IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JS: 70/07

In the matter between:

JOAN PENELOPE BEDDERSON Applicant

and

SPARROW SCHOOLS EDUCATION TRUST Respondent

JUDGMENT

LE ROUX, AJ

1 The following facts are common cause in this matter.

2 The Applicant commenced her career as an educator in 1955 and was employed in various schools. In 1993, at the age of 57, she took early retirement. She received a pension and other benefits in terms of the rules of the retirement fund to which she had belonged. In 1996 she again took up her career as an educator and was appointed to a Governing Body position at the Fairview Junior School. She worked in this position until 2001. Her employment at this school came to an end as a result of the fact that she would soon reach the retirement age of 65 set by the Gauteng Department of Education ("GDE").

3 On 14 February 2001 she was then appointed as an educator at one of the respondent's schools. By this time she was 64 years and 9 months old. Despite the fact that she was approaching the age of 65, an age that is

often regarded as a normal or agreed retirement age, this was not an issue raised at any stage prior to her employment. Her contract of employment did not contain a retirement age and there was no retirement policy in force at that time.

4 During the course of her employment with the respondent, the applicant was promoted to the position of Head of Department. In this position she received at least two favourable assessments from her superiors and the respondent had no cause for complaint as to her work performance.

5 On 6 October 2006, during the course of a staff meeting convened by the Principal of the applicant's school, a Ms Schott, staff were informed that a mandatory retirement age of 65 years of age had been introduced. Employees older than 65 years of age could be considered for temporary employment in terms of fixed-term contracts until the age of 70 years when this type of employment would also cease.

6 The introduction of this new arrangement was confirmed by means of a document provided to employees on 10 October 2006. This took the form of a letter dated 9 October 2006 addressed to the Principals and staff of the various schools operated by the respondent. In this letter the respondent's human resources practitioner stated that it appeared that there were still educators on the permanent staff who were older than 65. It went on to state that no employees were to be employed on a permanent basis after the age of 65. However, if an employee was delivering the same level of performance as that which was required of them they could be re-employed in a temporary capacity, but that this could not occur after an employee had reached the age of 70.

7 The above was reflected in a policy that came into force on 2 October 2006.

8 In October 2006 the applicant was a few months older than 70.

9 On 15 November 2007 the applicant received a letter from the respondent informing her that, according to the respondent's policy on retirement age, she would not be offered an employment contract for 2007 and that her final salary would be transferred electronically into her bank account on 31

December 2006. She was also thanked in sincere terms for the valuable contribution that she had made to the employer's school.

10 Her last day of work was the last day of the school term at the end of 2006. At that date she earned R7000.00 per month.

11 The applicant then approached an organisation called the Employees Labour Association for advice. This led to an exchange of correspondence between this Association and the respondent and the subsequent referral of a dispute to the CCMA. No settlement of the dispute was achieved at conciliation proceedings and the matter was referred to this Court for adjudication.

12 The above basic facts form the basis for the following claims:

12.1 a claim based on an allegation of an automatically unfair dismissal on the grounds of age as envisaged in section 187(1)(f) of the Labour Relations Act, 66 of 1995 (“LRA”);

12.2 a claimed based on an allegation of unfair discrimination in terms of section 6 of the Employment Equity Act, 55 of 1998 (“EEA”);

12.3 a claim based on an allegation of an unfair dismissal.

Was there automatically unfair dismissal?

13 The allegation of an automatically unfair dismissal is based on section 187(1)(f) which states that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee on various listed grounds, including that of age.

14 In his application for absolution from the instance Mr Lennox, who appeared on behalf of the respondent, argued that the applicant had not discharged the onus of showing that she had been dismissed. I rejected this argument in my ruling on this issue based on the facts before me at that stage of the proceedings. No further facts were placed before me during the further

course of the trial that persuade me to come to a different decision in this judgment. In my view the letter dated 15 November 2006 constituted a notice of termination of employment, especially when it is read with the letter given to staff on 9 October 2006. The mere fact that the letter did not explicitly state that she had been dismissed is neither here nor there. It manifests a clear intention to terminate the employment relationship. See in this regard **Marneweck v SEESA SA Ltd [2009] 7 BLLR 669 (LC)** and **SA Post Office Ltd v Mampeule [2009] 8 BLLR 792(LC).** There was also no automatic termination of employment.

15 It is common cause that the reason for the applicant's dismissal was the fact that she was older than 70. Her dismissal was therefore due to her age.

16 But this is not the end of the enquiry. Section 187(1)(f) makes it clear that it proscribes **unfair** discrimination. Unlike the other grounds for an automatically unfair dismissal found in section 187(1) it is clear that an employer is entitled to justify its decision on the grounds of fairness.

17 Section 187(2) mentions two situations where a dismissal will be fair despite the provisions of section 187(1)(f). The first is mentioned in section 187(2)(a). It provides that a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the job. Mr Lennox did not rely on this defence- correctly in my view. The second is contained in section 187(2)(b). This provides that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for the persons employed in a particular capacity.

18 Mr Lennox argued that this matter fell within the ambit of section 187(1)(2)(b). He then referred to the decision in **Schweitzer v Waco Distributors (a Division of Voltex (Pty) Ltd [1998] 10 BLLR 1050 (LC)** where it was held that the import of this section is that employees who are kept in employment after they have reached the agreed or normal retirement age cannot argue that their subsequent termination was unfair, at least where the reason for the dismissal was the age of the employee. This approach has been adopted in subsequent decisions as well.

19 His argument can be summarised as follows:

19.1 He accepted that, at the commencement of her employment, there was no agreed retirement age in force between the applicant and the respondent.

19.2 Clause 13 of the applicant's contract of employment stated that:

> "*All employees are required to acknowledge the policy document before signing the letter of appointment. Signing of this contract is an acknowledgement of understanding and acceptance of all the terms and conditions and the aims of the school.*
>
> *You shall undertake to observe and act in compliance with the policies, procedures and instructions of the Trust as published or amended from time to time.*"

19.3 This gave the respondent the right to introduce and amend policies and procedures.

19.4 The respondent's policies and procedures had been amended in 2006 to establish a retirement age. By agreeing, in terms of clause 13 of her contract of employment, to observe and act in compliance with the respondent's policies as published or amended from time to time, she had agreed to the respondent being able to introduce a retirement policy. The retirement age of 70 introduced in the new policy was therefore an agreed retirement age.

19.5 In short, because the applicant had agreed that the respondent could introduce such a new policy she had therefore also agreed to the introduction of a new retirement age. This meant that the principle formulated in the **Waco Distributors** decision applied.

20 This point was also raised by Mr Lennox when he applied for absolution from the instance. I refused to grant the application on the basis of the

principle accepted in decisions such as S*chmahmann v Concept Communications (Natal) (Pty) Ltd* (1997) 18 ILJ 1333 (LC) and *Thomas v Mincom [2007] 10 BLLR 993 (LC)* to the effect that such an application should not be granted in circumstances where the onus of proof rested on the respondent.

21 In my ruling I concurred with the view that employers are entitled to introduce policies and procedures regulating elements of the relationship between themselves and their employees. In the absence of a specific right to do this provided for in the contract of employment, I suggested that this flows from the right to issue reasonable and lawful commands, subject to the dictates of legislation more specifically the right to fair labour practices and the right not to be unfairly dismissed. I found, however, that when the applicant turned 65 shortly after commencing employment with the respondent she was entitled to be treated as a permanent employee. When she turned 70 in May 2006 she remained entitled to be treated as a permanent employee. The respondent accepted that this was the case and dealt with her on this basis. However, I rejected the notion that things changed after the introduction of the policy. I found that the mere introduction of a policy in terms of which the normal retirement age was set at 65 and subsequent to which employees are then employed on a temporary basis could not overturn, on some form of retrospective basis, what had already occurred. The introduction of the policy could not lead to the view that at the age of 65 the applicant's contract had retrospectively terminated automatically and that it was then replaced with a series of temporary contracts and that even this form of employment ceased automatically when she turned 70. The reality was that she remained in employment after she turned 70 and the mere fact that a new policy was introduced later did not lead to the automatic termination of her employment on the date that the policy was introduced.

22 I also concur with the view that the employment relationship is not a static one and that its nature can change over the years, thus impacting on the contractual obligations as well.

23 However, I was also of the view that the common law right to issue such

policies does not extend as far as actually changing the terms on which employment can be terminated. Generally speaking, policies must be formulated and applied within the framework of the contract which authorises their formulation. The applicant's contract does not envisage a retirement age. The employer cannot, by introducing a policy, change this fundamental aspect of the employment relationship. Taken to its extreme, it could mean that an employer could evade potential liability for unfair dismissal by simply introducing a policy in terms of which the contract of employment of its employees would terminate automatically in certain circumstances.

24 These remain my views. There was also no convincing evidence that the age of 70 was the normal retirement age. The continued employment of the applicant after the age of 70 shows this – as does the fact that it was not relied upon when her employment was terminated. I am therefore of the opinion that section 187(2)(b) has no application here. There was no agreed or normal retirement age. The principle formulated in the **Waco Distributors** decision does not apply.

25 There is some controversy as to whether the grounds set out in section 187(2) are the only circumstances in which a dismissal can be justified on the grounds of fairness or whether employers can rely on a general defence of fairness. See in this regard Du Toit *et al Labour Relations Law* (5th ed) at 597 and Dupper and Garbers in Thompson and Benjamin *South African Labour Law* 2002 CC1-61.

26 In view of the approach I have taken in this regard I do not need to decide this issue but I will accept, for the purposes of this judgment, that an employer is not limited to the grounds set out in section 187(2) to justify its decision to dismiss. However, I am also of the view that, given the importance of the values underlying section 187(1)(g) – the furthering of equality and the elimination of discrimination being a core Constitutional value - such a justification should not be easily accepted and should scrutinised critically – the onus lies on the employer in this regard.

27 The justification raised by the respondent was that the introduction of a policy regarding a retirement age was one of the requirements for accreditation and that the respondent's schools would not be permitted to operate without such accreditation. The accrediting agency, UMALUSI, did not specify what the requirement age should be, but simply required that there should be such an age. The respondent's management had considered the issue and decided that a retirement age of 70 was appropriate. In coming to this decision management had considered the fact that the GDE would have required employees to retire at the age of 65 but thought that a higher retirement age would be appropriate for the respondent.

28 The justification raised by the respondent is one akin to operational requirements. If a retirement age were not introduced it would not longer be permitted to operate. In my opinion this would clearly justify the introduction of a retirement age. It could also be justified on other grounds as well. It should be noted that the LRA itself permits the use of a retirement age.

29 The applicant herself had no complaint with the introduction of a retirement age, in principle at least. She simply argued that she felt that she still had something to contribute to the school and that she wanted to implement plans that she had helped to formulate for the 2007 school year. She was "not ready" to retire. She had not been consulted properly in this regard. She insisted that she was still capable of doing her work properly – a proposition with which the respondent agreed.

30 But the question is whether the application of such a retirement age can be justified in a case such as this where the employee had already reached and passed the retirement age? In my view it cannot. It is one thing to be able to justify the implementation of general retirement age but this does not mean that it is necessarily fair to dismiss somebody on the basis that she had already reached that age when the policy was introduced.

31 As indicated above, justification must be judged strictly. No evidence was led to show that the respondent would have lost its accreditation if it had permitted an employee who had already passed the retirement age to

continue in employment – ie to have "red circled" her. No evidence was led to show that this issue was taken up with UMALUSI. Her position as an individual with her unique circumstances were not considered. She was not consulted in any meaningful way regarding her personal circumstances. There was evidence led to show that the applicant was aware, to some extent at least, of the fact that such a policy was to be introduced and it is clear that she was informed of the implementation of the policy in October. It is also clear that she had a meeting with management where her dismissal was discussed, but this meeting was simply convened to inform her of this fact rather than for the purposes of considering her individual circumstances. In **Leonard Dingler Employee Representative Council and Others v Leonard Dingler (Pty) Ltd (1998) 19 *ILJ* 285 (LC)** at 295 the Court stated the following:

> "*Discrimination is unfair if it is reprehensible in terms of society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.*"

32 In my view, whilst the aim of introducing a retirement age was legitimate, I do not think that the Respondent's response was proportional with respect to the way in which it was implemented in the context of the unique circumstances of the applicant . It is true that the applicant did concede that the introduction of a policy on retirement age could or would be fair. However, what is also clear is that it was not so much the introduction of a policy that she challenged but its application to her in her circumstances.

33 I therefore come to the conclusion that the dismissal was automatically unfair.

Did the respondent discriminate against the applicant in terms of section 6 of the EEA?

34 Section 6(1) of the EEA provides that no person may discriminate, directly or indirectly, in any employment policy or practice against an employee on a range of prohibited grounds set out in this section, including age. The definition of an employment policy or practice set out in section 1 of the EEA specifically refers to dismissal.

35 A dismissal based on age can therefore fall within the ambit of section 6. I accept the view taken in **Evans v Japanese School of Johannesburg [2006] 12 BLLR 1146 (LC)** that an applicant may bring a claim for an automatically unfair dismissal and a claim based on a breach of section 6 of the EEA at the same time.

36 I can therefore consider the applicant's claim that she was dismissed in contravention of section 6 of the EEA. From the evidence set out above it is clear that the reason for the applicant's dismissal was her age. She was treated differently from a person who was younger than 70. (The fact that a person younger than 70 may, at a later date, also be treated in this way is irrelevant. That person may or may not have a similar claim at that time.) There was differentiation on a prohibited ground - this constitutes discrimination.

37 The applicant alleged that three other employees had been permitted to work beyond the age of 70 in breach of the policy adopted by the respondent in October 2006. The respondent's witnesses dealt with this issue in their evidence and explained the circumstances of each case. The applicant was not in a position to seriously challenge these facts and I am satisfied that these instances do not constitute a breach of the policy introduced by the respondent. There was also no inconsistency in this regard and they do not serve as comparators.

38 The respondent must therefore justify the fairness of the dismissal – see section 11 of the EEA.

39 Section 6(2) states that it is not unfair discrimination to take affirmative action measures consistent with the provisions of the EEA or to distinguish, exclude or prefer on the basis of an inherent requirement of a job. These

grounds for justification do not apply to this case. For the purposes of this decision I am again prepared to accept that these two grounds are not the only grounds that can justify the fairness of an employer act or omission. There is a general fairness defence available to the respondent. However, for the reasons set out above, I do not think that the respondent has established the fairness of its dismissal of the applicant. I therefore find that the dismissal of the applicant also constitutes a breach of section 6 of the EEA.

40 In the light of the above findings I do not deem it necessary to deal with the claim based on an allegation of an unfair dismissal.

The remedy to be awarded.

41 The applicant does not seek reinstatement. She claims compensation in terms of section 194(3) of the LRA, compensation in terms of the section 50(2)(a) of EEA and damages in terms of section 50(2)(b) of the EEA. She seeks compensation in terms of the LRA equal to 24 months' remuneration. She does not specify what the amount of compensation, or the extent of the order for damages, should be in terms of the EEA. She leaves this in the discretion of the Court.

42 The applicant provided very little guidance as to what loss, if any, she had suffered as a result of her dismissal. It appears that she has held temporary appointments as an educator since her dismissal.

43 Given the fact that she has not provided the Court with any evidence to show the extent of any loss that she has suffered I do not deem it appropriate to award damages.

44 Before dealing with the issue of the amount of compensation to be awarded it is necessary to deal with an argument raised by Mr Lennox based on section 64(4) of the LRA. He argued that because the applicant's terms and conditions of employment had been unilaterally altered, she could have relied on the provisions of this section to require the respondent to engage

with her on this issue. This might have obviated the need for these legal proceedings and the applicant's failure to utilise this mechanism should mean that the respondent should not be ordered to pay compensation. Whilst a failure by the applicant to raise the issue of the introduction of a new retirement policy may perhaps be relevant to whether compensation should be awarded, or the extent thereof, I do not think that the failure to invoke section 64(4) is relevant to this question. The applicant had the right to invoke the remedies she seeks to invoke. It is, in any event, debatable whether she was entitled to utilise section 64(4). See **Schoeman & Another v Samsung Electronics SA (Pty) Ltd [1997] 10 BLLR 1364 (LC).** It is also debatable whether it would have served any purpose.

45 As far as compensation is concerned I deal with both claims jointly. I have taken into account the important fact that I have found that the dismissal was automatically unfair. This type of dismissal is, of course, viewed in a far more serious light than "ordinary" unfair dismissals. Awards for the maximum statutory amount of 12 months' remuneration are not unusual. However, I am of the view that the circumstances of this case merit a different approach.

46 The applicant has obtained other employment, albeit on an ad hoc basis. She receives a pension flowing from her employment with the GDE. She makes no attempt to quantify her loss and does not seek to justify why the full 24 months' remuneration should be awarded in terms of section 193(3) of the LRA.

47 The applicant made much of the fact that she had been humiliated at the meeting on 6 October 2009 when the introduction of the new policy was announced – this on the basis that she was the only person in the room that had reached the age of 70. I am not convinced that this was the case. As a self confessed forceful person who had raised issues of concern in the past, she would have had ample opportunity to raise the issue further if she had felt this to be the case. No formal grievance was lodged. On her version she addressed the issue with Mrs Schott in the playground. I accept Mr Schott's version that this was not the case. However, even if this is accepted to be the case this is hardly the raising of a formal grievance. She waited until

she had been dismissed to seek compensation.

48 The applicant's evidence indicates that the reason for her unhappiness was not based on financial considerations but rather that she felt that she wanted to continue to play a role at the school and to implement plans that she had been involved in formulating. She also felt that she was not ready for retirement and had not been consulted. At one point she indicated that she simply felt that she wanted to delay her retirement by a few months rather than avoid it. At another point she conceded the fairness of the introduction of such a policy.

49 Ordinarily the impact of an award of compensation on the financial affairs of an employer should not carry weight in considering the amount to be awarded. However, in this case I am of the view that it may be relevant, especially as the applicant has not shown that she has suffered any significant loss. The respondent is a non-profit organisation that operates schools for children who experience barriers to learning. They come from deprived backgrounds and the costs associated with teaching these children are to a significant extent funded by the school itself from donations. The unchallenged evidence was that any compensation order would serve to limit the ability of the respondent to cater for the needs of these children.

50 Although discriminatory, the actions of the respondent's management were not mala fide. I acknowledge that the motive of the employer in determining whether unfair discrimination has taken place is irrelevant. Nevertheless, I do think that it may be relevant in determining what amount of compensation is just and equitable. In my view it is unnecessary to introduce a "punitive" element into the calculation of compensation in order to ensure that further contraventions take place.

51 I am of the view that compensation equal to six month's remuneration would be just and equitable.

52 In her statement of case the applicant sought an order in terms of which the award should be publicised as envisaged in terms of section 50(2)(f) of the EEA. She also sought an order directing the respondent to take steps to prevent the same unfair discrimination occurring – see section 50(2)(c) of the EEA. No evidence was presented to show why these orders should be granted and I do not think that such orders are appropriate or necessary in this case.

Order of court

53 In the light of the above it is the Court's finding that the dismissal of the applicant was automatically unfair and constituted unfair discrimination.

54 The applicant is ordered to pay an amount of R 42 000. 00 to the respondent within 14 days of the handing down of this order.

55 In my view this is not a case where costs should follow cause. The applicant was not completely successful in her case.

56 As a result I have come to the conclusion that I should exercise my discretion in favour of an order to the effect that each party should pay its own costs.

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LE ROUX AJ

APPEARANCES:

For the applicant:	Advocate L Pretorius
For the respondent:	Advocate M A Lennox
Date of judgment:	10 December 2009