REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Reportable

Case no: JA 87/10

IVOR MICHEAL KARAN

t/a KARAN BEEF FEEDLOT **Appellant**

and

J W C RANDALL **Respondent**

Heard: 04 May 2012

Decided: 22 June 2012

Summary: Appeal-automatically unfair dismissal- sec. 187(1)(f) of the LRA dismissal on the basis of age- the employee tacitly agreeing to work beyond normal retirement age and leaving it to the employer to determine the retirement age or date on notice to the employee- nothing unlawful or unfair in the agreement reached by the parties under these circumstances.

JUDGMENT

TLALETSI JA

Introduction

[1] The respondent was dismissed by the appellant on 28 February 2006. He considered his dismissal to be both substantively and procedurally unfair in that he was discriminated against because of his age. He referred a dispute of automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 ("the Act") to the Labour Court for adjudication after an unsuccessful conciliation of the dispute.

[2] The respondent contended that the respondent's dismissal was fair. The Labour Court (per Francis J) found that the dismissal of the respondent by the appellant was automatically unfair in terms of section 187 (1)(f) of the Act and ordered the appellant to pay the respondent compensation in the amount of R1 527 443-54 which was said to be an equivalent of twenty four (24) months remuneration plus costs of the application.

[3] Aggrieved by the decision of the Labour Court the appellant applied and was granted leave to appeal to this Court against the whole judgment and order of the Labour Court.

Factual background

[4] For a better understanding of the issues a brief factual background is apposite. In the Labour Court the respondent who was the applicant testified and the appellant tendered the evidence of David Johannes Loots ("Loots") who was the Group Human Resources Manager, Arnold Francois Pretorius ("Pretorius") who was Chief Executive Officer and Ivor Michael Karan, the owner of Karan Beef Feedlot and chairman of the respondent. It shall not be necessary for the purpose of this appeal to refer to the detailed evidence tendered because of the specific issue to be decided. The evidence is captured in detail in the judgment of the court below.

[5] The respondent, then 53 years old, was employed by the appellant on 01 June 1997 as a Financial Controller. On 01 August 1999 he was appointed the Group Financial Director, the position he held until his dismissal. The respondent was *inter alia*, responsible for developing appellant's accounting system.

[6] It needs to be mentioned that the respondent's letter of appointment did not make any reference to the respondent's retirement age. He was a member of the Karan Provident Fund ("the Fund"). The Rules of the Fund provided that normal retirement age was 60 years. On 05 February 2003, the appellant took a resolution adopting the Rules of the fund effective from 01 August 2002. This meant that the respondent's retirement age became 60 years.

[7] It was common cause that on 08 August 2003 Mr Loots addressed a letter to the respondent stating as follows:

> 'This is to confirm that you will reach your retirement age on 25 March 2004.
>
> We would like you to continue to work for Karan Beef. The normal notice period will apply in the event that we would like you to go on retirement.
>
> Please take note that you can continue to be a member of the Karan Beef Provident Fund as for the pensionable portion is concerned and it will be regarded as a deferred retirement...' (Emphasis added)

[8] The reference to 25 March 2004 was to the date on which the respondent turned 60 years old. On 25 February 2004 Loots sent another letter to the respondent with substantially similar content to that of 08 August 2003. The respondent did not respond to these letters.

[9] On 23 November 2005, Pretorius wrote a letter to the appellant informing him of his increase in salary as from 01 January 2006. He further thanked him for his contribution towards the success of the business during the past year and that they relied on his continued support towards the future success of the business.

[10] On 18 January 2006, Pretorius wrote another letter to the respondent and referred him to the letter dated 25 February 2004. He further informed him that in terms of the previous letter he was furnishing him with a notice that he was to go on retirement and that 28 February 2006 would be his last day in service. He was further advised that should an incentive bonus be paid in July, the respondent would qualify for a *pro rata* bonus up to the end of February.

[11] On 20 January 2006, the respondent wrote a letter to Pretorius in which he challenged the decision of the appellant to place him on retirement before he reached age 65 and suggested that a negotiated settlement be agreed upon. He suggested that a meeting be held with his attorney for the purpose of reaching an amicable solution. On 30 January 2006 the respondent's attorneys forwarded a letter to the appellant taking issue with the decision to retire the respondent and threatening legal action unless settlement was reached.

[12] On 31 January 2006 the respondent received a letter from Loots in which he was informed that the appellant was confirming that he was being relieved of his duties with immediate effect and that he was no longer required to report for duty.

[13] Since the parties could not settle their dispute the respondent instituted proceedings in the Labour Court challenging his "dismissal" and seeking *inter alia*, reinstatement, alternatively compensation for automatically unfair dismissal equivalent to 24 month's remuneration. The appellant contended that the dismissal or termination of the respondent's employment was fair as it was entitled to dismiss him as he had reached the requirement age of 60 which had been an agreed retirement age.

The Finding of the Labour Court

[14] The Labour Court made, among others, the following findings which are fundamental to this appeal.

14.1 The respondent had raised several defences that were not supported by the evidence.

14.2 The appellant's main and only defence was that the respondent had reached the normal or agreed retirement age.

14.3 Despite the denial by the respondent the appellant had a retirement age of 60 years and that the appellant was aware of such retirement age and that it was applicable to him.

14.4 The respondent was given a letter on 08 August 2003 and that his employment had come to an end upon reaching the retirement age of 60.

14.5 The effect of the letter was to offer the respondent new employment. There is no reference made in the said letter what the normal or agreed retirement age is going to be. The letter only gave the appellant the right to decide when they would like the respondent to go on retirement.

14.6 Since the letter did not employ the respondent on a fixed term contract of employment after his retirement date his employment was therefore for an indefinite period;

14.7 Where the appellant had decided on his own to keep the respondent in employment beyond the retirement age there would have to be a fair reason to terminate his services.

14.8 No evidence was presented what the normal or agreed retirement age was after he went beyond 60.

14.9 The appellant could not unilaterally impose a retirement date as in *casu* and its reliance on section 187(2)(b) of the Act is therefore misplaced. Since the respondent was dismissed solely on the grounds of his age, his dismissal was therefore automatically unfair.

[15] In this Court, counsel for the appellant contended that the mere fact that the respondent's employment was extended, did not mean that the protection afforded to the employer by section 187(2)(b) was thereby lost or that a new or agreed retirement age had to be brought about. Secondly, it was contended that, there was, in any case, an agreement between the parties as to when and how it would be determined that the respondent should be retired. This latter argument means that the Labour Court erred in finding that the appellant was legally empowered to unilaterally determine the retirement date and or age of an employee.

The appeal

[16] The relevant statutory provision in this case is section 187 which provides that:

> '187(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)...
>
> (b) a dismissal based on age is fair if the employee has reached the normal retirement or agreed retirement age for persons employed in that capacity.' (Emphasis added)

[17] It is common cause that the dismissal of the respondent was based on his age. His dismissal would therefore be automatically unfair unless the appellant shows that there is a fair reason for it. The appellant relies, for justification of the dismissal of the respondent, on section 187(1)(f), which 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.

[18] In *casu*, the *court a quo* found, correctly on the facts, that there was indeed an agreed retirement age of 60 years that was applicable to the respondent. However, the court held further that the respondent having reached the retirement age, the appellant offered him new employment by medium of the letter dated 08 August 2003 without stating what his new retirement age would be and instead reserved to itself unilaterally decide when to retire the respondent from his new employment contract. The *court a quo* ruled that the appellant was not legally empowered to determine unilaterally, the date or age of retirement of an employee.

[19] There are two plausible arguments concerning the application of section 187(1)(f) and 187(2)(b) in this matter. The first is that where there is a normal or agreed retirement age and the employee has reached that age, the employer shall enjoy protection prescribed in section 187(2)(b) from that date and at any time thereafter. He or she would be entitled to terminate the employment of the employee on the grounds of age.

[20] The second scenario is that, when there is an agreement reached between the employer and employee before the latter has reached the normal or agreed retirement age, to determine a new retirement age, the employer would enjoy the protection of section 187(2)(b), should he/she terminate the employment of the employee, once the new agreed employment date is reached.

[21] In light of the facts of this case, it is not necessary to decide upon the merits of the first argument. What is common cause is that the respondent was informed in the letters dated 08 August 2002 and 25 February 2004 respectively that the appellant required him to continue working beyond his retirement date and that it was left to the appellant to determine on notice when the respondent is to be retired. The Court *a quo* found, and it was also common cause in this Court, that the respondent did receive the aforementioned letters and did not respond to them. He instead continued with his employment beyond the date on which he reached his retirement age.

[22] The finding of the Court *a quo* that the appellant was not entitled to unilaterally determine a retirement date is therefore, in the circumstances of this case, not correct. The respondent tacitly agreed to work beyond the normal retirement age and left it to the appellant to determine the retirement age or date on notice to the respondent. There is nothing unlawful or unfair in the agreement reached by the parties under these circumstances. It was open to the respondent to reject the condition imposed by the appellant at the time it was made and make a counter proposal. He also had an election to refuse to continue rendering his services beyond his agreed retirement age.

[23] The evidence further showed that this was appellant's standard practice was applied to other employees who at different occasions, found themselves in a similar position to that of the respondent.

[24] In the light of this finding , it is unnecessary to deal with the correctness and fairness of the amount of compensation awarded to the respondent by the Court *a quo*. Furthermore, in view of the concession made on behalf of the appellant that he does not persist with costs both in the Court *a quo* and in this Court, in the event of the appellant being successful, it is not necessary to discuss same, save to state that the concession is properly made taking into account, *inter alia*, how the respondent was treated. It would be in accordance with the requirements of law and fairness that each party carry its costs of both courts.

Order

[25] In the result the following is ordered:

1. The appeal succeeds and the order of the Labour Court is set aside and replaced with the following:
   "(a) The applicant's claim is dismissed.
   (b) Each party is to pay its costs."

2. Each party is to pay its costs on appeal.

_____

TLALETSI, JA

Judge of the Labour Appeal Court

Davis JA and Murphy AJA concur in the judgment of Tlaletsi JA.

Appearances:

For the Appellant:	Advocate Kennedy SC
Instructed by:	Edward Nathan Sonnenberg Inc
For the Respondent:	Mr T Mills of Cliffe Dekker Attorneys