

REINSTATEMENT: WHEN DOES A CONTINUING EMPLOYMENT RELATIONSHIP BECOME INTOLERABLE*?

1 Introduction

In the Labour Relations Act 66 of 1995 (hereinafter “the LRA”) the tolerability of the employment relationship features twice: first, in the definition of dismissal, and second, in the context of remedies for unfair dismissal.

Section 186(1)(d) of the LRA defines dismissal as including a situation where:

“an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee”.

This is commonly known as a constructive dismissal.

Section 193 of the LRA, which deals with the remedies for unfair dismissal, provides in subsection 2 that:

- “(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.”

The concern of this note is the issue of “intolerability” in the context of section 193 of the LRA; in other words, in the context of reinstatement or re-employment. This is not to suggest that that the two sections quoted above will never be considered concurrently. Clearly, once a tribunal or labour court finds that the requirements of a constructive dismissal as defined in section 186(1)(d) are met, the tribunal or court will find it difficult to order reinstatement or re-employment. Furthermore, a tribunal or court may well find direction on the meaning of “intolerability” in the context of remedies from judgments and awards on constructive dismissal. After briefly revisiting the principles of constructive dismissal, the focus of this paper will move to section 193(2)(b) of the LRA. Practical problems associated with

* This note is an adaptation of a paper presented by the author at the 20th Annual Labour Law Conference, Johannesburg, July 2007.

reinstatement and the impact of recent judgments on the retrospective effect of reinstatement will also be alluded to.

2 Constructive dismissal

It is now trite that an employee wishing to show that a constructive dismissal has occurred bears quite a heavy onus, and that mere unhappiness or the existence of stressful relationships at work, even if it being the result of the employer's conduct, will not necessarily suffice. In *Murray v Minister of Defence* ((2006) 27 ILJ 1607 (C)), it was held that (par 29):

"The courts have required very strict proof of constructive dismissal, and have not readily found that circumstances complained of by employees constitute such a dismissal. Thus, for example, in *Aldendorf v Outspan International Ltd* (1997) 18 ILJ 810 (CCMA) it was held that '[w]here employees could reasonably have lodged a grievance regarding the cause of the unhappiness, and failed to do so before resigning, they may be hard put to persuade the court or arbitrator that they had no option but to resign'."

In this matter an SANDF soldier, who falls outside the protection offered by the LRA, proceeded with a common law claim based on constructive dismissal. The Cape High Court nonetheless relied heavily on the requirements for constructive dismissal as developed by the Labour Court, which requirements the court summarised as follows (par 31):

"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."

3 When does section 193(2) of the LRA apply?

Section 193(1) of the LRA provides that if a tribunal or court finds a dismissal to be unfair, the following remedies are available: reinstatement, re-employment or an order of compensation. Section 193(2) makes it clear that the re-employment and reinstatement ought to be the prime remedies. In other words, compensation should only be ordered in exceptional circumstances when a dismissal is found to be unfair. The Labour Appeal Court, in *Kroukam v SA Airlink (Pty) Ltd* ((2005) 26 ILJ 2153 (LAC)) has stated in quite emphatic terms that there are no choices (par 114):

"In this regard it is important to emphasize that the language of s 193(2) is such that, if none of the situations set out in paras (a)-(d), exists, the Labour Court, and, therefore, this court, or, an arbitrator, has no discretion whether or not to grant reinstatement. In the words of s 193(2) the Labour Court or the arbitrator 'must require the employer to reinstate or re-employ the employee' whose dismissal has been found to have been unfair. That embraces both dismissals which have been found to be automatically unfair and those which have been found to be, shall I say, ordinarily unfair. Ordinarily unfair dismissal

in this context does not include those which have been found to be unfair solely because the employer did not follow a fair procedure because those fall under the exception in para (d). It refers to those dismissals which are not automatically unfair but nevertheless lack a fair reason."

In stating the above, Zondo JP reminded us that this section was part of a trade-off that was made during the negotiation of the LRA (par 118):

"The deal arrived at, as reflected in s 193(2) and s 194, was that workers should be reinstated and the courts and other tribunals should not have any discretion to deny an unfairly dismissed employee reinstatement except in specified situations and that there should be a limitation on the amount of compensation that courts and other tribunals could award to employees."

This, it should be added, is not new and was in any event the approach of the Labour Appeal Court under the 1956 Act. In *National Union of Metalworkers of SA v Henred Fuehauf Trailers (Pty) Ltd* ((1994) 15 ILJ 1257 (A)) the (then) Appellate Division, for instance, held that (1263C):

"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."

Based on the above it is clear that the courts and tribunals are the gatekeepers of the appropriate remedy. In other words, it is for the court or tribunal to decide whether the circumstances surrounding the dismissal are such that it can be said *that a continued employment relationship would be intolerable* and they should not readily defer to the employer's judgment in this regard.

In the next paragraph the approach emerging from the Labour Court is explored.

4 Re-instatement: What does the case law suggest?

In a very recent matter, *National Union of Mineworkers v CCMA* ((2007) 28 ILJ 402 (LC)), the CCMA commissioner had found the employee's dismissal to be unfair and awarded compensation. The refusal to order reinstatement was apparently based on evidence that the employee was perceived to be a bad person and the fact that the relationship between the union and the employer was poor. On review the Labour Court confirmed (par 11) the peremptory nature of section 193(2) of the LRA and that the onus is on the employer to lead evidence to prove that the circumstances surrounding of the dismissal are such that a continued employment relationship would be intolerable. The judge held that the reason advanced by the commissioner for not ordering reinstatement is not covered by section 193(2) and that the arbitrator's finding was thus unreasonable (par 13):

"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 appears to have introduced a fifth requirement in considering whether reinstatement should or should not be ordered, namely that because the second applicant was perceived as a bad person and the relationship between the employer and the union was bad, he should not be reinstated ... 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."

In *Uys v Imperial Car Rental (Pty) Ltd* ((2006) 27 ILJ 2702 (LC)) the employer admitted that it would not have dismissed the employee, but for the employee's own admission that the relationship had broken down. Although the judge found that the dismissal was not fair and that many of the problems experienced by the employer could have been addressed by following a rehabilitative approach, reinstatement was nonetheless not ordered. In this regard the judge seemed to have relied on the employee's own assessment of the relationship.

In *Afrox Ltd v National Bargaining Council for the Chemical Industry* ((2006) 27 ILJ 1111 (LC)) an arbitrator's decision to reinstate an employee whose conduct she found to be unacceptable was taken on review. The arbitrator, however, believed that an improper procedure was followed and that this impacted on the sanction and for that reason the dismissal was held to be both procedurally and substantively unfair. The dismissed employee in this matter, extremely provoked by the conduct of two employees of a very important client of his employer, dropped his trousers and exposed his buttocks to them. While the arbitrator found the conduct to be repulsive, she considered that the combination of the provocation and remorse negated a claim that a continued relationship was intolerable. On review the court agreed with this approach. This approach is similar to that of the Labour Court in *Metro Cash & Carry Ltd v Le Roux NO* ([1999] 4 BLLR 351 (LC)) where an arbitrator's reinstatement of an employee, guilty of assault, was endorsed by the Labour Court. In this matter an employee had assaulted a customer, after the customer had accused the employee of shortages, had sworn at him and slapped him. He was subsequently dismissed. While both the arbitrator and Labour Court conceded that this is the type of offence that would normally justify dismissal, compelling circumstances may justify a departure from this approach. This has also been the view of the Labour Court regarding the reinstatement of striking workers. In *Adams v Coin Security Group (Pty) Ltd* ([1998] 12 BLLR 1238 (LC)) striking workers were dismissed for participating in what management believed was an unprotected strike. The court held that the strike was in fact protected and held the dismissal to be both procedurally and substantively unfair. Regarding the impact of their poor conduct during the strike Zondo J (as he then was) stated that (pars 88-89):

"the norm should be to order reinstatement and the denial of that primary relief should only occur as an exception.

In this case it was submitted on behalf of the respondent that reinstatement would not be appropriate. The reason advanced was that the applicants participated in unlawful conduct during the period 15-17 April 1997. In this regard the conduct of the applicants complained of included the blockading of

the entrance to the respondent's premises with a vehicle, the chaining and locking of a gate with a padlock, the deflation of a car tyre, pushing back a car to blockade the entrance when attempts were made to remove the vehicle from the entrance, parking of private cars of some of the applicants at the gate to blockade the entrance and the unauthorised occupation of one of the respondent's offices – all of which was very disruptive to the respondent's operations. The respondent even had to involve rival security companies to assist it to comply with its obligations to its clients."

Despite this disruptive conduct, the court held that there was no reason not to order reinstatement and suggested that the employer was not precluded from taking disciplinary action after reinstatement.

In *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit* ([1999] 7 BLLR 713 (LC)), the Labour Court reinstated a minister of the Dutch Reformed Church despite the fact that there was clear evidence that his relationship with his immediate colleagues had broken down irretrievably. It should be added that the court accepted that the breakdown was not as a result of his conduct and that it was possible to re-deploy him (the dismissed minister).

Similarly, in *Mathews v Hutchinson* ((1998) 19 ILJ 1512 (LC)), the Labour Court found that, while the commissioner correctly found the employee guilty of negligence, the dismissal of the employee was not warranted. Although the employee had been negligent in executing her duties, this did not mean that the employment relationship was intolerable. She had been employed for seven years and her transfer to an area not involving the control of money was not considered by the employer before dismissing her. This, so the court held, was a material omission since the employer was able to accommodate her in a position where control of money was not required. She was reinstated.

On the other hand, in *Buthlezi v Amalgamated Beverage Industries* ((1999) 20 ILJ 2316 (LC)), the court held that the dismissed employee had made continued employment intolerable by supporting a newspaper article which tarnished the company's public image. The court stated that (par 29):

"While employees have a right freely to 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."

(The court found that the dismissal was only unfair because an unfair procedure was followed and since this is covered by one of the exceptions listed in s 193(2), the above quote is therefore *obiter*.)

These judgments are clear illustrations that not every dark cloud hanging over a continued employment relationship is sufficient to meet the 'intolerability' requirement. As Grogan (*Dismissal, Discrimination and Unfair Labour Practices* (2005)) has pointed out (500), most dismissals (fair or unfair) would sour the employment relationship from both sides and allowing this to play a prominent role when considering reinstatement would allow

employers to abuse the exception, and would in effect undermine the rationale of section 193(2), as explained by Zondo JP. How can such abuse be avoided and the aims of section 193 of the LRA be achieved? It is suggested this can only be achieved if the tribunals and courts follow almost the reverse of the approach that is followed in the case of constructive dismissals.

It is suggested that the case law referred to above supports the following approach: It is for the employer to lead evidence to the effect that the continued relationship has become intolerable. Following the principles in respect of constructive dismissal, it means that very strict proof of the intolerability must be required and it should not be readily found that the circumstances complained of by the employer constitute such intolerability. Inevitably the employer will tender opinions that reflect poorly on the prospects of a continued relationship. Unless they are backed up by hard evidence, such opinions should be treated with caution. For instance, in *Perumal v Tiger Brands* ((2007) 28 ILJ 2302 (LC)) the court ordered reinstatement of an unfairly retrenched employee since "nothing in the evidence [prevented] the court" (par 35) from making such an order. Furthermore, in order to avoid the danger alluded to by Grogan, what has happened to the relationship after the dismissal should as far as possible be ignored in determining whether a continued employment relationship is still possible. It is, after all, the employer who effected the unfair dismissal. However, it is conceded that this would not always be possible (recall the *Buthlezi* matter), particularly where the employer and employee are expected to work in a very intimate environment, but even then, following the example in the *Schreuder* matter, reinstatement should only be avoided if this cannot be addressed by the re-deployment of the employee. Furthermore, even where the conduct of the employee that caused the dismissal (which has now been held to be unfair) is unacceptable, the circumstances of the case may justify allowances. In other words, the nature of the misconduct is not in itself sufficient evidence of the intolerability of the continued relationship.

5 Delay and practical problems

Practical problems associated with reinstatement may militate against reinstatement, and is indeed one of the exceptions listed in section 193(2). However, these problems should not be presented as the reason(s) for the continued intolerability of the employment relationship. In any event, the courts should treat such practical problems advanced by employers with caution since most of these problems would be the result of the employer's unfair actions. For example, in *Manyaka v Van der Wetering Engineering (Pty) Ltd* ([1997] 11 BLLR 1458 (LC)), the court ordered the reinstatement of an employee whose dismissal for operational requirements it had held to be procedurally and substantively unfair. The fact that another person had already been appointed in the place of the dismissed employee was therefore not accepted as an excuse for the employer.

Recent case law, however, suggests that the time lapsed since the dismissal and the final adjudication of the matter may be one practical matter that militates against reinstatement. In *Republican Press v CEPPWAWU* ([2007] SCA 121 (RSA)), the employees were allegedly unfairly retrenched with effect from 6 September 1999. Owing to union procrastination and negligence by their attorneys litigation was delayed and the Labour Court finally handed down judgment on 13 September 2005. The judge, satisfied that the retrenchments were procedurally unfair (substantive fairness was never in dispute), ordered reinstatement of some of the retrenched employees with effect from 7 September 1999 (the date of their dismissal). For reasons not relevant for the purposes of this note the employer appealed to the Supreme Court of Appeal (SCA). One of the issues raised by the employer was that reinstatement after a lapse of a period of six years was inappropriate. Not only had the jobs concerned been outsourced, but further business restructuring and retrenchments had been affected in the interim.

While the SCA held that reinstatement was competent in law, it was inappropriate in the circumstances for the reasons advanced by the employer. The employer was therefore ordered to pay compensation. However, the SCA did stress that while the passage of time would normally militate against reinstatement it should not be regarded as an absolute rule (par 22):

“That is not to suggest that an order for reinstatement or re-employment may not be made whenever there has been a delay, nor that such an order may not be made more than 12 months after the dismissal. It means only that the remedies were probably provided for in the Act in the belief that they would be applied soon after the dismissal had occurred, and that is a material fact to be borne in mind in assessing whether any alleged impracticability of implementing such an order is reasonable or not. In the present case the passage of six years from the time the workers were dismissed, all of which followed consequentially upon the failure of the union to pursue the claim expeditiously, was sufficient in itself to find that it was not reasonably practicable to reinstate or re-employ the workers.”

In fact this is confirmed by the net result of the judgment of the Constitutional Court in the much-debated *Sidumo v Rustenburg Platinum Mines* ([2007] ZACC 22). The matter concerned the extent to which a commissioner should defer to the employer's decision to dismiss. The court ultimately confirmed the commissioner's initial order of reinstatement. It is not clear whether it was argued, but the fact that the dismissal already occurred seven years earlier appeared not to have concerned the court.

Republican Press also raises another issue that would be relevant whenever reinstatement is ordered. In *Chemical Workers Industrial Union v Latex Surgical Products (Pty) Ltd* ((2006) 27 ILJ 292 (LAC)), the majority of the LAC, endorsing the view of the minority in *Kroukam v SA Airlink (Pty) Ltd* ((2005) 26 ILJ 2153 (LAC)), held that “it is not competent to order retrospective operation of a reinstatement order ... which is in excess of 12 months in an ordinarily unfair dismissal” (par 116). The gist of the argument appears to be that the back-pay that is associated with such an order should be regarded as compensation and since there is a 12-month cap on the

compensation that can be awarded the case of such dismissals (s 194(1)), the retrospective effect of reinstatement should similarly be capped. Nugent JA, in *Republican Press*, preferring the view of the majority in *Kroukam* held that this is wrong and that “an order of reinstatement restores the former contract and any amount that was payable to the worker under the contract necessarily becomes due to the worker on that ground alone” (par 19). What is more, so Nugent JA suggested (par 19), it is always possible to counter the harshness of reinstatement by ordering re-employment instead. This “restores the worker, but by different means”. Thus, relying on the hierarchy of the courts, the judgment of the LAC in *Latex Surgical Products* has now been overruled as far as this aspect is concerned.

6 Conclusion

Although there is no empirical evidence available to this effect, there is a general sense amongst practitioners that arbitrators are reluctant to order reinstatement and would find all too readily that a continued relationship is intolerable. Such an approach is inconsistent with the underlying rationale of section 193(2) of the LRA. In fact, case law suggests that the cloud hanging over the continued employment relationship must indeed be very dark for reinstatement not to be ordered. Furthermore, following the judgment in *Republican Press*, the retrospective effect of the reinstatement of a dismissed employee is not limited.

Rochelle le Roux
University of Cape Town