WERKSMANS ATTORNEYS

EMPLOYMENT

Reinstatement as a primary remedy

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Summary

This case reiterated the principle that reinstatement is the primary remedy available to employees who have been found to have been substantively unfairly dismissed, unless a recognised exception is found to be present. There was none in the present case. In addition, the fact that the employee had not, in his statement of claim, sought reinstatement was not a bar from his claiming such relief at a late stage.

Issue

Whether the Labour Court erred in awarding an employee compensation, instead of reinstating him, because the employee's post had been subsequently filled and the employee had not sought reinstatement in his statement of case.

Facts

This was the issue considered by the Labour Appeal Court (LAC) in the case of *Sibiya v South African Police Service* [2022] 9 BLLR 822 (LAC) (*Sibiya*). In the Labour Court (LC), it was found that the Sibiya's dismissal was procedurally and substantively unfair. Sibiya was awarded compensation. Sibiya, aggrieved by this finding, took the matter on appeal, the only issue for determination being whether the appropriate relief was awarded to him. The South African Police Services (SAPS) did not oppose the appeal. The pertinent facts of the matter are, briefly, as follows.

Sibiya was a career police officer, who had joined the SAPS as a junior recruit in 1989 and progressed to the position of Gauteng Provincial Head of the Directorate of Priority Crimes Investigation (DPCI) as of 31 August 2015.

On 31 August 2015, Sibiya was dismissed by his superior. The decision to dismiss Sibiya followed a disciplinary enquiry in which Sibiya had been charged with misconduct relating to the alleged illegal rendition of Zimbabwean criminal suspects to the Zimbabwean authorities in 2010. At the disciplinary enquiry, no evidence of Sibiya's alleged involvement in the rendition of such Zimbabwean suspects was produced by SAPS. Notwithstanding the lack of evidence, Sibya was dismissed.

Following his dismissal, Sibiya referred a dispute to arbitration, which was in turn referred directly to the Labour Court for resolution.

Labour Court findings

The Labor Court held that Sibiya's dismissal was procedurally and substantively unfair. The charges against Sibiya had been trumped up and were calculated to humiliate him. In other words, Sibiya was exonerated from the allegations levelled against him in the disciplinary hearing.

The Labour Court ordered SAPS to compensate him an amount equal to 12 months' salary but failed to consider reinstatement on the basis that Sibiya did not primarily seek reinstatement in his pleadings and that Sibiya's position had been subsequently filled since his dismissal.

Labour Appeal Court findings

In determining what relief should have been awarded to Sibiya, the LAC considered section 193 (2) of the Labour Relations Act 66 of 1995 (LRA), which provides that:

"The Labour Court or the arbitrator must require the employer to reinstate or reemploy the employee unless–

- *the employee does not wish to be reinstated or reemployed;*
- *the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
- *it is not reasonably practicable for the employer to reinstate or reemploy*

the employee; or

- *the dismissal is unfair only because the employer did not follow a fair procedure*."

The LAC with reference to 193 (2) of the LRA considered whether the exceptions listed for non-reinstatement contemplated in sections 193 (2) (b) and 193 (2) (d) could have been the basis for the LC did not ordering reinstatement. The LAC found that sections 193 (2) (d) of the LRA did not find application in this case, because the LC found Sibiya's dismissal to have been substantively and procedurally unfair and that in respect of section 193 (2) (b) no evidence had been led to show that a continued employment relationship between Sibiya and SAPS would be intolerable. To the contrary, the LC found that Sibiya was an innocent victim of officials who acted in bad faith and lacked integrity and that those officials had since been removed. There were therefore no circumstances which would have made a continued employment relationship intolerable.

The LAC found that the LC erred in its decision not to consider reinstatement as a remedy on the basis that the Sibiya did not seek reinstatement in his initial pleadings. He gave notice of his intention to seek reinstatement in both the pre-trial minute and his practice note and there is in any event nothing in the Labour Court Rules which precludes an oral amendment of pleadings or prescribes the time and manner for which an application for an amendment of pleadings can be made.

The SAPS would also not be prejudiced by the amendment.

In respect of 193 (2)(c) of the LRA, the LAC considered *South African Commercial, Catering and Allied Workers' Union and others v Woolworths* (*Pty*) *Limited* [2019] 40 ILJ 87 (CC) (*Woolworths*), where the Constitutional Court held that "*the term 'not reasonably practicable' means more than mere inconvenience and requires evidence of compelling operational burden*".

The LAC found that no evidence was presented to show that it was 'not reasonably practicable' to reinstate the employee and suggested that given the nature of SAPS, there is no reason for SAPS to refuse the employee's reinstatement, as he could be re-assigned to a position of a similar rank and level to that which he previously held.

The LAC ultimately set aside the LC's order for SAPS to pay him 12 months' salary and ordered that the employee be reinstated to the same post or a post which is on the same ranking or level Sibiya held at the time of dismissal, together with 14 months' backpay, unless Sibiya elected not to report for duty, in which case he would only be entitled to 12 months' compensation. The LAC noted further that fairness dictates that Sibiya's backpay should be limited to the period during which he was unemployed, Sibiya having found new employment after his dismissal.

Importance of the case

Where an employee's dismissal is substantively unfair, reinstatement must be considered as a primary remedy, unless exceptional circumstances exist and/or apply. Oral amendment to pleadings to claim reinstatement as relief sought is not barred where an applicant did not initially seek same, unless it is prejudicial to other parties involved in proceedings.



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