

## Reinstatement in South African Labour Law

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### Abstract

Once a court or an arbitrator finds that an employee has been unfairly dismissed, they are empowered to order the employer to reinstate or re-employ the dismissed employee or pay compensation to the dismissed employee. Reinstatement is the primary remedy if the dismissal is found to be substantively unfair. Reinstatement restores the employee to the position he or she occupied before the dismissal on the same terms and conditions. It rectifies the effect of the unfair dismissal and safeguards job security by restoring the employment contract. Reinstatement can be ordered from any date not earlier than the date of unfair dismissal. The arbitrator or the court has discretion to order reinstatement and they must judicially exercise the discretion. There are circumstances where reinstatement may not be ordered. They include, for instance, when the employee does not want to be reinstated or re-employed, where a continued employment relationship would be intolerable. Furthermore, the reinstatement will not be ordered where it is not necessary or practicable for the employer to reinstate or re-employ the employee. Finally, reinstatement is not appropriate if the dismissal is unfair only because the employer did not follow a fair procedure. Despite these exceptions, the reinstatement continues to be the primary remedy for unfair dismissal. It is submitted that where a dismissed employee has found a new job, compensation must be awarded as the reinstatement is not appropriate for the employee in these circumstances.

**Keywords:** Reinstatement, re-employment, unfair dismissal, intolerability of continued employment relationship, compensation

### 1. Introduction

According to the Labour Relations Act (hereinafter "the LRA") once a court or arbitrator finds that an employee has been unfairly dismissed, the court or arbitrator is empowered to either order the employer to reinstate the employee<sup>1</sup>, or re-employ the dismissed employee<sup>2</sup> or to pay the dismissed employee compensation.<sup>3</sup> Reinstatement is the primary remedy whenever a dismissal has been found to be substantively unfair. The Constitutional Court has explained reinstatement as putting "the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions."<sup>4</sup> The purpose of reinstatement is to place an employee in the position he or she would have been but for the unfair dismissal.<sup>5</sup> Reinstatement safeguards a worker's employment by restoring the employment contract.<sup>6</sup> If an employee is reinstated, he or she resumes employment on the same terms and conditions that prevailed at the time of his or her dismissal.<sup>7</sup>

It is clear from the wording of section 193(2) of the LRA that the employer should be ordered to reinstate an employee who has been unfairly dismissed as a preferred remedy before opting for other available remedies.<sup>8</sup> In practice the remedy of reinstatement has created a lot of controversy, particularly, in the way that the court has interpreted or employed it. This article gives a critical analysis of various judgments by the courts which have attempted to interpret how reinstatement should be applied. The article also discusses and defines reinstatement, the extent to which a court can

<sup>1</sup> Act 66 of 1995; s 193(1)(a).

<sup>2</sup> S 193(1) (b) of the LRA.

<sup>3</sup> S 193(1) (c) of the LRA.

<sup>4</sup> *Equity Aviation Services (Pty) Ltd v CCMA & Others (2008) 12 BLLR 1129 (CC) at paragraph 36.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> S 193(2) of the LRA.

order reinstatement, circumstances under which reinstatement may not be granted, re-employment as opposed to reinstatement, other remedies available for unfair dismissal and conclusion.

## 2. What is Reinstatement?

The LRA does not give a definition of what reinstatement is, and as such various court decisions have attempted to define the word. Reinstatement in principle means the restoration of the employment contract so as to ensure continuity of the employment relationship.<sup>9</sup> An employee who has been unfairly dismissed can only be reinstated if he or she is willing to avail him/herself to the employer.<sup>10</sup> Reinstatement is interpreted to mean placing an employee back in service, on the same or similar terms and conditions of employment enjoyed as if that dismissal had never taken place.<sup>11</sup> Since reinstatement restores the *status quo* it may not be conditional or coupled with any qualification which is contrary to full retrospectivity.<sup>12</sup> However in practice commissioners reinstate employees on warnings.<sup>13</sup> Where an employer is ordered to reinstate an employee, it does not bar the employer from changing the working arrangements of the reinstated employee in accordance with its contractual rights.<sup>14</sup> An order of reinstatement restores the previous contract and any other amount payable to the worker under the contract necessarily becomes due to the worker simply because reinstatement has been ordered.<sup>15</sup>

## 3. The Extent to which the Court can Order Reinstatement Retrospectively

The court may order the employer who has unfairly dismissed an employee to reinstate the employee from any date not earlier than the date of dismissal.<sup>16</sup> It is clear from the legislation that the only bar to retrospective reinstatement is that, reinstatement should not be ordered to a date before the employee's unfair dismissal.<sup>17</sup> In *National Union of Mineworkers & others RSA v Geological Services (A division of De Beers Consolidated Mines Ltd)*,<sup>18</sup> the arbitrator held that the Labour Relations Act provided no guidance with regard to the extent of retrospectiveness when ordering reinstatement, because the discretion conferred on judges and arbitrators in this regard is "subject only to the obvious caveat that such discretion must be exercised judicially." The arbitrator further suggested that full retrospectiveness should be preferred unless there are reasons to limit it to a date later than the date of dismissal. For instance, the conduct of the employees before and after their dismissal will be a factor to be considered in deciding the extent to which reinstatement should be ordered retrospectively.<sup>19</sup>

The court is given a guided discretion by section 193(1) (a).<sup>20</sup> Perhaps the most plausible reasoning was provided by *Equity Aviation Services (Pty) Ltd v CCMA*<sup>21</sup> where the court stated that: "The ordinary meanings of the word re-instate means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a commissioner of the CCMA orders the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the commissioner decides to render the reinstatement retrospective."<sup>22</sup>

A similar line of thought was articulated by the Labour Appeal Court in *Kroukam v SA Airlink (Pty) Ltd*,<sup>23</sup> where the majority of the Court expressed the view that re-instatement or re-employment may be ordered retrospectively to the date of dismissal, even if that period exceeds 12 months, in the case of substantively unfair dismissal, or 24 months, in the case of automatically unfair dismissal. Davis AJA summarized it as follows: "The wording of section 193(1) (a) supports appellant's contention that the court has discretion in respect of the retrospectiveness of a re-instatement award. In exercising this discretion, a court can address *inter alia* the time period between the dismissal and the trial. The court can

<sup>9</sup> J Grogan. *Dismissal*. (2011) 523; he states that "the period during which the employee has been out of work as a result of the unfair dismissal is regarded as nothing more than a suspension of the employment contract". see also: RD Sharrock. *Business Transactions Law*. 8 ed. (2011) 489.

<sup>10</sup> *Equity Aviation Services Pty Ltd v CCMA & others* (2008) 12 BLLR 1129 (CC) at paragraph 39; see also *Johannesburg Municipality v O' Sullivan* 1923 AD 201.

<sup>11</sup> See *Equity Aviation Services (Pty) Ltd v CCMA & others* (2008) 12 BLLR 1129 (CC).

<sup>12</sup> Grogan J. *Workplace Law*. 10<sup>th</sup> ed. (2010) 174.

<sup>13</sup> See *County Fair v CCMA* (1998) 9 ILJ 815 (LC); *De Beers Consolidated Mines Ltd v CCMA* (2000) 21 ILJ 1051 (LAC).

<sup>14</sup> *Ibid* at page 176. See also *Jeremiah v National Sorghum Breweries* (1999) 20 ILJ 1055 (LC).

<sup>15</sup> *Republic Press v CEPPWAWU* (2007) 11 BLLR 1001 (SCA) at paragraph 19.

<sup>16</sup> *Labour Relation Act* (note 1 above) s 193(1) (a).

<sup>17</sup> *Ibid*.

<sup>18</sup> *National Union of Mineworkers & others and RSA Geological Services (A division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB).

<sup>19</sup> *Ibid* at 424.

<sup>20</sup> See generally *Whall v BrandAdd Marketing (Pty) Ltd* (1999) 6 BLLR 626 (LC). The court was of the view that the ordering of reinstatement under section 193(1)(a) or (b) bestows a discretion on the court when exercising its powers.

<sup>21</sup> *Kroukam v SA Airlink (Pty) Ltd* (2008) 29 ILJ 2507 (CC).

<sup>22</sup> *Ibid* paragraph 36.

<sup>23</sup> *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at paragraph 116.

accordingly ensure that an employer is not unjustly financially burdened if re-instatement is ordered.<sup>24</sup>

In *NUMSA & others v Fibre Flair CC t/a Kango Canopies*,<sup>25</sup> the Labour Appeal Court confirmed that section 193(1) conferred on the Labour Court discretion to order non-retrospective reinstatement. The essence of the discretion is that: "If the repository of the power follows any one of the available courses, he/she would be acting within his or her power".

In *CWIU and others v Latex Surgical Products (Pty) Ltd*,<sup>26</sup> the employer gave notice to the trade union that it proposed the possible retrenchment of 33 employees. After consultation, the employer implemented retrenchments, citing financial constraints. The employees lodged a dispute with the Labour Court which found that the retrenchments were fair. On appeal, the Labour Appeal Court held that it was not competent for a court or arbitrator to order retrospective reinstatement in excess of 12 months in the case of substantively unfair dismissals or 24 months in the case of automatically unfair dismissals.<sup>27</sup> The court reasoned that back pay accompanying a reinstatement order, in effect, constituted compensation "in much the same way" as compensation awarded in terms of section 194 of the LRA.

In the case of *SACCAWU & others v Primserv ABC Recruitment Pty Ltd t/a Primserv Out Sourcing Incorporating*<sup>28</sup> the Labour Court noted that there were conflicting judgments of the Labour Appeal Court. Furthermore, the court emphasised that: "There is no limitation on reinstatement or a capping of reinstatement in the Act it is competent for a court to award reinstatement in excess of a 12 month period".<sup>29</sup>

The proper interpretation of section 193(1)(a) of the LRA was authoritatively decided in the case of *Republican Press v CEPPWAWU*,<sup>30</sup> where the Supreme Court of Appeal resolved the issue, holding that the decision in *CWIU v Latex Surgical Products*<sup>31</sup> was erroneous because reinstatement of the employment contract was unrelated to the issue of compensation. The court held that it was not practicable to reinstate the employees concerned and that 12 months remuneration was the only appropriate remedy.<sup>32</sup> The court further held that there is no reason why an order of reinstatement cannot be made retrospectively to the date of dismissal and beyond the 12 months or 24 months period, depending on the nature of the dismissal.<sup>33</sup> The effect of this judgment is that the retrospective effect of reinstatement is not limited.

#### 4. Circumstances under which Reinstatement may not be Ordered

Ordinarily the Labour Court or arbitrator "must" require the employer to re-instate or re-employ the employee as a primary remedy when it finds that the dismissal is unfair.<sup>34</sup> This sentiment was echoed by Zondo J in *Adams & others v Coin Security Group (Pty) Ltd*<sup>35</sup> that: "the norm should be to order re-instatement and the denial of that primary relief should occur only as an exception"<sup>36</sup>. A failure or refusal by an employer to reinstate or re-employ an employee amounts to Unfair Labour Practice as envisaged by section 186(2) (c) of the Labour Relations Act.<sup>37</sup> In *National Union of Metalworkers of SA v Henred Fuehauf Trailers (Pty) Ltd*<sup>38</sup> the Appellate Division, for instance, held that: "Where an employee has been unfairly dismissed he suffers a wrong ... The fullest redress obtainable is provided by the restoration of the *status quo ante*. It follows that it is incumbent on the Court when deciding what remedy is appropriate to consider whether, in the light of all the proved circumstances, there is reason to refuse reinstatement."<sup>39</sup>

To prevent reinstatement, the employer must lead evidence to prove that the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or that it is not reasonably practicable for the employer to reinstate the employee.<sup>40</sup> If an employee is unfairly dismissed he or she is entitled to be reinstated if there is no evidence preventing a court from making a different order.<sup>41</sup> Section 193(2) of the LRA has a list of instances

<sup>24</sup> *Ibid.*

<sup>25</sup> *NUMSA & others v Fibre Flair CC t/a Kango Canopies* (2000) 6 BLLR 631 (LAC).

<sup>26</sup> See generally *CWIU & others v Latex Surgical Products (Pty) Ltd* (2006) 2 BLLR 142 (LAC).

<sup>27</sup> See *Jaftha v CCMA* (2006) 27 ILJ 2368 (LC).

<sup>28</sup> *SACCAWU & others v Primserv ABC Recruitment (Pty) Ltd t/a Primserv Out Sourcing Incorporating* (2007) 1 BLLR 78 (LC) at paragraphs 18-21.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Republican Press (Pty) Ltd v CEPPWAWU & Others* (2007) 11 BLLR 1001 (SCA) at paragraph 19.

<sup>31</sup> *Latex Surgical Products supra*.

<sup>32</sup> *Republican Press v CEPPWAWU supra* at paragraph 21-22.

<sup>33</sup> *CWIU & others v Latex Surgical Products (Pty) Ltd supra* at paragraph 19.

<sup>34</sup> See *Manyaka v Van De Wetering Engineering (Pty) Ltd* (2004) 8 BLLR 1458 (LC).

<sup>35</sup> *Adams & Others v Coin Security Group (Pty) Ltd* 1998 (2) BLLR 1238 (LC).

<sup>36</sup> *Ibid* paragraph 88.

<sup>37</sup> *Du Toit D. et al. Labour Relations Law: A Comprehensive Guide* (2008) 500; See also *OCGAWU obo Mapolie v Metlite Alloys* (2002) 10 BALR 1058 (CCMA).

<sup>38</sup> *National Union of Metalworkers of SA & Others v Henred Fuehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A).

<sup>39</sup> *Ibid* 1263C.

<sup>40</sup> *R Le Roux "Reinstatement: When does a continuing employment relationship become intolerable?"* 2008 *Obiter* 69, 71. The author suggested that "it is clear that the courts and tribunals are the gatekeepers of the appropriate remedy."

<sup>41</sup> *Perumal v Tiger Brands* (2007) 28 ILJ 2302 (LC) at paragraph 35.

where reinstatement would not be appropriate or ordered. It 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 reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not necessary or practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure."<sup>42</sup> These are exceptions to the general rule that reinstatement is a primary remedy.

#### 4.1 Where the employee does not wish to be reinstated

The courts usually do not force an employee who does not wish to continue the employment relationship with the employer.<sup>43</sup> In *Van Zyl v Plastafrica (Pty) Ltd*,<sup>44</sup> the court held that re-instatement can only occur by consensus. In *Adams & others v Coin Security Group (Pty) Ltd*,<sup>45</sup> it was held in the context of automatically unfair dismissals that employees who did not wish to be reinstated were entitled to compensation in terms of section 194(3) of the LRA. The general rule, however, is that laid in *Van Zyl*,<sup>46</sup> it has been accepted by the Labour Court that, it is fair for an employee to reject an unconditional offer of re-instatement if the relationship of trust between the employer and the employee has been broken down.<sup>47</sup>

There has been however conflicting views recently on whether an employee can refuse an offer for reinstatement. In *Rawlins v Kemp t/a Centralmed*,<sup>48</sup> Dr. Rawlins was dismissed in February 1998 from her employment as a doctor without due process being followed. Her employer, Dr. Kemp, conceded that her dismissal was both procedurally and substantively unfair.<sup>49</sup> The employer argued that she was not dismissed as a consequence of her pregnancy but rather as a consequence of her employer's (Dr. Kemp's) operational requirements.<sup>50</sup> Dr. Rawlins had, subsequent to her dismissal, obtained employment at a higher salary than what she earned prior to her dismissal. It was not in dispute that Dr. Kemp had on three different occasions during the conciliation and litigation process offered to reinstate Dr. Rawlins from the date on which she was due to return to work following her maternity leave and Dr. Rawlins had either ignored or categorically refused to accept the offer made.<sup>51</sup>

Notwithstanding the offer of reinstatement and her improved earnings, the Labour Court awarded Dr. Rawlins 12 months compensation. This decision was overturned by the Labour Appeal Court. This court reasoned that an employee had no vested right to a remedy in terms of labour legislation but, the court further stated that what the employee had was a right to be considered for a remedy. An employer had a "right to right a wrong."<sup>52</sup> The Labour Appeal Court reasoned further that an employer who had treated an employee unfairly was entitled to remedy that conduct by offering to reinstate the aggrieved employee.<sup>53</sup> The court went on to state that if an employee unreasonably refused to be reinstated, the employer had a good case in support of no order of compensation being made in favour of the employee.<sup>54</sup>

In short the Labour Appeal Court did not accept that the relationship was irreparable between the doctors and rejected Dr. Rawlins' contention that she was unable to work with Dr. Kemp in light of what had transpired between them.<sup>55</sup> This was largely because Dr. Rawlins worked at a satellite practice and would not come into regular contact with Dr. Kemp and, furthermore, no objective grounds were advanced as to why the relationship was broken.<sup>56</sup> The court refused to accept only Dr. Rawlins' subjective perception of the working relationship.<sup>57</sup>

<sup>42</sup> Labour Relations Act (note 1 above) s 193 (2) (a) – (d). See also C Okpaluba "Reinstatement in contemporary South African law of unfair dismissal: the statutory guidelines" (1999) 116 SALJ 815, 821.

<sup>43</sup> *Mzeku and others v Volkswagen SA (Pty) Ltd and others* (2001) 8 BLLR 857 (LAC) at paragraph 74 the court was of the opinion that a court or arbitrator would be 'acting in a grossly unreasonable manner if it ordered reinstatement' to an employee who does not wish to be reinstated. See also *Tshongweni v Ekurhuleni Metropolitan Municipality* case number JA 47/2010 the court could not order reinstatement because the employee made it abundantly clear that he did not wish to be reinstated. See also *Equity Aviation Services (Pty) Ltd v CCMA & others* (2008) 12 BLLR 1129 (CC) at paragraph 34 the court could not order reinstatement because it was abundantly clear that the employee did not want to be reinstated.

<sup>44</sup> See generally *Van Zyl v Plastafrica (Pty) Ltd* (1999) 290 ILJ 212 (LC).

<sup>45</sup> *Adams & others v Coin Security Group (Pty) Ltd supra* at paragraph 114.

<sup>46</sup> *Van Zyl v Plastafrica supra*.

<sup>47</sup> See generally *Cuts v Izinga Access (Pty) Ltd* (2004) 8 BLLR 755 (LC); C Okpaluba "Reinstatement in contemporary South African law of unfair dismissal: the statutory guidelines" (1999) 116 SALJ 815, 822.

<sup>48</sup> *Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA).

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> *Rawlins v Kemp t/a Centralmed supra* at paragraph 26.

<sup>53</sup> *ibid*

<sup>54</sup> *ibid*

<sup>55</sup> *ibid*

<sup>56</sup> *ibid*

<sup>57</sup> *ibid*

On a further appeal, the Supreme Court of Appeal upheld or confirmed the decision of the Labour Appeal Court. The Supreme Court of Appeal held that a court's remedial powers were compensatory and not punitive in nature and therefore the court was clearly misdirected when making such an order.<sup>58</sup> The court had remarked that:

*Dr. Kemp may have treated Dr. Rawlins the respondent unfairly when he dismissed her in the manner in which he did but he had "a right to seek to right the wrong" that he had committed by offering to put the respondent back in the position in which she would have been had she never been dismissed. It is what I call an employer's "right to right a wrong". And, if the offer was genuine and reasonable, as it has been conceded on behalf of Dr. Rawlins it was, I cannot see why Dr. Kemp must be ordered to pay her compensation which would not have arisen if the respondent had accepted the offer of reinstatement. In my view it is important to affirm the employer's "right to right a wrong" that he or she has made in these kinds of circumstances. If an employer unfairly dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation.*<sup>59</sup>

The Supreme Court of Appeal, in upholding the Labour Appeal Court's decision, concurred with its findings and reiterated that the refusal of the repeated offers of re-instatement was unreasonable and as a consequence thereof, the employee only had herself to blame for her financial loss.<sup>60</sup> The judge had this to say:

*I agree with the conclusion of the majority. No doubt Dr. Rawlins genuinely felt that there had been a breach of trust. But these are two professional people who might be expected to resolve any acrimony that might earlier have existed. No objective grounds were advanced why any perceived breach of trust between them was not capable of being restored. Dr. Rawlins chose not even to explore that possibility but rejected it out of hand. That is not how labour relations should be conducted and I agree that the rejection of the repeated offers of reinstatement was unreasonable and she has only herself to blame for her financial loss.*<sup>61</sup>

However in a case decided subsequent to *Rawlins v Kemp* supra, the case of *Setcom (Pty) Ltd v Dos Santos & Others*,<sup>62</sup> the dismissal was found to be both substantively and procedurally unfair. In this case the court allowed the employee to refuse a conditional offer of reinstatement. It is important to note that the court distinguished this case from *Rawlins v Kemp*<sup>63</sup> on the facts and it advanced the following reasons that:

*The situation confronting the employee, in this instance at the time of the purported upliftment of her 'suspension', was not one of an employer that recognized its wrongdoing and was seeking to rectify matters, but of an employer that was attempting to disguise its actions to avoid them being characterized as an unfair dismissal. Under such circumstances, it is perfectly understandable for the employee to have rejected the upliftment of the suspension as a stratagem, rather than a bona fide attempt to make amends and to restore the relationship. It does not matter that the upliftment of the suspension was not conditional on her accepting a variation of her terms and conditions of employment: what was being proposed by the employer was an arrangement that entailed no acknowledgment of any wrongdoing and no undertaking to make redress, to which the employee would be acquiescing had she returned to work. In such circumstances, the employee can hardly have been said to have unreasonably rejected a bona fide offer of reinstatement, because there was none. The reasonableness of the employee's response must be assessed in relation to what was actually presented to her at the time, namely a disingenuous pretence that the employer was uplifting her suspension, whereas it had summarily dismissed her.*<sup>64</sup>

It is therefore clear from the above analysis that an employee can refuse a conditional offer of reinstatement but cannot however unreasonably refuse an offer of reinstatement, as doing so may leave him or her without a remedy in law.<sup>65</sup>

<sup>58</sup> *ibid*

<sup>59</sup> *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) at paragraph 26.

<sup>60</sup> *ibid*

<sup>61</sup> *Rawlins v Kemp t/a Centralmed* supra at paragraph 18. See also *Van Zyl v Plastafrica (Pty) Ltd* (1999) 20 ILJ 212 (LC); *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC); *C Okpaluba "Reinstatement in contemporary South African law of unfair dismissal: the statutory guidelines"* (1999) 116 SALJ 815, 823.

<sup>62</sup> *Setcom Pty Ltd v Dos Santos & Others* (2011) 32 ILJ 1434 (LC).

<sup>63</sup> *Rawlins v Kemp* supra.

<sup>64</sup> *Setcom (Pty) Ltd v Dos Santos & Others* (2011) 32 ILJ 1434 (LC), paragraph 37.

<sup>65</sup> See *Basson v Cecil Nurse (Pty) Ltd* 2001 22 ILJ 673 (LC), *Van Niekerk v Cheque Guarantee Services (Pty) Ltd* 2001 22 ILJ 728 (LC).



#### 4.2 The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable

Reinstatement is also not possible where the employment relationship is intolerable.<sup>66</sup> The employer has the onus of proving that the relationship has become intolerable.<sup>67</sup> The court's assessment of "intolerability" in the context of remedies is guided by judgments and awards on constructive dismissal.<sup>68</sup> The employee has to show more than just mere unhappiness or stress in the work environment caused by the employer, and demonstrate that the employer made it impossible to continue the employment relationship. The Cape High Court, in *Murray v Minister of Defence*,<sup>69</sup> concisely summarized the requirements for constructive dismissal by saying that:

*...the employee must be able to prove that he or she has terminated the employment contract; that the conduct of the employer rendered the continued employment intolerable; that the intolerability was of the employer's making; the employee resigned as a result of the intolerable behaviour of the employer and that the resignation or the termination of employment was a matter of last resort. Finally, the employee bears the onus to prove that there has been a constructive dismissal and that he or she has not in fact resigned voluntarily. And ... the employee should not delay too long in terminating the contract in response to the employer's conduct.*<sup>70</sup>

These same requirements would therefore be applicable in considering whether or not reinstatement should be ordered, in the case of an unfair dismissal.

Mlambo J in *Malelane Toyota v CCMA*<sup>71</sup> articulated that: "An act of dishonesty destroys the trust an employer places on an employee. Once such trust is destroyed there can be no hope of the employment relationship continuing."<sup>72</sup> In *Buthelezi v Amalgamated Beverage Industries*,<sup>73</sup> it was noted in an *obiter* that: "while employees have a right to freely express their grievances against their employers in the press, they do so at the risk of forfeiting their right to reinstatement or re-employment because high profile mud-slinging- particularly where an employer's business depends on a positive public image- makes a continued employment relationship intolerable."<sup>74</sup>

The courts have employed a very strict standard of proof for the employer to satisfy the requirement of intolerability.<sup>75</sup> In *Boardman Brothers (Natal)(Pty) Ltd v Chemical Workers Industrial Union*,<sup>76</sup> the employees were dismissed for being dishonest after they were caught sleeping at work during a night shift. The court came to the conclusion that the working relationship between the parties had not suffered irreparable damage as a consequence of the employees' conduct. Re-instatement was therefore appropriate.

In *Jabari v Telkom SA (Pty) Ltd*<sup>77</sup> where the applicant had been dismissed for unlawful reasons, it was held to be against public policy for the employer to be protected against the consequences of its conduct in refusing to reinstate the applicant on the basis that the trust relationship had been destroyed. Given the circumstances of the case, the employer made no real effort to repair the relationship. The court's decision was based on its approach to the employer's responsibility.

In *National Union of Mineworkers v CCMA*,<sup>78</sup> the Labour Court rejected the CCMA's reasoning that reinstatement was not possible because the employee, according to evidence, was a bad person and that the employer and employee's union had poor relations. The court reasoned that this did not make the employment relationship intolerable and as such the arbitrator did not correctly apply section 193(2) of the LRA.<sup>79</sup> In some instances the employee's own admission that the relationship had broken down, even if rehabilitation could mend the relationship, reinstatement has not been ordered.<sup>80</sup> Negligently executing one's duties does not make the employment relationship intolerable.

<sup>66</sup>*Schierhout v Minister of Justice* 1926 AD 99, 107 the Appellate Division stated that our "courts did not order specific performance for two reasons: the inadvisability of compelling one person to employ another who he does not trust in a position which imparts a close relationship; and the absence of mutuality, for no court could by its own order compel a servant to perform his work faithfully and diligently." *Foschini Group v Commission for Conciliation, Mediation and Arbitration* (2008) 29 ILJ 1515 (LC); *Strategic Liquor Services v Mvumbi* (2009) 30 ILJ 1526 (CC).

<sup>67</sup>*National Union of Mineworkers v CCMA* (2007) 28 ILJ 402 (LC).

<sup>68</sup>*R Le Roux supra* at page 69; see also section 186(1)(e) of the LRA; *N Whitear-Nel & M Rudling "Constructive dismissal: a tricky horse to ride"* *Jordaan v CCMA* 2010 31 ILJ 2331 (LAC) 2012 *Obiter* 193; *Strategic Liquor Services v Mvumbi* 2009 30 ILJ 1526 (CC).

<sup>69</sup>*Murray v Minister of Defense* (2006) 27 ILJ 1607 (C).

<sup>70</sup>*Ibid* paragraph 31.

<sup>71</sup>*Malelane Toyota v CCMA* (1999) 6 BLLR 555 (LC).

<sup>72</sup>*Ibid*.

<sup>73</sup>*Buthelezi v Amalgamated Beverage Industries* (1999) 9 BLLR 907 (LC).

<sup>74</sup>*Ibid* paragraph 29; see also *R Le Roux "Reinstatement: when does a continuing employment relationship become intolerable?"* 2008 *Obiter* 69, 73.

<sup>75</sup> See *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit* (1999) 7 BLLR 713 (LC); *Mathews v Hutchinson* (1998) 19 ILJ 1512 (LC). These cases suggest that it is difficult to meet the requirement of 'intolerability.'

<sup>76</sup>*Boardman Brothers (Natal) Pty Ltd v Chemical Workers Industrial Union* 1998 3 SA 53 (SCA).

<sup>77</sup>*Jabari v Telkom SA (Pty) Ltd*(2006) 10 BLLR 924 (LC) 939.

<sup>78</sup>*National Union of Mineworkers v CCMA* (2007) 28 ILJ 402 (LC) at paragraph 11.

<sup>79</sup>*National Union of Mineworkers v CCMA* *supra* at paragraph 13, the judge had this to say, "I have perused the record of the arbitration proceedings and could not find any evidence that proved that the exceptions contained in s 193(2) of the Act were met. ....the commissioner should have found that none of the exceptions referred to in s 193(2) of the Act existed and should have reinstated the second applicant."

<sup>80</sup> See generally *Uys v Imperial Car Rental (Pty) Ltd* (2006) 27 ILJ 2702 (LC).

#### 4.3 It is not reasonably practicable for the employer to reinstate or re-employ the employee

Where it is not practicable for the employer to reinstate or re-employ the employee is another exception to the general rule that reinstatement should be ordered. The practicability of ordering reinstatement depends on the particular circumstances of the case, but in many instances, the impracticability of resuming the relationship of employment will increase with the passage of time.<sup>81</sup> In *Republican Press v CEPPWAWU*,<sup>82</sup> the employees were unfairly retrenched and six years passed due to protracted litigation. The Supreme Court of Appeal held that although reinstatement was the primary remedy in law it was inappropriate under the circumstances because the employer had outsourced the concerned jobs and also further restructured the business and retrenched.<sup>83</sup> However the fact that a long period of time has elapsed since the dismissal of the employees does not necessarily constitute a basis to deny them reinstatement.<sup>84</sup> In a case where an employer no longer has any other employees, however, it was found reasonably practicable to take the applicant back into service.<sup>85</sup> Dishonesty has been held as a ground which makes reinstatement not to be reasonably practicable because the trust between the employee and the employer would have been lost.<sup>86</sup>

The fact that an employer has replaced an employee does not render reinstatement "not reasonably practicable" and was not a factor to be taken into account as the respondent had created the situation by its own unfair conduct. In *Volkswagen SA (Pty) Ltd v Brand NO & others*,<sup>87</sup> Landman J held that: "Re-instatement will also be invoked when the employee's job had been filled by a replacement, but care must be taken lest this become a ready means by which an employer can escape her obligations. In cases of this sort an employee should normally be re-instated and the employer be left to do what he or she traditionally does when there are too many employees on the payroll - commence the process of dismissal for operational requirements."<sup>88</sup> In *Manyaka v Van Der Wetering Engineering (Pty) Ltd*,<sup>89</sup> the court ordered reinstatement of an employee who had been unfairly retrenched for operational reasons. Reinstatement was ordered even though the employer had already appointed another employee in place of the dismissed employee. The practical consequence of this is that two people may end up on the same post.

In *SADTU & others v Head of Northern Province Department of Education*,<sup>90</sup> it was stated that: "To reinstate the individual applicants in the very positions or posts which they occupied prior to the withdrawal of their appointments: it would be impossible to reinstate them to such positions with retrospective effect. The order in my view requires the Department to re-instate the individual applicants with retrospective effect on terms and conditions of employment which are not less favourable than the terms and conditions applicable to them prior to such withdrawal."<sup>91</sup>

In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile*,<sup>92</sup> the court held that there was no need to manufacture a constitutional remedy where reinstatement could be ordered. The court ruled that it was practically possible to order reinstatement even after a long institutional delay. The Constitutional Court stated that: "It was the employer's own conduct in causing this delay that led to this state of affairs. Whether that conduct was motivated by a cynical 'playing of the system' or a genuine but belated recognition of its own misconception of the correct legal principles, matters not. Neither the institutional part of the system nor the employee was to blame for the unnecessary prolonging of the proceedings. If the employee earned income since that order was granted it was because he had to do so in order to survive and live a decent life. The employer could have prevented that necessity by implementing the reinstatement order."<sup>93</sup>

A slightly different context is whether it would be practicable for reinstatement to be ordered where section 189 of the LRA was not complied with. Mlambo J in *Germiston Uitgewers* held that on the facts reinstatement was not practicable, but he however stated albeit in an *obiter* that: "in appropriate cases it would be proper that where an employer has not complied with the prerequisites of a fair procedure as set out in S 189, the affected employees be

<sup>81</sup>*Republican Press (Pty) Ltd CEPPWAWU & others* 2008 1 SA 404 (SCA) at paragraph 20. The Supreme Court of Appeal held that the passage of six years from the date of dismissal rendered an order for reinstatement "not reasonably practical."

<sup>82</sup>*Republican Press supra*.

<sup>83</sup>*Republican Press supra* at paragraph 22.

<sup>84</sup>See generally *Mzeku v Volkswagen SA* (2001) 3 BALR 256 (CCMA). See also *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 2 SA 24 (CC), where reinstatement was ordered seven years after the dismissal.

<sup>85</sup>See generally *Elias v Germiston Uitgewers (Pty) Ltd t/a Evalulab* (1997) 12 BLLR 1571 (LC).

<sup>86</sup>See generally *Maepe v CCMA & another* (2008) 29 ILJ 2189 (LAC), the court held that a commissioner who lies under oath, when he is supposed to administer an oath was not a fit and proper person to hold the office of a commissioner.

<sup>87</sup>*Volkswagen SA (Pty) Ltd v Brand NO & others* (2001) 5 BLLR 924 (LC).

<sup>88</sup>*Ibid* paragraph 102.

<sup>89</sup>*Manyaka v Van Der Wetering Engineering (Pty) Ltd* (1997) 11 BLLR 1458 (LC).

<sup>90</sup>*SADTU & others v Head of Northern Province Department of Education* (2001) 7 BLLR 829 (LC).

<sup>91</sup>*Ibid* paragraph 23.

<sup>92</sup>*Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* (2010) 31 ILJ 273 (CC).

<sup>93</sup>*Billiton Aluminium SA Ltd t/a Hillside v Khanyile supra* at 52.

reinstated because there is a possibility that they could conceivably still be in employment had a fair procedure been followed. A fair consultation would have ensured that those employees would have been in a position to point out what viable alternatives were there. A fair consultation process would have ensured that there is consensus that retrenchment has to take place employees would be able to persuade the employer why objectively they should not have been selected thus ensuring continued employment.<sup>94</sup> This *obiter*, however, is not convincing as in most circumstances section 189<sup>95</sup> is followed only as a formality with the employer having already made a decision, it is highly unlikely that he (employer) would be convinced by employees to act otherwise. The court might be reluctant to reinstate where it is clear the business cannot afford to keep an employee.

Recently in *Tshongweni v Ekurhuleni Metropolitan Municipality* the court was of the view that it would not be reasonably possible to reinstate an employee who has been employed on a fixed term contract beyond the date of the expiry of the contract.<sup>96</sup> The Judge stated that: "it rarely will be reasonably practicable to reinstate an employee whose fixed term contract of employment has expired.....the employee has expressly agreed in the initial contract that he would not entertain any expectation of renewal or extension beyond the initial fixed term period. The purpose of such a term is to ensure that the renewal of the contract will take place by means other than mere expectation. The intention is for the parties to embark upon further negotiations directed at assessing previous performance, setting new targets and objections and imposing new conditions premised upon past experience.....neither party could reasonably assume the existence of an expectation of automatic renewal."<sup>97</sup>

#### 4.4 The dismissal is unfair only because the employer did not follow a fair procedure

The courts generally favour ordering compensation where the dismissal is only procedurally unfair.<sup>98</sup> In *Volkswagen SA (Pty) Ltd v Brand NO & others*,<sup>99</sup> it was held that section 193(2) of the LRA does not permit re-instatement as a remedy for dismissal that is only procedurally unfair. Landman J found that:

*... the section cannot be read as embodying a mandatory exclusion of re-instatement in the first three cases i.e. paragraphs (a) to (c) and a discretion to reinstate in the fourth (procedural unfairness) i.e. paragraph (d). All four are the same and all four exclude reinstatement. While the Labour Court has accepted in a number of cases that an order of reinstatement is competent where the dismissal is found to be procedurally unfair, these decisions were distinguishable on the basis that the procedural irregularities also resulted in substantive unfairness. Section 193 therefore does not contemplate that the commissioner may order reinstatement or re-employment where the dismissal is only procedurally unfair.*<sup>100</sup>

In *Mzeku & others v Volkswagen SA (Pty) Ltd*,<sup>101</sup> the Labour Appeal Court held that section 193 (d) of the LRA relates to an employee whose dismissal would have been fair in every respect had the employer followed a fair procedure. The court concluded that "the relief of re-instatement is not competent in the case of a dismissal that is unfair only because the employer did not follow a fair procedure."<sup>102</sup> In *Mekgoe v Standard Bank of SA*<sup>103</sup> the CCMA found that the dismissal was procedurally unfair in that the employer had failed to follow a fair procedure in the disciplinary appeal; the employee instead of reinstatement was awarded compensation in accordance with section 194(1) of the LRA.

## 5. Re-Employment as Opposed to Reinstatement

Re-employment implies termination of the previous employment contract and the creation of a new employment contract.<sup>104</sup> Reinstatement can be distinguished from re-employment in that reinstatement restores the original contract whereas re-employment creates a new contract.<sup>105</sup> In *NEWU v John & another*,<sup>106</sup> when the court was asked to review an

<sup>94</sup>GermistonUitgewers (1998) 19 ILJ 314 (LC) at 322 F-I.

<sup>95</sup> S 189 of the LRA.

<sup>96</sup>Tshongweni v Ekurhuleni Metropolitan Municipality case number JA47/2010: Judgment delivered on 15 June 2012.

<sup>97</sup> Ibid at paragraph 33.

<sup>98</sup>Malelane Toyota v CCMA & others (1999) 4 LLD 242 (LC), the court was of the view that where an employee is guilty of an offence involving dishonesty but a proper procedure was not followed then reinstatement can never be considered.

<sup>99</sup>Volkswagen SA (Pty) Ltd v Brand NO & others (2001) 5 BLLR 558 (LC).

<sup>100</sup> Ibid paragraph 111.

<sup>101</sup>Mzeku & others v Volkswagen SA (Pty) Ltd (2001) 22 ILJ 1575 (LAC).

<sup>102</sup>Ibid paragraph 79.

<sup>103</sup>Mekgoe v Standard Bank of SA(1997) 4 BLLR 445 (CCMA).

<sup>104</sup> See Namibian case Transnamb Holdings Ltd v Engelbrecht (Nm) at page 1403 C-F the court stated that the principal difference between the two concepts is that reinstatement relates to the identical job, while re-employment relates to a similar job.

<sup>105</sup>RD Sharrock. Business Transactions Law (2011) 489; see also Equity Aviation Services (Pty) Ltd v CCMA & Others supra at paragraph 37 it is stated that "Re-employment implies termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms both as to period and the content of the obligations undertaken."



award for re-employment as opposed to re-instatement, the Labour Court held that it was within the powers of the commissioner to order either reinstatement or re-employment or compensation.

Re-employment is usually employed by the courts in the context of dismissals which fall within the ambit of dismissals provided for in section 186(1) (b) and (d).<sup>107</sup> Re-employment usually requires that the employee be placed in a position that they were before the dismissal or in other "reasonably suitable" work.<sup>108</sup> The Labour Relations Act does not define the words "reasonably suitable work." The court will usually counter the possible harsh consequences of ordering reinstatement on the employer by ordering re-employment instead.<sup>109</sup>

## 6. Other Remedies which the Court can Make

Apart from reinstating an employee who has been unfairly dismissed, the court can order the employer to pay compensation in terms of section 193 (1) of the LRA.<sup>110</sup> Where the court does not order reinstatement or re-employment then, it may, in terms of section 193(1) (c), order the employer to pay compensation to the employee.<sup>111</sup> Section 194 limits the amount of compensation payable to an amount which is just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration in the case of ordinary unfair dismissal or 24 months where the dismissal is categorized as automatically unfair.<sup>112</sup> These however are not the only remedies available and the courts, on occasion, have articulated that the section 193 remedies are not exhaustive.<sup>113</sup> It should also be noted that if an employee unreasonably refuse an offer of reinstatement he runs the risk of not being awarded compensation.<sup>114</sup>

## 7. Conclusion

Reinstatement, though a primary remedy, is still problematic in a number of respects as this article has shown. There has been a variety of contentious decisions over the years involving reinstatement as a primary remedy for unfair dismissal but what remains clear from the assessment done by this article is that the limit on the extent of retrospectivity is left to the discretion of the court or arbitrator. The only limit on the extent of retrospectivity is that it should not be ordered to a date earlier than the date of dismissal. Ordinarily, reinstatement will operate from the date of the order or award, unless the commissioner, in his or her discretion, determines that it should be retrospective. The passage of time may mean that the matter falls in the exceptions listed in section 193(2) of the LRA,<sup>115</sup> which entitles the court or arbitrator to exercise discretion not to order reinstatement.

Although the reinstatement is a primary remedy for unfair dismissal or unfair labour practice as it ensures and maintains job security, sometimes the employee has to be awarded compensation. This can occur when the employer wants to reinstate the dismissed employee while he or she has already found another employment. In these circumstances, the employee should be awarded compensation even if he or she has disturbed or interfered with the employer in the attempt to remedy the situation by offering reinstatement. It is submitted that the employee should be awarded compensation when he or she has found another employment and declined an offer of reinstatement from the previous employer.

<sup>106</sup> *NEWU v John & another* (1997) 12 BLLR 1623 (LC).

<sup>107</sup> *Grogan J. Dismissals 2011 at 526 (non-renewal of fixed term employment contracts or selective re-employment). Section 186 (1) (b) and (d) the LRA provides that dismissal means that: (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another.*

<sup>108</sup> *Grogan J. Workplace Law* (2010) at 174.

<sup>109</sup> *Republican Press supra* at paragraph 19.

<sup>110</sup> S 194 of the LRA – Limits on compensation.

<sup>111</sup> S 193(1) (c) of the LRA.

<sup>112</sup> S 194 of the LRA.

<sup>113</sup> See *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA). The Supreme Court of Appeal held that nothing in the Labour Relations Act deprives an employee of his common law right to enforce the terms of a fixed term contract of employment or claim full compensation for the damage he has suffered arising from breach of the contract.

<sup>114</sup> See <http://retrenchmentassist.co.za/index.php/ra-newsletters/117-back-pay-after-reinstatement>. (Accessed on 23 November 2013).

<sup>115</sup> LRA, s 193 Remedies for unfair dismissal and unfair labour practice

(2) 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 reinstated or re-employed; (b) 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 reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.

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