REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C420/06

In the matter between:

GIDEON JACOBUS JANSEN VAN VUUREN **Applicant**

and

SOUTH AFRICAN AIRWAYS (PTY) LTD **First Respondent**

AIRLINE PILOTS' ASSOCIATION SOUTH AFRICA **Second Respondent**

Heard: **10 October 2012**

Delivered: **November 2012**

Summary: "A collective agreement is not justification for discrimination"

JUDGMENT

SHAIK AJ

Introduction

[1] The Applicant was employed by the South African Airways (Pty) Ltd, a state owned enterprise, as an airline pilot with the rank and title of

Senior Captain. Coincidentally, at or about the time that he turned 60 years of age, his employer was engaged in collective bargaining with the Air Line Pilots' Association of South Africa which the Applicant was a member of. During the collective bargaining held at the time, the retirement age of pilots, was amongst other matters, the subject of collective bargaining. Whilst the employer and the association was engaged in the collective bargaining process, the Applicant turned 60 years of age, the then retirement age, he was withdrawn from flying duty and instructed to remain at home pending a recall to active duty. Whilst on this lay-off, the employer paid the employee what he believed was a salary due but did so using the accumulated leave pay of the employee without his knowledge or on his authority. The employer and the association concluded a new collective agreement on the 11 November 2005 and the employee was recalled to render active service on or about 9 December 2005.

[2] The Applicant contends that his employer had introduced new terms and conditions of employment, for pilots over the age of 60, which were discriminatory and unfairly so to him and fellow pilots of that age. And he contends further, that the employer committed an unfair labour practice relating to the provision of benefits.

The issues

[3] The issues which the Court is required to decide are the following:

(a) Whether or not the employer has committed an unfair labour practice by debiting the employee's leave account during the period 1 September 2005 to 9 November 2005;

(b) Whether or not the employer has unfairly discriminated against the employee, on the ground of his age, by introducing new terms and conditions of employment ostensibly in accordance with the collective agreement dated 11 November 2005.

It is convenient to deal first with the complaint concerning discrimination and thereafter, the unfair labour practice. With regard to the unfair labour practice suit, by agreement, I serve as Arbitrator.

The facts

[4] I do not intend to record all of the evidence save that which is necessary and of relevance to the findings and the order and award made. The summary, set out below, features in the submissions made by Adv. Stelzner SC, Counsel for the Applicant. It is convenient to use this summary as the facts are not in dispute, and at any rate, was in accordance with the evidence led.

[5] Mr. Gideon van Vuuren commenced employment with SAA as an airline pilot at the age of 26 on 1 June 1972. Over the years, he progressed to the rank of Senior Captain at salary level SC 34 effective 1 June 2005. The level, SC 35, is the highest salary level for a Senior Captain. The reference to "35" indicates the years of service (the longevity notch), "SC" the rank.

[6] A Senior First Officer (SFO) was remunerated at a lesser salary. Remuneration was accordingly determined by the rank (position against which the employee was held) and the years of service provided for in the remuneration structure.

[7] In addition, there was a hierarchy consisting of *inter alia* Senior First Officer, Captain, and Senior Captain. The position of Pilot in Command of the aircraft also carried with it seniority – status and responsibility.

[8] The applicant turned 60 on 5 August 2005. At the time, the retirement age for pilots in SAA, which had been increased over the previous years by agreement with the union, most recently from 58 to 60, was in the process of being further negotiated. Pilots had previously been required to retire at the end of the month in which they reached the

retirement age (as agreed from time to time with the union) and would have received approximately 42% of their monthly salary as a pension on retirement.

[9] His last day of employment would have been 31 August 2005 but for the extension of the retirement age referred to below.

[10] SAAPA and SAA were engaged in annual collective bargaining to determine salary and conditions of service at the time. The extension of pilots' retirement age was one of the issues which formed the subject of the negotiations. Other employees of SAA retired at 63. Pilots, over the years, had had their retirement ages extended, first from 53 to 58, and then from 58 to 60. He continued to be employed throughout this period in terms of what was referred to as "the over 50's contract" after taking an early payment of part of his pension option at age 53 in 1998 (to benefit from a tax free lump sum payment benefit available to employees in his position at the time). He was thereafter employed in terms of the so-called fixed term contract on an ongoing basis throughout this period and the various previous extensions of the retirement ages for pilots.

[11] Agreement was reached between the union and SAA "in principle" on 19 August 2005 that the retirement age of pilots would be extended to 63. The mechanics of the agreement needed to be negotiated and the applicant was informed this would take some 2 – 3 weeks. A circular to this effect was sent out by the Association.

[12] It prompted the applicant to query, with Cathy Bill, General Manager of SAAPA, whether he would be retained given that the in principle agreement had been concluded before his exit date of 31/08/05. Cathy Bill called him to confirm that he would remain in the service and would not exit on 31 August 2005.

[13] The accumulated leave pay of R330 000 which would otherwise have been due to him on retirement (and had been paid to him apparently

in error on 31 August 2005) was repaid by him. He completed no exiting documentation and remained at home on stand-by awaiting flying instructions. He had completed recent retesting in July of that year which would have permitted him to fly until January 2006 without further testing. He was ready, willing and able to fly and given the agreement in respect of the extension of the retirement age between the union and his employer his service was not interrupted or terminated.

[14] The event on which the fixed term contract would have come to an end, namely the agreed retirement age, between Union and SAA, that of 63 as agreed to between the parties on 19 August 2005, did not present itself prior to his last day of work.

[15] Although the parties had agreed in principle to extend the retirement age on the 19 August 2005, the collective agreement was reduced to writing and signed by the parties on the 11 November 2005.

[16] In the interim period he was instructed to remain at home, by way of two phone calls with Gavin Schmietdiel, HR Officer, SAA, responsible for pilot matters. He informed Schmietdiel that he would not be submitting the exit documents which would have been due before 31 August 2005 as HR had approved that he remain in the service after age 60. Schmietdiel verified this and then called him back to inform him that he would be remaining in the service after 31 August 2005 until age 63, i.e. until 31 August 2008, his revised exit date. It was after this call that he received payment for his accumulated leave, an amount of R330,000.00 after taxation, a benefit due to him on retirement.

[17] He called Schmietdiel to inform him that this was in error as in terms of SAA's leave policy employees may only be paid out accumulated leave of 90 days at retirement. Schmietdiel requested that he return the R330, 000. 00 which the applicant duly did after receiving the

account details from HR. Consequently, his accumulated leave of 90 days with the monetary value of R330, 000. 00 after taxation, should have been retained until age 63, at which time the accumulated leave was to have been paid out at his then current rate of remuneration.

[18] At no time was he presented with a new contract, change of conditions of service and remuneration or any other document for signature. Nor was he informed that he had retired. He mandated his union to negotiate for an extension of the retirement age but not on the basis that he would be discriminated against and remunerated at a lower level because of his age. He also did not agree to his accumulated leave being used for the period between 1 September 2005 and the date on which the MOU referred to hereafter was concluded (11 November 2005) nor was he presented with nor did he sign the mandatory leave forms.

[19] He never agreed to take accumulated leave between 1 September and 9 November 2005. He was never placed on leave, and did not receive the usual request to sign leave forms. He only discovered that all his accumulated leave had been debited after he reported for Recurrent Training, when he received his Remuneration Advices from 1 September 2005 to 30 November 2005 in Johannesburg when he presented himself for flying.

[20] He was not and could not have been placed on unpaid leave and never received nor signed any documents stating this. He had been requested to wait at home for call-up in order to resume flying. He was waiting at the behest of SAA to resume flying after 31 August 2005 to 9 November 2005 and was thus not "on leave". He was not free to leave home and expected to be called up at any time. His medical certificate and licence was valid since he had completed his six monthly licence and competency test at the end of July 2005.

[21] He made several calls during this period to determine when he could resume flying as SAA was short of Captains on his aircraft type (B738) at the time and he wanted to assist by flying instead of sitting at home. He was unable to leave home as he could be called to resume flying duties at any time.

[22] SAA subsequently, unilaterally, determined that this period at home was to be treated as leave, debiting the leave pay due to him against an "advance on salary" account without informing him thereof. This appears to have been done in both November 2005 and in September 2008 again when he retired at the age of 63. This much is clear from his remuneration advices for this period. It is furthermore common cause in terms of the pre-trial minute.

[23] The value of the accumulated leave unilaterally debited by SAA was R330 000.00 as of 31 August 2005.

[24] He was furthermore discriminated against in that for the period 1 September 2005 to 10 November 2005 he was not paid a salary, neither at the reduced level provided for in terms of the MOU to have been with effect from 1 August 2005 already, nor at his previous level of remuneration at SC34. The leave pay benefit due to him was used to pay his salary.

[25] SAA and SAPA signed a Memorandum of Understanding (MOU) on 11 November 2005 confirming that the retirement age had been extended with an effective date of 1 August 2005. In terms thereof, it was confirmed that pilots who were in the employment of SAA as at 1 August 2005 would remain in the employment of SAA until they reached the new retirement date of 63.

[26] He did not 'elect' to resume duties after the MOU was signed on 11 November 2005. From 1 September – November 2005 he remained available to render flying duties. He resumed such duties immediately

when he received a call to be at Flight Operations in Johannesburg (within a day) to perform his reactivation test in December 2005.

[27] In his testimony, the employee referred to various discriminatory terms of the collective agreement titled: 'Memorandum of Understanding: Extension of Retirement Age to 63 years' which he contended were discriminatory and unfairly so. The relevant extracts are quoted below:

a) Date of implementation of the MOU shall be 01 August 2005.

b) A pilot may retire at any time between age 50 and 63 at his her discretion and such retirement shall be final.

c) Pilots reaching the age of 60 will be given the choice of whether they wish to continue to apply for SA a on either domestic or international reports. Pilots must indicate the choice to the company at least six months before reaching the age of 60.

d) If pilots to fly domestically they will operate as Captains. Pilots who opt to fly internationally will operate in the position of first officer on the current fleet with SFO insignia.

(Note: the reason for the change of operating status for the long-range pilots is that operational restrictions limit some of the destinations to which pilots over the age of 60 years can operate as pilot in command. Most of these restrictions are likely to fall away in November 2006 when ICAO introduces and amendment to the maximum flying age for the pilot in command from 60 to age 65.)

e) All pilots electing to fly over the age of 60 will be remunerated at salary scale SC 20, irrespective of whether the fly internationally or domestically.

f) Over 60 pilots will receive general annual increases. No notch increases will apply.

g) Pilots will not be permitted to bid to a coastal base after the age of 57.

h) A pilot over the age of 60 may not exercise a displacement bid for a category at a coastal base.

i) At the end of the three year period any pilot in service over the age of 60 will revert to his normal seniority and notch, on condition they agreed operational limitations have been lifted as per paragraph A. Back pay will not be payable.

j) On reaching age 60, all pilots shall have the option to take a maximum of 90 days accumulated leave provided that the company has received at least six months notice. Any outstanding leave will be paid out at age 60 at the current salary scale. Any leave paid out after the age of 60 will be paid out at SC 20 salary scale.

[29] The effects of the agreement as a whole and the terms mentioned above, were the following:

a) The terms of the MOU became the terms and conditions of employment of pilots over the age of 60; this was clearly an employment practice or policy as defined in the EEA

b) Pilots employed by SAA beyond the age of 60 were remunerated at a lower rate of remuneration to that of pilots under the age of 60 and at a lower rate of remuneration to that earned by them prior to their turning 60 – their remuneration was reduced by virtue of their age, differentiation on a prohibited ground and the for discrimination;

c) This arrangement applied to all pilots who were older than 57

and younger than 60 at the time the MOU was reached, and who had not retired yet, but not to those under the age of 57;

d) Pilots who were younger than 57 when this agreement was reached, would be entitled to continue beyond 60 at full pay and without any penalisation for having turned 60; further discrimination on the ground of age.

e) Applicant's annual remuneration before he turned 60 at SC34 was R1 476 150-00. His annual remuneration was reduced to SC20 R1 113 680-00 upon his turning 60. This resulted in a R362 460-00 reduction in annual salary (Total Cost of Employment). He should have continued to be paid his remuneration at level SC34 from 1 September 2005, instead he was only paid his remuneration from 11 November 2005 and at level SC20 (and before that his leave pay due to him was utilised to pay his salary at the lower level).

f) His remuneration overnight became less than that of younger pilots (below the age of 60) simply because of his age.

g) This discrimination detrimentally affected his and his fellow senior colleagues' dignity, sense of self worth and morale. Simply because of their age they were treated as subordinates of those over whom they had previously had command on long range flights and on domestic flights were paid less for doing exactly the same work as before.

h) He was paid at the lower notch of SC20, and not at his previous notch of SC34 for the period between 10 November 2005 and 31 August 2007, an annual total cash difference of R269,614,55 during 1 September 2005 and 30 May 2006 and a difference of R343 027,00 per year between 1 July 2006 and 32 September 2007.

i) He did not receive any salary for the period 1 September 2005 and 10 November 2005 when the accumulated leave pay due to him was utilised by SAA to pay his salary.

j) He did not receive the 2006 longevity increments (notch increases) which he would otherwise have been entitled to for that year.

[28] The employee lodged a protest with SAAPA shortly after he became aware of the terms of the collective agreement and drew attention to its discriminatory effects. He also lodged a protest with the Mr. Khayakhulu Ngqulu, the Chief Executive Officer of SAA.

[29] The collective agreement was cancelled on 3 September 2007, where after his remuneration and conditions of service return to 31 August 2005 levels. He received an extra longevity notch increase to SC 35 which he had previously been denied.

[30] The employer did not call any witnesses. The evidence of Mr. Van Vuuren was not contradicted and the matter falls to be decided on his evidence.

Differentiation and Discrimination

[31] As mentioned before, the employer led no evidence in the matter. In the result, the evidence of Mr Van Vuuren concerning the change in terms of conditions of service and remuneration, the terms of the collective agreement and its application, and the effects thereof on him and pilots in similar position, are accepted as the facts established.

[32] The memorandum of understanding, expressly provides for a reduction in remuneration of employees upon their reaching the age of 60 from their previous remuneration levels to salary scale SC20. This, together with the other effects, made mention of is clearly linked

to the Applicant's age, 60, and it clearly differentiates between him before the age of 60 and his remuneration post the age of 60.

[33] Clearly, the employer differentiated between employees on the ground of age and neither the differentiation nor its effects are in dispute.

[34] However, Mr. Cassim submitted that the differentiation, in remuneration and conditions of service, was not discrimination as envisaged in terms of the Employment Equity Act and made a number of submissions to support this contention. The submissions set out below are culled from the Principal Submissions made.

[35] Firstly, as the employee turned 60 on 5 August 2005, on this date, he was automatically retired. Thus, so the argument went, the employee had no entitlement to any further rights arising from his employment relationship upon his retirement on 4 August 2005.

[36] Secondly, as on 11 November 2009 the employer and the Association concluded an agreement – the reference is to the collective agreement at times referred to as the MOU - this novated the terms of the previous employment. It was said that a contract of novation is one that extinguishes an existing obligation and at the same time and replaces it with a fresh obligation. Alternatively, the collective agreement was a compromise and in the absence of a reservation of the right to proceed on the original cause of action, the compromise agreement bars any proceedings based on it.

[37] Thirdly, the source of the employee's right is the collective agreement. In the circumstances, it is, contractually speaking, unlawful to "cherry pick" certain terms of the collective agreement and request the court to ignore other terms of the collective agreement. It was contended that the employee sought to approbate and simultaneously reprobate.

[38] Fourthly, his claim must fail because any rights the applicant acquired were in terms of the negotiated collective agreement, and hence the obligations or liabilities arising there from cannot found the cause of action. The employee benefited from the collective agreement; he elected to participate and benefit from the rights emanating in the collective agreement and hence cannot seek to enjoy the rights but not to participate in the obligations directly flowing there from.

[39] Fifth, the remuneration and conditions of service was the product of collective bargaining. The bargaining has not taken place on the basis of sex, race or gender. It would be manifestly unfair if a court was simply to bypass and nullify the product of collective bargaining. The collective agreement is given binding effects by the Labour Relations Act. And, if discrimination has been established, that the collective agreement justifies such discrimination and that, in the circumstances, such discrimination was fair.

[40] Finally, and in any event, the employee failed to prove a case based on the breach of section 6 of the Employment Equity Act. It was submitted that the employee failed to prove an employment practice or policy, discrimination on grounds of age and a comparator.

[41] I turn to deal with the law and the approach developed by our courts in dealing with matters of discrimination and the justification there for. The primary issue I am called to consider is whether the employer unfairly discriminated against the employee on the basis of his age. The relevant laws are the following:

"Constitution

9.3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

9.4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

9.5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Employment Equity Act

Section 6 (1) provides:

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, language and birth.'

The burden of proof in claims of this nature is set out in section 11 of the Act:

> 'Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.'

[42] This in effect creates a rebuttable presumption that once discrimination is shown to exist, it is assumed to be unfair and the employer must justify it.

[43] The approach developed by the Constitutional Court in *Harksen v Lane No*[1] and subsequently followed by this Court in *Hospersa obo Venter v S A Nursing Council*[2] was stated as follows:

[1] 1997 11 BCLR 1489 (CC).
[2] [2006] 6 BLLR 558 (LC).

'(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established.

(ii) Secondly, if the differentiation amounts to 'discrimination", does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. The test for unfairness focus focuses primarily on the impact of the discrimination on the complainant and others is in his or her situation

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) Thirdly if the discrimination is found not to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause.'

[44] Although the reference made above is to the Constitution and another Act, it is the approach used by the Constitutional Court in dealing with discrimination that serves as a guide to determine, in this matter, if there has been a violation of section 6 (1) of the Employment Equity Act.

Analysis and evaluation

[45] *Automatic Retirement*. This contention is founded on the phrase "will automatically lapse on the last day of the month in which the pilot reaches maximum retirement age" as stipulated in the Fixed Term Contract dated 20 March 1998.

The "maximum retirement age" at the time the contract was concluded was 60 years. However, at the time that employee was due to retire, SAA and SAAPA were engaged in bargaining to amongst other things, extend the maximum retire age.

The effective date in terms of the Fixed Term Contract for the retirement of the employee was 31 August 2005. However, on the 19 August 2005, it was agreed, with effect from 1 August 2005, that age 63 would be the new maximum retirement age.

The employer was aware that the employee attained the retirement age in terms of the Fixed Term Contract, but specifically agreed to retain his services and keep him in employment. The employment relationship did not, in the circumstances, automatically terminate on the employee attaining the age of 65 years.

The collective bargaining, at the time, was intended to establish by consensus a new "maximum retirement age" for pilots. The collective agreement: EXTENTION OF RETIREMENT AGE TO 63 YEARS dated 11 November 2005 recorded the new retirement age and the terms and conditions of service.

The evidence, undisputed, established the fact that Mr. Van Vuuren was expressly included in the scope and application of the collective agreement and was treated from then on as being a beneficiary of the collective agreement.

The submission, that Mr. Van Vuuren was "automatically retired" on the 5 August and as of that date "had no entitlement to any further rights arising from his employment relationship" is unsustainable.

[46] Novation, Compromise. Mr. Cassim did not press these submissions in argument before me. In essence, the submissions made is that the collective agreement gave rise to novation alternatively compromise. These submissions, founded on the law of contract and the principles of *consensus ad idem* and *pacta sunt servanda*, must lead to the conclusion that the employee gave consent to suffer discrimination. There is no evidence –none whatsoever- that Mr. Van Vuuren gave such consent or authority to his association to conclude an agreement that was to cause him to suffer discrimination. As a matter of fact he was to protest, loud and clear, at every opportunity to the association and its members and management.

At any rate and regardless, it is against the provisions of the Constitution and Employment Equity Act that embodies our public policy, to consent to suffer unfair discrimination on a proscribed ground or to contract out of the protections afforded in these laws.

In *Sasfin (Pty) Ltd v Beukes*,[3] Smalberger JA was heard to say:

> 'No court should shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms or some of them offend one's individual's sense of proprietary and fairness… In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that he commercial transactions should not be unduly trammelled by restrictions on that freedom. A further relevant, and not unimportant, consideration is that public policy should properly take into account the doing of simple justice between man and man.'

[3] 1989 (1) SA 1 (A) at 9B-G.

[47] *Collective Agreement*. In the main, the employer sought to justify the discrimination on the ground that it was the product of a collective agreement and for that reason, was fair. And this is the nub of the matter: can a collective agreement be used to justify unfair discrimination?

[48] This question was considered in *Larbi-Odam and Others v Member of the Executive Council for education (North-West Province) and Another*.[4]

Per Mokgoro J

> 'Where the purpose and effect of an agreed provision is to discriminate unfairly against a minority, it's origin in negotiated agreement will not in itself provide grounds for justification. Resolution by majority is the basis of all legislation in a democracy, yet it to is subject to constitutional challenge where it discriminates unfairly against vulnerable groups.'

[49] The reference to an "agreed provision" was a reference to a regulation that was negotiated and agreed upon in the Education Labour Relations Council. This judgment is clear authority for the fact that justification cannot be founded on a collective agreement or any agreement for that matter.

[50] In *Barkhizen v Napier,*[5] it was held that public policy had to be determined with reference to the Constitution, so that a contractual term that violated the Constitution was by definition contrary to public policy and therefore unenforceable.

[51] I need mention here that no sooner the ink had dried on the collective agreement dated 11 November 2005, disputes arose about amongst other things, the binding effect of the agreement on the employer and

[4] 1998 (1) SA 745 (CC) at para 28.
[5] 2007 (5) SA 323 (CC) at para 29.

the interpretation and application of the agreement. A dispute in this regard was declared by SAAPA and referred for conciliation.

[52] Subsequently, SAA was to declare its position that the collective agreement dated 11 November 2005 was not binding on it as the representatives that represented the employer were not mandated to enter into the contract.

[53] On the 2 August 2007, Mr. Bhabhalazi Bulunga, General Manager Human Resources wrote a letter to Captain John Harty, Chief Negotiator SAAPA in the following terms:

> 'Re: EXTENSION OF RETIREMENT AGE
>
> Further to our discussions concerning the extension of the retirement age of pilots, please take notice that the Board has resolved to extend the retirement age of SAA employees to the age of 63 (sixty three) years.
>
> Accordingly, SAA has notified the relevant pension/retirement fund schemes that the retirement age of pilots is 63 (sixty three) years.
>
> Please take notice further that SAA herewith gives notice that the memorandum of understanding dated 11 November 2005, will be of no force or effect as of the 3 September 2007.'

[54] The employer unilaterally terminated the agreement. In the circumstances, reliance on the agreement as justification for discrimination, may well be misplaced as the employer seemingly did not consider itself bound by the agreement *ab initio* and at any rate unilaterally terminated it.

[55] A collective agreement is subject to the Constitution and the Employment Equity Act and is not exempt from its provisions. Parties may not contract out of the fundamental rights and protections set out in the Bill of Rights. This is all the more so as a collective agreement

may acquire the status of subordinate legislation. In this regard the test set out by Goldstone J in *Harksen v Lane* is relevant.

[56] The terms of the agreement were discriminatory and manifestly unfair. It served no legitimate purpose. Its effects were to cause for the employee to suffer reduction in remuneration and other detriment. He suffered this consequence for no other reason except on the ground of his age.

[57] This is not a claim for equal pay for equal work. Hence, the need for a third party comparator is irrelevant. In this case, the past and present treatment of the employee presents the comparison if any is required at all.

Conclusion: Discrimination

[58] I am satisfied having to the facts of this matter that the employer differentiated the employee from others; the differentiation was on the ground of his age, a proscribed ground. This constituted discrimination in terms of the Employment Equity Act. The employer failed to advance any justification for the discrimination. The discrimination was in the circumstances, unfair.

[59] The employee quantified his loss suffered and a Quantum of Claim was prepared and submitted to Counsel for the Respondent. There was no objection to the quantum claimed.

[60] I have taken note of the fact that SAA is a state owned enterprise, that it cancelled the collective agreement and brought an end to the discrimination and that by resolution of the board, increased the retirement age. However, the Applicant was made to suffer unfair discrimination on a proscribed ground, that the employer by discriminating thus sought to obtain an economic benefit, at the expense of the Applicant at time when he was most vulnerable on account of the fact he was at the end of his working life. He chose not

to suffer the discrimination; he raised the matter with the recognised union and brought it to the personal attention of the Chief Executive Officer who, seemingly, ignored his appeal for relief, which gave rise to this suit without unreasonable delay. Equality, having regard to our past, is a most cherished value and it is behoves us all to stand guard and defend any violation of it. The fact that a state owned enterprise committed the violation and sought to justify it betrays callousness. This suit, as the record reveals, was hard fought, that was to cause the delay in the hearing of the matter and rise in the burden of cost. I have taken these factors into account in the order made.

Order

[61] In the circumstances, I make the following order:

61.1 The Respondent discriminated unfairly against the Applicant on the basis of his age;

61.2 The Respondent is ordered to pay damages to the Applicant the following amounts being the remuneration he would have earned:

1. Period: 1 September 2005 to 30 May 2006: The sum of R 225 885,66 together with interest thereon calculated at the rate of 15,5% as from 1.9.2005

2. Period: 1 June 2006 to 30 May 2007: the sum of R 344 850,00 together with interest there on calculated at the rate of 15, 5% as from 1 June 2006

3. Period: 1 June 2007 to 2 September 2007: the sum of R 88 810,26 together with interest there on calculated at the rate of 15, 5% as from 1 June 2006

4. Back Pay: Back pay in the sum of R71, 976,34 together with interest thereon calculated at the rate of 15,5% together with interest thereon as from 31.10.2006.

5. Special Leave and 13th Cheque Payment: Re [31.10.2006]: The sum of R 30 507,65 being in respect of special leave, bonus and 13th cheque difference in pay, together with interest thereon calculated at the rate of 15,5% as from the 31.10.2006

6. Service Bonus 13th Cheque: Re [30-4-2006]: The sum of R25 167,50 together with interest calculated at the rate of 15,5% as from 30.4.2006

7. Service Bonus 13th Cheque: Re [30-4-2007]: The sum of R30 371,56 together with interest thereon calculated at 15,5% as from 30.4.2007

61.3 The respondent is order to pay the Applicant compensation in the sum equivalent to one (1) year remuneration calculated on the rate of pay applicable for his last year of service.

61.4 The aforesaid amounts are to be paid within 14 days of this order.

61.5 Cost of suit including the cost of employing two Counsel.

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SHAIK AJ

Acting Judge of the Labour Court

Arbitration award

[62] It is common cause that the employee's leave pay in the sum of R330 000,00 which should have been paid to him at the end of his employment in August 2008, was not paid to him and that that money was utilised to pay his remuneration for the period 1 September 2005 to 9 November 2005.

[63] It is contended by the employee that "the forced leave taking" constitutes an unfair labour practice and the relief sought is the reinstatement of the accumulated leave that was at the relevant time to his credit. In substance, the complaint concerns conduct of the employer that is unfair with regard to a "benefit".

[64] An employee, who complains of an unfair labour practice, with regard to benefits, is required to prove firstly, that which is claimed is a "benefit" and secondly, conduct unfair relating thereto. The relevant provision is section 186 (2) (a) of the Labour Relations Act 66 of 1995.

[65] The appropriation of the leave is as a result of an executive instruction issued by Mr. Gavin Schmittdiel on the 8 September 2005 to Elize Smit. He cast his instruction thus:

> 'Please re-instate Deon Van Vuuren and discuss with the IT department as to how the tax directive is to be reversed. At the same time utilize Deon's leave for pay purposes until the final agreement has been signed.'

[66] The employee was not consulted on this measure, it was a unilateral act. The employee discovered the appropriation some time later and per chance.

Mr. Cassim conceded that the appropriation was unfair and even unlawful. However, he submitted that this conduct did not constitute an "unfair labour practice" as defined in the Act.

[67] I was referred to the dictum in *Gaylard v Telkom SA Ltd*[6] wherein it was held that leave pay is not a "benefit". And in the result, the claim of "unfair labour practice" must be dismissed.

[68] I do not agree. Leave, that is to say the authorised absence from work, is a "benefit" but Leave Pay is not. In *Gaylard,* mentioned above, the employee claimed "leave pay" that is not the claim made in this matter.

[69] The complaint of the employee is that he was forced to take leave. He did not request it. At the time, he was in employment, and able and willing to work. And in fact, he testified, he sought to work.

[70] The employer, for reasons within its peculiar knowledge, requested that he stay at home and be on stand-by. In this way, 71 days or thereabout came to pass.

[71] The employee was of the belief that whilst on this lay-off, he was being remunerated in the ordinary manner. However, this was not so. The employer, without his consent, had debited his leave account and so reduced the number of days that was to his credit.

[72] Whilst it appears that he claims for "leave pay" that in reality is not the claim. The claim is that it was unfair, in the circumstances, for the employer to place the employee on leave.

[73] As the employer adduced no evidence to the contrary, there is nothing to gainsay the testimony of the employee.

[74] I consider the conduct of the employer, in forcing the employee to go on leave, to constitute an unfair labour practice.

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[6] [1998] 9 BLLR 942 (LC) at para 21.

Award

(a) The Respondent is to pay the Applicant the sum equivalent to 71 days calculated on his daily rate of pay which applied on his last day of service.

(b) The aforesaid sum shall bear interest at the rate of 15,5% calculated from the last day of service to date of payment.

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SHAIK AJ

Appearances:

For the Applicant: Advocates R. G. L. Stelzner SC with him S. Harvey instructed by De Klerk & Van Gend

For the Respondent: Advocates N.Cassim SC with him F.Boda instructed by Deneys Reitz Inc