

# Award reinstatement: But what if his job doesn't exist?

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In *Seopa v. Imperial Cold Logistics (Pty) Ltd and Others* (9 February 2018), the Labour Court had to decide whether an employer was in contempt of court if it reemployed an employee rather than reinstated him, as envisaged by the arbitration award.



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What is the difference between reinstatement and re-employment? In the context of reinstatement, employees resume employment on the same terms and conditions as those which prevailed at the time of their dismissal. In the context of re-employment, however, employees are employed on different terms and conditions, and are, effectively, accommodated in another role.

What happens if the employer does not have the same position available for the employee, but the award dictates that the employee must be reinstated?

In *Imperial Cold Logistics*, the employee, Seopa, was employed by Imperial as a van assistant before his dismissal. Seopa was reinstated and had the award made an order of court. He presented the court order to Imperial's HR manager on 16 July 2016. At the time, Imperial did not have any van assistant vacancies available. Imperial took steps to 'reinstate' him in another position at a warehouse on the same grade, rate of pay and similar job functions. Both parties agreed and a contract was drawn up, which contract also reflected his continuity of service.

Notwithstanding the fact that he was employed in a different role, there was no material disadvantage flowing from the conclusion of the contract and Seopa's re-employment. Seopa was advised that if a van assistant position became available he would be accommodated. After a week, Seopa complained that the warehouse was too cold and he could not perform his duties. Imperial asked Seopa to undergo medical tests to determine whether he was capable of working in the cold environment. In the meantime, he was placed in an ambient environment pending the outcome of the tests.

On 4 October 2016 (three months after signing the contract), Seopa launched an application against Imperial for contempt of court. His reason for pursuing the contempt of court application was because his new employment contract reflected the term re-employment and not reinstatement. After numerous delays, the matter was set down for 21 April 2017. In mid-April 2017, a permanent position for a van assistant became vacant and Seopa was offered the position. He accepted it.

The matter was heard in May 2017. The court held that Imperial's actions indicate substantial compliance with the court order. Specifically, the court held that maintaining continuity of service, being willing to accommodate Seopa when he complained about the working environment and placing him in his original position at the earliest opportunity are not indicative of a party acting in willful default of the court order. It shows that Imperial believed it was in agreement with Seopa to give practical effect to the order by adopting the measures it did.

With regard to Seopa's pursuit of the application after he was accommodated in the van assistant role, the court found that it was unnecessary for Seopa to pursue the contempt application to obtain clarity about the future. The application was dismissed and wasted costs were granted to Imperial for proceedings on 19 May 2017.

Employers should not feel pressure to create roles where reinstatement is ordered and the employee's erstwhile role is no longer available. Substantial compliance with a reinstatement award and a willingness to accommodate the employee as soon as reasonably practicable should mean that an employer is not in default of the award.

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