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EMPLOYMENT LAW ALERT

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Retrenched in retirement: When time no longer equals money

The facts in the February 2021 Labour Appeal Court decision in *Barrier v Paramount Advanced Technologies (Pty) Ltd* are not out of the ordinary and deserve attention.

Employees who retire are meant to enter into new contractual relationships with their former employers. It, however, happens that the arrangements into retirement years are not properly regulated which gives rise to disputes. There have also been numerous cases which deal with claims by retired or retiring employees based on age discrimination.

The facts in the February 2021 *Labour Appeal Court decision in Barrier v Paramount Advanced Technologies (Pty) Ltd* are not out of the ordinary but deserve attention. The dispute before the LAC centered around whether there was a "*break*" as contemplated in section 84(1) of the Basic Conditions of Employment Act 95 of 1997 (the Act) when Mr Barrier reached the age of 65, but continued (seamlessly) to work for the company until he was retrenched almost four years after the termination of his permanent contract of employment.

The case deals with important practical issues related to the interplay between sections 41(2), 84(1) and 84(2) of the Act in determining what impact an employee reaching retirement age, but nevertheless continuing with their former employer has on length of service and the calculation of severance in a retrenchment scenario:

- Section 41(2) provides that a retrenched employee is entitled to one-week's severance pay for each completed year of "*continuous service*" with the employer.
- Section 84(1) gives content to the meaning and calculation of "*continuous service*", by providing that if there is a break in an employee's service of less than one year, that break period will not be taken into account for the purpose of determining the length of service of that employee. (In effect, an employee will be deemed to be continuously employed by an employer notwithstanding a short break between periods of employment). The phrase "*continuous service*" is not expressly defined in the Act.
- Section 84(2) provides that any payment made to an employee during a previous period of employment must be taken into account in determining an employee's entitlement to further payments.

EMPLOYMENT REVIVAL GUIDE
Alert Level 1 Regulations

On 28 February 2021, the President announced that the country would move to Alert Level 1 (AL1) with effect from 28 February 2021. AL1 of the lockdown is aimed at the recommencement of almost all economic activities.

CLICK HERE to read our updated AL1 Revival Guide.
Compiled by CDH's Employment law team.

Retrenched in retirement: When time no longer equals money

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The LAC held that it is evident from section 84(1) that the "*break*" contemplated is a time lapse between periods of employment.

Briefly, the appellant had been in the employ of the company since 1985 when it was agreed that his employment would terminate upon him reaching the age of 65. However, in 2013 when Mr Barrier turned 65, he continued to work for the company uninterruptedly. It was only in 2017, approximately four years later, that Mr Barrier was retrenched.

The dispute related to the severance amount that had to be paid to Mr Barrier. The company's position was that Mr Barrier was entitled to only three weeks, being the period post-retirement from 2013 to 2017. Conversely, Mr Barrier's position was that he was entitled to 32 weeks' compensation – being the period he worked as a permanent employee from 1985 to 2017.

The LAC was called upon to determination this question: Does the termination of the written contract of employment (concluded in 1985) by the effluxion of time when Mr Barrier turned 65, and in the absence of a written extension thereof, constitute a "*break*" as contemplated in section 84(1) for the purpose of determining severance pay?

The LAC in considering the dispute started from the point of indicating that the correct question is not one related to the length of the continuous service but actually whether there had been a "*break*" in the first place, and whether an employee was entitled to severance pay for an earlier period, in light of the payment the employee was entitled to (or had received) at the end of the first period. The LAC held that it is evident from section 84(1) that the "*break*" contemplated is a time lapse between periods of employment.

Put differently, the determination of the entitlement of an employee, who has had more than one period of employment with an employer, to severance pay, requires the application of section 84(1) to determine the length of service, but also, requires the application of section 84(2), which obliges the employer to take into account "*any payment*" made to that employee in the previous period(s) of his employment with the same employer.

The LAC drew this analogy: an employee, employed for a long period with the same employer, does not lose his entitlement to severance pay when he is, after all those years, retrenched by the employer because the employer had been paying him generously and faithfully his salary and bonuses over the period of his employment. Such an employee also does not lose his entitlement to the retirement benefits he had accumulated until then. If an employee had been retrenched and paid a severance and then rehired by the employer, then this initial payment would of course be taken into account when calculating the period for severance pay due upon a second retrenchment, to avoid a duplication of payment. On the other hand, if an employee had been paid retirement benefits in a previous period of employment (and not severance pay), this would not lead to a duplication if the employee were, later, to be paid severance pay calculated to cover the same, previous period. This is because, the LAC concluded, severance pay is an additional payment from the employer which is meant to soften the blow of unemployment and is distinct from "*benefits*" such as pension/provident fund payments.

Retrenched in retirement: When time no longer equals money

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There had been no *"previous period of employment"* and as such, section 84(2), which contemplates a previous period, was not applicable.

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

So, was Mr Barrier entitled to his severance pay?

The LAC concluded that Mr Barrier, despite turning 65, had continued to work in the employment routine that he had been following since 1985 – there had not been a *"break"* of even one working day – and though his written contract of 1985 had (strictly in law) been terminated, this made no difference to his employment routine. As such, Mr Barrier's employment with the company was *"continuous"* from 1985 until he was retrenched in 2017, despite his contract terminating and him working beyond his retirement age. There had been no *"previous period of employment"* and as such, section 84(2), which contemplates a previous period, was not applicable.

Mr Barrier's uninterrupted employment with the respondent from 1985 until 2017 therefore entitled him to one week's severance pay for each completed year of service and the court ordered that the company pay him the further 29 weeks' severance pay that he had not been paid on his *"second termination"*. This was a payment in excess of R1,000,000 as compared to the circa R140,000 which the company computed was payable to him on his retrenchment.

Employers need to be extremely considered when it comes to the employment of retiring employees and to properly regulate and manage the further relationship to avoid unintended liability especially now in the instance of a retrenchment scenario during the post retirement employment years.

Imraan Mahomed, Jordyne Löser and Menachem Gudelsky

Comply or be liable for damages: How employers can ensure compliance with POPIA

Employers need to ensure that they lawfully process information. This can be achieved through complying with the eight conditions in POPIA.

The Personal Protection of Information Act 4 of 2013 (POPIA) came into effect on 1 July 2020, and responsible parties have been granted a grace period of 12 months (30 June 2021), to ensure compliance with POPIA. The nature of the civil liability created in terms of section 99(1) of the POPI Act and the restricted nature of the defences in terms of section 99(2) create significant risk for employers which may not be adequately addressed by the steps typically taken by employers to limit such risk.

What do employers need to do to ensure compliance with POPIA?

Employers need to ensure that they lawfully process information. This can be achieved through complying with the eight conditions in POPIA, namely:

- **Accountability:** Employers need to ensure that the conditions are complied with at the time of determination of the purpose and meaning of processing and processing itself. Employers can do this by appointing a compliance officer.
- **Processing limitation:** The processing of personal information must be limited to lawful processing in a reasonable manner that does not infringe the privacy of the employee.
- **Purpose specification:** When collecting information, it must be for a specific, defined and lawful purpose, related to the function of the employer in the employment context. The employer must inform the applicant or the employee of the purpose of the required documents.
- **Further processing limitation:** Employers require the consent of the employees to put personal information to further use, e.g. passing on information to a Medical Aid or retirement fund.
- **Information quality:** An employer must take steps to ensure that the information collected from the employee is complete, accurate and continually updated where necessary.
- **Openness:** An employer requesting information must ensure that the employee is aware of the information collected, the source of the information, the name and address of the responsible party, the purpose for which the information is requested and what law if any, prescribes the disclosure of information.
- **Security Safeguards:** An employer must take reasonable steps to ensure that the personal information in its possession remains secure. The employer can do this through considering virus programs, back-ups and off-site storage. Should there be reasonable grounds to believe that an employee's information has been accessed, the employer must notify the regulator and the affected employee.
- **Employee participation:** An employee has the right to know what information the employer has pertaining to him/her and may request the records or description of the information the employer holds.

Comply or be liable for damages: How employers can ensure compliance with POPIA*...continued*

Of concern to employers will be the fact that the defences do not include circumstances in which the employer is able to show that it did all that was reasonably practicable to ensure that the employee did not breach the POPIA Act.

Further steps for employers to ensure compliance with POPIA

- Employers must appoint an Information Officer.
- Employers should review recruitment processes, HR policies and employment contracts, and include provisions on processing of personal information where necessary. Employers should also acquire consent to process personal information and special personal information in this regard.
- Employers should establish adequate policies to ensure compliance with the 8 conditions (listed above).
- Employers should host awareness training for employees on compliance with POPIA.

Ensuring adequate safeguards

In terms of section 19 of POPIA, employers are required to implement appropriate, reasonable technical and organisational measures to secure the integrity and confidentiality of any personal information in their possession or control. Thus, employers are required to guard against reasonably foreseeable risks in respect of non-compliance with POPIA taking measures to ensure that compliance is developed and implemented effectively.

Consequences of non-compliance

Criminal: POPIA imposes various criminal offences for non-compliance. Non-compliance with POPIA can result in imprisonment not exceeding 10 years and/or a fine not exceeding R10 million.

Civil: In terms of section 99 of POPIA, a data subject or, at the request of the data subject, the Regulator, may institute a civil action for damages in a court having jurisdiction against a responsible party for breach of POPIA.

Possible defences to be raised by an employer

Section 99(2) of the POPI Act sets out the limited defences which an employer may raise in response to a claim in terms of section 99(1). The defences include vis major, consent of the plaintiff, fault on the part of the plaintiff, compliance was not reasonably practicable in the circumstances of the particular case or the Regulator has granted an exemption in terms of section 37.

Of concern to employers will be the fact that the defences do not include circumstances in which the employer is able to show that it did all that was reasonably practicable to ensure that the employee did not breach the POPIA Act.

In conclusion, employers should comply relevant requirements of POPIA. By failing to do so, employers are at the risk of imprisonment of up to 10 years and/ or fines of up to R10 million or being liable for damages.

Hedda Schensema, Asma Cachalia and Shandré Smith

POPIA and the disclosure of an employee's vaccination status

Section 26 of POPIA prohibits the processing of 'special personal information'. Given the sensitive nature of this information, this is a special category which attracts a higher degree of protection.

The Protection of Personal Information Act 4 of 2013 (POPIA) provides for the protection of personal information processed by public and private bodies. Whilst POPIA defines personal information, it also creates another category termed 'special personal information'.

POPIA defines 'personal information' as information relating to: Living natural persons and existing juristic persons. This includes information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person. Aspects such as criminal and employment history, physical address, telephone numbers and biometric information are also included under the definition.

Any form of 'personal information' may only be processed where:

- a person has provided consent;
- it is necessary for the conclusion of a contract;
- it is imposed by a law;
- it protects a legitimate interest of the person;
- it is required for the performance of a public law duty by a public body; or
- it is needed for pursuing the legitimate interest of the responsible party.

The word 'process' is widely defined in POPIA to include: Collection, collation, storage and retrieval of information.

Section 26 of POPIA prohibits the processing of 'special personal information'. Given the sensitive nature of this information, this is a special category which attracts a higher degree of protection. This information relates to religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information. Also included in this category is information relating to the alleged commission of any offence or any proceedings in respect of any offence allegedly committed and the outcome of such proceedings. In the absence of consent, processing 'special personal information' is prohibited.

However, in terms of section 27 of POPIA, there are a few instances where consent will not be required. This includes instances where the processing of such information is necessary by law and when such information is needed for historical, statistical or research purposes that serve the public interest. The exceptions to the prohibition of processing 'special personal information' are limited compared to the exceptions to the prohibition of processing 'personal information'.

When South Africa gets to the point of vaccinations, the question of whether an employee or applicant for employment has been vaccinated will arise. There are many reasons why an employer may legitimately require such information. So, can an employer require that an employee disclose their vaccination status? Can employees object to the request?

POPIA and the disclosure of an employee's vaccination status

...continued

There is likely not to be any law which will require that employees disclose their vaccination status.

There is likely not to be any law which will require that employees disclose their vaccination status. As an inoculation will be a voluntary act (assuming there to be no mandatory policy in a workplace), this means the issue will be regulated by the law of privacy and obviously POPIA. The same would apply in the instance of the imposition of a mandatory vaccination policy in the workplace. An employee's vaccination status would constitute 'special personal information'.

This aside, as part of the pre-planning by an employer on the application of a vaccine policy, during the consultation phase, this is also an important topic to be raised in consultation with employees. Under POPIA this information should not be retained for longer than is necessary for achieving the purpose for which the information was collected. Planning around this subject would require input and direction of the Information Officer and Human Resources.

Imraan Mahomed, Jordyne Löser and Yusuf Omar


SEXUAL HARASSMENT
IN THE WORKPLACE
Including the virtual
world of work
A GUIDE TO MANAGING
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The purpose of our 'Sexual Harassment in the Workplace – Including the Virtual World of Work' Guideline, is to empower your organisation with a greater understanding of what constitutes sexual harassment, how to identify it and what to do it if occurs.
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The LEGAL 500 EMEA

2021 RESULTS

CHAMBERS GLOBAL 2014 - 2021 ranked our Employment practice in Band 2: Employment.
Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2021 in Band 2: Employment.
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Gillian Lumb ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Employment.
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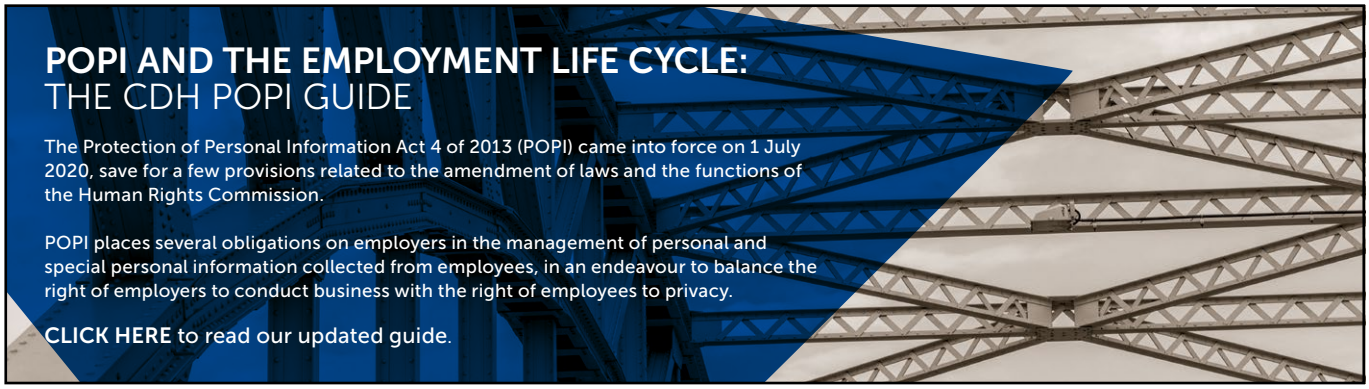
TOP RANKED Chambers Global 2021



POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

CLICK HERE to read our updated guide.

AN EMPLOYER'S GUIDE

TO MANDATORY WORKPLACE VACCINATION POLICIES

FOR A COPY OF THE CDH EMPLOYMENT PRACTICE GUIDE, CLICK HERE

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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