

# Are employees entitled to severance pay? Not necessarily...

By [Jacques van Wyk](#) and [Michiel Heyns](#)

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Section 41(4) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) relieves an employer of the duty to pay severance pay in circumstances where the employee who is dismissed for operational requirements "unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer".



Image source: Getty Images

The Labour Court (LC) recently revisited the application of section 41(4) in the case of *Servest Landscaping Turf Maintenance (Pty) Ltd v SACCAWY obo Thisani & Others [2022]* and re-affirmed the principle that the requirements of section 41(4) are satisfied if retrenchees are offered suitable alternative employment with a new employer as a result of the efforts of the retrenching employer.

## Legal principles

In the case of *Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration & others [2006]*, the Labour Appeal Court (LAC) held that

“ the purpose of severance pay in our law is not necessarily to tide the employee over while he is looking for another job. If that was the purpose, an employee who immediately walks into another and sometimes even better paying job after his dismissal would not be entitled to severance pay because he would have no need for it. ”

The LAC held that section 41(4) of the BCEA ultimately rewards an employer for offering or securing alternative employment for an employee.

**LAC set out four instances when severance pay is payable pursuant to section 41:**

- if the employee unreasonably refuses an offer of alternative employment, then no severance pay is payable;
- if the employee reasonably refuses such alternative employment in which event he or she is entitled to payment of severance pay;
- if the employee accepts the alternative employment in which event he or she also forfeits the right to severance pay;
- if an offer of alternative employment is made to the employee, but the offer is not made by his or her employer or through the efforts of his or her employer then he / she would be entitled to severance pay, even if the employee turns it down.



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### Application

In the *Servest* case, the Commission for Conciliation Mediation and Arbitration (CCMA), found that Servest had failed to prove that the individual employees had obtained alternative employment with Bidvest through Servest's efforts. Instead, the CCMA found that, at best, Servest played a part in facilitating the employment of the 22 employees with Bidvest but did not secure such employment for the employees.

The CCMA concluded that it was not at the instance of Servest that the retrenched employees found alternative employment with Bidvest. Servest subsequently referred the award for review to the LC.

In considering, amongst others, *Irvin & Johnson and Fidelity Supercare Cleaning* (as outlined above), the LC found that the arbitrator had made an error of law which led her to "disregard or minimise the significance of material evidence".

The evidence presented, which had been left uncontested, indicated that the relevant branch manager of Servest initiated meetings with Bidvest, that Servest kept a "close eye" on Bidvest's recruitment of its staff and made its own premises, facilities and resources available to ensure that no one would be left unemployed or lose a day's work.



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The LC found that the CCMA had made an error of law in finding that anything less than a binding undertaking obtained by Servest from Bidvest was sufficient to show that Servest secured alternative employment for the 22 employees. The LC set aside the finding of the CCMA with a finding that all of the employees who were employed by Bidvest through Servest's

efforts, were not entitled to severance pay as section 41(4) of the BCEA applied.

## **Conclusion**

An employee will not be entitled to severance pay if the employee is employed by another employer and the retrenching employer can demonstrate that it secured the alternative employment through its efforts.

At a minimum, a retrenching employer must be able to demonstrate that it played an instrumental role in securing alternative employment for an employee with another employer if it seeks to rely on section 41(4) of the BCEA.

## **ABOUT THE AUTHOR**

Jacques van Wyk, Director, Mchiel Heyns, Senior Associate, Werksmans Attorneys

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