

Revisiting the Remedies of Unfair Dismissal at the Workplace

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ABSTRACT Dismissal would be considered unfair if the adjudicating institution finds that the dismissal was harsh, unjust or unreasonable and unjustifiable. An unfairly dismissed employee has statutory rights to challenge the dismissal in order to reverse the decision or to be compensated. This paper revisits statutory remedies available to an unfairly dismissed employee by examining factors that influence the adjudicating authority to exercise discretion in favour of a particular remedy when it finds that a dismissal has been unfair. The paper concludes that a verdict of unfair dismissal is a 'condition precedent' for ordering a remedy in terms of section 193 of the South African Labor Relations Act 66 of 1995, as amended.

INTRODUCTION

An employee who has been unfairly dismissed is protected by the law in South Africa (Grobler 2005). It is against the backdrop of this protection that section 193 of the Labor Relations Act (LRA 995) provides remedies for unfair dismissal as follows, "(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 order the employer to reinstate the employee from any date not earlier than the date of dismissal; 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; or order the employer to pay compensation to the employee.* (2) *The Labor 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; it is not reasonably practicable for the employer to reinstate or re-employ the employee; or 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.*"

In most cases, if the adjudicating institution finds in favour of an employee, reinstatement is ordered (Estreicher 1985), except if the institution finds that it might not be practically implementable or enforceable, then other remedies may be ordered (Slinn 2008).

Unfair dismissal is usually devastating and has a grievous impact on the dismissed employee (Porter 2007). It can lead to various psychological problems such as stress, depression, lack of confidence and so on (Diaz 2010). At times, this might have negative impact on the dismissed employee's family (Baron 2000). It might also distort the employee's socio-economic responsibilities and this can cause depression, violence and sometimes, deviant behavior, especially if the dismissed employee is unable to provide for his family and perform his duty as the head of the family (Krippner et al. 2012). England (1978) indicates, "disputes over terminations of employment are, like strikes, endemic to the system. There is an inherent conflict between the interest of the employer, which is essentially to promote efficiency and that of the worker, which is essentially to guarantee his security." England (1978) further asserts, "For the employer the cornerstone of the employment contract on our system of economic organization is his right to discharge. That right is necessary to reinforce the right of command, legitimated in capitalist ideology as an attribute of private own-

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ership, to protect production against disruptive conduct, and to organize operations so as to extract the maximum profit. Further, labor mobility and an available pool of labor are corollaries of the right to discharge. For the employee, dismissal is the capital punishment of industry."

Narrating the impacts and consequences of dismissal of an employee (Autor 2003), England (1978) points out that "*he and his family face the possibility of a long period of economic hardship the more so in a tight labor market, and grave social and psychological upheavals, particularly if he has to uproot his family to a new area in search of work. It is submitted that, in the interests of the employer, the worker, and the public interest, certain minimum standards of fairness should be imposed by statute on the employer's right to dismiss.*"

Considering the devastating impacts and consequences of unfair dismissal on an employee, it is important to continue the ongoing debate on the most effective way of protecting, restoring the right and dignity of an unfairly dismissed employee (Langer 2011). It is important to point out that an employer should be made to pay dearly for any irrational decision taken that led to an employee's unfair dismissal (De Becker 2010) hence, appropriate sanctions and remedies should be applied by the adjudication body in order to serve as deterrent to other employers.

Objectives

The objective of this paper is to show that employers have no right to treat their employees with ignominy by hiring and firing with impunity (Moss 2007). The paper reveals that employees have substantial protection mechanisms under the law and upon any finding of unfair dismissal the court will impose appropriate sanctions against the erring employer (Verkerke 1998).

METHODOLOGY

Desktop qualitative research method was used in writing this paper. Literature and case laws relating and pertaining to the topic combined with statutory instruments were consulted and used for purposes of analysis and discussion of various protective remedies available to an employee who has been unfairly dismissed by the employer (Steiber and Murray 1982).

REMEDIES FOR UNFAIR DISMISSAL

Reinstatement or Re-employment

The attitude of the labor tribunal or court is that, "if it finds that an employee has been unfairly dismissed, the employee may be reinstated from a date not earlier than the date of dismissal" (Allard 2005), or the court may order the employer "to re-employ the employee back to the position occupied at the time of his or her dismissal or in any other reasonably suitable work on any terms and from any date not earlier than the date of dismissal" (Kanamugire and Chimuka 2014).

It is pertinent to point out that the LRA does not explain the difference between reinstatement and re-employment (Bhorat and Cheadle 2009). However, "reinstatement, in its ordinary meaning suggests that the period of service between dismissal and resumption of service is deemed unbroken re-employment means that the employment contract ended at the date of dismissal and resumed on the date of re-employment" (Tembo 2013). It has been observed, "in practice and in the vast majority of cases, unfairly dismissed employees who returned to work are granted reinstatement" (de Ruyter and Waring 2004). Re-employment "is usually offered as an alternative to dismissal to cater for forms of dismissal in which the employment relationship had terminated before the dismissal that is, where the employee was the victim of selective non-re-employment or where the employer refused to renew a seasonal contract" (Voll 2005).

The term 'reinstatement' also suggests, "an order that may not be conditional or coupled with any qualification, other than something less than full retrospectively. Although the LRA does not empower arbitrators to impose a penalty on dismissed employees, in practice, commissioners frequently reinstate employees on warning" as indicated in the case of County Fair versus CCMA and Others (1998) 19 ILJ 815 (LC). However, "it is arguable that an employee may not be 'reinstated' to a post inferior to that in which the employee was employed at the time of dismissal" (Dickens et al. 1981), because this would not amount to reinstatement, but to re-employment. This proposition is supported by the LRA and provides in section 193(1)(b) that, even in the case of an order of re-employment, dismissed

employees must be placed either in the position in which they were employed before their dismissal, or in other 'reasonably suitable' work. The LRA gives no guidance on what is meant by 'reasonably suitable' work.

Section 193(2) categorically indicates that reinstatement is the preferred remedy for unfairly dismissed employees, and that compensation should be granted instead only when one or more of the exceptions mentioned in paragraphs (a) to (d) apply. When these apply, reinstatement cannot be ordered as decided in the case of *Mzeku and Others versus Volkswagen SA (Pty) Ltd and Others* (2001) 2 ILJ 1575 (LAC). When determining whether the exceptions apply, the commissioner must do so on the basis of evidence, not mere speculations as articulated in the case of *Nomonde versus Mudau NO and Others* (Labor Court case no. JR1244/2005 dated 26 March 2008, unreported). The court also observed that in deciding to award compensation, the arbitrator had merely stated that he had formed the impression after 'listening' to the parties that the continuation of the employment relationship would be intolerable and that it would not be reasonably practicable for the employer to reinstate the applicant. The matter was remitted back to the Commission for Conciliation, Mediation and Arbitration (CCMA) to enable another commissioner to reconsider the appropriate relief.

The issue that needs to be scrutinized is whether an order of reinstatement or re-employment can be made together with compensation over and above the retrospective part of the order depends upon whether a literal meaning is given to the word 'or' between section 193(1)(b) and (c). If that word is read in its disjunctive sense, an order of retrospective reinstatement, whether complete or partial, excludes an order of compensation (Ndobela 2012). It is difficult to imagine cases wherein an employee would deserve both, full retrospective reinstatement and compensation (Dean 2004).

It has been observed, "if an order of reinstatement is granted, the reinstatement may be made retrospective from a date not earlier than the date of dismissal" (Okpaluba 1999). The implication of this is that judges and arbitrators need to practice discretion to reinstate employees from any date between the day the judgment or award is issued and the date of dismissal.

The Labor Appeal Court initially splits on the question of whether reinstatement can be made fully retrospective where the result is that the employee receives back pay in excess of the limits provided for in Section 194, that is more than the equivalent of 24 months' remuneration in the case of automatically unfair dismissals, or 12 months' remuneration in the case of other dismissals. The Supreme Court of Appeal and the Constitutional Court have now decided that there is no limit on the length of time a reinstatement order may be made retrospective as decided in the case of *Republican Press (Pty) Ltd versus Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2007) 28 ILJ 2503 (SCA). The position now is therefore that "a court may, in principle, grant reinstatement to a date more than 12 months preceding the date of the order, but the judge or arbitrator must carefully consider the effects of the delay before doing so."

Although the legislature gives no guidance on how far a reinstatement should be backdated, factors such as the employer's operational requirements as noted in the case of *Republican Press (Pty) Ltd versus Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2007) 28 ILJ 2503 (SCA) the employee's earning since the dismissal, or tardiness in pursuing the application, or the fact that the employee would in any event have been unable to work, like in the case of *Trident Steel (Pty) Ltd v CCMA and Others* (2005) 26 ILJ 1519 (LC) where the court refused to make a reinstatement order retrospective for the period in which the employee was in police custody after his dismissal. But unless there are reasons for not doing so, an order of reinstatement should be fully retrospective, subject to the limitation set by the court in the case of *Republican Press (Pty) Ltd versus Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2007) 28 ILJ 2503 (SCA), if applicable.

Section 193(2) obliges courts and arbitrators "to order reinstatement or re-employment of unfairly dismissed employees, unless the dismissed employee does not wish to return to the employer, or where the commissioner or the judge is satisfied that the resumption of the employment relationship would be 'intolerable' or impracticable." Orders of "reinstatement or re-employment may not be made where the dismissal was only procedurally unfair" as observed

by the labor court in the case of *Malelane Toyota versus CCMA and Others* (1999) 4 LLD 242 (LC), where the court held that reinstatement should never be considered where the dismissal was merely procedurally unfair and the employee was guilty of an offence involving dishonesty. In such cases, in terms of Section 140(2) of the LRA, the CCMA may charge the employer an arbitration fee.

Scholarly literature has established that “practical problems that can be experienced by an employer as a result of an order of reinstatement or re-employment are not generally relevant to the question of whether it should be granted” (MacMillan 1999), “especially where the employer has created these problems by employing new staff after the dismissal” (Grogan 2009). It is noteworthy to point out that “the closure of the business or genuine economic reason for the dismissal may, however indicate that re-instatement of re-employment is not ‘reasonably practicable’” (Mordsley 1987). For example, in the case of *Ellias versus Germiston Uitgewers (Pty) Ltd t/a Evalulab* (1998) 19 ILJ 314 (LC), the court declined to reinstate dismissed employees because the employer had closed down and no longer had any staff. In the case of *Republican Press (Pty) Ltd versus Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2007) 28 ILJ 2503 (SCA), the Supreme Court of Appeal accepted that “it would not be reasonably practical for the employer to reinstate retrenched employees some five years after their dismissal. The court pointed out that had the order been made shortly after the retrenchment, the employer could have revisited the selection process. As it was, the employer had engaged in several retrenchments since the dismissal of the respondent employees, and the unfair selection could no longer be undone by choosing other employees.” The Labor Appeal Court adopted the same view in the case of *Maephe versus CCMA and Another* (2008) 29 ILJ 2189 (LAC) in which a “CCMA commissioner reinstated another commissioner who had been dismissed for alleged sexual harassment. The court noted that the arbitrating commissioner had found that his former colleague had lied under oath at his disciplinary hearing and during arbitration proceedings, but had failed to take this into account before ordering reinstatement. The court held that, given the fact that the commissioners are themselves

obliged to administer the oath, the dismissed commissioner had demonstrated that he was not fit to occupy the position of commissioner. The reinstatement order was set aside and replaced by an award of compensation.”

It should be noted that “an order of reinstatement or re-employment does not operate in perpetuity” (Martin 1970), in the sense that it “precludes the employer from later transferring or altering the working arrangement of the employee in accordance with its contractual rights” in the case of *Jeremiah versus National Sorghum Breweries* (1999) 20 ILJ 1055 (LC) the employee complained that “the employer had breached the terms of the reinstatement order by proposing to transfer him to another area of its operation and giving him a different vehicle. The court observed that an order of reinstatement does not deprive the employer of its pre-existing rights to re-deploy the employee or amend his working conditions in accordance with the original contract.”

In the case of automatic unfair dismissals and unfair retrenchments, the Labor Court is permitted to ‘make any other order that it considers appropriate in the circumstances (Bhorat and Van der Westhuizen 2009). This suggests that the ancillary orders are not permissible in respect of other forms of dismissals. An example of another kind of order is an interdict to stop a discriminatory practice that led to dismissal. This suggests that any order made in terms of Section 193(3) must be additional to, not a substitute for, such orders as may be made under subsection (1).

Compensation

It is pertinent to point out, “apart from reinstatement or re-employment, the only other competent relief that may be granted to unfairly dismissed employees is compensation” (Perritt 1989). Further more, “under the 1956 LRA, the Industrial Court had an unfettered discretion in regard to the amount of compensation it could grant to unfairly dismissed employees. In an attempt to limit discretion of arbitrators and judges under the current LRA, the legislator decided to introduce a formula for quantifying compensation to employees whose dismissals were only procedurally unfair. They were entitled to the wages they would have earned between the date of dismissal and the date of the award, or to

nothing at all according to the original Section 194. The original Section 194 was amended.”

The current Section 194 eliminates the distinction drawn by its predecessor between compensation for procedurally and substantively unfair dismissal, but preserves the ceiling of 12 months’ compensation for automatically unfair dismissals. The amended Section 194(1) reads: *“the compensation awarded to the 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.”*

It is apparent that the Legislature heeded judiciary criticism of the old Section 194. The minimum of which the courts complained has been removed. This means that whether the dismissal at issue was procedurally or substantively unfair, the courts and arbitrators have complete discretion to award compensation of any amount, subject only to the 12 months’ ceiling. They have the same wide discretion in the case of automatically unfair dismissals except that the maximum remuneration period is double that of other dismissals.

The higher compensation “for automatically unfair dismissal indicates that the legislature intends to arm the courts with power to order punitive damages in such cases.” It was held in the case of CEPWAWU and Another versus Glass and Aluminum 2000 CC (2002) 23 ILJ 695 (LAC) that “the amount of compensation awarded for an automatically unfair dismissal must reflect the fact that, only in exceptional circumstances, the employee would be entitled to fully retrospective reinstatement, not only to ensure that the employee lost nothing as a result of the dismissal, but also ‘to penalize the employer for dismissing the employee for a prohibited reason.’ Where reinstatement is not requested, compensation should be calculated accordingly.”

The restoration of the discretion to determine compensation according to ‘justice and equity’ revives the principles adopted by the courts under the 1956 Act or contractual. Those

courts generally regarded claims for unfair dismissals as akin to claim for delictual damages, and held that the object of compensation was to recompense unfairly dismissed employees for the actual losses occasioned by their dismissals (Estreicher and Hirsch 2013); the case of Alert Employment Personnel (Pty) Ltd versus Leech (1993) 14 ILJ 655 (LAC) affirmed this. The factors taken into account in assessing the quantum of compensation were set out as follows in the case of Ferodo (Pty) Ltd versus De Ruiter (1993) 14 ILJ 974 (LAC): *“there must be evidence before the court of actual financial loss suffered by the person claiming compensation. There must be a proof that the loss was caused by unfair labor practice. The loss must be foreseeable, that is not too remote or speculative. The award must endeavor to place the applicant in monetary terms in the position in which he would have been had the unfair labor practice not been committed. In making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party. There is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment. Any benefit which the applicant receives, for example, by way of severance package, must be taken into account.”*

Notwithstanding these guidelines, the fact that the Act requires compensation to be ‘just and equitable’ confers on judges and arbitrators wide discretion when quantifying compensation. Ideally, the court and arbitrators should give reasons for the amount decided upon, but it has been held in the case of ABSA brokers (Pty) Ltd versus Mohoana NO and Others (2005) 26 ILJ 1652 (LAC) that the failure of the arbitrator to do so is not reviewable in itself, provided that the amount awarded is not startling in itself. The court found ‘startling’ an award of six months’ wages for procedural unfairness as observed in the case of Transnet Ltd versus CCMA and Others (2008) 28 ILJ 1289 (LAC). The employee in that case had savagely assaulted his wife at the workplace. Courts are also disinclined to award significant compensation in the case of procedurally unfair dismissals; especially where the degree of departure by the employer of the principles of a fair hearing is only slight as demonstrated in the case of Brolaz Projects (Pty) Ltd versus CCMA and Others (2008) 29 ILJ 2241 (LC).

If an employee on a fixed term contract is permanently dismissed, compensation should not exceed the amount the employee would have earned during the outstanding period of the contract as indicated in the case of Nkopane and Others versus Independent Electoral Commission (2007) 28 ILJ 670 (LC).

Section 195 of the LRA now expressly provides that the calculation of compensation shall not be affected by any other amount (such as pension benefits or severance pay and so on) to which the employee is entitled by law, collective agreement or contract. This position has been confirmed in the case of National Union of Mineworkers and Others versus Majuba Colliery (Pty) Ltd (1996) 17 ILJ 379 (LAC), where the court held that retrenched employees' entitlement to severance benefits does not entitle them to compensation for loss of long-term employment or to a further share in the distribution of company assets to which they have no contractual claim.

However, the Labor Court has held that where an employee succeeds in a claim for an automatically unfair dismissal and a claim for damages for sexual harassment under the EEA, compensation granted for the former may be taken into account when quantifying damages for the latter as observed in the case of Christian versus Collier Properties (2005) 26 ILJ 234 (LC).

Compensation awarded by arbitrators or the Labor Court will generally include any tax owing on that amount, if any. The Labor Court has held that the tax that may be deducted from the amount awarded in compensation need not be stated in the order; it is the responsibility of the employer and/or the dismissed employee to obtain a tax directive from the South African Revenue Services as pointed out in the case of Penny versus 600 SA Holdings (Pty) Ltd (2003) 24 ILJ 967 (LC).

In the case of retrenchments, severance pay at least equivalent to a week's remuneration for each completed year of service must be paid (Diwan 1994). This is not to be taken into account in the assessment of compensation for an unfair retrenchment. Since compensation under LRA is likened to an award for personal injury, it may be claimed by an insolvent employee as observed in the case of Viljoen versus Nketoana Local Municipality (2003) 24 ILJ 437 (LC).

An arbitrator has held that, since the amount of compensation is entirely discretionary, an employee whose fixed-term contract was prematurely and unfairly terminated is not necessarily entitled only to the amount he would have earned had the contract ran its course as ob-

served in the case of Victor and Another versus Picardi Rebel (2005) 26 ILJ 2469 (LC). Section 50(1)(e) of the Employment Equity Act (1998) empowers the Labor Court to grant punitive damages to any employee who is the victim of a dismissal involving unfair discrimination.

Court's Discretionary Power to Make Other Orders

Section 193 (3) provides, "*if a dismissal is automatically unfair or if a dismissal is based on 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 the case of a dismissal that constitutes an act of discrimination (Summers 1976), the court "may issue an interdict ordering the employer to halt the discriminatory practice in addition to one of the other remedies provided for in the Act." In the case of Whall versus BrandAdd Marketing (Pty) Ltd (1999) 20 ILJ, 12314 (LC), the Labor Court held that this section was intended to confer power to make orders ancillary to reinstatements, re-employment or compensation as noted in the case of Whall versus BrandAdd Marketing (Pty) Ltd (1999) 20 ILJ 1314 (LC).

IMPLICATIONS OF FINDINGS OF UNFAIR DISMISSAL

A finding that a dismissal is unfair, as it was held in the case of De Beers Consolidated Mines Ltd versus CCMA and Others (2000) 9 BLLR 995 (LAC) at 1007), is a "condition precedent" for ordering a remedy. In this matter the court interpreted Section 193 of the LRA thus, "*the onus is on the employer to prove the facts upon which it relies for the dismissal. If the facts upon which the employer relies are not proven at the end of the arbitration proceedings, then cadit quaestio, the employer has failed to prove the fairness of the dismissal. On the other hand, if the employer does prove the facts upon which it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair and only if the arbitrator is so satisfied may he or she order reinstatement. The arbitrator is not at large to substitute what he or she considers to be a fair sanction in the circumstances. This intention of the legislature is plain*

from a reading of Section 193 as a whole. Moreover, an opinion that finds a particular decision unfair or not is, qualitatively, different from one concerned with whether it is fair or not. One hardly need be a master of language to understand that to find that something is not unfair is not the same as finding it is fair.”

In the case of Toyota SA Motors (Pty) Ltd versus Radebe (2000) 3 BLLR 243 (LAC), however, the court found that a commissioner ought to ‘independently consider what sanction he or she would have imposed in the circumstances, as part and parcel of the inquiry into whether the dismissal was fair.’ The Constitutional Court has now resolved the issue in the case of Sidumo and Another versus Rustenburg Platinum Mines Ltd and Others (2007) 12 BLLR 1097 (CC), where it was held that “while the decision to dismiss belongs to the employer, the determination of its fairness does not. In determining the fairness of a dismissal and the sanction imposed, a Commissioner is not required to defer to the decision of the employer, but must consider all relevant circumstances in reaching an objective determination of fairness” as observed in the case of Fidelity Cash Management Services versus CCMA and Others (2008) 3 BLLR 197 (LAC).

CONCLUSION

Section 193(1)(a) of the LRA provides that: “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 order the employer to reinstate the employee from any date not earlier than the date of dismissal; or 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; or order the employer to pay compensation to the employee.”

Clearly, a finding by the arbitrator or the judge that a dismissal is unfair is a condition precedent for ordering a remedy in terms of Section 193 of the LRA. For instance, “a finding by the arbitrator that a dismissal is unfair is a condition precedent for ordering reinstatement. Put differently, this means that unless the arbitrator can make a positive conclusion that a dismissal was unfair, he or she does not have the power to order reinstatement.”

RECOMMENDATIONS

It seems that the way employers make decisions particularly by unfairly dismissing their employees will not stop any time soon. While it is important for the employees to make sure that they abide by the contract of employment and policy by making contributions to the companies they work for, the employers have no right under the law, to dismiss them unfairly with impunity. Employees are therefore enjoined to know their rights and if there is any ill treatment or unfair dismissal, they should take immediate steps to approach the appropriate institution for redress. The courts in South Africa are trying their best by meticulously applying the employment laws that protect the rights of the employees against unfair dismissals. However, they need to do more in view of the protracted and undue delays associated with adjudicating labor disputes in courts. In most cases, employees have been seen to abandon cases due to inordinate delays by the judicial system, thereby denying them remedies they deserved.

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