SEVERANCE PAY - A RIGHT

OR A PRIVILEGE?

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CONTENTS PAGE NO.

CONTENTS PAGE NO.

CHAPTER 1

INTRODUCTION

It is widely accepted that an employee should be paid severance pay in the event of him losing his job through no fault of his own. In 1963 the International Labour Organisation ("ILO") reflected upon the predicament of such employees and passed a recommendation that

> *"Some form of income protection should be provided for workers whose employment has been terminated; such protection may include unemployment insurance or other forms of social security, or severance allowance or other types of separation benefits paid for by the employer, or a combination of benefits, depending upon national laws or regulations, collective agreements and the personnel policy of employer."* [1]

Subsequently, in 1982, the ILO took the matter further and passed a Recommendation and a Convention which both provide that:

> *"A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to -*
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> *(a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or*

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1 *Paragraph 9 of Recommendation 119 of 1963. It is of interest to note that Recommendations as well as Conventions of the ILO must be passed by a two thirds majority of member states. Recommendations are intended to provide guidelines for governments whereas Conventions are intended to impose obligations on those member states which ratify them.*

(b) *benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or*

(c) *a combination of such allowance and benefits."*[2]

Notwithstanding these clear guidelines from the ILO, the labour courts in South Africa have failed to reach consensus on whether an employee who loses his job through no fault of his own is entitled to severance pay. An analysis of the cases reported in the Industrial Law Journal reveals that the score could not be closer. Of the 17 cases dealing with this issue to date there are nine judgements in favour of such an entitlement, and eight against. On closer analysis the scoreline looks as follows:

	For	**Against**
Industrial Court	8	5
Labour Appeal Court	1	3
Appellate Division	0	0
	9	8

The purpose of this dissertation is to explore the difficulties experienced by our labour courts on this issue in order to determine whether there is or ought to be such an entitlement in terms of our labour law and, in addition, to investigate ancillary issues such as whether parties are obliged to consult or negotiate concerning severance pay and the quantum of severance pay.

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2 *Paragraph 18(1) of Recommendation 166 and Article 12, paragraph 1, of Convention 158, both of 1982. It is of interest to note that these provisions are intended to apply to all instances of termination of employment at the initiative of the employer including instances prompted by the misconduct or poor performance of the worker. It is only in cases of serious misconduct that the ILO indicates that a worker should forfeit his severance pay. This potentially leaves the door open for dismissed workers in circumstances other than retrenchment, such as unsatisfactory performance, bringing claims against their employers for severance pay.*

CHAPTER 2

THE LEGAL FRAMEWORK

2.1 The Common Law

In terms of our common law an employer has the right to terminate the employment contract simply by giving notice of such termination to the employee. This right does not normally apply to fixed term contracts, but does apply to contracts entered into for an indefinite period which constitute by far the majority of employment contracts entered into in South Africa. Provided that the employer gives proper notice, he is entitled to dismiss the employee for virtually any reason or for no reason at all.

The required notice period is the notice period agreed upon, failing which "reasonable" notice must be given. The most important consideration in determining "reasonable" notice is the periodicity of payment. Thus normally a weekly-paid worker must be given one week's notice and a monthly paid worker should be given one month's notice. It has even been held that in the case of daily paid workers no notice of termination is required at all.[3]

There is no requirement in terms of our common law for the payment of severance pay. Such payments are purely voluntary and gratuitous payments by the employer, in the absence of which the luckless employee leaves empty handed to seek employment elsewhere on the labour market. In this regard it should be noted that the employer is entitled to dispense with notice altogether provided he pays the worker his salary in lieu of notice. By paying notice pay the employer is simply complying with his common law obligations and this should not be confused with severance pay.

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3 *Pretoria City Council v Minister of Labour and others 1943 TPD 244.*

The Basic Conditions of Employment Act now provides for statutory minimum periods of notice for those employees falling within its ambit.[4] Although these periods are clearly ascertainable from the Act they do not differ significantly from the common law with regard to the period of notice required. More importantly, for the purposes of this dissertation, the Act makes no provision whatsoever for severance pay.

2.2 The Labour Relations Act[5]

A possible solution to the problem arose with the introduction of the Industrial Court and its unfair labour practice definition which flowed from the deliberations and report of the Wiehahn Commission. An unfair labour practice was initially defined as

> *"any labour practice which in the opinion of the industrial court is an unfair labour practice."*

This definition briefly presented the industrial court with an unhindered path to determine clear principles of fairness in the employment sphere in South Africa. Unfortunately it was short-lived and was replaced in 1980 with a new definition which was then amended in 1982.[6] The 1982 definition stood for some six years and formed the basis of the earlier pronouncements by the Industrial Court on the issue of severance pay as well as numerous other issues. It read as follows:

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4 *Section 14 of Act 3 of 1983.*

5 *Act 28 of 1956.*

6 *The Industrial Court and the original unfair labour practice definition were first created in terms of Act 94 of 1979. The unfair labour practice definition was first amended in terms of Act 95 of 1980 and was again amended by Act 51 of 1982.*

"unfair labour practice" means -

(a) any labour practice or any change in any labour practice, other than a strike or a lock-out, which has or may have the effect that-

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

(b) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in para (a)."

This definition was subjected to serious criticism by employers who complained that its meaning was unclear. In an attempt to clarify employers' obligations to employees an attempt was made to codify the concept of an unfair labour practice. Thus an amended definition of an unfair labour practice was introduced with effect from 1 September 1988.[7] The portions of the definition directly relevant to this dissertation, which dealt with no fault termination such as retrenchments, read as follows:

"unfair labour practice" means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include the following ...

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7 *In terms of the Labour Relations Amendment Act, No. 83 of 1988.*

(b) the termination of the employment of an employee on grounds other than disciplinary action, unless-...

(ii)(aa) prior notice of such termination of employment in accordance with any applicable agreement, wage regulating measure or contract of service, has been given either to the employee, or if such employee is represented by a trade union or body which is recognised by the employer as representing the employees or any group of them, to such trade union, body or group; and

(bb) prior consultation in regard to such termination of employment took place with either such employee or where the employee is represented by a trade union or body recognised by the employer as representing the employees or any group of them, with such trade union, body or group; and

(cc) such termination of employment takes place in compliance with the terms of an agreement or contract of service, regulating the termination of employment of the employee whose employment is terminated; and

(dd) such termination of employment takes place in a case where the number of employees in the employment of an employer is to be reduced, according to reasonable criteria with regard to the selection of such employees, including, but not limited to, the ability, capacity, productivity and conduct of those employees and the operational requirements and needs of the undertaking, industry, trade or occupation of the employer ..."

It is significant that the definition made no mention of severance pay. However there was an "omnibus clause" at the end of the definition,[8] the intention being that practices, such as the failure to pay severance pay, which were not dealt with by any of the specific provisions of the definition might nevertheless constitute unfair labour practices in terms of the omnibus clause if the Industrial Court saw fit.

The 1988 definition was introduced together with certain other significant amendments to the Labour Relations Act. All these amendments were regarded at the time as being highly controversial. The effect of the amendments was to tilt the scale in favour of employers and, as a result, they were vehemently opposed by the trade union movement. Eventually the government of the day relented and a number of the 1988 amendments were reversed with effect from 1 May 1991.[9] The 1982 definition of an unfair labour practice was reintroduced with certain minor changes, and still applies today. It reads as follows:

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8 *Paragraph (10) of the definition.*

9 *In terms of the Labour Relations Amendment Act, No. 9 of 1991. It is important to note that one is not entitled to draw any specific inferences by virtue of the repeal of the 1988 definition. This flows from the insertion into section 1 of the Act of a new sub- section 4 which reads as follows:*

> *"The definition of "unfair labour practice" referred to in subsection (1), shall not be interpreted either to include or exclude a labour practice which in terms of the said definition is an unfair labour practice, merely because it was or was not an unfair labour practice, as the case may be, in terms of the definition of "unfair labour practice", which definition was substituted by section (1)(a) of the Labour Relations Amendment Act, 1991: Provided that a strike or lock-out shall not be regarded as an unfair labour practice."*

"unfair labour practice" means any act or omission, other than a strike or lock-out, which has or may have the effect that-

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the labour relationship between employer and employee is or may be detrimentally affected thereby;"

It was on the basis of these last three definitions (1982, 1988 and 1991) that our labour courts have been required to rule on numerous issues including the issue of severance pay. The definitions are by no means straight forward and prior to examining how the courts approached the matter, some discussion on the interpretation of these definitions is called for.

2.3 Interpretation of Unfair Labour Practice Definition

As illustrated above, the 1982 and 1991 definitions are virtually identical. They in turn are very similar to the "omnibus provision" contained in the 1988 definition.[10] All these definitions appear at face value to have been exceptionally badly drafted and, as a result, can give rise to absurd consequences. For example in terms of the wording of the current 1991

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10 *An important difference, which is not relevant to the subject matter of this dissertation, is that the so-called omnibus provision does not expressly exclude a strike or a lock-out from being an unfair labour practice.*

definition any act, excluding a strike or lock-out, which may result in the work security of an employee being prejudiced constitutes an unfair labour practice. If an employee is dismissed his work security is clearly prejudiced and thus, if the definition is taken literally, it means that any dismissal of an employee, regardless of the merits or circumstances of such dismissal, constitutes an unfair labour practice. This is clearly absurd.

The interpretation of a statutory provision is normally regarded as being a question of law. Thus the interpretation of the unfair labour practice definition has also been held by the Labour Appeal Court on at least two occasions to be a question of law.[11] One of these occasions was in the ***Bester Homes*** case in which Thring J handed down one of the Labour Appeal Court's leading decisions on severance pay. The normal rule of statutory interpretations is to apply the literal meaning of a statutory provision. However this is subject to an important qualification namely the presumption against absurdity, otherwise known as the "Golden Rule" of interpretation of statutes.[12] In such instances the court must apply what it believes the legislature reasonably intended to convey in terms of the statutory provision.

In practice our labour courts have usually ignored the wording of the definition and have simply determined each case in accordance with their own assessment of the concept of fairness in labour matters. By so doing our labour courts have, in effect, intuitively applied the "Golden Rule" on an unarticulated basis and this should be commended. However it does not excuse the legislature of sloppy draftmanship.

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11 *Bester Homes (Pty) Ltd v Cele & others (1992) 13 ILJ 877 (LAC) and NUMSA v Vetsak Co-operative Ltd and others (1991) 12 ILJ 564 (LAC).*

12 *See Cokram G-M; Interpretation of Statutes, 3rd edition (Juta & Co, 1987) at pages 44-48.*

Recently the Appellate Division was required to rule in the ***Perskor case*** on whether determining an unfair labour practice is in fact a question of law.[13] It found that it was neither a question of law nor a question of fact, but fell into the middle ground of judicial discretion - that is to say, all matters and questions as to what is right, just, equitable or reasonable. The Court went further and considered the wording of the definition (in this case the 1982 definition), and concluded that not only must our courts decide whether the requirements of the definition have been met but that they must *"also have regard to considerations of fairness or unfairness."* This it stated, is implicit in the very concept of an unfair labour practice.[14]

To rule that considerations of fairness or unfairness are implicit in the very concept of an unfair labour practice might appear at first glance to be obvious. However it also defeats the object of trying to define the concept at all. The 1982 definition made no attempt to define what the words "labour practice" mean as these words were simply repeated in the body of the definition. Thus one can only conclude that the thrust of the definition was to define the concept of "unfairness" and not that of a "labour practice". To argue in effect that "unfair" means "unfair" is futile and one would have expected more from the Appellate Division in this regard. These considerations also apply to the 1991 definition which clearly requires amendment. It is suggested that the legislature should simply revert to the original "definition" referred to at the commencement of section 2.2[15] of this dissertation unless a more meaningful definition can be found. In the

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13 *Media Workers Association of S.A. and others v Perskor 1992 (4) SA 791 (AD).*

14 *Ibid at page 798 E.*

15 *At page 4 above.*

meantime the Industrial Court should simply continue to ignore the wording of the current definition and to apply its own assessment of the concept of fairness in the cases which come before it.

Notwithstanding the problems linked to the definition of an unfair labour practice, the decision in the ***Perskor case*** has had an extremely positive effect on our labour courts. Not only was it held that the two assessors in the Labour Appeal Court are entitled to contribute to that court's rulings on unfair labour practices but, more importantly, it was further held that the Industrial Court, as a court of first reference, has the necessary authority and expertise to rule on labour matters to the extent that its decisions should no longer be lightly overturned. This new status of the Industrial Court was recently amplified by Thring J in the *Sopelog case*,[16] as appears from the following extract from the headnote to the judgement:

> *"It can be expected that members and additional members of the Industrial Court will have their fingers on the pulse of industrial relations, and will be sufficiently immersed in and conversant with the morals of the labour market place and the business and labour ethics of that section of the community to justify confidence that their discretionary decisions on what is fair and what is unfair in the field will usually correctly reflect the general sense of fairness and justice of the community. It would therefore, be a mistake for the Labour Appeal Court too readily to substitute its own views for those of the Industrial Court on a particular question of unfairness simply because they are different. The converse applies where the Labour Appeal Court is satisfied that the Industrial Court's view is clearly wrong or that the requirements of law or fairness*

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16 *CWIU & others v Sopelog CC (1994) 15 ILJ 90 (LAC).*

> *necessitate the intervention, or that the decision in question is vitiated by misdirection or the application of incorrect principles, or that the Industrial Court's discretion has been improperly exercised or that the court has exceeded its powers. In such a case the Labour Appeal Court would be at large to interfere with the Industrial Court's decision as it thought fit."*

With the benefit of hindsight it is now apparent that the unfair labour practice definition provided our labour courts with a clear opportunity to hand down rulings on whether in terms of the "*morals of the labour market place*" it was necessary for employers to pay severance pay. However, as will be seen from the following analysis of the cases, there was by no means uniformity amongst our labour court members as to how they should approach the matter.

CHAPTER 3

THE EARLY INDUSTRIAL COURT JUDGEMENTS

During the period 1988 to 1991 some eight judgements of the Industrial Court in which the issue of the entitlement to severance pay was pronounced upon were published in the Industrial Law Journal. Of these five were in favour of a right to severance pay while the remaining three expressed opposition to the idea. Details are as follows:

3.1 The Pro- Severance Pay Judgements

The first Industrial Court judgement on this issue was handed down in the case of *Ntuli & others v Hazelmore Group t/a Musgraves Nursing Home.*[17] After dealing with numerous other aspects of the retrenchment in that case, Landman AM (as he then was) stated as follows:[18]

> *"In my opinion having regard to the industrial relations practices which are followed by enlightened employers in this country, an employer who does not offer reasonable severance pay to an employee, taking into account such considerations as his length of service with the employer or an associated employer, is guilty of an unfair labour practice."*

It was unfortunate that Landman AM said little by way of motivating his conclusion, nor did he rely on any authority. Yet he was expressing his views on an area in which he no doubt believed he exercised a discretion in the sense subsequently verbalised in the *Perskor* and *Sopelog* cases.

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17 *(1988) 9 ILJ 709 (IC).*

18 *Ibid at page 718 J to 719 A.*

Ntuli's case was followed by *Jacob v Prebuilt Products (Pty) Ltd.*[19] In this case the Industrial Court, in its quest for some guiding authority on the matter, quoted the following extract from the judgement of Lord Denning in the English case of *Lloyd v Brassey*:[20]

> *"A worker of long standing is now recognised as having accrued rights in his job, his right gains in value over the years. So much so, that if the job is shut down he is entitled to compensation for a 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 straight away, he nevertheless is entitled to full redundancy payment. It is, in a real sense, compensation for long service."*

On the strength of this passage, as well as certain other considerations, the Industrial Court granted Mr Jacob a *status quo* order reinstating him in the employ of respondent as a result of respondent's failure to pay him a severance benefit upon retrenchment.

It would appear that *Ntuli's* case was followed by a number of unreported cases in which the Industrial Court held that severance pay must be paid. This would explain the statement of De Kock M in the *Status Hotel* case,[21] reported some two years after *Ntuli*, that the Industrial Court had in a number of prior cases indicated that severance pay must be paid.

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19 *(1988) 9 ILJ 1100 (IC).*

20 *(1969) 4 ITR; also reported in [1969] I All ER 382 (CA).*

21 *CCAWUSA & others v Status Hotel (1990) 11 ILJ 167 (IC).*

Oddly enough De Kock referred to no authority for this statement, not even the prior reported cases of ***Ntuli*** and ***Jacob***. However he did express his views on the purpose of severance pay which he stated are as follows:

1. It serves as an expression of gratitude for years of loyal service.
2. It takes the sting out of no fault termination.
3. It represents a price to retrenchment ensuring that retrenchment is not undertaken lightly.
4. It assists the employee and his family to tide themselves over until they find alternative employment.

A somewhat unsatisfactory aspect of the De Kock's judgement concerned the issue of the quantum of severance pay. He expressed the view that the determination of the quantum was the preserve of collective bargaining and then, almost in the same breath, he determined the appropriate severance pay in that case to be two weeks pay which he promptly awarded to the applicant. More significant than the inherent contradiction in his approach is the fact that he unwillingly laid the seed for the argument which subsequently almost became the death knell of an employee's right to severance pay, namely, that disputes on severance pay are disputes of interest as opposed to disputes of right and that the Industrial Court should therefore refrain from interfering in such disputes. This argument was fully developed by the Labour Appeal Court in the *Bester Homes* appeal case which is dealt with more fully below.[22]

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22 *See page 28 below.*

The ***Bester Homes*** case is one of the most important cases on severance pay to have come before our labour courts. The Industrial Court hearing took place during late 1989/early 1990,[23] more than two years before it was heard on appeal by the Labour Appeal Court. In this case a large retrenchment exercise had been frozen pending the determination by the Industrial Court on the retrenchment of six employees which had been put before it by way of a test case. No severance benefits had been paid to these employees. Botha AM ruled that this failure constituted an unfair labour practice. The basis of this ruling was as follows:

(a) He relied on the evidence of two experts in industrial relations who testified, *inter alia*, that at least nine out of ten major employers paid severance benefits.

(b) He referred to both ***Ntuli's*** and ***Jacob's*** cases with approval.

(c) He referred to the Recommendations and Convention of the ILO set out at the commencement of this dissertation.[24] In this regard he mentioned that although South Africa has a system of unemployment insurance, it is a very inadequate one.

(d) With regard to the quantum of severance pay he stated that this aspect should be left to free and fair collective bargaining, in the absence of which he proceeded to determine the amounts involved at the rate of two weeks pay per year of service.

In relying on the grounds set forth in (b) and (d) above Botha AM laid himself open to criticism. *Jacob's* case was the source of Lord

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23 *Cele & others v Bester Homes (Pty) Ltd (1990) 11 ILJ 516 (IC).*

24 *See pages 1 and 2 above.*

Denning's dictum in the ***Lloyd v Brassey*** case, which as we shall see below[25], was taken out of context. With regard to the quantum of severance pay the same misgivings raised with regard to De Kock's judgement on that point in the ***Status Hotel*** case also apply here.[26] Nevertheless the judgement was a good one in that the court intuitively exercised its discretion on what was fair and what was unfair without getting itself bogged down on the technical points which absorbed the Labour Appeal Court when the case was taken on appeal.[27]

Botha AM was also called upon to preside in the case of ***Durand v Ellerine Holdings Ltd.***[28] In this case the respondent admitted that it was liable to pay severance benefits and had in fact done so. Mr Durand's complaint was that his employer had discriminated against him for, although it had calculated his benefit in accordance with its normally applicable formula, it had calculated his ex-secretary's severance pay at a significantly higher rate. Botha AM ruled that this was unfair. However he raised a somewhat bizarre argument that there was a duty in this case which arose *ex lege* to pay a fair, reasonable and equal benefit to Mr Durand. This duty, so he claimed, was implied by law and flowed from the fact that in our law all contracts including the contract of employment are *bona fidei*. The contemporary community's concept of good faith in this case required that something additional in the form of severance pay be paid upon termination of the employment contract - and this was a legal duty. This somewhat garbled argument appeared to flow

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25 *See page 20 below.*

26 *See page 15 above.*

27 *See page 28 below.*

28 *(1991) 12 ILJ 1076 (IC).*

from a perception that the determination of an unfair labour practice is a question of law.[29] Of course it is now clear from the *Perskor* judgement that it is neither a question of law nor one of fact but belongs to a third category of matters in which the court is required to exercise its judicial discretion on the basis of equity.[30] Thus it was not necessary and somewhat strained for the Industrial Court to seek a legal basis for its findings in this case.

In summary therefore the Industrial Court had, in its pro- severance pay judgements, adopted an approach in terms of which its members, on the basis of their own intuition as experts with their fingers on the pulse of industrial relations, as well as on the basis of evidence from other experts and guidelines from the ILO, had found that there was an equitable duty on employers to pay severance benefits upon the retrenchment of employees. The amount of such pay was to be determined by collective bargaining but the Industrial Court was able to fix the amount in the absence thereof.

3.2 The Anti- Severance Pay Judgements

The first negative note arose in the case of *Howell v International Bank of Johannesburg Ltd.*[31] This case was not concerned with a retrenchment but with a constructive dismissal, which dismissal the court ruled was unfair. Copeling AM referred to the notion as expressed in *Lloyd v Brassey* that a

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29 *At page 1083 I of the judgement Botha gives an example of an implied contractual duty which flows from the requirement of bona fides and is implied ex lege and not in fact. Later at page 1084 A he states that it is obvious to him that the forces of bona fides are hard at work in labour relations.*

30 *See page 10 above.*

31 *(1990) 11 ILJ 791 (IC).*

worker of long standing has vested rights in his job and that severance pay constitutes compensation for long service and loss of such vested rights. Copeling argued that if this proposition were to be stretched to its logical conclusion it would mean that an employee would be entitled to severance pay by virtue of his period of service alone, in all instances in which the his services were terminated, even where he was guilty of gross dereliction of duty or even upon his retirement or voluntary resignation. This, Copeling found, would be nonsensical and he therefore rejected this line of argument. "*The fact of the matter*" he stated "*is that an employee of long standing does not by reason of his period of service alone, automatically acquire a vested right in his job*"[32]. The court therefore concluded that although period of service is a factor which must be taken into account in order to determine whether severance pay is payable, no severance pay was payable in that case as Mr Howell had in fact found alternative employment at a larger remuneration package and had therefore suffered no loss. Thus the judgement in ***Howell's*** case should rather be viewed as identifying circumstances in which severance pay is not payable as opposed to constituting authority for a general proposition that there is no duty to pay severance pay.

In ***Young & Anor v Lifegro Assurance***[33] the Industrial Court declined to award severance pay to the two applicants who it found had also suffered no prejudice on their services being terminated. The facts were that it had been decided to merge the business of Lifegro with another insurer by the name of Momentum. As a result of the merger the services of the two applicants with Lifegro were terminated but they were offered alternative employment

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32 *Ibid at page 798 G.*

33 *(1990) 11 ILJ 1127 (IC).*

on identical terms and conditions with Momentum. The court found that there was no question of redundancy in this case and that there was no retrenchment. However even if there was a retrenchment it found that the applicants had no claim to severance pay as a result of the offer made to them of substantially equivalent employment with Momentum.

The *Lifegro* judgement would appear to deal with an exceptional circumstance in which severance pay is not payable. However Van Niekerk S.M. went a lot further. He commenced by exposing a serious error made by the Industrial Court in the prior ***Jacob***[34] and ***Bester Homes***[35] cases. In these two cases the passage from the judgement of Lord Denning in ***Lloyd v Brassey***[36] had been referred to as authority for the proposition that employees of long standing are recognised as having accrued rights to their jobs. Van Niekerk pointed out that this passage was clearly taken out of context as it in fact dealt with the interpretation of a specific English statute[37] and was not a pronouncement upon the underlying principle of severance pay. He furthermore rejected the notion of an employee accruing a right to his job and stated that the fact that certain "enlightened" employers in this country offer severance pay is not sufficient to establish a binding custom in law or equity. After reviewing these and other aspects of prior Industrial Court decisions in which an attempt was made to establish a basis for an obligation to pay severance pay, he stated that "*this all, with the greatest respect, is really*

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34 *See note 19 above.*

35 *See note 23 above.*

36 *See page 14 above.*

37 *The Redundancy Payment Act of 1965 which was subsequently replaced by the Employment Protection (Consolidation) Act of 1978.*

the result of some muddled thinking"[38]. The primary purpose of severance pay, according to Van Niekerk SM, is to tide a retrenched employee over while he looks for other employment and such a situation ought in fact to be guarded against by insurance. He therefore found it to be *"legally untenable and, even, perhaps economically and socially immoral to attempt to use this court as an agent to enforce insurance benefits from a source from which it is not due"*[39].

As can be imagined the strong views expressed by Van Niekerk SM in the ***Lifegro*** case well and truly sparked off a debate on the issue. Advocate N F Rautenbach expressed strong contrary views in an article published in the Industrial Law Journal.[40] However prior to this article appearing the disappointing judgement of Schwietering AM in the ***Kalley Flooring*** case was handed down.[41] This case presented the Industrial Court with an ideal opportunity to decide whether it should be allowed to intrude in a situation in which a trade union was clearly endeavouring to negotiate more favourable severance packages for those of its members who had been retrenched. The trade union was demanding two weeks pay for each completed year of service whereas the employer was offering significantly less. One would have thought that the Industrial Court might have considered whether this was not a matter which should be determined by collective bargaining but instead the court concentrated on the somewhat bizarre argument that the purpose of severance pay is to compensate the employee for being underpaid by his

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38 *At page 1137 A of the judgement referred to in note 33 above.*

39 *Ibid at 1137 G.*

40 *This is dealt with at page 22 et seq below.*

41 *S.A. Woodworkers Union v Kalley Flooring Co (Pty) Ltd (1990) 11 ILJ 1342 (IC)*

employer during his period of employment. Needless to say the court rejected this argument and held that there is no equitable duty to pay severance pay.

3.3 Rautenbach's Commentary

As mentioned above Advocate N F Rautenbach, in his article ***In search of the Severance Package***[42] was drawn into the debate and, no doubt goaded by the strong views of Van Niekerk SM in the ***Lifegro***[43] case, unleashed some strongly expressed views of his own. He accused the Industrial Court of ignoring *"principle, logic or coherent and consistent systems of law"* and simply *"flying by the seat of its pants"* in order to produce arguments which were *"incoherent, rudderless and chaotic"*.[44] It is a brave man who prefaces his remarks with such strong words as they could later backfire and cause him embarrassment.

Rautenbach picks out the three reported anti- severance pay judgements of ***Howell***,[45] ***Lifegro*** and ***Kalley Flooring***[46] for criticism thereby indicating his pro- severance pay leaning. While his criticism of the ***Kalley Flooring*** judgement is fully justified, this judgement cannot be regarded as making any serious contribution to the topic. His criticism of ***Lifegro*** and ***Howell*** commences with him stating that these two decisions overlook perhaps *"the most obvious*

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42 *(1991) 12 ILJ 735.*

43 *Young & Anor v Lifegro Assurance (1990) 11 ILJ 1127 (IC).*

44 *Op cit note 42 at page 735.*

45 *Op cit note 31 above.*

46 *Op cit note 41 above.*

ingredient of the commercial logic of retrenchment pay : that persons who are retrenched lose their jobs through no fault of their own".[47] However this ingredient was clearly not overlooked. Van Niekerk dealt with it as follows in his *Lifegro* judgement:[48]

> *"It is often said that the position of the employee in cases of retrenchment requires special consideration because he is deprived of his employment through no fault of his own. The golden rule in the law of obligations according to Prof J C de Wet is that damage rests where it falls unless it should be shifted on considerations of fault. A fair and lawful retrenchment leaves no room for a finding of blameworthiness on the part of either party and, consequently, no room for an obligation to pay any compensation."*

Rautenbach criticises the last two sentences of this passage, thereby tacitly contradicting himself by acknowledging that the fault ingredient was not in fact overlooked. He then criticises Van Niekerk for introducing a principle of common law which he claims cannot be transposed *"to another field of law willy nilly".*[49] He attempts to justify this view by arguing that the Industrial Court must look to considerations of fairness instead of fault when adjudicating on these matters. This, of course, is nonsense. There in no reason why the principle of fault should not form as much as a part of the Industrial Court's equitable jurisdiction as it does our common law.

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47 *Op cit note 42 at 736.*

48 *(1990) 11 ILJ 1127 (IC) at 1135 C*

49 *Op cit note 47 at 738.*

Rautenbach proceeds to deal with the argument supported by John Brand in an article in the journal Employment Law[50] that the existence and extent of severance pay should be left to collective bargaining or market forces and that the Industrial Court should not interfere in this process. Rautenbach's handling of this aspect is more impressive. He makes the crucial observation that the bargaining equilibrium is severely distorted in negotiations on severance pay and that it is inappropriate to leave it up to collective bargaining in such circumstances.[51] The most powerful weapon normally at the disposal of a trade union in the collective bargaining process is its ability to withdraw its labour in the event of it being unable to reach agreement with the employer on the issue under negotiation. However in a retrenchment scenario the employer is himself dispensing with labour for operational reasons and the trade union is therefore deprived of its ultimate weapon. To expect the trade union in such circumstances to participate in collective bargaining with the employer is akin to expecting a boxer to go into the ring with his hands tied behind his back. It is in precisely this type of situation that our labour courts should be expected to intercede so that a fair outcome can be achieved. These observations by Rautenbach are therefore crucial to the debate.

Rautenbach next embarks on a useful discussion on the rationale for severance pay.[52] He correctly observes that the rationale underlying the employment relationship is purely commercial. The employer hires the employee because he wants the job done and is prepared to pay accordingly.

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50 *1990 (6) Employment Law 115.*

51 *Op cit note 42 at 738 to 739.*

52 *Ibid at 740 et seq.*

Similarly retrenchments are also purely commercial. The employer terminates the relationship when he no longer has a need for the job to be done. Rautenbach then seeks out the underlying reasons for the practice of certain employers to pay severance pay.[53] The first two identified by him are concern on the part of the employer

(a) that the employee may find it difficult to find alternative employment; and

(b) that the employee may suffer a degradation of status and reputation as a result of the termination as well as similar non-material losses.

However Rautenbach states that it would be naive to assume that employers are only concerned about these two factors. There must be some deeper commercial rationale for such payments. In all likelihood the employer will be more concerned about the possible harm that could come his way as a consequence of the retrenchment and the resulting dissatisfaction on the part not only of the retrenched employee but also the remaining workforce. This dissatisfaction may take the form of a defamatory statement in the press, industrial action, litigation or even sabotage. He concludes as follows:[54]

> *"In a nutshell, if a commercial rationale is to be found for the payment of severance pay, it lies in the fact that the employee is paid an amount of money which the employer believes is sufficient to mollify the employee so as not to harm the operation. The payment seeks to achieve a peaceful parting of the ways. The employer pays to avoid further disputes*

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53 *Ibid at 742.*

54 *Ibid*

or ramifications arising out of the retrenchment; it endeavours to buy industrial peace".

His conclusion overstates the position. Most employers would balk at paying what is, in effect, blackmail money. He furthermore omits to observe that because employers are concerned that their operations should continue to run as smoothly as possible, employee morale is a big factor. Astute employers only embark on retrenchments as seldom as they possibly can, and if they do so, they are keen that retrenched employees are not seen by the remaining workforce as having been "tossed to the wolves" and that the morale of the remaining employees is not unduly lowered.

Having dealt with this aspect at some length, Rautenbach then surprisingly concludes that the identification of this commercial rationale is not of much assistance. This is no doubt the case if Rautenbach approaches the matter from an unarticulated premise that severance pay should be obligatory. That is what he appears to do, and then having found that the commercial rationale does not assist him, casts it aside. However, having tied himself up in knots, Rautenbach still seeks some justification for a duty to pay severance pay. He finds it by relying on his instincts and intuition. *"One feels instinctively that the answer has to do with the fact that while the employer gains the commercial advantage [from the retrenchment]... the employee does not gain. Intuitively one senses [his] feelings of outrage.... Instinctively one empathises with the [retrenched] employee."*[55] It is a pity that Rautenbach did not develop this line of reasoning further for it arguably contained the seeds of the underlying principle in favour of an entitlement to severance pay.

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55 *Op cit note 42 at 743 to 744.*

CHAPTER 4

THE LABOUR APPEAL COURT STEPS IN

The Labour Appeal Court is manned by common law judges from the Supreme Court. They are by and large not sufficiently versed in labour affairs to enable them to adopt the mindset necessary to get to grips with such matters and tend to be guided by common law principles. Thus one would expect them to balk at the notion of compelling employers to pay something which they cannot be compelled to pay in terms of the common law. This is precisely what they did.

The first case to come the way of the Labour Appeal Court was the appeal by the aggrieved applicants in the *Lifegro* case.[56] One gained the distinct impression even at the Industrial Court stage that these applicants were taking something of a flyer and were trying to profit out of the circumstances in which their employer found itself. The Industrial Court had eventually found that there was in effect no redundancy as they were offered similar jobs with Momentum and that even if there was a redundancy the circumstances could not justify severance pay.[57] As expected the appeal failed and Combrinck J found himself in agreement with the judgement of Van Niekerk SM of the Industrial Court. He however added a further reason, namely that the labour courts should not interfere in severance pay disputes as this was the preserve of collective bargaining. *"An employee cannot be heard to complain"* so he argued *"...if he or his union were in a position at the commencement of his employment to bargain for such a condition"* ie. for

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56 *Young & Anor v Lifegro Assurance Ltd (1991) 12 ILJ 1256 (LAC)*

57 *See at page 19 above for a discussion on Industrial Court decision.*

severance pay.[58] This approach is, of course, completely divorced from reality. One can imagine the kind of response Mr Young would have elicited from Lifegro if he had endeavoured to insist, prior to the commencement of his employment, on a pre-determined severance package. One can only guess that the learned judge must have intuitively felt uncomfortable with this notion as he called for the legislature to intervene and to pass legislation on severance pay similar to that contained in the English Employment Protection (Consolidation) Act of 1978.

The next case in which the question of an obligation to pay severance pay was squarely put before the Labour Appeal Court was the appeal from the Industrial Court's decision in the *Bester Homes* case to award severance pay.[59] Thring J was assisted in the case by two well known and respected labour law experts who acted as assessors, namely Professor Barney Jordaan, an academic from Stellenbosch University, and Mr R van Witt, a highly respected Cape Town labour law attorney. They both concurred with the judgement. The court endeavoured to analyse the matter in great detail and the judgement was regarded at the time as being the most important and thorough judgement on the matter in South Africa. Yet the court appeared to grapple with the issues with great difficulty. Details are as follows:

(a) After setting out at some length the relevant facts and the arguments presented by both counsel, Thring J confronted what he considered to

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58 *This approach was subsequently echoed in obiter remarks made by Van Schalkwyk J in the case of Hoogenoeg Andolusite (Pty) Ltd v National Union of Mineworkers & others (1) (1992) 13 ILJ 87 (LAC)*

59 *See pages 16 and 17 above for discussion on Industrial Court decision. The Labour Appeal Court decision was reported in Bester Homes (Pty) Ltd v Cele & Others (1992) 13 ILJ 877 (LAC)*

be the first question, namely whether the retrenched employees had a legally enforceable right to severance benefits.[60] As explained on pages 3 and 4 above it is trite law that employees generally have no such right and Thring J came to the same conclusion on the facts of this case. From this he deduced that the dispute was therefore not a dispute of right, and that it was a dispute of purely economic interest. Clearly Thring J misunderstood the concept of dispute of right in the industrial relations arena for it involves more than a dispute concerning legally enforceable rights and encompasses also such *quasi* rights, based on equitable considerations, which the Industrial Court is able to enforce in terms of its unfair labour practice jurisdiction. Thring J thus wrongly rejected the concept of an equitable right which he stated could play no valid role in the resolution of the issues which arose in the case.

(b) The confusion between disputes of right and disputes of interest persisted throughout the judgement. For example counsel for the retrenched employees contended that an employee had no legally enforceable right protecting him against an unfair dismissal but that the Industrial Court was nevertheless entitled to rule that such dismissal constituted an unfair labour practice. Thring J surprisingly rejected this contention.[61] The reason advanced for this rejection was that an unfair dismissal does not normally fall into the arena of collective bargaining. While that may be so it begs the question of whether it gives rise to a legally enforceable right in the strict sense of

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60 *Ibid at 886 D.*

61 *Ibid at 893 A-F.*

the word. In fact unfair dismissals fall fair and square into the arena of equitable rights based on the unfair labour practice definition.

(c) Another aspect which confused Thring J was whether there is a duty on an employer to consult or negotiate on the topic of severance pay. He concluded that there was no such duty as there was no duty to make severance payments in the first place. This would imply that there is only a duty to consult or negotiate about something which one is obliged to do. Thus if an employer is obliged to pay a wage increase, only then need he consult or negotiate with the trade union about such wage increase. Of course an employer is never obliged to pay a wage increase, but that does not mean he is never under any obligation to negotiate on the topic with a trade union.

Throughout the judgement Thring J relied heavily on the reasoning of Cameron Cheadle and Thompson (hereinafter referred to as Cameron et al) in their work *The New Labour Relations Act*[62] and quoted extensive passages from it. One such passage appears to have caused the confusion concerning disputes of right and disputes of interest. The passage reads as follows:

> *"The discussion between disputes of right and disputes of interest lies at the heart of the matter:*
> *"Conflicts of rights (or 'legal' disputes) are those arising from the application or interpretation of an existing law or collective agreement (in some countries of an existing contract of employment as well), while interest or economic disputes are those arising from the failure of*

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62 *Cameron E, Cheadle H and Thompson C; The New Labour Relations Act", 1989, Juta & Co Ltd.*

> *collective bargaining, ie. when the parties' negotiations for the conclusion, renewal, revision or extension of a collective agreement end in deadlock."*[63]

However the learned authors were referring to a broad proposition applicable to labour law systems internationally and were not making a specific proposition dealing with the peculiarities of South African law. The authors acknowledge that *"our indigenous system of Labour Laws has clouded the penumbra still further through the amorphous unfair labour practice jurisdiction."*[64] It is clear on a proper reading of their views that they acknowledge that the unfair labour practice definition has created further "rights" which are not based on purely legal considerations but on considerations of fairness. These rights can best be described as equitable rights.

The basis for Thring J's finding that the failure on the part of the employer in ***Bester Homes*** to make severance payments did not constitute an unfair labour practice was that severance pay was a monetary matter which falls into the exclusive area of collective bargaining into which our labour courts are not entitled to intrude. As mentioned above Thring J relied heavily on the reasoning of Cameron et al in reaching this conclusion. The following extracts from their book[65] were referred to with approval:

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63 *See page 891 of the judgement, op cit note 59. The passage comes from page 96 of Cameron et al, in which they are quoting from the International Labour Office "Conciliation and Arbitration Procedures in Labour Disputes" (Geneva, 1980) at 5.*

64 *Cameron et al, op cit note 62, at pages 96 to 97.*

65 *Op cit note 62.*

> *"A claim for severance pay is essentially a monetary one; it is largely equivalent to a claim for an increase in wages for a particular employment period. Provided that an employer is not paying below an applicable statutory minima, he should be at liberty to dispense or withhold rewards as he sees fit..... On the face of it there is not much difference between instructing an employer to provide reasonable severance pay and instructing an employer to pay a reasonable (as opposed to minimum) wage."*[66]

However the learned authors instinctively detect a difference with the severance pay situation and go on to state as follows:

> *"On the other hand, perhaps there is a difference. Perhaps in the no-fault situation of retrenchment it should be incumbent on an employer to compensate an employee for the loss of his "proprietary" stake in a job. It is arguable therefore, that the retrenchment predicament constitutes an exception to the rule of judicial abstention regarding the outcome of the collective bargaining process."*[67]

However Thring J dismissed this reservation and stated that he could see no reason to create such an exception. Here too he appears to have erred. Although the "no fault" argument and the "proprietary stake in job" arguments referred to by Cameron *et al* are inconclusive, the fact of the matter is that collective bargaining does not function properly in a retrenchment situation

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66 *See pages 892 and 893 of the judgement (op cit note 59) and page 103 of Cameron et al (op cit note 62).*

67 *Ibid.*

and it is precisely in such a situation that our labour courts should interfere. An argument along these lines was put before Thring J but he rejected it. However the argument does not appear to have been presented in a sufficiently forceful manner for the learned judge dealt with it as follows:

> *"It was contended on behalf of the respondents that the position of a retrenched employee is a weak one in the collective bargaining process, and that this was a factor which should influence the court in the exercise of its unfair labour practice jurisdiction. I am unable to agree, as a matter of principle, that this is a relevant consideration."*[68]

However to describe the bargaining position of a retrenched employee as "weak" is a gross understatement. He is simply powerless. It is not a question of the parties playing the game on a sloping field, which Thring J concedes is a fact of economic life, it is a clear no contest situation in which to insist on the game being played is literally throwing the luckless employee to the wolves. While the Romans may have revelled in such contests, civilisation has progressed a little since those days. The relationship between employer and employee is clearly one of interdependence. The employer cannot do without labour and the employees cannot survive without the wages they derive from employment. In the collective bargaining arena the ultimate tactic of the employees is to withhold their labour in order to induce the employer to pay more and similarly the employer is entitled to deprive the employees of their wages, if necessary by locking them out, in order to induce them to accept his proposals. In the final analysis these are the only legitimate weapons which the parties possess. A retrenched employee has no such weapon at all and to expect him to nevertheless take part in the contest would reduce the contest to a farce.

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68 *At page 897 J of the judgement (op cit note 59).*

CHAPTER 5

RESISTANCE FROM THE INDUSTRIAL COURT

It makes something of a mockery of our labour court hierarchy if decisions of the higher courts on important issues of principle are not followed by lower courts. This is precisely what has been happening and, as a result, employers on the one hand and employees on the other have experienced extreme difficulty in ascertaining where they stand on labour issues. It may well transpire that legislation will be introduced to deal with the problem. On the severance pay issue certain members of the Industrial Court clearly had little regard for the Labour Appeal Court's decision in the ***Lifegro***[69] case and they expressed their disagreement in no uncertain terms.

In the ***Action Machine***[70] case Bulbulia DP expressly disagreed with the Labour Appeal Court decision in ***Lifegro***. The employer had retrenched two elderly employees whom it had employed for approximately 10 years. Their trade union demanded severance pay of one week's pay per completed year of service. The employer claimed it could not afford this as it was in dire financial straits. Bulbulia DP carefully reviewed all the cases ending up with the Labour Appeal Court's decision in ***Lifegro***. He then stated that although in terms of the ***Lifegro*** judgement there was no absolute duty on an employer to pay severance pay, it did not follow that the Industrial Court had been deprived of its discretion to award severance pay in appropriate circumstances. (Nevertheless, on the facts in the ***Action Machine*** case Bulbulia

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69 *Young & Anor v Lifegro Assurance Ltd (1991) 12 ILJ 1256 (LAC) discussed above at page 27 et seq.*

70 *Transport and General Workers Union v Action Machine Moving & Warehousing (Pty) Ltd (1992) 13 ILJ 646 (IC).*

found that the employer had simply been unable to make any severance payments and that its failure to do so was therefore not an unfair labour practice).

In the subsequent case of ***Ximba & others v LTA Earthworks (North)***[71] Schoeman AM expressed his agreement with the views of Bulbulia DP, and also held that the court had a discretion to adjudicate on the adequacy of a severance package offered by an employer.

In ***Field v Imperial Cold Storage & Supply Co Ltd***[72] Bulbulia was once again called upon to give a similar matter his consideration. The facts were that Mr Field was a director of ICS in charge of its operations in Cape Town and Johannesburg. After nine year's service with the company he was informed that his position had become redundant as a result of a merger between ICS and another company. In addition to certain other moneys he was offered an amount equivalent to four month's salary as severance pay. He wanted more. Bulbulia once again reviewed the cases and ended up by referring to the view expressed by Combrink J in the ***Lifegro*** case that severance pay should be determined by collective or individual bargaining and fell outside the domain of the Industrial Court. He then referred to the article ***"In search of the Severance Package"***[73] by Advocate N.F. Rautenbach. As discussed above Rautenbach pointed out that the bargaining process cannot function effectively in the case of a retrenchment. Bulbulia DP endorsed this reasoning

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71 *(1992) 13 ILJ 1513 (IC).*

72 *(1993) 14 ILJ 417 (IC).*

73 *Op cit note 42.*

and rejected Combrink J's reasoning in the ***Lifegro*** case. He promptly increased the amount of severance pay from four to ten month's salary for the reason, *inter alia*, that he believed a special scale should apply to senior executives.

CHAPTER 6

THE LABOUR APPEAL COURT RELENTS

The Labour Appeal Court was given a further opportunity to pronounce upon the matter when the judgement of Bulbulia DP in the ***Imperial Cold Storage*** case was taken on appeal.[74] The scene was potentially set for the Industrial Court to be sharply rebuked by the Labour Appeal Court for failing to follow its prior judgements, in particular its judgement in the ***Lifegro***[75] case. Moreover the authoritative judgement of Thring J in the ***Bester Homes***[76] case was also now available which made it even more likely that the Labour Appeal Court would follow a conservative common law approach. Thankfully it did not do so.

Joffe J had no difficulty in homing in on the main problem area in the ***Bester Homes*** judgement, namely the distinction between disputes of interest and disputes of right. He accepted that Thring J had placed unwarranted emphasis on the absence of a **contractual or statutory right** in finding that a dispute as to severance pay is a dispute of interest. He found that there is no reason why a refusal to pay severance pay might not constitute an unfair labour practice and thus be judiciable by the Industrial Court. He accepted the concept of an equitable right arising out of the definition of an unfair labour practice which he described as the right not to have an unfair labour

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74 *Imperial Cold Storage & Supply Co Ltd v Field (1993) 14 ILJ 1221 (LAC).*

75 *Young & Anor v Lifegro (1991) 12 ILJ 1256 (LAC) discussed above at page 27 et seq.*

76 *Bester Homes (Pty) Ltd v Cele & Others (1992) 13 ILJ 877 (LAC) discussed above at pages 28 to 33.*

practice visited upon one.[77]

Joffe J agreed with Thring J that there are certain disputes which are best left to market forces or collective bargaining to resolve and in which our labour courts should not interfere even if they might involve an element of unfairness. However he did not agree that severance pay was one such area. Strangely enough he did not refer to the argument first put forward by Rautenbach that collective bargaining does not function properly in a retrenchment situation, but relied on other grounds. These are dealt with below.

Firstly Joffe J referred to the six guidelines postulated by Cameron *et al* which should be followed by employers in a retrenchment situation. These are[78]

> *"(i) Employers should seek ways to avoid or minimize retrenchments.*
>
> *(ii) Employers should give sufficient prior warning of the pending retrenchments.*
>
> *(iii) The employer should hold proper consultations on the reasons for retrenchment, the alternatives thereto, selection criteria, etc.*
>
> *(iv) When no selection criteria are agreed, the employer should apply fair and objective criteria.*
>
> *(v) The employer should take steps to assist retrenched employees in respect of alternative employment.*
>
> *(vi) Employers should pay reasonable severance pay."*

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77 *See discussion at 1227 E to 1228 D of the judgement op cit note 74 above.*

78 *Ibid at 1226. See also Cameron et al The New Labour Relations Act op cit note 62 above.*

As Joffe J correctly pointed out there is ample authority from Industrial Court and Labour Appeal Court judgements for the first five guidelines. There is no such authority, however, for the sixth guideline. The question was whether our labour courts have the power to enforce this guideline if they see fit or whether they are excluded from doing so by virtue of it being a monetary matter which falls exclusively into the collective bargaining arena. The learned judge found there to be no distinction in principle between the sixth guideline and the other five.[79] He pointed out that every one of the first five accepted guidelines is a possible subject for negotiation and is indeed negotiated in many instances. Thus the fact that severance pay could have been negotiated at the commencement of the employment contract does not bar the court from ruling on it upon termination of the contract.[80]

Secondly Joffe J noted that *"a court does not in appropriate cases shirk from determining fair recompense"*[81] and thus rejected the notion that determining an amount of money is a responsibility which sits uneasily on the court and which is best left to the parties to negotiate. Moreover he distinguished between the court being asked to determine severance pay as opposed to wages, for severance pay involved determining the appropriate multiple of the monthly or weekly wages as opposed to determining the level of wages itself.[82]

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79 *At 1228 A of the judgement (op cit note 74).*

80 *Ibid at 1228 F-G.*

81 *Ibid at 1228 H.*

82 *Ibid at 1228 H to 1229 A.*

On the basis of the above arguments Joffe J found there to be no distinction between the sixth guideline and the other five, in particular where payment of a reasonable severance package could serve in order to soften the blow of the retrenchment on the particular individual or individuals. He concluded as follows:[83]

> *"In the result, all six of the above guidelines relate to the fairness or otherwise of a retrenchment. All must be seen in conjunction with one another. All supplement and in appropriate cases may replace or augment one another. All are aimed at ensuring that retrenchment and its consequences are implemented as fairly as possible in the circumstances. An employee's right to the flexible application of all six guidelines arises from his right not to have an unfair labour practice visited upon him, and not from any other contractual or specific statutory right."*

Thus he found the Industrial Court is not barred from determining whether a failure to pay severance pay constitutes an unfair labour practice and furthermore that it was correct to determine whether the amount paid in that case was fair or not.

The decision of the Labour Appeal Court in the ***Imperial Cold Storage*** case is to be commended, particularly when considered against the background of the Recommendations and Convention passed by the ILO as referred to at the commencement of this dissertation.[84] A surprising aspect

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83 *Ibid at 1229 A-B.*

84 *Above at page 1.*

of the decision is perhaps the failure of the Labour Appeal Court to refer to them in support of its decision. It is all very well for the Court to conclude that payment of a severance benefit is fair because it soften's the blow of the retrenchment on the individual concerned, but that alone is insufficient. There could be other measures which an employer might take to further soften the blow, but that does not mean that his failure to do so is an unfair labour practice. The function of our labour courts is to be conversant with the morals of the labour market place and the business and labour ethics of the community in order to decide what is and what is not permissible.[85] When dealing with a matter upon which the international labour community in the form of the ILO has laid down clear guidelines, our labour courts should abide by those guidelines unless there are clear reasons as to why they should be departed from. Those guidelines clearly constitute authoritative pronouncements on labour issues in all countries which subscribe to Western free market principles.

The morals and customs of the labour market place should feature as the central guiding principle in all unfair labour practice determinations. The labour market place operates on essentially free market principles as do other markets in South Africa. Thus the price of goods and services is by and large determined between willing buyers and sellers without interference by judicial bodies. However once the price at which an employee is able to sell his services is determined in accordance with these market principles and an employment contract is struck, other considerations come into play. If the agreement entered into is of indefinite duration it brings into being a long term relationship between employer and employee. Thus employees in these circumstances are customarily referred to as permanent employees. The very

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85 *CWIU & Others v Sopelog CC (1994) 15 ILJ 90 (LAC).*

lives of these employees are shaped by and revolve around their jobs. They become in many ways completely dependent upon their employers. Social *mores* require that these employees be acknowledged as being more than just commodities which can be simply discarded when no longer required. Retrenchment can ruin their lives and thus, while there are economic considerations which may render it necessary for employers to retrench employees, retrenchments are severely frowned upon by society, should be discouraged and the effects thereof should be ameliorated as far as is reasonably possible. To argue therefore, as did the Labour Appeal Court in the ***Bester Homes***[86] and ***Lifegro***[87] cases that permanent employees are not entitled to an award of severance pay upon their retrenchment because they omitted to **bargain** for such a benefit when entering the employment relationship is clearly out of step with the prevailing social *mores*.

The above considerations are implicit in the Labour Appeal Court's decision in the ***Imperial Cold Storage*** case but should have been more clearly spelt out. After all this was the first case in which the Labour Appeal Court had ruled in favour of a right to severance pay as it had found that there was no such right in its three earlier decisions. Furthermore the fact that individual employees, outside a unionised environment, have little or no prospect of negotiating severance benefits in the event of their retrenchment, should also have been referred to. Nevertheless the outcome in the ***Imperial Cold Storage*** case was correct and it will not doubt hold sway as the leading decision on the matter for many years to come.

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86 *Bester Homes (Pty) Ltd v Cele & Others (1992) 13 ILJ 877 (LAC) discussed at pages 28 to 33 above.*

87 *Young & Anor v Lifegro Assurance Ltd (1991) 12 ILJ 1256 (LAC) discussed at pages 27 to 28 above.*

CHAPTER 7

EXCEPTIONS TO THE GENERAL RULE

Is an employee always entitled to severance pay in the case of a retrenchment regardless of the circumstances? The Labour Appeal Court answered this question in the negative in the ***Imperial Cold Storage*** case. It stated that *"each case will have to be determined on its own merits, and one can well conceive that in a case where an employee has found suitable alternative employment, the court would decline to hold that he was in fairness entitled to expect severance pay over and above such re-employment".*[88] It is hard to find fault with this statement. However, it does not mean that severance pay is not payable whenever alternative employment is in the offing. Firstly it is difficult for an employer to predict in advance with any certainty whether the employee he is about to retrench will find suitable alternative employment. Should he therefore withhold severance pay for a period of time and if so for how long? This would surely be impractical. Secondly, even if the retrenched employee does find suitable alternative employment, there is nothing to prevent his second employer from retrenching him in due course. If this were to happen his second employer would be under no moral obligation to take the employee's period of employment with the first employer into account when calculating his severance pay. This may have been a lengthy period in which the employee had given his first employer years of loyal and dedicated service. Thus although retrenchment is socially undesirable and severance pay is arguably a penalty which the offending employer has to pay as a result thereof, the first employer would in this instance get off scot free and the luckless employee would be severely prejudiced. This would offend the social *mores.*

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88 *Imperial Cold Storage & Supply Co Ltd v Field (1993) 14 ILJ 1221 (LAC) at 1229 D-E.*

It follows from this line of argument that an employee does in fact acquire something of a vested or proprietary interest in his job which grows as his period of service with his employer lengthens. This notion which originally found its way into our labour jurisprudence was "torpedoed" by Van Niekerk SM when he found that its source was the passage, referred to above,[89] from the ***Lloyd v Brassey*** case, which had been quoted out of context by the Industrial Court in the ***Jacob*** and ***Bester Homes***[90] cases. Combrinck J[91] had added his stamp of approval to Van Niekerk SM's approach and, as a result, the notion of a proprietary or vested interest has not resurfaced in any of the subsequent cases. However the fact that the quotation from ***Lloyd v Brassey*** referred to a specific English statute does not mean that the concept has no place in our labour jurisprudence. It is futile to argue that if one accepts such a concept it necessarily follows that an employee should be entitled to receive severance pay under any circumstances even, for example, if his services are terminated as a result of his own gross misconduct,[92] for this would surely constitute no more than an exceptional circumstance in which the employee forfeits his vested right. The concept of an employee acquiring a proprietary or vested right to his job which strengthens as his period of service lengthens is, in the writer's view, perfectly valid.

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89 *At page 14.*

90 *See discussion on page 20 above.*

91 *In Young & Anor v Lifegro Assurance Ltd (1991) 12 ILJ 1256 (LAC) at 1265 D-E.*

92 *This line of argument can be found in the judgement of Copeling AM in Howell v International Bank of Johannesburg Ltd (1990) 11 ILJ 791 (IC) at 798 A-G.*

The proposition that there are exceptional circumstances in instances of retrenchment in which severance pay is not payable has surfaced in a number of cases and these will now be reviewed critically against the background of the above discussion.

(a) **Offer of Suitable Alternative Employment**

The English Employment Protection Consolidation Act of 1978 provides that an employee who is dismissed for redundancy shall be disqualified from receiving any redundancy payment should he unreasonably refuse an offer of alternative employment, provided the offer is one of suitable employment in relation to the employee.[93] In such a situation the employee suffers little or no loss and thus the retrenchment does not offend the social *mores* of the labour market place. The classic example of this can be found in the ***Lifegro***[94] case. As mentioned above the facts were that, pursuant to a decision to merge the business of Lifegro with Momentum, the services of the two applicants with Lifegro were terminated but they were offered employment on identical terms and conditions with Momentum. More particularly due recognition of their past service with Lifegro was to be given. Thus if Momentum was to have subsequently retrenched them they would have been able to claim that Momentum would have been obliged to take their service with Lifegro into account when

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93 *See Jacob v Prebuilt Products (Pty) Ltd (1988) 9 ILJ 1100 (IC) at 1105 C-D.*

94 *Op cit note 91 above.*

calculating their severance benefits.[95] The applicants refused the offer of alternative employment and their claims for severance pay from Lifegro accordingly failed.

It follows from the above that a retrenched employee who receives an offer of suitable employment may nevertheless claim severance pay, regardless of whether he accepts or rejects the offer, unless the employee's accrued rights to his job are carried forward to the new employer. Thus it would follow that ***Howell's***[96] case was wrongly decided. In that case Mr Howell was the victim of an unfair constructive dismissal. However the Industrial Court rejected his claim for severance pay for the reason that he had managed to find alternative employment at a higher salary. However his new employer had not assumed responsibility for his accrued service with his prior employer and could, for example, have retrenched him shortly thereafter.

If the offer of alternative employment is not suitable the employee is fully entitled to decline the offer and to claim severance pay. Thus in

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95 *Cf Ntuli & Others v Hazelmore Group t/a Musgrave Nursing Home (1988) 9 ILJ 709 (IC). In this case Landman AM (as he then was) found that, upon the transfer of a nursing home business from one employer to another, the second employer had, in the circumstances of this case, not assumed responsibility for the continuity of service of certain employees which it retrenched one month after the transfer, and that no severance benefits were therefore payable by the second employer. The Court suggested that the retrenched employees lodge their claim against the first employer. The Court stated that the matter should be approached from the vantage point of the common law as opposed to the practices adopted in European countries and the principles embodied EEC Directive 80/987. It is submitted that this case was wrongly decided.*

96 *Howell v International Bank of Johannesburg Ltd (1990) 11 ILJ 791 (IC).*

the *Ellerine Holdings*[97] case the Industrial Court held that the retrenched employer, Du Randt, did not forfeit his claim to severance pay by refusing offers of alternative employment, which offers effectively amounted to offers of demotion. This aspect of the Industrial Court's judgement was not challenged on appeal.[98]

(b) Employer unable to pay

In the case of *Hensberg Bros*[99] the employer was in dire financial straits and the Industrial Court therefore held that it should be excused the obligation of making severance payments.[100] The reasoning of the Court was summarised in the following passage with which it is hard to find fault:

> *"Where continuous operational losses have reduced a business to the state of insolvency, its closure and retrenchment of its work-force are of no real commercial benefit to the employer. He has no prospect of returning the business to profitability, for he has been forced to abandon it and he cannot convert its assets and capital to another venture, for they have been consumed. Such is the misfortune, according to the evidence, which has been visited*

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97 *Durand [sic] v Ellerine Holdings Ltd (1991) 12 ILJ 1076 (IC) especially at 1081 B-H. This case is also discussed at page 17 above.*

98 *Ellerine Holdings Ltd v Du Randt (1992) 13 ILJ 611 (LAC).*

99 *Construction & Allied Workers Union & Others v Hensberg Boos (1992) 13 ILJ 166 (IC).*

100 *See also Transport and General Workers Union v Action Machine Moving & Warehousing (Pty) Ltd (1992) 13 ILJ 646 (IC), discussed at page 34 above.*

upon the respondent. The returns from the deployment of its work-force have been negative and it has, for a considerable period of time, been contributing to the wages of its employees from its own resources. Respondent's ability to accommodate its work-force has been exhausted and no conceivable purpose, or principle of fairness, could be served by imposing upon it the impossible obligation of disbursing severance benefits to the individual applicants."[101]

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101 *Op cit note 99 at 171 F-H.*

CHAPTER 8

CONCLUSION - THERE IS A RIGHT TO SEVERANCE PAY

From the aforegoing analysis one can conclude that employees do have a right to severance pay upon their being retrenched by their employers. This may well extend to other instances of termination at the initiative of the employer[102] excluding instances in which termination is brought about by the serious misconduct of the employee.[103]

The right to severance pay does not flow from the common law nor does it owe its existence to any statutory enactment creating a specific legal right. It flows from the unfair labour practice jurisdiction of our labour courts in terms of which they are entitled to rule on what they consider to be fair or unfair in the sphere of the relationship between employers and employees. It is therefore an equitable right as opposed to a legal right but is nevertheless fully enforceable by our labour courts.[104]

In reaching this conclusion one is not persuaded by the fact that a narrow majority of our labour court decisions are in favour of such a right. This is purely coincidental. The right has finally been acknowledged by the Labour Appeal Court in its most recent and authoritative decision on the

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102 *Such as unfair constructive dismissal - Howell v International Bank of Johannesburg Ltd (1990) 11 ILJ 791 (IC).*

103 *See note 2 above.*

104 *Section 53 of the Labour Relations Act, No. 28 of 1956, provides that failure to comply with a determination or order of our labour courts constitutes a criminal offence.*

question.[105] This decision is undoubtedly correct in view of the following:

(a) Our labour courts have a judicial discretion, in terms of the unfair labour practice definition, to rule on what is fair and what is unfair.[106]

(b) In ruling on unfair labour practices our labour courts are required to ascertain and apply the general sense of fairness and justice prevailing in the community.[107]

(c) In terms of the general sense of fairness and justice prevailing in the community

(i) Employees, in particular "permanent employees", enjoy a status in terms of which they are more than mere commodities which can be simply discarded by the employer and they acquire a proprietary or vested right in their jobs.[108]

(ii) Unemployment is undesirable and should be discouraged.

(iii) Retrenchment can cause employees significant, sometimes devastating, material harm as well as non-material suffering in the form of degradation of status and reputation.

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105 *Imperial Cold Storage & Supply Co Ltd v Field (1993) 14 ILJ 1221 (LAC).*

106 *Media Workers Association of SA, and others v Perskor 1992 (4) SA 791 (AD).*

107 *CWIU & Others v Sopelog CC (1994) 15 ILJ 90 (LAC).*

108 *See discussion at page 41 et seq above.*

(iv) Severance pay serves to compensate the employee and to tide him over while he looks for alternative employment. In addition it serves to discourage employers from embarking on retrenchment exercises lightly.

(d) ILO Recommendations and Conventions serve to reinforce the perception of the general sense of fairness and justice in the community, as do the practices of major employers in the country.[109]

(e) Although it is a monetary matter, it is not appropriate to leave it to the exclusive domain of individual or collective bargaining to determine whether it should be paid in each case.[110]

(f) Payment of severance pay has the beneficial effect of promoting industrial peace amongst collective labour. It also serves to promote employee morale.[111]

Employees are not entitled to severance pay in all instances of termination of employment at the initiative of the employer. The following are instances in which severance pay would not be payable:

(i) Terminations resulting from the serious misconduct of the employee.

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109 *It now appears that Botha AM was correct to take into account the practices of major employers in the case of Cele & Others v Bester Homes (Pty) Ltd (1990) 11 ILJ 516 (IC).*

110 *See page 33 above.*

111 *See pages 25 to 26 above.*

(ii) Retrenchments where the employee receives an offer of suitable alternative employment in terms of which his rights in respect of past service are maintained.

(iii) Instances in which the employer is financially not able to pay.

CHAPTER 9

ANCILLARY MATTERS

9.1 Obligation to consult or negotiate

The debate on severance pay revolves essentially around two questions.

- Is an employer obliged to pay severance pay? and if so,
- How much should the employer pay?

The first question has now been answered. Yes, an employer is under an obligation to pay. The question therefore of whether an employer should hold prior discussions with his employees in order to determine, in principle, whether or not he should pay falls away. The remaining question of how much he should pay must, however, still be answered. Linked to this is the secondary question of whether the employer is under a duty to hold prior discussions with his employees in order to determine the amount of severance pay, and whether those discussions should take the form of consultations or negotiations.

9.1.1 Pre-Retrenchment Discussions

It is appropriate at this point to first examine whether an employer is generally under a duty to consult or negotiate prior to retrenching employees. The early decisions of the Industrial Court laid down a number of general

principles to be observed.[112] These principles include a requirement that the employer should ***consult*** with a recognised or representative trade union, or any other recognised form of employee representation, prior to the retrenchment.[113] It is important to note that the word ***consult*** was used by the Industrial Court as opposed to ***bargain*** or ***negotiate***, and there was initially no controversy as to whether an employer should consult or negotiate. In two later cases the Industrial Court found cause to reflect upon the meaning of the word consult. The first was the case of ***MAWU v Hart***[114] in which the court was required to determine whether there was a duty on an employer to enter into wage negotiations with a trade union at plant level when negotiations already took place at industry level. This case had nothing to do with retrenchments. It is not clear why the issue of consult versus negotiate cropped up, but one can only speculate from the tone of the judgement of Bulbulia AM (as he then was) that counsel for the union advanced the duty to consult in retrenchment cases as an argument that there was a duty on the employer to enter into negotiations at plant level. The court found that there was a clear distinction between ***consult*** and ***negotiate*** and referred to the *Concise Oxford Dictionary* (5th Edition) in support of the following statement.

> *"To consult, means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms*

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112 *See especially UAMUWU v Fodens (SA) (1983) 4 ILJ 212 (IC); Shezi v Consolidated Frame Cotton Corporation (1) (1984) 5 ILJ 3 (IC) and Gumedi v Richdens t/a Fichdens Food Liner (1984) 5 ILJ 84 (IC).*

113 *This is one of the applicable requirements which were usefully summarised by H Cheadle in Brassey, Cameron, Cheadle & Olivier: The New Labour Law (Juta & Co, 1987) at 286 and 287.*

114 *(1985) 6 ILJ 478 (IC).*

of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise or agreement."[115]

In the second case, ***Hadebe v Romatex Industrials***,[116] the question was whether proper consultations had in fact taken place prior to the retrenchment of certain employees. The Industrial Court again referred to the ***Concise Oxford Dictionary*** as well as other authorities in order to establish the true meaning of the word ***consult*** and then found that proper consultation had not taken place. The court did not have to deal with any argument to the effect that the pre-retrenchment discussions should in fact have taken the form of negotiations.

These two cases were referred to by H Cheadle in a book he co-authored, *The New Labour Law*[117]. He argued that these two cases had rendered the matter controversial by relying on the ***Concise Oxford Dictionary***, instead of the court's own assessment of fairness in retrenchment matters, to determine whether it was necessary to consult as opposed to negotiate. He contended further that the Oxford dictionary *"can never be authority for why one should only consult in retrenchment cases and not bargain."* Of course the Oxford dictionary can also never constitute authority for the proposition that one should bargain instead of consult. It would in fact appear that the controversy regarding whether one should consult or bargain in retrenchment cases was of Cheadle's own making and was never in fact an issue seriously

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115 *Ibid at 493H.*

116 *(1986) 7 ILJ 726 (IC).*

117 *Op cit note 113.*

considered by the Industrial Court, at least not in its reported judgements.[118] The Industrial Court simply accepted that the duty was to consult.

The Labour Appeal Court also found no reason to consider this matter controversial in its only decision on the matter dealing with the 1982 definition of an unfair labour practice.[119] It simply ruled that the employer in that case had committed an unfair labour practice by failing to ***consult*** an employee prior to retrenching her.

Cheadle later acknowledged[120] that whatever controversy there had been, regarding whether prior negotiations as opposed to consultations were required, was laid to rest by the 1988 definition of an unfair labour practice which expressly used the term ***consultation.***[121] However when the 1988

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118 *In the cases of Ngwenga & Others v Alfred McAlphine & Son Ltd (1986) 7 ILJ 442 (IC) and TGWU v Putco (1987) 8 ILJ 801 (IC) it was suggested to the court that prior negotiations should have taken place. In both cases, however, retrenchment procedures had been agreed to by the respective parties and formed the basis of the decisions reached by the court. In NUTW v Braitex (1987) 8 ILJ 794 (IC) the court ordered that a retrenchment be delayed so as to allow more time for finalisation of "negotiations and consultations" [sic]. However the question of whether the pre-retrenchment discussions should take the form of negotiations as opposed to consultations was not an issue before the court and it appears that the court used both terms simultaneously without reflecting on the distinction between them.*

119 *See pages 4 to 8 above for a discussion on the 1982, 1988 and 1991 definitions of an unfair labour practice. The case was Morester Bande v NUMSA (1990) 11 ILJ 687 (LAC).*

120 *Together with his co-authors in the book E Cameron, H Cheadle, C Thompson: The New Labour Relations Act (Juta & Co, 1989) at page 125.*

121 *See para (b)(ii)(bb) of the definition as set out on page 6 above. In case of Cele v Bester Homes (1990) 11 ILJ 516 (IC) especially at 520 the Industrial Court confirmed that consultations and not negotiations were required.*

definition was repealed[122] and replaced by the 1991 definition the controversy was resurrected by Professor Brassey who suggested that there is no difference in practice between consult and negotiate. He argued as follows:[123]

> *"What, you may ask, is the difference? To hear the cognoscenti speak, it is this: consultation obliges the employer only to listen to the union whereas negotiation entails dialogue aimed at reaching agreement. In practice, of course, the two are impossible to separate: once the dialogue starts, what employer will resist trying to strike a deal if one is in the offing? But the theorists continue to whack on about the matter; they simply refuse to recognise the tedium of it all, and good drinking time has been wasted in interminable discussion on this issue."*

While his observations are no doubt correct an important consequence of imposing a duty to negotiate would be that, in order to ensure that negotiations would take place in good faith, the employer would be obliged to negotiate to impasse. This could mean the employer would have to delay implementation until a conciliation board had been established and had deadlocked on the proposed retrenchment. While it is arguable that negotiations would entail a more thorough canvassing of the issues and would therefore be more likely to result in industrial peace being maintained, a retrenchment is an operational matter with which employees or their unions will by definition, be unwilling to agree. Thus to insist that the matter be

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122 *By the Labour Relations Amendment Act, No. 9 of 1991 which replaced it with the still current "1991" definition which is set out at page 8 above.*

123 *Employment Law March 1991 Vol 7 No 4 at page 82.*

strung out with very little likelihood of agreement ever being reached could harm the operational interests of the employer and would be counter productive.

Since the enactment of the 1991 definition of an unfair labour practice the issue of consult or negotiate has never been seriously contested before our labour courts. This is no doubt partly attributable to arguments in favour of consultations, such as those set out above, and also due to the fact that the overwhelming body of international guidelines point to consultations as opposed to negotiations being the correct procedure to follow prior to an employer embarking on retrenchments.[124] Thus it must be accepted that prior consultation as opposed to negotiation is required.[125]

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124 *Article 13 of ILO Convention No 158 of 1982 uses the word "consultation" as opposed to "negotiation". This convention is called the "Convention Concerning Termination of Employment at the Initiative of the Employer". Article 13 deals with the termination of employment for economical, technological, structural or similar reasons. See also paragraph 20 of ILO Recommendation No 166 of 1982. Both German and Australian law, for example, also make provision for consultation. See in this regard Prof. Dr. R Blanpain (editor-in-chief): International Encyclopedia for Labour Law and Industrial Relations, Vol 5 at page 87 of the section dealing with the Federal Republic of Germany, as it then was; and Vol 2 at page 92 of the section dealing with Australia. Furthermore our Industrial Court originally based its consultation requirement on what Cheadle referred to as its "unreflecting reliance" on English authority see in this regard Brassey et al op cit note 113 at 292 - 293.*

125 *Joffe J effectively acknowledged this to be the case when he endorsed the first five of the requirements listed by Cameron et al as et out on pages 38 and 39 above.*

9.1.2 Severance Pay to be included?

Having concluded that an employer is under a general requirement to consult prior to retrenching employees, it is now necessary to determine whether the quantum of severance pay should be included in such consultations or not. Cameron *et al* list the purposes of consultation, one of which they state is to canvass various aspects of the proposed retrenchments including severance pay.[126] On reflection there would appear to be no reason why the amount of severance pay, being a vital aspect of any retrenchment, should be excluded from the consultations. It would be nonsensical for the employer to withhold this vital piece of information until such time as the retrenchment is implemented. The prospect of receiving severance pay would no doubt serve to soften the blow caused by the news of the proposed retrenchment and would minimise the potential for industrial unrest. It would also make no sense to compel the parties to hold separate negotiations on the quantum of severance pay and consultations on all the other aspects of the retrenchment. Thus one can only conclude that the quantum of severance pay must be dealt with during the consultations.

It is often said that an employer should strive to seek agreement with his employees on all aspects of a proposed retrenchment, including the quantum of severance pay. Yet one wonders how much such an agreement is worth. A redundant employee may well feel powerless not to agree with any amount of severance pay offered to him.[127] Is he then bound to such an agreement to the extent that our labour courts will not determine whether the amount

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126 *Op cit note 120 at page 126. These are listed at page 38 above.*

127 *See discussion at page 33 above.*

offered to him was fair and reasonable or not. It is submitted that the quantum of severance pay does not necessarily lend itself to be determined by negotiation and agreement and should be determined by other objective criteria. Ideally legislation should be passed such as in the U.K., but in the absence of such legislation it must fall to our labour courts to set guidelines for fair and reasonable severance pay.

It can be argued that the above considerations would not apply in the event of a proper collective agreement incorporating retrenchment provisions, and a severance pay formula having been negotiated by a *bona fide* trade union, preferably prior to any retrenchment being proposed by the employer. Yet on the other hand what if the trade union lacked the collective muscle to negotiate a favourable agreement and ended up agreeing to a watered down retrenchment procedure and minimal severance benefits. Ideally such matters should still be determined by fair, reasonable and objective criteria contained in legislation failing which guidelines of our labour courts and should not be dependent on the raw bargaining power of the respective parties.

9.2 Quantum of Severance Pay

The approach of the Industrial Court when dealing with issues regarding the quantum of severance pay should be no different to its approach when dealing with other matters under its unfair labour practice jurisdiction. The function of the Industrial Court is well set out in the ***Sopelog*** case.[128] In brief it is expected that members of the Industrial Court will have their fingers on the pulse of industrial relations and will make discretionary

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128 *CWIU & Others v Sopelog (1994) 15 ILJ 90 (LAC).*

decisions which will reflect the general sense of fairness and justice of the community. Moreover the Labour Appeal Court must not substitute its own views for those of the Industrial Court simply because they are different but only when the Industrial Court's decisions are clearly wrong.[129] Thus the Industrial Court has a very wide discretion which would appear to extend to determining a fair severance package.

In the ***Imperial Cold Storage***[130] case Bulbulia DP exercised his discretion by determining what he believed was a fair severance pay formula in that case. This he stated was as follows:

1 - 3 years service	-	1 week's salary per year of service
4 - 6 years service	-	2 week's salary per year of service
7 - 9 years service	-	3 week's salary per year of service
10 or more years service	-	4 week's salary per year of service

However Joffe J of the Labour Appeal Court disagreed.[131] He stated that Bulbulia's formula had much to recommend it, but could not sustain itself in the absence of any authority or evidence of custom being put before the court.[132] Herein lies something of a dilemma. The Industrial Court is given a wide discretion but at the same cannot exercise that discretion in the absence of some clear authority. Of course it may well be impossible for the Industrial Court to find any authority on matters on which it is required to exercise its discretion in view of the fact that labour law in South Africa is

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129 *For the full extract from Sopelog's case see page 11 above.*

130 *Field v Imperial Cold Storage & Supply Co Ltd (1993) 14 ILJ 417 (IC).*

131 *Imperial Cold Storage & Supply Co Ltd v Field (1993) 14 ILJ 1221 (LAC).*

132 *Ibid at 1230 G.*

still in a young and developing stage. One would have hoped that the Labour Appeal Court would have been mindful of this and would have allowed Bulbulia's formula to stand, but regrettably it did not do so. It preferred a scale of between one and two weeks pay per year of service which was identified in previous cases as being a scale commonly adhered to by employers.[133] Imperial Cold Storage itself normally only paid 1 week per year of service. However its scale and those applied by other employers are normally unilaterally determined by the employers themselves and not by an impartial adjudicator, who would be more likely to arrive at a more generous and fairer level of severance pay.

Admittedly the job of determining a fair scale for severance pay requires a somewhat arbitrary approach and it would be infinitely preferable for the matter to be regulated by legislation as in the case of many European countries.[134]

In the *Imperial Cold Storage case* Bulbulia DP made reference to four factual indicators which are relevant to the determination of a fair severance package. They are the length of the employee's service; the employee's age;

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133 *See for example Ellerine Holdings Ltd v Du Randt (1992) 13 ILJ 611 (LAC) in which the employer scale of 1 week's pay per year of service, subject to a maximum of 10 weeks, was applied; Cele and Others v Bester Homes (Pty) Ltd (1990) 11 ILJ 516 (IC) in which a scale of 2 week's pay per year of service was awarded; CCAWU v Status Hotel (1990) 11 ILJ 167 (IC) in which it was recorded that with hourly and weekly paid employees a scale of one week per year of service is often paid; Ntuli & Others v Hazelmore Group (1988) 9 ILJ 709 in which it was noted that the usual practice of employers is one or two weeks per completed year of service.*

134 *Such as in France, Great Britain and Italy - see Yemin E: Workforce Reductions in Undertakings (ILO 1982) as referred to by the Industrial Court in the Imperial Cold Storage case op cit note 130 at 429.*

unemployment in the industry and the financial position of the employer. These are all no doubt, valid considerations. However Bulbulia then added a fifth factor namely the senior status of the retrenched employee. He stated that the employee *"deserved special consideration having regard to the fact that he ranked 3 on the Perommes scale"* and that the employer's normally applicable formula of one week's pay for each year of service should not have applied to him.

It is not clear how Bulbulia envisaged that seniority should be taken into account in other cases. Did he envisage a sliding scale in terms of which the more senior employee, the more generous the formula? As severance pay formulae are based on the salary of the employee, senior employees end up with more in any event. Should this now be compounded? This would surely be unfair. Joffe J of the Labour Appeal Court agreed that it was unfair and stated as follows:

> ***"There is no good reason why one should distinguish between managerial and other employees in determining the fairness of a retrenchment package.... Courts presided over by persons who would generally, if not always, regard themselves as of managerial status, must be careful to treat all employees with an equal brush of fairness".***[135]

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135 *Imperial Cold Storage appeal case op cit note 131 above.*

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