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When will severance payment be due to employees?



South Africa's economy is increasingly vulnerable to a recession due to numerous economic factors, such as the lasting effects of Covid-19 and ongoing electricity crisis, to name a few.

According to a Bloomberg survey of economists, *the probability of a recession in South Africa stands at 68%* . This could lead to an increased need for retrenchments by numerous businesses across South Africa.

In previous blogs, we discussed *the procedures to follow in the event of retrenchments* as well as *how severance payments should be calculated* .

In this article we will focus specifically on when an employee is entitled to severance payment.

Section 41 of the Basic Conditions of Employment Act - Payment of severance pay

Section 41 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) provides guidelines and requirements that must be met in respect of the payment of severance pay.

What are the limitations to the right to severance payment?

There are several limitations to the right to severance payment.

The first is that the employee must have been dismissed for operational requirements (retrenched), unless their contract of employment provides otherwise. Therefore, not all employees are legally entitled to a severance package upon termination of service.

An employee would, for example, not be entitled to severance pay in the following scenarios:

- The employee is dismissed for misconduct or incapacity;
- The employee's fixed-term contract terminated automatically for acceptable reasons;
- The employee was selected to be retrenched; however, the employer ultimately decided not to retrench;
- The employee is compelled to retire on reaching the agreed or normal retirement age;
- Employees are transferred from one employer to another as a going concern in terms of section 197 of the LRA. The previous employer and new employer must come to an agreement regarding the severance pay that would have been payable to the transferred employees of the previous employer in the event of retrenchment. The agreement must be in writing and must specify which employer is liable for paying the amounts due to the employee, and this agreement must be disclosed to the employees;
- An employee who accepts and/or signs a full and final settlement or resigns.

Caselaw: Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration (CCMA) & others (2006)

In the case of ***Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration (CCMA) & others (2006)***, the Labour Appeal Court stated that the legal purpose of severance pay is to help support the retrenched employee while they search for new employment.

Therefore, when a retrenching employer immediately provides alternative employment/positions to the retrenched employee within the company or assists in securing employment elsewhere during retrenchment process, the employee shall not be entitled to severance pay if he or she accepts the offer as they had found new employment.

However, an employee who unreasonably refuses an offer of alternative employment with the retrenching employer or with any other employer will not be entitled to severance pay, as per section 41(4) of the BCEA. An employee who accepts the alternative position/employment but abandons it shall also not be entitled to severance pay.

What can be deemed as a reasonable offer?

Reasonableness of the offer will include consideration of the terms and conditions of employment, remuneration, status and job security.

The employee's personal circumstances will be taken into account when considering whether his/her refusal to accept the offer was reasonable. Should it be found that the employee reasonably refused the offer of alternative employment, he/she is still entitled to severance pay. For example, an employee who refused an offer of alternative employment because it was not made on similar terms, would be entitled to *severance pay*.

An employee who secures alternative employment, on the same or better terms, immediately after the retrenchment by their own efforts and without the assistance of their retrenching employer, shall be entitled to severance pay.

As was held in the case of ***Servest Landscaping Turf Maintenance v SACCAWY (2022)***, a dismissed employee cannot expect severance payment if they had found alternative employment through the efforts of their retrenching employer; however, the employer must have evidence that they had played an instrumental role in the process of securing employment.

In conclusion

SERR Synergy assists employers to understand and appreciate when severance payment must be made to employees during these challenging times. Our aim is to ensure that our clients make final payment to employees that is fair and reasonable.

About the author: Angelique van der Sandt joined SERR Synergy in March 2017. She is the Labour Manager at our Cape Town branch. She is an admitted attorney of the High Court of South Africa and completed her Bachelor of Arts (BA) in Law and subsequent Bachelor of Laws (LLB) degrees, Law School and post-graduate Certificate in Advanced Labour Law at the University of Pretoria.

The following sources are acknowledged:

- o <https://businesstech.co.za/news/finance/664115/recession-warning-for-south-africa/>
- o Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration & others (2006) 27 ILJ 935 (LAC)
- o Servest Landscaping Turf Maintenance (PTY) Ltd v SACCAWU obo Thisani and 20 Others (C 464/2019) [2022] ZALCCT 54; (2023) 44 ILJ 380 (LC) (24 October 2022)

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