

# When is reinstatement not permissible?

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In terms of section 193(1) of the Labour Relations Act 66 of 1995 (as amended) (the LRA), an arbitrator has a discretion to either order an employer to reinstate, re-employ or compensate an employee whose dismissal is found to be unfair.



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Section 193(2) of the LRA provides that:

“The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

- the employee does not wish to be reinstated or re-employed;
- the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- the dismissal is unfair only because the employer did not follow a fair procedure.”

It is therefore trite that reinstatement is the primary remedy when a dismissal is found to be unfair, unless one of the abovementioned factors suggest otherwise.

Despite this, reinstatement is not possible in all circumstances, even though none of the abovementioned factors are present.

This was the case in *Toyota SA Motors (Pty) Ltd v CCMA and others [2023]* (LAC) (*Toyota Motors*). In *Toyota Motors*, an employee worked for Toyota since 21 March 2010 as a crane driver. He was employed on a three-month fixed-term contract. His contract was repeatedly renewed until his dismissal on 14 August 2015.

On 18 June 2015 he was suspended and issued with a notice to attend a disciplinary inquiry. On 15 June 2015, three days before his suspension, the employee signed a further fixed-term contract, commencing on 1 August 2015 and terminating on 31 October 2015. On 14 August 2015, after the disciplinary inquiry, the employee was dismissed. He unsuccessfully appealed against his dismissal and referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The arbitrator tasked with the matter found that the employee's dismissal was substantively unfair and ordered that he be paid compensation, exercising her discretion against reinstatement, reasoning that reinstatement as a permanent employee is not an option and, since his fixed-term contract has long since expired, she could not order the employee's return to work on that basis.



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## Labour Court and appeal

Dissatisfied with the outcome, the employee's trade union instituted a review application against the arbitration award, seeking that the compensation award be reviewed, set aside and replaced with an order that the employee be reinstated with retrospective effect.

The Labour Court reviewed and set aside the compensation award of the arbitrator and substituted it with an order that Toyota must "reinstatement the employee from the date of his dismissal with no loss of earning or benefits as if he was not dismissed".

Toyota took the matter on appeal to the Labour Appeal Court (LAC).

While the LAC affirmed that, in terms of section 193(1) of the LRA, an arbitrator has a discretion to either order the employer to reinstate, re-employ or compensate an employee whose dismissal is found to be unfair, it stated that: "Integral to the exercise of [this discretion] in deciding whether to reinstate, re-employ or compensate the employee, is the nature of the employment contract and whether it is extant when an employee's dismissal is found to be unfair. The remedy of reinstatement is confined to the situation where, at the date of the finding that the dismissal is unfair, the original employment contract is still in existence. However, where the employee is employed on a fixed-term contract, the expiry of which precedes the unfair dismissal finding, as in this dispute, then reinstatement or re-employment are not legally permissible remedies."

The LAC upheld the appeal and held:

“ The Labour Court's reinstatement order sought to create a permanent contract of employment between the employer and employee when no such contract existed. Since reinstatement involves the original contract of employment, which in this case was one of limited duration that had terminated by the effluxion of time, it was legally impermissible for the Labour Court to create a new contract through ordering reinstatement. ”

## Importance of case

In circumstances where an employee's dismissal is found to be unfair, but the employee had been employed on a fixed-term contract which expired prior to the date of the unfair dismissal ruling, reinstatement as a remedy is not permissible as the arbitrator or Court will in essence create an employment agreement on behalf of the parties.

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