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Calculating severance pay after retirement age

By Jonathan Goldberg

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The case of *Barrier v Paramount Advanced Technologies (Pty) Ltd* (18 February 2021) is an appeal against an order of the Labour Court setting aside an arbitration award of a commissioner. The award concerns the severance amount that had to be paid to the employee when he was retrenched by the employer after working for it long before and after the date of retirement at the age of 65.

The award was based on section 41(2) of the Basic Conditions of Employment Act (BCEA) which requires the employer to pay the employee, upon retrenchment, an amount 'equal to at least one week's remuneration for each completed year of continuous service'. Based on this, the (ultimate) question is whether, and to what extent, the payment(s) the employee was entitled to at his retirement at 65 impacted the amount he was entitled to as severance pay.

The employer only considered the period after the employee had reached the age of 65. The arbitrator held that the period before also had to be taken into account as the employee's employment with the employer continued uninterrupted after he turned 65 and continued until it was terminated upon his retrenchment.

End of contractual period

The Labour Court found that the arbitrator's conclusion was not correct and the (contractual) period which ended when the employee turned 65 could not be considered in determining the amount of severance pay that was owing to him.

The facts were that the employee reached the age of 65 on 13 June 2013 but continued to work for the employer, as he used to and uninterruptedly, beyond this date until he was voluntarily retrenched by the employer with effect from 31 May 2017.

The employee applied for the voluntary separation package (VSP) and his application was accepted. On calculation of the employee's severance pay, he had officially retired on 30 June 2013 in terms of his employment.

The employee referred a dispute to the CCMA regarding the calculation of his severance pay. He contended that it should have been for 32 weeks and not for 4 weeks.

The Labour Court considered if severance was payable considering the retirement of the employee. It concluded that the arbitrator had erred in finding that the employee had not retired because he was not paid his retirement benefits and did not cease his employment when he turned 65. The Labour Court held that when the employee turned 65, his contract of employment was terminated by passage of time. This did not constitute a dismissal. As there was no dismissal at that stage, the provisions of section 41(2) of the BCEA were not triggered.

Length of employment

The Labour Appeal Court (LAC) found that it is accepted that a fair severance allowance, upon the termination of employment for operational requirements, is one based (at least) on the employee's length of employment with the employer and his (or her) remuneration.

Section 41(2) of the BCEA deals with severance pay:

> *"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."*

It goes further to say that an employer who dismisses an employee for, among others, operational reasons is obliged to pay that employee severance pay. The amount of this pay must be at least equal to one week's remuneration for every completed year of continuous service with that employer.

Section 84(1) specifically provides that the section is applicable where the length of an employee's employment with a specific employer is to be determined "for any provision of the Act". Since the length of an employee's employment with a particular employer would have to be determined in compliance with section 41(2) of the BCEA, section 84 would be applicable, in particular, where there has been a "break" or "interruption" in the course of the employee's employment with the particular employer.

Section 84(1), in particular, provides:

> *"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. ”

Does the written contract of employment, which was concluded in 1985, terminate when the employee turned 65? In the absence of a written extension to the contract does this constitute a “break” as contemplated in section 84(1)? (The “break” is a time-lapse between periods of employment; hence the reference in the section to breaks of less than one year.)

The employee’s employment with the employer was “continuous”, in the true sense of that term (and without the aid of the deeming provision, or fiction, created by section 84(1) regarding continuity) from May 1985 until he was retrenched by the employer in 2017. His employment relationship with the employer subsisted beyond the formal termination of the 1985 contract.

Thus, the employee was entitled to be paid for 33 weeks, as found by the arbitrator. The appeal was upheld. This case has got significant consequences regarding retirement employment.

ABOUT JONATHAN GOLDBERG

Jonathan Goldberg is a leading voice in space Labour Law and Employee Relations. As the joint-CEO of Global Business Solutions, Jonathan has made the company into the foremost labour law, human resources and industrial relations consultancy.
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