UNDUE EQUATION OF 'SAVINGS' WITH 'COMPENSATION FOR SERVICES': CASE COMMENT

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Introductory note

Individual employer-employee relations are regulated by a regime called 'employment law'. Despite the inadequate semantic clarity in our legal system regarding the usage of the words '*employment law*' and '*labour law*', the latter is 'understood as the regime that governs workers' efforts to advance their own shared interests through self-organisation and collective protest, pressure, negotiation and agreement with employers.'[1] Among the numerous benefits accorded to an outgoing employee is severance payment that somehow provides an interim income during transition from one engagement to another. And this form of benefit represents one variety of the 'third wing' within the regime of labour relations that are legislatively determined 'minimum labour conditions'. These are conditions which are subject to neither individual nor collective negotiations to their detriment. While we moved on from an indiscriminate entitlement regime to a selective approach towards who may (or may not) get this form of benefit, the exact contours of application still remain contested. This comment addresses a trend that is currently being entrenched in the practice of the labour benches whereby they deny severance pay in case a discharged employee is a beneficiary of a scheme known as 'provident fund' or *vise versa*. This of course has been legislated upon by the labour (amendment) proclamation and is being practiced by our courts. This comment is a critical appraisal of that practice based on the *dictum* of the Federal Supreme Court on the matter.

1. Case summary

The case, *Awash International Bank v. Ato Ephrem Newayemariam*,[2] was initially instituted at the Federal First Instance Court by the present respondent

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[1] See Sachs, Benjamin I. (2008), 'Employment as labour law', *Cardozo Law Review*, 2689 Vol. 29, No. 6, 27 May 2008, p. 2701

[2] Federal Supreme Court, Cassation Division, Awash *International Bank P.L.C. v. Ato Ephrem Newayemariam*, File No 35197, decided on Tikimt 13/2001 Eth. Cal.

whereby he brought a claim to severance payment and interest with an aggregate amount of Birr 24,873.18. The employee had been working at the bank since Yekatit 1987 Eth. Cal. (Feb. 1995) and had resigned voluntarily. The bank paid to the respondent all the necessary dues including provident fund though it failed to effect severance payment. Accordingly, the applicant at the lower court pleaded for the payment of the severance pay based on the relevant law. The court, however, denied the claim relying on Proclamation 494/2006, which restricts severance payment to instances, among others, 'where he has no entitlement to a provident fund or pension right and his contract of employment is terminated upon attainment of retirement age stipulated in the pension law.'[3] Aggrieved by this verdict *Ato Ephrem* took the case to the Federal High Court by appeal where he obtained a reversal of the lower court's decision.

The present applicant brought the matter to the cassation division of the Federal Supreme Court by invoking basic error of law committed by the Federal High Court to which the court gave a leave for reviewing the matter. After evaluating both sides of the arguments once again, the Supreme Court framed the following issue for its deliberation and decision: 'would an employee be paid severance pay where he is entitled to provident fund?' Before delving into the evaluation of the reasoning and final verdict of the Supreme Court, I shall first discuss the precursors to both severance payment and provident fund within the Ethiopian legislative framework.

2. Background: terminologies and concepts

It is worth putting a few lines by way of explaining what we mean by *severance payment* and then *provident fund*. This would offer a ground work for our discussion on the case. Henry Black defines *severance payment* in the following words:

> 'Money (apart from back wages or salary) paid by an employer to a dismissed employee. Such a payment is often made in exchange for a release of any claims that the employee might have against the employer. Also termed *separation pay; dismissal compensation*.'[4]

The important definitional element of severance payment is thus, similar to provident fund; it presupposes termination of the engagement for it to be due. In other words, it is meant to compensate the severance of the relationship that the parties to the employment contract have had for the past period of time, the length of which shall, together with the salary, determine its amount. Under

[3] See Labour (Amendment) Proclamation No. 494/2006, particularly Article 2(2)(g).
[4] Bryan A. Garner (Ed), (2004), '*Black's Law Dictionary*', Deluxe Eighth Edition, Thomson West, p. 1406

Ethiopian law, this form of payment had been for the first time given recognition under the 1964 minimum labour conditions regulations.[5] Article 9 of the regulations stipulated the following:

> Where an employer, without good cause, terminates a contract of employment which has lasted for more than one year, the employee shall be entitled to compensation equal to thirty times the average daily wage received by or due to him during the six immediately preceding periods of payment during which he has been in the service of his present employment.[6]

It is interesting to note that this provision (though titled severance payment) speaks of compensation for service. This was meant to replace the 'fair compensation' rule of the 1960 Civil Code under Articles 2573 & 2574 for cases of unjustified discharge[7] with a liquidated amount. This vague merger of the two, i.e., severance payment and compensation for services, was cleared under the 1975 labour proclamation that considered the two as distinct entitlements. According to this proclamation, severance payment was made available only for cases of justified terminations as a result of bankruptcy or lay-off measures.[8] The amount was without any progression and amounted to two months' salary payable only in cash. Compensation for service, however, was due as an entitlement to all workers whose contract of employment was cancelled on the legitimate grounds provided under the proclamation and it appears that those mentioned as beneficiaries of severance payment would again benefit from this form of compensation as well.[9]

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[5] Regulations issued pursuant to the Labour Relations Proclamation 1963, Minimum Labour Conditions Regulations, *Legal Notice* No 302/1964.

[6] *Ibid*, Article 9(1). The provision further stipulated the progression of this payment by 25% for each year of continuous employment.

[7] See Article 9(3) of this Regulations.

[8] See Labour Proclamation No 64/1975. Article 16 which provides 'only a worker whose contract of employment is cancelled under Art 14(1) (e) (which is about termination on grounds that the undertaking ceases operation because of bankruptcy or any other reason) or (f) (which is about cancellation of the contract of employment where the worker becomes redundant as a result of the reduction in the volume of work and it is not possible to transfer the worker to another undertaking).

[9] One might wonder then what would be the special entitlements of those workers whose contract of employment had been unjustifiably cancelled and the answer would be quite simple. Since the legislation provided a single most important effect of unjustified discharge, i.e., which was reinstatement, there was no need of providing any form of monetary compensation for unlawful termination cases. See particularly Article 14(3) which provided 'when the undertaking dismisses the worker for reasons other than those provided in sub-article 1 of this article, the contract of employment shall not be deemed cancelled.'

As can be observed from this brief historical backdrop on severance payment, it was meant to compensate specific forms of terminations and not an entitlement in all cases where the contract of employment comes to an end. A striking similarity, however, existed in its nature because it was strictly related to termination of the employment contract and the amount was paid exclusively from the employer's pocket.

Under the labour proclamation which was issued by the transitional government of Ethiopia in 1993, however, the approach to severance payment changed fundamentally from the former ones in basically two points: the entitlement to severance payment was meant for every worker whose contract of employment had been terminated, justly or otherwise; secondly, there had been a reverse approach in the sense that compensation came only in exceptional cases of unjust dismissals while severance payment is considered as compensation for service in general than for unjust dismissals only.[10] The only circumstance that would have displaced this payment was entitlement to pension allowance upon termination.[11]

Finally, C158 on termination of employment in the Convention of the ILO provides severance allowance as one of the most important income protections of a worker upon termination by the employer and it makes, in principle, no segregation based on reasons of termination for this payment to be due.[12] Under Article 12, this Convention stipulates that 'a worker whose employment has been terminated shall be entitled…to [a] severance allowance or other separation benefits, the amount of which shall 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'.[13] Down the line, the provision permits some form of legislative exclusion under the national law of the member states particularly 'in the event of termination for serious misconduct.'[14]

Contrary to this, however, the 2003 labour proclamation and its subsequent amendment have come up with important deviations whereby entitlement to

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[10] Article 39 of this proclamation provided 'a worker who has completed his probation and whose contract of employment is terminated under the provisions of this proclamation shall be entitled to receive severance pay from the employer' and further Article 43 provided that compensation in lieu of reinstatement shall be paid, in cases of unlawful termination, together with severance payment making this form of payment an entitlement both during just and unjust dismissal cases. Labour Proclamation No 42/1993.

[11] This was inserted by a later Labour (Amendment) Proclamation No 88/1997

[12] See C158, *Convention concerning termination of employment at the initiative of the employer*, adopted on 22nd June 1982, Geneva; entered into force on 23 Dec 1985. Ethiopia has ratified this convention on 28th Jan 1991.

[13] See Art 12(1)(a) of C158, ibid

[14] See Art 12(3) of C158, ibid

severance payment is to exist only selectively. The instances of terminations that result in the entitlement to severance payment are termination due to bankruptcy or any other cause (mentioned under Article 24(4); during unlawful termination of employment contract and where reinstatement has not been ordered by the court or not accepted by the employee; termination as a result of reduction of work force under Article 28(2) cum 29; during extra-ordinary resignation for reasons either of abuses committed on the employee's human dignity by the employer or consistent failure by the employer to discharge the duties under the employment contract (Article 32(1) (a) &(b)); termination because of medically certified disability (arguably a termination under Article 24(5); termination because of retirement and where no entitlement to pension allowance or provident fund exists;[15] voluntary resignation after a minimum of five years of service and where there are no contractual obligations for extended service; termination because of sickness,[16] or death; and finally where the contract is terminated as a result of a special type of sickness, i.e., HIV/AIDS.[17]

When it comes to provident fund, a single most important definition existed under the 1962 labour relations decree no 49. Article 2(p) of this legislation defined 'provident fund' as 'any fund established by any employer or any organisation having as its purpose the aid and relief of its members in time of need.'[18] Thus, during those early days in the development of labour conditions, this form of fund was meant to be a form of social security scheme that would have guaranteed aid and relief during the unlucky days of a worker. It even anticipated the establishment of this fund by 'any organisation' implying that

[15] This remains to be a very significant move, albeit its being vague, incomplete and unreasonably cumbersome on the outgoing employee as shall be discussed in the next sections of this contribution.

[16] This must be referring to a situation where the employment contract is terminated because of the inability of the worker to continue working after the exhaustion of the maximum period of sick leave and the contract of employment terminates by operation of the law. This, however, is not explicitly mentioned under Article 24 of the labour proclamation that speaks of termination grounds by operation of the law. Nonetheless, if we have to give proper effect to the sick leave limits provided under Article 85 of the labour proclamation, which is six months in a year either taken consecutively or separately, then we need to interpret it to imply termination once the maximum ceiling has been reached. Moreover, the civil servants' regime might also be of some assistance which expressly provides 'where a civil servant is unable to resume work within the time specified under Article 42(2) & (4) (which are provisions that stipulate about the maximum sick leave to be given to a civil servant) of this proclamation, he shall be deemed unfit for service and be discharged.' See Federal Civil Servants Proclamation No 515/2007, particularly Article 79(1)

[17] These are all grounds listed under Article 39(1) of the labour proclamation and Article 2(2) of the amendment proclamation infra note 24 and supra note 3, respectively.

[18] See Labour Relations Decree No 49/1962.

this scheme has a wider purpose than strictly as an employment benefit. Nonetheless, the provision remains to be vague on few counts such as whose duty it would be to contribute to this fund, to whose 'aid and relief' it would be coming- the employer, the employee or both. These matters remained unsettled under this piece of legislation.[19]

Under this statute the establishment of a provident fund was made to be discretionary and it was provided under Article 22(f) in the following way:

> 'Employers shall have the right to establish and maintain provident funds. Such funds shall be segregated and maintained separately from all other funds of the organisation, and shall not be reached in bankruptcy for any debts of the organisation.'

Notably, therefore, there had been a clear distinction in approach between a provident fund and severance pay. While the former was one variety of saving for times of distress to be kept separately from the assets of the undertaking, the latter is a payment from the assets of the undertaking to be effected during termination of the employment contract.

Under the 1975 labour legislation, some of the matters were clarified and there was a redefinition of the term 'provident fund' as well. According to Article 2(20) of the Proclamation, 'provident fund shall mean, except in instances where a pension scheme is in effect, a fund to which the worker and the undertaking contribute regularly and is payable to the worker when the contract of employment is terminated.'[20] From this wording, it was apparent as to who contributes, to whom the benefit belongs and when the payment shall be due.

However, as in the earlier legislation, the manner of collection, administration and custody of this fund remained vague under this proclamation. It was observed in practice that the undertaking would 'utilise the fund for capital investment purposes and unilaterally appropriate profits accrued from it.'[21] That notwithstanding, the 1975 legislation restricted the possibility of establishing this form of fund only to those undertakings where there existed no pension scheme and accordingly, it was a matter for private establishments to discretionarily provide for this bilateral contribution system. Implicit in this exclusion was surely the apparent, if not exact, similarity that exists between a pension scheme and a provident fund. The well entrenched social security scheme in Ethiopia is the pension contribution which is raised through 4%/6%

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[19] See Daniel Haile, '*Reading Materials on Labour Law*', Nov. 1985, AAU, Law Faculty, page 11

[20] See Proclamation 64/1975, *supra* note 8

[21] See *supra* note 19

financing by the employee and the employer.[22] Thus, this provision tells us that a pension scheme and a provident fund scheme could not co-exist. It is no wonder that the law had prohibited the parallel existence of the two schemes as they have resemblance in their nature and purpose.

There had been no express mention of the provident fund under the 1993 labour proclamation and it can be asserted that this scheme is primarily a contractual arrangement that the employees (either individually through the employment contract or collectively through a collective agreement) and the employer decide to establish. It was when the approach to severance payment had changed under the 2003 labour proclamation and its subsequent amending legislation that provident fund became a contentious matter.[23] Under the new approach, gone are those old days where everyone, (presumably even a delinquent employee) would have benefited from the payment of severance pay[24] and the provident fund came as one of the displacing factors to this entitlement. Since there is no definition of this term under the 2003 labour proclamation, we can only rely on the particular arrangement's understanding of the matter and how it had been treated under the previous statutes.

3. The Supreme Court's reasoning and comments

While reversing the Federal High Court's decision (highlighted in Section 1 above) and reincarnating the Federal First Instance Court's position, the Supreme Court reasoned as follows:

> 'It can be understood from [Article 2(2)(g) of proclamation No 494/2006] that an employee who is covered by provident fund and whose contract of employment is terminated cannot get severance payment from the employer. In other words, both provident fund and severance payment cannot be claimed from the same pocket at the same time. As it is well understood, the main objective of severance payment is to mitigate the financial strains of an employee during his search for new job. This is not different when it comes to provident fund too. If their objective is similar asking the payment of both at the same time and from the same pocket would only amount to a 'double jeopardy' on the employer and thus

[22] It was in 1963 that this share of contribution had been legislated and remained unaltered to-date. See, the proclamation to provide for the payment of contributions towards the cost of pensions for public servants and members of the Armed forces, Proclamation No 199/1963, Articles 3 & 4

[23] This, however, should not imply the absence of academic discourse over the issue before the coming into force of these laws, and it can even be asserted that the legal positions were taken following the controversies that abound the matter. While Article 39(1) of proclamation No 337/2003 innovatively came up with lists of inclusions/exclusions for entitlement to severance pay, the amendment proclamation No 494/2006 enlarged that list further by adding three conditions as discussed above.

[24] See Labour Proclamation No 337/2003.

> unjust. Accordingly, when the legislature denied the payment of severance pay where there is an entitlement to provident fund, its intention must be presumed to avoid such form of double-payment and nothing else.'[25] (*Author's translation*).

Reasonable deduction could have it that where it was the severance which was paid instead, this same justification would have been invoked to deny the payment of the provident fund.[26] The decision, with all its brevity and vagueness errs on many counts. Primarily, the conclusion reached by the court in equating the justificatory grounds of the two forms of benefits is, at best, unconvincing. Severance payment is one type of minimum labour conditions and thus cannot be rendered defunct contractually.[27] This form of payment, as discussed above has a purpose of providing financial support to an employee whose contract of employment has been terminated and who probably might be looking for another job at the moment. I argue that this is not the only justification. An undertaking's asset is something that accumulates throughout the production process and the production process comprises three important elements, which Karl Marx once called '*the trinity formula*'.[28] These three elements are 'Capital-profit (profit of enterprise plus interest), land-ground-rent, labour-wages.'[29] He then succinctly argues that wages of labour, or price of labour, is but an irrational expression for the value, or price of labour-power' as it is the single most important source of wealth to the enterprise. This is because capital, if not laboured on can only yield interest, which is meaningless as a social production process and land too provides a constant amount of yield depending on its fertility and the labour invested on it. Thus, what remains to be important in all the processes is labour and where an employee is leaving the establishment for

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[25] See the part of the decision at paragraphs 6 & 7, *supra* note 2

[26] Of course this is a minor, though not that simple, issue which the amendment proclamation failed to address with utmost clarity. If there is a difference in amount between the two payments, whether we would have to follow 'the best interest of the employee' logic or not is a matter left for the courts to workout. This is unlike what we had seen above under Article 17 of Proclamation No 64/1975.

[27] Because of the well-known asymmetry in bargaining powers of the two parties in an employment relation, the state has invariably maintained its traditional role of intervening into this 'contractual marriage' through its labour legislation that primarily aims at laying down the minimum conditions of labour which would withstand any contractual terms that go below them. One such minimum condition is payment during severance of the relationship the amount of which is specified by the law, though only to those specific forms of termination. One can, however, argue that those legal restrictions may even be lifted by favourable terms in a collective agreement or employment contract the application of which would have arguably prevailed over the law based on the relevant provisions of the labour proclamation.

[28] See Karl Marx (First German Edition, 1894), '*Capital: A Critique of Political Economy*', Vol III, Edited by F. Engels, Foreign Languages Publishing House, Moscow 1962

[29] *Ibid*, page 794.

good, some level of benefit-sharing should exist which would not be adequately captured just by the periodic wages he had been earning during the life of the engagement.

Even the manner of calculation supports this view which is dependent up on the years of service and the periodic wages he was getting while the relationship was intact.[30] When the transitional government changed the socialist-oriented labour legislation, it has omitted the title 'compensation for service' of Article 17 and substituted it by 'severance pay' without changing its contents, i.e., as an all-benefiting entitlement during termination and payable progressively based on earnings and years of service. When the subsequent proclamation changed the approach, it only imposed restrictions on who may benefit from the scheme of severance payment and not the other matters. Nonetheless, at least no one would convincingly argue that the justifications have been changed altogether.

Even under the 2006 amendment legislation, Article 2(2)(g) mentions an entitlement to severance payment for an employee who has resigned and where s/he fulfils two conditionalities. These are, first serving for five years, and secondly, the non-existence of any contractual obligations for serving more.[31] This underscores the justification to be, not just providing 'palliative' support during transition, but also a consideration of severance payment as a form of compensation for service.[32]

The fundamental confusion that reigns over this matter emanates from Article 2(2)(g) of Proclamation 494/2006 which reads:

> [A worker who has completed his probation] 'where he has no entitlement to a provident fund or pensions right AND his contract of employment is terminated

[30] By some unknown reason to this writer, the 1975 labour legislation, while providing a liquidated sum under the heading of 'severance pay' it had stipulated a progressive sum of payment by way of 'compensation for services' under its Articles 16 & 17, respectively. While the former is only applicable exceptionally to few forms of termination, the latter would have benefited all outgoing employees. Apparently, what can at least be judged from the overall conceptual and practical understanding of the terms is that compensation for services, whether we call it severance payment or otherwise, is an important minimum labour condition that should be made available to an outgoing employee.

[31] See *supra* note 3

[32] Similar arguments could also be made for many of the listed instances under Article 39(1) and also the amendment law and to remain brief I optimistically leave that for further build-ups to this contribution.

> upon attainment of retirement age stipulated in the pension law…[shall have the right to get severance pay from the employer].[33] (Emphasis added).

This, as mentioned above, is what the Federal Supreme Court relied on to deny all employees the payment of both provident fund and severance payment in parallel, and for reasons mentioned in the case at hand. While denying severance payment for those employees who have been covered by the pension scheme is an old subject, this provision is innovative with regard to the scheme of provident fund. Primarily, the provision envisages two situations and it implicitly speaks of their similarity as well. These are the pension scheme and the provident fund which are mutually exclusive and where either exists would displace severance payment. Secondly, the provision strictly provides the form of termination too and thus it must be a termination because of the attainment of retirement age as that is one of the lawful grounds to severe the employee-employer relationship.[34] Ordinarily, pension scheme applies to 'public servants' by whom we refer to 'a person permanently employed in any 'public office', and includes a government appointee, member of the defense force and the police.'[35] By public office too we are referring to 'an office wholly or partly run by government budget, and includes public enterprises.'[36] That being the scope of application of the pension scheme, it does not apply, therefore, to private undertakings. However, the fact that they are not covered by the pension scheme would not warrant the assertion that retirement age may not be used as a legitimate ground for termination. This has been once an issue before the cassation division of the Federal Supreme Court by which the Court had given an authoritative interpretation of Article 24(3) in such a way that it also applies to private undertakings.[37]

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[33] I had to combine the texts of Proclamation 377/2003 and the amending legislation so that together they would give full sense without, obviously, adding anything than what exists in the law.

[34] See Article 24(3) of the labour proclamation, supra note 24

[35] See Public Servants Pension Proclamation No 345/2003, *Federal Negarit Gazeta*, 9th Year, No 65, Addis Ababa, 8th June, 2003, Article 2(1)

[36] *Ibid*, Article 2(2)

[37] In this case, the respondent was dismissed from his employment upon attaining his 60's and then pleaded before the Federal First Instance Court for declaration of the act of termination as unlawful, which the First Instance Court denied. However, the High Court, accepting the application of the applicant reversed the lower court's decision. The Supreme Court, on its part reasoned that even if there is no clear legislation that stipulates about the retirement age for private undertakings, the purpose of retirement is applicable irrespective of the nature of the establishment as private or public. And the purpose is first when people become older in age, there is a tendency of reduction in productivity and on the other hand there will be increased medical risks thereby increasing the expenses. Therefore, it is legitimate to analogise the retirement age determined for the public

In this sense, I believe that the provident fund has a purpose different from severance payment, and it probably shares a closely similar purpose with that of a pension scheme. The court's reasoning is indeed flawed when it said 'from the same pocket and at the same time' because it is not the case when it comes to provident fund, just like pension allowance. While severance payment, as mentioned above, is one of the *minimum labour conditions*,[38] provident fund, on the other, is a form of *social security* scheme to which both parties would contribute, which exists only where they have contractual agreement to that effect and which is payable upon the termination of the employment contract.[39]

This unique feature of provident fund was acknowledged by the Supreme Court itself in another case.[40] At issue in this case was the applicable period of limitation to claim the payment of provident fund to which the lower courts had identically responded based on Article 162 of the labour proclamation saying that it shall be barred unless brought within the short period of time specified in this provision.[41] Upon appeal, the Supreme Court reversed the decision by particularly taking into account the special features of provident fund:

> 'The source of [Provident fund] is not exclusively the employer. Included in the accumulated fund is the employee's 5% wage which was deducted every month. Its objective is to provide to the employee and his family with social security benefits where the contract of employment is terminated either because of dismissal or resignation.'[42]

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servants as similarly applicable to private undertakings too. See the case of *St. Josef School v Ato Girma Mersha*, Supreme Court Cassation division decision, File No 22130, decided on 29th Tir 1998 (E.C.)

[38] See also Ato Mehari Redae (2008), '*Notes and Materials on Employment Law*', Justice and Legal System Research Institute, Addis Ababa (Unpublished)

[39] It is worth noting also that there are arrangements in practice by which the employees might be able to withdraw some percentage of this fund even before the termination of the employment contract as interest-free loan. After all, this is a saving and it is not reasonable to object to this form of arrangement, especially considering the purpose of provident fund which is meant to come into the 'aid and relief' of the worker in times of need.

[40] See the case of *Ato Girma Shiferaw v Christian Relief and Development Aid (CRDA),* Federal Supreme Court Cassation Division, File no 32545, decided on 14th Ginbot 2000 (E.C.)

[41] Because of the special nature of claims related to employment relations such as effecting outstanding dues, reinstatement, certificate of service, etc, the law has come up with very limitative periods that apply only to labour relations. See generally Article 162 of the proclamation supra note 24

[42] See *supra* note 41, para 3 of the case. Based on this reasoning, the court declared that Article 162 of the Labour Proclamation shall not bar the claim of provident fund and it cannot be left for an indefinite future either. Based on Article 1677, the applicable period

If one compares this reasoning with that of *Ato Ephrem's* case, it is evident that they contradict and it appears that the Supreme Court has come back-in to the rightful understanding of the nature of provident fund in the later case. Where a contribution has been made bilaterally and saved for and in the name of the employee, it is unjust to equate it with severance payment and consider them mutually exclusive. On this point, I will have to regrettably disagree with *Ato Mehari* who follows, with numbered reasons, the Supreme Court's approach. Among others, he relies on the ILO Convention C158 and on a more pragmatic reason in support of his position.[43] For him, the ILO Convention that I mentioned above envisages the source of the separation payments to be either the employer alone or a fund to which the employer has contributed.[44] However, this must not be understood to imply a fund the type of which we are discussing here, i.e., provident fund. This is because provident fund is neither severance allowance nor separation benefits that the Convention envisages under its Article 12. If we have to stick to our understanding of severance payment strictly as one of the minimum labour conditions, then it is at least distinct from provident fund which is sourced from both parties. The Convention, by referring to a fund, must be understood to refer to some form of social benefits scheme that is meant to support employees during unemployment. If it is a contribution to which the employee had also made, then it cannot be called an employment benefit, at least for the purpose of Article 12 of C158.

Ato Mehari's second point is of course a practical one and states that requiring an employer to pay twice for a single termination might discourage undertakings in the future to establish the provident fund scheme altogether. This surely is a proper concern. However, considering that private undertakings are not within the pension scheme which would have resulted at least to the compulsory contribution of 6% of every employee's salary to the social security scheme, we cannot foretell that employers might end up being possessed by such greed, particularly in this increasingly liberalised economy where labour mobility is becoming relatively easy and competition comparably stiff. Thus, the other side of optimism is as much a possibility.

Unless we go contra to the unlawful enrichment proscriptions of the extra-contractual liability law, therefore, even the legal stipulation under the amendment proclamation in itself could remain tenable. This is because unlike the old approach under Proclamation No. 64/1975, if we assume that the

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of limitation to provident fund shall, therefore, be Article 1845, which is 10 years from the date it has come due.

[43] See *supra* note 38, page 47, where he foot notes at length his views on the issue at foot note 25

[44] See *supra* note 12

employee had higher amount of severance payment than provident fund, we would have to deny him all the money that had been accumulated, which also includes his own contributions. Thus, to the extent the undertaking is permitted to keep that part of the employee's contribution, we are but tolerating the enrichment of the employer's estate unlawfully.[45]

In the case at hand, the court applied this provision to deny severance payment for *Ato Ephrem* whose contract of employment has come to an end by voluntary resignation.[46] Apart from the unwarranted labelling of the justifications of the two to be the same, the court also failed to look at the provision which strictly singles out retirement to be the form of termination for displacing severance payment in favour of pension scheme or provident fund, whichever is available. In cases of resignation, however, we already have Article 2(2)(h) of the same Proclamation 494/2006 which in principle requires a minimum of five years service, among others, for a resigning employee to benefit from severance payment.

In this case, the court's rather expansive interpretation would exclude an employee from being entitled to his provident fund because he had already taken his severance payment. In effect, what is implied would be that so long as there is provident fund, under no circumstance could an employee be entitled to severance payment and thus, an employee can only take his provident fund at the expense of loosing his severance payment.[47] However, the fact that the legislature excludes severance payment in situations of termination as a result of retirement and in the availability of provident fund significantly indicates the distinct nature of the two, rather than their similarity. This is because, severance payment is meant to fill an interim gap between termination and finding another job and an employee who is retiring cannot, in principle, be presumed to be a

[45] Article 2162 of the Civil Code provides, 'Whosoever has derived a gain from the work or property of another without just cause shall indemnify the person at whose expense he has enriched himself to the extent to which he has benefited from his work or property.'

[46] I use the term 'voluntary resignation' to distinguish it from the other variety of resignation, which is involuntary under Article 32 of the proclamation.

[47] For example, an unlawfully dismissed employee whose reinstatement is not ordered by the court and who had taken his severance pay as he will be entitled to that under Article 39(1)(b) cannot, in this awkward sense, request to be paid his provident fund. I had an informal discussion about this matter with one Justice from the Supreme Court and he enlightened me on the reasonable interpretation of this legislation. Accordingly, if the law prohibits the payment of both for an employee who is retiring, it is reasonable to deduce that the legislature had intended to deny same for those who are resigning, for instance, after serving as little as five years. So, for him, the stipulation under Article 2(2)(g) is meant to lay down the principle of the mutually exclusive nature of provident fund and severance pay in all circumstances, and not just in instances where the employment contract is terminated as a result of retirement.

job seeker. So, what the retiree is presumed to need is a form of social security scheme for old age; and the provident fund, if present, is considered to fill this gap.

Concluding remarks

Severance payment is a form of compensation for service and a support system while an employee is in transition. It is thus duly prescribed as one of the *minimum labour conditions*. On the other hand, a provident fund is a variety of *social security* scheme that involves the fund gathered from the contributions of both the employee and the employer, and it is meant to exceed minimum labour conditions. It is rather a form of saving that cannot properly be equated with severance payment. However, the Supreme Court Cassation Division's assertion that the two have identical purpose and are sourced from the same pocket needs careful review as it will be followed by the lower courts based on Proclamation No. 454/2005 that re-amended the Federal Courts proclamation.[48] The legal provision relied upon excludes entitlement to severance payment only under two situations (i.e. termination of employment upon retirement and the availability of provident fund). Thus, there needs to be restraint from denying a right which emanates from a person's entitlement to *minimum labour conditions*; and this indeed necessitates a restrictive rather than an unduly expansive interpretation.

[48] See Federal Courts Proclamation Re-amendment Proclamation No 454/2005, *Federal Negarit Gazeta*. See particularly Article 2(1) which provides 'Interpretation of a ***law*** (erroneously written as 'low') by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional ***courts*** (again mistakenly written as 'council') at all levels, The cassation division may however render a different legal interpretation some other time.