The legal timing of a financial incentive in lieu of a resignation

Provided By FLUXMANS ATTORNEYS

About Us Fluxmans Attorneys Is One Of South Africa's Top Law Firms. We Offer An Extensive Range Of Legal Services To A Diverse Client Base, Including Individuals And Large Corporates Across All Se...

MORE

By BRONWYN MARQUES

Topics Dispute Resolution | Labour Law

19 Aug 2021

As a result of Covid-19, pandemic-related retrenchments have sadly become commonplace and an issue that often arises when an employer considers a

retrenchment process is that of voluntary severance packages (VSP). A VSP is a financial incentive that is offered to an employee in lieu of his/her resignation or retirement. A VSP must set out the minimum severance benefits imposed by law and any additional benefits that are applicable as a result of the voluntary nature of the termination.

There has been much debate about when a VSP may be offered. Previously, an employer could only offer a VSP outside of a retrenchment process, if it could be shown that the employer was not contemplating retrenchments.

However, the judgment of SACU and another vs Telkom SA SOC Ltd and Others 2020 JOL 46876 [LC] has changed this position. In this judgment, the Court held that Section 189(3) of the Labour Relations Act 66 of 1995, as amended (the Act) does not prescribe a rigid sequence in terms of which consultations are meant to proceed and that there is nothing untoward about Telkom inviting employee representatives to consult on voluntary severance packages. As a result of this judgment, employers may initiate VSPs even before dispatching Section 189(3) notices.

As such, an employer is able to offer VSPs to employees without following a Section 189 consultation process in circumstances where the offering of such an alternative package would avoid the possibility of a retrenchment all together at a later stage and if the employer did not contemplate that the refusal of the offer could precipitate retrenchments.

Another issue that may arise and which was dealt with in the case of Barrier vs Paramount Advance Technologies (Pty) Ltd 2021 JDR0478 (LAC) is the issue of severance pay in light of an employee having reached an agreed and/or normal retirement age. In this case the facts were briefly as follows:

- The company employed Mr Barrier as an Engineer with effect from 8 May 1985. In terms of a written contract of employment, concluded later, it was agreed, inter alia, that Barrier's employment with the Company would terminate at the end of the month in which he reached the age of 65, unless the parties agreed otherwise in writing. Barrier reached the age of 65 on 13 June 2013 but continued to work for the company beyond the date until he was voluntarily retrenched by the Company with effect from 31 May 2017;
- In March 2017, the Company indicated an intention to embark upon a restructuring of its business operations due to its unfavourable financial position. On 4 April 2017, the Company invited all of its employees including Barrier to apply for a VSP. The Company offered to pay for every completed year of service as well as any incomplete years of service and freed employees from the obligation to work their notice period.
- Barrier applied for the VSP and queried the amount which was calculated which only took into account Barrier's employment with the company from 1 July 2013 and not the period up to the

date of his retirement i.e. 30 June 2013, despite his payslip reflecting that he was engaged with the company from 1 May 1985 as the starting date of his employment.

- The Company paid Barrier a severance pay of 4 weeks at the rate of R34 849.14 per week, totalling an amount of R139 396.55. The company held that this was the severance payment due to Barrier because he had officially retired on 30 June 2013 in terms of the contract of employment and therefore, the first period of employment (i.e. 1 May 1985 to 30 June 2013) was not taken into account in calculating the severance pay.
- Barrier accepted the severance package subject to the reservation that the severance pay was not correctly calculated in that it had to be for 32 weeks and not for 4 weeks as calculated.
- Barrier proceeded to refer the matter to the Commission for Conciliation, Mediation and Arbitration (the CCMA).

At the CCMA, the arbitrator found that:

- Even though the written contract of employment provided that Barrier would retire at age 65, Barrier did not in fact retire upon reaching that age, but continued to be employed by the company until his retrenchment. As such, the Company neglected to compel Barrier to retire even though it had the right to do so.
- Thus, even if the written contract came to an end on 30 June 2013 (because it was not extended by the parties), the employment relationship continued uninterrupted on the same conditions of service.
- With reference to section 84(1) of the BCEA, which provides that a break in the employment of less than one year is inconsequential, there was no break in Barrier's employment with the Company.

In light of these findings, the arbitrator concluded that the duration of Barrier's employment with the Company, for purposes of section 41(2) of BCEA was May 1985 until 30 June 2017. The Company therefore had a duty to pay Barrier severance pay equal to at least one week's remuneration for each completed year of service i.e. 33 weeks of his weekly remuneration.

The Company was dissatisfied with the award and referred the matter to the Labour Court in terms of the review application. The Labour Court held, inter alia, that:

- The arbitrator was correct in finding that Barrier was dismissed for operational reasons and thus entitled to severance pay. The crux of the matter was about how the severance pay was to be calculated.
- The arbitrator had erred in finding that Barrier did not retire on 30 June 2013 because as recorded in the written employment contract, Barrier's contract was terminated by the effluxion of time on 30 June 2013.
- This was not a dismissal, and therefore the provisions of section 41(2) of the BCEA were not triggered. Barrier was not entitled to the payment of severance pay upon his retirement, and thus Barrier's employment from 1 July 2013 constituted a new employment relationship.

The decision of the court a quo was referred to the Labour Appeal Court. The Labour Appeal Court noted that the principal question in the matter is whether there was a

"break" in service as contemplated in section 84(1) of the BCEA when Barrier reached the age of 65, but continued (seamlessly) to work for the Company. It is generally accepted that a fair severance allowance upon the termination of employment for operational requirements is one that based on the employee's length of employment with the employer and his/her remuneration.

According to section 84(1) of the BCEA, "for the purpose 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 two periods of employment is less than a year."

The LAC also dealt with section 41(2) of the BCEA which provides that "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." The LAC held that these sections are unambiguous and clearly note that an employee is entitled to one week's remuneration for every completed year of service. Thus there are no issues pertaining to the interpretation and Section 84 (1) is to be read with section 41(2) of the BCEA.

Section 84(1) however, according to the LAC, is the section relevant and in question in the present matter. Section 84(1) qualifies the ordinary, dictionary meaning of "continuous" and effectively provides that even though there is a break or interruption in the course of employment, for purposes of determining the length of service, the break or interruption is inconsequential if it is less than one year. According to the LAC, the significance of this section is that to determine length of service, previous periods of employment have to be considered if the interruption was of less than a year.

The LAC also held that there is a difference between severance pay and retirement benefits. According to the LAC, severance pay is an additional and distinct form of contractual notice pay and other "entitlements". The LAC noted that it is a form of compensation, which is gratuity for services rendered and is intended to "soften the blow" of unemployment. Retirement benefits, on the other hand, are usual and generally funded by the employee himself from his remuneration. The LAC, therefore, held that the purposive interpretation of the payments shows that these two

payments serve a different purpose, and as such payment of one does not disentitle the employee to payment of the other.

The LAC concluded that the fact that there are instances where an employer also pays a contribution into such a fund does not make a difference. The employer does so in compliance with a contractual obligation, and the contribution constitutes part of the employee's remuneration. It has nothing to do with retrenchment.

The LAC thereafter considered these principles in respect of the present matter. Accordingly the LAC found that Barrier's employment with the Company was "continuous" in the true sense of the term from May 1985 until he was retrenched by the Company in May 2017. His employment relationship with the Company subsisted beyond the formal termination of the contract. Therefore, according to the LAC, there was no break or interruption between the employer and employee relationship as the relationship continued as per normal.

The LAC, therefore, concluded that Barrier was entitled to be paid for 33 weeks, as found by the arbitrator and that the court a quo was wrong in coming to a different conclusion. As such, the appeal succeeded.

The above is illustrative of the legal position concerning severance benefits in the case of where an employee works beyond retirement age and brings to the fore interesting questions of law.

See also:

- Employee discipline in the face of Covid-19
- CCMA process
- A COVID 'escorted' dismissal
- The Basic Conditions of Employment Act
- Labour dynamics: Retrenchment as a result of COVID-19

(This article is provided for informational purposes only and not for the purpose of providing legal advice. For more information on the topic, please contact the author/s or the relevant provider.)

ARBITRATION | BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA) | COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA) | COVID-19/CORONAVIRUS | EMPLOYMENT | LABOUR APPEAL COURT (LAC) | LABOUR COURT | RETRENCHMENT | SEVERANCE BENEFIT | TERMINATION CLAUSE

[Bronwyn Marques](#)

Bronwyn Marques is widely recognised for her broad practice offering and ability to provide high profile commercial resolution to clients across all sectors in both contentious and non-contentious matters. Bronwyn... [Read more about Bronwyn Marques](#)

Click here to send a legal query to Bronwyn Marques

Labour Law articles by **Fluxmans Attorneys**

- Employee discipline in the face of Covid-19
- Labour Court delivers judgment restraining EFF
- Amended Directive issued by Minister of Employment and Labour
- A COVID 'escorted' dismissal

Labour Law articles on GoLegal

- Going to work during the pandemic – The fine line between when employees should and shouldn't be attending the workplace
- I may not be (vacc)seeing you anytime soon, is it worth the shot?
- Some challenges associated with business rescue proceedings
- Grossly unreasonable and aberrant disciplinary hearing outcomes and sanctions need not stand

PROVIDED BY:

Fluxmans

BY

Bronwyn Marques

Bronwyn Marques is widely recognised for her broad practice offering and ability to provide high profile commercial resolution to clients across all sectors in both contentious and non-contentious...

SEND A LEGAL QUERY TO BRONWYN MARQUES

EXPERTS IN LABOUR LAW

Adams & Adams
7 Relevant articles

Eversheds Sutherland
44 Relevant articles

Fluxmans Attorneys
8 Relevant articles

Juta
15 Relevant articles

KISCH IP

3 Relevant articles

Legal&Tax

12 Relevant articles

LexisNexis

22 Relevant articles

Sabinet

19 Relevant articles

SchoemanLaw Inc

29 Relevant articles

UPCOMING EVENTS

The ABCs of corporate governance – Unpacking essential tools

AUG 24 @ 2:00 PM - 3:00 pm

Unpacking SLA's – Service Level Agreements

AUG 26 @ 2:00 PM - 3:00 pm

Insourcing versus outsourcing – The resources required

SEP 22 @ 11:00 AM - 12:00 pm

Series: Three steps to becoming a better leader (Part 3)

OCT 21 @ 2:00 PM

Unpacking accountability structures and disciplinary proceedings – Directors and employees

OCT 25 @ 11:00 AM

Want the latest legal news and views in your box?

Your email address

Subscribe

FOLLOW US

SIGN UP FOR OUR NEWSLETTER

Want the latest legal news and views in your box?

Your email address

SUBSCRIBE