

# Remedies Available to the Employee for an Unfair Dismissal

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## INTRODUCTION

Section 193 of the Labour Relations Act 66 of 1995 (**"the Act"**) outlines remedies for the employee in the circumstances where there is an unfair dismissal.

## REMEDIES IN TERMS OF SECTION 193 OF THE LABOUR RELATIONS ACT

Section 193(1) provides that if the Labour Court or the Conciliation for Mediation and Arbitration (**"CCMA"**) determines that a dismissal was unfair, it may order the employer to:-

1. re-instate the employee;
2. re-employ the employee; or
3. pay compensation to the employee.

## RE-INSTATEMENT

With reinstatement there is a continuity of employment as the employee returns to the position that the employee occupied before the unfair dismissal took place. The period between the dismissal and the reinstatement does not affect the employee's length of service and the employee will be back paid for the period between the dismissal and reinstatement. This is the primary remedy for unfair dismissals, because it places the employee in a position that the employee would have been in, had the employee not been unfairly dismissed.

## RE-EMPLOYMENT

The employee will be re-employed on a new employment contract with the same employer who dismissed the employee, however, it is potentially in a different role or on different terms. With this remedy there is no continuity of employment as the employee will not be paid for the period between the dismissal and re-employment.

## COMPENSATION

The Labour Court or the CCMA will determine the amount of compensation that is due to the employee.

For an unfair dismissal dispute the maximum amount of compensation that can be awarded is 12 months' compensation, however, this is seldomly awarded. If a dismissal is automatically unfair, the employee can be awarded compensation for a maximum period of 24 months.

## WHEN TO APPLY FOR EACH REMEDY?

Re-instatement is the primary remedy for unfair dismissals and if re-instatement is not possible, re-employment is required.

Re-employment would be ordered when, for example, the previous position is not available anymore (redundant or occupied by someone else) or the employee prefers a different role. The reason for this is that the Act envisages placing the employee in the same or similar position that the employee would have been, had it not been for the unfair dismissal or unfair labour practice.

Section 193(2) of the Act requires the adjudicator to re-instate or re-employ the employee, except in the following circumstances:-

1. where the dismissal was unfair due to the employer not following a fair procedure;
2. where the employee does not want to be reinstated or re-employed;
3. where a continued employment relationship would be intolerable; and
4. where it would be impractical for the employer to reinstate or re-employ the employee.

In the circumstance, the adjudicator will order the appropriate amount of compensation which is determined by what is just and equitable in the circumstances, dependent on:-

1. Length of service;
2. The extent of the deviation;
3. The Employee's conduct; and
4. Anxiety and hurt as a result of the non-adherence to the procedure.

When there is an unfair labour practice dispute, the adjudicator may, on the terms that he or she deems reasonable, award re-instatement, re-employment or compensation. The adjudicator will consider which of the above remedies are applicable to the employee in the relevant circumstances.

## CONCLUSION

Section 193 of the Act provides for remedies for unfair dismissal and unfair labour practices, including reinstatement, re-employment, or compensation. Reinstatement, being the primary remedy, is aimed at restoring the employee to the employee's previous position. If reinstatement is not feasible, re-employment may be ordered under a new contract and potentially in a different position. Compensation is granted when neither option is possible or in certain unfair labour practices. Compensation is determined by considering what is "just and equitable" by applying various factors.



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