

# Unlocking labour laws

In each edition *Labour Bulletin* takes queries from trade unionists and workers on labour law matters. Here **Norma Craven** and **Sibusiso Gule** answer queries on back pay and unfair dismissal, and on imprisoned workers' rights.

**Is it true that if a worker is dismissed unfairly and the court awards him or her reinstatement the maximum back pay they can get is 12 months?**

This has recently changed in an important judgement, *Equity Aviation Services v CCMA and others* given in September 2008 in the Constitutional Court.

Mr Mawelele was dismissed for misconduct before Equity Aviation, a baggage handling service, retrenched all its staff when it lost its SAA licence in 2008. (It had no money to pay its retrenched employees and yet it continued to waste money on pursuing litigation!) He lost his case at the

CCMA but won it on review at the Labour Court because the court argued that Equity had not used progressive discipline.

There are three options under the Labour Relations Act (LRA) in the case of unfair dismissal, namely reinstatement, re-employment and compensation. Reinstatement is generally the best option because the intention of the LRA is to preserve jobs. In the case of reinstatement the employee is entitled to back pay. Reemployment occurs if the court finds that the employee was at fault in some way but not sufficiently to warrant dismissal. In this case back pay is not given and the worker loses previous benefits and starts work with the status of a new employee.

Compensation occurs where the court rules that the worker was unfairly dismissed but s/he does not want to return to the job or it is impossible for him/her to do so. It is in effect damages for not getting a fair hearing on dismissal.

Equity Aviation appealed the Labour Court judgement but the Labour Appeal Court upheld its ruling saying that reinstatement was implicit in the Labour Court's finding. It ordered Equity to reinstate Mr Mawelele on terms and conditions that governed his job just before his dismissal. The Appeal Court also ordered that Mr Mawelele should be reinstated from the date of the arbitration.

The company then applied for leave to appeal to the Supreme Court of Appeal but this was unsuccessful.

It therefore decided to take the

case to the Constitutional Court. Here it argued that the court should be bound by the *Latex* case. The company argued that a court could not order retrospective reinstatement of more than 12 months. It argued that any order for back pay is the same as an order for compensation and so the limitations on compensation should apply. The law had capped the amount of back pay that an employee could receive.

The Constitutional Court's judgement thus revolved around the question of what is reinstatement and what is compensation. The South African Transport & Allied Workers Union (the worker's representative), argued that compensation and reinstatement are different things.

Satawu argued that the worker was dismissed unfairly and was entitled to reinstatement. It argued Mr Mawelele should be compensated from the date of the arbitration 19 months previously.

The Constitutional Court ruled that the back pay for reinstated employees should not be confused with compensation. Under the old LRA (1956) it was possible for a court to award both reinstatement and compensation but this was no longer possible under the current LRA. The worker can either get compensated for not going back to work or reinstated. It is not possible for both to happen at the same time. In the *Latex* case the two had been incorrectly linked. Compensation and reinstatement must be separated out. The *Latex* case had muddied the waters.

The court further argued that if there was a limit of 12 months on back pay this was an invitation for employers to go to the law as in the end they would have to pay no more than 12 months to get rid of a worker. The court pointed out to Equity Aviation that if it had wrongfully dismissed an employee and had chosen to appeal a judgement then it must take the consequences of having to back pay to the point of the award.

So Mr Mawecele got a chunk of back pay to the date of the Labour Appeal Court award (but then was sadly retrenched).

**I am a shop steward and I have to deal with a case of an imprisoned worker who is not able to pay his bail pending a trial. The employer has dismissed him for failing to report for work. Is this legal?**

Employers in these circumstances often get it wrong.

In *NUM obo Maloma and Samancor Tubatse Works (2007)* the worker had been dismissed after 10 days absence. He was detained by the South African Police Services on suspicion of robbery. He phoned his supervisor from the police cells and his sister also notified the company. The company justified the dismissal on the basis that he was incapable of performing his duties under the contract of employment.

The court found that absenteeism is a disciplinary offence. It criticised the procedure followed by the company in that it did not give him an opportunity to present his case. Further, the company did not make an effort to find out how long the employee was likely to be detained, and the matter was not discussed with the worker or his trade union.

The court also found that the dismissal was unfair because the company did not take into account that the worker had no control over the circumstances and duration of his absence. Also, there was no evidence that he occupied a senior and key position that made dismissal necessary after 10 days of absence.

The arbitrator found that the dismissal was both substantively and procedurally unfair, and ordered the company to reinstate him.

This decision was reinforced in the *Laminate Profiles CC v Mompei & Others (2007)* where Laminate wanted to set aside an award by the CCMA who found the dismissal of an employee unfair. The worker was dismissed when he was an awaiting trial prisoner. He was arrested on suspicion of rape and acquitted. Thereafter his employer told him that he had been replaced and that he was not dismissed because he had absconded from work thereby terminating his contract of employment.

The Labour Court had to decide whether the dismissal was procedurally and substantively unfair. It found that the worker was unable to perform his obligations because he was in detention. It referred to an old case of *Beretta v Rhodesia Railways Ltd 1947* which stated that a contract is not automatically terminated by temporary inability but that it may be terminated if the inability persists.

The court also found that the company ought to have granted him an opportunity to be heard before his dismissal. An alternative remedy was available to the employer, for instance, employing someone on a temporary basis.

*Trident Steel (Pty) Ltd v CCMA & Others (2005)* supported previous judgements. The worker contended that he was absent from work because he was arrested. The employer did not believe him although a fellow employee had informed the company that he was in custody. A disciplinary enquiry was convened while he was in detention, he was dismissed. On his return to work a second disciplinary enquiry was held where the employee charged him with absence and failing to inform his supervisor of his whereabouts. He was dismissed again.

The court found that it was impossible for him to work and he was not wilfully absent from work. So when an employee returns to work with a valid explanation, to discipline the employee is unfair. The alternative was that the employer could employ a temporary worker. If the employer could not arrange this, it had to consult with the employee under the LRA about his redundancy or its operational requirements. The employer cannot simply convey to an employee that he had been dismissed for misconduct in his absence.

The imprisoned employee is not, however, entitled to be paid for the period of absence. LB

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