IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

REPORTABLE

CASE NO: **D119/06**

In the matter between

J J WANLESS Applicant

and

FIDELITY (PTY) LTD Respondent

JUDGMENT

PILLAY D J

[1] The applicant employee, Mrs Wanless, sought an order declaring that she was dismissed, that her dismissal was automatically unfair, alternatively unfair, and that the respondent employer, Fidelity (Pty) Ltd ("Fidelity"), should compensate her. She abandoned her initial claim for reinstatement.

[2] The circumstances were the following: Mrs Wanless was a public relations officer. She had worked for Supercare Cleaning (Pty) Ltd ("Supercare") since 1978. In 2001 Fidelity took over Supercare. Predictably, the take-over resulted in some confusion and adjustments to synchronise the custom, culture, practices and policies of the constituent entities.

[3] Not everyone welcomed the changes. Three former Supercare employees who testified for Mrs Wanless resigned or retired from Fidelity soon after the take-over to join competitors. As Mrs Wanless enjoyed her work, she remained with Fidelity.

[4] On 1 May 2000 she had her letter of appointment with Supercare

refreshed. A term of the contract material to this dispute is the following:

> "Your employment shall terminate automatically without notice on you reaching the company's compulsory retirement age of 60 years."

[5] Mrs Wanless was approaching 60 years. She did not want to retire. The retirement age stipulated in the pension fund for former Supercare employees was 60 years. Fidelity employees engaged before and after the take-over retired at age 65. Mrs Wanless wanted to retire at age 65.

[6] About six months after the take-over she telephoned Ashley Thomas, the Group Human Resources Director based in Johannesburg, to enquire about her retirement. Mr Thomas, she alleged, advised her that she would have to claim her retirement benefit at age 60 and reinvest it while she continued working for Fidelity until age 65. Mrs Wanless deduced from this that she would be allowed to work until age 65.

[7] Nevertheless, she remained concerned about her retirement age and raised it on no less than three occasions with the Managing Director himself, Mr Philip Kruger. The first occasion was at a regional meeting in 2004. Mrs Wanless alleged that at the end of the scheduled business for that meeting she asked Mr Kruger what her position would be as she would be turning 60 two years later. Mr Kruger, she said, reassured her that she had nothing to worry about and that she was valuable to Fidelity. He reiterated this during the luncheon. She inferred from this that she would remain employed after she turned 60 years. At both the regional meeting and the luncheon her witnesses were present.

[8] The second occasion was when she transported Mr Kruger to or from the airport. On that occasion she was alone with him. The third occasion was at the 2005 July Handicap. Mr Kruger's wife was present. Mrs Wanless alleged that he gave her similar assurances on the last two occasions as he did on the first occasion when she raised her concern about her retirement.

[9] In April 2005 Graeme Bird, the Regional Manager since 2004, discussed with Mrs Wanless the issue of her Avis car lease expiring and

informed her that she would thereafter receive a car allowance. Mr Bird also asked her to work a full day at an additional 1% increase in remuneration. She refused to work longer hours. After negotiations, Fidelity agreed to give her a car allowance of R3 500 per month. She informed Fidelity that she would buy the leased car from Avis, which she would transfer to her son as he had paid for it. She also claimed to have informed Mr Bird that she would be buying another car for herself. She subsequently bought a car under a five-year credit agreement, which she intended to pay off with her car allowance. She submitted that she would not have assumed the burden of credit if she had known she was to retire before the car was paid off.

[10] On 10 November 2005 Mr Bird met Mrs Wanless and informed her that she would be retiring on 13 January 2006. Mrs Wanless was shocked and upset. Mr Bird offered to extend her employment with a fixed-term contract until the end of February 2006. Despite several exchanges, Mrs Wanless's employment terminated with effect from 13 January 2006. On 10 January 2006 Mr Bird instructed her to leave immediately. He allegedly frog-marched her out of the building.

[11] Against this background Mrs Wanless, on the representations allegedly made by Messrs Thomas and Kruger, alternatively on the basis of Fidelity's customs, culture, practices and policies not to enforce the contractual retirement age of 60, asserted that:

(a) Fidelity had agreed to extend her retirement date to age 65.

(b) Alternatively, Fidelity had given her a choice to retire at or after 60 but not later than 65.

(c) Further, alternatively, she had a reasonable expectation to renew her employment until age 65.

[12] Fidelity disputed many of Mrs Wanless's allegations. However, the Court concerns itself with only those allegations that are material to the resolution of the central issues.

[13] The obvious starting point of the Court's analysis must be to determine the basis on which Mrs Wanless' services with Fidelity terminated. It is common cause that her contract of employment and pension fund fixed her retirement age at 60 years. Fidelity took over Supercare in terms of section 197 of the Labour Relations Act No 66 of 1995 ("the LRA"). In so doing, Fidelity stepped into the shoes of Supercare in respect of all the latter's rights and obligations towards its employees. In relation to Mrs

Wanless, section 197 effectively substituted Fidelity as her employer in terms of her May 2000 letter of employment.[1]

[14] Fidelity's personnel policies and procedures manual[2] ("the manual") applied to all staff "except where the provisions of any policy are inconsistent with any legislation or formal agreement covering any employee/employees, e.g. wage determinations, bargaining council agreements, recognition agreements". Although that page of the manual originated in 1997 following the merger of the cleaning and security divisions of Fidelity, it remained in force when Fidelity took over Supercare.

[15] The letter of appointment was a formal agreement and fell within the exception above unless Mrs Wanless proved that the formal agreement was cancelled, varied or superseded by the representations from Messrs Thomas and Kruger or Fidelity's customs, practices, culture or policies.

[16] Mrs Wanless conceded that she did not engage anyone from Fidelity about extending her retirement date to 65 in "a focused manner", nor was there anything in writing concerning the extension of her retirement date to age 65.

[17] Messrs Thomas and Kruger deny ever entering into any agreement with Mrs Wanless for the extension of her retirement date to age 65. Both had no recollection of ever having had discussions with her in terms of which they gave her any undertaking that her employment would continue after she turned 60 years, or from which she could reasonably have inferred such an undertaking.

[18] Mr Thomas testified that if he had been asked about her retirement he would have answered that she had to retire at age 60. If her services were still required Fidelity would have entered into a fixed-term contract with her for, at most, a year. As her services were not required, Fidelity insisted on enforcing the contract.

[19] The only discussion Mr Kruger recalled was that which occurred when Mrs Wanless was transporting him. He testified that he informed her that she could continue working for Fidelity after resigning at age 60, provided it was operationally convenient and she had the skills and ability to perform her function. She was advised that she would have to renegotiate her fixed-term contract with the Regional Manager. Fixed-term contracts usually did not exceed a year.

[20] The Managing Director and the Group Human Resources Director

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1 A 178
2 A 107(a)

therefore denied that they would ever have given an undertaking to employ her up to 65 years in the light of Fidelity's contractual arrangements and its customs, culture, practices and policies.

[21] By no stretch of any construction can the Court elevate Mrs Wanless's representations to Messrs Kruger and Thomas, even on her version, to an express agreement to extend her retirement date. Nor can the Court infer such an agreement from her representations. Furthermore, all the circumstances discussed above and below militate against such an inference. Most pertinently, the express terms of the letter of appointment bar the Court from inferring any implied terms. Mrs Wanless had to prove a clear cancellation or variation of the letter of appointment in order to succeed in proving that the new term of her employment was that she could retire at age 65.

[22] As regards Fidelity's customs, culture, practices and policies, Fidelity demonstrated that every former Supercare employee was contractually bound to retire at age 60. Except for Mr Bird, all the witnesses for the parties were former Supercare employees. All of them confirmed that their retirement age was 60 years. Fidelity also showed that retired employees, for example Mr Vawda and Ms Groenewald, who returned to work, did so on fixed-term contracts. Mrs Wanless could not point to a single instance in which the employment of a former Supercare employee was extended to 65 years. Marcia Nel remained employed with Fidelity after her retirement date at age 60 only because Mr Walter Burger, who was Ms Nel's supervisor and Mrs Wanless's first witness, omitted to process her retirement. Another former employee, namely Mrs Weir, continued her relationship with Fidelity, but not as an employee.

[23] Fidelity's customs, culture, practices and policies therefore were not to extend the contracts of Supercare employees beyond 60 years, but to terminate them automatically when employees reached 60 years. Exceptionally, some employees were retained on fixed-term contracts of not more than a year.

[24] Several witnesses for both parties acknowledged the corporate culture of Fidelity. Every change in Fidelity's employment policies was documented, hence the manual was described as a "living document". Specifically in relation to Mrs Wanless an addendum was agreed and signed to reaffirm her working hours as they differed from other employees. The change from having the use of a leased car to receiving a car allowance was agreed and recorded in writing. Her leave was amended unilaterally, but to her advantage. Fidelity issued documentation to the staff notifying them of the changes.

[25] Fidelity's customs, culture, practices and policy was to record

important changes in writing. If Fidelity had agreed to change Mrs Wanless's retirement date to age 65, it would have recorded such a material term of employment in writing. The probabilities are, therefore, that it did not agree to extend the retirement date, nor could she reasonably infer such an agreement from either the representations made to her or from Fidelity's customs, culture practices and policy.

[26] In these circumstances, Mrs Wanless could also not have had any reasonable expectation of her employment continuing after age 60. There was no precedent to support it. In the opinion of the Court she did not in fact have such an expectation because, if she did, she would not have asked Mr Kruger repeatedly about her position. She was insecure because she knew she had no clear right to employment with Fidelity after age 60. She bought a car on credit despite her insecurity about her job because she needed a car to do her job.

[27] Turning to the discrimination claim, the Court questioned Mr M *Stewart*, counsel for Mrs Wanless, about the basis of this claim as it appeared from the way the pleadings were drafted that the cause of action was a breach of an express, alternatively implied, agreement or policy to extend her retirement date. At the end of the trial the Court was still in the dark about whether Mrs Wanless was discriminated against. If she was discriminated against then she did not prove who was differentiated from whom and whether and how the differentiation amounted to discrimination. As a discrimination claim, these issues had to be specifically pleaded, but Mrs Wanless's representatives failed to do so.

[28] In these circumstances the Court was inclined to dismiss the discrimination claim without further consideration. However, it elected to respond to Mr *Stewart's* submissions made during the closing argument in reply. Mr *Stewart* submitted that the ground of discrimination was age. Mrs Wanless was differentiated from other Fidelity employees on that ground and that the differentiation amounted to discrimination because it was irrational. The Courts have repeatedly pointed out that simply articulating a listed or unlisted ground of discrimination is not enough to found an action for discrimination. *Harksen v Lane N.O. and Others* 1998 (1) SA 300 (CC) and the litany of cases in the Constitutional Court, the Supreme Court of Appeal and the Labour Court prescribe the format for pleading and proving a discrimination claim. The Court does not intend to repeat the requirements here.

[29] In so far as the differentiation was between Mrs Wanless and other Fidelity employees, there was a rational basis for differentiation between former Supercare and Fidelity employees. Each group came with different conditions of employment. In some respects Supercare employees were employed on better terms. Some employees like Messrs Vawda and Davis,

who was another witness for the employee, preferred to retire at age 60 in accordance with the Supercare conditions of service. Section 197 of the LRA required Fidelity to abide by the Supercare contracts of employment. Likewise, section 64(4) of the LRA prohibited Fidelity from unilaterally changing terms and conditions of service of Supercare employees.

[30] The suggestion of Mrs Wanless and her witnesses that Fidelity's practices applied to Supercare unilaterally and without deference to the individual contracts of employment is factually unfounded and improbable. If it did happen, it would be unlawful or unfair. Fidelity also established that all former Supercare employees subsequently employed as Fidelity employees were treated similarly, i.e. all Supercare employees retired at age 60.

[31] The basis for differentiating Mrs Wanless from other Fidelity employees is therefore ill-conceived. The proper comparison should have been between Mrs Wanless and former Supercare employees. Having failed to prove the differentiation, the Court's inquiry about the alleged discrimination ends. Mrs Wanless's representatives did not plead or submit that as Fidelity terminated her services on the grounds of age which is listed as a prohibited ground of discrimination in the Constitution and the Employment Equity Act No 55 of 1998, the termination was automatically discriminatory and no comparator was required. The Court has found a comparator, namely, former Supercare employees. Consequently, Fidelity's treatment of Mrs Wanless is not unique that no comparator is available, as in the case of women refugees in South Africa. (*Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC).)

[32] The Court accordingly finds that Mrs Wanless was not dismissed. Her services terminated in accordance with her contract of employment when she reached the retirement age of age 60. Section 187(2)(b) of the LRA stipulates that dismissal based on age is fair if the employee has reached the normal or agreed retirement age. Therefore, in so far as Mrs Wanless suggested that her services were not terminated by the effluxion of time but at Fidelity's will, section 187(2) makes it clear that such a dismissal would be fair.

[33] The Courts are usually slow to impose cost orders on litigants in discrimination cases. In this case the Court is mindful that a person who is retiring after 27 years service is emotional and vulnerable. The reality of a future without work, without an income and the mere thought of getting old can be overwhelming. In the quest to avoid retirement, the Court finds that Mrs Wanless could only have misread Fidelity's responses to her and slanted them to best suit her ends to avoid retirement.

[34] However, the Court must discourage ill-conceived discrimination

litigation. In this case Mrs Wanless failed to establish even a factual basis for discrimination. Furthermore, if those advising her stopped to study *Harksen* they would have realised at the outset that the facts of this case did not satisfy the requirements for discrimination. In those circumstances the Court cannot but impose the usual costs order.

[35] The order that the Court grants therefore is the following:
The claim is dismissed with costs.

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PILLAY D, J

Judge of the Labour Court

Date of Judgment: 27 September 2007

Appearances:
ON BEHALF OF THE APPLICANT: MR A J PRIOR

ON BEHALF OF THE RESPONDENT: MR R A K VAHED SC

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