IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE Nos.C992/2001
C1006/2001
C185/2002
C186/2002

In the matter between:

SACTWU	First Applicant
J. HENDRICKS	Second Applicant
P. MAY	Third Applicant
A. FISCHER	Fourth Applicant
Q. ADAMS	Fifth Applicant

And

RUBIN SPORTSWEAR	Respondent

JUDGMENT

WAGLAY J:

[1] The second to fifth Applicants commenced employment at Val Hau et Cie (Pty) Ltd (hereinafter "Val Hau") on 26 April 1982, 4 February 1980, 25 June 1996 and 5 June 1976 respectively. At the date of their dismissal, the second to fifth applicants were aged 63, 60, 61 and 63 respectively.

[2] During January 2001 the respondent purchased the business of Val Hau as a going concern. The effective date of sale was 1 February 2001. Prior to the purchase the respondent concluded an agreement with Val Hau and the Applicant union in terms of which the terms and conditions that existed at Val Hau vis-à-vis applicant's members, which included the second to fifth applicants herein, would continue to apply to all employees transferred with the business to the respondent. There is also agreement between the parties that the transfer of the business took place in accordance with s197 (2)(a) of the Labour Relations Act ("LRA") as it existed at the time.

[3] On 1 February 2001 the employees in the business purchased by the respondent from Val Hau became employees of the respondent on terms and conditions that regulated their employment with Val Hau. On the same day the respondent drew a notice advising these employees that the normal retirement age at the respondent company was 60 years and that this retirement age would apply with immediate effect. This notice was only shown to the shopstewards committee at a meeting on

15 February 2001.

[4] In early March the fourth and fifth applicants were informed that they were being retired at the end of February 2001 but that they would be retained in respondent's employ on a fixed term contract commencing on 1 March 2001 and terminating on 21 December 2001.

[5] The fixed term contracts were brought to the notice of the first applicant who on 23 March 2001 wrote to the respondent stating:

" We hereby advise that we received a copy of the contract that the company has currently processed for our members to sign in their ignorance of their rights in terms of the law.

We term your action grossly unlawful and advise that you declare the contracts null and void with immediate effect."

[6] The respondent immediately reacted to the above letter stating "we will no longer be giving these contracts at retirement date". A few days later the first applicant again wrote to the respondent stating that the retirement age recognized by the constitution of this country and the Agreements concluded at the Bargaining Council relating to provident fund/retirement policy was the age of 65 years. To this letter the respondent, while challenging the allegations made by the first

applicant, stated that it has been its practice to retire its employees at age 60 and if there is work available and such retirees are able to continue in their employ a fixed term contract is then concluded with such retirees.

[7] The first applicant's response to the respondent's correspondence was inter alia, that the respondent had failed to consult with the first applicant about a retirement policy and that any dismissals on the basis of an employee having attained the age of 60 would be considered unfair. The final letter was the respondent's reply. Respondent stated that it had in fact concluded an agreement with the shopstewards committee, representing the first applicant and it's members at the respondent's operation, on 15 February 2001, with respect to the retirement policy and therefore it had consulted and concluded an agreement with the applicants.

[8] The second to fifth applicants were dismissed between the period March 2001 to September 2001, and dismissed on the grounds that they had attained or past the retirement age of 60 years. Each of them with the first applicant argue that their dismissal constituted an automatically unfair dismissal as provided in s187(1)(f), because it was based on discrimination on the grounds of age.

[9] The Respondent apposes the claim relying on s187(2)(b) of the LRA which provides:

"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."

[10] Therefore while it was common cause that the reason for the dismissals of the second to fifth applicants was their age, the issue before me for determination was whether the age of 60 was an agreed or normal retirement age.

[11] The respondent contended that the age of 60 was both the agreed and the normal retirement age for the following reasons:

(a) the provident fund of which second to fifth applicants were members specified "normal retirement" as any age from 55;

(b) the usual or typical retirement, and hence "normal" retirement age for employees at Val Hau was 60 years and this normal age was inherited by the respondent;

(c) at the meeting of 15 February 2001, the shopstewards, as representatives of the first applicant, to which the second to fifth applicant belonged expressly agreed to a policy document which explicitly set the retirement age at 60 for all employees of the respondent;

(d) if I find that there was no express agreement to a retirement at age 60, there was a tacit agreement by the first applicant thereto and as such the applicants are estopped from denying the agreement to retire at age 60; and

(e) even if there was no agreement about the retirement age of 60, this become the

normal retirement age when the employer communicated the new policy to all employees so that any reasonable expectation that they may have had with regard to the age at which they could expect to retire was destroyed and replaced by such other reasonable expectation formed by the new policy.

[12] Dealing with the above contention in terms, firstly, Respondent's reliance on the terms of the provident fund is misplaced. The provident fund defines retirement age as "the age of 55 or any age thereafter, but not later than the contributors 65th birthday". This formulation does not help respondent. It does not stipulate an age for retirement but merely confers a right upon an employee who is a member of the provident fund to claim his/her benefits within a set age bracket.

[13] Furthermore a reading of clause 9(3)(b) of the fund's rules indicates that an employee may if he/she wishes to do so, work even past the age of 65 years.

[14] Respondent's argument with regard to the policy that existed at Val Hau was that while it was not compulsory for employees to retire at age 60 in practice the majority of those who did retire, retired at age 60 or younger. Further that there were some employees who were allowed to remain in Val Hau's employ past the age of 60 years.

[15] Various documents were placed before this Court in an attempt to satisfy this

Court that the normal retirement age at Val Hau was in fact 60 years and that this retirement age was inherited by the respondent. These documents in no way support the respondent's contention: the record cards in respect of three employees indicate that these three employees retired well after the age of 60; a list prepared by some secretary purported to show that a majority of retirees in the immediate past retired at the age of 60. When this list was tested it became clear that the list included names of employees who had either resigned of their own accord, were retrenched or left for some other reason. These documents do not evince any general practice that employees of Val Hau would retire at he instance of Val Hau on attaining 60 years of age.

[16] Respondent further argued that the word "normal" should be given its ordinary meaning, meaning "conforming to a standard; usual; typical or expected" (South African Concise Oxford Dictionary) and therefore "normal retirement age" should not be seen as the compulsory retirement age, but that which is usual or typical age. This according to Respondent was 60 years at Val Hau. If I accept this argument Respondent is required to satisfy me that 60 years was the usual or typical retirement age at Val Hau. Even on respondent's definition, when employees of their own accord decide to go into retirement: after the age of 55 but before the age of 60; as an alternative to retrenchment, their going on retirement does not constitute a "normal retirement age". A normal retirement age in the context of s187 (2)(b) implies, the age at which the employer requires the

employee to go on retirement, not where the employee is entitled to go on retirement if he/she wishes to do so.

[17] Tepperson who had for many years worked for Val Hau in their labour relations department and moved to respondent with the sale of business sought to convince the Court that Val Hau had a "loose policy" on retirement. However, in cross – examination it became apparent that Val Hau had in fact no policy at all. The Respondent could not point to one instance where Val Hau retired an employer at its instance once the employee had attained the age of 60.

[18] In the circumstances when respondent agreed to a take over the employees of Val Hau in terms of the agreement referred to above, Val Hau did not have a retirement policy in place. Respondent then sought establish a policy. This it attempted to do by way of a notice dated 1 February 2001 and presented to the shopstewards committee on 15 February 2001.

[19] Before dealing with what transpired at this meeting it needs to be recorded that Tepperson on behalf of the respondent conceded that given the nature of the respondent's proposed retirement policy, it was necessary to consult with the applicants with a view of reaching agreement. Furthermore, and without deciding I accept, for the purposes of this judgment, that consultation with the shopstewards to conclude an agreement on the retirement policy without notice to the union is due compliance of the duty to consult with the applicants.

[20] At the meeting of 15 February 2001, according to respondent's witnesses the shopstewards were presented with the document entitled "Retirement Policy – Rubin Sportwear". The pertinent part of the document reads: " As the normal retirement age is 60 years it is the policy of this company that with immediate effect the retirement age for all employees is set at 60". Tepperson one of the witnesses testified that, the fifth applicant – who was one of the shopstewards simply asked what would happen to her because she had either already reached 60 years of age or was to attain this age within the next few months. Tepperson's reply was to the effect that although fifth respondent will be retired she will be retained on a fixed term contract until the end of the year. This was confirmed by Carolus a shopsteward who was also at the meeting. According to the respondent the above together with a statement from Tepperson to the effect that the policy of retirement at age 60 was the policy of the respondent and it was a policy that will be of application, records the sum total of what transpired at the meeting of 15 February 2001. On the basis thereof Tepperson for respondent concluded that an agreement had been concluded between respondent and the applicant with regard to the retirement policy document.

[21] The witnesses for the applicants dispute the respondent's version stating that no agreement was concluded at all. However even if I disregard applicants version altogether I still fail to understand on what basis Tepperson with over 14 years of

experience in the labour field at Val Hau and the respondent could conclude, on her own version of events, that an agreement had in fact been concluded.

[22] According to Tepperson, since none of the shopstewards expressed any reservation or made any comment she accepted that there was agreement. Her own evidence however gives a lie to this belief. Tepperson conceded that consultation was necessary for purposes of obtaining agreement. Yet she presents the policy to the shopstewards not in the spirit of opening the door to a process of consultation but with a statement which to any observer would have meant nothing other than that a policy was being laid down which was neither open to debate or discussion. Seen against this background it is patently understandable that the fifth respondent, who faced immediate dismissal would enquire about her future.

[23] It has now become accepted practice that for meaningful consultation to take place parties must not only be presented with proposals but also be given an opportunity to coldly consider the impact of the proposals in isolation or amongst their team away from the other party. To present a team with a new policy without any prior warning thereof and informing them that, that policy is to be implemented forthwith does not evince an intention to consult, it demonstrates that the respondent had already made the decision and the shopstewards were called in not for purposes of consultation but to be advised of the new policy. The fact that the policy was presented as a fait accompli and not open to debate is borne out not

only by evidence of Tepperson but also that of respondent's other witness Carolus, who stated that she saw the policy document presented as being the new policy which was not open to being objected to. The language of the document itself also made it clear that the retirement age of 60 for all employees was to be the new policy effective immediately.

[24] Had the policy been open to consultation, I am satisfied that it would not simply have been presented, a statement or two made thereon and be regarded as being immediately operational. In the circumstances I find Tepperson's evidence that she believed because of the failure of the shopstewards to make any comments or raise any objections to the policy as an acceptance thereof not only far fetched but less then honest.

[25] The argument by the respondent that even if this Court finds that no agreement had been concluded between the parties about retiring at the age of 60, this became the normal retirement age once the respondent communicated the new policy to all employees such that any reasonable expectation that they may have had with regard to the age at which they could expect to retire were destroyed and replaced by such other reasonable expectation formed by the new policy.

[26] This argument may be of merit where the right of the employer to make and implement policy is not subject to consultation and/or negotiation. In those

circumstances once the employer makes policy and it is communicated to the employees, the employees cannot have an expectation contrary to the set policy.

[27] In the matter before me however, the respondent itself acknowledged the need to consult with the applicant union, albeit the union as represented by the shopstewards at its workplace, it cannot then having failed to consult claim that the policy now represents a normal retirement age of employees simply because the policy has been communicated to the employees and they therefore cannot expect to remain in respondent's employ on a permanent basis once they attain the age of 60 years. To accept such an argument would be to defeat the very need for an employer and an employee to strive towards a joint problem solving exercise in relation to the disputes that, as a matter of course, they are confronted with regularly.

[28] In the circumstances I am satisfied that the respondent's action in dismissing the second to fifth applicants on the grounds of their age constitutes an automatically unfair dismissal as provided for in s187(1)(f) of the LRA.

[29] Turning then to the relief, the second to fifth applicants seek compensation. In terms of the LRA I have a discretion as to the amount of compensation I may order the respondent to pay each of the said applicants up to a maximum limit of what each would have earned over a 2 year period had they remained in

Respondent's employ.

[30] The second to fifth applicants are all over the age of 60. They have been in respondent's employ (having regard to the fact that respondent accepted them in its employ with their service record in tact) for 19 years; 21 years; 5 years and 27 years. Although all claim to be fit to continue in their employ, their age, no doubt serves as a barrier to obtaining alternative employment. For this reason I am satisfied that compensation must be awarded to each of these applicants.

[31] With regard to the amount of compensation that I should order respondent to pay – this is a more difficult matter. At least one of the applicants has obtained other employment. The others have not obtained other employment and being under the age of 65 do not qualify to claim state pension.

[32] I must however also take into account that in the case of the fourth and fifth applicants, the respondent immediately offered them fixed term contracts on the same terms that governed their employment, prior to being retired, for a period of 10 months. These agreements were cancelled at the insistence of the first applicant, the trade union – why it did not allow the fourth and fifth applicants to continue while still proceeding with this matter it could not satisfactorily explain. The respondent also made an offer to the fourth and fifth respondents to return to work while this case was to continue. Again for no logical reason the first applicant influenced them against returning to work.

[33] The second applicant was neither offered a fixed term contract nor was he asked to return. In his case also however, the respondent stated that a fixed term employment offer would have been made but because of the first applicant's opposition no such offer was made to the second applicant.

[34] In the circumstances I am satisfied that the second to the fifth applicants should be treated similarly with regard to the amount of compensation. As to the amount having regard to the factors referred to above and the fact that the wrong committed by the Respondent is a serious one I belief that it is fair and equitable that the respondent pay to each of the second to fifth applicants an amount equal to what they would have earned over a 26 week period.

[35] With regard to costs having regard to both law and equity I am not satisfied that this is a matter in which costs should follow the result, because I do believe that while the process followed by the employer was not correct, this action was not intended to prejudice the employees.

[36] In the result I make the following order:

(a) The dismissal of the second to fifth applicants was unfair as provided for in s187(1)(f) of the Labour Relations Act (as amended).

(b) Respondent must pay the following compensation consequent upon their unfair

dismissal:

(i) to J. Hendricks the sum of R17 264,00

(ii) to P. May the sum of R14 079,00

(iii) to A. Fischer the sum of R11 414,00

(iv) to Q. Adams the sum of R12 532,00

(c) There is no order as to costs.

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WAGLAY J

date of judgment: 15 November 2002

for the Applicants: J. Whyte of Cheadle Thompson & Haysom Inc.

for the Respondent: Adv. R.T. Paschke instructed by Deneys Reitz Inc.