CASE NO. SA 7/2004

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TRANSNAMIB HOLDINGS LTD **APPELLANT**

and

CAROLINE ENGELBRECHT **RESPONDENT**

CORAM**:** Mtambanengwe, A.C.J., O'Linn, A.J.A. *et* Chomba, A.J.A.

HEARD ON: 2004/10/15

DELIVERED ON: 2005/04/22

APPEAL JUDGMENT

O'LINN, A.J.A.: The appellant Transnamib Holdings (Pty) Ltd, appeals to this Court against a judgment given by the Labour Court in favour of Caroline

Engelbrecht, the respondent. Mr Corbett appeared before us for the appellant and Mr Ueitele for the respondent herein.

I will hereinafter for the sake of convenience refer to the appellant as Transnamib and to the respondent as Engelbrecht.

Engelbrecht was employed by Transnamib from 16 January 1998 until 5th October 2000. From November 1999 to May 2000 Engelbrecht was employed as a receptionist at an accommodation and training establishment (Gammams) belonging to Transnamib.

On 9th May 2000 Engelbrecht handled payments from *inter alia* delegates from Botswana who attended a fair at Ongwediva, Namibia. In the course of the payments handled by Engelbrecht, she cancelled a copy of a receipt and a further book copy of the same receipt without cancelling the original receipt, which was in the possession of a certain Ms Chinyepi who handled the payments on behalf of the Botswana delegation. The upshot of this was that Engelbrecht was charged with theft of an amount of N$300 at a disciplinary hearing conducted by Transnamib and discharged from employment as from 5th October 2000.

Engelbrecht appealed to the District Labour Court which found her conviction and dismissal unfair and set aside her conviction for theft. The District Labour Court reinstated her in her previous position as from 15th April 2002, but nevertheless

found that she had failed to follow company procedure and was given a final warning in this regard. As a penalty the District Labour Court refused to order Transnamib to pay Engelbrecht any back-pay from the date of dismissal on 5th October 2000 to 15th April 2002.

Engelbrecht remained unemployed during the whole period from 5th October 2000 to 15th April 2002. Engelbrecht appealed to the Labour Court against that part of the order finding that she was negligent and refusing to order payment by Transnamib for loss of income for the period of unemployment.

The Labour Court upheld Engelbrecht's appeal and substituted the following order for that of the District Labour Court:

> "It is ordered:
>
> That the appeal is hereby allowed. For the avoidance of doubt, the order of the District Labour Court dated 15th April 2002 is varied to read:-
>
> 1. That the respondent is hereby ordered to reinstate the appellant in the position in which she would have been has she not been so dismissed; i.e. retrospectively to the date of her dismissal which is the 5th October 2000.
>
> 2. That the respondent pay to the appellant back pay for eighteen (18) months nine (9) days/or/for the whole period of dismissal.
>
> 3. That the substituted conviction of a failure to follow company procedure and the penalty thereof of a final warning are set aside."

Transnamib now applied for leave to appeal to the Supreme Court against "the whole of the judgment" but then set out the following grounds:

> "1. The learned judge erred in law in that he wrongly interpreted the word 'reinstate' as used in Section 46 of the Labour Act, 1992, to have retrospective effect and particularly because:
>
> 1.1 'reinstate' as used in Section 46 of the Labour Act concerns those circumstances where an employee is reinstated to the same position in which he/she was employed prior to his/her dismissal;
>
> 1.2 're-employ' as used in Section 46 concerns those circumstances where an employer is ordered to receive an employee back, on the same terms and conditions, but in another post;
>
> 1.3 should the word 'reinstate' be interpreted in the manner as was done by the learned president, then and in that event:
>
> (a) the provisions of Section 46(1)(a)(iii) (with regard to reinstatement) become superfluous;
>
> (b) such interpretation, ignores the fundamental principle of Namibian law that an employee is obliged to mitigate his/her losses."

The Court a quo granted Transnamib Holdings leave to appeal because the Court was of the opinion that "the issue raised is so important that the Supreme Court should have the last say on the issue" even though the Court felt "very strongly that the appellant's case has no merits."

It should be noted that an appellant can only appeal from the Labour Court in terms of Section 21 of the Labour Act to the Supreme Court on points of law. The correctness or otherwise of issues of fact regarding the alleged misdemeanour of an

employee in a Labour matter falls outside the jurisdiction of the Supreme Court. The finding by the District Labour Court as well as the Labour Court setting aside the conviction of alleged theft, has also not been raised as a ground of appeal. Furthermore, the finding by the Labour Court, setting aside the finding of the District Labour Court of Engelbrecht's negligent failure to comply with the regulations of Transnamib Holdings, was also not placed in issue.

The words in the first sentence of the notice of appeal, stating that the appeal is "against the whole of the judgment" of the Learned President of the Labour Court, does not only appear inappropriate, but does not broaden the scope of this appeal.

The appeal is also very academic, if not an exercise in futility, because even if that Court interpreted the word 'reinstate' as proposed by counsel for Transnamib, it still had a discretion in accordance with Section 46 (1) of the Labour Act, of 1992, to make the order which it did in fact make, whether or not in the reasons for its order, it interpreted the word "reinstate" as "reinstatement retrospectively to the date of dismissal or suspension". This is so because once the Court finds that there was an unfair dismissal, the Court must exercise a judicial discretion as to the appropriate order, which can be either reinstatement in terms of subsection (1)(a)(i), or re-employment in terms of subsection (1)(a)(ii) and/or payment for losses suffered by the employee, in terms of subsection (1)(a)(iii), further read with subparagraph (c) of Section 46(1), subsections (2) and (4)(b) of Section 46.

It follows from the above that even if Transnamib succeeds on appeal to obtain endorsement for its interpretation of the words “reinstate”, and “re-employ” and subsection (1)(a)(iii) of Section 46 providing for payment of losses sustained, the specific order made by the Labour Court can only be set aside to the extent that the order for repayment was made without determining whether Engelbrecht had suffered any financial loss as a result of her dismissal and requiring her to prove that she had attempted to mitigate her loss.

It is best to deal with the factual side of this last issue before proceeding on the assumption that Transnamib Holdings and its counsel are correct on the legal issue.

The Court *a quo* misdirected itself in this regard where it found that: “…and I agree that the appellant did not testify under oath on the loss of income…”

The fact was that Engelbrecht in fact testified under oath before the District Labour Court in this regard and this evidence was not in any respect contested on behalf of Transnamib and thus had to be accepted for the purposes of this case. The said evidence read as follows:

Q: “Can you just tell this Court after your dismissal have you ever tried to look for a job somewhere else?”

A: “More than thirty times I have applied in writing more than thirty times.”

Q: “You have done a lot of applications?”

A: “That’s right.”

Q: “How many of them were successful?”

A: “None.”

Q: “None and you still have not been employed since then?”

A: “I was not employed.”

In the light of the above uncontested evidence, there is no basis whatever for Transnamib to rely at the appeal stage on the principle that the employee must mitigate his or her loss.

I however cannot agree with the Learned President of the Labour Court, that this factual issue relating to the mitigation of loss, was immaterial and irrelevant, because once a District Labour Court or Labour Court decides to order “reinstatement”, then such Court, without more and by operation of law, is taken to have ordered the reinstatement to be retrospective to the date of dismissal and with all the financial benefits, such as salary, pensions and medical, payable as from that date.

The Court apparently even assumed that where the District Labour Court, as in this case, had ordered reinstatement only from the date of the successful appeal and refused to order payment to the employee of the loss of income, such order was in conflict with section 46(1)(a)(i) of the Labour Act and was thus invalid for that reason alone.

There is no justification for such a view, neither in Section 46 of the Labour Act, nor in any of the many decisions referred to by both counsel before us.

The Labour Court, as well as counsel on both sides, also failed to refer to and give any consideration and weight to paragraph (c) of Section 46 (1) and subsections (2) and (4)(b) of Section 46.

The relevant parts of Section 46, for the purposes of this argument reads as follows:

> "46(1). If, upon a complaint lodged in accordance with the provisions of Part IV by an employee who has been dismissed from his or her employment……a District Labour Court is satisfied that such employee has been so dismissed unfairly,……the District Labour Court may –
>
> (a) in the case of an employee who has been so dismissed, issue an order in which such employer is ordered -
>
> (i) to reinstate such employee in the position in which he or she would have been, had he or she not been so dismissed;
>
> (ii) to reemploy such employee in work comparable to that to which he or she was engaged immediately before his or her dismissal from such date and on such conditions of employment as may be specified in such order;
>
> (iii) to pay, whether or not such employee is reinstated or reemployed, to such employee an amount equal to any losses suffered by such employee in consequence of such dismissal of such dismissal or an amount which would have been paid to him or her had he or she not been so dismissed;
>
> …….

(c) make such order as the circumstances may require;

(2) An order referred to in subparagraph (i) or (ii) of paragraph (a) of subsection (1) may be made subject to such conditions as the district labour court may deem just and equitable in the circumstances and may include a condition providing for the imposition of an appropriate disciplinary penalty.

…..

(4) In considering -
(a) ….
(b) the nature of an order to be made in the event of the district labour court finding that the employee concerned has been dismissed unfairly……, the district labour court shall have regard –

(i) to the order prayed for in the relief sought by the employee;

(ii) to the circumstances in which the employee concerned has been dismissed……including the extent to which such employee has contributed to or caused his or her dismissal……;

(iii) to the practical enforceability of any such order."

(The provisions above quoted also refer to employees against whom disciplinary action has been taken unfairly, but those parts of the provisions have been left out to save space and because those parts are irrelevant to the present argument).

The door was thus open for the District Labour Court, if the facts justified it, to incorporate in the order following on the finding that the dismissal was unfair, a finding that the employee had nevertheless negligently contravened the regulations of Transnamib Holdings and is reprimanded in that regard.

In the case of subsection (4)(b) the language is imperative and mandates the District Labour Court to have regard to relevant circumstances, including "the extent to which such employee has contributed to or caused his or her dismissal or disciplinary action", as well as to the "practical enforceability of any such order."

Once again, this provision provides for an order as made by the District Labour Court, provided of course that the facts justify such an order.

It must be kept in mind that the aforementioned disciplinary order was set aside by the Labour Court on appeal and there is no appeal on that finding to this Court.

It is obvious to me that when Section 46 is interpreted in regard to the orders that may be made once a Labour Court has found that an employee has been unfairly dismissed, all the provisions of Section 46 above quoted bearing on the question, must be considered as a statutory scheme and as a whole because the Legislature must have intended all those provisions to be applied by a Court when exercising its discretion.

As was said in S v Weinberg,

> "If possible, a statutory provision must be construed in such a way that effect is given to every word and phrase in it; or putting the principle negatively……

> 'a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant…' The reason is of course, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention correctly, and it will therefore not use words that are superfluous, meaningless and otherwise otiose.'"[1]

The Labour Court, in interpreting the word "reinstate", compared the word "reinstate" in subsection (1)(a)(i) of Section 46 with the word "reemploy" in subsection (1)(a)(ii), but for the rest gave no attention or weight to subsection (1)(a)(iii), providing for an order on the employer to compensate the employee for losses suffered as a result of his/her unfair dismissal and furthermore did not consider subsection (1)(c), (2) and/or (4)(b) of Section 46. Section (4)(b)(ii) and (4)(b)(iii) in particular, require the Court to have regard to wider and important considerations, over and above a mere comparison with subsection (1)(a)(ii) of Section 46.

Subsection (1)(a)(iii) provides not only the mechanism for payment by the employer to an employee for losses suffered, where there has been an order for "reinstatement", but also where there was an order for "reemployment". It also entrenches the common law principle of reasonable steps for the mitigation of loss for an unfair dismissal, to be taken by the employee, which the Legislature obviously intended to retain and incorporate in Section 46 of the Namibian Labour Act.[2]

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[1] 1979 (3) SA 89 (A)
[2] *Holmdene Brickworks (Pty) Ltd, v Roberts Construction (Pty) Ltd*, 1977 (3) SA 670
Ferado v de Ruiter, (1993)
Myers v Abrahamson, 1952 (3) SA 121 (CPD at 127 D-E.

The interpretation accepted by the Labour Court, leaves no room for the application of the principle of mitigation of loss and of subsection (1)(a)(iii), of Section 46. That alone is a strong indication that the Court's interpretation, of Section 46 cannot be correct.

The strongest contention by the Court was that the peculiar wording of subsection (1)(a)(i) in the Namibian Labour Act, signifies an intention by the Legislature to make the "reinstatement" retrospective to the date of dismissal and with all the financial benefits, including salary, payable from that date. The wording relied on is – "to reinstate such employee in the position in which he would have been had he or she not been so dismissed;" (My emphasis added).

The wording is clearly ambiguous and the meaning attached by the Court is obviously one of at least two possible meanings. The meaning contended for by Mr Corbett, on behalf of Transnamib is that the word "reinstatement" "refers to putting the employee back into his/her former position at work, and nothing more. Then the Court has a further discretion in terms of Section 46 (1)(a)(iii) to award back pay to the dismissed employee to a date as far back as the date of dismissal."

I agree with Mr. Corbett's argument in this regard. I do not agree with the Labour Court and Mr Ueitele, who supported the Labour Court's argument at least in part.

I do not think that the mere use of the words – "…in the position which he or she would have been had he or she not been so dismissed," necessarily take the meaning beyond the "position", which means the job description of the job the employee had occupied, with all the financial benefits thereof, as at the date of his dismissal. It does not necessarily mean that the reinstatement in that "position" runs from the date of dismissal.

Subsection (1)(a)(iii) is expressly applied by the Legislature also to orders for "reinstatement". If the Court's interpretation is accepted, it could mean that the aforesaid subsection (iii) cannot be applied to "reinstatement" cases and this important part of subsection (iii) would thus be frustrated. To ignore such a clear provision, is not compatible with principles of interpretation laid down over decades in South African and Namibian law.[3]

The lower court's interpretation is also inconsistent with the law in the United Kingdom, Zimbabwe and South Africa as laid down by most of the authoritative decisions of the Courts of those countries.[4]

Mr Ueitele also referred the Court to the book – "Work Place Law" by John Grogan at p120 where the author argues that:

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[3] *Venter v Rex*, 1907 TS 910 at 913.
Keyter v Minister of Agriculture, 1908 NLR 522.
S v Weinberg 1979 (3) SA 89 (A)
[4] *Powell Duffryn Ltd v Rhodes*, [1946] 1 All ER 666 KBD at 667.
Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court and Others, (1986) 7 ILJ 489 D-E
Chegutu Municipality v Manyora, (1997) 18 ILJ 323 (ZSC) at 324G-326A and 326D-327C.

> "In its ordinary meaning, reinstatement suggests that the period of service between dismissal and resumption of service is deemed unbroken: re-employment that the employment contract ended at the date of dismissal and resumed at the date of re-employment…"

I do not agree with the author. After all there is no logical reason why both "reinstatement" and "reemployment" can not run from the same date – such as e.g. from the date of dismissal, or from any subsequent date, such as e.g. the date of reinstatement or reemployment. The essential difference between the two concepts is not the time from which it will run, but that "reinstatement" will relate to the identical job, whereas "reemployment" relates to a similar job, merely comparable to what the employee had prior to the dismissal.

The point is further that those two categories are clearly distinguishable as such in specific statutory provisions but joined together by the provision made in subsection (1)(a)(iii), for orders regarding payment by the employer to the employee of losses suffered as a result of the unfair dismissal.

According to the quotation, Grogan further argues:

> "The term reinstatement also suggest that an order of reinstatement may not be conditional or coupled with any qualification, other than something less than full retrospectivity."

It may be that one use of the term “reinstatement”, “suggests” what the author says. However, the author was not commenting on Section 46 of the Namibian Labour Act and its interconnected subsections (1)(a)(i), (1)(a)(ii) and (1)(a)(iii) of Section 46.

Mr Ueitele also referred to a quotation from the book “Unfair Dismissal” by Andre van Niekerk where the author opines that “reinstatement implies that the period of service between the date of dismissal and the reinstatement order remains unbroken and in spite of dismissal employment is regarded as continuous….. A reinstatement order effectively requires the employer to place that employee in the position in which the employee would have been, but for the dismissal. The employee is entitled to be paid for any retrospective period of reinstatement and to the benefits that accrued to the employee during the period.”

Again, the author relied on was not in a position to and did not comment on the Namibian Act and could not deal with its Section 46 as a whole and in context. Again this author did not and could not deal with the built-in principle that the employee must take reasonable steps to mitigate his or her loss.

Mr Ueitele admitted the applicability of this principle. If this principle is applicable, then how can the principle fall away, whenever an order for "reinstatement" is made.

In my respectful view, subsection (1)(a)(iii) was enacted precisely for the purpose of arming the Court with a mechanism to adjudicate fairly between the conflicting claims of employer and employee. To do otherwise would allow the employee to profit unfairly and financially from the "unfair dismissal" by e.g. receiving full pay and benefits from the employer for a period when the employee received an income from other employment engaged in during the same period, made possible by the employee's dismissal.

Mr Corbett, for Transnamib, also drew attention to the dictionary meaning as contained in The Oxford Dictionary and Thesaurus, Oxford University Press (1997) where the following meaning is given:

> "1. Replace in a former position.
> 2. Restore (a person etc) to former privileges."

This definition falls short of the extended meaning adopted by the Labour Court.

In my respectful view, the Labour Court erred in its interpretation of Section 46 of the Labour Act in those respects discussed above. However, that does not mean that the appeal against its order can succeed.

As indicated above, the orders made stand on their own feet and could be arrived at by the Court *a quo*, even if it adopted the correct interpretation of Section 46 of the

Labour Act. If I had to reconsider the orders made, applying the restricted meaning of the term "reinstatement", I would have made the same orders as that made by the Learned President of the Labour Court, as he said, “for the avoidance of doubt”.

In the result:

1. The appeal is dismissed.
2. The appellant shall pay the costs of the appeal.

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O’LINN, A.J.A.

I agree

_____

MTAMBANENGWE, A.C.J.

I agree

_____

CHOMBA, A.J.A.

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Instructed by: **Kauta, Basson & Kamuhanga Inc.**

COUNSEL ON BEHALF OF THE 1ST RESPONDENT **Mr S F I Ueitele**

Instructed by: **Ueitele Legal Practitioners**

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APPEAL JUDGMENT

JUDGMENT

MTAMBANENGWE, A.C.J.: I have read the judgment of my brother O' Linn A.J.A and agree with the conclusion that he reached namely, that the appeal be dismissed. I, however, am unable to agree with the "restricted meaning" he assigns to the term "reinstatement." I therefore take the opportunity to express briefly the reasons for so disagreeing.

His Lordship state at page 13 of the judgment:

> "The lower court's interpretation is also inconsistent with the law in the United Kingdom, Zimbabwe and South Africa laid down by most of the authoritative decisions of the Courts of those countries."

And refers in the foot notes to *Powell Duffry Ltd v Rhodes* [1946] ALL ER 666 KBD at 667; *Consolidated Frame Colham Corporation Ltd v The President, Industrial Court and Others* (1986) 7 LLJ 489 D-E and *Legute Municipality v Manyora* (1997) 18 ILJ 323 (ZSC) at 324 G – 326 A and 326 D – 327 C.)

The interpretation concerned related to section 46(1)(a)(i) of the Labour Act 1992 which spells out one of the orders the District Labour Court may make where an employee has been dismissed unfairly.

It provides:

> "(a) in the case of an employee who has been so dismissed, issue an order in which such employer is ordered;
>
> (i) to reinstate such employee in the position he or she would have been, had he or she not been so dismissed."

In S v Winberg 1979 (3) SA 89 (A) Trollip, J. Asaid at 98 E-F:

> "I think that the starting point in considering this argument is to emphasize the general well-known principle that, if possible, a statutory provision must be construed in such a way that effect is given every word or phrase in it: or putting the same principle negatively, which is more appropriate here:
>
> "a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant…"
>
> per COCKBURN CJ in *The Queen v Bishop of Oxford* [1879] a QB 245 at 261. This dictum was adopted by Kotze JA in Attorney-General, *Transvaal v Additional Magistrate for Johannesburg* 1942 AD 421 at 436. The reason is, of course, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention correctly, and it will therefore not use any words that are superfluous, meaningless, or otherwise otiose. (see Steyn *Die Uitleg van Wette* 3rd ed at 16.)"

The difficulty I have with the restricted interpretation of the above provision is that it ignores the plain meaning of the phrase 'position he or she would have been' and makes those words meaningless. A comparison of the statutory provisions concerned in the cases my brother O'Linn AJA rely on shows the phrase used in the statute involved in, for example the English case is different from the phrase in s46 of our Labour Act. The following passage (at 667 E-G) from *Powell Duffryn Ltd v Rhodes* illustrates the point that the Ordinance there involved provided differently and cannot be relied on to interpret 'reinstatement' in this case:

> "LORD GODDARD, L.C.J: This case raises a very short point under the Essential Work (Coalmining Industry) Order, 1943. Powell Duffryn, Co,. Ltd. Being ordered by a national service officer to reinstate a collier whom they had dismissed for serious misconduct (the local appeal board having come to the conclusion that he had not been guilty of serious misconduct) offered him employment at the same wages in the same grade at another pit, and the man said that he would not work at the other pit. He claimed that he was entitled to be reinstated in his employment, and that that claim to reinstate meant being put back into the same position as that in which he was when he was dismissed. I think that "position" means, not only the grade in which he was working, but the place at which he was working.
>
> I do not think that it is the law that, if an employer engages a man to work for him at place. A, he can at his own will and pleasure order the man to work at place B. The man may agree to work at place B, but if his employment is to work for a master at a particular place, it is breach of contract on the part of the of master if he orders the man to work at another place, and if the man refused to go to the other place and he was dismissed on that ground, it would be a wrongful dismissal of the man. In those circumstances, it seems to me that the word "reinstatement" must mean that, if the employers are ordered to reinstate the man, they must put him back at the same place as that in which he was working before. I think that the justices came to a right decision, and the appeal fails."

The <u>'position a dismissed employee would have been"</u> imports all the benefits, including promotion increment in salary etc that would have normally accrued to him in the course of his employment had he not been dismissed. If it meant merely the position he was

employed, in the legislative would have said ‘reinstate such employee in the position he or she was before he or she was so dismissed.’

Obviously sub section 1(a)(i) must be read with subsection 1(a)(iii) which reads:

> “(iii) to pay, whether or not such employee is reinstated or re-employed, to such employee an amount equal to any losses suffered by such employee in consequence of such dismissed or amount which would have been paid to him or her had he or she not been so dismissed.”

In my opinion subsection 1(a)(iii) envisages a situation where the relationship between the parties (employer and employee) have soured so much or broken down so irretrievably that to order reinstatement or re-employment is not a viable option. The fact that paragraph (a)(iii) goes on to spell out what an employer may be ordered to pay a dismissed employee, even if reinstated, does not, in my opinion, render that paragraph superfluous simply because it would be a repetition of what paragraph (a)(i) entails. On the other hand to restrict the meaning of the wording ‘the position he or she would have been’ to mean ‘in the position (job) he or she was employed before he or she was so dismissed,’ does not answer the question: what position would he or she been had he or she no been so dismissed.

Finally if one uses, *inter alia*, *Manyora’s* case, supra as fortifying the restricted interpretation of the word reinstate, one must remember that the word ‘reinstate’ appeared in that case in an agreement between an employer and an employee, and it was in that context that McNally JA interpreted it.

In the *Manyora's* case McNally, JA referred to the South African Labour Relations Act 28 of 1956, where the word reinstatement ways used. He remarked:

> "The significance of that wording is that the South Africa legislative interpreted 'reinstatement' as having no inherent retrospective commotation. That is why specific provisions made to allow retrospective reinstatement. The decision of Nicholas AJA (as he then was) goes on to consider, at 798B-D the meaning of 'reinstate'. But perhaps because the point was obvious, he did not consider whether 'reinstatement' necessarily meant 'reinstatement with effect from the date of dismissal'. No doubt this was because the legislation with which he was dealing clearly did not use the word in that sense."

I do not see anything clearly ambiguous, as my brother O'Linn AJA said at page 12 of his judgment, in the wording to reinstate in the position in which he or she would have been had he or she not been so dismissed. I agree with Grogan when he states in his book "Work Place Law" at page 120:

> "In its ordinary meaning reinstatement suggests that the period of service between dismissal and resumption of service is deemed unbroken: re-employment that the employment contract is ended at the date of dismissal and resumed at the date of re-employment…"

The wording 'reinstate…in the position he or she would have been reinforces that interpretation. If reinstate has no retrospective commotation the legislature might well have used the wording "to employ such employee in the position in which he or she was before

he or she was so dismissed." The words 'reinstate …in the position he or she would have been', must be given a meaning by interpreting them as Gragan suggest in "Work Place Law".

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MTAMBANENGWE, A.J.A