IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS347/06

In the matter between:

JOHN WILLIAMS CHARLES RANDALL Applicant

and

IVOR MICHAEL KARAN t/a KARAN BEEF FEEDLOT First Respondent

KARAN BEEF (PTY) LIMITED Second Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicant is a 65-year-old male who was employed by the first respondent on 1 June 1997. He was dismissed on 28 February 2006. He alleges that his dismissal was both substantively and procedurally unfair and that he was discriminated against based on his age. He referred an automatically unfair dispute in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 (the Act) to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and thereafter to this Court for adjudication.

2. The applicant initially brought a claim against the first and second respondents. He cited the first respondent as Ivor Michael Karan t/a Karan Beef Feedlot and the second respondent as Karan Beef (Pty) Ltd. He has subsequently withdrawn his claim against the second respondent after the respondents had filed a statement of response stating that he was at all times employed by the first respondent and had become a director of

the second respondent. This Court will for convenience sake refer to the respondents as respondent. The referral was opposed by the respondent on the grounds that it has a normal retirement age of 60 and that his dismissal was fair in terms of section 187(2)(b) of the Act.

The evidence led

3. It is not necessary to set out the evidence led in any great detail. The applicant testified in person and did not call any witnesses. The respondent called three witnesses in support of its defence.

4. The applicant was employed by the respondent as a financial controller on 1 June 1997 in terms of a letter of appointment in which no reference is made to a retirement age. He was 53 years old at the time and became a group financial director on 1 August 1999. A networked pastel accounting system set up by the applicant went live at the feedlot on 1 March 1998. The applicant was a member of the provident fund. The Karan provident fund issued a guide for the year commencing 1 August 1999 in which it was stated that the normal retirement age is 65. However the respondent contended that this document contains errors and the retirement age has always been 60 years. The Navision accounting system went live on 1 July 2001 at Karan Beef. Arnold Pretorius was appointed group chief executive officer (the CEO) with effect from 1 June 2001. He had announced that Graham Simonsen and Mervyn Gaffney would be joining the respondent as the marketing manager and group systems manager on 10 July 2001 and 1 August 2001 respectively. The applicant had developed a good rapport with Ivor Karan, and was regularly complimented on his performance and received salary increases throughout his employment with the

respondent.

5. On 23 July 2003 ABSA consultants and actuaries investigated the possibility of increasing the retirement age for selected employees beyond 60 to 65. On 3 March 2005 the respondent requested Gaffney to set up a committee to investigate the issue concerning life and disability insurance falling away for employees on reaching age 60. On 5 September 2005 the board of trustees and management committee of the Karan provident fund approved the inclusion of members who had attained the normal retirement age in terms of risk policies and who were still employed by the respondent. Such employees would be covered until age 65 in terms of death, disability and funeral benefits. On 8 August 2003 the respondent sent the applicant a letter confirming that he would be reaching his retirement age on 25 March 2004. The letter stated further that the respondent would like him to continue to work for it and that the normal notice period would apply in the event that it would like him to go on retirement. The applicant said that the letter was a standard letter dealing with issues relevant to the provident fund and constituted notification that as far as the insured benefits were concerned, he would no longer enjoy disability or burial cover after reaching the stipulated retirement age in terms of the rules of the provident fund. On 13 May 2004 the respondent thanked the applicant for his report and praised him for what he had accomplished during his period with the respondent. On 25 March 2005 while Karan was sailing around the world, he telephoned him from the Suez Canal and wished him a happy 61st birthday. Karan told him that it was indeed a pleasure to have him as his top financial man and valued his services. He regarded him as an extremely loyal employee and a friend and would like to have him in his employ for many years to come. On 17 November 2005 the applicant was reappointed as a director of the second respondent. On 23 November 2005 he

received from the CEO a letter about his salary increase effective from 1 January 2006 and that the CEO would rely on his continued support towards the future success of the business. He had a discussion with the CEO on 12 January 2006 about the possibility of buying a motor vehicle. Shortly after that the CEO enquired from him whether he had purchased the motor vehicle and suggested that he should just go and sign up for it.

6. On 18 January 2006 after attending a cash flow meeting at 09h00 the CEO called the applicant to his office where Loots was present. The CEO referred to a letter dated 25 February 2004 and stated that in terms thereof, he was furnishing him with notice that he was to go on retirement from 28 February 2006. The applicant did not receive the said letter and asked for a copy which was given to him. He was shocked by the news that he was to be retired. He requested to be allowed to remain up to the end of the financial year. This was turned down. It was agreed that should an incentive bonus be paid out, he would receive a pro rata share. On 19 January 2006 the CEO informed him that Ben Coetzee, the group IT manager would be taking over a number of his duties and that Gaffney would be taking over his accounting duties. On 20 January 2006, the CEO enquired from him if he could send out a communique advising staff of his retirement. In the ensuing days, numerous of applicant's colleagues enquired from him why he had decided to retire, why it was so sudden, why he was retiring so young and why it was necessary for him to retire when other employees over the age of 60 were still in the respondent's employ. The applicant sought legal advice. He was given two letters by his attorney dated 23 and 30 January 2006 respectively. He handed these to the CEO. On 1 February 2006 Loots telephoned him and asked if he and the group security officer could see him in his office. He was informed that he

was no longer required to report for duty and was unceremoniously escorted off the premises. The applicant denied that the respondent has a normal or agreed retirement age. He is seeking compensation.

7. Dawid Johannes Loots (Loots), the first respondent's group human resources manager testified that the respondent's provident fund rules always provided for the retirement age of 60. The respondent's original provident rules were first available in August 1998. The rules were revised and the new rules were implemented with effect from August 2002. He has a system which flagged an employee who was to retire within six months to allow him to generate a letter informing the employee that he was to retire in six months. When an employee was flagged for retirement, Loots would approach the department manager to receive feedback about whether or not the employee was to retire. The respondent operates in the field of an abattoir and there are not many qualified people in the industry. For this reason in cases where employees have many years of experience and cannot be easily replaced, the manager would make a call about whether or not the employee who has reached retirement age should retire or not. The majority of employees retire on the retirement date when they turn 60. The document at A160 stating that the normal retirement age was 65 years was not distributed as it contained mistakes. When the applicant was six months from reaching the normal retirement date, Loots spoke to the CEO about his retirement. The CEO instructed him to furnish the applicant with a letter that he would continue to work beyond the retirement date. Loots was informed by the CEO that it would not be ideal for him to go on retirement as he was in the middle of the implementation of Navision and felt that he was definitely needed to see through the implementation of the system. The respondent's employees knew about the normal

retirement date because it was communicated to them on the benefit statement from the respondent's provident fund. Sixteen employees of the respondent remained in the employ of the respondent notwithstanding that they had reached retirement age. Loots identified five senior employees who are still employed by the respondent. They are Mrs Turner, who deals with Karan's affairs, Fraser the marketing director, Mrs Karsten the clinic sister, Simonsen the branding director and Riley the abattoir engineer. The CEO contacted Loots on 17 January 2006 and informed him that the bulk of the Navision system had been completed and that the applicant was to be retired. Loots was instructed to prepare the documentation and arrange to meet with the applicant the next day at the feedlot to terminate his employment. The CEO had picked up gossip that the applicant had badmouthed the respondent and on this basis he insisted that the applicant should be paid out his notice and not be required to work out his notice period. Loots conceded that the applicant was dismissed based on his age.

8. The CEO, Arnold Francois Pretorius, testified that the applicant was employed until January 2006 as the respondent's group financial director. The normal retirement age for employees of the respondent is 60. Employees continued to be employed beyond 60 either by special request or by arrangement between management and the individual employee. The retirement age is not extended for any employee. Employees are retained beyond the retirement age in specific cases for reasons discussed with the individual employee. He took the decision to allow the applicant to work beyond 60 after he had consulted with Coetzee of the IT department because Coetzee could tell him whether the applicant was required for further implementation of the Navision system. He did not discuss with the applicant that he would be

working beyond his normal retirement age. After discussing the applicant's continued employment with Coetzee, he informed Loots that the applicant should work beyond the normal retirement date and that a letter should be addressed to the applicant to confirm the arrangement. He had no idea how long the applicant was required to work beyond his normal retirement date. He decides who should retire. He spoke with Coetzee in December 2005 and Coetzee informed him that the job was now done and fully implemented concerning the Navision system. On this basis, he concluded that the applicant should be retired. On 18 January 2006 he arranged for Loots to call the applicant in and furnish him with six weeks notice of termination of his employment. He was surprised to receive a letter from the applicant's attorneys as he thought that the meeting of 18 January 2006 was amicable. He considered the letter to be quite threatening. The letter was handed back to the applicant. Subsequently the applicant stormed into his office and had a letter in his hand which he threw on his desk and said at the same time that he would not tolerate to being treated in such a despicable manner. He was surprised by the applicant's behaviour. As a result of this, he resolved that it was not in the interest of the respondent to keep the relationship with the applicant going on and he called the head of security, George Booker, to be available the next day to ensure that he left the premises without any further incident.

9. The third witness called by the respondent was Ivor Michael Karan who is the owner of Karan Beef Feedlot and the chairman of the respondent. He confirmed that it is part of his management style to praise the applicant and his employees for what they have achieved. This is to motivate them. The applicant was a good worker. At no stage did he give the applicant the impression that he would be employed by the respondent for many years since this would be a stupid thing to say or do. He did not

call the applicant on 25 March 2005 due to stormy seas while sailing in the Suez Canal. He called him a week or two later. He would not have told him that he would be at the respondent for many years to come. He tries and calls senior employees on their birthdays since he has an interest in their well being and this is how he runs his business. There are senior employees who have acquired skills which cannot be replaced easily. This includes people like the abattoir engineer and marketing manager. He sends out emails every three months to motivate employees and expect them to read it so that they are all on the same page and this is how he motivates his employees. The applicant is not his friend and did not create any expectation in his mind. He did not make him believe that he could work as long as he wanted. They have a contract of employment with a set of rules and this was nonsensical. If he motivates and makes them feel that they are part of his business, picked them up and if this is regarded as continuous employment, he should stop praising people. He has the best people working for him. It will be a sad day if he does not praise the employees. Every employee makes a difference to his business.

The parties contentions

10. It was contended on behalf of the applicant that his claim is founded on the Act and not the Employment Equity Act. There was no agreed retirement age in his contract of employment. The normal retirement age at the respondent is 65 years. The respondent had acknowledged that he was dismissed on the grounds of his age and relied on section 187(2)(b) of the Act as a defence. The sole reason for his dismissal was that he had passed the normal retirement age of 60. The respondent contented that he had reached its normal retirement age of 60 and relied on the rules of the Karan provident fund. It was a long established practice of the respondent that its

employees retire on the retirement date stipulated in the provident fund rules. By virtue of his membership of the Karan provident fund it was a tacit, alternatively an implied term of his employment contract with the respondent that his normal retirement date would be 60 years. The applicant contended that the principles to be applied by a court in determining whether or not a term should be implied in a contract are well established. It was contended that it was not necessary to import the provisions of the alleged implied term to give business efficacy to his contract of employment. The applicant was not offered any conditional employment on or after 8 August 2003 as pleaded by the respondent and no evidence was led to support this. It could not be said that the normal retirement age referred to in the provident fund is an implied or tacit term of the applicant's letter of employment. He was employed for an indefinite period with no stipulation of a retirement age. Based on the respondent's witnesses concessions that he was dismissed based on his age in the absence of an agreed or normal retirement age necessarily meant that section 187(2)(b) of the Act did not find application. His dismissal was in the result automatically unfair.

11. It was contended in the alternative for the applicant that should this Court find that letter dated 8 August 2003 constituted an express agreement that he would continue in employment after the initial agreed retirement age and that the normal notice period would apply if the respondent wished him to go on retirement, such a contract of employment would then continue on new, mutually agreed terms. The letter of appointment dated 8 May 1997 was novated and substituted with the aforesaid letter. The 8 August 2003 letter stipulates neither an agreed retirement date nor a normal retirement date. The retirement age that was relevant for determining the application of section 187(2)(b) of the Act would thus become what the respondent considered

would be the retirement age. This is neither an agreed retirement age nor a normal retirement age as contemplated by section 187(2)(b) of the Act. The dismissal was a unilateral act by the respondent and the only reason relied upon by the respondent to dismiss the applicant was his age. The dismissal was in the premises automatically unfair in terms of section 187(1)(f) of the Act.

12. It was contended for the respondent that the issues to be decided by this Court are contained in the statement of claim and pre-trial minutes and as confirmed by the parties at the beginning of the trial. The applicant has raised contradictory and mutually defeating allegations. He had stated in his statement of claim that the respondent did not agree with him on a retirement date and did not have a normal retirement date at all. In the pre-trial minute he alleges that he was unfairly discriminated against because the respondent confirmed that he would continue working for it after having reached his retirement age and that the respondent employed employees older than 60 years of age. He had a reasonable expectation that he would continue working beyond his retirement age. He was assured of continued and indefinite employment by the respondent and the 8 August 2003 letter constituted a unilateral amendment of his terms and conditions of employment. It was contended that the applicant had implicitly conceded that the respondent had a normal retirement age, and that he was entitled to work beyond this age based on a reasonable expectation that he would be allowed to do so.

13. It was further contended for the respondent that during the trial the applicant sought to raise a third argument that was raised neither in his statement of claim nor in the pre-trial minute, namely that there was a normal retirement age of 60 years for certain

employees of the respondent, but this normal age was not applicable to him and to other employees in the occupational category that he belongs namely senior employees. He could not raise this argument since it is not contained in the statement of claim and pre-trial minutes. The respondent relies on section 187(2)(b) of the Act in that it has a normal, alternatively an agreed retirement age of 60 years that applied to the applicant. It has consistently maintained that it has a normal retirement age of 60 in respect of all of its employees. All the employees including the applicant were aware of this normal retirement age and the respondent did not extend the applicant's normal retirement age.

14. The respondent's normal retirement age is sixty years and the applicant was at all material times aware of this. He was in terms of the letter dated 25 February 2004 offered continued employment beyond his retirement age on a fixed term basis and not for an indefinite period on condition that the normal notice period would apply in the event that the respondent wanted him to go on retirement. This offer was made to him because he was involved with the implementation of certain IT projects and his services were required for the finalisation of these. He accepted the offer. The letter does not constitute a unilateral amendment of his terms and conditions of employment. The respondent does from time to time offer employees continued employment beyond their normal retirement date. This would ordinarily take place for purposes of transferring skills to the remaining employees or the successor of the employee due to retire or if a particular job required the skills of the employee due to retire and those skills are not readily available. He accepted the offer of continued employment beyond his normal retirement age for a fixed term to a date to be determined by the respondent on thirty days notice to him. The respondent denied

that it has committed an act of discrimination by requiring the applicant to go on retirement after he had been in the respondent's employ for a fixed term after reaching the normal retirement age.

Analysis of the evidence and arguments raised

15. This Court is required in terms of the pre-trial minute to decide whether the respondent's conduct constituted an automatically unfair dismissal on discriminatory grounds of age and whether he was unfairly discriminated against on the grounds of age.

16. The applicant testified during the trial that there was a normal retirement age of 60 for certain employees of the respondent but this normal age was not applicable to him and other employees in the occupational category which he belongs namely senior employees. This is not pleaded in his statement of claim and is a new issue. It is not open for the applicant to raise this issue since it was not raised in his statement of claim. In this regard see *Peach & Hatton Heritage (Pty) Ltd v Neethling &* Others [2001] 5 BLLR 528 (LAC) where it was held that parties are not permitted to raise issues at the trial in which were not foreshadowed in the statement of claim, even when they were raised in the pre-trial conference. It becomes unnecessary to deal with this issue.

17. It is common cause that the applicant is a 65-year-old male who was dismissed on the grounds of his age. He was 62 years and 11 months old at the time of his dismissal. The respondent has raised several defences that were not supported by the evidence led. Loots could not shed any light on the pleaded version of the respondent that he

made an offer to the applicant to work for the respondent on condition that the normal notice period would apply if they would like him to go on retirement. The CEO's evidence also did not support the versions pleaded by the respondent regarding an offer and acceptance of an agreement on 8 August 2003, that the applicant was employed for a fixed term after 25 March 2004 or that the he fulfilled any other role than group financial director after 25 March 2004. He was also unable to testify about the allegation that the applicant was offered continued conditional employment beyond his normal retirement date because he was involved in the implementation of certain IT projects. Its main and only defence is that the applicant had reached the normal or agreed retirement age.

18. Discrimination in the workplace is generally outlawed in terms of section 187(1)(f) of the Act. The only exception is found in section 187(2) of the Act. Section 187(1)(f) provides that 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 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, conscience, belief, political opinion, culture, language, marital status or family responsibility. Section 187(2)(b) provides that despite subsection (1)(f) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. Since the respondent has admitted that the applicant was dismissed based on his age, it bears the onus to prove the justification or the defence that it has raised.

19. The first issue that need to be determined is whether the respondent has a retirement

age and if so what the retirement age is. If it does not have a retirement age, it cannot unilaterally implement such an age, and since it has admitted that the applicant was dismissed as a result of his age, it would follow that such a dismissal would be automatically unfair. In this regard see *Rubin Sportswear v SACTWU & Others* [2004] 10 BLLR 986 (LAC). If the Court finds that there was a normal or agreed retirement age, it does not necessarily follow that the applicant's dismissal was fair since he was allowed to continue working beyond his retirement age. The Court will than have to consider whether the respondent can unilaterally decide when to retire an employee and whether the defence raised can still be sustained in such an event.

20. The applicant contended that the respondent did not agree on a retirement age with him. He did not have a normal retirement age and the only significance of the normal retirement age of 60 in the provident fund rules is that when employees reached 60, there was a change to their benefits in that funeral and disability benefits fell away.

21. It is common cause that the applicant signed a contract of employment dated 8 May 1997. Clause 4 deal with provident fund. It read as follows:

"The total contribution, based on a salary of R15 000-00 per month, will be paid by Karan Beef. In the event of you leaving the employment of Karan Beef, the provident fund will be paid out to you according to the rules of the fund."

Clause 8 deals with the notice period and provide as follows:

"Your appointment is subject to a seven month probation period. A 30 day notice period will be applicable to both parties. A final decision by both Karan Beef and yourself on your permanent employment will be made by 1 January 1998."

22. It is not in dispute that the applicant was employed permanently after his probationary

period. He testified that he received a letter dated 8 August 2003 from the respondent. The respondent had initially pleaded no knowledge about this letter. However when Loots testified, he admitted that this letter came from him. The said letter reads as follows:

"Dear Mr Randall

This is to confirm that you will reach your retirement age on 25 March 2004.

We would like you to continue to work for Karan Beef. The normal notice period will apply in the event that we would like you to go on retirement.

Please take note that you can continue to be a member of the Karan Beef Provident Fund as far as the pensionable portion is concerned and it will be regarded as a deferred retirement.

As far as the insured benefits are concerned you will have no disability or burial cover after reaching your retirement age. The death cover will be handled under the continuation option of the rules of the fund, which implies that within 30 days after reaching retirement age, your death cover can be converted into an individual policy. After the 30 days this option will lapse.

You need to advise us of your decision as soon as possible.

For further information please contact the Human Resources Department."

23. The aforesaid letter clearly informed the applicant that he would be reaching his retirement age on 25 March 2004, that is, when he turned 60. He did not respond to the said letter. All that he was required to do in terms of this letter was to inform the respondent about his decision on the option concerning his insured benefits. He was called upon to advise of his decision about what option he wanted to happen to his

insured benefits. It should be remembered that this letter is dated 8 August 2003 and that the provident fund rules were later changed to accommodate those employees who the respondent had requested to work beyond the retirement age. The risk arrangements were implemented on 5 September 2005. The applicant continued working beyond this period. The applicant did not confront the respondent about why it was stated in the aforesaid letter that he would be reaching his retirement age on 25 March 2004. This would have been the most natural thing to have done. He must have known that his retirement age was 60.

24. The applicant was employed as the group financial manager. He was a senior employee. He was a trustee of the provident fund trustees and apart of the management committee. He was present at the meetings and must have been aware when the issue of retirement and the befits were raised by and on behalf of employees who had been working beyond their retirement dates. The management meeting minutes of 3 March 2005 reflects that the issue of life and disability insurance falling away on reaching 60 was raised and it was resolved that a committee would be set up to investigate this aspect. The applicant was present in a management committee meeting of 14 March 2005 where under item 6.6 there was a discussion about the inclusion of members who had attained the normal retirement age in terms of group life benefits. The following is recorded:

"ABSA Consultants and Actuaries informed the meeting that, should members exceeding the normal retirement age, be included in terms of the Group Life policy, the premiums would increase from 2.63% of salaries to 2.76% of salaries.

The meeting noted this and requested Messrs D Sonnenberg and M Gaffney to attend to this matter further."

The management committee minutes of 5 September 2005 reflect under item 5.5 that all members exceeding the normal retirement age 60 were now included in terms of the risk arrangements. Such members would now be covered until the age of 65 in terms of death, disability and funeral benefits.

25. After the applicant was informed by the respondent that he had reached his retirement age and that his services would be terminated on 28 February 2006, he was shocked and sought legal advice. His attorney drafted him two letters dated 23 and 30 January 2006. The following is stated in paragraph 2 of the letter of 23 January 2006:

"As you know, the retirement age of certain Karan employees (including myself) was extended to age 65. I have not reached the retirement age as I am now almost 62 (3 years still to go)."

Paragraph three of the letter dated 30 January 2006 read as follows:

"We are instructed that our client did reach retirement age on 25 March 2004 although on 25 February 2004 the Group Human Resources Manager addressed a letter to our client informing our client that Karan Beef wished our client to continue to work for it and the letter also specified that the normal notice period will apply in the event that Karan Beef would like our client to go on retirement."

26. The applicant in his statement of claim alleged that the respondent did not agree to a retirement date with him and that the respondent did not have a normal retirement date at all. However in the pre-trial minute at paragraph 5.3 the applicant alleges that he was unfairly discriminated against because the respondent confirmed that he would continue working for it after having reached his retirement age, that the respondent employs employees older than 60 years of age, and that he had a reasonable expectation that he would continue working beyond his retirement age.

27. It is therefore clear from all the aforegoing that despite the applicant's denial, he knew that the respondent has a normal retirement age. The retirement age is 60 for all employees including the applicant. If the applicant was dismissed on turning 60, the defence raised by the respondent in terms of section 187(2)(b) would have succeeded.

28. It is common cause that the applicant was given a letter on 8 August 2003. The aforesaid letter is referred to in paragraph 22 above. His employment came to an end. In the aforsaid the letter the respondent stated that they wanted him to continue working for it and that the normal notice period would apply if they would like him to go on retirement. His letter of appointment provides for a 30-day notice period to be given by both parties. The applicant was offered new employment in terms of the letter. There is no reference made in the said letter what the normal or agreed retirement age is going to be. It gives the respondent the right to decide when they would like him to go on retirement. There is no indication in the 8 August 2003 letter that the applicant was employed for a fixed period as pleaded by the respondent. No evidence was led that he was employed on a fixed term period. He was not informed that he was employed to complete a specific task. The CEO testified that he did not know how long he was going to be employed. It cannot be said that he was working on a fixed term contract. His contract of employment was for an indefinite period. In any event he was not dismissed because he had completed his task or in terms of the fixed term contract. He was dismissed as a result of his age. The applicant did not accept the termination of his services on 28 February 2006. As stated above he challenged it on the basis of section 187(1)(f) of the Act. The defence raised by the respondent is that the applicant had reached the normal or agreed retirement age in

terms of section 187(2)(b) of the Act.

29. There are two schools of thoughts in this Court about what the position is when an employee who has reached the normal or agreed retirement age but who is allowed to remain on, whether the said employee can challenge his dismissal on the basis that it was automatically unfair and whether the defence in terms of section 187(2)(b) would be valid. The one view is that the dismissal is not automatically unfair and that section 187(2)(b) is a complete defence. The other is that section 187(2)(b) is not a complete defence and the dismissal what automatically unfair.

30. In *Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd* [1999] 2 BLLR 188 (LC), the applicant a product manager aged 67 years, was dismissed by the respondent which claimed entitlement to do so because he had passed its normal retirement age. He challenged his dismissal on the grounds of age discrimination which allegation was contested by the respondent which relied on the exception couched in section 187(2)(b) of the Act. The respondent contended that sixty-five years was the agreed or normal retirement age applicable to the applicant. On an examination of the facts of the matter, the court per Zondo J (as he then was) concluded, firstly that the employee's dismissal was based on his age, secondly, that the employer did have a normal or agreed retirement age for persons employed in the capacity in which the applicant had been employed, thirdly, that the employee had reached that retirement age at the time of his dismissal and consequently that the provisions of section 187(2) (b) were applicable to the case. The applicant's dismissal in those circumstances was protected by the legislation and could not have been automatically unfair. The court however took the issue further. Whilst not automatically unfair, was the applicant's

dismissal unfair in any other respect? The court said that it was common cause that he was well beyond the retirement age at the time of his dismissal, the respondent having permitted him to go on working when it could legitimately have required him to retire in terms of section 187(2)(b) when he actually reached retirement age. The court in that context, embarked upon an analysis of the definition of dismissal in section 186 of the Act and concluded that the fact that the coming to an end of the contract of employment by effluxion of time was not contemplated in the definition of dismissal in section 186 of the Act meant that the dismissal in section 187(2)(b) must include a dismissal after the applicant had gone past the agreed or normal retirement period. This decision was followed by *Rubenstein v Price's Daelite (Pty) Ltd* [2002] 5 BLLR 472 (LC).

31. The two decisions were not followed by Steenkamp AJ in *Datt v Dunebo Industries (Pty) Ltd* [2009] 5 BLLR 449 (LC). The respondent acknowledged that the applicant had reached retirement age. Notwithstanding that, it made the applicant an offer to remain employed until the parties mutually agreed that he should retire. The contract of employment would continue on new, mutually agreed items. The retirement age that was relevant for determining the application of section 187(2)(b) thus became that which would be mutually agreed and no longer the initial age of 65. The court said that 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. The only basis relied upon by the respondent to dismiss the applicant was his age. There was no allegation of incapacity, poor performance, misconduct, operational requirements or any other reason. The dismissal was found to be automatically unfair in terms of section 187(1)(f). The court agreed with the criticisms levelled against the *Waco*

Distributors and *Price Daelite (Pty) Ltd* and said that the *Waco Distributors* matter was distinguishable in that in the present matter there was an express agreement that the employee would continue in employment after the initial agreed retirement age and until a mutually agreed later date.

32. The analysis in the *Waco Distributors* case was questioned by various academics and also by John Grogan in an article called "No Work for the Aged" in Employment Law Vol 14 No 6 (March 1999) where the author said that the court's reasoning suggested, was:

"..... somewhat difficult to follow. If, as the Judge appears to suggest, every indefinite-period contract which contains a compulsory retirement clause is, in fact, a protracted fixed-term contract that terminates automatically when the employee reached retirement age, what purpose is served by section 187(2)(b)? The dismissals to which it refers can, in this view, never happen. Furthermore this reasoning does not address Judge Zondo's concern about the unfairness of giving employers carte blanche to dismiss employees whom they have permitted to work beyond retirement age. The answer to that, one would thought, less in the actual wording of section 187(2)(b). It says a dismissal is fair if the employee has reached retirement age, not when he reaches it".

33. It cannot and is not our law that an employer can unilaterally decide when to retire an employee who it has required to work beyond his retirement age like it was testified too by the CEO. It should be remembered that the CEO testified that he would after consulting with the relevant department person decide whether an employee should be allowed to work beyond his retirement and he would decide when the said employee

should be retired. I accept that an employer may decide to terminate a contract of employment by giving the requisite notice. If the said employee accepts termination of his employment, nothing further will happen. If he disputes the termination or dismissal, he could still challenge it and the employer will have to prove that the dismissal was for a fair reason and fair procedures were followed. Our law has fortunately developed and is no longer stuck in the time where an employer could decide on a whim to dismiss employees. An employer cannot *carte blanche* dismiss employees by giving them the requisite notice. If they do so they will have to face the consequences of their actions.

34. It is clear from the evidence placed before this Court that the CEO decided who should retire. This means that not much notice can be taken about the retirement age. If he can decide who to retire it is not clear why it is contended that the defence that an employer can raise in terms of section 187(2)(b) would succeed. The respondent unilaterally decided when to retire the applicant.

35. The position would have been different if the applicant was dismissed after he had reached his retirement age. He would have had no claim. Where the respondent on its own decided to keep him in employment beyond that period there would have to be a fair reason to terminate his services. The defence does not assist the respondent. The CEO said that it was his decision to retire and to allow an employee to work beyond his retirement. For the respondent to succeed in its defence after it had decided to employ the applicant after his retirment age, it must prove that they had reached a new normal or agreed retirement age. The normal or agreed retirement cannot be imposed unilaterally by the respondent. No evidence was led what the

normal or agreed retirement age was after he went beyond 60. It must be a normal or agreed retirement age of employees who were allowed to work beyond 60. There are indications in the management committee minutes that the benefits were extended up to the age of 65.

36. The position might have been different if the applicant was informed that he was employed beyond his retirement age for a specific period or to complete the task that he was busy with. It is clear from the evidence led that he was not consulted or told about it. It was a decision taken by the CEO after he had consulted with Coetzee. This did not happen in the applicant's case.

37. It is my finding that the respondent did not have a normal or agreed retirement age after the applicant was offered and had accepted employment beyond 60. The respondent could not unilaterally impose a retirement date as it did in this case. Since it is common cause that the applicant was dismissed solely on the grounds of his age, the application should succeed. The respondent's reliance on section 187(2)(b) of the Act is misplaced.

38. The applicant sought twenty-four months compensation. He testified that he was able to do voluntary work and had sought employment and earned a third of what he used to earn for a period. He was 63 years old at the time of his retirement age. Women, the aged and people with disabilities are the most vulnerable employees of our society. This is one reason why the legislature had decided to double the compensation that such employees may receive. The applicant was treated in the most shocking manner by the respondent. He was not informed that he was employed to complete a specific task. He was not consulted about this. He was out of the blue told that he was going

to be retired. He requested that this decision be postponed up to the end of the financial year. This was turned down. The CEO was proud to testify that he could decide when an employee could be retired. His decision was therefore final. This I am afraid is fortunately not the law of our land. The respondent was not frank with this court about what its real defence was to the applicant's claim. It concocted a defence that he was employed on a fixed term contract which is not the case. The applicant was a good worker. He was loyal to the respondent and was later escorted off the premises by security. This is not how the aged and loyal employees should be treated.

39. I am of the view that it will be just and equitable to award the applicant twenty months compensation.

40. There is no reason why costs should not follow the result.

41. In the circumstances I make the following order:

41.1 The applicant's dismissal by the respondent is found to be automatically unfair in terms of section 187(1)(f) of the Act.

41.2 The respondent it to pay the applicant compensation of R1 527 443.54 which is equivalent of twenty months remuneration payable within ten days of date of this order.

41.3 The respondent is to pay the costs of the application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	T E MILLS OF CLIFF DEKKER HOFMEYER INC
FOR THE RESPONDENT	:	D MASHER OF BELL DEWAR & HALL ATTORNEYS
DATE OF HEARING	:	15, 16 & 22 APRIL 2010
DATE OF JUDGEMENT	:	19 MAY 2010