IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA35/2020

In the matter between:

PATRICK ALAIN HENRI BARRIER **Appellant**

and

PARAMOUNT ADVANCED TECHNOLOGIES (PTY) LTD **Respondent**

Heard (via TEAMS): 18 February 2021

Delivered: Deemed to be the date on which the judgment is e-mailed to the parties.

Summary: Retrenchment---Severance pay---Basic Conditions of Employment Act 75 of 1997--- Section 41 read with s 84---*Determination of length of service for purpose of severance pay---Formal written contract of employment to terminate upon employee reaching retirement age---Employee reaching retirement age but continued working without interruption---Employee later retrenched---No break occurred in employment and s 84(1) finds no application---Service continuous and encompassing the entire period of employment up to the date of retrenchment---Employee entitled to severance pay calculated over entire period despite entitlement to retirement benefits.*

Coram: Davis JA, Coppin JA *et* Molefe AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against an order of the Labour Court (Prinsloo J), with the leave of that court, setting aside, in terms of s145 of the Labour Relations Act[1] ("LRA"), an arbitration award of a commissioner ("the arbitrator") of the Commission for Conciliation Mediation and Arbitration (" the CCMA"), that was made in favour of the appellant.

[2] The dispute that was the subject of the award concerns the severance amount that had to be paid to the appellant when he was retrenched by the respondent after working for it long before and beyond the date of retirement at the age of 65.

[3] In particular, since the relevant provision, namely, s 41(2) of the Basic Conditions of Employment Act[2] ("BCEA"), required the respondent to pay the appellant upon retrenchment an amount 'equal to at least one week's remuneration for each completed year of continuous service' with it, the (ultimate) question is whether, and to what extent, the payment(s) he was entitled to upon his retirement at 65 impacted on the amount he was entitled to as severance pay.

[4] In determining the amount of severance pay¸ the respondent only took into account the period after the appellant had reached the age of 65. The arbitrator essentially held that the period before that also had to be taken into account as the appellant's employment with the respondent continued uninterrupted after he turned 65 and continued until it was terminated upon his retrenchment.

[5] The Labour Court, essentially, 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. The correctness of that decision is to be evaluated and adjudicated in this appeal.

[6] The succeeding paragraphs deal with the essential common cause facts, the award of the arbitrator, the Labour Court' decision, an evaluation of that

[1] Act 66 of 1995.
[2] Act 75 of 1997.

decision, the issue of costs and, ultimately, the relief. For convenience and practicality, where necessary, the designation of the parties as 'applicant' or 'respondent' in quotations from documents or process preceding this appeal has been adapted to reflect their designations as on appeal.

<u>Common Cause Facts</u>

[7] The respondent employed the appellant as an engineer with effect from 8 May 1985. In terms of a written contract of employment subsequently concluded between them on 19 May 1994, it was agreed, inter alia, that the appellant's employment with the respondent would terminate at the end of the month when he reached the age of 65 unless the parties agreed otherwise in writing. The contract also contained a so-called "no-variation-except-in-writing" clause.

[8] The appellant reached the age of 65 on 13 June 2013 but continued to work for the respondent, as he used to, uninterruptedly, beyond this date until he was voluntarily retrenched by the respondent with effect from 31 May 2017.

[9] On 21 February 2017, the respondent offered the appellant a fixed-term contract that was to commence from 1 February 2017 and terminated on 28 February 2019 and provided, inter alia, 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.

[10] In March 2017, the respondent indicated an intention to embark on a restructuring of its business operations due to its unfavourable financial position. On 4 April 2017, the respondent invited all its employees, including the appellant, to apply for a voluntary retrenchment package (VSP) on certain terms. One week's compensation was offered for every completed year of service. The terms of the VSP were the same as upon forced retrenchment, save that the respondent offered to even pay a week's salary for incomplete years of service and freed employees from the obligation to work during their notice period.

[11] The appellant applied for the VSP, and his application was accepted by the respondent on 10 April 2017. The agreement entered into in that regard did not specify the actual amount of the severance pay that the respondent would pay the appellant, but he was informed of that (specific) amount subsequently.

[12] The appellant queried the amount as it was calculated only taking into account the appellant's employment with the respondent from 1 July 2013, and not the period up to the date of his 'retirement', i.e. 30 June 2013 (he reached the age of 65 on 20 June 2013), despite his payslip always having reflected 1 May 1985 as the starting date of his employment with the respondent.

[13] In response, the appellant was informed by the human resources (HR) manager of the respondent, Ms Mmolotsi, in essence, that the appellant had officially retired on 30 June 2013 in terms of his employment contract and therefore, the first period ending on that date was not taken into account in calculating his severance pay. The HR manager also informed him that his payslip had only indicated his starting date as May 1985 for UIF and tax purposes, but not for the purposes of calculating his severance pay.

[14] The appellant proceeded to accept 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 (totalling R 139 396,55) in respect of severance pay.

[15] On 15 June 2017, the respondent 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. He sought payment from the respondent of severance pay for 29 weeks, made up of the difference, and of the additional period he had remained in the employ of the respondent. Even though his termination date in the retrenchment agreement had been stipulated as 31 May 2017, he only, eventually, and finally left his employment with the respondent on 30 June 2017.

<u>The arbitration in the CCMA</u>

[16] At the arbitration, there was an issue about whether the eventual termination of the appellant's employment with the respondent was a retrenchment and, accordingly, a dismissal as contemplated in section 41(2) of the BCEA. The respondent contended, essentially, that the appellant had retired and that after his retirement, "the termination was as a consequence of the VSP granted" to the appellant and that he was therefore not entitled to the severance pay which he claimed.

[17] The arbitrator found that even though the written employment contract that the parties had entered into in 1985 had provided for the appellant's 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. According to the arbitrator, on the respondent's 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."

[18] The arbitrator reasoned that even if it were to be accepted that the written contract came to an end on 30 June 2013 (i.e. after the appellant turned 65), because it was not extended by the parties in writing, as contemplated in that contract, "it is apparent that the (appellant's] employment nevertheless continued uninterrupted the next day on similar or materially identical conditions of service."

[19] 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, and provides, essentially, as shall be fully discussed below, that a break in the employment of less than one year is inconsequential, 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."

[20] The arbitrator referred to aspects of the decision in *Rogers v Exactocraft (Pty) Ltd* (2015) 36 *ILJ* 277 (LC) (*Rogers)*, but distinguished the facts there from the present on the basis that the accepted evidence indicated that the appellant "had in fact not retired; nor did the respondent compel him to do so in June 2013", and further, that neither the appellant nor the respondent, had

processed the appellant's retirement and the appellant had not been paid any of his retirement benefits.

[21] The arbitrator found that the respondent had initiated a retrenchment process in March 2017, and during the consultation phase, which it had also initiated, had offered its employees (including the appellant) the VSP, which formed part of the respondent's efforts to comply with section 189(2)*(b)* and *(c)* of the LRA. The section provides that the employer must, during the consultation process, attempt to reach a consensus on the method for selecting the employees to be dismissed as well as on the severance that is to be paid to them. In a memorandum dated April 2017, the respondent had stressed that those who were granted the VSP would be treated as if they had been forcibly entrenched.

[22] In light of that, the arbitrator concluded, essentially, that the matter before him was about the amount of the appellant's 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.

[23] Regarding the calculation of severance pay, the arbitrator concluded as follows: "[66] I made the finding, above, that the duration of the [appellant's] employment with the respondent, for the purposes of section 41(2) is 8 May 1985 until 30 June 2017. The respondent therefore, had a duty to pay the [appellant] severance pay equal to at least one week's remuneration for each completed year of continuous service for this period. The respondent had, in addition, granted the [appellant] an additional one week's severance pay in terms of the VSP. Hence the [appellant's] entitlement amounted to 33 weeks of his weekly remuneration."

[24] Having taken into account the amount that the respondent had already paid the appellant in respect of severance pay, the arbitrator concluded: "the respondent is still liable to the [appellant], in respect of severance pay, in the amount of R1 010 625, which is calculated as follows: R 34 849.14 (1 week's income) x 29 weeks (33 weeks' entitlement - 4 weeks already paid)."

[25] The final award made by the arbitrator reads as follows:

> ‘[68] The [appellant], Mr. Patrick Alain Henri Barrier, is entitled to severance pay, as contemplated in section 41(2) of the [BCEA] in the amount of R1 010 625.
>
> [69] The respondent, Paramount Advanced Technologies (Pty) Ltd, must pay the [appellant] his severance pay entitlement of R1 010 625 by 20 October 2017.
>
> [70] The amount of R1 010 625 shall attract interest as contemplated in section 143(2) of the [LRA].’

<u>In the Labour Court</u>

[26] The Labour Court noted that the arbitrator’s finding that the appellant was dismissed for operational reasons was not challenged by the respondent in the review, but nevertheless, briefly, considered the cogency of arguments raised by the respondent’s counsel in that regard. It 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 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.

[27] Instead of then proceeding directly to the determination of the severance package, the Labour Court, firstly, considered whether a severance was payable in light of the 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. The Labour Court held that when the appellant turned 65, his contract of employment terminated by effluxion of time. This did not constitute a dismissal; since there was no dismissal at that stage, the provisions of section 41(2) of the BCEA were not triggered, and the appellant was not entitled to the payment of severance pay upon his retirement; hence the appellant’s employment (i.e. post his retirement) constituted a new employment relationship.

[28] The Labour Court then focussed on the 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."

[29] The Labour Court then went on to conclude as follows:

> '[75] Severance pay 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.
>
> [76] 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 on retirement. The [appellant] was only eligible for severance pay in respect of his employment post retirement.
>
> [77] The arbitrator was wrong to find that the [appellant] did not retire in June 2013 and in my view, as a result of the fact that the arbitrator got this wrong, he was incapable of calculating the severance pay correctly. The arbitrator's interpretation of s 41(2) was wrong and so was his calculation of the severance pay.
>
> [78] 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.'

[30] Having concluded that there should be no costs order due to the novelty of the issues raised by the review application, the Labour Court proceeded to make the following order:

> "1. The arbitration award issued on 28 September 2017 under case number GAT W9153 – 17 is reviewed and set aside;
>
> 2. The award is substituted for an order as follows: 'The respondent is not entitled to any further severance pay'.

3. There is no order as to costs."

[31] The Labour Court granted the appellant leave to appeal to this Court against that order. The appellant contends, in essence, that the arbitrator was correct and that the Labour Court was wrong, while the respondent argues the exact opposite.

Discussion

[32] It is generally 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.[3]

[33] Section 41(2) of the BCEA deals with severance pay. The section in particular (as has been mentioned above, albeit in paraphrasing) provides as follows: "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."

[34] The section is relatively unambiguous. 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 that employer.

[35] 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, etc… Since the dispute in this matter focuses on different, albeit tangentially aligned points, no more needs to be said about the section at this juncture. Section 35 does not really assist in determining the other main

[3] See, inter alia, ILO Convention on Termination of Employment, 1982 (No. 158), in particular article 12(1)(a).

aspect arising from section 41(2); in particular, the length of the employee's service or employment with a particular employer.

[36] The phrase "continuous service" is not expressly defined in the BCEA, and a meaning would have to be given to it. Closely aligned to the meaning of that phrase is the question of the duration or length of service. Section 84 of the BCEA deals with that aspect.

[37] 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 for 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. This was also the conclusion (effectively) of the arbitrator and of the court in *Rogers*, the correctness of which the court a quo also accepted.

[38] 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."

[39] The section, like section 41(2) of the BCEA, is relatively clear and unambiguous. Section 41(2) has to be read in light of and consistently with section 84(1) of the BCEA. The latter section qualifies and assists in the interpretation of the former.[4]

[40] Section 84(1) does qualify the ordinary, dictionary meaning of "continuous", and effectively provides that even though there is a break or interruption in the course of the employment, for the purposes of determining the length of service, the break or interruption is inconsequential if it is less than one year. In that sense, it gives a special meaning to the phrase "continuous service" found in section 41(2).

[4] See inter alia, *Insurance & Banking Staff Association on behalf of Aucamp v Old Mutual Life Assurance Co* (2000) 21 *ILJ* 2515 (CCMA); [2000] 9 BALR 1030 (CCMA) ("*Banking Staff Association*") at 1030.

[41] Thus, for the purpose of determining the length of service, a break of less than a year is not regarded as consequential in determining whether the service was continuous. Section 84(1) creates a fiction in that regard because the ordinary dictionary meaning of "continuous" is "uninterrupted" or "without a break". However, having stated that, breaks are not altogether irrelevant, as we shall see when dealing with section 84(2).

[42] What is significant about section 84(1), in the light of the issues in the present matter, is that it requires, for the purpose of determining the length of the employee's service with a particular employer, that all the periods of employment of the employee with that employer be taken into account, provided that the break between those periods of service is less than one year. What is also noteworthy is that the length or duration of the break determines whether the period immediately preceding the break is to be taken into account in determining the length of service.[5]

[43] Even though the court in *Rogers* stated that it was purposively interpreting sections 41(2) and 84, it did not illustrate how the two sections could be applied in harmony with each other, and in fact, possibly, did not comply with section 84(1) when it excluded the period before retirement in that case in determining the length of the employee's service with the employer there, because the alleged 'break' between the period that culminated in the employee's retirement and his further service with the same employer was almost imperceptible, and definitely far less than the one year contemplated in section 84(1). The court a quo, in following and applying that decision to the facts of this case, made the same error.

[44] Both, in *Rogers* and in this matter, the Labour Court was really grappling with an issue that arises, not in the context of giving meaning to sections 41(2) or 84(1) of the BCEA, but that arises from the application of section 84(2). The problem, in particular, was not one relating to the length of the continuous service, but whether, firstly, there was a "break" between the period of employment that terminated upon the employee reaching the age of 65 and the next phase of his employment with the same employer; and, secondly,

[5] See also *Solomons v Usabeo (Pty) Ltd* (2002) 23 ILJ 786 (CCMA) at 791 ('*Solomons*").

whether, in light of the payment the employee was entitled to, or had received at the end of the first period, he or she was entitled to severance pay for that (earlier) period. Both of these are questions that are to be answered with reference to the facts of the particular case.

[45] In both *Rogers* and in this matter, the Labour Court concluded that the employee was not entitled to severance pay for the first period because he had received (or was entitled to) retirement benefits in the form of "old-age benefits", i.e. a pension or provident fund payout. But the conclusion was arrived at on the basis of the incorrect premise, either because the inquiry necessitated by section 84(1) was, seemingly unwittingly, conflated with the issue of entitlement, or because no particular attention was given to section 84(2) of the BCEA. There is no specific reference to that section either in *Rogers* or in the judgment of the court a quo.

[46] While the court in *Rogers*, and by extension the court a quo, implied that its conclusion was the outcome of a purposive interpretation of sections 41(2) and 84, it is not evident from those judgments that the actual wording of those sections was engaged. It is not stated how the sections related to each other, and how a section, such as section 41(5) of the BCEA, found application in the particular legal and factual matrix. The latter section provides that "payment of severance pay in compliance with the section does not affect an employee's right to any other amount payable according to law."

[47] It bears mentioning that the wording of a provision is vital in the process of its interpretation because "interpretation is a process of attributing meaning to the words used"[6] in their proper context. The words of the provision are the starting point of any interpretation,[7] be it purposive or otherwise. Therefore, the interpretation of a provision must illustrate an engagement, inter alia, with its actual wording.

[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[7] *Bothma- Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2012 (2) ALL SA 517 (SCA) para 12.

[48] The position concerning the importance of the words in an interpretation that is consistent with the Constitution of the Republic of South Africa (1996) was put aptly by the Constitutional Court in *Moloto*[8] as follows:

> '…the provisions of the Act must be interpreted purposively so as to give effect to the Constitution, the objects of the Act itself and the purpose of the provisions in issue. But, this approach does not necessarily equate to an expansive construction of the provisions of the Act. This is so because the purpose of the Act may well require a restrictive interpretation of the particular provisions so that the exercise of a protected right is not unduly limited. Therefore, due regard must be had to the express language used in the provisions under consideration.'

[49] Section 84(2) of the BCEA provides as follows: "Any payment made or any leave granted in terms of this Act to any employee contemplated by subsection (1) during a previous period of employment must be taken into account in determining the employee's entitlement to leave or to a payment in terms of this Act."

[50] This section, like section 84(1), applies to all provisions of the BCEA that either expressly or by implication, require the determination of the length of an employee's employment with an employer, including section 41(2). It is therefore relevant to the computation of the amount of severance pay due to an employee who has been employed by the same employer for more than one spell.

[51] Even though the "break" between the periods may be less than one year, and therefore (in terms of section 84(1)) inconsequential in determining the length of the employee's service with the particular employer, in terms of section 84(2) "any payment" made to the employee by that employer during a previous period of employment "must" be taken into account in determining the employee's entitlement to the payment under consideration. The latter part of the section refers back to the provision(s) of the BCEA, which required the determination of the length of an employee's employment as contemplated in section 84(1).

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[8] *SA Transport and Allied Workers' Union (SATAWU) & others v Moloto NO &another* [2012] ZACC 19; [2012] BLLR 1193; (2012) 33 ILJ 2549 (CC) para 20.

[52] The determination of the entitlement of an employee, who has had more than one period of employment with an employer, to severance pay, as contemplated in section 41(2) of the BCEA, requires the application of section 84(1) to determine the length of service, but also, most importantly for present purposes, requires the application of section 84(2), which obliges the determiner of such entitlement to take into account “any payment” made to that employee in the previous period(s) of his employment with the employer.

[53] Hence, even if the break(s) between the periods of employment is less than one year, and therefore insignificant as contemplated in section 84(1) (the disparate periods of employee’s employment, added together, being deemed effectively to be continuous), the employee with such a history of employment is not automatically entitled to (at least) one week’s remuneration for each completed year (i.e. if the period(s) of his actual employment with the employer are added together) – but the determiner of the amount due to that employee in respect of severance pay is obliged to take into account “any payment” made to that employee in any previous period(s) in determining the amount of the employee’s entitlement.

[54] Regrettably, while obliging the determiner to take into account such previous payment(s), subsection 84(2) does not provide any criteria that the determiner may utilise for determining whether a particular payment, made to an employee in any particular previous period of employment, disentitles the employee (totally or partially) to the payment under consideration, such as severance pay, in this instance.

[55] This absence of criteria, norms or guidelines, to assist the determiner not only introduces a risk of possible arbitrariness or irrationality, but saddles the determiner with a very difficult task. In both the present matter and in *Rogers*, even though there was no particular reference to section 84(2), the court was, in effect, grappling with this very problem. In *Rogers*, the court was intensely engaged with determining, effectively, whether the employee was entitled to be paid severance pay calculated taking into account a “previous” period of employment in light of the fact that he had been paid his “old age benefits” at the end of that period.

[56] The Labour Court in *Rogers* resolved the conundrum by finding, effectively, that the period that culminated in the employee's retirement ought not to be taken into account in determining, in essence, the length of the employee's continuous service with the employer, and in concluding that the reason for the break (i.e. retirement), not being a dismissal, did not entitle the employee to the payment of severance pay.

[57] Since the facts in this matter have many features in common with those in *Rogers*, the court a quo, seemingly, adopted the same approach as in *Rogers*. As pointed out above, this approach was wrong because it effectively and seemingly unwittingly overlooked the actual wording of section 84(1), which does not accord any relevance to the reason for the "break" or "interruption" in the employment[9].

[58] Further, it is clear from the BCEA that the fact that an employee was paid a wage or salary by the employer in the course of his employment with the same employer does not disentitle the employee from receiving the statutory severance pay as contemplated in section 41(2) if he is retrenched by that employer. And the same may be said regarding the payment of other bonuses and allowances.

[59] In the ordinary course, an employee's entitlement to what he had accumulated while in the employment of a particular employer, in respect of his pension, or provident fund, does also not disentitle him to (at least) statutory severance pay, calculated by taking into account the period he was employed there if he is retrenched by that employer, say, before or even shortly before his retirement[10].

[60] More directly, an employee, employed for a long, truly continuous period, with the same employer, does not lose his entitlement to severance pay when he is, after all those years, retrenched by the employer because the employer had been paying him generously and faithfully his salary and bonuses over

[9] See *Solomons* (above) at 791 and *Rogers* (above) at paras 21-22.
[10] See for eg. the facts in *Heunis v Lejsweleputswa District Municipality & another* (2016) 37 ILJ 895 (FB); and in *Meyer v Iscor Pension Fund* (2003) 24 ILJ 338 (SCA).

the period of his employment. Such an employee also does not lose his entitlement to the retirement benefits he had accumulated until then.

[61] If that is so in the normal course, why must an employee who had been employed over different periods, albeit deemed to be in continuous employment, i.e. if section 41(2) is a read with section 84(1), be treated differently? Why must she be disentitled to the statutory severance pay contemplated in section 41(2) (read with section 84(1)) because of a pension, or provident fund, pay out made to her in a previous period of employment, and to which she is entitled by law?

[62] In *Rogers,* the Labour Court considered the rationale or purpose of severance pay, which, presumably would have been in order to determine whether that rationale or purpose was also covered by the payment of "old-age benefits", but, seemingly, ultimately did not execute that exercise to its logical conclusion and make such a comparison, but resorted, instead, to concluding that severance pay was not payable upon retirement.

[63] In *Banking Staff Association,*[11] a CCMA Commissioner engaged in answering the question of whether a retrenched employee was entitled to severance pay for a particular period of service completed before a break (i.e. he had resigned after seven years of service, had been re-employed shortly thereafter, only to be retrenched by the same employer after two years of his re-employment), made reference, inter alia, to a "NEDLAC Report on the Basic Conditions of Employment Standards Bill" and mentions that the Bill had "specifically stated that 'any previous payment of severance pay in terms of section 41 must be taken into account in determining the employees' entitlement to severance pay'". Unfortunately, I have not been able to allocate the document or the Bill that was referred to in order to ascertain the veracity and accuracy of the statement.

[64] Nevertheless, anecdotally, if section 84(2) had read as the Bill reportedly, envisaged that it should, the task of the determiner would have been relatively simple in comparison to what it is now. In any event, we know now that it is

[11] See *Banking Staff Association* (above) at 1031.

not how section 84(2) reads. This may be due to the fact that it was broadened so as to apply to other kinds of entitlements of an employee in terms of the provisions of the BCEA, including the entitlement to severance pay, which all require the determination of an employee's length of service with an employer for purposes of such entitlement, as is envisaged in section 84(1).

[65] This reference, however, adds invaluable grist to the mill. If, say, an employee had, in the previous spell of employment with the same employer, been retrenched and paid a severance, and had been rehired again, the payment of the severance pay in that previous period would reasonably conceivably disentitle the employee to be paid severance pay yet again for the same period because it would clearly amount to a duplication of payment.

[66] That would also constitute a rational and reasonable basis for finding that an employee is not entitled to the severance pay calculated over the entire period, as contemplated in section 84(1), read with section 41(2), to the extent that there would be a duplication of payments.

[67] In contradistinction to the situation where the employee was paid a severance package in the previous period, the payment of retirement benefits (and not severance pay) in a previous period would not, at least obviously, amount to a duplication if the employee were to be paid severance pay calculated as contemplated in section 84(1), read with section 41(2), covering that same period.

[68] As pointed out earlier, section 41(5) of the BCEA provides that payment of severance in compliance with section 41 does not affect the employee's right to any other amount payable to him according to law. The application of section 84(2) checks the validity of the corollary of that provision, namely, whether the employee's right to any other amount payable according to the law, albeit in a previous period of employment with the same employer, affects his right to payment of severance pay in compliance with section 41(2) read with section 84(1) of the BCEA?

[69] In the context of the South African labour laws[12], severance pay is "additional and distinct from contractual notice pay and other entitlements"[13]. It is a form of compensation, which is a gratuity for services rendered and is intended "to soften the blow" of unemployment, but it is also intended to deter employers from readily resorting to the retrenchment of employees[14]. It is axiomatic that the payment must come from the employer's own funds, and is not to be subsidised or funded by the employees themselves.

[70] On the other hand, so-called benefits, such as pensions, provident funds, retirement funds, medical aid and the like, are usually and generally funded by the employee himself from his remuneration. Usually, the employer makes the deduction from the employee's remuneration and pays the amount to the particular benefit fund as the employer is obliged to do in terms of section 34A (2) of the BCEA. The money so deducted and paid-in is the employee's money, which he or she is entitled to be repaid in terms of and in accordance with the law and the rules of the relevant fund, and has nothing to do with the employee's entitlement to severance pay.

[71] The fact that there are instances where an employer also pays a contribution into such a fund does not make a difference. The employer does so in compliance with a contractual obligation, and the contribution constitutes part of the employee's remuneration. It has nothing to do with retrenchment.

Application

[72] Regarding the present matter, the principal question is whether there was a "break" as contemplated in section 84(1) of the BCEA when the appellant reached the age of 65, but continued (seamlessly) to work for the respondent. Put differently, does the termination of the written contract 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 section 84(1)?

[12] For an excursus of foreign laws and other approaches on the topic see, inter alia, *Irvin and Johnson Ltd v CCMA & Others* [2006] 7 BLLR 613 (LAC) and D W de Villiers "*The Entitlement to Severance Pay Revisited*" (2010) 22 SA Merc LJ 114-116.
[13] J Grogan *Workplace Law* (9ed) p 240.
[14] Ibid.

[73] 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 one year.

[74] 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 services as an employee to the respondent at the respondent's request and with its consent. There was not even a time-lapse (or "break") of one working day between his 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 that routine.

[75] The appellant's employment with the respondent 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 respondent in 2017. His employment relationship with the respondent subsisted beyond the formal termination of the 1985 contract.[15]

[76] Turning to the application of section 84(2) – the question that arises is whether the period from May 1985 to the date of the formal termination of the 1985 contract (i.e. by effluxion of time) could be construed as "a previous period of employment" of the appellant with the respondent, particularly since a previous period can only be such because it is demarcated by a time-lapse (or "break"), as contemplated in section 84(1), between that period and the one that culminated in his retrenchment. The answer must clearly be negative because the appellant continued to be employed by the respondent uninterruptedly until his retrenchment. This also implies that section 84(2) is not applicable as there is no "previous period of employment" as contemplated in that section.

[77] In any event, even if it is to be assumed that the phase of his employment, that culminated in the appellant turning 65, is "a previous period of employment", the evidence in the present case that further distinguishes it from the facts in *Rogers*, is that even after the appellant had turned 65, he

[15] See: *National Automobile v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A).

was not paid his retirement benefits, despite being entitled to the same, and this, presumably, only occurred much later when he was ultimately dismissed for operational requirements.

[78] I should add that even if it is assumed that he had been paid such benefits, that payment would not, for the reasons stated above, disentitle him to be paid a severance that was calculated taking into account the entire period of his employment, i.e. from May 1985 until the date of his retrenchment or dismissal.

[79] 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 appeal should succeed.

[80] Taking all the circumstances, including the law and fairness, as well as the novelty and importance of this matter, into account, a costs order in favour of a particular party is not appropriate.

[81] In the result, the following is ordered:

1. The appeal is upheld.

2. The order of the Labour Court is set aside and is substituted with the following order: *"The application to review and set aside the arbitration award of the second respondent dated 28 September 2017 under case number GATW 9153/17 is dismissed."*

P Coppin

Judge of the Labour Appeal Court

Davis JA and Molefe AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: Advocate Jacques Eastes

Instructed by Erasmus-Scheepers Attorneys.

FOR THE RESPONDENT: Advocate Ashley Cook

Instructed by Crawford & Associates Attorneys.