

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

**CASE NO. J 2322/98**

In the matter between:

**ALICE GQIBITOLE**

Applicant

and

**PACE COMMUNITY COLLEGE**

Respondent

**J U D G M E N T**

**BASSON, J**

[1] The applicant in this matter, Ms Alice Gqibitole, was dismissed by the respondent, Pace Community College (on the respondent's version) on 30 June 1998.

[2] The applicant alleges that the dismissal was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 ("the Act").

[3] Section 187(1)(f) reads as follows:

"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 any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, **age**, disability, religion, conscious belief, political opinion, culture, language, marital status or family responsibility" (emphasis supplied).

[4] Subsection 187(2)(b) of the Act places a limitation on such claim in that it states that "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" (emphasis supplied).

[5] In the judgment of the Labour Court the matter of Schweitzer v Wacko Distributors 1998 10 (B) LLR 1050 (LC) (per Zondo J) the Court held (at page 1055G-I) that the question to be answered in determining whether or not section 187(2)(b) of the Act is applicable are:

"(a) Was the employee's dismissal based on age?

(b) If the answer to question (a) is in the affirmative, did the employer have a normal

or agreed retirement age for persons employed in the capacity of which the employee was employed? If yes, what was it?

- (c) If the answer to the first question in (b) above is in the affirmative has the employee reached such retirement age at the time of his dismissal?".

[6] The applicant was in the employment of the respondent in May 1998 when she was almost 68 years of age, being born on 29 July 1930.

[7] The applicant taught Std. 9 and Std. 10 pupils up to the beginning of the year 1998 when she was in the employ in the respondent for a period of almost eight years.

[8] On 6 March 1998 she received a timetable in terms of which it appeared that she was demoted to teach Std. 6's and 7's.

[9] On 10 March 1998 a letter attached at page 3 of a bundle that was handed up to the Court ("the bundle"), the applicant was informed as follows:

#### "Re Retirement

We note that on 28 July 1998 you will be 68 years of age, and this is well past the **statutory retirement age of 60 years for women**. It is irregular that you have been kept in service beyond the **normal retirement age** and we also note that unhealthy stresses may build up when people work beyond what is naturally

reasonable. We therefore give you notice that your services will be terminated with effect from 1 April 1998.

Your contribution to the academic life of Pace Community College is appreciated.

We wish you well and hope you will enjoy your retirement" (emphasis supplied).

[10] The letter was signed by the chairman of the Board of Convenors of the respondent which appears to be a private school.

[11] It is difficult to understand what is meant by "the statutory requirement age of 60 years for women" as I am unaware of such statute applying to private schools in South Africa.

[12] Furthermore, it was clear from the evidence of the applicant, (the only witness who testified on her own behalf in default application proceedings) that there are persons in the employ of the respondent who are past the age of 60 years and are still working, either as teachers or in a different capacity.

[13] This much also appears from page 4 of the bundle, a document identified by the applicant as an appeal by parents of the students taught by the applicant on her behalf and sent to the said chairman of the Board of Convenors. This document states *inter alia*:

"We are surprised that you seemed to have remembered her age suddenly. In

addition to this, we do not know of any age restriction so far as conditions of teachers at Pace are concerned.”

[14] The document continues:

"It is also crystal clear to us that you are victimising Ms Gqibitole as there are other women on the staff of Pace who are well over 60 years of age. They are not sent notices of retirement. Further, it is a fact that there is a precedent in the case of teachers, although they were past their mid 70's remain serving at Pace until they voluntarily left."

[15] The applicant stated in evidence that there was no response to this memorandum by the said parents.

[16] The applicant received a letter (attached at page 5 of the bundle) dated 1 April 1998 written by the then headmaster of the respondent informing her as follows:

"I have been instructed by the chairman of the Board ... to inform you that you are entitled to three months' notice pay. Further I have to point out that in terms of section 10 of the Income Tax Law this amount will not be taxed. Should you however elect to serve the three months' notice the salary for that three months will be taxed as usual.

Please sign the attached form to confirm your acceptance of the three months'

notice pay."

[17] This letter thus indicated that, having been dismissed on 1 April 1998, the services of the applicant were terminated with effect 30 June 1998.

[18] The applicant, however, testified that she did not sign the said form (at page 6 of the bundle) and merely kept on working. It would appear that the applicant did not accept the termination of her services by the respondent in terms of this letter. In fact, she kept on working even after 30 June 1998.

[19] The applicant received another letter from the respondent's acting headmaster on 22 July 1998 (at page 7 of the bundle) stating the following:

"This is to remind you that according to the instructions of the Board of Governors issued to my office on 1 April 1998 your services were terminated by 30 June 1998 following your choice of serving the said notice of three months (i.e. between 1 April 1998 and 30 June 1998). I have not received any instructions contrary to those instructions from the Board, nor have I heard anything from you contrary to your decision to serve the said notice as indicated by you to me in our meeting held on 29th April 1998. Until further instructions from the Board of Governors it shall be very much appreciated if we could both observe those instructions with immediate effect. Any further consultations, if any, shall be welcome."

[20] The applicant kept on working despite having received the said letter and was clearly of the view not to accept the dismissal by the respondent.

[21] A further letter was then written to the applicant attached at page 19 of the bundle dated 25 August 1998 stating:

"Dear Madam

As a follow up to my letter dated 22.7.98 in respect of my call to you and to both of us to observe the instructions from the Board pertaining to the termination of your services with effect from 1 July 1998 or that your three months' notice (1.4.98 to 30.6.98) expired on the 30th June 1998, thereby regarding your services being terminated with effect from 1st July 1998 and also as a follow up to the chairman of the Board's letter to you dated 17.8.98 confirming the termination of your contract as at 30.6.1998; also in response to your position that only the chairman's letter would have meaning to you in this regard than the said mine, may it now be brought to your notice that my instructions from the chairman of the Board that in respect of the decision to terminate your services your presence on the school premises, with immediate effect, shall no longer be welcome and shall be regarded as illegal. The protocol for visiting the school is obtainable from the school security. It is hereby hoped that you will avoid embarrassment from our security whose observation of the protocol for visitors may result in your not being allowed to enter the premises of this school given the circumstances of the

termination of your contract with Pace Community College."

[22] The applicant nevertheless attended the school premises on 26 August 1998 and was asked by her pupils to teach them. According to her testimony, she was then removed by the security personnel from the premises on 26 August 1998. That was the last time that she attended the premises of the respondent. The applicant was also not paid for the period that she had worked during July and August 1998.

[23] The applicant also referred the Court to her retirement policy that she had concluded with the help of the respondent in 1994. She pointed out that the date of retirement given in terms of this policy is 1 March 2000 and the applicant stated that the respondent was aware of the fact that the date of retirement was given as 1 March 2000.

[24] In answering the first question referred to above, that is, was the applicant's dismissal based on age, it is undoubtedly clear that she was dismissed because of her age.

[25] The next question is whether the employer (the respondent) had a normal or agreed retirement age for persons employed in the capacity in which the employee was employed, that is, a teacher.



[26] The applicant gave evidence that teachers taught well beyond the age of 60 and that there are teachers who even taught into their mid and late 70's.

[27] In the event, there was clearly no "normal" retirement age for teachers for the purposes of section 187(2)(b) of the Act (quoted above).

[28] In the case of the applicant, however, it would appear that she had agreed when she concluded the policy with the assistance of the respondent, (attached at page 23 of the bundle) that the date of retirement would be 1 March 2000. It would therefore appear (for the purposes of the provisions of section 187(2)(b)) that there was an "agreed retirement age" *in casu*.

[29] However, the applicant has not reached this age and will only do so on 1 March 2000. Section 187(2)(b) accordingly does not become operative as a bar to her claim on the basis of an automatically unfair dismissal in terms of section 187(1)(f) of the Act.

[30] The applicant does not wish to be reinstated in her employ if I find the dismissal to be automatically unfair in terms of section 187(1)(f) and this brings into operation section 193(2)(a) of the Act which reads as follows:

"The Labour Court must require the employer to reinstate or re-employ the employee unless the employee does not wish to be reinstated or re-employed."

[31] Section 194(3) of the Act prescribes the limits on compensation that is operative in instances of automatically unfair dismissals. Section 194(3) reads as follows:

"The compensation awarded to an employee whose dismissal is automatically unfair must be **just and equitable** in all the circumstances, but **not more than the equivalent of 24 months' remuneration** calculated at the employee's rate of remuneration on the date of dismissal" (emphasis supplied).

The rate of remuneration in the present matter is R5 612,00 per month.

[32] It appears that in terms of section 194(3) of the Act I have a discretion to award less than 24 months' remuneration on the basis of the fact that the compensation "must be just and equitable in all the circumstances" of the present matter.

[33] As compensation stated here means that the employee is to be compensated for something lost, I have to take into account the fact that the employee has earned an amount of R1 200,00 due to temporary employment up until today. Such amount accordingly has to be deducted from the compensation awarded for her losses in the circumstances.

[34] In the event, I find that the applicant's dismissal by the respondent took effect on 30 June 1998. Second, I find that the employer unfairly discriminated against the applicant directly on the basis of age in so dismissing the applicant. I make

this finding because the dismissal based on age is not fair as the employee has not reached the normal retirement age for the persons employed in that capacity (there being no such age barrier) and also did she not reach the agreed retirement age as at 1 March 2000.

[35] In awarding compensation I have to award compensation in view of what is just and equitable in all the circumstances. In this regard I also wish to point out that even if I was wrong in finding that there was an agreement that the retirement age would be 1 March 2000, it would be equitable or just to place some kind of limitation on the maximum compensation of 24 months' remuneration which would, of course, take the applicant to a period well beyond March 2000. I therefore regard it as equitable that there must be a cut-off point to the 24 months' remuneration as maximum amount of compensation allowed in the case of automatically unfair dismissals in terms of section 194(3) of the Act.

[36] I regard it as just and equitable that the applicant be compensated for the period between her dismissal on 30 June 1998 and 1 March 2000. I therefore regard it as just and equitable to limit the amount of compensation to a period of 20 months' remuneration calculated at the applicant's rate of remuneration at the date of her dismissal on 30 June 1998 which comes to an amount of R112 240. With the deduction of the said amount of R1200, the amount of compensation awarded comes to R111 040.

[37] In the event I make the following order:

1. The dismissal of the applicant by the respondent on 30 June 1998 was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995.
2. The respondent is to pay to the applicant compensation in the amount of R111 040.
3. No order is made as to costs.

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**BASSON, J**

**JUDGE OF THE LABOUR COURT OF SOUTH AFRICA**

APPLICANT : ADV L ERASMUS

: Joubert Pike Attorneys

PONDENT : NO APPEARANCE  
: 20 JANUARY 1999

DATE OF JUDGMENT : EX TEMPORE  
(EDITED VERSION)

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