

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 86/18

In the matter between:

BMW (SOUTH AFRICA) (PTY) LTD

Applicant

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

First Respondent

KARL DEPPE

Second Respondent

Heard: 12 September 2019

Delivered: 18 May 2020

Summary: Unfair discrimination in terms of s187(1)(f) of LRA and s 6 of the EEA---age--- employee's retirement age changed from 65 to 60---Whether employee consented to change ---Employee's conduct and unchallenged evidence leading to finding that he did not consent to the change--- evidence indicating that employee never received the election form to indicate whether to retire at age 65 or 60 ---*BMW (SA) (Pty) Ltd v NUMSA and Another* (2019) 40 ILJ 305 (LAC) distinguished --- Dismissal automatically unfair- on account of age discrimination.

Relief---employee claiming compensation under LRA --- Court held employer liable for payment of compensation to employee for automatically unfair dismissal.

Employee also claiming damages equivalent to five years remuneration under section 50 of the EEA--- Court held employer liable for employee's proven

(patrimonial) damages ---court postponing the determination of the quantum of compensation and damages to be awarded.

Cross-appeal ---employee's claim for damages in terms of s 77(3) of the BCEA dismissed for lack of evidence. Appeal partially upheld.

Coram: Coppin JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal and cross-appeal against the judgment and order of the Labour Court (Mahosi J) in which it found *inter alia* that Mr Karl Deppe's ("Mr Deppe") dismissal by BMW South Africa (Pty) Ltd ("BMW") constituted an automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act ("LRA")¹ as BMW had discriminated against him on the grounds of age. It also held that his dismissal constituted unfair discrimination on the same grounds in terms of section 6(1) of the Employment Equity Act ("EEA").²

In the Labour Court

[2] Although the issues of merits and quantum were separated and only the merits of the dispute were before it, the Labour Court awarded Mr Deppe compensation equivalent to 24 month's remuneration in terms of section 194(3) of the LRA. In doing so, the Labour Court reasoned as follows:

'In considering what is just and equitable, where there is a single action with claims under the LRA and EEA, the Court should not consider separate compensation under the LRA and the EEA but what is just and equitable for the indignity the employee has suffered. Because there is no limit prescribed

¹ No. 56 of 1996.

² No. 55 of 1998.

to the amount of compensation that can be awarded under the EEA and the amount for compensation under the LRA for automatically unfair dismissal is limited to a maximum of 24 months remuneration, I am of the view that the employee be awarded the maximum compensation provided by the LRA. This compensation achieves the result of giving effect to the employee's right to claim under both the EEA and the LRA while at the same time not penalising the employer twice for the same wrong as a single determination is made to what is just and equitable compensation for the single wrongful act.

[3] The appeal lies against the Labour Court's orders that Mr Deppe's dismissal constituted an automatically unfair dismissal in terms of section 187(1)(f) of the LRA and unfair discrimination in terms of section 6(1) of the EEA. It also lies against the Labour Court's award of compensation. The appeal is with leave of the Labour Court.

[4] Mr Deppe also claimed damages arising out of BMW's breach of his employment contract in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997. Under this claim, Mr Deppe sought damages equivalent to five years remuneration which he claimed he was entitled to, and would have earned had his contract of employment not been wrongfully repudiated by BMW. The Labour Court disallowed Mr Deppe's contractual claim and dismissed his claim for damages. In doing so, it observed as follows:

'Turning to the relief of damages, it is trite that a claim for damages is not there for the asking. Anyone claiming damages for breach of a contract should prove the loss that he/she had suffered and that such loss was consequent to the breach. In this case the employee claims five years' remuneration as damages, which is the remainder of the period he would have worked for BMW but for his retirement. There is no shred of evidence to prove the actual loss.

[5] The cross-appeal lies against the Labour Court's dismissal of the damages claim with its leave.

Analysis of the Evidence

[6] Mr Deppe worked for BMW one month short of 31 years. BMW employed him on 1 December 1984 as a test technician in the workshop. At the time of his dismissal, he was employed as a quality technician.

[7] When Mr Deppe commenced employment with BMW, his retirement age was 65 years. His contract of employment did not stipulate a retirement age. It was stipulated in a staff handbook. His contract of employment provided in relation to policies of the company that:

‘You are expected to familiarise yourself with the policies of the Company, changes to which have an overriding influence on the conditions laid down in this letter. The policies are reviewed regularly and may be amended in terms of changing employment and market conditions.’

[8] The contract of employment encloses a “Staff Handbook containing particulars of the employees’ benefits and the rules and regulations of the Company” with which Mr Deppe was “asked to familiarise himself”.

[9] Mr Deppe was a member of the BMW Pension Fund (“the Pension Fund”). At the time of joining the Pension Fund, the retirement age stipulated in its rules was 65 years. On 1 February 1994, the chairman of the Pension Fund Trustees, Mr DP Kirby, issued an internal memorandum to all Pension Fund members stating that:

‘Taking into account all the factors at play in our economy, it would appear prudent to reduce the retirement age from 65 to 60 years for both male and female employees.

Because those already over 50 years of age may have already planned their retirement on a different basis we would like to give them the option to retain a later retirement age.

To enable us to evaluate opinion on this issue we would appreciate you returning the attached form with your comments before March 30, 1994.’

[10] Mr Deppe chose to retire at age 65. According to Mr Deppe, he filled in the survey form and returned this document to BMW. Since there were no emails

at BMW in 1994, Mr Deppe returned the hardcopy to BMW. Mr Deppe's evidence on this aspect remains unchallenged. At the trial, Mr Deppe testified that he chose to retire at age 65 because at the time of completing the survey document he was not yet 30 years old and wished to keep his options open should he decide, in the future, to retire earlier. Mr Deppe's explanation for choosing to retire at age 65 also remains unchallenged.

[11] On 28 March 1995, Mr Kirby issued an inter-office memorandum confirming that:

'The official Company Retirement Age has now been changed to 60 years. Those of you [regardless of age at the time] who indicated that you would like to remain at retirement age 65 will be able to do so.

...

We will make a list of all who specifically indicated they would like to keep their retirement age at 65. If you are in doubt please contact my secretary to confirm what your choice was.'

[12] Mr Deppe received this document but believed that because he had expressed his will in the survey document, the change referred to in the inter-office memorandum did not apply to him.

[13] Mr Kelbrick of BMW testified that, some two months later, a Managerial Notice (signed by C Wesells – Personnel Training & Development), dated 16 May 1995, recording the change in the retirement age from 65 to 60 was placed on BMW's noticeboards. Employees who had a problem with it were invited to write to the Personnel Department. According to Mr Kelbrick, members of staff were expected to read the Managerial Notice that was placed on the company's noticeboards. Mr Deppe conceded that this kind of notice is generally placed on the company's noticeboards.

[14] It is common cause that in 1995, BMW amended Mr Deppe's age of retirement from 65 to 60. The extract from the BMW Pension Fund Rules dated February 1995 reflects the amended rule as follows:

‘Normal retirement date’ shall mean for each member the last day of the month in which the member attains 60 years, provided that each member who was a member on 31 January 1995 may elect the last day of the month in which the member attains age 65 years to be the member’s normal retirement age.’

- [15] BMW compiled a list of employees above the age of 50, and a separate list of employees below 50 who elected in 1995 to retire at 65 and forwarded it to Alexander Forbes, the administrator of the Pension Fund. Mr Deppe’s name did not appear on this list.
- [16] Mr Deppe’s pension benefit statement dated 31 May 1994 records his normal retirement age as 65 and his pension benefit statement, dated 28 February 1995, records his retirement age as 60. He only learnt of the change to his retirement age from 65 to 60 when he received his 1995 pension benefits statement. He, however, assumed it was a “mistake” and not that his age of retirement had actually been changed. BMW did not dispute this at the trial.
- [17] A day or two later, Mr Deppe raised the change to his retirement age with Ms Greyling and she undertook to fix the matter and revert, but never did. BMW disputes this. Ms Greyling, a secretary at the time, testified that she did not speak with Mr Deppe as she did not work on pension fund matters and was not based in Rosslyn (the workshop where Mr Deppe worked) during this time. She, however, conceded under cross-examination that she did, in fact, go to Rosslyn during this period.
- [18] Mr Deppe’s raising of an objection with Ms Greyling, is the first of six times Mr Deppe protested against the change of his retirement age to 60.
- [19] In 2001, Mr Deppe approached Mr Barnard (Representative of the Salary Council at the time) and asked if he could assist in getting his age of retirement “put back to 65”. Mr Barnard took up Mr Deppe’s issue with Ms Greyling, first in person, and then in an email. The email’s subject line: “Option: Karl Deppe”. In the email, Mr Barnard mentions the previous occasion when he had spoken to Ms Greyling about Mr Deppe’s age of

retirement.

- [20] Mr Barnard asked Ms Greyling what he and Mr Deppe should do. The complaint was expressly about Mr Deppe's age of retirement that had been changed. Ms Greyling's response dealt with Mr Barnard and benefits, and not the change to Mr Deppe's age of retirement from 65 to 60. Ms Greyling testified at the trial that she understood the email to relate to benefits and not the age of retirement.
- [21] Ms. Greyling's response was off-point. It dealt with benefits in relation to Mr Barnard and not the change to Mr Deppe's retirement age from 65 to 60. She explained, in her evidence, that she understood the email to relate to benefits and not the age of retirement. I consider her explanation to be implausible as there is simply no reference to benefit in the email. There are, however, two references to the "age 60/65 issue"; and an express reference to "age of retirement" and "pension fund".
- [22] Ms Greyling's failure to deal with the change to Mr Deppe's retirement age prompted Mr Barnard to write another email to her, in which he explicitly stated that Mr Deppe did not get the necessary option form to fill in. The email from Mr Barnard to Ms Greyling was Mr Deppe's third objection to the change of his retirement age to 60. Ms Greyling failed to respond.
- [23] Thereafter, in April 2002, Mr Deppe joined an action group that was formed to address the change in the age of retirement from 65 to 60. The action group had 20 members who complained that BMW unilaterally amended their age of retirement. The action group's document contains a table in which Mr Deppe indicated that he received the opinion/survey form and had raised the change to his age of retirement with Ms Greyling earlier. The document provides in relation to Mr Deppe:

'Chose to remain on 65 on the option evaluation.

BMW records show 60

Plus/minus four years ago requested S Greyling to correct mistake, no response

Please query onto Salary Council Rep'

- [24] This is a contemporaneous document which supports Mr Deppe's version entirely. Crucially, BMW did not challenge its contents. The action group was Mr Deppe's fourth protestation against the change to his age of retirement. Unfortunately, the action group collapsed as a result of a lack of funds on the part of employees to take the matter forward.
- [25] In 2014, Mr Deppe, together with 21 fellow workers, raised an internal grievance. The grievance is detailed as "60 v 65 age of retirement" and the settlement retirement: "to be compensated or be allowed to retire at 65". This was Mr Deppe's fifth protestation against BMW changing his age of retirement.
- [26] The first stage internal grievance was unsuccessful and again Mr Deppe protested – for a sixth time. The matter was referred to stage two of the internal grievance, but was again unsuccessful.
- [27] Mr Deppe was required to retire on 31 October 2015 at the age of 60. He followed the necessary legal processes which culminated in the proceedings in the Labour Court. At the trial, BMW discovered a document from 1997. This document indicates that BMW had provided some employees with an election by way of an election form dated 1997. This form states that the age of retirement was changed in 1995 to 65 and that it is now "a condition of employment". The form recognises that not everyone had been given an opportunity to make an election and therefore, BMW was providing this option to elect in 1997. The form was addressed to Provident Fund members only.
- [28] Mr Deppe claims he did not receive an election form of the kind sent by BMW to Provident Fund members in 1997. BMW failed to provide evidence at the trial demonstrating that it provided Pension Fund members with an election form akin to the 1997 election form which it gave to Provident Fund members.

The stark absence of this evidence compels the inference that Provident Fund members did receive an option form to make this election whilst, crucially, Pension Fund members did not. Even more significant, is that BMW recognised that not everyone had been given an opportunity to make an election, yet it did nothing to rectify the situation in so far as Pension Fund members were concerned.

- [29] Mr Deppe's uncontested evidence is that he did not receive an election form akin to the 1997 form sent to Provident Fund members. Notably, at no stage during the trial in the Labour Court did BMW contest Mr Deppe's evidence that he did not receive an election form. Indeed, Mr Kirby said under cross-examination that "he cannot testify to whether or not Mr Deppe received such an election form".
- [30] Bearing in mind BMW's failure to contest Mr Deppe's evidence that he did not receive an option to elect in 1997, his purported failure to see Mr Wessel's managerial notice (dated 31 May 1995) or to respond to the 28 March Memorandum takes the issue no further. Properly construed, these documents were not options to elect.
- [31] Nowhere in its evidence does BMW point to providing Mr Deppe with an option to make an election between retiring at age 65 or 60 prior to changing his retirement age to 60. Indeed, prior to 1997 Mr Deppe was provided with no such option. This much is consistent with the statement in the 1997 inter-office memorandum which reads: "It appears that not all members were aware of the choice. Therefore, a further opportunity is provided to exercise your option if you were a member prior to June 1995". What is clear from this is that despite BMW's failure to provide Mr Deppe with an option to elect, it changed his retirement age in 1995 without his consent. Markedly, the survey form which Mr Deppe submitted in 1994 expressly indicated that he did not wish for his retirement age to be changed to 60.

Issues for determination

- [32] The central issue for determination is whether Mr Deppe retired at his normal

retirement age of 60 on 31 October 2015 or whether he was discriminated against by BMW by being dismissed on the grounds of his age thereby constituting an automatically unfair dismissal as envisaged in section 187(1)(f) of the LRA and unfair discrimination under section 6(1) of the EEA.

[33] However, BMW's principal argument in the appeal is that the current appeal can be disposed of on the basis of this Court's decision in *BMW(South Africa) (Pty) Ltd v NUMSA and Another* ("Van der Bank")³ which held that where an employee had not made an election to retire at age 65, then unless the circumstances indicated otherwise, she had acquiesced to the change.

[34] In the cross-appeal, the question for determination is whether Mr Deppe is entitled to damages flowing from BMW's breach of his employment contract.

Does the application of Van der Bank dispose of the appeal?

[35] I deal with this question first because an affirmative finding would be dispositive of the appeal. BMW's first point of contention in relation to this question is that there is a significant difference between Mr Deppe's pleaded case in his statement of claim and the evidence that he presented at the trial. The change, it contends, relates to whether or not Mr Deppe elected to retire at age 65. It points to Mr Deppe's statement of case where he alleges that he elected to retire at age 65 and contrasts this with his evidence, in the trial, that he did not exercise an election.

[36] With regard to the purported inconsistency between Mr Deppe's pleaded case and the evidence led at the trial, BMW argues that the Labour Court ought to have rejected Mr Deppe's version. As indicated, BMW places reliance on the decision of this Court in *Van der Bank*⁴ as support for this contention. In *Van der Bank*, BMW changed Mrs Van der Bank's retirement age from 65 to 60 in 1994. Mrs Van der Bank contended that she had not consented to the change of her retirement age to 60.

³ *BMW (SA) (Pty) Ltd v NUMSA and Another* (2019) 40 ILJ 305 (LAC) ("Van der Bank").

⁴ *Van der Bank* paras 3-6.

[37] This Court concluded that her conduct led to a finding on the probabilities that she had acquiesced to the change. In arriving at this conclusion, it examined Mrs Van der Bank's conduct from the time the change took effect in 1994 to the time of the filing of her statement of case, almost 14 years subsequent to her termination of employment, and concluded that her pleaded case differed from her case as articulated in the original grievance which she raised with BMW. In rejecting Mrs Van der Bank's version that she had submitted an election form to BMW electing her retirement age as 65 (as opposed to 60), this Court held that her belated claim that she had submitted an election form electing to retire at age 65 was not probable, as she was repeatedly asked for a copy of the election form but did not counter this by saying that she had submitted the form. The Court went on to hold as follows:

'Were it otherwise, the grievance reports would necessarily have alluded to her claim of a submission of such a form and that no record was in existence to corroborate the claim. The repeated articulation of a demand to show her where she accepted age 60 is inconsistent with her pleaded claim that she made a positive election to retain age 65.

...

Ultimately, the case to be decided is the case put up by the respondent: did she or did she not submit an election form retaining age 65, or did she acquiesce in the changes. This should not be thought to be reversing the *onus*; the respondent's burden was limited to a burden to adduce evidence of her averment that she submitted a form which her employer received. Absent a positive finding that the probabilities show that she did elect as alleged, the appellant's case that she acquiesced is made out, by reason of the length of time that elapsed since the change was made, initially until 2010, and then a further period of acquiescence until 2014.

Her claim to have made an election cannot be found to be true.⁵

[38] BMW's reliance on the decision of *Van der Bank* is misplaced as it is distinguishable from the current matter in three primary respects: First, in *Van*

⁵ *Van der Bank* paras 37-42.

der Bank, there was no dispute that Mrs van der Bank was given an opportunity to elect her age of retirement and that BMW had sought to obtain her consent. It is common cause on the facts of the current matter, that Mr Deppe never received an option to elect his age of retirement nor was his consent sought.

[39] Second, in *Van der Bank* this Court disbelieved Mrs Van der Bank's version that she had, in fact, elected to retire at 65. In this case, Mr Deppe's consistent and unchallenged evidence was that he was not even given that opportunity. Thirdly, Mr Deppe did not acquiesce to the change of his retirement age from 65 to 60. It is clear from the evidence led in the Labour Court that he complained on at least six occasions, only one of which is disputed by BMW. This notwithstanding, BMW contends that after 2002 and the collapse of the action group, Mr Deppe accepted his position and "abandoned his objection to the change in his retirement age".

[40] There is no substance to this argument as it is abundantly clear from the evidence on record that Mr Deppe did not acquiesce, nor did he abandon his objection to the change in his retirement age. BMW's stance was that it would change his age of retirement if he provided it with an election form. Yet, the undisputed evidence is that BMW did not provide Mr Deppe with an election form. This being the case, Mr Deppe could have objected daily but it would have changed nothing.

[41] This is precisely why, in his words, he felt "defeated" and "gave-up". As pointed out on behalf of Mr Deppe, "feeling defeated in the face of repeated dejections by a powerful company is not the same as formal abandonment" or for that matter waiver of one's rights. In fact, Mr Deppe categorically denied abandoning his right to retire at 65.

[42] Mr Deppe's conduct subsequent to 2002 is not indicative of an employee who sat back and did nothing to resolve his issue, but rather of one who was met with closed doors at every attempt. His conduct is distinguishable from that of an employee who, believing that it is permissible, accepts the change to his

age of retirement. In this case, Mr Deppe objected but knew that without proof of an election, he would be unable to persuade his employer. Being defeated is different from agreeing to a change. Mr Deppe felt defeated.

[43] I am, accordingly, of the view that Mr Deppe did not acquiesce to the change of his retirement age from 65 to 60. *Van der Bank* is, therefore, clearly distinguishable. That being so, BMW's contention that the appeal should succeed based on this Court's decision in *Van der Bank* is without foundation.

[44] Returning then to BMW's contention that Mr Deppe's pleaded case is inconsistent with the case he presented at the trial in the Labour Court. I see no merit in it as the records make it clear that Mr Deppe testified to his pleaded case in the trial. Significantly, BMW conflates the pleadings in relation to a 1994 memorandum with Mr Deppe's evidence in relation to a 1997 memorandum: Mr Deppe pleaded and testified consistently that he received the 1994 memorandum and made an election in the form attached thereto. He, however, considered this document to be a survey/opinion document - and stated honestly that this was not the election referred to in the 1997 memorandum.

[45] Mr Deppe testified that he did not receive the 1997 memorandum and could not make an election in relation to that document. As I see it, BMW is conflating Mr Deppe's testimony in not having made an election on the 1997 memorandum with his pleadings dealing with the 1994 memorandum. Mr Deppe's evidence was: "I never at any stage had the opportunity to elect, select, with the exception of the opinion survey, in which I did select 65. I never ever had an opportunity after that again".

[46] Mr Deppe believed that the survey document did not have legal consequences and was not the election document. He received the survey document but not the election document. However, during cross-examination, counsel for BMW conflated the option form with the evaluation form:

unfairly discriminated against him on the grounds of his age by forcing him to retire at 60 years of age, when his agreed retirement age was 65.

- [50] Mr Deppe's contract of employment provided for an agreed retirement age of 65. It, nevertheless, permitted BMW to amend its policy on the retirement age from 65 to 60. However, prior to doing so, BMW chose to provide its employees with an election to retire at 65 or 60.
- [51] BMW did not provide Mr Deppe with an election/option form which it gave to Provident Fund members in 1997 to make an election between retiring at age 65 or 60. The undisputed evidence, however, indicates that Mr Deppe did, in fact, elect to resign at age 65 in the survey/opinion document which he completed in 1994. This notwithstanding, BMW changed his retirement age from 65 to 60 without his consent.
- [52] Consequently, but for reaching the age of 60 BMW would not have dismissed Mr Deppe. In the circumstances, Mr Deppe has succeeded in making out a *prima facie* case that his dismissal is automatically unfair as envisaged in section 187(1)(f) of the LRA, as BMW unfairly discriminated against him on the grounds of age.
- [53] BMW bears the onus to demonstrate that the reason for Mr Deppe's dismissal does not constitute unfair discrimination on the grounds of age. In an attempt to do so, BMW invokes the provisions of s187(2)(b)⁸ of the LRA arguing that it did not dismiss Mr Deppe because of age, but rather because he reached the normal retirement age of employees in the industry.
- [54] The provisions of section 187(2)(b) of the LRA relating to the normal retirement age only apply to the case where there is no agreed retirement age between the employer and the employee. In this case, Mr Deppe was dismissed before reaching his contractually agreed age of retirement which

⁸ Section 187(2)(a) provides:

'Despite subsection 1(f) –

- (a) A dismissal may be fair if the reason for the 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.'

was 65. Therefore, the provisions of section 187(2)(b) of the LRA relating to the question of a normal retirement age have no application.⁹

[55] Accordingly, when BMW dismissed Mr Deppe on reaching age 60, his dismissal was not based on his agreed age of retirement but rather on an imposed age of retirement without his consent. As a result, BMW has failed to discharge the onus to prove that Mr Deppe's dismissal did not constitute an automatically unfair dismissal in terms of section 187(1)(f) of the LRA.

Unfair Discrimination in terms of the EEA

[56] Mr Deppe contends that on dismissing him when he turned 60, BMW discriminated against him on a ground listed in section 6(1) of the EEA, namely age.

[57] In terms of section 11 (1) (a) and (b)¹⁰ of the EEA, BMW is required to prove on a balance of probabilities that it had not unfairly discriminated against Mr Deppe as alleged; or that such discrimination is rational and not unfair or is otherwise justifiable. BMW has, however, failed to do so. Consequently, Mr Deppe's dismissal also constitutes unfair discrimination on the grounds of age in terms of section 6(1) of the EEA.

⁹ *Metcash* at paras 25-26.

¹⁰ Section 11 of the EEA entitled "Burden of Proof" provides in so far as is relevant:

'(1) If unfair discrimination is the alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—

(a) did not take place as alleged; or

(b) is rational and not unfair or is otherwise justifiable.'

Remedy

[58] In relation to his automatically unfair dismissal claim (Claim A), Mr Deppe sought compensation in the amount of 24 months' remuneration in terms of section 194(3) of the LRA. And in relation to his unfair discrimination claim as envisaged in section 6(1) of the EEA, he sought compensation and damages in terms of section 50(1)(d) and (e)¹¹ of the EEA respectively.

[59] The issue of the quantum of compensation was separated from the merits of the respective claims by agreement between the parties. The parties sought an order to this effect which the Labour Court granted. Thus having found that Mr Deppe's dismissal is an automatically unfair dismissal, as envisaged in section 187(1)(f) of the LRA, and constitutes unfair discrimination on the grounds of age, as envisaged in section 6(1) of the EEA, the Labour Court had to determine whether it would be appropriate to order BMW to pay compensation and/or damages to Mr Deppe in terms of section 193(3)¹² of the LRA and section 50(1) of the EEA.

[60] The Labour Court's discretion to do so was limited to the question of whether BMW is liable to pay compensation and/or proven damages to Mr Deppe in respect of each of these claims, and did not extend to a determination of the quantum of compensation and/or damages it is liable to pay. That determination is reserved for a subsequent determination by the Labour Court in terms of section 194(3)¹³ of the LRA and section 50(2)¹⁴ of the EEA.

¹¹ Section 50(1) of the EEA in so far as is relevant provides:

'(1) except where this Act provides otherwise, the Labour Court may make an appropriate order including—

...

(d) awarding compensation in any circumstances contemplated in this Act;

(e) awarding damages in any circumstances contemplated in this Act;

...

¹² Section 193(3) of the LRA provides:

'If a dismissal is automatically unfair, or if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.'

¹³ Section 194(3) of the LRA provides:

[61] This notwithstanding, the Labour Court awarded Mr Deppe compensation equivalent to 24 months remuneration in respect of both his LRA and EEA claims. It premised this award on the following principle which was articulated in *ARB Electrical Wholesalers v Hibbert*:¹⁵

‘... where claims are made both in terms of the LRA and the EEA and the court is satisfied that the dismissal was based on unfair discrimination as provided for in the LRA and the employee was unfairly discriminated against in terms of the EEA, the court must ensure that the employer is not penalised twice for the same wrong. In seeking to determine compensation under the LRA and the EEA, the court must not consider awarding separate amounts as compensation but consider what is just and equitable compensation that the employer should be ordered to pay the employee for the humiliation he/she suffered in having his/her dignity impaired. The employees automatic unfair dismissal is so labelled because it is based on a violation of his constitutional right (in this case not to be discriminated against on the basis of his age) and his claim under the EEA is for exactly the same wrong, that of being discriminated on the basis of his age.’

[62] The Labour Court, in my view, erred in applying the principle articulated above at the merits stage of the trial, as that inquiry is reserved for the court that will determine the quantum of compensation and/or damages that BMW would be liable for pursuant to section 194(3) of the LRA and 50(2) of the EEA respectively. In other words, it is that court which would need to apply the just and equitable principle required by the LRA.

‘The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal.’

¹⁴ Section 50(2)(a) of the EEA provides:

(a) payment of compensation by the employer to that employee.

¹⁵ *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC) para 33.

[63] Moreover, the Labour Court made the compensation award without giving the parties an opportunity to present evidence or advance argument as to what just and equitable compensation would be under the circumstances. This is a misdirection that prevented a fair trial of the issues. The Labour Court's compensation award in paragraph 3 of its order, accordingly, falls to be set aside on appeal.

[64] In relation to Claim B, Mr Deppe sought both compensation and damages in respect of his unfair discrimination claim in terms of section 6(1) of the EEA. In terms of section 50(1) of the EEA, the Labour Court is empowered to make any appropriate order including awarding compensation and/or damages in any circumstances contemplated in the EEA. The Labour Court, however, failed to exercise its discretion in terms of section 50(1)(d) of the EEA in relation to the question of whether BMW is liable for Mr Deppe's proven damages in terms of section 50(1)(d) of the EEA.

[65] Notably, Mr Deppe averred in his statement of claim, in relation to his unfair discrimination claim, that he has suffered patrimonial loss by being denied five years' worth of remuneration. He accordingly sought an order awarding him damages under the EEA equivalent to five years remuneration. He reasserted this in the evidence he gave at the trial in the Labour Court.

[66] What is clear from this is that Mr Deppe's damages claim is for patrimonial loss (loss of earnings) and not non-patrimonial loss for a violation of his dignity. There is, therefore, no duplication between this claim and his compensation claims under the EEA and LRA, both of which are for impairment of his dignity.¹⁶ Accordingly, the Labour Court ought to have found that BMW is liable for Mr Deppe's proven damages.

[67] There is a fundamental difference between "damages" and "compensation" as contemplated in s50(2) of the EEA. Damages in the EEA relates to an actual or potential monetary loss (patrimonial loss) and compensation relates to the award of an amount as a solatium (non-patrimonial loss). This Court has

¹⁶ *ARB Electrical Wholesalers v Hibbert* (2015) 36 ILJ 2989 (LAC) at para 26.

repeatedly held that a claimant in an unfair discrimination claim, such as we have in this case, may suffer actual (patrimonial) loss) as well as injured feelings or non-patrimonial loss. A damages award for patrimonial loss is aimed at placing an employee in the financial position that the employee would have been, had he or she not been unfairly discriminated against. Compensation for non-patrimonial loss, on the other hand, is “to assuage by means of monetary compensation the insult, humiliation and indignity or hurt” that a claimant has suffered as a result of the unfair discrimination.¹⁷

- [68] All things considered, the Labour Court erred in failing to make an order to the effect that BMW is liable for Mr Deppe’s proven damages for loss of earnings arising from the unfair discrimination he suffered.

Cross-Appeal

- [69] In Claim B, Mr Deppe sought damages for breach of contract equivalent to five years remuneration. The Labour Court found that there was not a shred of evidence to prove the actual loss. Quite apart from the fact that the Labour Court was not allowed to enquire into the quantum of damages suffered by Mr Deppe, it had on a more elementary level omitted to determine whether BMW repudiated Mr Deppe’s employment contract by changing the retirement age from 65 to 60.

- [70] Although Mr Deppe was entitled in the same action to bring an unfair discrimination claim for damages under the EEA as well as a contractual claim for damages for wrongful termination of his contract of employment, Mr Deppe was required to bring these claims in the alternative, which he did not do. Thus, to the extent that Mr Deppe has proved his unfair discrimination claim under the EEA, and would be entitled to his proven damages arising from that claim, he is not entitled to claim contractual damages as well.

- [71] However, even if this Court were inclined to find that Mr Deppe has succeeded in proving that BMW repudiated his employment contract by amending his retirement age from 60 to 65 without his consent, Mr Deppe

¹⁷ *SA Airways (Pty) Ltd v Janse van Vuuren and Another* (2014) 35 ILJ 2774 (LAC) at paras 78-80.

would only be entitled to contractual damages in the amount of one month's notice pay in terms of his contract of employment. His damages are limited to the position he would have been in, under the contract, had the breach not occurred. Mr Deppe's contractual claim for five years pay is, therefore, misplaced as Mr Deppe's contractual claim for wrongful termination of employment is limited to one month's notice pay.

Costs

[72] BMW has only achieved partial success in the appeal. To this end, I consider it fair and just not to award it costs in the appeal. On account of the equivalent result in the Labour Court, I adopt the same approach to the order of costs there.

Order

[73] In the result, it is ordered that:

1. The appeal is partially upheld with no order as to costs.
2. The order of the Labour Court is set aside and replaced with the following order:
 - (i) The Second Applicant's dismissal is automatically unfair in terms section 187(1)(f) of the Labour Relations Act 66 of 1995.
 - (ii) The Second Applicant's dismissal constitutes unfair discrimination in terms of section 6(1) of the Employment Equity Act 55 of 1998.
 - (iii) The Respondent is liable for payment of compensation to the Second Applicant for his automatically unfair dismissal and for discriminating against him on the grounds of age.

- (iv) The Respondent is liable for the Second Applicant's proven damages (patrimonial) for discriminating against him on the grounds of age.
- (v) The determination of the quantum of compensation and damages is postponed *sine die*.
- (vi) There is no order as to costs.'

3. The Cross-Appeal is dismissed with no order as to costs.

F Kathree-Setiloane

Acting Judge of Appeal

I agree

P Coppin JA

Judge of Appeal

I agree

J Murphy AJA

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:

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Ms. H Barnes with Ms. I de Vos

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