THE LABOUR COURT OF SOUTH AFRICA

AT CAPE TOWN

Of interest to other judges

Case no: C 383/2021

In the matter between:

PATRICK VILJOEN **Plaintiff**

and

PENINSULA PLUMBING AND ENGINEERING WROKS (PTY) LTD **Defendant**

Heard: 23-24 July and 9 August 2024

Delivered: 15 May 2025

Summary: (S 187(1)(f) of the LRA – Alleged automatically unfair dismissal base on age- claim that all employees were due to retire at 60 and that it was automatically unfair to retire the applicant at 60 when others were permitted to work beyond that age – employer had a two-tier retirement age system applicable to different categories of employee – S 187(2)(b) of the LRA applicable – No automatically unfair dismissal)

JUDGMENT

LAGRANGE, J

Nature of the application

[1] The plaintiff, Mr P Viljoen ('Viljoen'), worked as an artisan plumber for the respondent firm ('Peninsula') until his service was terminated by the firm on 12 October 2020. He started working for the firm on 4 August 2008. Viljoen claims that the firm terminated his services on account of his age and that it was automatically unfair in terms of s 187(1)(f) of the Labour Relations Act, 66 of 1995 ('the LRA') read with section 6 of the Employment Equity Act 55 of 1998 ('the EEA'). His claim is that it was automatically unfair that he was required to retire at age 60 whereas some other employees were allowed to continue working beyond that age.

[2] Peninsula disputes his claim. According to the firm, Viljoen's service was terminated on him reaching the normal retirement age of 60 which applied to employees engaged in his occupational category in terms of the Building Industry Bargaining Council agreement and in terms of PPEW's own policy. It is common cause that Viljoen turned 60 years old in October 2020.

[3] Viljoen had also contended, in the alternative, that he had been automatically unfairly dismissed on account of being a shop-steward. When the matter was argued an alternative claim of unfair dismissal under s188 of the LRA was advanced, but that was not a case which had been pleaded, so the court could not consider it.

Factual background

[4] Viljoen was advised on 28 September 2020 that he was due to retire on 12 October 2020 and that his retirement age of sixty was *"as per the Building Industry Bargaining Council and that of PPEW"*. On 8 October he lodged a formal grievance alleging he was being unfairly denied further employment after his retirement. He identified two other employees, Mr M Ragmaan ('Ragmaan') and Mr C Mthiya ('Mthiya'), whom he claimed were respectively four and six years older than him but were still working beyond the age of 60. He also questioned if he was being denied the right

to work after 60 because he was a shopsteward who had to fight the company for workers' rights.

[5] Mr S Marten ('Marten"), the firm's human resource manager, responded the same day, stating that his grievance would not be entertained. Firstly, Ragmaan held the position of foreman and had "a pertinent role whilst working with the supervisor Waja on the projects needed". Secondly, Mthiya was not a site employee but was employed at HQ Operations where a retirement age of 65 years applied. His allegation of victimisation as a shopsteward was dismissed as being far-fetched.

[6] Viljoen pointed out that Ragmaan was an artisan plumber like himself doing similar work. He was a scheduled employee like all others on site. If he was a supervisor, he would be classified as an unscheduled employee. Nonetheless, Viljoen agreed that Mthiya occupied a foreman's position at the foreshore site he was employed on at the time of Viljoen's retirement and was known as a "62 employee". This was reference to employees specifically entrusted with health and safety functions at the workplace under the Occupational Health and Safety Act, 85 of 1993 ('OHSA') . He claimed to have been unaware that there were two retirement policies governing different classes of employee. He felt PPEW's conduct in terminating his service at age 60 amounted to a form of discrimination based on age.

[7] Viljoen also said he spoke up for workers when the employer did things it was not supposed to. An example was of this was in 2017 when he claimed the firm changed conditions of employment which resulted in workers being paid only 9 days fortnightly instead of 10. He also took up the issue of underpayments for family responsibility leave. Marten queried why he was questioning the company's actions when he knew it could not victimise employees. He became a NUM shopsteward in 2018. Under cross-examination he conceded that there were four unions operating at the firm, which was used to dealing with them. When he was challenged why there was no correspondence from NUM complaining about him being victimised and that the issue was only raised by him when he was retired, he said NUM was not interested in assisting him and that, while

victimisation was part of his complaint, the main issue was his complaint about age discrimination.

[8] He testified that he was employed permanently in 2008 after he had worked for more than three months on probation. At that stage he had no written contract, let alone one he allegedly signed in Marten's presence, as the latter testified. It was only in 2018 he received a copy of his contract, when he needed one for his bank and his attorney had requested it from PPEW. He claimed he had never signed the contract himself. When Viljoen requested the copy of his contract, Marten said he would have to draw one up as there was no copy of his own written contract. Consequently, the copy obtained at that time was unsigned.

[9] Clause 4.6 of the unsigned contract he received from Marten stated that *"The employment shall terminate automatically on the employee's 60th birthday."* In an annexure to the employment contract in which details nature and expected duration of the work were stipulated, it also had a provision which read *"1. With reference to paragraph 4 of the Permanent Contract of Employment, it is recorded that it is the company's retirement policy to retire employees, both permanent and temporary on attaining the age of 60 years old"*. Viljoen read this to mean that all employees had to retire at age 60.

[10] In the discovery process, PPEW produced, what it claimed was a scanned copy of a signed annexure to Viljoen's contract of employment and Form 5 of Employment Equity Act 55 of 1998. Both documents were dated 19 June 2017 and bore signatures which Viljoen conceded "looked like" his signature. One of the annexures was a standard annexure to PPEW's employment contracts and contained a stipulation that the retirement age was 60 for both temporary and permanent employees.

[11] Much was made of the fact that these two signed documents were not produced when Viljoen had previously asked for a copy of his contract in 2018 and PPEW but the firm could not provide any signed documents, yet later these signed documents, purportedly signed in 2017, had come to light afterwards. Marten testified that when Viljoen's attorney had requested a copy of the contract, he had been unaware of the existence of

these two backed up scanned documents bearing Viljoen's signature, which had been discovered as attachments to an email. He maintained that he had in fact given the contract and the two annexures to Viljoen on site for his signature, but it was possible he had not returned the signed contract itself because he wanted more time to read it. The firm also produced a copy of a contract of another artisan plumber concluded in 2019, which stipulated that his employment would terminate automatically on his 60th birthday. The contract had similar annexures to the ones apparently bearing Viljoen's signature. In any event, the annexure confirming the retirement age of 6o is one of the documents, that Viljoen appeared to sign.

[12] After the court had dismissed PPEW's application for absolution from the instance at the close of Viljoen's case, but before the employer began to lead evidence in support of its case, it produced a copy of its Retirement policy. The introduction to the policy stated: "*The company has adopted the normal retirement age of 65 years for office administration staff, supervisory and foreman levels and that all other site worker employees will have a retirement age of 60 years as per this policy and in-line with the Building Industry Bargaining Council (BIBC) rules of the relevant retirement funds.*" There was a dispute about the late introduction of the document, but it was admitted because it had been part of PPEW's pleaded case that Mthiya worked in the firm's head office and was subject to a retirement age of 65 applicable to persons in his category of work. Moreover, in his evidence in chief, Viljoen had acknowledged the existence of a two-tier retirement age at the firm for different categories of staff but argued that such a differential policy was inherently unfair.

[13] When Viljoen was shown the provisions of the Building Industry Pension Scheme (Western Province), which state that the normal retirement age is 60, he claimed it was the first time he had seen that. Nonetheless, he did not dispute this evidence.

[14] It was put to Viljoen under cross-examination that the scope of the bargaining council main collective agreement did not cover *"clerical employees, supervisory staff and administrative staff, unless hourly paid"*

and that is was why it did not cover Mthiya who was designated as a despatch supervisor and was working at head office. Viljoen responded that this did not make it non-discriminatory, and he contended that it conflicted with PPWE's own company policy which made no distinction between categories of employee, based on the text of the employment contract, which only stipulated one retirement age of 60.

[15] Marten testified that Mthiya was a salaried employee but hourly rates of pay were entered on all certificate of service forms issued under s 42 of the Basic Conditions of Employment Act even if they were paid a monthly salary, hence it did not mean that Mthiya or Ragmaan were hourly paid.

[16] Viljoen reluctantly conceded that Ragmaan was in a more senior position as a foreman on the foreshore site where he worked, even though he disputed that the project had any 'special' status. In Ragmaan's certificate of service his job designation was "Foreman-Artisan". It was also not disputed that the foreman position came with certain health and safety responsibilities.

[17] It is true that a copy of Viljoen's full contract of employment was not produced. However, a copy of a signed contract of another plumbing artisan stipulated a retirement age of 60. That too had an annexure stipulating the retirement age of 60, which was identical in form to the one that Viljoen appeared to have signed. At first glance, it might seem odd that PPEW only came up with the EEA form and Annnexure which appeared to bear Viljoen's signature after it previously failed to locate a signed copy of his contract, but the explanation that the two other documents were only located because they had been attached to an email was not implausible. The fact that the forms had been required for EEA purposes, means there was a needfor the firm to have obtained his signature at the time. Moreover, even though Viljoen denied signing the two documents, he conceded that the signatures looked like his. The probabilities favour the view that he had in fact signed the two annexures, one of which confirmed a contractual retirement age of 60.

[18] Viljoen also could not dispute that six other employees working in the same category as himself were also retired at age 60. He further agreed

that Ragmaan retired at the end of the Foreshore project but argued that he was already older than 62 at that stage, because he recalled Ragmaan's sixtieth birthday being celebrated in 2016. Viljoen's recollection is corroborated by Ragmaan's identity number appearing on his certificate of service which shows he would have been 64 by the time he retired on 10 August 2020. Mthiya's certificate of service showed he retired in December 2019, having turned 65 in January that year. Viljoen's issue with the retirement of both these employees was that they ought to have been retired at age 60 which he maintained was the retirement age applicable to all employees.

[19] Marten explained that the reason for different retirement ages at PPEW was the nature of the work done. The employees falling under the bargaining council agreement were generally engaged in more physically demanding work than the supervisory and administrative personnel, hence the different retirement ages of 60 and 65, respectively. Clause 1 of the Retirement policy did provide for distinct retirement ages for two categories of employee and Mthiya and Ragmaan fell into the 65 year age category and Viljoen into the 60 year age group when it came to retirement dates.

Evaluation

[20] On balance, most of the material evidence points to Viljoen being subject to a retirement age of 60, even if the full signed version of his own contract could not be produced. The evidence supporting this is: the rules of the Building Industry pension scheme; the annexure which Viljoen most probably did sign, which stipulate a retirement age of 60; clause 1 of the PPEW retirement policy; the undisputed fact that a number of his peers were also retired when they reached the age of 60, and the retirement provision of the contract of another permanent artisan plumber. Moreover, even though Viljoen was reluctant to concede that the normal retirement age in the industry and the firm was 60, his claim was implicitly premised on the inconsistent application of a rule about having to leave employment at age 60.

[21] Mthiya and Ragmaan were not in the same occupational category as Viljoen and the six other artisans. The evidence was that Mtshiya was not employed on site but held a position as a dispatch supervisor could not be disputed. In the circumstances, Mthiyane was clearly in a category of employees which was not subject to a normal retirement at 60 but whose normal retirement age was 65. That said, he was not retired at 65, but was kept on for another ten months after reaching 65.

[22] As mentioned, Viljoen also conceded that, even if Ragmaan was also an artisan, he occupied a foreman's position, which was corroborated by his certificate of service. He did not dispute that the role Ragmaan performed entailed OHSA responsibilities which were not part of the artisan's ordinary functions. Viljoen claimed he too could have been appointed as a foreman, but he was not. PPEW had explained it had kept Ragmaan in employment because of the work he was performing as a foreman on a particular foreshore site. In any event supervisory staff had a retirement age of 65. As it happened, Ragmaan retired earlier when he was 64.

[23] There might well be a legitimate argument to be made that having different retirement ages for different categories of staff is unfairly discriminatory, but s 187(2)(b) of the Labour Relations Act, 66 of 1995 ('the LRA') has specifically stipulated that such differentiation acceptable, in stating :

> *"(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."*

[24] In passing, it is noteworthy that ILO Convention 158 adopted in 1982, does not specifically identify age as an illegitimate ground of discrimination *per se,* though it does not regard the illegitimate reasons it does identify as forming a closed list[1]. ILO Recommendation 162 concerning "older

[1] Article 5 of the Convention, which South Africa has not ratified, states:

workers"[2] urges ILO member states not to discriminate against such workers *inter alia* in relation to employment security, subject to national law and practice relating to termination of employment[3]. It recommends that mandatory retirement provisions should be examined in the light of measures to ensure that retirement should be voluntary and that eligibility for old age pensions should be flexible[4]. By enacting s 187(1)(f) of the LRA, the legislature accepted the general principle that discrimination based on age is prohibited but permitted an exception under s 187(2)(b) when the retirement takes place at a retirement age established by agreement or practice.

[25] Whatever the criticism of mandatory retirement ages might be, *in Motor Industry Staff Association & another v Great South Autobody CC t/a Great South Panelbeaters* [5] the Labour Appeal Court affirmed the right of employers to retire employees who have reached or passed a normal or agreed retirement age under s 187(2)(b), and rejected an argument that the provision is unconstitutional:

> *"[18] … Properly construed, s 187(2)(b) does not contemplate a new tacit contract coming into existence between an employer and employee (by virtue of their conduct) which governs their employment relationship when the employee continues to work for his or her*

"Article 5

The following, inter alia, shall not constitute valid reasons for termination:

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

e) absence from work during maternity leave."

[2] Ragmaan62 - Older Workers Recommendation, 1980 (No. 162)

[3] Article 5(c)

[4] Article 22 read with Article 21. See further the discussion in C Bosch, Section 187(2)(B) and the Dismissal of Older Workers - is the LRA Nuanced Enough? (2003) 24 *ILJ* 1283 at 1293 ff.

[5] (2022) 43 ILJ 2736 (LAC)

employer after reached the normal or agreed retirement age. In the same vein, s 187(2)(b) does not envisage a tacit amendment of the contract to the effect that the employee would continue to work indefinitely or that a new retirement age applies, as is contended for by the appellant in this appeal.

[19] This interpretation gives effect to the right that accrues to an employer in terms of s 187(2)(b) to fairly dismiss an employee who has passed the agreed or normal retirement age. Significantly, it is consistent with the purpose of s 187(2)(b) which is to allow the employer to dismiss employees who have passed their retirement age to create work opportunities for younger members in society.

[20] I disagree with the appellants' submission that this interpretation of s 187(2)(b) of the LRA is inconsistent with the right to fair labour practices in s 23 of the Constitution 8 because an employee's right to a fair dismissal is integral to that right. There is a distinction in the value that informs the content of fairness relative to employees who have reached retirement age and those who have not. While the dismissal of an employee, on the grounds of age, prior to reaching retirement age may have the effect of impairing the right to human dignity of that employee, the dismissal of an employee who has passed his or her retirement age would not. This is because employees with agreed or normal retirement dates anticipate that they will work until they reach retirement age and are expected to prepare financially for their retirement by contributing to provident or pension funds.

[21] It is not unfair, in these circumstances, for the legislature to expect employees with agreed or normal retirement ages to work until reaching retirement age or for as long as the employer can accommodate them after reaching that age. Construing s 187(2)(b) in a manner that allows an employer to create opportunities for a younger and more innovative workforce, especially in a country such as ours with unprecedented unemployment levels, is not inconsistent with the spirit, purport, or objects of the right to fair labour practices in s 23 of the Constitution."

(emphasis added)

Even though the LAC was dealing with a case where an employer retired an employee who had *passed* their retirement age, the Court clearly emphasised that s 187(2)(b) conferred a right on an employer to implement a mandatory retirement age. That provision also expressly envisages that different retirement ages for different categories of employee are permitted, which is the principal focus of Viljoen's attack.

[26] Subsequently, the Constitutional Court has considered the fairness of post-retirement age dismissals, in a judgement in which the LAC decision in *Grand South Autobody* was one of the cases on appeal.[6] The essential question the court was seized with in both the matters before it was whether an employer was entitled to terminate an employee's service on grounds of retirement, and thereby be protected under s 187(2)(b) from a claim under s 187(1)(f), if the employee continued working beyond the normal or agreed retirement date. Regrettably, there was a split decision but the majority of the court, for different reasons, dismissed the appeal against the LAC decision, confirming that an employer may fairly retire an employee on or after their normal or agreed retirement date[7]. It was not part of the reasoning of any of the judgements in the constitutional court that a mandatory retirement cannot be imposed.

[27] In this matter, it is clear there is a two-tier mandatory retirement system in place and Viljoen's direct peers were all retired when they reached the age of 60, like himself. I accept that, it is possible that he could potentially have been appointed as a foreman on a site, like Ragmaan, but he was not, and his job designation remained that of an artisan at the time he was due to retire. Consequently, he was not employed in a supervisory capacity which would have entitled him to retire at age 65. Thus, the fact that Ragmaan worked beyond the age of 60 has no bearing on the fairness of Viljoen being retired at that age.

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[6] *Motor Industry Staff Association & another v Great South Autobody CC t/a Great South Panelbeaters; Solidarity on behalf of Strydom & others v State Information Technology Agency SOC Ltd* (2025) 46 *ILJ* 481 (CC)

[7] At paragraphs 175 and 207, with the minority ratio appearing at paragraph 109.

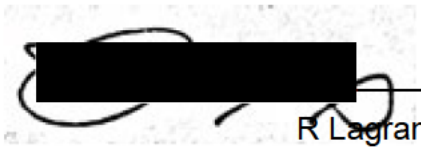
[28] It is true that it turned out that Mthiya had retired after his agreed retirement age of 65, albeit that it was in the same year he reached that age. However, Viljoen's case was based on other employees being allowed to work after the age of 60, because he asserted that this retirement age applied to everyone including Ragmaan and Mthiya, whom he compared himself with. The essence of his claim was that only one retirement age applied to everyone. He did not plead, as an alternative, that even if a two-tier retirement age system applied, he still should not have been dismissed because one of them had worked beyond a different agreed retirement age, which was later than his own. In any event, it seems to be common to the decisions comprising the majority in the Constitutional Court that the employer has a choice whether to waive the requirement that an employee must retire on the mandatory retirement date. If an employee could insist that waiver of one employee's retirement on the date it fell due it would compel the employer thereafter to waive reliance on the mandatory retirement date for all employees, that would render the right of waiver nugatory. At the very least, Viljoen ought to have expressly pleaded this alternative case so PPEW could have addressed it and the court have considered it.

[29] In light of the reasoning above, I am not persuaded that Viljoen has proven that his retirement at the applicable retirement age of 60 was an automatically unfair dismissal in terms of s 187(1)(f) of the LRA.

[30] Notwithstanding the result, this is not a case in which a cost award would be appropriate. The court is greatly indebted to Ms Duba of Legal Aid for representing the applicant.

Order

1. The referral is dismissed.
2. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant:	J Duba from Legal Aid SA.
For the Respondent:	W Jacobs from Willem Jacobs and Associates