

SOUTH AFRICA / JUDGMENT

Kutuma and Others v Limpopo Legislature (JS886/09) [2014] ZALCJHB 357 (15 September 2014) [2014] ZALCJHB 357

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JS886/09

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Of interest to other judges

Case no: JS 886/09

In the matter between:

R E KUTUMA First Applicant M M MONYAMA Second Applicant N S NKADIMENG Third
Applicant And LIMPOPO LEGISLATURE Respondent

Heard: 08 September 2014

Delivered: 15 September 2014

Summary: (S 187(1)(f) – s 187(2) – Alleged automatically unfair dismissal based on age – both parties having an election to terminate employment once normal retirement age reached - unilateral variation of conditions of service unnecessary to decide – dismissals not unfair).

LAGRANGE, J

Introduction

- [1] In this matter, the parties agreed that the essential facts are common cause and were content to confine themselves to presenting argument, without leading any additional evidence. Both parties presented oral argument, which they supplemented with written heads of argument after the hearing.
- [2] The applicants claim that they were unfairly dismissed on account of their age contrary to section 187(1)(f) of the Labour Relations Act, 66 of 1995 ('the LRA'). The respondent's defence lies in section 187(2) of the LRA which states that "a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity". The applicants were between the ages of 61 and 63 years when their services were terminated on 31 March 2009.
- [3] The respondent terminated their services because they had reached the normal retirement age according to a Policy Document on Conditions of Service dated 8 January 2001 ('the Conditions of Service Policy'), which appears to have been approved by the Northern Province Legislature Service Board on 27 November 2000. It contains the following definition:

"Retirement age' means from the age of 55 years (early retirement), through 60 years (normal retirement), to 65 years (compulsory retirement)."

- [4] Section 19 of the Government Employees Pension Law, 1996[1] ('the Pension Law'), provides:

"19 Age of retirement

Subject to the provisions of this Law, a member shall have the right to retire on pension and shall be so retired on reaching the age determined by the law governing his or her employment: Provided that where such a law does not determine such retirement age, a member-

(a) ...

(b)..."

(Emphasis added)

- [5] The Pension Law also contains the following definition:

"'pension-retirement date', the earliest date on which a member is entitled to retire in terms of section 19 of the Law with normal retirement benefits, i.e. without application of an early retirement adjustment factor as envisaged in rule 14.3.3 (b): Provided that for the purpose of section 19 (b) of the law it shall be the date when such a member attains the age of 60 years;..."

- [6] On 27 May 2008 the respondent's Legislature Service Board resolved inter alia that "all employees should go on normal pension when reaching the age of 60 as this was in line with the Government Pensions Fund of which all employees of the legislature were contributing to."

- [7] Until 5 August 1998, when the Northern Province Legislature Act, 3 of 1997 ('the NPLA') commenced operating, the respondent regulated its employees conditions of employment in terms of the Public Service Act of 1995 as amended.

Submissions of the parties

Respondent's Argument

- [8] Mr Mphahlani, who appeared for the respondent submitted that once it was established that the normal retirement age was 60 all other issues

fell away. The normal retirement age of 60 stipulated in the Conditions of Service since 2001 has never changed. Clause 1.2 of the same document provides that the conditions of service apply to all employees of the legislature, unless expressly stated otherwise.

- [9] The respondent also contended that in addition the Legislature Service Board established by section 3 of the NPLA had the power under section 8 (1)(d)(ii) of the same Act to determine the conditions of retirement and the retention of services of employees. Accordingly, when the Service Board decided in its meeting of 27 May 2008 that all employees should go on normal pension when reaching the age of 60 as this was in line with the government pension fund which all employees of the legislature were contributing to, that decision simply confirmed that the normal retirement age was 60.

- [10] Further, it submitted that in terms of the NPLA Conditions of Service Policy ('Conditions of Service Policy') the board's interpretation of what constituted the normal retirement age was final. In this regard, the respondent placed reliance on clause 1.3 of the Conditions of Service Policy which states:

"1.3 Interpretation

1.3.1 If doubt arises regarding the interpretation of the provisions of these conditions of service, the matter shall be referred to the board for a decision.

1.3.2 The decision of the board is final and binding upon all concerned, and forms the basis of future interpretations."

- [11] As I understand this argument, the proposition is that, in the absence of a dispute about the interpretation of the board's decision of 28 May 2008, the board's pronouncement in that decision on the normal retirement date at age 60 is unassailable. Nevertheless, as mentioned above, later on in the argument, the respondent emphasised that whether or not this resolution was determinative of the matter did not matter as it was merely confirming the pre-existing situation.

[12] It appears the respondent wishes to argue on the one hand that the resolution changed nothing, but also that, as it put it in its written heads, the 'old retirement age policy' was "... amended or repealed on 27 May 2008 when the Respondent's Board made a new Law determining the normal retirement age to be 60 years, of which new Law the Applicants were at all relevant times fully aware."

[13] The respondent also referred to clause 4.8.1 of the Conditions of Service Policy which states: "An employee's service in the Legislature may be terminated on account of: 4.8.1 reaching retirement age..."

[14] Section 19 of the Pension Law states:

"19 Age of retirement

Subject to the provisions of this law, a member shall have the right to retire on pension and shall be so retired on reaching the age determined by the law governing his or her employment: Provided that where such a law does not determine such a retirement age, a member-

- (a) who was a member of the fund on the fixed date shall have the right to retire on pension and shall be so retired on reaching the retirement age provided for in any other law which applied to him or her on the date preceding the fixed date; or
- (b) who became a member of the fund after the fixed date shall have the right to retire and shall be so retired on reaching the retirement age determined in the rules."

The respondent relies on the portion of this provision before the proviso. In other words, in terms of the Pension Law the right to retire on pension and the date on which such a person may be retired, in this case, is determined by the Conditions of Service Policy.

[15] On the other hand, the respondent also sought to rely on the definition of 'pension-retirement date' in the Pension Law, which states:

"pension-retirement date", the earliest date on which a member is entitled to retire in terms of section 19 of the Law with normal retirement benefits, i.e without application of an early retirement adjustment factor as envisaged in rule 14.3.3 (b): Provided that for the purpose of section 19(b) of the Law, it shall be the date when such member reaches the age of 60 years;..."

(emphasis added)

In its written heads, the respondent contends that it was common cause that the resolution of 28 May 2008 brought the normal retirement age into line with s 19(b) of the Pension Law, namely 60 years. It maintains that if the applicants wanted to challenge the position after 28 May 2008, they should have sought to review the empowering legislation or the decision itself.

[16] The respondent also maintains that the facts of this matter are on all fours with the LAC decision in *SA Metal & Machinery Co (Pty) Ltd v Gamaroff*. [2]

[17] In its written heads, the respondent argued that because the applicants had agreed that the respondent had terminated their services 'because they reached the normal retirement age of 60', they had therefore abandoned their claims in their statement of case that the respondent had simply terminated their services because they were over 60, whereas the compulsory retirement age was 65 and that their termination constituted unfair discrimination based on age. However, this was plainly not a concession but simply a statement of the respondent's reason for terminating their services. One only has to have regard to the facts in dispute in the pre-trial minute to see that this was not the case and the respondent's argument on this point rips the statement out of the context of the rest of the minute.

Applicants' Argument

[18] Ms Pillay, who appeared for the applicants, argued that the applicable retirement age was that set out in the Conditions of Service Policy

which effectively meant that an employee was eligible for retirement at the age of 60 but had the option of working until the compulsory

retirement age of 65.

[19] An argument which was not foreshadowed in the pleadings was that if one looked at the resolution of the board in its entirety it was clear that the real reason behind the decision to retire employees aged 60 and beyond was because of work performance.[3] The respondent rightly objected to this line of argument since the applicants' case was simply that they had been automatically

unfairly dismissed on account of age discrimination. Accordingly, it is of no relevance in the determination of this case.

[20] In relation to the respondent's reliance on the definition of the pension-retirement date in the Pension Law, the applicants submitted that what that provision clearly implied was that, an employee was entitled to retire on pension at the age of 60, but was not obliged to. The Pension Law simply emphasised the normal retirement age, which is stipulated in the Conditions of Service Policy.

[21] The applicants agreed with the respondent that the proviso to the definition of the pension-retirement date in the Pension Law was of no application in this matter.

[22] Ms Pillay contended that the central issue in this case was what constituted a normal retirement age. She referred in this regard to the judgement in *Rubin Sportswear v SA Clothing and Textile Workers Union & others* [4], which was also cited in the *Gamaroff* decision, in which the court held:

"[13] I am unable to uphold the appellant's contention that by unilaterally fixing 60 as the retirement age of all its employees including the second and further respondents, 60 became the normal retirement age for such employees. 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'.[5]

On the facts of that case, there was no agreed retirement age nor was there any normal retirement age stipulated in the terms and

conditions of employment. What the judgement also highlighted is that the determination of a normal retirement age is a fact based enquiry.

[23] By contrast, in this case, the applicants argue that the Conditions of Service Policy determined the definition of a normal retirement age and retirement is only obligatory at age

65. The applicants also sought to draw an analogy with the Rubin case in which the employer had unilaterally decided on a retirement age, by arguing that the decision of the Board could not suddenly make 60 the compulsory retirement age. This was no different to what the employer did in Rubin's case, and accordingly the resolution could not be considered to have changed anything.

[24] The applicants reject the proposition that the interpretation provision of the Conditions of Service Policy has the effect of making the Service Board's resolution dispositive of the normal retirement age because no dispute about the interpretation had been referred to it in terms of clause 1.3. Further, the applicants contend that even if the board could determine the retirement age in terms of section 8 (1)(d)(ii) it could not do so with retrospective effect.

[25] In Gamaroff's case the court found that there was a normal retirement age based on the rules of the Provident fund. Likewise, the applicants submitted in this matter the retirement age was common cause. The judgement in Cash Paymaster Services (Pty) Ltd v Browne [6] was distinguishable from this matter because in that case there was an agreed retirement age.

[26] The rules of the Provident fund in Gamaroff's case stated:

"4.2.1 A Member may retire at any time after having attained the early retirement age specified in the Special Rules, provided that he may not retire prior

to age 55 years. A Member who is dismissed from Service after having attained the specified age may also proceed on retirement if the participating Employer regards such dismissal as early retirement.

4.2.2 A Member who has not retired in terms of Rule 4.2.1 must retire on reaching his Normal Retirement Age unless his Employer agrees to his remaining in Service after that date.

4.2.3 The Trustee, upon receipt of notification from the Employer that a Member has become totally and permanently incapable of efficiently carrying out his duties, shall agree to such Member's retirement at any time before he reaches Normal Retirement Date.

4.2.4 A Member who is allowed to remain in Service after his Normal Retirement Age shall retire at a date not later than the last day of the month in which he attains the age of 70 years, subject to the agreement of his Employer.”[7]

In that matter, the rules of the fund also specifically stipulated a normal retirement age of 65.[8]

Evaluation

The application of the Pension Law

[27] The two provisions relied on by the respondent to assert that the resolution of 28 May 2008, merely affirmed the normal retirement age in the Pension Law have been mentioned already. For convenience, they are repeated below:

“19 Age of retirement

Subject to the provisions of this Law, a member shall have the right to retire on pension and shall be so retired on reaching the age determined by the law governing his or her employment:

Provided that where such a law does not determine such retirement age, a member-

and

[28] Initially, the respondent appeared to agree with the applicants that the first sentence of section 19 was of application in this case, namely that the age of retirement was determined by the law governing their employment which is what was originally set out in the Conditions of Service and then amended by the resolution. Later, the respondent tried to place some reliance on the age of 60 years mentioned in the definition of ‘pension-retirement date’. The latter stance cannot be sustained. Reading the two provisions together it is clear that the 60 year retirement age only applies if s 19(b) applies, which is not the respondents’ own case. Consequently, the age of 60 in the definition is of no relevance.

[29] What remains relevant is that the ‘pension-retirement date’ is defined as the earliest date on which someone can retire on normal retirement benefits, without having to take early retirement. That date is not a compulsory retirement date but the date on which a person is eligible for retirement.

The retirement ages in the Conditions of Service

[30] The definition which applied prior to the resolution is unambiguous, viz:

“ ‘Retirement age’ means from the age of 55 years (early retirement), through 60 years (normal retirement), to 65 years (compulsory retirement).”

- [31] It envisages three possible retirement ages. The first is the age when an employee could take early retirement and the second when they are eligible for normal retirement, but not obliged to retire, and the last is the mandatory retirement date.
- [32] What the 28 May resolution did was to make 60 the mandatory retirement age and not merely the age when an employee became eligible for normal retirement. The twofold object of the resolution is also clear: it was to reintroduce incentives to encourage staff eligible for early retirement to opt for it and also to compel those who had reached what was previously the age at which they became eligible for normal retirement to retire, even though they had not reached the previous mandatory retirement age of 65. Before the resolution was passed the mandatory retirement age was 65 and afterwards it was 60. It was decided by executive fiat and there was no evidence of any consultation with the applicants, nor was it contended it was an agreed change.
- [33] Is this a situation in which the previous policy permitted the employer to retire an employee at any stage after the normal retirement date had been reached as was the case in *Schweitzer v Waco Distributors (A division of Voltex (Pty) Ltd)*[9] and *Gamaroff*[10] ?
- [34] If one has regard to the original definition of retirement age mentioned in paragraph [30] above, it would seem the election to retire, lay entirely with the applicants until they reached the age of 65 at which point the respondent then acquired the right to oblige them to retire. However, if one considers clause 4.8.1 of the Conditions of Service Policy that stated that an employee's service in the legislature 'may be terminated' on account of reaching 'retirement age'. This would appear to give the employer the right to terminate an employee's services once the employee has reached retirement age.
- [35] It may be questionable if this would apply in the case of employees who have only reached the age when they are eligible for early retirement, as an early retirement date could hardly be considered a 'normal retirement date' for the purposes of s 187(2)(b). However it is difficult to see why the respondent would not be entitled to rely on clause 4.8.1 in the case of employees who had reached the normal retirement age but had not yet reached the compulsory retirement age. There is nothing inconsistent in having a normal retirement age, which after it is reached, permits either party to terminate the employment relationship coupled with a mandatory retirement age, at which stage retirement must take place. Consequently, the circumstances in this respect are not dissimilar to those in *Schweitzer* and *Gamaroff's* cases.
- [36] If clause 4.8.1 could only have been intended to refer to the age of compulsory retirement one would have expected it to refer to the compulsory retirement age rather than using the broader term 'retirement age'. Even if the status of the 28 May resolution in so far as it might amend the conditions governing the applicants' retirement entitlements is debatable, and if I assume in their favour that they are entitled to rely on the Conditions of Service Policy

issued in 2001, those conditions do not seem to give them alone the choice of deciding when to retire after age 60. By virtue of clause 4.8.1 the employer may also decide, once an employee has reached the age of 60 but not yet 65, to rely on the employee having reached the normal retirement age to terminate their employment.

- [37] I appreciate that the applicants might have hoped they would continue to work until the compulsory retirement age, but under their conditions of service they were always vulnerable to being retired after reaching the age of 60. I also wish to emphasise that because I have assumed in the applicants' favour that they were entitled to rely on the conditions of service which they claimed to be entitled to enforce, namely those which prevailed prior to the 28 May resolution, it is not necessary to make a finding on whether that resolution validly amended those conditions.
- [38] Consequently, I am satisfied that in this instance the respondent can rely on the defence provided by s 187(2)(b) of the LRA and that the applicants' dismissal was fair because they had reached the normal age for retirement after which the employer was entitled to dismiss them for that reason under clause 4.8.1 of the policy.

Order

- [39] The applicants' claims under s 187(1)(f) of the Labour Relations Act, 66 of 1995, are dismissed.
- [40] No order is made as to costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:

L Pillay instructed by Molebaloa Attorneys

RESPONDENT:

J S Mphahlani instructed by M M Baloyi

[1] Proclamation 21 published in government Gazette 17135 of 19 April 1996.

[2]

[2010] 2 BLLR (LAC)

- [3] The full resolution of 27 May 2008 read: "6.6.2 Staff not performing due to ageing in a position The Board raised concern that there were staff members who have been on the same position for so many years and have become lax in their performance and they were in a state of inertia to expect any change from them. After thorough deliberations, it was

resolved that: 6.6.2.1 the Secretary should reopen the incentive given during the past years by the board, that persons who have reached the age of 55 and not yet 60 can be allowed early retirement and also be paid six months salary to compensate for the period that they would have worked up to the age of 60. 6.6.2.2 all employees should go on normal pension when reaching the age of 60 as this was in line with the Government Pension Fund of which all employees of the legislature were contributing to." (sic)

[3] The full resolution of 27 May 2008 read:

"6.6.2 Staff not performing due to ageing in a position

The Board raised concern that there were staff members who have been on the same position for so many years and have become lax in their performance and they were in a state of inertia to expect any change from them. After thorough deliberations, it was resolved that:

6.6.2.1 the Secretary should reopen the incentive given during the past years by the board, that persons who have reached the age of 55 and not yet 60 can be allowed early retirement and also be paid six months salary to compensate for the period that they would have worked up to the age of 60.

6.6.2.2 all employees should go on normal pension when reaching the age of 60 as this was in line with the Government Pension Fund of which all employees of the legislature were contributing to."

(sic)

[4]

(2004) 25 ILJ 1671 (LAC)

[5] At 1677.

[6]

(2006) 27 ILJ 281 (LAC)

[7] At 143-144.

[8] At 138, para [6.3.1]

[9]

[1999] 2 BLLR 188 (LC) at 192-3.

[10] See fn 7 above.

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