



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

C681/2019

In the matter between:

MPHEREFERE EDITH MOCWALEDI

Applicant

and

THE PREMIER OF THE NORTHERN CAPE PROVINCE

Respondent

**Date heard: 31 August 2022; Heads of Argument filed by 23 September 2022
 whereupon judgment was reserved**

**Date delivered: 19 January 2023 by means of email. Deemed received 10.00hr
 on 20 January 2023**

JUDGMENT

RABKIN-NAICKER J

- [1] The applicant claims that she was dismissed from her employment on the basis of her age and that this amounts to an automatically unfair dismissal in terms of section 187(f) of the LRA. She seeks reinstatement and compensation.
- [2] It was common cause between the parties that the applicant was employed by the respondent (and its precursor) for 32 years from the 1 April 1987, until 30 January 2019. She attained the age of 65 in January of 2019.

- [3] The applicant gave evidence that she obtained approved leave from respondent for the period 15 January 2019 until the 4 February 2019. She returned to the office on the 4 February, and worked for 4 days. A colleague then called her and asked what she was doing there and told her she had been removed from the Persal system. She stated that she was shocked and went to check with the Treasury where her son is employed, and he confirmed that this was correct.
- [4] She testified that no information had been given to her that her retirement was imminent and no consultation and information sharing had taken place with her as an individual. She returned to her office and handed over her phone and laptop and left. Her line manager who sat opposite her, said nothing.
- [5] The applicant told the Court that two other employees, a Ms Mafongo and Mr Kolozi had remained in the department after the age of 65, which she regarded as inconsistent. She had not received a retirement letter from the HR Department which it claimed to have tried to deliver to her during her leave period. She was prejudiced as she had to wait for three months for her pension fund monies to be paid out.
- [6] The applicant was cross-examined by the State Attorney who put it to her that she sought to dodge her retirement by taking the leave when she did, and did not answer her door bell or telephone when the employer tried to contact her about the letter indicating her retirement date. This was vigorously denied by the applicant. The reasons for keeping two other persons in the Department on contract after their retirement age, were also put to her.
- [7] The respondent brought two witnesses to give evidence, Ms Mphahlele, the Assistant Manager of HR and Mr Virgil Fredericks, Senior Manager responsible for HR since 2014. The gravamen of their evidence was that the applicant was well aware that the retirement age under the Public Service Act is 65, and that persons who were employed before the proclamation of that Act had also retired at 65 from the Department. The practice in the Department is to look at who is going to turn 65 in January of each year, and to then communicate with the person concerned, but there is no written policy in that regard. Many staff are away in January and the fact that the applicant was to reach retirement age

that month was only realized late and the retirement letter prepared on the 18th January 2019. A submission to the Director General of the Department regarding the retirement of the applicant was only made on the 30 January 2019 after the retirement letter was dated, which was a circumvention of the normal process. It was recommended that the applicant should be paid for the 4/5 days she reported for duty in February, but that her retirement age must be recorded on Persal as the 31 January 2019.

Evaluation

- [8] The applicant represented herself at the proceedings. Both she and the state attorney filed heads of argument. This Court must apply the law on automatically unfair dismissal claims based on age discrimination to this case. In terms of section 187(1)(f) of the LRA, a dismissal is automatically unfair 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, *inter alia* age. However, in terms of section 187(2)(b) of the LRA, “a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons in that capacity”.
- [9] The Public Service Act provides in Section 16 that the retirement age for public service members is age 65. The Section also sets out notification periods to be given by those who were employed before the 1994 Proclamation, and have the right to retire at an earlier age. On the evidence before me, there is no question that the applicant had reached the statutory, normal retirement age on her 65th birthday in January 2019.
- [10] The applicant was well versed in the policies of the respondent, having herself been responsible for Corporate Services at an earlier stage in her career. In applying for leave when she did, and it being granted, she may have believed that her services were needed beyond the age of 65. While this may be considered as wishful thinking, the stance taken by the respondent at trial, that she was trying to dodge retirement, was hurtful to her and she described it as an affront to her sense of dignity.
- [11] The Department's omission to consider that some of its employees may have birthdays in January and to only do a perusal for retirees once a year in that

month, was a contributing factor to the situation leading to the launching of this dispute. It is also evident that the respondent's failure to have acted in terms of a formal written policy dealing with members facing retirement compounded a situation in which the applicant felt that her dignity had been negatively impacted. Over thirty years of service should surely have merited a farewell function where the applicant could be duly thanked for her work and contribution. The applicant made these heartfelt feelings clear in her testimony. However, her treatment at the hands of the respondent did not amount to an automatically unfair dismissal as set out below.

- [12] The Labour Appeal Court has held¹ that even where an employee is kept on after the agreed or normal retirement age, an employer may nevertheless fairly terminate the employment relationship at a later stage. The LAC considered the question in the context of constitutional values and held that:

[18]..... Properly construed, section 187(2)(b) does not contemplate a new tacit contract coming into existence between an employer and employee (by virtue of their conduct) which governs their employment relationship when the employee continues to work for his or her employer after reaching the normal or agreed retirement age. In the same vein, section 187(2)(b) does not envisage a tacit amendment of the contract to the effect that the employee would continue to work indefinitely or that a new retirement age applies, as is contended for by the appellant in this appeal.

[19] This interpretation gives effect to the right that accrues to an employer in terms of section 187(2)(b) to fairly dismiss an employee who has passed the agreed or normal retirement age. Significantly, it is consistent with the purpose of section 187(2)(b) which is to allow the employer to dismiss employees who have passed their retirement age to create work opportunities for younger members in society.

[20] I disagree with the appellants' submission that this interpretation of section 187(2)(b) of the LRA is inconsistent with the right to fair labour practices in

¹ Motor Industry Staff Association & Another v Great South Autobody CC t/a Great South Panel Beaters (JA68/2021) handed down in September 2022.

section 23 of the Constitution because an employee's right to a fair dismissal is integral to that right. There is a distinction in the value that informs the content of fairness relative to employees who have reached retirement age and those who have not. While the dismissal of an employee, on the grounds of age, prior to reaching retirement age may have the effect of impairing the right to human dignity of that employee, the dismissal of an employee who has passed his or her retirement age would not. This is because employees with agreed or normal retirement dates anticipate that they will work until they reach retirement age and are expected to prepare financially for their retirement by contributing to provident or pension funds."

[12] On the facts before me, and the jurisprudence by which I am bound, I cannot find that the termination of the employment relationship in this case amounted to an automatically unfair dismissal. The circumstances around the termination reflect a lack of professional work practice by the respondent in that leave was granted for a period after the applicant's retirement date. The fact that the applicant worked after her retirement date cannot assist her claim. She was paid for these days and has not sought to claim her salary for the whole of February.

[13] The respondent has argued that the applicant should be mulcted in costs. On the normal principles, I am of the view that law and fairness dictate that no costs order should be made. I make the following order:

Order

1. The application is dismissed
2. There is no order as to costs.

H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: In person

Respondent: State Attorney Northern Cape

LABOUR COURT