THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 948 / 14

In the matter between:

DEON BOS **Applicant**

and

EON CONSULTING (PTY) LTD **Respondent**

Heard: **1, 2, 4 and 5 August 2016**

Delivered: **12 August 2016**

Summary: Automatic unfair dismissal – dismissal based on age – employee placed on retirement having attained age of 65 – whether employee properly placed on compulsory retirement – application of Section 187(2)(a) of the LRA

Retirement age – no agreed retirement age – whether normal retirement age exists – principles considered to establish normal retirement age and when it exists in an employer

Retirement age – introduction of retirement age in an employer by policy and/or practice – requirements considered as to when it would competent to do so

Automatic unfair dismissal – no normal retirement age established and section 187(2)(a) thus not applicable – employee's dismissal based on his age automatically unfair

Compensation – compensation for automatic unfair dismissal – principles considered – compensation awarded

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this matter, the applicant brought three claims to the Labour Court. The first claim is founded on an alleged automatic unfair dismissal in terms of Section 187(1)(f) of the Labour Relations Act ('the LRA')[1] based on his age. The other two claims concern damages claimed by the applicant for breach of his employment contract by the respondent. The applicant has brought these claims to this Court by way of statement of claim filed on 27 October 2014.

[2] The respondent, on the other hand, contended that the applicant was placed on compulsory retirement having attained and then surpassed the normal retirement age of 65 in the respondent, and as such the applicant's dismissal must be deemed to fair as contemplated by Section 187(2)(b) of the LRA. As to the applicant's two employment contract claims, the respondent's case in essence was that these claims were not founded on the employment contract itself.

[3] The matter came before me on trial on 1, 2, 4 and 5 August 2016. Once the evidence in this matter was concluded on 4 August 2016, the issues for determination was narrowed down further. Firstly, the applicant withdrew the two contract claims, being claims 2 and 3 in the applicant's statement of claim. Secondly, the applicant testified that where it came to the relief he sought for his alleged automatic unfair dismissal, he did not seek reinstatement, but was seeking only compensation.

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[1] Act 66 of 1995.

[4] Considering that the contract claims were withdrawn, I shall pay no attention to the same in this judgment. The parties argued the only remaining dispute of the alleged automatic unfair dismissal on 5 August 2016, which argument I have considered as well. I will now decide this dispute by first setting out the relevant factual matrix.

The relevant background

[5] Fortunately, in this matter, most of the important factual considerations turned out to be either common cause, or undisputed.

[6] The applicant was employed by the respondent from 1 March 2003 as a financial manager, following an earlier stint as a consultant to the respondent as from 1 May 2002. The applicant was 57 years of age when he started employment with the respondent. The applicant did not have written contract of employment at the time of commencing employment in 2003. The applicant's services rendered to the respondent were at all times exemplary. It was clear from the evidence that the respondent regarded him as a valued employee.

[7] Turning to the issue of retirement age, it was common cause that no actual written employment contract was concluded when the applicant commenced employment with the respondent, stipulating a retirement age. The applicant testified that the issue of retirement or retirement age was not even contemplated by the parties when he commenced employment. The respondent did not have a pension or provident fund in place at the time. The applicant was also unaware of the existence of any prescribed retirement age in the respondent.

[8] The applicant at all relevant times, at least until end 2013, worked with the respondent's CEO, Mr Wim Terblanche ('Terblanche'), one of the founding partners of the respondent. The applicant's son in law, Etienne Du Toit ('Du Toit') was also one of the respondent's other founding partners, but had nothing to do with the appointment of the applicant by the respondent. It appeared that the applicant had very little to do with Du Toit in the course of his employment with the respondent.

[9] What is clear is that in 2010, there was some attempts by the respondent to formalize its employment practices because of an incident that concerned a confidentiality breach by an employee that left the respondent, which potentially exposed the respondent to damages claims, without proper employment contracts in place to protect against such an eventuality. In this context, all employees were then required to conclude and sign written contracts of employment. This included the applicant, who signed a contract of employment on 2 December 2010. Terblanche signed the applicant's employment contract on behalf of the respondent.

[10] Before specifically dealing with the terms of this employment contract itself, it was common cause that also in 2010, the respondent introduced a group life, income protection and funeral aid scheme for its employees. The documentary evidence shows this scheme became effective on 1 October 2010. The respondent paid the premiums for this scheme on behalf of all its employees. The applicant was the nominated trustee, on behalf of the respondent, on this scheme, and he explained this scheme was in essence a life insurance policy in the normal sense, which entitled employees to benefits in terms of the policy if certain events arose. Employees were eligible for participation in the scheme until the age of 65.

[11] This group life, income protection and funeral aid scheme was not linked to actual retirement of employees and all being said had nothing to do with retirement. The fact that employees were no longer eligible to participate in the scheme when they turned 65 did not mean that they had to retire. All that it meant was that such an employee's membership of the scheme would end at age 65, but despite this the employee would remain employed. In fact, and what happened to the applicant when he turned 65 properly illustrates this situation, as will be dealt with hereunder.

[12] Turning back to the applicant's employment contract itself, it specifically provided, in clause 4, that participation in a retirement annuity ('RA') scheme was compulsory and the contributions made in respect of the same formed part of the applicant's remuneration. The applicant contributed 5% and the respondent 5%, of a total contribution of 10% to the RA scheme. Like any retirement annuity, the RA scheme contemplated an intended date of

retirement of the employee beneficiary under the scheme. The applicant confirmed in evidence that where it came to him, his intended retirement under the scheme was 65 years of age. It is however undisputed that the applicant did not retire at 65 and that after turning 65, his membership of the RA scheme was extended to age 70 as the intended date of retirement, and his employment with the respondent continued unabated.

[13] In May 2011, the respondent appointed Albert Van Der Merwe ('Van Der Merwe') as the senior HR manager. Van Der Merwe was tasked by Terblanche to consolidate all the respondent's policies and practices, some of which were documented and some were not. The idea was to draft and then implement one consolidated employment policy handbook ('the handbook'), and then, because most of the respondent's employees worked off site, to publish the handbook on the respondent's intranet where it would be available and accessible to all employees. Van Der Merwe further advised the respondent's management, following his appointment, that it was preferable (best practice) for the respondent to have a pension fund for employees, rather than the existing compulsory RA scheme.

[14] According to Van der Merwe, he had a meeting with Terblanche and Du Toit at the end of 2011 to give feedback on the proposed handbook. Van Der Merwe testified that amongst other issues discussed in this meeting, he felt compelled to point out that a retirement age of 65 needed to be introduced into the handbook. According to Van Der Merwe, Terblanche then answered that a retirement age of 65 had to be left out of the handbook because it would prejudice the applicant. The pleadings suggest another discussion between Terblanche and Van der Merwe to the same effect in February 2013, which Van Der Merwe in his testimony indeed confirmed to be the case. It was suggested by the respondent that these discussions and position adopted by Terblanche indicated that the applicant had some or other unique protection, and the reason for this was that Du Toit was his son-in-law. But whatever the reason behind this decision by Terblanche may have been, the point is that when the handbook was ultimately first published only on 1 April 2013, it contained no reference to a retirement age.

[15] Because of Van der Merwe's suggestion to establish a pension fund in the respondent, the respondent started considering a variety of proposals from different parties for such a pension fund, as from end 2011, and ultimately a pension fund was implemented on 1 July 2012. It was undisputed that this pension fund stipulated a retirement age of 65 years. But, and critically, the existing employees of the respondent at the time when the fund was implemented were not compelled to join the pension fund. The undisputed evidence by both parties was that existing employees had a choice, being that they could either remain with the existing RA scheme as it stood, or join the pension fund. It was conceded by Van Der Merwe that only employees that commenced employment after the introduction of the pension fund were required to sign contracts of employment referring to the pension fund, and then incorporating the retirement age of 65 in terms of the pension fund into their contracts of employment. Van Der Merwe testified that the first person to sign such a new contract was the respondent's current CEO, Bertha Dlamini ('Dlamini'), which she did in December 2012. Two further examples of such contracts, signed in 2013 by two new employees, were also provided as part of the documentary evidence. The applicant himself was however never aware of the terms of any of these contracts, which were not disclosed to him.

[16] In the case of the applicant vis-à-vis the new pension fund, at the time when it came to be introduced, the applicant stated that he was not happy with the pension fund, made this clear to the respondent, and elected to remain on the RA scheme. As a result, the applicant never became a member of the pension fund, and the provisions of such fund did not apply to him. In addition, there was never any evidence that the applicant was even presented with a new contract of employment to sign, after the one he signed in 2010, which referred to or applied the pension fund provisions and the accompanying retirement age.

[17] It is significant that when the applicant turned 65 on 18 September 2012, nothing happened. His employment continued unabated, as before. No one in management at the respondent said anything to him about what possible consequences there could be for him because he had turned 65. It was business as usual, save for two changes, one of which related to the group life, income protection and funeral aid scheme, which the applicant was no

longer eligible to participate in. The other change related to the RA scheme, already touched on above.

[18] Because the applicant was no longer eligible to participate in the group life, income protection and funeral aid scheme having turned 65, an option was explored in terms of which the applicant could procure separate similar cover and benefits, by way a policy extending beyond 65 only in respect of the applicant. A quote was obtained on such a policy, and its premiums, and the policy was then taken out by the applicant effective end September 2012. The applicant enquired from the respondent whether it would be willing to pay the premiums on the policy, and in an e-mail on 2 August 2012, the respondent agreed to do so for as long as the applicant was employed by the respondent. Since then, the respondent contributed the premiums to this policy. Insofar as the RA scheme was concerned, the applicant's intended retirement date was changed to 70 years of age.

[19] In the end, it was undisputed that when the applicant turned 65 in September 2012, there existed no policy stipulation in the respondent specifying or referring to a compulsory retirement age of 65. The applicant's employment contract did not stipulate a retirement age at all. As far as the pension fund was concerned, the applicant was not compelled to belong to it, and elected not to. The applicant's RA scheme retirement date was extended to 70, and he took out a replacement life policy with no age limit to participation therein, the premiums of which were paid for by the respondent. Also, and at this time, there was no instance of any other employee, in the past, having retired from the respondent, let alone retiring at 65.

[20] Nothing much then changed in 2013. Van Der Merwe, as stated, managed to implement the handbook in April 2013, but this did not in any way deal with a compulsory retirement age. Van Der Merwe implemented a second revision of the handbook on 1 October 2013, but still it did not contain any reference to a compulsory retirement age. It is only the third revision of the handbook implemented on 8 April 2014 that now for the first time imposed a compulsory retirement age of 65 years of age. But by then, the applicant had already been notified that he had been placed on retirement, as discussed hereunder. It is however critical consider that all these handbook implementations in any

event occurred after the applicant had already turned 65 years of age and had continued working. Also, and throughout 2013, it was never once intimated to the applicant that he had exceeded what was the retirement age in the respondent or that he faced possible retirement.

[21] Sometime towards the end of 2013, there was also a change in shareholding at the respondent. This resulted in the four founding partners in the respondent leaving the respondent in January 2014. This included Terblanche, and the applicant's son-in law, Du Toit.

[22] Sometime in February 2014, there was a meeting between the respondent's new CEO designate Dlamini, Van Der Merwe, and one Renier Van Coller ('Van Coller'). Van Coller was the COO from Lesedi, the new principal shareholder in the respondent, and was specifically tasked to assist in the management and transition of the business, and to deal with all employment related issues in the course of this transition. According to Dlamini, this meeting had nothing to with the applicant and his retirement. It was a normal operational meeting, aimed at commencing the process of *inter alia* standardizing and consolidating of all the respondent's employment policies and procedures. Dlamini testified that in the course of this discussion, it was Van Der Merwe made her aware that the applicant was older than 65, which according to what Van Der Merwe told her, was the retirement age prescribed by the respondent's policies.

[23] In his testimony, Van Der Merwe said that the issue of the retirement of the applicant had nothing to do with him, and he was only tasked to deal with it, once the decision had been made. This was directly at odds with the testimony of Dlamini, who said that it was Van der Merwe who told her about the applicant exceeding the age of 65, and that this was contrary to the respondent's retirement policy. According to Dlamini, because this issue was raised by Van Der Merwe, there was a discussion about it and in a joint decision taken by Dlamini, Van Der Merwe and Van Coller, it was decided to place the applicant on retirement.

[24] The decision to place the applicant on retirement having been made, the applicant's immediate superior and the chief financial officer, Ian Van Niekerk ('Van Niekerk'), was tasked to meet with the applicant to inform him of that

decision. On 21 February 2014, the applicant was then called to a meeting by Van Niekerk. Van Niekerk told the applicant that it was in essence his unhappy duty to inform the applicant that the management of the respondent had decided that the respondent now expected the applicant to retire, because the applicant was older than 65. The applicant answered that he was not ready to retire and said that he had no knowledge of any retirement age of 65 being prescribed in the respondent. Van Niekerk told the applicant that he would be given a letter to confirm this discussion.

[25] On 28 March 2014, the applicant was then presented with a letter, dated 26 March 2014, referring to the discussion with Van Niekerk on 21 February 2014, and inter alia stating that since the applicant had exceeded the age of 65 years in terms of the "EON policy', he was given three months' notice of retirement, making his retirement effective 30 June 2014. There was also an offer of an ex gratia payment. The letter was presented to the applicant by Van Niekerk, who asked the applicant to go through it. The applicant was not satisfied with this state of affairs.

[26] On 30 April 2014, the applicant sent an e-mail to Dlamini, asking for a copy of the policy referred to in the letter of 26 March 2016. Dlamini testified that she then sought to obtain this policy in order to give it the applicant, and met with Van Der Merwe and Van Coller. It was then conveyed to her by Van Der Merwe that there were actually two policies in existence, the one being as contained in the handbook, which contained no reference to a retirement age. The other policy was never published and contained a retirement age of 65. According to Dlamini, she was informed by Van Der Merwe that he had been instructed by Terblanche not to publish the policy with the 65 years retirement age because it would prejudice the applicant.

[27] Dlamini stated that she was concerned about the fact that there were two such policies, and that the published policy did not accord with the current employment contracts. She then instructed Van Der Merwe to publish the most current policy in the employee handbook and make sure it accorded with the current contracts. This evidence does not entirely match the undisputed chronology, because, as touched on above, the policy containing the retirement age was published as version 3 of the handbook on 8 April 2014

already. Be that as it may, the introduction of a retirement age in the handbook only took place after it had already been decided to place the applicant on retirement, and after he had been informed in writing of his retirement.

[28] At the beginning of May 2014, Van Der Merwe came to the applicant's office to discuss the applicant's request for the EON policy, with him. In this discussion, the applicant again told Van Der Merwe that he (the applicant) was not aware of any policy stipulating a retirement age of 65 and that Terblanche had undertaken to him that he could remain working for as long as his health permitted it. Van Der Merwe asked the applicant what he expected of the applicant and what he would be happy with in order to leave. The applicant intimated that he would consider accepting the retrenchment package that recently retrenched employees in the respondent received based on his 11 years' service, at two weeks' salary per year of service.

[29] Pursuant to this discussion with the applicant, Van Der Merwe then sent an e-mail to Van Coller on 12 May 2014. This e-mail is an important piece of evidence in deciding this matter. In this e-mail, Van Der Merwe specifically referred to what had been conveyed to him by the applicant, concerning the undertaking given by Terblanche, and recorded that if it was true that such an undertaking was given, the respondent 'could have a problem which we have to negotiate around'. Van Der Merwe clearly appreciated, in this e-mail, that even if there was a policy, such an undertaking by Terblanche, the CEO at the time, could negate such policy. Van Coller answers on 13 May 2014, and says that what the applicant said about the commitment by Terblanche was 'probably true'. Van Coller says that this earlier decision had now been 'altered', and asks Van Der Merwe if the respondent should 'take this further'. Van Der Merwe replies on the same day that he would negotiate with the applicant and recommends advice be sought.

[30] On 3 June 2014, the applicant then places his position on record. He writes to Dlamini, and says that he was not consulted about his retirement, that he has no intention to retire, that his performance was exemplary, and there existed no policy which stipulated that he was compelled to retire at age 65. The applicant demanded that the decision to terminate his services be retracted.

[31] A further meeting between the applicant, Dlamini and Van Der Merwe followed on 9 June 2014, about the applicant's letter, but nothing significant transpired in that meeting, other than an undertaking that the applicant's letter will be formally responded to.

[32] The respondent's formal answer the came on 18 June 2014. Significantly, and now clearly being confronted with the absence of the policy initially relied on, the respondent changes tack. It is now contended that the applicant was aware of a retirement age of 65 'in practice', so to speak, because the applicant was the custodian of the respondent's group life, income protection, and funeral aid scheme, that scheme contained a 'retirement age' of 65, and this was 'implicitly' part of his conditions of employment. Further, the answer took on a more sour note, in that it was said that the applicant remained in employment by way of 'grace and favour', because his son-in-law was one of the founding members. The applicant answered, curtly, on 23 June 2014 and disagreed.

[33] Further correspondence then followed about the nature and basis of the ex gratia payment offered to the applicant, none of which has any bearing on this matter. Suffice it say that in the end, agreement could not be achieved, and the applicant's retirement effective 30 June 2014 stood. The applicant then duly departed at the end of June 2014, and pursued the dispute as an automatic unfair dismissal, first to the CCMA where it remained unresolved, and now to this Court.

Was the dismissal automatically unfair?

[34] It is common cause that the applicant was dismissed, effective 30 June 2014. It is equally common cause that this dismissal was entirely founded on the applicant's age, being that he had exceeded the age of 65. Because the termination of employment of the applicant is based on his age, Section 187(1)(f) of the LRA applies, and the relevant part thereof reads thus:

> '(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is - ….

> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on an arbitrary ground, including but not limited to .... age.'

[35] Consequently, and in principle, the termination of employment of the applicant based on his age would be automatically unfair, which is indeed the foundation of the applicant's case. But this is not where the enquiry ends. Section 187(2)(b) provides an exception to the general principle created by Section 187(1)(f), and provides as follows:

> '(2) Despite subsection (1)(f) - …. (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.'

[36] It is clear that Section 187(2)(b) can apply in either one of two instances, the first being a case of an agreed retirement age and the second being the case of a normal retirement age. In *Rubin Sportswear v SA Clothing and Textile Workers Union and Others*[2] the Court said:

> 'Section 187(1)*(b)* creates two bases upon which an employer can justify the dismissal of an employee on grounds of retirement age. The one is an agreed retirement age, the other is normal retirement age. Those are the only two bases. ….'

[37] As to these two bases referred to, it has to be one or the other. It cannot be both. A normal retirement age can only apply where there is no agreed retirement age. In *Cash Paymaster Services (Pty) Ltd v Browne*[3] the Court said:

> '….The provision relating to the normal retirement age only applies to the case where there is no agreed retirement age between the employer and the employee ….'

[38] Turning firstly to an agreed retirement age, there can be no question of what an agreed retirement age means. In order for an agreed retirement age to

[2] (2004) 25 ILJ 1671 (LAC) at para 24.
[3] (2006) 27 ILJ 281 (LAC) at para 25.

exist, it has to be shown that the employer and the employee achieved consensus on the actual age of retirement of the employee and that this retirement age gives rise to the compulsory retirement of the employee from the employ of the employer at that age. This agreement need not be in writing, although this would be preferable. A retirement age stipulated in the employment contract of the employee would constitute such an agreed retirement age.

[39] As to what constitutes a normal retirement age, the Court in *Rubin Sportswear*[4] said:

> '…. What is the normal retirement age depends upon the meaning to be accorded the word 'normal' in s 187(2)*(b)*. The word is not defined in the Act. It, accordingly, must be given its ordinary meaning. Chambers-Mcmillan's *SA Student's Dictionary* describes the word 'norm' thus: 'You say that something is the norm if it is what people normally or traditionally do.' It further says: 'Norms are usual or accepted ways of behaving.' It describes the adjective 'normal' as meaning 'usual, typical or expected'. The word 'normality' is described as 'the state or condition in which things are as they usually are'. *The New Shorter Oxford English Dictionary* describes the word 'norm' as meaning, among others 'a standard, a type; what is expected or regarded as normal; customary behaviour, appearance'. As to the adjective 'normal', one meaning that the latter dictionary gives is 'constituting or conforming to a standard; regular, usual, typical, ordinary, conventional'.'

After analysing a number of judgments[5] the Court concluded:[6]

> 'It seems to me that the word 'normal' as used in s 187(2)*(b)* really means what it says. It means that which accords with the norm. ….'

[40] 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

[4] (*supra*) at para 13.
[5] See paras 14 – 18 of the judgment in *Rubin Sportswear*.
[6] Id at para 19

found in *Botha v Du Toit Vrey and Partners CC*[7] 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.[8] Another consideration would be how the employer had treated other employees who attained the same age in the past.[9] 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*[10] the Court said the following, with specific reference to the introduction of a retirement policy:

[7] (2005) 26 ILJ 2362 (LC) at para 15.
[8] *Wanless v Fidelity (Pty) Ltd* (2008) 29 ILJ 2030 (LC) at paras 22 – 23.
[9] *Hibbert v ARB Electrical Wholesalers (Pty) Ltd* (2013) 34 ILJ 1190 (LC) at paras 19 – 20.
[10] (2010) 31 ILJ 1325 (LC) at para 21. See also *Botha v Du Toit Vrey and Partners CC (supra)* at para 15.

> '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. ….'

The first proviso however is that this implementation can never work retrospectively, meaning that an employee that had already exceeded the fixed retirement age by the time it is implemented cannot then be retired in terms of this norm. In *Bedderson*[11] the Court said:

> 'But the question is whether the application of such a retirement age can be justified in a case such as this where the employee had already reached and passed the retirement age? In my view, it cannot. It is one thing to be able to justify the implementation of general retirement age but this does not mean that it is necessarily fair to dismiss somebody on the basis that she had already reached that age when the policy was introduced.'

The second proviso is that the policy unilaterally implemented cannot be at odds with, or contradict, an employee's existing conditions of employment or agreed retirement age.[12]

[44] The attaining of a normal or agreed retirement age is comparable to the situation of the expiry of the term in the case of a fixed term contract of employment. As such, specificity is important. The point is that retirement age serves as basis, in itself, for an employer to bring about the termination of the employment of an employee without due process, and as such, the retirement provisions must be clear and unambiguous. This holds true for a retirement age whether determined by agreement, or by norm.

[45] Because a dismissal on the basis of an agreed retirement age or a normal retirement age is deemed to be fair by virtue of the application of Section 187(2)(b), there is no separate requirement of procedural fairness in effecting it. Therefore, there is no need to first consult the employee or affording the employee some kind of hearing before implementing retirement.[13]

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[11] Id at para 30.
[12] *Rubin Sportswear* (supra) at paras 11 and 21.
[13] See *Rockliffe v Mincom (Pty) Ltd* (2008) 29 ILJ 399 (LC) at paras 32 – 33;

[46] A final consideration is the situation where an employee works beyond an agreed or normal retirement age. The harsh reality is that such an employee is in effect working on 'borrowed time'. The employer, unless it can be proven that the employer specifically waived its rights to apply the retirement age, would remain entitled to at any point after the employee had attained the normal or agreed retirement age place the employee on retirement. In *Rubenstein v Price's Daelite (Pty) Ltd*[14] the Court held, with specific reference to Section 187(2)(b), that: 'It says a dismissal is fair if the employee has reached retirement age, not when he reaches it.' In *Rockliffe v Mincom (Pty) Ltd*[15] the Court approved of the above *ratio* in *Rubenstein* and further said:[16]

> 'Accordingly in an automatically unfair dismissal claim the enquiry ends at the point where, if a defence of having reached an agreed age is raised, such age has been reached. What happened afterwards is immaterial unless a defence of waiver is successfully raised.'

[47] In the end, one can hardly do better than quote *Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd)*[17] as to when Section 187(2)(b) can be successfully relied on, where the Court said:[18]

> '…. the enquiry in relation to the fairness of the dismissal can only relate to whether the conditions necessary for s 187(2)*(b)* to apply exist. Once it is established that they do exist, and it has been established that the dismissal is one based on age, the statute itself pronounces on the fairness of the dismissal; it states that such dismissal 'is fair'. Once those conditions are found to exist, there is nothing left for the court to pronounce on. The conditions which must exist in order for a dismissal to be fair in terms of s 187(2)*(b)* are the following:
>
> *(a)* the dismissal must be based on age;
>
> *(b)* the employer must have a normal or agreed retirement age for persons employed in the capacity of the employee concerned;
>
> *(c)* the employee must have reached the age referred to in *(b)* above. ….'

[14] (2002) 23 ILJ 528 (LC) at para 23.
[15] (2008) 29 ILJ 399 (LC) at para 26.
[16] Id at para 36
[17] (1998) 19 ILJ 1573 (LC).
[18] Id at paras 30 – 31.

[48] I will now apply the above principles to the facts *in casu*. Firstly and immediately, there exists no agreed retirement age in this instance. The most current employment contract signed by the applicant in 2010 contains no reference to retirement or a retirement age. There was also no evidence of any retirement age ever being proposed to the applicant by the respondent, which the applicant had agreed to. In any event, the respondent did not seek to rely on an agreed retirement page.

[49] This then leaves the issue of a normal retirement age. According to the respondent, the normal retirement age for employees in the respondent was 65 years of age. The respondent's case was that this normal retirement age was established by a number of factors. The first factor was that the applicant was a member of the respondent's group life, funeral benefit and income protection scheme which stipulated a retirement age of 65. The second factor was that it was compulsory that the applicant be a member of the RA scheme which equally had a planned retirement age of 65. The third factor was that the respondent had introduced a pension fund into the business which stipulated a retirement age of 65. The fourth factor was that other employees signed employment contracts stipulating a retirement age of 65. The fifth and final factor was that there existed a policy that stipulated a retirement age of 65. I will now deal with each of these factors hereunder, *seriatim*.

[50] Considering the first factor of the group life, funeral benefit and income protection scheme, it is of course so that the applicant did belong to this scheme and in terms of the scheme document as contained in the documentary evidence, a retirement age of 65 was stipulated therein. This being said, this scheme must however be seen for what it really was. It was nothing else but a life insurance policy, to which all the respondent's employees were joined, and in respect of which the respondent paid the premium. The applicant, as the respondent's nominated trustee for the scheme, explained that the retirement age as reflected in the scheme was nothing more than the date when employees were no longer eligible to participate in the scheme itself, and it was never intended as a date when employees had to leave the respondent. This explanation was never contradicted. In any event, and what happened in the case of the applicant once he turned 65 in September 2012 bears out this explanation. As the

applicant was no longer eligible to participate in this scheme, his membership terminated, and he had to take out, individually, his own comparable life insurance. The applicant then obtained a quote from Sanlam for comparable life insurance, which included a quote for the premium he had to pay. The applicant accepted the quote, and asked the respondent whether it would be willing to pay the premium for the life insurance, to which the respondent agreed for as long as the applicant remained employed by the respondent. The applicant, now no longer a member of the respondent's life scheme, remained employed by the respondent with his own life insurance policy, the premium of which was being paid for by the respondent for as long as he remained working there.

[51] I am therefore of the view that the life insurance scheme of the respondent cannot serve as a basis to establish a normal retirement age. That was never the intention with this scheme. The intention of the scheme was to convey a benefit to the respondent's employees in the case of death, and afforded no benefit to employees once an employee would simply turn 65 years of age. Furthermore, and as stated above, the applicant's membership of this scheme ended when he turned 65, and this was replaced, by agreement with the respondent, with a similar scheme for the applicant specifically which would be paid for by the respondent for as long as the applicant remained employed. Such a scenario is entirely inconsistent with a scheme that would establish a compulsory retirement age norm.

[52] Turning then to the second factor, being the RA scheme, this scheme indeed seeks to establish a retirement benefit for employees. But, and significantly, it is not a measure implemented by the respondent, as an employer, to establish a retirement age, on which it could rely to bring about the termination of the employment of employees. In my view, it is clear from the evidence that all the respondent wanted to do was convey a benefit onto its employees by compelling them, together with an equal contribution by the respondent as employer, to divert part of their income towards catering for their retirement one day. The applicant conceded in evidence that when he initially took out this RA, he reflected his envisaged retirement date therein to be 65. Critically however, and when he turned 65, this envisaged retirement date was amended to be 70 years of age. It is clear that the intended retirement date in

the RA is determined by the employee, and not the employer. It was never intended to establish a compulsory retirement age, but was simply a benefit working in favour of employees. I thus conclude that the RA scheme can equally not serve to establish a normal retirement age in the respondent.

[53] The third factor relates to the introduction of the pension fund into the respondent. Van Der Merwe testified that he was tasked to do this, and that this pension fund introduced a compulsory retirement age of 65. There can be no arguing that this was indeed the case. But how did this effect the applicant and how did this serve to establish a possible normal retirement age in the respondent? I may point out that there is some contradiction as to then this pension fund was in fact introduced. Van Der Merwe testified that it was beginning July 2012. The respondent's answering statement reflects the date of introduction as being in 2013. When seeking to prove a norm, such a contradiction is certainly not helpful to the respondent. But the simple answer to the respondent's case in this regard is that at the time of introduction of this pension fund, it was not compulsory. Existing employees in the respondent, such as the applicant, had a choice to either remain on their existing RA scheme or join the pension fund. It was clear that only if the employee elected to join the pension fund, would the rules of the fund, and consequently the compulsory retirement age therein, apply to the employee.

[54] In the case of the applicant, he made it clear that he was not happy with the pension fund, and conveyed this in no uncertain terms to the respondent. The applicant never joined the pension fund, and instead remained on his RA scheme. It is therefore in my view clear that the application of the compulsory retirement age in the pension fund came about by agreement between the respondent, and those employees that elected to join the fund. Because this was the case, the compulsory retirement age of 65 would only apply to those employees who so agreed. This situation is further evidenced by the fact that all new contracts of employment concluded with new employees that became employed with the respondent after the introduction of the pension fund, contained the compulsory retirement age of 65 as reflected in the pension fund. It was thus an issue of specific agreement, and not the establishment of a norm. A similar situation arose in *Hibbert v ARB Electrical Wholesalers (Pty)*

Ltd[19] where it was suggested that the rules of a provident fund established a normal retirement age, and the Court said:[20]

> 'The difficulty with this argument is the fact that the applicant was clearly exempted from membership of the fund. ….'

The same considerations apply *in casu*, and I shall apply this same reasoning.

[55] What I have said above with regard to the pension fund, equally answers the fourth factor relied on by the respondent, being the fact that other employees signed contracts of employment containing a retirement age of 65. Again, and to be complete, this was a retirement age based on agreement with that particular employee who elected to join the pension fund. The simple fact is that an agreement can differ from the norm where it comes to retirement age. Only new employees, after establishment of the pension fund, signed these contracts. I may add that there was no evidence that the applicant himself or any other employee (other than the employee who the contract related to) was actually aware of these contracts and what they contained, and the contents thereof was certainly never disclosed to them. It can thus hardly be suggested that the knowledge of the terms of such contracts, by employees, could establish a norm.

[56] What the respondent sought to suggest was that the mere fact that these contracts of employment with other employees, that stipulated a retirement age of 65, existed, established an inconsistency. The respondent contended it was not palatable to have such contractual retirement age, on the one hand, and employees subject to no such retirement age on the other, in the same employer. The respondent argued that it was important to consistency that the 65 years retirement age in these other contracts of employment should equally apply as a norm. The respondent's argument is however based on a flawed premise. There is nothing wrong with inconsistency in the case of retirement age, when one retirement age is established by agreement, and another is established by a norm, in the same employer. This is in fact specifically envisaged by Section 187(2)(b) of the LRA. The point is that even if these is a

[19] (2013) 34 ILJ 1190 (LC) at para 17
[20] Id at para 18

norm in an employer, the employer and the employee individually can agree on an alternative retirement age, which would always override the norm. As the Court said in *Cash Paymaster Services*[21]:

> '…. The retirement age dispensation provided for in s 187(2)*(b)* of the Act is one that works on the basis that, if there is an agreed retirement age between an employer and an employee, that is the retirement age that governs the employee's employment. This is the case even when there is a different normal retirement age for employees employed in the capacity in which the employee concerned is employed. The provision relating to the normal retirement age only applies to the case where there is no agreed retirement age between the employer and the employee ….'

[57] This then leaves only the issue of the policy. It is in fact my view that the evidence surrounding the issue of the policy, is that which confirms that there was not a normal retirement age in the respondent, until only after the applicant was placed on retirement. The applicant's undisputed evidence was that when he started working for the respondent he was already late in his 50's, retirement was at that point in time not even a consideration to the parties, and nothing was said or discussed about it, until the meeting with Van Niekerk in February 2014. The applicant was not involved in, nor was he aware of, any envisaged policy changes where it came to a retirement age.

[58] Van Der Merwe, as touched on above, came into the business in 2011 and was specifically tasked to standardize and consolidate policies and procedures. I accept that Van Der Merwe proposed to the respondent's management late in 2011 that a retirement age be introduced in the business by way of policy. But, and in response to this proposal, the respondent's CEO, Terblanche, made it clear that this should not be done because it would prejudice the applicant. There is no indication that Terblanche was not competent to make such a decision. The upshot was that no policy was introduced or published that contained a retirement age.

[59] According to Van Der Merwe, the first version of the consolidated policy was published on the respondent's internal network in April 2013. This policy did not form part of the documentary evidence, but Van Der Merwe confirmed it

[21] (*supra*) at para 25. See also *Rubin Sportswear* (*supra*) at para 20

contained no reference to a retirement age. The second version of the policy was published on 1 October 2013. This version indeed formed part of the documentary evidence, and it was clear that all that was provided for was the choice employees had between membership of the pension fund, or retaining / taking up the RA option. There is no stipulated retirement age.

[60] Van Der Merwe also testified, as evidenced in the answering statement, that there was a second occasion in 2013 where he was told by Terblanche not to include a retirement age into the policy because of the applicant. Added to this was the discussion between the applicant and Terblanche after the applicant turned 65, referred to above, where Terblanche had said that the applicant could remain employed for as long as his health permitted it. What the evidence in my view clearly showed is that as the end of 2013, by which time the applicant had more than a year before surpassed the age of 65, not only was there no policy in existence at the respondent that stipulated a retirement age of 65, but this *lacuna* was as a result of deliberate decision made by the respondent's management. At this time, the issue of a retirement age for new employees that commenced employment with the respondent after introduction of the pension fund with its 65 years' retirement age, was contractually covered on an individual basis in such employees' individual contracts of employment.

[61] So what changed? The answer is that the respondent's founding management (partners) sold their shareholding and left the business in January 2014. Dlamini was appointed as the new CEO. And as the saying goes, new brooms sweep clean, resulting in Dlamini then tasking Van Der Merwe to ensure all the conditions of employment, policies, procedures and practices in the respondent were to be consolidated and standardized, and conflicts eliminated. In the course of a discussion about this task, Van Der Merwe raised with Dlamini that the applicant was still employed despite having exceeded the retirement age of 65 prescribed by 'policy'. Dlamini testified that Van der Merwe assured her there was such a policy. According to Dlamini, and in consultation with van Der Merwe and Van Coller, it was decided to place the applicant on retirement. Dlamini testified that it was Van Der Merwe that drafted the applicant's termination letter dated 26 March 2014, which she signed.

[62] I may add that Van Der Merwe offered a contrary version. He testified that he had nothing to with raising the applicant's retirement age with Dlamini, the decision to retire the applicant, and the drafting of the letter of 26 March 2014. I have little hesitation in rejecting the evidence of Van Der Merwe in this respect. He was clearly trying to distance himself from what was a very bad and ill informed decision. He also clearly misled Dlamini as to the existence of a policy. Further, Dlamini would not have any prior knowledge of these issues, only having just been appointed in a management role, and all that she knew in this regard was conveyed to her by existing managers, whom she said she trusted.

[63] It was common cause that since the applicant's retirement letter referred to a policy as basis for the retirement age, the applicant asked Dlamini for it. Dlamini testified that she then asked Van Der Merwe for the policy, and Van der Merwe then told her there were two policies, one published and one unpublished. The published policy had no retirement age, and the unpublished policy had a retirement age. It was in the end conceded by both Van Der Merwe and Dlamini that there existed no policy which could be provided to the applicant as he requested. Further, Dlamini instructed Van Der Merwe to immediately publish the policy with the retirement age, which was then version 4 of the policy published on 8 April 2014. But, and by then, the applicant had long before turned 65 and had already been told he was placed on retirement.

[64] This clearly left the respondent in a predicament. As a result, Van Der Merwe sought to meet with the applicant to ask the applicant what he wanted from the respondent. This led to the discussion and e-mail exchange in May 2014, referred to above. What is significant is that it is clear that the respondent accepted that under the former management, the applicant was given an undertaking that he could work for as long as his health permitted it, and that the respondent had now decided to change this state of affairs. The respondent then sought advice from Andrew Levy on how to bring about the retirement of the applicant, considering the challenges referred to.

[65] The advice given was bad. Abandoning the reliance on a policy and ignoring the undertaking given to the applicant, the respondent now sought to rely on

the fact that the applicant was custodian of the group file scheme which recorded a retirement age of 65, and this meant that he must have been aware that there was a norm of such a retirement age. There can be no substance in this new position adopted by the respondent. I have dealt with the group life scheme above, and it is clear that this scheme never served to create a retirement age norm. Further, this still cannot serve as an answer for the undertaking given to the applicant by Terblanche. Finally, and considering that this was only raised when the respondent could not make out a case on the non existent policy it sought to rely on, this is clearly an afterthought and a basis lacking any credibility.

[66] I have no hesitation in thus concluding that there existed no policy provisions in the respondent, at the time when the applicant was placed on retirement, which created a normal retirement age of 65 applicable in the respondent. I accept that whilst the respondent was entitled to implement such policy stipulating such a retirement, it cannot do so ex post facto. It cannot implement and then apply such a policy to the applicant, who at that stage had already surpassed the age of 65. The respondent had to honour the undertaking given to the applicant beforehand. The matter *in casu* has many similarities with the judgment in *Datt v Gunnebo Industries (Pty) Ltd*[22], where the managing director in that case furnished the employee with a letter saying that notwithstanding that the employee had reached the normal retirement age of 65, he would remain in employment until such time as the parties mutually agreed that he should retire.[23] In *Datt*, it was similarly the case of the employee that he accepted that he did not expect to have a 'job for life', but intended to work until age 70, provided he was of sound mind and could fulfil his duties competently.[24] Based on these facts, the Court in *Datt* said:[25]

> '…. I am of the view that the respondent could no longer rely on s 187(2)*(b)* as a justification to unilaterally terminate the applicant's employment based on his age. The 'normal' or 'agreed' retirement age was no longer 65. The parties mutually agreed that, henceforth, the applicant could only be dismissed based on his age when they 'mutually agree' that he should retire. ….'

[22] (2009) 30 ILJ 2429 (LC)
[23] See paras 4 and 9 of the judgment.
[24] See para 12 of the judgment.
[25] Id at para 26

Therefore, and even if it may be accepted that there existed some or other norm that retirement age in the respondent was 65 because of, for example, the RA scheme or group life scheme, and applying the ratio in *Datt*, the position adopted by Terblanche and the undertaking subsequently given by him to the applicant overrides this, and the applicant could work for as long as his health allowed it. The respondent is bound by the undertaking Terblanche gave the applicant.[26]

[67] In short, and *in casu*, the terms and conditions of employment specifically applicable to the applicant made no provision for a retirement age. Unilaterally introducing a retirement age in such circumstances would amount to a unilateral change in employment conditions, which is not permitted, and which the applicant refused to accept. If the respondent wanted to change the situation with regard to the retirement age applicable to the applicant, as it clearly did want to do, it needed to negotiate with the applicant to try and secure an agreement.[27]

[68] In a last ditch effort to salvage the case, Mr Venter, representing the respondent, sought to suggest that the applicant was employed in a financial position related to that of an accountant, and that the normal retirement age in such an occupation is 65. There are two simple answers to this contention. The first and most immediate answer is that such a case was never pleaded. If the respondent wanted to rely on a normal retirement age as established by an industry norm, it needed to plead it, and in the absence of pleading it, it cannot be raised now.[28] As the Court said in *Imprefed (Pty) Ltd v National Transport Commission*[29], in dealing with a case not pleaded: '…. A party is not permitted to alter his stance whenever the shoe pinches. ….'. The second answer is that there was no evidence presented as to what would indeed be a normal retirement age in the 'financial industry', which needed to be established by

[26] *Datt* (*supra*) at para 17.
[27] *Rubin Sportswear* (*supra*) at para 22.
[28] See *Hibbert* (*supra*) at para 12; *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd* (2009) 30 ILJ 1379 (LC) at paras 42 and 52; *Bandat v De Kock and Another* (2015) 36 ILJ 979 (LC) at para 30; *SA Transport and Allied Workers Union v Old Mutual Life Assurance Co SA Ltd* (2005) 26 ILJ 293 (LC) at para 112; *Owen and Others v Department of Health, KwaZulu-Natal* (2009) 30 ILJ 2461 (LC) at 2466
[29] [1993] 2 All SA 179 (A) at 188.

expert testimony. *In casu*, not only was there no such expert testimony, but the issue was not even canvassed between the parties in course of the evidence actually presented. In *South British Insurance Co Ltd v Unicorn Shipping Lines* (*Pty*) *Ltd*[30] the Court said:

> '…. the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.'

The attempted reliance by Mr Venter on some or other industry retirement age thus falls to be rejected.

[69] The applicant afforded the respondent the opportunity to retract this decision to retire him, and considering the applicant's notice only expired end June 2014, the respondent had ample opportunity to do so. Instead, and plainly based on the advice of Messrs Levy and Van Der Merwe, the respondent persisted will its ill conceived and unfounded course of action. I may add that there was no other person in the respondent that had been retired at age 65 which could possibly have served as some or other beacon that there may be such a norm.[31] As the Court said in *Hibbert*:[32]

> 'The difficulty the respondent faces in establishing a retirement age norm for someone in the applicant's position is the lack of other retired external salespersons with whom it could compare the applicant.'

[70] Accordingly, I conclude that the respondent has failed to establish the existence of either an agreed or normal retirement age to be applicable in the respondent, and in particular, being applicable to the applicant. As such, because one of the essential requirements for the application of Section 187(2)(b) is then absent, the defence in terms of this Section is not available to the respondent. Because the applicant was dismissed based on his age, the

[30] 1976 (1) SA 708 (A) at 714G.
[31] See *Rubin Sportswear* (*supra*) at para 22; *Hibbert* at paras 20 - 21.
[32] (*supra*) at para 20.

applicant's dismissal was automatically unfair as contemplated by Section 187(1)(f) of the LRA, which I hereby determine to be the case.

The issue of relief

[71] I now turn to the relief to be afforded to the applicant in this matter, as a result of his automatic unfair dismissal. As stated above, the applicant is now seeking maximum compensation of 24 months' remuneration. The applicant's monthly remuneration at the time of his dismissal was R78 286.55.

[72] When it comes to deciding an appropriate award of compensation, this Court must exercise a judicial discretion. In Section 193(4), it is provided that compensation must be 'just and equitable in all the circumstances'. The normal basis upon which this discretion is to be exercised is properly enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others,*[33] as thus*:*

> 'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[73] The above being said, the fact of the matter is that the dismissal of the applicant in this instance was automatically unfair. In the case of compensation awards for automatic unfair dismissals, the compensation cap is double that of other unfair dismissals, being a maximum of 24 months' remuneration instead of 12 months' remuneration.[34] This confirms that from a statutory perspective, and despite what was said in *Le Monde Luggage*, automatic unfair dismissals are seen in a much more serious light and must

[33] (2007) 28 *ILJ* 2238 (LAC) at para 30. See also *Mohlakoana v CCMA and Another* (2010) 31 *ILJ* 2688 (LC); *SA Post Office Ltd v Jansen Van Vuuren NO and Others* (2008) 29 *ILJ* 2793 (LC); *Metalogik Engineering and Manufacturing CC v Fernandes and Others* (2002) 23 *ILJ* 1592 (LC): *Rope Constructions Co (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2002) 23 *ILJ* 157 (LC); *H M Liebowitz (Pty) Ltd t/a the Auto Industrial Centre Group of Companies v Fernandes* (2002) 23 *ILJ* 278 (LAC).

[34] See Section 194(1) and (3)

have a punitive component.[35] In *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass and Aluminium 2000 CC*[36] the Labour Appeal Court specifically dealt with the issue of the award of compensation in the case of an automatic unfair dismissal in terms of Section 187 and said the following:[37]

> '…. It is a dismissal that undermines the fundamental values that the labour relations community in our country depends on to regulate its very existence. Accordingly such a dismissal deserves to be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected.
>
> In considering whether or not to award compensation in such a case, the court must consider that not to award any compensation at all where reinstatement is also not awarded may give rise to the perception that dismissal for such a reason is being condoned. This may encourage other employers to do the same. It must also take into account the fact that such a dismissal is viewed as the most egregious under the Act. Accordingly, there must be a punitive element in the consideration of compensation.'

[74] But the desire to disseminate punishment is somewhat diminished where it comes to instances of an automatic unfair dismissal based on age, where retirement is involved, and in particular where the employer was not *mala fide*. In *Bedderson*[38] the Court said:

> 'Although discriminatory, the actions of the respondent's management were not mala fide. I acknowledge that the motive of the employer in determining whether unfair discrimination has taken place is irrelevant. Nevertheless, I do think that it may be relevant in determining what amount of compensation is just and equitable. ….'

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[35] See *Heath v A & N Paneelkloppers* (2015) 36 ILJ 1301 (LC) at para 71; *Naude v Member of the Executive Council, Department of Health, Mpumalanga* (2009) 30 *ILJ* 910 (LC) at para 113. See also *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (2011) 32 *ILJ* 1637 (LC) at para 77; *University of South Africa v Reynhardt* (2010) 31 *ILJ* 2368 (LAC) at para 14 and the Court a quo judgment in *Reynhardt v University of South Africa* (2008) 29 *ILJ 7*25 (LC) at para 145; *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 *ILJ* 1564 (LC) at paras 81–82.

[36] (2002) 23 *ILJ* 695 (LAC).

[37] Id at paras 48–49. The Court at para 50 also set out some of the factors that have to be considered in exercising the discretion in determining the quantum of compensation.

[38] (*supra*) at paras 50 – 51.

[75] The Labour Appeal Court in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[39] dealt with compensation in the case of an automatic unfair dismissal dispute concerning retirement. It must be said that the Court a quo in *Hibbert*, which judgment is referred to above, in applying a discretion, awarded 12(twelve) months' salary in compensation. Considering this award, the Labour Appeal Court in *Hibbert* said:[40]

> '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. There are conflicting decisions regarding whether compensation should be analogous to compensation for a breach of contract or for a delictual claim. In my view, and as I said earlier, because compensation awarded constitutes a 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.'

[76] In *Hibbert*, the Labour Appeal Court held that the following principles should be used as a guideline in deciding appropriate compensation to be awarded:[41]

> 'the nature and seriousness of the injuria, 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 a relationship between the parties, and the attitude of the defendant after the injuria had taken place'.

[77] The punitive element and the fact that compensation may well be a *solatium* duly considered, I remain of the view that compensation must always be fair to both parties. I consider myself guided by what was said by Zondo JP (as he then was) in *Kemp t/a Centralmed v Rawlins*[42]:

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[39] (2015) 36 ILJ 2989 (LAC) at paras 21 – 23.
[40] Per Waglay JP at para 24.
[41] Id at paras 24 – 25. The Court was quoting from the judgment in *Minister of Justice and Constitutional Development and Another v Tshishonga (Tshishonga)* (2009) 30 *ILJ* 1799 (LAC) at para 18.
[42] (2009) 30 *ILJ* 2677 (LAC) at para 27. The SCA in *Rawlins v Kemp t/a Centralmed* (2010) 31 *ILJ* 2325 (SCA) upheld the findings of the LAC with regard to the principles set out in the LAC judgment.

> '…. The court has to consider all the relevant circumstances and make such order as it deems fair to both parties in the light of everything ...'.

[78] The point is that 'considering everything' must mean a consideration also of the scope and extent of the loss suffered by the employee, the nature and extent of the deviation from what would normally be considered to be fair, whether there may exist any justification for the conduct of any of the parties, and the impact of the award on the employer or its business.[43]

[79] Applying all the above considerations, I accept that the respondent was not *mala fide*. Dlamini, new to the scene, was poorly advised by advisors she trusted. The reliance of the respondent on the group life policy was not so far fetched as to be *mala fide* – it was just wrong to rely on it. It is also not a situation where the respondent sought to implement a retirement age that matched, so to speak, the age of the applicant, so as to facilitate his termination of employment after the fact. I also consider that the applicant was only unemployed for about a month, albeit that his new employment was at less than half the remuneration he earned at the respondent. I further consider that in testimony, the applicant said that he would have accepted the severance package of 2(two) weeks per year of service the respondent paid to the 2013 retrenched employees, if the respondent has been willing to offer it as the applicant had asked. I finally consider the applicant's length of service of more than a decade and that he had always properly fulfilled his duties. There was no evidence of what effect a compensation award may have on the business of the respondent, but I do consider that it was common cause that it recently lost a major contract and had just come out of a round of retrenchments. Based on a consideration of all these factors, with due regard to the punitive consideration where it comes to automatic unfair dismissals, I consider that an award of 14(fourteen) months' salary to the applicant would be appropriate.

[43] See *Rawlins* (*supra*) at para 20; *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 *ILJ* 974 (LAC); *Datt* (*supra*) at paras 31 – 33.

[80] Accordingly, and based on the applicant remuneration of R78 286.55 per month, for 14(fourteen) months, the applicant is awarded R1 096 011.70 in compensation.

[81] As to costs, it must be considered that the applicant was successful in showing an automatic unfair dismissal to exist. But is must also be considered that the applicant instituted two contract claims which were dealt with in the pleadings, in the pre-trial, and then in evidence, which claims were then abandoned. The litigation was also properly conducted by both parties, and as I have said, I do find any *mala fides* on the part of the respondent. I accept that it is appropriate that a costs order be made against the respondent because of the automatic unfair dismissal, but this costs order should also reflect the aforesaid considerations. Applying the broad discretion I have with regard to the issue of costs in terms of Section 162 of the LRA, I consider it fair and appropriate to award the applicant costs of 50% of the normal party and party scale in opposed trial proceedings.[44]

Order

[82] For all of the reasons as set out above, I make the following order:

1. The applicant's dismissal by the respondent constitutes an automatic unfair dismissal as contemplated by Section 187(1) (f) of the LRA, based on the applicant's age.

3. The respondent is ordered to pay compensation to the applicant in an amount of R1 096 011.70 (one million and ninety six thousand and eleven rand seventy cents), which amount shall be paid to the applicant by the respondent within 10(ten) days of date of handing down of this judgment.

4. The respondent is ordered to pay 50% of the applicant's taxed costs.

[44] See *Heath* (*supra*) at para 83.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: Ms S Lancaster of Lancaster Kungoane Attorneys

For the Respondent: Advocate F Venter

Instructed by: Dewey Hertzberg Levy Attorneys