

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO J945/01

In the matter between:

MAUREEN RUBENSTEIN

Applicant

and

PRICE'S DAELITE (PTY) LTD

Respondent

JUDGMENT

JAMMY AJ

1. For the stated reason that she had “already exceeded the company’s retirement age” the employment of the Applicant, then aged seventy-two, was terminated by the Respondent on 12 June 2001.
2. Consequent thereon, the Applicant seeks from this court an order alleging unfair discrimination based on age, declaring her dismissal to have been unfair and awarding her compensation equivalent to twenty-four month’s remuneration.
3. The factual background to this matter involves a series of corporate

transactions which do not merit detailed analysis. Suffice it to say that the Applicant has been continuously employed since 1957 in a number of companies, the names and ownership of which have from time to time changed. At all material times however, and certainly since 1996, the controlling interest in those companies has been held, as it is now held in the Respondent, by the Goodman family, one member of which, Leo Goodman, is the Applicant's nephew. At one point Leo Goodman was the Managing Director of the Respondent but now carries on business independently in another company, similarly involved in the production of candles.

4. Following the withdrawal from its management structure of Leo Goodman, Mr D A H Gould, who, he testified, had been "headhunted" under pressure from a major creditor of the Respondent, was appointed its Managing Director. In its prevailing financial circumstances he identified the need for a radical review of its operating costs, which would include a reduction in its staff complement and wage bill.
5. One anomaly immediately apparent to him, he testified, related to the Applicant whose remuneration package was in his view totally disproportionate to the position which she held and the fact that she was a half-day employee.
6. When he discussed the matter with her in the presence of the company's Human Resources Manager however having ascertained that she was "in her early seventies" and had been employed since 1957, he learned to his surprise that she enjoyed no pension benefits. She had come into the business as a member of the Goodman family, the original company by which she was employed – Price's Candle Company (Pty) Ltd, having had no Pension or Provident Fund.

7. The company, Daelite Industries (Pty) Ltd, with which Price's Candle Company merged by acquisition in 1996, resulting in the incorporation of the Respondent as a new entity, did have a Pension Fund but it had transpired, Mr Gould learned, that when the Applicant applied for membership of that fund at that time, this had been refused because of her age.
8. On 31 August 1999 all employees of the company, including the Applicant, were given a letter, headed "Letter of Appointment" in which they were advised that "Due to new requirements specified by the Basic Conditions of Employment Act, it is necessary to provide every employee with a new Letter of Appointment". The Applicant's letter recorded that she was "employed by Price's on 3 June 1957 in the position of Admin Assistant. Your current position is Sales Co-ordinator based in Johannesburg".
9. Relevant to this dispute was a specific provision of that letter which read as follows:

"Pension/Provident Funds

You are obliged during the first month of employment to become a member of either the Pension or Provident Fund. The total contribution (your own plus that of the company) must comply with the rules of the Pension and Provident Funds and may not be less than 7.5% (employee contribution) for the Pension Fund and 7% (employee contribution) for the Provident Fund. There is an employer contribution to the Pension and Provident Funds."

10. The rules of the Respondent's Provident Fund however contained in the

definition clause the following:

“Normal Retirement Age: age 63 years.

Normal Retirement Date: the first day of the month coinciding with or following the month in which a Member attains Normal Retirement Age”.

Once again, and as a consequence of her age at that stage, the Applicant’s application for membership of the Provident Fund was rejected, as was her application for membership of the Respondent’s Pension Fund, the definition clause of which contained almost identical provisions.

11. The Respondent had no problem with the Applicant’s standard of work, said Mr Gould – she was a valued employee and in an attempt to find a solution to the problem which it now faced, he enquired whether she would agree to a reduction in salary, - she was earning more than R16 000 in her half-day position, more than double the monthly salary ordinarily payable for an equivalent post. The Applicant rejected this proposal on the grounds that she had numerous commitments. She was then asked to move temporarily to a half-day switchboard operator position and agreed to do so. On 6 April 2001 therefore she was given a letter in the following terms:

“Dear Maureen

STRUCTURAL ADJUSTMENT

Due to some remuneration imbalances, structural adjustments have been

implemented on packages in specific categories.

Therefore, your cost to company package will be adjusted to R17 563,31 per month with effect from 1 May 2001. You will be transferred to the position of Receptionist/Switchboard Operator with effect from 17 April 2001.

Attached to this letter is a Package Record Schedule, which indicates your total remuneration package. Please complete the schedule and return it to the Human Resources Department.

The company appreciates your loyal efforts and commitment. Regular reviews on performance will be conducted. Keep up the hard work.”

The letter was signed by the Respondent’s Personnel Manager Ms Retha Ludick.

12. Questioned by Mr G Higgins, representing the Applicant, Mr Gould stated that he was informed on joining the company that its normal retirement age was sixty-three. He assumed that the Applicant was a member of the Pension Fund and reiterated that he was surprised to learn that this was not the case. The options which the company had explored in its attempt to find a solution to the problem were set out in a letter to the Applicant of 11 May 2001 in which she was then informed that:

“In view of the fact that you have already exceeded the company’s retirement age and after investigating your position and consulting on and discussing the alternatives and options with yourself, the company has decided to retire you from the service of the company with effect from 12

June 2001”.

She had been informed, the letter continued, that her current position did not justify the salary package attached to it and that “there is no relationship between your position and market-related salary”. She was not amenable to working a full day in the position of a receptionist. The proposal from her son-in-law, in their course of discussions with him on her behalf, that she be retrenched on a package of three weeks pay per completed year of service could not be practicably considered. Following discussions and “as per the letter dated 6 April 2001,

... you were transferred to the position of Receptionist with effect from 17 April 2001 until further notice”.

13. The concluding paragraphs of that letter are indicative, in their terms, of the position in which the company found itself and the decision taken to deal with it. They read as follows:

“The company does not consider these alternative options to be fair or reasonable in view of the fact that you have already exceeded the company’s retirement age and that the practice on retirement is not to pay a retrenchment package.

Furthermore you have benefited directly as a consequence of continuing to be employed after normal retirement age.

It would also be discriminatory should the company allow certain employees to work beyond retirement age without operational justification and to require all other employees to depart at retirement age. The

company therefore does not believe that your continued employment is in the best interest of either the company or yourself.

The company however wishes to thank you for the many years of loyal service to both its current ownership and during the time that the company was a family owned concern.

We wish you a restful and fulfilling retirement.”

It was correct Mr Gould acknowledged, that the letter of 6 April 2001, in terms of which the Applicant assumed the Receptionist/Switchboard position, did not indicate that this was a temporary arrangement but this, he said, had been made clear to her in the course of their discussions. The company had subsequently obtained legal advice to the effect that they were entitled to retire the Applicant and proceeded to do so.

14. The Respondent's Personnel Manager, Ms Retha Ludick testified that following the 1996 merger, she learned that the Applicant was not a member of the Provident Fund and processed an application on her behalf. When this was rejected because of the Applicant's age she explained the position and the Applicant was fully aware of it when she signed acceptance of the Letter of Appointment of 31 August 1999 specifying, as a condition of employment, membership of both the Pension and Provident Funds. No one other than the Applicant had been retained in the employ of Price's Daelite beyond the age of sixty-three.
15. The Applicant had been advised by management, in a meeting early in March 2001, of the possibility that she might be retired having exceeded the company's normal retirement age. Ms Ludick was also present, she said, in further discussions with the Applicant and her son-in-law in which a

number of alternative options were canvassed and found impractical. The Applicant was offered, and accepted, the temporary position of Receptionist/Switchboard Operator, while other options were being explored. She was aware that the company was seeking a full-time Receptionist/Switchboard Operator at a salary of approximately R4 500 per month.

16. Questioned by Mr Higgins, Ms Ludick stated that at one stage she had discussed the problem with Mr Leo Goodman whose response had been that the Applicant “had to remain in employment – she was part of the family”. When Mr Gould, on his arrival, had questioned the Applicant’s salary, she explained to him that this was because she was a member of the Goodman family. He had then instructed her to set up meetings with the Applicant to discuss the problem of her continued employment in the company in the context of her age. When the final letter terminating her employment was eventually given to the Applicant on 11 May 2001, she was sad to receive it but not surprised. She did not suggest any entitlement on her part to continue in the employ of the company. It was not true that she had informed the Applicant at any prior stage that she should not worry because she would receive a large retirement package. She was not in the position to have discussed any such aspect with the Applicant.
17. Notwithstanding indications by Mr Higgins during the course of his cross-examination of the Respondent’s witnesses that evidence contrary to certain of their submissions would be presented on behalf of the Applicant, the Applicant’s case was closed without testimony from her or any other witness and the Respondent’s factual evidence, as adduced through Mr Gould and Ms Ludick, stands uncontroverted. It is therefore on

the basis of that evidence and appropriate reference to the documentation before the court, that this matter stands to be determined.

18. The minute of the pre-trial conference between the parties records as an item of common cause, the fact that the Applicant's services were terminated due to her age. The issues that the court is required to decide, as they are there identified, are whether an automatically unfair dismissal of the Applicant by the Respondent occurred and, "in the event of it being found that Applicant was unfairly dismissed, the relief, if any to which the Applicant is entitled".
19. There can be only one interpretation of those recorded factors. If the Applicant was unfairly dismissed, that unfairness was directly related to the acknowledged reason for her dismissal, - her age. No allegation or suggestion is made by the Applicant of procedural inadequacy in the process followed by the Respondent and no other reason, fair or unfair, is postulated. In short, her claim is based on an unambiguous allegation of age discrimination which, if established, would constitute her dismissal as automatically unfair, entitling her to the prescribed compensation which she claims. The principle that the onus of proof in that context lies with her, is not open to question. The Applicant's claim is sourced in Section 187 of the Labour Relations Act 1995. A dismissal is automatically unfair, it prescribes, if the reason for the dismissal is, *inter alia*, that the employer unfairly discriminated against the employee directly or indirectly on any arbitrary ground including, amongst others specifically referred to, age. This notwithstanding however, Section 187(2)(b) decrees,

"A dismissal ... based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity".

20. A situation akin to that prevailing in this matter was considered by this court in

**Schweitzer v Waco Distributors (A division of Voltex (Pty) Ltd) (1998)
10 BLLR 1050**

The Applicant in that matter, a product manager aged sixty-seven years, was dismissed by his employer which claimed entitlement to do so because he had passed its normal retirement age. His dismissal was challenged on the basis of age discrimination, an allegation contested by the employer in reliance upon the exception couched in Section 187(2)(b). Sixty-five years was, the Respondent contended, the agreed or normal retirement age applicable to the Applicant.

21. On an examination of the facts of the matter, the court concluded firstly that the employee's dismissal was based on his age, secondly that the employer did have a normal or agreed retirement age for persons employed in the capacity in which the Applicant had been employed, thirdly that the employee had reached that retirement age at the time of his dismissal and consequently that the provisions of Section 187(2)(b) was applicable to the case. The Applicant's dismissal in those circumstances was protected by the legislation and could not have been automatically unfair.
22. The court however took the issue further. Whilst not automatically unfair, was the Applicant's dismissal unfair in any other respect? It was common cause that he was well beyond the retirement age at the time of his dismissal, the company having permitted him to go on working when it

could legitimately have required him to retire in terms of Section 187(2)(b) when he actually reached retirement age. In that context, the court (Zondo J, as he then was) embarked upon an analysis of the definition of “dismissal” in Section 186 of the Act and concluded that:

“The fact that the coming to an end of the Contract of Employment by effluxion of time is not contemplated in the definition of dismissal in sec 186 means that the dismissal in Section 187(2)(b) must include a dismissal after the employee has gone past the agreed or normal retirement period”.

23. That analysis is called respectfully into question in an article by Professor John Grogan entitled “No Work for the Aged” in **Employment Law: Volume 14 No. 6 (March 1999)**. The court’s reasoning, the author suggests, is

“... somewhat difficult to follow. If, as the Judge appears to suggest, every indefinite-period contract which contains a compulsory retirement clause is, in fact, a protracted fixed-term contract that terminates automatically when the employee reaches retirement age, what purpose is served by Section 187(2)(b)? The dismissals to which it refers can, on this view, never happen. Furthermore this reasoning does not address Judge Zondo’s concern about the unfairness of giving employers carte blanche to dismiss employees whom they have permitted to work beyond retirement age. The answer to that, one would have thought, lies in the actual wording of Section 187(2)(b). It says a dismissal is fair if the employee has reached retirement age, not when he reaches it.”

24. I am in respectful agreement with that analysis. In the instant matter, the Respondent’s evidence, both in relation to established practice and the

requirements of its Pension and Provident Funds, acknowledged and unchallenged by the Applicant when she signed her acceptance of the terms and conditions in her new Letter of Appointment of 31 August 1999, that the normal retirement age for its employees was sixty-three, is not placed in issue by any testimony to the contrary on the part of the Applicant. The answer to the first question identified by pre-trial consensus between the parties for determination by this court, namely whether an automatically unfair dismissal of the Applicant by the Respondent occurred, is that it did not. With regard to the second, somewhat ambiguous, issue, namely whether the Applicant was unfairly dismissed, presumably on some other basis, the answer must similarly in my view, be in the negative. No challenge is mounted to the procedures followed by the Respondent and there remains for consideration only one further contention advanced by the Applicant, expressly in the course of correspondence addressed to the Respondent by her legal representatives and obliquely dealt with in their pleadings, and that is whether, having failed to terminate the Applicant's employment when she reached the normal retirement age of sixty-three, the Respondent's right to do so at the stage that that occurred, had been waived.

25. There is, in my opinion, no substance to that contention. The Respondent was not the Applicant's employer when she reached the age of sixty-three. At the time of the 1996 merger which spawned the new corporate entity by which she then became employed, she was already sixty-seven. When she signed the Letter of Appointment of 31 August 1999, she was already approximately seventy.
26. Mr A Redding, representing the Respondent, conceded in argument that whilst, in these circumstances, there could have been no question of a

waiver of rights by the Respondent, the Applicant may well have had some reasonable expectation of continued employment at the time that it was in fact terminated. That to my mind was a generous concession. The Applicant's attention, according to the testimony of both Mr Gould and Ms Ludick, was drawn as early as 1996 to the fact that she was still in the employ of the company at an age substantially beyond that in effect for normal retirement. The circumstances in which this state of affairs continued, and which were directly motivated by her family ties to the controlling shareholders in the company, must have been apparent to her. Her unique position was subsequently emphasised and exacerbated when, having unreservedly accepted the new terms and conditions of her employment in August 1999, her application for membership of the Pension and Provident Funds was rejected because of her age. The company's ongoing concern thereafter with the anomalous state of affairs which existed, manifested in the various meetings and discussions held with her and her son-in-law, must continuously have been apparent to her. The Respondent's uncontroverted evidence that she agreed to perform the Receptionist/ Switchboard function on a temporary basis and at a salary hugely disproportionate to the status of that position, must have indicated to her that this was a state of affairs that could not continue indefinitely.

27. I am left in no doubt, in these circumstances, that what the Applicant harboured could have been nothing more than a *spes* in relation to her ongoing employment by the Respondent. An endorsement in that regard, is found in Ms Ludick's testimony that when she eventually received the notice of termination of her employment, she expressed no surprise or indication of resistance.
28. In summary therefore whilst, as the parties acknowledge, the reason for

the termination of the Applicant's employment was manifestly her age, she has failed to discharge the onus upon her to establish that her dismissal was unlawfully discriminatory and therefore automatically unfair and there is nothing in the conspectus of evidence presented to this court to suggest that it was unfair for any other reason. In these circumstances, my order is the following:

- 28.1 the application is dismissed;
- 28.2 the Applicant is to pay the Respondent's costs.

B M JAMMY
Acting Judge of the Labour Court

14 March 2002
Representation:

e Applicant:

eg Higgins: Sampson Oakes Higgins Inc.

e Respondent:

Adv Andrew Redding instructed by Webber Wentzel Bowens