

EMPLOYMENT

Severance pay entitlement of an employee who continues to work after he reaches the contractual retirement age

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Severance pay entitlement – Issue

Whether an employee, who continued employment with the same employer after he reached the contractual 'retirement age', was entitled to severance pay for all his years of service with the employer.

Summary

An employee who had worked for four years after he was due to retire was deemed to have worked for a continuous period. The employee was found to be entitled to severance pay for the entire period of employment since his initial employment date.

Labour Appeal Court – Facts

This was the issue considered by the Labour Appeal Court ("**LAC**") in the case of *Barrier v Paramount Advanced Technologies (Pty) Ltd [2021] 7 BLLR 643 (LAC)*. In this case, the employee worked at the respondent for 28 years, reached the retirement age of 65 but continued to work, uninterrupted, for a further 4 years. He was then voluntarily retrenched in 2017. As part of the voluntary severance package, the respondent offered one week's remuneration for every completed year of service as well as one weeks' salary for incomplete years of service. This offer was accepted by the employee.

The employee's severance pay was, however, calculated only taking into account his employment with the respondent for the years of completed service after the date of his retirement (i.e., 4 weeks). When the employee queried this calculation, the employer informed him that he had officially retired in 2013 in terms of his employment contract and therefore, his years of service before that were not considered when calculating his severance pay.

The employee accepted the severance package subject to the reservation that the calculation of the severance pay was incorrect. A dispute was referred to the Commission for Conciliation, Mediation and Arbitration ("**CCMA**"), in relation to the calculation of severance pay.

At the CCMA, the arbitrator had to consider whether the eventual termination of the employee's employment was a retrenchment and a dismissal as contemplated in terms of section 41(2) of the Basic Conditions of Employment Act 75 of 1997 ("**BCEA**").

The arbitrator did find that the employee had been dismissed. The arbitrator found, further, that even though the employment contract provided for the employee's retirement at the age of 65, the employee did not retire at that age but continued to be employed by the respondent until his retrenchment.

The arbitrator referred to section 84(1) of the BCEA which outlines the formula for determining the length of an employee's employment with the same employer, and provides, essentially, that a break in the employment of less than one year is 'inconsequential.' It was accordingly

held that there was no break in the employee's employment with the respondent when he continued his employment after he reached the retirement age and therefore, the employee was entitled to 33 weeks' severance pay.

On review, the Labour Court ("LC") set aside the arbitrators award and ruled that the employee was entitled to severance pay based only on his years of service after his retirement. The LC found that when the employee reached the retirement age his contract terminated by effluxion of time. While he continued working this constituted a new employment relationship. The LC then turned to calculating the severance due. In doing so they relied on the decision in *Rogers v Exactocraft (Pty) Ltd (C 1142/10) ZALCCT 16 April 2014* ("**Rogers**" case) which had held that the period before retirement should not be taken into account when calculating severance pay. An employee who received (or was entitled to receive) retirement benefits could not also obtain severance pay. The LC held that there was no reason to deviate from the position in *Rogers* and that the period before retirement should not be considered when calculating the employee's severance pay in accordance with section 41(2) and section 84 of the BCEA. Therefore, it was concluded that the employee was only entitled to 4 weeks' severance pay, being one week per year of service after retirement.

LAC's evaluation

On appeal, the LAC had to answer the question of whether the employee was entitled to severance pay for the full period of service.

The LAC focused on the analysis and interpretation of section 41(2), section 84(1) and section 84(2) of the BCEA. Each section provides as follows:

- **41(2)** – "*An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936) severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.*"
- **84(1)** – "*For the purposes of determining the length of an employee's employment with an employer for any provision of this Act, previous employment with the same employer must be taken into account if the break between the periods of employment is less than one year.*"
- **84(2)** – "*Any payment made or any leave granted in terms of this Act to an employee contemplated by subsection (1) during a previous period of employment must be taken into account in determining the employee's entitlement to leave or to a payment in terms of this Act.*"

The LAC noted that section 41(2) of the BCEA is unambiguous and provides that if employees are dismissed for operational reasons they are entitled to severance pay equal to one week's remuneration for each completed year of service with the same employer. While the phrase 'continuous service' is not defined in the BCEA, section 84(1) provides that an employee's service with the employer is considered to be 'continuous' if there was a break of service of less than one year. Therefore, Section 84(1) effectively provided that even if there is interruption in the course of the employment, for the purposes of determining the length of service, the break or interruption is inconsequential if it is less than one year. What is important to note is that the reason for any break in service is not relevant.

The LAC found that the entitlement of an employee, who has had more than one period of employment with an employer, to severance pay, requires the application of section 84(1) as well as 84(2).

The LAC did not agree with the LC's reliance on the *Rogers* case and stated that it was first important to consider whether there was a 'break' in the employee's employment before it was terminated (many a break of more than one year) on retirement and the following four years of employment after his retirement. Second, whether he was entitled to severance pay for that (earlier) period. Both questions had to be answered with reference to the facts of the case.

In view of the above the real issue in this case was the application of section 84(2). Section 84(2) obliges an employer to consider 'any payment' made to an employee in the previous period of employment with the employer. In other words, just because an employee has been working for a set period does not automatically entitle him to one week's severance for every completed year of service. This is because in certain circumstances it may be necessary to consider a payment received.

The section does not provide for any criteria that may be used to determine which payments should or should not be considered when determining the employee's entitlement to severance pay. The LAC noted that the "absence of criteria, norms or guidelines to assist the determiner not only introduces a risk of possible arbitrariness or irrationality but saddles the determiner with a very difficult task". The LAC does note that "the fact that an employee was paid a wage or salary by the employer in the course of his employment with the same

employer does not disentitle the employee from receiving the statutory severance pay...and the same may be said regarding the payment of other bonuses and allowances". In addition, in the ordinary course the payment of pension or provident fund benefits (i.e., retirement benefits) does not disentitle an employee to severance (in the present case the employee had not claimed retirement benefits, a further distinguishing feature from the *Rogers* decision). The LAC does note, as an aside, that if the employee had previously been retrenched and had been paid severance then this amount should be considered (otherwise there would be a double payment).

The LAC held that the employee continued working 'seamlessly' from the date that he reached the retirement age until his retrenchment in 2017. The employee's employment was therefore uninterrupted. In addition, he had received no payments that would justify a deduction from the payment of one week for every completed year of service. He was, therefore, entitled to 33 weeks' severance pay, as the CCMA had held.

Importance of the case

A break in employment of less than a year does not affect the calculation of an employee's length of service, regardless of the reason for the break. The length of service is not the only factor which determines what the quantum of a severance package will be – prior payments of severance pay, paid earlier in the employee's employment with an employer may be deducted from the final severance payment.

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by Jacques van Wyk, Director; Andre van Heerden, Senior Associate; and Lukrisha Ramadu, Candidate Attorney



Andre van Heerden

Director

[View Profile](#)



Jacques van Wyk

Director

[View Profile](#)