

The South African Institute of Chartered Accountants
Private Bag X32
Northlands
2116

Our Reference	A Patel
Account Number	02036216
Your Reference	T Jackson
Direct Line	+27 11 562 1107
Direct Telefax	+27 11 562 1607
Direct Email	aadil.patel@cdhlegal.com
Date	9 October 2020

Attention: Tonia Jackson
By Email: ToniaJ@saica.co.za

Dear Tonia

SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS / TRAINEE SEVERANCE PAY

- 1 We refer to your email dated 10 June 2020 requesting an opinion on severance pay payable to trainees who may be retrenched for reasons resulting from the Covid-19 pandemic, and the drafting of a guideline for use by South African Institute of Chartered Accountants ("**SAICA**") training offices on severance pay for trainees.
- 2 This note deals with severance pay. We will send to you the draft guidelines soon.

BACKGROUND

- 3 SAICA accredits training offices and provides guidance to training offices on matters related to the training programme. Although SAICA does not ordinarily involve itself in employment related matters, it plans to assist offices during this uncertain time.
- 4 Due to the Covid-19 lockdown some training offices¹ have had to retrench trainees². The trainees are employees, usually employed on a fixed term basis by SAICA-accredited training offices that are their employers.
- 5 The training offices have also requested SAICA to advise on severance payable in instances where trainees may be retrenched. This also requires consideration of whether trainees may be retrenched.

EXECUTIVE SUMMARY

¹ Training offices are employers who employ individuals and train them to become chartered accountants.

² Trainees are employees who are employed, generally for a fixed term period by training offices.

CHAIRPERSON TG Fuhrmann **CHIEF EXECUTIVE OFFICER** B Williams **CHIEF FINANCIAL OFFICER** ES Burger

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EXECUTIVE CONSULTANTS: AC Alexander RD Barendse VMM Cadman M Chenia HS Coetzee PJ Conradie N Hancock J Latsky NW Muller J Nesor FT Newham JM Witts-Hewinson

CONSULTANTS: A Abercrombie JMA Evenhuis[™] Prof A Govindjee JH Jacobs EJ Kingdon FF Kolbe M Kraus Q Moeletsi S Naidoo S Parbhoo C Pepermans J Sweet H Vrey

SENIOR ASSOCIATES: RS Alho KF Anderson A Bezuidenhout KA Biddulph C Bodenstien JL Botha CF Brockman JC Cameron LY Coffee E Cornelius BP Cripps N Dhana DV Durand C Dutilleux T Erasmus NK Fletcher RA Geswindt AJ Gilliam K Govindsamy A Govuza B Hayath GT Howard SJ Jamieson TC Jegels SM Kelly N Loopoo AW MacPherson MP Manaka B Mangale V Manko S Mcetywa V Moodaley W Murray Z Ngakane VT Ngcobo BS Nhlapho AL Pereira J Roberts J Strydom KB Tlhabanelo YA van Leeve M Werner ER West K Weyers CA Wood

CLIFFE DEKKER HOFMEYR SERVICES PROPRIETARY LIMITED DIRECTORS: GC Badenhorst ES Burger JA Cassette AB Hoek MW Lington R Mouton B Williams

[#]British [™]Dutch [§]Cape Town Managing Partner

- 6 Trainees are employees. Therefore, they may be retrenched subject to the training office complying with the provision of the Labour Relations Act 66 of 1995 ("**LRA**").
- 7 An employee working on a Fixed-Term Contract ("**FTC**") shorter than 24 months will not be entitled to severance pay insofar as they are regulated by section 198B of the LRA. This employee is someone who earns below the threshold. The threshold is R205 433.30 per annum. In terms of section 198B of the LRA, the conclusion of a FTC will be justified if the employee, amongst other things -
- "is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession."*
- 8 If clause 7 is not applicable, an employer must pay one week's severance pay per completed year of service. If an employee has not worked for longer than 12 months, the employee may not receive severance pay.
- 9 If the employer's policy provides for a more favourable severance payment, that policy must be adhered to and cannot be ignored.
- 10 The Severance Pay Guideline is attached as Annexure "**A**".

THE LAW

- 11 Section 213 of the LRA defines operational requirements as follows –
- "operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer."*
- 12 Section 189 of the LRA concerns dismissals based on operational requirements and in terms of section 189(3), provides as follows -
- "(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to –
- ...
- (f) the severance pay proposed"
- 13 Further, in terms of section 198(10)(a) of the LRA –
- "(10)
- (a) An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act."
- 14 These provisions of section 41 of the Basic Conditions of Employment Act, 75 of 1997 ("**BCEA**") are instructive –
- "41 Severance pay**
- (1) For the purposes of this section, 'operational requirements' means requirements based on the economic, technological, structural or similar needs of an employer.
- (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 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.

...

- (5) *The payment of severance pay in compliance with this section does not affect an employee's right to any other amount payable according to law.*
- (6) *If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to-..."*

15 Severance pay is calculated in accordance to these provisions in section 35 of the BCEA -

"35. Calculation of remuneration and wages.—

- (1) *An employee's wage is calculated by reference to the number of hours the employee ordinarily works.*
- (2) *For the purposes of calculating the wage of an employee by time, an employee is deemed ordinarily to work—*
 - (a) *45 hours in a week, unless the employee ordinarily works a lesser number of hours in a week;*
 - (b) *nine hours in a day, or seven and a half hours in the case of an employee who works for more than five days a week, or the number of hours that an employee works in a day in terms of an agreement concluded in accordance with section 11, unless the employee ordinarily works a lesser number of hours in a day.*
- (3) *An employee's monthly remuneration or wage is four and one-third times the employee's weekly remuneration or wage, respectively.*
- (4) *If an employee's remuneration or wage is calculated, either wholly or in part, on a basis other than time or if an employee's remuneration or wage fluctuates significantly from period to period, any payment to that employee in terms of this Act must be calculated by reference to the employee's remuneration or wage during—*
 - (a) *the preceding 13 weeks; or*
 - (b) *if the employee has been in employment for a shorter period, that period."*

16 Section 41(2) of the Basic Conditions of Employment Act 75 of 1997 ("**BCEA**") requires an employer to pay at least one week's remuneration for each completed year of continuous service to an employee who is dismissed for reasons based on the employer's operational requirements.

17 In terms of s 41(4), an employee who unreasonably refuses to accept the employer's offer of alternative employment is not entitled to severance pay in terms of subsection (2).

18 The import and purpose of s 41(4) is clear: an employee may not insist on being paid severance pay where he or she unreasonably refuses to accept the employer's offer of alternative employment.³ There are compelling reasons the legislature saw fit to limit the payment of severance pay in this manner. Not only does it incentivise an employer to provide alternative employment, but it also seeks to limit job losses on retrenchment.⁴

CASE LAW

³ **Pretorius v Rustenburg Local Municipality & Others** (2008) 29 ILJ 1113 (LAC); also see **Edward Lemley v CCMA & Others** Case no: PA6/2018 (not reportable).

⁴ **Irvin & Johnson Ltd v CCMA & Others** (2006) 27 ILJ 935 (LAC).

- 19 The Labour Court in **Rogers v Exactocraft (Pty) Ltd**⁵ defined "severance pay" as follows:
- "[32] As explained in the article by Holzmann and others, severance pay is both a form of compensation for a no-fault termination of the contract of employment as well as recognition of the employee's 'investment' in the employer's enterprise. "
- 20 This definition was elaborated on further in **Whall v Brandadd Marketing**⁶ where stated that severance pay is a form of compensation for employees who fall victim to economic forces and losing employment.
- 21 The case of **EHCWAWU o.b.o. Tshabalala and Others v M & P Bodies CC**⁷ came before the Labour Court as a referral in terms of section 191 of the LRA after seven employees were retrenched by the Respondent on in April 1997. The respondents sought reinstatement and compensation. The Labour Court held:
- "[24] **In terms of s196 of the Act, an employer is obliged to pay retrenched employees a severance package calculated in accordance with its provisions. Such severance pay is, therefore, legally due to retrenched employees, whether or not they contest their retrenchment.**"
- 22 Section 189(2) of the LRA requires an Employer to consider alternatives short of dismissal. In **Communion Union & another v Telkom SOC Ltd & Others**⁸ the Labour Appeal Court found that Voluntary Severance Packages constitute a possible alternative to forced retrenchment and by consulting employees on such Voluntary Severance Packages does not place a stumbling block on the consultation process. In the event that the employer enters into Voluntary Severance Packages with employees, the employer can consider offering employees more than the statutory severance amount as an *ex gratia* payment.
- 23 The amount of severance payable to an employee and what is meant with continuous service was dealt in the matter of **Paramount Advanced Technologies (Pty) Ltd v Barrier & Others** wherein the employee had continued to work for the employer after retirement. Some four years later, he accepted a VSP package during a retrenchment process. The Court found that the period before the employee's retirement could not be considered for purposes of determining severance pay, and he was therefore only entitled to severance pay for the period he had worked after his retirement.
- 24 A fixed-term employee cannot be retrenched before the expiry of his/her fixed-term contract if there is no termination clause provided for within the contract stipulating that the contract could end before the expiry date due to operational requirements. In the case of **Buthelezi v Municipal Demarcation Board (Buthelezi)**⁹, the Labour Appeal Court (LAC) held that "*there is no right to terminate such contract even on notice.*"
- 25 Therefore, a trainee employed on a FTC can only be retrenched if in their contract of employment there is an express provision that the employee may be retrenched before the expiry of the contract. If there is no such provision the trainee **cannot** be retrenched.

ANALYSIS

- 26 In **Rogers**, the term "severance pay" merely refers to the payment of money when an employee leaves the employment of the employer.
- 27 In terms BCEA, an employee retrenched must be paid at least one week's remuneration for every completed year of service with the employer. For example, if an employee has been working for the employer for 3½ years, she may have a statutory severance package equal to at least 3 weeks' pay.
- 28 An employee who has worked less than 24 months on a FTC and earns below the threshold shall not be statutorily entitled to any severance payments if they are employed for justifiable reasons. This may be altered

⁵ (2015) 34 ILJ 277 (LC).

⁶ 1999 ILJ 1314 (LC).

⁷ (J866/98) [1999] ZALC 26 (26 February 1999).

⁸ (J203/2020) [2020] ZALCJHB 56.

⁹ (JA37/2002) [2004] ZALAC 15 (22 July 2004).

depending on the employer's policy. If the employee earns above the threshold, he may have severance pay in terms of the BCEA if the contract of employment allows for termination for operational requirements.

- 29 If the employer has a policy or practice relating to retrenchments and severance pay it must comply with this policy or practice. Besides severance pay, the employee must be paid notice pay under his or her contract of employment or the BCEA, if the BCEA provides for a longer notice period. Whether the employee is required to work out the notice period is for the employer to decide.
- 30 The employee must also be paid for any outstanding annual leave pay to which he or she may be entitled in law, and any other benefits which may have accrued to the employee but not yet paid, e.g. pro rata bonus (if applicable).
- 31 If there is a dispute about the severance pay to which an employee is statutorily entitled, an employee can refer a severance pay dispute to either the CCMA or to a bargaining council in terms of section 41(6) and (9) of the BCEA, which gives these forums the authority to conciliate and arbitrate on such disputes.
- 32 Employers must pay all employees, with longer than 12 months' service, severance pay. The entitlement to severance pay is not dependent on the employee's employment. A fixed term employee, employed for longer than 12 months, would nevertheless be entitled to severance pay.

Kind regards

AADIL PATEL
CLIFFE DEKKER HOFMEYR INC

ANNEXURE A: SEVERANCE PAY GUIDELINE

How is severance pay calculated? ¹⁰

- 1 These payments are included in an employee's remuneration to calculate severance pay:
 - 1.1 housing or accommodation allowance or subsidy; or housing or accommodation received as a benefit in kind. Any housing or accommodation allowance or subsidy paid in cash, or the value thereof if paid in kind, is deemed part of remuneration.
 - 1.2 car allowance or the value of provision of a company car. This does not apply where the employer provides a vehicle to the employee to allow the employee to travel to and from work, with no other private usage of the vehicle by the employee.
 - 1.3 any cash payments made to an employee, except those listed as exclusions in paragraph 2 below.
 - 1.4 employer's contributions to medical aid, pension, provident or similar funds or schemes, must be part of the employee's remuneration and must be included when making calculations in terms of this notice.
 - 1.5 employer's contributions to funeral or death benefit schemes also form part of remuneration and must be included in the calculation of remuneration.
- 2 These items do not form part of the employee's remuneration for these calculations:
 - 2.1 any cash payment or payment in kind provided to enable the employee to work (for example, equipment, tools or a similar allowance, or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work only.
 - 2.2 a relocation allowance.
 - 2.3 gratuities, for example tips received from customers, and gifts received from the employer.
 - 2.4 share incentive schemes.
 - 2.5 discretionary payments not related to the employee's hours of work or performance, for example a discretionary profit-sharing scheme.
 - 2.6 an entertainment allowance.
 - 2.7 an education or schooling allowance.
- 3 The value of payments in kind must be follows:
 - 3.1 a value agreed to in either a contract of employment or collective agreement, provided that the agreed value may not be less than the cost to the employer of providing the payment in kind; or
 - 3.2 the cost to the employer of providing the payment in kind.
 - 3.3 (Employers who accommodate the employees, or any other benefits in kind, are advised to contract with the employee regarding the value of the accommodation or other benefits provided in kind.)
- 4 An employee may not have a payment or the cash value of a payment in kind as part of remuneration if:
 - 4.1 the employee received the payment or enjoyed, or could enjoy, the payment in kind during the period.
 - 4.2 With a contribution to a fund or scheme that forms part of the remuneration, the employer contributed regarding the period.

¹⁰ Minister of Labour in Government Notice 691 of 2003.

- 5 If the payment fluctuates, it must be calculated over 13 weeks or if the employee has been in employment for shorter period, over that period.
- 6 A payment received in a particular period regarding a longer period (e.g. a 13th cheque) must be calculated pro rata.
- 7 This Guideline applies only to the minimum payments that an employer must make in terms of the Basic Conditions of Employment Act, 1977.
- 8 Where the employee's remuneration fluctuates regularly, the calculation of payment for annual leave must be based on the employee's average earnings for the previous 13 weeks. The average will include commission and or overtime paid for.

Step 1: Calculate the employee's years of service.

Step 2: The employee shall obtain 1 week's remuneration for every year (12 months) of service completed. (If the service is below 12 months the employee may not have a severance payment).

Step 3: Calculate the employee's remuneration with consideration to the above paragraphs 1-4.

Step 4: Divide the employee's monthly remuneration by 4.333.

Step 5: Multiply the weekly remuneration amount obtained by the number of the employee's years of service to SAICA.

Example:

An employee has been employed for 3 and a half years. The employee earns R8 000.00 per month and receives contributions to medical aid, pension and a death benefit to the value of R1 200.00.

Step 1: 3 completed years of service.

Step 2: 3 week's severance pay.

Step 3: R6 000.00 + R1 200.00 = R7 200.00

Step 4: R7 200.00 / 4.333 = R1 661.66628

Step 5: 1 661.66628 X 3 = R4 985.00