

An Overview of Reinstatement in Retrospect

Kola O. Odeku

Faculty of Management and Law, School of Law, University of Limpopo, South Africa

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ABSTRACT An unfairly dismissed employee has the right to approach the appropriate labor court to quash and nullify the employer's verdict of dismissal. In South Africa, one of the remedies of unfair dismissal available to the employee is reinstatement. The court, having considered overall evidence and the facts of the case, may order reinstatement forthwith or retrospectively. The court has a discretionary power to exercise reinstatement in retrospect in order to perpetrate justice for the aggrieved victim of unfair labor practice. This is usually the situation where the court exercises its discretion in favour of the employee against the employer. Consequences of unfair dismissal are devastating and painful and as such, it is against the backdrop of this, that this paper looks at the remedy of reinstatement in retrospect and its impact in restoring the employee back to the job.

INTRODUCTION

When a competent tribunal or court is confronted with whether to exercise its discretion, based on the overall facts presented by the employer and employee and ordered reinstatement in retrospect, the courts of law have been inundated with cases where the employers wanted to limit the retrospectively of the application of reinstatement as a remedy for unfair dismissals while the dismissed employee will want the court to exercise the discretion in his or her favour and apply the remedy of reinstatement retrospectively.

It is pertinent to point out that as part of exercising its discretionary power, the court might award compensation instead of retrospective reinstatement in an instance where reinstating the employee is just practically impossible or the employee himself does not want to be reinstated. Section 192 of the Labor Relations Act 1995 (LRA) recognizes this sort of situation where it is reasonably impracticable to reinstate the worker because the relationship between the employer and the employee had broken down to an extent that continued employment is no longer tolerable or sustainable (Bamberger and Donahue 1999). However, where reinstatement in retrospect is ordered, if the work environment is still conducive for the unfairly dismissed em-

ployee to return and he or she is willing to go back to work (Leonard 1987), there and then, the court's order to reinstate would become easily executed. The order of reinstatement would have the effect as if the employee was never dismissed in the first place.

The literary meaning of retrospect means amongst others is the reviewing or contemplation of things in the past, or to look back and think about the past for purposes of correcting, reviewing, re-examination, and reminiscence wrong done. These meanings also find expressions in labor disputes and as such, they are relevant to restorative labor justice, where the unlawfully dismissed employee is, through labor tribunal, restored back to his or her position as if the dismissed employee was never dismissed at any particular material time during the course of the employment. Whenever the labor court finds unfair dismissal, it may order reinstatement, sometimes retrospectively.

Statement of the Problem

An aggrieved victim of wrongful and unfair dismissal will usually approach the court in order to seek redress and relevant reliefs from the court. The court has the competency to act and award appropriate remedy. The court, in exercising its judicial and discretionary powers is expected to act fairly and equitably towards all the parties. With regard to reinstatement in retrospect, the courts have been known to give conflicting judgments. To this end, the courts are therefore enjoined to uphold the labor rights and dignity of the dismissed employee, who would

Address for correspondence:
Kola O. Odeku
Faculty of Management and Law,
School of Law,
University of Limpopo, South Africa
E-mail: kooacademics@gmail.com

be allowed to reap the benefits of the success of the judgment and awards without any conditionality or limitation imposed by the courts. The approach of some courts that reinstatement in retrospect would be a financial burden on the employer who acted unfairly does not hold water at all. The employer must take responsibility for the misbehavior and the irrational decision taken to unfairly dismiss the employee.

THE MEANING OF REMEDY OF RETROSPECTIVE REINSTATEMENT IN LABOR DISPUTES

Undoubtedly, an unfairly dismissed employee would approach the court to declare the dismissal unfair and seek the courts relief and order to be reinstated back to the position as if there was no dismissal in the first place (Hillestad 1988). Reinstatement will take place in retrospect if the court finds that the dismissal was unfair, but such reinstatement will only commence from the date the employee was unfairly dismissed but not earlier (Ewing and Napier 1986). What normally brings contestation is that employer would want the remedy of reinstatement to commence on the date the relief is granted, whereas the unfairly dismissed employee will want the relief and remedy to be retrospectively backdated to the day of dismissal by the employer. It must be emphasized that although the court has discretionary power to make an award in retrospect, the discretion should be exercised in favour of the dismissed employer even if it is going to be a financial burden on the employer who decided to act recklessly by violating the labor and dignity rights of the unfairly dismissed employee. In essence, labor rights and right to dignity should be protected and the court should champion this. Therefore, the 12 and 24 months limitations that classify dismissal into two categories of dismissal and substantively unfair dismissal respectively are discriminatory and should not be the yardstick upon which the court limits its discretionary power. If the unfairly dismissed employee is successful against the employer, he should be allowed to reap the benefits of the judgment, which should commence from the date the employee was unfairly dismissed and not the date the court handed down judgment and the award.

Literature Review

South African labor laws and legislation recognize that an employer has the right to dismiss an employee on the grounds of misconduct, incapacity, and operational requirements (Bhorat and Cheadle 2009). At the same time, the concept of unfair dismissal and the remedies thereof in the LRA are also available to remedy unfair dismissals. Hence, “the consequence that an employer may discharge an employee for any cause, no cause, or even a bad cause” (Peck 1979) is not accommodated in the South African Labor laws. Any decision to dismiss must follow and align with the provisions of the existing laws regulating labor disputes (Bendix 2010), otherwise it will be classified as unfair dismissal and there are consequences for this. Remedies available to the dismissed employee(s) under the LRA are reinstatement, forced reinstatement, reemployment and compensation (Basson and Elize 1996). Therefore, the court is empowered to order remedies of reinstatement, reinstatement, forced reinstatement and compensation if it finds that an employee has been wrongfully and unfairly dismissed (LeRoux 2011). Reinstatement means that the unfairly dismissed employee is restored back to the position occupied before dismissal (LeRoux R 2008). The implications of reinstatement is that it restores the dismissed employee’s dignity and right to work (Mohamed and Ali 2014), it rectifies the wrong done by the employer, it protects the rights of the dismissed employee and amounts to upholding the right to job security.

Although there have been instances of different interpretations of reinstatement in retrospect by different adjudicating bodies, the purport and reason for reinstatement in retrospect is to reinstate the dismissed employee to the position occupied before the dismissal (Berger 2002) and all terms and conditions of service restored as if there was no dismissal at all. Therefore, the date of the dismissal becomes more relevant than the date the court judgment was delivered. As a matter of fact, a pragmatic court will order that the reinstatement should be retrospective and take effect from the date the employer unfairly dismissed the employee. Unfair dismissal should not be tolerated due to the socio-economic consequences it will have on the dismissed employee, hence the courts should exercise their judicial and discretionary powers

to restore hope to the vulnerable unfairly dismissed employees (Cassim 1984).

CONSEQUENCES AND IMPLICATIONS OF UNFAIR DISMISSAL

The employer has absolute right under the law to dismiss an employee for misconduct (Weiler 2009). However, when exercising the right to dismiss, an employer has to ensure that the procedure and processes used are in line with how labor disputes are resolved and that the laws are duly followed and complied with thoroughly and fairly (Holley et al. 2003). This would amount to a fair dismissal and the dismissed employee should be able and ready to bear the consequences arising from the wrongdoing (Finkin 2004). In the same vein, an employee also has the right under the law not to be unfairly dismissed (Summers 1976) as provided for in Section 185 of the LRA, which gives legislative backing to the constitutional right to fair labor practices and provides that "every worker has the right not to be unfairly dismissed." The court also recognizes this right and sought to protect it as demonstrated in the case of NEHAWU versus University of Cape Town and others 2003 (2) BCLR 154 (CC), where the Constitutional Court held that the right not to be unfairly dismissed is a core right protected under the right to fair labor practices.

An unfairly dismissed employee does not only automatically lose his or her job but also the source of livelihood (Maltby 1998). This will definitely negatively impact the employee's family, and affect their socio-economic responsibilities, usually being discharged by the dismissed employee to the family in various ways. The employee will have no source of livelihood and can become destitute. This might negatively impact the entire household and more importantly, the children and affect the continuation of the schooling of the children, and as such, they will be denied the right to education as a result of the dismissal of their father or mother who is the breadwinner in the family setting. Explaining the predicament of a dismissed employer, Mohamed and Ali (2014) put it this way, "*the power to dismiss workers from employment is an extremely powerful economic sanction possessed by the employer. This deprives a worker of his livelihood resulting in financial loss and if unemployment is prolonged, it may*

involve the worker and his or her family in actual deprivation of the necessities of life." Considering the harsh consequences of unfair dismissal on a dismissed employee Mohamed and Ali (2014) admonish that "*any impending dismissal must be substantively justified and procedurally fair.*" This is said against the backdrop that by the time a labor tribunal is handing down an unfair dismissal judgment, the unfairly dismissed employee, if suspended or dismissed without salary, would have faced and experienced irreparable hardships during the period of the dismissal, which might become difficult to remedy.

The right to job security and the right to work are very precious (Harvey 2005) and as such, these rights need to be protected and any attempt by an employer to violate them should be vehemently opposed through the existing legal institutions. According to Peck (1979), "*the right to work is the most precious liberty that man possesses, man has indeed as much right to work as he has to live, to free, to own property.*" Peck (1979), stating the ideal and perception of the right to work in the American context quoted Emerson's thus "*a man has a right to be employed, to be trusted, to be loved, to be revered.*" Interpreting and applying this ideal, Peck (1979) asserts, "*It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many, it will be better to work in jail than to sit idle on the curb. The great values of freedom are in the opportunities offered to man to press to new horizons, to pit his strength against the forces of nature, and match skills with fellow men.*"

Currently, South Africa is experiencing a chronic rate of unemployment (Du Toit 2005). A lot of people are unable to get jobs (Banerjee et al. 2007). Those who are working are using their salary income to cater for themselves and sometimes, unemployed members of the family (Perret and Anseeuw 2005). Assuming an employee is unfairly dismissed, will make the situation worse and exacerbate the already chronic unemployment situation and creates a circle of abject poverty (Bhorat 2009). The consequences and implications of these sorts of unreasonable unfair dismissals are elaborately explained by Stewart (1995) thus, "*we live in a society which places enormous value on the performance of paid work. Having a job is not merely important in*

offering a means of subsistence, it also helps to provide a sense of identity and self-worth, no matter how unsatisfying or stultifying the tasks involved are. For that reason, the involuntary loss of employment is one of the most painful misfortunes that can befall a citizen. The consequences can be devastating, both in financial terms and in relation to the worker's physical and mental health. The loss may be all the harder to take where what motivates the dismissal is not the employer's asserted need to shed staff for economic reasons, which can at least be attributed to the vicissitudes of life in a capitalist society, but the worker's own alleged failings in terms of competence or conduct. Where those allegations are unfounded, or the failings are not weighed against other more-compelling factors, or where indeed the dismissal is purely arbitrary in character, the worker is entitled to harbor a powerful grievance."

Therefore, protection of workers, their rights and dignity should be paramount in an unequal society like South Africa (Mubangizi 2004). The labor regulations should be strengthened in order to provide ample protection to workers (Bhorat 2009). While some judges are applauded for taking a strong stand against employers who engage in unfair dismissal practices (Corder 2004), others have been found wanting and have not been proactive in ensuring that vulnerable workers are amply protected (Stewart 1995).

CONCLUSION

Literature and judicial decisions are mostly in support of retrospective reinstatement particularly if it arises from unfair dismissal. The employee would be restored back to the position as if the employment relationship between the employee and employer was never broken. The consequences and implications of unfair dismissal are very devastating and sometimes very painful. They threaten the very existence of the unfairly dismissed employee. To this end, the judiciary, sitting in judgments on issues of unfair dismissals, should be seen to ensure justice and guarantee that the right and dignity of the aggrieved unfairly dismissed worker is restored.

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