

SOUTH AFRICA / JUDGMENT

Hibbert v ARB Electrical Wholesalers (Pty) Ltd (D775/10) [2012] ZALCD 13; [2013] 2 BLLR 189 (LC); (2013) 34 ILJ 1190 (LC) (27 September 2012) [2012] ZALCD 13

COURT
Labour Court Durban

BEFORE
R Lagrange

CASE / FILE NUMBER
D775/10

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case: D775/10

In the matter between:

HIBBERT N.D.Applicant

and

ARB ELECTRICAL WHOLESALERS (PTY) LTDRespondent

Heard: 19-22 September 2011

Final judgment: 27 September 2012

Summary: (Automatically unfair dismissal- age – unilateral retirement - normal retirement age not proven- no damages under EEA)

LAGRANGE, J:

This case concerns an alleged automatically unfair dismissal based on age discrimination. The employer alleged that there was no dismissal but that the applicant agreed to retire at age 64.

The applicant is also claiming damages for the alleged unfair discrimination in terms of the Employment Equity Act 55 of 1998. The essence of this claim is that the applicant alleges that once the act of unfair discrimination based on his age was brought to the respondent's attention it failed to act to remedy his selection for retirement based on age. As a result of being forced to retire at 64 he claimed he was unable to maintain payments on various policies and incurred medical aid membership fees.

By agreement between the parties the first issue to be determined in this case was whether or not the applicant was dismissed. The parties further agreed that any evidence led in relation to this issue would not be repeated if the case advanced to the next stage, in the event I found that the applicant was indeed dismissed.

I handed down judgment on the first question on 21 September 2011. I decided that the applicant had not agreed to retire in April 2010 when he turned 64. Rather, the respondent had unilaterally decided to retire him then. The respondent then proceeded to lead additional evidence on the question of whether or not the applicant's dismissal was automatically unfair.

Evidence

Only Mr B Neasham, the Financial Director, was recalled to give further evidence in the second half of the trial. The evidence given previously by himself, the applicant Mr B Sloley (a Director) and Mr C Robertson (the CEO), is set out in the decision on whether or not the termination of the applicant's services was consensual and will not be repeated in this judgment.

In *Rubin Sportswear v SA Clothing & Textile Workers Union and others*

(2004) 25 ILJ 1671 (LAC), the LAC held, "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."¹ In *Cash Paymaster Services (Pty) Ltd v Browne* (2006) 27 ILJ 281 (LAC), the LAC held that "(t)he 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."² The thrust of Neasham's additional evidence was to try to lay a foundation for an argument that there was a retirement age norm in the respondent's business and that the applicant's compulsory retirement had been effected in line with that norm.

As a background, he explained how the business had grown significantly as it expanded geographically, so that by 2007 it had approximately 350 employees and at the time the matter was heard there were about 450 employees and 70 trainees on learnerships. Neasham also provided a list of eleven persons, inclusive of the applicant, who had retired or were due to retire from the company. On that list, of the eight persons who had been retired the three youngest were 61 and were retired in

2009. Of the remaining five, two had been retired at the age of 62 also in 2009. Apart from the applicant, the oldest two retirees were 63 and 67 years old, who had also retired in 2009. At the time the list was compiled, three other employees were due for retirement at the end of December 2010, two of whom were 60 and the other 61 years of age when the list was drawn up.

He pointed out that the persons on the list were not external sales persons like the applicant, who was expected to be on the road soliciting business from new clients and new business from existing clients. Neasham testified that there were now 38 external sales personnel employed by the firm with an average age of 33.8 years. He sought to emphasise in his evidence the relatively demanding role of an external salesperson who had to create demand rather than just satisfying existing demand as an internal sales person does.

The employee who had been retired at age 71, had been employed as an internal administration clerk and was office based. Another employee, Mr P M Naidoo had been retired around 2005. He was also office based and returned to work on a contract basis for the firm. He too was around 71 years old when he retired. When asked who was the oldest existing employee after the applicant, Neasham identified a Mrs S Winter who was not yet 60 but was taking early retirement because the demands of the work were proving too onerous. As far as external sales representatives of competitors were concerned, Neasham said he was not aware of any who were older than 60 years of age. Under cross-examination, he conceded that the firm had transferred Hibbert to Nelspruit when he was 62 and agreed that it was possible for a strong person of that age to do the work of an external salesperson. He also pointed out under cross-examination that because the company was relatively new the need to retire people had only recently arisen.

He also confirmed evidence which was led in the first portion of the trial that the applicant one of three employees who had not joined the firm's Provident Fund. There were no persons currently employed who did not belong to the fund. The Provident fund rules specified a normal retirement age of 64 of all employees with the possibility of early retirement from the age of 55 onwards with the employer's consent and retirement between 60 and 65 at the employer's election.

Evaluation of automatically unfair dismissal claim

In argument, the respondent sought to rely on s 187(2)(a) and (b) as alternative defences to the claim of a discriminatory dismissal based on age. The provisions read:

“(2) Despite subsection (1)(f)— (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job; (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.”

Applicant's counsel argued strenuously that the respondent's attempt to rely on s187(2)(a) was not previously canvassed in the pleadings and could not be raised only belatedly in argument. Ms Poseman pointed out that had the applicant been apprised of the respondent's intentions in regard to relying on s 187(2)(a) she would also have tailored her cross-examination accordingly. I

agree that the respondent was not entitled to disclose this defence in closing argument on the fourth day of trial: it should have been addressed by an agreed amendment to the pre-trial minute or, failing that, by applying for leave to amend its answering statement.

Mr Moosa gamely argued that a defence based on operational requirements was revealed in the respondent's answering statement in paragraph 31 where it addressed the legal issues raised by the applicant. That paragraph reads:

"The Respondent denies that what occurred constituted a dismissal, [or] an automatically unfair dismissal and that the termination of employment gives rise to a claim for compensation either under the Labour Relations Act or the Employment Equity Act."

In relation to s 187(2) (b), the respondent persisted with an argument that the applicant's retirement date was both the normal age for retirement and an agreed retirement age. As I have already determined that the decision to retire the applicant was the respondent's and not the result of an agreement, it follows that the second alternative is a decided matter for the purposes of this judgment and only the remaining leg of the respondent's defence falls to be considered. Nonetheless, I will make mention of the further argument advanced in favour of the existence of a general agreement on the normal retirement age, advanced by respondent's counsel, in so far as it might have a bearing on the existence of a normal retirement age.

The respondent relied on the authority of the Labour Appeal Court decision in *SA Metal & Machinery Co (Pty) Ltd v Gamaroff*

[2010] 2 BLLR 136 (LAC) as support for its argument that since the provident fund rules determined that the normal retirement age was 60 years of age, that applied equally to the applicant. Applicant's counsel, Ms Poseman, correctly pointed out that the facts in *Gamaroff* are not on all fours with this matter. In that case, the company policy and procedure booklet, which formed part of the respondent's contract, referred to the provident fund rules.³ Also, the former employee in that case withdrew his claim that the retirement age was 70, and led no evidence to prove that he was not bound by the provident fund rules, even though he was a member of the fund. By contrast, in this instance, it was common cause the applicant was not a member of the provident fund. There were also no comparable contractual ligaments tying him to a specific retirement regime as part of his terms and conditions of employment.

Did the respondent establish that it had a normal retirement age, which applied to the applicant? Mr Moosa argued that even though the court had found that there was no agreement between the applicant and respondent on a normal retirement age, at a more general level there was consensus on the issue. He sought to rely, in part, on the evidence of the Provident fund retirement provisions as support for inferring that 60 was the normal retirement age. He pointed out that Hibbert had been granted a special dispensation by being exempted from the fund and could not rely on his exemption from membership of the fund to argue for a retirement age that was more generous than what the fund rules stipulated. It was also suggested that the Provident fund rules of the respondent's funds referred to the normal retirement age of 'employees'

whereas in Gamaroff the scheme rules only referred to the retirement age of ‘members’. However, the only document referred to in evidence, which dealt with the respondent’s Provident fund rules was in the form of a memorandum addressed to members. It makes no mention of whether the retirement age is applicable to members or employees generally.

The difficulty with this argument is the fact that the applicant was clearly exempted from membership of the fund. Secondly, the respondent’s efforts to obtain the applicant’s acceptance of the retirement ages stipulated in the fund, indicates it saw the need to try and obtain his consent in order to apply those standards to him. Moreover, it was conceded by Neasham that the company had not really addressed the issue of its retirement policy until it encountered the difficulties with the applicant. This is supported also by the evidence that at least two employees had retired at 71, which shows that notwithstanding the provident fund rules, there was not a consistently applied retirement policy that was applied to all.

Turning to the argument that a normal retirement age of 60 years had been established by the respondent on the basis of other evidence, it was argued that the only staff members whose retirement had taken place at the more advanced age of 71 years were not external salespersons. Consequently, they were not staff employed in the same capacity as the applicant. For the provisions of section 187(2)(b) to apply, the employer must establish the normal retirement age in respect of a person employed in the same capacity as the applicant, thereby making allowance for the possibility that an employer might have different normal retirement ages for different categories of staff.⁴

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 sales persons with whom it could compare the applicant. In Rubin Sportswear the LAC made this observation about s 187(2)(b) in passing:

*“What the section does not make clear is whether the words ‘persons employed in that capacity’ refer to such persons who are in the same employer’s employ or whether it also refers to persons who are employed in the same capacity by other employers in the same industry or in general.”*⁵

There was no history of retiring external sales persons at the firm, so the respondent sought to rely on Neasham’s evidence that he was ‘not aware’ of any external sales personnel employed by the respondent’s competitors that were over 60 years old. It must be said that this evidence was extremely sketchy and lacking in detail. Moreover, vague as it was, Neasham provided no evidence of whether any of the persons employed in that capacity by competitors had reached the age of 60 yet. They might just as well be in the same position as the respondent’s external sales staff who are mostly in their early thirties. In Rubin Sportswear the LAC was alive to the difficulty an employer may encounter in proving the existence of a retirement norm:

“A retirement age that is not an agreed retirement age becomes a normal retirement age when employees have been retiring at that age over a certain long period - so long that it can be said that the norm for employees in that workplace or for employees in a particular category is to retire at a particular age. An example would be where, without any formal agreement, employees in a particular

category have over 20 years been retiring at a particular age without fail. The period must be sufficiently long and the number of employees in the particular category who have retired at that age must be sufficiently large to justify saying that it is a norm for employees in that category to retire at that age. If the period is not sufficiently long but the number is large, it might still be that a norm has not been established. If the period is very long but the number of employees in the particular category who have retired at that age is not large enough, it might be difficult to prove that a norm has been established.”⁶

In relation to the other information of retirees presented by Neasham, it is apparent that most of the persons in question were retired between April and August 2009, which follows the period in which the cost reduction procedures were implemented. As there were only three staff who never became members of the Provident Fund, all of these persons would have been subject to the provisions of the fund’s rules, and the provisions of the rules would have been directly relevant to determining their normal retirement dates. However, in the absence of being a member of the fund, and in the absence of cogent evidence of retirement ages of person performing in the same capacity as the applicant either in the employment of the respondent or its competitors, I am not persuaded the respondent has established a normal retirement age that would have applied to the applicant.

As the respondent has not succeeded in proving a defence under s 187(2)(b), I must conclude that the applicant’s dismissal on grounds of age was automatically unfair in terms of s 187(1)(f) of the LRA.

Claim under Employment Equity Act

The applicant also claimed that he was entitled to further compensation and damages for the employer failing to take action against the person who was responsible for forcing him to retire simply on account of his age, alternatively that the forced retirement constituted unfair discrimination entitling him to further compensation and damages resulting from his premature retirement.

In advancing this claim, the applicant placed reliance on the judgments in *Evans v Japanese School of Johannesburg* (2006) 27 ILJ 2607 (LC), *Bedderson v Sparrow Schools Education Trust* (2010) 31 ILJ 1325 (LC) and *Ehlers v Bohler Uddeholm Africa (PTY) Ltd* (2010) 31 ILJ 2383 (LC). In all these judgments, an automatically unfair dismissal in terms of s 187 of the LRA was also held to amount to unfair discrimination in an employment policy or practice which contravened s 6(1) of the EEA. If this court finds an employer has unfairly discriminated against an employee under the EEA, it may make an award of compensation and, or alternatively,

damages under section 50(1)(d) and (e) read with s 50(2)(a) and (b).

In *Evans’s* case the employee who had been retired was retired 4 years prior to the retirement age previously agreed with her. The court ordered not only compensation for unfair dismissal of 24 months’ salary, but also damages amounting to approximately two-thirds of what she claimed. In *Bedderson’s* case the court accepted that the applicant was entitled to bring distinct claims for

compensation under both the LRA and EEA, but it determined the issue of compensation jointly. No damages were awarded because no evidence was led to support such a claim. In Ehlers' case, the court declined to make an award of damages or compensation for unfair discrimination under the EEA in a case involving

automatically unfair on account of gender discrimination. The court acknowledged that a distinct claim of unfair discrimination based on the employer's conduct prior to the employee's dismissal might have been made out which would have warranted an award of damages or compensation, but it had not been proven.

In *Wallace v Du Toit* [2006] 8 BLLR 757 (LC), the court was alive to the problems of duplicating compensation where the act of unfair discrimination under the EEA is essentially the same act of discrimination on which the claim of automatically unfair dismissal under the LRA is based. Pillemer, AJ, made the following observations in relation to the matter before him in that case:

"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 "7

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.

That leaves the question of damages. It can still be argued that even if an employee cannot expect compensation under both the LRA and the EEA, he or she might still be entitled to claim damages for the unfair discrimination under the EEA, which unlike the LRA, recognises such a claim. Accepting that proposition is correct, the employee must still prove his damages. As I understood the applicant this was a matter that could be dealt with in further proceedings as to quantum in the event the court was minded to find the respondent liable to pay damages.

In this case, a fundamental difficulty presents itself which was not an issue in *Evans's* case. In that matter the employer varied an agreed retirement age, so the resulting loss to the applicant clearly would arise from the reasonably foreseeable losses she suffered in consequence of not being employed for the remainder of the period between her actual retirement and the due date of retirement. In this instance, just as the respondent could not establish a normal retirement date applicable to the applicant, the applicant could also not establish what his due retirement date should be, other than by reference to his own financial planning which was premised on a retirement date at age 65.

In the absence of a due retirement date, I do not see how it will be possible to determine with any certainty actual damages arising from the applicant's unilateral retirement by the respondent. Accordingly, I cannot hold the respondent liable for damages in this matter. This does not detract from the finding that his retirement in the absence of a normal retirement age being determined for him was unfairly discriminatory.

Relief

Having found the applicant had been automatically unfairly dismissed on account of his age and that such dismissal was also unfairly discriminatory under s 6 of the EEA, the remaining issue is to determine an appropriate level of compensation, since reinstatement is not being sought.

This is not the most egregious type of automatically unfair dismissal on account of age, particularly given the absence of a previously understood due date of retirement which the employer then unilaterally altered to an earlier date. An award of twenty four months' remuneration under these circumstances would be excessive in my view. Taking into account also the applicant's own expectation that he would retire at age 65 and was not intending to work beyond then it seems to me that it would be inappropriate to award him more than one year's remuneration as compensation.

There is no reason why the applicant should not be awarded costs as he has been substantially successful in his claim.

Order

The respondent's dismissal of the applicant on account of his age in the absence of the existence of a normal retirement date, was automatically unfair in terms of s 187 of the LRA and was an act of unfair discrimination in terms of s 6 of the EEA.

The applicant's claim for an award of damages under the EEA is dismissed.

The respondent must pay the applicant an amount of compensation equivalent to twelve months' remuneration in the amount of R 420, 0000-00 within 15 days of this

judgment.

The respondent must pay the applicant's costs.

R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Appearance:

For the Applicant: M M Poseman instructed by Riaan Kruger

For the Respondent: O A Moosa, SC instructed by C Haralambous.

1At 1680,[24]

2At 288,[25].

3At 135-136,[27]-[28]

4In Rubin Sportswear, the LAC acknowledged this possibility: “Of course, there can be nothing wrong with the fixing of a normal retirement age for all the employees of an employer irrespective of their different capacities in which they may be employed.” (At 1679,[21]).

5At 1679,[19].

6At 1679-80,[20]

7At 764,[20]

1At 1680,[24]

2At 288,[25].

3At 135-136,[27]-[28]

4In Rubin Sportswear, the LAC acknowledged this possibility: “Of course, there can be nothing wrong with the fixing of a normal retirement age for all the employees of an employer irrespective of their different capacities in which they may be employed.” (At 1679,[21]).

5At 1679,[19].

6At 1679-80,[20]

7At 764,[20]

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