IN THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

Case no: JS 746/05

In the matter between:

THOMAS ROCKLIFFTE Applicant

and

MINCOM (PTY) LTD Respondent

JUDGMENT

MOSHOANA AJ

Introduction

1]. The applicant referred a dispute of automatically unfair dismissal to this Court. The applicant alleged that his dismissal was automatically unfair in that same was based on his age. The applicant turned 65 years on 03 February 2004. He however left the respondent on 30 June 2005, after he was given notice to retire by the respondent.

2]. The applicant contended that he entered into an oral agreement

with the managing director of the respondent, that he shall retire at the age of 70 years. In view of the fact that the respondent asked the applicant to retire before the age of 70 years, the applicant approached this Court for a relief.

Facts

3]. It is common cause that, in terms of the respondent's retirement fund underwritten and administered by Liberty Corporate Benefits, the normal retirement age in respect of the retirement fund is 65 years. In terms of clause 5 of the applicant's letter of appointment, the compulsory retirement age for all male employees is 65 years.

4]. On, 03 February 2004, the applicant turned 65 years. On, 09 May 2005, the applicant was handed a letter informing him of his retirement date being 30 June 2005. The applicant refused to accept the letter.

5]. Few days before his retirement, the applicant became aware of a policy which stated that retirement from Mincom (respondent) may occur at any age. His interpretation of the policy was that 65 years could be surpassed. He then approached Mr Collins, and informed him of his interpretation of the policy. According to the applicant an agreement was reached that he will retire at 70 years. This Mr Collins disputed in his evidence.

6]. Around February 2005, Mr Collins conducted a performance review with the applicant. From the performance documents, the following was revealed:

Applicant: Same position or similar up to retirement at 70.

Mr Collins: We need to bring this forward and state a particular date.

Mr Collins: By June, I expect noticeable progress on correcting the shortfall in numbers. Over the next review period we need to articulate a more definite retirement date.

Applicant: This has been stated by myself as at my 70th birthday.

7]. From the pleadings and evidence tendered in court, it was apparent that the main dispute is around whether there was an oral agreement to work until age 70? On this score the applicant testified that around October, November 2003 after having seen the policy, he discussed with Mr Collins that he shall work until the age of 70. Mr Collins agreed to that on condition, the applicant remains in perfect health.

8]. Mr Collins testified that no agreement was reached between him and applicant on the retirement age of 70. With reference to the

letter of appointment he testified that an extension may happen for a period of one year at a time. He did not have authority and powers to extend retirement age for more than one year at a time. He denied that the policy of retirement at any age applied to South Africa. It only applied to the Australian company.

Argument

9]. Mr Morgan for the applicant conceded rightly so that the applicant bears the onus to prove that an agreement was reached to work until the age of 70. He argued that probabilities favours the applicant that such an agreement was reached.

10].In support thereof, he relied on the uncontested evidence of the applicant that he incurred substantial debt at the age of 65. He further argued that on the balance of probabilities the applicant discharged the onus of proof. In his submission, the fact that the applicant was dismissed before he reached 70 renders the dismissal automatically unfair.

11].He argued that 65 years was not an agreed and normal retirement age. In support of this contention, he relied on the fact that one Lorraine Van der Merwe had worked until the age of 64, which is four years after the retirement age of females. Further he relied on the fact that the applicant himself was 66 years at the time of dismissal.

12].Advocate Van As for the respondent, argued that the applicant has failed to discharge the onus of proof in so far as the retirement age of 70 as alleged. He submitted that documents like the performance plan point to the fact that no agreement was reached. He argued that it was the applicant's wish to retire at 70 but no agreement was reached.

Analysis of the facts

13].There are only two main factual issues to be determined in this matter namely:

13.1 Did the applicant and the respondent agree on 70 years as the retirement age?

13.2 Does the respondent have an agreed retirement age?

<u>The issue of 70 years.</u>

14].In the Court's view the following facts militates strongly against any agreement to work until age 70:

14.1 The comments by Collins that we need to bring this forward and state a particular date.

14.2 The comment by Collins that over the next review period we need to articulate a more definitive retirement date.

14.3 Statement by the applicant in his letter dated 22 June 2005 to the effect that in January 2004, we discussed my plan in the employ of Mincom until the age of seventy at which time I would retire from the company. No objections were raised in the light of this discussion and therefore this became a tacit term of my contract of employment.

14.4 Collins in his letter of reply dated 24 June 2005 stating notwithstanding the above, we place on record that there was no agreement to extend your normal retirement age to 70 as alleged.

14.5 A clause in the conditions of employment which suggests that any extension may be for one year at a time.

15].In the Court's view, the fact that the applicant worked until age 66 cannot suggest an agreement to work until age 70. Neither is the Court convinced that the fact that Lorraine Van der Merwe worked until age 64 lends credence to the existence of an agreement to work until age 70.

<u>The issue of agreed retirement age.</u>

16].The Court takes a view that age 65 was established as

retirement age for male employees. This much is borne by the conditions of service signed by the applicant. The fact that the applicant himself approached Collins to discuss his retirement few days before his 65th birthday only suggest that the applicant himself was aware that the agreed age was 65 years. If it were not so, it would have been a futile exercise for the applicant to approach Collins when he was about to turn 65.

17].Accordingly, it is the Court's finding that 65 years has been established as an agreed retirement age.

The Law

18].In terms of section 187(1) (f) of the Labour Relations Act 66 of 1995, age is a ground upon which one can be discriminated against. In terms of section 187(1) a dismissal is automatically unfair if the reason for dismissal is age.

19].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.

20].In this matter, it is common cause that dismissal was based on the applicant's age. It is also common cause that at the time of dismissal, the applicant had reached the age of 65 years. As the Court has already found, 65 years is the agreed retirement age for male employees. This therefore establishes the defence set

out in section 187(2) (b).

21].In **Hospersa obo Venter v SA Nursing Council (2006) (6) BLLR 558 (LC)**, the court found that a dismissal was automatically unfair in that the employee was dismissed before the agreed retirement age of 70.

22].Unlike in this matter, age 70 was agreed upon.

23].In **Cash Paymaster Services(Pty) Ltd v Browne 2006 (2) BLLR 131 (LAC)**, the court said the following:

" *The retirement dispensations provided for in section 187(2) (b) of the Act, is one that works on the basis that, if there is an agreed retirement age between an employer and an 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".*

24].In **Rubin Sportswear v SA Clothing & Textile Workers Union and Others (2004) 25 ILJ 1671 (LAC)**, the court stated that:

" *where an employer seeks refuge in the provisions of section 187(2) (b) against a claim of unfair dismissal and his defence is that the employee had reached normal retirement age, he must show not only that the employee had reached normal retirement age but that the retirement age is normal to employees employed in that capacity as the employee concerned.*

25].In the matter before me there was an agreed retirement age, therefore all that had to be shown is that that age was reached.

Does the fact that the applicant had reached the age and passed it before dismissal render the subsequent dismissal unfair, in any manner?

26].In the Court's view, for the defence contemplated in section 187(2) (b) to succeed, all that has to be shown is the fact that the employee had reached the agreed age. If the employee goes beyond that age, an employee may in my view raise waiver and or estoppel once the defence of agreed retirement age is raised.

27].In the matter before me, waiver was not pleaded. The defence of waiver must be pleaded. (**Montesse Township and Investment Corporations v Gouws and another 1965 (4) SA 373 (AD) at 381 A-D**).

28].In **Benson & Simpson v Robinson 1917 WLD 126**, Wessels J said:

" the plaintiff must not set out the evidence upon which he relies, *but must state clearly and concisely on what facts he bases his*

claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove the plaintiff's allegations".

29].This statement of law is valid and true to this day.

30].In ***Rubenstein v Prices Daelite (Pty) Ltd (2002) 5 BLLR 472 (LC)****, the contention of waiver was rejected in circumstances where an employee had worked pass the retirement age.*

*31].The section makes reference to the employee having reached the agreed retirement age and not when he or she reaches the retirement age. (****John Grogan: "No work for the aged" Employment Law Vol 14 No: 6, March 1999****)*

I am in agreement with the sentiments expressed in Rubenstein.

32].In ***Botha v Du Toit Vrey & Partners CC (2006) 1 BLLR 1 (LC)****, Revelas J took a view that a dismissal was procedurally unfair in that the retirement age came and went without termination.*

33].I am unfortunately not in agreement that if retirement age comes and goes there may be basis for procedural unfairness.

34].In my view, there is no basis upon which an automatically unfair dismissal could be procedurally unfair only. In terms of section 188(1) a dismissal that is not automatically unfair, is unfair if the employer fails to prove that dismissal was effected

in accordance with a fair procedure.

35].The wording of the section suggests that automatically unfair dismissals become so if the reason for it is prohibited. It does not matter if some form of procedure proceeds such a dismissal.

36].Accordingly in an automatically unfair dismissal claim the inquiry ends at the point where, if a defence of having reached an agreed age is raised, such age has been reached. What happened afterwards is immaterial unless a defence of waiver is successfully raised.

The issue of onus

37].In my previous judgment, dealing with the issue of absolution from the instance, I concluded that the onus to justify the dismissal rests on the respondent.

*38].In a discrimination case, an applicant has the evidential burden to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place (**Kroukam v SA Airline (Pty) Ltd 2005 26 ILJ 2153 (LAC)**. In this matter I have already found that age was the basis to dismiss the applicant, therefore the onus was on the respondent to justify the dismissal so as to make it fair even if it is based on age (prohibited ground).*

39].The onus in this regard is for the respondent to prove that there was an agreed retirement age and same was reached at the time of dismissal. This once shown renders the dismissal fair.

*40].In instances where an employee alleges that some other retirement age was agreed upon, then the onus is on that employee to prove that agreement. In this case, the applicant alleged that age 70 was agreed upon. Therefore, the onus is on him to prove that agreement. He stated that it was an oral agreement (**Kriegler v Minitzer 1949 (4) Sa 821 (A)**).*

*41].In **Stellenbosch Farmers' Winery Group Ltd v Martell et Cie 2003 1 SA 11 (SCA)**, the following was said with regard to factual dispute on oral agreements:*

" The technique generally employed by courts in resolving factual

disputes of this nature may conveniently be summarised as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability and (c) the probabilities……".

42].In this matter it was not necessary to consider the credibility and reliability of the witnesses per se. In the Court's view the probabilities are such that an agreement was not reached. As pointed out earlier, the onus was on the applicant to establish the oral agreement, he has failed to do that.

Order:

43].In the result I make the following order:

1. The dismissal of the applicant is fair.
2. The applicant is ordered to pay the costs of the respondent.

_____

G N MOSHOANA
Acting Judge of the Labour Court

Date of Hearing: 24, 29 August 2007
Date of Judgement: 17 September 2007

APPEARANCES;

For the Applicant: Mr Morgan

For the Respondent: Advocate Van As
Instructed by Anthony Hinds Attorneys