IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN DURBAN

Reportable

Case no: DA3/13

In the matter between:

ARB ELECTRICAL WHOLESALERS (PTY) LTD **Appellant**

and

HIBBERT N.D **Respondent**

Judgment delivered on: 21 August 2015

Summary: Claim for automatically unfair dismissal under the LRA and for unfair discrimination based on age under the EEA – employer retiring employee prior to him reaching the age of 65 – employer contending that employee agreeing to retire at age 64 and in any event it has discretionary power to dismiss employees who have passed the normal retirement age of 60 – employee not consenting to retire - termination of employee's services automatically unfair – employee entitled to compensation for both the automatically unfair dismissal and unfair discrimination claims and to bring both claims in one action .

Meaning of compensation – compensation and damages distinguished – compensation a *solatium* - monetary relief for the humiliation employee

suffered - compensation payment for the impairment of employee's dignity - Proof of loss not necessary in a claim for compensation under the LRA - damages payment for the loss suffered as the result of a wrongful act under the EEA–

Quantum of compensation under the LRA and the EEA - court not allowed to award separate compensation for each claim – court considering what is just and equitable compensation for the humiliation suffered by employee taking into account relevant factors – statutory limitation of compensation under the LRA and no limitation under the EEA – Labour Court awarding 12 months compensation for both claims – compensation just and equitable – appeal court not interfering with quantum of compensation – Appeal dismissed with costs -

Cross- appeal – employee claiming damages under the EEA – employee not proving any loss– cross-appeal dismissed with costs – Labour Court's judgment upheld.

Coram: Waglay JP, Ndlovu and Coppin JJA

JUDGMENT

WAGLAY JP

[1] This is an Appeal and a Cross-Appeal against the judgment of the Labour Court (Lagrange J) in terms of which it found the dismissal of the Respondent by the Appellant based on his age to constitute an automatically unfair dismissal in terms of section 187 of the Labour Relations Act 66 of 1995 ("the LRA"). The Labour Court also found the dismissal to be an act of unfair discrimination in terms of section 6 of the Employment Equity Act 55 of 1998 ("the EEA").

[2] The Labour Court ordered the Appellant to pay the Respondent the sum of R420 000.00 in compensation which was equal to the remuneration the Respondent would have earned over a 12 month period for the automatically

unfair dismissal but dismissed Respondent's claim for damages under the EEA.

[3] To briefly sketch the background. The Respondent was employed by the Appellant initially for a period of 12 years from 1984 to 1996. From September 1996 to February 1999, the Respondent rendered services to the Appellant through a Labour Broker. From 1 March 2002, the Respondent re-commenced employment with the Appellant. A month after the Respondent commenced employment with the Appellant, he attained the age of 56.

[4] At the time of his initial employment with the Appellant, Respondent was also a shareholder of the Appellant. It was at this time that the Appellant concluded an agreement with a pension fund company in terms of which its employees could belong to a pension fund. As the pension fund was newly established, the then existing employees had an election to join the fund. All new employees would however be compelled to be members of the pension fund. The Respondent at that time refused to join the fund.

[5] In terms of the said pension fund, the retirement age for all of the Appellant's employees was set at age 60. When Respondent commenced employment with the Appellant after his lengthy absence and having turned 56, he did not join the Appellant's provident fund. His statement of claim gives as a reason for not joining the fund:

> '*…because at that stage applicant* [respondent] *turned 56 (fifty six) years of age and the period of his membership to such a fund would have been too short to build up a reserve'*.[1]

[6] On 20 March 2008, the Respondent, notwithstanding the fact that he was not a member of the pension fund, received a memorandum from the Appellant in which it was indicated that the Appellant was moving its employees to a new pension fund managed by Alexander Forbes and that no changes would result in the terms and conditions that were applicable to the employees. In terms of this new pension fund, the retirement age for all employees remained at 60

[1] Record vol 1 page 4, third part of paragraph 11.

but the Appellant was entitled to elect employees to continue past that age but not beyond the age of 65.[2]

[7] In May 2008, the Appellant offered the Respondent to move from the Richards Bay branch to a new branch it opened in Nelspruit. The offer was made because the Respondent was not performing optimally in Richards Bay and the Respondent had indicated that he was familiar with Nelspruit having lived and also played rugby there. Appellant believed that the Respondent's experience and familiar surrounding will benefit it in Nelspruit while at the same time reinvigorate the Respondent to perform optimally. The Respondent accepted the offer subject to an increase in remuneration. The Respondent commenced work in Nelspruit at an increased remuneration and other benefits on 1 August 2008. By November 2008, it became evident to the Appellant that Respondent's transfer was not only of little benefit but was becoming a hindrance to developing the Nelspruit branch. The Appellant then informed the Respondent that he would be relocated to his old work place in Richards Bay while retaining his increased remuneration and benefits.

[8] Respondent returned and commenced work at Appellant's Richards Bay branch on 1 February 2009. On 18 February 2009, Respondent was informed by letter that he would be retired 14 months hence, at the end of April 2010. In that month, Respondent would have reached the age of 64. There was no immediate reaction thereto in writing by the Respondent although the Respondent had verbally expressed his unhappiness to Stoley, the Appellant's director and the bearer of the news.

[9] On 31 March 2009, the Respondent was involved in a motor vehicle collision resulting in the Appellant's vehicle being written off as the damage to the vehicle was beyond economic repair. The Appellant sought not to replace the vehicle and wished that Respondent use his personal vehicle and claim compensation for its use.

[2] In paragraph 10 of the judgment of the court *a quo,* it is recorded that the fund made provision for retirement at age 64. The documents in the record do not say that. These documents provide for the final retirement age of 65.

[10] On 29 April 2009, the Appellant issued Respondent with another letter advising him that due to the stressed economic climate, his retirement age had to be moved forward to July 2009. This was followed up by further correspondence, meetings and discussions between the parties resulting in the Appellant writing to the Respondent indicating that 30 April 2010, the original date of retirement contained in its letter of 18 February 2009, would remain his date of retirement and not the proposed earlier date of July 2009. The letter also stated that this was agreed to by the Respondent.

[11] Respondent denied agreeing to any retirement age, holding the view that the age of 65 was the age at which he planned to retire.

[12] The Appellant and Respondent then continued with a very unhappy working relationship until 19 February 2010 when Appellant by letter to the Respondent confirmed that his retirement was due at the end of April 2010 but that his last working day was 28 February 2010.

[13] The Respondent then referred the matter to the CCMA for conciliation and thereafter to the Labour Court for adjudication.

[14] At the Labour Court, the Respondent tendered evidence to the effect that he held the belief that the retirement age was 65 and he had worked towards retiring at that age. He denied that there was any agreement that he retires at a date before he attained the age of 65. He testified that he was simply issued with a fiat that he was to retire on 30 April 2010 being the month when he would have reached the age of 64.

[15] The Appellant on the other hand, tendered evidence and argument to the effect that the reason the Respondent was not a member of the Appellant's provident fund was because he took up employment with the Appellant at the age of 56 and the retirement age at the Appellant was 60 and, as such, the Respondent, as he himself has claimed, would not build up any beneficial surplus by the time he attained the age of 60. Furthermore, the policy of the fund provided that the Appellant may at its discretion, retain an employee's services beyond the age of 60 but not beyond the age of 65 at which age the employee "must be retired". The above, notwithstanding, the Appellant said

that it and Respondent had concluded an agreement that the Respondent would retire on 30 April 2010, the date he was asked to leave. Appellant's further submitted that even if the Court was not satisfied that an agreement was concluded as aforesaid, the fact that the Respondent had passed his 60th birthday meant that his continued employment with the Appellant was at the Appellant's pleasure and it could discharge the Respondent at any time because the Respondent had reached his retirement age. Finally and in order to prove that its action was not simply arbitrary, the Appellant led evidence – which was unchallenged – that since late 2008 and early 2009 there was sincere dissatisfaction with Respondent's ability to perform his duties and although action against the Respondent was being considered, it was decided, having regard to the Respondent's history with the Appellant, his relationship with the senior members of staff and his age that rather than take action against the Respondent and cause him some embarrassment at his advanced age, the Appellant utilises its discretion in terms of its fund policy and retires the Respondent.

[16] At the heart of Appellant's contention was that the parties had agreed to 30 April 2010 as the retirement date and, as such, the issue of dismissal did not arise. The Labour Court dismissed this contention, and correctly so, there was simply no evidence to substantiate this claim. The agreement was purportedly concluded between Mr Stoley of the Appellant and the Respondent. Yet Stoley was unable to recall this. Respondent denied the agreement. Appellant then went on to argue that Respondent's failure to respond within a reasonable time to the letter informing him of his date of retirement was evidence of the agreement. This argument is also without merit. The letter stated that the Respondent will be retired on 30 April 2010, no more no less. The letter does not say that the date was agreed upon nor does it solicit any response from the Respondent. It was, as I said earlier, a fiat issued by the Appellant and I see no reason why the Respondent should have reacted to it. There was no positive duty upon the Respondent to do so and he was not called upon to express any view thereon.

[17] Absent the agreement, the Respondent had established that he was dismissed and it was common cause that the reason for his dismissal was his age. If Appellant's argument that the retirement age of all staff was 60 is acceptable, it must be accepted with the condition that even if Appellant's employees attain the age of 60, it did not mean that they will be retired at that age. The Appellant was entitled in terms of its Fund's rules to retain its employees past the age of 60 but not beyond the age of 65. In my view, this demonstrates that while in terms of the fund, 60 is the retirement age, employees could be expected if they agreed and the Appellant so desired, to continue in their employ but not beyond the age of 65. The Appellant argued that employment between the age of 60 and 65 is at its pleasure according to the terms of the Fund. Whatever the validity of that term, it is not a term to which the Respondent was bound, as he was not a member of the Fund. The fund is instructive to establish the retirement age applicable at the Appellant and having regard to the rules of the Fund. I am satisfied that the retirement age at which the Respondent is to be retired has to be 65 as that is the age beyond which an employee cannot be retained at the Appellant.

[18] In the circumstances, in doing what it did, notifying the Respondent that he will be retired at the age of 64, the Appellant in fact dismissed the Respondent. There was no agreement that the Respondent would retire at that age. While I have no problems accepting that the age prescribed in the Fund's contract as being the normal retirement age, I am satisfied that this document prescribes the age at which an employee must retire as 65. The added provision that the employment for the period age 60 to 65 is at the whim of the employer is problematic, but it is of no consequence to the Respondent as he is not bound by the terms of that contract. What the Fund's contract does evince is that the normal retirement age at the Appellant can be up to the age of 65.

[19] As the Respondent was dismissed simply because he attained the age of 64, his dismissal was, as correctly found by the court *a quo,* an automatically unfair dismissal as it is one of the listed grounds in s187(1)(7) of the LRA.

[20] In terms of s193(1) of the LRA, the remedy that an employee whose dismissal is found to be unfair may be entitled to reinstatement or re-employment or be paid compensation. Section 193(2) then goes on to provide that the Labour Court or an arbitrator "must" order the employer to re-instate or re-employ an employee whose dismissal was found to be unfair unless certain exceptions set out in that sub-section apply or the reason for the unfair dismissal was only a failure by the employer to follow a fair procedure. The primary remedy that of reinstatement or re-employment does not include any compensation. Reinstatement implies being placed back in the employment from the date of dismissal and the employee is therefore entitled to his full salary from the date of his dismissal to the date he recommences employment. With regard to re-employment, this can be ordered from any date after dismissal and a different date ordered at which the employee must commence rendering his/her services. Payment from the date of reinstatement and between the re-employment date and date of commencing employment again is not compensation but payment of salary for unfair dismissal. This is akin to granting specific performance or similar relief in a contractual dispute.[3]

[21] Where a dismissed employee does not seek reinstatement or re-employment or where reinstatement or re-employment is not an appropriate remedy as provided for in s193(2) of the LRA, or where only compensatory relief is sought for a claim of unfair dismissal or an automatically unfair dismissal, then compensation sought and ordered in terms of the LRA is limited in terms of s194. The limit on compensation for a dismissal found to be automatically unfair is what the dismissed employee would have earned over a period of 24 months. However, before one sets out how to calculate what the appropriate compensation is, it is important to consider what is understood by compensation under the LRA. As a starting point, compensation under the LRA must not be confused or conflated with compensation as understood in the laws of contracts or delict. As pointed out in *Trotman and Another v Edwick*,[4]

[3] See *Equity Aviation Services (Pty) Ltd v CCMA and Others* [2008] 12 BLLR 1129 (CC).
[4] 1951 (1) SA 443 (A).

> *'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he had sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony had been diminished by such conduct should be restored to him."*[5]

[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he has suffered.[6] The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not to be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.

[23] Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a *solatium*[7] and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated.[8] The *solatium* must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising[9] the employer. It is

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[5] At 449 B-C.

[6] An employee who has been subjected to an unfair labour practice or unfairly dismissed and who has immediately found other better employment suffers no loss but may still be entitled to compensation under the LRA.

[7] This was first raised in *Johnson and Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC) with regard to procedurally unfair dismissals.

[8] The LRA and the EEA in matter such as this give effect to the fair labour practice right entrenched in the Constitution of the Republic of South Africa Act 108 of 1996.

[9] We do not need to enter into the debate on whether or not *solatium* contains a penal element suffice to say that the monetary prejudice the employee suffers must equate to some form of a punitive element but not a penalty in the context of criminal and criminal procedural laws. Compare S Vettori "The Role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals" PER/PELJ 2012 (15)4 102/231-123/231 when he says *"The cap on compensation for automatically unfair dismissal is double that of "ordinary dismissal", namely 24 months' salary as opposed to 12*

not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

[24] The determination of the quantum of compensation is limited to what is "just and equitable".[10] The determination of what is "just and equitable" compensation in terms of the LRA is a difficult horse to ride. There are conflicting decisions regarding whether compensation should be analogous to compensation for a breach of contract or for a delictual claim. In my view, and as I said earlier, because compensation awarded constitutes a *solatium* for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action (ie action *injuriarum*) for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a *solatium* because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA. In *Minister of Justice & Constitutional Development v Tshishonga (Tshishonga),*[11] this Court in an award of *solatium* referred to the delictual claim made under the *actio iniuriarum* for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but were not limited to:

> *'…the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's*

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months' salary. Perhaps this could be construed as an intention on the part of the legislature to introduce a punitive element in the amount of compensation awarded for automatically unfair dismissals since these reasons for dismissal seem to be morally reprehensible and repulsive to our sense of justice." At 109/231.

[10] The LRA provides that the amount of compensation ordered must be "just and equitable".

[11] [2009] 9 BLLR 862 (LAC) and the cases cited therein.

humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place…'.[12]

[25] The above *dictum* should serve as an appropriate guideline in determining what is just and equitable compensation that can be awarded under s194(3) of the LRA.

[26] The next issue is whether the Respondent's dismissal was also an act of unfair discrimination as contemplated by s6 of the EEA and if so, is the Respondent (i) entitled to claim under both the LRA and EEA and do so in a single action; and, (ii) entitled to separate remedies under both Acts for what is effectively a single wrongful act by the employer.[13]

[27] There is also no bar for an employee to claim "compensation" for an automatically unfair dismissal based on being discriminated against under the LRA and to claim "compensation" for being unfairly discriminated under the EEA, and to do so in a single action. All evidence led in support of each of the claims will be the same. In the circumstances, not only is it expedient to institute one action but a party who institutes two separate claims could, if it seeks to lead same evidence in two separate actions, face a costs order for not combining the two claims in a single action.

[28] Turning to the entitlement to seek remedies in terms of both Acts: the remedies provided for in terms of the LRA for an automatically unfair dismissal is compensation which the court finds to be "just and equitable" but limited to maximum of what the claimant would have earned while in the employ of the employer for a period of 24 months.[14] The remedy provided for under the EEA is also what the court finds to be "just and equitable" but there is no statutory limit to the amount of compensation that the court may order the employer to pay.[15]

[12] At para 18.
[13] In respect of the first part, I am of the view that the court *a quo* correctly concluded that the respondent's dismissal was also an unfair act of discrimination based on his age and as contemplated in s6 of the EEA.
[14] S194(3).
[15] S50(2) (see footnote below).

[29] Where a dismissed employee seeks reinstatement or re-employment and is granted that relief, that employee will still be entitled to "compensation" for the claim formulated under the EEA because reinstatement or re-employment is to undo the effects of an unfair dismissal and has nothing to do with the discrimination itself. However, where compensation is the relief sought for the unfair dismissal, then the position is entirely different because, firstly, compensation sought under the two Acts is for a single wrongful conduct by the employer and secondly, the meaning ascribed to compensation under the LRA is, in my view, the same as would apply to the concept of compensation under the EEA. There is in fact no pressing need in the circumstances of the case to differentiate between the meanings attached to compensation in the two Acts. In so far as an employee may have suffered a loss as a result of being discriminated, he is also entitled to claim damages under the EEA as the EEA provides for an employee to claim both compensation and damages.[16]

[30] Where claims are made both in terms of the LRA and the EEA and the court is satisfied that the dismissal was based on unfair discrimination as provided for in the LRA and that the employee was unfairly discriminated in terms of the EEA, the court must ensure that the employer is not penalised twice for the same wrong.[17] In seeking to determine compensation under the LRA and the EEA, the court must not consider awarding separate amounts as compensation but consider what is just and equitable compensation that the employer should be ordered to pay the employee for the humiliation he/she suffered in having his/her dignity impaired. The employee's automatically unfair dismissal is so labelled because it is based on a violation of his constitutional right (in this case not to be discriminated on the basis of his

[16] Section 50(2) of the EEA provides that:
"If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-
a) Payment of compensation by the employer to that employee;
b) Payment of damages by the employer to that employee;…

[17] See also *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) where the court held that a party is not entitled to claim twice in respect of a single wrongful act by a respondent.

age) and his claim under the EEA is for exactly the same wrong that of being discriminated on the basis of his age.[18]

[31] In *Wallace v Du Toit* ("Wallace"),[19] the Labour Court correctly noted the duplication of compensation where the act of unfair discrimination under the EEA is the same act of discrimination on which the claim of automatically unfair dismissal under the LRA is based. In this respect, the Labour Court in *Wallace* made the following observations:

> '*It seems to me that where a solatium is claimed or awarded under the ambit of compensation to compensate for the automatic unfairness of the dismissal, which in this situation embodied the unfair discrimination, and such claim is made in addition to a claim for damages for unfair discrimination arising out of the same facts then there is a duplication that works unfairly against a respondent which a court must be careful to avoid'.*[20]

[32] The Labour Court erred in *Wallace* in conflating damages with compensation. It should have referred in the passage quoted above to "a claim for compensation" and not "a claim for damages".

[33] Where there is a single action with claims under the LRA and the EEA based on the employee being discriminated against and the court is satisfied that there has been an automatically unfair dismissal and that the employer's action also constitutes a violation of the EEA, it must determine what is a just and equitable amount that the employer should be ordered to pay as compensation. In arriving at this determination, the court should not consider separate compensation under the LRA and the EEA but what is just and equitable for the indignity the employee has suffered. In doing this, it may take various factors into account *inter alia*, as set out in *Tshishonga,* additionally, including but not limited to the position held by the employee within the employer's establishment, the remuneration he earned, how reprehensible and offensive was the employer's conduct, how if at all did it affect the employee and what motivated the wrongful conduct by the employer to act as

[18] Compare *SA Airways (Pty) Ltd v Jansen Van Vuuren and Another* (2014) 35 ILJ 2774 (LAC) paras 48-62 for a detailed discussion of the issue of unfair discrimination on the basis of age .
[19] [2006] 8 BLLR 757 (LC).
[20] At 764 C-D; para 20.

it did etc.[21] If the claim is under the LRA only, the court must, if the amount determined by the court to be just and equitable exceeds the threshold set in s194(3) of the LRA, reduce the amount of compensation to bring it within the limitation provided in s194(3). The amount will not have to be reduced though if, like in this matter, the claim is brought under both the LRA and the EEA because there is no limit prescribed to the amount of compensation that can be awarded under the EEA. The importance of this is that the employee's right to claim under both the EEA and the LRA is recognised and given effect to while at the same time the employer is not being penalised twice for the same wrong as a single determination is made as to what is just and equitable compensation for the single wrongful conduct.

[34] Turning then to what is just an equitable compensation, the Labour Court determined that compensation should amount to R420 000.00 which is what the Respondent would have earned over a 12 month period in the Appellant's employ. As the Labour Court exercised a discretion in determining "just and equitable" compensation, it is not open to this Court to interfere in the exercise of that discretion unless the discretion was not properly exercised. The factors that play a role in determining fair compensation are therefore of relevance.

[35] In this matter firstly, the Respondent was asked to leave one year before he attained his retirement age having worked there on the last occasion for nine years. While the Respondent persists that he expected to retire at age 65, this is difficult to tie-in with his averment that he did not want to be a member of the pension fund because the period of membership from the date he commenced his employment (at age 56) to his retirement (at age 65) would be too short to build any beneficial surplus. Secondly, the Respondent was one of the most senior members of the Appellant's staff and the Appellant acknowledged this. Additionally, the Appellant always took into account that the Respondent was an original shareholder of the Appellant. It was in fact this acknowledgement that works both in favour and against the Appellant. It works in favour of the Appellant because the Appellant was seeking what it thought was the most dignified way in which to end the Respondent's

[21] See also *SA Airways (supra)* paras 82-84.

employment: It is clear from the evidence that the Respondent was not meeting the targets set for him or providing the service expected of him. In order to address this, the Appellant first decided that perhaps a change of environment might reinvigorate the Respondent. To this end not only did it transfer the Respondent to Nelspruit but also met the Respondent's demand for an increase in remuneration to meet the higher costs of living associated with the move.

[36] When the Respondent failed to be of any benefit in Nelspruit but became an obstacle in developing the Nelspruit branch, the Appellant brought the Respondent back to Richards Bay and the Respondent retained the increased salary although costs of living would now have reduced. On his return to Richards Bay, Respondent continued to fail to meet the required standard of performance and the Appellant was faced with a choice of counselling the Respondent. Because of Respondent's age and seniority, the Appellant believed that the Respondent might find taking that route infra dig. The Appellant's frustration with the Respondent also became evident when it decided not to replace the car damaged by the Respondent and it sought for the Respondent to use his own vehicle and claim the costs of use thereof.

[37] In the circumstances, Appellant was genuinely of the view that the early retirement was a more dignified way of ending the Respondent's employment than taking corrective action against the Respondent who was not only more senior to most of the staff and directors in Appellant's employ but was one of the founding shareholders of the Appellant. In taking this route, the Appellant erred because our Labour laws are very clear: the employer must deal with what is the real issue between it and its staff and not, no matter how honourable the intention may be, use another untrue reason to end the employment relationship.

[38] Appellant's conduct offensive as it was to the Respondent was not intended to be that. It did cause the Respondent in his advanced age to feel distressed and humiliated and that is why I say that although the Appellant believed that he was being benevolent, its action had the opposite effect on the Respondent. Taking all of the above into account and the fact that what the

Respondent sought was to continue for a further 12 months to attain what he believed to be his retirement age, I am of the view that the award of 12 months' salary as compensation amounting to a substantial sum of R420 000.00 is not unreasonable, though I might have been a little less generous. This amount thus constitutes the total compensation that the Respondent is awarded both in terms of the LRA and EEA for the discrimination he suffered at the hands of the employer, the Appellant.

[39] Turning then to the Respondent's claim for damages under s50(2)(b) of the EEA. In this respect, the Labour Court was of the view that it was not prepared to allow the Respondent any damages in addition to compensation. The Respondent sought for the Labour Court to postpone the matter to allow it to lead evidence in respect of the damages, this was refused and I see no reason to interfere with that decision. The Respondent failed to make out a case to be granted such an indulgence even if the Appellant did not object to it. Furthermore, the Respondent failed to indicate what the loss was that it had suffered in respect of which he intended to lead evidence. The Respondent, in the alternative sought payment in the sum of R134 254.00 this being the amount he said that he would lose as a result of cashing in his retirement policy a year before it was due.

[40] The Respondent failed to prove that it actually suffered the loss of R 134 254.00. All that he produced were letters indicating that that would be the amount he would lose if he cashes his policies a year before time. In the absence of proving that he in fact suffered that loss, he is not entitled to be granted that amount as damages. The court *a quo,* in my view in those circumstances, correctly dismissed the claim for damages brought under the EEA.

[41] In the circumstances, I make the following order:

(i) The appeal is dismissed with costs, and

(ii) The cross-appeal is dismissed with costs.

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Waglay JP

I agree

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Ndlovu JA

I agree

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Coppin JA

APPEARANCES:

FOR THE APPELLANT: Adv O A Moosa SC

Instructed by Cox Yeats Attorneys

FOR THE RESPONDENT: Adv M M Poseman

Instructed by Riaan Kruger Attorneys