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IN THE LABOUR COURT OF SOUTH AFRICA
BRAAMFONTEIN CASE NO: JS1178/01
2003.01.21

In the matter between
JOHN JAMES BROWN Applicant
and
CASH PAYMASTER SERVICES (PTY) LIMITED

Respondent

J U D G M E N T

PAMMENTER A.J: The applicant in this matter is John James Brown. He was born on 18 July 1941, and in 1970 he commenced employment with a company which over the years underwent a series of mergers and name changes, and which in 1998 was known as Datacor Holdings (Pty) Limited. For the sake of convenience I shall hereafter in this judgment refer to this company and its predecessors as "Datacor". It is not necessary in this judgment to elicit all the different mergers and name changes which Datacor underwent, it is suffice to say that for the purposes of the Labour Relations Act, 66 of 1995 (which I will hereafter refer to as the "LRA") the applicant must be considered to have been employed by the same employer until at least 1998.

His employment commenced in the United Kingdom, and in 1982 he was transferred to South Africa. By 1998 he had progressed to become the general manager of the Technologies Application Group (which I will hereafter refer to as "TAG") which was a trading division of Datacor.

It is not disputed that in terms of his contract of employment his retirement age was 65 years, and that he contributed to a pension scheme in terms of which he would have received a pension at that age.

On 23 April 1998 Datacor sold TAG to Cash Paymaster Services (Pty) Limited, the respondent in this matter. It is perhaps relevant to note that at the time the respondent was a subsidiary of the First National Bank Limited (which I will

hereinafter refer to as "FNB").

In terms of the contract of sale TAG was sold as a going concern, and with it went the applicant's contract of employment. It is not disputed that section 197 of the LRA, as it read prior to it being amended by Act 12 of 2002, applied to the transaction in question. At the time the respondent did not have a pension scheme for its employees, and accordingly could not offer the applicant the same benefits he had enjoyed when employed by Datacor. In other respects the respondent was also unable to offer the applicant the same terms and conditions which had applied to his employment by Datacor. As a result a series of negotiations commenced between the applicant and a Mr Rose, the then human resources manager of the respondent, which culminated in two documents being signed on 25 May 1998. The first was a letter from Mr Rose to Mr Brown the applicant confirming an agreement which had been reached regarding various matters concerning his employment. The second was a letter headed "Offer of Employment" signed by Mr Rose on 25 May 1998 and which was subsequently signed and accepted by the applicant on 11 June 1998. The penultimate paragraph of this latter document read as follows:

"The terms and conditions of employment set out in this letter must be regarded as a summary of the most prominent aspects. More comprehensive terms and conditions are set out in the CPS Staff Manual, and such terms and conditions are subject to amendment by the CPS Management." (Underlining added)

The reference to the CPS Staff Manual was a reference to a manual produced by the respondent, amended from time to time, which set out the terms and conditions of its staff's employment.

It is perhaps also relevant to note that as regards the salary which was offered to the applicant in the offer of employment the same contained an element to compensate the applicant for the fact that the respondent did not have a pension scheme, and therefore the applicant would have to make his own arrangements in this regard. In a nutshell, his salary was increased by an amount equal to Datacor's contribution to the pension fund of which he had formerly been a member.

On 15 June 1998 the applicant signed a document headed "Articles of Agreement made and entered into between Cash Paymaster Services (Pty) Limited and John James Brown".

This document also contained terms and conditions of the applicant's employment.

In April 1999 FNB sold the respondent to the Aplitech

Group (which I will hereinafter refer to as "Aplitech") and which, as I understand the position, was a group of companies which provided various different services to the public.

Mr Chalmers, the current group human resources manager of Aplitech, gave evidence that in about October or November 1999 a decision was taken to integrate certain of the operating divisions of Aplitech. In so doing it also became necessary to have a common human resources policy, including a policy as regards retirement. Prior to that stage neither Aplitech nor the respondent had any policy regarding retirement age. At the time Mr Chalmers was the human resources manager of the respondent and not of the entire Aplitech Group. He and an associate determined that an appropriate retirement age for all employees in the group would be 60 years. During the course of his evidence he gave reasons for arriving at this conclusion, namely that certain of the work some of the employees were expected to perform was of a strenuous nature and they could not reasonably be expected to continue doing so after the age 60 years. Furthermore, his research indicated that 60 years was the normal retirement age for employees in the financial services sector. He candidly conceded, however, that he did not consult with any of the employees of the Aplitech Group, including the applicant, before arriving at the conclusion that the retirement age should be 60.

The board of directors of Aplitech accepted the suggestion that the retirement age should be 60 years, and directed that the CPS Staff Manual should be amended accordingly. This resulted in the following insertion into the staff manual on 17 February 2001, which was made in the appropriate place, namely:

"9.10.4 Retirement age for all staff is 60 years of age."

Immediately he learnt of this insertion in the manual the applicant objected and wrote to Mr Chalmers on 23 February 2000. Much correspondence followed on the topic, and in addition the applicant had meetings with various persons in the Aplitech management, during the course of which he raised his concerns.

Whilst cross-examining the applicant, Mr Redding, counsel for the respondent, suggested to him that he had accepted the retirement age of 60 years. However, when Mr Chalmers gave evidence he made it perfectly clear, with commendable frankness, that throughout the applicant had objected to, and had never accepted, the new retirement age.

During the course of the meetings, and in the

correspondence to which I have referred above, the applicant was offered a fixed term contract for a period of one year after his retirement, with the possibility of this contract being extended. He refused to accept the same, with the result that his employment came to an end on 31 July 2001 being the end of the month in which he turned 60.

A further issue arose between the applicant and the respondent relating to what I shall refer to as "the retirement package" offered by the respondent to the applicant on his retirement. In a letter dated 14 May 2001 Mr Chalmers informed the applicant that on his retirement on 31 July 2001 he would received the following package:

1. One month's salary.
2. One week's salary for every completed six months of service with CPS (i.e. the respondent).
3. All outstanding leave pay and *pro rata* leave pay.

It is paragraph 2 of this offer which has led to the dispute. The applicant contends that in computing his time of service for the purpose of the retirement package his service with Datacor, and not only his service with the respondent, should have been taken into account. He made this point immediately clear to the respondent in a letter which he wrote to Mr Chalmers on 13 May 2001. However as things turned out the respondent was not impressed with his arguments in this regard, and on retirement his retirement package took into account only his service with CPS, i.e. since 1998. It is relevant to note that the retirement package was just that, namely an ex gratia payment on retirement. It was not severance pay.

Further issues arose between the applicant and the respondent regarding an increase in salary payable from 1 October 2000 and a bonus, which in the normal course would have been payable to the applicant after the end of the financial year at 30 June 2001. However during the course of the trial, the applicant elected not to persist with his claims arising out of these issues.

It follows from all of the aforegoing that the issues to be determined in this case are the following:

1. Whether the respondent was entitled to insist that the applicant retired at age 60. (I shall henceforth refer to this issue as "the retirement age issue").
2. Whether, for the purpose of calculating his retirement package, the applicant's years of service with Datacor should have been taken into account. (I shall refer to this issue as "the retirement package issue).

I now turn to consider each of these issues separately.

THE RETIREMENT AGE ISSUE

Both parties are agreed that section 197 of the LRA is pertinent to this issue. Although there was initially some controversy regarding the interpretation of this section prior to its amendment in 2002 this controversy has been resolved in a number of recent judgments, all of which are binding on me. These judgments are the following: *National Education Health and Allied Workers' Union v University of Cape Town and Others*, an unreported judgment of the Constitutional Court of South Africa handed down on 6 December 2002. *National Education Health and Allied Workers' Union v University of Cape Town and Others* 2002 (23) ILJ 306. This was the judgment of the Labour Appeal Court which formed the subject matter of the Constitutional Court case referred to above. *Food Grow (a Division of Leisure Net) v Keo* 1999 (9) BLLR 875 LAC (which I shall hereinafter refer to as "the Food Grow judgment").

The legal position which can be gleaned from the above three cases can be summarised as follows:

1. On the sale of a going concern the employee's contract of employment is automatically transferred from the seller to the buyer.
2. The terms and conditions of the employment contract may then be varied by agreement between the parties.
3. They may be varied to such an extent that the old contract remains in skeletal form only. However some incidents of the old contract would be unalterable, such as the date of the commencement of employment. (In this regard see paragraph 32 of the judgment of Conradie JA in the *Food Grow* case.)

As I have already indicated, in the present case it is common cause that prior to the takeover of TAG by the respondent it was a term of the applicant's employment that he had the right to work until the age 65. (In this regard see paragraph 3 of the Unidata employee handbook.) That term of his employment could only be varied by agreement. None of the documents which the applicant signed at the time of commencing his employment with the respondent, and which I shall hereinafter refer to collectively as "the new agreement", dealt in specific terms with retirement. Therefore there was no express term varying the retirement age clause which had previously existed in the applicant's employment contract.

Notwithstanding this, Mr Redding argued vigorously that it was clearly a tacit term of the new agreement that this was the case, namely that the agreed retirement age would fall away.

He contended that on a perusal of the documents which constituted the new agreement they clearly indicated that they were intended to constitute the entire agreement between the parties, and that nothing remained of the old agreement save for the skeletal form referred to by Conradie JA in the *Food Grow* case. There was, he contended, a complete novation of the existing contract.

I should mention that it was not Mr Redding's contention that the new agreement itself provided for a reduction of the retirement age from 65 to 60 years. It was his contention that the new agreement did away with the provisions in the existing contract relating to the applicant's retiring age. Therefore, when the applicant turned 60, as he had by then reached the normal retirement age for persons employed in his capacity, he could be dismissed without the dismissal being deemed to be unfair in terms of section 187 of the LRA. In this regard he relied on the provisions of section 187(2)(b) of that Act.

As pointed out by Mr Kochs who appeared for the applicant a novation, because it constitutes a waiver of rights, is never easily presumed. The most clear evidence of the intention to waive the right is required. I believe that this is trite law and it is not necessary to cite any authority in support of this contention. It is also relevant that, it being common cause that the applicant was dismissed, the onus was on the respondent to prove that the dismissal was fair, which meant that it had to prove the tacit variation of the employment contract. (In this regard see section 192(2) of the LRA.)

I do not believe that the new agreement, read in the light of the circumstances which existed at the time, prove such a tacit variation. These circumstances which existed at the time included the fact that the applicant would have had no reason for wanting to waive his rights in regard to his retirement age, and the respondent, by virtue of the fact that it had no policy in place regarding retirement age, would have had no reason for wanting the applicant to waive his right. I believe it is also significant that in the negotiations which preceded the conclusion of the new agreement the respondent agreed to pay the applicant extra in order to make up for the employer's contribution to the pension fund which he had formerly received from Datacor. It seems obvious that what was intended was that the applicant's position as regards retirement should remain the same. This would militate against any conclusion that the parties intended, at least tacitly, that the applicant should waive his rights as regards retirement age.

In the circumstances I find that the respondent has not succeeded in showing that there had been any tacit variation of the term of the applicant's contract of employment regarding his retirement age.

In the alternative Mr Redding argued that the term in the offer of employment dated 25 May 1998, which reserved the right to the respondent to vary the terms of the CPS staff manual, entitled it unilaterally to vary the terms of the applicant's employment as regards retirement age.

I believe there are two answers to this contention: The first is that the clause must obviously be strictly interpreted. It purports to take away rights of employees. It refers to "more comprehensive terms and conditions" as set out in the CPS staff manual, which terms and conditions "are subject to amendment". On a strict interpretation thereof this clause does not permit the introduction of a completely new condition, it merely permits the amendment of an existing condition. The CPS staff manual does not deal with the retirement age. It appears to deal, only in paragraph 9, with what is to happen as regards outstanding leave on retirement. The introduction of the retirement age clause was therefore a completely new clause which the respondent sought to introduce. I do not believe that it was entitled to introduce this clause unilaterally.

The second answer is that, where a contract permits one party to unilaterally vary the terms thereof, such a party may only do so if he acts *bono et viri*, i.e. as a reasonable man would act. In this regard see the judgment of the Supreme Court of Appeal in *Deeb v Absabank* 1999 (4) SA 928.

Without wishing to be unduly critical of the respondent, I do not think that it can be said that it acted reasonably in unilaterally imposing the new retirement age without first at least consulting with the employees who would be affected thereby. Having regard particularly to the strictures against unilateral variation of terms of employment in our labour law I believe that a reasonable person, in the position of the respondent, would first have consulted with the affected employees before introducing the new condition regarding retirement.

In the circumstances I am bound to conclude that the respondent has not succeeded in showing a variation of the term of the applicant's existing contract of employment regarding retirement age when he commenced employment with the respondent.

Before leaving this issue I should deal with a point which

was raised by me during the course of argument and adopted, albeit faintly, by Mr Redding. Section 187(2)(a) of the LRA provides that it is not unfair to dismiss someone who has reached the normal or agreed retirement age. Mr Redding contended that this subsection could be interpreted to mean that even if there was an agreed retirement age an employee could still be dismissed before that age, provided he had reached normal retirement age.

I believe there is a short answer to this contention. Section 39(2) of the Constitution requires me to interpret section 187(2)(a) of the LRA in accordance with the spirit and purport of the Bill of Rights as contained in the Constitution. Section 23(1) of the Constitution, which forms part of the Bill of Rights, provides that the applicant is entitled to fair labour practices. It would hardly constitute a fair labour practice if an employee, who has agreed a retirement age with his employer, may be dismissed earlier than that age simply because he has reached the normal retirement age.

Accordingly even if the applicant had reached normal retirement age, a matter which I do not believe it is necessary for me to decide, he could, in my view, not be dismissed by the respondent prior to his agreed retirement age. In the circumstances I find that the applicant was unfairly dismissed.

The parties were *ad idem* that if I made this finding I would of necessity have to find that the dismissal had been automatically unfair in terms of section 187(1)(f) of the LRA. The applicant does not seek reinstatement, accordingly there remains to be considered only the compensation to which he is entitled in terms of section 194 of the LRA.

However, because I believe the limit of compensation to some extent must depend on whether or not the applicant receives any award pursuant to the retirement package issue, I shall deal with the compensation issue after I have dealt with the retirement package issue.

THE RETIREMENT PACKAGE ISSUE

The applicant basis his claim for the increased retirement package on contract. He does not contend that he has any entitlement to the package in terms of the Basic Conditions of Employment Act, 75 of 1977, nor in terms of the LRA. Nor does he contend that his entitlement arises out of any of the conditions of his employment. It is his contention that his entitlement stems from the letter addressed to him on 14 May 2001 by Mr Chalmers. I have already quoted in this judgment the relevant portion of the letter. He contends that this letter, or

the relevant portion thereof, read with section 197(4) of the LRA obliges the respondent, in calculating the retirement package, to take into account his period of employment with Datacor.

Section 197(4) of the LRA, prior to its amendment, read as follows:

"A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new employer as if with the old employer."

The subsection must of course be read in conjunction with the remainder of section 197. This section has to do, *inter alia*, with the preserving of an employee's rights on the sale of a business. The applicant, however, had no right at the time of the sale of TAG to a retirement package, and therefore that right could not be preserved by section 197(4). The offer of the retirement package was an *ex gratia* offer made by the respondent. As such it could attach such conditions to it as it saw fit. The position may have been different if the respondent had had a policy in place regarding retirement packages which determined that the package was based on the length of service. However no such policy existed and the offer contained in the letter of 14 May 2001 was a once off offer, to which the respondent was entitled to attach such conditions as it saw fit.

In the circumstances I must conclude that the applicant has not succeeded in satisfying me that he is entitled to the increased retirement package.

Question of Compensation

I now deal with the *quantum* of compensation to which the applicant is entitled following upon his unfair dismissal. This is a matter entirely for my discretion, save that in terms of section 194(3) of the LRA the compensation may not exceed an amount in excess of two years' salary at the time of the applicant's dismissal.

During the course of argument both parties' legal representatives urged me to take a number of factors into consideration in favour of either increasing or decreasing compensation. I do not believe that it is necessary to list them all here. The salient ones are however the following:

1. For the applicant to have been dismissed five years before his agreed retirement age, and then only to have been given one year's warning of that dismissal, must have made it very difficult for him to reorganise his finances on retirement. He must have suffered considerable financial loss. Not only was there a loss of salary but also the fact that he would now have to draw on his pension earlier, resulting in a reduced pension for the remainder

of his life. At his age it would not be easy for him to find alternate employment. This factor militates strongly in favour of awarding the applicant the maximum compensation permissible in terms of section 194.

2. The applicant could have reduced his financial loss by opting for reinstatement, he was certainly entitled thereto, and had he done so his financial loss would have been considerably reduced. There is nothing to suggest that the relationship between the applicant and the respondent had broken down to such an extent that it would not have been feasible for him to have continued working for the respondent. On the contrary, I distinctly got the impression on listening to Mr Chalmers' evidence, that the relationship at a personal level was still quite good. This factor militates against a high award of compensation.
3. The respondent did offer the applicant a fixed term contract of 12 months with a possibility of extending the same. If he had accepted this contract, at the same time reserving his rights to approach the CCMA and if necessary the Labour Court, he could have significantly reduced his financial loss.

I believe that the first of these factors far outweighs the others. However, some consideration must be given to the other factors, and accordingly I believe that it would be appropriate if the applicant was to be awarded compensation equivalent to 21 months of his salary at the time of his dismissal.

It is common cause that at the time of his dismissal the applicant's salary was R32 601,00 per month, 21 months' salary accordingly equals R684 621,00. This is the award for compensation which I intend to make.

Costs

I am enjoined to make a costs order which is in accordance with both fairness and law. The applicant was successful in regard to the retirement age issue, but unsuccessful in regard to the retirement package issue. I am however in agreement with Mr Kochs that more than half of the trial was spent in determining the retirement age issue.

In all the circumstances I believe that it would be both fair and lawful if the applicant were to be awarded 70% of his costs.

O R D E R

In the circumstances I make the following order:

1. The respondent's dismissal of the applicant on 31 July 2001 is hereby declared to be automatically unfair in terms of section 187(1)(f) of the Labour Relations Act, 66 of 1995.
2. The respondent is ordered to pay the applicant compensation in

terms of section 194(3) of the Labour Relations Act in an amount of R684 621,00.

3. The respondent is ordered to pay 70% of the applicant's costs and tax of suit.

ON BEHALF OF THE APPLICANT: MR KOCHS
ON BEHALF OF THE RESPONDENT: MR REDDING