



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JS171/2014

In the matter between:

LYALL, MATHIESON MICHAEL

Applicant

And

THE CITY OF JOHANNESBURG

Respondent

Heard: 16, 17 and 20 November 2017

Delivered: 29 November 2017

Summary: Retirement – whether the parties agreed on a retirement age. Retirement – whether the employer had a normal retirement age. Dismissal – whether the employer dismissed the applicant automatically unfairly because of his age or whether the applicant retired

JUDGMENT

COETZEE AJ

Introduction

- [1] The parties parted ways after 36 years. After 36 years, a dispute arose as to whether the respondent dismissed the applicant because of his age or whether the respondent retired the applicant after the applicant had reached the respondent's normal retirement age.
- [2] The applicant is a medical practitioner. He joined the respondent during August 1977.
- [3] The respondent is the City of Johannesburg, a local authority established in terms of legislation.
- [4] The respondent amongst others, provides medical services within its jurisdiction. For that purpose, it conducts, amongst others, clinics for the benefit of its residents.
- [5] The applicant initially agreed to work part-time, that is 5 mornings a week. When he joined the respondent, the respondent regarded him as a part-time employee. The respondent's retirement regime at the time did not provide for part-time employees to join a retirement fund. This regime changed during 1984.
- [6] The applicant has two issues with the respondent. The first issue is about an alleged unfair labour practice that allegedly occurred during 1989. The applicant alleges that the unfair labour practice "continued" from 1989 to the date of termination of his employment on 31 December 2013.
- [7] The applicant has a second issue with the respondent. The applicant claims that he was entitled to work until he reached the age of 70.
- [8] The first basis for this claim is that he allegedly had an agreement with the respondent to this effect. The agreement was not in writing but came about in the way described more fully below.

- [9] The second basis for this claim is that the respondent had no normal retirement age, or at least one that applied to the applicant. It is his case that insofar as the respondent wished to rely upon a retirement age referred to in any of the rules of its retirement funds those were not binding upon the applicant. More specifically, the rules of the fund of which the applicant was a member when he left the respondent's service on 31 December 2013 did not bind him because he never in writing agreed to move to that fund from the Johannesburg Municipal Provident Fund (the Provident Fund). In addition, the respondent compelled the applicant to join a retirement fund against his will and thus the rules of the fund should not be binding upon him insofar as it may impose or demonstrate a retirement age. The termination of the applicant's services by the respondent, according to the applicant, constitutes an automatically unfair dismissal because it was based upon his age.
- [10] The respondent relies upon a normal retirement age that applied to the applicant. The respondent denied the existence of any agreement between the parties regarding his retirement age.
- [11] The respondent on 20 September 2013 handed to the applicant a letter to the effect that he had reached the retirement age and his last day of work would be 31 December 2013. The respondent thereby disputes that it dismissed the applicant.
- [12] The applicant represented himself. He presented the facts of his case in minute detail.

The unfair labour practice

- [13] When the retirement benefits regime of the respondent changed during 1984 to provide for part-time employees to become eligible to join one of the retirement funds, the applicant indicated that he was not interested in joining a retirement fund. He became eligible to become a member of one of the retirement funds. Membership was optional and he elected not to join a fund.
- [14] During 1989, the regime changed further and the respondent made it compulsory for its part-time employees to join one of the retirement funds.

They could join either the JMPF or the Johannesburg Provident Fund (the Provident Fund).

- [15] A representative of the respondent telephoned the applicant sometime during 1989 to inform him of his obligation to join the Johannesburg Municipal Pension Fund (JMPF). The applicant was reluctant to do so. When a representative from the respondent asked the applicant to sign an application form to join the JMPF he completed the form and wrote on the form "Against my will". He did so to record his unwillingness to join the fund. One of his concerns was the amount of the pension fund contribution he had to pay to the JMPF.
- [16] The applicant contacted the respondent with regard to the contribution to the JMPF. The respondent's representative then offered him an alternative. The alternative was to join the Provident Fund. The monthly contribution to the Provident Fund was much less than the contribution to the JMPF. The applicant completed the necessary application form without again recording his unwillingness to join a retirement fund.
- [17] At a later stage, the Provident Fund ceased to exist and the Provident Fund's members received from the Provident Fund their dues. It is apparent from the rules of the newly established eJoburg Retirement Fund that various retirement funds at various rates of contribution and benefits preceded the new fund. All of these funds culminated in one retirement fund and all employees were obliged to become members of the eJoburg Retirement Fund.
- [18] The rules of the eJoburg Retirement Fund were not in dispute. The rules provide that any eligible employee becomes a member of the eJoburg Retirement Fund if it is a condition of employment of the employer who is an employer member of the eJoburg Retirement Fund to belong to a retirement fund.
- [19] The applicant thus became a member of the eJoburg Retirement Fund. There is not much that turns on this. The applicant held the view that he unfairly became a member of the eJoburg Retirement Fund because he

never signed an application to join this fund. He submitted that in the absence of his signature he could not have become a member of this fund.

The normal retirement age

[20] The applicant turned 65 on 13 July 2012. The respondent's case was that the respondent had a retirement policy. In terms of the policy, the normal retirement age for its employees is 65. The respondent called a witness from the HR department to testify thereto. She testified that the respondent had a retirement policy in place and that the retirement age applied to the applicant. The applicant challenged the witness on the lack of availability of the policy but at no stage in cross-examination challenged her evidence that the policy existed and applied to the applicant.

[21] The applicant in his statement of case also did not dispute the existence of such a policy. He pleaded that by agreement he was entitled to work until the age of 70. He then further pleaded as follows:

"Alternatively, if and where there is no agreement between the parties as to the retirement age of the Applicant and/or no norm for retirement of persons in the Applicant's capacity or position can be established it should be found that there was an unilateral act by the Respondent and that same amounts to an automatically unfair dismissal ..."

[22] The parties recorded in the pre-trial minute that it was in dispute as to whether there was a norm pertaining to the position held by the applicant in respect of the age on which he was to retire at.

[23] It is common cause that the applicant worked beyond the age of 65. After July 2012 when he had just turned 65 a copy of the pension fund rules was sent to him. Under the heading "Benefits" the rules provided that a Member of the Retirement Fund will become entitled to the benefits at his or her normal retirement age, or at an earlier date agreed with his or her employer but not before he or she reaches the age of 55 or at a later date agreed with his or her employer but not after he or she reaches the age of 70.

[24] The respondent's testimony was that an employee who reaches retirement age could approach his or her line manager with a request to work past the

normal retirement age of 65. Such a request must be made in writing and submitted to the line manager. The line manager would then submit the written request to the HR department. If such a request is approved, the employee who made the request is advised in writing of the approval. The HR department would also send a copy of the written approval to the retirement fund so that the fund would know not to regard the person as having retired.

- [25] It is common cause that the applicant did not avail himself of such a procedure. The respondent's HR department by email dated 28 August 2013 set in motion a procedure to meet with the applicant about his retirement. The applicant was not willing to meet with a representative from HR on a Wednesday for which the meeting was arranged. The applicant did not normally work on a Wednesday and for that reason he refused to attend the meeting. He did not attempt to reschedule the meeting. Such a meeting would have presented to the applicant an opportunity to discuss retirement details and procedures and to be advised of what options were available to him. Unfortunately, he did not take up the opportunity.
- [26] In the period between July 2012 and September 2013, the applicant attended a meeting initially set for 12 October 2012 but held somewhat later with regard to operational issues. The applicant testified that during the meeting he made a statement that he had the right to work until age 70 on the same conditions of service. No one at the meeting refuted the statement or commented on the statement. His statement was met with silence. The witnesses for the respondent denied that he made such a statement.
- [27] The applicant testified that prior to this meeting he had phoned his Union who had informed him that he had the right to work until age 70. The union representative did not inform him why he was entitled to work to age 70. The representative mentioned that he had been "to the meeting" and he knew it was the case. He raised this matter at the meeting initially set for 12 October 2012 on the strength of what his union representative had told him.
- [28] He attended further meetings with his line manager and others during August 2013 and again on 13 September 2013. During the meeting of 13 September

2013, his line manager discussed with him possible changes to the geographical area where he was working. At that time, by agreement, he was working 3 mornings in any week in agreed areas.

- [29] During the period from July 2012 to September 2013, the applicant at a meeting undertook to attend conferences as part of his duties. His line manager at the meeting asked him whether he would be prepared to do so. He was willing to attend conferences. The first conference he attended was on 19 and 20 August 2013. He only attended on 20 August 2013, as 19 August 2013 was not one of his working days. He did not want to create the impression that he was prepared to work on a day that was not agreed upon. He also refused to sign the registration form to attend the conference. He believed that if he were to sign the registration form he would agree to a change to his conditions of employment and thereafter had to work on Monday mornings which was not part of his agreement.
- [30] The fact that he was asked to attend a conference created with him the impression that the respondent had agreed to employ him past his retirement age. This impression was reinforced by the other discussions during this period about changing the geographical area that he had to serve.
- [31] The HR department prepared a letter to notify the applicant of the date of his retirement. The letter is dated 19 September 2013. The letter was handed to the applicant on 20 September 2013. The letter reads as follows:

"NOTIFICATION OF RETIREMENT

It has come to our attendance (sic) that you were due for retirement at the 13 July 2013; the last working day will be 31 December 2013.

We would require you to arrange a meeting with Eugene Du Preez of Human Resources on 011 407-7136 by the 30 November 2013 to complete all relevant documents pertaining to your Retirement Funds.

...

Please do not hesitate to contact Human Resources for further information."

Analysis and submissions

The alleged unfair labour practice

- [32] The applicant submitted that the respondent unfairly compelled him to become a member of the Provident Fund and subsequently without his signature transferred him to the eJoburg Retirement Fund. The respondent's conduct to compel him constituted, in his submission, an unfair labour practice with regard to benefits. In his evidence he also stated that it was an unfair labour practice for the respondent at first only to inform him that he had to join the JMPF instead of informing him of both the JMPF and the Retirement Fund. He rightly did not pursue this in argument as he never pleaded such a case.
- [33] In his evidence, he introduced a further aspect and that is that if he had not become a member of the Provident Fund he would have qualified for a gratuity equal to one month's remuneration for each year of completed service. The applicant never pleaded this as part of his case. He limited his unfair labour practice to the fact that he was compelled to join the Provident Fund.
- [34] The respondent submitted that the applicant in the first place never referred a dispute about an alleged unfair labour practice to the Commission for Conciliation Mediation and Arbitration (the CCMA). Secondly that in 1989 the Labour Relations Act¹, had not been promulgated. As the applicant had failed to adhere to any prescribed timelines, he would not be entitled 24 years after the alleged unfair labour practice to refer the matter to the CCMA or the Labour Court. The respondent further submitted that the applicant recorded his unwillingness to join the JMPF but never recorded such an objection when he joined the Provident Fund. The respondent made the further submission that the applicant for 24 years never acted upon the alleged unfair labour practice. He did not file a grievance or referred the matter to the CCMA or the then Industrial Court.
- [35] In return, the applicant argued that the alleged unfair labour practice continued until 31 December 2013 when he left the employ of the

¹ Act 66 of 1995 as amended.

respondent. He was afraid to file a grievance as he feared victimisation from the respondent.

- [36] The applicant clearly pleaded an alleged unfair labour practice that occurred in 1989 and that the unfair labour practice was that the respondent compelled him to belong to a retirement fund. That was a single incident and it was not an ongoing event. The applicant failed to establish an unfair labour practice under the LRA.
- [37] If there were an unfair labour practice, he did not adhere to the then prescribed time limits. He has not shown that he could still lawfully pursue such an alleged unfair labour practice at the time when he filed his statement of case.
- [38] The applicant did not mention in his referral of a dispute any alleged unfair labour practice. The commissioner after failed conciliation issued a certificate. The certificate records that one of the disputes that remained unresolved, related to an alleged unfair labour practice. The fact that in the certificate mention is made of an alleged unfair labour practice does not mean that the applicant had referred such a dispute to the CCMA when no mention is made in the referral of such a dispute. Nothing turns on this as I have already found that the applicant failed to adhere to the prescribed time limits in terms of the legislation preceding the LRA, and if applicable, the prescribed time limit in the LRA.
- [39] The applicant's claim based upon an alleged unfair labour practice is dismissed.

The normal retirement age

- [40] The respondent through evidence established that at the time of the retirement of the applicant the respondent had a normal retirement age in place.
- [41] Instead of challenging the evidence that there was a normal retirement age policy in place, the applicant challenged the evidence that at the time of his retirement there was no proper system in place alerting the HR department

to the retirement dates of the employees. The evidence was that usually the employees would approach the HR department when they became due to retire. During 2013 the HR Department cleaned up the process and discovered that a number of employees had continued to work past their retirement dates. The applicant was one of them. They were all then informed that they were to retire. This included the applicant. The applicant maintained that the respondent at all times was aware of his age and the respondent's failure to retire him when he turned 65 during July 2012 (but only informed him of his retirement during September 2013) means that the respondent agreed that he could retire at age 70.

- [42] The respondent's witness from HR did not concede that there was a proper reporting system in place to alert HR of the retirement dates of the respondent's employees.
- [43] The applicant attempted to establish an agreement between the applicant and respondent in terms whereof he was entitled to work until age 70. By implication his case was that there was in place an agreed retirement age that applied to him and that such agreement excluded the normal retirement age policy of the respondent.
- [44] The applicant was unable to testify as to the date when the parties entered into this agreement. He relied upon events that "built upon themselves" and culminated in an "agreement". The first fact is that he was allowed to work past age 65. The second fact is that his line manager created the impression with the applicant that the applicant would work until age 70. The line manager by discussing with him after he had turned 65 his geographical area of work and asking him whether he would attend conferences constituted conduct that created such an impression with him. Finally, he relied upon what he had said in the meeting about his right to work until age 70 without that statement being disputed.
- [45] The one pillar upon which the alleged agreement rests is the communication from the union to the applicant. The applicant was unable to provide a substantive basis for the communication. The communication from the union representative does not provide any proof of an agreement as alleged by the

applicant. Fact is that he had no such a notion until he had telephoned the union to ask about his retirement age. The union representative informed him that he was entitled to work until age 70 on the same terms and conditions of employment. This he conveyed to his line manager and others in the meeting. What the applicant conveyed to the meeting was nothing more than the contents of a communication from his union representative. This does not constitute the basis for an agreement.

[46] I am not persuaded that there was a meeting of minds at the meeting in this regard. The line manager in the first instance disputed that the applicant ever made the statement that he was entitled to work until age 70. On the assumption that the applicant made such a statement the applicant lacked any factual or legal basis for the statement. He conveyed hearsay advice from a union representative. He could not have had any factual or legal basis, other than what the union representative told him, of the alleged right to work until age 70. The line manager certainly had no intention to enter into an agreement with the applicant the work until the age of 70. His silence in the face of such a remark from the applicant certainly cannot constitute conduct that created an agreement.

[47] The submission of the applicant also lacks rationality. There is no basis to create a contract in the meeting as alleged by the applicant when the applicant was merely conveying to the meeting his already existing right to work until age 70. What he was telling the meeting, on his version, was that he had already had an agreement to work until 70. That is what the union representative told him. It is not rational to rely upon an existing agreement and on the conclusion of a new agreement in conveying to the other side the existence of an existing agreement.

[48] The applicant has the onus to prove the existence of an agreement to work until age 70. He has failed to discharge such an onus. In the absence of an agreed retirement age the evidence of the respondent stands that a normal retirement age was in place at the time when the respondent retired the applicant.

- [49] The applicant, representing himself, understandably raised ancillary issues that did not contribute to his case.
- [50] In argument, he submitted that it was unfair for the respondent to have a retirement policy that applied to all employees. He submitted that the respondent had to consider the individual circumstances of someone in the position of the applicant before applying the normal retirement age. The submission is not based upon any part of the applicant's case as pleaded. Never pleaded that if there was a retirement policy that such a policy was unfair. The applicant also had an opportunity to approach his line manager with a request to work for a longer period. He did not avail himself of this opportunity.
- [51] The applicant submitted that the respondent in fact had in place a reporting system to alert the HR department of, amongst others, his retirement age. According to him, there must have been some secret agreement or arrangement between the HR department and his line manager to let him work past age 65 and then to, at will, retire him. The applicant was unable to direct the attention of this Court to any evidence about the reporting system. The witness from HR testified that there was no such a proper reporting system in place at the time.
- [52] The applicant made the submission that the respondent was obliged to call an expert witness to establish the normal retirement age of the respondent. In the absence of expert evidence, the respondent failed to establish a normal retirement age. The submission fails in the first instance because the applicant has not challenged the respondent's evidence that such a policy existed. For this submission, he relied upon the judgement in *Deon Bos vs Eon Consulting*.²
- [53] This authority does not support the applicant's submission. In the *Deon Bos* matter³, the Court dealt with how an employer could establish a normal retirement age with reference to the industry to which the employer belongs. In such a case, it is preferable that an expert testified:

² Unreported JS948/2014 dated 12 August 2016

³ *Supra*.

"[41] A retirement age that accords with the norm, as contemplated by Section 187(2) (b), can be established both internally in an employer, or externally in a particular industry if there is no norm in the employer itself. An example of the application of an industry norm to establish a normal retirement age can be found in *Botha v Du Toit Vrey and Partners CC* where the Court dealt with and accepted the retirement age set in the municipal sector for the particular profession of assistant appraiser, which was 65 years of age, even in the absence of a norm in the employer.

[41] When relying on an industry norm, it is critical that the employer presents credible evidence, preferably by an expert, as to what would constitute the particular industry standard or norm, in order to establish the retirement age in that industry. A comparison to the retirement age applicable in other directly comparable employers in the industry would also be a consideration. If the industry is organized or regulated, then the provisions of industry collective agreements or other form of published regulation in that industry would be an important consideration.

[42] Where it comes to the norm in an employer, this must equally be established by evidence. This evidence would include evidence about a practice in the employer, when other employees may have retired, policy provisions or regulation, or pension / provident funds rules or annuity provisions. Another consideration would be how the employer had treated other employees who attained the same age in the past. The easiest way of establishing a retirement age norm in an employer would of course be by way of a retirement policy.

[43] It is not required that employees have to be consulted on, or that they have to agree to, the retirement age as stipulated by the employer in the retirement policy. In principle, an employer is entitled to unilaterally fix, and then implement, a normal retirement age. In *Bedderson v Sparrow Schools Education Trust* the Court said the following, with specific reference to the introduction of a retirement policy:

'In my ruling I concurred with the view that employers are entitled to introduce policies and procedures regulating elements of the relationship between themselves and their employees.'

- [54] What the judgment in *Deon Bos*⁴ says is that the employer must present credible evidence of the normal retirement age. The judgment does not say that when the employer internally determines a normal retirement age it must present expert evidence to prove the normal retirement age.
- [55] The judgment further emphasises that the employer may adopt a normal retirement age without the cooperation of the employees provided it is not in conflict with an agreement between the employer and the employee.
- [56] The submission of the applicant that the respondent should have called an expert to establish the normal retirement age is without substance.
- [57] The applicant submitted that it was unfair to issue a letter of retirement to him without any prior consultation. He submitted that it could not be that an employer could act unilaterally in implementing an employee's retirement. According to him, retirement is not something that could be left to the employer only.
- [58] The applicant has not pleaded any such case. I have already indicated that an employer is at liberty unilaterally to introduce a retirement age and to act in accordance with the retirement age. Of course, the employer cannot make such a retirement age retrospective or apply it in breach of an agreement with an employee. The applicant has not shown any agreement to the contrary. There is no substance in this submission.
- [59] The applicant made it abundantly clear that he was not pursuing a claim based upon victimisation. The manner in which he pleaded his case created the impression that he might have suggested that the respondent victimised him for not agreeing to a change to the geographical area that he had to serve. The applicant conceded that the respondent at no stage required of him to render the services in a geographical area that he had not agreed to. On one occasion, he in fact attended to render services in such an area but he did so willingly.
- [60] The applicant has not discharged the onus to prove an agreement with regard to his retirement age. In the absence of an agreement, the normal

⁴ Supra

retirement age of the respondent applied to him when the respondent retired him on 31 December 2013.

[61] The applicant's claim that the respondent automatically unfairly dismissed him because of his age is dismissed. I have already indicated that his claim that he suffered an unfair labour practice has met the same fate.

[62] The respondent has not asked for a cost order. The applicant has not incurred legal costs. He represented himself in person.

[63] I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: In person

For the Respondent: Advocate L Mkhize with Advocate M Mafisa

Instructed by: Mncedisi Ndlovu & Sedumedi Inc

LABOUR COURT