Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 710/13

In the matter between:

KEITH HARRIS **Applicant**

and

OCEAN TRADERS INTERNATIONAL (PTY) LTD **Respondent**

Heard: 2, 3, 4 November 2015

Delivered: 23 February 2016

Summary: (Alleged automatically unfair dismissal - s 187(1)(f) – dismissal on account of age – dispute as to applicable retirement age – agreed retirement age 65 – compensation – damages under Employment Equity Act)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant in this matter was required to retire at the end of December 2012 when he turned 63 years of age. He contended that his agreed retirement age was 65 and that forcing him to retire for that age amounted to an automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act, 66 of 1995 ('the LRA'). He claims compensation of two years' remuneration and damages in the same amount under the Employment Equity Act 55 of 1998 ('the EEA').

[2] The applicant maintains that the retirement age of 65 was agreed between himself and Mr B Nathan ('Nathan'), the founder of the respondent and former co-owner of the business with his spouse since 1994. The respondent maintains that there was no agreed retirement age but originally the normal retirement age in terms of the firm's policy was 60 and then changed to 63 when Imperial Holdings became the holding company of the respondent, in terms of Imperial's policy. Mr H Theart ('Theart') gave evidence for the employer. During the course of Harris's employment, the respondent was sold twice, once to CIC Holdings in 2007 and again to Imperial Logistics and operating company of Imperial Holdings in 2010.

Central factual issues arising from the evidence

[3] The applicant was employed on 1 April 1998. At the time the business was run on a relatively informal basis and was a very family orientated one.

[4] Nathan said that when he interviewed the applicant, he explained that the firm had no pension policy but that he could work until he was 65. He referred the applicant to an Old Mutual broker, Mr B Adams, to obtain advice on a pension plan. The applicant said he had enjoyed a substantial pension at his former employer, Metro, and had asked about pension provisions at the respondent and was advised he must take out a policy, but could not remember if retirement age was discussed at the interview. No mention was made of his retirement age in his letter of appointment. However, the applicant said that he had discussed his pension fund with Nathan and Adams at a meeting in the firm's boardroom and that is when

his retirement had been discussed and a policy entered into with a retirement age of 65. Harris understood that OTI's policy at that stage was that, 65 was the retirement age. Subsequent to that, at a birthday party, Nathan had asked him if he intended to work until he was 65 and he confirmed that he would.

[5] Aside from the letter from Nathan, the other document referred to by the applicant was a copy of the Annual Rate and Fee Review Report of the OTI Old Mutual Death and Disability group scheme policy drawn up in 2011, which stipulated a "Normal Retirement Age" of 65. Harris agreed it was not a retirement plan but simply a company insurance scheme to cover staff who travelled. Theart agreed that his understanding was that the cover provided in the policy would end when a person stopped working and that the insured age limit should have changed to 60 when CIC Holdings took over.

[6] Harris agreed that he was aware that when CIC and subsequently Imperial Logistics took over, the company policy on retirement age changed to 60 and 63 years of age, respectively, but he never agreed to accept the changes.

[7] The unsigned contract of his appointment as manager of the East African operation of the respondent from 1 July 2007 contained clauses dealing with his position, hours of work, basic salary, annual leave, sick leave, annual bonus, medical aid and the like and had a general provision entitled Company Rules which read:

> "Your employment is subject to company rules that will be made available to you. You will be required to read them and signed acknowledgement of your understanding and acceptance thereof."

1 July 2007 was in fact the date on which CIC Holdings acquired control of the respondent.

[8] A major issue in contention was whether OTI policies at that time reflected those of the current holding company, CIC Holdings. During 2007, at which stage he was 58, he was approached by the Financial Director, Mr M O'Neill ('O'Neill'), and asked to sign the new contract of employment, which entailed agreeing to a retirement age of 60, but he refused as it

would be difficult to find work at that age. Theart testified that it was a requirement of CIC auditors that every employee should have a signed contract of employment. However, Theart claimed that CIC owned five separate companies at the time each with their own policies, which CIC did not try to change. When he was employed at OTI, he found a 50 page document entitled "OTI Group of Companies: Company Rules and Procedures". The document states in clause 1.1 thereof that: "This manual will supersede any existing regulations currently in force and constitutes the terms and conditions of employment of the company and comes into effect from 1 May 2001." 2.4.6 of the document dealing with retirement stated: "Termination of the existing employment contract is automatic when an employee reaches the age of 60 (sixty)." As far as Theart was concerned, this document applied to all staff as long as CIC Holdings owned the respondent. If it had emanated from CIC he would have participated in drafting it. When Imperial Logistics acquired the firm, its policies applied except where existing contracts contained more favourable terms for an employee. Theart did concede that Harris had 'dug in his heels' and there was no evidence that he had bound himself to accept a retirement age of 60, and that if his retirement age was 65 a different age could not be imposed on him.

[9] Nathan was adamant that the document could never have been drafted in 2001, and he had no recollection of a staff manual being created for what was a family business. At that stage he was still fully in control of the business as managing director and remained in effective control 2008, although CIC Holdings Ltd acquired the company in 2007. He resigned as executive chairperson of the respondent towards the end of 2009 when he felt he was no longer in control of the business. Harris also claimed that as a member of the board in 2007, he would have been aware of such a document if it had been adopted before CIC took over because the board would have been involved in producing it. He could not dispute it might have been in existence by the time Theart took over as Managing Director of the respondent around 2008 or 2009.

[10] Harris claimed he never saw the contract which O'Neill asked him to sign in 2007, but he had asked him what the new conditions of employment

entailed and the latter had told him that the retirement age was now 60. On legal advice he did not sign the contract.

[11] Eventually, in March 2008 the applicant signed a letter of employment at the request of the Financial Director Matthew O'Neill ('O'Neill') because there was nothing on record. The letter in fact states that it "…serves to confirm the current employment of Keith Harris in Ocean Traders International (Pty) Ltd." The letter only contained details of his current salary, medical aid and annual leave provisions. No reference was made in the letter to any other policies governing his employment or to a retirement age.

[12] Around the time of his 60th birthday in 2009, the applicant received an email from the firm saying that he must retire. He met with Mr Truter of the respondent in a hotel in Maputo, who explained that the OTI policy was that 60 was the retirement age. The applicant told him that he did not agree because his retirement age was 65 and intimated that he would seek legal advice. He claimed to have sent an email to Theart confirming this to which he never received any response. Theart did not recall receiving such an email.

[13] He assumed when he did not get an instruction that he must retire that the matter was no longer under discussion. Theart said that the respondent did not proceed to retire Harris at that stage because he was still needed by the company, though this explanation was not tested with Harris. Harris said he did not approach Nathan that stage to confirm their agreement because Nathan had already sold his shares in the company and felt that he had let people down and was somewhat embittered and communications between them had stopped. The contract which Truter wanted him to sign he never did. According to Theart there were a couple of other staff members who also would not sign the contract. Theart accepted that the applicant never bound himself to the company policy or that he had agreed that a retirement age of 63 could be imposed on him.

[14] On 23 April 2012, shortly before the respondent was acquired by Imperial Holdings, the applicant was advised in a letter that he would be retired in December that year when he turned 63 in line with the rules of Imperial

Holdings. Theart said there was no reason to do this other than to apply the applicable retirement policy of Imperial Logistics. To assert his understanding, Harris asked Nathan to confirm that his retirement age was in fact 65. The applicant requested the letter because there was nothing in writing about his retirement age. On 1 May 2012, Nathan wrote a letter to confirm the applicant's agreed retirement age, which stated:

> "I hereby confirm that the retirement age applicable to Keith Harris who was employed by Ocean Traders International (Pty) Ltd. (OTI) was 65 years of age.In subsequent takeovers of OTI and its successors, section 197 of the Labour Relations Act no 66 of 1995 applied and his retirement age should remain unchanged."

Although the letter was written on an OTI letterhead, by that time Nathan was no longer a director of the company, but he readily conceded that he did not sign the letter in his official capacity, but was just confirming the arrangement made with the applicant when he was employed. Theart did not dispute the integrity of Harris and Nathan or mean to imply that they had fabricated the alleged agreement about Harris's retirement age, but said he had a duty to apply the firm's policy and if there had been a written agreement stipulating Harris's retirement that would have been a different matter.

[15] Harris also sent Theart a copy of the OTI Old Mutual Death and Disability document mentioned above. Theart said he was unaware of this provision until it had been pointed out to him by the applicant, but the death and disability policy had nothing to do with retirement. As he was not a party to drawing up the group death and disability scheme he could not explain why it was stated that the normal retirement age was 65. By the end of 2011, the old Mutual group scheme had been terminated.

[16] On 22 May 2012, Theart responded that only a letter of employment or contract or other binding document signed by both parties would be accepted as a valid contract with OTI. He went on to say:

> "The letter from Brian Nathan (on an OTI letterhead) is totally in contradiction to the OTI "Employment Contract" that we have on file. The contract is not filled in or signed, but is an example of the "old" OTI contract. In this contract the retirement age is stipulated as 60 years of age.

> I understand that Brian wants to assist but really I do not want this to end up in a debate between him and Imperial due to statements made and documents on file.
>
> As we do not have a document on file stating a different age to that of the Imperial Group, the policy of 63 years of age will be binding. As asked before, should you have any binding document stating different, please submit and we will adhere to the age stipulated in such."
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> (*sic*)

At that stage, Theart said the company had no need to retain Harris beyond his retirement age and in fact was suffering losses at the Swaziland operation where Harris was working.

[17] Nathan believed that employees would have been asked to sign employment contracts in 2007 after CIC acquired the respondent and that this would have been handled by the financial director, O'Neill. An unsigned draft contract confirming the applicant's appointment as director intellectual management of the respondents East African operation with effect from 1 July 2007 contained no express provision relating to retirement age but did contain the following clause:

> "9. COMPANY RULES
>
> Your employment is subject to Company Rules that will be made available to you. You will be required to read them and sign acknowledgement of your understanding and acceptance thereof."

(emphasis added)

[18] At the time he was asked to sign this contract, which he did not want to because it would entail agreeing to a retirement age of 60, despite the applicant's close association with Nathan, the applicant did not approach him to corroborate his understanding that the agreed retirement age was 65.

Evaluation

[19] In essence, the applicant contends that when he was employed in April 1998 by Nathan and when shortly thereafter he had to take out his own retirement annuity because the company did not have a pension scheme,

he was advised by Nathan that his retirement age would be 65. He also understood this to be the normal retirement age applicable at the respondent at that time. By contrast, the respondent contends that the agreed or normal retirement age since 2001 until the respondent was sold to Imperial Holdings (Pty) Ltd was 60 and thereafter was 63. The company maintains that the retirement age was determined by the current retirement policy of the company at any point in time. The respondent also asserted that the doctrine of quasi mutual assent was applicable. This doctrine of English law which is now a well-established part of our law was first expressed succinctly by Blackburn J in ***Smith v Hughes***[1]:

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."[2]

[20] In terms of s 187(2) (b) of the LRA a dismissal based on age will not be automatically unfair in terms of s 187(1) (f) of the LRA if an employee has reached the "normal or agreed retirement age for persons employed in that capacity". Consequently, if the employer can establish that the employee had reached either one of those ages that is a complete defence to a claim of dismissal based on age discrimination.

[21] In ***Rubin Sportswear v SA Clothing & Textile Workers Union & Others***[3] in which an employer sought to impose a normal retirement when previously there had been no agreed or normal age, the LAC viewed the issue in the following terms:

> "[11] The question that arises is whether the appellant could render 60 to be the normal retirement age for the second and further respondents by simply declaring unilaterally that 60 was their normal retirement age. In acting as it did, the appellant was seeking in effect to introduce a new condition of employment into the terms and conditions of the employment

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[1] **(1871) LR 6 QB 597** at 607

[2] See discussion in RH Christie and GB Bradfield, The Law of Contract in South Africa, 6th Edition 2011, pages 10-12 and 26-32.

[3] **(2004) 25 *ILJ* 1671 (LAC)**

> of the second and further respondents. In law it had no right to do that without the second and further respondents' consent. The appellant's conduct in purporting unilaterally to fix 60 as the normal retirement age for the former Val employees including the second and further respondents was a breach of their terms and conditions of employment which it had taken over from Val by reason of s 197(2)*(a)* and of the agreement of 30 January. It was a breach of their contracts of employment in that regard because, with their contracts not containing any clause or G provision fixing a retirement age, it was implicit in their contracts of employment that their contracts of employment could not be terminated in the absence of a fair reason and age could not per se be a fair reason for their dismissal. Such conduct constituted a repudiation of the second and further respondents' contracts of employment. The repudiation gave the second and further respondents an election either to accept it or to reject it and hold the appellant to the terms and conditions of their contracts of employment. In this matter the second and further I respondents chose the latter course. Accordingly, the purported change of their employment terms and conditions was unlawful, wrongful and of no legal effect."[4]

[22] Both Harris and Nathan disputed that "OTI Group of Companies: Company Rules and Procedures" containing a retirement age of 60 had been adopted as OTI company policy. Theart could only testify that he found the document when he joined the company in 2007. No evidence was adduced of it being adopted by the board, nor that Harris at any stage had agreed to the terms of therein. It is possible it might well have been in circulation or under consideration by the respondent at some stage, but there is nothing definite to indicate that it probably was implemented.

[23] I am satisfied on the basis of the evidence that after CIC Holdings took over the company there was an attempt made to formalise and regularise conditions of service, and that employees were asked to sign contracts of employment. I am also satisfied that on a balance of probabilities Harris refused to sign the contract because it would have bound him to a retirement age of 60, and that when he refused, the respondent did not pursue the issue. It is common cause that when he reached that age nothing was said and he continued working until he was approaching 63,

[4] At 1676.

which was the retirement age Imperial Holdings applied in the absence of any agreed retirement age above that.

[24] I believe that the respondent was open to persuasion that the applicant might have had an agreed retirement age higher than 63, but understandably was somewhat reluctant to accept the say-so of a former director in the absence of a written contract of employment containing the agreed age.

[25] In favour of the applicant is the undisputed circumstantial evidence of him concluding a retirement annuity policy with a retirement age of 65 at a meeting when the broker and the managing director were present. There is also the evidence of the Old Mutual death and disability policy provided by the respondent for employees. That scheme was only discontinued in 2011 and provided cover until the age of 65. It seems rather improbable that the company would have effectively covered all employees for a period of five years beyond the normal retirement age as a matter of course, if most of them were due to retire five years earlier at 60. In my view, the balance of probabilities favour the version that when the applicant was employed, the understanding between him and the respondent was that he would retire at age 65.

[26] The remaining factual question is whether this agreed retirement age was varied subsequently under the changes of ownership which the respondent underwent in 2007 and 2010. On this issue, it was common cause that there was no document evidencing that the applicant had waived his right to insist on a retirement age and it is common cause when he was asked to sign a contract which might have had that effect he did not. Consequently, I am satisfied that the applicant's agreed retirement age of 65 was not varied subsequently.

[27] In conclusion the applicant was dismissed because of his age and neither of the defences afforded by s187(2)(b) can assist the respondent. Therefore his dismissal was automatically unfair in terms of s 187(1)(f) of the LRA.

Relief

[28] The applicant has claimed compensation under the LRA and damages in terms of the EEA. The respondent argued that in relation to compensation, the applicant had to demonstrate his patrimonial loss. While that may be true of a claim for damages, it is not a pre-requisite for a claim of compensation. The most recent statement of this principle was made by the LAC in another age discrimination case **ARB Electrical Wholesalers (Pty) Ltd v Hibbert *[5]**:

> "[22] The compensation that an employee, who has been unfairly dismissed or subjected to an unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that she/he has suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.
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> [23] Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a solatium and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated. The solatium must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising the employer. It is not however a token amount hence the need for it to be 'just and equitable' and to this end salary is used as one of the tools to determine what is 'just and equitable'."
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> [24] 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

[5] **(2015) 36 *ILJ* 2989 (LAC)**

> 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. While a delictual action (ie actio iniuriarum) for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a solatium because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patrimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA. In *Minister of Justice & Constitutional Development & another v Tshishonga (Tshishonga*), this court in an award of solatium referred to the delictual claim made under the actio injuriarum for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but were not limited to —
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> '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' " [6]

(footnotes omitted)

[29] In this instance, the applicant would have continued working until age 65 for the respondent. He eventually did secure alternative full time employment only in February 2015. Initially, he had relied on a tax rebate as his main source of income. He had also suffered the emotional impact of the dismissal which left him with a feeling of inadequacy and a belief he would not get alternative employment. Eventually, after a year, he managed to start a small business in Swaziland. The primary consideration in this matter is that, he would have retired two years later, but I accept the respondent's contention that there was *no mala fides* on

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the part of the firm in insisting he should retire at 63 because I am persuaded that Theart genuinely believed in the absence of a written agreement on the applicant's retirement age, the company was entitled to apply the policy which it had adopted.

[30] The applicant also seeks damages under the EEA, though it must be said he did not testify with much precision on the extent thereof. In *Hibbert* the LAC had this to say about claims for damages based on the same facts:

> [33] Where there is a single action with claims under the LRA and the EEA based on the employee being discriminated against and the court is satisfied that there has been an automatically unfair dismissal and that the employer's action also constitutes a violation of the EEA, it must determine what is a just and equitable amount that the employer should be ordered to pay as compensation. In arriving at this determination, the court should not consider separate compensation under the LRA and the EEA but what is just and equitable for the indignity the employee has suffered. In doing this, it may take various factors into account, inter alia, as set out in *Tshishonga*, additionally, including but not limited to the position held by the employee within the employer's establishment, the remuneration he earned, how reprehensible and offensive was the employer's conduct, how if at all did it affect the employee and what motivated the wrongful conduct by the employer to act as it did, etc. If the claim is under the LRA only, the court must, if the amount determined by the court to be just and equitable exceeds the threshold set in s 194(3) of the LRA, reduce the amount of compensation to bring it within the limitation provided in s 194(3). The amount will not have to be reduced though if, like in this matter, the claim is brought under both the LRA and the EEA because there is no limit prescribed to the amount of compensation that can be awarded under the EEA. The importance of this is that the employee's right to claim under both the EEA and the LRA is recognised and given effect to while at the same time the employer is not being penalised twice for the same wrong as a single determination is made as to what is just and equitable compensation for the single wrongful conduct."[7]

[7] At 2999-3000.

[31] Given the factors mentioned in paragraph [29] above, I am satisfied that in this instance sixteen months' remuneration would be just and equitable compensation.

Order

[32] The applicant's dismissal was automatically unfair for a reason related to his age in terms of s 187(1)(f)

[33] The respondent must pay the applicant an amount of R 1,283,760-00 (one million, two hundred and eighty three thousand and seven hundred and sixty rands) within 21 days of the date of this order.

[34] The respondent must pay the applicant's costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	A L Cook instructed by O De Sousa
RESPONDENT:	S Snyman of Snyman Attorneys.