____ and, if so, the extent of that loss
 - This is discussed below- see section 14.
- What is the e _____ financial position? The courts have held that the purpose of compensation is generally not to punish employers and an appropriate amount of compensation must be determined with reference to the situation of both the employer and the employee.
 - So, for example, the amount of compensation may be reduced if any greater amount would disproportionately prejudice the employer rather than remedy the unfair dismissal. In appropriate circumstances . This applies in particular to small businesses, and domestic workers.
- Whether compensation should be paid in _____ instead of a single lump sum. This is related to the employer's financial position.

10. Compensation when offer of reinstatement rejected

The circumstances in which an arbitrator may exercise her discretion not to award compensation are set out in the *Johnson and Johnson v CWIU* case, in which the court said:

The nature of an employee's right to compensation under section 194(1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of section 194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee.

In *Mkonto v Ford No & Others* Conradie JA set out the relevant principles as follows-

The refusal to accept the reinstatement offer impacts upon the appellant's entitlement to compensation.The guiding principle is fairness. I should therefore ask myself whether it would be fair fully to compensate an employee to whom an unconditional offer of reinstatement was

made before the effective date of her dismissal. If not, I must deny her compensation. I would think that the appellant ignored the offer at her peril. She put herself in a position where 'the employer's ability and willingness to make . . . redress is frustrated by the conduct of the employee' (*Johnson Johnson (Pty) Ltd v CWIU* at 1220D). An employee's refusal to allow an employer to remedy a procedural defect may, depending on what is fair, deprive him or her of compensation which would otherwise have been payable: *De Bruin v Sunnyside Locksmith Suppliers (Pty) Ltd* (1999) 20 ILJ 1753 (LC) at 1762B-E. The appellant's refusal to accept the reinstatement offer was grossly unreasonable.Not only did she fail to proffer any reason for having refused the offer of reinstatement, but her evidence concerning the reinstatement offer, the only factual issue in the case, was patently false. [my editing]

In *Heath* the Labour Court held that employee was dismissed, that the reason she was dismissed was because she became pregnant, and held that her dismissal was automatically unfair. The employee did not seek reinstatement but 24 months compensation. The court noted that 'Considering the fact that an automatically unfair dismissal is in actual fact arbitrary and prohibited conduct by an employer, per se, it has to carry with it a punitive element where compensation is considered'. However, the employer had offered to reinstate the employee, and this changed the Courts view. The Court, following the LAC, held that:

[74] Where an employer has committed a wrong, as the current respondent clearly has, the employer still has a right to remedy this wrong committed. This is especially the case where the employer unconditionally offers to restore the employment relationship. The fact is that an employer that appreciates and embraces the error of its ways, must be given the opportunity to restore matters to the way they were before it strayed from the right path. Where an employer thus acknowledges wrongdoing and offers fully retrospective reinstatement to a dismissed employee, this should not readily be refuted by a dismissed employee. In such a case, the duty would be on the employee to provide a plausible and reasonable motivation for not accepting the proposal of the employer. Whilst this issue naturally does not detract from the determination that the original dismissal would be unfair, it certainly would have a direct and material impact on compensation to be awarded to the employee for such unfair dismissal. Whilst each such case of course must be considered on its own merits, I venture to suggest the following considerations which would be pertinent in the court exercising its discretion as to the awarding of compensation in such instances:

74.1 The elapse of time between when the dismissal took place and the offer of reinstatement was made must be considered. The longer the delay, the more likely it would be that it can reasonably be contended that the employment relationship had eroded away. In other words, time is of the essence.

74.2 The offer should not be subject to conditions, and should be fully retrospective. In simple terms, it should constitute a proposal of the complete restoration of the status quo ante dismissal.

74.3 The offer should also contain an assurance to the employee that the employee shall not be subjected to any form of harm or prejudice for having taken issue with his or her dismissal.

74.4 Preferably, the offer should provide a date and time the employee is to return to work.

74.5 The court should ultimately decide if the offer was made bona fide, and constituted a genuine attempt to remedy the wrong committed.

In *Kemp Zondo* JP (as he then was) said:

'There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

(a) The nature of the reason for dismissal; where the reason for the dismissal is one that renders the dismissal automatically unfair such as race, colour, union membership, that reason would count more in favour of compensation being awarded than would be the case with a reason for dismissal that does not render the dismissal automatically unfair; accordingly, it would be more

difficult to interfere with the decision to award compensation in such case than otherwise would be the case.

(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even less, if it is only procedurally unfair.

(c) Insofar as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the less the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) Insofar as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

(g) Insofar as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes.'

11. When no compensation need be ordered

An arbitrator may decide not to award compensation in the following circumstances:

- When the _____ of compensation would be to reward an unreasonable party. In the *Johnson and Johnson* case the court was of the view that the union was unreasonable because it was obstinate as it had refused an earlier offer of reinstatement thereby preventing the employer from remedying a defect in form.
- When the employer's ability and willingness to make that redress is _____ the conduct of the employee:
- When the _____ that the employer deviated from the requirements of a _____ are _____.
- Where the employee has _____ to pay reasonable compensation to the employee for the unfair dismissal. However, the court in the *Scribante* case added a cautionary note against employers making an 'arbitrary offer of money' in an attempt to make redress for a procedural wrong. 'To hold otherwise would result in employers flouting the procedural requirements proposed by the law and thereafter at arbitrary dates offering compensation to make good the procedural wrong.'

12. Orders for compensation in particular situations

This section discusses compensation in the context of particular situations. In doing so it is not suggested that arbitrators must slavishly follow what is set out; rather the purpose is to provide guidelines for Practitioners.

12.1 *Delay in referral of dispute*

In *Ensign Brickford* the Labour Court held that if the delay in getting the dispute to arbitration was unreasonable, then that is a factor which should be considered in determining a just and equitable award.

12.2 *Fixed term contract dismissals*

The thorny question which arises in the context of the unfair dismissal of an employee employed on a fixed term contract is this:

Can employee who has been employed on a fixed term contract and whose dismissal has been held to be substantively unfair, be compensated in excess of the period for which his fixed term contract was concluded, or is an arbitrator obliged to limit an award of compensation to the balance of the contract?

A survey of case law

<i>Biggs v Rand Water</i>
<i>SALSTAFF & another v Swiss Port South Africa (Pty) Ltd & other</i>
<i>Solidarity obo McCabe v SA Institute for Medical Research</i>
<i>Touche de Poujol / Power Costcutters (Pty) Ltd</i>
<i>Alvillar / NUM</i>
<i>In Baba / East Cape Agricultural Project</i>
<i>M’Pela / University of Transkei</i>
Grogan

Sean's view

12.3 *Constructive dismissal*

Where the employee's conduct played a significant role in the deterioration of the employment relationship, this was held to be a just and equitable reason to reduce the amount of compensation awarded to an employee who had been constructively dismissed.

12.4 *The dismissal is only procedurally unfair*

In *Johnson and Johnson* the LAC said:

[41] The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss.

The CCMA Guidelines note that the amount of compensation where the dismissal is only procedurally fair must be just and equitable and recommend that the following factors be considered:

- the extent or severity of the procedural irregularity together with the anxiety or hurt experienced by the employee as a result of the unfairness. An employee's length of service may be relevant in determining the extent of the anxiety or hurt suffered by the employee.
- the employer's conduct prior to, and in the course of, dismissing the employee.
- Whether the procedural irregularity was minor and did not prejudice or inconvenience the employee. In such circumstance the arbitrator may award no compensation.
- whether the employee has found alternative employment or mitigated the losses caused by the dismissal in any other way. If so, these should not be considered.

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 arbitration fee.

<i>Molema & others</i>
<i>Mabunda</i>

13. What should be included or excluded from an award of compensation?

Where _____ is paid to a retrenched employee, this should not be included in the calculation of the amount of compensation where the employee's dismissal is held to be unfair.

What if the dismissed employee has been _____ by his employer – can this be taken into account? In *Penny*, the employee owed a sum of money in respect of a loan to his employer. The Labour Court summarised the law with regard to a '_____', and concluded that provided that the loan is 'liquid' meaning there is no dispute either to the amount of the loan, or that the loan is due then the amount of the loan can be set -off against the amount of compensation. If the debt is not admitted, the amount can be set off 'if it is capable of easy and speedy proof. A bank overdraft and charges and an agent's commission has been held to constitute debts which are capable of easy and speedy proof' [at 21].

The Court was also of the view that the _____ which have lapsed due to non payment by the dismissed employee, or costs related to _____ and forced sales should not be taken into account when determining the amount of compensation.

Where an employee has been dismissed for causing damage, whether intentionally or negligently the _____ and other costs associated with the damage can not be considered when assessing the amount of compensation.

Remuneration includes benefits, so the cost of these should be included in the calculation of the award.

Compensation does not include the dismissed employee's _____ to another city to take up a new employment position.

The fact that an employee was _____ for 13 months before his dismissal was not included when calculating the amount of compensation in *Lembede*.

14. Interest on an award of compensation

In *Billion Group* the LAC noted that 143(2) provides that a money order contained in an arbitration award 'earns interest from the date of the award ... unless the award provides otherwise'. Section 2(1) of the Prescribed Rate of Interest Act 55 of 1975 states:

'Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.'

Section 2A(5) provides that:

'Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.'

The LAC said 'I see no reason in this appeal as to why the terms of s 143(2) should not be applied and interest be ordered to be paid from date of the arbitration award in this matter', and ordered as follows:

The applicant is ordered to pay the first respondent an amount equal to two and a half months' compensation, calculated at the rate of R54,166.67 per month, within ten days of this order with interest calculated on such amount at the prescribed rate from the date of the arbitration award to date of final payment.³

³ This order is cited here as an example of how such orders should be framed.

15. Best practice- example of an award of compensation

In *Hutchinson*, an arbitration in which the dismissal of a probationary employee was at issue, the arbitrator's award stated:

[81] I order the respondent, National Business Initiative for Growth & Sustainable Development, to pay the applicant, John Luke Hutchinson, compensation for the unfair dismissal in the amount of R300,000 by no later than 31 May 2024.

[82] The respondent, National Business Initiative for Growth & Sustainable Development, may make such deductions from the amount of compensation as are permissible in law.

[83] The amount of compensation ordered above earns interest at the prescribed rate of interest of 11.25% per annum from the date it becomes due and payable.

A good example best practice is the award in *Bester* which shows the reasoning applied by the arbitrator after concluding that the restoration of the relationship was inappropriate as contemplated in s 193 of the LRA, the arbitrator awarded her compensation, reasoning as follows:

'The respondent submitted that the remedy of reinstatement is not appropriate. This is so. The applicant had already tendered her resignation and was serving her notice period at the time of her hearing. The applicant is currently unemployed and lives in the Western Cape. Although reinstatement is the primary remedy for unfair dismissal, s 193(2) of the LRA provides limitations of which two are applicable. Firstly, where the circumstances of the dismissal are such that a continued employment relationship would be intolerable and secondly where it is not reasonably practicable. In view of the unresolved grievances and the tendered resignation of the applicant, it is hard to understand how she can contemplate returning to the workplace. The relationship of trust was at mutual low ebb. It is neither desirable nor practicable for her to be reinstated. She is entitled to compensation. Factors taken into account are the length of service, that she is unemployed and the hostile and summary manner in which the respondent treated her. Her grievances and concerns were not attended to and no progressive disciplinary action was followed. The only record of her remuneration is her letter of appointment date 18 October 2012 and compensation is based on this as the best evidence at hand. She is awarded eight months' compensation calculated as follows: $R756,000 \div 12 = R63,000 \times 8 = R504,000$.'

16. Taxation of an award of compensation

An award of compensation is subject to tax. It is neither the arbitrator's nor the Labour Courts role to decide how much the award should be taxed, and so this should not be included in the award.

17. CCMA Guidelines

The CCMA Guidelines provide a helpful summary of what representatives and Arbitrators need to take into account when arguing for or against an award of compensation, where the employee's dismissal is held to be unfair. While these Guidelines have been discussed in some detail above, they are set out here in full for easy reference.

Awarding compensation

130. The relevant factors to be considered when awarding compensation include:

- 130.1. the nature and reason for the dismissal;
- 130.2. whether the dismissal was automatically unfair;
- 130.3. whether the dismissal was substantively or procedurally unfair, or both; and if the dismissal is only procedurally unfair, the nature and extent of the deviation from procedural requirements;
- 130.4. whether the employee was guilty or innocent of the misconduct;
- 130.5. the consequences to the parties if compensation were or were not to be awarded; and
- 130.6. any conduct of the parties that undermines the objects of the Act.

131. The amount of compensation awarded to an unfairly dismissed employee-

- 131.1. must be just and equitable taking into account all the relevant circumstances of the case, and

- 131.2. may not exceed 12 months of the employee's remuneration at the rate applicable at the time of the dismissal.
132. Arbitrators must ensure that they have sufficient evidence to properly determine the amount of compensation. If the parties do not present the necessary evidence, the arbitrator should request the parties to provide additional evidence by way of oral or documentary evidence. There are different considerations that are relevant when determining compensation for a dismissal that is substantively unfair as opposed to one that is procedurally unfair. Guidance on the exercise of the discretion to award compensation must be sought in the purposes of the LRA and its interpretive principles. The amount of compensation must be determined with regard to the circumstances of both employer and employee. An employee is not necessarily entitled to the full extent of losses suffered as a result of the unfair dismissal.
133. Compensation for an unfairly dismissed employee must be determined with regard to the extent of the employee's financial loss and the nature of the unfair dismissal. While the purpose of the compensation is generally to make good the employee's loss and not to punish the employer, a compensation award may be used to express the arbitrator's displeasure at a seriously unfair dismissal and to that extent may have a punitive element to it.

Compensation for substantively unfair dismissals

134. In determining compensation for a substantively unfair dismissal, an arbitrator should consider the following:
- 134.1. the employee's remuneration and benefits at the time of dismissal;
 - 134.2. the time that has elapsed since the dismissal;
 - 134.3. whether the employee has secured alternative employment and, if so, when and at what rate of remuneration;
 - 134.4. what steps the employee has taken to attempt to mitigate his or her losses by, for example, finding alternative employment;
 - 134.5. the patrimonial (financial) loss suffered by the employee. While this is a relevant factor in determining compensation, the absence of loss does not prevent an award of compensation;
 - 134.6. the employee's prospects of future employment. The employee's chances of finding future employment may be affected by factors such as age, experience, level of education, qualifications and the availability of suitable job opportunities;
 - 134.7. whether the employee failed to use the opportunity to state a case at a disciplinary investigation or enquiry;
 - 134.8. whether the resolution of the dispute was unreasonably delayed, and if so, whether the delay was caused by either the employer or the employee (or their representatives). A delay in referral may be taken into account even though condonation for a late referral was granted;
 - 134.9. whether the dismissal was both substantively and procedurally unfair;
 - 134.10. the extent of unfairness of the dismissal. This involves considering the extent to which the employer transgressed the requirements for a fair dismissal. For example, the amount of compensation might be increased if the employee committed no misconduct, as opposed to an employee committing some misconduct for which dismissal was not a fair sanction;
 - 134.11. payments received by the employee from the employer, other than amounts due in terms of any law, collective agreement or the contract of employment. For example, the amount of compensation may not be reduced by what the employee has received as notice pay, severance pay, or from the Unemployment Insurance Fund, but it may be reduced to take into account amounts which the employer has voluntarily paid over and above its contractual or statutory obligations;
 - 134.12. whether the employee unreasonably refused an offer of reinstatement. In general, employers should not be penalised if they have offered to reinstate an unfairly dismissed employee. However, an employee may refuse such an offer, and be entitled to appropriate compensation, if the offer is not made in good faith or if the trust relationship between the employee and the employer has broken down as a result of or following the dismissal. Similar considerations may come into play if the employee refuses a reasonable offer of re-employment in circumstances in which reinstatement is not feasible;
 - 134.13. whether the employee unreasonably refused other attempts by the employer to make substantial redress for the unfair dismissal such as securing employment with another employer or making an offer of payment;

- 134.14. whether the conduct leading to the employee's dismissal caused the employer loss and, if so, the extent of that loss;
- 134.15. the employer's financial position. The courts have held that the purpose of compensation is generally not to punish employers and an appropriate amount of compensation must be determined with reference to the situation of both the employer and the employee. So, for example, the amount of compensation may be reduced if any greater amount would disproportionately prejudice the employer rather than remedy the unfair dismissal. In appropriate circumstances Commissioners should consider ordering compensation to be paid in instalments instead of a single lump sum.
135. The onus is on the parties to produce suitable evidence of the factors relevant to compensation that support their submissions. Mere allegations are not sufficient.

Compensation for procedurally unfair dismissals

136. An arbitrator who finds that a dismissal is procedurally unfair must determine-
- 136.1. whether an award of compensation is appropriate in the light of the severity of the procedural unfairness;
- 136.2. if it⁴ is, determine an amount of compensation that is just and equitable in all the circumstances.
137. The courts have held that compensation in these circumstances is a *solatium* for the loss of the right to a fair pre-dismissal procedure. It is punitive of the employer to the extent that the employer who has breached the right must pay a penalty for doing so.
138. In order to determine the appropriate amount of compensation for a procedurally unfair dismissal, the arbitrator must take into account the extent or severity of the procedural irregularity together with the anxiety or hurt experienced by the employee as a result of the unfairness.
139. An arbitrator may find that a dismissal is procedurally unfair but award no compensation because the procedural irregularity was minor and did not prejudice or inconvenience the employee. When assessing the extent of the procedural irregularity, arbitrators may consider the employer's conduct prior to, and in the course of, dismissing the employee.
140. As the determination of compensation for procedural unfairness is not based on the employee's actual financial losses, it is not relevant whether the employee has found alternative employment or mitigated the losses caused by the dismissal in any other way. An employee's length of service may be relevant in determining the extent of the anxiety or hurt suffered by the employee.
141. An arbitrator who finds that a dismissal is procedurally unfair may charge the employer an arbitration fee. This may be done irrespective of the finding on substantive fairness.