THE REMEDIES FOR UNFAIR DISMISSAL

by

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SUMMARY

In terms of section 193 of the Labour Relations Act 66 of 1995, there are basically three remedies for unfair dismissal and unfair labour practice, namely reinstatement, re-employment and compensation. In disputes of unfair labour practice an arbitrator may determine a dispute on terms that the arbitrator deems reasonable, including the abovementioned three remedies. For example, in an unfair labour practice dispute relating to promotion or appointment, an arbitrator may order that the process of appointment be started afresh, if is found that the process was flawed.

The right to fair labour practice is a right that is enjoyed by everyone and it is a right upon which every employee enjoys not to be unfairly dismissed is entrenched in section 23 of the Bill of Rights. The rights of every employee contained in the Labour Relations Act give content and effect to the right to fair labour practice contained in section 23 of the Bill of Rights.

Every trade union, employer's organisation and employer has a right to engage in collective bargaining, which includes but not limited to the formulation of disciplinary policies in the workplace, which should be observed by every employee. Our constitution mandates the Legislature to enact legislation that regulates collective bargaining.

One of the purpose of our Labour Relations Act is to promote collective bargaining and the effective resolution of labour disputes. The remedies for unfair dismissal and unfair labour practice therefore give content and effect to the purpose of the Act, which is to promote effective resolution of labour disputes. The Legislature has given a legislative and policy framework, in terms of which the labour disputes may be resolved.

In order to restrict the powers of the arbitrators and courts, section 193 of the Act provides that in ordering the reinstatement and re-employment of dismissed employee, they must exercise a discretion to order reinstatement re-employment, not earlier than the date of dismissal.
The remedy of compensation is an alternative remedy, which must be ordered if the circumstances set out in section 193(2)(a) to (d) are applicable. Some arbitrators have made a mistake of treating this remedy as part of the primary remedies. However, our courts have clarified the intention of the Legislature in crafting the remedies for unfair dismissal.
CHAPTER 1
INTRODUCTION

The remedies for unfair dismissal and unfair labour practice have always been part of our labour law since the times of the Industrial Court. Our law of unfair dismissal was previously governed by the Labour Relations Act 28 of 1956 where the old Industrial Court was vested with powers to determine unfair labour practice dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation.

Our law of unfair dismissal was codified through the enactment of the Labour Relation Act 66 of 1995. The Industrial Court’s jurisprudence was and is still very useful in some areas of law of unfair dismissal in order to interpret our labour law, and in particular, the remedies for unfair dismissal. The enactment of the new Labour Relations Act 66 of 1995 was meant to give effect to the right to fair labour practice entrenched in section 23 of the Bill of Rights contained in the Constitution of the Republic of South Africa.

With the advent of a democratic era, our courts and tribunals or forums were enjoined when interpreting any legislation, and when developing common law or customary law, to promote the spirit, purport and objects of the Bill of Rights. This constitutional obligation upon our courts and tribunals when interpreting any legislation was also applied in the labour law sphere. In the beginning of the new Labour Relations Act, it was a challenge for our courts to give judgments which created certainty in the remedies for unfair dismissal. For example, before the 2002 amendments, there was a distinction between the award of compensation for substantive and procedural unfairness of a dismissal, which had an effect of compensating an unfairly dismissed employee for more than the maximum statutory period of 12 months.

The confusion created by section 194(1) and (2) in awarding compensation necessitated some legislative amendments to the section in order to create certainty on how to calculate compensation for dismissals that are substantively and
procedurally unfair. A history on the remedies for unfair dismissal will be outlined in Chapter 2 and in Chapter 3 the court’s interpretation of the remedies for unfair dismissal will be discussed in order to give an idea on how the industrial relations players have to organise their business, and thereby give content to the constitutional right to give fair labour practice.

Basically, my discussion will focus on the primary remedies for unfair dismissal, namely reinstatement and re-employment, as well as the remedy of compensation, which is applicable in situations that are set out in section 193(2) of the Act. The discussion will be concluded with the evaluation of the legislative framework on the remedies for unfair dismissal and the court’s present interpretation of the same.

It will be demonstrated, through recent case law on how the courts have adopted a proper approach for the interpretation of the provisions of the remedies for unfair dismissal. It will also be demonstrated, through the use of case law, which factors must be taken into consideration when an arbitrator or a court formulates an award of compensation. In assessing a proper amount of damages to be awarded, one has to exercise discretion in a judicial manner and the award of compensation must be just and equitable.

It is important to note that the Labour Relations Act 66 of 1995 also makes provision for remedies for the residual unfair labour practice, and they include but not limited to reinstatement, re-employment or compensation. The unfair labour practice disputes are disputes of right, which flow the contract of employment, collective agreements and statute, which aggrieved parties can refer to the CCMA or a council, if parties to the dispute fall within the registered scope of that council. It will be demonstrated, how the courts have distinguished between the disputes of rights and disputes about matters of mutual interest in determining unfair labour practice disputes.
2.1 INTRODUCTION

In understanding the general principles relating to the remedies for unfair dismissal, a brief historical background will be discussed first, in order to show how the labour law dispensation has evolved since the 1979 amendments.

A discussion will also be made about the Industrial Court’s jurisprudence on the remedies of the unfair labour practices, which regulated the employment law disputes until the promulgation of the Labour Relations Act 66 of 1995.

This chapter will be concluded by outlining the impact of the 2002 amendments on the remedies for unfair dismissal.

2.2 1979 AMENDMENTS

In 1973, the black workers engaged in a wave of strikes as they were no longer prepared to accept their secondary status in the industry. In the same year, the government passed a Black Labour Relations Regulations Act. This Act provided for the establishment of the liaison committees at plant level, as alternative to the already existing workers committees.

By 1976 it had become obvious that the provision of the Black Labour Relations Act of 1973 had not solved the problems of black worker militancy.

The threat of sanctions and disinvestment had increased and various codes of employment and various codes of employment practice (notably the EEC Code, the Sullivan Code and the British Code of Employment Practice) had been issued to multinational companies in South Africa. An improved image was sorely needed, and it was in this climate that the government in 1977 appointed the Commission of Inquiry into Labour Legislation, commonly known as the Wiehahn Commission. The
original brief of the commission was to rationalise the then existent labour legislation, to seek possible means of adapting the industrial relations system to changing needs and to eliminate bottlenecks and other problems experienced in the labour sphere.

Many of the recommendations of the Commission were accepted and implemented by the government, thus substantially changing South African labour legislation. The Wiehahn Commission’s first report was certainly the most momentous and the legislation which followed brought about the most radical changes in labour relations. The report recommended, *inter alia*, that:

- full freedom of association be granted to all employees regardless of race, sex or creed;

- trade union, irrespective of composition in terms of colour, race or sex, be allowed to register;

- stricter criteria be adopted for trade union registration;

- a system of financial inspection of trade union be introduced;

- prohibitions on political activity by unions be extended;

- liaison committees be renamed as work councils;

- where no industrial council had jurisdiction, work councils and workers committees be granted full collective bargaining rights;

- statutory job reservation be phased out;

- safeguards be introduced to protect minorities previously protected by job reservation;

- the Industrial Tribunal be replaced by the Industrial Court;
• fair employment practices be developed by the Industrial Court;

• job reservation be phased out, with the consent of those concerned;

• allowance for a closed shop be maintained; and

• a tripartite National Manpower Commission be established.

An exposition of section 43 of the Labour Relations Act 28 of 1956 (prior to repeal by Act 66 of 1995) will also be made below.

"43. Power of court to order reinstatement of employees or restoration of terms and conditions of employment or abstention from unfair labour practice.

(1) In this section, the term ‘dispute’ means a dispute concerning an alleged unfair labour practice.

(Sub-s. (1) substituted by s.15(a) of Act 83 of 1988.)

(2) Any party to a dispute who:

(a) refers the dispute to an industrial council having jurisdiction in respect of the dispute; or

(b) if there is no industrial council having jurisdiction, applies under section 35(1) for the establishment of a conciliation board in respect of the dispute,

may within 10 days of the date of such reference or application apply by means of an affidavit to the industrial court for an order under subsection(4).

(Sub-s. (2) amended by s.15(b) of act 83 of 1988.)

(3) (a) Whenever an application for an order is made in terms of subsection (2) the applicant shall at the same time furnish proof to the satisfaction of the industrial court that a copy of the application has been sent by registered post or delivered to the other party or parties to the dispute, and if there is an industrial council having jurisdiction in respect of the dispute, to the secretary of that council.

(b) The party or parties and the industrial council (if any) referred to in paragraph (a) may within 14 days of the date on which the application was posted or delivered by hand or such further period or periods as the industrial court may from time to time either before or after the
expries of any such period fix, submit an affidavit sent by registered post or delivered by hand to the industrial court in regard thereto and shall send by registered post or deliver by hand to the applicant a copy thereof, and the applicant may within 10 days from the date on which the affidavit was posted or delivered or such further period or periods as the industrial court may from time to time fix, by means of an affidavit reply thereto.

(Para. (b) substituted by s.15(c) of Act 83 of 1988)

(c) The provisions of section 45(a) shall apply mutatis mutandis to the parties to the dispute at proceedings before the industrial court in pursuance of an application under subsection (2) of this section.

(4) (a) Unless the industrial court on good cause shown decides otherwise, no order may be made under this subsection if the relevant application under subsection (2) was not made within 30 days of the date on which notice was given of the alleged unfair labour practice or if no such notice was given, of the date on which the alleged unfair labour practice was introduced.

(Para. (a) substituted by s.15(d) of Act 83 of 1988.)

(b) After considering –

(i) whether the application has complied with the relevant provisions of this section;

(ii) the facts set out in the application and the affidavits as contemplated in subsection (3)(b);

(iii) any oral representation or evidence allowed by the industrial court;

(iv) whether the applicant has in good faith endeavoured to settle the dispute by agreement or otherwise; and

(v) whether it is expedient to grant an order in terms of this section,

(NB: In terms of s.2 of the Agricultural Labour Act 147 of 1993, for the purposes of s.1 of Act 147 of 1993, this Act must be construed as if a sub-para. (iv) had been added. For the wording of sub-para-(vi) see ‘LABOUR RELATIONS ACT 28 OF 1956 AS TO BE CONSTRUED IN TERMS OF THE AGRICULTURAL LABOUR ACT 147 OF 1993’ immediately below this Act.)

The industrial court may make such order as it deems reasonable in the circumstances: Provided that no party may be ordered to pay damages of whatever nature and the court may at any time, on the application of any party, in respect of which application the provisions of subsection (3) shall apply, withdraw or vary any such order.

(Para. (b) Substituted by s15(e) of Act 83 of 1988.)
The industrial court shall not make any order as to cost in respect of any proceeding brought before it under this section, save on the ground of unreasonableness or frivolity on the part of a party to a relevant dispute.

When making an order under subsection (4) the industrial court shall fix the date from which the order shall operate and may make it retrospective to a date not earlier than that on which the alleged unfair labour practice was introduced.

An order made by the industrial court under subsection (4) shall prevail over any contrary provisions in any law or wage regulating measure and shall, unless it is withdrawn sooner, remain operative-

(a) until the dispute has been settled by the industrial council or the conciliation board concerned or, if it is referred or is required to be referred to arbitration or to the industrial court for determination, by an award or determination, as the case may be; or

(b) until the secretary of the industrial council or chairman of the conciliation board concerned informs the industrial court that the industrial council or the conciliation board, as the case may be, failed to settle the dispute and has decided not to refer the dispute to an arbitrator or to arbitrators and an umpire or to the industrial court,

whichever event occurs first: Provided that no such order shall remain operative for longer than 90 days from the date of commencement fixed by the industrial court under subsection (5), unless the industrial court, taking into consideration the steps taken by the parties to settle the dispute, of its own motion or on application extends that period by periods not exceeding 30 days at a time.

If an order is made not to suspend or terminate the employment of an employee, or if such suspension or termination has already occurred, to rescind the suspension or to reinstate an employee, an employer who pays to an employee the remuneration which would have been due to the employee in respect of his normal hours of work had his employment not been suspended or terminated or lesser remuneration as the industrial court may determine taking cognizance of any remuneration to which the employee has in the meantime become entitled by virtue of work performed by such employee, shall be deemed to have complied with the order.

If an arbitrator or arbitrators and an umpire to whom the matter is referred in terms of this Act or the labour appeal court or the industrial court, confirms the suspension or termination or the decision or proposal which gave rise to the dispute, any employer who under the provisions of subsection (7) has paid any remuneration to an employee in satisfaction of an order made under subsection (4) in respect of the same matter shall be entitled to
recover the remuneration so paid from the employee by civil legal proceedings.

(Sub-s.(8) substituted by s.15(i) of Act 83 of 1988.)

(9) The industrial court may refuse to grant an application made in terms of subsection (2), but may permit the applicant to make use of any documents on which that application was based, in applying to the industrial court for an order under subsection (4).

(S.43 amended s.7 of Act 41 of 1959, by s.13 of Act 94 of 1979 and by s.7 of Act 95 of 1980 and substituted by s.8 of Act 51 of 1982.)

Having laid down the provisions of section 43 of the old Labour Relations Act 28 of 1956, the discussion to follow will deal with the industrial court’s jurisprudence on the determination of unfair labour practices and remedies thereof.

2.3 INDUSTRIAL COURT’S JURISPRUDENCE

Section 46(9)(c) of the Labour Relations Act 28 of 1956 (as amended) provided that:

“the industrial court shall as soon as possible after receipt of the reference in terms of paragraph (b), determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation, and the provisions of section 49 to 58, 62 and 71 shall mutatis mutandis apply in respect of any determination made in terms of this subsection in so far as such provisions can be applied: Provided that such determination may include any alleged unfair labour practice which is substantially contemplated by the referral to the industrial council or with the terms of reference of the conciliation board determined in terms of section 35 (3)(b)”.

Advocate NF Rautenbach discussed in his article on “Remedying Procedural Unfairness: An Employer’s Dilemma”.¹ The problems which could face employers from time to time as illustrated by the decision of MAWU v Henred Freuhauf Trailers.²

The applicant employee was dismissed on 2 February 1987, but thereafter reinstated on 10 February 1987 with retrospective effect to the date of dismissal. The employee was then suspended on full pay pending a fresh disciplinary enquiry. An enquiry was held on 11 February and this resulted in the termination of the employee’s services. The matter was then referred to an industrial council which failed to resolve the dispute. The dismissal complained about was that of that of 2 February and not the

¹ (1990) 11 ILJ 466.
² (1988) 9 ILJ 488 (IC).
later one on 11 February. In an application in terms of section 46(9) of the Labour Relations Act, the respondent employer raised a special plea that the dispute concerning the dismissal of 2 February had been determined by the reinstatement of the applicant on 10 February.

The court held that it was abundantly clear that by reinstating Maake (the applicant) on 10 February dispute relating to the dismissal on 2 February was resolved. The court found that the reinstatement was not a sham because the applicant was remunerated for the interim period and participated in the subsequent enquiry.

Advocate Rautenbach stated that the ratio of the decision of Landman AM was that the court cannot make a determination where the dispute has been resolved by a settlement or by a party rescinding its action so totally and completely as was done in this case. The court also held that the applicant’s papers could not be amended to include an allegation that the dispute concerned the dismissal on 11 February, because this dispute had not been referred to the industrial council even though both dismissals were for the same reason. Accordingly, the applicant was not entitled to any relief.

In Van Dyk v Markly Investments, Bulbulia M was called upon to decide a dispute in which an employee was reinstated without a disclosure by the employer that it intended to hold a disciplinary enquiry. The court found that the employer had neither ‘played open cards’ with the employee nor made a genuine attempt to settle the dispute. The court accordingly reinstated the applicant. This decision, according to Adv Rautenbach, suggested that there are two requirements for an offer of reinstatement to resolve a dispute. Firstly, the employer must play “open cards” and be frank with the employee on the terms of the reinstatement. Secondly, genuine agreement between the parties is a prerequisite for determination of the dispute.

It appears that the rationale of the principle laid down is Van Dyk was that the employer was entitled to reinstate the employee, subject to the right to continue with a disciplinary enquiry on the same dispute.

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3 (1988) 9 ILJ 918 (IC).
4 Supra.
What is apparent from the Industrial Court’s approach is that the court could order reinstatement of an employee, where the employer did not follow a fair procedure, even though the employer had good reason to dismiss the employee.

In Towels, Edgar Jacobs Ltd v The President of the Industrial Court,⁵ it was stated that the employment of particular employees, whether they form part of an identifiable group or not, can be said to be a labour practice. To reinstate them is to “restore the labour practice” that existed prior to their dismissal within the contemplation of section 43(4)(b)(iii) of the Act. To retrench employees by simply giving them the required notice of termination of their service contracts is conduct such as falls within the ambit of the definition of unfair labour practice.

In this case an interdict was sought and granted, as an interim measure, against the continuation of part-heard proceedings before the industrial court in terms of section 46(9) of the Labour Relations Act 28 of 1956 (“the LRA”). The applicant, without filing any papers on the merits of the application, challenged jurisdiction of the industrial court before that tribunal. The challenge failed at a preliminary hearing arranged by the parties. The deputy president of the court dismissed the objection to the jurisdiction. He ordered the respondent (the present applicant) to give notice of its intention to oppose the section 46(9) application and to deliver a statement of its defence in terms of rule 6(2)(b) within the time prescribed by the rules of the industrial court.

The court found that the dispute between the parties was one involving an unfair labour practice; it was competent for the industrial council to refer this dispute to the industrial court and it properly did so. The interim order was accordingly discharged.

Advocate JG Van Der Riet stated in his article on the “Reinstatement of Unfairly Dismissed Employees”⁶ that it was accepted that the power of the Industrial Court to determine disputes concerning an alleged unfair labour practice included the competency to determine unfair dismissals. He stated that if an employee who was

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⁵ (1986) 7 ILJ 496 (C).
⁶ (1994) 15 ILJ 1238.
found to have been dismissed unfairly sought to retain the job that he or she had been unfairly deprived of, then the only practical way to protect and enhance job security was to reinstate the employee. Or to put it differently, if unfairly dismissed employees who wanted their jobs back, were given remedies other than reinstatement by the labour courts, job security would not had been enhanced by the unfair dismissal jurisdiction of the labour courts.

In *Cremack v SACWU*\(^7\) the court confirmed the view, “that if an unfair dismissal appears, the inference is that fairness demands a reinstatement”. The court referred to a number of Labour Appeal Court decisions, which were based on the dictum of Goldstein J in *Sentraal-Wes (Kooperatief) Beperk v FAWU*\(^8\) where the learned judge stated “*prima facie*, if an unfair dismissal occurs, the inference is that fairness demands reinstatement. And it is for an employer to raise the factors which displace such inference”.

In *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union*,\(^9\) the issue came squarely before the Appellate Division for the first time. The employees in this case were dismissed because they had engaged in an unlawful strike. The majority of court held that the dismissal constituted an unfair labour practice in the circumstances of the case and that reinstatement was the appropriate relief in the matter.\(^10\) Goldstone JA (who wrote the majority judgment) stated that the dictum of Goldstein J in the *Sentraal-Wes* case was “far too widely stated”. He was of the view that “a rule of thumb, even if applied on a *prima facie* basis, will tend to fetter the wide discretion of the Industrial Court (or the Labour Appeal Court)”.\(^11\)

In *NUMSA v Henred Fruehauf Trailers*,\(^12\) the Appellate Division was asked to set aside a Labour Appeal Court decision refusing the reinstatement of unfairly dismissed workers. Nicholas AJA (who wrote the judgment) considered the judgment of Goldstone JA in the Performing Arts Council of Transvaal case. Without expressly

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7 (1994) 15 ILJ 289 (LAC).
8 (1990) 11 ILJ 977 (LAC) at 994E-F.
9 (1994) 15 ILJ 65 (A).
10 At 79D.
11 At 78B.
stating whether he approved of the criticism of Goldstein J, he concluded as follows:\textsuperscript{13}

“Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the \textit{status quo ante}. It follows that it is incumbent on the court when deciding what remedy is appropriate to consider whether in light of all the proved circumstances there is reason to refuse reinstatement.”

The learned judge found on the facts and circumstances before the Appellate Division, that reinstatement was the appropriate relief and the decision of the labour Appeal Court was set aside.

\textbf{2.4 REMEDIES IN TERMS OF THE LABOUR RELATIONS ACT 66 OF 1995}

After the 1994 election the reconstituted Department of Manpower, now renamed the Department of Labour commenced putting its stamp on the labour relation system. A task team was established to draft a new Labour Relations Act and in February 1995, the first draft Negotiation Document was published for comment.

On 11 November 1996 the new Labour Relations Act 66 of 1995 was passed into law and it overhauled the old Labour Relations Act 28 of 1956 and codified the law of unfair dismissal.

Of relevance for purposes of this discussion are sections 193, 194 and 195, which were enacted as follows:

\textbf{“193 Remedies for unfair dismissal}

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

\textsuperscript{13} At 1263C-D.
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;

(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.

(3) If a dismissal is automatically unfair or, if a dismissal based on the employer’s operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.

194 Limits on compensation

(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee’s rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim.

(2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee’s conduct, capacity or based on the employer’s operational requirements, must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12 months remuneration calculated at the employee’s rate of remuneration on the date of dismissal.

(3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal.

195 Compensation is in addition to any other amount

An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.”
In *Matthews v Hutchinson*,\(^\text{14}\) the applicant employee had been charged and found guilty of negligent conduct relating to the third respondent store’s cash float count sheet. She was dismissed. The CCMA found that the dismissal was fair.

The court, having considered the evidence, found that the cumulative effect of the misdirections of the commissioner amounted to a gross irregularity and failure of justice. The commissioner did not apply his mind to the evidence and the subtle nuances of the evidence. He misunderstood the import of the evidence and attributed motives to the employee which could not reasonably be drawn. He also relied on suspect evidence. The court accordingly set aside the award and replaced the sanction of dismissal with a final written warning. It also ordered the employee to make good the loss of R5 000 to the store.

In *Mzeku v Volkswagen SA (Pty) Ltd.*,\(^\text{15}\) the court held that the remedy of reinstatement is not appropriate where the dismissal was substantively fair but procedurally unfair. The court, however, found that the employee’s dismissal was both substantively and procedurally fair.

It should be noted that the dismissed employees finally approached the Constitutional Court for an order declaring that their dismissal was procedurally unfair and for an order for reinstatement. The court dismissed the employee’s application for leave to appeal in *Xinwa v Volkswagen of SA (Pty) Ltd.*\(^\text{16}\)

It was widely accepted that the all or nothing approach with regard to compensation led to injustice. The courts were often reluctant to deny applicants any compensation for a procedurally unfair dismissal, yet feel it would be even more unjust to the employer to award the full amount of the compensation prescribed in section 194(1) for a procedurally unfair dismissal. In *Fourie v Iscor Ltd.*,\(^\text{17}\) the court held that it was “of the view that the applicants should not be lightly denied compensation for a procedurally unfair dismissal”. This view was echoed by Damont AJ in the *Scribante* case, where he held that “the court should not lightly deprive applicants who have

\(^\text{14}\) (1998) 19 ILJ 1512 (LC).
\(^\text{15}\) (2001) 22 ILJ 1575 (LAC).
\(^\text{17}\) (2000) 11 BLLR 1269 (LC).
been the victims of procedural unfairness of compensation. It may be that the amount of compensation is high, but that is a matter for the legislature to consider”.\textsuperscript{18}

It is against this background of ambiguity caused by subsections 194(1) and (2) that led to the legislature’s amendments in 2002, which will be discussed below, including the court’s application and interpretation of the amendments.

2.5 2002 AMENDMENTS

Section 193 of the Labour Relations Act 66 of 1995 was amended by the addition of subsection 4 which provides as follows:

“An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.”

Subsection 194(1) was substituted by section 48(a) of Act 12 of 2002 as follows:

“The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal is a fair reason relating to the employee’s conduct or capacity or the employer’s operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal.

Subsection 194(2) was deleted by section 52(b) of Act 12 of 2002.

Subsection 194(4) was added by section 48(a) of Act 12 of 2002 as follows:

“The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months’ remuneration.”

\textsuperscript{18} At para 5.4.
2.6 CONCLUSION

The law of unfair dismissal has evolved since the days of the Industrial Court jurisprudence until the enactment of the Labour Relations Act 66 of 1995 and the 2002 amendments. From the period of 1980 to date, our courts have assisted in the application and interpretation of the law of unfair dismissal, thereby giving some guidance on the industrial relations players on how to apply the law of unfair dismissal.

At times, it was difficult for our courts to redress the wrongs caused by an unfair dismissal to individual employees due to the powers conferred upon them by the labour laws of the day. However, as the Labour Relations Act 66 of 1995 was new to most of the industrial relations players, the courts awarded judgments which did not give clarity on how to deal with certain disputes arising from unfair dismissal. That necessitated some amendments to the law of unfair dismissal in order to enhance the labour relations system by promoting job security, labour peace and advance economic development of the enterprises.
CHAPTER 3
INTERPRETATION OF THE REMEDIES FOR UNFAIR DISMISSAL

3.1 INTRODUCTION

In this chapter, the discussion will focus on the three remedies for unfair dismissal as set out in section 193 of the Labour Relations Act 66 of 1995. These remedies are reinstatement, re-employment or compensation.

The ways in which these remedies are couched in section 193 means that reinstatement and re-employment are primary remedies for unfair dismissal. The remedy of compensation is normally applied when the exceptions in subsection 2 (a) to (d) are applicable.

It will also be demonstrated, through the decided cases, how the remedies for unfair dismissal have been interpreted in order to give certainty to the labour relations system.

3.2 REINSTATEMENT

Section 193(2) makes it clear that reinstatement is the preferred remedy for unfairly dismissed employees, and that compensation should be granted instead only when one or more of the exceptions mentioned in paragraph (a) to (d) apply. When those do apply reinstatement cannot be ordered. When determining whether the exceptions apply, the commissioner must do so on the basis of evidence, not mere speculation.

If an arbitrator or the Labour Court finds that an employee has been unfairly dismissed, the employee may be reinstated from a date not earlier than the date of dismissal or the employer may be ordered to re-employ the employee in the work in which the employee was employed at the time of his or her dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal.
The difference between reinstatement and re-employment is not explained. Reinstatement, in its ordinary meaning suggests that the period of service between dismissal and resumption of service in deemed unbroken; re-employment that the employment contract ended at the date of dismissal and resumed on the date of re-employment. In the vast majority of cases, unfairly dismissed employees who are returned to work are granted reinstatement. It seems that re-employment was offered as an alternative to dismissal to cater for forms of dismissal, in which the employment relationship had terminated before the dismissal, *ie* where the employee was the victim of selective non-re-employment or where the employer refused to renew a seasonal contact.

The term "reinstatement" also suggests that an order of reinstatement may not be conditional or coupled with any qualification, other than something less than full retrospectivity. Although the LRA does not empower arbitrators to impose a penalty on dismissed employees, in practice commissioners frequently reinstate employees on warnings. This was held permissible in *County Fair v CCMA*. The court also appeared to confirm that commissioners have the power impose penalties short of dismissal in *De Beers Consolidated Mines Ltd v CCMA*.

An order of reinstatement does not operate in perpetuity, in the sense that it precludes the employer from later transferring or altering the working arrangements of the employee in accordance with its contractual rights. Thus, in *Jeremiah v National Sorghum Breweries*, the employee complained that the employer had breached the terms of the reinstatement order by proposing to transfer him to another area of its operation and giving him a different vehicle. The court observed that an order of reinstatement does not deprive the employer of its pre-existing rights to re-deploy the employee or amend his working conditions in accordance with the original contract.

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In *CTL Group (Pty) Ltd v Memela*, the CCMA awarded reinstatement with effect from 15 April 2002 and back pay in the amount of R25 718 to the first respondent employee. The applicant employer raised a preliminary point that the employee was not entitled to any payment for the period 15 April 2002 to the date when the Labour Court made the award an order of court or until the employee was physically reinstated.

The court noted that the effect of the employer's submission, if it were to be accepted, would be to permit an employer who has defied an award or order of the court to profit from it. The court stated that could not be tolerated as the orders for payment for the period between the date of the award or the date on which the award orders reinstatement and the date of the order of the Labour Court had been regularly granted by the court without debate.

Implicit in the judgment in *Ntombela v Hewidge Hire & Haul CC* was the acceptance that there may be a monetary remedy over and above the contempt remedy available to an employee who is deprived of physical reinstatement in terms of valid award and order of the court. The court dismissed the preliminary point with cost.

It would appear that the employer failed to comply with the arbitration award until the same was made an order of court in terms of section 158(1)(c) of the Labour Relations Act and it wanted to benefit by defying the award or order of court from 15 April 2002 to the date until the Labour Court made the award an order of court. That could never have been the intention of the Legislature to deprive the employee his or her backpay where the contract of employment had been restored.

In *Trident Steel (Pty) Ltd v CCMA* the applicant company sought to review an award of the CCMA reinstating the fourth respondent employee retrospectively to the date of his dismissal. It appeared that the employee had been absent from 4 January to 7 March 2000. In his absence the company conducted a disciplinary hearing into his absence without leave, and dismissed him in absentia. When the

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22. *(2003) 24 ILJ 1680 (LC).*
23. *(1999) 20 ILJ 901 (LC).*
24. *(2005) 26 ILJ 1519 (LC).*
employee returned to work on 7 March a second disciplinary enquiry was held and he was found guilty of absence from work without leave and failing to inform his employer of his whereabouts, and was dismissed again. It appeared, however, that the employee was in prison from 23 December 1999 until his return to work in March 2000.

The commissioner found that the initial disciplinary hearing was procedurally unfair because the company had dismissed the employee in his absence well knowing that he was in prison. The commissioner rejected the company's denial of its knowledge of his whereabouts during his absence. The commissioner accepted that the employee had given a reasonable explanation for not contacting the company while he was in prison. The commissioner also considered the employee's clean disciplinary record, and length of service and noted that as the company had offered to re-employ the employee if a vacancy arose, the employment relationship had not been destroyed.

The court failed to find anything wrong with the commissioner's finding that the dismissal had been substantially unfair. Furthermore, disciplining the employee for misconduct for a second time after he had returned to work with a valid explanation was unfair.

The court found, however, that the commissioner had failed to take into account that imprisonment suspended the obligation of the employer to pay the employee a salary for the period of his imprisonment. Remuneration should not have been granted for the period January, February up to 7 March 2000. The court accordingly upheld the award subject to the deduction of the remuneration paid for the above period from the compensation award.

The above case illustrates an important point for employers when they are faced with cases involving employees who are absent without leave as a result of imprisonment. This case guides employers intending to institute disciplinary action to afford the employees an opportunity to explain why they did not contact their employer to advise it about its whereabouts.
However, a balance is struck between the rights of employees and the rights of employers by stating that they employers are not obliged to remunerate the employees during the period that they were in prison and not tendering their services to the employer.

On the other hand, a termination of the employment contract of an employee who is in prison may be done by operation of law, as it is the case in the public sector, where an employee is deemed to have deserted his employment after 30 days.

In *New Clicks SA (Pty) Ltd v CCMA*,25 the court was asked to determine the application and interpretation of section 193(2)(b), where following their dismissal for misconduct, the respondent employees approached the CCMA which ruled that their dismissal had been substantively unfair and ordered their retrospective reinstatement. The applicant company sought to review the award on the ground that it was not reasonable and that the remedy of reinstatement was inappropriate regard being had to section 193(2)(b) of the Act. It also objected to the incomplete record on review.

The company argued that the commissioner, when determining whether reinstatement was the appropriate remedy, ought to have given consideration to the company’s statement that it did not trust the employees and in such circumstances section 193(2)(b) precluded the commissioner from reinstating the employees.

The court did not agree with the company. In the court’s view in all matters relating to dismissal for alleged misconduct employers will immediately lose trust in the employee the minute the employee faces disciplinary proceedings. If section 193(2)(b) were to be interpreted to mean that because at one stage the employer had a strong suspicion that an employee was guilty of misconduct that rendered continued employment intolerable, then the primary remedy of reinstatement would never be afforded to an employee dismissed for misconduct. The section had to be interpreted to mean that evidence had to be led to substantiate the fact that continued employment would be intolerable.

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The court found that, given the fact that reinstatement is the primary remedy, a commissioner should invoke the provisions of section 193(2)(b) to deny reinstatement sparingly and only after careful consideration of all the circumstances. The court accordingly dismissed the review application with costs.

I will now deal with the subject of retrospective reinstatement, which has divided our Labour Courts and Labour Appeal Court for some time until the Supreme Court of Appeal and finally the Constitutional Court gave certainty on the subject to give direction in the labour relations arena. In *Kroukam v SA Airlink (Pty) Ltd*,²⁶ the applicant was employed as a pilot by the respondent company. He was dismissed after being found guilty of insubordination and constituting a disruptive influence in the operations of the company. He was at the time of his dismissal, chairperson of the Airlines Pilots Association, a trade union. The employee contended that his dismissal was in fact automatically unfair in terms of section 187(1)(d) of the Labour Relations Act 66 of the 1995 because he had been dismissed for union activities and initiating litigation against the company on behalf of the union. The Labour Court found the employee’s allegation that he had been dismissed for union activities to be without merit. The employee appealed to the Labour Appeal Court.

Although both Zondo JP and Davis AJA concluded that the employee’s dismissal was automatically unfair, they adopted different approaches to the manner in which automatically unfair dismissals should be considered by the court and the retrospectivity of relief granted by the court.

After an extensive consideration of the evidence, Zondo JP concluded that some of the reasons why the employer brought disciplinary charges against the employee related to his union activities. He was of the view that, where, as in this case, the reason or reasons for the dismissal of an employee comprise one or more reasons that would render the dismissal automatically unfair and one or more reasons that would not render the dismissal automatically unfair, but the reason or reasons that

²⁶ *(2005) 26 ILJ 2153 (LAC).*
would render the dismissal automatically unfair are the dominant reason or reasons, the dismissal is automatically unfair.

Regarding relief, Zondo JP noted that, as the employee sought reinstatement and none of the situations set out in section 193(2)(a) – (d) existed, the court was obliged to order reinstatement. It was clear from the language of section 193(2) that the court had no discretion whether or not to grant reinstatement in such circumstances.

In considering the period of retrospectivity, Zondo JP disagreed with Davis AJ’s view that it is competent for the court to make an order of reinstatement that operates with retrospective effect up to the date of dismissal even if that goes beyond 24 months in cases of automatically unfair dismissals and 12 months in the case of other unfair dismissals. In Zondo JP’s view section 194 caps the amount of compensation awardable at an amount equivalent to 24 and 12 months’ remuneration respectively. According to Zondo JP section 193 should be construed to mean that an order of reinstatement can operate retrospectively to the date of dismissal or up to 24 months or 12 months backwards, as the case may be, whichever is the more recent. He stated that this construction would harmonize the provisions of section 193 and 194.

In the case before the court the period between the employee’s date of dismissal and the date of delivery of the judgment of the Labour Court was 17 months and was thus less than the 24 months contemplated in section 194. The question the court had to decide was whether the reinstatement should operate with retrospective effect to the date of dismissal of the employee or to any date or whether it should not be retrospective at all.

Zondo JP would ordinarily had been inclined to order that reinstatement operate with retrospective effect to the date of dismissal of the employee. However, he took into account the fact that the employee had worked for another air service for five months, and the amount he earned during this period had to be deducted from whatever compensation or backpay the court ordered. In addition, Zondo JP noted that the employee had been offered another job at the same or a higher salary than that paid by the company, but he had refused it because of the litigation pending in this matter. He found that the employee’s decision not to take the job broke the
causal connection between his financial loss and the company’s conduct in dismissing him as it did. It was not canvassed in evidence when that job was offered to the employee, which made it difficult to determine the period of retrospectivity. Zondo JP, however, concluded that he believed that a period of seven months retrospectivity would be fair and equitable in the circumstances.

Davis AJA (with whom Wallis JA concurred), noted that there was uncertainty concerning the terms and conditions of the alternative employment offered to the employee and in order to bring finality to the proceedings, only took account of the amount paid to the employee for the five months when he was employed after his dismissal, and found that a backdated period of reinstatement of 12 months was just and equitable in the circumstances.

In *Chemical Workers Industrial Union v Latex Surgical Products (Pty) Ltd*, Zondo JP who gave a minority judgement in *Kroukam*, after having found the retrenchment of the employees to be without a fair reason, then considered the appropriate remedy. The employees sought reinstatement. Since none of the situations provided for in section 193(2)(a) – (d) existed, the court was obliged to order reinstatement. As the employees had been dismissed more than twelve months before the Labour Court order, the court had to decide whether the reinstatement order could operate with retrospective effect for a period of more than 12 months.

Following the obiter of Zondo JP on this point in *Kroukam*, the court found that it is not competent to order the retrospective operation of a reinstatement order in excess of 12 months in an ordinary unfair dismissal case.

The court’s discretion to award retrospective reinstatement was thus limited to 12 months or less. The court took into account the employee’s failure to take up the company’s offer to discuss the use of their services pending the outcome of the litigation, and found that this warranted a reduction in the amount of retrospectivity.

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28 *Supra.*

29 *Supra.*
The court found that six month’s retrospection to be appropriate in the circumstances.

The two conflicting judgements of the Labour Appeal Court in *Kroukam* and *Latex* caused a lot of uncertainty on retrospective reinstatement and it also divided our Labour Courts and labour dispute resolution tribunals for quite some time.

For example in *Jaftha v CCMA*, the court observed that there was no evidence that the working relationship between the employee and the company had been damaged or destroyed. Reinstatement appeared therefore to be appropriate. The employee had been dismissed four years before the hearing. Relying on the Labour Appeal Court decision in *Chemical Workers Industrial Union v Latex Surgical Products (Pty) Ltd* on the limitation of retrospective reinstatement orders, the court limited the period of retrospection to 12 months.

In *National Union of Mineworkers v CCMA*, the CCMA had found the second applicant employee’s dismissal by the third respondent employer to be unfair and had awarded him compensation. In an application to review the award the applicants contended that the commissioner should have ordered the reinstatement of the employee.

An application for condonation accompanied the review application. At the hearing, the employer conceded that, if condonation were granted, the commissioner’s award of compensation instead of reinstatement was irrational and therefore reviewable.

Having perused the record, the court was of the view that the commissioner should have found that none of the four exceptions referred to in section 193(2) existed. The commissioner appeared instead to have introduced a fifth exception, namely that the employee was perceived to be a bad person and the relationship between the union and the employer was bad, and that as a result of this, reinstatement was not the appropriate remedy. The court found that the commissioner had committed a gross irregularity. He should have ordered the reinstatement of the employee.

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Regarding retrospectivity of the award, the court noted that the crucial date was the date on which the award was issued by the commissioner. This was 7 May 2001, about eight months after the employee’s dismissal on 8 September 2000. The commissioner should therefore have reinstated the employee from the date of his dismissal, a period which would not have exceeded 12 months. The court accordingly, reviewed and set aside the commissioner’s award and replaced it with an order that the employer reinstate the employee from the date of his dismissal.

On examination of the legal position set out in the above case, it appears that the period in which to determine whether the reinstatement order would exceed 12 or 24 months, as the case may be, is the period between the date of dismissal and the date of arbitration or adjudication hearing. It also appears that the court shared the same view as Zondo JP in Latex, since Francis J stated in paragraph 15 of his judgment that “he award was issued on 7 May 2001 which was eight months after the dismissal and the backpay would not have exceeded 12 months”. This statement by Francis J indicates that had the dismissal been more than 12 months from the date of dismissal, backpay on the reinstatement order would not have exceeded 12 months.

The above two Labour Court judgments of Jaftha and National Union of Mineworkers, illustrate the way in which our Labour Courts have been divided on the subject of retrospective reinstatement, as the courts followed the principle laid down in Latex by Zondo JP.

This legal position was also followed in Laminate Profiles CC v Mompei, where the employee had been arrested by the police on 8 March 2001, had been dismissed on 8 June 2001 when his father informed the employer that he was in prison, and had been released from prison on 25 March 2002. The dismissal dispute was finalized by the CCMA on 8 March 2004. The commissioner had ordered the employer to reinstate the employee retrospectively from the date of his dismissal.

32 Supra.
33 Supra.
The court found that because the employee had been in detention from 8 March 2001 to 25 March 2002, the commissioner should have found that imprisonment suspended the obligation on the employer to pay him a salary and he was not entitled to remuneration for that period. No compensation should therefore have been awarded to the employee in respect of the period of his detention.

The court found, further that the commissioner had awarded retrospective reinstatement for a period longer than 12 months prior to the date of finalization of the arbitration. The employee was however only entitled to be reinstated retrospectively for a period no longer than 12 months. The court accordingly corrected the CCMA award to provide for the retrospective reinstatement of the employee with effect from 8 March 2003.

However, in Clarke v Mudan NO,35 the court seemed to have followed the legal position set out in Kroukam.36 The facts of this case were as follows: the applicant employee had been dismissed by the third respondent, Edgars for processing a false cash transaction. Her dismissal was upheld by the CCMA although it was clear from the evidence before the commissioner, inter alia, that the processing of fictitious cash transactions was a widespread practice in Edgars’ stores countrywide; that no-one had ever been dismissed for doing so, and that the practice had only been investigated by top management and prohibited after the dismissal of the employee.

The court found that the commissioner had committed a reviewable irregularity in finding that the employee’s conduct constituted a dismissible offence. The court distinguished this matter from those in which several employees were disciplined and given different sanctions for the same offence. The court distinguished this matter from those in which several employees were disciplined and given different sanctions for the same offence. In this matter the employee was the first to be dismissed for the conduct in issue, so the question of inconsistency of treatment did not arise.

In paragraph 14 Ngalwana AJ declared that a first and final warning would have been an appropriate sanction on the facts of this case and ordered the third respondent

36 Supra.
employer to reinstate the applicant with retrospective effect to date of dismissal with all the remuneration to which the applicant would have been entitled had she not been dismissed.

Once again the question of retrospective reinstatement came before Zondo JP in *Oosthuizen v Telkom SA Ltd*, where the appellant employee was a specialist switching engineer with 30 years service with the respondent, Telkom. He was a member of the SA Communications Union, but did not fall within the bargaining unit because of his seniority. When Telkom decided to reduce the number of its employees, it consulted with the Alliance of Telkom Unions (ATU), of which SACU was a member union. Telkom and ATU reached an agreement on staff optimization which provided, *inter alia*, for the procedure to be followed when contemplating retrenchment and/or redundancies and procedures for avoiding or minimizing dismissals. Employees whose positions were determined to be redundant were in terms of the agreement, to be offered a voluntary severance package or entry into a redeployment pool from which they could apply for vacancies and for which Telkom undertook to provide training, if required.

When the appellant’s position was declared to be redundant, he elected to be placed in the redeployment pool. Following his entry into the redeployment pool and until his retrenchment some five months later, the appellant applied unsuccessfully for 22 vacancies in Telkom’s organization. He also applied, again, unsuccessfully, for four vacancies after his retrenchment. After conciliation failed before the CCMA, the appellant approached the Labour Court for relief but it dismissed his application.

The court found that an employer has an obligation not to dismiss an employee for operational requirements if the employer has work which such employee can perform, either without any additional training or with minimal training.

The court found further that the fact that Telkom had not placed any evidence before the court below to explain why the appellant was not appointed to any of the positions he had applied for and for which he met the basic requirements and why

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37 *(2007) 28 ILJ 2531 (LAC).*
those positions had been given to other employees meant that Telkom had failed to justify the dismissal of the appellant. Telkom was obliged to explain the basis for its selection and to show that the selection criteria used was fair and objective. In a separate, detailed judgement, Mc Call AJA also found that it had not been established before the court below that there were in fact no alternatives to dismissal or that the procedure adopted leading to the appellant’s dismissal had been fair and objective.

The court was satisfied that Telkom had failed to prove that there was a fair reason for the selection of the appellant for retrenchment, and his dismissal was accordingly substantively unfair. The court found that the reinstatement was the appropriate remedy, and ordered Telkom to reinstate the appellant retrospectively for a period of 12 months from the date of the court order, until the date of his dismissal when he was in the redeployment pool. The court further ordered that the appellant’s reinstatement was to give the respondent an opportunity to offer the appellant a specific position in its employ or to enable the appellant and the respondent to reach some other agreement about the future of the appellant in the respondent’s employ.

The question of retrospective reinstatement came before the Supreme Court of Appeal for the first time in Republican Press (Pty) Ltd v Chemical Energy Printing Paper Wood & Allied Workers Union,\(^\text{38}\) where the appellant company had retrenched about 150 workers on 6 September 1999. Certain of the workers and their union contested the fairness of their dismissals before the Labour Court. The matter came to trial some six years after the worker’s retrenchment. The only issues before the Labour Court were whether the selection criteria used were fair and objective and the appropriate relief, if any.

The court found in favour of the workers and ordered that some of them be reinstated with effect from 7 September 1999, that others be paid 12 months compensation and that the same amount be paid into the estate of workers who had died before the trial. The company’s application for leave to appeal was refused by both the Labour Court and the Labour Appeal Court. The company then approached the Supreme

Court of Appeal for leave to appeal directly to that court. The company sought leave to appeal only against the order of reinstatement.

The company raised two issues arising from the delay. First, it contended that the reinstatement of 28 workers after the lapse of a period of six years was wholly inappropriate, and secondly, it contended that the order was in conflict with the decision in *Chemical Workers Industrial Union v Latex Surgical Products (Pty) Ltd*,\(^{39}\) which held that the LRA had to be construed so that an order for reinstatement could not be given retrospective operation for longer than 12 months.

The court disagreed with the LAC’s construction of the LRA in Latex. The court did not opine that the backpay to which a worker ordinarily becomes entitled to when an order for reinstatement is made is to be equated with compensation. It held that an order for reinstatement restores the former contract and any amount that was payable to the worker under that contract necessarily becomes due to the worker on that ground alone. The court agreed with Davis AJA (in *Kroukam v SA Airlink (Pty) Ltd*) that the remuneration becomes due under the terms of the contract itself and does not constitute compensation as envisaged by section 194. The court also found that there were no proper grounds for inferring that the limitation suggested in Latex was inadvertently omitted and ought to be read into the section.

However, the court stated that the hallmark of the LRA is its insistence upon disputes concerning unfair dismissal being resolved expeditiously. The court found that while the Act requires an order for reinstatement or re-employment generally to be made, a court or an arbitrator may decline to make such an order where it is “not reasonably practicable” for the employer to take the employee back into employment. Whether that is so depends on the particular circumstances, but in many cases the impracticability of resuming the relationship of employment increased with the passage of time.

In the court’s view this was such a case. It found further that the passage of six years from the time the workers were dismissed which followed consequentially upon

\(^{39}\) *26 supra* at 21.
the failure by the union to pursue the claim expeditiously was sufficient to find that it was not reasonably practicable to reinstate or re-employ the workers.

Nugent JA stated in paragraph 22 of the judgment as follows:

“The only alternative remedy that is available in the circumstances is an order that the company compensate the workers for their unfair dismissal. That must necessarily be limited to 12 months’ remuneration and the company accepted that that would be appropriate.”

On the analysis of the court's findings in the Republican Press, it appears that it agreed with the LAC's decision in Kroukam on the fact that a reinstatement order could operate retrospectively more than 12 or 24 months, whichever case may be, from the date of the arbitration or adjudication hearing. However, it could not confirm the Labour Court's order for reinstatement due to the provisions of section 193(2)(c) of the LRA. In this matter, the problem was exacerbated by the fact that the time the Labour Court made its order, the employer had undertaken further retrenchments and some of the company's operations had been restructured.

In my view, the Supreme Court of Appeal’s interpretation of sections 193 and 194 of the LRA is in line with the literal meaning of the provisions of those sections as envisaged by the Legislature.

The differing LAC decisions have resulted in confusion among the courts. It also raised doubts about the specialised status of the LAC that ordinarily is deemed the champion of the objects of the LRA. The conflicting LAC decisions seemed more to disable rather than enable the realisation of the objectives of the LRA.

It was hoped by the players in the industrial relations arena, that the Republican Press decision in the SCA had fully and finally settled the law on retrospective reinstatement and compensation until the same question came before the Constitutional Court, which is the supreme court of the land.
In *Equity Aviation Services (Pty) Ltd v CCMA*,\(^{40}\) the CCMA had found, on 18 March 2002, that the dismissal of the third respondent employee for misconduct on 8 March 2001 had been substantively and procedurally fair. On review, the Labour Court found that the misconduct should have been corrected with progressive discipline. On 18 October 2004 it set aside the award and replaced it with an award that read:

> “The employee is to receive a final written warning to the effect that should he commit a similar transgression in the next two years, he may be dismissed immediately.”

The applicant company appealed to the Labour Appeal Court, which observed in its judgment handed down on 15 June 2007 that the Labour Court had not expressly made an order of reinstatement after setting aside the award, although there was no doubt that the Labour Court was of the view that the CCMA ought to have ordered reinstatement.

Regarding retrospectivity of a reinstatement order, the Labour Appeal Court found that retrospectivity could not be implied. Since the employee had not noted a cross-appeal against the Labour Court’s failure to make an order backdating the reinstatement to the date of his dismissal, the court concluded that the reinstatement order that the CCMA would have made should have run only from the date of the issuing of the award. The court accordingly ordered, *inter alia*, that the order to reinstate the employee should operate from the date of issuing of the CCMA award. The Supreme Court of Appeal dismissed the company’s application for leave to appeal against the judgment of the LAC.

On its appeal to the Constitutional Court, the company relied on *Chemical Workers Industrial Union v Latex Surgical Products (Pty) Ltd*\(^{41}\) where the LAC held that it is not competent for a court or a tribunal to order retrospective operation of a reinstatement order in excess of 12 months. The Constitutional Court noted that the central issues for consideration related to (1) the proper interpretation of section 193(1)(a) of the LRA 1995 read with section 194, more pointedly whether these sections, correctly interpreted, limit the payment of backpay where a court orders

\(^{40}\) (2008) 29 *ILJ* 2507 (CC).

\(^{41}\) (2006) 27 *ILJ* 292 (LAC).
reinstatement or re-employment to a maximum of 12 months wages as contended by
the company; (2) whether the LAC exercised a discretion in relation to the
retrospectivity of the order and, if so, whether it failed to exercise its discretion
properly; (3) whether remittal of the case to the LAC would constitute appropriate
relief.

The court noted that section 193 provides for three remedies a court or arbitrator may
order after ruling that a dismissal is unfair. They are reinstatement, re-employment
or compensation. A court must order reinstatement or re-employment unless one or
more of the circumstances specified in section 193(2)(a) – (d) exist, in which case
compensation may be granted depending on the nature of dismissal. Relying on the
established rules for interpretation of statutes, the court observed that the ordinary
meaning of the word ‘reinstate’ is to put the employee back into the same job or
position he or she occupied before dismissal, on the same terms and conditions.

As the language of section 193(1)(a) indicates, the court noted, the extent of
retrospectivity is dependent upon the exercise of a discretion by the court or
arbitrator and that the only limitation in this regard is that the reinstatement cannot be
fixed at a date earlier than the actual date of dismissal.

The court rejected the company’s contention that an order for payment of
retrospective remuneration is in effect an order of compensation and that the
limitations imposed by section 194 should consequently apply to any award of
backpay. It considered the conflicting decisions of the LAC in *Kroukam* and *Latex*,
and found that the SCA clarified the position in *Republican Press (Pty) Ltd v
Chemical Energy Paper Printing Wood & Allied Workers Union*. The SCA held that
the backpay to which a dismissed employee ordinarily becomes entitled when an
order of reinstatement is made cannot be equated with compensation, thus allowing
for the limitation contained in section 194 not to be applied in relation to backpay.
Given the clear language used in section 193(1)(a) and the coherent legislative
structure for the resolution of dismissal disputes in the LRA, the court found that the

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42 *Supra.*
43 *Supra.*
interpretation in *Republican Press* in which the SCA endorsed the majority view in *Kroukam*, was correct.

The company contended further that the remedies of reinstatement and re-employment are not alternative remedies to compensation and they can be ordered simultaneously with it and that, in order to achieve fairness between employers and employees, the legislature had deemed it fit to “cap” the amount of remuneration, or backpay, to which the unfairly dismissed employee was entitled on reinstatement. The court found that the language of section 193(1)(a) is not amenable to this construction. 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 court found that the remedies in section 193(1) are thus in the alternative and mutually exclusive.

A distinction has to be drawn between the remedies of reinstatement and compensation provided for in section 193(1)(a) and (c) respectively, so as to understand the scope of the limits on compensation under section 194. It might well be that the limits on compensation seek to curtail the employer’s financial risk when confronted with an unfair dismissal claim. In the case of reinstatement or re-employment the statute provides two mechanisms for the management of such concerns: first, section 193(2)(c) provides that the remedies of reinstatement or re-employment need not be ordered if the court or commissioner is satisfied that it would not be reasonably practicable for the employer to reinstate or re-employ the employee, and second, the statute provides that the court or commissioner has a discretion to determine the extent of retrospectivity of the order of reinstatement or re-employment. In exercising this discretion, the court or commissioner may address, among other things, the period between the dismissal and the trial as well as the fact that the dismissed employee was without income during the period of dismissal ensuring, however, that the employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded.

The court held that, the capping in section 194 has no bearing on retrospective reinstatement. It is only when reinstatement or re-employment is not ordered that compensation in terms of section 194 may be ordered to a maximum of 12 or 24
months remuneration depending on the nature of the dismissal. It held further that, it is competent to make a reinstatement order that requires an employer to pay backpay for more than 12 months.

The court dismissed the company’s contention that the LAC should have exercised its discretion to determine the date from which reinstatement order was effective on the grounds that the issue had not been raised by the company in its notice of appeal or its argument before the LAC. The court also rejected the company’s call for the matter to be remitted to the LAC on the grounds that there was no legal or factual basis for granting such an order. The majority court accordingly dismissed the appeal with costs.

In a minority judgement Yacoob J (Langa CJ and Van der Westhuizen J concurring) was of the view that the prospects of success were so bad that it would not be in the interests of justice to grant leave to appeal. He found that the conclusion in the majority judgment presupposed that an order of retrospective reinstatement had been made by the courts below. However, on a proper construction, the reinstatement order had never been retrospective and thus the question whether and the extent to which retrospective reinstatement was permitted by the LRA did not arise in this matter. The minority court, accordingly, dismissed the application for leave to appeal.

### 3.3 RE-EMPLOYMENT

The LRA does not specify the circumstances in which re-employment should be ordered, rather than reinstatement. Nor is the term defined in the Act. In *Consolidated Frame Cotton Corporation v President of the Industrial Court*, it was held that re-employment must accordingly be given its ordinary meaning: the employees begin work afresh with the employer and any benefits arising from their past employment are not extended to the new employment relationship.

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44 1986 (3) SA 786 (A).
The difference between reinstatement and re-employment is not explained, however, reinstatement in its ordinary meaning suggests that the period of service between dismissal and resumption of service is deemed unbroken; re-employment, on the other hand, suggests that the employment contract ended at the date of dismissal and resumed on the date of re-employment. It seems that re-employment was offered as an alternative to dismissal to cater for the forms of dismissal in which the employment relationship had terminated before the dismissal – *ie* where the employee was the victim of selective non-re-employment or where the employer refused to renew a fixed-term contract.

Employees or their unions are entitled to be consulted on, and the employer is obliged to provide information concerning, the possibility of the future re-employment of the employees to be dismissed. The provisions regarding retrenchment do not expressly oblige the employer either to make such an offer or to honour it should future vacancies arise. However, section 186(1)(d) provides that a refusal by an employer which has dismissed a number of employees for the same or similar reasons to re-employ some of them is deemed a dismissal. Employees who have been refused re-employment can thus challenge their non-re-employment as an unfair dismissal. An employer that re-hires only some of a group of retrenchedes may therefore have to defend its decision not to re-employ the remainder on operational grounds.

It is an unfair labour practice to fail or refuse to reinstate or re-employ a former employee contrary to an agreement. In *OCGAWU v First Pro Engineering*, the respondent company manufactured components for the motor industry. After the cancellation of certain contracts the company undertook a retrenchment exercise, during which three of the applicant employees were retrenched. On 12 February 2002 the company and the union signed an agreement in terms of which the company agreed “when engaging employees during the subsequent 36 months, to give preference, as far as is practicable, to the re-engagement of those employees who are retrenched”. In April 2003, more employees, including six of the applicant employees, accepted voluntary retrenchment.

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Later in 2003, the respondent began to increase its workforce again, and the nine applicant employees were not re-employed as they did not reach the level of skills then prescribed by the respondent. The arbitrator looked first at the scope of the agreement and found that, given a wide interpretation, it covered all the applicant employees, including those who took voluntary retrenchment in April 2003.

The arbitrator then looked at the agreement as a whole to ascertain the intention of the parties. Under the heading “Selection Criteria” the agreement stipulated that commercial and economic factors and the employer’s operational requirements would be taken into account, including the employee’s service, knowledge and skills. On the word “practicable”, the arbitrator found that it had to be interpreted to mean that the employees were able to perform work although lacking the theoretical knowledge.

The applicants had been invited to meet the new criteria but were unsuccessful. On the evidence the arbitrator could not find that the agreement guaranteed the employees re-employment. The introduction of selection criteria was permitted, and the applicants were not entitled to automatic re-employment before new employees who had the necessary skills.

Therefore, whether a rehiring agreement is satisfied obviously depends on the wording of the agreement – provisions which impose an obligation to rehire “if practicable” or if the employees are suitably qualified, or which require the employer merely to consider retrenchees for employment, do not impose an obligation to re-employ if those conditions are not satisfied.

With regards to fixed-term contacts, if the parties agreed at the outset that the contract of employment was for a specific period, the contract terminates at the end of that period. Notice is not required to effect the termination. An employer may terminate a fixed-term contract before the agreed date of termination only if the employee is in material breach.
Otherwise, premature termination constitutes a repudiation by the employer, for which the employee may in principle claim damages equivalent to the salary he or she would have received until the date of termination or end of the contract as it was stated in *Buthelezi v Municipal Dermacation Board*,\(^{46}\) where the employer prematurely terminated a fixed-term contract of employment based on its operational requirements.

Fixed-term contracts may be tacitly renewed by the conduct of the parties. One judgment suggests that where this occurs there is a rebuttable presumption that the contract is on the same terms and for the same period as the original contract. However, the sounder view is that unless anything is said to the contrary the new contract is of indefinite duration. If a fixed-term contract has been frequently renewed, and the parties do not specify that the renewal shall be for a further specific period, it will generally be assumed that as far as the parties are concerned the contract has become one for an indefinite period. The labour courts held under the 1956 LRA that, even when a fixed-term contract had expired, non-renewal could constitute unfair labour practice. See *Food & General Workers Union v Lanko Co-operative Ltd.*\(^{47}\) The current LRA expressly provides that failure by an employer to renew a fixed-term contract, or its renewal on less favourable terms, constitutes a dismissal if the employee reasonably expected renewal.

The court or the arbitrator also has a discretion to order re-employment in the case of unfair dismissal and unfair labour practice, however, a new contract of employment is concluded between the employer and the employee for the latter to occupy the position it held before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal.

### 3.4 COMPENSATION

The amended section 194 eliminated the distinction between compensation for procedurally and substantively unfair dismissals, but it preserved the ceiling of 24 months compensation for automatically unfair dismissals. The higher compensation

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\(^{47}\) (1994) 15 *ILJ* 876 (IC).
for automatically unfair dismissal indicates that the legislature intended to arm the
courts with power to order punitive damages in such cases.

It was held in *CEPWAWU v Glass & Aluminium 2000 CC*\(^48\) that the amount of compensation awarded for an automatically unfair dismissal must reflect the fact that, save in exceptional circumstances, the employee would be entitled to fully retrospective reinstatement, not only to ensure that the employee lost nothing as a result of the dismissal but also to penalise the employer for dismissing the employee for a prohibited reason. Where reinstatement is not requested, compensation should be calculated accordingly.

I will now deal with the question of compensation in cases decided by our courts on unfair retrenchment.

In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*,\(^49\) the court held that the provisions of section 189 placed formal primary obligations on the employer in terms of various subsections, but that these were geared towards the specific purpose of attempting to reach consensus. This joint consensus seeking process could be frustrated by the employer or the employee.

The court held that the proper approach to any investigation into compliance with section 189 must be to examine whether such frustration of the purpose of the section had taken place and, if so, by whom. A finding of non-compliance by the employer would almost invariably result in a finding that the dismissal was procedurally unfair, although not necessarily substantively unfair.

The court found that in this case, although the dismissal had been procedurally unfair for want of compliance with section 189 regarding selection criteria for retrenchment, the employer had made good its failure properly to discuss selection criteria soon after its final decision to retrench but that the union and the employees had been unreasonably obstinate in refusing to discuss this criteria. The court accordingly found that the employees were not entitled to compensation under section 194(1).

\(^{49}\) (1999) 20 *ILJ* 89 (LAC).
The most important aspect of this judgment is that a court or arbitrator has a discretion whether to award compensation or not. Froneman DJP stated in paragraph 40 as follows:

“If compensation is awarded it must be in accordance with the formula set out in section 194(1), nothing more, nothing less. The discretion not to award compensation in the particular circumstances of a case must, be exercised judicially.”

In *Scribante v Avgold Ltd (Hartebeesfontein Division)*,\(^{50}\) the court following *Johnson & Johnson*,\(^ {51}\) held that the relevant factors to be taken into account in determining whether or not to award compensation are the following:

1. whether the employer has already provided the employee with substantially the same kind of redress;
2. whether the employer’s ability and willingness to make that redress is frustrated by the conduct of the employee;
3. the degree that the employer deviated from the requirements of a fair procedure; and
4. whether the employer secured alternative employment for the employee.

The court was satisfied that it was not appropriate to take into account the actual loss sustained by the employee, whether the employee successfully obtained alternative employment immediately after the dismissal, whether the employee did or did not mitigate his loss, and the period that it would have taken to effect a fair dismissal. The court was also satisfied that factors such as length of service, prospects of finding alternative employment and the financial position of the employer are not relevant factors.

\(^{50}\) (2000) 21 ILJ 1864 (LC).

\(^{51}\) *Supra.*
In *NUMSA v Dorbyl Ltd*,\(^{52}\) Fulton AJ considered the extent to which the union failed to comply with its obligations under section 189(2)(a)(i) and 6 and found that it would be just and equitable in the circumstances to award the retrenched employees compensation equal to two months remuneration.

In *Nkopane v Independent Electoral Commission*,\(^{53}\) the court concluded that the respondent had no lawful basis, and therefore acted unfairly in its premature termination of the fixed-term contracts of employment of the applicants. Regarding appropriate relief, the court was of the view that the appropriate and fairest measure of compensation was an amount equivalent to the applicant's remuneration for the remaining period of their employment contracts, from which the severance packages they had received had to be deducted.

However, the court’s assessment of the issue of compensation appears to be in conflict with the provisions of section 195 which provides that an order or award of compensation made in terms of Chapter VIII is in addition to, and not substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

In *Lakomski v TTS Tool Technic Systems (Pty) Ltd*,\(^{54}\) the court after finding that employee’s retrenchment was both, substantively and procedurally unfair, observed that the employee found employment within days of her retrenchment at a higher salary than that paid to her by the company and that she did not suffer any patrimonial loss. However, the court found, that the test in deciding whether compensation should be granted is not whether the employee has suffered patrimonial loss. That is a factor that the court may take into account. Other factors include, *inter alia*, how the employee was treated and what steps the employer took to comply with the provisions of the Act. The court found, in the circumstances, that it was just and equitable to award the applicant five months compensation together with her costs.

\(^{52}\) (2004) 25 ILJ 1300 (LC).
\(^{54}\) (2007) 28 ILJ 2775 (LC).
In *Rowmoor Investment (Pty) Ltd v Wilson*, 55 where the company raised the issue that the award was reviewable because the commissioner failed to provide reasons for awarding 12 months compensation for unfair retrenchment, Molahlehi J, relying on *Almalgamated Pharmaceuticals Ltd v Grobler NO* 56 and *Bezuidenhout v Johnston NO*, 57 stated in paragraph 43 as follows:

“In considering whether failure to provide reasons for the relief provided, the court is required to determine from the commissioner’s finding whether he or she anticipated the remedy or the basis for the remedy is apparent from the record.”

In *Transnet Ltd v CCMA*, 58 the court was asked to deal with the measure of compensation in circumstances where the third respondent, a senior employee of the applicant was dismissed from his employment after he committed a serious assault upon his wife at the workplace, as a result of which she suffered grievous bodily harm. In the proceedings before the CCMA the commissioner found the dismissal to be substantively fair but procedurally unfair and awarded the employee compensation equal to six month’s remuneration.

In the court’s view the commissioner arrived at a finding that was entirely disconnected from the evidence to such an extent that it could not be said that his conclusion was one that a reasonable decision maker would have reached.

On the question of compensation, the court found it clear that the commissioner had absolutely no regard to the seriousness and the highly offensive nature of the employee’s misconduct in arriving at the quantum of compensation, particularly in the light of the fact he had found on the evidence that the employee had seriously assaulted a co-employee who was also his wife. In the court’s view this was one of the circumstances where the commissioner should have concluded that the reprehensible nature of the offence outweighed any consideration of compensation and that it was not “just and equitable” to have awarded compensation.

58  (2008) 29 ILJ 1289 (LC).
The issue of measure of compensation and damages came before Pillemer AJ in *Wallace v Du Toit*\(^5^9\) where he found that the applicant’s dismissal was automatically unfair in terms of section 187(1)(e) and further found that there was unfair discrimination on the grounds of pregnancy in terms of 56(1) of the Employment Equity Act as it was not an inherent requirement of the job of an *au pair* that the incumbent must not be pregnant or a parent.

On the appropriate measure of damages to be awarded, the court made a single award in relation to the *solatium* element under the LRA and the damage’s claim under the EEA. An amount of R24 000.00 was regarded as a fair *solatium* for the impairment of the applicant’s dignity and self-esteem, in addition to compensation for patrimonial loss based on 12 months’ remuneration.

However, the court’s award of compensation for patrimonial loss is open to criticism when one has regard to other Labour Court’s decisions which ruled that actual patrimonial loss is not to be taken into account when assessing compensation to be awarded to unfairly dismissed employees.

My discussion will now look into the court’s assessment of compensation in cases envisaged under section 194(3) of the LRA.

In *Christian v Colliers Properties*,\(^6^0\) the applicant’s dismissal was found to be automatically unfair in terms of section 187(1)(f) and she was awarded compensation of 24 months remuneration and payment of damages in terms of section 50(1)(e) of the Employment Equity Act 55 of 1998. The court noted that, by providing for compensation in excess of that which may be awarded in cases of other dismissals, the legislature’s clear intention in section 194(3) was the eradication of the categories of automatically unfair dismissal laid down in section 187(1) and the protection of workers against such dismissal. The compensation that can be awarded has a punitive and preventative element.

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\(^{5^9}\) (2006) 27 ILJ 1754 (LC).

\(^{6^0}\) (2005) 26 ILJ 234 (LC).
The court further noted that it mattered not whether the applicant’s employment had been of short duration as newly appointed and long established employees were equally vulnerable in situations of sexual harassment and therefore equally deserving of protection. The court found that the calculating manner in which Mr C effected the applicant’s dismissal was an aggravating factor and he compounded the gravity of the situation by seeking to justify the dismissal on a false pretext.

In *Pedzinski v Andisa Securities (Pty) Ltd*, the court found that the applicant’s dismissal was substantively and procedurally unfair as contemplated in section 187(1)(c) and (h). Regarding the appropriate remedy, the court held that the applicant’s dismissal was a sham and the company used her health condition in order to rid itself of an employee who proved to be diligent and committed to the execution of her duties, and it awarded her 24 months compensation.

In *Food & Allied Workers Union v The Cold Chain*, where the applicant’s dismissal was found to be automatically unfair as envisaged in section 187(1)(f) as a result of refusing to relinquish his position as a shop steward when he was appointed to a higher graded position, Nel J noted that the applicant employee did not seek reinstatement for undisclosed personal reasons not related to any conduct of the employer, and he stated that since he would have ordered the retrospective reinstatement of the employee, he was of the view that it would be just and equitable to award him the equivalent compensation of nine months’ remuneration.

In *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd*, where the court found that the dismissal was automatically unfair in terms of section 187(1)(g), it made reference to decided case law which prescribed that in determining appropriate relief, consideration should be given to the interests of both employee and employer, to seriousness of the unfairness and the nature of the constitutional infringement. The court found that the contravention of section 187(1)(g) had been exacerbated by the unfair treatment meted out to the employee prior to his dismissal, and also took into account that he secured alternative employment soon after his dismissal. The court

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ordered the respondent to pay the applicant compensation equivalent to a period of 18 months’ remuneration at the applicant’s rate of remuneration at the date of his dismissal.

In Sekgobela v State Information Technology Agency (Pty) Ltd, the court found the applicant’s dismissal to be automatically unfair for having made a protected disclosure as contemplated in section 187(1)(h) of the Act. On the appropriate relief, the court was of the view that it would be just and equitable to order the maximum compensation allowed for by the Act, equivalent to 24 months’ salary. Basson J stated as follows in paragraph 33 of his judgment:

“The applicant was the typical victim of an occupational detriment who dared to question the modus operandi of his employer and his colleagues. What makes this matter worse is the fact that the respondent is a state organ who is entrusted with public funds and trusted by the public to adhere to accountable procurement policies. An employee should not be subjected to an occupational detriment if he discloses information that exposes a public entity for not complying with its legal obligations and responsibilities.”

My discussion will now focus on the court’s assessment of compensation in unfair dismissals as envisaged in section 194(1) of the Act.

The refusal to accept the reinstatement offer may impact upon the employee’s entitlement to compensation. In Mkhonto v Ford NO, it was held that, fairness is the guiding principle in determining whether or not to compensate an employee who refuses to accept the reinstatement offer, and it was held, further that, the appellant’s refusal to accept the reinstatement offer was grossly unreasonable.

The same principle set out in Mkhonto was followed in Technikon SA v Mojela, where the employee did not take up an offer of reinstatement and the court ordered that the employee was not entitled to any compensation arising out of his dismissal.

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66 Supra.
In *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO*,\(^68\) where the employee claimed constructive dismissal, after she resigned following an assault by the employer, the court found that there was some merit in the store’s argument that it was not just and equitable to award 12 month’s compensation where both the employee’s and the owner’s conduct had contributed to the deterioration of the employment relationship over a period of time. However, the court found that it cannot be sympathetic to employers who assault employees. Such an assault is an egregiously wrongful act. The court found that the award of 12 months compensation was not punitive, but was clearly justifiable on the basis of the nature of the wrongful act committed by the owner which was the key event which gave rise to the unfair dismissal.

In *Tibbett & Britten (SA) (Pty) Ltd v Marks*,\(^69\) the court found that the employee’s dismissal for unauthorised use of her company credit card was substantively fair but procedurally unfair and the arbitrator by granting the employee compensation equal to 12 months salary was indeed rewarding her for misconduct. Revelas J held that, in the absence of rational justification for the award, it must be accepted that the arbitrator did not exercise her discretion in a judicial manner, or at all, and the award was set aside on the ground. In the court’s view, compensation in an amount equal to six months salary was fair in the circumstances.

In *Boxer Superstores (Pty) Ltd v Zuma*,\(^70\) the commissioner had found the employee’s dismissal to be substantively unfair but procedurally fair and awarded compensation amounting to three months remuneration. On review, the Labour Court found that once the commissioner had found that the employer had failed to discharge the onus of proving the substantive fairness of the dismissal, the only appropriate remedy was to order reinstatement of the employee.

On appeal, the court noted that section 193(2) mandates an arbitrator or the court to examine the factors set out in the section in order to craft a remedy. The court agreed that the court below had not engaged with the requirements of section 193(2)

\(^{68}\) (2007) 28 ILJ 2238 (LAC).
\(^{69}\) (2005) 26 ILJ 940 (LC).
\(^{70}\) (2008) 29 ILJ 2680 (LAC).
but had simply concluded that the only appropriate remedy was to reinstate. The court observed that the enquiry required an engagement with the requirements of section 193(2) and the evidence before the court as to the nature of the relationship between the parties.

Regarding the question of appropriate relief, the court found that the award was irrational because the arbitrator gave no reasons for awarding compensation after having found the employee’s dismissal to be substantively unfair. The court further found that there was thus no evidence before it or the court a quo, which would justify a court to substitute a decision taken by the arbitrator and replace it with its own. The Labour Court’s judgment was set aside on appeal and the matter was remitted to the arbitrator to record his reasons for the remedy and determine an appropriate remedy.

It is debatable, whether this case is not in conflict with a Labour Court judgment in Rowmoor Investment (Pty) Ltd v Wilson,71 where Molahlehi J found that the court is required to determine from the arbitrator’s findings of fact whether he or she anticipated the remedy. It is probable that it was due to the fact the court did not have evidence on record to support the arbitrator’s findings on compensation, which led the court to adopt a different approach from that used by Molahlehi J.

In Greater Letaba Local Municipality v Mankgabe NO,72 the employee’s dismissal was found to be substantively fair but procedurally unfair because he was not afforded an opportunity to address the executive committee in defence of the recommendation in his favour and that the executive committee was not competent to nullify the sanction recommended by the chairperson because the collective agreement provided that a determination by a disciplinary tribunal was final and binding on the municipality. The court upheld the review application and awarded the employee two months compensation.

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71 Supra.
In *Amazwi Power Products (Pty) Ltd v Turnbull*,\(^{73}\) the employee, a financial director resigned from the board of directors and indicated her intentions of serving the company as an ordinary employee. The board accepted her resignation in total and advised her not to return to work. On appeal, the court confirmed the Labour Court’s decision to award the employee a sum of R247 800.00, being the equivalent of six months salary, based on the employee’s salary as at the date of dismissal. The employee was therefore awarded an equivalent of a salary of a financial director, the position she occupied on the date of her dismissal.

The remedies for unfair dismissal are also provided for residual unfair labour practices as envisaged in section 193(4) and 194(4), which rest on the principles of reasonableness, fairness and equity.

It will be demonstrated below, through case law, on how the arbitrators and the courts have to approach the assessment of remedies for unfair labour practices.

In *Solidarity obo Kerns v Madau NO*,\(^{74}\) following the merger of two municipalities, the employee previously employed as the senior personnel officer, was placed in the post of committee officer on the same terms, conditions and remuneration as those applicable to him in his former post as senior personnel officer. The employee objected that this placement constituted a demotion.

The court noted that the juridical concept of demotion did not necessarily require that one should suffer financial loss or loss of benefits for a demotion to eventuate, demotion could also occur where status, job content, responsibility and promotion prospects were prejudiced. The court found that the employer’s failure to address the employee’s objection to his placement constituted a breach of the resolution and collective agreement and constituted an unfair labour practice for which the employee was entitled to maximum compensatory relief in terms of section 194(4).

Until his early retirement, the employee had been expected to perform the functions of the post of committee officer and those of manager human resources, but he was

\(^{73}\) (2008) 29 ILJ 2554 (LAC).

\(^{74}\) (2007) 28 ILJ 1146 (LC).
not remunerated for the higher post. The employee was accordingly awarded compensation of 12 months, representing the difference between his salary and that applicable to the manager human resources.

With regards to the unfair labour practice relating to promotion, the Labour Appeal Court’s judgment in *Department of Justice v CCMA*,\(^75\) is instructive in that regard. The court accepted that the employee’s complaint was that the department had not appointed him to the post on a permanent basis and that this constituted an unfair labour practice. The court found that the decision of the commissioner that the department had made a final decision to appoint or promote the employee was not based on the evidence before him and was completely unjustified. The court found that the employee should have waited until a final decision had been made to fill the post on a permanent basis before initiating the arbitration proceedings.

In *Polokwane Local Municipality v SA Local Government Bargaining Council*,\(^76\) the employee referred a dispute to the bargaining council alleging that the municipality committed an unfair labour practice (a) by not paying her a standby allowance from October 2001 to July 2004 and (b) by not re-evaluating her position and upgrading her post from level 8 to level 6 and compensating her accordingly with effect from January 1997.

The court noted that the grading or evaluation of a post was a matter of mutual interest. The fact that the employee had acted in a post for a long time or performed a function of a higher post did not create an obligation on the municipality to promote her or to upgrade the employee’s post from level 8 to level 6. The bargaining council, the court noted, only had jurisdiction to entertain an unfair labour practice dispute relating to the provisions of benefits where those benefits arose *ex contractu* or *ex lege*.

The court found that the employee had no existing right *ex contractu* or *ex lege* to be paid an acting allowance and prior to August 2004 to be paid a standby allowance.

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\(^76\) (2008) 29 *ILJ* 2269 (LC).
The court also upheld the municipality’s submission that the bulk of the employee's claim had prescribed in terms of the Prescription Act 68 of 1969.

It is also important to note that in unfair labour practice disputes relating to promotion, an arbitrator cannot order promotion, which is equivalent to reinstatement, where the fairness of the labour practice only relates to the issue of procedure. For example, in SA Police Service v Safety & Security Sectoral Bargaining Council, the court noted that the fact that the applicant allegedly reneged on its undertaking to remove Director Nevling from the interviewing panel did not render its conduct unfair, and that the arbitrator’s finding to the contrary was not reasonable. From the records of the interview the third respondent never raised any objection or sought the recusal of Director Nevling.

The court found that the remedy of promotion ordered was inconsistent with the arbitrator’s finding that the process was procedurally flawed. Therefore, section 193(2) prevented the arbitrator from ordering promotion, which has the effect of a reinstatement. Moshoana AJ stated in paragraph 16 of his judgment as follows:

“He did not make a finding that the third respondent was the best candidate on the merits and that he deserves to be appointed. At best a reasonable term would have been to set aside the appointment and order the assessment without the participation of Dr Nevling. In the court's view he exceeded his powers in that regard.”

Another important point relating to unfair labour practice is in dispute of unfair demotion and provision of benefits and the compensatory relief thereof.

For example, in Minister of Justice and another v Bosch NO, the employee, a senior administrative clerk, had been appointed to act as an assistant Magistrate in terms of section 9(4) of the Magistrate’s Court Act 32 of 1944. His appointment was temporary and had to be renewed once a month by the chief magistrate. In January 2000 the department issued a directive withdrawing the chief magistrate’s discretion to appoint the employee as a judicial officer. The arbitrator found that the department

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78 (2006) 27 ILJ 166 (LC).
had committed an unfair labour practice relating to the demotion of and the provisions of benefits to the employee.

The Labour Court noted that, since the question whether the directive by the department constituted a demotion was not an agreed ground of review, it was unable to determine the matter. However, if it were, the court would have found the decision reviewable and would have ruled that the department’s conduct did not constitute a demotion. The court found that the arbitrator’s finding that the subsistence and travel allowance constituted a benefit was reviewable as subsistence and travel is paid only in circumstances where an employee is required to perform his or her duties at a place other than the office at which he or she is stationed.

The court observed that damages are awarded as either patrimonial or sentimental damages and in order to succeed with a claim for sentimental damages, the party seeking such damages must establish that a wrong has been committed and that that wrong constitutes an *injuria*. Having found that the action of the department did not amount to an unfair demotion, it followed that in the absence of a wrong the employee was not entitled to sentimental damages.

In *MEC for Tourism & Environmental & Economic Affairs: Free State v Nondumo*, the respondent employee was suspended, first with pay and later without pay, following criminal charges for fraud which gave rise to disciplinary charges. He referred an unfair labour practice dispute to the CCMA and the commissioner found his suspension to have been substantively and procedurally unfair, and ordered the reinstatement of the employee, 18 months’ outstanding salary and benefits and 12 months’ compensation in terms of section 194(4) of the LRA.

The court, correctly in my view, found that the commissioner had clearly misdirected himself when he ordered reinstatement, compensation and arrear payments in one award. It is clear from the reading of section 193(4) that reinstatement and re-employment are exclusive remedies to compensation when an arbitrator determines

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79 (2005) 26 *ILJ* 1337 (LC).
any unfair labour practice disputes. The court also, correct in my view, found that the employer was not obliged to pay the employee arrear salary beyond the termination date of the fixed-term contract and it ordered 9 months arrear salary. The court was also correct in finding that the employee was entitled to his outstanding salary in terms of section 195, in addition to an award of compensation.

3.5 CONCLUSION

On a purposive interpretation of section 193, it is clear that the legislature intended to give a Labour Court or an arbitrator a discretion, where there is an unfair dismissal to order reinstatement, re-employment or compensation. What is also clear from the content of this section is that reinstatement and re-employment are the primary remedies for an unfair dismissal. This is in line with the purposes of the Labour Relations Act, which is to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objects of the Act.80

The word “or” after section 193(1)(b) indicates that the remedy of compensation cannot be ordered together with reinstatement and re-employment as these are exclusive remedies. Some arbitrators, have on occasion, treated these remedies as inclusive and their awards have been correctly, in my view, set aside on review by the Labour Court. In order to properly interpret section 193, the rules of interpretation have to be adhered to, by giving the provisions of the statute their ordinary and literal meaning, unless that interpretation would lead to absurdity.

I am of the view that the legislature had a rationale for formulation of a policy framework, by treating the remedies for unfair dismissal as exclusive, in order not to expose the employers who face claims for unfair dismissal and unfair labour practice to huge financial exposure when they redress wrongs made to individual employees.

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80 See s 1 of the Labour Relations Act 66 of 1995.
CHAPTER 4
CONCLUSION

What is clear from the reading of section 193 of the Act is that the court or an arbitrator has a discretion on the remedy to be awarded in cases of unfair dismissal and unfair labour practice, however, that discretion must be exercised in a judicial manner in the interests of fairness and equity. The present legislative framework has been in place since 2002 and the Legislature has not indicated an intention to amend our law of unfair dismissal. However, it would be interesting to see, if the organised business would raise any proposals for legislative changes in the remedies for unfair dismissal, in light of the latest decision by the Constitutional Court in the *Equity Aviation* case.

The employers face a huge financial risk in cases, where the courts or arbitrators order a retrospective reinstatement of an unfairly dismissed employee. It is therefore very important that the employers attempt to resolve a dismissal dispute as soon as the possibly can so that they may avoid to face a financial risk. On the other hand, the employees should pursue their claims for unfair dismissal in an expeditious manner so that there would be no delay that would be attributed to them and lessen an award of retrospective reinstatement in cases where their dismissal is found to be substantively and procedurally unfair.

I am of the view that the SCA’s decision in the *Republican Press* and the Constitutional Court’s decision in the *Equity Aviation* were correctly decided due to the fact that the intention of the Legislature is clear on the wording of section 193(1)(a), which gives a court or an arbitrator a discretion to order reinstatement of an employee to a date not earlier than the date of dismissal. I do not foresee any problems in interpreting the section in the manner adopted by the courts because the discretion must be exercised by looking at the circumstances of each case and by conducting an enquiry in terms of section 193(2)(a) to (d) to ascertain whether or not reinstatement would be an appropriate remedy.
On the factors to be considered on the appropriate compensation to be awarded to an unfairly dismissed employee, I submit that the most important factors to be considered are the following: the seriousness of the infringement of the employee’s rights, the steps taken by the employer in order to redress the wrongs made, the employee’s unreasonable refusal of an offer of reinstatement, and the interests of fairness and equity. The other important factor highlighted by the Labour Court in the analysis of a commissioner’s findings of fact is that an award is not reviewable because there are no reasons stated in the award for awarding compensation, where in his findings of fact, the commissioner anticipated the appropriate remedy.

I fully agree with the court’s approach in this regard as section 138(7)(a) provides that the commissioner must issue an arbitration award with brief reasons, signed by the commissioner. The reasons for the award would certainly be found in the commissioner’s findings of fact.

The area which seems to be a grey area to some extent is the unfair labour practice disputes relating to promotion and provision of benefits to employees. The courts have set out clear that employees do not have an automatic right to promotion as they have to contest with other candidates for the advertised position. However, in some cases the courts have ordered that the non-appointment of an employee who acted in a higher position to transfer skills and equip him for that position, constituted an unfair labour practice. The whole process revolves around the principle of legitimate expectation.

The problem with the provision of benefits is that if there is no existing right to the benefits, it is a matter of mutual interest which must be resolved by collective bargaining and power play, which leads to the exploitation of a single or few employees. I am of the view that, if an employee could show a legitimate expectation to the provision of benefits, his or her dispute must be arbitrated or adjudicated.
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