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Quantifying compensation for unfair dismissal



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Introduction

The [Labour Relations Act 66 of 1995](#) (the LRA) provides the following remedies for an unfair dismissal:

- The employer to reinstate the employee on the same terms and conditions of employment before the dismissal.
- The employer to re-employ the employee, which may be on new terms and conditions of employment.
- The employer to pay compensation to the employee.

If compensation is granted as relief, the quantum is determined at the discretion of the Commissioner or Judge adjudicating the dispute. The maximum compensation which may be awarded is capped at a maximum of 12 months remuneration for an ordinary unfair dismissal (e.g. misconduct or incapacity) alternatively, 24 months remuneration for an automatically unfair dismissal (e.g. dismissal due to pregnancy/discrimination or protected disclosure). Compensation must be just and equitable in all circumstances. There are no fixed factors to measure what is fair and equitable.

A recent Labour Appeal Court (LAC) judgement alters the way we understood the purpose of compensation in labour matters. The LAC recognised in [Total SA \(Pty\) Ltd v Meyer and Others](#) that it had held approximately 20 years ago, in *Johnson and Johnson (Pty) Ltd v CWIU*, that compensation for an unfair dismissal was intended not to compensate the employee for patrimonial loss, but as a payment for an infringement of the employee's dignity that is, solatium. Notwithstanding this, there may be cases in which payments made to employees on termination of employment, which exceed statutory minimums may be factored in when assessing the quantum of compensation equitably.

In the Total South Africa case, a [CCMA](#) commissioner held that the dismissal was fair. On review, the Labour Court set aside the award and substituted the award with a finding that:

- the dismissal was unfair; and
- the Company was to pay the employee compensation equivalent to 12 months' salary.

The Company did not challenge the Labour Court's decision on the unfair dismissal but challenged the quantum of compensation which was granted. The Company argued that the compensation was excessive because the employee was paid a severance package in the amount of R2.9m, which included two years of medical benefits and that he had obtained new employment immediately after being

retrenched. The employee rebutted by arguing that the Company was conflating patrimonial considerations with the solatium compensation.

The legal term patrimonial loss refers to actual loss suffered caused by a wrongdoing (such as loss of income from date of dismissal) whereas solatium is compensation for pain and suffering caused by a wrongdoing. Compensation for patrimonial loss aims to restore a claimant to the position he/she would have been in, had the wrongdoing not occurred, and solatium on the other hand, is compensation for the hurt or injury to feelings or dignity caused by the wrongdoing.

The LAC held that it would be just and equitable to reduce the order for compensation to 6 months because the employee had received a severance pay more than that provided for by the [Basic Conditions of Employment Act 75 of 1997](#). Further, the case did not involve the kind of egregious conduct by an employer that would justify a maximum award of compensation.

Conclusion

This case is authority for the position that whilst compensation is generally regarded as solatium, factors related to actual patrimonial loss may be relevant to determining compensation that is just and equitable. Such an argument, as presented by the employer in this case, is now legally sound.

Written by:

Michelle Naidoo, Partner, Mooney Ford Attorneys

Jasmin Reddy, Candidate Attorney, Mooney Ford Attorneys

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- [Individual employees cannot rely on section 187\(1\)\(c\) of the LRA to claim that their dismissals are automatically unfair](#)
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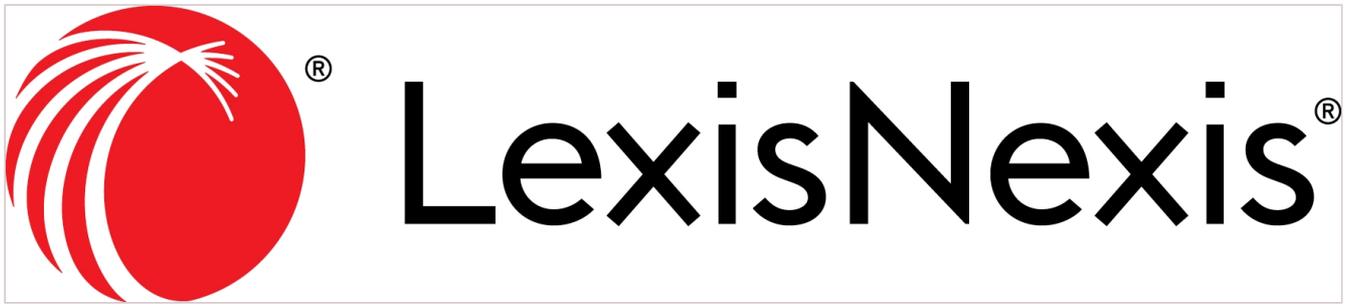
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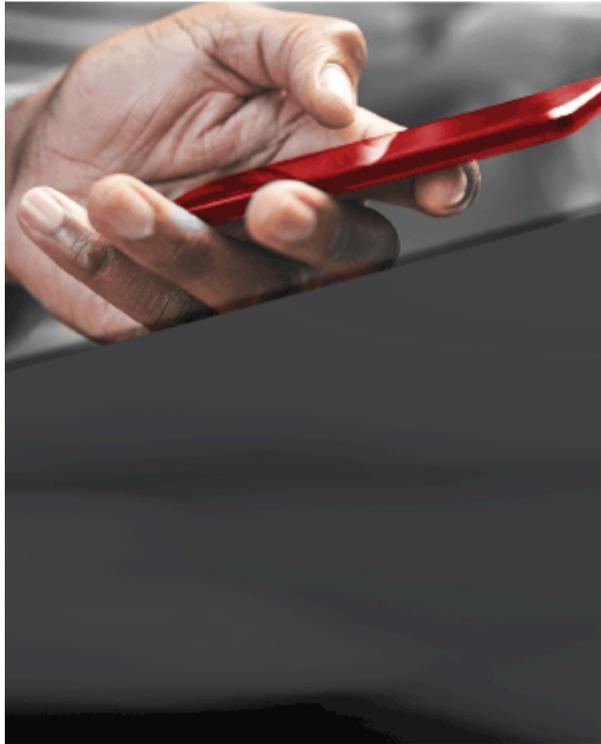
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