

# EMPLOYMENT

## IS REINSTATEMENT NECESSARILY RETROSPECTIVE?

**In the recent case of *David Themba v Mintroad Sawmills (Pty) Ltd (J 1683/2012)*, Judge Snyman was required to determine whether reinstatement is coupled with retrospective. Essentially, the issue which needed to be decided was whether employers have to pay their reinstated employees back pay.**

In this matter, the employee Mr David Themba (employee), argued that his employer, Mintroad Sawmills (Pty) Ltd (employer), owed him remuneration and other benefits, including outstanding interest as a result of an award resisting him in to the employ of the employer.

Briefly, the facts are that the employee was dismissed on 8 September 2009, where after the employee referred an unfair dismissal dispute to The Commission for Conciliation, Mediation and Arbitration (CCMA). At the arbitration stage, the Commissioner found that the employee was, indeed, unfairly dismissed and granted an award that the employee be re-instated on the same terms and conditions. However, the reinstatement was granted without requiring the employer to pay the employee back pay. On his return to work, his employer refused to reinstate him pending the final determination of the review application. The review application was dismissed and as such, the employee reported for work on 8 June 2012 and has remained working for his employer ever since.

The issue before the court was whether the employee was entitled to increases, remuneration, including retrospective wage increases and bonuses, leave pay and interest on the total amount.

The judge referred to the case of *Equity Aviation Services (Pty) Ltd v CCMA and Others* (2008) 29 ILJ 2507 (CC) and found that reinstatement means that an employer takes an employee back into its service on the same terms and conditions of employment as if the dismissal never occurred. He further stated that the concept of reinstatement does necessarily include back pay and highlighted that the discretion as to whether back pay is granted and the extent thereof is not statutorily prescribed. The discretion lies with the arbitrator or judge arbitrating or adjudicating the matter.

Accordingly, the judge found that the employee's reinstatement applied from 28 December 2009. He aligned his reasoning with that of the court in *Republican Press (Pty) Ltd v CEPPWAWU and Others* (2007) 28 ILJ 2503 (SCA). The judge found that the employee's entitlement to be paid

by the employer whilst the review is pending does not arise from the reinstatement award, but actually directly from his contract of employment which had been restored from the date of the award.

In line with this, he found that the employee was entitled to at least his basic monthly remuneration for the entire period from 28 December 2009 to 8 June 2012.

In relation to the question of entitlement to increases, it was found that in order to claim increases the employee had to show he had a contractual or statutory right to such increases. It was, accordingly, found that he was indeed entitled to increases as per the collective agreements concluded during the period when the review application was pending. These collective agreements, the court reasoned, flowed directly from his contract of employment. On the issue of bonuses, leave pay and interest thereon, the court found that he was not entitled to claim any such amounts.

After examining all the evidence before it, the court ordered the employer to pay the employee an amount of R146 203,79 calculated for the period 28 December 2009 to 8 June 2012.

The importance of this matter is that the court confirmed that reinstatement order is not necessarily retrospective and does not create an automatic right to any increases unless that right is founded on a contract of employment or collective agreement.

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