

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS72/17

In the matter between:

SOLIDARITY OBO SW PARKINSON

Applicant

and

DAMELIN (PTY) LTD

Respondent

Heard: 29 May 2018

Delivered: 07 June 2018

Summary: Back-pay is an obligation that flows from the order of reinstatement – the employee's tender of his or her services is inconsequential.

JUDGMENT

Nkutha-Nkontwana J.

Background

[1] In this matter the applicant (Solidarity) is suing the respondent (Damelin) by way of a stated case for a back-pay in the amount of R420 000.00 consequent to an order reinstating its member, Mr Parkinson. Damelin had dismissed Mr Parkinson on 15 May 2012. Solidarity unsuccessfully challenged his dismissal at the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner, Mr Sithole, found that his dismissal was procedurally and substantively fair.

[2] Solidarity launched the review proceedings and succeeded. In a judgement delivered on 2 December 2014, this Court, per Bleazard AJ, reviewed and set aside the award, replacing it with an order reinstating Mr Parkinson retrospective to 1 January 2014. Damelin appealed the judgment but was unsuccessful. The Labour Appeal Court, in judgment delivered on 10 January 2017, dismissed the appeal with costs.

[3] I pause to allude to the fact that Mr Parkinson secured employment with his current employer on 21 August 2014. Soon after receiving the judgment by Bleazard AJ, Solidarity addressed a letter to Damelin, through its attorneys, proposing a discussion on compensation instead of reinstatement. Damelin was seemingly not indulgent; instead, it instituted the appeal proceedings.

[4] On 17 January 2017, Damelin's attorneys addressed a letter to Solidarity stating the following:

'We refer to the above matter and note the judgment handed down by the Labour Appeal Court on 10 January 2017.

We note further that your client has not tendered his services in terms of the judgment rendered by Bleazard AJ in the Labour Court.

We are instructed that your Client is to tender his service and report for duty at the Damelin, Pretoria City Campus ("Pretoria Campus") at approximately 08h00 on 19 January 2017. To the extent that your Client may incur travel costs in travelling to Pretoria campus as opposed to Boksburg Campus, such reasonable travel costs shall be paid by our C, subject to proof of such costs being presented by your Client and an agreement being reached.

We are further instructed that your Client's failure to tender his service and report for duty as directed herein shall result in the appropriate action been taken by our Client. Our Client's rights remain strictly reserved in this regard.'

[5] On 19 January 2017, Mr Parkinson presented himself at the Pretoria Campus and tendered his resignation with immediate effect. In his letter of resignation dated 18 January 2017, he states the following reasons:

'The judgment/ruling did not state that my reinstatement was to be with immediate effect, specifically since it is known by all parties that I currently have employment, yet Damelin has insisted through their attorney, Mr

Moodley, that I report to the Pretoria Campus today 19 January. This insistence is thus contrary to labour law whereby I cannot have 2 permanent employers and they have refused to allow time to be afforded an opportunity to resign my current employment, or discuss the terms of my reinstatement.

In addition, Damelin made no formal offer or remuneration and/or benefits for my reinstatement nor have they confirmed in what capacity is my reinstatement. At no time have any employment forms been presented which would be required by law, for purposes of payment of taxes, insurances or medical aid. Damelin can surely not expect that my terms, conditions, salary and benefits are to remain the same as they were before my dismissal in 2012, as it was those same terms and conditions of employment that led us to the 5 year process which led to the Labour appeals courts. It would also be a ridiculous assumption of anyone, for a person to take up any employment without any of these being in the first instance discussed, especially after such a long period and in particular now that my salary package is more than double with my current employer, to what was being paid by Damelin 5 years ago.

These current actions by Damelin are not a positive way in which to try to restart any employer/employee relationship and tantamount to constructive dismissal.'

- [6] Damelin responded to Mr Parkinson's resignation letter the same day, stating the following:

'You caused a letter dated 18 January 2017 to be delivered to the Company this morning and at approximately 08h56.

We are advised that Ryan Frayster ("Frayster") was running late because of traffic but contacted you telephonically. We are also advised that Frayster requested that you wait for ten (10) minutes for him to arrive but you left the Pretoria Campus before his arrival without allowing the Company the opportunity of meeting with you to discuss your reinstatement.

Your letter has been handed to us for review and a response. The date of the letter (being 18 January 2017) suggest that it was prepared in advance. And on fact before you were required to tender your services and report for duty this morning which deprived the Company of the opportunity to meet with you.

We deem it necessary to point out that the request for you to tender your services and report for duty was to ensure that the Company complied with the judgment of the Labour Court ("the judgement") and more particularly in light of your failure to tender your services and report for duty despite having sufficient time to do so.

We deny that the request to tender your services and report for duty is contrary to labour law in any way. Kindly therefore note that your current employment status and the terms and conditions of such employment does not involve the Company in any way, manner or form and we wish to stress that the Company was merely ensuring that it complied with the judgment.

The effect of the judgment was that your contract of employment was revived and you were to be placed in the same position you occupied before your dismissal and on the same terms and conditions. The Company made various arrangements in this regard and even went as far as tendering payment for travel costs occasioned by your travel to the Pretoria Campus as opposed to Boksburg Campus.

It is unfortunate that you allege that you did not have sufficient time to resign or discuss your reinstatement with the Company when such request was ever made by you to the Company.

Furthermore, and as mentioned above, you left Pretoria Campus shortly after delivering the letter and without allowing management of the Company to meet with you regarding your reinstatement. The intention of the Company was to meet with you this morning to discuss all matters relating to your reinstatement, which would have included reinstating you to the position of General manager, addressing other pertinent matters and finalising all outstanding administration.

In fact, you had discussed with both the Academic Manager and Sales Manager wherein you informed them that you would be their boss as you were the new General manager and expressed surprise when they informed you that they were well aware of this and in fact had been awaiting for you to arrive to take up the position since yesterday the 18th of January 201[7] as all staff had in fact been informed of your imminent arrival. Ryan Frayster had been sent from Durban to the Pretoria Campus with the specific purpose of

ensuring that there was a smooth transition and that you would have engaged with him on your duties, functions, responsibilities, etc. You however chose not to wait for such interaction and wanted to leave prior to 9:00 am and insisted that your resignation be acknowledged by us.

The company had therefore proceeded lawfully in compliance with labour legislation and due regard to the order appearing in the judgment. Any allegation/s that the actions of the Company is/are tantamount to a constructive dismissal is/are therefore devoid of merit, frivolous and denied for reasons appearing herein.

Your resignation with immediate effect is noted and accepted by the company and we wish you well in your future endeavours.'

- [7] The crisp issue for determination is whether Mr Parkinson is entitled to back-pay and ancillary to that is the question whether he tendered his services for the purposes of reinstatement.

Legal principles

- [8] Section 193 of the Labour Regulations Act¹ ('LRA') provides that:

- '(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-
- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
 - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
 - (c) order the employer to pay compensation to the employee.
- (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;

¹ Act 66 of 1995, as amended.

- (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.'

[9] Both parties accept the principles explicated in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,² where the Constitutional Court reaffirmed reinstatement as 'the primary statutory remedy in unfair dismissal disputes...aimed at placing an employee in the position he or she would have been but for the unfair dismissal... by restoring the employment contract...The extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal.'

[10] The Constitutional Court stated further that:

'...the sum of money paid to an unfairly dismissed employee subsequent to an order of reinstatement with retrospective effect is not compensation as contemplated in section 193(1)(c) or section 194. The remedies in section 193(1)(a) are thus in the alternative and mutually exclusive.'

Clearly, reinstatement denotes a restoration of the *status quo ante*. In essence, the contract of employment gets resuscitated on the same terms and conditions as existed prior to dismissal.

[11] Pertinent in the present case is the issue of the retrospectivity of the order of reinstatement, normally known as 'back-pay', a separate discretion that must

² [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC) at para 36.

be exercised by the arbitrator or the judge when deciding to award reinstatement.³ As mentioned above, the order of reinstatement resuscitates the contract of employment and it follows that any amount that was payable to the employee in terms of that contract of employment would become due and payable on that ground alone.⁴ The Court or an arbitrator may order reinstatement with limited retrospectivity and the limited back-pay would still become due as per the terms of the employment contract, notwithstanding.

[12] In *National Union of Metalworkers of South Africa obo Fohlisa and Others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Limited)*,⁵ the Constitutional Court delivered two judgments dealing with whether the order of retrospective reinstatement is a judgement debt in terms of the Prescription Act⁶ and whether a claim for back-pay for the period not mentioned in the order but occasioned due to a judicial process of appeal is also part of the judgement debt. The first judgment does not distinguish between the two periods and it was held that both were part of the judgement debt. Conversely, the second judgement found that the two periods are effectively different but conceded that, when it comes to the first period, the right to back-pay flows from the judgement debt.

[13] The first judgment, per Madlanga J, stated that:

'[36] The obligation that existed was to reinstate. *Equity Aviation* tells us that "'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions". Surely, that must mean the obligation to reinstate is not about only allowing employees to return to work. It is also about paying their remuneration. This - rolled in one - is the nature of the obligation. The obligation comprises two prongs which are bound inextricably and are thus not mutually exclusive. That is why, like the

³ *Supra*.

⁴ *Republican Press (Pty) Ltd v Chemical Energy Paper Printing Wood and Allied Workers Union and Others 2008 (1) SA 404 (SCA); [2007] 11 BLLR 1001 (SCA); Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC); [2005] 12 BLLR 1172 (LAC).*

⁵ [2017] JOL 38189 (CC).

⁶ Act 68 of 1969.

very obligation to reinstate, the duty to retrospectively fulfil contractual obligations (eg payment of remuneration) flows directly from the order and is a judgment debt.⁷ (Emphasis added)

[14] Whilst in the second judgment, per Zondo J, pertinently stated that:

[126] Would the second and further applicants have been entitled, by virtue of paragraph (a) of Cele AJ's order, to payment of any remuneration for the three months after Cele AJ's order? Quite obviously, the answer would be: No. They would not have been entitled to remuneration for that period. Part of the reason for that is that paragraph (a) of Cele AJ's order did not say anything about payment of any remuneration. It did not say that Hendor had to pay the second and further applicants on condition they reported for duty nor did it say that they had to be paid any money whatsoever. It only ordered Hendor to put the second and further applicants into the positions they had occupied at the time of dismissal and on the same terms and conditions of employment. The reason why it said nothing about payment of remuneration for any period after 23 April 2007 is that the statute is based on an appreciation that, what would happen after the reinstatement order had been made would be governed by the contract of employment because, once the employer had reinstated the employee, the contract would be restored.

[127] Another question is: would the second and further applicants have been entitled to payment of their remuneration for the first period if they had not reported for duty or tendered their services for any period, for example three months, after Cele AJ had made his order on 16 April 2007? The answer is: Yes, they would have been entitled. This would be so despite the fact that, for three months after the Labour Court would have granted the order, they would not have reported for duty or tendered their services.

[128] The next obvious question is: why is the answer to the first question in the negative but the one to the second question in the affirmative? The two different answers to this question reveal that, indeed, there is

⁷ *Supra* n 5 at para 36.

a big difference between the first period and the second period. The answer to this question is this: in regard to the first period, there is an order of Court and, in respect of the second period, there is no order of Court. The second and further applicants' entitlement to payment of their remuneration for the first period is not dependent upon or subject to them reporting for duty. The reason why the failure of the second and further applicants to report for duty after Cele AJ's order had been made would disentitle them from payment of remuneration for that period is this. During that period the employment relationship is meant to be governed by the contracts of employment after the restoration thereof upon the reinstatement of the employees and in terms of the basic principles of contract.

[129] If an employee does not report for duty or does not tender his or services, he or she is not entitled to payment of wages. No work, no pay. In respect of the first period, the second and further applicants would be entitled to payment of their arrear wages even if they resigned a day after they had been reinstated whereas they would not be paid anything under paragraph (a) of Cele AJ's order in respect of the second period if they did not want to go back to Hendor's employ and, therefore, rejected reinstatement. All that any one of the second and further applicants needs to show in order to qualify for payment of remuneration in respect of the first period is that he or she was one of the applicants referred to in the order. However, when it comes to the second period, different considerations apply.⁸ (Emphasis added)

[15] Turning to the present case, Solidarity is claiming Mr Parkinson's back-pay for the period from 1 January 2014 to 2 December 2014 consequent to his reinstatement as ordered by Bleazard AJ. Damelin argued that he is not entitled to any remuneration because he failed to tender his services for the purpose of reinstatement. Mr Nel, counsel for Damelin, submitted that both *Hendor* judgments require a tender of service by the employee in order to accrue a right to back pay. I disagree.

⁸ *Supra* n 5 at para 126 – 129.

[16] In both *Hendor* judgments, the Constitutional Court explicitly stated, in line with *Equity Aviation* tenets, that inherent in the obligation to reinstate is the duty to retrospectively fulfil the contractual obligation, including back-pay flowing directly from the order, referred to as the first period in the second judgement. According to both judgements, that obligation stands, notwithstanding the fact that the employee failed to report for duty or tender his or her services in accordance with the order. To underscore this point, the second judgment went further to state that, in respect of the first period covered by the order, the employee ‘...would be entitled to payment of their arrear wages even if they resigned a day after they had been reinstated...’

[17] Clearly, Damelin misconstrued the *Hendor* judgments. By reinstating Mr Parkinson, Damelin resuscitated the employment contract and effectively placed him at par with all its employees. Mr Parkinson, like any other employee, duly exercised his right to resign and, in so doing, terminated the contract of employment. In fact, on the strength of the *Hendor* judgments, the handing in of the resignation letter in person was a mere courtesy. Mr Parkinson could have served it in any other manner or, better still, just absconded without a trace.

[18] To my mind, therefore, whether Mr Parkinson did in actual fact tender his services is inconsequential. Mr Parkinson’s resignation tender and the subsequent acceptance by Damelin evidently attest to the fact that reinstatement did take place. What is now outstanding, as correctly argued by Solidarity, is the back-pay flowing precisely from Mr Parkinson’s reinstatement. As such, Damelin’s argument that Mr Parkinson is not entitled to back-pay since he is earning a better salary in his current employment is devoid of merit.

Conclusion

[19] In short, Mr Parkinson is entitled to back-pay for the period from 1 January 2014 to 2 December 2014 as per the order by Bleazard AJ. In essence, he is

entitled to a back-pay that is equivalent to 11 months' remuneration computed from R35 000.00 which was his monthly remuneration at the time of his dismissal. The total amount due to him is **R385 000.00** (35 000 x 11 months). This amount excludes all the lawful deductions as per the contract of employment.

[20] Both parties did not pursue costs. As such, I am not inclined to make an order as to costs.

[21] In the circumstances, I make the following order:

Order

1. Mr Parkinson is entitled to back-pay for the period from 1 January 2014 to 2 December 2014.
2. The total back-pay due to Mr Parkinson is R385 000.00.
3. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Ms N Ras

Solidarity Official

For the Respondent:

Advocate AJ Nel

Briefed by:

Jason Moodley Attorneys

LABOUR COURT