

Is Severance Pay Always There For The Taking?



As a general principle, an employer 'must pay an employee who is dismissed for reasons based on the employers operational requirements severance pay of at least one week's remuneration for each year of completed service'. The only exception to the general principle is found in section 41(4) of the Basic Conditions of Employment Act ("BCEA") in terms of which an employer is only absolved from paying severance pay 'if an employee unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer'.

This bulletin addresses whether severance pay is still payable when an employer has assisted the employees in securing alternative employment with another employer. In other words, there was no unreasonable refusal on the part of the employees – they accepted the employment at a different employer.

In the case of *Khanya Cleaning Group v SATAWU and Others*, the applicant sought to review and set aside an arbitration award. The commissioner held in his arbitration award that an employer was obliged to pay severance pay to the employees notwithstanding that the employees became employed by another employer, through the intervention of the old employer, a day after they were dismissed.

The underlying facts of the review application are briefly set out below.

About 30 employees were retrenched following the end of a contract of service between the employer and a tyre factory, which contract was subsequently awarded to a competitor, Supercare. The employees were dismissed for operational requirements on 30 June 2022. They commenced employment with Supercare the next day on 1 July 2022. The employees referred a dispute in the CCMA claiming unpaid severance pay while they were employed by Supercare.

The employer contended that it actively assisted in the employment of the retrenched individuals by coordinating with Supercare, distributing employees' contact details, arranging the interviews to take place at its premises and providing paid leave for interview attendance. The employer further argued that the employees encountered no gap in their employment; they were terminated on 30 June 2022, and began their tenure with Supercare on 1 July 2022, effectively having continuous employment.

The employees on the other hand contended that they secured their new positions independently and that their previous employer's role was merely that of performing minor administrative tasks that did not substantially influence their appointment by Supercare.

After interpreting section 41(4) of the BCEA with reference to LAC and Labour Court authorities, the Court concluded that the Commissioner's understanding of section 41(4) of the BCEA was flawed. The Court opined that the Commissioner's misunderstanding of section 41(4) stemmed from a narrow interpretation which did not align with the actual language or text of the BCEA and the legislative intent behind the provision.

Further, that the Commissioner's belief that a formal agreement between the old and new employer (Supercare) to the effect that the latter would employ the retrenched employees, was necessary, was a misinterpretation of the *Irvin Johnson* principle. Furthermore, while the *Fidelity Supercare* case noted that providing a reference does not amount to arranging alternative employment, the Commissioner failed to acknowledge the other forms of assistance which were rendered by the employer, which went beyond mere introductions. Had the Commissioner considered the other forms of assistance rendered by the employer in this case, he would have found that the exception to the general principle was applicable in the case before him.

In the final analysis, the Court held that there was no basis upon which employees could obtain for themselves both alternative employment one day after dismissal and severance pay simultaneously. On the facts of this case, the employer was correctly absolved from its obligation to pay severance pay.

We believe that the Court carefully considered the facts and arrived at the correct decision. The employees were assisted in securing alternative employment. There was no gap in their employment. Consequently, there was no need to pay severance pay.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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