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Should reinstatement always be awarded after unfair dismissal?

By Jacques van Wyk

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The Labour Appeal Court recently had to consider whether reinstatement must always be awarded where a dismissal is found to be substantively unfair, in the case of *Afgen (Pty) Ltd v Ziqubu (2019)*.

In certain instances, the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Court, may deviate from the obligation to award reinstatement where a dismissal is found to be substantively unfair. Circumstances warranting a departure from the standard position, that reinstatement must be awarded, are, however, exceptional and include where reinstatement is impractical or the circumstances are such that a continued employment relationship would be intolerable.

Facts

In *Afgen v Ziqubu*, the respondent employee, Ntombizodwa Ziqubu (employee), had been employed with the applicant employer, Afgen (employer), from January 2011 for just over a year. The employee had suffered from depression and was on sick leave for two months during 2011.

In December 2011, the employee was charged with misconduct for

i. sending unauthorized emails to customers and

ii. making unlawful statements in the emails pertaining to a meeting which the employer was to convene with the employee regarding her work performance.

In the emails the employee asked customers of the employer to provide a report on their dealings with her so as to assist her in a work performance meeting to be convened by the employer. No work performance meeting was scheduled as averred by the employee. The employer only became aware of this after several customers complained about having to complete the report.

A disciplinary hearing was held during which the employee was found guilty on both charges and issued with a final written warning (first final written warning). The employee referred an unfair labour practice dispute to the CCMA.

In January 2012, the employee was once again charged with misconduct for the same offence relating to the emails sent to customers. The charges were that:

1. the trust relationship had broken down;
2. the employee had brought the name of the company into disrepute;
3. the employee was insubordinate; and
4. the employee had made false accusations against management.

Disregarding the fact that it was irregular to charge the employee on the same facts as those in December 2011, the chairperson at the disciplinary hearing (who had also chaired the previous hearing) found the employee guilty of the first two charges and she was summarily dismissed.

The insubordination charges also pertained to the same facts forming the subject matter of the first final warning, save for the additional allegation that the employee had abused company resources by sending her curriculum vitae to potential future employers using the employer's computers. This resulted in another final written warning being issued (second final written warning). The employee was found not guilty of the fourth charge.

Court's evaluation

The employee alleged that her dismissal and second final written warning were unfair and referred both matters to the CCMA. The Commissioner arbitrated two disputes: an unfair labour practice dispute regarding the first final written warning and an unfair dismissal dispute (there appeared to be an oversight in the CCMA addressing the second final written warning).

The Commissioner found that the first final written warning constituted an unfair labour practice and the warning was set aside. Similarly, the employee's dismissal was found to have been substantively unfair.

Section 193(2) of the Labour Relation Act 66 of 1995 (LRA) provides that an arbitrator or court must reinstate or re-employ an employee if the employee's dismissal is substantively unfair unless any of the exceptions in section 193(2) of the LRA are applicable. Section 193(2) provides as follows:

The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless:

- *the employee does not wish to be reinstated or re-employed;*
- *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 re-employ the employee;*
- *the dismissal is unfair only because the employer did not follow a fair procedure.*

The Commissioner held that the employer-employee relationship had broken down to such an extent that reinstatement would not be appropriate. The employee was awarded three months' salary as compensation.

The employer unsuccessfully took the matter on review to the Labour Court which substituted the award with an order that the employee be reinstated and be compensated 24 months' salary. The employer thereafter appealed to the LAC.

The LAC held that section 193(1)(a) and (b) of the LRA dictates that if a dismissal is found to be substantively unfair, the employee is entitled to reinstatement or re-employment. Only extraordinary reasons will justify a deviation and would only be allowed as contemplated in section 193(2). The LAC referred to the case of *Edwin Maepe v CCMA and Another (2008) (LAC)* where the Court held that it was impractical to reinstate the employee due to the fact that he had given false testimony under oath.

The LAC also referred to the case of *Glencore Holdings (Pty) Ltd and Another v Gagi Joseph Sibeko and Others (2018) (LAC)* (Glencore) where the Court held that no matter how abominable an employee's behaviour, it cannot automatically deny the employee an award of reinstatement or re-employment. Whether the unacceptable behaviour occurred pre- or post-dismissal was irrelevant.

In Glencore, the employee did not perform a "functional role" and did not have a direct relationship with his superiors. There was thus *"no real obstacle in the continued employment of the employee"*. It was therefore noted that the degree of relationship between the employee and his/her superior should be considered.

Taking the above into consideration, the LAC held that because the employee fell directly under the supervision of her manager, with whom she had to interact on a daily basis and from whom she had to take instruction and report to on a daily basis, a continued working relationship would be impractical.

The Court held that the break down in the trust relationship was evident in the employee's clear disregard for her manager. This was evident from the testimony the manager gave regarding the employee's conduct at work. Further, the employee's own union representative stated to the chairperson of the disciplinary hearing that no relationship exists between the employee and management. The type of relationship required in this position was one in which the employee would need to work closely with her superior. In the absence of such relationship, reinstatement would be inappropriate. This was compounded by the short duration of the employee's term with the employer.

The LAC therefore, agreed with the CCMA that reinstatement was inappropriate.

Importance of the case

Employees' conduct towards an employer both before and after their dismissal may, in appropriate circumstances, bar such employee from reinstatement even if their dismissal is found to be substantively unfair.

ABOUT JACQUES VAN WYK

Jacques van Wyk is a director in Labour and Employment Law at Werksmans Attorneys. He was named as a recommended lawyer in Labour & Employment by the Legal500 (2010-2012), and co-authored 'Labour Law in Action - A Handbook on the new Labour Relations Act - 1997' with Frances Anderson. Jacques specialises in commercial employment transactions arising during mergers and acquisitions, corporate restructures, executive employee terminations of employment, drafting employment contracts and letters of appointment; disciplinary codes and procedures; and grievance procedures.

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