REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C956/2013

In the matter between:

HILARY TRUTER Applicant

And

CARECROSS HEALTH (PTY) LTD First Respondent

Date heard: 4 and 5 September 2014

Delivered: 23 January 2014

JUDGMENT

RABKIN-NAICKER J

[1] The applicant has referred a claim to this court in which she seeks to have her dismissal considered as automatically unfair, in that it was based on her age. She was employed by the respondent company up until 31 August 2013 when her services were terminated on the basis that she had reached 65 years of age.

[2] The applicant was employed on 1 October 1998. Her remuneration at the time of her dismissal was R 34,319.15 a month. Her dismissal was on the 31 August 2013, while her 65th birthday was on the 5 June 2013. The respondent

company relies on a contention that 65 is the company's "normal" retirement age as is contemplated in section 187 (2) (b) of the LRA. The common cause facts of the events leading up to the dismissal are contained in the pre-trial minute as follows:

2.1 On 22 May 2013, the applicant was presented with a letter recording that she would be placed on retirement. It was also recorded that the applicant would remain in the employ of the respondent until the end of December 2013, provided she sign a fixed term contract terminating on 31 December 2013. The applicant objected to this and consulted an attorney.

2.2 Following discussions between the applicant and the HR manager, Rene Niske (Niske) on 31 May 2013, the applicant submitted a letter to the CEO of the company, Dr Nauta (Nauta), setting out her objections and why she would resist any attempt to place on her retirement. Pursuant to these objections, she was not placed on retirement until the matter could first be consulted on. She then went on leave from the 3rd to 14 June 2013 and was due to return to work on 18 June 2013.

2.3 A meeting was then held between the applicant, Niske and Nauta on the 26 June 2013. Following on this meeting labour consultants of the employer, Labour Net, facilitated two meetings with the applicant in July 2013 to try and convince her to accept the situation and to conclude a fixed term contract, which would guarantee her employment to 31 December 2013. The applicant remained steadfast in her refusal to agree to this. She maintained her position that she should be allowed to work until she was 70 years of age.

2.4 On 30 July 2013 the applicant was given a letter setting out the preceding events and which recorded that she would be placed on compulsory retirement from 31 August 2013.

[3] In her statement of claim the applicant submits that as far she is aware, she was the first employee that had been retired by the company at 65 years of age. She contended further that thus far she was aware only one other person had been retired by the respondent, one Ethel Seidel, (Seidel) whose contract

of employment was terminated unilaterally by the respondent when she was 70 years of age. Further, she had been advised that the respondent's policy on retirement, which was incorporated in recent contracts of employment (but not her own) reads that: "once the employee reaches the age of 65, she may be placed on retirement, at the discretion of the employer."

[4] The company's case as set out in the statement of defence is that on 1 March 2006, the respondent's board of directors adopted a resolution with regard to retirement of employees reading as follows: "the company shall institute a retirement policy. The policy will read as follows: an employee shall retire from the service of the company at the end of the calendar year in which the employee reaches the retirement age of 65 years. Implementation of these conditions of service will take effect on 1 March 2006."

[5] The company's case is that Seidel was already over 65, but on advice that the implementation of the policy could not be unilaterally applied to her, the company consulted with her individually with regard to retirement. This led to her concluding an actual agreement – a written addendum to her contract of employment on 12 and 18 July 2006. The addendum recorded that an employee shall retire at the age of 65, but the respondent could, at its sole discretion allow an employee to work beyond that age. Seidel recorded in her own handwritten manuscript the following on this addendum: "I'm signing this on condition that this will be applied to all the employees, otherwise I consider this as discriminatory."

[6] This matter stands to be decided with regard to section 187 of the Labour Relations Act, which *inter alia* provides as follows:

> "(1) 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-
>
> ……..
>
> (f) 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;

……

(2) Despite subsection (1) (f)-

(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."

[7] It is evident on the respondents own pleadings that there was no agreement between the applicant and the company as to her retirement date. The witnesses for the company, as well as in submissions filed on behalf of the company, made statements that 65 is the normal retirement age in the 'industry' in which the applicant worked as a nursing manager. However I note that this was not pleaded by the company.

[8] The evidence of the applicant was that her contract which was signed on 26 November 1998 did not contain a reference to a retirement age. The employment contract contained a non-variation clause. As for the resolution passed by the board on 1 March 2006, she had never had sight of it until 28 August 2014, although she was aware that a resolution existed in 2006 when Ethel Seidel was 70 and was retired. She testified that in December 2012, her direct supervisor, Miss Palmer (Palmer) asked her to stay for another five years and after that she had moved to Cape Town from Gordons Bay to be nearer work in March 2013. She was totally shocked to receive notification that she had to retire. She had never seen a company policy regarding retirement and was not aware of one in any event. She was not a member of the employer's Provident fund in which a normal retirement' date might have been referred to.

[9] The applicant stated that there was not a normal retirement age in her view, and that the only person she knew who had retired in the company, had done so at 70 years of age. She testified that she was told not to work her notice period and to pack up and leave within two hours. She had worked 15 years

with the company and felt terrible to be told to pack up in this way Since her dismissal, she had been working at a frail care centre doing 12 hour shifts, 15 days a month and getting a third of what she earned with the respondent. She wanted to be reinstated in the employment of the respondent company.

[10] Under cross examination, the applicant stated that if she had been prepared and had the knowledge of the fact that she would be retired at 65 she would have made different decisions and at least understood that she was going to have to retire and prepared herself for it.

[11] The HR manager Niska testified that when she was looking at other administrative records, it 'dawned' on her that the applicant was turning 65 and she had then written the letter informing her that she would be retiring. She did recall having had discussions about the cost of the applicant traveling in from Gordon's Bay with her, but not with her retirement in mind. It wasn't in the forefront of her mind as to how old the applicant was. She stated that the move to Cape Town was a personal decision made by the applicant after her divorce, based on financial considerations. She testified that she had joined the company six years ago and that it was common knowledge that the retirement age is 65. When new employment contracts were drafted that was incorporated into them. She stated that she was aware 65 is the normal retirement date in the nursing industry.

[12] Under cross examination Niske was not sure whether her contract of employment contained the retirement age of 65. She conceded that she knew the applicant very well since she had been young, but did not have a specific idea of her age, but she knew she was over 60. She had never revisited the company's policy document implemented in 2009 to see whether the resolution regarding the 65 age retirement was contained in it. She confirmed that the knowledge of the fact that the applicant was reaching 65 dawned on her out of the blue, as a result of discussions a senior manager and herself were having about the staff complement. This was a month or two before the letter she drafted in May.

[13] She confirmed that she was not able to give an example of a person who had retired at 65 because there was nobody of that age before the applicant. She

conceded that it would appear that had been no normal retirement age before the board of directors' decision. It was put to her that the decision of the board was never formally discussed with the applicant. She replied that employment contracts had been amended after 2006. She stated that it was common knowledge that 65 was the retirement age. She had enquired about this and was told it was had been a board resolution, which unfortunately was not in the policy manual. She agreed that the clauses dealing with the retirement age in employment contracts subsequent to the board resolution, was not in applicant's contract. She had only seen the resolution dealing with retirement and that it referred to retirement at the "end of the calendar year", after the applicant had left the employ of the respondent because the financial director had been unable to locate a copy of the resolution.

[14] Niske conceded that the knowledge she had about the retirement policy was from the board resolution and the clause in the new employment contracts. It was put to her that as HR manager, she was grossly negligent in not having known of the resolution or having had sight of it. She denied this and insisted that the company does have a normal retirement age. She stated that the board resolution was the policy on this and she knew about the resolution and acted on it, although she couldn't find the resolution at the time. It was put to her that by applying the board resolution to the applicant amounted to a change to her terms and conditions of her employment. Niske stated she had no comment.

[15] The CEO, Nauta, testified *inter alia* that the company had eventually taken a resolution on retirement and that 65 was accepted as the normal retirement date. As for the employee that had retired 70, he did not really know on which principles this was based and couldn't remember. He didn't know which document was used to base her retirement on as he was not involved. He was asked why the applicant was retired at 65 and stated that he wasn't directly involved, but believed that his executive did it in the right way for the right reasons.

[16] He testified that he agreed there was no retirement age up until March 2006 and he didn't know why Ethel was allowed to work until she was 70. He did not know why the resolution of the board did not find its way into the policy

manual and stated that: “my style is very laissez-faire.” He didn’t know whether anyone had tried to negotiate a change to applicants contract but it was common knowledge in the building that 65 was the retirement age. He didn’t know whether all new contracts contain this clause. He conceded that the company should have communicated better when the board resolution was passed. He had no idea that the applicant had moved from Gordons Bay in March 2013 to be close to work. He did not know why his HR manager had never seen the resolution at the time of the retirement of the applicant. He did not know whether the resolution of the board was still applicable but assumed that it still stands. He agreed that it was incorrect that Applicant was not given to the end of the calendar year to retire in terms of the resolution. He knew of no issues about her work militating her leaving the company and stated that the applicant did not report to him.

[17] Nauta conceded that as far as retirement age is concerned, he had a discretion in terms of clause 20 of the policy addendum to new contracts, which reads “once the employee reaches the age of 65, she may be placed on retirement, at the discretion of the employer.” He stated he would be hard pressed to override his senior people. He stated that he couldn’t, for nice and sentimental reasons, do something not in the interests of the company. When it was put to him that the retirement was sprung on the applicant two weeks before she had to leave, he stated that he believed the company had stuck as close as possible to doing the right thing.

[18] When asked whether there was any reason whatsoever that the applicant couldn’t come back to work for the company, if the court should find this is a suitable remedy, he stated that “when you are 65 you get slower and their capacity to be optimal goes down”. He disagreed that the retirement of the applicant constituted an automatically unfair dismissal, although he agreed that there was a discrepancy regarding the end of the calendar year.

[19] The final witness for the company was applicant’s supervisor Palma who testified that she manages the disease management section and was a trained nurse. She confirmed the retirement age is 65 and said she did not remember, as had been stated by the applicant in one of the meetings held with the company, that she had asked her to stay another five years. In any

event, she said she did not have the authority to do so. On the day that the applicant left the company, she was there and a meeting was held with the HR Department. She stated that she went down to help the applicant to pack up her belongings so that she could leave the company that day. She was aware that she had relocated in March 2013 and it was put to her that she would never have moved to Cape Town had she been aware that she was going to retire. Palmer said that she had no comment on this.

Evaluation

[20] In **Rubin Sportswear v SA Clothing & Textile Workers Union & others**[1] the Labour Appeal Court considered the meaning to be attributed to "normal retirement age' in terms of section 187 of the LRA. The court per Zondo JP held as follows:

> "[22] In my view a certain age cannot suddenly become a normal retirement age for employees or for a certain category of employees simply because the employer wakes up one morning and decides that he wants a certain age as the normal retirement age for his employees or for a certain category of his employees. He can put a proposal to his employees on what should be the retirement age and, if they agree, then there will be an agreed retirement age in that workplace applicable to all those who have agreed to the proposal. A retirement age that is not an agreed retirement age becomes a normal retirement age when employees have been retiring at that age over a certain long period - so long that it can be said that the norm for employees in that workplace or for employees in a particular category is to retire at a particular age. An example would be where, without any formal agreement, employees in a particular category have over 20 years been retiring at a particular age without fail. The period must be sufficiently long and the number of employees in the particular category who have retired at that age must be sufficiently large to justify saying that it is a norm for employees in that category to retire at that age. If

[1](2004) 25 ILJ 1671 (LAC)

> the period is not sufficiently long but the number is large, it might still be that a norm has not been established. If the period is very long but the number of employees in the particular category who have retired at that age is not large enough, it might be difficult to prove that a norm has been established……..(my emphasis)
>
> [24] Section 187(1)(b) creates two bases upon which an employer can justify the dismissal of an employee on grounds of retirement age. The one is an agreed retirement age, the other is normal retirement age. Those are the only two bases. In this case 60 was neither the normal nor the agreed retirement age for the second and further respondents."

[21] It was common cause in this matter that the resolution of the board was never formally discussed with the applicant, and there was no attempt by the company to seek the applicant's agreement to amend the terms and conditions of employment. Furthermore, nobody else in the company had ever retired at the age of 65. Taking into account the law as set out in **Rubin Sportswear** quoted above, there was no established practice or norm of the company staff retiring at age 65. Moreover, Seidel had worked for the company until she was 70 years of age.

[22] As submitted on behalf of the applicant, the company put forward two positions applicable to its retirement policy. The first was a resolution in 2006, which read: "an employee shall retire from the service of the company at the end of the calendar year in which the employee reaches the retirement age of 65 years." On the evidence before the court, this policy was not applied in the 'retirement' of the applicant. Furthermore, the resolution was not publicized to the extent that even the HR manager of the applicant had never laid eyes on the resolution until after the applicant left the company's employ.

[23] A second position appears to be contained in clause 20 of the company's policy, an addendum to recent contracts of employment, which reads "once the employee reaches the age of 65, she may be placed on retirement, at the discretion of the employer." It was submitted on behalf of the applicant that this latter position would not have the effect of establishing a firm or definitive

normal retirement date. Mr De Kock submitted further that as there is no practice of retiring employees at the age of 65, the document containing clause 20 does not serve to establish a normal retirement date. In addition I note that this policy was not incorporated into applicant's contract of employment and she was never asked to sign a new contract when contracts for staff were re-drafted.

[24] The disarray in which the company's HR policies evidently were at the time that they decided to retire the applicant, do not assist the company's case that retirement at the age of 65 was the "norm". My view is strengthened by the fact that the head of HR on her own version was only struck by the fact that the applicant was in her 65th year in the course of a discussion she was having about staffing issues. Niske had never seen the policy reflected in the resolution taken by the board in 2006. Nor had she considered the discrepancy between the wording of that policy and the clause contained in the addendum to employment contracts entered into in more recent years. I must agree with Mr De Kock that although the company witnesses dealt with the question of what was in their opinion the normal retirement age in the industry as a whole, this was not pleaded by the company and in any event, the question the court has to consider is whether retirement at the age of 65 was the "norm" at the respondent or for the category of nursing managers into which applicant fell. General statements elicited from company witnesses about the industry did not suffice.

[25] The witnesses for the company did not impress the court. In particular, the CEO, Dr Nauta , who portrayed himself as a laissez-faire entrepreneur who did not involve himself in the nitty-gritty of his executives work, and was unable to give convincing evidence in relation to the development of policy in his company. Furthermore, when directly asked why the applicant should not be reinstated, his views about what happens to persons over the age of 65 i.e. that they 'get slower and below optimum', stated in generalised terms, did not assist the company's case or his image.

[26] Given all of the above, I find that there was no normal date of retirement at the company in the sense set in the **Rubin Footware** judgment. Therefore on the

evidence before me I find that, that the termination of the applicant's employment amounted to unfair discrimination based on age. The effective date of the dismissal of the applicant was 31 August 2013. She has sought reinstatement effective to the date of her dismissal.

[27] Given the attitude reflected by the CEO in respect of persons of 65 and over, I trust that the Applicant's reinstatement will not be accompanied by further infringement of her dignity. In all the circumstances I make the following order:

Order

1. The termination of applicant's employment constituted an automatically unfair dismissal in terms of section 187(1)(f) of the LRA;
2. The applicant is to be reinstated into her position with full retrospective effect to August 31 2013, within 30 days of this order;
3. The respondent is to pay the costs of this application.

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H. Rabkin-Naicker

Judge of the Labour Court

Applicant: Adv. C de Kock instructed by Baigraims Attorneys

Third Respondent: Snyman Attorneys