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# EMPLOYMENT ALERT

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### IS REINSTATEMENT POSSIBLE AFTER REACHING THE AGREED RETIREMENT AGE?

This was the question before the Labour Court in the decision of *Dr Lubka Ivanova v The Department of Health: Kwazulu-Natal and Others*, Case No: D695/14 handed down in January 2016.

# IS REINSTATEMENT POSSIBLE AFTER REACHING THE AGREED RETIREMENT AGE?

*Reinstatement was opposed by the Department of Health: KwaZulu-Natal who raised the 'doctrine of effectiveness', claiming that the order sought was no longer capable of being given effect to.*

*The Labour Court found that there was no statutory end point as to how far reinstatement could apply or continue and on this basis held that the 'doctrine of effectiveness' was not a valid defense to the relief sought in the employee's review.*

This was the question before the Labour Court in the decision of *Dr Lubka Ivanova v The Department of Health: Kwazulu-Natal and Others*, Case No: D695/14 handed down in January 2016.

The facts in brief were that the employee was a qualified medical practitioner who worked at the G J Crookes Hospital, in Scottsburg, Durban. During June 2012 she treated a patient who had been involved in a serious motorbike accident. Certain allegations were levelled against her regarding the negligent treatment of the patient concerned.

The employee was subsequently charged and dismissed after a disciplinary enquiry. She went on to challenge the fairness of her dismissal but was unsuccessful at the arbitration. The employee then filed a review application to the Labour Court, seeking to set aside the award and claiming reinstatement.

The employee's prayer for reinstatement was opposed by the Department of Health: KwaZulu-Natal who raised the 'doctrine of effectiveness', claiming that the order sought was no longer capable of being given effect to. This argument was premised on the fact that the employee had on 12 March 2015, during the currency of the dispute, reached the agreed retirement age of 65 years - as stipulated in the Government Employees Pension Act, No 21 of 1996.

As such, the Department argued that reinstatement could not be given effect to and that the employee had in any event not asked the court to extend her employment beyond the agreed retirement age.

In determining this issue, the court considered the decision of *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC) in which it was held that s193(1)(a) of the Labour Relations Act, No 66 of 1995 confers a discretion on a commissioner or the court to determine the extent of retrospectivity of the reinstatement and that the only legislative limitation found to exist was that reinstatement could not be fixed at a date earlier than the actual date of dismissal.

The Labour Court found that there was no statutory end point as to how far reinstatement could apply or continue and on this basis held that the 'doctrine of effectiveness' was not a valid defense to the relief sought in the employee's review.

In turning to the merits of the review, the court found that the employer did not prove that the employee acted negligently in treating the patient concerned and as such held that the commissioner had



# IS REINSTATEMENT POSSIBLE AFTER REACHING THE AGREED RETIREMENT AGE?

CONTINUED

*The Labour Court accordingly found that the employee's dismissal was substantively unfair and set aside the arbitration award, substituting it with an order of reinstatement.*

failed to have regard to material facts in the matter. The commissioner was also criticised for failing to properly evaluate the facts presented - the consequence being that he came to conclusions that were unreasonable in justifying his award.

The Labour Court accordingly found that the employee's dismissal was substantively unfair and set aside the arbitration award, substituting it with an order of reinstatement.

Given that the employee had already reached the agreed retirement age during the course of the dispute, the court held that the employee would be reinstated into her employment with effect from the date

of her dismissal and with no loss of income or benefits, but that her reinstatement would be limited subject to the terms agreed to between the parties, namely that she would be entitled to paid as if she was reinstated, but then only up until her agreed retirement age which would have been reached at the end of March 2015.

This decision is indicative of the fact that reinstatement orders will be limited to the rights that the employee would have ordinarily been entitled to had it not been for their dismissal, whether those rights originate by way of agreement or otherwise.

*Nicholas Preston*

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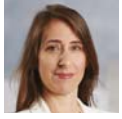


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