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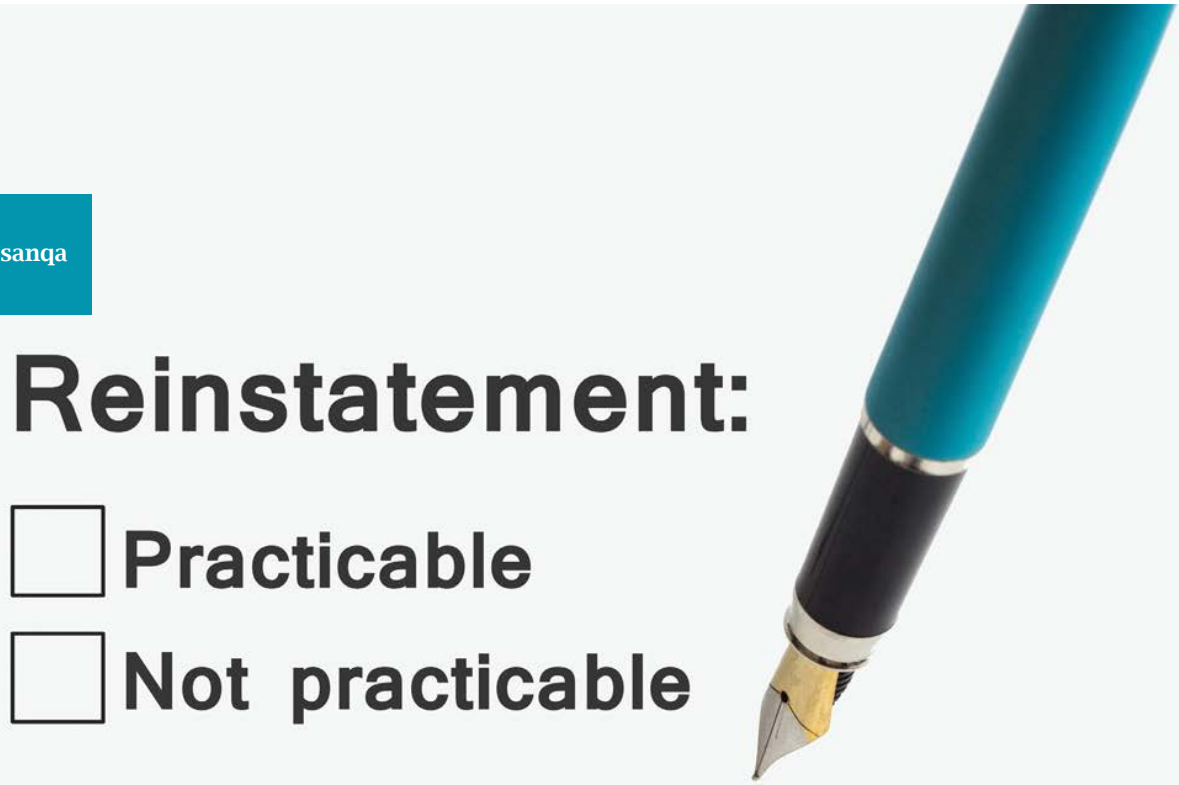

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Reinstatement except when 'not reasonably practicable' – a discussion of s 193(2)(*c*) of the LRA

The primary remedy for an unfair dismissal is reinstatement or re-employment, because of the importance of job security in our country. Reinstatement for a dismissed employee means returning to the position the employee held at the time of the dismissal. Re-employment may place the employee into a different position, other than the one held at the time of dismissal. For many employers facing the reinstatement of an employee they have dismissed is unpalatable and will seek to persuade the Commission for Conciliation, Mediation and Arbitration (CCMA) or Labour Court (LC) that it is not practicable to do so. There is therefore, contestation about the circumstances in which this may occur.

There are exceptions to the remedy of reinstatement (or re-employment), which are set out in s 193(2) of the Labour Relations Act 66 of 1995 (LRA). These exceptions are:

'(*a*) the *employee* does not wish to be re-instated or re-employed;

(*b*) if the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;

(*c*) it is not reasonably practicable for the employer to re-instate or re-employ the *employee*; or

(*d*) the *dismissal* is unfair only because the employer did not follow a fair procedure'.

This article deals with the circumstances in which the CCMA (including, bargaining councils) and our courts have found it reasonably practicable to reinstate and when they have not.

The term 'not reasonably practicable' is not defined in the LRA, but a recent Labour Appeal Court (LAC) decision has provided some clarification. In *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at para 11, the court held that: 'The object of s 193(2)(*c*) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term "not reasonably practicable" in s 193(2)(*c*) does not equate with "practical"... . It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile.'

Reinstatement must also be shown to be fair, when considering the competing interests of employees and employers. In *DHL Supply Chain (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Others* [2014] 9 BLLR 860 (LAC), the LAC held that 'Labour Relations Act 66 of 1995 prescribes reinstatement unless it is proven to be intolerable or impracticable (section 193(2)(*b*) and (*c*)). The evaluation of this question is clinically objective, having regard to the balance of fairness between employer and employees and a decision is the outcome of the exercise of a discretion ... . A decision in terms of this section is therefore, in part, a value judgment and, in part, a factual finding made upon the evidence adduced about the unworkability of the resumption.'

To succeed in a claim that the resumption of the employment relationship is not reasonably practicable, the employer has the onus to adduce evidence to prove that submission. The CCMA Guidelines on Misconduct Arbitration, expound further at para 115 with '[t]his criterion [not

reasonably practicable] will be satisfied if the employer can show that reinstatement or re-employment is not feasible or that it would cause a disproportionate level of disruption or financial burden for the employer.'

What can be seen from the cases and guidelines is that reinstatement will be applied as the primary remedy on a finding of an unfair dismissal if it is fair, practicable, appropriate and feasible. It should not be applied if the converse is true – if the reinstatement would be unfair, disruptive, burdensome, intolerable or impracticable for the employer.

Noting the above, the question the arbitrator (or the court) has to answer is this: Is it feasible for the employer to re-engage the employee and re-integrate them back into the workforce or is reinstatement potentially futile?

The courts have dealt with the applicability of s 193(2)(*c*) in the following circumstances:

- replacement of one employee by another;
- changes in the identity of the employer;
- the nature of the misconduct; and
- delays in litigation.

This article will discuss these circumstances.

Replacement of an employee by another

Often in CCMA arbitrations, employers give evidence that they cannot reinstate an employee because they have filled that employee's position. This is persuasive when the arbitrator – on a finding of unfairness – considers the question of the appropriate remedy, and may in light of that evidence decide instead on compensation. However, this argument does not always hold water, and the LC when faced recently with an urgent application to interdict an impending appointment, in the face of an unfair dismissal arbitration at the CCMA warned employers of the perils of pursuing a replacement (regardless of the outcome of the dispute in progress) (see *Mashaba v SA Football Association* (2017) 38 ILJ 1668 (LC)).

Mr Mashaba was the head coach of the South African National Football team. He was dismissed allegedly after a poor year at the helm, and referred an unfair dismissal dispute to the CCMA. Parallel to that, he lodged an urgent application to the LC seeking an order to interdict the South African Football Association (SAFA) from appointing a replacement coach pending the finalisation of his CCMA dispute. He feared that if SAFA replaced him before the conclusion of his CCMA case the commissioner would find it reasonably impracticable to reinstate him. In other words, assuming that he was successful in proving a case of unfair dismissal, the commissioner would not award reinstatement simply because he had been replaced.

Lagrange J summarised the primary right of an employee to be reinstated on a finding of unfairness in para 13 as follows: '[A]n order of reinstatement pays no heed to other contractual arrangements that might have come into existence between the employer and a replacement. That is of no concern to the arbitrator or the court and the employer is left to its own devices to sort out the mess it finds itself in having employed someone and then being ordered to re-engage someone in the same position.' Therefore, the mere replacement of an employee by another during the litigation process does not render the remedy of reinstatement reasonably impracticable.

Lagrange J goes on to say that employers should be more proactive. He stated at para 10 that 'if the employer does not take suitable steps in its contract with the replacement, it ought to realise that it runs the risk that it will be faced with the possibility of terminating that relationship or of trying to renegotiate the replacement's contract if the former incumbent is reinstated.'

If an employer has run the risk and it has materialised the employer is now faced with two employees in the post (the new appointment and the reinstated employee) the CCMA guidelines (para 115) suggest that retrenchment of the new appointee may be the solution for the employer on the grounds of their operational requirements.

Section 197 transfer of a business as a going concern

In the transfer of a business, the court has held that employees who refuse to move to the new employer, and then claim an unfair dismissal, will not meet with an order of reinstatement back to the old employer as it is 'not reasonably practicable'. In *Halgang Properties CC v Western Cape Workers Association* (2002) 23 ILJ 1784 (LAC) a sale agreement was concluded between Halgang Properties CC and Wembley Investments (Pty) Ltd. The sale triggered the provisions of s 197 of the LRA, however, the employees refused to be transferred to the purchaser who had assumed the role of new employer. As a result, the employees were retrenched as Halgang Properties CC ceased to operate as a business after the sale. The LAC held that reinstatement was not reasonably practicable in terms of s 193(2)(*c*).

Nicholson JA held at para 45 that: 'The mini-mall business had been sold and transferred to the buyer, Wembley (for whom the employees refused to work); and the appellant seller had no other functioning business in which their services could, in any practical way, be used.' The employees could not be reinstated to Halgang Properties CC because the company did not exist anymore. The court also rejected the argument that an order of reinstatement against Halgang Properties could be used as a springboard against the new employer in subsequent proceedings. As a party with a substantial interest in the matter, the new employer should have been joined in the proceedings. This principle was upheld years later in *Kunyuza and Another v Ace Wholesalers (Pty) Ltd and Others* [2015] 7 BLLR 683 (LC).

The nature of the misconduct

In some cases the nature of an employee's misconduct is unacceptable and despite a finding that a dismissal was substantively unfair the courts applied s 193(2)(*c*) to deny the primary remedy of reinstatement. In a recent case, *SA Revenue Service v Commission of Conciliation, Arbitration and Mediation and Others* (2017) 38 ILJ 97 (CC), the Constitutional Court (CC) highlighted an arbitrator's responsibility to consider the provisions of s 193(2) when deliberating on the appropriateness of the remedy of reinstatement in those circumstances. In the *Sars* case an employee pleaded guilty to using the 'K' word and the chairperson of the disciplinary hearing sanctioned him with a final written warning. Sars overruled that sanction and imposed dismissal. The unfair dismissal dispute wound its way through the CCMA and courts and was ultimately heard in the CC. Mogoeng CJ held that 'After concluding that Mr Kruger's dismissal was unfair, the arbitrator immediately ordered his reinstatement without taking into account the provisions of s 193(2). She was supposed … to determine whether this was perhaps a case where reinstatement is precluded. … By ordering SARS to reinstate Mr Kruger the arbitrator acted unreasonably. She also does not appear to have been mindful of the fact that in terms of s 193(2) of the LRA, reinstatement would not follow as a matter of course.' A failure by a commissioner to consider s 193(2)(*c*) when deliberating on the appropriateness of a remedy, in circumstances in which the misconduct is grave or contravenes public policy, thus rendering such a remedy 'not reasonably practicable' is likely to give rise to an award vulnerable on review.

When faced with the limitations of reinstatement in s 193(2) as a remedy to countenance the unfair dismissal, the alternative remedy is compensation, (up to a maximum of 12 months for an 'ordinary' unfair dismissal and 24 months for

an automatically unfair dismissal). This will be applied when the nature of the misconduct goes to the heart of the functions the employee performs. For example in *Maepe v CCMA and Another* [2008] 8 BLLR 723 (LAC) the LAC, held that a commissioner, whose duty includes administering an oath to litigants, who was found guilty of lying under oath, would not be able to successfully discharge his duties as a commissioner, and could not be reinstated. In applying s 193(2)(*c*), Zondo JP drew similarities with a driver whose reinstatement would be meaningless without a driver's licence – it was an inherent operational requirement.

Delays in prosecuting a matter

Delays in finalising litigation may be a sufficient justification to deny an employee the primary remedy of reinstatement, because it would not be reasonably practicable to do so. In the case of *Republican Press (Pty) Ltd v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and Others* (2007) 28 ILJ 2503 (SCA) the SCA considered the appropriateness of the remedy of reinstatement in the face of a six year delay. The question before the court was whether the selection criteria used by the employer in a retrenchment process was fair and objective. The court found in favour of the employees, however, when deciding on the appropriate remedy, it considered the fact that the employer had embarked on further retrenchments since the employee's dismissal and in addition, some of the company's operations had been restructured. The SCA held that the remedy of reinstatement was inappropriate and ordered 12 months compensation instead.

In the case of protracted litigation the employer is required to adduce evidence as to why reinstatement is not the appropriate remedy. In the absence of such evidence, the courts have held that s 193(2)(*c*) is not applicable. In *Visser v Mopani District Municipality and Others* [2012] 3 BLLR 266 (SCA) the matter took six years to finalise. The SCA held that in the face of systemic delays it was unjust to punish the employee who was completely blameless, and that he was entitled to be reinstated.

The principle seems to be that reinstatement, despite delays, may still be ordered provided that it is still practicable for the employer to take back the employee, and the employer has failed to lead evidence as to why it would be unduly onerous to do so.

Conclusion

Noting that reinstatement is the primary remedy – on a finding of an unfair dismissal – in line with the LRA's principle of security of employment, the courts are likely to order that remedy unless persuaded by an employer that it would not be reasonably practicable. The term 'not reasonably practicable' means more than inconvenience, and requires evidence of compelling operational burden as demonstrated in the *Halgang Properties*, *Republican Press* and *Maepe* cases.

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