IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO **JS 930/04**

In the matter between:

HOSPERSA OBO TERSIA VENTER Applicant

And

THE SOUTH AFRICAN NURSING COUNCIL Respondent

JUDGMENT

STEENKAMP AJ:

[1] Tersia Venter was forced to retire after reaching the age of 60. Does this constitute unfair discrimination on the grounds of age?

THE FACTS

[2] Ms Venter, who is represented in these proceedings by her trade union, Hospersa (the Applicant) was employed by the Respondent (the South African Nursing Council) in 1984. She held the position of personal assistant to the Registrar.

[3] In 1995, all existing Nursing Councils were dissolved and an interim Nursing Council was established.

[4] All employees of the existing Nursing Councils were deemed to be employees of the interim Nursing Council.

[5] At the time when Ms Venter was employed, the terms and conditions of service which applied to her specified that her retirement age was 70 years. However, she could elect to retire at the end of the month in which she attained the age of 65 years or at any time thereafter.

[6] The Council confirmed Ms Venter's re-appointment as personal assistant to the Registrar, effective from 1 April 1996, in a letter dated 20 June 1996. The letter made no mention of any change in her terms and conditions of service.

[7] It appears that, in April 1996, the interim Nursing Council unilaterally adopted amended terms and conditions of employment which amended the retirement age

contained in the original terms and conditions of employment applicable to Venter. In terms of the amended terms and conditions of employment, the retirement age became 60 years. However, an employee could, with the permission of the Council, elect to retire at any time thereafter but not later than the 1st April following the attainment of the age of 65.

[8] Both Ms Venter and the union representative, Mr Hans Murray testified that they had not been consulted over the amendment. The current Registrar of the Council, Ms H Subedar, could not contest this evidence. I must accept, on the evidence before me, that the amendment to the retirement age was imposed unilaterally.

[9] The current South African Nursing Council ("the new Council") was established in July 2003.

[10] In January 2003, Ms Venter was advised that she was due to retire in September of that year, when she turned 60. She discussed the matter with the Council's human resources officer who advised her that in order to ensure that she continued to work until the age of 65, as she wished to do, she had to address a letter to the Council. On 17 January 2003, she wrote to the Registrar, Ms Subedar in the following terms:

> "I wish to inform you that as on 8 September 2003 I shall turn 60 and thus it will be my pensionable month as well. I hereby ask if I could continue working up to 2008 when I shall turn 65."

[11] The Council granted Ms Venter an extension of her retirement date until 30 September 2004.

[12] On 16 February 2004, Ms Venter addressed another letter to the Registrar and CEO and Council members of the Council requesting them to allow her to remain in service until September 2008 when she would turn 65.

[13] In that letter, Ms Venter also stated: "I also wish to inform you that at the time of my appointment my conditions of service allows me to work to 65 and even up to 70, should I so wish." She enclosed her letter of appointment, together with the applicable clause in the terms and conditions of service then applicable dealing with retirement; and her letter of re-appointment of 20 June 1996. She stated that, when she was reappointed in 1996, the 1984 conditions of service were still applicable.

[14] On 29 June 2004 the Council informed Ms Venter that her request for an extension of her retirement date had been rejected and that 30 September 2004 would be her last day of service.

[15] On 29 July 2004, Ms Venter – assisted by Hospersa – referred a dispute to the CCMA alleging unfair discrimination in terms of section 10 of the Employment Equity Act.

[16] The matter remained unresolved as at 31 August 2004. Subsequent to her dismissal and on 9 November 2005 Ms Venter referred the dispute to this court.

DID THE COUNCIL DISCRIMINATE?

[17] Ms Venter elected to refer a dispute in terms of section 6(1) read with section 10 of the Employment Equity Act[1], and not in terms of section 187(1)(f) of the Labour Relations Act[2]. Neither did she claim breach of contract arising from the unilateral change to her terms and conditions of employment.

[18] Section 6(1) of the Employment Equity Act reads as follows:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including … age."

[19] In terms of section 6(2), it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act; or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. The Respondent *in casu* has not pleaded any of these justification grounds.

[20] In terms of section 187(1)(f) of the Labour Relations Act, a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5[3] or, if the reason for the dismissal is that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including age.

[21] Despite that section, section 187(2)(b) provides that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

[22] As stated above, the Applicant in this matter elected to refer a dispute in terms of the Employment Equity Act and not the Labour Relations Act. It appears that one of the reasons therefor was that she referred a dispute before she had been dismissed. Nevertheless, I consider the principles encapsulated in section 187 of the Labour Relations Act to provide guidance in handling allegations of discrimination based on age, in the employment context, in terms of the Employment Equity Act. "Employment policy or practice", as defined in s 1 of the EEA, includes dismissal[4]. The proviso in section 187(2)(b) of the LRA that a dismissal based on age is fair if the employee has reached the normal agreed retirement age for persons employed in that capacity, appears to me to be no more than a justification for what would otherwise amount to unfair discrimination based on age.

[23] Mr *Beaton*, for the Respondent, argued that there was no discrimination. Another

1 Act No 55 of 1998

2 Act No 66 of 1995

3 Section 5 confers protections relating to the right of freedom of association and on members of workplace forums.

4 Subsection (m)

employee, Ms Macha applied for and was granted an extension of her employment after she had turned 60. The reasons for this extension were her personal circumstances. Mr Beaton argues that both Ms Venter and Ms Macha were over 60 and that there is no evidence that Ms Macha's employment was extended because she was younger, or older, than the Applicant. Accordingly, he says, this ground falls away.

[24] Mr Beaton's argument, with respect, misses the point. In deciding whether there was discrimination, it is so that the court must first establish whether there was differentiation between people or categories of people.[5]

[25] In deciding whether the employer had discriminated against an employee on the basis of age, however, the question is not how the employer treated other employees of the same age. The "comparator", insofar as one may be necessary at all, is any other employee of any age – in other words, was the sole reason for treating the employee differently to any other employee her age? If so, discrimination is established on a listed ground. The onus is then on the employer to show that it is fair, in terms of section 11 of the Employment Equity Act.

[26] Counsel have not referred me to any comparative international case law, and the South African cases dealing with this topic are restricted to cases of unfair dismissal based on s 187(1)(f) of the LRA.

[27] However, the Canadian case of *McKinney v University of Guelph* is apposite. Dealing with the mandatory retirement policies of a number of universities, the Supreme Court of Canada stated that, on the assumption that these policies are law, they are discriminatory within the meaning of s. 15(1) of the Canadian Charter of Rights and Freedoms, (given the judgment in *Andrews v. Law Society of British Columbia*[6]), since the distinction is based on the enumerated personal characteristic of age.

In *Andrews*, the Supreme Court of Canada applied the following test for discrimination under s. 15(1) of the Charter[7]:

"I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

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5 *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) at para [38]

6 1989 CanLII 2 (S.C.C.)1989 CanLII 2 (S.C.C.), [1989] 1 S.C.R. 143

7 at pp. 174-75

There is no doubt, held the same court in *Guelph,* that the mandatory retirement policies, agreements and regulations impose burdens on the employees. In *Reference Re Public Service Employee Relations Act (Alta.)*, [8] employment was described as follows:

"Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."

The court in *Guelph* pointed out that mandatory retirement takes this away, on the basis of a personal characteristic attributed to an individual solely because of his association with a group.

The Charter protects not only from direct or intentional discrimination but also from adverse impact discrimination. The court went on to find, though, that the distinction made in the universities' policies, though based upon an enumerated ground to the disadvantage of individuals aged 65 and over, constitutes a reasonable limitation under s. 1 of the Charter to the right to equality accorded under s. 15.

Mandatory retirement was found to be rationally connected to the objectives sought. Following a long history, a mandatory retirement at age 65 had become the norm and is now part of the very fabric of the organization of the labour market in that country.

[28] In the South African context, the LRA codifies the justification for dismissal based on age if the retirement age is normal or agreed.

[29] In the present case, the applicant had not agreed to the retirement age of 65. On the contrary, she considered herself and the employer to be contractually bound to an agreed retirement age of 70, with the option to elect to retire at 65.

[30] Section 3(d) of the EEA provides that the Act must be interpreted "in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisations Convention (No 111) concerning Discrimination in Respect of Employment and Occupation."

[31] Convention 111 defines "discrimination" as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." It also includes "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies."

[32] In the case of South Africa, the member state, the envisaged consultation took place within NEDLAC and age was included as a specified ground of discrimination in s 6 of the

8 1987 CanLII 88 (S.C.C.)1987 CanLII 88 (S.C.C.), [1987] 1 S.C.R. 313, at p. 368

EEA. Section 9(2) read with s 9(4) of the Constitution[9] provided that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including age. It goes on to state that national legislation must be enacted to prevent or prohibit unfair discrimination. The EEA gives effect to this constitutional imperative. The effect is to prohibit age discrimination absolutely. The onus is then on the employer to show that its conduct did not amount to "discrimination" as defined, or to justify it.

[33] In the present case, the fact that other employees were forced to retire at 60, or that there were cogent reasons to extend Ms Macha's retirement age, do not amount to a justification. Evidence that the mandatory retirement age of 60 had become the norm or had been agreed, would have justified the apparent discrimination based on age. However, as outlined above, there was no agreement with Ms Venter or her trade union to change her agreed retirement age (although new entrants would have been subject to the amended policy on retirement). Nor did the Respondent lead any evidence to show that a retirement age of 60 had become the norm, to the extent that Ms Venter had acquiesced thereto.

[34] In the recent case of *Cash Paymaster Services (Pty) Ltd v Browne*[10] the Labour Appeal Court dealt with forced retirement in the context of s 187(1)(f) of the LRA.

Following a transfer of a business as a going concern as contemplated by s 197 of the LRA, the new employer introduced a retirement age of 60. The appellant had planned to remain in employment until age 65.

In holding the appellant's dismissal to be automatically unfair, the Labour Appeal Court confirmed its reasoning in *Rubin Sportswear v SACTWU & others*[11].

After dealing with the relevant constitutional provisions, Zondo JP pointed out[12] that the retirement age dispensation provided for in s 187(2)(b) of the LRA is one that works on the basis that, if there is an agreed retirement age between an employer and employee, that is the retirement age that governs the employee's employment. This is the case even when there is a different normal retirement age for employees employed in the capacity in which the employee concerned is employed. The provision relating to the normal retirement age only applies to the case where there is no agreed retirement age between the employer and the employee.

[35] In the present case, albeit to be decided in terms of the provisions of the EEA, the same applies with regard to the potential justification for the discrimination based on age that led to the Ms Venter's retirement. Even though a new norm – being the retirement age of 60 – may have been established by the new Council, the agreed retirement age

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9 Act 108 of 1996

10 (2005) 14 LAC 8.34.1; [2005] JOL 16155 (11 November 2005)

11 (2004) 25 *ILJ* 1671 (LAC)

12 In para [25]

applicable to Ms Venter remained 70, with the option open to her to retire at 65.

[36] I am satisfied that the respondent has unfairly discriminated against the applicant in its employment policy of imposing a retirement age of 60, on the grounds of age as contemplated in s 6 of the EEA. The respondent has failed to establish that the discrimination is fair as contemplated in s 11.

The relief sought

[37] In terms o s 50(2) of the EEA, this Court may make any appropriate order that is just and equitable in the circumstances, including payment of compensation or damages by the employer to the employee.

[38] The applicant has stated that she always intended to remain in the employ of the respondent until the age of 65, i.e. 30 September 2008. Her actual loss in salary would, therefore, amount to the equivalent of three years' salary. However, she is receiving a monthly pension equivalent to approximately half the salary she received whilst in the employ of the respondent. She has claimed compensation equivalent to two years' remuneration. I consider that to be just and equitable in the circumstances.

[39] Neither party has asked for costs, given the nature of the matter and its importance to the public and to our labour law jurisprudence.

Order

[40] I make the following order:

1. The respondent has unfairly discriminated against the applicant, Ms Tersia Venter.

2. The respondent is ordered to pay Ms Venter the amount of R 180 000, 00 (One Hundred and Eighty Thousand Rand), being the equivalent of 24 months' remuneration.

3. There is no order as to costs.

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A J STEENKAMP,

Acting Judge

Labour Court, Johannesburg

Date of hearing: 17 – 19 November 2005; 13 December 2005

Date of judgment: 5 January 2006

For Applicant: **David Short attorney, Johannesburg**

For Respondent: **Adv RG Beaton, instructed by Rooth & Wessels Inc, Pretoria**