NATIONAL UNIVERSITY OF LESOTHO

RETHINKING REINSTATEMENT REMEDY IN LESOTHO: A NEED FOR LAW REFORM

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DECLARATION

I Makatleho Molelekoa solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

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DEDICATION

This study is dedicated to my late sisters Ms. Nthabiseng and Ntlhanngoe Thamae. I will forever be thankful for their love and persistent support.

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First and foremost, I would like to praise and thank God almighty for the strength and wisdom he gave me throughout.

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CHAPTER ONE:

1.1. INTRODUCTION AND BACKGROUND OF THE STUDY

The employer's duty to maintain discipline in the workplace lies at the heart of the employment relationship. This duty entails that the employer has the right to set and prescribe standards of conduct in the workplace and to take disciplinary action and impose sanctions against employees who fail to adhere to prescribed standards.[1] It is trite that "a lighter sanction should be applied in the case of a first offence and graver sanctions reserved for repetitions."[2]

The most severe sanction the employer can ever impose on the employee who transgressed is dismissal.[3]The law specifies three grounds under which the employer may lawfully terminate the employment, namely; where the employee has committed misconduct, if maybe due to ill-health the employee is incapable of performing his job or for other reasons fails to meet the performance standards required of him and finally where technological or structural changes in the company necessitates dismissal of the employee.[4] Notwithstanding the authority to dismiss the employer is clothed with, the employee also has a statutory right not to be unfairly dismissed.[5] Thus, the employer must be able to show that he had a fair and acceptable reason for dismissing the employee and that the dismissal was effected in accordance with a fair procedure.[6]

In the event that the employee suspects that the reason for dismissal is invalid or the procedure leading to dismissal was not fair and proper, that aggrieved employee is at liberty to approach the labour court or tribunal with the claim of unfair dismissal against the employer and seek remedies. Where the dismissal has been unfair, the law entitles an unfairly dismissed employee to various remedies, one of which is reinstatement. It is trite that where the arbitrator or the labour court finds that dismissal is substantively unfair, should foremost order the remedy of reinstatement, and that other remedies may be ordered only if the

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[1] John Grogan, Workplace *Law* (Juta& co, 8th edition) 91
[2] Ibid 98
[3] Ibid 103
[4] Du Plessis and Fouche "*A practical guide to Labour Law*" (6th Edition 2006) 275
[5]Labour Code Order 1992, s66
[6] Grogan 177

employee no longer wants to return to his job, or reinstatement is considered to be impracticable in the circumstances.[7]

The Court or Tribunal has a discretionary power when it comes to deciding whether to order the remedy of reinstatement or not. In exercising discretion, these arbitral and adjudicatory institutions are being guided by provisions of the statutes relating to reinstatement. These provisions are not expressed in too many words[8]; one may wonder whether they constitute a sufficient guide.

Section 73 of the labour code states that "if the Court or Arbitrator finds the dismissal to be unfair, shall if the employee so wishes, order the reinstatement of the employee and that such an order cannot be made only if reinstatement is found to be impracticable depending on the circumstances of each case"[9] and that compensation will then be awarded in the event that reinstatement is impracticable or the employee does not want to be reinstated. In the same way, Section 193 of Labour Relations Act no 66 of South Africa provides that if a dismissal is found to be unfair the Labour Court or the Arbitrator may order the employer to reinstate the employee from any date not earlier than the date of dismissal, order the employer to re-employ the employee or order the employer to pay compensation to the employee. Also Article 10 of ILO convention no.158 stipulates that if the Court, labour tribunal, arbitration committee or arbitrator finds that the employee's employment has been unjustifiably terminated, shall order or propose reinstatement of the employee, provided that national laws allow that, and if reinstatement is impracticable, payment of adequate compensation or such other relief as may be deemed appropriate may be ordered.

On the strength of authorities above, it is clear that reinstatement is meant to be the primary remedy for unfair dismissal, with compensation being awarded only if reinstatement is inappropriate.[10] In *Matsemela v Naleli` Holdings*[11] it was stated that section 73 (1) makes reinstatement mandatory upon the finding of unfair dismissal. However, in practice reinstatement is rarely awarded; labour Courts and tribunals are very reluctant to order reinstatement. Failings of reinstatement as a primary remedy are evident from the scarcity of

[7] Ibid, 126
[8] Chuks Okpaluba, 'Reinstatement in Contemporary South African Law of Unfair Dismissal: The Statutory Guidelines' (1999) 116 S African LJ 815
[9] Labour Code s73
[10] Elizabeth Shi and Freeman Zhong, 'Rethinking the reinstatement remedy in unfair dismissal law' (2018) 39 (2) Adelaide Law Review 365
[11] LAC/CIV/A/02/07

orders made to this effect. Awards for the payment of compensation are far more common than reinstatement awards, although this trend clearly contrasts with the policy considerations behind the enactment of the statutory remedies.[12]

The courts and labour tribunals are vested with very broad discretionary powers to determine whether to order the remedy of reinstatement or not, but in the vast majority of cases they do not do so. In some cases labour courts and tribunals have exercised their remedial discretion in a way that is inconsistent with the purpose of the statutes and the norms recognised and created by statutes. In some instances courts have too readily denied reinstatement on the basis of the employer's alleged loss of trust and confidence in the employee.[13]

Authorities also show that the court or the arbitrator shall not order reinstatement if it considers it to be impracticable in the circumstances. However, the statutes fail to state what impracticability entail, thus, they omitted to mention factors which may be considered valid grounds for rendering reinstatement impracticable and those which may not. For instance, section 66(1) of the labour code provides for reasons valid for termination of employment while 66(3) outlines circumstances under which an employee may not be dismissed. In *Makafane v Zhongxian Investment*,[14] the employee was allegedly dismissed for operational requirements but her view was that she was dismissed on account of her pregnancy because dismissal occurred right after she had handed a letter disclosing her pregnancy to the employer. Her dismissal was then found to have been unfair on the basis of section 66(3) (d) which provides that pregnancy may not be a sound reason for cancelling the contract of employment.

Given the language of the provisions dealing with remedies available for unfair dismissal cited earlier, it can be expected that problems of interpretation will emanate.[15] Particularly problematic is the question: "When will it be reasonably practicable for an employer to reinstate or refuse to reinstate the dismissed employee?"[16]

1.2. RESEARCH QUESTIONS

1. To what extend do courts order the remedy of reinstatement in Lesotho?

[12]Geldenhyuys J 'The Reinstatement and Compensation Conundrum in South African Labour *Law*' (2016) PER/ PELJ 19
[13] Ibid
[14] LC/76/2013
[15] C. Okpaluba 818
[16] Ibid

2. Does the Labour Code provide Courts and Arbitrators sufficient guideline to exercise discretion whether to grant reinstatement or not?
3. Have the legislative measures taken by Lesotho in order to promote job security achieved their purpose of safeguarding employment?
4. Should Lesotho amend the Labour Code?

1.3. AIM/ PURPOSE OF THE STUDY

The aim of this study is to examine how the Courts or labour tribunal exercise their discretion in awarding the remedy of reinstatement and then recommend for the amendment of the law of reinstatement in the labour code.

1.4.THEORETICAL FRAMEWORK

1.4.1. Reinstatement: Common Law and Statutory positions

The word 'reinstate' in the employment law context means to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions.[17]Reinstatement therefore is the primary statutory remedy in unfair dismissal disputes, involving the restoration of a dismissed employee to his usual position and at the same place of work.[18] "It is aimed at placing an employee in the position he or she would have been but for unfair dismissal. It safeguards workers' employment by restoring the employment contract."[19] Reinstatement brings back the contractual relationship between the employer and the employee as if nothing has ever happened between them,[20] thus, all benefits the employee enjoyed remain the same. Reinstatement entails that the employer must restore the employee to the position he held at the time of dismissal, and that he must treat such employee as though dismissal had never occurred.[21] The reinstatement order also obligates the employer to pay the employee remuneration that would have been due had his employment not been terminated.[22] Therefore the remedy of reinstatement is aimed at maintaining the *status quo ante*.

[17]Equity Aviation Services (Pty) Ltd v CCMA ([2008] 12 BLLR 1129 (CC)
[18] Chucks Okpaluba 815
[19]Equity Aviation Services (Pty) Ltd
[20]SEAWU v Trident Steel (1986) 7 ILJ 418
[21]Kubjana KL and Manamela KE, 'To order or not order reinstatement as a remedy for Constructive Dismissal' 332
[22]Consolidated Frame Cotton Corporation Ltd v President of the *332 OBITER* 2019 Industrial Court 1986 (3) SA 786 (A)

The rationale behind the remedy of reinstatement was set out in *Numsa v Hendred Fruehauf Trailers*[23]as follows:

> Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed...the fullest redress obtainable is provided by the restoration of the status quo ante. It is incumbent on the court when deciding what remedy is appropriate to consider whether in the light of all the proved circumstances there is reason to refuse reinstatement[24]

Under common law the employer had the power to dismiss the employee at-will, that is, to dismiss for any reason, without having to establish just cause for such a dismissal. The employer was regarded to have lawfully terminated employment if he simply "gave the employee notice that corresponded with the period of payment of wages under the contract."[25] Wrongful dismissal under common law only occurred where the employer terminates employment in a manner that is in breach of the employee's terms of the contract of employment. For instance, if he discharges the employee without giving an adequate notice or dismissing on grounds not justifying dismissal.[26] However, summary dismissal was regarded as a lawful dismissal in the case where the employee has committed a serious misconduct. Even if dismissal was found to have been wrongful, the employee would never be entitled to restoration of the contract; the only remedy that the employee was entitled to was damages; either 'notice damages' or damages for breach of the contract.[27]

The above common law inadequacy was rectified by statutes through devising the concept of unfair dismissal and the remedy of reinstatement. Statutory law generally entitles the employee to a right not to be unfairly dismissed and to reinstatement as the primary remedy where dismissal has been substantively unfair. The general principle is that dismissal is unfair if the reason for such dismissal is invalid and /or procedure was not properly followed prior to termination, and that the employee who has been unfairly dismissed will be entitled to reinstatement unless he or she no longer wishes to work with the employer or the court or

[23] (1994) 15 ILJ 1257
[24] ibid
[25]Mosito K.E. and Mohapi T, '*A* comparative evaluation of the law on remedies in cases of unfair dismissal for employee misconduct: Lesotho & South Africa in perspective' (2016) 24 (1) LLJ 145
[26]Atunes Lawyer, unfair & wrongful dismissal< http://www.antunes.com.au> accessed 23 March 2022
[27]Mosito and Mohapi supra

labour tribunal after considering all relevant factors of the case finds reinstatement to be impossible.[28]

Different authors from different jurisdictions have attempted to define the concept of reinstatement. Looking from the British law system's perspective, *Rideout* defines reinstatement as an "order that the employer shall treat the employee in all respects as if he had not been dismissed."[29] *Landsman* looked at the definition of the term from the Australian point of view. For him reinstatement refers to the reappointment of the employee to the position in which he was before the termination on terms and conditions no less favourable than his previous terms and condition.[30]

The South African Labour Relation Act does not define reinstatement, and as such various court decisions and authors have attempted to define the word.[31] According to *Kanamugire* and *Chimuka;*[32]

> Reinstatement in principle means the restoration of the employment contract so as to ensure continuity of the employment relationship. An employee who has been unfairly dismissed can only be reinstated if he or she is willing to avail him/herself to the employer. Reinstatement is interpreted to mean placing an employee back in service, on the same or similar terms and conditions of employment enjoyed before, as if that dismissal had never taken place.[33]

Moraine relied on the definition of reinstatement stated in *Bramdaw v Union Government;*[34] the term was defined in this case as "the replacement of the dismissed officer in his post so that he can perform the work attaching to that post. The Courts generally accepted the British definition of reinstatement as meaning restoration of the status quo ante the dismissal."[35]

For Okpaluba;

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[28] Labour Code ss66 and 73, and also LRA s193

[29] Mosito K.E. and Mohapi K, 'Reinstatement, Re-employment and Compensation' (2017) 25 (1) LLJ 7

[30] Ibid, see also Landman A, 'The reinstated employee – a common law employee or creature of statute?' (2005) Contemporary Labour Law Vol. 14 No. 7 at 67

[31] The landmark case when it comes to defining reinstatement is *Equity Aviation Services (Pty) Ltd v CCMA*

[32] Kanamugire J.C. et al. 'Reinstatement in South African Labour Law' (2014) 5 (9) (MCSER Publishing, Rome-Italy)

[33] See Equity Aviation Services case

[34] 1930 NPD 57

[35] Mosito K.E. at al, supra

> The South African courts generally accept the British definition of reinstatement as it relates to reinstatement as meaning the restoration of the status quo ante the dismissal, but they disagree with that view which states that it is not reinstatement merely to take back the employee and pay his wages without providing him with work unless there is in fact no work for him to do. In South Africa, an employer is deemed to comply with such an order if he pays to an employee the remuneration which would have been due in respect of his normal hours of work had his employment not been terminated.[36]

Lesotho has been a member of International Labour Organisation (ILO) since 1966, and the current Lesotho's position as far as the laws for unfair dismissal and the remedies are concerned, is tilted in favour of the ILO Recommendations 119(1963) and the Termination of Employment at the initiative of the employer Convention, 1982(c158) and *Recommendation No. 166,* which provide reinstatement as the primary remedy for unfair dismissal. The main objectives of these instruments were to regulate termination of employment at the initiative of the employer so as to ensure that employees are not being dismissed unfairly, and where the unfairness has occurred they get appropriate remedies. At the heart of these instruments are; the protection of the worker's security of employment and the protection against unjustified termination of employment. The underlying principle for the convention is to ensure that more employees enter and remain in the employment.[37]

The 1963 Recommendation was the first instrument specifically dealing with termination of employment, and it established the framework of elements seen today in Convention No. 158 and Recommendation No. 166. Pursuant to the worker member's request to adopt a new instrument in the form of a convention that would clarify and improve provisions of recommendation no. 199[38]an item on termination of employment at the initiative of the employer was placed on the agenda of the 67th session (1981) of the ILO Conference[39] wherein member states were asked the following questions regarding remedies for unjustified termination of employment:

[36]Okpaluba, C, supra (Footnote no2)

[37] International Labour Conference 67th Session 1981 Report VIII (2) Termination of Employment at the Initiative of the Employer. P 41

[38] This happened during the 1974 conference committee on application of standards (CCSA)

[39] Background paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166)

Whether the instrument(s) provide that the court, labour tribunal, arbitration committee, arbitrator or similar body should be empowered; if they find that the termination was unjustified, to:

> (a) Annul the termination or order the reinstatement of the worker in his previous job or in another job, where appropriate with payment of unpaid wages from the date of termination, if the body considers reinstatement to be practicable, or
> (b) if reinstatement is impracticable, to order payment of adequate compensation for unjustified termination of employment or such other adequate relief as may be deemed appropriate?[40]

Total number of replies was 49, and the majority of governments considered that reinstatement should be the obligatory remedy in case of unjustified termination of employment by the employer. Some other governments referred to the need for flexibility, to permit alternative remedies if reinstatement is impracticable. One government considered that the competent bodies should have complete discretion in deciding on the remedy and, therefore, that the remedy of compensation should not be limited to cases in which reinstatement is found to be impracticable.[41]

Following are some of the replies from some member states:

Botswana: the court, labour tribunal or arbitration committee should be empowered, if reinstatement is impracticable, to order payment of adequate compensation for unjustified termination.[42]

Ethiopia: If the termination is found to be unjustified the only remedy should be reinstatement in the worker's previous job or in another similar job.[43]

France: The instrument should provide that the court and arbitrator should be empowered, if they find that the termination was unjustified, to propose the reinstatement of the worker in

[40] ILO 67th Session 1981, supra p72-73
[41] Ibid
[42] Ibid p73
[43] Ibid p74

his job, and in the absence of reinstatement, to order the payment of adequate compensation for unjustified termination of employment.[44]

Madagascar: If the courts and labour tribunals find that the termination was unjustified, they should be empowered to annul the termination and order the reinstatement of the worker in his previous job or in a similar job, with payment of unpaid wages from the date of the termination.[45]

New Zealand: The Government does not agree that any of the forms of relief outlined in clauses (a) and (b) should be mandatory. National law empowers a grievance committee or the Arbitration Court to order on a discretionary basis any one or more of the following: reimbursement of wages lost; reinstatement in the former position or one not less advantageous to the worker; payment of compensation by the employer. These forms of relief are all optional and discretionary. The common law does not generally provide for reinstatement or compensation for non-pecuniary loss.[46]

After analysing the replies, the governing body then came up with the following proposed conclusion:

The court, labour tribunal, arbitration committee, arbitrator or similar body should be empowered, if they find that termination was unjustified, to –

(a) nullify the termination or order the reinstatement of the worker in his previous job or in another job, where appropriate with payment of unpaid wages from the date of termination, if reinstatement is desired by the worker and the body considers it to be practicable ; or

(b) order payment of adequate compensation for unjustified termination of employment or such other relief as may be deemed appropriate, if reinstatement is not desired by the worker or if the body does not consider it to be practicable.[47]

The above conclusion precipitated adoption of article 10 of convention no 158 which deals with remedies for unfair dismissal. The provision in the Lesotho labour code giving effect to article 10 above is section 73 as section 4 of the labour code expressly states that International Labour Standards are major point of reference for the labour law of Lesotho. In

[44] ibid
[45] ibid
[46] Ibid 75
[47] ibid

terms of the said section if dismissal is found to be unjust, the court or the labour tribunal is obliged to direct the employer to reinstate the employee to his or her work, "without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal,"[48] if the employee so wishes.

Having discussed the history of ILO provisions for termination of employment at the initiative of the employer, and the influence of ILO conventions on the labour law of Lesotho, there can be no doubt that reinstatement is meant to be a primary remedy for unfair dismissal.

The court in *Lesotho Flower Mills v Matsepe*, defined reinstatement as "to put the employee back into the same job or position he or she occupied before the dismissal, on the condition he or she would have been but for the unfair dismissal."[49] The aim of this remedy is to safeguard the worker's employment by restoring the employment contract; this means that the employee whose employment has been unjustifiably terminated resumes employment on the same terms and conditions that prevailed at the time of dismissal.[50]

In *Standard Bank v Molefi 'Nena*, Mosito AJ as he then was, stated that according to section 73 of the Labour Code; the DDPR, the Labour Court and the Labour Appeal Court have no authority to deny the employee who has been unfairly dismissed the remedy of reinstatement, "except where the employee does not wish it, or, in the light of the circumstances, it is impracticable to reinstate such worker, in which case, compensation should be awarded."[51]

1.4.2. The effect of the reinstatement order

The effect of the reinstatement order is that the unfairly dismissed employee is reinstated to his employment with full benefits. In *Matsepe* case supra, Labour Appeal Court's order was that "the judgment of the Labour Court is set aside and replaced with one that the application is grated with costs."[52] It is imperative to mention that the case before the Labour Court was an unfair dismissal case, and then if the application is grated it means dismissal has been found to be unfair. The remaining question, since the Labour Appeal Court did not prescribe any remedy, was whether by virtue of finding unfair dismissal, reinstatement has been awarded by default. The court stated that the remedy of reinstatement is mandatory upon the

[48] Labour Code s73
[49] Lesotho Flower Mills v Matsepe (C of A (CIV) 58 of 2015) [2016], see also Equity aviation case
[50] ibid
[51] Standard bank v Molefi 'Nena LAC/CIV/A/06/08
[52] Lesotho Flower Mills v Matsepe, supra

finding of unfair dismissal. And, where neither party raised the issue of the appropriate remedy the court must raise it *mero motu,* the reason being that the remedy of reinstatement requires issues like; the wish of the employee, the terms and conditions thereof and its practicability to be canvassed.[53]

1.4.3. Reasons for reluctance to order reinstatement

Notwithstanding that statutory law has ousted the common law position; courts are still reluctant to order the remedy of reinstatement, even where dismissal has been found to be substantively unfair. Different authors and academics advance reasons for the courts to restrict remedies to compensation and depart from the standard position that reinstatement must be awarded where dismissal is found to be substantively unfair.[54]

According to the author Clark there are two reasons why the courts prefer to order compensation instead of reinstatement. Firstly; "employment contracts are of a peculiarly personal nature and the Courts would be reluctant to interfere where the relationship came to an end."[55] Secondly, to order reinstatement would be identical to compelling persons to maintain continuous personal relations with one another while they do not have a desire to do so. In reaction to the author's thinking, I share the same sentiments with Prof. *Mosito* and *Mohapi*[56]where they said the following;

> This attitude, it is submitted was based on the state of relations between master and servant under common law where personal contact in the workplace was unavoidable. In the present day situation such thinking, it is submitted would not really hold water due to the ever widening gap in terms of personal contact between the employer and the employee in the workplace.

According to the author *Grogan*[57] where an unfair dismissal has been found, the employee must be reinstated in the position he or she held at the time of dismissal, or in any other reasonably suitable position, but this alternative position should not be less favourable than the previous one because that would not amount to reinstatement properly speaking. "This proposition is supported by the fact that even in the case of an order for re-employment the

[53] Ibid
[54] Jacques van Wyk, 'Reinstatement not always an appropriate remedy'Aug 2019, Werksmans Attorneys.
[55]Mosito et al on 'remedies for unfair dismissal' supra
[56] Ibid
[57]Grogan 126

unfairly dismissed employee must be placed either in the post in which he or she was employed before dismissal, or in other reasonably suitable work."[58] The order of reinstatement must be made fully retrospective unless there are compelling reasons for not doing so. The reasons may include, but not limited to; the case where dismissal has been found to be unfair only procedurally, where the employee does no longer wish to return to the employer or where the judge or arbitrator is convinced that employment relationship has irretrievably broken.[59]

1.4.4. Practicability of reinstatement where a replacement has been appointed

Different writers and academics have differing views on the issue whether "would it be reasonably practicable for an employer to reinstate an employee where the employer had found a permanent replacement in the employee's position?"[60]Some of the thoughts of the critics of reinstatement in the circumstances are that; "Reinstatement cannot be a practicable option where it would result either in redundancies or significant overmanning,"[61] that it would be contrary to the spirit of the legislation to compel redundancies and contrary to justice and common sense to enforce overmanning. Therefore it would not be reasonably practicable to reinstate the employee where a permanent replacement has been appointed because the employee's return may precipitate a redundancy situation or exacerbate an already threatening redundancy situation.[62]Writers like *Charlie Maples* also opine that, "factors that are relevant in determining whether to or not to order reinstatement include whether the employer has hired a permanent replacement, and that this can be relevant to practicability where the business needed someone to cover the dismissed employee's work and a reasonable period of time passed.[63]

The problem with the above line of thinking is that it ignored the vital consideration of the employee's personal circumstances and for that reason it cannot hold water because the whole purpose of the remedy of reinstatement is to do right by the poor employee who has been wronged.

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[58] Ibid
[59] Ibid, p177
[60] C. Okpaluba 835
[61] ibid
[62] ibid
[63] Charlie Maple, *'Remedies for Unfair Dismissal: reinstatement for the big win?' Footanstey (29 March 2022)*

For adherents of the idea that permanent replacement cannot render reinstatement impracticable, the employer cannot simply say that they are not going to reinstate the employee on the basis that they have employed someone else[64] and that fact cannot be a factor to be taken into account since the employer had created the situation by his own unfair conduct. In *Mashaba v SA Football Association*[65] the court said the employer may not thwart a dismissed employee's bid for reinstatement by replacing him and then arguing that it cannot reinstate him because there is someone occupying his former position.[66] If the employer appoints the replacement employee before learning of the outcome of the unfair dismissal case, that appointment cannot protect it against the reinstatement order. As a result the employee will not be deprived of his right to reinstatement, if the only consideration which might stand in its way is the employment of a replacement employee.[67]

In *Volkswagen SA (Pty) Ltd v Brand NO & others*[68], the court held that: the remedy of reinstatement will also be invoked when the employee's job had been filled by a replacement. In cases of this sort an employee should normally be reinstated and the employer be left to do what he or she traditionally does when there are too many employees on the payroll, maybe commence the process of dismissal for operational requirements. In *Manyaka v Van Der Wetering Engineering (Pty) Ltd*[69] the court ordered reinstatement of an employee who had been unfairly retrenched for operational reasons. Reinstatement was ordered even though the employer had already appointed another employee in place of the dismissed employee. The practical consequence of this is that two people may end up on the same post and is the business of the employer.

Courts have in so many times dealt with impracticability of reinstatement in the circumstances where a replacement employee has been appointed in the place of an unfairly dismissed employee. On the authority of the majority of court decisions and various authors, the fact that the employer has filled the position does not render the remedy of reinstatement impracticable. However, employers in labour courts or tribunals still give evidence that they cannot reinstate an employee because a replacement has been appointed in the employee's

[64] Grogan J. p177
[65] 2017 38 ILJ 1668 (LC), see also Nadine Mather, 'Employers Thwarting Dismissed Employees' Attempt for Reinstatement by Filling their Position,' Bowmans, Aug, 2017 < http://www.bowmanslaw.com. > accessed 5 Dec 2021
[66] ibid
[67] ibid
[68] [2001] ZALC 36
[69] [1997] 11 BLLR 1458 (LC)

position. “This is persuasive when the arbitrator on a finding of unfair dismissal considers the question of the appropriate remedy, and may in light of that evidence decide instead on compensation.”[70]

Despite the existence of the remedy of reinstatement and its evident objective of safeguarding employment security, courts are still reluctant and very hostile to award it. Therefore it remains a textbook remedy and only effective for academic purposes .The courts hide behind the inadmissibility of compelling the employer to employ another whom he does not trust in a position that imports a close relationship and also the issue of complete loss of confidence in an employee once dismissed for whatever reason.

1.5. CONCEPTUALIZATION

Lesotho is a small developing country with a very high unemployment rate. There is no social security or relief fund scheme to help unemployed persons in the country. It is the reality that it is highly impossible for an unfairly dismissed employee to acquire a similar job and occupy the same position in a different company altogether. The situation becomes even worse where the employee has got less qualification than required for the job but achieved the high position through hard working or recognition of his long service with the employer. With this being the case, it is clear that the only thing that may safeguard the interest of the employee is reinstatement.

1.6. THE RATIONALE

It is clear from the wording of provisions dealing with remedies for unfair dismissal such as section 193(2) of the LRA of South Africa, section 73 of the Labour Code Order of Lesotho and article 10 of ILO Convention No.158 of 1982 that the primary remedy for unfair dismissal is reinstatement, and that other remedies may be ordered only if the employee does not have a desire to return to his or her job or the adjudicator or the arbitrator finds the remedy to be impossible. However, the circumstances which may cause impracticability of reinstatement are never specified in the provisions. Often employers argue that reinstatement is impracticable because employment relationship has irretrievably broken. The issue under which circumstances can the relationship be intolerable remains unsettled. Another common reason advanced by employers is that a replacement employee has been hired in the position

[70]Tamsanqa M. ‘Reinstatement except where not reasonably practicable, a discussion of section 193(2)(c) of LRA’ (2018)< http://www.derebus.org.za > accessed 30 April 2022

of the employee. There is still a controversy whether this can be a valid reason or not. As a result; there is inconsistence and uncertainty in the judgments and there is scarcity of reinstatement awards because presiding officials have too broad discretion. If the law can be specific on what constitutes impracticability of reinstatement and what does not, perhaps more reinstatement awards will be granted and more employment be safeguarded.

1.7. METHODOLOGY

The research study will be conducted through doctrinal research methodology, where reliance will mostly be on; text books, journals, articles and case law. A comparative research methodology will be used, particularly in chapter three where different legal systems will be compared and analysed. The internet will also be used in order to access recent case law and other materials.

1.8. ORGANISATION OF THE STUDY

This research comprises four chapters. Chapter one is a foundational chapter, where the researcher discusses the concept of reinstatement in unfair dismissal in depth, and states the main problem she seeks to address. The second chapter discusses the remedy of reinstatement in Lesotho. Chapter three is a comparative study wherein different legal systems are going to be compared. Chapter four rounds up the discussion with findings and conclusions and consists of a compilation of recommendations that seek to guide us towards the correct interpretation of impracticability and how courts should exercise their discretion whether to order reinstatement or not.

CHAPTER TWO: THE REMEDY OF REINSTATEMENT IN LESOTHO

2.1. INTRODUCTION

It is now the settled principle of Labour Law that the employer can only dismiss the employee if there are valid and fair reasons for doing so, and that in a case whereby the Labour Court or labour tribunal finds that dismissal was unfair, the unfairly dismissed employee will be entitled to several remedies. This position has ousted the common law position that the employer may dismiss the employee at anytime and for whatever reason, as long as he complied with the notice requirement and that the only remedy available to the employee who has been unlawfully dismissed is damages or compensation. In terms of the Labour Code, remedies available for unfair dismissal are reinstatement, re-employment and compensation. This chapter is about the remedy of reinstatement in Lesotho. It traces the remedy from the initial labour legislations, namely, Masters and Servants Act of 1856 and the Employment Act of 1967 to the current legislation; Labour Code Order No.24 of 1992. The main aim is to examine the improvements in the code concerning security of employment as well as the weaknesses and to investigate the extent to which those weaknesses affect the effectiveness of the remedy of reinstatement and the Labour Court and DDPR compliance with the provisions of the code relating to reinstatement.

2.2. MASTER AND SERVANTS ACT

Employment security has been and continues to be an important social concern worldwide. The problem has always been that employment law fail to accord workers sufficient protection against unjust termination of employment.[71]In Lesotho during the Colonial era, all employment matters were governed by the Masters and Servants Act. Under this Act penalties for misconduct by the servant included a fine of a certain amount of money and /or imprisonment, termination of the contract of service did not form part of the sanctions. Job positions recognised by the Act were that of a herdsman and a domestic or agricultural servant, therefore actions which constituted punishable misconduct were on the part of a herdsman, a failure to report to his master the loss or death of animals placed under his care, and a failure to report to the master damage or loss of any property for those hired in the

[71]Seeng Letele, 'Security of Employment in Lesotho: the private sector' (1990) vol.6 LLJ p77

capacity other than a herdsman.[72] If the servant was found guilty of one of the above-mentioned offences, the court would order payment of a fine or imprisonment in the event of the failure to make payment or just order imprisonment right away, without the option of a fine. However, the law precluded the master from terminating the contract of service on account of the servant's conviction[73] section 55 provides that; "no fine paid or period of imprisonment undergone by the servant shall have the effect of cancelling the contract of service."[74] And this has some element of employment security.

Under this legislation the master is not clothed with the authority to cancel the contract of service; he only remains with the power to determine terms and condition of the contract of service, as well as its duration.[75] The master is mandated to approach the court first if he desired to cut ties with the servant. If the court is convinced that the master has valid reasons for wanting to terminate the contract of service will order same, but if it is not, would decline. With this being the case it is evident that there is no possibility of unfair dismissal, hence there are no remedies provided for under this Act.

Masters were also not immune to punishment under the act; they would also be fined or imprisoned for offences they committed against the servant. Those conducts the act considers to be punishable offences include; withholding the servant's wages without reasonable and probable cause,[76] refusing to deliver or release the servant's property before or after the expiration of the contract of service,[77] the property include cattle, sheep, goats or any other animals acquired by the servant during the period of service with the master. Failure to supply articles stipulated in the contract[78] like food, bedding and others, was also an offence. The master would also be punished for wasting the court's time by bringing charges against the servant without reasonable cause.[79]

Notwithstanding that the master is prohibited from cancelling the contract of service on his own, there are exceptional circumstances under which the same contract can be terminated without notice. The contract automatically terminates in the event of the death or insolvency

[72] Masters and Servants Act s53
[73] Ibid s55
[74] ibid
[75] Seeng, p77
[76] Masters and Servants Act s60
[77] ibid s61
[78] Ibid s62
[79] Ibid s64

of the master.[80] In the event that the master relocates or changes his place of trade or business, the contract dissolves automatically if upon request the servant declines or refuses to accompany his master to the new residence, especially if the contract of service does not make him bound to do so.[81]

With regard to female servants, the contract would be terminated without notice for reasons connected to her marriage or pregnancy. The master of the female servant, who falls pregnant during the currency of her stipulated service, would be entitled at anytime subsequent to such marriage to terminate or dissolve the contract and to dismiss the servant if such servant is by contract bound to reside or perform domestic work in the house or premises of her master. In the case whereby the servant is not bound by the contract to reside or perform services in the house or premises of her master, the master would be entitled to dissolve the contract and to dismiss the servant at anytime if by the reason of pregnancy or delivery of the baby, the servant has become disabled to perform the service which by such contract was bound to perform.[82]

2.3. EMPLOYMENT ACT OF 1967

Lesotho got independence in the year 1966 and became a member of International Labour Organisation (ILO) the same year. It is imperative to mention that the country took ILO membership when the organisation had already adopted instruments dealing with Termination of Employment and Protection against unjust Dismissal, namely, Termination of Employment Convention no. 158 of 1982 and Recommendation no.116 (Termination of Employment at the Initiative of the Employer). These international instruments were adopted following the recognition by member states that employment laws did not give workers adequate protection against unfair dismissal.[83]

In 1967, almost a year after independence and after becoming the International Labour Organisation member, the Employment Act was enacted. It is not clear whether there had been any assistance from ILO when the law was promulgated, but what is obvious is that the aim of the Act was to amend and consolidate the law relating to employment and recruiting

[80] Ibid s29
[81] Ibid s33
[82] Ibid s40
[83] Seeng Letele p77

of employees in Lesotho.[84] Also important to note is that at the time the country had not yet ratified international instruments mentioned earlier.

The position of the common law that the employer has the right to dismiss at will had been curtailed, but the legislation still does not grant employees full protection against unjust dismissal or any employment security. The employer still has the right to dismiss the employee at any time as long as he provided notice corresponding to the period and type of the contract parties entered into, or effected payment in lieu of notice.[85] The notice to terminate the contract may be either verbal or written, and can be given anytime.[86]

In terms of section 84 of the Act, the court has the jurisdiction to award damages for wrongful dismissal[87]. What is worth noting here is that the Act talks of a 'wrongful dismissal' not 'unfair dismissal'. Wrongful dismissal is the concept of common law, and it occurs where the employer fails to comply with requirement or where "it can be established that the employer claimed dismissal for cause where none existed"[88] and in the circumstances the employee's remedy can only be damages incurred as a result of such wrongful dismissal.

According to Seeng;

> There is basically not much protection accorded to an employee dismissed unjustly under the Employment Act except specification of the notice period entitlement. What the legislature did was to copy the common law concept of dismissal into the Act without giving an employee any more protection than what is already provided for by common law, that is, the requirement of reasonable notice before dismissal. An employee is thus not granted full protection against unjust dismissal under this Act. This is so because an employer is not required to give any valid reasons for the dismissal as long as the notice entitlement given to the employee is proper and in accordance with the provisions of the Act. There is no provision in the legislation

[84] Ibid p78
[85] Employment Act of 1967 s13
[86] Ibid s14
[87] Labour Code s73
[88] Seeng Letele p79

indicating that courts may order specific performance of a contract of service under any circumstances.[89]

Despite the deficiency articulated above one would be persuaded to believe courts in Lesotho would be inclined to follow decisions of other courts whereby reinstatement has been granted more so because the law is silent on the issue of specific performance. Fortunately they have attempted to gradually move from the common law position by requiring employers to advance valid reasons for dismissal and ordering reinstatement even in the absence of provisions to that effect.[90]And this was a recommendable move.

In the South African case; *National Union of Textile Workers v Stag Packing (Pty) Ltd and Another*[91]the court held that even in the case of a contract of service, the court at common law has a discretion to grant an order for specific performance which would also include an order for reinstatement. The court in this case was confronted with a debatable question of what civil remedy if any is available to workers dismissed in contravention of those sections in Industrial Legislation prohibiting victimization of employees. The court in Lesotho, in *Seeisa Nqojane v National University of Lesotho*[92] disregarded the common law court's earlier decision of refusing to award specific performance and followed a decision in the *Stag packing's case*. Brief facts of the case were that *Seeisa* was the employee of Lesotho Institute of Accounts, he had been summarily dismissed for alleged under performance of his duties. He successfully established before the court that his dismissal was wrongful and in contravention of the contract of service, but the respondent on the other hand failed to prove its case. The court then ordered the respondent to return the employee to his job and to pay him all arrears of salary from the date of dismissal to the date of the award. This paradigm shift by courts from common law position of declining to order specific performance to granting reinstatement to wrongfully dismissed employees has established some security of employment.[93]

2.4. THE LABOUR CODE ORDER NO 24 OF 1992

The Employment Act 1967 remained in force until it was repealed by the Labour Code Order No. 24 of 1992. The Code which was effectively formulated with technical assistance from

[89] Ibid p83
[90] Ibid p79
[91] 1982 (4) SA 151
[92] C OF A CIV/27/87
[93]Seeng p82

the ILO brought about new changes in the labour relations system in Lesotho. The intention was to ensure that the framework introduced by the Code aligned in all respects with the ILO Conventions and principles.[94] The code is to date the principal labour legislation in Lesotho. The Labour Code, Order No 24 of 1992, came into effect on 1 April 1993.

> It is to be welcomed for a number of reasons: First, for consolidating and streamlining several pieces of legislation on labour relations into one fairly coherent document. Second, for introducing modern aspects of labour law and institutions absent from previous legislation such as the Labour Court (part 3 of the Code) and the protection against sexual harassment by declaring it an unfair labour practice (s 200). A very important general provision is that which provides that in case of ambiguity the Code shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation' (s 4(c)). The introduction of the requirement that dismissal by the employer be only for valid reasons and that such reasons be given in writing (s 66), is a further improvement on previous legislation. This is in accordance with ILO standards set out in the Termination of Employment Convention 158 of 1982 and Recommendation 166 of 1982. However, this improvement is weakened by another provision which virtually gives an employer the option whether or not to take back an employee unlawfully dismissed (s 73).[95]

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The code provides for workers' full protection of unjustified termination of employment and security of employment. The law provides for the employee's right not to be dismissed unfairly[96]and entitles the same employee to remedies[97] where the employer's reason for dismissal is found to be invalid and / or the due procedure has not been properly followed. Thus, the dismissal must be both procedurally and substantively fair. The reason for dismissal

[94]Mothepa Ndumo 'appraisal of Lesotho's statutory scheme for organisational rights and collective bargaining in the private sector with an emphasis on trade unions' participation" (2020)
[95]Sam Rugege, 'Workers' Collective Rights Under Lesotho Labour Code'(1994) 15 Indus. L.J. (Juta) 930
[96] Labour Code s66
[97] Ibid s73

can only be valid if it is related to the employee's conduct, or capacity or employer's operational requirements.[98]

2.5. DISMISSAL

The word dismissal is not defined in the labour code. The Codes of Good defines it as termination of employment by the employer[99] or at their initiative. Unfair dismissal is the termination of employment without good cause or a fair procedure or both.

We have seen that under the Employment Act of 1967 the employer was entitled to terminate the contract of service at anytime and for any reason as long as he could provide a sufficient notice, and also that he would lawfully terminate the contract without notice if he felt that the employee's conduct amounted to a serious breach of a material express or implied term of the contract. This means there was no requirement of a fair hearing or a fair reason for dismissal. Where the dismissal had been wrongful; where the employee has been summarily dismissed when notice was required, the only remedy available was compensation. The Labour Code has however shifted from that position. It requires every employee to be dismissed for a valid reason and also to be afforded a fair hearing before dismissal.[100] The mere fact that an employee has committed a fundamental breach at common law will no longer necessarily entitle the employer to terminate the contract. The employer is required to prove that the dismissal was for a fair or valid reason under the code. Section 66 provides that;

> An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment, which reason is;
>
> (a) Connected with the capacity of the employee to do the work the employee is employed to do (including but not limited to an employee's fraudulent misrepresentation of having specific skills required for a skilled post);
>
> (b) Connected with the conduct of the employee at the workplace; or

[98] Ibid Section 66
[99] Codes of Good Practice (2003) code 2 (d)
[100] Labour Code s66

(c) Based on the operational requirements of the undertaking, establishment or service.[101]

2.5.1. Dismissal for operational requirements

Dismissal for operational requirements is commonly referred to as retrenchment. As was pointed out by the Labour Court in *Labour Commissioner V Lesotho Carton (Pty) Ltd*[102]**,)** retrenchment as per the *Labour Code (Codes of Good Practice)* is "a dismissal arising from a redundancy caused by the reorganization of the business or the discontinuance or reduction of the business for economic or technological reasons."[103] Termination of an employee's employment for operational reasons, is called a retrenchment, there is no doubt therefore that the definitions of the two coincide corresponds because they are essentially two sides of the same coin. At Clause 19(3) the Codes of Good Practice provide as follows:

> Because retrenchment is essentially a "no fault" dismissal and because of the adverse effect on the employees affected by it, the courts will scrutinize a dismissal based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to dismissal before the dismissal is effected.*[104]*

Retrenchment is procedurally unfair where the employer failed to follow a proper procedure before retrenching the employee. Substantive unfairness occurs if the reason for such retrenchment is not valid. In most cases employers tend to use retrenchment in order to get rid of employees that are suspected to have been involved in misconduct or are believed to be under-performers. This is usually in situations where the employer does not have sufficient proof that a particular employee is guilty of an offence or the employer dislikes the employee for one reason or another. The example may be where only one employee is retrenched without any rational reason.[105] When the Labour Court or DDPR finds that the retrenchment was just a sham may declare a dismissal substantively unfair and then order reinstatement of the employee if the employee so wishes and reinstatement is practicable in the circumstances of the case.

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[101] Ibid s66 (1) (a)-(c)
[102]LC/64/04
[103] ibid
[104] Codes of Good Practice c19 (3)
[105]Tharollo Consultancy, 'Dismissal for Operational Requirements'. https://www.tharollo.org.ls accessed on the 16th May 2022

2.5.2. Dismissal for Incapacity

Incapacity is the immanent inability of an employee to perform work according to the employer's established standards of performance.[106] Dismissal for incapacity is divided into those relating to poor work performance and those arising from ill health or injury, this type of dismissal and dismissal for operational requirements are referred to as 'no-fault' dismissals because they arise from circumstances for which the employee is not to blame[107]. The employer is under liberty to dismiss the employee for incapacity if that capacity was the primary reason for dismissal and he must follow the due procedure. In *Labour Commissioner V Highlands Water Venture*[108]dismissal was found to be unfair because incapacity was not the primary reason for which dismissal was effected. The brief facts of the case are that the employee got injured when he was at home on weekend. He was taken to hospital where a sick leave certificate was issued by the doctor who advised that he would be indisposed for a period of two months. Upon his return after two months he was called to answer a charge of absenteeism for two months. The outcome of the enquiry was that because of the employee's long period of absence he had been replaced and as such his services were terminated on account of incapacity to perform. The court found the dismissal to have been unfair and ordered the respondent to reinstate the employee.[109]

2.5.3. Dismissal for Misconduct

Dismissal for misconduct is different from dismissal for incapacity-incompatibility and dismissal for operational requirements by the employer, in that, it is at the fault of the employee while the latter are at the behest of the employer. It is worth mentioning that dismissal for misconduct has proved to be the most common in our labour history. There is no statutory definition of the term; however, misconduct can generally be defined as unacceptable conduct by the employee at the workplace.[110] The conduct committed by the employee must constitute a breach of a material term of the employment contract and must be of such a nature that completely destroys the employment relationship. This is why in certain

[106]Hilisha Sewnarain, 'Understanding Dismissal for Incapacity Due to Ill Health' SERR Synergy- https://serr.co.za accessed on the 19th May 2022
[107] Grogan John, p207
[108] LC/ 144/ 95
[109] Ibid
[110] Ibid

circumstances employers can discipline employees for alleged misconduct committed outside the workplace or committed after working hours for as long as the conduct by the employee impacts negatively on the employment relationship.[111]

2.6. SUBSTANTIVE AND PROCEDURAL FAIRNESS

The Labour Code, Codes of Good Practice,[112] sets out circumstances under which dismissal may be regarded to have been substantively fair and procedurally fair. The employer's reason for dismissal for misconduct may be valid if he dismissed for the employee's contravention of the employer's established rule, which is reasonable and the employee was very much aware of it or ought to have been aware of it.[113] With regard to dismissal for poor work performance the reason is valid if the employee is dismissed for failing to meet performance standards expected of him, if the standard is reasonable and the employee has been aware of the required standard and he failed to improve despite being given the opportunity to do so.[114] Regarding the fair procedure the codes provide as follows;

> (1) An investigation should normally be conducted by the employer to ascertain whether there are grounds for dismissal before a hearing is held.
>
> (2) The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand.
>
> (3) The employee should be entitled to a reasonable time to prepare a response and to seek the assistance of a trade union representative or fellow employee.
>
> (4) The hearing should be held and finalized within a reasonable time.
>
> (5) The employee should be given a proper opportunity at the hearing to respond to the allegations and to lead evidence if necessary.
>
> (6) If an employee unreasonably refuses to attend the hearing the employer may proceed with the hearing in the absence of the employee.

[111] Gogo v University of Kwazulu Natal & Others (2007) 28 ILJ @ 2688 (D)
[112] Codes of Good Practice c10
[113] ibid
[114] ibid c13

(7) After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of the decision.

(8) Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

(9) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer a dispute concerning the fairness of the dismissal to the Directorate.

In the case of *Standard Lesotho Bank v Morahanye and Another,*[115]the court stated that procedural fairness relates to the procedure followed before dismissing the employee, while substantive fairness relates to the existence of a fair reason to dismiss, thus, the question here is whether on the evidence before the court a fair reason existed at the time of dismissal. With regard to procedure, the question is not whether the procedure was followed in the court, but whether it was followed prior to dismissal.[116]

2.7. REMEDIES FOR UNFAIR DISMISSAL

Remedies for unfair dismissal are provided for under section 73 of the Labour Code as amended. The section highlights two very important points; first and foremost, if it is found that the employee has been unjustly dismissed and that employee expresses his or her desire to go back to the job, the employee will be entitled to be reinstated to the position he or she held before dismissal without loss of benefits he or she would have received if she or he had not been dismissed. The exception may only be where the court or arbitrator is convinced that reinstatement cannot be possible. Secondly, where dismissal has been found to be unfair but exceptional circumstances exists, the remedy of compensation may be granted, and the amount of compensation given should be just and equitable in all circumstances of the case.[117]

[115] LAC/CIV/A/06/08
[116] Ibid Para 25
[117] Section 73of the Labour Code

What the above section entails was spelt out in the case of *Mpota v Standard Lesotho Bank*.[118] The court in that case said; "in terms section 73 of the labour code reinstatement is the preferred remedy in cases of unfair dismissals where the employee desires it. If the employee does not desire reinstatement or reinstatement is not practicable in all the circumstances of the case,"[119] then the next available remedies are re-employment and compensation. In *Lesotho Flower Mills v Matespe*[120] it was held that it is trite that reinstatement is the primary remedy for unfair dismissal, and section 73 requires it to be ordered once it is established that the employee so wishes.

2.8. DETERMINATION OF PRACTICABILITY OF REINSTATEMENT

Reinstatement restores the status quo ante. This explains the purpose of section 73 of the Labour Code as a whole, in particular, the importance of determining the practicability of reinstatement, including its implications for the workplace dynamics. The Court of Appeal has held that, reinstatement is the primary remedy for unfair dismissal.[121] Section 73 itself requires it once it is established that the employee so wishes. Section 73 (1) makes the remedy of reinstatement mandatory upon a finding of unfair dismissal. If the employee so wishes, it must be considered.

The application of the provisions of section 73 raises questions of fact which might require evidence to be placed on record before the court. Reinstatement requires that the employee's wish must be canvassed and that its terms and conditions must be spelt out. The proper approach in cases of unfair dismissal is that it is incumbent on the Court when deciding on the appropriate remedy to consider whether in the light of the proved circumstances there is reason to refuse reinstatement.[122]

2.9. RETROSPECTIVITY

In Lesotho, the legislation provides for full retrospectivity. According to Section73 of the Code; "if the employee so wishes, the Court or tribunal may order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or

[118] LAC/CIV/010/08
[119] ibid
[120] C of A (CIV) 58/2015
[121] ibid
[122] ibid

benefits which the employee would have received had there been no dismissal."[123] Once the remedy is ordered it must be ordered fully, that is, with effect from the date of dismissal and with full benefits. The employee must be placed in the same position he or she was in before the occurrence of unfair. "In essence it amounts to a retrospective order, that the employee retain the position that he or she occupied and the benefits that he held within the establishment prior to the unfair dismissal".[124] In South Africa the position is however different. The LRA provides that if the Labour Court the arbitrator finds that dismissal was unfair, may order the employer to reinstate the employee from any date not earlier than the date of dismissal.[125] The reinstatement order does not have full retrospective effect at all times. If for instance the circumstances are such that the employee could be blamed in some way in the whole act, the unfairly dismissed employee may not be granted reinstatement with full benefits. It has been held that in unfair dismissal disputes other than misconduct the Court or labour tribunal may very easily order reinstatement which is not fully retrospective for example in unprotected strike or lockout situations. The author Grogan's stand point is that, reinstatement may in certain circumstances not be fully retrospective to the date of dismissal. He further contends that "full retrospective reinstatement is usually denied if the employee was partly to blame for the circumstances that led to the dismissal or if the employee unduly delayed instituting the action for unfair dismissal."[126]

> This is not the case in Lesotho. In misconduct cases the situation is different. Here it is either that the employee is found guilty of misconduct on a balance of probabilities or not. If the dismissal is declared substantively unfair, it would only be fair for the employer to effect full retrospective reinstatement because the employee would have done nothing not to deserve being put in the original position with full seniority and benefits. Again once the Court orders reinstatement in principle, it takes the direction that the employee should be placed in the position in which he would have been had he not been dismissed and not beyond.[127]

[123]Mosito K. E and Mohapi T, 'Reinstatement, Re-employment & Compensation' p9
[124] ibid
[125]Labour Relations Act no 66 1995 of South Africa s193 (a)
[126] Grogan p127
[127]Mosito and Mohapi p9-10

In Lesotho the date of reinstatement is not left to the discretion of the court. The labour code does not give the Court or labour tribunal discretion to determine the extent of the retrospectivity. Section 73(1) clearly states that once it is established that employment has been unfairly terminated, the employee must be reinstated to his or her job "without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal..."[128] If reinstatement has been found to be practicable it is ordered in full from the date of dismissal. Thus, the date of reinstatement is not subject to discussion.

The legislature here took into account that reinstatement means "to put an employee in the same position he or she was in prior to dismissal, and this means that the employee will resume his or her position on the same terms and conditions as if the dismissal never occurred."[129] The purpose of reinstating the employee is not only to put the employee back into his or her former position, but also to order the employer to pay the employee all remuneration and benefits accrued between the date of dismissal and the date of reinstatement.[130]

In *Commissioner of Police and Another v Ntlots'oeu*[131]Ntlots'oeu who was a trooper in the Lesotho Mounted Police Service failed to offer his services to his employer for almost six years. What transpired is that he fled to South Africa in February 1997 and stayed there until on the 3rd September 2000 when he came into the country. Two days after his return he was then arrested and remained in custody until the 17th February 2003 when he was released on bail. After his disappearance, on 26 March 1997, the respondent was declared a deserter and struck off the police roll. However, it came to the attention of the Commissioner of Police that his dismissal was irregular and as a result a letter of his reinstatement was issued on the 31st July 2003. The letter read as follows:

> REINSTATEMENT TO DUTY:
> I am instructed by the Commissioner of Police to advise you that a decision has been made to reinstate you to police duly effective from 28 February, 1997. However, you are further to recall that you disappeared from your

[128] Labour Code s73
[129] Thabo Mongale, 'Re-employment versus Reinstatement' Dispute Resolution Official – Kimberly< https://ceosa.org.za > accessed 6 May 2022
[130]Mosito and Mohapi p12
[131] C of A (CIV)12/2004

> duty without leave since 7 February, 1997 until when you were arrested by the Police on 3 September. 2000 on which date you were put in prison custody to answer a charge of Sedition. The fact that a period covered during the dates between February, 1997 and September, 2000 of your being away from police work was in your own accord that made it impossible for you to render police services to LMPS clients deprives you a privilege to access salary for the said period. Upon receipt of this letter, you will be expected to report yourself before the Director of Training at PTC for instructions of duty starting from Monday 4 August, 2003.[132]

The employee's claim before the court was that he was entitled to be paid salary arrears from the date he left work, that is to say he was entitled to retrospective reinstatement. The High Court upheld the claim, but the appellant appealed against such decision. The issue before the Court of Appeal was whether the respondent was entitled to back-pay notwithstanding the fact that he had not rendered any services, or put differently the issue was whether the word 'reinstate' carries retrospective connotation. In answering this question the court aligned itself with what was said in the case of *Chegutu Municipality v Manyora*[133]and expressed that there is no reason why the same position would not apply in Lesotho, it said the following;

> Having regard to case law and various statutory provisions, both Zimbabwean and South African, the word 'reinstate' or 'reinstatement' carries no automatic retrospective connotation, either in ordinary language or in Zimbabwean legislation; normally it meant simply that the person concerned would be placed in his or her former job. If retrospectivity was intended one would normally look for words to achieve such purpose.[134]

It is submitted that the opinion of the court in the above case was improper regard being had to what section 73(1) of the labour code provides. In Lesotho the position is that once dismissal has been found to be unfair the effect is that the person who has been unfairly dismissed must be reinstated with full benefits. The position of the law in South Africa is that

[132] ibid
[133] 1997 (1) SA 662
[134] ibid

reinstatement may be retrospective from any date not earlier than the date of dismissal,[135]and so gives the Court or labour tribunal discretion to determine the extent of the retrospectivity from any date between the day the judgment or award is issued and the date of dismissal. This is not the case in Lesotho. It would not be proper for the Court or labour tribunal to order reinstatement and then say that the salary or benefits should not be paid

2.10. COMPLIANCE WITH SECTION 73 OF THE LABOUR CODE

From the wording of the section and case law, it is apparent that the remedy of reinstatement is the principal remedy for unjust termination of employment and that Labour Courts and the Directorate of Dispute Prevention and Resolution (DDPR) are obliged to consider reinstatement first after establishing unfair dismissal, and to look into other remedies only if the employee does not want to be reinstated or there are compelling reasons preventing the employer to reinstate the employee. However, these institutions seem to be very resistant to order reinstatement, even in obvious cases of substantively unfair dismissal and where an employee has express his desire to be reinstated. In *Limakatso Molapo v Boliba Savings and Credit*[136] before arbitrator *Mokitimi* in the Directorate of Dispute Prevention and Resolution (DDPR), on the date on which the matter was set down for hearing the respondent did not make any appearances and there were no reasons advanced for non attendance. The Arbitrator decided that the matter should proceed by default, pursuant to section 227 (8) of the Labour Code as amended which provides that; "if a party to a dispute contemplated in subsection (4) fails to attend conciliation or hearing of arbitration the Arbitrator may... (c) Grant an award by default."[137] The applicant testified during dismissal she was working a teller, she was summarily dismissed on allegation of theft of money amounting to M6000.00. She mentioned that the allegation was instigated by the shortage of the same amount she had a day before dismissal. She said the practice of being checked by the supervisor whenever there was a shortage did not take place before she was dismissed. She then indicated that she wished to be reinstated.

Since the respondent was not there to defend itself, the Arbitrator correctly applied the principle in *Theko v Commissioner of Police and Another*[138] and found the applicant to have been unfairly dismissed, but very surprisingly did not order reinstatement, she said: "the

[135] Labour Relations Act of SA s193
[136] DDPR award no A0102/19 delivered 21/08/20
[137] Labour Code (amendment) s227
[138] 1991-1992 LLR-LB p242

applicant wished to be reinstated.... In light of the period the applicant had been out of work, I am of the view that reinstatement may not be practicable. Therefore the award of compensation is hereby ordered..."[139]

That reinstatement is the primary remedy for unfair dismissal is trite, and section 73 requires it to be ordered once it is established that dismissal was unfair and that the employee wishes it. The onus to show impracticability of reinstatement lies on the employer; therefore it would then be determined by the court or arbitrator as a question of fact in the circumstances of the case. Thus, the determination of impracticability is based on the surrounding context of the case.[140] Then for the arbitrator to consider reinstatement to be impracticable in a default judgment case, where she had no facts from the employer was an irregular thing ever. The employee had been out of work for almost three years, so to say that she cannot be reinstated because of the period does not hold water.

It has become a habit for courts to opt for compensation instead of reinstatement for no valid reasons, to the detriment of unfairly dismissed employees. This happens even in obvious unfair dismissal cases. In one incident, about 700 factory workers had been dismissed by their employer, Jonsson Manufacturing (Pty) Ltd, following the strike that the firm purported to be unlawful. These employees were unionised, so their union, National Clothing and Textile Workers Union (NACTWU) represented them in an unfair claim before the Directorate of Disputes Prevention and Resolution (DDPR) in Maputsoe, Leribe. The relief sought before the tribunal was reinstatement. After a long and bruising legal battle, the DDPR found that the dismissal was unfair but only awarded the workers three months wages, much to their dismay.[141]

It had been a shock to everyone that the DDPR did not order the reinstatement of those workers. NACTWU secretary-general, Sam Mokhele, said he was appalled that while the DDPR accepted that the workers were fired unlawfully it still failed to order their reinstatement. 'The court only ruled that the workers were dismissed unlawfully therefore they should be compensated for a salary of three months,' Mokhele said.[142]

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[139]Molapo v Boliba Savings and Credit A0102/19

[140] Lesotho flower Mills v Matsepe

[141]Nkheli Liphoto, '*Union demands Reinstatement for Unfairly Dismissed Employees, not Compensation'* (31st march 2020) https://www.business-humanrights.org accessed 3 May 2022

[142]ibid

2.11. CONCLUSION

It is very clear from the Labour Code that the intention of the legislature was not to give the Labour court or the DDPR the discretion to determine the retrospectivity of the reinstatement order. This is in term of section 73(1) which only requires that once reinstatement is considered practicable and the employee wishes for it, the employee must be reinstated with effect from the date of dismissal; however there is a controversy when it comes to whether courts have discretion to determine retrospectivity of reinstatement. Courts sometimes fail to draw a line of demarcation between the Lesotho's position and the South African one. This is evident from the approach adopted by the Honourable Judge in the case of *Commissioner of Police and Another v Ntlots'oeu* cited earlier in this work.

The remarkable improvements in the Labour Code are the introduction of the requirement that dismissal by the employer should be only for valid reasons and the introduction of the remedy of reinstatement for unfair dismissal. Under the code workers are offered full protection of unjustified termination of employment and security of employment. However, they do not enjoy those. This fundamental improvement relating to the reinstatement remedy is weakened by another provision which virtually gives an employer the option whether or not to take back an employee unfairly dismissed. As the result of this weakness the remedy of reinstatement is not effective at all as courts seem reluctant to order reinstatement when it is due, because of the broad discretion they have been granted.

CHAPTER THREE: COMPARATIVE STUDY

3.1. INTRODUCTION

It is trite that the reinstatement is the primary and preferred remedy for unfair dismissal, with compensation being ordered only if under the circumstances of the case reinstatement would be impracticable. However, the courts have generally demonstrated their reluctance in awarding this remedy. It is not possible to conclusively determine exactly why reinstatement is so rarely awarded, why courts choose to order compensation even in cases where reinstatement seems practicable. In some cases the legislature seems to have given the courts or tribunals too broad discretion, so they exercise this discretion in a way that is inconsistent with the purposes for which the legislation was enacted, in other jurisdictions reinstatement provisions are drafted in a very unclear and vague manner and the courts use this loophole to run away from what exactly the law says and in others the law and practices in the jurisdiction hinder the ability of some workers, or some classes of workers, to seek reinstatement.

This chapter is a comparative analysis which seeks to investigate why courts are reluctant to order reinstatement despite it being a primary remedy. That will be achieved by examining reinstatement provisions from different jurisdictions and how courts have exercised their discretion to award the remedy of reinstatement or not. Selected jurisdictions are South Africa, Canada and Germany.

3.2. REINSTATEMENT REMEDY IN SOUTH AFRICA

The Labour Relations Act provides that the employee whose employment is found to have been unjustifiably terminated is entitled either to be reinstated, re-employed or compensated. The primary remedy is reinstatement or re-employment, because of the importance of job security in the country. However there are exceptional circumstances under which reinstatement or re-employment may not be ordered. In terms of Section 193(2);

> the Labour Court or the Arbitrator must require the employer to reinstate or re-employ the employee unless (a) the employee does not wish to be re-employed or re-instated (b) the circumstances surrounding the dismissal are such that continued employment relationship would be intolerable (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee (d) the

dismissal is unfair only because the employer did not follow fair procedure.[143]

3.2.1. The Employee's wish to be reinstated or not

The LRA provides that an employee who has been unfairly dismissed can only be reinstated if he or she is willing to avail himself or herself to the employer.[144] The general rule has been that an unfairly dismissed employee who does not want to be reinstated will be entitled to compensation; however, this position has recently changed. As the employer cannot be allowed to unreasonable refuse to reinstate the employee he or she has dismissed unfairly, the employee cannot also be allowed to reject the reinstatement offer without valid reasons. The employer who has wronged the employee by unfairly dismissing him or her has a "right to right a wrong"[145] and that he or she can do by offering to reinstate the aggrieved employee. If the employer unfairly dismisses the employee and he wishes to reverse that decision by offering reinstatement and in the light of the circumstances of the case the offer is genuine and reasonable, but the employee without valid reasons rejects the offer and opt for compensation, the employer's refusal to compensate the employee may be justified.[146]

In *Rawlins v Kemp t/a Centralmed*[147]the employer dismissed the employee from employment without following the due procedure. The employer conceded that dismissal was unfair both procedurally and substantively and had on different occasions during the conciliation and litigation process offered to reinstate the employee, but the employee rejected the offer and wanted compensation. It was common cause that the employee subsequent to her dismissal found another job much better than the previous one hence the rejection of the reinstatement offer. Notwithstanding the employer's persistent offer of reinstatement, the Labour Court awarded the employee twelve months compensation. At the Labour Appeal Court the decision was overturned, and the Supreme Court of Appeal upheld the decision of the Labour Appeal Court. The Supreme Court of Appeal remarked that the employer unfairly treated the employee when he dismissed her in the manner he did, therefore it was reasonable of him to seek to rectify his conduct by offering to put the respondent back in the position in which she would have been had she never been dismissed. It was then held that the employee failed to

[143] Labour Relations Act s193(2), see also SA Commercial Catering and Allied Workers Union and v Primserv ABC recruitment (Pty) Ltd, Para 46
[144] LRA s193
[145] Rawlins v Kemp t/a Centralmed (2010) 31 ILJ 2325 (SCA)
[146] LRA s193
[147] (2010) 31 ILJ 2325 (SCA)

accept a genuine and reasonable offer without any valid reasons, therefore she was not entitled to any remedy.[148]

Notwithstanding the position held by the Court above, the employee whose dismissal has been found to be substantively unfair may be allowed to reject reinstatement if the court is convinced that exceptional circumstances exist. *In Setcom (Pty) Ltd v Dos Santos & Others*[149] the employee had been suspended by the employer and later received the email terminating her services and further received another email requesting her to return to work failing which she would be deemed to have resigned. The court found that the employer's offer was not genuine and accepted the employee's rejection of the offer of reinstatement and awarded compensation.

3.2.2. When a continued employment relationship may be deemed intolerable

Courts and academics have attempted to answer the question when a continued employment relationship may be deemed intolerable, and they are in agreement that it is for the court to decide if the circumstances warrant a continued employment relationship intolerable, and this cannot be deduced from the employer's judgment.[150] According to *Chucks* "the conduct of the employee is intolerable where it has irreparably dealt so serious a blow to the employment relationship that no reasonable employer could be expected to keep such an employee in his employment."[151] In *VSB Construction t/a Techni-Civils CC v NUM obo Mngqola and Others*, [152]the employee was dismissed for allegedly stating that the Chief Executive Officer of the company was a racist. He subsequently repeated the allegation to other employees, particularly to members of the human resources department. This misconduct could easily be deemed to have broken the trust relationship between the employer and employee, but the employer failed to argue that continued employment relationship would be unbearable, as such, reinstatement was ordered.

The onus of proving that employment relationship has become unbearable rests on the employer. The employer must present evidence to the effect that the employee's conduct has irretrievably broke trust relationship; therefore it would not be possible to continue working with that employee. The mere mention that the trust relationship has been broken due to the

[148] ibid
[149] [2010] ZALC 193
[150]Rochelle le Roux 'Reinstatement: When does a continuing employment relationship become intolerable'p75
[151]Chuks Okpaluba 828
[152]*[2021] ZALAC 21*

employee's misconduct may not always be sufficient to convince the court or the arbitrator that the situation is indeed so dire. In *Booi v Amathole District Municipality* the employer argued that reinstatement should not be ordered because the relationship between the applicant and his supervisor had broken down irretrievably, this evidence was however insufficient to persuade the arbitrator to deviate from ordering reinstatement. The constitutional court then confirmed the arbitrator's decision.[153]

In *Standard Bank of SA Ltd v Leslie & Others*, the Labour Appeal Court held that in assessing whether or not the continued employment relationship would be intolerable or unbearable, the employee's behaviour both before as well after the incident should be taken into account. In this case the employee had been found not guilty of misconduct he was dismissed for. However, evidence revealed that in two occasions he had proceeded to the cash box alone contrary to what the employer's rules say. This conduct was found to have broken trust relationship irretrievably and the employee was granted compensation instead of reinstatement.[154]

3.2.3. When is it not reasonably practicable to reinstate

The LRA states that the Court or arbitrator upon the finding of unfair dismissal must order the employer to reinstate the employee unless it is not 'reasonably practicable' to do so.[155]The term 'practicable' has been described as 'an ordinary English word meaning "able to be done or put into practice successfully, which, whenever it is used, is a call for the exercise of common sense, a warning that sound judgment will be impossible without compromise."[156] In *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others*[157] the court stated that the term "not reasonably practicable" in s193 (2) (*c*) is not identical to the word practical, but refers to the concept of feasibility.[158] Something is not feasible if it is beyond possibility, therefore the employer who claims impracticability must prove that reinstatement cannot be possible. The criterion 'not reasonably practicable' is

[153]Booi *v Amathole District Municipality CCT 199/20*
[154]*Standard Bank of SA Ltd v Leslie & Others (2021) 42 ILJ 1080 (LAC*
[155] LRA s193 (2) (c)
[156] Chucks p833
[157](2016) 37 ILJ 2313 (LAC)
[158] ibid

satisfied if the employer can be able to show that reinstatement is not feasible or that it would cause a disproportionate level of disruption or financial burden on the employer.[159]

The practicability of ordering reinstatement depends on the particular circumstances of the case. It worth mentioning that the issue of impracticability of reinstatement is very complicated since one factor can be found to constitute impracticability in one case, but in another case found not to be a sufficient reason for causing impracticability. For instance, employers generally believe that impracticability can be caused by a mere fact that a long period of time has elapsed since the dismissal of the employees. In *Republican Press v CEPPWAWU*, it was held that a mere fact that long time has passed since the employee's dismissal does not necessarily constitute a reason for denying them reinstatement. The court here did not consider reinstatement to be inappropriate because six years had lapsed since employees were dismissed, but because the employer had outsourced the concerned jobs and also further restructured the business and retrenched.[160]

It is also common that employers almost every time argue that reinstatement cannot be possible because the dismissed employee's space is occupied by a replacement employee. On the strength of many authorities on this issue, one may be persuaded to believe that the position of the law in South Africa in that regard is that having appointed a replacement employee does not constitute a ground for refusing reinstatement. The authors *Jean Chrysostome Kanamugire* and *Terence Vincent Chimuka* opine that; the fact that another employee has been appointed in place of the unfairly dismissed employee is not in itself a reason to deny reinstatement, and this position seems to be supported by case law and may other authorities, [161]however one may wonder why employers to date are still holding on to this argument.

3.2.4. When dismissal is only unfair procedurally

The LRA provides that one of the exceptional cases when reinstatement cannot be ordered is where the court or arbitrator finds that the employee indeed committed a misconduct he or she was dismissed for, but the employer just failed to follow proper procedure prior to dismissal.[162] In *Malelane Toyota v CCMA and Others*[163]the court held that reinstatement

[159] CCMA Guidelines: Misconduct Arbitrations Para. 115
[160] Republican Press v CEPPWAWU (2007) 11 BLLR 1001 (SCA)
[161] John Grogan, Chucks Okpaluba, CCMA Guidelines: misconduct arbitration, Mashaba v SAFA, etc.
[162] LRA S193 (2) (d)
[163] [1999] 6 BLLR 555 (LAC)

should never be considered where the dismissal was merely procedurally unfair. In this case the employer failed to follow proper procedure before dismissing the employee in that it failed to consult the employee's trade union and to give it the opportunity to represent its shop steward, the employee. However the dismissal was found substantively fair because the employee committed an offence based on dishonesty in which he enriched himself at the expense of the employer. The court remarked that; an act of dishonesty destroys the trust the employer places on the employee, and once such trust is destroyed there can be no hope of employment relationship continuing. The employee was then denied reinstatement.[164]

In *Mzeku and Others v Volkswagen SA(Pty) Ltd and Others* [165] employees were summarily dismissed for failing to render their services to the employer for over two weeks on grounds that they wanted the union to deal with their grievances. The dismissal was found to be substantively fair but procedurally unfair. The court in answering the question whether reinstatement is a competent remedy where dismissal was substantively fair but procedurally unfair, had the following to say;

> The dismissal envisaged by par (d) is a dismissal of an employee whom the employer has a fair reason to dismiss but in respect of whose dismissal the employer did not follow a fair procedure. Indeed par (d) relates to an employee whose dismissal would have been fair in every respect had the employer followed a fair procedure. It seems to us that, in such a case, absent special circumstances, there is nothing unfair if the employee is not reinstated despite the dismissal being procedurally unfair. In the light of this it seems understandable that the Act may have treated such a case in the same way as those described in paragraphs (a),(b) and (c) and said that in each of such cases reinstatement and re-employment were not competent remedies. In order to ensure that employers will still have a reason to comply with fair procedures, the Act left the remedy of compensation still available for that and other situations.[166]

[164] ibid
[165] (2001)22 ILJ 1575 (LAC)
[166] ibid

3.2.5. Discretion with respect to retrospectivity

Section 193(1) (a) of the LRA provides that where the court considers reinstatement to be the appropriate remedy, it may order the employer to reinstate the employee from any date between the date of dismissal and the date of the award.[167]What this section means is that the discretion to determine the date in which reinstatement may commence lies with the Labour Court or the Arbitrator. Thus, the Court is at liberty to order the employer to reinstate the employee from any date as long as that date is not earlier than a date of dismissal, or not after the date of the award.

According to *Chucks Okpaluba* the term reinstatement also suggests that an order reinstating the employee should not be coupled with any qualification other than retrospectivity, however if there are reasons preventing the order of full retrospectivity, partial or non-retrospective reinstatement may also be ordered.[168] The court or the arbitrator usually limits the retrospectivity of reinstatement orders as a way of showing disapproval of the employee's conduct. This is common in cases where employees have been involved in an illegal or unprotected strike and where the employee has unreasonably and deliberately delayed proceedings leading to her dismissal, but nothing precludes the limitation from also being extended to cases involving other misconduct.[169]

In *David Themba v Mintroad Sawmills (Pty) Ltd*[170] the court was confronted with the issue whether reinstatement is necessarily retrospective. In this case the employee contented that he was entitled to payment of wages and other benefits including outstanding interest, as a result of the reinstatement award he had been granted. The court stated that the concept of reinstatement does not necessarily include back pay and that the discretion as to whether back pay is granted and the extent thereof is not statutorily prescribed, therefore the discretion lies with the arbitrator or the judge arbitrating or adjudicating the case. Put differently, the reinstatement order is not necessarily retrospective and does not create an automatic right to any back pay and increases unless that right is founded on a contract of employment or collective agreement.[171]

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[167] LRA s193 (1) (a)
[168] John Grogan 126
[169]Ibid 127
[170] J 1683/2012
[171]Ndumiso Zwane, 'The South African Labour Guide: is reinstatement necessarily retrospective?' < https://www.labourguide.co.za > accessed 10 May 2022

In *SA Commercial Catering and Allied Workers Union and v Primserv ABC recruitment (Pty) Ltd*[172] the court held that "the court may order reinstatement effective from any previous date provided that it is not earlier than the actual date of dismissal."[173] In this case reinstatement was ordered effective from the date of dismissal and the court in substantiating its decision said;

> The dismissal was substantively unfair. That means that there was no fair reason for the dismissal of the applicants. Additionally, this was a dismissal for operational requirements and not a dismissal for misconduct. It is a so called no-fault dismissal. There was no fault on the part of the applicants which brought about their dismissal. On the contrary, it was the employer who was at fault in dismissing them.[174]

3.2.5. Re-employment vs. Reinstatement

What is common with the remedies of reinstatement and re-employment is that they both return the unfairly dismissed employee to his or her job, and they are only available to an employee whose dismissal has been found to be substantively unfair. The distinction between the two is that with the former the employee returns on the terms and conditions of their previously terminated employment, as if the dismissal had never occurred, while with the latter he or she returns to the employer's employ as the new employee and signs a new contract of employment. For *chucks* reinstatement denotes that the period of service between dismissal and resumption of service is deemed unbroken, while re-employment suggests that the contract of employment ended at the date of dismissal and resumes at the date of re-employment.[175]

Re-employment seems not to be a commonly ordered remedy, thus in the vast majority of cases, unfairly dismissed employees who are returned to work are granted reinstatement. It appears to be an alternative remedy and awarded in cases "where the employee was the victim of selective non-employment or where the employer refused to renew a seasonal contract."[176]

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[172] [2018] ZACC 44
[173] Ibid Para 57
[174] ibid
[175] Grogan p126
[176] ibid

Under the Labour Code the section corresponding to section 193 of the LRA is section 73. The said provision provides as follows;

> (1) If the Labour Court or Arbitrator holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.[177]
>
> (2) If the Court or Arbitrator decides that it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement.[178]

When comparing corresponding sections from two jurisdictions it can be learned that the labour code does not give the court or the arbitrator the discretion in respect of retrospectivity, that is, once reinstatement is considered it must be ordered in full. With regard to the exceptions of reinstatement, the labour code specifies only two exceptions, namely the wish of the employee and impracticability, while the LRA gives a more detailed guide in that regard.

3.3. REINSTATEMENT REMEDY IN CANADA

Under the Canadian Labour Law system, unionized employees are distinguished from non-unionised ones. The labour code governs labour issues in respect of non-unionised employees, while the unionised ones are governed by collective agreements. Initially the remedy of reinstatement was restricted to the unionised sector while compensation was restricted to non-unionised sector;[179] however the legislature made an effort to change this position by extending the reinstatement remedy to non-unionised employees under the labour code. The code recognises compensation and reinstatement as remedies for unfair dismissal.

[177] Labour Code s73 (1)
[178] Ibid s73 (2)
[179] Michelle Flaherty, 'Reinstatement as a Human Rights Remedy: When Jurisdictions Collide' (2015) 36 Windsor Rev Legal &Soc Issues p101

It provides that the board upon finding that the employee has been unjustly dismissed may order or require the employer who dismissed the person to;

> (a) Pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (b) Reinstate the person in his employ; and do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.[180]

From the wording of the above it is clear both remedies are on the same rank, that is, unlike in Lesotho and South Africa reinstatement is not to be a primary remedy for unfair dismissal in Canada. However, research shows that reinstatement is a favoured remedy for its benefits to the employees. One frequently raised argument in favour of reinstatement is that it provides workers significantly greater job security.[181]

3.3.1. Advantages of reinstatement

Under the Canadian common law like in many other jurisdictions, federal workers who suspected that their dismissal was wrongful were forced to pursue their claims of wrongful dismissal in the courts, with the remedy restricted to damages. However this position was ousted by the enactment of the labour code which introduced the remedy of reinstatement. The main recognised advantage of the reinstatement remedy is job security. Proponents of reinstatement contend that because of high unemployment rate, it may be difficult for a dismissed employee to find another job if he or she is not reinstated, and that a monetary award is just a temporary relief which cannot compensate for the hardship brought by unemployment.[182]

According to the author Eden;

> Another potential advantage of reinstatement is that the threat of this remedy may force a reshaping and civilizing of the process of termination by employers. To avoid having a termination decision

[180] labour code of Canada (1985) s240 (4)
[181] Genevieve Eden, 'Unjust Dismissal and the Remedy of Reinstatement' J. Individual Employment Rights, Vol. 2(3) 183-198, 1993-94 P183
[182] Ibid 184

> reversed by an adjudicator, employers must ensure fair treatment towards employees; this contributes to the enhancement of the quality of their work life. Reinstatement may also serve employees' interests by placing them in a better position to obtain another job than would be the case if they were dismissed. Removing the stigma associated with dismissal may well increase their future job prospects.[183]

Notwithstanding the importance of the remedy of reinstatement, employers in Canada like in other jurisdictions do not uphold this remedy at all, while employees on the other hand prefer it. From the view point of employees, whether unionized or non-unionized, reinstatement is the most preferred remedy. It is only through it that the employee who has been wronged by the employer's conduct of unjust termination of his or her employment can be made whole again. The remedy of reinstatement alone puts an aggrieved employee exactly where they would have been but for the unfair dismissal, preserving all benefits that would have accrued. They hold that when coupled with financial compensation for lost income, reinstatement has the advantage of being a complete remedy. Their primary reason for preferring reinstatement is simply that no amount of money can be enough to adequately make -up for the employee's loss of employment, benefits, and the value of the work previously occupied. For employers, however, "reinstatement is generally seen as a less desirable remedy. Once they have made the decision to dismiss an employee, many employers are resistant to that employee's return to the workplace."[184] They prefer compensation so much that even when reinstatement is ordered some choose to pay a premium to resolve the matter without the employee returning to work. They try all they can to avoid challenges which may be posed by reinstatement, such as finding a suitable position for a returning employee, re-establishing relationships with supervisors, and maintaining co-worker morale on the part of the employee[185]

3.3.2. Effectiveness of the remedy of reinstatement

There is a belief that in the unionized sector the remedy of reinstatement is well-established and successful and therefore this remedy can only be effective in the unionised sector. The reason behind such a thought is that Union Officials are there at the workplace to monitor the return of the reinstated employee and assist with the employer's harassment and

[183] Ibid p185
[184] Ibid p108-109
[185] Ibid p109

discrimination.[186] Regarding non-unionised sector there are controversial views on whether the remedy of reinstatement can be viable in that sector. "The continuing debate concerning the viability of the remedy of reinstatement in the non-unionized sector has recently been accompanied by controversy over the apparent unwillingness of adjudicators to reinstate."[187]

It has been found out that, even though reinstatement is regarded by many as a significant advance in job protection it can encounter grave difficulties in realization. The main reason for this has been found to be that employers generally resist policies that infringe on management flexibility, therefore, when their decision to dismiss an employee is overruled by another party, the employer may seek to get even with the reinstated employee. Often employers may start by arguing that reinstatement will not be feasible, and if their argument is not considered and the employee is reinstated, they make their lives miserable upon return, "through harassment tactics such as changing job duties or reducing status or employment benefits."[188]

3.3.3. Factors causing impracticability

The labour code gives the adjudicator the power to award reinstatement or damages. The employee is required to state his or her preferred remedy when lodging the claim, this may be a consideration in adjudicators' choice of remedy, however, adjudicators can exercise their own discretion.[189]The studies reveal that first and foremost adjudicators considered the remedy initially requested by the discharged worker although other factors were also given weight. The fact that a dismissed employee found a new job subsequent to dismissal has been cited as one reason for courts to award compensation rather than reinstatement. The breakdown of the employment relationship and the incompatibility of the dismissed employee with the management or co-employees also have been found to attract the remedy of compensation, given that, in such cases, reinstatement could have a disruptive and negative effect on the workplace.[190] The time lapse between the date an employee was discharged from his or her employment and the date of the decision is also considered; the delay of proceedings has the potential to trammel the decision to reinstate, since in such cases, the

[186] Eden 189
[187] Ibid 186
[188]Ibid 185
[189]Ibid 188
[190] ibid

employer is more likely to have found a replacement for the discharged worker during the period of proceedings[191]

3.3.4. Reinstatement as a Human Right Remedy

In Canada if the employee is not satisfied with his or her dismissal because he or she feels like the dismissal had been as a result of discrimination, he or she is at liberty to approach either the Statutory Human Rights Tribunal or the Arbitral Tribunal and seek reinstatement.[192] Regardless of some important distinctions between the remedial authority of labour arbitrators and human rights tribunals, they are similar in many respects. Both forums' objective in awarding reinstatement is to make the innocent party whole again.[193]

Employees who seem to benefit most from Human Rights Tribunals are non-unionised ones. For the longest time non-unionised employees could not enjoy the right to the remedy of reinstatement. In the case where their employment was terminated without just cause, non-unionised employees in most jurisdictions in Canada, under the Labour Arbitration Tribunals had limited rights to reinstatement; generally, they were only entitled to receive appropriate notice of the termination or payment in lieu of that notice. This position has been changed by Human Rights Tribunals, since they have departed from this general principle and held that a non-unionised employee may be also entitled to the remedy of reinstatement[194] Human Rights Tribunals therefore became the primary venue for non-unionised employees who claim discrimination and challenge the termination of their employment on that basis. Labour arbitration on the other hand remains the main forum for dealing with the dismissal of unionised employees, including cases where discrimination is alleged.[195]

3.4. REINSTATEMENT REMEDY IN GERMANY

3.4.1. Dismissal

The Germany labour law recognises two kinds of dismissal, namely; ordinary dismissal and extraordinary dismissal. Ordinary dismissal occurs where the employer unilaterally terminates the contract of employment by just giving the employee an ordinary notice corresponding to the period of service the employee has. Extraordinary dismissal on the other

[191]ibid 189
[192] Michelle Flaherty 101
[193]ibid 108
[194] Ibid 102
[195] Ibid 105

hand refers to termination of employment with immediate effect. The German Civil Code provides that the employee may be dismissed summarily for 'serious cause'.[196] "The contract of employment may be terminated, "with immediate effect, for serious cause, if the [employer] cannot be expected to continue the service relationship until the expiration of the period of notice."[197]

Germany is well known for its fundamental principle of codetermination which advocates for workers' participation through most important employee representative body called works council. The work council is a group of employees elected by other employees to represent all employees in a company in meetings with their employer.[198] The dismissal procedure in Germany is therefore different from other jurisdictions, particularly those discussed earlier in this research. The Works Council Act requires the employer who anticipates dismissal to consult and explain his or her decision to dismiss before issuing the notice to the employee. If the council has an objection to the proposed dismissal but the employer on the other hand insists on dismissing and proceeds to give the employee a notice, the said employee will be entitled to remain in service while he or she proceeds to challenge the employer's decision before the labour court. If the labour court finds the proposed dismissal to be unjustified, the employer will be ordered to retain the employee. It must be noted however that where there is no works council, the employer need not retain the employee from the end of the notice period to the date of the Labour Court decision.[199] Looking at the limited protection non-unionised employees have in Canadian jurisdiction regarding enjoyment of reinstatement, and the restricted protection afforded employees where there are no work councils, it can be concluded that represented workers are at advantage than unrepresented ones.

In Germany protection of employment is highly valued; unfair dismissal proceedings are given priority. Thus a dismissed employee is allowed to bring an action before the Labour Court without any specific time limit. Low paid employees who are not trade union members may request the assistance of a lawyer if the employer is so represented. The employee's lawyer's fees will be paid by the government.[200] "The Labour Courts, at the trial and appellate stages, have three judges, two lay-judges (who represent employers and employees)

[196] Civil Code of Germany (2002) article 626
[197] Herbert L. Sherman Jr., 'Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries' (1981) 29 Am J Comp 482
[198] Cambridge English Dictionary
[199] Herbert L 482
[200] ibid

and a professional judge who attempts conciliation of the dismissal case. The Labour Court often decides cases at the trial level within ten days, but appeals may take years."[201] The setting in the labour courts in Germany is identical to that in Lesotho, except that the lay-judges in Lesotho are called assessors and that in Lesotho the Labour Court like the Labour Appeal takes years to finish cases at the trial level.

3.4.2. Remedies for Unjustified Termination of Employment

Germany recognizes reinstatement and compensation as legal remedies where an employee has been unfairly dismissed. However, due to the statutory procedure applicable to dismissals discussed above, the question of reinstatement is not usually reached; thus the matter is often settled at the company level by the work council and management. In the case whereby the case has proceeded to the labour court and dismissal is found to be unfair, for those employees who remained in service the court may order them to be retained and where this is the case all issues relating to reinstatement become inapplicable. In the case where the employee had been dismissed the court may then order reinstatement.[202]

The general principle is that if the employer dismisses the employee summarily with immediate notice without valid reasons, or without notice and the dismissal is not warranted, the Labour Court may grant the remedy of reinstatement. Like in other jurisdictions discussed earlier in this chapter, there are exceptional instances where reinstatement may not be considered the appropriate remedy depending on the circumstances of each case. Where the court finds dismissal to be socially warranted and that the employer was entitled to dismiss the employee, such an employee will not be entitled to any remedy. If the court finds that dismissal is not socially warranted or unfair, but then it is also "unlikely that collaboration between the employee and the employer can continue,"[203] it may dissolve the employment relationship and order the employer to pay appropriate compensation. Also in a case where a small company is involved and it is proved that employment relationship has irretrievably broken, the Labour Court is quite likely to order damages rather than reinstatement even if the dismissal is improper.[204]

[201] ibid
[202] Ibid 481
[203] ibid
[204] ibid

3.4.3. Importance of Work Councils

There are several identified benefits which result from having work councils at the workplace. Research shows that it is rare for an employer to dismiss for alleged misconduct over the objection of the Works Council especially if the Council's cooperation has been strong on many important matters. Employers may nevertheless insist on the right to dismiss employees over Works Council objection for only grave offenses such as assault on a supervisor or participation in an illegal wildcat strike. Apart from that studies show that large companies make it a point that dismissal occurs as a last resort because they are concerned about their images and do not want to be found by the Labour Court to have unfairly dismissed an employee. It also appears that strikes to protest dismissal are not as common in Germany as in many other countries and that this is due in part to cooperative attitudes between many employers and members of Works Councils.[205]

3.5. CONCLUSION

From the ongoing discussion it is clear that remedies available for unfair dismissal are generally reinstatement and compensation and that reinstatement is cherished by employees as it is the only remedy that can make a dismissed employee whole again, while employers disapprove of it because it restricts their autonomy to decide when and how to discharge the employee. With regard to South Africa the discussion has also revealed that the South African employment law offers more detailed guidance on how the discretion may be exercised in deciding whether to order the reinstatement or not, than other jurisdictions, particularly Lesotho. With this being the case, one may hold that the reason why courts in South Africa are still reluctant to order reinstatement is merely that they pay insufficient attention to the clear purpose of the Labour Relations Act. In Germany dismissal procedure requires the employer to consult the work council before it can issue a notice of termination of employment so that the council can express their objection to the proposed dismissal if it anticipates unfairness. It has been learned that due to this dismissal procedure dismissals are rare since many cases are being settled at the company level by the work councils and the management. In Canada where a dismissed employee alleges discrimination he or she can choose whether to lodge a claim and seek reinstatement in the arbitration tribunal or in the Human Rights Tribunal. The human rights tribunal has been very beneficial to non-unionised

[205] ibid

employees because under the Labour Arbitration Tribunals they were only entitled to receive appropriate notice of the termination or payment in lieu of that notice, not reinstatement.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1. CONCLUSION

This research established that at common law the only remedy available for an employee dismissed without cause was a reasonable notice period, this remedy has not been the best protection against unjust termination of employment at all, and has not provided any job security. The amount of money one would get as compensation for the employer's failure to give notice was so little that it could not even provide with means for livelihood while the employee is looking for another job. Courts were reluctant to grant orders of specific performance in employment contracts or reinstatement because that felt like to compel a person to work with another against their will.

The Courts in South Africa have moved away from the common law approach and started ordering reinstatement to wrongfully dismissed employees under certain circumstances and this can be seen from the case of *National Union of Textile Workers v Stag Parking (Pty) Ltd and Another*. Following that development by South African courts, the position then progressed to Lesotho; the example is the case of *Seeisa Nqojane v National University of Lesotho.* Despite the step our court has taken, when the Employment Act was enacted the remedy of reinstatement still was not provided. What the legislature did was to copy the common law concept of dismissal into the Act without granting the employee any more protection than what is already provided by the common law.

The research revealed that the reinstatement remedy was introduced by the Labour Code Order of 1992 which was effectively formulated with technical assistance from the ILO, with the aim of bringing about new changes in the labour relations system of Lesotho. Section 73 of the code confers power on the Labour court or the DDPR to award the remedy of reinstatement where the dismissal is found to be unfair and to award compensation if the employee does no longer want to return to his or her job, or after considering all relevant factors surrounding the case, reinstatement is found to be impracticable. Except for the wish of the employee, the legislation does not stipulate any further guidelines as to what the court or the arbitrator may consider in order to determine impracticability of the remedy of reinstatement. Put differently, the section is couched in a general, unspecific, unintelligent and vague manner. The corresponding section in the Labour Relation Act of South Africa,

section 193, provides in more detail circumstances for which reinstatement may be deemed impracticable. According to the Act, reinstatement will not be feasible if the employee does not wish to be reinstated, when continued employment relationship is deemed intolerable, when is it not reasonably practicable to reinstate and when dismissal was unfair only procedurally. These guidelines have been of a great importance because our courts in Lesotho refer to them in formulating the decisions on whether reinstatement is practicable or not.

Notwithstanding that courts in Lesotho consistently refer to the South African legal principles, the fact is that these principles are only persuasive not binding in Lesotho's courts, as a result, there is still inconsistency and uncertainty as far as practicability of reinstatement is concerned. For instance; in *Central Bank of Lesotho v DDPR, Arbitrator Shale and Mpho Ivonne Mofokeng,* the Arbitrator had ordered the employer to reinstate the employees after finding dismissal to have been substantively fair but procedurally unfair. This decision was reviewed and set aside in the Labour Court on ground that in that circumstances the appropriate remedy was compensation. Regardless of what the court said in the *Central Bank case*, the same mistake subsequently occurred in the case of *Seotlong Financial Services (Pty) Ltd v 'Makhomari Morokole*; in this case the learned Arbitrator found that the dismissal was procedurally unfair because the employee was not afforded a hearing, but found the employer to have had a valid reason to dismiss the employee due to her constant absenteeism. He said there was sufficient evidence before him proving that the employee absented herself from work frequently and as a result financial statements continued to be behind and this compelled the employer to engage temporary help to remedy that. The learned Arbitrator however ordered reinstatement. The decision was reviewed by the Labour Court and awarded compensation. I submit therefore that had the law been clear in respect of the circumstances constituting impracticability, this problem would not have happened.

The problem with section 73 is that it does not provide specific criteria for the award of reinstatement other than 'impracticability', and this gives the Labour Court and the DDPR a broad discretion in deciding whether to award reinstatement or not. When a decision-maker has a broad discretion and is free, it is possible that he or she may limit discussion of legal principles and make determinations dependent to a greater extent on personal inclination and preference. The exercise of power must still be within a given range, so that when there is an allegation that a decision-maker was wrong in deciding in a manner he or she did, the criteria for determining the wrongfulness will be whether the discretion was exercised outside the

given range or whether the decision-maker correctly applied relevant legal principles stipulated in the legislation.

The labour code stipulates that the court or arbitrator upon finding that the dismissal was unfair, shall, if the employee wishes order the employer to reinstate the employee to his or her previous job, without loss of remuneration, seniority or any other entitlements or benefits the employee would have received but for dismissal. From the wording of the relevant section, it can be implied that it means once reinstatement is considered to be an appropriate remedy it must be ordered from the day the employee was dismissed, thus, the court or the arbitrator does not have discretion to determine the date of reinstatement. Under the South African law the court or the arbitrator is granted discretion to determine the date of reinstatement under the condition that it should not be earlier than the date of dismissal. The Courts or labour tribunals must properly apply their minds to the date of reinstatement. They should not just arbitrarily place a date on which the employee may be reinstated in this regard, but should be guided by specific circumstances of the case. Judicial discretion in this instance should again be guided by questions of what is right, just and equitable and not predetermined by authoritarian rules of law.

In practice reinstatement is really a problem; the Labour Court and the DDPR seem to be unenthusiastic to order reinstatement and this is proved by the fact that compensation awards are far more common than reinstatement awards. In rare cases where reinstatement is ordered, employers ensure that they lodge review applications against it, and this is evidenced by pilling Review Applications in the labour court. Looking at what is happening in practice and considering the Lesotho's economy and low salaries employees get, I am persuaded to believe that employers might have a very serious financial problem when they have to pay dismissed employees from the date of dismissal, given a long period cases take to reach finality. Perhaps things would be different if judges and Arbitrator had the discretion to determine the date of reinstatement, like it is the case in South Africa.

Generally, remedies for unfair dismissal or unjust termination of employment are reinstatement and compensation. The purpose of the remedy of reinstatement is to safeguard employment and to completely rectify the unjust conduct of the employer by putting the employee back into the job and giving him or her all benefits that would have been received if unfair dismissal did not occur; hence it is called a primary remedy. However, security of employment is still the issue because for various reasons this remedy has not been effective

and therefore failed to achieve the purpose for which it was formulated, it remains a mere textbook remedy. With this being the case, it would be only reasonable to suggest that other ways of safeguarding employment may be also taken into account, particularly avoiding dismissal. Germany has been proved to have rare cases of dismissals because the law requires the employer to consult the work council before the employee could be issued with a notice of dismissal. This procedure is said to have yielded productive outcomes since many cases are being settled right at the consultation stage, before the employee could be dismissed.

4.2. RECOMMENDATIONS

The research has established that reinstatement is a primary remedy for unfair dismissals. Reinstatement guarantees job security in that it allows an employee to revert to his or her employment, and to retain the rights he or she has acquired during his or her years of service. Security of employment is therefore a core value of the Labour Code and the importance of retaining one's job cannot be overemphasised. We have seen also that due to some deficiencies in the code reinstatement is not effective and therefore does not serve the purpose for which it was formulated. Research also shows that it is the legislation that has managed to cure the deficiencies that existed in common law where there was no job security because remedies for unfair dismissal were limited to damages for failing to provide notice. It is therefore on the basis of the above observations that the amendments on provisions of reinstatement are recommended.

It is recommended that section 73 (1) of the Labour Code should be amended and specify circumstances the Judge or the Arbitrator may consider when making a decision whether reinstatement is practicable or not. These specified circumstances will serve as a guideline in determining whether reinstatement is practicable or not. Decision-makers will be compelled to exercise their discretion to order or not order reinstatement within a given range and that will prevent the dependence on personal inclination or preference, and consequently the remedy of reinstatement will be denied only for a reasonable cause. The Labour Relations Act of South Africa already states that reinstatement may not be ordered where the employee is not willing to be reinstated, where continued employment will be intolerable because trust relationship between the employer and the employee has irretrievably broken, where after considering all relevant factors it is found that reinstatement will not be feasible and where dismissal is found to be unfair only procedurally. Therefore it is recommended that Lesotho may follow suit.

Research has shown and it is also pubic knowledge that Lesotho is a poor country, with a constantly declining economy and a very high unemployment rate. Also it has been shown that dismissal cases take too long to complete. With this being the case for employers to reinstate dismissed employees may be very burdensome and may also be the cause why they plead impracticability every time the issue of reinstatement arises, since the law requires that it must be ordered from the date of dismissal. It is therefore recommended the law should give Judges and Arbitrators discretion to determine the date when reinstatement may start to operate. They should not just order full retrospective reinstatement without first considering specific circumstances of the case. Under the South African law decision-makers have the discretion to order reinstatement from any time not earlier than the date of dismissal; Lesotho is recommended to follow suit again on this one.

It is recommended that workers participation in the form of either workplace forums or work councils should be introduced into the Lesotho labour law and that employers should be required to consult those forums or councils once dismissal of the employee is anticipated, before the relevant employee may be given a notice of dismissal. This research revealed that in Germany employers are required to consult work councils before they can make a final decision to dismiss the employee and that due to this procedure dismissals are very rare, since many cases are being settled at the consultation stage. In Lesotho dismissal rate is very high, this may be implied from the backlog of cases in the DDPR and the Labour Court. If the Germany dismissal procedure may be adopted and incorporated into the law, the high rate of dismissals may be reduced and job security promoted.

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