REMEDIES FOR UNFAIR LABOUR PRACTICE FINDINGS
Compensation and other remedies for an employer’s unfair actions

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Standard remedies set out in the Labour Relations Act 66 of 1995 (the LRA) upon a finding that an employer has committed an unfair labour practice ("ULP") includes reinstatement, re-employment or compensation. Those are remedies similarly applied to dismissal disputes. Reinstatement and re-employment are clearly appropriate as remedies for unfair dismissals but arguably less appropriate as remedies for ULPs as the complainant usually remains in employment with the employer who perpetrated the ULP – there is no termination of the employment relationship. The LRA does permit some discretion though in fashioning a remedy which is wider than the three remedies of reinstatement, re-employment or compensation as ULPs may be determined “on terms that the arbitrator deems reasonable.” This article explores the different orders granted for different species of ULPs. If an employer is found to have committed an ULP what sanctions have in practice been imposed? And conversely if an employee has been the victim of an ULP or reasonably suspects that an ULP is about to be committed what relief can she / he realistically expect?

The concept of an ULP has a long and not always unproblematic history in South African labour law. After the ground-breaking amendments to labour legislation in the early 1980s, arising from the recommendations of the Wiehahn Commission, the ULP served as the cornerstone of jurisprudence developed in the Industrial Court. At that time the definition of an ULP was extremely wide and encompassed the unfair dismissal of employees.

The LRA shifted the focus away from the ULP entirely and the concept (excluding dismissals) clung precariously to life in Schedule 7 – Transitional Arrangements (the Schedule).

The Employment Equity Act 55 of 1998, repealed the unfair discrimination provisions in the Schedule and shifted the resolution of unfair discrimination disputes into section 10 of that Act. In 2002, the remaining ULP provisions in the Schedule were inserted into chapter 8 of the LRA, a chapter originally dealing with dismissals and the definition of an ULP was extended to protect whistleblowers who disclose criminal or irregular conduct of employers.

An ULP is defined in section 186(2) of the LRA as “any unfair act or omission that arises between an employer and an employee involving:

- Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits of an employee;
The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

A failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

An occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000, on account of the employee having made a protected disclosure defined in that Act.”

The process of dispute resolution and statutory remedies

If there is a dispute about an ULP then an aggrieved employee may refer the dispute in writing to a bargaining council / statutory council if the parties to the dispute fall within the registered scope of the council or to the CCMA if the council has no jurisdiction. The referral must be made within 90 days of the act or omission which allegedly constitutes the ULP, or within 90 days of the date on which the employee became aware of the act or occurrence. The council or CCMA (as the case may be) must attempt to resolve the dispute through conciliation, but if the dispute remains unresolved the council / CCMA must arbitrate the dispute. (An employee who alleges an ULP in terms of the Protected Disclosures Act may refer the dispute after the conciliation stage to the Labour Court for adjudication.)

Prior to the 2002 amendments arbitrators determining ULPs (apart from unfair discrimination disputes which were heard by the Labour Court) had the power to determine the dispute on “reasonable terms”. After the 2002 amendments arbitrators could determine ULP disputes on terms which the arbitrator “deem(ed) reasonable” including an order of reinstatement, re-employment or compensation.

Noting the relative discretion available to arbitrators to fashion a reasonable remedy appropriate to the nature of the particular ULP it is useful to examine the exercise of that discretion with respect to the various species of ULPs.

Remedies for promotion disputes

Most ULPs especially in the public sector are concerned with promotions. In this regard one of the key issues has been whether, in any given case, the matter relates to a promotion to a higher (vacant) post (of an internal candidate), or whether the dispute relates to the making of an appointment (of an external candidate) to a vacant post. Only promotions are covered by the ULP definition, appointments are not. In the Department of Justice v CCMA & others [2004] 4 BLLR 297 (LAC) Zondo, JP (at para 47) held that the protection not to be subjected to an ULP pertaining to promotion is conferred on an existing employee and not on an applicant for employment.

The remedies the CCMA and courts have ordered upon a finding of a promotion related ULP is (depending on the facts) to compel an employer: to promote an aggrieved employee or to set aside an irregular promotion or to correct an improper procedure.
In *Walters v Transitional Local Council of Port Elizabeth & another* [2001] 1 BLLR 98 (LC) the employer appointed a person to the post of principal personnel officer on the basis of race despite the appointee’s lack of knowledge and experience pertinent to the post. A dissatisfied employee who had scored the highest marks in the interviewing process referred both a delictual claim based on her constitutional right to equality and in the alternative an ULP claim to the Labour Court. The Labour Court dismissed the delictual claim (on the basis that the litigant had an adequate remedy in terms of the ULP jurisdiction of the Labour Court) and found that the employer had committed an ULP.

The Labour Court ordered the employer to appoint the applicant to the post retrospective to the date of the interview with all benefits. Landman J quoted Ngcobo J in the case *Hoffmann v South African Airways* [2000] 12 BLLR 1365 (CC):

“...An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who has suffered a wrong as a result of unfair discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.” (at para 50)

The Labour Court was unmoved by the fact that the employer had made a different appointment (appointing a Mr Sohena from a fixed term contract to permanent appointment) knowing that litigation on the matter was pending. Landman J commented:

“The actions of the Council are, I believe, irrelevant to the relief that the applicant claims. It made a decision and it must have foreseen that there was a possibility that Ms Walters would be instated.” (at para 49)

The applicant did not seek the setting aside of Mr Sohena’s appointment and thus the Council found itself in a position in which it had two employees for a single post.

For comparative purposes mention must be made of the Labour Appeal Court decision in the *Department of Justice* case in that that Court was not prepared to make such an order, although the facts of the cases were arguably similar. Upon the retirement of the then Chief State Law Advisor, the Department of Justice advertised this post internally and externally. At the time the formal requirements for the post were an LLB degree and admission as an advocate of the High Court. Transformation principles were also important. The Deputy state law advisor (the “deputy”) who had the necessary qualifications, but not the desired racial profile applied for the post but was unsuccessful.
The eventual successful applicant for the post had the desired profile but not the necessary qualifications, (The Minister agreed to relax the qualifications requirements in making the appointment which was in terms of a fixed term contract.) The deputy referred an ULP dispute to the CCMA. The CCMA found that the Department had committed an ULP and ordered the department to pay R50 000 as compensation / damages. The Labour Court upheld the CCMAs finding of an ULP but set aside the order to pay R50 000. The LAC set aside the finding of an ULP on the basis that – inter alia – the position had not been filled permanently and that the referral was premature. Goldstein AJA dissented and made an order that the employer pay the deputy the same salary and benefits as if he had been promoted to Chief State Law Advisor.

The CCMA has set aside promotions which arise from an ULP. In Nutesa v Technikon Northern Transvaal [1997] 4 BLLR 467 (CCMA) the employer motivated by transformation considerations appointed five black employees to newly created posts in secret and without advertising the new posts in violation of agreed procedures which included advertising vacant or newly created posts. The union NUTESA referred a dispute to the CCMA. The CCMA Commissioner commented:

“It may well be that those appointed are the most suited for the position and would have been appointed in any event. But without the observance of the proper process, the appointments are fatally flawed.” (at para 6.3)

In Great North Transport v Legodi & others [2004] 1 BLLR 51 (LC) the employer was reprimanded for failing to adhere to proper procedures and ordered to correct an improper procedure which had given rise to an ULP. The CCMA held that an employer committed an ULP by not promoting an employee to the post of typist in circumstances in which the evidence showed that she was the strongest candidate. The CCMA ordered the employer to re-test the employee with a view to making the promotion. The Labour Court upheld the award on review.

Remedies for demotion disputes

Our courts have been prepared to grant interim relief on a prima facie view of an ULP prior to the actual determination of the dispute.

In Bensch v Phalaborwa Transitional Local Council [1997] 9 BLLR 1163 (LC) the Labour Court granted an interim interdict pending an arbitration of an ULP dispute involving unfair conduct relating to demotion. An aggrieved chief executive officer / town clerk sought an interdict restraining his employer from advertising his post arguing that any subsequent appointment would inevitably entail his dismissal or demotion. An interim order was granted restraining the employer from advertising the post pending the arbitration of the dispute.

Our courts have granted compensation and ordered reinstatement as remedies in circumstances in which a demotion led to a constructive dismissal.
In *Van Wyk v Albany Bakeries Ltd & others* [2003] 12 BLLR 1274 (LC) a regional manager was demoted when appointed to the post of branch manager, although his salary and terms of conditions remained unchanged. He claimed that he had been constructively dismissed and referred a dispute to the CCMA. He was unsuccessful and approached the Labour Court on review. Ndlovu AJ found that the demotion amounted to a unilateral variation in the applicant’s conditions of service and that the commissioner had misdirected himself by finding that the applicant had not been constructively dismissed. He set aside the award and awarded him compensation equivalent to six months remuneration. The court noted that although an employee may have a remedy to refer an ULP dispute to the CCMA the employee could elect to accept the employer’s repudiation of the employment contract and sue for compensation.

In *Mhlabi v CCMA & others* [2006] 4 BLLR 348 (LC) a surgical buyer for a hospital was demoted, following a disciplinary enquiry. The enquiry was unfair as the sanction for failure to follow administrative procedures was initially a transfer to another hospital, which was amended the next day to be that of dismissal. On appeal to the hospital the sanction of demotion to the position of a porter (in which she consequently earning half her salary) was imposed. She referred an unfair dismissal dispute to the CCMA and the CCMA found that she had failed to discharge the onus that she had been dismissed and that the real dispute was not about dismissal but about demotion – an ULP issue. The Labour Court found that the arbitrator had misdirected himself by not considering whether the applicant had been constructively dismissed. Revelas J referred to *Van Wyk* and held that a “unilateral demotion is a form of repudiation of the contract of employment, amounting to a constructive dismissal.” (at para 15) Revelas J set aside the arbitration award and ordered reinstatement and back pay of 12 months remuneration.

**Remedies for the provision of benefits disputes**

The granting of compensation is the favourite remedy in an ULP benefit dispute.

In *Protekon v CCMA & others* [2005] 7 BLLR 730 (LC) the employer a Transnet owned company withdrew a travel benefit from middle managers and replaced the benefit with a salary increase. The salary increase was worth approximately 1/3\(^{rd}\) of the travel benefit.

An employee upset at the loss of the travel benefit referred an ULP dispute to the CCMA. The CCMA found that the withdrawal was an ULP and ordered the employer to pay the applicant the difference between the value of the travel benefit and the amount actually received for a period of one year (from the date of the withdrawal of the benefit to the date of the arbitration). The Labour Court agreed with this computation.

In *SACCAWU V Garden Route Chalets (Pty) Ltd* [1997] 3 BLLR 325 (CCMA) the union representing 7 workers resident in George, referred an ULP dispute to the CCMA. The parties had signed a collective agreement, operative from November 1996 – August 1997, in terms of which the employer agreed to transport employees living in Rondevlei, Smutsville and Barrington to and from work. The parties agreed that an outstanding issue
was the transport of employees resident in George and that this issue would be referred to the CCMA for determination.

The union argued that it was unfair for the employer to provide transport to workers resident in Smutsville, Barrington and Rondevlei but not to extend that benefit to workers resident in George. The employer argued that the employer’s cost in transporting workers was R98,78 each per month but the cost to and from George would be approximately R700 per month per employee (as the distances were greater) and the employer would need to purchase a vehicle at a cost of around R60 000. The CCMA commented:

“…it is clear that the employer in excluding the George employees from the transport benefit has a legitimate objective connected to business needs and economic factors ... The crisp issue for determination, however, is whether a blanket refusal to extend the benefit is the necessary means for securing those legitimate business needs. While it would be unfair and unreasonable for an arbitrator to award a massive increase such as would result from an award ordering the employer actually to transport the George workers, there are other compensatory options which by their nature amount to more proportional forms of differentiation permissible in terms of Item 2(1) (b). Instead of denying the George employees any form of transport benefit, the employer should have compensated them for their disadvantage in some other way. The most obvious solution would be to grant them, for the period of the collective agreement, a travel allowance based on the average monthly cost of the transport benefit received by the other workers, viz R98,78 per month. Although the average monthly cost does not accurately reflect the exact benefit received by each worker, it is the most practical and convenient yardstick to apply. Such an arrangement would render fair the employer’s prima facie unfair conduct.” (at para 6 and 7)

The CCMA ordered the employer to pay a transport allowance of R98,78 per month to the George workers for the duration of the collective agreement.

In Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others [1997] 11 BLLR 1438 (LC) Seady AJ ordered the parties to fashion their own remedy, failing which the Labour Court would impose one. In this case the Labour Court found that the employer had committed an ULP by reserving membership to a staff benefit scheme (a registered Staff Benefit Fund) to monthly paid employees (mainly white) thereby excluding weekly paid employees (mainly black). Weekly paid employees belonged either to a registered pension fund or an unregistered provident fund. The employer contributed disproportionately to the schemes – 10% of an employees wage to the Staff Benefit Fund and 5% to the pension and provident funds. The LC considered the financial complexities in the matter, the lack of expert evidence led on the financial implications of correcting the rules of the benefit scheme, and the negotiation processes taking place between the parties and ordered the parties to fashion a suitable
remedy. The parties were given 10 weeks to do so, failing which the LC would impose an outcome on the parties.

**Remedies for unfair suspension and unfair disciplinary action short of dismissal disputes**

The remedies of reinstatement and orders restoring the original terms and conditions of employment are applied in these disputes.

In *Saloojee v McKenzie NO & others* [2005] 3 BLLR 285 (LC) Ngcamu, AJ ordered the Independent Complaints Directorate to reinstate the applicant (the Head of the ICD, Western Cape Office) pending his appeal against a sanction imposed at an internal disciplinary enquiry. In this case the employee gave an interview on national television without the requisite approval. The employer held a disciplinary enquiry and imposed the sanction of a reduced salary for one year and a final written warning for misconduct. The employee appealed. Within 2 days of giving notice of his intention to appeal the employer suspended him (by placing him on “special leave”) and notified him of their intention to transfer him to their offices in Mpumalanga. The court found that the transfer was a demotion which was carried out in bad faith and with an ulterior motive (to achieve what in essence the disciplinary hearing had not – dismissal). The court accordingly reviewed and set aside the decision to transfer the employee and ordered his reinstatement pending his appeal.

In *SAPU & another V Minister of Safety and Security & another* [2005] 5 BLLR 490 (LC) Farber AJ ordered the employer to lift the sanction of suspension imposed on police employees and to restore their salaries and benefits with retrospective effect (to the date of the suspension). In this case the employer sought to transfer staff from Port Elizabeth to Bisho to improve policing services in that area. Staff resisted the transfer and did not take up their new posts in Bisho. Instead they submitted medical certificates indicating that they suffered from post traumatic stress. The employer suspended them without salaries and benefits. The court found that the suspensions contravened procedural steps set out in regulations gazetted in terms of the South African Police Service Act 68 of 1995. The suspensions without remuneration were declared to be invalid and of no force or effect.

**Remedies for protected disclosure disputes**

In *Grieve v Denel (Pty) Ltd* [2003] 4 BLLR 366 (LC) the Labour Court granted an interim interdict pending the determination of an ULP concerning an “occupational detriment” which contravened the Protected Disclosures Act, 2000. The applicant approached the Labour Court for relief when he was charged with misconduct and summoned to attend a disciplinary enquiry after he made disclosures to his employer’s Board about a managers alleged financial wrong-doing. The Labour Court held that the disclosures appeared to be *bona fide* and if true revealed possible criminal conduct. The applicant had made out a *prima facie* case that the employer had committed an ULP and the Labour Court granted him interim relief.
Conclusion

Arbitrators and judges have utilized the scope of remedies permitted to correct ULPs and have: ordered interim relief, granted compensation, set aside promotions, ordered promotions, ordered the implementation of proper procedures, reinstated employees, reinstated salaries and benefits and have encouraged parties to fashion their own remedies best suited to their circumstances.

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