

12 JULY 2021

EMPLOYMENT LAW ALERT

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But you were employed!

Understanding whether attaining employment after a dismissal precludes an employee from receiving full back pay.



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The applicant's application for leave to appeal to the Labour Appeal Court was dismissed. As a result, he approached the CC to have the matter finally determined.

But you were employed!

Understanding whether attaining employment after a dismissal precludes an employee from receiving full back pay.

Does the fact that a dismissed employee obtained employment immediately after their dismissal preclude them from receiving full back pay as a consequence of a finding that their dismissal was unfair? This is the issue the Constitutional Court (CC) was required to decide in its recent judgment in *Maroveke V Talane N.O. and Others* (CCT 187/20) [2021] ZACC 20.

In this matter, the applicant was employed as a mine technician by the third respondent, Fermel. On 25 June 2009, he received a distress signal and while attending to it, drove a company vehicle underground through a tunnel where it sank in an area covered with water. As a result, the car was damaged, incurring significant repair costs. Following the accident, the applicant was provided with a loan form and was requested to sign it in order for Fermel to recover the cost of repairs to the vehicle. He objected to signing the loan form and requested to inspect the vehicle engine. As a result of this objection, he was charged with misconduct and subjected to a disciplinary hearing, which resulted in his dismissal.

Aggrieved by his dismissal, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration. While the matter was pending before the CCMA, and approximately two months after his dismissal, the applicant obtained alternative employment. After the conclusion of the arbitration proceedings, the CCMA found that the dismissal was

substantively unfair and awarded the applicant reinstatement together with back pay equivalent to 12 months' remuneration.

Unhappy with the commissioner's finding, Fermel challenged the arbitration award on review to the Labour Court (LC). The court was of the view that the commissioner did not make a reasonable decision because the awarding of 12 months' compensation was unreasonable as the applicant had only been unemployed for two months after his dismissal.

What precludes an employee from receiving full back pay?

The LC, relying on *Toyota SA Motors v CCMA and Others [2016] 37 ILJ 313 (CC)*, held that the principle of back pay following reinstatement ought to neither impoverish nor enrich a dismissed employee, but must restore them to the position they would have been in had they not been unfairly dismissed. Accordingly, the LC set aside the back pay awarded and reduced it to two months' remuneration, equivalent to the applicant's period of unemployment.

The applicant's application for leave to appeal to the Labour Appeal Court was dismissed. As a result, he approached the CC to have the matter finally determined.

Back pay following reinstatement ought to neither impoverish nor enrich a dismissed employee, but ought to restore them to the position they would have been in had it not been for the unfair dismissal.

But you were employed!...continued

The crux of the question before the CC was whether the attainment of employment after a dismissal precludes an employee from receiving full back pay, which is normally calculated from the date of dismissal until the date of the arbitration award. In deciding the above issue, the CC upheld the decision of the LC and reaffirmed the legal principle that back pay following reinstatement ought to neither impoverish nor enrich a dismissed employee, but ought to restore them to the position they would have been in had it not been for the unfair dismissal.

The CC further held that the commissioner reached an unreasonable award by failing to take into account the fact the applicant was only unemployed for two months after his dismissal by Fermel. Further, the CC reiterated that when courts consider the issue of the back pay due to an unfairly dismissed employee who subsequently found alternative employment, any loss that such an employee suffers as a result of any difference between the salary they earn in the alternative job and the salary they earned prior to their dismissal must be taken into account by the arbitrating commissioner and the LC.

Accordingly, the CC held that, on the facts of this case, the amount of R97,306, which was the difference between the applicant's salary prior to his dismissal and the salary he earned in his new job, was an amount that the employee was entitled to be paid as part of his back pay.

The Arbitrating commissioner and not the LC just had erred in not reaching this conclusion.

This decision is of particular importance because it clarifies the true character of the restorative relief to be granted by the CCMA to a dismissed employee in terms of section 193(1) of the Labour Relations Act 66 of 1995.

Bongani Masuku, Mayson Petla and Muzammil Ahmed

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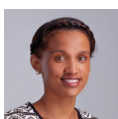
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