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PRZYWRÓCENIE DO PRACY JAKO PRZEJAW *RESTITUTIO IN INTEGRUM*

Andriy Mydel
aspirant Kijowskiego Uniwersytetu Narodowego imienia Tarasa Szewczenki (Kijów, Ukraina)
ORCID ID: 0000-0001-8335-8304
an.mydel@gmail.com

Adnotacja. Artykuł dotyczy kwestii przywrócenia do pracy jako środka ochrony praw pracowników w przypadku bezprawnego zwolnienia w celu osiągnięcia *restitutio in integrum*. Najpierw autor analizuje historyczne pochodzenie pojęcia *restitutio in integrum*, a także współczesne znaczenie tego terminu. Szczególną uwagę poświęcono celom i zakresowi tego środka w kontekście stosunków pracy. Następnie autor analizuje procedurę przywrócenia do pracy jako ucieleśnienie *restitutio in integrum*. Autor analizuje teoretyczny mechanizm przywrócenia do pracy, a także jego konsekwencje prawne, biorąc pod uwagę status prawny stron. Ponadto w artykule podjęto próbę rozważenia argumentów ekonomicznych, społecznych i psychologicznych przemawiających za stosowaniem przywrócenia do pracy w przypadku bezprawnego zwolnienia oraz ich pogrupowania.
Słowa kluczowe: restitutio in integrum, metoda ochrony, ochrona praw pracowniczych, umowa o pracę, bezprawne zwolnienie, przywrócenie do pracy.

REINSTATEMENT AS A MANIFESTATION OF *RESTITUTIO IN INTEGRUM*

Andriy Mydel
Postgraduate Student
Taras Shevchenko National University of Kyiv (Kyiv, Ukraine)
ORCID ID: 0000-0001-8335-8304
an.mydel@gmail.com

Abstract. The article discusses the study of reinstatement as a remedy applied to protect employees' rights in case of unlawful dismissal in order to achieve *restitutio in integrum*. Firstly, the author investigates the historical origin of the concept of *restitutio in integrum* and its modern meaning. Specific attention is paid to the aim and scope of this remedy in the context of employment relationships. Then the order of reinstatement is examined from the perspective of it being the embodiment of *restitutio in integrum*. The author investigates the theoretical mechanism of implementing the order of reinstatement and the legal consequences thereof with regard to the parties' legal positions. In addition, the article presents an attempt to examine the economic, social, and psychological arguments regarding the application of reinstatement in case of unlawful dismissal and to cluster there arguments into several groups.
Key words: restitutio in integrum, legal remedies, protection of labour rights, employment contract, unlawful dismissal, reinstatement.

ПОНОВЛЕННЯ НА РОБОТІ ЯК ПРОЯВ *RESTITUTIO IN INTEGRUM*

Андрій Мидель
аспірант Київського національного університету імені Тараса Шевченка (Київ, Україна)
ORCID ID: 0000-0001-8335-8304
an.mydel@gmail.com

Анотація. У статті розглядаються питання поновлення на роботі як засобу захисту прав працівників у разі незаконного звільнення з метою досягнення *restitutio in integrum*. Спочатку автор досліджує історичне походження поняття *restitutio in integrum,* а також сучасне значення вказаного терміну. Особливу увагу приділено цілям та обсягу цього способу захисту в контексті трудових відносин. Згодом розглядається порядок поновлення на роботі як втілення *restitutio in integrum*. Автором досліджується теоретичний механізм реалізації поновлення на роботі, а також його правові наслідки з урахуванням правового становища сторін. Крім того, у статті зроблено спробу розглянути економічні, соціальні та психологічні аргументи щодо застосування поновлення на роботі у разі протиправного звільнення та згрупувати їх.
Key words: restitutio in integrum, спосіб захисту, захист трудових прав, трудовий договір, протиправне звільнення, поновлення на роботі.

Introduction. Employment relationship, as a rule, plays an important role in people's lives, serving as a main source of income and giving the employees a framework to implement their talents and skills. Unlawful dismissal breaks this relationship and may cause severe consequences to employees. Thus, emerges the idea of putting an employee in the position as if there was no unlawful dismissal, i.e., the idea of application of *restitutio in integrum* to an unlawfully dismissed employee.

This paper aims to analyze the remedy of *restitutio in integrum* in labour law on the example of order for reinstatement in case of unlawful dismissal. Firstly, the concept of reinstatement will be analyzed more precisely, pointing out its origin and modern meaning. Then the theoretical notion and legal nature of reinstatement will be investigated (as the manifestation of *restitutio in integrum*) as well as the impact of this remedy on the legal position of the parties to an employment contract. Finally, the article also explores and systemizes practical reasons and arguments *pro* and *contra* reinstatement.

The issue of reinstatement has been analyzed in the literature from the two main perspectives. On the one hand, the practical implications of reinstatements are discussed and disclosed. Reinstatement is said to restrict an employer's freedom to discretionally manage human resources. This issue has been quite aptly outlined by G. Davidov and E. Eshet: "Employees need security; they deserve protection from arbitrary dismissals. At the same time, employers need flexibility; they should be given freedom to make managerial decisions concerning dismissals." (Davidov & Eshet, 2015: 191). Since an employee is a weaker party, both within the labor relations and in the labor market, the legislation aims to eliminate the imbalance in the parties' bargaining power and to protect the interests of employees (Elias, 2018: 870; Pylypenko, 1999: 11). On the other hand, reinstatement has been theoretically analyzed as a manifestation of the protective function of labour law, in particular, of its restorative (compensatory) subfunction (Scherbyna, 2009: 10-13; Vavzhenchuk, 2021).

This research is based on the legislation, court practice and scientific achievements regarding the concept of *restitutio in integrum* and the issues of admissibility, effectiveness, conditions for reinstatement as a remedy for unlawful dismissal.

The research is carried out within the framework of the laws of thought. Methodologically this study is based on the general scientific methods of cognition such as analysis, synthesis, deduction, abstraction. In the part of special-scientific methods, the comparative-legal, as well as the formal-legal method, were used.

Results and discussion.

The paper is divided into two parts. The first is devoted to the analysis of the concept of *restitutio in integrum* in its historic origins and modern understanding. It will demonstrate the aim and scope of *restitutio in integrum*. The second part investigates reinstatement in case of unlawful dismissal as the embodiment of *restitutio in integrum*. The study will explicitly explore theoretical model of reinstatement as well as the practical implications of this remedy.

1. The concept of restitutio in integrum

1.1. Historical origins of restitutio in integrum

The concept of *restitutio in integrum* as a legal remedy as well as the term denominating this remedy was developed within the Roman jurisprudence and Roman legal and political system (Lambiris, 1987: 23). Roman *restitutio in integrum* is traditionally seen as an extraordinary remedy (*auxilium*) "granted at the request of a person who had suffered an inequitable loss or was threatened by such a loss" (Berger, 1953: 682). The following situation may serve as an example of a case when the remedy of *restitutio in integrum* found its application: A owes B 100 by stipulation; A was adopted by C due to which A's obligation is destroyed (Schulz, 1961: 68). In order to restore the equity the praetor restores A's obligation by praetor's decree and grants to the creditor specific *actio utilis* against A (Schulz, 1961: 68-69).

In modern science exist two major approaches towards the understanding of Roman *restitutio in integrum.* Under the first approach, which may be called 'traditional', *restitutio in integrum* is exclusively limited to the process before the praetor within which the praetor decides whether the restitution may be granted and also determines the type of its implementation (Kaser, 1977: 102). This means that *restitutio in integrum* is understood as such a remedy through which the praetor decrees the former legal position (Kupisch, 1974: 96) (as in the example above, the praetor decrees that the former A's obligation to pay 100 to B shall be restored). What is extremely important with regard to this study is that such an approach limits the effect of *restitutio in integrum* only to restoring *legal position*. As Schulz summarizes: because *restitutio in integrum* is limited only to the decree of a magistrate, "only the restitution of a legal status can come in question since facts cannot be undone by decree" (Schulz, 1961: 68). Naturally, it also means that *restitutio in integrum* cannot restore the factual position of an injured party.

The second approach, developed by the German scholar Berthold Kupisch, broadens the concept of *restitutio in integrum*. Kupisch suggests that *restitutio in integrum* was not limited only to the decreeing by the praetor of the former legal position; *restitutio in integrum* also included the restitution by a judge (the so-called 'judicial restitution') (Kupisch, 1974: 9). The judicial restitution was based on the *formula arbitratia* granted by the praetor. A specific structure of the *formula arbitraria* allowed the respondent to avoid condemnation if respondent restitutes the claimant. However, it was the judge who assessed whether the concrete actions taken by the respondent were sufficient in order to restitute the claimant; thus, the judge practically determined the content of restitution, i.e. judge was able to prescribe to the respondent the actions the latter shall take to avoid condemnation (Kaser, 1977: 103). The crucial is that the design of the judicial restitution allowed the judge to prescribe the respondent to take the factual actions, which means that the *restitution of a factual position* of the injured party is possible (in contrast to the traditional approach) (Kaser, 1977: 105).

Thus, the Roman *restitutio in integrum* is a special remedy aiming to restore the position of a person who suffered or was threatened to suffer an inequitable loss. Whilst according to the traditional approach *restitutio in integrum* could only restore the legal position (legal status) of the injured party, under the approach of Berthold Kupisch this remedy was also capable of restitution of the facts (of the factual position).

1.2. Modern concept of restitutio in integrum

The concept of *restitutio in integrum* has found its widespread application in the practice of the European Court of Human Rights (the ECHR). The content of this remedy is closely related to the provisions of Article 41[1] of the European Convention on Human Rights (the Convention). Article 41 of the Convention empowers the ECHR to award just satisfaction to the injured person and lists the conditions under which the ECHR may condemn *just satisfaction* for the benefit of an applicant. These conditions (according to the wording of Article 48) are the following: (i) there is a violation of the Convention and (ii) the internal law of the country concerned allows *only partial reparation* to be made. This second condition and more specifically the meaning of the term "*reparation*" constitutes a particular interest to understand the concept of *restitutio in integrum*.

The meaning of reparation, the lack of which gives the ECHR the authority to afford just satisfaction under Article 41 of the Convention, was examined in the Vagrancy cases (*De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, 1972). The ECHR attempts to overcome the narrow interpretation of Article 41 of the Convention and to expand the hypothesis within which the ECHR is authorized to afford *just satisfaction*. According to the literal interpretation of this norm, *just satisfaction* is allowed only when (i) *reparation* is possible, but (ii) the internal law of the country concerned precludes it from being done. The *reparation* is possible, according to this decision, in cases where "the nature of the injury would make it possible to wipe out entirely the consequences of a violation" (*De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, 1972). The ECHR then asks whether *just satisfaction* is allowed in cases when *reparation* is impossible. And the crucial is that in order to denote *reparation* ECHR uses the term "*restitutio in integrum"* as its synonym. Thus, two important conclusions can be made. Firstly, according to the ECHR, *restitutio in integrum* means wiping out entirely the consequences of a violation. Secondly, the ECHR clearly states that *restitutio in integrum* can be impossible.

It should then be asked: how *restitutio in integrum* (i.e. wiping out entirely the consequences of a violation) shall be interpreted so it could be impossible? Or, in other words, what are the consequences which are impossible for the law to wipe out? The obvious and reasonable suggestion is to interpret the consequences as *factual consequences*, as opposed to the normative (legal) consequences. Only factual consequences, which do belong to the empirical reality, might be of such a nature that they cannot be reverted.

1.3. Consequences (interests) to be taken into account for the purpose of *restitutio in integrum* in the context of employment relations

Above it was stated that, according to one of the approaches, Roman *restitutio in integrum* could involve the restoration of facts which constituted the interest of the claimant (injured party). Then we have demonstrated that the ECHR interprets *restitutio in integrum* as a remedy which is aimed at wiping out the factual consequences of the violation (if that is possible). The next step is to determine which factual consequences of the violation are intended to be restored by virtue of *restitutio in integrum*. This issue can also be discussed in another way. If a legal remedy is intended to wipe out certain facts, then these facts as well as the injured party's interests embodied in these facts may be seen as having been recognized by a law. If the law says that it will provide a tool to revert the specific facts, then it means that the law "sees" these facts and obviously gives them specific importance.

We will discuss the facts and interests which the law acknowledges in connection to *restitutio in integrum* in the context of unlawful dismissal. Though the Convention does not directly deal with unlawful dismissal issues, due to its purposive and evolutive approach to interpretation, the ECHR has made a number of conclusions concerning the right to work (O'Connell, 2012). This article will not discuss in detail all implications that unlawful dismissal might have on the rights protected by the Convention. Neither do we intend to analyze all consequences of unlawful dismissal with regard to the (former) employee which are acknowledged by the ECHR. On the contrary, the goal is to generally outline the existing approach to the question concerned.

In the case of Kyriakides v. Cyprus the applicant, who formerly served as a senior police officer, was dismissed because of an accusation that police officers under his command allegedly tortured suspects (*Kyriakides v. Cyprus*, 2008). The ECHR in its decision explicitly states that such a dismissal has harmed the applicant in many different ways: his good name and his reputation in the eyes of society were injured, "significant injury had been caused to the applicant's moral and psychological integrity" as well as he suffered other severe defamatory consequences (*Kyriakides v. Cyprus*, 2008). The ECHR has found a causal link between the dismissal and these consequences and awarded a monetary compensation to the applicant.

In the case of Rainys and Gasparavičius v. Lithuania the applicants were dismissed on the ground that in the past they have served as the officers of KGB (USSR State Security Committee) (*Rainys and Gasparavičius v. Lithuania*, 2005). Because the applicants were seen as "former KGB officers" they have been "deprived of the possibility to seek employment in various private-sector fields" (*Rainys and Gasparavičius v. Lithuania*, 2005). The ECHR in its judgement has acknowledged the existence of pecuniary damage incurred by the applicants because of the loss of the source of income and harming their careers (*Rainys and Gasparavičius v. Lithuania*, 2005).

The cases mentioned above show that the circle of interests and facts that the ECHR acknowledges and takes into consideration is quite broad. It includes, non-pecuniary interests such as employee's moral and psychological integrity, good name and his reputation (as in Kyriakides v. Cyprus) as well as monetary consequences of unlawful dismissal such as loss of source of income and harm to employee's career prospective (as in Rainys and Gasparavičius v. Lithuania).

1.4. The aimed effect of restitutio in integrum with regard to the unlawful dismissal

We have showed that according to modern point of view *restitutio in integrum* is such a remedy that is aimed not only at restitution of an injured party's legal position, but also is designed to restitute its factual position.

[1] In the original version of the Convention – Article 50.

According to the ECHR practice the broad list of factual consequences of an unlawful dismissal shall be taken into consideration when examining dismissed employees' claims.

2. Reinstatement in case of unlawful dismissal from the point of view of *restitutio in integrum*

2.1. The theoretical model of reinstatement

Reinstatement can be briefly defined as a labour law remedy which "restores the contractual position between the employer and the employee as if it had never been broken" (Kubjana & Manamela, 2019: 331). At the time the decision to reinstate the employee is adopted, the employment contract is already terminated. The very concept of reinstatement speaks in favor of the fact that the employment contract and regulatory relationship arising out of it have ceased to exist. Indeed, if the employment contract and relationships existed at the time the competent authority decided to reinstate the employee, such a decision would be superfluous. It only makes sense to apply reinstatement when the relationship has ended. Thus, the competent authority by reinstating the employee restores the contractual employment relationship between the parties (Vavzhenchuk, 2021: 312). In other words, reinstatement "brings back to life" the employment relationship. Taking things in such a way, the reinstatement can be considered as an embodiment of *restitutio in integrum*.

Our next step is to find out how, from the point of view of legal dogmatics, the restoration of the contractual employment relationship is being processed. Logically, only two approaches are possible: the decision to reinstate the employee either creates a new employment relationship with the same subject, between the same parties and on other identical terms or renews the existing relationship. The first approach leads to the conclusion that the court decision to reinstate the employee serves as the legal basis for the employment relationship. This means that such an employment relationship is produced not by the employment contract embodying the will of the parties, but by the external act. Theoretically, this would mean that the court forces the employee to work for the particular employer and forces the employer to pay him/her for his/her services. The court decision, thus, "replaces" the employment contract, it performs the function of the employment contract. The second approach anticipates that the restoration of regulatory labor relations occurs by "eliminating" the fact that blocked their further existence. It means that the employer's decision to dismiss the employee becomes the subject matter of the dispute. By recognizing the employer's decision as void (as having no legal effect) the court renders the employment contract uninterrupted. Contrary to the first approach, the employment contract remains the basis for the employment relationship. At the same time, the court invades into employer's human resources management making employer's decisions subject of state's overview.

2.2. Influence of reinstatement on the parties' legal positions

The construction of the employment relationship incorporates the employee's obligation to perform specific work for the employer's benefit. By restoring the employment relationship, the court, naturally, restores also this employee's obligation. The employee's request to protect his/her rights, thus, results in the restoration of employee's duty to work: reinstatement presupposes coercion to work.

This issue is of particular importance for the legal system, which considers reinstatement as the only remedy available to the unlawfully dismissed employee. Under Art. 235 of the Labour Code of Ukraine in case of unlawful dismissal, the employee shall be reinstated in a previous job by the competent body. It should be emphasized that *the law requires the employee to be reinstated*. This model, therefore, looks quite rigid for the employee. The employee has two alternatives: either not to seek protection at all and be left without any compensation, or to be reinstated, i.e., obliged to perform work for the employer's benefit.

By reinstating the employee, the court also condemns the employer to pay wages, as dictates the nature of the employment relationship. But this does not exhaust the actions the employer is compelled to take in order to fulfil this decision. The employer is also forced to re-hire the employee, create necessary working conditions and complete all the formalities involved.

2.3. 'Practical' arguments concerning reinstatement

The literature extensively investigates and reveals the practical advantages and disadvantages of applying reinstatement as a remedy for unlawful dismissal of the employee. The word "practical" in this regard refers to economic, social, psychological considerations concerning the benefits or disadvantages of reinstatement from both employees' and societies' perspectives. Summarizing the arguments made in the literature, we believe it would be fruitful to divide them into the following groups of arguments "pro" and "contra" applying reinstatement as a measure to protect employees' rights.

2.3.1. Arguments *pro* reinstatement

1. Reinstatement as a complete remedy. Compared to other remedies granted by the law to an employee in case of unlawful dismissal, it is argued that "reinstatement has the advantage of being a complete remedy" (Flaherty, 2015: 108). This means that reinstatement can compensate for all the losses caused to the employee by unlawful dismissal. Usually, the income of employees and their expectations for the future are based on the expectation that their employment will continue (Brodie, 1998: 38). This loss, although of a material nature, is difficult to assess in monetary terms. Monetary valuation becomes fundamentally impossible when it comes to losses of a non-material nature, such as damage to reputation or social status, mental harm, etc. As an example, "people sometimes have an interest in retaining a specific job, in which they have invested and where they have created personal and professional contacts. Perhaps they rely on this job for personal fulfillment, satisfaction and so on." (Davidov, & Eshet, 2015: 178). "Damages would be inadequate because they could not compensate for the loss of pleasure and satisfaction in doing a more demanding job" (Carty, 1989: 465). Another example of such non-material losses is

that after dismissal the employee may be perceived as a trouble-maker and therefore the employee will find it more difficult to find a new job (Weisenberger, 1988: 575-576).

In other words, it is argued that reinstatement as fully and accurately as possible returns the employee to the situation that existed before unlawful dismissal occurred, thus, achieves *restitutio in integrum*. In this regard, reinstatement is considered to be the opposite of damages (monetary compensation), awarding of which does not allow to fully cover and compensate for the violated interests of the employee (Carty, 1989: 449-468).

2. The social effects of reinstatement. Reinstatement promotes employment, eliminates unemployment and, consequently, has a positive economic and social effect. Thus, if the loss of income due to dismissal is prolonged, it might deprive the employee and his or her family of the necessities of life (Kola, 2015: 389). Also, as R. Weisenberger points out, reinstatement avoids social and economic waste (Weisenberger, 1988: 575-576) associated with a certain period of unemployment. In addition, it is stated that reinstatement can be very useful in protecting union members, who, due to the specifics of their activities, should have some guarantees against biased actions of the employer, including dismissal (Inshyn et al., 2021: 228).

2.3.2. Arguments contra reinstatement

1. Loss of mutual trust. According to the common approach, under parties to employment contract are obliged to "behave towards each other in a manner consonant with a relationship of mutual trust and confidence" (Brodie, 1998: 40). Dispute between the parties on whether the dismissal was lawful usually violates this personal connection, which, in turn, raises some doubts about the practical possibility of further existence of the employment relationship between the parties. From this point of view, the decision of the competent authority to reinstate the employee, although will restore the legal relationship itself, will not restore mutual confidence and trust immanently prescribed to the employment relationship. This means that a forcibly restored relationship may be "defective" because it will lack an element of trust. Therefore, it can be concluded that forced reinstatement at work is often considered to be a futile exercise (Ashgar, 2004: 53).

Based on this argument, legislation of some counties does not recognize reinstatement as a universal remedy for unlawful dismissal. For example, South African labor law provides for cases where reinstatement is not considered as an appropriate remedy. In particular, it is a situation in which the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable (Kanamugire & Chimuka, 2014: 261).

At the same time, some scholars deny the validity of this argument. G. de N. Clark notes that the hypothesis (doctrine) on which it is based is false: "all these doctrines of the contract of service as personal, non-assignable, unenforceable, and so on, grew up in an age when the contract was still frequently a "personal relation" between a farmer or the master of a small workshop and his servant." (Clark, 1969: 534).

2. Fulfilling the decision on forced reinstatement is both costly and difficult. In practice, reinstatement involves the employer taking a set of actions to return the employee back to work under the same terms and conditions that had existed before the unlawful dismissal occurred. These actions, as well as the continued existence of the employment relationship, need significant contribution on the part of the employer. It is also dependent on the employer's interest (in a subjective sense) in further cooperation with the employee. At the same time, actions needed to reinstate the employee include much more active participation of the coerced party than, for example, the seizure of the thing that is the subject of the dispute. Given the above, implementation of such a decision might require constant supervision by the competent authority (Lando & Rose, 2003: 15, 19). This is, of course, costly and requires significant human and financial resources.

2.4. Assessment of practical arguments concerning reinstatement

The above brief description shows that both the arguments *pro* and *contra* reinstatement are convincing. At the same time, none of them may be regarded as absolute, which would fully assert the necessity or impossibility of reinstatement in terms of its efficiency and practical feasibility.

Assessing the above arguments, we should first of all pay attention to the fact that the focus is clearly shifted from the law itself towards the social and economic efficiency of the reinstatement, towards its impact on social reality. The issue is discussed in terms of practical (social, economic, psychological) feasibility of applying this remedy. Such a point of view embodies the transition from universal to individual, from a formal plane to a plane of facts. Within this approach the law itself is described in functional terms - as the tool to achieve appropriate social, economic, psychological effects. However, the essence of the legal construction itself remains in the shadows and out of context. In this regard, R. Knegt should be cited: "The increased influence of economic perspectives in the political discourse regarding labor relations has put pressure on labor law's project of realizing justice" (Knegt, 2018: 512).

Conclusions. Summarizing the results of the study, we would like to highlight the following conclusions. According to the modern approach *restitutio in integrum* is a remedy aimed not only at the restitution of an injured party's legal position but also is designed to restitute its factual position. In the context of unlawful dismissal such consequences as moral harm to a dismissed employee, its defamatory effect, loss of a source of income and harm to the employee's career prospects are considered.

The remedy reinstating the dismissed employee can be analyzed as the embodiment of *restitutio in integrum.* From this point of view, reinstatement involves the restoration of labour relations between the parties. However, the exact theoretical mechanism thereof is unclear. Either reinstatement creates new legal relationships or it restores the previous legal relations. According to the first approach court's decision to reinstate the employee, by its function, replaces the employment contract. The second approach foresees that the court's decision cancels the employer's decision to dismiss the employee *ab initio.*

Reinstatement can also be analyzed from the perspective of its practical implications on the employee's and employer's factual interests and positions. These arguments are based on economic, social, and psychological factors. It should be concluded that there are both reasons in favor of applying reinstatement and against this remedy. At the same time, neither the arguments pro nor the arguments contra reinstatement are absolute and do not give final certainty on the necessity or impossibility of reinstating the employee in order to achieve *restitutio in integrum*.

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