AN ANALYSIS OF REINSTATEMENT AS A REMEDY TO UNFAIR DISMISSAL

BY

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DECLARATION

I declare that this thesis hereby submitted to the University of Limpopo for the Masters degree in Labour law has not been previously submitted by me for a degree at any other University.

I further declare that this thesis is a product of my own work , and that all the materials used have been acknowledged.

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DEDICATION

This study is dedicated to my family, they are Moniccah Maletjane (my wife), our children Mokopu Virginia, Mpotle Solomon, Mangalime Lizzy and Tlodupyane Raesetsa Matlou for their love and support.

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ABSTRACT

Reinstatement is one of the remedies for unfair dismissals. Dismissed employees have a recourse to approach the Commission for Conciliation, Mediation and Arbitration[1] or labour courts to seek reinstatement. The arbitrator or the courts have a discretion to order reinstatement based on the facts of the case, sometimes retrospectively. Retrospectivity is a discretionary matter in the hands of the courts and therefore the courts of law have been inundated with cases where the employers wanted to limit the retrospectivity of the application of reinstatement as a remedy for unfair dismissals. On the other hand, the dismissed employees would want the court to extend the application. In other circumstances the court would award compensation instead of retrospective reinstatement like where reinstating the employee is just practically impossible or the employee himself does not want to be reinstated.

The Labour Relations Act[2] has limited the power or discretion of the employers to dismiss employees at will. Section 185 of the LRA provides that there should be fair and valid reason for dismissals. The employer would have to prove the reason for dismissal for it to be valid. On the other hand, the case law also has established that where there is unfair dismissal, the arbitrator or the court must give the primary remedy in favour of the employees which is to reinstate them in their work. Such reinstatement would have the effect as if the employee was never dismissed in the first place.

[1] CCMA or the Commission as established by section 112 of Labour Relations Act 66 of 1995.
[2] 66 of 1995 or the LRA

CHAPTER ONE

Reinstatement as a remedy to unfair dismissals

1.1 INTRODUCTION/BACKGROUND

Remedies for dismissals can be found either in the breach of contract at common law or in unfair dismissals under the Labour Relations Act of 1995. In this research study, the focus will be on the concept of reinstatement based on unfair dismissals.

The law prescribes that no employee may be dismissed unfairly by virtue of section 185 of the Labour Relations Act of 1995. There should be valid and fair reasons for dismissal thus both procedurally and substantively. Where a dismissal occurs unfairly, the employee has various remedies, one of which is the remedy of reinstatement. This research study focuses on the remedy of reinstatement. The aggrieved party may approach the Commission for Conciliation, Mediation and Arbitration (CCMA) or a court of law and pray for reinstatement as a remedy for unfair dismissal. [3]

When the court finds that the dismissal was not unfair, reinstatement is not ordered, but when the court finds that the dismissal was unfair, it may order reinstatement, sometimes retrospectively.[4]

The concept of unfair dismissal is regulated by chapter VIII of the LRA which is entitled “unfair dismissal”. Our law recognizes that the employer has the right to dismiss an employee based on misconduct, incapacity, and operational

[3] JV du Plessis and MA Fouche Dispute Resolution, A practical guide to Labour Law sixth edition, Chap 16, 2006 Page 319. Also the case of Metal and Allied Workers Union and Other v Stobar reinforcing (Pty)Ltd and Another Industrial Labour Journal Page 84 1983 Volume 2 (Industrial Court).

[4] National Union of Mineworkers v Council for Conciliation, Mediation and Arbitration and Others (2007) 28 Industrial Law Journal Page 402 (Labour Court). See also SA Commercial and Allied Workers Union and Others v Primserv ABC Recruitment (Pty) Ltd t/a Primserv outsourcing incorporated, (2006) 27 Industrial Law Journal 2162 (Labour Court).

requirements[5]. While misconduct generally refers to wrongdoings or unwillingness to perform, incapacity refers to ill-health or poor work performance. Operational requirements refers to technological or structural changes in the company[6]. However, over and above the circumstances above where the employer may dismiss, the employer still has to prove that the dismissal was procedurally and substantively fair[7]. In other words, it must be proved that the procedure adopted has been a fair one leading up to dismissal and substantively, that the there was a valid and fair reason to dismiss.

In the event any of the requirements is lacking, the dismissal becomes an unfair one. The remedies available to the dismissed employee(s) are reinstatement, re-employment and compensation[8].

1.2 RESEARCH PROBLEM

The Labour Relations Act of 1995 makes provisions for three remedies for unfair dismissals, one of which is reinstatement. It was held by the Constitutional court in the case of Equity Aviation Services v CCMA and Others that reinstatement means putting the employee back into the position where he or she was before the dismissal, the employee goes back to the position as if there was no dismissal, with all benefits intact.

The problem centres around the requirements or the discretionary powers that the court of law or arbitrator would have in deciding the appropriateness of the remedy of reinstatement and its aftermath. Where the worker has been unfairly dismissed, "the employer may be ordered to reinstate the worker"[9]. The requirements or the discretionary powers referred to above include whether it is

[5] Sec 188 of the LRA, See also du Plessis and Fouche "A practical guide to Labour Law" 6TH Edition 2006 at Page 271
[6] du Plessis and Fouche "A practical guide to Labour Law" 6TH Edition 2006 at Page 275 until 276
[7] Basson and others "Essential Labour Law" 1998, Page 76 until 77.
[8] Sec 193(1) a-c
[9] Sec 193(2), see also Republican Press (Pty) (Ltd) and Ceppwawu & Gumede and others (2007)SCA 121(RSA) , Page 11 of the Judgement.

reasonably practicable to reinstate the worker. This relates to sec 192 LRA which provides for conditions under which reinstatement may not be practically possible e.g where the relationship between the employer and the employee had broken down to an extent that continued employment is no longer tolerable or sustainable.

1.3 LITERATURE REVIEW

Moksha Naidoo[10] is of the view that where the employer realizes that he or she has unfairly dismissed an employee and makes an offer to remedy the unfair dismissal by making an offer of reinstatement to which the dismissed employee refuses, that may leave the dismissed employee without the remedy at all. However the employee has the right to refuse if the employer makes the offer in bad faith.

Employee may also refuse if there are reasons as mentioned in section 193(2) of the LRA[11], to which compensation may be the only option left. The writer further asks what if the employee who has been unfairly dismissed is offered maximum compensation and refuses. Maximum compensation refers to 12 months remuneration in ordinary dismissals. It is further attested that his or her refusal will be justified if it is associated with the reinstatement which he or she wants as the primary remedy of unfair dismissals.

Johan Botes[12] opines that where the remedy of reinstatement is ordered, it does not automatically imply that it will be retrospective from the date of dismissal. The discretion granted to the arbitrator or the court must be exercised in

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[10] Moksha Naidoo(Attorney in Johannesburg)" Maximum Compensation, retrospective reinstatement and 'the right to right a wrong' principle" De Rebus April 2011

[11] Section 193(2) LRA provides four reasons where compensation may not be ordered, see also Moksha Naidoo(Attorney in Johannesburg)" Maximum Compensation, retrospective reinstatement and 'the right to right a wrong' principle" De Rebus April 2011

[12] Johan Botes (Director at Cliffe Dekker Hofmeyr'Employment Law practice) Labour Law "Which date applies" July 2009

consideration of factors like conduct of the dismissed employee after being dismissed, the period of litigation etc.

AC Basson and Others[13] supported the decision in *Equity Aviation Services (Pty) Ltd v CCMA and Other*[14] that reinstatement implies the contract is restored to its original position as if it was never interferred with. The decision in the case mentioned above is that reinstatement or re-employment have the same effect of putting the dismissed employee back into the employment, except that with re-employment it is with new contract whereas with reinstatement the same old contract is put into place as if it was never interfered with.

The authors qualify the decision that section 194 of the LRA only applies to compensation. it caps the amount of remuneration that is to be given to a dismissed employee who is entitled to compensation as opposed to reinstatement. Sec 193(2) LRA provides for circumstances[15] under which re-instatement or re-employment may not be ordered.

Cases like *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty)Ltd*[16] and also the minority judgment in *Kroukam v SA AirLink (Pty) Ltd*[17] *case* decided that reinstatement cannot be retrospective as it must be limited by the application of section 194 of the LRA. They argue that retrospectivity cannot be in excess of the time period mentioned in section 194 of the LRA. The case of *Republican Press v Ceppwawu and Another*[18] disagreed with the decision above. The argument here is that the court can order retrospective reinstatement up to the date of dismissal even if it extends beyond

[13] AC Basson, MA Christianson, C Garbers, PAK Le Roux, C Mischke, EML Strydom: reinstatement and re-employment, Essential Labour Law Volume 1 1998 Page 227
[14] 2009(1) SA 390 (CC)
[15] They are where the employee does not wish to be reinstated or re-employed, where continued employment relationship would be intolerable, where it is not reasonably practicable for the employer to reinstate or re-employ the employee, where the dismissal is unfair only because the employer did not follow a fair procedure
[16] (2006) 27 ILJ 292 (LAC),
[17] 2005 (26) Industrial Law Journal Page 2153 Labour Appeal Court
[18] (2007) SCA 121 (RSA)

time periods in section 194 of the LRA. This time period is 24 months for automatically unfair dismissals and 12 months for ordinary unfair dismissals. The position above is also supported by the decision in the case of *Equity Aviation Services v CCMA and Others*[19] that back-pay cannot be equated with compensation. They are two different remedies.

The argument that reinstatement is the primary remedy for unfair dismissal is maintained by JL Pretorius and Others[20], Leigh Allardyce[21], M Naidoo[22]. It is hereby argued that reinstatement revives the contract of employment as if it was never interfered with[23].

1.4 PURPOSE OF THE STUDY

The research study aims to examine the interpretation and application of the remedy of reinstatement. The study will critically analyse the different interpretations of the remedy of reinstatement by the courts. The focus will be on the case analysis up to the very recent case study. The purpose shall therefore be to investigate, examine the remedy of reinstatement with the view to developing it as a useful tool in labour law concerning dismissals.

1.5 AIMS AND OBJECTIVES

In line with the research question above, the aim of the study was to determine and analyse the remedy of reinstatement. The focus being to investigate the

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[19] 2009(1) SA 390 (CC)

[20] JL Pretorius(Director of the centre for Human Rights Studies, University of the Free State), Unfair Dismissal remedies, Labour Law July 2011

[21] Leigh Allardyce (specialist Labour Lawyer) "Can an employee refuse an offer of unconditional reinstatement" Legal Eagle July 2007 Page 37.

[22] Moksha Naidoo(Attorney in Johannesburg)" Maximum Compensation, retrospective reinstatement and 'the right to right a wrong' principle" De Rebus April 2011

[23] Sec 193(1)(a) which gives the court or arbitrator the power to order reinstatement, refer also to AC Basson, MA Christianson, C Garbers, PAK Le Roux, C Mischke, EML Strydom: reinstatement and re-employment, Essential Labour Law Volume 1 1998 Page 227. See also Kroukam v SA Airlinks (Pty)Ltd (2005) 26 ILJ 2153 LAC and Equity Aviation Services (Pty) Ltd v CCMA and Others.

extent to which the remedy of reinstatement is applicable to different scenarios.

Consistent thereto, the main objective of this study was to assess how the courts have reacted to the interpretation and application of this remedy and the impact it has had on labour relations, in particular when it comes to unfair dismissal cases.

1.6 RESEARCH METHODOLOGY

The research study will be conducted by relying on books, journals, articles and case law, mainly obtainable from the library. The library therefore will be used as first hand information centre. Most reliance will be on literature. The internet will also be used as an easy access to recent case law and other material. As will appear, the bulk of the study will be on case law.

1.7 SIGNIFICANCE OF RESEARCH

The significance of this research study is to analyse the remedy of reinstatement in unfair dismissals. The ultimate importance is to examine the impact it has had on the employment relationship between employer and employee and how our courts have reacted in its interpretation and application. The rationale is also to examine how the reinstatement remedy has affected other remedies for unfair dismissals in various ways. These other remedies are re-employment and compensation.

CHAPTER TWO

REINSTATEMENT AND ITS RETROSPECTIVE APPLICATION

2.1 Definition of Key operational concepts

Reinstatement: The term is ordinarily used to refer to a situation where the dismissed employee is put back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. This was held by the Constitutional Court in the case of *Equity Aviation Services v CCMA and Others*[24]. It aims to restore the employment contract and an employee in the position he or she would have been but for the unfair dismissal. The restoration of the status quo ante dismissal.[25]

Re-employment: The employee is given back the job but on new terms and conditions, the job may even be a different one, the rights could be new ones different from the previous ones. There is a new relationship which may be different from the old one.[26]

Retrospectivity: This term refers to the past period during which the dismissed employee has been out of work due to a dismissal.

Compensation: The amount awarded to an employee whose dismissal is found to be unfair as is regulated by section 194 of the LRA.

Back pay: The term represents a loss of earnings during the period of unemployment but is not compensation per se.[27]

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[24] 2009 (1) 390 (CC)
[25] Chuks Okpaluba: Reinstatement in contemporary South African Law of unfair dismissals, the statutory guidelines, Chuks Okpaluba) S. African Law Journal 815 1999
[26] AC Basson & others . Essential Labour Law 4th Edition 2005 at Page 353
[27] John Grogan: Dismissal 2010 at Page 522

2.2 Introduction

Section 193 to 195 of the LRA[28] provides remedies for unfair dismissals and unfair labour practice. Court or arbitrator may order reinstatement or re-employment or compensation, or Labour Court may order any other appropriate remedies under some circumstances e.g. where it found that there was an automatically unfair dismissal or dismissal based on operational requirements is found to be unfair.[29]

The Labour Court or arbitrator is given the discretion to determine the date of retrospectivity in case there is an order for re-instatement, with only condition that such date may not be date earlier than the date of dismissal, as was held by the Labour Court in the case of *SA Commercial Catering and Allied Workers Union and Another v Primserv ABC recruitment (Pty) Ltd*[30]. In this case the retrospectivity of the reinstatement was in question and the court hinted that the only restriction by the statute was that the date should not be any date earlier than date of dismissal. It was further said that this matter is the court's discretion which must be exercised judicially and fairly to all parties with regard to all relevant circumstances. Reinstatement and Re-employment are ordered where there is substantive unfairness, lest compensation will be ordered instead if dismissal is found only to be procedurally unfair in terms of section 193(2) (b) of the LRA.

In the case of *DG : Office of the Premier Western Cape and Another v SA*

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[28] Sec 193(1) reads thus :
(1) If the Labour Court or arbitrator appointed in terms of this Act finds that the dismissal is unfair, the court or the arbitrator may:
(a)order the employer to reinstate the employee from the date not earlier than the date of dismissal,
(b)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,
(c) order the employer to pay compensation to the employee.

[29] Section 193 (3) : If a dismissal is automatically unfair or, if a dismissal is based on the employer's operational requirements is found unfair , the Labour Court in addition may make any other order that it considers appropriate in the circumstances.

[30] (2006)27 ILJ 21 2162 (LC)

Medical Association[31] the court noted the three remedies for unfair dismissals and gave the difference between re-employment and re-instatement. In this case, Dr Hermanus Broers, who was a medical officer employed by the department of health in the Western Cape, was diagnosed with anxiety and depression in June 2002. His psychiatrist recommended that he be employed in a non-clinical capacity. In 2003 he was informed by the department that they would begin with medical boarding due to his ill-ness. The same year the psychiatrist insisted that there was no need for medical boarding, the department should provide him with alternative employment.

The department did nothing about this recommendation and as a result Dr Broers did not return to work. Then in 2004, the department wrote him a letter terminating his services and further saying that he has been absent for one calendar year. The Bargaining Council ordered reinstatement in a non- clinical equivalent post. On review, the department argued that Dr Broers 's contract had been terminated by operation of law, therefore the member had not been dismissed and therefore the arbitrator did not have the jurisdiction. The court could not agree and said that the department was at fault because they ignored the recommendation of the psychiatrist and in fact had dismissed Dr Broers unfairly. The court went further to say that as far as legislation is concerned on the issue of re-employment, it qualifies that a dismissed employee can be re-employed in another suitably qualified work, however as far as reinstatement is concerned, the legislation is silent on the matter.

The court came to a conclusion that the purposive interpretation must be given to the legislature which would require that the arbitrator would also have the power or discretion to order reinstatement in another position to give effect to the objects of the LRA namely the effective resolution of labour disputes. As a result the court decided that the dismissed employee can be reinstated in another position when purposive interpretation is applied.

[31] (2010) 32 ILJ 1077 (LC),

Compensation is ordered in circumstances under section 193(2) of the LRA 1995.[32] An arbitrator also has discretion in terms of what remedies, when determining unfair labour practice, are appropriate under the circumstances.[33]

Sec 194 of the LRA provides that in automatically unfair dismissals and ordinary dismissals, compensation should be restricted to twenty-four months and twelve months respectively, it requires that it must be just and equitable in all the circumstances. It is now necessary to look at these remedies in details, considering the development of case law in this regard.

2.3 Reinstatement as a remedy for unfair dismissal

"Reinstatement restores the contractual position between employer and employee as if it was never broken. The employee is entitled to be paid for the retrospective period of reinstatement and entitled to benefits that may have accrued during the period of reinstatement" (AC Basson et al)[34].

The concept of reinstatement has always been a traditional or primary remedy for unfair dismissals. It is ordered where the dismissal is found to be substantively unfair as was held in the case of *Chemical Workers Industrial Union and Others v Latex Surgical Products(Pty) Ltd*[35]. In this case the Labour Appeal Court found the dismissal of workers to have been substantively unfair. The facts of the case are briefly as follows: The company in this case decided to downsize its operations. The Company invited the union for negotiations. The union attended to the negotiations which ultimately deadlocked and the workers went on strike,

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[32] Sec 193(2) provides that 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 re-employed or re-instated (b) the circumstances surrounding the dismissal are such that continued employment relationship would be intolerable (c) it is not reasonably practical for the employer to reinstate or re-employ the employee (d) the dismissal is unfair only because the employer did not follow fair procedure

[33] Sec 193(4) provides that an arbitrator appointed in terms of this Act may determine any unfair labour practicedispute referred to the arbitrator deems reasonable, which may include ordinary reinstatement, reemployment or compensation.

[34] AC Basson et al Essential Labour Law 5th Edition at Page 378

[35] (2006) 27 292 (Labour Appeal Court)

later retrenched based on evaluation report . While on strike, the company hired casual and contract workers. The Labour Court found that the dismissal was substantively and procedurally unfair.

The case then went on appeal where the Labour Appeal Court confirmed the findings of the Labour Court based on three reasons. The first one was that although the company suffered huge financial losses before retrenchment, it had employed over 80 casual and contract workers soon after retrenchments and therefore this casted doubts whether the company needed to reduce its workers for operational requirements.

Secondly, the company's failure to use the criteria set by the independent assessment in recruiting casual and contract workers failed to show that there was a fair reason for the selection of employees for dismissal. The last one was that the selection criteria was found to be subjective and unfair. Reinstatement was then ordered, as the employees sought reinstatement and none of the situation provided for in 193(2)a-d of the LRA existed. This section provides that the court or arbitrator will order reinstatement unless the employee does not wish to be reinstated or re-employed, or the circumstances surrounding the dismissal are such that continued employment relationship would be intolerable,or it is not reasonably practical for the employer to reinstate or re-employ the employee , or lastly the dismissal is unfair only because the employer did not follow fair procedure.

The court will find dismissal to be unfair and order reinstatement where the employees were participating in a protected strike. The case of *Edelweiss Glass and Aluminium (Pty)Ltd v National Union of Metal Workers of South Africa and 37 Others*[36] illustrates the point. The facts were that the union had sought to have organizational rights and to establish a collective bargaining relationship with the company (Appellant in the Labour Appeal Court). Although the company was

[36] (2012) 1 BLLR 10 (Labour Appeal Court)

willing to grant some organizational rights, it was not willing to grant all of the rights and facilities to the shop stewards.

The matter was referred to the CCMA for conciliation in respect of organizational rights. Meanwhile the union was making other further demands like the 13th cheque, leave pay and leave bonus. The matter could not be resolved and the union issued a letter of intention to go on strike. Before the strike could commence, the company called a general meeting of the employees communicating its view that the strike will only relate to organizational rights and not any "substantive issues".

The union went on strike. During the strike there were communications between the union representatives and the company which gave the impression that all the union wanted was the 13th cheque and not really the organizational rights. It was then the contention of the company that since the employees were on strike for something other than what they demanded initially, which was organizational rights, from that moment on, the strike had become unprotected and therefore on that basis the company dismissed the employees.

The union contended that the strike was protected and that the employees were dismissed automatically unfair. It further contended that even if the strike was unprotected, the reason for dismissal was unfair and the fair procedure was not followed. The court rejected the contention by the company that the strike was unprotected. It hinted out that the fact that the union made other demands than initially made does not render the strike unprotected. The dismissal was found to be automatically unfair. Reinstatement was ordered for those who wanted to be reinstated and compensation for those who did not wish to be reinstated.

Reinstatement was also ordered in the case of *Novo Norsdisk (Pty) Ltd v Commission for Conciliation Mediation and Arbitration.*[37] The dismissal of the

[37] (2011) 10 BLLR 957 (Labour Appeal Court)

employee in this matter arose from the fact that he was found in unauthorized possession of the property of the appellant. He was charged with theft and dismissed. There was no enough evidence implicating the employee with theft. All the evidence given were hearsay evidence and the court hinted out that the appellant should have called the private investigator upon whose probative value the hearsay evidence rested. In the circumstances, the dismissal was therefore unfair.

The court also found that the dismissal was unfair in the following cases which will all be discussed later: *Kroukam v SA Airlinks(Pty) Ltd*[38]*, Republican Press v Ceppwawu and Another*[39] *, Mawelele v CCMA and Others* [40]*, Apron Services (Pty) Ltd v CCMA and Others*[41]*, Equity Aviation Services (Pty) Ltd v AWUSA obo Kruger and Others*[42]*, Equity Aviation Services (Pty) Ltd v CCMA and Others*[43]*.*

The Labour Court in the case of *Mawelele v CCMA and Others*[44] found that the dismissal was substantively unfair. The facts in this case are that the applicant, shift controller in this matter, had been charged with leaving the workplace early and leaving a subordinate with responsibilities that he was not able to carry out and also leaving before the end of the shift, bringing the name of the company into disrepute, and failing to work according to the standard. The applicant left his job before the end of the shift and delegated his responsibilities to a subordinate Mr Khoza. In his presence, certain things went wrong, e.g. that the passengers' buses did not get to their designated airplanes and as a result passengers had to walk some distance to the terminal building.

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[38] (2005) 26 ILJ 2153 LAC
[39] (2007) SCA 121 (RSA)
[40] ((2004) ZALC 77
[41] (2007) ZALAC 14
[42] (2008) ZALC 39
[43] (2009)(1) SA 390 (CC)
[44] ((2004) ZALC 77

The other thing was that the passengers voiced their dissatisfaction and indicated that they would rather seek the services of a different service provider. It was the job of the respondent to provide certain passenger service provider for SA Airways.

The court found that the four charges arose of one incident. The court was not persuaded that the four charges did not amount to the splitting of charges. Further that the charges were not dismissible offences and therefore the applicant was subjected to a harsh penalty of dismissal instead of progressive discipline. Court found that applicant entitled to a warning before being summarily dismissed. Court therefore impliedly ordered a reinstatement. Apron Services (Appellant) appealed against Labour Court decision to LAC which appeal was also unsuccessful.

Labour Appeal Court clearly ordered reinstatement on the basis that the dismissal was substantively unfair. The matter was petitioned to the Supreme Court of Appeal which also dismissed the petition and was finally taken to the Constitutional Court where the decision of the LAC was confirmed. All evidence point to the fact that there was unfair dismissal which was met by reinstatement retrospectively to the date of the issuing of Arbitration Award by the CCMA. The court in this case, as per Revelas J did not make an explicit order for reinstatement, however, it was implied by the fact that he substituted the arbitration award of dismissal with a final written warning to the effect that should he(the applicant) commit a similar transgression in the next two years he may be dismissed immediately.

A re-instatement order restores the employment contract with its rights and duties, terms and conditions.[45] It puts back or into place the contractual position between the employer and the employee as if it was never interfered with. This

[45] AC Basson and Others Essential Labour Law Volume 1 1998 Page 352, see also Page 5 on the judgment of Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC)

means that if there were seniority rights or benefits that the reinstated employee had before the dismissal, they would not be affected[46]. This therefore pre-supposes that when the order is made the employee should not resume work an any less favourable conditions than the ones that existed before dismissal.[47] The fact that it took too long for re-instatement order to be made or that there was a delay in litigation should not disadvantage the employee more so if the delay was not occasioned by him.[48] The reasoning behind this is that it is the employer who occasioned the 'unfair' dismissal. This is where court exercises its discretion on retrospectivity of the reinstatement order.[49]

In the case of *Equity Aviation Services v CCMA and Others,*[50] the Constitutional Court (CC) was quick to state that the employer (Equity in the case) cannot be heard to be saying that during the period of litigation they did not benefit from the services of the employee. They, themselves, have made a choice of a right of election which is "not to ask the employee" to render his services nor did they offer him alternative employment. The fact that the employee made himself or herself available to perform his or her contractual obligation in terms of contract of employment he is entitled to remuneration despite the fact that the employer did not use his services. In order words, the contract of employment was unfairly interrupted to the detriment of the employee and therefore the employee should not be prejudiced by the unfair treatment or dismissal meted out by the employer.

In the case of *kroukam v SA Airlink (Pty) Ltd,*[51] the court found that the applicant had been dismissed due to his union activities as he was the chairperson of a

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[46] AC Basson and Others Essential Labour Law 5th Edition 2009 at Page 378
[47] Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC)
[48] Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC) at Par 53 of Page 20
[49] Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC)
[50] (2009) 1 SA 390 (Constitutional Court) The Judge explains the word "reinstate" at Page 36 of the judgment as " to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he would have been but for the unfair dismissal. It safequards workers'employment by restoring the contract of employment. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal".
[51] (2005) 26 ILJ 2153 LAC

trade union and initiated litigation against the company. This therefore amounted to automatically unfair dismissal. The court therefore ordered reinstatement. Where the employee seeks reinstatement and none of the conditions set out in sec 193(2) of the LRA exists, as is in this case, the court would have no discretion whether or not to grant reinstatement in such circumstances, the court will have to order reinstatement[52].

In the matter between *Republic press (Pty) Ltd v Ceppwawu and Gumede and Others,*[53] the Labour Court, per Pillay J, found that the company's operational requirements justified the reinstatement but that the workers were not selected for dismissal in accordance with selection criteria that were fair and subjective and therefore ordered re-instatement. Although the SCA set aside the reinstatement order on the basis that the litigation of the matter took too long (a period of six years) and therefore it was practically unreasonable to order reinstatement since the company had already undergone some restructuring during that period of six years.

Re-instatement was denied in the case of *Samancor Manganese (Pty) Ltd v CCMA*[54] based on medical incapacity.The employee of Samancor Manganese, Mr Gorrah, got injured while at work to an extent that he was unable to proceed with the current work he was doing at the company. The company doctor referred him to a specialist doctor who recommended that he was unfit to proceed with his current occupation and that it would be proper if he was provided with the alternative occupation. His trade union, National Union of Mineworkers, the management convened a meeting on this matter and came up with the DMA (Disability Management Agreement), which then constituted the collective agreement. Mr Gorrah was categorized as a C- Categorization employee which meant he was unfit to continue with current occupation but if there were

[52] Rochelle le Roux- Reinstatement: When does a continuing employment relationship become intolerable at Page 70 with reference to Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC).
[53] (2007) SCA 121 (RSA)
[54] 2009(ZALAC) 4 LAC

alternative occupations he must be considered for. A C Category is a partial Permanent Disability.

A number of meetings were held in terms of which there were no alternative occupation. As a result the company wrote a letter to Mr Gorrah terminating his employment and made some financial offers. He challenged his termination in the CCMA on the basis that it was not fair. The commissioner issued the arbitration award that the dismissal was procedurally and substantively fair. The matter was then appealed to the Labour Court which decided that the dismissal was unfair. This matter was further appealed to Labour Appeal Court which denied reinstatement. Central to this denial was the fact that the court believed that all the proper channels were followed wherein the representative of Mr Gorrah were always there including the union. The LAC found that the DMA authorized the company to dismiss a Category C employee, if he has been offerred an alternative occupation but has not occupied it because of his unfitness. Moreover in terms of the DMA, four months have passed since he declined the alternative occupation and the other alternative occupation is unavailable.

The other case in which reinstatement was denied is *Ralph Dennis Dell v Seton South Africa (Pty) Ltd*[55]*.*The managing director of the company, Seton in South Africa, was charged with misconduct and dismissed during the Disciplinary Inquiry. The matter was arbitrated and the commissioner found that Mr Dell, the managing director was procedurally and substantively fairly dismissed. Aggrieved by this he took the matter to the Labour Court which also confirmed his dismissal. He further took the matter to the Labour Appeal Court which also refused to reinstate him. The misconduct in this matter relates to the fact that he failed to disclose that he was receiving further and irregular remuneration from the company, in fact he was receiving remuneration in far excess to what he disclosed to the company.The LAC was convinced that Mr Dell was dishonest

[55] 2011(9) BLLR 846 (LAC)

with his dealings with the company and the company did everything to investigate the matter and found out on his misconduct.

2.4 Reinstatement and retrospectivity

Cases are often heard or come to CCMA or court long after the employee has been dismissed. Examples of such cases are *Equity Aviation Services v CCMA and Others* where dismissal took place in March 2001 and the matter came to CCMA in March 2002, it was adjudicated by Constitutional Court in 2009. The other case is that of *Director-General : Office of the Premier of the Western Cape and Another v SA Medical Association obo Brouers and Others* where dismissal took place in June 2004 and the matter was only adjudicated in May 2011.

Where the arbitrator or the court orders reinstatement, a discretion is conferred by the statute on the arbitrator or court to determine the date of retrospectivity only on conditions that the date would not be any date before the date of dismissal[56] and this is normally termed retrospective reinstatement.[57] It is only ordered if the court finds that there was unfair dismissal.

When a reinstatement order is made, obviously there shall have been time lapse between date of dismissal and date of order or award as indicated above. Section 193 of the LRA sanctions the retrospectivity between these two dates, in other words , not earlier than the date of dismissal and not after date of issue of order or awards. The court or the arbitrator is empowered to exercise the discretion between these two dates.

In the case of *The Department of Correctional Services and Popcru and Others*[58], the court gave judgment which encompassed both reinstatement and

[56] See Sec 193(1) Labour Relations Act 1995. It provides that the Labour Court or arbitrator may order the employer to reinstate the employee from any date not earlier than the date of dismissal.
[57] Kroukam v SA Airlink (Pty) Ltd 2005 (26) ILJ Page 2159 of the judgement
[58] (2001) ZALAC 21Labour Appeal Court.

compensation. The facts were that the department had dismissed the employees who were working during the official hours while wearing their dreadlocks. This, according to the department, was against the Dress Code of the department. The respondents contended that they were automatically and unfairly discriminated against on the basis of gender, religion, culture and traditional beliefs. In terms of section 187(1)(f) of the LRA , the dismissal is automatically unfair if, directly or indirectly, is based on race,gender,sex,ethnic or social origin, religion, culture etc.

This argument was based on the fact that women in the same department were allowed to put on dreadlocks. It was further based on the fact that they have contended that they wore dreadlocks because of traditional beliefs, or some were practicing the traditional belief of becoming traditional healers or that it was a belief in Rastafarianism. The Labour Court ordered that those appellants who wished to be reinstated be reinstated, and those who did not wish to be, be compensated in an amout equivalent to 20 months salary.

The minority judgment of Jacoob J shed light in this regard in the case of *Equity Aviation Services v CCMA and Others*. The Judge observed that retrospectivity only refers to any date between the date of dismissal and any date before the date on which the arbitrator or court issues the arbitration award or made a decision /order. It is the court, of first instance that makes the decision. If it does not order that a reinstatement order will operate from any date mentioned above, which is between date of dismissal and date of granting of award or court order, it will be assumed that the court has not exercised that discretion and therefore the reinstatement order will operate as from the date of the issuing of the award or court order (i.e court of first instance). The authority for this is the case of *Equity Aviation Services v CCMA and Others.*

According to the Judge, the issuing of the retrospectivity in the case in question should never have been entertained as the court or arbitrator never ordered it. Mr Mawelele was dismissed on 8 March 2001 and the arbitration award was issued

on 18 March 2002. No court (or even the CCMA) ever ordered the retrospectivity from any date before 18 March 2002, so the reinstatement order , implied as it was, was never ordered. The arbitration award was reviewed and set aside and replaced with reinstatement order. The LAC decided the case based on the evidence before the Labour Court, it reviewed the decision of the Labour Court on arbitration award issued by the commissioner, so for all purposes they could not have ordered the operation of the reinstatement order to operate from the date on which they, themselves, made the order which is 18 October 2004 for the Labour Court and 15 June 2007 for the LAC. These are the observations of the minority judgment. In essence he says that if the court of first instance or the arbitrator omitted the date of the operation of the reinstatement, it means it cannot be retrospective. If it is ordered by any court later , then it can only operate from the date on which it is ordered and not any date earlier.

The case of *Hender Steel Supplies v NUMSA and Others*[59] decided on 19 June 2009 did not offer much help. The facts of this case are as follows: The appellant, Hender Steel Supplies, deals with the scrapping metals in the mining industry, and had the labour force that works night and day shifts. The workforce became discontent with what they referred to as the strong attitude of their foreman, Mr Corrie de Bruyn. They complained that he was victimizing the company employees. De Bruyn was suspended following a work stoppage, he was subjected to a disciplinary hearing which recommended a final warning to him.

The appellant did not comply with the recommendation and this was viewed as being in favour of Mr De Bruyn and employees then went on strike. An ultimatum was issued for the employees to return to work. They failed to return and were dismissed. Later there was an agreement between the appellant and the union where they the strikers/employees signed a document obliging them to return to work and report to De Bruyn, failing which the strike would be deemed unlawful,

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[59] (2009) ZALAC 6

which they complied. This was pending the filing of the papers for the hearing by the Labour court.

The Labour Court found that the dismissal of the workers had been substantively unfair and reinstate workers with three and half months' retrospectivity without advancing reasons for this three and half months' retrospectivity.The LAC also found that the strike was unprotected. Court was of the opinion that even though the workers committed 'misconduct', the sanction of dismissal was not the appropriate sanction. The Labour Appeal Court did not find reasons to deviate from what the court *a quo* found. It therefore found in their favour. Workers were dismissed on August 2003, and this case was decided by the Labour Court on 16 April 2007. This means that workers had missed out between the date of dismissal and the 01st January 2007 which is the date from which the reinstatement order was to operate.

The LRA allows for 12 months compensation for ordinary unfair dismissals and 24 months for automatically unfair dismissal[60] and therefore the thorny question has always been whether retrospective re-instatement should also be of the same periods as in compensation or whether the court or arbitrator can go beyond these stipulated periods if the employee had been dismissed more than the period before the award or Labour Court order. Can reinstatement order operate with retrospective effect for a period more than 12 or 24 months?

Zondi JP in *Chemical Workers Industrial Union* v *Latex Surgical products case*[61] opined that reinstatement cannot be retrospective which means it is limited to 12 months only for ordinary unfair dismissal just as compensation is limited to 12 or 24 months depending on the nature of dismissals. The judge was of the view that the limits as stated in section 194 of the LRA[62] must apply to reinstatement. The

[60] Section 194 of the LRA
[61] (2006) 2 BLLR 142 (LAC)
[62] Section 194 provides for the periods within which the compensation amount should be paid. For an ordinary unfair dismissals, it provides for 12 months retrospectivity and for automatically unfair dismissals

limitation that applies only to compensation in section 194 of the LRA must, according to him also apply to reinstatement orders. Latex was decided on 25 November 2005.

In the earlier case of *Kroukam v SA Airlinks (Pty) Ltd,*[63] It was Zondi JP who delivered a minority judgment which retained the same opinion in the case of *Chemical Workers Industrial Union* v *Latex Surgical products*. According to the Judge President, reinstatement order is not retrospective in excess of stipulated periods because it is limited to 12 or 24 months as sanctioned by the LRA and therefore any discretion of the court or arbitrator would be within these periods or less. Hence it was held that six months would be appropriate in that case depending on the circumstances of that case. Put differently, according to Zondi JP, reinstatement could be up to date of dismissal or up to 12 (twelve) or 24 (twenty four) months whichever is the most recent. He wants to harmonise reinstatement and compensation as reflected in his minority judgment in *Kroukam v SA Airlinks (Pty) Ltd* and his judgment in *Chemical Workers Industrial Union* v *Latex Surgical products.*

It is possible to order retrospective reinstatement up to the date of dismissal even if it goes beyond 12 (twelve) months in ordinary unfair dismissals or 24 (twenty-four) in automatically unfair dismissals.[64] Therefore the limits set out in section 194 LRA 1995 (on compensation) do not apply. In this case, the applicant had been dismissed by the respondent company for insubordination and disruptive influence on the operation of the company. He argued that his dismissal was automatically unfair[65] as it related to his union activities. He was the chairperson

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it provides for 24 months. This section only deals with compensation to be awarded to an employee whose dismissal is found to be unfair.

[63] (2005) (26) ILJ 2153 LAC

[64] Kroukam v SA Airlinks (Pty) Ltd[64] (2005) (26) ILJ 2153 LAC

[65] Sec 187 LRA defines Automatically Unfair Dismissal. S 187 (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is – that the employee took action, or indicated an action to take action against the employer by (i) excercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act. The Appellant alleged that he was victimized for participating in the lawful activities of the association, for his membership of the union, and further that the LRA conferred on him the right to do all that he is accused of

of the trade union, Airlinks Pilots Association, himself a Pilot and played a role in litigation against the company.

Both Zondi JP and David AJA in *Kroukam v SA AirLinks (Pty) Ltd* agreed that this was a case of automatically unfair dismissal as it was based on his membership of the union and litigation against the company, however, disagreed on the retrospectivity of relief, following the fact that employee wanted reinstatement and none of the situations set out in section 193(2) a-d of the LRA existed and therefore the court was obliged to order re-instatement.

The difference in principle relating to retrospectivity in this case is clear between minority judgment and majority judgment, and it is that the former says there should be no reinstatement beyond twelve or twenty-four months while the latter which is the majority says that the court can order reinstatement in excess of twelve or twenty-four months. In the present case in question, the period between date of dismissal and date of delivery of court order was 17 (seventeen) months and therefore less than 24 months contemplated in section 194 of the LRA. In other words, the court still had to decide on whether reinstatement should operate with retrospective effect to the date of dismissal or to any other date or whether there should be any retrospectivity at all. For Zondi JP, following his principle (*obiter*) it would have been obvious that the retrospective effect would be to the date of dismissal, however both him and David AJA considering a number of factors, reduced the retrospectivity to 7 (seven) and 12 (twelve) months respectively.

Zondi JP went further to consider that the same company offered him services pending the outcome of the litigation to which the applicant refused. The Judge described the applicant as " author of his own misfortune". If the applicant agreed, it was supposed to be the second 'contract of employment ' which could

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and therefore this amounted to automatically unfair dismissal.

also have been terminated on the same reasons as the first one and he could still be offered the third contract of employment. It is a fallacy to expect the applicant to have taken up this offer in order to receive full retrospective benefit (17 months). My view is that the issue that the dismissed employee was working during the period of litigation should not be considered in determining retrospective reinstatement, all that must be considered is whether there was an unfair dismissal or not.

It could be argued that the court should consider as a factor the fact that the applicant himself took time to prosecute his own claim. If the applicant deliberately delays litigation, he should be blamed for the delay. Where he is blamed, the applicant cannot expect the court to extend the period of retrospectivity or even to be reinstated in the first place.[66]

The case of *Equity Aviation Services v CCMA and Others* impliedly supports this position. When Equity (applicant) argues that Mr Mawelele will unjustly benefit from the delay in prosecuting the review (19 months), The Judge responded by saying that the delay was not deliberate, wilful and did not transgress the provisions of the LRA.

The case of *Republican Press Pty(Ltd) and Ceppawn & Gumede and Others*[67] deserves special attention. In September 1999 the company retrenched a number of workers on the grounds of operational requirements. 40 (forty) of these workers constitute the crux of the subject matter. The case was decided by the Labour Court on 13 September 2005, six years after dismissal. Pillay J found that the company's operational requirement justified the retrenchments but that the selection criteria used were not fair and objective and therefore ordered 28 workers to be reinstated with effect from September 1999. 7 (seven) were ordered to be paid compensation in an amount equivalent to 12 months pay, 5

[66] John Grogan – Dismissal 2010 at Page 527
[67](2007) (SCA) 121 (RSA)

(five) same amount to be paid to their estates since they have passed on.

This matter came before Supreme Court of Appeal after Labour Court and Labour Appeal Court refused leave to appeal. Company only appealed against the order of reinstatement on the basis that it was made six years after the dismissal and therefore inappropriate as the company has undergone a lot of restructuring and further retrenchments, secondly that the order is in conflict with the orders in *CWIU* v *Latex Surgical Product*[68] *case*. In *Latex case* the court ordered that re-instatement should only be limited to 12 months (in ordinary unfair dismissals) just as compensation is, because in the Judge's view the court is not competent to order retrospective operation of reinstatement order in excess of 12 months.

Nugent JA agrees with Davis AJA, the majority in *Kroukam v SA Airlinks (Pty) Ltd*[69] that the court has the power to grant retrospective reinstatement in excess of 12 or 24 months depending on the nature of dismissal. In principle, the order that was made by the Labour Court was competent in law. The Act does not bar retrospective reinstatement, the limits set out in section 194 of the LRA do not apply.[70]

The reinstatement order in this case was set aside and replaced by compensation of 12 months remuneration. The court agrees with the decision of the Labour Court, but differs as far as the practicability of the order is concerned. Court is of the opinion that six years have passed and a lot of things have happened to the company and therefore it is not reasonably practicable to bring dismissed employees to work.[71]

In terms of sec 193 of the LRA, the court or the arbitrator may also order re-

[68] (2006) 2 BLLR 142 LAC
[69] (2005) 26 ILJ 2153 LAC
[70] Kroukam v SA Airlinks (Pty)Ltd (2005) 26 ILJ 2153 LAC
[71] Kroukam v SA Airlinks (Pty)Ltd (2005) 26 ILJ 2153 LAC

employment as one of the remedies for unfair dismissals. With this remedy, the employee may be re-employed in the work in which he or she was employed before dismissal or, unlike reinstatement, in other reasonably suitable work on any terms.[72] With re-employment the employee may get the old job or the new job. The similarity with reinstatement is that the date for getting into the job may not be the date earlier than the date of dismissal.

2.5 Discretion with respect to retrospectivity

When the court or the arbitrator orders re-instatement or re-employment, the question remains as to the decision concerning the retrospectivity of the re-instatement or re-employment. Does the court or the arbitrator really have a discretion in this regard? If he or she has in terms of retrospectivity, does he or she also have the discretion concerning the actual date of retrospective reinstatement? Johan Botes[73] argues that reinstatement or re-employment should not be automatically[74] awarded with full retrospective effect. He bases his argument on the interpretation of sec 193(1) of LRA which provides that an employer may be ordered to reinstate an employee "from any date not earlier than the date of dismissal". This means that the date does not necessarily have to be the date of dismissal, it can be any date from the date of dismissal as long as is not any date earlier than date of dismissal.

There had already been a decision from the Labour Court in the case of *Department of Labour v General Public Service Sectoral Bargaining Council and Other*[75] that reinstatement can be ordered without retrospective effect. The facts

[72] Du Plessis and Fouche: A practical guide to labour law sixth edition 1998 at Page 282
[73] Johan Botes (Director at Cliffe Dekker Hofmeyr'Employment Law practice) Labour Law "Which date applies" July 2009
[74] This view finds support from John Grogan – Dismissal 2010 at Page 522 when he says that "full retrospectivity is not automatic, it depends who is at fault"
[75](2010) 31 ILJ 3131 (LAC). Two employees were accused of misconduct of sexual nature, and the Labour Court ruled the CCMA and held that the dismissal was unfair and ordered reinstatement without retrospectivity with effect from 15 15 October 2007. The alleged misconduct took place in 2001. However the Labour Appeal Court ruled against the Labour Court on the 29th day of January and found that the dismissal was fair.

were that two employees were accused of sexual misconduct. They appeared before disciplinary hearing at the department. The chairperson of the hearing recommended the dismissal but the Director General wanted something short of dismissal like a final written warning. The two accused took the matter to the bargaining council. The matter was not resolved and then taken to CCMA which held that the dismissal was substantively fair. At the Labour court, the dismissal was held to be unfair and ordered reinstatement without retrospective effect. However the matter was finally settled by the Labour Appeal Court which held that dismissal was fair. In *Platinum Mile Investments(Pty)Ltd t/a transition transport SA Transport and Allied Workers Union,*[76] although the LAC ruled that the dismissal was fair, the Labour Court earlier on had ordered reinstatement without loss of earnings or benefits.

In the case of *NUM and Other v CCMA and Others*[77] the commissioner found the dismissal to be unfair but instead of awarding a reinstatement, he awarded compensation because he added another requirement that the employee testified that he was perceived as a bad guy. However the Labour Court ordered reinstatement from the date of dismissal being the 08th September 2000 and not from the date of award being 07 May 2001. The case of *SA Commercial Catering and Allied Workers Union and Others v Primserv ABC Recruitment (Pty) Ltd t/a Primserv Outsourcing Inc*[78] involved the issue of unfair retrenchment. The court interpreted the retrospectivity of reinstatement and section 193(1) (a) and said that the court could reinstate to any date not earlier than the date of dismissal and that that is the only retriction. It is for the court to decide as long as the discretion is exercised judicially and act fairly to all parties with regard to all relevant circumstances.

When the court makes an order of reinstatement, it is already empowered with

[76](2010) 10 BLLR 1038 LAC
[77] (2001)28 ILJ 402 (LC),
[78] (2006) 27 ILJ 2162 (LC)

the discretion to decide on its retrospectivity[79]. The discretion extends on to the question of whether it should be from the date of dismissal, date of the award or any date so decided.

Section 193(1)(a) of the LRA states that where the employer is ordered to reinstate the employee, the order will be from any date nor earlier than the date of dismissal.[80] This is the legislative framework which grants the discretion on the arbitrator and the courts. Johan Botes[81] is of the opinion that reinstatement or re-employment should not necessarily be from the date of dismissal. It could from any date after the date of dismissal after the court has taken into consideration of a number of factors like the conduct of the employee after the dismissal, steps taken by the employer in remedying the unfairness of the dismissal and so on. He observed that the employers will be at worse positions if there is a blanket retrospective reinstatement from the date of dismissal without considering a number of all these factors.[82]

Johan Botes seems to be in agreement with the decision in the case of *CWIU v Latex Surgical Products*[83] where it was stated that reinstatement could not be made retrospective as far back as the date of dismissal. In the case of *Equity Aviation Services (Pty) Ltd v CCMA and Others*[84] one of the reasons put forth by the applicant employer in Equity's case was that discretion with regard to retrospective reinstatement should be exercised on the basis that the employee took long time to litigate the matter. In other words, this supports the idea that a lot of factors be taken into account when making a decision on retrospective reinstatement. The case of *NUM and Other v CCMA and Others*[85] held that in

[79] Fionna Leppan (Director at Cliffe Dekker Hofmeyr ' Reinstatement and Compensation" at Page 48
[80] Johan Botes (Director at Cliffe Dekker Hofmeyr'Employment Law practice) Labour Law "Which date applies" July 2009, Page 37
[81] Johan Botes (Director at Cliffe Dekker Hofmeyr'Employment Law practice) Labour Law "Which date applies" July 2009
[82] Johan Botes (Director at Cliffe Dekker Hofmeyr'Employment Law practice) Labour Law "Which date applies" July 2009, Page 37
[83] (2006) 2 BLLR 142 LAC
[84] (2009) (1) SA 390 (CC)
[85] (2001)28 ILJ 402 (LC).

fixing the date of reinstatement the following factors must be taken into account, whether the employee got alternative employment and the delays in referring the disputes to the CCMA.

2.6 Conclusion

The LRA confers the power on the labour court or the arbitrator to award any of the three remedies, reinstatement, re-employment or compensation where it is found that the dismissal was unfair. It further provides that the primary remedies will be reinstatement or re-employment. Compensation is considered where there are other factors in terms of section 193(2) of the LRA that go against the awarding of such remedies.

It is very clear from the LRA that the intention of the legislature was to give the Labour court or the arbitrator the discretion to determine the retrospetivity of the reinstatement order. This is in term of section 193(1) of the LRA which only requires that the date of retrospectivity should not be a date earlier than the date of dismissal. As per Chuks Okpaluba[86], once the unfairness of the dismissal is established, the court is bound to consider all relevant circumstances in trying to determine the appropriate remedy. Once the remedy of reinstatement is determined, the issue of the retrospectivity comes into the picture.

When reinstatement is awarded, it simply revives the employment contract and put back the dismissed employee into the position that he or she was before the dismissal just as if he or she was never dismissed[87]. Reinstatement are awarded in cases of substantive unfairness[88], whereas compensation is considered on cases of procedural unfairness. Factors that are considered in making decisions of retrospectivity include, but not restricted to, the delay in prosecuting the case,

[86] Chuks Okpaluba "Reinstatement in contemporary South African law of unfair dismissal: the statutory guidelines 1999"
[87] Republican Press v Ceppwawu and Another (2007) SCA 121 (RSA)
[88] Kroukam v SA Airlinks (2005) 26 ILJ 2143 LAC

who is to blame for that matter, the time period from the time of the date of dismissal to the date of the order, operational requirements of the company[89] , etc.

I support the view that the inordinate delay in prosecuting any labour matter should be interpreted to work against any litigant that is quilty of such in as far as retrospectivity is concerned. If the employee takes so much unreasonable time to delay the process, he or she should not be heard to be praying for a full full retrospective reinstatement. The same applies to the employer delays the process hoping that the employee would get disgruntled and leave the prosecution of the matter. This is interpreted as bad faith and should not be allowed to derail the normal processes of the law.

I further hold the view that in some cases, employees by mala fide initiate legal proceeding. The employer is by his or her nature a person in business, and therefore cannot be expected to hire or continue working with someone who has a disability that prevents him from doing the very same job that sustains the business[90].

[89] [89] Republican Press v Ceppwawu and Another (2007) SCA 121 (RSA)
[90] Ralph Dennis Dell v Seton South Africa (Pty) Ltd (2011) (9) BLLR 846 (LAC)

CHAPTER THREE

REINSTATEMENT AND COMPENSATION

3.1 Introduction:

Only when the court or arbitrator cannot order reinstatement or re-employment under certain conditions, can compensation be ordered.[91] Such conditions include where the employee does no longer wish to be re-employed or reinstated or a continued employment relationship would be intolerant, or is not reasonably practicable to reinstate or re-employ the dismissed employee or dismissal is unfair only due to unfair procedure[92].

It is apt to discuss the recent case of the *Independent Municipal and Allied Trade Union (IMATU) obo Anton Strydom and Witzenburg Municipality.*[93] The employer instituted an inquiry against the employee, Mr Anton Strydom, a member of the appellant trade union. The inquiry was about the employee's incapacity based on illness following longer period of absence from work. He was absent for eight months during which period he was booked off on account of post traumatic stress disorder. He was dismissed and referred the unfair dismissal dispute to CCMA. He sought the relief of reinstatement, alternatively compensation.The CCMA, and later the Labour Court, found that the dismissal was procedurally and substantively fair and the employee then approached the Labour Appeal Court on appeal.

The LAC had to decide on the fairness of the dismissal. Sec 188(2) provides that the code of conduct must be taken into account whether the reason for dismissal was a fair one or whether the procedure was fair. The code itself gives the guidelines on the issue of incapacity, ill-health or injury. It provides that in case of

[91] Sec 193 LRA
[92] Sec 193(2) LRA
[93] (2012) ZALAC 1

temporary incapacity, employer must investigate the extent of the incapacity. Where it is likely to take unreasonably long time, employer should investigate other alternatives short of dismissal[94]. The employer may also adapt the work of the employee with a view of accommodating his disability. In the process, the employee should be afforded the opportunity to state his case.

The court was of the view that the guidelines above were not complied with. The incapacity inquiry was only held six months after Mr Strydom applied for early retirement benefits unsuccessfully. The Chairperson of the inquiry concluded the enquiry relying on the medical report that was issued six months before the enquiry despite the employee insisting on getting the second opinion from the psychiatrist. The LAC also mentioned that the enquiry was also not about investigating the extent of the incapacity but also misconduct. This therefore did not bring the investigation in line with the LRA and its code of practice specifically Schedule 8, item no 10 and 11. The LAC also held that the commissioner had erred in dismissing the application by the appellant by holding that the employee was permanently incapacitated and that he could not be reasonably be accommodated by the employer. The evidence of Dr Van Niekerk stated that the illness arose of work-related circumstances and that it was not permanent.

The court came to the conclusion that the dismissal was unfair both procedurally and substantively. When it came to appropriate remedies, it hinted out that although the primary remedy for unfair dismissal was reinstatement , compensation was appropriate since the employee did no longer want to work for the respondent. The employee should then be compensated for unfair dismissal in an amount equivalent to 12 months remuneration at the rate that applied on the date of his dismissal.

Section 194 of the LRA applies to compensation alone. It provides that the

[94] Independent Municipal and Allied Trade Union (IMATU) obo Anton Strydom and Witzenburg Municipality. (2012) ZALAC 1

compensation awarded to an employee should not be more than the equivalent of 12 (twelve) months' remuneration calculated at the employees' rate of remuneration on the date of dismissal in an ordinary unfair dismissal i.e. if the employer did not prove that the reason for dismissal was a fair reason relating to employees' conduct, capacity or based on the employers' operational requirement (section 194(2) of the LRA).

It further states that compensation should not be more than 24 (twenty-four) months' remuneration if the dismissal is found to be automatically unfair dismissal. This was held in the case of *Pedzinski v Andisa Securities (Pty) Ltd*[95] Compensation is not to be a substitute for any amount to which the employee is entitled in terms of any other law, collective agreement or contract of employment (section 195 of the LRA).

3.2 Back-pay

Davis AJA in the case of *Kroukam v SA AirLinks (Pty) Ltd*[96] defines back pay as the amount that becomes due under the contract when an order for reinstatement is made. The Judge further says that the reinstatement order revives the former contract and therefore any amount that was payable under the contract becomes due and that amount becomes the back pay. When an employee is reinstated to the date of his dismissal, he is entitled to remuneration(back pay) for the period from his dismissal to the eventual award[97]. Back pay must not be confused with compensation which is regulated by sec 194 LRA.

Our courts have been plagued by the issue whether compensation is equivalent to back-pay. The reasoning by the court in *Latex* and minority judgment in

[95] (2006) 27 ILJ 362 (LC).
[96] Davis AJA in Kroukam at paragraph 59
[97] Johan Botes (Director at Cliffe Dekker Hofmeyr'Employment Law practice) Labour Law "Which date applies" July 2009 at Page 37

Kroukam v SA AirLinks (Pty) Ltd suggested that the limitation contained in section 194 of the LRA is to be applied in relation to back-pay. In other words the court held in *Latex* case that if the reinstatement order will have the retrospective effect of going beyond 12 or 24 months, it would be unfair to the employer because the employer would have to remunerate the employee for the period from dismissal until the order was made whereas had the order for compensation been made, the employer's liability would have been limited to 12 or 24 months. This is not fair to the employer according to them. The court held in *Chemical Workers Industrial Union* v *Latex Surgical products* that there should not be a difference between back pay and compensation.

By this is meant that reinstatement order should be allowed to have the same effect as compensation, it must fall within the ambit of section 194 of the LRA.

In the case of *Republican Press (Pty) Ltd Ceppwawu & Gumede and Others,*[98] which was decided in 2007 by the SCA after both *Latex and Kroukam*, the Judge remarked as follows:

> "I respectfully disagree with the construction – that of *Latex and Kroukam* (my italic), I do not think that the back-pay to which a worker ordinarily become entitled when an order for reinstatement is made is to be equated with compensation"

The Judge opined that remuneration becomes due under the terms of contract itself and does not constitute compensation as envisaged by section 194 of the LRA. In other words the order for reinstatement restores the former contract, it revives it from the date of dismissal and therefore any amount that was payable under the contract necessarily becomes due to the worker on that ground alone.

[98] (2007) SCA 121 RSA

3.3 Back pay and Compensation

John Grogan[99] argues that although the employer must pay the employee the sum of money when there is reinstatement order, this is not compensation as contemplated in section 193(1). He further argues that the reason behind this is because back pay represents a loss of earnings during the period of unemployment but is not compensation per se. Back pay and compensation cannot be awarded at the same time. He maintains that the use of the disjunctive "or" in section 193(1) means that reinstatement and compensation are alternative remedies.

Equity Aviation Services (Pty) Ltd v CCMA[100] is the case in point and important in understanding the law as it relates to back-pay versus compensation. It was decided on 25 September 2008 by the Constitutional Court in order to clear the legal uncertainties that had existed in the previous decisions of the SCA and Labour Appeal Courts with relation to the correct interpretation of section 193 of the LRA. This in fact, constituted one of the main reasons why the Constitutional Court had to intervene.

Central to the issue for the decision by the court in this case was the interpretation of section 193 (1)(a) of the LRA.[101] The Constitutional Court had to decide whether the back-pay payable to the employees reinstated in their employment is limited to 12 months' wages.

Background: The company, *Apron Services Pty (Ltd*) dismissed Mr Mawelele for 'misconduct'[102] on 8 March 2001. Aggrieved by this dismissal, Mr Mawelele

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[99] John Grogan :Dismissal 2010 at Page 522

[100] 2009 (1) 390 (CC)

[101] The relevant provision of section 193(1) (a) reads as follows:

(1) If the Labour 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;

[102] It relates to allegations that during November 2000, he left his work without

approached the CCMA in terms of section 191(1) (a) of the LRA [103] to determine the matter. The Arbitrator ruled that the dismissal was both substantively and procedurally fair. Arbitration award was given on the 18 March 2002. Mr Mawelele referred the matter to Labour Court in terms of section 145(1)[104] of the LRA for an order setting aside the Arbitration award.

This court, per Revelas J found that the dismissal was unjustifiable and ordered that Mr Mawelele be given the final warning, by implication he was reinstated. The court was of the view that the offence be corrected with 'progressive discipline'. This decision was handed down on the 18 October 2004.

The company, further appealed against the Labour Court decision to the LAC, Zondi JP ruled that the dismissal was substantively unfair. The appeal did not succeed. The court set aside the Labour Court Order and ordered that award by commissioner be set aside, and ordered reinstatement on conditions no less favourable than those before dismissal, and lastly that the order would operate upon the date of the issuing of the award.

This judgment was delivered on the 15 June 2007. The company made a petition to the Supreme Court of Appeal which also dismissed the petition. The company, now known as *Equity Aviation Services (Pty) Ltd* appeals to the Constitutional Court on the following basis:

a. That the decision by the LAC reinstating Mr Mawelele retrospectively to the date of the issuing of the award is in conflict with the decision in Latex case. It

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permission before the end of duty and failed to provide buses for flights, he further delegated his responsibilities to a subordinate that he could not carry out and therefore brought the name of the company into disrepute by failing to meet the standards.

[103]The section provides that if there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to a council, if the parties fall within the registered scope of that council..

[104]The section provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the labour court for an order setting aside the arbitration award..

contends that the court is not competent to order retrospective operation of reinstatement order in excess of 12 (twelve) months for ordinary unfair dismissal. The same argument in *Latex* is put forth here, that reinstatement order should be within the ambit of section 194 of the LRA just as compensation is. Therefore section 193 of the LRA, according to *Latex* gives effect and protection to unfair labour practice as envisaged in section 23(1) of the Constitution of RSA 1996.

b. That fully retrospective reinstatement order can only be granted in the most exceptional circumstances.

c. That back-pay is equal compensation, therefore limitation in section 194 of the LRA applies on any award for back-pay. There should not be differences between reinstatement and compensation in terms of financial implications otherwise there would be unfairness between those employees who have sought reinstatement and those who have not but instead sought compensation.

d. That the LAC erred, alternatively ,in ordering reinstatement to operate from the date of issuing of award.

From the outset, a clear examination of case law before this one in question would show that the judicial opinions have always been that compensation and back-pay are two different remedies[105]. They cannot be equated. The decision in the *Republican Press* case has settled this matter, however, as the judge in this case put it clearly, it was now time to clear the uncertainties. In essence the disparities between the case of *Latex* and that one of *Kroukam* has been settled by the decision in *Republican Press* by holding that the court has the power to grant retrospective reinstatement in excess of twelve (12) months in cases of ordinary unfair dismissals and twenty-four (24) months in cases of automatically unfair dismissals.

[105] Republican Press (Pty) Ltd v Chemical Energy Paper Printing Wood and Allied Workers Union and Others (2007) SCA 121 RSA, see also Kroukam v SA AirLinks (Pty) Ltd (2005) 26 ILJ 2153 (LAC)

Nkabinde J, who delivered the judgement in the case of *Equity Aviation Services v CCMA and Other*, was not persuaded by any of the contentious issues mentioned above in the case of *Equity Aviation Services v CCMA and Other.* The judgment was very straightforward.

According to the court, the proper construction of section 193(1)(a) does not support the view that compensation be equated with back-pay. Back-pay refers to that amount which is payable to a dismissed employee where a reinstatement order is made retrospective at the discretion of the court or arbitrator[106]. Compensation is governed by sections 193 (1) (c) and 194 of the LRA. It is ordered only where reinstatement and re-employment cannot be ordered under certain circumstances. Section 194 of the LRA caps the amount of compensation payable i.e. 12 (twelve) months for ordinary unfair dismissals and 24 (twenty-four) months for automatically unfair dismissals.

The court supports the decision in *Republican Press v CEPPWAWU* that back-pay and compensation cannot be equated and therefore section 194 of the LRA cannot apply. Further that reinstatement means restoring the employment contract. It puts back the employee to the position that he would have been had it not been for the unfair dismissal. It safeguards the workers' employment in line with the core values of the LRA.[107]

Where reinstatement is ordered, the arbitrator or the judge has a discretion to order its retrospective operation to any date not earlier than the date of dismissal. The court can take into account a number of factors thereof including but not

[106] Johan Botes (Director at Cliffe Dekker Hofmeyr'Employment Law practice) Labour Law "Which date applies" July 2009 at Page 37

[107] Paragraph 39 of the judgement of the Equity case mentions that the core value of the LRA is security of employment. This underscores the importance of section 185 that every employee has the right not to be unfairly dismissed. Section 1 of the LRA states its purpose which is to "advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are (a) to give effect to and regulate the fundamental rights conferred by sec 27 of the constitution (d) to promote the effective resolution of labour disputes. Any person applying the Act must ito section 3 interpret its provisions to give effect to its primary object.

limited to, the delay in the prosecution of the claim, the fact that dismissed employee has been without income during the duration of dismissal etc. It is the findings in *Equity Aviation Services v CCMA and Other* that the order (retrospective) can be made in excess of 12 or 24 months or to the date of dismissal. Court opined that a proper construction of the section supports the core values of the LRA which is about the security of the employment. It relates to the fact that the employers cannot 'hire and fire' at will, employees need to be protected by virtue of section 23 (1)[108] of the Constitution of the Republic of South Africa.

The court was convinced that section 193(1) (a) of the LRA was interpreted in conformity with the Constitution. The views expressed in the case of *Equity Aviation Services v CCMA and Other* that the remedies of reinstatement and re-employment can be ordered simultaneously with compensation was dismissed. Compensation cannot be ordered in addition to back-pay, because the two are distinct remedies, they are alternative remedies. Section 194 of the LRA, in short , has no effect or bearing on retrospective reinstatement.

The Constitutional Court in the case of Equity found correctly that the reinstatement order by the LAC must be made to run retrospectively from the date of the issuing of Arbitration Award (18 March 2002) and not from the date of the decision of the Labour Court (18 October 2004). This is because the LAC was determining whether the decision of the Labour Court in reviewing the award was correct, therefore it could or was competent to substitute the order of the Labour Court with retrospective effect from date of issuing of award. In casu, reinstatement here refers to the period between date of Arbitration Award and LAC order which is 15 June 2007. LAC decided the case on the basis of evidence before Labour Court and simply substituted the decision of that court.

[108] This section provides that everyone has the right to a fair labour practice.

3.4 Conclusion

It is trite law that the two remedies of reinstatement and re-employment remain the primary remedies for unfair dismissal. The legislation grants the Labour court and the arbitrator the discretion to decide the appropriate remedy to be awarded, however it stipulates factors that must be taken into consideration before the discretion is exercised. Once it is established that there was in fact an unfair dismissal, legislation requires that there be reinstatement or re-employment unless there are factors in existence that militate against the awarding of reinstatement or re-employment.

Only when such reasons exist, shall the court then consider compensation. Compensation is regulated by section 194 of the LRA. This section prescribes that in ordinary unfair dismissals, retrospective remuneration should be limited to 12(twelve months) while in automatically unfair dismissals the limitation is 24(twenty-four) months. It is hereby concluded that section 194 does not apply to back pay because back pay is a different concept.

When an order for reinstatement is made with retrospective effect, the amount that the employee is paid retrospectively (back pay) is not the same as compensation and therefore section 194 of the LRA will not apply to this scenario. In other words the retrospective payment is never limited to either 12 or twenty four months. This amount or back pay can go beyond the limitation in section 194 of the LRA. The only limitation in as far as this amount is concerned is that it cannot go beyond any date prior to the date of dismissal. This is a statutory requirement. Both case law and recent writers on this matter like John Grogan in his fifth edition attest to this point.

I support the view that section 194 of the LRA should only apply to compensation and not any back pay resulting out of retrospective reinstatement order. The Labour court or the arbitrator should be at liberty to order

retrospectivity to any date other than a date earlier than the date of dismissal. Reinstatement and compensation are two different remedies and therefore cannot be ordered simultaneously.

CHAPTER FOUR

FORCED REINSTATEMENT

4.1 Introduction

Employers are often faced with the situation where they realize after they have dismissed the employee that in fact they should not have done so. Under these circumstances they would approach the dismissed employee to try to reconcile the matter so that it should not go further. Leigh Allardyce[109] refers to this as unconditional reinstatement, whilst Moksha Naidoo[110] calls it "the right to right a wrong principle". When an employer makes an offer of reinstatement to a dismissed employee, can such be refused? What would be the impact of the responses from the dismissed employee?

4.2 Forced reinstatement

There are two arguments to the topic above. The first one relates to the situation where the employer makes a genuine offer to the dismissed employee of retrospective reinstatement in order to remedy an unfair dismissal and the employee refuses it. It was decided in the case of *Rawlins v Dr DC Kemp t/a Centralmed* [111] 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 our courts with reasonable and justiciable grounds to sustain their prayers or to convince the courts.

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[109] Leigh Allardyce (specialist Labour Lawyer) "Can an employee refuse an offer of unconditional reinstatement" Legal Eagle July 2007.
[110] Moksha Naidoo(Attorney in Johannesburg)" Maximum Compensation, retrospective reinstatement and 'the right to right a wrong' principle" De Rebus April 2011
[111] 2010 31 ILJ 2325 (SCA)

The second situation relates to where the employer makes an offer of maximum amount of compensation as opposed to reinstatement but the employee refuses and seeks reinstatement. The answer to this scenario can be found in the intention of the legislature or what the idea is behind the principle of "the right to right a wrong" principle.

Reinstatement is regarded as the primary remedy for unfair dismissals.[112] In terms of the LRA, reinstatement has become the maximum remedy obtainable, which means therefore that it is expected that the employer would in the letter of the law not go for any minimal remedy not warranted by the Act or the circumstances of the case.[113] It would be unfair for the employee to be awarded compensation when in fact he still wishes to keep his job permanently. It is also an indication of the *mala fide* from the side of the employer because in effect the employer is terminating the employment of the employee by replacing that with money or compensation[114].

The wording of section 193(2) of the LRA provides answers to this question. This section requires the employer to reinstate or re-employ the employee unless the employee does not wish to be reinstated or re-employed. An employer who dismisses unfairly and offers compensation goes against the letter of the LRA. Unless if the employee himself/herself accepts the offer of maximum compensation without undue influence. The employee can consider it reasonable if he is on a fixed term employment which is perhaps nearing an end. This is because arguing for reinstatement may raise the issues of extending the contract beyond what was initially agreed upon by the parties.[115] The court might be

[112] Kylie v Commission for Conciliation, Mediation and Arbitration and Others(2008) 29 ILJ 1918 (LC). See also National Union of Mineworkers and Others v Chrober Slate (Pty) Ltd (2008) 29 ILJ (388 (LC) and Rawlins v Dr DC Kemp t/a Centralmed (2010) 31 ILJ 2325 (SCA)

[113] Moksha Naidoo(Attorney in Johannesburg)" Maximum Compensation, retrospective reinstatement and 'the right to right a wrong' principle" De Rebus April 2011and Rawlins v Dr DC Kemp t/a Centralmed (2010) 31 ILJ 2325 (SCA)

[114] Moksha Naidoo(Attorney in Johannesburg)" Maximum Compensation, retrospective reinstatement and 'the right to right a wrong' principle" De Rebus April 2011.

[115] Moksha Naidoo(Attorney in Johannesburg)" Maximum Compensation, retrospective reinstatement and 'the right to right a wrong' principle" De Rebus April 2011.

making a new agreement/contract for the parties which is not supposed to. If compensation is awarded under those circumstances, the amount of compensation would be limited to the balance of time left before the expiry of the contract.

4.3 When is it practically impossible to reinstate?

Section 193(1) prescribes three possible remedies which the court or the arbitrator can possibly award if it is found that the dismissal is unfair, they are reinstatement, re-employment and compensation.

Section 193(2) reads "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 re-employed or re-instated (b) the circumstances surrounding the dismissal are such that continued employment relationship would be intolerable (c) it is not reasonably practical for the employer to reinstate or re-employ the employee (d) the dismissal is unfair only because the employer did not follow fair procedure". According to Chuks Okpaluba[116], the statutory guideline underscores the fact that the two remedies of reinstatement and re-employment are primary remedies. It is peremptory for them to be considered first unless there are factors as mentioned in the section above that militate against the two remedies[117].

The court may not order reinstatement if it is practically impossible, the court will then consider compensation. The author is of the view that all factors must be considered before the order is made, first and foremost the wishes of the employee. Chuks Okpaluba contends that if the employee does not wish to be reinstated, he or she should not be forced to be reinstated otherwise it will be unfair to him or her. He further contends that legislation is there to protect the

[116] Chuks Okpaluba "Reinstatement in contemporary South African law of unfair dismissal: the statutory guidelines 1999"
[117] Chuks Okpaluba "Reinstatement in contemporary South African law of unfair dismissal: the statutory guidelines 1999" At Page 821

employee therefore his wishes must be taken into consideration. However if the employee unreasonably refuses to be reinstated, he or she may as well be refused compensation[118]. John Grogan[119] seems to support this view and further maintains that if the employee who is reinstated retrospectively fails to report, he will also loose back pay because reinstatement is the primary remedy and back par secondary unless his failure is due to reasons beyond his control.

Rochele le Roux[120] is also of the view that where the continued employment has become intolerable, reinstatement must not be granted. It is for the court to decide if the circumstances warrant a continued employment relationship intolerable, and this cannot be deduced from the employer's judgment[121].

4.4 Conclusion

The purposive interpretation of section 193 is to confer power on the Labour court or the arbitrator to award the remedies of reinstatement, re-employment and compensation where the dismissal is found to be unfair. However the section qualifies the power by requiring the Labour court or the arbitrator to consider a number of factors before the order is made. The court must first consider the first two remedies of reinstatement and re-employment as the primary remedies for unfair dismissal, and go further to enquire if there are some factors that militate against awarding the reinstatement or re-employment.

The court should consider the statutory guidelines as enshrined in section 193(2) (a – d). Consideration may be had of the time lapse between the unfair dismissal and the time when the court order is made, who is to blame or who caused the

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[118] Van Zyl v Plastafrica (Pty) Ltd (1999) 20 ILJ 212 (LC)
[119] John Grogan Dismissal 2010 at Page 523
[120] Rochelle le Roux " Reinstatement: When does a continuing employment relationship become intolerable. "
[121] Rochelle le Roux " Reinstatement: When does a continuing employment relationship become intolerable. " at Page 75

delay in prosecuting the matter, the wishes of the employee etc.

I am of the view that the interests of the employee must be taken into account when an award is made. It will be unfair to reinstate the employee who is no longer interested in returning to the same workplace. At the sametime, the employee is not expected to make unreasonable demands. Where such unreasonable demands are made, the court must exercise its discretion honestly taking into consideration the intention of the legislature.

CHAPTER FIVE

REINSTATEMENT IN BRITAIN AND USA

5.1 Introduction

In various jurisdictions or the legal systems of the world, reinstatement has always been regarded as the primary remedy for wrongful dismissals or unfair dismissals.[122] Originally this remedy found its expression at common law. The relationship between the employer and the employee arose out of a contract of employment which gave the employers the upper hand when dealing with dismissal cases. As in Britain,[123] the employers were at will to hire and dismiss workers who were left without sustained remedy. In normal circumstances the courts would order specific performance to force the employer to observe the rules of employment contract where there is a breach. Specific performance is defined by Cathy and Hazel as "a court order in terms of which party committing the breach is ordered by the court to fulfill contractual obligations". Reinstatement is therefore a form of specific performance. British courts would not normally order specific performance in case of the breach of contract and this therefore exposed the vulnerability of common law workers or workers – at – will. [124]

However in the case of *Hill v Parsons CA and Co Ltd*[125] the court held that "the rule against specific performance is not inflexible". This was in reaction to the rigidity by the British courts against ordering specific performance. The Industrial Relations Act 1971 was born as a more accessible forum to contest unfair dismissal. For that matter, Britain decided to legislate common law and as a result the ILO (the International Labour Organisation) was consulted.

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[122] Cathy and Hazel, "Dismissed employees: the search for more effective range of remedies" Modern Law Review, Volume 52 No 4 1989 Page 449
[123] Cathy and Hazel, "Dismissed employees: the search for more effective range of remedies" Modern Law Review, Volume 52 No 4 1989 Page 449
[124] G de Clark, Unfair dismissal and reinstatement, Modern Law Review Volume32 1969 Page 532
[125] (1972) 1 Chapter 305

5.2 Reinstatement as a remedy

"Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking , establishment or service" reads the ILO recommendation. It is this recommendation that gave the British jurisprudence the impetus to legislate and require that there should be a justifiable reasons for dismissals.

It should be mentioned that the Industrial Tribunals were more seen as managerial than courts, and therefore there was a lack of trust and confidence in them[126]. They did not have consistent and coherent way of dealing with cases or a clear and visible precedent[127]. The two existing remedies were reinstatement and compensation and the question was which one should be the primary relief. Arguments advanced for both remedies were that since the contract remained a personal relationship between the employer and the employee, it would be unfair to order reinstatement because that would be tantamount to enforcing a personal relationship between two people which has collapsed[128]. In essence, the argument was that since specific performance can be ordered in cases of breach of contract, it should not be extended to amount to reinstatement[129].

A distinction had been made between the so called ordinary workers and those working for the state/office workers[130]. The former were dismissed by the employer at will without good cause as they were much in a master and servant relationship. The latter, thus state functionaries, were treated with due process of

[126] G de Clark, Unfair dismissal and reinstatement, Modern Law Review Volume32 1969
[127] Cathy and Hazel, "Dismissed employees: the search for more effective range of remedies" Modern Law Review, Volume 52 No 4 1989 Page 452
[128] G de Clark, Unfair dismissal and reinstatement, Modern Law Review Volume32 1969
[129] G de Clark, Unfair dismissal and reinstatement, Modern Law Review Volume32 1969
[130] Cathy and Hazel, "Dismissed employees: the search for more effective range of remedies" Modern Law Review, Volume 52 No 4 1989 Page 457 -9

law[131]. This is actually one of the main reasons that made the courts in Britain to start giving more meaning to the definitions of remedies, in that the court had to be convinced that indeed there exist valid and fair reasons for a dismissal failing which the court would order reinstatement. The case of *McClelland v Northern Ireland General Health Services Board* [132] is a case in point. Having being dismissed, the dismissal was declared a nullity as she was unfairly dismissed.

Reinstatement was then ordered to clear the confusion whether the contract of service existed or not. According to Reinstatement in Civil Employment Acts 1944 and 1950, the employer is obliged to reinstate the person who has been a soldier in his employment when he returns from military service. Despite the different statutes regulating reinstatement, the employee were still reluctant to go back to their jobs and rather prefer monetary compensation[133].

There has been a growing number of dismissal cases in Britain in the 70's,[134] Harcourt Concannon[135] argues that in cases decided at arbitration, there were no prescribed remedies as opposed to unfair dismissal applications decided by the tribunals where there were prescribed remedies. This was a study of ACAS (Advisory, Conciliation and Arbitration services) demonstrating the growing number of dismissal cases in the 70's. In most of the cases, reinstatement was ordered where there were no good reasons for dismissal.

In the USA, the three remedies for unfair dismissals are reinstatement, re-engagement and compensation.[136] The content or the meaning of these terms amount to the same ones in the Republic of South Africa (RSA), only differing on the use of the word re-engagement which in RSA is called re-employment. As it

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[131] Cathy and Hazel, "Dismissed employees: the search for more effective range of remedies" Modern Law Review, Volume 52 No 4 1989 Page 457 -9
[132] 1957(1) WLR 594 H.L
[133] G de Clark, Unfair dismissal and reinstatement, Modern Law Review Volume 32
[134] Harcourt Concannon, Handling dismissal disputes by arbitration, 1978,Page 13
[135]Harcourt Concannon, Handling dismissal disputes by arbitration, 1978, Page 13
[136] Kevin Williams, Job Security and Unfair Dismissals, Volume 38 May 1975, Page 292

is defined, re-engagement[137] means the "taking back into employment under the new contract", whereas reinstatement means "putting the person back, in law and in fact, in the same position as he occupied immediately before the employer terminated his employment".

It has become usual with the industrial tribunals in Britain to award compensation but only if there could not be advanced or convincing reasons to order for reinstatement or re-engagement. In *Dobson v K.P Morrit Ltd*[138] dismissal was found to be unfair and re-engagement was ordered as it was thought to be more practicable and the employer also accepted it. This further advances the reasons that reinstatement remains the primary relief, failing which compensation would apply. Compensation in American legal system, argurs well for the fact that there should be monetary compensation for the period between dismissal and reinstatement[139].

Compensation has pecuniary value in that it must take into account the number of days that the complainant has been out of work, whereas re-engagement does away with the intervening period of unemployment. There is an obligation on the part of the industrial tribunal where it recommends reinstatement or re-engagement to state the terms upon which it considers recommendation. This has caused uncertainty as the conditions, for example, in re-engagement may almost amount to full reinstatement which was not initially intended as in the case of *Aldridge v Dredging and Construction Company Ltd.*[140]

[137] Kevin Williams, Job Security and Unfair Dismissals, Volume 38 May 1975, Page 293
[138] 1972 II.R.L.R 99,
[139] G de Clark, Unfair dismissal and reinstatement, Modern Law Review Volume 32 Page 543 - 546
[140] (1972) I.R.L.R 67.

CHAPTER 6

FINDINGS AND RECOMMENDATIONS

6.1 Findings

This research findings show that the LRA provides for three remedies for unfair dismissals. They are reinstatement, re-employment and compensation. Reinstatement is the primary remedy obtainable for unfair dismissals. The order for reinstatement revives the contract of employment from the time when the employee is dismissed, whereas re-employment presupposes the new contract of employment. Where the court finds that the dismissal was unfair and the dismissed employee seeks reinstatement, the Labour court or the arbitrator must order reinstatement or re-employment unless there are factors that exist in terms of section 193(2) of the LRA that militate against the awarding of such remedies.

Section 193(2) a –d of the LRA makes provision that the court or arbitrator will order reinstatement unless the employee does not wish to be reinstated or re-employed, or the circumstances surrounding the dismissal are such that continued employment relationship would be intolerable,or it is not reasonably practical for the employer to reinstate or re-employ the employee , or lastly the dismissal is unfair only because the employer did not follow fair procedure.

The findings show that if any of the conditions above does exist, the court or arbitrator will consider compensation.

The findings also show that where reinstatement order is awarded, the court or arbitrator has a discretion whether it must apply retrospectively or not, retrospectivity is not automatic. This is evident from the wording of section 193(1) of the LRA which sanctions the restrospectivity to any date “not earlier than the date of dismissal”.

The argument that only the court of first instance can order retrospectivity has been not been sustained. Any subsequent court can order it. This retrospectivity is not limited by sec 194 of the LRA, but can be ordered back to the date of dismissal even if such date exceeds the twenty-four months period or twelve-months period for automatically unfair dismissals and ordinary unfair dismissals respectively.

The research findings unfold that the period between the date of dismissal and the date when the CCMA/Court makes an order is a “wasted time” in as far as the dismissed employee is concerned. The employer cannot be heard to be saying that he has not made production during that period because the employee did not provide labour. On condition that the dismissal is found to be unfair, the employer bears the loss of time because the employee was available to offer his labour which was unfairly terminated.

It is also revealed that compensation should not in anyway be harmonized with reinstatement. This is because the limits set out in section 194 of the LRA do not apply in reinstatement as per *Davis AJA in Kroukam v SA AirLinks (Pty) Ltd case*. Reinstatement restores the former contract as if it was not interfered whereas compensation offers monetary value because there cannot be reinstatement or re-employment. Section 194 of the LRA only applies to compensation. The limitations set in there do not apply to reinstatement or even back pay. Back pay should further not be confused with compensation. The former as per John Grogan, represents the loss of earnings during the period of unemployment and is not regulated by section 194 of the LRA, whereas compensation is regulated by section 194 of the LRA.

6.2 Recommendations

The objective behind the LRA is to give effect to section 23 of the Constitution of the Republic of South Africa (RSA Constitution). Section 23 of RSA Constitution provides that everyone has a right to a fair labour practice and further makes provision that national legislation may be enacted to regulate collective bargaining. That legislation is the Labour Relations Act. The following recommendations are based on the above mentioned principles of properly regulating the labour relations in South Africa.

The rights of the workers must be protected to the fullest extent that the law permits. The underlying factor of all social legislations including the LRA is to protect the identified social grouping in the form of the employees. It is this legislation that has managed to cure the deficiencies that existed in common law where the employees were found to be at the mercy of the employers. Most cases already studied show that most dismissals were unfair due to factors not sanctioned by law.

Our law should lean towards encouraging collective bargaining at workplaces. The LRA intends promoting and facilitating collective bargaining. Employers are obliged to observe such as they help to further promote worker participation. If this point is observed, most trivial cases will be solved at an earlier stage at work level than flood our courts and other institutions of labour disputes.

The discretion to order retrospectivity when reinstatement order is made must be recognized as conferred upon the court or the arbitrator. The court or arbitrator must also have that discretion as far as the date of commencement is concerned provided it cannot be a date before the date of dismissal. Dismissal is the termination of employment contract between the employer and the employee. It cancels existing rights and duties between the employer and the employee.

It is further recommended that it be recognized that as per cases law reinstatement and compensation remain two distinct remedies with respect to the period of retrospectivity. In other words it is now settled law that reinstatement is not restricted by the time period in section 194 of the LRA, it can extend even to the date of dismissal if that period goes beyond the twenty-four or twelve months period in section 194 of the LRA. Sec 194 regulates only compensation and not reinstatement. The concept of retrospectivity refers to a time period between date of dismissal and date on which the arbitrator grants an award or the court makes an order. It is all a discretionary matter in the hands of the arbitrator or the court taking into consideration all relevant factors.

By the same token, it is further recommended that as per case law that back pay and compensation are recognized as two different concepts. This is because the LRA does not regulate the issue of back pay but only compensation. Such a difference will help to clear the issues were the employee who was unfairly dismissed is given back pay from the date of dismissal than just compensation when a reinstatement order is made.

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