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# EMPLOYMENT ALERT

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### DOES A POSSIBLE ORDER OF REINSTATEMENT LIMIT AN EMPLOYER'S DISCRETION TO FILL AN UPGRADED POST IN CASES OF RESTRUCTURING?

The decision to restructure a business rests with the employer especially where there are no retrenchments that arise from it. Such a discretion is only fettered by law and not by the possibility of reinstatement in cases pending during the time of the restructuring. This has been the position until the Labour Court in *Ivan Myers v National Commissioner of the South African Police Service: Western Cape* [2014] 5 BLLR 461 (LC) shed light on this issue especially with regards to benefits that the upgraded post attracts.

# DOES A POSSIBLE ORDER OF REINSTATEMENT LIMIT AN EMPLOYER'S DISCRETION TO FILL AN UPGRADED POST IN CASES OF RESTRUCTURING?

Although the judgment in this case was handed down by the Labour Court, the SCA judgment is the most important as it ordered retrospective reinstatement of the employee to the position he held before the date of his dismissal.

*The Labour Court did not grant the order sought but interpreted the SCA order to mean that the employee must be reinstated into the restructured post, the current salary that the post attracts coupled with retrospective backpay.*



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At the time of dismissal the employee was a commander of the dog unit which was a level 10 grade post. Without discussing the length of reviews and appeals in this case it's suffice to state that the review proceedings in the Labour Court found in favour of the employee. The Labour Appeal Court upheld the employer's appeal and the Supreme Court of Appeal (SCA) upheld the employee's appeal. Although the judgment in this case was handed down by the Labour Court, the SCA judgment is the most important as it ordered retrospective reinstatement of the employee to the position he held before the date of his dismissal.

The employee was ordered to report for duty to a post different from the one he occupied. The employer's argument was that the original post was upgraded to a level 12 grade post and that reinstatement was impossible as the original grade 10 post was non-existent at the time of the reinstatement order and the employer could not be appointed into the new post.

The employee approached the Labour Court seeking an order of contempt of the SCA order by the employer. The Labour Court did not grant the order sought but interpreted the SCA order to mean that the employee must be reinstated into the restructured post, the current salary that the post attracts coupled with retrospective backpay. In respect of this interpretation the employer argued that such interpretation seeks to deprive it of its discretion to deal with a situation where a post is upgraded as this would promote the employee to a position of a colonel.

The Labour Court considered regulation 30(8) of the SAPS Employment Regulations which allows the employer to continue to employ an incumbent in the higher graded post without advertising if:

- i. the incumbent already performs the duties of the post;
- ii. the incumbent has received satisfactory rating in his or her most recent performance assessment;
- iii. it will be in the interest of the Service.

An important point made by the court is that the employer risked the possibility that successful litigation would place it in a difficult position regarding reinstatement. It held that the discretion to fill the upgraded post was limited by the order or reinstatement to the restructured post. 'This limitation is the wages of the sin of an unfair dismissal of an employee from a post upgraded in his absence.'

The current legal position seems to be that where a post is upgraded, the incumbent shall continue with the post provided that he or she already performs the duties, had received satisfactory rating and that it would be in the interest of the post to have the incumbent to continue. It is believed that this is the position that should be adopted by employers where there are no specific regulations that provide for upgrades of posts.

*Fiona Leppan and Bheki Nhlapho*



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