REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 88/2016

In the matter between:

Johanna GREEN Applicant

and

Dr Frikkie HARTOG Respondent

Heard: 10-11 August 2017

Delivered: 5 September 2017

Summary: Claim for automatically unfair dismissal because of discrimination based on age. LRA s 187(1)(f). Employee agreed to retire instead of facing discipline. No dismissal. Claim dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Ms Johanna Green, worked for the respondent, Dr Frikkie Hartog (an ophthalmologist) and his predecessor, Dr Paul Burger, for 25 years. She left Dr Hartog's employ in 2015. She says she was dismissed because of her age and that it is an automatically unfair dismissal as contemplated in s 187(1)(f) of the Labour Relations Act.[1] He says that they agreed that she would retire (she was 56 at the time) as an alternative to being disciplined for misconduct and poor performance.

The evidence

[2] The two protagonists as well as another ophthalmic reception assistant, Ms Karin Delport, testified at trial. Much of the evidence prior to the events of 2015 is common cause.

[3] Ms Green started working for Dr Burger as a receptionist in 1990. Dr Hartog joined the practice in 2006. She signed a contract of employment with Dr Hartog on 24 October 2006. Her retirement age was not specified.

[4] Fast forward to September 2015, when a Department of Labour inspector visited the practice. He advised Dr Hartog to amend certain aspects of his employees' contracts.

[5] It is common cause that Ms Green as well as Ms Delport and an accounts clerk, Ms Annadia Nieuwland, signed amended contracts of employment on 9 October 2015. This contract differed from the 2006 contract in that it included clauses for family responsibility leave and retirement. The latter clause reads:

> "Die aftree-ouderdom sal enige tyd na die vyf en vyftigste verjaardag wees."

[6] It is also common cause that, at her insistence, Dr Hartog made three changes to the draft that he had given Ms Green some days before. Those were to change her job description from "ontvangsdame" to "oftalmiese ontvangs assistant"; and to keep the dates for salary payments as they were in the 2006 contract, i.e. the 23rd day of the month.

[1] Act 66 of 1995 (the LRA).

[7] Where the parties part ways, is with regard to the draft that Green had received. She says that the draft did not contain any reference to a retirement age. Hartog says that he gave all three employees identical drafts (including the retirement clause) and that none of them had any objection.

[8] The other difference lies in the circumstances of signing the contract. Both Hartog and Delport say that the three employees signed in each other's presence and countersigned each other's contracts as witnesses; Green denies this.

[9] The next disputed event is that of 30 October 2015. Whilst it is common cause that Dr Hartog called Ms Green in to discuss his dissatisfaction with her work, what is disputed is what happened after that.

[10] Ms Green says that Dr Hartog simply handed her two envelopes. The one contained a Canal Walk gift card for R 1000. The other contained a letter of termination that states:

> "Beste Johanna
>
> Jy het 'n lang werksgeskiedenis met die praktyk en jou bydrae wat jy gelewer het oor al die jare word baie waardeer. Jy het egter aftree ouderdom bereik en ek wil met die brief vir jou een maand kennis gee van diensbeëindiging. Ek beoog om die afskeid vir jou so gemaklik as moontlik te maak.
>
> Beste wense
>
> Dr Frikkie Hartog."

[11] Dr Hartog agrees that he called Ms Green in. He discussed with her his long standing disappointment with her work performance and frequent absenteeism. He suggested that it may be better for her to retire rather than face a disciplinary process. Were she to be dismissed, she would not leave with a clean record; and were she to retire, she would receive Unemployment Insurance and tax benefits. He would also pay her a month's notice and a 13th cheque. She opted for retirement. As contemporaneous proof of that version of events, Dr Hartog presented the Court with the alternative letter that he presented to Ms Green. That letter

states that he would need to take disciplinary action and ask for her dismissal:

> "Geagte Johanna
>
> Ten spyte van herhaaldelike skrftelike waarskuwings sedert 2007 asook mediasie is daar geen verbetering waargeneem in jou diens aan die praktyk nie. Daar is steeds onaanvaarbare gebreke en versuim om die basiese pligte uit te voer. Verder is jou werksverhouding met pasiënte en personeel baie swak en lei steeds tot klagtes en stel die praktyk in 'n baie swak lig. Jou versuiming om enige regstellende aksies te neem ten spyte van herhaalde versoeke noodsaak my om verhorende aksie te neem en jou afdanking te eis met een maand kennisgewing.
>
> Die uwe
>
> Dr Frikkie Hartog."

[12] She accepted the retirement option and they parted ways.

Evaluation

[13] I shall consider the parties' conflicting versions regarding the existence of an agreement to retire at the hand of the well-known principles set out by Nienaber JA in *Stellenbosch Farmers' Winery*:[2]

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the

[2] *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 11 (SCA) par 5.

> probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[14] At the outset, I must note that Green's denial that she signed the 9 October 2015 contract in the presence of the other two employees is highly improbable. It appears from the face of all three contracts that they were all signed on the same day; and more importantly, that Delport and Nieuwland signed her contract as witnesses. That lends more credence to the version of Dr Hartog and Ms Delport that they all signed the amended contracts at the same time in each other's presence.

[15] That, in turn, casts doubt on the veracity of her evidence as a whole; as does her refusal to accept that she had a long history of unsatisfactory work performance.

[16] Even if Ms Green was not aware of the retirement age in the final version of the contract because she did not see it before signing the contact, she is bound by it on an application of the *caveat subscriptor* rule and the doctrine of quasi-mutual assent.

[17] Her case was that the respondent dishonestly inserted a retirement age into the contract she signed. She was thus labouring under the mistaken impression that the contract she signed contained no retirement age.

[18] *In George v Fairmead (Pty) Ltd*[3] the then Appellate Division said:

> 'When can an error be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? ... If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame, and the first party is not bound.'

[19] And in *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers*[4] the Supreme Court of Appeal held that the appropriate question to ask is not whether the person seeking to rely on the contested clause (A) knew or ought to have known that the person seeking to escape liability (B) was unaware of that clause. Rather, the question is whether A knew or ought to have known that B was labouring under a mistake.

[20] The evidence led in this matter does not support a conclusion that Dr Hartog made any misrepresentation to Ms Green nor does it show that he knew or reasonably ought to have known that she was labouring under a mistake. It is common cause that she signed the final version of the contract and initialled it on every page. She therefore expressly indicated her acceptance of the terms on each page. Our courts have made it clear that a person will not escape the consequences of her signature if they have not read the document in question. One is expected to read what one signs. In *Matshabe v Sobi*[5] the court held that:

> 'One is expected to read before one signs. I know of no other safer and wiser way of familiarising oneself with contractual obligations whose binding legal force and effect can only be activated and unleashed through an act of signing a contractual document. One who signs a contractual

[3] 1958 (2) SA 465 (A) at 471.

[4] 2007 (2) SA 599 (SCA) at para 9.

[5] [2015] ZAFSHC 210 (5 November 2015) par 24. See also *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (WLD) at para 12.

document without or before reading it does so at his own peril. One who is able to read is expected to read before signing.'

[21] Even if Ms Green was not given an opportunity to consider the final version of the contract before 9 October 2015 she was given such an opportunity on 9 October. Ms Delport and Dr Hartog testified that the employees were asked prior to signing whether they were satisfied with the contract or whether they required changes. No further changes were requested. In those circumstances, he was reasonably entitled to accept that she was aware of and agreed to the retirement age in the final version of the contract.

[22] Ms Green testified that on 9 October 2015 she was simply presented with a contract while she was busy and told to sign it. That version cannot be accepted in the face of the evidence of Hartog and Delport, whose evidence in that regard was not undermined in cross examination.

[23] Ms Green was obviously someone who read contracts before signing them. That was clear from the fact that she requested that the contract be changed before signing the final version. She knew that she was signing a contract and knew that it contained a change or changes. She thus signed the final version of the contract of employment knowing full well that it contained a retirement age. And even if she didn't read it properly, she was bound by the retirement age clause by virtue of the principle of *caveat subscriptor* read with the doctrine of quasi-mutual assent.

[24] That then leads to the question of the reason for Dr Hartog calling Ms Green in on 30 September and the question whether she was dismissed.

[25] Dr Hartog testified at some length about the problems had had with Ms Green's work, corroborated by contemporaneous documentary evidence.

[26] Reams of complaints and warnings were put to Ms Green in cross-examination and elaborated upon by Dr Hartog in chief. Starting from 2006, Green was given at least five warnings for unprofessional conduct, neglecting her duties, poor and aggressive communication with patients, and failure to carry out routine tasks. Eventually he asked a mediator, Mr Graeme Bloch, to assist. He met with Dr Hartog as well as Ms Green and Ms Smith on 27 March 2015. Hartog explained that numerous reprimands

and warnings had fallen on deaf ears; Green and Smith refused to accept responsibility. The mediator tried to stress that it would be in everyone's interests to sort out their differences; at the same time, he made it clear that continued behavioural problems on the part of the employees and their continued refusal to carry out their duties would lead to discipline and could lead to dismissal.

[27] Following the mediation, Dr Hartog kept a detailed log of further problems. From May to October 2015 he logged no fewer than 38 complaints about Ms Green's performance and her failure to carry out instructions. That culminated in the meeting of 30 October 2015.

[28] Apart from two warnings to which she had responded, Ms Green simply denied any allegations of misconduct. I find it highly improbable that Dr Hartog, out of some strange vindictive motive, would simply make up non-existent allegations and confront her with those for no reason whatsoever.

The events of 30 October 2015

[29] Given the history outlined above, Dr Hartog's version of events on 30 October 2015 is more probable than that of Ms Green. He called her in to admonish her, once again, about her misconduct and poor performance. But he gave her a choice: either she could submit to a disciplinary process (in which he would call for her dismissal); or he would give her the option to retire. She chose the latter. In order to believe her version, the Court would have to believe that Dr Hartog fabricated the letter dealing with the "disciplinary option" with no option to ever present it to her; and that he told her that she had to retire out of the blue. Furthermore, he would have had to conceal the retirement clause in her revised contract of employment by some subterfuge; this despite the fact that she not only signed the contract, having acknowledged that she had read, but initialled every page, including the one containing the retirement age. And her credibility is further undermined by her version that she did not sign the agreement together with the other employees, weighed against the clear evidence to the contrary of Dr Hartog and that of Ms Delport (an unaffected third party).

Conclusion

[30] On a balance of probabilities, I find that Ms Green was not dismissed, but that she agreed to retire rather than face disciplinary action. In the absence of any dismissal at all, the question of an automatically unfair dismissal does not arise.

[31] Both parties asked for costs to follow the result. I see no reason in law or fairness to disagree.

Order

The claim is dismissed with costs.

_____

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Yaaseen Abass

Instructed by Parker attorneys.

RESPONDENT: Craig Bosch

Instructed by Teresa Erasmus.