Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO JS 355/07

In the matter between

MERVYN DATT APPLICANT

and

GUNNEBO INDUSTRIES (PTY) LTD RESPONDENT

JUDGMENT

STEENKAMP AJ:

INTRODUCTION

1. The applicant, Mr Mervyn Datt, continued to be employed by the respondent company after he had reached the normal retirement age of 65. Was his subsequent dismissal based on his age automatically unfair?

BACKGROUND FACTS

2. The applicant is an accountant. He started working for the respondent's predecessors in title in 1987. The respondent company went through a number of changes in name and ownership that are not relevant to the current dispute. The respondent is wholly owned by a Swedish entity, Gunnebo Industria AB. The Board of Directors comprises the Swedish CEO, CFO and chairman (all based in Sweden); and the Managing Director of the South African entity (based in South Africa).

3. The applicant's letter of appointment did not refer to any retirement age. He did, however, sign a revised employment agreement on 9 February 2004 in which he acknowledges that he had read the rules of the company provident fund and is bound by them. The provident fund rules, in turn, stipulate that:

   "Your normal retirement age is 65 but you may retire at any time within the 10 years before then or you may with the agreement of the Company remain in service after normal retirement age in which event payment of your retirement benefit will be deferred until you actually retire."

Both parties accepted that the normal retirement age was 65.

4. The applicant turned 65 on 4 April 2004, i.e. some two months after signing the revised employment agreement. Upon reaching retirement age, he raised the possibility of his future employment with the then Managing Director, Mr Richard Eyres. On 4 June 2004, Eyres presented him with a letter stating the following:

   "Mervyn,

   Further to our recent conversation notwithstanding that it is normal Company policy for employees to retire on reaching the age of 65 years, we now request that you remain in our employ until such time as we mutually agree that you should take retirement.

   We thank you for your past efforts on behalf of the Company and look forward to your continuous contribution in the future."

   The letter was signed by Richard Eyres as MD on a company letterhead. Datt signed his acceptance of "this offer" and kept a copy of the letter.

5. Eyres resigned in September 2005 in unsalutary circumstances. He was facing a number of allegations at a disciplinary hearing. None of these related to the applicant.

6. An acting MD, Mr Andrew Stigwell, was appointed until a suitable permanent replacement could be found. This was Mr Pierre Hultbäck, who assumed his duties as MD in April 2006.

7. In July 2006 Hultbäck formed the view that Datt (who was then 67) was a "risk" to the company and that he should retire and make way for a new accountant. On 28 July 2006 Hultbäck sent an email message to the chairman in Sweden, Mr Christer Lenner, stating amongst other things: "I have told Mervyn [Datt] that I need to replace him before Xmas." The email was copied to the applicant, amongst others.

8. A new financial manager, Mr Jaco Voges, was appointed in January 2007, apparently to take over the applicant's duties.

9. On 19 March 2007 Hultbäck gave the applicant a letter stating the following:

   "Mervyn,

   Further to our discussion of early March 2007 and September 2006 we hereby would like to inform you that your retirement according to the rules of the provident fund will take effect as from the 16th April 2007.

   We thank you for your efforts during the past 20 years and wish you a well earned retirement."

   The letter was signed by Hultbäck as MD.

10. On 19 April 2007, i.e. three days after his dismissal, the applicant referred a dispute to the CCMA alleging automatically unfair dismissal in terms of s 187(1)(f) of the Labour Relations Act.[1]

The applicant's contentions

11. The applicant claims that his dismissal was automatically unfair because the reason for the dismissal is that the employer unfairly discriminated against him on the grounds of age. That, he argues, brings his dismissal foursquare within the ambit of s 187(1)(f) of the LRA.

12. In his pleadings, the applicant also relied on s 6 of the Employment Equity Act[2] for the relief sought. This cause of action did not form part of the applicant's initial referral to the CCMA and Mr *Pretorius*, who appeared for the applicant, did not press this aspect of the claim in argument. I intend to confine my judgment to the claim in terms of s 187(1)(f) of the LRA.

13. The applicant acknowledges that Hultbäck advised him of his decision to "retire" him.[3] However, he denies vehemently that he agreed to retire in 2006. The applicant testified that he did not expect to have a "job for life"; he had intended to work until age 70, provided he was of sound mind and could fulfil his duties competently, whereafter he would probably have agreed to retire, as envisaged in the letter of 4 June 2004. He acknowledges that Hultbäck told him what was envisaged, but submits that this was not a consensus-seeking exercise.

The respondent's defence

14. The respondent acknowledges that the applicant was dismissed on the grounds of his age. The sole reason for his dismissal was that he had passed the normal retirement age of 65. The respondent relies on the justification provided for in s 187(2)(b) of the LRA:

    "[A] dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity".

15. The respondent also attempted to cast doubt on Eyres's authority to enter into the agreement contained in the letter of 4 June 2004. Firstly, it contended, Eyres did not have the authority to extend the contract of employment. Messrs Hultbäck and Hermans (a previous MD of the respondent's predecessor in title) testified on behalf of the respondent that it applied a "grandfather principle" in terms of which an executive could not make decisions of this nature pertaining to his "direct reports", but that it would have

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[1] Act 66 of 1995 ("the LRA")

[2] Act 55 of 1998

[3] I use the word as a transitive verb as shorthand to describe the process whereby the respondent forced the applicant to retire, or in fact dismissed him as a result of the fact that he had passed the normal retirement age of 65.

to be referred to one higher level. In the present case, the applicant reported to Eyres. Therefore, a decision to extend the applicant's contract could only be taken by Eyres's superior, who was the CEO. This had not been done.

The contentious letter

16. The letter of 4 June 2004, signed by the then Managing Director, creates a clear agreement that varies the applicant's existing conditions of employment. It records clearly that, notwithstanding that the employee had reached the normal retirement age of 65, he will remain in employment until such time as the parties mutually agree that he should retire. These terms were recorded as an "offer" that was accepted by the applicant by his countersigning it. There is no doubt that this offer and acceptance constitutes a variation of the terms and conditions of the applicant's employment, specifically with regard to the agreed retirement age.

17. In the light of this new agreement, I am of the view that the respondent could no longer rely on section 187(2)(b) as a justification to unilaterally terminate the applicant's employment based on his age. The 'normal' or 'agreed' retirement age was no longer 65. The parties mutually agreed that, henceforth, the applicant could only be dismissed based on his age when they ''mutually agree'' that he should retire. Had the parties agreed to a new, fixed retirement date – say 70, or 68 – that would have been binding and the contract of employment would have terminated on the applicant reaching that new, agreed retirement age. He would not have had a claim under s 187(1)(f). The respondent, however, elected to couch the agreement in the terms set out above. It may have been unwise; as the present MD, Hultbäck, tesitified, he would never have done it. The fact remains that the previous MD reached an agreement in those terms on behalf of the company and the respondent is bound by it.

18. I am not persuaded by the respondent's contention that there was some form of collusion between the applicant and Eyres in drafting the letter. The respondent led evidence about allegations relating to misconduct against Eyres that arose more than a year later. The conduct complained of did not relate to Datt or to the present dispute. There was no allegation of impropriety levelled against the applicant and he was never called upon to answer to any such allegations. I consider the evidence around Eyres's alleged misconduct wholly irrelevant to the present dispute.

19. The applicant, who reported to the MD, had no reason to believe that the MD did not have the authority to enter into the agreement relating to retirement that he did. In any event, Eyres testified that he was not aware of the ''grandfather principle''. The respondent's witnesses could only testify to the application of that principle in Scandinavia with any certainty. Neither of them could refer to any written policy that would bind the MD to such a principle. I am satisfied that the letter of 4 June 2004 created a binding agreement between the applicant and the respondent.

20. Even if Eyres did not have actual authority to issue the contentious letter, the respondent is bound on the basis of estoppel by representation. At the very least, Eyres as MD had ostensible authority to enter into the agreement with the applicant and Datt could rely on it. Eyres had, at the very least, ostensible authority to enter into the agreement. As Denning MR noted in *Hely-Hutchison v Brayhead Ltd and another*[4]:

    ''Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint on of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his *actual* authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation.''

21. I am further satisfied that there was no agreement that the applicant would retire in April 2007. Although the new MD, Hultbäck, informed the applicant that he intended to retire him, the applicant never indicated his assent. Hultbäck's letter of 19 March 2007 constituted a unilateral termination of the applicant's contract of employment on notice.

22. Of course, the employer would always be able to dismiss an employee in circumstances such as the current one (where the parties had agreed to an amended retirement age) on other acceptable grounds, such as incapacity, misconduct or operational requirements, provided it was a fair reason and the employer followed a fair procedure. The only reason proffered by the respondent for dismissing the applicant in the present case, though, was his age.

Interpretation of s 187(2)(b)

23. What then of the justification created by s 187(2)(b)?

24. This section was considered by this court in *Schweitzer v Waco Distributors (a division of Voltex (Pty) Ltd).*[5]

25. In *Waco*, the court posited the following test to determine whether s 187(2)(b) is applicable:[6]

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[4] [1968] 1 QB 549 (CA) at 538 A-G [cited with approval by Navsa AJ in *SABC v Coop & others* 2006 (2) SA 217 (SCA) at 234 B-F]

[5] [1999] 2 BLLR 188 (LC)

[6] at para [15]

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

(b) If the answer to question (a) is in the affirmative, the next question is: Did the employer have a normal or agreed retirement age for persons employed in the capacity in which the employee was employed? If yes, what was it?

(c) If the answer to the first question in (b) is in the affirmative, the next question is: Had the employee reached such retirement age at the time of his dismissal?

The court then draws the conclusion that, if s 187(2)(b) applies, it necessarily means that the dismissal of the applicant on grounds of age is not automatically unfair and, therefore, s 187(1)(f) finds no application.

26. This approach was followed in *Rubinstein v Price's Daelite (Pty) Ltd*[7].

27. The *Waco* judgment has been the subject of some criticism[8]. I share the learned authors' disquiet about the interpretation of s 187(2)(b) adopted in *Waco*. However, the facts in the present matter can be distinguished from those in *Waco* and in *Price's Daelite.* In those cases, unlike the present case, there was no express agreement that the employee would continue in employment after the initial agreed retirement age and until a mutually agreed later date.

28. The respondent in this case asserted that, "notwithstanding that it is normal Company policy for employees to retire on reaching the age of 65 years, we now request that you remain in our employ until such time as we mutually agree that you should take retirement." The employer, in other words, acknowledged that the employee had reached retirement age. Notwithstanding that, it made the employee an offer to remain employed until the parties mutually agreed that the employee should retire. The contract of employment would continue on new, mutually agreed terms. The retirement age that was relevant for determining the application of s187(2)(b) thus became that which would be mutually agreed and no longer the initial age of 65.

29. At the time of the applicant's dismissal, the parties had not mutually agreed that he would retire. His dismissal was a unilateral act by the respondent.

30. The only reason relied upon by the respondent to dismiss the applicant was his age. There is no allegation of incapacity, poor performance, misconduct, operational requirements or any other reason. The dismissal is automatically unfair in terms of s 187(1)(f).

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[7] [2002] 5 BLLR 472 (LC)

[8] See Craig Bosch, *Section 187(2)(b) and the dismissal of older workers – is the LRA nuanced enough?* (2003) 24 *ILJ* 1283; Mike Wagener, *Age discrimination – a note on Schweitzer v Waco Distributors* (2006) 27 *ILJ* 2031; and John Grogan, ''No work for the aged'' *Employment Law* Vol 14 No 6 (March 1999) p 9.

Compensation

31. The applicant's remuneration at the time of his dismissal was R22 155, 50 per month. He testified that he found new employment as an accountant within a month of his dismissal at a salary of R12 000, 00 per month. He also testified that he intended to work until age 70. At the time of his dismissal he had just turned 68, on 4 April 2007. But for his dismissal, he would have continued to work for the respondent for another two years, provided he remained healthy.

32. I deem it just and equitable to award the applicant compensation equivalent to the difference between the remuneration he would have received had he remained in the respondent's employ, and the remuneration he is now receiving, for a period of 24 months, i.e. from the date of dismissal to the date of his envisaged retirement. That amounts to R 243 612, 00.

33. The law on the interpretation of s 187(2)(b) of the LRA in circumstances where the employee has continued working beyond the normal or agreed retirement age is unclear, as I have set out above. In the circumstances law and fairness do not require a costs order to be made against either party.

Order

34. I make the following order:

    31.1 The applicant's dismissal by the respondent based on his age is automatically unfair.

    31.2 The respondent is ordered to pay compensation to the applicant in the amount of R243 612, 00.

    31.3 There is no order as to costs.

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AJ STEENKAMP, Acting Judge

Date of hearing: **2-4 February 2009**

Date of judgment: **20 February 2009**

For applicant: **Adv L Pretorius, instructed by Smith & Peters attorneys**

For respondent: **Mr M Thompson, Thompsons attorneys**