THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J791/16

In the matter between:

NTM OBO ISRAEL MOTHAPO **Applicant**

and

INTERWASTE (PTY) LTD **Respondent**

Heard: **7-8 November 2019**

Delivered: **13 November 2019**

Summary: Dismissal based on age – presumed to be an unfair discrimination unless – shown that the age is one agreed upon for retirement or a normal retirement one. Where an employer relies on a normal retirement age, it must provide testimony in support of the norm for the category to prove on preponderance of probabilities that the age at which an employee was made to retire is the normal one. Held: (1) The applicant has been automatically unfairly dismissed. (2) The respondent is ordered to pay to the applicant 24 months' compensation. (3) The respondent is interdicted and restrained. (4) The respondent to reimburse the applicant.

JUDGMENT

MOSHOANA, J

Introduction

[1] In this referral, there is no dispute that the applicant's employment was terminated on 31 August 2015 on the basis that he had reached the age of sixty years. It is also common cause that at the time of the dismissal, the applicant was aged 60. The applicant was aggrieved by his dismissal and referred a dispute alleging automatically unfair dismissal. His contention being that the agreed retirement age was the reaching of age 65. In justifying the dismissal, the respondent alleged that the applicant had reached the normal retirement age, being 60 years, thus his dismissal is not unfair.

Background facts and evidence.

[2] It is common cause that the applicant commenced employment with the respondent on 19 May 2010 as a code 14 driver. On 16 June 2015, the applicant turned 60. Having turned the age, he was asked to leave. He offered resistance, since in his knowledge, he was to retire at age 65. He was offered a one year fixed term contract which he rejected. On 7 July 2015, the applicant received notification from the Human Resources Director (Rajas Pillay) notifying him that his last day of service was 31 August 2015 as he had reached a compulsory retirement age of 60 years. His trade union took issue with his "forced retirement" and wrote a letter protesting the retirement. The response to the letter is of critical importance, regard being had to the respondent's defence. In parts, it read thus:

> "Mr Mothapo's retirement age is 60 as per the normal practice in our business… While the benefit statement makes provision for retired at 65, it does not (and cannot) enforce the company to retire its employees at that age – it is a company prerogative.
>
> In this regard I wish to draw your attention to the **Government Gazette No 27713, dated 1 July 2005** – also known as the Collective Provident Fund Agreement… Here the definition of retirement age is clearly provided and in section 5 (j) and (k), clarity is provided on when 60 and when 65 would be considered the applicable age for retirement."

[3] The applicant's testimony is briefly that as set out in a benefit statement dated 28 February 2014, his retirement age was recorded as being 30 June 2020, at which time he would have turned 65. In August 2015, he had not reached age 65. The respondent on the other hand tendered the testimony of Rajas Pillay. I interpose to say, her evidence was most confusing and inconsistent with the written documents, in particular the above quoted letter, which she contributed into its creation. On the one hand she placed reliance on the collective agreement and its interpretation by the officials of the bargaining council.

[4] Also, she testified about a "common practice" of retiring at the age of 60. She further testified that those employees who joined prior to 1 June 2005, could, in terms of some collective agreement – not produced in court –, retire at age 65 and those who joined after, like the applicant who joined in 2011, should retire at 60, as set out in the collective agreement of 2005. She could not testify as to when did the "common practice" commence as she only joined the respondent after 2005. She referred the Court to letters of termination of other employees in support of the so-called "common practice". She speculated that the information contained in the benefit statement of the applicant might have been referring to the historical position. Later on and in re-examination, she vaguely testified about drivers requiring PDPs (Public Driving Permits), which could not be issued to persons over the age of 60.[1]

[5] This matter could have been concluded in one day, however, Mr Hutchinson, appearing for the respondent, sought an adjournment to the following day in order to present a further witness for examination. Lo and behold, on the following day no further witness was presented[2].

[1] Interestingly, this version was never put to the applicant, nor was it mentioned in the letter in response to the trade union's protest letter.

[2] I must state, this appeared to me as a further day to earn an appearance fee. No explanation was provided to the Court as to what became of the witness that the Court adjourned the matter early for. This is unacceptable, taking into account the fact that the matter could have been concluded a day before.

Argument

[6] After presenting short heads, Mr Hutchinson argued that reliance is placed on the norm as opposed to an agreement. He rightfully conceded that the alleged norm contradicts what the benefit statement records. After pointing out that the joining date is incorrectly reflected on the benefit statement, he submitted that it is not the respondent's case that the veracity of the benefit statement is challenged. He further submitted that in the event the Court finds in favour of the applicant, he should not be afforded maximum compensation because he rejected a one year fixed term contract.

Evaluation and discussion.

[7] Presumably, dismissing an employee on the basis of age amounts to unfair discrimination. But, that presumption is rebuttable once the provisions of section 187 (2) are met. The section provides thus:

> "(2) Despite subsection (1) (f)-
>
> (a) …
>
> (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."

[8] In *casu*, it is in dispute that age 60 is either agreed or a normal retirement age. On application of the principle enshrined in *Schweitzer v Waco Distributors (A division of Voltex (Pty) Ltd)*[3], which is (a) was the employee's dismissal based on age? (b) If the answer to question (a) is in the affirmative, the next question is, did the employee have a normal or agreed retirement age for persons employed in the capacity in which the employee was employed? If yes, what was it, (c) if the answer to the first part of the question in (b) is in the affirmative, the next question is; had the employee reached such retirement age at the time

[3] [1999] 2 BLLR 188 (LC).

of dismissal? If so, then the dismissal of the applicant is fair, this court must evaluate the defence of the respondent.

[9] As pointed out, the respondent relies on the norm and not an agreement. The LAC in *Rubin Sportswear v SACTWU and Others*[4] made it clear that an employer may not just wake up and say a particular age is a norm. The Court specifically stated the following:

> "A retirement age that is not an agreed retirement age becomes a normal retirement age when employees have been retiring at that age over a certain long period – so long that it can be said that the norm for employees in that workplace or for employees in a particular category is to retire at a particular age. An example would be where, without any formal agreement, employees in a particular category have over 20 years been retiring at a particular age without fail. The period must be sufficiently long and the number of the employees in the particular category who have retired at that age must be sufficiently large to justify that it is a norm for employees in that category to retire at that age. If the period is not sufficiently long but the number is large, it might still be that a norm has not been established. And if the period is very long but the number of employees in the particular category who have retired at that age is not large enough, it might be difficult to prove that a norm has been established."[5]

[10] In order to prove a norm, an employer is required to present evidence that shows on a preponderance of probabilities that such was the norm. The respondent failed dismally in that regard. As a point of departure, the fact that the applicant was offered a one year fixed term contract militates against the alleged norm. Had the applicant accepted the offer, as a driver, he would have worked beyond the alleged normal retirement age. The number of employees that the respondent sought to rely on as an indication of the norm is woefully insignificant. In others, like Marais, the termination notice was issued on 19

[4] [2004] 10 BLLR 986 (LAC)

[5] At para 22I-J page 993 to 994 at A-B+

June 2014, and on the same date she was offered a one year fixed term contract, which was extended until 15 July 2015.

[11] It is apparent to me that this defence of 60 years being a norm is nothing but an afterthought. It is clearly apparent that the respondent sought to rely on the provisions of the collective agreement of 2005. In the statement of defence the following is apparent:

> '2.4 In the terms of the Collective Provident Fund Agreement, it is recorded that where there is consent of an employer, an employee may retire early at the age of 55 years of age and that the normal retirement age is not earlier than 60 and not later than 65 years of age.
>
> 2.5 In terms of the practice of the Respondent and in accordance with aforegoing provisions, the retirement age applicable to the Applicant was in fact 60 years of age. In terms of the Government Gazette 27713, an employee who joined the NBCRFLI Provident Fund before 1 July 2005, could be retired at the age of 60. This was directly applicable to the Applicant.'

[12] During her testimony, Pillay, relied on the definition clause as well as clause 5 (2) (j) and (k) to advance the respondent's case. Mr Hutchinson correctly conceded that the definition of a normal retirement age states that the age would be specified in an employee's conditions of service. He further conceded that the definition clause specifies ranges – 60 to 65 and does not specify a particular age. The respondent has failed to provide the Court with the applicant's employment conditions. Clause 5 (2) (j) and (k) does not assist the respondent. It still requires proof of the retirement age as specified in the conditions of service. Having realised these insurmountable difficulties a *volte face* was made to use the so-called "common practice".

[13] Accordingly, this Court is not satisfied that the respondent succeeded in showing that 60 years is a normal retirement age. On the probabilities, account taken of the benefit statement, the agreed retirement age between the applicant

and the respondent is age 65. It being common cause that the applicant had not reached the agreed age at the time of termination, his dismissal is automatically unfair.

The issue of the relief.

[14] The applicant did not wish to be reinstated. In terms of section 194 (3) of 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. The respondent submitted that the applicant should not be awarded maximum compensation for reasons that he rejected a one year fixed term offer. It is instructive to note what the LAC said in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*.[6] It said:

> '[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.
>
> [23] Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a *solatium* and it constitutes a solace to provide satisfaction to an employee who's constitutionally protected right to fair labour practice has been violated. The *solatium* must be seen as monetary offering or pacifier to satisfy the hurt feeling of the employee

[6] [2015] 36 ILJ 2989 (LAC)

while at the same time penalizing the employer. It is not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

[24] The determination of the quantum of compensation is limited to what is "just and equitable". The determination of what is "just and equitable" compensation in terms of the LRA is a difficult horse to ride…In my view, and as I said earlier, because compensation awarded constitutes *solatium* for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action…for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a *solatium* because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patrimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA. In *Minister of Justice & Constitutional Development v Tshishonga*, this court in an award of *solatium* referred to a delictual claim made under the *actio iniuriarum* for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but not limited to:

"…the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place…"

[25] The above *dictum* should serve as an appropriate guideline in determining what is just and equitable compensation that can be awarded under s 194 (3) of the LRA.

[15] This Court doubts that the offer made to the applicant was genuine. I say so because it was conditional. In the correspondence of 01 October 2015, the HR Business Partner recorded thus:

> "We shall in good faith, extend another fixed term contract to Mr Mothapo, on the condition that he is found medically fit for duty, as with all our employees."

[16] If the applicant was found to be medically unfit, he would have not been retained on a fixed term contract. In any event, the applicant was left with a solid five years before his retirement. It became clear to me that the applicant was hugely humiliated by the turn of events. He had an incomplete house, which he had planned to complete before retirement. He was distressed by this unlawful conduct on the part of the respondent. In the exercise of my discretion[7], it is just and equitable to award the applicant the maximum compensation.

[17] In terms of section 193(3) of the LRA, if a dismissal is automatically unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances. This section empowers this Court to, even if not prayed for, issue interdictory relief. It is apparent from various correspondence that the respondent has mentioned to its employees that the age of 60 is a compulsory retirement age. On the facts of this case, it has been established that it is not a norm to retire at 60. A greater possibility exists that the respondent would continue with this practice of suggesting that 60 years is a compulsory retirement age. Thus, it is appropriate to issue interdictory relief against such a discriminatory practice.

[18] For all the above reasons, the following order is made:

Order

[7] See *Dorey v TSB Sugar* Case no JS287/2012 delivered on 03 May 2017 at paragraphs 42 – 45 of the judgment and *TSB Sugar v Dorey*. Case no JA86/17 dated 19 February 2019 at paragraphs 103 of the judgment.

1. The applicant's dismissal is automatically unfair.
2. The respondent is ordered to pay to the applicant an amount of **R 202 840.56** (Two hundred and two thousand eight hundred and forty rand and fifty-six cents) being an equivalent of 24 months' remuneration at the rate of **R 8 451.69** (Eight thousand four hundred and fifty-one rand and sixty-nine cents) per month.
3. The respondent is restrained and interdicted from unfairly discriminating its employees on the basis of age.
4. The respondent must reimburse the applicant his proven travelling expenses for the two days of court attendance.

_____

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : In Person.

For the Respondent : Advocate W Hutchinson.

Instructed by : Fluxmans Inc, Rosebank.