IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA44/03

In the matter between:

CASH PAYMASTER SERVICES (PTY)LTD **Appellant**

and

JOHN JAMES BROWNE **Respondent**

JUDGMENT

Zondo JP

Introduction

[1] This is an appeal from a judgment of the Labour Court in a dispute between the appellant and the respondent. The dispute was about the fairness or otherwise of the dismissal of the respondent by the appellant from its employ. The dismissal took the form of a forced retirement. The Labour Court found that the dismissal was automatically unfair and ordered the appellant to pay the respondent compensation in an amount of R 684 621,00 and 70% of the respondent's costs of suit. Leave to appeal was granted by the Labour Court.

The facts

[2] As at February 1998 the respondent was in the employ of a company called Datakor (Pty)Ltd as a general manager for its division called Technology Application Group ("**TAG**"). His conditions of employment included a clause to the effect that his retirement age was 65. He had made all his plans – including financial plans- on the basis that he would retire when he reached the age of 65. To this end he was making contributions to a pension scheme in terms of which he would receive a pension at that age.

[3] On the 23rd April 1998 Datakor (Pty)Ltd sold TAG to the respondent and transferred it to the latter as a going concern as contemplated by sec 197 of the Labour Relations Act, 1995 (Act 66 of 1995)("**the Act**"). A consequence of a transfer of a business or part of a business as a going concern as contemplated by sec 197 of the Act is that the contracts of employment of the employees in such business or part of business transfer automatically from the transferor of the business to the transferee of the business. The result hereof is that the transferee steps into the shoes of the transferor in regard to the employment contracts of the employees employed in the business or part of business concerned. Although the actual transfer of TAG was effected on the 23rd April 1998, the transfer was made to be with retrospective effect from the 1st March 1998.

[4] At the time of the transfer of TAG to the appellant, the terms and conditions of employment of the appellant's employees did not include any specification of a retirement age. However, the appellant had a staff manual which included a clause to the effect that the respondent could amend the provisions of the manual.

[5] On the 31st March 1998 the respondent addressed a letter to Mr Louis Rose of the appellant in which he raised a number of concerns relating to his employment with the appellant which seemed to him to be less favourable than those that he had enjoyed while employed by Datakor (Pty)Ltd. It would seem that subsequently the parties held a meeting to discuss the respondent's concerns. This can be gathered from Mr Rose's letter of the 25th May 1998 which he addressed to the respondent. In that letter Mr Rose addressed among others the respondent's concern relating to the use of a petrol card and also assured him that, should the appellant consider staff retrenchment, the respondent's previous service with Datakor would be added to his service with the appellant "**for calculation purposes.**"

[6] On the 25th May 1998 the appellant's managing director, a Mr Etsebeth, wrote to the respondent. The heading of the letter was: "**Offer of Employment**." The first two paragraphs of that letter read thus:-

> "**We are pleased to offer you the position of manager: Technological Innovations and Services with effect from 1 March 1998.**
>
> **We have a set of values which influence our approach to our work, colleagues and most importantly our customers. As a manager of CPS you have a significant role to play in promoting the positive image of CPS and we seek your active participation in ensuring effective**

customer service at all times in support of your division's drive for legendary service."

[7] After these first two paragraphs of this letter followed a number of paragraphs dealing with conditions of employment under various headings such as emoluments, commission, hours of work, leave, etc. The last topic dealt with in the letter was "**Terms and Conditions of Employment**". Thereunder appeared the following paragraph: "**The terms and conditions of employment set out in this letter must be regarded as a summary of the most prominent aspects. More comprehensive terms and conditions are set out in the CPS Staff Manual and such terms and conditions are subject to amendments by the CPS Management**."

[8] In the concluding sentence of the letter the appellant's managing director asked the respondent to indicate his acceptance of the appellant's offer of employment by signing "**all copies of this Offer of Employment**." On the 11th June 1998 the respondent signed the bottom part of the last page of the offer of employment and, by so doing, signified his acceptance of the offer of employment.

[9] On the 15th June 1998 the appellant and respondent signed a document bearing the heading: "**Articles of Agreement made and Entered into by and between Cash Paymaster Services (Pty)Limited (hereinafter referred to as 'CPS') of the one part, and, John James Browne (hereinafter referred to as 'the Employee') of the other part**". Clause 2 thereof read thus. "**The**

Employee agrees to enter the employment of CPS and to serve at such place and in such capacity, and perform such duties, as CPS may from time to time require.” Clause 3.1 of the document read thus in part. “**The employee undertakes to make himself familiar with the contents of CPS’s Staff Manual as amended from time to time and acknowledges that those terms and conditions contained therein … shall apply to his employment …”** For reasons that will emerge later on in this judgment, it needs to be highlighted at this stage that neither the document headed “**Offer of Employment”** referred to earlier nor the document headed: “**Articles of Agreement …”** contained a clause to the effect that such document contained all the terms and conditions of employment between the appellant and the respondent.

[10] On the 23rd February 2000 the respondent received a document – circulated to employees of the appellant – which contained amendments to the staff manual. The document was dated the 17th February 2000. The amendments created a new clause 9.10.4 of the staff manual. That new clause read: “**Retirement age for all staff is 60 years of age.”** This clause introduced a retirement age for all employees of the appellant – something that had not been there before.

[11] After the respondent had learn’t of the introduction of 60 as the retirement age, he immediately protested to the appellant and made his objection known. On the 23rd February 2000 he wrote a letter to Mr Lawrie Chalmers who was the human resources manager of the appellant objecting to the introduction of 60 as the retirement age for himself. He said in part: “**That is a serious change to the**

plans and employment terms of both Jimmy Malan and me." The respondent stated that all his retirement plans had been made on the basis that he would retire when he attained age 65. He sought a review of the policy and a meeting to discuss the matter.

[12] On the 15th May 2000 the respondent wrote a memorandum to Mr Chalmers. It appears from that memorandum that, subsequent to the respondent's letter of the 23rd February 2000, there had been discussions between the respondent and Mr Chalmers. In the letter the respondent mentioned certain items on which he and the appellant had held discussions and reached agreement following upon his transfer from Datakor (Pty) Ltd to the appellant. He then said: "The subject of Retirement age (sic) was never discussed because it was not an issue for CPS or ourselves. The last three paragraphs of the memorandum read thus:-

> **Additionally, last October CPS offered me a 'Preferred Compensation Plan', the benefits of which do not apply until the policy has been held for 5 years. I must assume that the retirement age of 65 was not an issue for CPS less than 6 months before the change in policy was issued.**
>
> **As I stated in my earlier letter, all my financial affairs are set up to provide best benefit at retirement at age 65 and I have every expectation that I will continue to work until that age. I am most unhappy at this unilateral and arbitrary action on the Company's part to try to change**

> **these aspects of my employment terms and conditions and again, ask that the policy to be reviewed.**
>
> **Finally, as stated in our last conversation, we both have 29 years service because it was agreed that the service with Dakator carried forward into CPS. I attach a copy of both James's and my 25 Year Certificates, dated January 1996 and November 1995 respectively."**

[13] By a memorandum dated the 31st July 2000 Mr Chalmers responded to the respondent's letter and memorandum of the 23rd February and the 15th May respectively. Paragraph 2 of the letter read thus: **"(w)hen we were a part of the FNB Group we did not have a retirement age stipulated in the Staff Manual even though the FNB Group's retirement age was 60 at the time. In January 2000 it was decided at an Exco meeting to formalise the retirement age within the company and the age of 60 was the age that was decided upon. The age is fair when you consider that a large number of companies now have their retirement age at 55 and in some cases 50**." Mr Chalmers went on to say in the letter that, subject to certain conditions, employees who were retired at 60 could be given contract work until a maximum of age 65.

[14] By a memorandum of the 25th January 2001 the respondent lodged a grievance with the appellant concerning, among others, his objection to 60 being made a retirement age applicable to him. The appellant stuck to its position that it would require the respondent to retire in July 2001 when he reached age 60. The respondent was

going to turn 60 on the 8th July 2001 but the appellant wanted him to continue working until the end of July 2001. The respondent also stuck to his position that this was unacceptable to him. By a memorandum dated the 12th March 2001 Mr Chalmers, on behalf of the appellant, offered the respondent a fixed-term contract of employment for his post-retirement period.

[15] In that memorandum Mr Chalmers also stated that fixed term contracts could be offered to the respondent until he attained the age of 65 provided that:

(a) the respondent was healthy enough to continue working;

(b) the respondent was performing at the required level;

(c) the respondent had no disciplinary action that was currently on his file; and,

(d) a suitable position was available.

A copy of the fixed-term contract that was offered to the respondent was attached to the memorandum. As for the duration of the contract clause 2.1 read thus:- "**Subject to 2.2 and 7, this agreement shall commence on 1 August 2001 and terminate on the 31st July 2002**." Clause 22 read thus:- "**Notwithstanding the provisions of 2.1 this agreement shall be terminable by either party giving not less than one-month's notice of termination**."

[16] The respondent rejected the offer of a fixed-term contract of employment. In his evidence he gave at least two reasons to justify his decision in this regard. The one was that, as far as he was concerned, he still had a contract of employment with the appellant which stipulated 65 as his retirement age. The second was that the

clause in the offer of a fixed-term contract to the effect that the contract was terminable by the giving of a month's notice by either party meant that in effect the contract was not really one for a year because, if he accepted it, the appellant could terminate it before the expiry of the term by simply giving a month's notice.

[17] On the 25th April 2001 Mr Chalmers addressed a memorandum to the respondent on the latter's retirement. He maintained the appellant's position. In that memorandum Mr Chalmers drew the respondent's to the fact that he had signed the "**Offer of Employment**" referred to earlier as well as the "**Articles of Agreement**." At the bottom of the first page of that memorandum Mr Chalmers wrote in bold that no mention had been made of a retirement age in the "**Offer of Employment**." Further discussions and correspondence between the parties did not yield any results and the respondent's services were terminated with effect from the 31st July 2001 in accordance with the appellant's policy that the retirement age for its employees was 60. There was no question that the respondent's age would affect his performance of duties if he had been allowed to continue working beyond the end of July 2001. Indeed, all indications are that he was still going to perform his duties satisfactorily.

Proceedings in the Labour Court

[18] A dispute arose between the appellant and the respondent about the fairness or otherwise of the respondent's dismissal. In due course the respondent instituted a claim in the Labour Court for an order declaring that his dismissal constituted an automatically unfair

dismissal and for compensation. The appellant defended the claim and contended that it was entitled to dismiss the respondent when he turned 60 as it had made 60 the retirement age for all its employees. It also contended that in any event 60 was the normal retirement age for employees in the industry in which the appellant operated. As already indicated earlier, the Labour Court found in the respondent's favour and made the order already referred to earlier.

<u>The appeal</u>

[19] From the facts set out above it is clear that the reason for the respondent's dismissal was the fact that he had reached the age of 60. This Court has recently dealt with another case where an employee was dismissed for the reason that he had reached the age of 60 which his employer had just recently imposed unilaterally on its employees as the retirement age. (see **Rubin Sportswear v SACTWU & others [2004]25 ILJ 1671(LAC)**).

[20] Section 9(1) of the Constitution of the Republic of South Africa 108 of 1996 **("the Constitution")** provides that **"(e)veryone is equal before the law and has the right to equal protection and benefit of the law."** Sub-section (2) provides that **"(e)quality includes the full and equal enjoyment of all rights and freedoms**." It goes on to provide that **"(t)o promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken**." In so far as it is relevant to this case, ss(3) provides that **"(t)he state may**

not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, … age… .” Subsection (4) provides that “(**n)o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”** Subsection (5) reads: “**Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”**

[21] Sec 187(1)(f) of the Act reads thus:

> **“(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:-**
>
> **(a) - (e)**
>
> **(f) that the employer unfairly discriminated against an employee, directly or indirectly, on an arbitrary ground, including but not limited to … age…”.**

Sec 187(2)(b) provides an exception to the general rule created by sec 187(1)(f). It reads thus:

> **“(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.”**

[22] The respondent’s dismissal, based as it was on age, will be automatically unfair unless the appellant can show a fair reason for it. The appellant relies on the provisions of sec 187(2)(b) to justify

the dismissal. As already indicated above, that provision provides that, despite the provision of sec 187(1)(f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

[23] The appellant's first contention is that, when there is a normal retirement age for employees employed in the capacity in which an employee is employed, the dismissal of such employee when he reaches such normal retirement age is fair in terms of sec 187(2)(b) of the Act even if there is an agreed retirement age. As I understand the argument that would relate to a case where the employee reaches the normal retirement age before he reaches the agreed retirement age. The appellant contends that in this case there was a normal retirement age applicable in the financial sector which was the sector in which the appellant operated which Mr Chalmers testified was 60. Such normal retirement age occurred earlier than the agreed retirement age of 65.

[24] It was contended on behalf of the appellant that, because the respondent had reached normal retirement age, the dismissal was fair in terms of sec 187(2)(b) of the Act. Counsel contended in effect that the reference in sec 187(2)(b) to "**normal or agreed retirement age**" contemplates that, if the normal retirement age occurs before the agreed retirement age, then the dismissal of the employee on the basis of having reached the normal retirement age provides a fair reason for dismissal.

[25] There is no merit in the appellant's contention. The retirement age dispensation provided for in sec 187(2)(b) of the Act is one that

works on the basis that, if there is an agreed retirement age between an employer and an employee, that is the retirement age that governs the employee's employment. This is the case even when there is a different normal retirement age for employees employed in the capacity in which the employee concerned is employed. 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.

[26] It would make no sense for the Act to make provision for an agreed retirement age if such an agreement would not be binding on the employer if there is a normal retirement age for employees employed in the relevant capacity. What makes sense is precisely what the law is, namely, where there is an agreed retirement age, that agreement governs the position irrespective of the existence or otherwise of a normal retirement age for employees employed in the relevant capacity. Where there is no agreed retirement age but there is a normal retirement age for employees employed in the relevant capacity, the position is governed by the normal retirement age for employees employed in that capacity.

[27] If the appellant's contention were to be upheld, the result would be that, if there was a normal retirement age for employees employed in a particular capacity and the employer and an employee agreed upon a different retirement age, such agreement would be of no use because, on the appellant's contention, it would be the normal retirement age that would prevail over the agreed retirement age. That would include a situation where the agreement containing the agreed retirement age would be a collective agreement. One of the

principles which form the pillars of this Act is the primacy of collective agreements. There is no way that there may be a section in this Act which would let a norm or practice prevail over a contrary provision of a collective agreement. The appellant's contention can simply not be correct. The appellant's first contention accordingly falls to be rejected.

[28] In the light of the above conclusion, I do not need to consider and deal with the evidence of Mr Chalmers about there having been a normal retirement age applicable to the respondent because it is irrelevant in this case as there was an agreed retirement age between the appellant and the respondent which was transferred from Datakor. This conclusion also makes it unnecessary for me to deal with the English cases to which we referred that interpreted the phrase "**normal retiring age**" in the relevant English statute. It is unnecessary to do so because there was an agreed retirement age in this case and, where there is an agreed retirement age, the normal retirement age which differs from the agreed retirement age has no role to play.

[29] The second contention by the appellant was based on the fact that the respondent made himself party to the "**Offer of Employment**" dated 25 May 1998 from the appellant which he signed on the 11^{th} June 1998 as well as the "**Articles of Agreement**" which was signed on behalf of the appellant and by the respondent on the 15^{th} June 1998. The argument was that that agreement (or those agreements) constituted a single memorial to which the parties intended to incorporate all their rights and obligations and that, as no provision for a retirement age was included therein, the

intention of the parties was that there should at that stage be no agreed retirement age between them.

[30] I am unable to uphold the appellant's contention in this regard. The factual position is that, immediately before the respondent signed the "**Offer of Employment**" and the "**Articles of Agreement**", there was in law an agreement between the appellant and the respondent that he would retire at age 65. In other words there was an agreed retirement age between the parties. The appellant's contention amounts to saying that through the "**Offer of Employment**" and the "**Articles of Agreement**", the respondent and the appellant reached an agreement in terms of which the respondent did away with such agreed retirement age. Put differently, it means that the respondent waived his contractual right to retire at age 65. In either case the onus lies with the appellant to prove the parties' alleged agreement to do away with the agreed retirement age of 65 or to prove the waiver. In determining whether the appellant has discharged that onus, the question which arises is this: must that be determined only from the terms and conditions of the "**Offer of Employment**" and the "**Articles of Agreement**" or is it permissible to take into account evidence about the circumstances leading to or surrounding the conclusion of such agreements?

[31] It seems to me that, whether one confines oneself to the terms and conditions of those agreements or one takes into account the evidence relating to the surrounding circumstances, the result would be the same. That is that the appellant has failed to discharge the onus. If one has regard to the terms and conditions of both the

"**Offer of Employment**" and the "**Articles of Agreement**", there is no clause therein to the effect that those agreements contain all the terms and conditions of employment between the appellant and the respondent. There is also nothing that is inconsistent with the continued existence between the parties of the agreement that age 65 would be the retirement age for the respondent. There is furthermore no reason apparent from the two documents why the respondent would have wanted to give this right up. Accordingly, the respondent's conduct in signing those documents did not have in law the result that he gave up his contractual right to retire at 65.

[32] If evidence of the circumstances leading to, or, surrounding, the conclusion of the agreements in the form of the "**offer of Employment**" and the "**Articles of Agreement**" is admissible and should be taken into account in determining the question, in my view that evidence is firmly against the proposition that the respondent agreed to forgo his contractual right to retire at 65. That evidence reveals that, prior to the conclusion of those agreements, the respondent was aware that he had a right to retire at 65, he had arranged his retirement annuities on the basis that he would retire at 65 and had not done anything before to suggest that he might desire to retire earlier than 65. The respondent's reaction when the appellant purported to fix 60 as the retirement age applicable to all employees including him was indicative of someone who had not given up his contractual right to retire at 65. In those circumstances I am of the view that, even if one has regard to evidence extraneous to the written agreements, the appellant failed to discharge the onus that the respondent had agreed to do away with the agreement then binding on the parties that the retirement age applicable to him was

65 or that he had waived his contractual right to retire at age 65. Accordingly, the appellant's contention in this regard also falls to be rejected.

[33] The appellant's third contention was that, by signing the "**Offer of Employment**" and "**the Articles of Agreement**", the respondent agreed that the terms and conditions of employment contained in the CPS Staff Manual became applicable to his employment. It contended that the appellant had the right to amend the respondent's terms and conditions of employment contained in the manual without requiring any further agreement from him. Put differently, the appellant argued that those two agreements gave it the discretion to amend the terms and conditions of employment of the employees to whom the manual applied without having to seek their further consent. The appellant argued that, when it gave notice to all employees that the retirement age would be 60, it was exercising that discretion.

[34] In support of the contention that the appellant had such a discretion to amend the staff manual, the appellant's Counsel drew our attention to the second last paragraph of the "**Offer of Employment**" and clause 3.1 of the "**Articles of Agreement**" The second last paragraph of the "**Offer of Employment**" reads thus:

> **"The terms and conditions of employment set out in this letter must be regarded as a summary of the most prominent aspects. More comprehensive terms and conditions are set out in the CPS Staff Manual and <u>such terms and conditions are subject to amendments by CPS Management."</u>** (Underlining supplied).

Clause 3.1 of the "**Articles of Agreement**" reads thus:-

"The employee undertakes to make himself familiar with the contents of the CPS's Staff Manual as amended from time to time, and acknowledges that those terms and conditions contained therein, which are applicable to the category of employment into which he falls, shall apply to his employment and, in particular, but without derogating from the generality of the aforegoing, acknowledges that the paragraphs covering hours of work, salaries, wages and allowances and leave of absences apply to his employment with CPS."

[35] The appellant's argument was that through the above two paragraphs the respondent agreed that the terms and conditions of employment contained in the staff manual governed his employment and that the appellant could amend them. The Court a quo took the view that such right to amend was limited to amendments of existing terms and conditions and did not extend to introducing new terms and conditions. In this regard it held that, since, prior to the amendment of the staff manual introducing 60 as the retirement age, there was no clause dealing with retirement age, this "**amendment**" was one introducing a new condition of employment and not amending an existing condition of employment, and, was, therefore, not the kind of amendment contemplated by clause 3.1. of the "**Offer of Employment**." I agree with the Court a quo in this regard. If one has regard to the relevant part of the second last paragraph of the "**Offer of Employment**", it refers to the terms and conditions that "**are**

subject to amendments by the CPS Management" as "**such terms and conditions …**". The "**such**" refers to the earlier reference to the "**more comprehensive terms and conditions [that] are set out in the CPS Staff Manual**." In my view this is a good enough reason to justify a rejection of the appellant's contention in this regard. Accordingly, it is rejected.

[36] I am not sure whether it was the appellant's case that, even without relying on the Staff Manual, the appellant was entitled to unilaterally introduce a new retirement age as it did. To the extent that this may have been part of the appellant's case, it is rejected for the reasons given by this Court in regard to a similar argument in Rubin Sportswear.

[37] In those circumstances, the appellant's appeal falls to be dismissed. With regard to costs, the appeal was argued on the basis that costs should follow the result. I shall make a cost order on that basis.

[38] In the premises the appeal is dismissed with costs.

Zondo JP

I agree.

Davis AJA

I agree.

Jappie AJA

Appearances:

For the appellant	:	Adv A Redding SC
Instructed by	:	Webber Wentzel Bowans Attorneys
For the respondent	:	Mr H Kocks
Instructed by	:	Kocks & Dreyer Attorneys
Date of judgment	:	