

# The Entitlement to Severance Pay Revisited

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## 1 Introduction

As a rule, severance packages are paid to employees dismissed for operational requirements. But sometimes these packages are not paid, in instances specified in s 41(4) of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

It seems that the payment of severance packages is limited by statute when retrenchments are made. Facing a minefield of options over and above the general legal requirements of ss 189 and 189A of the Labour Relations Act 66 of 1995 (LRA), some employers willingly pay severance benefits, but others allege that they need not do so (P de Bruin ‘Loop Lig Met Aflegging Van Werkers, Waarsku Hof’ (2004) *Beeld* (6 October 12)).

The forums that hear labour disputes are also divided on how to decide on these matters (John Grogan ‘Package Puzzle: The Right to Severance Pay’ (1999) 15(2) *Employment Law* July 6). The Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court, the Labour Appeal Court and the Constitutional Court have given different decisions on similar facts (eg, *National Education Health & Allied Workers Union v University of Cape Town & Others* (2000) 21 *ILJ* 1618 (LC); *NEHAWU v University of Cape Town & Others* [2002] 4 *BLLR* 311 (LAC); *National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC); *SAMWU & Others v Rand Airport Management Co (Pty) Ltd & Others* [2002] 12 *BLLR* 1220 (LC); *SA Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd* (2005) 26 *ILJ* 67 (LAC)).

More recently, an important decision was delivered by Zondo JP in the Labour Appeal Court in *Irvin & Johnson Ltd v CCMA & Others* ([2006] 7 *BLLR* 613 (LAC)). This precedent, discussed at length below, has not always been followed, as in *Vergenoeg vir Seniors v CCMA & Others* (27 June 2006 *JR* 322/05 LC (unreported)), where severance pay was awarded by the CCMA and an application to review the ruling was dismissed. But *Irvin & Johnson Ltd v CCMA* (supra) was followed in *SAEWA obo Molepi & Others v Laingsdale Engineering* ([2006] 10 *BALR* 1005 (MEIBC) at 1009J). Wide confusion abides.

The purpose of this analysis is to explore the dilemma when disputes arise during a procedure under s 189 of the LRA through which an employer has secured ongoing employment for his employees at another employer. Is the employer then liable to pay severance packages? I hope that some of the confusion can be cleared up.

## 2 Statutes, Regulations and Codes

### 2.1 South African Law

Section 196 of the LRA used to deal with severance pay, but was repealed in 1997. A new section on severance pay was included in the BCEA and does not differ substantially from the repealed section. Severance payments in South African law are therefore now governed by s 41 of the BCEA, subs (4) of which is relevant to the present analysis: ‘An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of subsection (2).’

Section 11 of the Code of Good Practice: Dismissal based on Operational Requirements seems to be clearer on how s 41(4) of the BCEA should be applied:

‘If an employee either accepted or unreasonably refused to accept an offer of alternative employment, the employee’s right to severance pay is forfeited. Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the employee’s refusal. In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the employee’s personal circumstances play a greater role.’

The words ‘either accepted or . . .’ are added here to the formulation of the Act that effectively provides for the alternative to refusal. Possibly s 141 of the Employment Rights Act 1996 (c. 18) (ERA) in the United Kingdom could have played a role in the formulation of s 11 of the Code cited above.

Sections 189 and 197 of the LRA also have a bearing on severance pay. Section 189 regulates retrenchments per se and states (in subs (2)) that parties must engage in a meaningful joint consensus-seeking process and attempt to reach consensus on:

- (a) appropriate measures to avoid the dismissals, to minimise the number of dismissals, to change the timing of the dismissals, to mitigate the adverse effects of the dismissals;
- (b) the method for selecting the employees to be dismissed; and
- (c) the severance pay for dismissed employees.

Section 197 of the LRA deals with the transfer of a business when a new employer is substituted in the place of an old employer regarding all contracts of employment in existence immediately before the date of transfer. According to s 197(2)(d), transfer does not interrupt an employee’s continuity of employment, and an employee’s contract of employment continues with the new employer as if with the old employer. But this implies that no severance remuneration has to be paid, since the employees have effectively lost nothing (see *Pama & Others v CCMA & Others* [2001] 9 BLLR 1079 (LC) in par 1; *Middleton & Others v Industrial Chemical Carriers (Pty) Ltd* [2001] 6 BLLR 637 (LC) in par 16).

## 2.2 English Law

Labour law in the United Kingdom deals explicitly with the entitlement to severance pay when an employee's contract is renewed or he or she is re-engaged elsewhere after an offer was made or negotiated by the old employer (s 141(4) of the ERA). No redundancy payment is to be made if the alternative employment 'is suitable in relation to the individual employee', even if the place where or the capacity in which the latter is employed or the other terms and conditions of the employment differ from the corresponding provisions of the previous contract. A trial period of four weeks at the new employer is applicable, after which the employee cannot simply terminate the contract without good reason and still expect to receive redundancy pay (s 141(5)).

There are two possible consequences if an employer offers suitable alternative employment to an employee before the employment terminates (Andrew C Bell *Employment Law* (2006) at 168). First, if the employee accepts the offer (pending a four-week trial), there is no dismissal, and no redundancy pay either. Second, if the employee unreasonably refuses the offer, there is no claim for redundancy pay.

It seems that English law is more directive than the South African statute as regards the entitlement to severance pay, and takes a more practical approach to dealing with these instances. Whether the drafter of the South African Code for dismissal in terms of s 189 of the LRA noted the stipulations set out by the ERA is not known. But s 11 of the South African Code purports at least to give some working guidelines of what 'reasonableness' implies in this context.

## 3 The Rationale for Severance Benefits

### 3.1 General

Severance pay can be described informally as money given by an employer to an employee who loses his job because of operational reasons. The purpose or rationale of this pay is contentious. Nor is it a new issue in our labour law. During the 1980s and early 1990s a debate raged under the old Act over the purpose(s) of severance pay (see *Irvin & Johnson Ltd v CCMA* [2006] 7 BLLR 613 (LAC) in pars 32-7). There were largely two schools of thought on the reasons why severance benefits should be paid. These are discussed next.

### 3.2 The Vested Rights Viewpoint

According to the vested rights viewpoint, the employee attains vested rights in his job that increase with tenure. The principle of employment protection underlies this opinion, and an employee should be compensated for the loss of his job (Earle K Shawe & Mark J Swerdlin 'You Promised! – May an Employer Cancel or Modify Employee Severance Pay Arrangements?' (1985)

44 *Maryland LR* 903). This follows English common law, which implied that severance pay was payable even if the retrenched worker got another job immediately (Alan Rycroft ‘Severance Pay: The Emerging Legal Issues’ (2001) 22 *ILJ* 2131).

Some of the cases supporting this school of thought (eg, *Jacob v Prebuilt Products (Pty) Ltd* (1988) 9 *ILJ* 1100 (IC) at 1104E-H; *TGWU v Action Machine Moving and Warehousing (Pty) Ltd* (1992] 13 *ILJ* 646 (IC)) referred with approval to the view of Lord Denning MR (in *Lloyd v Brassey* [1969] 2 *QB* 98 (CA) at 102; [1969] 1 *All ER* 382 at 383):

‘a worker of long standing is now recognised as having an accrued right in his job; and his right gains in value with the years. So much so that, if the job is shut down, he is entitled to compensation for loss of the job – just as a director gets compensation for loss of office. The director gets a golden handshake. The worker gets a redundancy payment. It is not unemployment pay. I repeat “not”. Even if he gets another job straightaway, he nevertheless is entitled to full redundancy payment. It is, in a real sense, compensation for long service’.

### 3.3 The Lifeboat Principle

According to the other view – the lifeboat principle – a retrenched employee is entitled to a lifeboat (Carl Mischke ‘Severing the Tie: Retrenchment Pay Issues’ (2003) 19(3) *Employment Law* June 9) to tide him over the hardship of non-employment, since it is not his fault that he loses his job. The principle of equity underlies this opinion, and the payment of severance pay has become an interest issue rather than a rights issue (see *Bronn v University of Cape Town* (1999) 20 *ILJ* 951 (CCMA) at 952H). This school of thought holds that the purpose of severance pay is to see the employee through the period after dismissal when he is unemployed and looking for another job.

Reference was made in *Young & another v Lifegro Assurance Ltd* ((1990)11 *ILJ* 1127 (IC) at 1137) to an unreported decision of the Industrial Court (*Mdlalose & Another v BAC Services CC (NHN 11/2/1603)*), where that Court apparently held that the purpose of giving an employee severance pay is primarily to tide him over while he looks for other employment. It does not really matter whether this is done by way of extended notice without the obligation to work, or more money in his pocket on the day he stops working.

It has been suggested that the most satisfactory motivation for the payment of severance benefits in a fair retrenchment is to soften the blow of a ‘no fault’ dismissal by assisting the retrenched employee until he or she has found another job (Elize Strydom & Kathleen van der Linde ‘Severance Packages: A Labour Law and Income Tax Perspective’ (1994) 15 *ILJ* 451). In calculating the amount of severance pay, the employee’s years of tenure are taken into account, not so much as to reward the latter for long service, but rather as a means of differentiating between different employees. Tenure is mainly rewarded by pension or provident provisions and is in any event severely protected by law (s 41(5) of the BCEA).

The second view should be favoured in jurisprudence, so it has been argued (PAK le Roux & A van Niekerk *The South African Law of Unfair Dismissal*

(1994) at 266). But there are some other arguments entertained by the South African courts that will be investigated in the next section of this analysis.

## 4 The CCMA and the Courts

### 4.1 General

In this section, relevant decisions of the CCMA, the Labour Courts and the Constitutional Court are examined. The focus is on cases in which the employer was instrumental in an offer of alternative employment for his workers, which they either refused or accepted, though they still demanded severance pay.

### 4.2 Older Cases

The ‘lifeboat principle’ as a rationale for making severance payments (see par 3.2. supra) was foreshadowed in *Stellenbosch Farmers’ Winery (Pty) Ltd v National Union of Wine, Spirits and Allied Workers & Others* ((1992) 13 ILJ 1182 (LAC) at 1187). There a collective agreement required the employer to offer its employees ‘suitable alternative employment’ if retrenchment were contemplated. The Labour Appeal Court had to decide whether the alternative employment offered to and accepted by the employees constituted ‘suitable alternative employment’. The Court interpreted the phrase as follows (at 1186A):

‘[T]he word “suitable” . . . does not mean “identical” or even “similar”. . . . [I]t all depends on the person, his or her skills and his or her disposition and needs. Nor does it connote the concept of “equivalent or better”.’

Mischke (op cit at 12) believes that to determine whether a particular position is ‘suitable’, the approach should be flexible rather than rigid. It involves a consideration of all facts and circumstances pertaining to the particular situation(s) and the person(s) under consideration. Employees who unreasonably refuse offers of alternative employment must sink or swim in the stormy waters of unemployment without the benefit of severance pay. Section 41(4) of the BCEA entrenches the ‘lifeboat principle’ in our law, according to Mischke (ibid). However, not all judicial forums agreed with this viewpoint.

*Edworthy v Amalgamated Banks of SA Ltd & Another* ((1994)15 ILJ 869 (IC)) was decided before the LRA and the BCEA came into force. The Court found that where an employer offers an employee an alternative position, that position does not have to be the same as the previous one (at 874E). Even a reduction in salary or grade does not mean that the alternative position is not suitable. The employee may, however, reject or accept the new position. If the grounds for rejecting the position are not reasonable, the employee is not entitled to severance pay (at 875D-E).

In *Kynoch Feeds (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* ((1998) 19 ILJ 836 (LC)) at 838) an employee first accepted redeployment with another company, but then resigned just before

starting the new job, for personal and domestic reasons. Since redeployment was rejected, this employee forfeited the right to severance pay. The Court interpreted the then s 196(3) of the LRA as providing that the acceptance of alternative employment did not imply that the entitlement to severance pay survives (*idem* in par 54; see also John Grogan ‘Golden Handshake: When Severance Pay Is Due’ (2006) 22(5) *Employment Law* October 5). If so, there will be little incentive for the employer to arrange alternative employment. In this regard, the Code is more explicit where it provides that ‘if an employee *either accepted or unreasonably refused* to accept an offer of alternative employment the right to severance pay is forfeited’ (Rycroft *op cit* at 2141 (emphasis supplied)).

In *Purefresh Foods (Pty) Ltd v Dayal & Another* ((1999) 20 ILJ 1590 (LC) in par 12) the Court adopted a purposive interpretation of the then s 196(3) of the LRA. For this section to apply in its literal sense, three requirements must be met: (a) there must be an offer of alternative employment; (b) the offer must emanate from the retrenching employer; and (c) the offer must be refused unreasonably (in par 10). In *Purefresh Foods (Pty) Ltd v Dayal* (*supra*) the application for review was dismissed, since the offer did not emanate directly from the retrenching employer. The employee received severance pay, although he accepted an offer of reasonable and even better alternative employment from another employer, an action that was initiated by the retrenching employer. Counsel for the respondents argued that the right to severance pay had been created not simply to ‘reward’ retrenched employees, but also to ensure that retrenchment carried financial consequences for employers that would cause them to think seriously before retrenching their employees. Although an employee who unreasonably refuses a viable offer of alternative employment is not entitled to severance pay, it does not follow that an employee who accepts such an offer is disentitled (Grogan ‘Package Puzzle’ *op cit* at 7).

Contrary to the decision in *Purefresh Foods (Pty) Ltd v Dayal* (*supra*), the Labour Court held in *Pama v CCMA* (*supra* in par 3) that the legislature clearly contemplated that an offer of alternative employment might emanate from another employer. The dismissing employer would then certainly have complied with s 41(4) of the BCEA if he helped to facilitate this new employment.

### 4.3 A New Perspective

The decision in *Bronn v University of Cape Town* (*supra* at 953D) provided clarity on the entitlement to receive severance pay when accepting an alternative to a fixed-term contract of employment. This offer of alternative employment comprised similar terms and conditions, and the transfer took place with the consent of the applicants. The university gave notice that the fixed contracts would not be renewed, but employment could be continued at a new s 21 company. The respondent was released from the obligation to pay

severance compensation. What is important is that the Court interpreted the purpose of severance pay to provide social security to employees who had become unemployed through no fault of their own (at 952H-J).

*Khumalo & Others v Supercare Cleaning* ([2000] 8 BALR 892 (CCMA) at 894) considered the similar position of an employee whose fixed-term contract terminated. The employer argued that the employees were not dismissed in terms of s 189 of the LRA, since the employees all signed fixed-term contracts that depended on a cleaning contract between Supercare and a government department. This cleaning contract was lost by Supercare, and the employees' jobs were terminated by virtue of contract. The employees were not entitled to severance pay (at 897D-F; see also *SACCAWU obo Makubalo & Others v Pro-Cut Fruit & Veg* [2002] 5 BALR 543 (CCMA) at 545E).

In *Freshmark (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* ((2003) 24 ILJ 373 (LAC) in par 15) the employee first agreed to take up employment by the same employer in the same position but on different terms and conditions (eg, work on Saturdays because of operational needs). Then she reneged and proposed a severance package. The employer retrenched her for operational requirements and denied her any severance package. The Labour Appeal Court decided (in par 23) that this variation in terms and conditions constituted alternative employment as qualified by the then s 196(3) of the LRA.

The Court also held that the purpose of s 196(3) is to deny severance pay to an employee who unreasonably rejects an offer of employment as an alternative to his or her dismissal for operational requirements. The rationale behind this is that an employee who unreasonably refuses an offer of alternative employment is not without fault (in par 24). He has himself to blame if he later finds himself without employment, and he thus does not deserve to be treated like the employee who finds himself without employment through no fault of his own. The Court concluded that the employee's rejection of the company's offer of alternative employment was unreasonable. She was therefore not entitled to severance pay. The appeal by Freshmark was accordingly upheld.

In *Managerial & General Workers Union on behalf of Nkuna v CTP Book Printers (A Division of CTP Ltd)* ((2003) 24 ILJ 650 (CCMA) at 651D) the employee had to prove that his refusal of an alternative job was reasonable. On a balance of probabilities he had failed to discharge the onus that his refusal was not unreasonable. He was accordingly not entitled to severance pay (at 654G).

#### 4.4 Contrasting Decisions

The series of cases in *National Education Health & Allied Workers Union v University of Cape Town & Others* ((2000) 21 ILJ 1618 (LC)); *NEHAWU v University of Cape Town & Others* ((2002] 4 BLLR 311 (LAC)) and

*National Education Health and Allied Workers Union v University of Cape Town & Others* (2003 (3) SA 1 (CC)) dealt with whether outsourcing following a procedure under s 189 should rather be seen as a transfer of business and would therefore be considered within the ambit of s 197 of the LRA instead (see John Grogan 'Outsourcing Workers: A Fresh Look at Section 197' (2000) 16(5) *Employment Law* October). The National Education Health & Allied Workers Union had applied to the Labour Court and claimed a declaratory order to the effect that the employment of its members had been transferred to a number of service providers (other businesses), on the same terms and conditions, when the university outsourced their gardening, maintenance and security functions. The rights of workers when an employer outsources a work function to a contractor were at stake here. The union lost the case, primarily because the Court took the view that there had been no transfer of a part of the university's business as a going concern (*National Education Health & Allied Workers Union v University of Cape Town* (2000) 21 ILJ 1618 (LC) in par 33).

When the Labour Appeal Court heard the matter (in *NEHAWU v University of Cape Town & Others* (2002] 4 BLLR 311 (LAC)), the only issue that it decided was whether s 197 provided for an automatic and obligatory transfer of contracts of employment when the underlying transaction assumed the form of a transfer as a going concern, or whether the section was permissive in the sense that the transferor and transferee employees could agree that it should apply. The majority of the Court effectively held that unless the employees were transferred, it could not be said that there was a transfer of a business as a going concern, and that the employers were free to elect whether the employment contracts were to be transferred.

The union applied to the Constitutional Court for leave to appeal. Leave was granted, and the Constitutional Court (in *National Education Health and Allied Workers Union v University of Cape Town & Others* (2003 (3) SA 1 (CC) in par 71) overruled the interpretation given to s 197 by the Labour Appeal Court and paid little attention to the workings of s 189 of the LRA. A purposive approach to s 197 required that considerations of work security be given primacy, and on this basis, the Court held that s 197 had an automatic and obligatory effect. In other words, once a commercial transaction assumes the form of the transfer of the whole or part of a business as a going concern, the contracts of employment of the old employer's employees transfer to the new employer, unless there is a contracting out of that consequence in terms of the section. The intentions of the two employers are irrelevant; the transfer takes place by operation of law (in par 69).

The confusion of the procedures under s 189 and s 197 might result from the fact that the employees continued working at the same workplace, doing mostly the same work as before, although the employer had changed. It has since become common strategy for employees and their unions to plead that s 197 applies in these cases, and to downplay the process under s 189, previously relied on, as being unfair, especially if no severance pay is paid. In

my opinion, ss 189 and 197 deal with two very different sets of circumstances that should be kept separate. An absurd ruling by the CCMA may take place, awarding rights under s 197 together with severance pay to the same employees!

Outsourcing can be defined as the policy of hiring outside contractors to take over a particular non-core function of an enterprise (eg, human resources) rather than employing full-time personnel (see Craig Bosch 'Transfers of Contracts of Employment in the Outsourcing Context' (2001) 22 *ILJ* 840). This often involves personnel in activities such as catering, cleaning, gardening, data processing and security. Since worker protection is high on the agenda of the courts (see *Nxumalo & Others v Industrial Contract Catering Services t/a Corporate Chefs* [2006] 4 *BALR* 423 (CCMA)), outsourcing is most readily seen as a transfer of (a part of) business that falls under s 197 of the LRA, when most probably it is in essence not a transfer of a going concern in terms of the facts before the CCMA and the courts.

Outsourcing of an activity, not an enterprise or a part of business, was the focus of the dispute in *SAMWU & Others v Rand Airport Management Co (Pty) Ltd & Others* ([2002] 12 *BLLR* 1220 (LC)) and *SA Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd* ((2005) 26 *ILJ* 67 (LAC)). These decisions highlight the care that should be taken when drafting outsourcing agreements. Specialist advice is needed to determine whether s 197 applies in each case. The complexity of this question is demonstrated by this dispute, where the Labour Court first ruled that s 197 did not apply where nothing more than an activity was outsourced. This case concerned the outsourcing of gardening services, and the Court held that those services were not an entity: they had no management structure, assets, goodwill, goals or customers to speak of and were 'merely an activity'.

Section 197 was amended in 2002: the term 'business' now includes 'the whole or a part of any business, trade, undertaking or service' that could be transferred as a going concern. So s 197 became much more widely applicable when this matter was heard by the Labour Appeal Court in 2005. But the Appeal Court decided that no transfer of the employment contracts to the new service provider had been proved here (see *SA Municipal Workers Union & Others v Rand Airport Management Co (Pty) Ltd* (2005) 26 *ILJ* 67 in par 45). The facts that led to this decision differ somewhat from those of *University of Cape Town* (discussed supra), since outsourcing in terms of s 197 and not s 189 of the LRA was in dispute already from the first stage of the latter in the Labour Court.

#### 4.5 The Final Word?

Critical are the decisions in the *Irvin & Johnson* matter (see *Irvin & Johnson Ltd v CCMA & Others* (2002) 23 *ILJ* 2058 (LC) and *Irvin & Johnson Ltd v CCMA & Others* [2006] 7 *BLLR* 613 (LAC)), which decided the question – finally, one hopes, by setting a precedent – whether in our law an

employer is liable to pay severance pay to employees who face an imminent dismissal for operational requirements but accept an offer of alternative employment with another employer. In stating this question, the Labour Appeal Court (*Irvin & Johnson Ltd v CCMA & Others* [2006] 7 BLLR 613 (LAC) in par 1) at the outset of the judgment deliberately referred to a 'dismissal', even though there was a dispute about whether what had happened was a dismissal or simply an agreed termination of the contracts of employment in terms of the common law by mutual consensus between the employer and the employees.

When the appellant decided to outsource its canteen, it required that all bidders should employ the existing staff of the facility. The successful bidder was appointed on a twelve-month contract, and took over the canteen staff at their existing rates of pay. The respondent employees accepted the contractor's offer of employment and signed new contracts after the appellant had paid them their pro-rata annual bonuses, accumulated leave and provident fund benefits. The employees later claimed that they were entitled to severance pay from the appellant. The CCMA found that the employees had been dismissed for operational reasons, and that they were entitled to severance pay (see *Food and Allied Workers Union v Irvin & Johnson Ltd* [2001] WE 36152 (CCMA)). On review, the Labour Court (*Irvin & Johnson Ltd v CCMA & Others* (2002) 23 ILJ 2058 (LC) in pars 16-20) found that the offer of alternative employment was unreasonable, among other things, because the contractor had not agreed to credit the employees with their years of service with the appellant. The appellant contended unsuccessfully that, by accepting employment with the contractor, the employees had forfeited their right to severance pay.

After investigating international and foreign law, the Labour Appeal Court summarised the position with regard to those jurisdictions (*Irvin & Johnson Ltd v CCMA & Others* [2006] 7 BLLR 613 (LAC) in par 38). In terms of the relevant ILO Convention (art 12(1) of the ILO Convention concerning Termination of Employment at the Initiative of the Employer (No. 158) (1982), as referred to in *Irvin & Johnson Ltd v CCMA* ([2006] 7 BLLR 613 in par 38), whether an employee is entitled to severance pay is determined in accordance with national legislation. In terms of the Redundancy Payments Act 1965 (c. 62) of the United Kingdom that applied at the time of *Lloyd v Brassey* (supra [1969] 2 QB 98 (CA) at 105; [1969] 1 All ER 382 at 385), an employee who accepted the renewal of his employment by the new employer where there had been a change in the ownership of a business had no right to redundancy pay, just as was the case with an employee who unreasonably refused an offer of such renewal (*Barber v Guardian Royal Exchange Assurance Group* [1990] IRLR 240 (ECJ) in par 13). The European Court of Justice took the view in this case that the purpose of severance pay was to tide the employee over during the period of unemployment after his dismissal while he was looking for another job.

The Labour Appeal Court then referred to South African academic writings and case law (in *Irvin & Johnson Ltd v CCMA* [2006] 7 BLLR 613 in par 32

ff). It was suggested, though without substantiating support, that severance pay is forfeited if an employee accepts an alternative employment (D du Toit et al *Labour Relations Law: A Comprehensive Guide* (2000) at 395). Rycroft (op cit at 2141) contends convincingly that

‘one interpretation of s 196(3) is that only if an employee unreasonably refuses the alternative employment does he/she lose an entitlement to severance pay. If he/she accepts the alternative employment the Act can be read to mean that the entitlement to severance pay survives. This would be in accordance with the view that severance pay is a form of compensation for the loss of accrued rights in the job and a recognition that the employee’s investment in the job or career path has been terminated. However, it can be argued that this second reading of s 196(3) is contrived and provides little incentive for an employer to arrange alternative employment’.

The Code brings some clarity where it provides in s 11: ‘If an employee either accepted or unreasonably refused to accept an offer of alternative employment the right to severance pay is forfeited.’ It is clear that, if one takes this provision of the Code into account as s 203 of the LRA requires, there can be no doubt that where an employee has accepted an alternative employment arranged by the employer, he forfeits his right to severance pay.

Why is s 41(4) included in the BCEA? Put differently, what is its purpose? Under s 41(4) an employee forfeits his right to severance pay if he unreasonably refuses the employer’s offer of alternative employment with that employer or another employer (see *Durand v Ellerine Holdings Ltd* (1991) 12 *ILJ* 1076 (IC) at 1677E). The drafters of the BCEA probably anticipated that an employer could negotiate alternative employment for an employee, but simply to receive the severance pay an employee might reject such alternative employment without any sensible reason. The purpose of s 41(4) of the BCEA was also to deter employees from unreasonably turning down offers of alternative employment arranged by their employers, just for the need of cash in their pockets supplied by the severance pay.

A major aim of the BCEA is to preserve fair employment. Employers are given an incentive to procure alternative employment for their employees facing dismissal (see *Irvin & Johnson Ltd v CCMA* ([2006] 7 *BLLR* 613 in par 41). Alternatively, they could simply give them money in the form of severance pay and leave them to look for alternative employment on their own. 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 were the prime purpose, an employee who immediately takes on another and sometimes even better paying job after his dismissal should also not be entitled to severance pay, because he would have no need for it.

To put it drastically: s 41(4) of the BCEA rewards the employer for offering or securing alternative employment for the employee (*idem* in par 42). When alternative employment is presented to an employee facing (possible) dismissal for operational requirements, then according to Zondo JP, there are in effect three scenarios possible in terms of s 41(4) (*idem* in par 44):

‘... the employee unreasonably refuses such alternative employment in which case section 41(4) applies and the employee forfeits the right to severance pay;

- ... the employee reasonably refuses such alternative employment in which event he is entitled to payment of severance pay; and
- ... the employee accepts the alternative employment in which event he also forfeits the right to severance pay'.

An employee cannot receive both severance pay and alternative employment. But he can receive neither when he unreasonably declined the offer of alternative employment. However, where he has refused the offer of alternative employment but acted reasonably in doing so, he still receives severance pay. If he accepts an offer, though, it does not matter whether the offer of alternative employment is fair or reasonable (De Bruin op cit at 12; see also Carol Rudd 'Severance Pay: Legal Talk' (2007) *HR Future* February 28). The test for reasonableness applies only where refusal and not acceptance of the alternative is concerned, namely in the first two scenarios (*Irvin & Johnson Ltd v CCMA* [2006] 7 BLLR 613 in par 45).

In *Irvin & Johnson Ltd v CCMA* (supra) the Labour Appeal Court decided that the employee respondents' acceptance of the appellant's offer of alternative employment implied that they forfeited their right to severance pay. Accordingly, the CCMA commissioner erred in construing s 41(4) of the BCEA as conferring a right to severance pay on an employee who had accepted the employer's offer of alternative employment with that employer or with another employer (par 49). Their contracts were terminated by mutual agreement, and no dismissal envisaged by s 189 of the LRA took place. The appeal was upheld.

## 5 Conclusion

The present South African law on the non-payment of severance benefits will now be summarised.

The CCMA and the courts differ in their interpretation and application of s 41(4) of the BCEA. It seems that especially the CCMA commissioners often turn a blind eye to the Code in which acceptance and unreasonable refusal of an alternative employment are on even par. In both instances – acceptance and unreasonable refusal – the employee forfeits the right to severance pay. Possibly the precedent set by Zondo JP in *Irvin & Johnson Ltd v CCMA* ([2006] 7 BLLR 613 in par 46) in the Labour Appeal Court will impact more widely in future: any acceptance of alternative employment as such also negates the entitlement to severance pay.

The grounds for this decision relate to the reasons why severance pay is paid. In *Irvin & Johnson Ltd v CCMA* (supra in par 41) the Court emphasised that the prime purpose of s 41(3) of the BCEA is to promote sustained employment by giving employers an incentive to procure alternative employment for their employees facing dismissal for operational requirements. This could save employers large sums of money that they would otherwise have to pay in severance packages. Employees, on the other hand, should not have the choice of simply refusing alternative jobs in order to receive money in their pockets (S Stelzner & A de Vos 'Severance Pay? – Not Always' (2006) 6(8) *Without prejudice* 41).

Outsourcing should clearly be distinguished from a transfer of business. Outsourcing is not the same method of restructuring and should therefore be managed differently. The crucial point is whether only a non-core activity is outsourced on tender or rather (a part of) the business (*SAMWU obo Manana & Others v Rand Airport Management Company (Pty) Ltd & Others* (2005) 26 *ILJ* 67 (LAC) in par 1). The procedures of restructuring under s 189 and s 197 must be clearly distinguished. Outsourcing can be at stake in both instances, but the procedure under s 197 is more radical and final than that under s 189. The courts seem to incline towards an absolute interpretation of outsourcing, as always being a procedure falling under s 197, which can sometimes become confusing and possibly even wrong.

To conclude: three scenarios arise when an employer has arranged alternative employment for an employee who is facing retrenchment, and also when a non-core activity is being outsourced:

- the employee unreasonably refuses such employment and he forfeits the right to severance pay;
- the employee reasonably refuses such employment and he is still entitled to severance pay;
- the employee accepts the alternative employment and forfeits the right to severance pay.

Although the reasonability test apparently does not apply to the last option, it seems only fair that the terms and conditions of the new job should not differ substantially from the old one. What would constitute such a significant and unacceptable change is not certain. But it is clear that an employee could refuse such an offer as being unreasonable. If there is a dispute over whether this refusal is reasonable, it has to be decided by an outside tribunal (*Sayles v Tartan Steel CC* (1999) 20 *ILJ* 647 (LC)).

I hope that the CCMA and the Labour Courts will in future throw more light on how to decide on matters regarding s 41(4) of the BCEA.