

SOUTH AFRICA / JUDGMENT

Bank v Finkelstein t/a Finkelstein and Associates (JS219/15) [2016] ZALCJHB 428 (26 October 2016) [2016] ZALCJHB 428

COURT

Labour Court Johannesburg

BEFORE

S Snyman

CASE / FILE NUMBER

JS219/15

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

case no: JS 219 / 15

In the matter between:

HEATHER ELISE BANK

Applicant

and

MARK FINKELSTEIN t/a

FINKELSTEIN & ASSOCIATES

Respondent

Heard: 8 September 2016

Delivered: 26 October 2016

Summary: Automatic unfair dismissal – dismissal based on age – employee simply placed on retirement – whether employee properly placed on compulsory retirement – application of Section 187(2)(a) of the LRA

Retirement age – no agreed retirement age – whether normal retirement age exists – principles considered to establish normal retirement age and when it exists in an employer

Retirement age – no policy and/or practice regarding retirement age existing in the employer – employer unilaterally determining retirement age – not permitted – employer using retirement to terminate the services of the employee for other reasons

Automatic unfair dismissal – no normal retirement age established and section 187(2)(a) thus not applicable – employee's dismissal based on her age automatically unfair

Compensation – compensation for automatic unfair dismissal and discrimination – principles considered – compensation awarded

SNYMAN, AJ

Introduction

- [1] The applicant has instituted a claim in the Labour Court founded on an alleged automatic unfair dismissal in terms of Section 187(1)(f) of the Labour Relations Act ('the LRA')[1], for a dismissal based on the applicant's age. The applicant has also brought a discrimination claim in terms of Section 6(1) as read with Section 50(2) of the Employment Equity Act ('the EEA')[2] on the same basis. The applicant contended that she was simply placed on retirement by the respondent, in circumstances where no retirement age existed, either by agreement, or as a matter of policy or practice. The applicant also claims her salary for January 2015 and leave pay, which the respondent did not pay.
- [2] The respondent opposed the claim. It contended that the applicant was placed on compulsory retirement having attained the normal retirement age of 60 in the respondent, and as such the applicant's dismissal must be deemed to fair as contemplated by Section 187(2)(b) of the LRA. Similarly, and according to the respondent, there can be no existence of discrimination in such circumstances.
- [3] The matter came before me on trial on 8 September 2016 and evidence in the matter was concluded on that date. The respondent asked that the parties be permitted to submit written argument, as the respondent had other commitments (the respondent being an attorney) in the commercial crimes court that afternoon. The applicant was willing to accommodate the respondent in this respect. I then made an order that the parties must each file written submissions by close of business on 16 September 2016. The applicant filed written submissions as ordered. The respondent did not file written submissions, which I find rather unacceptable, considering it was the one who wanted the indulgence in the first place. Despite this failure by the respondent, I will nonetheless fully consider its case based on the pleadings and the evidence presented in Court. I will commence by first setting out the relevant factual matrix.

The relevant background

- [4] The applicant was employed by the respondent as from 15 February 2005 as a legal secretary to Mr Finkelstein, the proprietor of the respondent. I will, in this judgment, refer to the respondent's proprietor as 'Finkelstein'. The business of the respondent is an attorneys' legal practice. It was common cause that the applicant was dismissed by the respondent on 10 December 2014, and was earning R15 509.48 per month at the time of her dismissal.
- [5] When she started working for the respondent, the applicant was already 55 years of age, having been born in September 1950. It was undisputed that no retirement age was discussed between her and Finkelstein when the applicant was offered and started employment, and that no retirement age was agreed upon. As Finkelstein made it clear in his own testimony – the applicant would never agree to a retirement age as she wanted to always continue working.
- [6] It was also common cause that there was no written retirement policy in place at the respondent, specifying a retirement age. Further, the respondent did not have a pension or provident fund that may have prescribed a retirement age. Finally, no one else had been retired in the respondent before.
- [7] According to Finkelstein, he was always, at least until a year or two prior to her dismissal, satisfied with the work and performance of the applicant. According to Finkelstein, and because the applicant was getting older, her performance was deteriorating. She was making excessive mistakes on the documents she was typing, she could not hear the dictation, became easily angered, and had a severe tremor in her hand. Finkelstein stated that he believed all this was happening because of the applicant's age.
- [8] The applicant disagreed with this view of Finkelstein. According to the applicant, it was Finkelstein that had become brash, disrespectful and rude towards her. She disputed that she made the kind of mistakes as alleged. She said she would on occasion have difficulty hearing dictation, but that because of the equipment Finkelstein used, or where he dictated with food in his mouth. She said that the tremor in her hand was something she had since childhood, and was there when Finkelstein employed her. She said the tremor was still the same as it had always been and had not deteriorated. According to the applicant, there was nothing wrong with her ability to discharge her duties, she in fact properly discharged her duties, and it was Finkelstein that had a problem with her.
- [9] The applicant said that Finkelstein had in March 2014 mentioned to her that she should retire in July 2014. This was after an altercation between them, because she wanted to take leave, and which Finkelstein was not willing to approve. But after this incident, retirement was never mentioned again and July came and went without the applicant being retired.

- [10] Whatever the cause of the animosity was between the applicant and Finkelstein, it is clear to me when this matter was being conducted in Court that there was absolutely no love lost between the applicant and Finkelstein. I had a brief glimpse of what life must have been like in the respondent shortly before the dismissal of the applicant. It certainly was far from harmonious.
- [11] Against the above background, and on 10 December 2014, the applicant was presented with a letter of termination of employment. The letter records that the applicant's employment was terminated based on retirement. Reference is made in the letter to the fact that the applicant, at 64 years' of age, had surpassed the age of retirement in terms of the respondent's policy. Specific reference is made to Section 187(2)(b) of the LRA, in support of the termination. The letter finally recorded that the applicant was not required to work beyond 15 December 2014, but would be paid until 31 January 2015.
- [12] In the context of the termination notice of 10 December 2014 referring to a policy, and with no written policy actually existing in the respondent, I asked Finkelstein exactly what the prescribed retirement age in the respondent was. He answered that he could remember that at the former firm he was working at, it was 60, and he assumed this would normally apply. He however conceded that this age was never conveyed to the applicant as being a normal retirement age.
- [13] It was also common cause that no incapacity proceedings were ever conducted where it came to allegations of unacceptable performance, or an inability to perform, on the part of the applicant. Finkelstein answered this by saying that any deficiency in performance was due to the applicant's age and he wanted to spare her feelings.
- [14] The respondent paid the applicant's salary for December 2014. In the new year the applicant referred her dismissal dispute to the CCMA. The respondent retaliated by refusing to pay her salary and leave pay at the end of January 2015. The dispute came before the CCMA on 4 February 2015 for conciliation, which the respondent did not even attend. The applicant's dismissal dispute was then referred to this Court as an automatic unfair dismissal dispute and discrimination dispute, in which the applicant claims compensation, together with the payment of her January 2015 salary and leave pay.

Was the dismissal automatically unfair?

- [15] As stated above, it is undisputed that the respondent dismissed the applicant on 10 December 2014. As to the reason for such dismissal, the termination letter and the pleadings make it clear that the dismissal is squarely founded on the applicant's age.

- [16] A complication however does arise from the fact that the respondent's answering statement records that some performance (capacity) issues relating to the applicant did arise. As stated above, Finkelstein in evidence said that he could not tolerate the applicant's capacity issues any longer and he believed this was caused by her age. Two factors therefore come into play in this case as relating to the reasons for her dismissal, being her age and her alleged incapacity.
- [17] In *SA Chemical Workers Union and Others v Afrox Ltd*[3] the Court dealt with an alleged automatic unfair dismissal based on a protected strike. The Court held as follows where it came to deciding whether the dismissal was indeed founded on participation in a protected strike, or something else:[4]

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual two-fold approach to causation, applied in other fields of law should not also be utilized here ... The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. ... Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a). ...'

Clearly, this same test would be applicable to any case of automatic unfair dismissal, and in particular in the current matter, to an alleged automatic unfair dismissal under Section 187(1)(f).

- [18] The test in *Afrox* was applied in *Kroukam v SA Airlink (Pty) Ltd*[5] by way of two concurring judgments. In the one judgment, Zondo JP (as he then was) said:[6]

'... I am of the view that, when all the circumstances are taken into account, the principal or dominant reason for the appellant's dismissal is the one I have given above. I am of the view that, where, as in this case, the reason or reasons for the dismissal of an employee comprise one or more reasons that would render the dismissal automatically unfair and one or more reasons that would not render the dismissal automatically unfair but the reason or reasons that would render the dismissal automatically unfair can be said to be the dominant reason or reasons, the dismissal is automatically unfair.'

In the other judgment, Davis AJA (as he then was) held:[7]

'... The starting-point of any enquiry is to be found in chapter VIII of the Act. Thus, if an employee simply alleges an unfair dismissal, the employer must show that it was fair for a reason permitted by s 188. If the employee alleges that she was dismissed for a prohibited

reason, for example pregnancy, then it would seem that the employee must, in addition to making the allegation, at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly based on this condition. Some guidance as to the nature of the evidence required is to be found in *Maund v Penwith District Council* [1984] ICR 143, where Lord Justice Griffiths of the Court of Appeal held at 149 that:

'[I]t is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal.'

[19] In *Van der Velde v Business and Design Software (Pty) Ltd and Another*[8] the Court considered what had been held in *Kroukam*, in both judgments referred to in that matter, and in turn said:

'At this point, the tests of factual and legal causation become relevant. Assuming the test of factual causation (the 'but for' test referred to in *Afrox*) to be satisfied, the enquiry is into legal causation, or put another way, whether the transfer or a reason related to it is the dominant, proximate or most likely cause of the dismissal. In *Kroukam*'s case, it is in respect of this latter requirement (legal causation) that there appears to be a difference in approach, one that relates to the degree of dominance, proximity or likelihood that the automatically unfair reason was the reason for dismissal. On both approaches, it is clear that the automatically unfair reason need not be the sole reason for dismissal. On the approach adopted by Zondo JP, it would appear to be sufficient that the transfer or a reason related to it significantly influenced the employer's decision to dismiss. The test postulated by Davis AJA would appear to require more than 'significant influence' This approach would seem to require that the court first determine the dominant or principal reason for the dismissal, and if that reason falls within the ambit of those reasons categorized by the Act as automatically unfair, to find that the dismissal is automatically unfair. Even if an automatically unfair reason did not constitute the principal or dominant reason for dismissal and in this sense

constituted an ancillary reason, the dismissal is unfair if an automatically unfair reason influenced the employer's decision to

dismiss to a 'significant degree' ...'

[20] Based on the above, I have little hesitation in concluding that the dominant reason for the dismissal of the applicant was her age. This is already evident, as I have already touched on above, from the pleadings and in fact the notice of termination of employment itself. Whilst

the dismissal of the applicant may have a performance component attached to it, as stated by Finkelstein in evidence, it was clear that as far as Finkelstein was concerned this performance component had as its cause the applicant's age. In other words, the applicant's age was the primary consideration throughout. A proper nexus exists between the applicant's dismissal and her age, as contemplated by both the factual and legal causation test articulated in *Afrox*. This matter must accordingly be decided on the basis that the applicant was indeed dismissed based on her age.

[21] In any event, and where age is used to bring about the termination of employment of an employee, in circumstances where the dismissal is actually motivated by other considerations on the part of the employer, this does not change the fact the dismissal could still be considered to be automatically unfair based on the employee's age. In *Cosme v Polisak (Pty) Ltd*[9] the Court dealt with a situation where the employee was placed on retirement in the context of having challenged conduct of the managing director of the employer who had the habit of treating employees poorly, and demanding an apology. The Court held:[10]

'The probabilities strongly point to the fact that, but for demanding an apology after the abusive language by Tayob and engaging him with regard to the issue of his status as a supervisor, the issue of age would never have arisen. Thus age was used by the respondent to justify the termination of the employment relationship and accordingly made the dismissal automatically unfair in terms of s 187(1)(f) of the LRA. ...'

Finkelstein said, in *casu*, that he did not pursue either disciplinary or incapacity proceedings against the applicant for what he considered her unacceptable conduct and performance, because he wanted to spare her feelings, and instead decided to rely on her age to bring about termination of employment. Based on the above reasoning in *Cosme*, if age is used as justification to terminate employment of an employee in order to avoid dealing with an employee as prescribed by Chapter VIII and Schedule 8 of the LRA, then the dismissal would still be considered to be automatically unfair based on the fact that age was used. That would certainly be the case in the matter now before me.

[22] The Court in *Heath v A & N Paneelkloppers*[11] dealt with a similar situation in the context of an alleged automatic unfair dismissal based on pregnancy[12], and concluded as follows: [13]

'Considering the above factual matrix, I have no hesitation in accepting that the real reason for the dismissal of the applicant was indeed her pregnancy. The simple point is that if the applicant did not become pregnant and experience the complications she did, none of what happened to her would have happened. There was no other cause or reason to take any action against her, considering there was no problem with her work performance. The respondent considered the applicant's pregnancy to be an obstacle in the way of the smooth running of its business, which is something it did not want from the outset. The respondent simply did not want to deal with applicant's pregnancy and have her absent from work for this reason. He wanted her to resign

and return after she had her baby. Therefore, and applying both factual and legal causation as contemplated by the judgment in *Afrox*, was it not for the applicant's pregnancy, she would not have lost her employment, and further the most likely cause of the loss of her employment actually was her pregnancy.'

Applying these same considerations in *casu*, this was exactly the approach adopted by Finkelstein. He said that the applicant's age caused her problems. Therefore, was it not for her age, she would not have been dismissed. If poor performance was the actual and only reason for the applicant's dismissal, it was an imperative that her age should not in any way feature in bringing about her dismissal, and that her termination of employment had to be determined in proper incapacity proceedings conducted in terms of the LRA.[14] But the applicant's age was very much in play throughout, and remained the dominant reason for her dismissal.

[23] In all the above circumstances, I am satisfied that the applicant discharged the onus resting on her to substantiate a case that her dismissal was based on her age. Because the termination of employment of the applicant is therefore based on her age, Section 187(1)(f) of the LRA applies, the relevant part reading:

'(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is - (f) that the employer unfairly discriminated against an employee, directly or indirectly, on an arbitrary ground, including but not limited to age.'

[24] Ordinarily, a dismissal based on age would be automatically unfair, unless it can be shown that Section 187(2)(b) applies. The respondent was in fact very much alive to this, considering that Section 187(2)(b) was specifically referred in the letter of termination of employment of 10 December 2014 as being applicable. Section 187(2)(b) thus provides an exception to the general principle created by Section 187(1)(f), and provides:

"(2) Despite subsection (1)(f) - (b) a dismissal based on age is fair if the employee has reached the normal or agreed

retirement age for persons employed in that capacity.'

[25] For Section 187(2)(b) to apply, two scenarios are contemplated, the first being a case of an agreed retirement age and the second being the case of a normal retirement age. In *Rubin Sportswear v SA Clothing and Textile Workers Union and Others*[15] the Court said:

'Section 187(1)(b) creates two bases upon which an employer can justify the dismissal of an employee on grounds of retirement age. The one is an agreed

retirement age, the other is normal retirement age. Those are the only two bases.'

[26] Further, the two scenarios in Section 187(2)(b) are mutually exclusive. It has to be one or the other, and cannot be both. An employer can only rely on a normal retirement age if no agreed retirement age exists. In *Cash Paymaster Services (Pty) Ltd v Browne*[16] the Court said:

‘...The provision relating to the normal retirement age only applies to the case where there is no agreed retirement age between the employer and the employee ...’

[27] In order for an agreed retirement age to exist, it has to be shown that the employer and the employee achieved consensus on the actual age of retirement of the employee and that this retirement age gives rise to the compulsory retirement of the employee from the employ of the employer at that age. This agreement need not be in writing, although this would be preferable. A retirement age stipulated in the employment contract of the employee would constitute such an agreed retirement age. Similarly, if an employee agreed to a retirement age contained in a policy, it would be an agreed retirement age.

[28] As to what constitutes a normal retirement age, the Court in *Rubin Sportswear*[17] said:

‘... What is the normal retirement age depends upon the meaning to be accorded the word 'normal' in s 187(2)(b). The word is not defined in the Act. It, accordingly, must be given its ordinary meaning. Chambers-Mcmillan's SA Student's Dictionary describes the word 'norm' thus: 'You say that something is the norm if it is what people normally or traditionally do.' It further says: 'Norms are usual or accepted ways of behaving.' It describes the adjective 'normal' as meaning 'usual, typical or expected'. The word 'normality' is described as 'the state or condition in which things are as they usually are'. The New Shorter Oxford English Dictionary describes the word 'norm' as meaning, among others 'a standard, a type; what is expected or regarded as normal; customary behaviour, appearance'. As to the adjective 'normal', one meaning that the latter dictionary gives is 'constituting or conforming to a standard; regular, usual, typical, ordinary, conventional.’

After analysing a number of judgments[18] the Court concluded:[19]

‘It seems to me that the word 'normal' as used in s 187(2)(b) really means what it says. It means that which accords with the norm. ...’

[29] A retirement age that accords with the norm, as contemplated by Section 187(2)(b), can be established both internally in an employer, or externally in a particular industry if there is no norm in the employer itself. An example of the application of an industry

norm to establish a normal retirement age can be found in *Botha v Du Toit Vrey and Partners CC*[20] where the Court dealt with and accepted the retirement age set in the municipal sector for the particular profession of assistant

appraiser, which was 65 years of age, even in the absence of a norm in the employer.

- [30] When relying on an industry norm, it is critical that the employer presents credible evidence, preferably by an expert, as to what would constitute the particular industry standard or norm, in order to establish the retirement age in that industry. A comparison to the retirement age applicable in other directly comparable employers in the industry would also be a consideration. If the industry is organized or regulated, then the provisions of industry collective agreements or other form of published regulation in that industry would be an important consideration.
- [31] Where it comes to the norm in an employer, this must equally be established by evidence. This evidence would include evidence about a practice in the employer, when other employees may have retired, policy provisions or regulation, or pension / provident funds rules or annuity provisions.[21] Another consideration would be how the employer had treated other employees who attained the same age in the past.[22] The easiest way of establishing a retirement age norm in an employer would of course be by way of a retirement policy.
- [32] It is not required that employees have to be consulted on, or that they have to agree to, the retirement age as stipulated by the employer in the retirement policy, in order for a norm to be established. In principle, an employer is entitled to unilaterally fix, and then implement, a normal retirement age. In *Bedderson v Sparrow Schools Education Trust*[23] the Court said the following, with specific reference to the introduction of a retirement policy:
- ‘In my ruling I concurred with the view that employers are entitled to introduce policies and procedures regulating elements of the relationship between themselves and their employees.’
- The first proviso however is that this implementation can never work retrospectively, meaning that an employee that had already exceeded the proposed normal retirement age by the time it is implemented, cannot then be retired in terms of this norm. In *Bedderson*[24] the Court said:
- ‘But the question is whether the application of such a retirement age can be justified in a case such as this where the employee had already reached and passed the retirement age? In my view, it cannot. It is one thing to be able to justify the implementation of general retirement age but this does not mean that it is necessarily fair to dismiss somebody on the basis that she had already reached that age when the policy was introduced.’
- The second proviso is that the policy unilaterally implemented cannot be at odds with, or contradict, an employee’s existing conditions of employment or agreed retirement age.[25]

[33] The attaining of a normal or agreed retirement age is comparable to the situation of the expiry of the term in the case of a fixed term contract of employment. As such, specificity is important. The point is that retirement age serves as a basis, in itself, for an employer to bring about the termination of the employment of an employee without due process, and as such, the retirement provisions must be clear and unambiguous. This holds true for a retirement age whether determined by agreement,

or by norm.

[34] Because a dismissal on the basis of an agreed retirement age or a normal retirement age is deemed to be fair by virtue of the application of Section 187(2)(b), there is no separate requirement of procedural fairness in effecting it. Therefore, there is no need to first consult the employee or affording the employee some kind of hearing before implementing retirement.[26]

[35] A final consideration is the situation where an employee works beyond an agreed or normal retirement age. The harsh reality is that such an employee is in effect working on 'borrowed time'. The employer, unless it can be proven that the employer specifically waived its rights to apply the retirement age, would remain entitled to at any point after the employee had attained the normal or agreed retirement age place the employee on retirement. In *Rubenstein v Price's Daelite (Pty) Ltd*[27] the Court held, with specific reference to Section 187(2)(b), that: 'It says a dismissal is fair if the employee has reached retirement age, not when he reaches it.' In *Rockliffe v Mincom (Pty) Ltd*[28] the Court approved of the above ratio in *Rubenstein* and further said:[29]

'Accordingly in an automatically unfair dismissal claim the enquiry ends at the point where, if a defence of having reached an agreed age is raised, such age has been reached. What happened afterwards is immaterial unless a defence of waiver is successfully raised.'

[36] In the end, one can hardly do better than quote *Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd)*[30] as to when Section 187(2)(b) can be successfully relied on, where the Court said:[31]

'... the enquiry in relation to the fairness of the dismissal can only relate to whether the conditions necessary for s 187(2)(b) to apply exist. Once it is established that they do exist, and it has been established that the dismissal is one based on age, the statute itself pronounces on the fairness of the dismissal; it states that such dismissal 'is fair'. Once those conditions are found to exist, there is nothing left for the court to pronounce on. The conditions which must exist in order for a dismissal to be fair in terms of s 187(2)(b) are the following:

- (a) the dismissal must be based on age;
- (b) the employer must have a normal or agreed retirement age for persons employed in the capacity of the employee concerned;
- (c) the employee must have reached the age referred to in (b) above.'

[37] Turning to the facts of the case before me, there can be no doubt that there was no agreed retirement age. There was no contract of employment stipulating a retirement age. The applicant testified that she never agreed to a retirement age. Finkelstein himself testified that the applicant wanted to remain employed indefinitely and that she would never agree to a retirement age. In any event, the respondent did not seek to rely on a case of an agreed retirement age.

[38] What remains for determination is the second Section 187(2)(b) consideration, being the issue of a normal retirement age. Firstly,

there was no written policy in place at the respondent stipulating what may be a normal retirement age. Secondly, there was no

retirement fund or related policy which also could have prescribed a retirement age. It was common cause that when the applicant was employed and throughout her employment (save during the last year thereof) retirement was never even raised or discussed with her. Finally, there was no prior history of anyone being retired in the respondent, and therefore as the Court said in Hibbert:[32]

‘The difficulty the respondent faces in establishing a retirement age norm for someone in the applicant's position is the lack of other retired external salespersons with whom it could compare the applicant.’

All of the aforesaid considerations strongly inform in favour of a determination that there is no normal retirement age in the respondent.

[39] Turning then to the events when retirement was raised in 2014, even on the respondent's own version, there is a difficulty. All that the applicant was told was that it was ‘due’ for her to retire. The applicant testified that she was told in March 2014 that she had to retire in July 2014, which never came to pass. Even in these discussions, the applicant was never told what the actual retirement age was. In his testimony, Finkelstein could not even point to a clear and specified

retirement age. According to him, he ‘believed’ that the retirement age was 60, based on his experience at another law firm, before he started at the respondent firm. Finkelstein however conceded that he never conveyed his ‘belief’ to the applicant. Similarly, the only rational and reasonable conclusion that can be drawn from all this evidence is that there was no normal retirement age implemented in the respondent.

[40] In short, and in casu, the terms and conditions of employment specifically applicable to the applicant made no provision for a retirement age. Unilaterally

introducing a retirement age in such circumstances would amount to a unilateral change in employment conditions, which is not permitted.

The applicant was clear in her evidence that she did not want to retire and could still properly discharge her duties. She certainly,

even in 2014, never acquiesced to the application of a specified retirement age to her. If the respondent wanted to change the

situation with regard to the retirement age applicable to the applicant, as Finkelstein had in mind in 2014, it needed to negotiate

with the applicant to try and secure an agreement.[33]

[41] On the evidence, there can be little doubt that there never existed a normal retirement age of 60 in the respondent, as suggested by Finkelstein, by way of policy or otherwise.

Therefore, and when the applicant was placed on retirement on 10 December 2014 in terms of the respondent 'policy', there was no policy that could form the foundation of such conduct by the respondent. That in reality should mean the end of the matter for the respondent. It relied on a policy that did not exist to establish a norm, and therefore Section 187(2)(b) cannot apply.

[42] But even considering that Finkelstein in 2014, when he had the whole idea of retirement of the applicant in mind as he testified to be the case and then sought to implement a retirement age of 60 as his past experience informed him, there is still an insurmountable obstacle. Even accepting that Finkelstein was simply entitled to unilaterally consider that 60 was the retirement age in the respondent (which I have already said I do not believe can be done), the point must be that when he so decided, on his own version, in 2014, the applicant was already 64. Therefore, and even if it was competent to argue that the respondent was entitled to implement such a retirement age of 60 years, it could not do so *ex post facto*. In simple terms, Finkelstein could not decide to implement a 60 years' of age retirement age to apply to the applicant, at a point in time where the applicant was already 64.

[43] Finkelstein also, in evidence, referred to the fact that the conduct of the respondent was justified based on normal retirement age for secretaries in the legal industry. However, and under cross examination, he conceded that legal secretaries often work beyond 60, provided they can still do the work. In any event, there was no real evidence presented as to what would indeed be a normal retirement age for legal secretaries, in the legal industry, which evidence had to be provided by expert testimony, and was not done. In short, no industry retirement age was proven.

[44] Accordingly, I conclude that the respondent has failed to establish the existence of either an agreed or normal retirement age to be applicable in the respondent, and in particular, being applicable to the applicant. As such, because both of the essential requirements for the application of Section 187(2)(b) are then absent, the defence in terms of this Section is not available to

the respondent. Because the applicant was dismissed based on her age, the applicant's dismissal has to be automatically unfair as contemplated by Section 187(1)(f) of the LRA, which I hereby determine to be the case.

The discrimination claim

[45] It is so that even though the applicant's dismissal was automatically unfair based on her age, these exact same considerations giving rise to this finding can equally substantiate the existence of unfair discrimination as contemplated by Section 6(1) of the EEA[34]. The point is that a dismissal is an employment practice as defined in Section 1 of the EEA, and age is one of the prescribed discrimination grounds in Section 6(1). Therefore, dismissal based on age is unfair discrimination in the context of an employment practice prohibited by the EEA.

[46] An automatic unfair dismissal claim and a discrimination claim, even if it is founded on the exact same facts, can exist side by side. It is competent to institute both claims in one legal proceeding.[35]

[47] Accordingly, and because the applicant was dismissed based on her age, she was unfairly discriminated against in terms of the EEA, and has a valid claim in this regard as well, entitling her to relief under the EEA.

The issue of relief

[48] Where it comes to the relief sought by the applicant, I wish to first dispose of the issue of the applicant's salary for January

2015. As referred to above, the applicant's termination notice specifically recorded that she would be paid until 31 January 2015, but need not work out her notice. The failure to pay her salary for January 2015 is nothing else but an act of retribution by Finkelstein because the applicant challenged her dismissal by referring the matter to the CCMA. This kind of conduct is entirely unacceptable, and smacks of mala fides. It resulted in the applicant being deprived of salary she is actually entitled to, without doubt, in circumstances where she then been left unemployed by the conduct of the respondent. I have the power to order that the respondent now pay the applicant's salary for January 2015[36], in the sum of R15 509.48, with interest, in addition to any compensation awarded, which I intend to do.

[49] Added to the above, the applicant testified that she has 12 days leave pay due to her when she was dismissed. Finkelstein did nothing else but offer a bald denial of this. He did not produce the leave records, which he is legally obliged to keep[37], showing when the applicant was supposed to have taken her leave exhausting that she was entitled to. I may add that the evidence was that when the applicant wanted to take leave in 2014, to go overseas, this was refused, and considering that she did not take further leave that year, this must mean that she had leave owing to her. The respondent needed to prove, off the leave records it is obliged to keep, what leave the applicant was entitled to in the leave cycle and what leave she actually took. I have no reason to doubt the applicant's testimony that she is

entitled to 12 days' leave pay amounting to R5 386.10, and I also intend to order that the respondent pay this amount, with interest. This amount was due to the applicant upon termination of employment.[38]

[50] I now turn to the applicant's compensation claim for her automatic unfair dismissal. The applicant is seeking maximum compensation equivalent to 24 months' remuneration. The applicant's monthly remuneration at the time of her dismissal was R15 509.48.

[51] When it comes to deciding on an appropriate award of compensation, this Court must exercise a judicial discretion. In Section 193(4), it is provided that compensation must be 'just and equitable in all the circumstances'. The normal basis upon which this discretion is to be exercised is properly enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others*,[39] as thus:

'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[52] The dismissal of the applicant in this instance was automatically unfair. In the case of compensation awards for automatic unfair dismissals, the compensation cap is double that of other unfair dismissals, being a maximum of 24 months' remuneration instead of 12 months' remuneration.[40] This confirms that from a statutory perspective, and despite what was said in *Le Monde Luggage*, automatic unfair dismissals are seen in a much more serious light and must have a punitive component.[41] In *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass and Aluminium 2000 CC*[42] the Labour Appeal Court specifically dealt with the issue of the award of compensation in the case of an automatic unfair dismissal in terms of Section 187 and said the following:[43]

'.... It is a dismissal that undermines the fundamental values that the labour relations community in our country depends on to regulate its very existence. Accordingly such a dismissal deserves to be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected.'

In considering whether or not to award compensation in such a case, the court must consider that not to award any compensation at all where reinstatement is also not awarded may give rise to the perception that dismissal for such a reason is being condoned. This may encourage other employers to do the same. It must also take into account the fact that such a dismissal is viewed as the most egregious under the Act. Accordingly, there must be a punitive element in the consideration of compensation.'

[53] But the desire to disseminate punishment is somewhat diminished where it comes to instances of an automatic unfair dismissal based on age, where retirement is involved, and in particular where the employer was not mala fide. In *Bedderson*[44] the Court said:

‘Although discriminatory, the actions of the respondent's management were not mala fide. I acknowledge that the motive of the employer in determining whether unfair discrimination has taken place is irrelevant. Nevertheless, I do think that it may be relevant in determining what amount of compensation is just and equitable.’

[54] The Labour Appeal Court in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[45] dealt with compensation in the case of an automatic unfair dismissal dispute concerning retirement. It must be said that the Court a quo in *Hibbert* in applying a discretion, awarded 12(twelve) months’ salary in compensation. Considering this award, the Labour Appeal Court in *Hibbert* said:[46]

‘The determination of the quantum of compensation is limited to what is ‘just and equitable’. The determination of what is ‘just and equitable’ compensation in terms of the LRA is a difficult horse to ride. There are conflicting decisions regarding whether compensation should be analogous to compensation for a breach of contract or for a delictual claim. In my view, and as I said earlier, because compensation awarded constitutes a solatium for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss.’

[55] In *Hibbert*, the Labour Appeal Court held that the following principles should be used as a guideline in deciding appropriate compensation to be awarded:[47]

‘the nature and seriousness of the injuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of a relationship between the parties, and the attitude of the defendant after the injuria had taken place’.

[56] The punitive element and the fact that compensation may well be a solatium duly considered, I remain of the view that compensation must always be fair to both parties. I consider myself guided by what was said by Zondo JP (as he then was) in *Kemp t/a Centralmed v Rawlins*[48]:

‘.... The court has to consider all the relevant circumstances and make such order as it deems fair to both parties in the light of everything’

[57] The point is that 'considering everything' must mean a consideration also of the scope and extent of the loss suffered by the employee, the nature and extent of the deviation from what would normally be considered to be fair, whether there may exist any justification for the conduct of any of the parties, any mala fides on the part of the employer, and the impact of the award on the employer or its business.[49]

[58] The applicant is also seeking compensation in terms of for being unfairly discriminated against, to which claim the EEA applies. There is no limit placed on compensation in terms of the EEA. The compensation that might be awarded must only be just and equitable, as prescribed by Section 50(2) of the EEA which reads:

'If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that

is just and equitable in the circumstances, including-

- (a) payment of compensation by the employer to that employee;
- (b) payment of damages by the employer to that employee ...'

[59] In *SA Airways (Pty) Ltd v Jansen van Vuuren and Another*[50] the Court held:

'...The EEA draws a distinction between 'compensation' and 'damages', and does not regard them as the same.

... The intention must have been that they connote different kinds of award. In my view, the only rational meaning that can be given to the terms is that 'damages' connotes a monetary award for patrimonial loss and 'compensation' connotes a monetary award for non-patrimonial loss (including a 'solatium').'

The Court concluded:[51]

'In the EEA, 'damages' refer to an actual or potential monetary loss (ie patrimonial loss) and 'compensation' refers to the award of an amount as a solatium (ie to non-patrimonial loss). It is conceivable that cases of unfair discrimination may involve actual (or patrimonial) loss for the claimant, as well as injured feelings (or non-patrimonial loss). ...'

The purpose of an award of damages for patrimonial loss by means of a monetary award, is to place the claimant in the financial position he or she would have been in had he, or she, not been unfairly discriminated against. This is the common purpose of an award of damages for patrimonial loss in terms of the South African law in both the fields of delict and contract. In the case of compensation for non-patrimonial loss, the purpose is not to place the person in a position he or she would have otherwise been in, but for the unfair discrimination, since that is impossible, but to assuage by means of monetary compensation, as far as money can do so, the insult, humiliation and indignity or hurt that was suffered by the claimant as a result of the unfair discrimination.'

[60] The applicant is claiming compensation under the EEA, and not damages. It is thus not about patrimonial loss in this regard, but a solatium for the act discrimination meted out to her by the respondent. The problem however is that compensation under the LRA for an automatic unfair dismissal normally also includes an element of a solatium, as I have discussed above. This could lead to the unfortunate result that an employee is double compensated for the same thing and on the same basis. Considering that compensation must always be fair to both parties, this balance could be upset in that it could be considered to be unduly unfair towards the employer to make such a double award.

[61] The Court has been confronted with the above predicament in a number of judgments in the past. In *Bedderson*[52] the Court sought to resolve the problem by dealing with both claims together, and as one, when deciding on relief. In *Wallace v Du Toit*[53] the Court held:

‘It seems to me that where a solatium is claimed or awarded under the ambit of compensation to compensate for the ‘automatic unfairness’ of the dismissal, which in this situation embodied the unfair discrimination, and such claim is made in addition to a claim for

damages for unfair discrimination arising out of the same facts then there is a duplication that works unfairly against a respondent which a court must be careful to avoid. Where the total of the amount fixed is less than 24 months’ remuneration there is no need to try and disentangle the two causes of action in assessing quantum. The need to do this will only arise if the amount considered fair and reasonable by the court exceeds the cap in s 194(3) of the Labour Relations Act, because since there is no cap under the Employment Equity Act, what is awarded under each Act then takes on greater significance. I do not intend to award more than 24 months’ remuneration and so I do not try to disentangle the two causes of action and make a single award in relation to the solatium element under the Labour Relations Act and the damages claim under the Employment Equity Act.’

[62] This same approach was followed in the Labour Court judgment in *Hibbert v ARB Electrical Wholesalers (Pty) Ltd*[54] where the Court held:

‘My difficulty with the applicant’s claim under the EEA in this matter raises analogous problems. As in *Wallace*, the essence of the discriminatory conduct lies in the dismissal of the applicant on account of his age in the absence of a normal

retirement age being established. To award compensation simply because the employer’s conduct amounts to discrimination warranting

compensation under either Act, does not in my mind mean that the employee is entitled to compensation for the same wrong under both. ...’

[63] I agree with what was set out in *Wallace* and *Hibbert* (a quo). I have already considered the aspect of a solatium in deciding an appropriate compensation award for an automatic unfair dismissal under the LRA. To award, in effect, a double solatium for the same dismissal based on the same reason will upset the balance of making an award that is fair to both parties. The

applicant is not claiming damages based on a patrimonial loss, which could have brought other considerations into play. I will accordingly, in awarding compensation in this matter, deal with both the automatic unfair dismissal and discrimination claims, as one, so as to avoid any duplication of compensation.

[64] Applying all the above considerations, I have my doubt about the respondent's bona fides. I remain convinced that the respondent sought to rely on the applicant's purported retirement age to bring about her dismissal, so as to avoid the far more stringent requirements applicable to a dismissal based on incapacity. In short, the respondent had seen retirement as an easy way out in order to avoid properly dealing with the applicant where it came to all the issues Finkelstein said he had with her. This is a situation where the respondent sought to implement a retirement age, after the fact, to facilitate the termination of employment of the applicant.

[65] I also consider the retribution dispensed by Finkelstein in not paying the applicant's final salary and leave pay, which was beyond doubt due and payable, when she dared challenge her dismissal. I do however consider that the respondent is a small practice, as Finkelstein explained, and thus a maximum compensation award could have a material impact on the respondent. The applicant did however testify that she was still unemployed. I finally consider the applicant's length of service with the respondent of close on a decade, and that she had always properly fulfilled her duties at least until 2014. Based on a consideration of all these factors, with due regard to the punitive consideration and solatium where it comes to automatic unfair dismissals, I consider that an award of 18(eighteen) months' salary to the applicant would be appropriate.

[66] Accordingly, and based on the applicant remuneration of R15 509.48 per month, for 18(eighteen) months, the applicant is awarded R279 170.64 in compensation.

[67] As to costs, it must be considered that the applicant was successful in showing an automatic unfair dismissal to exist. As I have said, I am not satisfied that the respondent was bona fide. I accept that it is appropriate that a costs order be made against the respondent because of the automatic unfair

dismissal, and because of the issues of not even paying the applicant's salary and leave pay due, without any proper cause

for such failure. I also consider the fact that the respondent did not even file written submissions, despite being the one asking for an opportunity to do so, which shows disrespect to the Court. Applying the broad discretion I have with regard to the issue of costs in terms of Section 162 of the LRA, the applicant is entitled to her costs.

Order

[68] For all of the reasons as set out above, I make the following order:

1. The applicant's dismissal by the respondent constitutes an automatic unfair dismissal as contemplated by Section 187(1)(f) of the LRA, based on the applicant's age.
2. The applicant was discriminated against as contemplated by Section 6(1) based on her age.
3. The respondent is ordered to pay compensation to the applicant in an amount of R279 170.64 (two hundred and seventy nine thousand one hundred and seventy rand sixty four cents).
4. The respondent is ordered to pay the applicant's salary for January 2015 in the amount of R15 509.48, together with interest at the legally prescribed rate, calculated from 1 February 2015 to date of payment.
5. The respondent is ordered to pay the applicant's leave pay due in the amount of R5 386.10, together with interest at the legally prescribed rate, calculated from 1 February 2015 to date of payment.
6. The amounts payable by the respondent to the applicant in terms of clauses 3, 4 and 5 of this order shall be paid within 10(ten) days of date of handing down of this judgment.
7. The respondent is ordered to pay the applicant's costs.

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:

Adv S Swartz

Instructed by;

Michael Salomon & Associates Attorneys

For the Respondent:

Mr M Finkelstein in person

[1] Act 66 of 1995.

[2] Act 55 of 1998.

[3] (1999) 20 ILJ 1718 (LAC) at para 32

[4] Id at para 32.

[5]

(2005) 26 ILJ 2153 (LAC). See also New Way Motor and Diesel Engineering (Pty) Ltd v Marsland

(2009) 30 ILJ 2875 (LAC) at paras 22 and 23

[6] Id at para 91.

[7] Id at para 27

[8] (2006) 27 ILJ 1738 (LC) at 1746G-1747F. See also *Schatz v Elliott International (Pty) Ltd and Another*

(2008) 29 ILJ 2286 (LC) at para 33 in respect of the same application of this test.

[9]

(2010) 31 ILJ 1861 (LC).

[10] Id at para 38.

[11]

(2015) 36 ILJ 1301 (LC) at paras 42 – 43.

[12] See paras 42 – 43 of the judgment.

[13] Id at para 60.

[14] See Schedule 8 Clauses 8(2), (3) and (4), and 9.

[15]

(2004) 25 ILJ 1671 (LAC) at para 24.

[16] (2006) 27 ILJ 281 (LAC) at para 25.

[17] (*supra*) at para 13.

[18] See paras 14 – 18 of the judgment in *Rubin Sportswear*.

[19] Id at para 19

[20]

(2005) 26 ILJ 2362 (LC) at para 15.

[21] *Wanless v Fidelity (Pty) Ltd*

(2008) 29 ILJ 2030 (LC) at paras 22 – 23.

[22] *Hibbert v ARB Electrical Wholesalers (Pty) Ltd*

(2013) 34 ILJ 1190 (LC) at paras 19 – 20.

[23]

(2010) 31 ILJ 1325 (LC) at para 21. See also *Botha v Du Toit Vrey and Partners CC* (*supra*) at para 15.

[24] Id at para 30.

[25] Rubin Sportswear (supra) at paras 11 and 21.

[26] See Rockliffe v Mincom (Pty) Ltd (2008) 29 ILJ 399 (LC) at paras 32 – 33;

[27]

(2002) 23 ILJ 528 (LC) at para 23.

[28]

(2008) 29 ILJ 399 (LC) at para 26.

[29] Id at para 36

[30]

(1998) 19 ILJ 1573 (LC).

[31] Id at paras 30 – 31.

[32] (supra) at para 20. See also See Rubin Sportswear (supra) at para 22 See Rubin Sportswear (supra) at para 22.

[33] Rubin Sportswear (supra) at para 22.

[34] Section 6(1) reads: ‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment

policy or practice, on one or more grounds, including ... age’

[35] See Evans v Japanese School of Johannesburg

(2006) 27 ILJ 2607 (LC); Bedderson (supra); Wallace v Du Toit

(2006) 27 ILJ 1754 (LC); Hibbert v ARB Electrical Wholesalers (Pty) Ltd

(2013) 34 ILJ 1190 (LC).

[36] See Section 158(1)(b) as read with 195 of the LRA, as well as Section 77(1) and (3) of the Basic Conditions of Employment Act 75 of 1997 (the ‘BCEA’).

[37] See Section 31 of the BCEA.

[38] Section 40 of the BCEA.

[39] (2007) 28 ILJ 2238 (LAC) at para 30. See also Mohlakoana v CCMA and Another (2010) 31 ILJ 2688 (LC); SA Post Office Ltd v Jansen Van Vuuren NO and Others

(2008) 29 ILJ 2793 (LC); Metalogik Engineering and Manufacturing CC v Fernandes and Others

(2002) 23 ILJ 1592 (LC): Rope Constructions Co (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others

(2002) 23 ILJ 157 (LC); *H M Liebowitz (Pty) Ltd t/a the Auto Industrial Centre Group of Companies v Fernandes*

(2002) 23 ILJ 278 (LAC).

[40] See Section 194(1) and (3)

[41] See *Heath v A & N Paneelkloppers*

(2015) 36 ILJ 1301 (LC) at para 71; *Naude v Member of the Executive Council, Department of Health, Mpumalanga*

(2009) 30 ILJ 910 (LC) at para 113. See also *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre*

(2011) 32 ILJ 1637 (LC) at para 77; *University of South Africa v Reynhardt*

(2010) 31 ILJ 2368 (LAC) at para 14 and the Court a quo judgment in *Reynhardt v University of South Africa*

(2008) 29 ILJ 725 (LC) at para 145; *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd*

(2008) 29 ILJ 1564 (LC) at paras 81–82.

[42]

(2002) 23 ILJ 695 (LAC).

[43] *Id* at paras 48–49. The Court at para 50 also set out some of the factors that have to be considered in exercising the discretion in determining the quantum of compensation.

[44] (*supra*) at paras 50 – 51.

[45]

(2015) 36 ILJ 2989 (LAC) at paras 21 – 23.

[46] Per Waglay JP at para 24.

[47] *Id* at paras 24 – 25. The Court was quoting from the judgment in *Minister of Justice and Constitutional Development and Another v Tshishonga* (2009) 30 ILJ 1799 (LAC) at para 18.

[48]

(2009) 30 ILJ 2677 (LAC) at para 27. The SCA in *Rawlins v Kemp t/a Centralmed*

(2010) 31 ILJ 2325 (SCA) upheld the findings of the LAC with regard to the principles set out in the LAC judgment.

[49] See *Rawlins* (*supra*) at para 20; *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC); *Datt* (*supra*) at paras 31 – 33.

[50]

(2014) 35 ILJ 2774 (LAC) at para 75 – 76.

[51] Id at paras 78 – 80.

[52] (supra) at para 45.

[53]

(2006) 27 ILJ 1754 (LC) at para 20.

[54]

(2013) 34 ILJ 1190 (LC) at para 28. It may be added that the Labour Appeal Court judgment in ARB Electrical Wholesalers (Pty) Ltd v Hibbert (supra) at paras 39 and 40 approved of the reasoning of the Court a quo.

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