EMPLOYMENT

Reinstated today, retrenched tomorrow? The limits of redundancy as a defence to reinstatement

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Reinstatement has long been recognised as the primary remedy for substantively unfair dismissal under the Labour Relations Act. Yet employers frequently raise the same practical objection when faced with an order restoring an employee to work: *what happens if the employee's job no longer exists?*

The recent Labour Appeal Court judgment in *Bakhresa SA (Pty) Ltd v Jaipal* provides an important reminder that the disappearance of a position is not necessarily the end of the reinstatement enquiry. More significantly, it confirms that reinstatement and retrenchment are not mutually exclusive concepts. An employer may still embark on a genuine operational requirements process after reinstatement – but it cannot use redundancy as a shortcut to avoid reinstatement altogether.

The employee was dismissed following allegations that she had accused her employer of fraud in relation to Labour Court proceedings and had used inappropriate language towards management during an unprotected strike. The CCMA found the dismissal substantively unfair and ordered her reinstatement with retrospective effect. Both the Labour Court and, ultimately, the Labour Appeal Court upheld that decision.

The employer's principal argument on appeal centred not on the fairness of the dismissal, but on remedy. It contended that reinstatement was no longer reasonably practicable because the employee's position as Procurement Supervisor had become redundant after her dismissal. Her procurement responsibilities had been distributed among other employees and, according to the employer, there was simply no job to return to. That argument failed. The Court drew an important distinction between the disappearance of a *position* and the disappearance of the *work*. While the title of Procurement Supervisor may have fallen away, the procurement function plainly continued. The employer remained a large food manufacturing business that still required procurement services. The work had merely been spread across existing employees. That did not establish that reinstatement had become impossible or even impracticable.

More importantly, the Court emphasised that section 193(2)(c) of the LRA requires compelling evidence that reinstatement is not reasonably practicable. Bare assertions from management will not suffice. Employers seeking to rely on redundancy must demonstrate genuine operational circumstances making reinstatement futile or impossible. Unsupported claims that a position has been abolished will rarely meet that threshold. Perhaps the most commercially significant aspect of the judgment, however, lies elsewhere.

The Court expressly recognised that reinstatement does not prevent an employer from subsequently initiating a fair retrenchment process if operational requirements genuinely justify it. Once the employment contract has been revived, the employer remains entitled to consult under section 189 regarding any legitimate redundancy. What it cannot do is rely on its own unilateral decision to abolish a position during the employee's absence as a reason to deny reinstatement in the first place. That distinction is critical. Reinstatement restores the employment relationship; it does not guarantee lifetime employment or freeze an employer's operational structure. Businesses remain entitled to restructure where commercial realities demand it. Equally, employees whose dismissals have been found to be unfair remain subject to the same operational processes that would apply to any other employee.

The Court went even further by clarifying what reinstatement actually means. It is not necessarily a return to the identical job title previously occupied. Rather, reinstatement revives the employment contract on terms and conditions no less favourable than those that existed before dismissal. Positions evolve, reporting lines change and organisational structures shift. The law protects the contractual relationship – not necessarily the label attached to the role.

For employers, the practical lesson is an important one. If an unfair dismissal is challenged, replacing the employee, redistributing their duties or redesigning the organisational chart should never be viewed as an insurance policy against reinstatement. Courts are unlikely to permit employers to defeat the LRA's primary remedy through changes that they themselves implemented after the dismissal. If genuine operational requirements arise, the appropriate course is to comply with the reinstatement order and then follow a procedurally and substantively fair consultation process under section 189.

The Labour Appeal Court's judgment strikes a sensible balance. It preserves reinstatement as the primary remedy for unfair dismissal while recognising that legitimate business restructuring remains possible. Employers are not trapped by reinstatement orders – but nor can they use redundancy as a convenient escape route. In employment law, process still matters, and operational fairness cannot be achieved by bypassing the very protections the LRA was designed to provide.

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