

Unlocking labour laws

Some confusion has emerged around the application of retrospective reinstatement and how it relates to back-pay in cases of unfair dismissals. **Shanta Reddy** explores the relationship between reinstatement and compensation in light of a recent Supreme Court of Appeal (SCA) decision – *Republican Press (Pty) Ltd v CEPPWAWU and Gumede and Others (2007) SCA 121 (RSA)*.

In September 1999, Republican Press (Pty) Ltd (owned by Caxton Press) retrenched 58 workers. Following the retrenchments the union (Ceppwawu) approached the Labour Court (LC) claiming that the retrenchments were substantively unfair as the company had failed to comply with various provisions in section 189 of the LRA.

Following various delays (partly a result of the actions of Ceppwawu's first set of attorneys as well as the company), the matter was only heard in the LC in September 2005 which ordered reinstatement to those workers who wanted reinstatement (28 workers) and awarded them two and half years (for the delay) back-pay less notice and severance pay that had been paid out already. For those who wanted compensation, the LC awarded 12 months.

The company appealed against this decision and argued that a Labour Appeal Court (LAC) decision, *Latex Surgical Products (Pty) Ltd v CWIU*, handed down shortly after the LC decision in this matter only allowed reinstatement with 12 months back-pay and for this reason the LC decision was incorrect.

In August 2006, the LAC dismissed this petition and the company approached the SCA. (The company had in fact brought two applications for leave to appeal. One was against the whole judgement of the LC which was dismissed by the LAC in chambers early in 2006. The other, on the various legal points, was heard by the LAC and dismissed in August 2006.) Two applications for leave to appeal might be considered unusual and could be rather expensive.

In August 2007, the company argued before the SCA that Latex applied and therefore, the workers could not be reinstated with four and a half years back-pay. The SCA, in a judgment handed down on 27 September 2007 held that the Latex case was incorrect and set it aside thereby restating the law that reinstatement was not necessarily capped at one years' back-pay.

Despite this, the SCA held that the passage of time from the date of dismissal (Sept 1999) to the date of the LC judgment (Sept 2005) was too long and that any reinstatement order would not be reasonably practicable. It therefore set aside the reinstatement of the

28 workers and replaced it with an order for 12 months compensation.

WHAT DOES THE LAW SAY?

Labour law jurisprudence requires the circumstances of each case to be considered. Whether an employee is entitled to back pay, and what amount, depends on issues like: the financial circumstances of the company; whether workers had looked for and found alternate employment; whether the company could take them back; whether the delay meant that the workers could not be trained or accommodated. In this case, the company had played a huge hand in prolonging the litigation by not releasing relevant documents, raising frivolous legal points and requesting adjournments and threatening applications for leave to appeal when the LC ruled against its legal point taking.

The law does not bar reinstatement merely on a delay. In cases of unfair dismissals, labour law jurisprudence is clear that reinstatement is retrospective to the date of dismissal and with back-pay unless specifically directed otherwise. Workers are awarded compensation if reinstatement or



re-employment is not a practical option. The old LRA drew a distinction between reinstatement and compensation. Reinstatement placed the employee back into employment and compensation was an award of money, either together with reinstatement or by itself. Compensation was usually awarded as a form of recompense when reinstatement was not feasible.

The current LRA clarified the distinction between reinstatement and compensation. The jurisprudence that has developed over the years and the courts accept that compensation is limited to specific circumstances (only procedurally unfair dismissals or where reinstatement is not a reasonably practical option in substantively unfair dismissals). These principles have been persistently applied in LAC decisions as well.

In *General Food Industries trading as Blue Ribbon v FAWU*,

the LAC dealt with a substantively and procedurally unfair retrenchment of employees in February 2000. The unanimous decision of the LAC confirmed the reinstatement of all the employees to the date of dismissal, less payments received in respect of severance and notice pay. The LAC did not interpret the LRA to imply that retrospective reinstatement cannot be more than 12 months from the date of the court order. In this case the employees received four and a half years back-pay.

In *Kroukam v SA Airlink (Pty) Ltd* the first challenge to the full retrospective aspect of reinstatement surfaced. The LAC agreed that the dismissal in this case was automatically unfair and that reinstatement was the appropriate relief.

The unanimous decision of the LAC was to apply to another LAC decision, *NUMSA v Fibre Flair CC t/a Kango Canopies*. It held that section 193(1)(a) meant that the

only limitation to the reinstatement was that it could be ordered to any date but not earlier than the date of dismissal.

The court was split on the interpretation of the retrospective aspect of reinstatement. The majority decision held that the employee could be reinstated at any date not earlier than the date of dismissal, even if the retrospective aspect of the reinstatement was greater than 24 months in an automatically unfair dismissal (and logically greater than 12 months in an unfair dismissal). The majority confirmed the distinction between the capping of compensation and the non-capping of reinstatement as stated in *CEPPWAWU and another v Glass and Aluminium*.

The minority decision held that the courts must seek to balance the relief between compensation and reinstatement. The limits on compensation in terms of section 194 must by implication place a limit on the retrospective aspect of

a reinstatement order in terms of section 193. In other words whether an employee in an (automatically) unfair dismissal dispute seeks reinstatement or compensation should make no difference to the financial effect such an order has on an employer. In either situation the employer must not bear more than the financial burden envisaged in compensation orders in terms of section 194.

THE LATEX CASE

The LAC in *Latex* unanimously adopted the minority judgement in *Kroukam*. The effect of the *Kroukam* majority decision had no major impact on other cases where reinstatement was sought, as it merely restated the law in terms of labour law jurisprudence. However, *Latex*, after adopting the minority decision in *Kroukam*, has had the effect of seeing an increase in technical points being raised by employers in unfair dismissal disputes. In addition, the judgement has the potential of removing an employers' risk of a reinstatement order with more than one year's back-pay.

The differing LAC decisions resulted in confusion amongst the Courts. The court in *South African Commercial Catering and Allied Workers Union and others v Primserv ABC Recruitment t/a Primserv Outsourcing Incorporated* found itself in a difficult position when having to decide on the reinstatement of employees who were unfairly dismissed by the respondent labour broker. The dismissals were substantively and procedurally unfair. The court was aware of the conflicting decisions of the LAC in *Kroukam* and *Latex*. It found that there was no capping, in the LRA, of reinstatement and accordingly

held that reinstatement could be greater than 12 months.

CONCLUSION

Then *Republican Press (Pty) Ltd v CEPPWAWU and Gumede and Others (2007) SCA 121 (RSA)* was decided by the SCA which hopefully has finally, settled the law on reinstatement and compensation. The pivotal principle that *Gumede* expresses, however, is that the LRA intended for reinstatement to be a separate and distinct relief from compensation. In so doing the SCA overturned the decision of the LAC in *CWIU v Latex Surgical Products (Pty) Ltd*.

The *Latex* decision referred to an anomaly that may arise if a court made an order for reinstatement more than 12 months after the date of dismissal. Compensation is capped at 12 months where dismissals are procedurally unfair or where they are substantively unfair but reinstatement is not an option in terms of section 193(2).

Where reinstatement is ordered in terms of a substantively unfair dismissal the Act does not cap the retrospective aspect of the reinstatement. This means that where reinstatement is granted more than 12 months after a dismissal (or more than 24 months after an automatically unfair dismissal) an employer stood the risk of a greater financial burden than if compensation had to be granted, as irrespective of the date of the order, compensation cannot be more than 12 months in unfair dismissals (and 24 months in automatically unfair dismissals). The LAC sought to prevent such an anomaly arising in the future.

The SCA in *Gumede* disagreed with this interpretation and stated that the LRA clearly makes a distinction between reinstatement, re-employment and compensation as

types of relief available to employees who have been unfairly dismissed. It also confirmed that it was never intended that reinstatement be capped, and that the limitation is only applicable to compensation. With the language of the LRA being clear, the SCA concluded that, it was not necessary for a court to read into the Act a limitation on reinstatement. The LRA clearly does not provide for such limitation.

The SCA confirmed the majority decision in *Kroukam v SA Airlink (Pty) Ltd* that reinstatement restores the former contract and all remuneration due in terms of the contract; and that reinstatement is not compensation in terms of section 194. The court further stated that the fact that the LRA either allows for reinstatement or re-employment, implies that it was intended that reinstatement revived the contract from the date of dismissal.

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