

## Forced Reinstatement Phenomenon: Implications in Labor Relations

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**ABSTRACT** Reinstatement is one of the remedies that adjudicating tribunals will order for unfair dismissal in a workplace. Usually, it is supposed to be executed immediately once it is ordered. However, there are instances where the employer or the employee will refuse or decline to adhere to the order of the competent tribunal compelling reinstatement. There are consequences for failure to effect remedy of reinstatement, which in turn will result in forced reinstatement. Against the backdrop of refusal to carry out the order, the court can force or enforce reinstatement. In this regard, reinstatement is said to be forced. This paper seeks to examine the forced reinstatement phenomenon and its implications in the workplace for both the employees and employers.

### INTRODUCTION

In labor relations, the employer could, based on the processes, procedures and provisions of the laws governing labor disputes, dismiss or terminate the employment of an employee, but such termination must be seen to be fair in all aspects (Stewart and Flinders 1995). If the termination or dismissal is adjudged unfair by a competent adjudicating body, the court may order remedies such as reinstatement, reemployment, compensation and forced reinstatement (Okpaluba 1999). The focus of this paper is on forced reinstatement. If a court or competent tribunal has pronounced that the termination or dismissal of an employee is unfair and orders reinstatement in addition to other remedies (Odeku and Animashaun), it is incumbent on the employer to abide by the order of the court and reinstate the employee (Alvarez and Lipsky 1987).

However, the employer may prove stubborn and refuse to reinstate the employee. Sometimes, what employers can do is offer the aggrieved employee a huge compensation for the wrongful dismissal instead of reinstatement (Martucci and Boatright 1990). It is pertinent to point out that the employee and the employer are able to settle the matter if the employee accepts the offer and does not demand to be reinstated (Williamson et al. 1975). However, the employee may

decline the offer of compensation or any other remedy offered and insist that reinstatement is the option that is preferred (Finkin 2004). To this end, the employee might want to reap the benefit of reinstatement as a primary remedy of unfair dismissal duly ordered by the court (Lipsky 1989). It will therefore be unfair on the part of the employer to offer or substitute the primary remedy with a mere monetary compensation while the employee remains unemployed. This will hinder the career progress of the employee (Peritt 1989). Hence, by insisting on, and extending an offer of compensation as opposed to reinstatement, the employer effectively limits the remedy available to the employee in redressing the wrong done (Sherman 1981). An employee has the right to seek reinstatement and insist on keeping his job permanently (Pollert 2005). At times, the employer would offer compensation but not in good faith. The offer is made just to ensure that the employee is gotten rid of and dismissed. This is a desperate means of getting rid of the employee irrespective of the court order to reinstate (Fishman 2000). This would be tantamount to acting mala fide by the employer and this is regarded as an outright disregard for the rule of law and it is condemned in the strongest terms. Furthermore, the employer insisting on compensation as a replacement to reinstatement is determined to dismiss the employee by all means, at all costs (Collins 1993). This paper seeks to illustrate and describe how reinstatement can be enforced against an adamant and belligerent employer who refuses to heed or comply with the appropriate order of reinstatement issued by a competent labor court and tribunal.

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## Literature Review

An order for reinstatement can only be issued by a competent labor court or tribunal (Le Roux 1987). If the employer heeds the order by complying to reinstate the unfairly dismissed employee, then the whole matter is settled. However, if the employer is adamant and becomes permanently belligerent to the extent of not heeding the court or tribunal's judgment against dismissal and order for reinstatement thereto, the court will not sit back and watch its judgment being recklessly violated and disobeyed. Therefore, the court can order in addition to reinstatement, forced reinstatement as provided for in section 193(2)(d) of the Labor Relations Act 1995 (LRA). As part of effective remedies for employment rights, "lawyers and scholars have become increasingly aware during the last dozen of a broad, long-term trend toward legal protection of the individual employee in the employment relation" (Summers 1992). This awareness was triggered as part of the strategic interventions and measures coupled with robust labor laws reform, which outlines in democratic contents, the labor law relations in South Africa. These have culminated into right-based labor laws that now regulate the employment relations (Arthurs 2008). This is the worldwide general trend in employment relations. South Africa has various laws and policies regulating this relationship. Confirming this, Martucci et al. (1990) observed, *"the trend in employment law across the country is clearly toward the expansion of rights of employees and creation of remedies for violation of those rights. Courts and legislatures are providing increased legal protection for employees from arbitrary and unfair labor practices, especially in the areas of wrongful discharge and discrimination. Management representatives, as well as the attorneys who represent management interest need to be aware of these trends and should conduct their business practices accordingly."*

Sometimes, unfair discharge or dismissal is usually perpetrated by the managers of the company without the support or knowledge of the owners of the company (McCall 2003). However, the position in law is clear, the owner is liable for the acts of the managers and representatives (Campbell 2007). Since the owner takes benefit in terms of the brilliant performance of the managers, which sometimes results in profitable outcomes, the management would also accept liability for any wrongdoing or misdeed of the man-

agers should they be found wanting and reckless in the performance of their job (Falck and Hebllich 2007). Benefits and responsibilities are two important elements guiding the relationships between the management and the owners (Matten and Moon 2008). This is simply known in the legal parlance as the fiduciary relationship (MacNeil 2009). Fiduciary is generally and loosely described as *"where one person places complete confidence in another in regards to a particular transaction or one's general affairs or business. The relationship is not necessarily formally or legally established as in a declaration of trust, but can be one of moral or personal responsibility, due to the superior knowledge and training of the fiduciary as compared to the one whose affairs the fiduciary is handling"* (Farlex 2015). It could also be illustrated as *"an individual or organization legally responsible for managing assets on behalf of someone else, usually called the beneficiary. The assets must be managed in the best interests of the beneficiary, not for the personal gain of the fiduciary"* (Farlex 2015). It goes on further to say, *"a person who enjoys a relationship of trust or confidence with respect to another such that the law will impose greater than normal responsibilities on the fiduciary for honesty, integrity, candor, and scrupulous good faith even if it means sacrificing the interests of the fiduciary"* (Farlex 2015).

This principle is well entrenched and is applicable to companies, their managers and owners. This point is well elucidated in order to show that the management representatives may act unreasonably for reasons best known to them and wrongfully and unfairly discharge or dismiss an employee (Mordsley and Wall 1983). In a situation like this, the action of the manager is, under the law, considered as the action of the company and the owner. They are therefore, jointly and severally liable. Therefore, the employee insisting on reinstatement at all cost for the wrong done can re-approach the court to compel the employer to reinstate and if this is done, it means the employee has been forcefully reinstated (Finkin 2005).

### THE LRA SUPPORT FOR FORCED REINSTATEMENT

Section 193 of the LRA explicitly and amply provides for remedies for unfair dismissal by stating that,

1. *“If the Labor 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 reemploy 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.*
2. *The Labor Court or the arbitrator must require the employer to reinstate or reemploy the employee unless,*
  - a. *The employee does not wish to be reinstated or reemployed,*
  - 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 reemploy the employee, or*
  - d. *The dismissal is unfair only because the employer did not follow a fair procedure.*
3. *If a dismissal is automatically unfair or, if a dismissal based on the employer’s operational requirements is found to be unfair, the Labor Court in addition, may make any other order that it considers appropriate in the circumstances.*
4. *An arbitrator appointed in terms of this Act may determine any unfair labor practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, reemployment or compensation.”*

With regard to forced reinstatement, Section 193(2)(d) supports reinstatement forthwith if *“a dismissal is automatically unfair or, if a dismissal based on the employer’s operational requirements is found to be unfair, the Labor Court in addition, may make any other order that it considers appropriate in the circumstances.”* In this instance, the court may compel forced reinstatement, as part of an additional order can be considered appropriate in the circumstances, especially if the dismissal is in content and the context automatically unfair.

### **REASONS FOR FORCED REINSTATEMENT**

Forced reinstatements are usually imposed to protect, safeguard and restore the rights and dignity of the employee by restoring him to the status quo (van Niekerk 2004). Against the backdrop of this, Stewart aptly points out, *“We live in a society which places enormous value on the performance of paid work. Having a job is not merely important as 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 these reasons, the involuntary loss of employment is one of the most painful misfortunes that can befall a person. 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 motivated the dismissal is not the employer’s 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.”*

Undoubtedly, apart from the psychological and legal consequences of unfair dismissal, it also has a lot of socioeconomic implications (Jahoda 1982). If dismissal is fair, the employee knows that it is as a result of his/her misconduct and hence, the law and procedure must apply (Harcourt et al. 2012). Still, the employee should be given a fair hearing (Kim and Mauborgne 1997). If the employee is dismissed based on due processes and fair hearing, the dismissal is justifiable (Bellace 1982) but still, the employee has the right of appeal even to the highest court (Okpaluba 2012). An employee takes responsibility for his or her deeds and as such appropriate sanctions will be imposed for misconduct, which may result in outright dismissal from the workplace (Berkowitz et al. 2008). This will serve as a warning and deter other employees and prospective employees that will deliberately exhibit misconducts in whatever forms against the policy of the organization and the laws regulating labor relations. However, if the dismissal is au-

tomatically unfair and the court has pronounced reinstatement and the employee elects to return to the job as opposed to any compensation or incentives (Petersen 2004), the wish of the employee must be respected and he/she should be allowed to go back to work (Aye 2012). However, if the employer refuses to reinstate the employee as ordered, this refusal in itself is an affront to the judgment and order of the competent tribunal and as such, will amount to contempt of the court (Teeter 1994).

#### THE ISSUE OF IMPRACTICABILITY OF REINSTATEMENT

If the employer realizes that an error of judgment had been made by wrongfully and unfairly dismissing an employee (MacLeod and Nakavachara 2007), and afterwards promptly reaches out to the employee to try and reconcile the matter so that it could be resolved and the employee gets reinstated without any condition or further ado, it is the prerogative of the wrongfully dismissed employee to accept reinstatement or not. Although, various courts have expressed the sentiment that the employee should accept the offer of reinstatement so as not to lose any other remedies such as compensation should the employee decline reinstatement. This was the position of the court in the case of *Rawlins versus Dr DC Kemp t/a Centralmed483/09* [2010] ZASCA 102 (7 September 2010) that if the employee does not furnish reasonable grounds for refusing such an offer, he/she may find himself/herself completely without a remedy. The court reiterates the need for the litigants to approach the courts with reasonable and justiciable grounds to sustain their prayers or to convince the courts.

The position of the court on this is tantamount to bullying of the vulnerable employee. It would have been expected that the court allow the employee to exercise his right to be reinstated or not. Forcing reinstatement down the throat of the employee will amount to violation of the right to fair labor practice (Compa and Vogt 2000). After all, an employee may elect to resign his appointment. There is no law that says such resignation should not sustain. Insisting that the employee accepts reinstatement by all costs will amount in this instance to an involuntary forced reinstatement (Mordsley 1987).

A situation where reinstatement is practically impossible is provided for in section 193(2) and reads “*the Labor Court or the Arbitrator must require the employer to reinstate or reemploy the employee unless,*

- 1) *The employee does not wish to be reemployed or reinstated,*
- 2) *The circumstances surrounding the dismissal are such that continued employment relationship would be intolerable,*
- 3) *It is not reasonably practical for the employer to reinstate or reemploy the employee,*
- 4) *The dismissal is unfair only because the employer did not follow fair procedure.”*

This situation calls for careful evaluation and analysis of the position of the employee and the employers. The employee must be provided with ample and genuine reasons why reinstatement will not be feasible even if it is apparent that there was unfair dismissal (Dickens et al. 1981). At this stage, it must be explained to the employee that while it is within his/her rights to be reinstated, it might not be the best action to take as it might impact the good relations of the employer and employee which will result in a negatively conducive work environment for both parties involved. This dialogue may lead to an understanding and thereafter an acceptance of the offer not to be reinstated. At the same time, during the dialogue and after advancing a compelling argument in the circumstance that the court may not order reinstatement if it is practically impossible, the court will then consider compensation as an alternative remedy and offer same to the employee with cogent reasons on why the second option, that is, compensation should be accepted and the idea of reinstatement abandoned.

More importantly, it is imperative that all factors should be considered before the order is made. First and foremost, the wishes of the employee should be respected. If the employee elects not to be reinstated, he or she should not be forced to be reinstated, otherwise it will be unfair to him or her. Undoubtedly, as earlier exemplified, the laws regulating labor relations seek to protect the employee and therefore his wishes must be respected and taken into consideration before any conclusion is reached (Weiler 2009). Although, some scholars have argued that if the employee unreasonably refuses to be reinstated, he or she may as well be refused com-



pensation and that if the employee who is reinstated retrospectively fails to report, he will also lose back pay because reinstatement is the primary remedy and back pay secondary, unless his failure is due to reasons beyond his control. This, however, seems to be a narrow argument because of the insensitivity of those scholars to the plights of vulnerable wrongly dismissed employees. Choice is the main factor here. The reasonableness or unreasonableness is therefore insignificant. It is the right and choice of the employee that matters. By forcing reinstatement in this instance, as earlier said, it will amount to bullying, coercion, enslaving and blatant violation of labor rights and other related rights.

Therefore, it is pertinent to point out that where the continuation of the employment relationship has become intolerable, reinstatement must not be granted (Blades 1967). It is the duty of the court to decide if the circumstances warrant a continued employment relationship intolerable, and this cannot be deduced from the employer's judgment alone (Smit 2011). The wish of the employee is also vital and should not be discarded. The employee should be allowed to accept any offer made without any cohesion, threats or undue influence.

### CONCLUSION

The employer has the right to dismiss an employee for misconduct, but due process and the rule of law must be strictly adhered to. An aggrieved employee also has unlimited rights to challenge the dismissal in a competent court that has the right to overturn the dismissal and order a reinstatement. If the court finds in favor of the employee, the court, based on the relief sought by the employee, could order reinstatement. It is incumbent on the employer to obey the court's judgment and reinstate the dismissed employee. However, the employer may refuse to reinstate the employee. At this stage, the court will not tolerate non-compliance with the judgment and orders therein. The court has the power to order forced reinstatement by insisting that the dismissed employee who was refused reinstatement should be forcefully reinstated since the employer is disobeying the order of the court to reinstate.

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