Encapsulating The Apprehension Of Retirement & Severance Packages

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INTRODUCTION

Economic climatization is argued to be prevalent for survival. Throughout the ages, everyone has understood retirement to be the advent of repose. However, as a consequence of evolution, technology and possibly man's inability to abate, it is pellucid that mankind persists in employment beyond retirement age. This does not only foretell various adverse consequences, but also predicts elaboration on legal resolutions. Retirement age; the legal consequence thereof and legal resolutions recently, in February 2021, and in the case of Barrier & Others v paramount Advanced Technologies (Pty) Ltd were further reconnoitred. The Labour Appeal Court in this matter observed that it is generally accepted that a fair severance allowance upon the termination of employment for operational requirements, is one based on the employee's length of service with the employer and his remuneration.

SECTION 41(2) OF THE BASIC CONDITIONS OF EMPLOYMENT ACT

Section 41(2) of the BCEA deals with severance pay. This section provides as follow: "An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates int terms of Section 38 of the Insolvency Act, 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 section is relatively ambiguous. An employer who dismisses an employee, inter alia for operational reasons is obliged to pay that employee severance pay, the amount of which, at least, must be equal to one week's remuneration for every completed year of continuous service with the employer. Section 35 which is referred to in section 41(2), deals with the calculation of remuneration, and it, inter alia, specifies how an employee's remuneration is to be calculated, what forms part of such remuneration for the purposes of the calculation, and so forth.

SECTION 84 OF THE BASIC CONDITIONS OF EMPLOYMENT ACT

Section 84 (1) specifically provides that the section is applicable where the length of an employee's employment with the specific employer is to be determined for a provision of the act. Since the length of service of an employee's employment with a particular employer would have to be determined for compliance with section 41(2) of the BCEA, section 84 would be applicable, where there has been a break or interruption during the employee's employment with the particular employer, this was also the conclusion of the arbitrator and of the court in Rogers, the correctness of which the courts a quo also accepted. Section 84(1) provides for the purposes of determining the length of an employee's employment with an employer, that same employer must take into account, if the break between the period of employment is less than one year.

LABOUR COURT - Paramount Advanced Technologies (Pty) Ltd v Barrier & others

In Paramount Advanced Technologies (Pty) Ltd v Barrier & others (at 1414) the Labour Court had to calculate the period of continuous employment in terms of s 84 of the Basic Conditions of Employment Act 75 of 1997. It was noted that on the arbitrator's findings the Respondent was dismissed for operational requirements which was not challenged by the respondent in the review, but nevertheless, if concluded correctly, that it had to be accepted that the arbitrator was correct in finding that the respondent had retrenched the appellant and that he was therefore entitled to severance pay, but that the actual issue and bone of the contention was about how the severance pay was to be calculated with reference to the number of years the appellant was in the employment of the respondent. Instead of then proceeding directly to the determination of the severance package, the Labour Court considered the following: (i) Whether a severance was payable in light ofthe retirement of the appellant. It concluded that the arbitrator had erred in finding that the appellant did not retire because he was not paid his retirement benefits and did not cease his employment when he turned 65. It held that the appellant turned 65 and by virtue of effluxion of time, the contract was consequently terminated. This did not constitute a dismissal since there was no dismissal at this stage, the provisions of section 41(2) of the BCEA were not triggered, and the appellant was not entitled to payment of severance pay upon his retirement, hence the appellant's employment constituted a new employment relationship. The Labour Court went further and focused on computation of the severance pay. It concluded that the arbitrator's differentiation of the facts in Rogers was artificial and that there was no reason to deviate from the position established in Rogers, namely that "the period before retirement should not be taken into account when calculating an employee's severance pay in accordance with section 41(2) and section 84 of the BCEA. (ii) The Labour court concluded the following: (i) Severance is not payable in respect of retirement as there is no dismissal and for purposes of calculating the number of years continuous service, the arbitrator was wrong to include a period in respect of which there existed no dismissal and for which there was no entitlement to severance pay. (ii) The right to severance pay for the years prior to retirement never existed on retirement and cannot be created simply because the appellant was employed by the respondent after his retirement. There is no need to pay severance pay on retirement and the appellant was never eligible for severance pay in respect of his employment post retirement. (iii) The Arbitrator was wrong to find that the appellant did not retire in June 2013 as a result of the fact that the arbitrator got this wrong, he was incapable of calculating the severance correctly. The arbitrator's interpretation of section 41(2) was wrong and so was his calculation of the severance pay. (iv) The respondent correctly calculated the period of service for purposes of payment of severance pay and paid the appellant accordingly. He is not entitled to more.

LABOUR APPEAL COURT - Barrier & Others v Paramount Advanced Technologies (Pty) Ltd

The Labour Appeal Court in Barrier & Others v Paramount Advanced Technologies (Pty) Ltd, the subject of the award under appeal was against an order of the Labour Court, setting aside, in terms of Section 145 of the Labour Relations Act, an arbitration award of a commissioner of the Commission for Conciliation Mediation and Arbitration that was made in favour of the Appellant, wherein the court took into consideration the following relevant facts: The Respondent employed the appellant as an engineer with effect from 1985. The written contract was concluded

between 19 May 1994 and inter alia prescribed that the appellant's employment with the respondent would terminate at the end of the month when he reaches the age of 65 unless the parties agreed otherwise in writing. The contract contained a so-called "no variation except in writing clause". Upon the appellant reaching the age of 65, on 13 June 2013 he continued to work for the respondent uninterruptedly and beyond this date until he was voluntarily retrenched by the respondent with effect form 31 May 2017. On or about 21 February 2017 the respondent offered the appellant a (new) fixed term contract that was to commence from 1 February 2017 and terminated on 28 February 2019 provided that the appellant would not be entitled to any discharge or severance benefits upon its termination. The Appellant was not satisfied with its terms and did not accept the offer but continued to be employed by the Respondent. In March 2017, the respondent indicated an intention to embark on restructuring and on 4 April 2017 the respondent invited all its employees including the appellant to apply for a voluntary retrenchment package. The appellant applied for VSP and his application was accepted by the Respondent on 10 April 2017. The appellant queried the amount as it was calculated only taking into account the appellants' employment with the respondent from 1 July 2013 and not the period up to the date of his retirement on 30 June 2013, despite his payslip always having reflected 1 May 1985 as the starting date of his employment with the respondent. The appellant accepted the severance package subject to the reservation that the severance pay was not correct, in that it had to be for 32 weeks and not for 4 weeks. The appellant was paid for 4 weeks at the rate of R 34 849,14 per week (R139 396,55) in total in respect of the severance package. (i) In the CCMA, the arbitrator went about determining severance pay, a. the respondent only took into consideration the period after the appellant had already reached 65. b. The arbitrator held that the period before that also had to be taken into account as the appellant employment with the respondent continued uninterrupted after he turned 65 and continued until it was terminated upon retrenchment. c. Labour Court held that the arbitrator's conclusion was not correct, having found, in essence, that the contractual period that ended when the appellant turned 65 cannot be taken into account in determining the amount of severance pay that was due to him. d. The arbitrator further found that even though he written employment contract that the parties had entered into in 1985 had provided for the appellants' retirement at age 65, the appellant did not in fact retire upon reaching that age but continued to be employed by the Respondent until his eventual retrenchment by the respondent. e. According to the arbitrator on the Respondent own version, it neglected to compel the appellant to retire when he reached the age of 65 even though it had the right to do so. f. The Arbitrator reasoned that even if it were to be accepted that the written contract came to an end on 30 June 2013 because it was not extended by the parties in writing, as contemplated in the contract, it is apparent that the employment nevertheless continued uninterrupted the next day on similar or materially identical conditions of service. With reference to Section 84(1) of the BCEA, which provides the formula for determining the length of an employee's employment with the same employer the arbitrator held that there was absolutely no break in the appellant's employment with the respondent when he continued his employment after 30 June 2013. g. The arbitrator referred to aspects of the decision in Rogers V Exactocraft (Pty) Ltd[1] but distinguished the facts there from the present on the basis that the accepted evidence indicated that the appellant had not retired, nor did the respondent compel him to do so in June 2013 that neither the appellant nor the respondent had processed the appellants retirement and the appellant had not been paid any of his retirement benefits. h. In light of the fact the arbitrator concluded essentially that the matter before him was about the amount of the appellants severance pay, as the parties had already agreed that the appellant would be paid severance pay and that his employment had been terminated for operational requirements, which was by definition, a dismissal. Regarding the calculation of severance pay, the arbitrator concluded as follow "made the finding, above, that the duration of the appellants employment with the respondent for purpose of section 41(2) is 8 May 1985 until 30 June 2017. The respondent, therefore, had a duty to pay the appellant severance equal to at least one week's remuneration for every completed year of continuous service for this period. The respondent had, in addition, granted the appellant an additional one-week severance pays in terms of the VSP. i. Hence the appellants entitlement amounted to 33 weeks of his weekly remuneration. The arbitrator made the following award: that the appellant Patrick Barrier is entitled to severance pay as contemplated in section 41(2) of the BCEA in the amount of R 1010 625. j. The Respondent must pay the appellant his severance pays entitlement of R 1010 625 by 20 October 2017. (ii) LABOUR APPEAL COURT in referring to this specific matter, had to determine as a principal question, whether there was a break as contemplated in section 84(1) of the BCEA when the appellant reached the age of 65, but continued to work for the respondent. If it is put differently the question would be whether termination of the written contact of employment which was concluded in 1985 by the effluxion of time when the appellant turned 65, and in the absence of a written extension thereof, constitute a break as contemplated in terms of section 84(1). It is evident from Section 84(1) that the break contemplated therein is a time lapse between periods of employment, hence the reference in the section to breaks of less than a year. It is common cause that despite turning 65, the appellant continued with the employment routine that he had been following since May 1985 and attended at the respondent's workplace and provided his service as an employee of the respondent at the respondent's request and with its consent. There was not even a time-lapse of one working day between the employment up to age 65 and thereafter. The fact that the written contract of 1985 may strictly in law have terminated made no difference to break routine. In sum, the appellant was entitled to be paid for 33 weeks as found by the arbitrator. The court a quo was wrong in coming to a different conclusion. It follows that the appellant should succeed. Taking in consideration all factors of Law and fairness, the appeal was upheld and the order by the Labour Court set aside and substituted by the following: "The application to review and set aside the arbitration award of the second respondent is dismissed."

CONCLUSION

Considering the recent case law in determining the period of service in respect of retrenchment and consequently calculation of severance, it is clear that retirement has a consequence on a severance pay out, and that employers who elects to allow retirees to work beyond retirement, should consider the financial implication thereof accordingly.

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