

Goals for 2010 & beyond

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2010 PLA CONFERENCE - SPIER - WESTERN CAPE
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Topic The impact of reinstatement orders on pension funds

Section 193 Remedies for Unfair Dismissal from Employment

1. Reinstatement OR

2. Re-employment

Unless (a) employee does not want it; (b) continued employment relationship is intolerable; (c) not reasonably practical for employer or (d) only procedurally unfair (but substantively fair)

In which case

3. **Compensation** not exceeding the equivalent of 12 months salary or 24 month's salary if automatically unfair dismissals (s193(1)(c) read with s194)

Are all mutually exclusive remedies (Constitutional Court in *Equity Aviation*)

Re-instatement Orders

(a) Can be from date of dismissal, from date after dismissal (DD) or from date of court or arbitrator's order (DO)

(b) No limit on retrospectivity because back-pay not compensation (CC in *Equity Aviation*, SCA in *Republican Press*, LAC in *Kroukam* and but conflicting LAC decision in *CWIU v Latex Surgical Products*)

(c) Restores old contract on same terms and conditions

(d) All employment rights accrued under old contract preserved (eg. leave, seniority, years of service) & back-pay due from ED-R

(e) Legal effect if reinstated from date **after** DD? Same as above but no service and no benefits for period between DD and ED-R

Re-employment Orders

- (a) New employment contract so break in employment
- (b) Accrued rights iro previous employment period forfeited
- (c) Back-pay from ED-R
- (d) Can change terms and conditions of employment

Need a framework

(a) Many fund issues that are impacted upon

(b) Need sound framework for considering issues that is based on clear principles so that consistent approach

(c) In attempting to establish framework, will look at four issues:

- Recovery of benefits paid & adjustment of future benefit liability and pensionable service
- Membership
- Contributions
- Retrospective benefits

(d) Key issue: Whether a finding of unfairness or order of reinstatement nullify the dismissal?

Does a finding of unfairness or order of reinstatement nullify the dismissal?

(a) Seen in language used by courts, arbitrators and adjudicator. For eg,

dismissal is declared **null and void and set aside**'

'The legal effect of reinstatement is that the unlawful dismissal is deemed never to have taken to have occurred. Therefore **reliance on such dismissal by the fund to determine the benefit payable to the complainant is reliance on a contingency which never arose in law.**' (*Sathegke v Orion Money Purchase Fund (SA) & another (1)* ; *Pather v Tongaat-Hullett Pension Fund*)

(b) Assumption that if reinstated dismissal is legally regarded never to have happened

(c) Employer & all third parties must simply undo consequences of that dismissal regardless of how long ago it happened or regulatory regime that governs them

Does a finding of unfairness or order of reinstatement nullify the dismissal? Alternate approach?

(d) Finding of unfairness **does not wipe out the fact of a dismissal** – simply declares it unlawful

(e) Result regulated by s193 which offers different ways to address consequences of the dismissal

(f) Thinking echoed in *Union of Metal Workers & others v Henred Freunhauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A)

‘Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise.’

(g) If re-employment or compensation or reinstatement to date after DD ordered – fact of dismissal still stands

Does a finding of unfairness or order of reinstatement nullify the dismissal?

(h) Full retrospective reinstatement also does not wipe out **fact** of dismissal because:

- Whether dismissal is nullified cannot depend on what remedy is chosen
- Difference between
 - (i) stg aimed at treating employee “as if” dismissal did not occur and so seeking to correct consequences of dismissal as fully as possible, and
 - (ii) saying that dismissal is **legally** regarded as never having happened

(i) Reinstatement is a remedy that seeks (a) but cannot have the effect of (b).

Does a finding of unfairness or order of reinstatement nullify the dismissal?

Hilton Kramer v Pension Funds Adjudicator & another [2005] 11 BPLR 915 (W)

- (a) Employee disabled before retirement. Employer-owned policy entitled him to disability benefit. Fund rule stated that membership continued as long as received disability benefit ito policy.
- (b) Insurer stopped benefit so membership ceased. Benefit reinstated following arbitration.
- (c) Court upheld fund argument that that membership did not resume because despite reinstatement of benefit, rule said membership terminates if benefit terminates & benefit had terminated and so membership had terminated
- (d) Court held that funds need certainty re whether benefit or contributions due & cannot be caught in employer-employee disputes
- (e) Fact of termination not legality of termination was important here

If Dismissal is Nullified: Recovery and adjustment of future benefit liability

- (a) Fund would have to recover any benefit that was paid with interest – unjustified enrichment claim - but cost and time

- (b) If member unable to pay/fund unable to recover benefit, how to adjust future benefit liability?
 - (i) **Adjust now:** DB fund - could reduce years of service; DC fund - reduce fund credit but both prohibited by s37A because not authorised deduction from MIR

 - (ii) **Set-off from future benefit entitlement** – but prohibited by s37A because not authorised deduction

 - (iii) **Registrar's approval as deduction ito s37D(1)(c)(iii)** - not possible as contemplates pmts to third parties obo member not to member him/herself

If Dismissal is Nullified: Recovery and adjustment of future benefit liability

Options that may work:

(a) Rule saying that if member is **challenging fairness of dismissal, fund will withhold benefit** until finally determined

- Fairness to member? Choice between chance of getting back job or compensation
OR benefit to sustain self and family while unemployed

(b) Agreement between employer, fund and employee at time of dismissal that **reinstatement is conditional upon pay-back of benefit** (*Babcock Engineering Contractors (EDMS) Bpk v President, Industrial Court & Another* (1993) 14 ILJ 111 (T))

- will save the fund time and cost of litigation
- but employee in difficult position if cannot pay

Recovery and adjustment of future benefit liability: If Dismissal is Nullified

(c) Could payment be regarded as an **advance** at time that calculating benefit entitlement?

- Does it matter that no ongoing benefit entitlement?
- Is it simply a different way to allow a set-off? Or make a loan?
- Would SARS object? Tax adjustment later on when full benefit paid?
- If advance is possible, actuarial calculations to factor in member use of money and that fund could not earn return on money

(d) Best would be **legislative change to s37D** allowing deduction of withdrawal benefits if member reinstated and benefit not repaid to fund

Recovery and adjustment of future benefit liability: If Dismissal NOT Nullified

(a) No obligation to recover any benefit paid because fact of dismissal remains so not ultra vires

(b) Beneficial to fund – eliminates time, cost & difficulties of recovery

(c) Beneficial to member who may not have the money to pay back. Benefits start accruing afresh.

(d) But rules can also allow member who wants to pay back to do so

- DC fund – treat as AVC
- DB fund – treat as purchase of pensionable service

Membership: If Dismissal is Nullified

- (a) Membership restored automatically because dismissal never occurred
- (b) Not a new member for purposes of insured benefits so disclosure requirements do not apply on reinstatement (*Pather v Tongaat-Hullett Pension Fund*)
- (c) No interruption in membership (eg entitlement to benefit if were a member before X date)

Membership: If Dismissal NOT Nullified

(a) Membership restored automatically because employment contract restored & membership is condition of employment

(b) For ITA purposes – fund membership must be compulsory for all eligible employees

(c) But because was interruption of service (because fact of dismissal remains), would be new member for purposes of insured benefits or other rights

Option: Rules say that if readmitted to fund on account of reinstatement, deemed not to be a new member

Contributions: If Dismissal is/is not Nullified

(a) Arrear contributions **automatically due from DR even if not specified in reinstatement order** because

(i) Contributions are part of remuneration and all back-pay contractually payable (*Swanepoel v Abraham & Gross Provident Fund & Another* (PFA); *Parry v Cleaver* (UK); *GN 691* as determined to s35(5) of the BCEA)

(ii) s13A requires payment of contributions as soon as become a member

(b) *Mgwebi v UNISA* (PFA) illustrates prejudice for employees/members when non-payment of arrear contributions following reinstatement is treated differently from normal case of non-payment of contributions.

Contributions: If Dismissal is/is not Nullified

Is late payment interest due on arrear contributions?

- (a) Monthly contributions due by 7th day of following month (s13A(3))
- (b) Late payment interest “shall” be payable from 8th day on a compound basis (s13A(7) read with reg 33(7))
- (c) No limit on retrospectivity of reinstatement order + compound interest = potentially huge financial burden on employer, which could affect business and other employees
- (d) Argument that purposive interpretation requires interest from when back-pay due because no earlier obligation to pay contributions
- (e) But member negatively affected if DC because no return on contributions and no late payment interest that fund can use to credit member with return
- (f) And fund affected if DB because full benefit liability remains despite fund not having been able to receive return from those contributions to fund benefit

Retrospective Benefits: If Dismissal is/is not Nullified

- (a) Benefit entitlements that arise in period between ED-R & DO
- (b) Not a member at time but retrospective reinstatement could create retrospective entitlement eg, death, disability
- (c) If benefits self-funded – same as other benefit entitlements
- (d) If insured benefits (and fund liability limited to what insurer pays)
 - Despite membership, non-payment of premiums may cause cover to lapse
 - Waiting periods may have expired
- (e) Funds should try to negotiate upfront with insurers that
 - In these special circumstances so long as arrear premiums brought up to date, member will be covered
 - Waiting periods will be waived or adjusted

Comparison of biggest problems of each approach

	RECOVERY & ADJUSTMENT	MEMBERSHIP	CONTRIBUTIONS	RETROSPECTIVE BENEFITS
IF DISMISSAL NULLIFIED	<p>Recovery of benefit</p> <p>How to adjust future liability if can't recover benefit</p> <p>Solution: Agmt that reinstatement conditional on refund of benefit</p> <p>Maybe regard as advance pmt???</p> <p>Legislative change to PFA to recognise as deduction</p>		Late payment interest ?	Negotiate cover with insurer
IF DISMISSAL NOT NULLIFIED		<p>New member for insured benefit disclosure & other entitlements</p> <p>Solution:</p> <p>Rules deems reinstated member not be new member</p>	Late payment interest ?	Negotiate cover with insurer

Thank you

QUESTIONS ARE WELCOME

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