

FAIRNESS OF TERMINATION OF EMPLOYMENT DUE TO OLD AGE

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTERS DEGREE IN LABOUR LAW**

**MARIUS H. A. RIEGER
(STUDENT NUMBER: 94120260)**

SUPERVISOR:

PROF S. R. VAN JAARVELD

2012

UNIVERSITY OF PRETORIA

TABLE OF CONTENTS

Page

CHAPTER 1: INTRODUCTION

A.	GENERAL	5
B.	BACKGROUND	6
C.	OBJECTIVES AND OUTLINE	
1.	Objectives	7
2.	General Outline	7
3.	Approach Adopted	8

CHAPTER 2: PRINCIPLES REGARDING AGE DISCRIMINATION

A.	INTRODUCTION.....	10
B.	DEFINITION OF DISCRIMINATION.....	10
C.	DIRECT AND INDIRECT DISCRIMINATION	11
D.	EXCEPTIONS TO UNFAIR DISCRIMINATION (PERMISSABLE DISCRIMINATION)	
1.	Introduction	12
2.	Inherent Requirements of a Job	13
3.	Reaching of Normal or Agreed Retirement Age	14
4.	Age Discrimination by Agreement	14
5.	Testing of Employees	16
E.	CONCLUSION	17

CHAPTER 3: THE INTERPLAY BETWEEN UNFAIR DISMISSALS AND AUTOMATICALLY UNFAIR DISMISSALS

A.	INTRODUCTION	18
B.	REQUIREMENTS IN TERMS OF THE CONSTITUTION	
1.	Application of the Bill of Rights	19
2.	Equality	19
3.	Freedom of Trade, Occupation and Profession	20
4.	Labour Relations	20
C.	CASE LAW REGARDING AGE DISCRIMINATION	20
D.	REQUIREMENTS FOR FAIRNESS OF DISMISSAL	
1.	Introduction	26
2.	Pre-employment Dismissals / Repudiation Before Employment Commences	26
3.	Unfair Dismissal	30
4.	Automatically Unfair Dismissals	30
5.	Exceptions to Automatically Unfair Dismissals	41
6.	Code of Good Practice: Dismissal – Schedule 8	43

E.	EMPLOYMENT EQUITY ACT REQUIREMENTS	
1.	Introduction	44
2.	Different Forms of Discrimination	46
F.	CONCLUSION	48

CHAPTER 4: PROCEDURES AND REMEDIES IN REGARDS OF AGE DISCRIMINATION

A.	PROCEDURE IN REGARDS OF AUTOMATICALLY UNFAIR DISMISSALS	51
B.	ONUS / BURDEN OF PROOF.....	52
C.	REMEDIES IN TERMS OF SECTION 193 OF THE LRA	53
D.	CONCLUSION	54

CHAPTER 5: THE IMPACT ON SOCIAL SECURITY

A.	INTRODUCTION	56
B.	UNEMPLOYMENT	
1.	Definitions.....	57
2.	Old Age Benefits	57
C.	IMPACT OF AMENDMENTS OF SOCIAL SECURITY AMENDMENT ACT	58

CHAPTER 6: COMPARATIVE SURVEY

A.	INTRODUCTION	59
B.	ENGLAND	
1.	Unfair Dismissal in General	59
2.	What is Age Discrimination	60
3.	Forms of Dismissal	60
4.	Procedure	61
5.	Potentially Fair Reasons	61
6.	Which Defences are Available to Discrimination on the Grounds of Age	62
7.	What Retirement Age do the Regulations Allow?	63
8.	Automatically Unfair Dismissals	64
9.	Remedies and Compensation	64
10.	Case Law on Age Discrimination	65
11.	Conclusion	66
C.	THE UNITED STATES OF AMERICA	
1.	Introduction and Applicable Principles	66
2.	What Enforcement / Remedies Exist	69
3.	Are There any Specific Exceptions in US law?	70
4.	Retirement Ages	70
5.	Important Cases	71
6.	Conclusion	72

CHAPTER 7: SUMMARY AND CONCLUSION

A.	INTRODUCTION	73
B.	UNFAIRNESS IN AGE DISCRIMINATION	
	1. Procedural Fairness / Unfairness.....	73
	2. Substantive Fairness / Unfairness.....	76
C.	CREATION OF NEW LEGAL TERMS	
	1. “Automatically Unfair Constructive Dismissals”	77
	2. “Automatically Unfair Labour Practices”	77
ANNEXURES:A – BIBLIOGRAPHY		78
	B – CASE LAW	79
	C – SUMMARY	82

CHAPTER 1

INTRODUCTION

A. GENERAL

It is inevitable, logical and human for any affected applicant to claim the maximum amount that may be awarded when he / she has been wronged. In labour law, the legislature has, so to speak, “trusted it’s gut feelings” by creating law that ensures that any discrimination based on any arbitrary ground may be sanctioned more severely than any other basis or reason for dismissal which is unfair. These discriminatory, unfair reasons for dismissal for dismissal are termed “automatically unfair dismissals” and are dealt with the Labour Relations Act and the Employment Equity Act mostly, although the right not to be unfairly discriminated against is enshrined in the Bill of Rights of Constitution.

This dissertation will look into the reasons for this double penalty / sanction, the fairness thereof, the manner in which our tribunals and courts interpret the applicable legislation, how the commissioners and judges apply this legislation, how they balance the walk on the “legal tightrope” between (mere) unfairness and automatic unfairness by concentrating on one such discriminatory ground, namely old age.

Although discrimination regarding age obviously protects children as well, this dissertation will only focus on discrimination due to old age. The reason why old age is chosen as the single focus point herein, is due to the relatively recent amendment to the age at which males may retire in terms of the Social Assistance Amendment Act and especially since the progressive reduction in such retirement age from 65, to 63, to 61 and eventually to 60 in four declining stages. This opens the “labour law door to the rooftops of our tribunals and courts” to where applicants may easily run and shout “discrimination” and “automatic unfair dismissal”.

This further creates a need for presiding chairpersons at disciplinary inquiries, facilitators at consultations, commissioners in conciliations and / or arbitrations and Judges in our Labour Courts or High Courts to ensure that they know and understand the applicable legislation and that they need to tread carefully on the extremely fine line between fairness and automatic unfairness or non-discriminatory and discriminatory reasons for dismissal.

A pre-supposition is made, namely that in the most cases stated herein, no clear contractual term/s existed wherein the exact retirement age of employees is / was agreed to prior to commencement of employment or immediately upon commencement of employment.

B. BACKGROUND

In the employment sphere, eventually everyone needs to stop working. Although certain people prefer to retire at an early age, others choose to work for as long as possible, especially due to the uncertainties of financial, political and social aspects the future may hold. Unfortunately labour legislation in the Republic of South Africa (hereinafter referred to as “the RSA”) does not deal directly with the issue of retirement age. What is clear, however, is that no one may be unfairly discriminated against merely because of his age¹.

With the enactment of the Labour Relations Act, Act 66 of 1995 (hereinafter referred to as “the LRA”) since 11 November 1996, a new dimension has been added to unfair dismissals, namely “automatically unfair dismissals”. Although the legislature obviously intended a clear, unambiguous and decisive distinction between (mere) unfair dismissals and automatically unfair dismissals, our tribunals and Courts have found it not so easy a task to always keep what has now become two parallel and separate legal terms, apart from each other².

The fact that our legislature has however created this “great divide”, which is clearly substantiated by the relatively huge difference in remedies³ for each type / category of dismissal, has however made it easier for commissioners and judges to substantiate what might otherwise have seemed atrociously unfair sanctions when they have ruled that a dismissal was in fact automatically unfair.

Cases of discrimination against any applicant for work or against an employee are mostly referred to the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as “the CCMA”), the applicable Bargaining Council or the Labour Court, as an “automatic unfair dismissal” in terms of S 187 (1) (f) of the LRA.

Dismissals are generally classified into three distinctive categories, namely:

- (i) Pre-employment dismissals;
- (ii) Unfair dismissals and;
- (iii) Automatic unfair dismissals.

These three categories of dismissals will be dealt with in Chapter 3, but the focus will be on the third category in which dismissals of employees based on merely their age will be considered as an automatically unfair dismissal due to the discriminatory grounds thereof.

¹ References to Constitutionally enshrined rights and applicable sections of the relevant Acts will be made in Chapter 3 hereof.

² See also the critical remarks of Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (PPLL) (2012) service issue 23 par 811.

³ Referring to the sanction of a monetary award of:

- up to 12 months’ remuneration (as at date of dismissal) as per S 194 (1) or;
- up to 24 months’ remuneration (as at date of dismissal) as per S 194 (2) of the LRA.

C. OBJECTIVES AND OUTLINE OF DISSERTATION

The essence of this dissertation revolves around a search of the correct procedure that an employer should follow in cases where the employer contemplates dismissing an employee, or rather, to term it more softly, to terminate an employee's services due to the fact that the employee has reached a reasonable retirement age in the specific practice. As centre point of this legal study, the LRA's Code of Good Practice: Dismissal, Schedule 8 items 1 and 4 is pivotal and crucial.

The key principle in the Code of Good Practice: Dismissal is that employers and employees should treat one another with mutual respect, with a premium being placed on both employment justice and the efficient operation of (the employer's) business⁴.

The preamble of the Social Assistance Amendment Act, Act 6 of 2008 reads as follows: "*To amend the Social Assistance Act, (Act 13 of) 2004, so as to regulate afresh the eligibility of men for an older person's grant...*" The Social Assistance Amendment Act's amending of retirement age for men and its impact on the labour market in the RSA will be elaborated upon hereinafter.

1. Objectives

- (i) Attempting to bring the impact of the Social Assistance Amendment Act to the attention of South African Employers, Employees and the State;
- (ii) Highlighting the need for Employer's to tread carefully when dealing with aspects which may easily be deemed to be automatically unfair;
- (iii) Looking into "the abyss" between awards of 12 months' and 24 months' Remuneration; and
- (iv) Reaching a fair conclusion by applying the Tests of Fair Substance and Fair Procedure.

2. General Outline

The essence of the problem which this dissertation aims at dissecting, is the following: when is dismissal automatically unfair because of age?

As soon as an employee proves⁵ that his/her contract of service has been terminated (for purposes of this dissertation) based on / due to old age, or if the employer does not place dismissal (or if we accept that the reference to

⁴ Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2012) service issue 23 par 795.

⁵ S 192 (1) of the LRA.

“termination of employment” can be used as well), then the onus shifts⁶ to the employer to prove not only that such dismissal was not unfair, but that it was not automatically unfair⁷.

Since it is relatively easy to convince a commissioner / panellist / arbitrator, on a (mere) balance (or rather, on a preponderance) of probabilities, that terminating an employee’s contract of service was due to him/her reaching a certain age (assuming of course that this is factually the case), and there being no (duly signed and witnessed) written contract of employment clearly regulating retirement at a specific age, then it is merely a matter of convincing such presiding commissioner / panellist / arbitrator, that the dismissal is discriminatory and in the opinion of the referring party (employee) a breach of his/her Constitutional rights to be treated fairly. From there it depends if the employee is aware of the concept of “automatically unfair dismissal”, or not, but a commissioner / panellist / arbitrator should connect the dots on behalf of the employee and at some stage, once again depending on how well the employer seems to be aware of the concept of “automatically unfair dismissal” and the remedies provided to such commissioner / panellist / arbitrator⁸, warn (or at least thoroughly inform) the employer of the “double” risk that such employer faces if a ruling is made in favour of the employee.

Due to the general practice of CCMA’s, Bargaining Councils, as well as private arbitrators or mediators, not (automatically) allowing legal representation in arbitrations⁹, the responsibility of commissioners is even higher dealing with matters wherein the gist of claims are grounds for an automatically unfair dismissal.

Just as calling a spade a spade, does not necessarily make it a spade, “labelling” a dispute “automatically unfair” should not vest in the labelling thereof, but the facts should be very carefully considered to establish if the unfairness, is (unfortunately so for the employer) one which is based on a Constitutionally enshrined right, thereby warranting / justifying any judge of the Labour Court¹⁰ to remedy the unfair dismissal by fairly utilising the remedy which the Labour Relations Act provides.

3. Approach Adopted

The approach followed in this dissertation is to place focus on how our courts interpret and apply the tools which the LRA provides commissioner / panellist /

⁶ S 192 (2) of the LRA.

⁷ S 187 (1) of the LRA.

⁸ In terms of S 194 (3) of the LRA.

⁹ According to Rule 25 of the CCMA Rules, similarly applied in Bargaining Councils. See however *The Law Society of the Northern Provinces v Minister of Labour, Minister of Justice and Constitutional Development*, et al, decided in the North Gauteng High Court, Pretoria, case no: 61197/11, reported on 15/10/2012.

¹⁰ In terms of S 191(5)(b)(i) of the LRA, all automatically unfair dismissal disputes may only be conciliated in the CCMA or relevant Bargaining Council, but such alleged automatically unfair disputes must be adjudicated in the Labour Court. Also see *Wardlaw v Supreme Moulding (Pty) Ltd* (2004) 25 ILJ 1094 (LC).

judges¹¹ to issue a “double penalty / double sanction” and specifically to investigate if the parallel concept, namely “automatically unfair labour practice” has already earned a place in our labour law, but only needs to be phrased as such and written into our Labour Relations Act. A study will therefore be done hereby to ascertain if, and how regularly of late, our tribunals and Courts indeed imposes such “double sanction” relating to discrimination based on old age where an employment contract existed, or did not come to be specifically due to age discrimination.

Furthermore, should our legislature provide much more clarity on it’s (the legislatures’) reasoning for providing a double sanction [by means of S 194 (3)], for dismissals that are regarded to be automatically unfair? Should it not be for our Courts to have to attempt to interpret the legislature’s reasoning?

Lastly, in attempting to narrow the great divide between (mere) unfair dismissals and automatically unfair dismissals, the insertion of “intention to discriminate” in the description of “automatic unfair dismissals”, is suggested by writer hereof as a possible solution to the huge uncertainty that currently exists in the RSA’s jurisprudence.

CHAPTER 2

PRINCIPLES REGARDING AGE DISCRIMINATION

A. INTRODUCTION

It inevitably seems obvious that discrimination is unlawful, unless it can be justified either by specific a law or by our common law.

The first starting point is to establish if there is a statutory definition of age discrimination.

B. DEFINITION OF DISCRIMINATION

Discrimination may be described as the unfair and unequal treatment of an employee by his employer in comparison to other employees on grounds of gender, sex, race, colour, language, political belief, religion, age, pregnancy, and so forth¹ and may take place in a direct or indirect manner. The list is not a closed, limited list of grounds.

In an interesting decision the Supreme Court of Appeal² differed from the Labour Appeal Court by saying that discrimination must be proven, it can not be inferred from the facts. The case related to an employee that had assaulted a manager; but naturally the story is much more complicated. The employee had been the victim of an assault himself previously, but because he had not lodged a complaint or a grievance, no disciplinary action was taken in respect of the previous incident. Even though his dismissal was not automatically unfair (as the Labour Appeal Court had found, because it found that the inconsistency was based on racial grounds), the differential treatment of the two employees was sufficient to render the employee's dismissal unfair³.

A question that begs an answer, is whether or not intent or intention should become an element, if not the core definitive element, of "automatic unfair dismissals". Currently, the decision of whether a dismissal is (merely) unfair, thereby affording the successful party up to 12 months' compensation (or reinstatement⁴, or whether the dismissal is automatically unfair, thereby affording the successful party up to 24 months' compensation (or reinstatement)⁵, is merely based on issues which our society labels to be discriminatory grounds,

¹ Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* issue 23 par 829.

² *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala* (2008) 29 ILJ 267 (SCA).

³ IR Network Today, week ending 04th July 2008: *Discrimination and inconsistency*.

⁴ In terms of S 194 (1) of the LRA.

⁵ In terms of S 14 (3) of the LRA.

without there being any objective test to ascertain if there was indeed a discriminatory intent with the employer or person acting in a justified capacity or a capacity to be able to justify vicarious liability. In short, our Constitution's labelling (by naming certain grounds) as constitutionally protected rights (including the right not to be discriminated upon due to age), is not enough to penalise an employer double as harsh as normal, if it is found that the reason for terminating an employee's contract of service, is due to one of such Constitutionally protected rights, such as age.

S 5 of the LRA protects employees against discrimination. In fact, this section extensively expands the general perception of what is deemed to be discrimination, by also referring to words such as: do, or threaten to do, require, prevent, prejudice, advantage, or promise to advantage. In general, S 5 is seen as the statutory protection against victimisation or discrimination against any of the rights conferred by the LRA, including the right not to be discriminated against due to an arbitrary ground such as age. This protection is extended to job seekers⁶. Various legislative provisions have been implemented since 1993 to prohibit discrimination expressly, although job discrimination was regarded as an unfair labour practice during the previous labour dispensation⁷.

An employee's right to protection against discrimination is recognised internationally. The International Labour Organisation (hereinafter referred to as the "ILO), to which the RSA is a member, renders specific protection to employees against discrimination in terms of the Convention concerning Discrimination in respect of Employment and Occupation⁸. The Convention aims to achieve equality in employment through the elimination of discrimination⁹.

C. DIRECT AND INDIRECT DISCRIMINATION

The EEA seeks to prohibit both direct and indirect discrimination. Direct discrimination is relatively easy to recognise — this form of discrimination usually arises where an employer draws a distinction between employees on one or more arbitrary grounds (such as sex or race). Indirect discrimination is less easy to recognise — it exists where an employer applies a criterion that is, on the face of it, neutral, to all employees or prospective employees, but the application of that criterion has the effect of discriminating between certain groups of employees or potential employees. The requirement that a prison guard comply with certain physical attributes, such as height and weight, may be indirectly discriminatory against women — even though the employer may try to rely on the defence that these discriminatory requirements are related to the inherent requirements of the job.

⁶ S 5 (2) and (3) of the LRA.

⁷ Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* service issue 23 par 828.

⁸ ILO Convention 111 of 1958 and ILO Convention 156 of 1981.

⁹ Van Jaarsveld and others *Principles and Practice of Labour Law* issue 23 par 830.

The courts have explained the distinction as follows:

*"Direct discrimination is generally easily recognizable as it involves a direct differentiation between the two sexes. For example, an employer follows a policy of remunerating a female employee on a lower scale simply because she is a woman, whereas a male employee is remunerated at a much higher scale for the same work. Indirect discrimination, on the other hand, is usually a more veiled form of discrimination and is not always easily recognizable. In simple terms this form of discrimination may be defined as the imposition of a gender-neutral condition but which has a disproportionate impact on one sex."*¹⁰

In ***Adriaanse and Swartklip Products***¹¹ the employer required a Standard 8 certificate for a post. The employee did not have the required qualification, but, as a contract-worker, had been doing the work for some time. But the employer could not indicate that the qualification was required for the job itself. The Commissioner found that the employee had been unfairly discriminated against.

D. EXCEPTIONS TO UNFAIR DISCRIMINATION (PERMISSIBLE DISCRIMINATION)

1. Introduction

The LRA¹², together with the EEA¹³ lists 3 permissible grounds as exceptions to unfair discrimination (in other words the following exceptions are recognised by the LRA regarding dismissals that would otherwise be automatically unfair), *viz*:

- (i) a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job¹⁴; and
- (ii) a dismissal based on age will be fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity¹⁵.
- (iii) where measures and practices are adopted and implemented to protect and advance employees or groups of employees disadvantaged by unfair discrimination in the past ("affirmative action")¹⁶. This ground is not relevant to this discussion.

However, it is suggested in practice that two more exceptions exist, namely:

- (iv) by agreement; and
- (iv) testing of employees.

¹⁰ Association of Professional Teachers and another v Minister of Education and others [1995] 9 BLLR 29 (IC).

¹¹ [1999] 6 BALR 649 (CCMA).

¹² S 187 (2) (a) and (b).

¹³ S 6 (2) (a).

¹⁴ S 187 (2) (a) of the LRA; *Ntsangani v Golden Lay Farms* 1992 ILJ 1199 (IC).

¹⁵ S 187 (2) (b) of the LRA; *Rubin Sportswear v SACTWU* 2004 ILJ (LAC).

¹⁶ S 6 (2) (b) of the EEA; S 9 of the Constitution.

2. Inherent Requirements of a Job

The Employment Equity Act 55 of 1998 does not define the phrase "inherent requirements of a job". The phrase was first formulated by the International Labour Organisation in Convention 111 of 1958 (Discrimination in Employment and Occupation Convention), where it was stated that any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".

The inherent requirements of a job is essentially a defence that the employer can seek to rely on when faced with charges of unfair discrimination — the employer will, in such a case, probably admit that there was discrimination, but will seek to justify that discrimination on the grounds of the inherent requirements of the particular job.

It has been suggested that the criteria used in English law be used for judging whether or not the employer's reliance on the inherent requirements of the job is a valid defence. These include considerations as to whether the reliance on the inherent job requirements is authentic, whether there is a need to preserve privacy and decency, and also considerations relating to the nature of the employer's organisation or the part of the organisation in which the work is being done.

Discrimination on the basis of sex (and, to a more limited extent race) may be justified by reference to the inherent requirements of the job: it would, for example, not be discriminatory for an employer to insist that the role of a woman in one of Shakespeare's plays be performed by a woman. Privacy and decency may relate to situations such as the often cited example from American law: male nurses could not work in a maternity hospital (in spite of the presence of male gynaecologists). However, a reliance on privacy and decency may be used by the employer as a mask for unfair discrimination on the basis of sex — generally speaking, discrimination based on sex is only a valid form of discrimination when the essence of the business operation would be undermined by not hiring members of only one sex.

The employer may also want to argue that the inherent requirements of the job entail continuous service — a requirement such as this may discriminate against pregnant women¹⁷.

In *Lagadien v University of Cape Town*¹⁸ the employer indicated a preference for a tertiary education in an advertisement for the post. The applicant was interviewed, but another person, holding tertiary qualifications was preferred. The preferred interviewee could not take up employment, and the post was re-advertised. The applicant argued that she was unfairly discriminated against solely on the basis of her lack of a tertiary education. The Labour Court held that the requirement of a tertiary education constituted fair discrimination as it was an inherent requirement of the job.

¹⁷ See, for example, *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC).

¹⁸ (2000) 21 ILJ 2469 (LC).

3. Reaching of Normal or Agreed Retirement Age

A dismissal based on age may be fair if the employee has reached the normal or the agreed retirement age for persons employed in that capacity. The leading decision on this point is ***Rubin Sportswear v SACTWU and Others***¹⁹. After being transferred from one employer to another, the new employer unilaterally imposed a retirement age of 60 years. The new employer argued that the employees had reached their “normal” retirement age, and that the dismissal was therefore not automatically unfair. On the facts of the case, the Labour Appeal Court held that the new employer had no right to unilaterally impose a new condition of employment on the employees concerned because their terms and conditions of employment did not include a ‘normal’ retirement age — the new employer was attempting to unilaterally introduce a new condition of employment.

4. Age Discrimination by Agreement

For most employees, the day of their retirement can hardly come soon enough: the prospect of no longer having to brave the morning rush hour, the idea of being able to sleep late (which, after a lifetime of early mornings, may well turn out to be virtually impossible) or even the mere thought of not having to respond to the employer’s slightest whim and fantasy. And in most cases, an employee’s retirement age is fairly well settled: either in the employee’s individual terms and conditions of employment, the employers’ policy manual or retirement documents, and, of course, the rules and provisions of the pension plan.

In some exceptional cases, however, employees would like to continue working past their normal retirement age and when they are then compelled to leave the employer’s service, they claim that they have been unfairly dismissed. Almost invariably, this dismissal is alleged to have been automatically unfair, because, the argument goes, the dismissal is related to a discriminatory ground, namely age. S 187 of the Labour Relations Act does, however, provide that it will not constitute an automatically unfair dismissal if the employee’s services are terminated because of the fact that the employee has reached his or her “normal” retirement age.

However, in ***Wanless v Fidelity***²⁰ things were slightly different. The employee had worked for one company since 1978. In 2001, the company was taken over by another (Fidelity). Naturally, there was some confusion and adjustments to synchronise the custom, culture, practices and policies of the two companies. Mrs Wanless’s employment contract provided that her employment would terminate automatically without notice on her reaching the company’s compulsory retirement age of 60 years, but even though she was approaching 60 years, Mrs Wanless did not want to retire, she wanted to retire at the age of 65. It seemed that the employees who had been working for Fidelity before the

¹⁹ (2004) ILJ 1671 (LAC).

²⁰ (2000) 21 ILJ 2469 (LC).

takeover (and those appointed by Fidelity after the takeover) retired at the age of 65.

There were a number of incidents relevant to this case. Ms Wanless alleged that the group human resources had indicated, in some way, that she would be allowed to work until the age of 65, but she also took up the matter with the managing director himself. From the various statements the managing director made, Mrs Wanless got the impression that she would be allowed to continue working past the age of 60 years. In about April 2005, she bought a car in terms of a five-year credit agreement; naturally, she said, she would not have incurred this debt if she had known that she would be forced to retire at the age of 60.

Mrs Wanless was, however, informed in November 2005 that she would be retiring in January 2006. She was shocked, and the employer offered her a one-year fixed term employment contract. There were some exchanges between the employer and the employee, but eventually her employment was terminated and she was instructed to leave.

Before the Labour Court, Mrs Wanless argued that Fidelity, her employer, had agreed to extend her retirement age to 65. Alternatively, Fidelity had given her a choice to retire at or after 60 years of age, but no later than 65 years of age. She also argued that she had a reasonable expectation that her employment contract would be renewed until she reached the age of 65.

The challenge she faced was considerable: she had to prove that the formal agreement (the terms of her employment contract) had been cancelled, varied or superseded by the statements and representations made to her by the various managers - or that the employer's customs, practices, culture or policies changed her terms and conditions of employment. The Court found that even on her own version, the statements the other managers made could not be construed as an express agreement to extend her retirement date. Similarly, the employer's customs, culture, practices and policies did not extend employment contracts for the employees of the old company beyond 60 years. In some cases, employees were retained after their retirement date, but this was on a fixed-term basis, for no more than one year. Mrs Wanless could not have had any reasonable expectation of her employment continuing after the age of 60. There was no precedent to support it.

The question of discrimination (on the basis of age) also arose. The argument was that Mrs Wanless was differentiated from other employees and that this differentiation constituted discrimination because it was irrational. But the question was with whom Mrs Wanless was to be compared? Should her position be compared to other employees of the old employer? Or should her position be compared to other employees in the new employer, after the takeover? The Labour Court was not, incidentally, impressed by the way in which Mrs Wanless's representatives had presented the case on discrimination.

The Labour Court concluded that there had been no dismissal: the employee's services terminated, in line with the provisions of her contract, when she reached

the age of 60 years. Given the ill-conceived approach as regards discrimination, however, the Labour Court also awarded costs against Mrs Wanless.

5. Testing of Employees

The EEA places limitations on both medical testing of employees and psychological testing of employees.

The term "medical testing" is defined in S 1 of the EEA to include any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition.

As a rule, S 7 of the EEA prohibits the medical testing of an employee unless it is permitted or required by legislation or it is justifiable in the light of:

- (i) medical facts;
- (ii) employment conditions;
- (iii) social policy;
- (iv) the fair distribution of employee benefits; or
- (v) the inherent requirements of a job.

Testing for an employee's HIV status is also prohibited, unless such testing has been approved by the Labour Court in terms of S 50(4) of the EEA.

S 8 of the EEA also generally prohibits psychological and other similar assessments of employees unless the test or the assessment complies with the requirements set out in that section.

In ***Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v Numsa and Others***²¹ the Labour Court laid down requirements in respect of when the Labour Court would permit an employer to test employees for HIV / AIDS.

E. CONCLUSION

The essence of an automatically unfair dismissal lies in the fact that the dismissal arises in the context of a fundamental right. In the case of a dismissal relating to age, sex, race or any other discriminatory ground, the right not to be unfairly discriminated against, as enshrined in the Constitution and in the Employment Equity Act, comes into play.

The fundamental question remains: what is the real and *bona fide* (justifiable) reason for the employee's dismissal. Each case must be considered on its merits, and the Labour Court will, invariably, carefully look at the employer's motivation for dismissing an employee. This means that employers need to carefully consider why they are dismissing an employee when it seems that there

²¹ (2002) 23 ILJ 391 (LC).

is some possibility that the dismissal may be for an automatically unfair reason. But at the same time, a mere allegation that a dismissal was, for instance, based on pregnancy will not always be sufficient²².

²² Carl Mischke *IR Network* August 2006.

CHAPTER 3

THE INTERPLAY BETWEEN UNFAIR AND AUTOMATICALLY UNFAIR DISMISSALS

A. INTRODUCTION

One of the many grounds on which an employer may discriminate against an employee is the employee's age. Sometimes this discrimination may be hidden: it may for instance be an issue in the recruitment, selection and appointment process. The employer may be reluctant to offer employment to someone older than the employer would like to see occupying the position.

Age discrimination may also play a role in dismissal. If the employer dismisses an employee because of his or her age, the dismissal may constitute an automatically unfair dismissal in terms of S 187(1)(f) of the Labour Relations Act of 1995 (the LRA). But in terms of S 187(2) a dismissal based on age is fair if the employee has reached the 'normal' or agreed retirement age for persons employed in that capacity. The general rule seems clear: if an employer dismisses an employee because of his or her age, the discriminatory dismissal will fall within the ambit of S 187(1)(f), unless the employer is in a position to show that the employee has reached the 'normal' or the agreed retirement age.

If an employee has reached the 'normal' or agreed retirement age, a termination of employment will not constitute a dismissal. In other words, where a contract comes to an end because the employee has reached the agreed or normal retirement age, the tribunals and Courts do not regard the termination as a dismissal within the meaning of the statutory definition of dismissal¹.

It is necessary in each case, however, to first establish if in fact the act of the employer did amount to dismissal *per se*. Therefore it is crucial to first mention the requirements for a fair dismissal:

- (i) the dismissal must qualify as a dismissal in terms of the LRA²;
- (ii) only an employee, as defined in the LRA, is entitled to protection afforded by the doctrine of unfair dismissals³;
- (iii) the reason for the dismissal must be fair⁴; and
- (iv) the procedure (followed in dismissing the employee) must also be fair⁵.

¹ *Schweitzer v Waco Distributors* (1998) 19 ILJ 1573 (LC); *Schmahmann v Concept Communications Natal (Pty) Ltd* (1997) 18 ILJ 1333 (LC); *Coetzee v Moreesburgse Koringboere Koöperatief Bpk* (1997) 18 ILJ 1341 (LC).

² S 186 (1) of the LRA.

³ S 213 of the LRA.

⁴ S 188 (1) of the LRA, which reads:

"A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

- (a) that the reason for dismissal is a fair reason-
 - (i) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements"

⁵ S 188 (1) (b) of the LRA.

Although it is so that all employees have the right not be unfairly dismissed⁶, not every termination of employment is covered by S 185 (a) of the LRA – thus, not every termination is deemed to be an (unfair) dismissal. In other words, S 185 (a) of the LRA only applies to those terminations which are regarded by the LRA as dismissals and which are also regarded to be unfair.

B. REQUIREMENTS IN TERMS OF THE CONSTITUTION (Bill of Rights)

1. Application of the Bill of Rights

S 8 (1) states that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. S 8 (2) confirms that a (any) provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

2. Equality

S 9 (1) states that everyone is equal before the law and has the right to equal protection and benefit of the law. This begs the question: has it not been unfair since the enactment of the Social Assistance Act's creation to discriminate between the age at which men and woman may retire? Political activism for the recognition of woman's rights has almost always been an issue in any state's / nation's history, but "retirement age" never comes up as first or even last thought when one thinks of the agendas of such meetings and rallies. If ever it was, what would most likely have been the woman's outcries:

- (i) *"we demand that we may also only retire at 65 years of age (and thereby lift the financial burden on the State of being able to access social security 5 years earlier than men)";*
- (ii) *or would it have been: "what's good for the goose is good for the gender / what's fair is fair, so amend legislation so that men may also retire at 60 years of age"; and*
- (iii) *or what about being even more fair in their reasoning by stating: "let's have legislation meet us (woman) and them (men) halfway by amending the Social Assistance Act to confirm the age at which either men or woman may retire is 62,5 (or more practical then at 62 or 63 years)".*

In my view either of the 3 options is exactly what S 9 (2) makes provision for, namely "the achievement of equality" by legislative measures.

⁶ S 185 (a) of the LRA.

3. Freedom of Trade, Occupation and Profession

S 22 states that every citizen⁷ has the right to choose their trade, occupation or profession freely. Furthermore, the practice of a trade, occupation or profession may be regulated by law.

4. Labour Relations

S 23 (1): “Everyone has the right to fair labour practices” has an extremely wide ambit.

C. CASE LAW REGARDING “AGE DISCRIMINATION”

Before the specific requirements / grounds for an unfair dismissal is investigated, a few cases provide a background to “dismissals” related to age.

1. *Schmahmann v Concept Communications Natal (Pty) Ltd*⁸

The Labour Court came to the conclusion that if the employer and the employee agree, beforehand, as to what the retirement age will be, the employment relationship terminates at that date. In this case, it cannot be said that the employer dismissed the employee — even though the employer’s obligations in respect of the employee come to an end. The Labour Court held as follows:

‘In my opinion this decision correctly states the law that when one reaches a retirement age, the employment relationship terminates. In my opinion this is so whether it is an agreed age or the normal retirement age. The services are terminated and this termination does not constitute a dismissal. However, if, and I doubt this to be the case as we are not dealing with an unfair labour practice as defined in the Labour Relations Act 28 of 1956, there must be consultation, then in this case there was consultation. The applicant did not indicate at that stage to her employer that she did not wish to retire although she told the court that she would have continued to work for a lesser salary. It was only after she had retired and made contact with the Department of Labour that she felt aggrieved.’⁹

2. *Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd)*¹⁰

In this case the employee continued working beyond the normal retirement age (65) in the company and was dismissed when he was 67 years old. At the time of his dismissal, there were no complaints as to his performance — the employee

⁷ This specific reference to citizens should be interpreted in the broader sense of the word so as to include non-citizens who are deemed to be “legally documented” and working in the RSA with a valid worker’s permit. This case is clearly illustrated by *Discovery Health v CCMA and Others 2008 ILJ 1480 (LC)*.

⁸ (1997) 18 ILJ 1333 (LC).

⁹ This point was confirmed, in passing, in *Coetzee v Moreesburgse Koringboere Koöperatief Bpk* (1997) 18 ILJ 1341 (LC).

¹⁰ (1998) 19 ILJ 1573 (LC).

claimed that his dismissal was based on operational requirements and that the employer had failed to comply with the relevant pre-dismissal procedures. In the alternative, the employee argued that his dismissal was automatically unfair because it was based on age discrimination.

The Labour Court held that there are three questions to be asked in order to ascertain whether the dismissal falls within the scope of S 187(2) - the exception clause:

- (i) whether the employee's dismissal was based on age. If the answer is yes, the next question is:
- (ii) whether there was a normal or agreed retirement age. The answer to this question is not only yes or no, but also what that retirement age is.
- (iii) The third question is simply whether the employee had reached such a retirement age at the time of his dismissal. Because of the answers to these questions (all being answered in the affirmative) the Labour Court held that the employee's dismissal was not automatically unfair.

This decision of the Labour Court is also important because of the fact that the termination of employment in these circumstances does not fall within the ambit of S 186 of the LRA (definition of dismissal) but a termination of employment by the effluxion of time. The Labour Court also concluded that there was no duty on the employer to follow any procedure other than giving the employee the contractual notice of termination.

Even such statutory notice is not an obligation of the employer. In other words, when the employee reaches the agreed retirement age, the contract merely terminates without any prior notification, written or otherwise, by the employer to remind the employee that his contract will be terminating, since same is already stipulated in the contract of employment. It would be cumbersome and unfair to regard the employer to have acted procedurally unfair merely because the employer did not remind the employee that his (the employee's) contract is coming to a natural end.

One could take issue with this view, especially in the situation where the employee continues to work after his or her retirement age - something that is not uncommon. Would it not be possible to argue, in this case, that the ordinary employment contract did come to an end upon the employee's reaching the retirement age, but that the parties concluded a new employment contract (expressly or tacitly)? The employer and the employee, in this view, would have concluded a second contract for the employee's services after retirement, and a termination of this second contract would then fall within the ambit of the definition of dismissal in S 186(1) of the LRA.

3. *Rubin Sportswear v SACTWU and Others*¹¹

This case is the proverbial holy grail of cases which dealt with “old age” / “retirement age” directly in the employment contract and labour law sphere, is. This case is a perfect summary of all the legal aspects which is mentioned in this dissertation and therefore every aspect of the last mentioned case is mentioned and dissected herein below.

This appeal raises the question whether an employer may render a particular age to become the normal retirement age for his employees or a category of his employees as contemplated by S 187(2)(b) of the Labour Relations Act 66 of 1995 ("the Act") by fixing it unilaterally as the retirement age for them.

The facts were (briefly): The appellant and a company called Val Hau et Cie ("Val") concluded an agreement in terms of which the manufacturing part of Val's business was transferred as a going concern to the appellant. That agreement was to take effect on 1 February 2001. This was a transfer of a business as contemplated in S 197(2)(a) of the LRA as it read in 2001. In terms of S 197(2)(a) of the LRA, as it read in 2001, such a transfer of business or part of a business automatically transferred the contracts of employment of the employees of the business transferor to the transferee. The result of such transfer is that in relation to such employees' contracts of employment with the business transferor, the business transferee stepped into the shoes of the business transferor.

Prior to the transaction the appellant had a normal retirement age for its employees, which was 60. Val did not have a normal retirement age nor did it have an agreed retirement age. The second and further respondents were employed by Val for many years until 1 February 2001 when their contracts of employment were automatically transferred to the appellant by operation of law terms of S 197(2)(a). Before the transfer of business could take effect, Val, the appellant and the first respondent – the latter being a registered trade union acting on behalf of, among others, the second to the fifth respondents – concluded an agreement in terms of which they all agreed on 30 January 2001 that the same terms and conditions which Val's employees had enjoyed at Val would apply to all Val's employees being transferred to the appellant's employment. By operation of S 197(2)(a) of the Act the second to the fifth respondents became employees of the appellant on 1 February 2001.

On or about 15 February 2001 the appellant called the second and further respondents and/or the shop stewards and informed them that with immediate effect it was fixing 60 as the normal retirement age for all its employees. This included the ex-Val employees.

It was accepted that the second and further respondents did not agree to the appellant's purported fixing of 60 as the normal retirement age applicable to them as well. The fact that the dispute arising therefrom led to litigation is a clear

¹¹ (2004) ILJ 1671 (LAC).

indication that the respondents rejected the appellant's idea of fixing 60 as the retirement age applicable to them. Subsequent to its conduct of purporting to fix normal retirement age for the employees from Val at 60, the appellant dismissed the second to the fifth respondents on different dates as they turned 60.

The respondents did not accept the dismissal. The respondents made the point that the second to the fifth respondents were still able and willing to perform their work beyond the age of 60 and had thus far been performing it satisfactorily and the appellant had not raised any complaints about their performance. They contended that this was a dismissal on grounds of age in breach of S 187(1)(f) of the Act, which rendered the dismissal automatically unfair.

The appellant, however, contended that the second and further respondents had been dismissed on account of an agreed or alternatively, normal retirement age as provided for in S 187(2)(b) of the Act which, so the appellant contended, rendered the dismissal fair.

A dispute arose about the fairness of the dismissal of the second and further respondents. The resultant dispute was referred in due course to the Labour Court for adjudication. The Labour Court¹² held that there had been no agreed nor normal retirement age in relation to the second and further respondents and that the dismissal was in breach of S 187(1)(f) of the Act and, therefore, automatically unfair. It ordered the appellant to pay the second to the fifth respondents certain compensation but made no order as to costs. The Court *a quo* subsequently granted the appellant leave to appeal to this Court against that order.

It was for the CCMA, then the respective Courts to rule whether such a (unilateral) change was acceptable or not. It was ruled that such change was unfair.

In determining whether a 'normal' retirement age of 60 years applied to the employees in question and what constitutes a normal retirement age, the Labour Appeal Court held that it depends on the meaning of the word 'normal' as used in S 187(2) of the LRA. The Court came to the conclusion '*that the word "normal" as used in S 187(2) really means what is says*'¹³. It would also be conceivable that one employer could have different normal retirement ages for different categories of employees within its workforce. For example, there could be different retirement ages for professionals and for artisans, respectively.

On the facts of the case, the Labour Appeal Court held that the new employer had no right to unilaterally impose a new condition of employment on the employees concerned because their terms and conditions of employment, after the transfer of the business from the old employer to the new employer did not include a normal retirement age - the new employer was attempting to unilaterally introduce a new condition of employment.

¹² per Waglay, J.

¹³ Paragraph 19.

The Labour Appeal Court comprehensively and thoroughly considered the most important legislation, namely the applicable section¹⁴ of our Constitution, as well as S 187(1)(f) of the LRA¹⁵. S 187(2)(b) provides an exception to the general rule created by S 187(1)(f). It reads:

"(2) *Despite subsection 1(f)–*

. . .

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

The respondents' complaint against the dismissal is that it offends against the provision of S 187(1)(f) and that it is, therefore, automatically unfair. The respondents further contend that the appellant's conduct in purporting to unilaterally fix the retirement age at 60 constituted a unilateral change of the second and further respondents' terms and conditions of employment which it had no right to do which was ineffectual in law. In its defence the appellant seeks refuge in the exception created by the provision of S 187(2)(b) and contends that the second and further respondents had reached normal retirement age of 60 when they were dismissed and that, for that reason, the dismissals were fair. The appellant does not contend on appeal that the second and further respondents had reached an agreed retirement age when they were dismissed. Accordingly, what needs to be determined is whether there was a normal retirement age of 60 that was applicable to the second and further respondents. If there was not, that is the end of the appeal. If there was there may or may not be further issues to consider.

It was accepted by all concerned that the second and further respondents' terms and conditions of employment at Val did not include any provision to the effect that their normal retirement age was 60. It was also accepted that those terms and conditions of employment did not include any provision for an agreed retirement age. Accordingly, it follows that in law Val could not have dismissed the second and further respondents on the basis that they had reached an agreed or normal retirement age for persons employed in the capacity in which they were employed. In terms of the agreement concluded between the appellant, Val and the first respondent on 30 January 2001 as well as in terms of S 197 of the Act the terms and conditions of employment which the Val employees, including the second and further respondents, enjoyed at Val before the transfer were to continue to apply to them after the transfer. The effect of this was that there was no agreed or normal retirement age applicable to them

¹⁴ S 9.

¹⁵ which reads: (1) "A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to s 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 . . .age . . ."

immediately before the appellant purported to unilaterally fix 60 as the normal retirement age for them.

The question that arises is whether the appellant could render 60 to be the normal retirement age for the second and further respondents by simply declaring unilaterally that 60 was their normal retirement age. In acting as it did, the appellant was seeking to in effect introduce a new condition of employment into the terms and conditions of employment of the second and further respondents. In law it had no right to do that without the second and further respondents' consent. The appellant's conduct in purporting to unilaterally fix 60 as the normal retirement age for the former Val employees, including the second and further respondents, was a breach of their terms and conditions of employment which it had taken over from Val by reason of S 197(2)(a) and of the agreement of 30 January. It was a breach of their contracts of employment in that regard because, with their contracts not containing any clause or provision fixing a retirement age, it was implicit in their contracts of employment that their contract of employment could not be terminated in the absence of a fair reason and age could not *per se* be a fair reason for their dismissal. Such conduct constituted a repudiation of the second and further respondents' contracts of employment.

The repudiation gave the second and further respondents an election either to accept it or to reject it and hold the appellant to the terms and conditions of their contracts of employment. In this matter the second and further respondents chose the latter course. Accordingly, the purported change of their employment terms and conditions was unlawful, wrongful and of no legal effect.

There is an additional basis on which the matter can be dealt with which relates to whether the appellant's conduct did make 60 the normal retirement age for the second and further respondents. The appellant's attorney accepted, correctly in my view, that, if the appellant's conduct did not render 60 the normal retirement age, the appeal must fail. Of course, he submitted that the appellant's conduct did render 60 the normal retirement age for the second and further respondents.

The Labour Appeal Court was unable to uphold the appellant's contention that by unilaterally fixing 60 as the retirement age of all its employees, including the second and further respondents, 60 became the normal retirement age for such employees. What is normal retirement age depends upon the meaning to be accorded the word "normal" in S 187(2)(b). The word is not defined in the Act. It, accordingly, must be given its ordinary meaning.

The Labour Appeal Court, per Zondo, Judge President, stated: *'In my view a certain age cannot suddenly become a normal retirement age for employees or for a certain category of employees simply because the employer wakes up one*

*morning and decides that he wants a certain age as the normal retirement age for his employees or for a certain category of his employees.*¹⁶

The employer had some options: it could either have engaged in a consensus-seeking process with the employees to establish an agreed retirement age, or, as a result of long practice, a certain age becomes the 'normal' retirement age. The employer could have instituted a lock-out, the Court added, to force the employees to agree to 60 as the retirement age'.

The Labour Appeal Court dismissed the appeal, agreeing with the Labour Court that the dismissal of these employees were automatically unfair because the dismissals were based on their age.

D. REQUIREMENTS FOR FAIRNESS OF DISMISSAL

1. Introduction

The new labour dispensation confirmed the fundamental requirements for a valid dismissal identified in the previous dispensation, namely:

- 1.1 procedural fairness¹⁷; and
- 1.2 substantive fairness¹⁸.

However, a new dimension has been added which, although intended to effect greater legal certainty and simplicity, has made the new system more complex and technical¹⁹. A number of new grounds which constitute automatically unfair dismissals are now specifically provided for in the Labour Relations Act²⁰.

2. Pre-employment Dismissals / Repudiation before Employment commences

In terms of S 185 of the LRA, employees enjoy protection against unfair dismissal. The question as to who is an employee has always been a vexed question in our law: at present, our courts use the 'dominant impression' test to ascertain whether an applicant is indeed an employee, an independent contractor or something else, for example a director of a company, a partner or a member of a close corporation.

¹⁶ Paragraph 22.

¹⁷ S 188 (1) (a) of the LRA.

¹⁸ S 188 (1) (b) of the LRA.

¹⁹ For example, provision has been made for different categories of dismissals, each with their own procedures and remedies.

²⁰ S 187 of the LRA; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* issue 23 par 794.

In **Swart / Mr Video (Pty) Ltd**²¹ an employee was not appointed to a post because, the employer stated, she was 28 years old instead of 25 (as required by the text of the advertisement). The employer sought to justify its non-appointment of the applicant on the basis of age. The CCMA Commissioner found that the employer had not only unfairly discriminated on the basis of age, but also on the basis of marital status and family responsibility (the job applicant was married with children). The main thrust of the employer's case was what it saw as the inherent requirements of a job: the salary was low and therefore suited to young people starting a job for the first time and the fact that the employee would have to accept instructions from a younger person and an older person might be reluctant to accept instructions from a younger person. These, the CCMA commissioner held, did not amount to inherent requirements of the job.

The most recent decision on the test for distinguishing between an employee and an independent contractor is **SABC v McKenzie**²². The fact that only employees are protected against unfair dismissal has, of course, led to considerable problems of jurisdiction - the CCMA can, for instance, proceed with a conciliation of an unfair dismissal dispute if (and only if) the applicant is indeed an employee.

In view of the fact that only someone who qualifies as an 'employee' enjoys protection against unfair dismissal, it appears, at first sight, to be nonsense to talk about pre-employment dismissal. However, the question has arisen as to when a person becomes an employee: when he or she agrees to the employment, signs a letter of appointment, signs the employment contract, or when he or she begins working?

From a contractual perspective, of course, it is worth bearing in mind that, technically speaking, someone who has been dismissed is no longer an employee. However, our law changes this common law rule by providing specifically for remedies relating to the unfair termination of employment. There is no such clarity in respect of when employment begins. Often a clause in an employment contract will specify when the contract or when the employment commences, but there may not be such a clause; even if there were, disputes may still arise. The contractual issue here is that of offer and acceptance: whether the employer's offer had been accepted by the employee. As a rule, once an offer has been accepted, it cannot be revoked.

Woolworths (Pty) Ltd v Beverley Whitehead²³ is one of the best-known and one of the most controversial decisions ever handed down by the Labour Appeal Court. The importance of this case lies in the fact that it deals with issues such as discrimination on the grounds of pregnancy. The applicant was not appointed to a post; she argued that the employer's failure to appoint her was based on the fact that she was pregnant.

²¹ (1998) 19 ILJ 1315 (CCMA).

²² (1999) 20 ILJ 585 (LAC).

²³ 2001 ILJ 511 (LAC).

One of the issues before the Labour Appeal Court was whether the employer could change its mind:

“In that event the question that arises is whether, between the date of the interview and the date of the taking of the final decision by the employer on which of the candidates he gives the job to, an employer is not entitled to change his mind about which candidate he thinks is the best for the job. Clearly, an employer is entitled to change his mind between those two events provided he has not yet made an offer to anyone of the candidates. In my judgment it is irrelevant whether the change of mind is due to his own reconsideration of issues or whether he has spoken to a colleague or an adviser. The fact of the matter is that the period between the interview and the taking of the final decision is for the employer to consider all the candidates – their strengths and weaknesses as well as what his/her business requirements are before he makes the final decision to give the job to one of the candidates or, indeed, not to give the job to anyone of the candidates.” (at paragraph [22] of the judgment).

The Labour Appeal Court’s judgment in this case focused on other issues — it does not devote much attention to the issue of when employment starts. However, before the matter got to the Labour Appeal Court, a judge in the Labour Court had considered the issue in some detail.

In the Labour Court, the Court held that it is not sufficient for an applicant to prove that a contract of employment had been concluded. The fact that there was an employment contract merely means that the applicant has a contractual claim, but it does not mean that the applicant is an employee for the purposes of protection in terms of the LRA. The contract of employee comes into existence, the court held, at the point where the employer’s offer is accepted, but the LRA’s protection only comes into effect at the point in time where the applicant ‘actually commences her performance or at least tenders performance in terms of the contract’ (paragraph [7]).

In ***Jack v Director-General Department of Environmental Affairs***²⁴ the employee received a letter of appointment and resigned his position in order to take up the new job. The day before commencing work with the new employer, however, the employee was told that there had been an administrative error and that his appointment had been cancelled. The settlement between the parties (reached before the matter went before the Labour Court) provided that the employee would be employed for a one year period only. The remaining issue before the court was the issue of costs: one of the points raised by the employer in this regard was that the person was not an employee because he had not yet rendered services and had not yet been remunerated - this meant, argued the employer, that the Labour Court did not have jurisdiction to order payment of costs. The Labour Court rejected this argument, ordering the employer to pay the employee’s legal costs.

²⁴ [2003] 1 BLLR 28 (LC).

More recently, the issue of termination of the relationship before the employee tenders or renders services was at issue in **Wyeth SA (Pty) Ltd v Manqele and Others**²⁵. The employee was offered a position as sales representative. A written employment contract was concluded on 15 March 2000, providing that the employment was to commence on 1 April 2000. But before 1 April, however, the employer informed the employee that it was no longer prepared to employ him. The reasons for this related to a motor vehicle: according to the employer it was agreed that the employee could purchase a new motor vehicle; used vehicles were not allowed. However, the vehicle selected by the would-be sales representative turned out to be used. The employer regarded this as being a serious misrepresentation.

The 'employee' referred the matter to the CCMA, and one of the jurisdictional issues raised before the CCMA was whether the person was an 'employee'. The CCMA concluded that he was, by virtue of the employment contract, and the employer sought to have the award reviewed and set aside on that point.

The Labour Court held as follows:

'The interpretation of the definition of "employee" adopted in **Whitehead v Woolworths (Pty) Ltd** necessarily consigns a person such as the first respondent, who is an employee party to a valid contract of employment to become effective on a later date, to a jurisprudential limbo unless and until that party physically renders services in terms of that contract. Persons in these circumstances may well have resigned from their existing employment and put themselves at considerable financial risk in the expectation of commencing work in terms of an agreement that is binding on both parties at common law. To deny the statutory protection of the security of employment conferred by the LRA in the interregnum between the conclusion of a valid contract of employment and the physical commencement of work seems to me to be contrary to a purposive interpretation of the definition of "employee".

A less literal approach to the statutory definition of employee is further justified by the extent of the constitutional protection of employment rights. S 23(1) of the Constitution provides that "everyone has the right to fair labour practices". The choice of the word "everyone" was deliberate; other constitutional labour rights extend to a "worker".

A person who is an employee party to a binding contract of employment is obliged to commence work, and entitled to receive remuneration on the date that the parties agree that these respective rights and obligations will commence. In my view, the term "employee" as defined in S 213 of the LRA and the requirement that a person "work" for another to be an employee extends to a person who is contracted to work.' (paragraphs [20]-[22]).

The Labour Court rejected the employer's review application.

²⁵ 2005 ILJ 749 (LC).

While this point in our law appears to be unsettled, the decision of the Labour Court in the *Wyeth SA (Pty) Ltd v Manqele and Others* case is extremely persuasive. One of the very few decisions to deal exactly with this point, its approach is perhaps preferable over the literal and technical approach of the Labour Court in the first Woolworths decision. It is also clear, especially on the facts of this case, that there is a lot at stake, especially for the employee. An employee would suffer considerable prejudice if he or she were to resign from one position in order to take up another, only to find that the employer does not intend to comply with the provisions of the employment contract. It should be borne in mind, however, that the unfair dismissal protection (as it was extended in the Wyeth decision) is only one option at the disposal of the employee - he or she could always approach either a civil court (or the Labour Court in terms of S 77 of the Basic Conditions of Employment Act) on the basis of breach of contract. This option is of huge importance, since the claimant in a civil matter is not limited to claim 12 months' remuneration, or possibly 24 months' remuneration as it is limited to in the CCMA or a Bargaining Council²⁶.

3. Unfair Dismissal

Dismissals that are normally regarded to be unfair, are mostly referred in terms of S 186 (1) (a), whereby "dismissal" means that "*an employer has terminated a contract of employment with or without notice*".

However, as soon as the dismissal is deemed to be unfair based on any arbitrary ground, such as old age, then such dismissal is dealt with under S 187, which is discussed directly herein below.

4. Automatically Unfair Dismissals

4.1 Introduction

The LRA describes an "automatically unfair dismissal" as follows (as far as it is applicable to this dissertation):

- "A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to S 5²⁷ or, if the reason for the dismissal is- ...*
- (a) *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"...*

²⁶ S 194 (1) and (3).

²⁷ Of the LRA (which confers protections relating to the right to freedom of association).

The concept of “automatically unfair dismissals” is adopted from English law²⁸. The LRA provides²⁹ that if an employee is dismissed for any of the seven reasons (and which writer hereof adds that such list is not a conclusive list), such dismissal will be automatically unfair and the employee will be entitled to a higher amount of compensation, namely 24 months’ remuneration³⁰. Thus, if any of the reasons for automatic dismissal are present, the Labour Court has no option but to confirm the unfairness of the dismissal, unless either of the two defences (exceptions / permissible grounds) are proven by the employer. An unqualified acceptance of this approach may give rise to various legal technical problems. It is difficult to understand why a dismissal in this instance is called “automatically unfair” if it is disputed by an employer. Perhaps it is a misnomer and the name (or reference) intended was “fundamental unfair dismissals” referring to the alleged breach of constitutional labour rights or derivatives thereof.³¹

I agree with Van Jaarsveld and others³² that “*it is difficult to understand why a dismissal in this instance is called “automatically unfair” if it is disputed by an employer*”. I also agree that it is “*...a misnomer and the name intended was **fundamental unfair dismissals** referring to the alleged breach of constitutional labour rights or derivatives thereof*”. I suggest that the term “automatic unfair dismissal” should rather be referred to as “discriminatory dismissals”.

4.2 Harris, L v Bakker and Steyger (Pty) Ltd³³

The applicant was aged 68 and was in good health. He had been employed by one or more of the group of companies of which the respondent was a part. The applicant reached the retirement age of 65 on 1 April 1990, but it was agreed that he would continue his employment. According to the applicant the group managing director promised that he would have a job as long as he was capable of performing it.

The applicant continued his employment as depot manager until the end of 1991 when a restructuring of operations led to the closing of the depot, at which stage, according to the respondent's managing Director (MD), the applicant would have been retrenched had it not been for the intervention of the group MD. The applicant accepted a position as sales representative at a much reduced salary but with commission.

The whole group of companies began to suffer losses as a result of the recession and a retrenchment process was set in motion. The applicant was given two and a half months’ notice on 15 October 1992 until the end of December 1992.

²⁸ Van Jaarsveld and others *Principles and Practice of Labour Law* Issue 23 par 811; See eg. Honeyball and Bowers *Textbook on Labour Law* (2002) 7th ed 161-165; Whincup *Modern Employment Law* (1997) 9th ed 155.

²⁹ in S 187 (1).

³⁰ in terms of S 194 (3) of the LRA.

³¹ Van Jaarsveld and others *Principles and Practice of Labour Law* Issue 23 par 811.

³² Van Jaarsveld and others *Principles and Practice of Labour Law* Issue 23 par 811.

³³ (1993) ILJ 1553 (IC).

It was argued for the applicant that he was unfairly retrenched because of a total lack of consultation and insufficient notice. The respondent's argument was that the applicant was not retrenched, strictly speaking, but was asked to take his retirement which the respondent was entitled to insist on as long as he was given fair notice. The respondent further submitted that the fact that this came about during the course of laying off staff for economic reasons did not entitle the applicant to the rights and benefits of retrenchees. The court held that when an employee reaches retirement age, the employer may demand that he (the employee) actually takes his retirement. In such event the employee's employment is terminated by effluxion of time and no consultation is required. Where the employer has agreed to retain the employee's services beyond the agreed date for retirement, but can at a later stage no longer afford to do so, the employer retains the right to demand from the employee to take his retirement. It cannot be said that the employer either forfeited or waived his rights simply because he agreed to retain the employee's services, unless of course the parties specifically agreed otherwise. In order for it to be fair, the decision of the employer to exercise that right must be *bona fide* and the employee must be given reasonable notice. That was the position in this case and the application was accordingly dismissed.

I agree with the Court's reasoning and finding that the employee (applicant's) contract of employment came to a natural end due to an effluxion of time, as agreed and for no other reason. Our tribunals and Courts should, in my opinion, be extremely careful when this seems to be the facts, but when applicants attempt to persuade tribunals or Courts otherwise in a *mala fide* attempt to acquire 24 months' compensation by "tainting" the reason for dismissal as one of discrimination and unfair treatment of the employee!

4.3 Botha v Du Toit Vrey and Associates³⁴

This is a very important case in which our Labour Court considered the issue of automatic unfair dismissal due to old age. The facts were: When the services of the applicant were terminated by the respondent on 30 June 2003, he was 66 years old. He had been engaged by the respondent as an appraiser assistant since 1 September 1995. The reason advanced by the respondent for his dismissal was that the respondent was of the view that the applicant had already reached his retirement age in October 2001 and that the time had come for his services to be terminated on the basis of his age.

The applicant referred a dispute about an automatically unfair dismissal in terms of S 191(5)(1)(b)(ii) of the Labour Relations Act 66 of 1995 ("the Act"), read together with S 187(1)(f) of the same Act, to this court (Labour Court) alleging that he was discriminated against because of his age.

³⁴ Labour Court case number: JS 749/03, reported on 17 May 2005.

According to him he was entitled to work until he himself decided to retire or when he became unable to work as so many appraisers in the field continued to work until very late in life.

Apparently the nature of the work is not physically demanding and in that particular occupation one does not see as many changes as in other fields. In South Africa, a dismissal based on an employee's age would be regarded as fair provided "the employee has reached the normal or agreed retirement age for persons employed in that capacity (see S 187(2)(b) of the Act).

The respondent contended that the termination of the applicant's services was indeed fair since there was a tacit or implied agreement between the parties that the age of 65 years would be the applicant's retirement age. In the alternative it was contended that 65 years was the "normal" retirement age for assistant appraisers.

The respondent pleaded that it was its policy that the normal retirement age of employees would be 65. The last and only retirement prior to that of the applicant was the retirement of Mrs van Niekerk who retired in 2002 at the age of 65. There was also evidence led by Mr du Toit (a partner) that Mrs van Niekerk and her husband were going on a caravan trip together.

According to the respondent, the fact that the applicant's continued his employment well beyond his 65th birthday, was for humanitarian considerations. At any time after the applicant attaining the age of 65, the respondent contended, it was entitled to terminate his services. The applicant was handed a letter wherein he was given notice that his retirement date had been fixed by the respondent as 31 July 2003. Reference was also made in the same letter to the fact that on 2 October of that same year he would be 67 years old and that he had already reached the retirement age when he became 65 years old.

This letter was also preceded by a meeting held (on 15 April 2003) between the two partners of the respondent, the applicant and a secretary (Mrs van den Berg). At the meeting the declined income of the deceased estates department of the respondent was discussed. It was felt by the respondent that the applicant should endeavour to get more businesses for the firm by approaching executors' houses and the like. Mention was also made of the fact that he should send out advertisements. In evidence Mr du Toit said that the applicant made no efforts to comply with these suggestions.

The applicant's main function was the administering of deceased estates. It was stated at this meeting (15 April 2003) that should matters not approve the deceased estates department of the respondent would have to close down. Evidence was also led by the respondent that there was a decline in work. The applicant believes that there was an ulterior motive behind his dismissal or it was not really necessary for him to be dismissed.

It was common cause between the parties that appraisers practise their professions until very late in life. Examples were given of octogenarians who were still in practice. Mr du Toit, one of the two of the respondent's partners, testified that he was turning 64 himself this year. He explained that whereas it was open to him and the other partner in the close corporation partnership, to work beyond the retirement age of 65, the same did not apply the employees of the partnership. He emphasised that the applicant was an assistant appraiser as opposed to a learner appraiser. He could therefore not be registered as a proper appraiser. As such he was employed by the Municipality where the retirement age, he said, was 65 years and in the municipal sector that was the normal retirement age. The applicant was also employed by the former City Council of Johannesburg.

From Mr du Toit's evidence the impression was that he resented the applicant's failure to qualify himself further and that he did not do enough to attract more work to the respondent's deceased estates department. In the four months prior to the termination of the applicant's services, only one deceased estate was dealt with by the aforesaid department, said Mr du Toit. He also made mention of the applicant's temper that was becoming shorter. This Mr du Toit attributed to old age. Judge Revelas stated that he formed the view that while listening to Mr du Toit's testimony, that the reason for the applicant's dismissal was not because he had reached the retirement age but rather for reasons relating to his work performance and the respondent's operational requirements.

Instead of embarking on a process of counselling or a consultation process with the applicant, the respondent simply invoked the question of the applicant's retirement age. The question to decide was whether the respondent was entitled to do so and whether the manner in which it did so, was fair.

It is common cause that none of the partners ever told the applicant that his retirement was 65 years of age. The employment contract between the applicant and the respondent was an oral one. Save for Mrs van Niekerk, there is no example of someone employed by the respondent who left their services when or because they became 65 years old.

On the above facts, there was clearly no agreement that the retirement age was 65. The applicant's 65th birthday came and went. Not a word was mentioned of retirement. Does this mean that the applicant could continue to be employed by the respondent until he (the applicant) terminated the agreement? The answer to this question must be no. In the absence of an agreed retirement age, the respondent was entitled to determine the applicant's retirement age at the standard or normal retirement age in the field he was working in. On the facts of the matter this age is 65. That age is also consistent with the normal retirement age in many other sectors in this country where appraisers are employed and otherwise. Whereas it is indeed so that appraisers are often literally capable of working until their death, such a choice could not be imposed on such an assistant appraiser's employer. For obvious reasons persons in private practice who run their own businesses, may

very well work until they choose to retire. Unfortunately the same does not apply to their employees. It would not be fair to expect of an employer to keep an employee in its employ indefinitely. Judge Revelas agreed with counsel for the applicant, that much benefit can be derived from keeping elderly persons in the job market beyond retirement age, the decision to do so falls within the managerial prerogative and is not a question which is to be decided by the employee. Accordingly, the respondent was entitled to rely on a retirement age of 65, based on the retirement age set in the municipal sector for this particular profession, namely that of an assistant appraiser. The employee's consent is not required in such a case, there being no agreement.

What concerned Judge Revelas is the question that his retirement age was not discussed even after his 65th birthday. He continued to work after that age. There was no agreement between the parties on an extended retirement age either. In such circumstances some form of consultation is required, and so demands the decrees of fairness.

Obviously such a consultation process would not have the same purpose as the contemplated in S 189 of the Act, namely to avoid dismissal. The employer should have raised the question of retirement with the employee concerned, and discussed some possible dates which could be determined as the date of retirement. In certain situations one can imagine that alternatives to an immediate retirement date could be discussed. This opportunity was not open to the applicant.

In the view of Judge Revelas it seemed very unfair to present an employee, such as the applicant with a notice terminating his services within one month without any prior discussion.

Whereas the termination of the applicant's services were substantively fair, he should be entitled to compensation because the termination of his services was procedurally flawed. Since the respondent was permitted to act in law as he did, and the applicant's services would be terminated eventually, consultation may not have changed the position much. The lack of consultation before an inevitable event does not warrant substantial compensation. The purpose of the consultation needed in this matter was to avoid surprise and indignation, not to save the applicant's job. I also have to consider the fact that no employee can reasonably expect, in the absence of an agreement on retirement, to be employed for purposes of his or her convenience and for an indefinite period. The Act also does not prescribe any procedure to be followed before a retirement age is announced, but for the reasons set out above, I believe there should be one.

Compensation equal to three months' remuneration was deemed appropriate and was ordered to pay the applicant's costs.

4.4 *Rockliffe v Mincom*³⁵

The applicant sought relief against the respondent, on the basis that it was guilty of effecting an automatically unfair dismissal. The basis of that argument was that the respondent had terminated applicant's employment due to his age. The basis upon which this court found jurisdiction arise from the provisions of S 191(5)(b)(i). The said section provides:

"the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is automatically unfair."

The Labour Court held that the applicant bore the onus of proving that his dismissal amounted to unfair discrimination. The respondent did not dispute the dismissal, but argued that it was justified in that the applicant had reached the applicable retirement age.

S 187(2)(b) of the Labour Relations Act 66 of 1995 states 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.

It being common cause that the applicant's age was the reason for his being dismissed, the dismissal would be automatically unfair unless proved to be justified. In other words, a presumption arises that an unfair discrimination had taken place.

The court briefly, and correctly so, summed up the applicable sections of the LRA that were applicable in this case:

"The respondent submits it has a justification for such a dismissal. Ostensibly the provisions of S 187 (2) (b). S 187 (1) states:

"a dismissal is automatically unfair if . . . the reason for the dismissal is—"

S 187(1)(f) states:

"that the employer unfairly discriminated against an employee directly or indirectly, on any arbitrary ground including but not limited to . . . age."

S 187(2)(b) states:

"despite sub-s (1)(f)–

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

I must mention that this is the justification that the respondent wishes to defend the dismissal. It can only do so by presenting evidence to prove that 65 years is a normal or agreed retirement age (see SA Clothing – Textile Workers Union and Others and Rubin Sportswear (2003) 24 ILJ 429 (LC).

S 192 states:

³⁵ (2008) 29 ILJ 399 (LC).

- (i) *in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.*
- (ii) *if the existence of the dismissal is established the employer must prove that the dismissal is fair.*

*The matter before me is a dismissal claim, alleged to be automatically unfair in that the applicant was unfairly discriminated. In **Kroukam v SA Airlink (Pty) Ltd**³⁶ Davis AJA said the following:*

"In my view s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place (my underlining)."

In this matter it is clear that the termination arose based on the applicant's age (letter dated 6 May 2005, letter of applicant, letter of respondent dated 24 June 2005).

*In **City Council of Pretoria v Walker**³⁷, the court held:*

"This court has consistently held that differentiation on one of the specific ground referred to S 8(2) give rise to a presumption of unfair discrimination."

According to Davis AJA in the Kroukam matter, once there is credible possibility, then it behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in S 187 for constituting an automatically unfair dismissal (paragraph [28]). This I agree with.

Applying the test set out in Walker's decision, age is one of the specific ground, then the presumption arise that an unfair discrimination has taken place. That age is the basis in this matter is almost beyond doubt".

The Court accepted the respondent's evidence regarding the company's policy on retirement, and dismissed the application.

4.5 Cash Paymaster Services v Brown³⁸

The respondent had been employed by Datakor and his conditions of employment included a clause providing that his retirement age was 65. He had made all his financial plans on the basis that he would retire at 65. Datakor was transferred to the applicant company as a going concern and the respondent's contract of employment was consequently automatically transferred to the company. At the time the company had no specific retirement age. The respondent signed two documents indicating that he accepted the terms and conditions of employment of the company. Neither of these documents had a

³⁶ 2005 26 ILJ 2153 (LAC) at par 28.

³⁷ 1998 (3) BLLR 257 (CC).

³⁸ (2006) 27 ILJ 281 (LAC).

retirement clause, but both provided that the provisions of the staff manual could be amended by management. Some two years later a new clause was added to the staff manual which provided that the retirement age at the company was 60 years. The respondent immediately protested to management, and several meetings followed. The company refused to budge and insisted that the respondent would be required to retire when he reached 60. The company did, however, offer the respondent a fixed-term contract, which was subject to certain conditions, until he attained the age of 65. The respondent rejected this offer, firstly, because he believed his contract of employment would only terminate when he reached 65, and secondly, because the contract provided for one month's notice for cancellation thereof. The respondent's services were finally terminated when he reached the age of 60. The Labour Court found the respondent's dismissal to have been automatically unfair and awarded him compensation.

Before the Labour Appeal Court the company contended that the reference in S 187(2)(b) of the LRA 1995 to 'normal or agreed retirement age' contemplated that, if the normal retirement age occurred before the agreed retirement age, the dismissal of an employee on the basis of having reached the normal retirement age would be fair.

The court found that there was no merit in the company's contention. The retirement age dispensation provided for in S 187(2)(b) 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. It would make no sense for the Act to make provision for an agreed retirement age if such an agreement would not be binding on the employer if there were a normal retirement age for employees employed in the relevant capacity.

The company contended further that the respondent had signed two documents which incorporated all the rights and obligations of the parties and that, since they did not provide for a retirement age, the intention of the parties was that there was no agreed retirement age at the time. The court rejected this argument as well. Immediately before the respondent signed the two documents there was in law an agreement between the company and the respondent that he would retire at 65. The company had failed to discharge the onus of proving that, either in terms of the documents or in terms of the evidence of the surrounding circumstances leading to the conclusion of the agreements, the parties agreed to do away with the agreed retirement age of 65 or the respondent waived his contractual right to retire at 65. Accordingly, the respondent's conduct in signing

the documents did not have in law the result that he gave up his contractual right to retire at 65.

The company also contended that the two documents gave it the discretion to amend the terms and conditions of employment of employees to whom the staff manual applied without seeking their further consent. The court agreed with the Labour Court that the introduction of a new term relating to retirement age was not an 'amendment' of an existing condition of employment as contemplated in the two documents.

The appeal was accordingly dismissed with costs.

4.6 *UCT v Auf der Heyde*³⁹

The decision of the Labour Appeal Court in this case leaves the law of unfair discrimination in a state of less certainty than before and introduces elements that are potentially deeply problematical. The ostensible effect is to uphold appointments which, though irregular, were intended as affirmative measures. The unsuccessful litigant belonged to a group which, historically, was the major beneficiary of racial discrimination. A measure of judicial activism, even some rough justice, may not seem inappropriate in redressing historical imbalances.

There may, however, be unintended consequences. The law of employment equity represents both an experiment in social engineering and a finely balanced set of socio-economic and political compromises. On the one hand it makes affirmative action mandatory at least for medium and large employers. On the other hand it prohibits dismissal or 'absolute barrier(s)' to the employment or advancement of 'people who are not from designated groups', 44 ie white males without disabilities. The compromise is by no means ideal and will no doubt undergo development and refinement. This very process, however, presupposes ongoing commitment by all role-players to make it work. The national consensus needs to be replicated at enterprise level in affirmative action policies providing a degree of certainty to all concerned. Not only should they offer adequate prospects of advancement to potential beneficiaries; they should offer sufficient security for those who feel threatened by affirmative action (and often possess a disproportionate share of technical expertise) to ensure continued cooperation. Where such policies have been arrived at, they need to be implemented carefully and sensitively.

This did not happen in the present matter. The agreed policy was disregarded. Whatever sense of common purpose may have been invested in it can only have been weakened. The LAC, rather than upholding the policy, effectively sanctioned its breach. Any precedent which this may have set should be corrected.

³⁹ (2002) 23 ILJ 658 LAC.

4.7 Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others⁴⁰

In this case Wallis AJ concluded that he was not obliged to follow an LAC ruling because it rested on a finding which had been rejected by the Constitutional Court. It is suggested above that the findings of the LAC in the present matter may likewise be at odds with the approach of the Constitutional Court to the prohibition of unfair discrimination. To this extent the Labour Court may be at large to consider the issues afresh.

The essence of an automatically unfair dismissal lies in the fact that the dismissal arises in the context of a fundamental right. In the case of a dismissal relating to sex, age, race or any other discriminatory ground, the right not to be unfairly discriminated against (enshrined in the Constitution and in the Employment Equity Act of 1998 comes into play. The same consideration applies in the case of dismissal for reasons relating to the employee's age.

Certain forms of dismissal are therefore seen as automatically unfair because of the reason for the dismissal - the unfairness does not lie in the pre-dismissal procedures, but, seen generally, that the employer is in some way infringing an employee's fundamental rights by dismissing him or her.

But what is the real issue with automatically unfair dismissals? It is not the case that there is any real, conceptual difficulty with understanding these forms or reasons for dismissal. The real issue is that, from the employer's perspective, the dismissal concerned usually relates to misconduct or even operational requirements. No employer will willingly engage in an automatically unfair dismissal - at this stage of the game, the risks attached to an automatically unfair dismissal (the possibility of two years' remuneration) are well known. It is more a case of the stated reason for a dismissal (misconduct) and what appears to be the real reason for the dismissal once analysed by the Labour Court.

What may seem, at first glance, to be nothing more than a dismissal for misconduct, incapacity or operational reasons may, on closer inspection, fall within the ambit of an automatically unfair dismissal.

S 187 of the LRA contains a list of automatically unfair dismissals:

A dismissal based on discriminatory grounds (such as race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility) would be automatically unfair.

This is the original list of automatically unfair dismissals. Two specific forms of automatically unfair dismissals, arising in very exceptional circumstances, were added in 2002:

⁴⁰ [2007] BLLR 1097 (CC).

(i) The first is where the dismissal also constitutes a contravention of the Protected Disclosures Act of 2000 — in other words, if the employer has dismissed an employee because the employee has blown the whistle (and that protected disclosure falls within the ambit of the Protected Disclosures Act); and

(ii) The second specific automatically unfair dismissal, added in 2002, relates to transfer from one employer to another — S 187 (1) (g) says cryptically that it would be an automatically unfair dismissal if the reason for the dismissal was related to a transfer, or a reason related to a transfer from one employer to another in terms of S 197 or 197A.

5. Exceptions to Automatically Unfair Dismissals

5.1 Introduction

The following exceptions are recognised by the LRA regarding dismissals that would otherwise be automatically unfair:

- (i) a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job⁴¹; and
- (ii) a dismissal based on age will be fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity⁴².

These two grounds are further extended by a third exception when discrimination is alleged, namely:

- (iii) where measures and practices are adopted and implemented to protect and advance employees or groups of employees disadvantaged by unfair discrimination in the past (“affirmative action”)⁴³.

S 187 (2) contains two exceptions, and one of these relates to age. A dismissal based on age may be fair if the employee has reached the normal or the agreed retirement age for persons employed in that capacity.

5.2 *Rubin Sportswear v SACTWU and Others*⁴⁴

This is the leading decision on this point. After being transferred from one employer to another, the new employer unilaterally imposed a retirement age of 60 years. The new employer argued that the employees had reached their “normal” retirement age, and that the dismissal was therefore not automatically unfair. On the facts of the case, the Labour Appeal Court held that the new employer had no right to unilaterally impose a new condition of employment on the employees concerned because their terms and conditions of employment did not include a ‘normal’ retirement age - the new employer was attempting to

⁴¹ S 187 (2) (a) of the LRA; *Ntsangani v Golden Lay Farms* 1992 ILJ 1199 (IC).

⁴² S 187 (2) (b) of the LRA; *Rubin Sportswear v SACTWU* 2004 ILJ (LAC).

⁴³ S 6 (2) (b) of the EEA; S 9 of the Constitution.

⁴⁴ (2004) 25 ILJ 1671 (LAC).

unilaterally introduce a new condition of employment. An important newer decision on this point is **Cash Paymaster Services (Pty) v Browne**⁴⁵: here the employer also sought to unilaterally reduce the employee's retirement age from 60 to 65 after a transfer and then force the employee to resign. The dismissal was held to be an automatically unfair dismissal.

5.3 Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd)⁴⁶

This case contains a valuable interpretation of S 187 (2) of the LRA. The fundamental question remains: what is the real reason for the employee's dismissal. Is it a case of misconduct, as the employer may argue, or is it in reality based on discrimination, pregnancy or because of the employee's trade union activities? Each case must be considered on its merits, and the Labour Court will, invariably, carefully look at the employer's motivation for dismissing an employee. This means that employers need to carefully consider why they are dismissing an employee when it seems that there is some possibility that the dismissal may be for an automatically unfair reason. But at the same time, a mere allegation that a dismissal was, for instance, based on pregnancy will not always be sufficient. The decision of the Labour Court in **Wardlaw v Supreme Mouldings (Pty) Ltd**⁴⁷ is important because it shows that the employer's stated reason for the dismissal (gross negligence by the employee after she had returned from maternity leave) may very well be the real reason for the dismissal and, in such a case, the employee's claiming that the dismissal was automatically unfair will be in vain.

5.4 Mclnnes v Technikon Natal⁴⁸

This case is interesting in relation to what it says in respect of automatically unfair dismissal on the basis of race, and discrimination on the basis of race. It is also relevant in respect of the issue of the non-renewal of a fixed-term contract of employment. The employee had been employed by the Technikon as a "substitute" lecturer, and her one-year contract had been renewed three times before the post was advertised. In respect of the discrimination argument, the Labour Court held that the employer could not discharge the onus of proving that the discrimination was fair. The employer may have believed that it was acting on the basis of its affirmative action policy (which may have justified the discrimination), but, the court held, it was not applying the policy at all.

It may appear easy to claim that a dismissal is automatically unfair (and there is, of course, always the tempting prospect of 24 months' remuneration for compensation), but employees should be careful. The factual basis for a claim of automatically unfair dismissal must be laid with care, and it is up to the employee to produce evidence that the dismissal was related to the transfer, for instance, or related to the employees' exercise of a statutory right (in terms of S 187 (1)

⁴⁵ (2006) 27 ILJ 281 (LAC).

⁴⁶ (1998) 19 ILJ 1573 (LC).

⁴⁷ (2004) 25 ILJ 1094 (LC).

⁴⁸ (2000) 21 ILJ 1138 (LC).

(d). Claims of automatically unfair dismissals are not magic - they require careful thought and preparation and a thorough factual basis being laid.

It is also worth noting that in two of these cases, the employees made a poor impression on the court - they were unreliable, contradictory or even compelled to make some telling concessions under cross examination. Employees should be aware of the fact that if they claim that they have been automatically unfairly dismissed, they can and probably will be required to give oral evidence. And how well they do so (or how well they fail to do so) may effectively determine the end result (and the cost order).

5.5 Other Cases

In *Ntsangani and 5 Others v Golden Lay Farms Ltd*⁴⁹ the Court observed⁵⁰ that it would be unreasonable to expect an employer to replace male employees with females in 'heavy work' areas. However, in *CWIU and Others v Johnson and Johnson (Pty) Ltd*⁵¹ the employer's reliance on age, rather than length of service (on the ground that it needed agile workers) was regarded as unfair in the circumstances, because an employee's age was not an infallible or invariable determinant of fitness or agility.

In *SACTWU and Others v Rubin Sportswear*⁵² the Labour Court found that the employer failed to discharge the onus of proving that the employees have in fact (respectively, at different dates) reached the normal or agreed retirement age. The Labour Court found that the 'normal' retirement age is the age at which employees are compelled to retire, not the age at which they may retire on reduced benefits. This decision was upheld on appeal⁵³. The Labour Appeal Court added that a 'normal' retirement age is the age at which employees employed in the same category have generally retired. The (Labour Appeal) Court had no difficulty with the setting of different retirement ages for different categories of employees⁵⁴. The latter Court stated that a retirement age does not become 'normal' merely because the employer declares it to be such. An agreed retirement age will always trump a normal retirement age⁵⁵.

6. Code of Good Practice: Dismissal – Schedule 8 of the LRA

The LRA contains a "Code of Good Practice: Dismissal"⁵⁶. The key principle in the Code is that employers and employees should treat one another with mutual respect, with a premium being placed on both employment justice (referring to

⁴⁹ 1992 ILJ 1199 (IC).

⁵⁰ at 120 G-E.

⁵¹ [1997] 9BLLR 1186 (LC).

⁵² (2003) 24 ILJ 429 (LC).

⁵³ *Rubin Sportswear v SACTWU and others* (2004) 25 ILJ 1671 (LAC).

⁵⁴ At par 20.

⁵⁵ John Grogan *Workplace Law* 10th Ed p195 (on automatically unfair dismissals).

⁵⁶ Schedule 8.

the broader right of employees) and the efficient operation of the employers business.

The guidelines of the Code provide for:

- a) fair reasons for dismissal⁵⁷;
- b) fair procedures⁵⁸ to be implemented by an employer before dismissing an employee on grounds of:
 - (i) misconduct⁵⁹;
 - (ii) industrial action⁶⁰;
 - (iii) poor work performance⁶¹;
 - (iv) ill-health or injury⁶²;
 - (v) operational reasons⁶³; and
- c) disciplinary measures short of dismissal⁶⁴.

Although much can be read into the obvious fact that the Code is merely a Code of Good Practice and therefore a guideline to employers, as well as to employees and therefore not peremptory, as it would have been had it been acts (part of the LRA), the tendency is all the more for commissioners and judges to place a huge amount of focus on the '*audi alteram partem*' rule⁶⁵ when any aspect of poor performance, ill health or any other reason for dismissal, is alleged to be an (automatically) unfair dismissal.

In other words, if the contract of employment does not merely terminate (naturally) due to a natural effluxion of time when parties have contractually agreed that a contract of service will terminate when the employee reaches the agreed age, then the deemed provisions of termination of employment kick in and from there onwards, the onus firstly falls on the applicant to prove that there was a dismissal, unless the employer agrees that there was a dismissal. Then the Code of Good Practice becomes a very strict yardstick according to which the respondent's actions are tested.

E. EMPLOYMENT EQUITY ACT REQUIREMENTS

1. Introduction

Through a sophisticated system of goal setting, the Employment Equity Act (hereinafter referred to as the "EEA") provided for job reservation in the labour

⁵⁷ Item 2.

⁵⁸ Item 4.

⁵⁹ Item 3 (4) – (6).

⁶⁰ Item 6.

⁶¹ Item 8 and 9.

⁶² Items 10 and 11.

⁶³ Item 12.

⁶⁴ Item 3.

⁶⁵ Known as "hear the other side" rule.

market⁶⁶. The basis for the promulgation of the EEA is to be found in the Constitution, which states that South Africa is one sovereign democratic state founded on human dignity, the achievement of equality, the advancement of human rights and freedoms and non-racism and non-sexism⁶⁷.

Considering the history of South Africa, it is not surprising to find specific legislation relating to the elimination and prohibition of unfair discrimination⁶⁸. Specifically related to employment, there is the Employment Equity Act 55 of 1998 (hereinafter referred to as the “EEA”). This Act, in Chapter II, deals specifically with the elimination and prohibition of unfair discrimination, and it indicates which kinds of workplace-related discrimination may be fair.

More generally, there is also the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The object of this Act is to give effect to S 9 read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination and to prevent and prohibit hate speech. Chapter II of this Act relates to the prevention, prohibition and elimination of unfair discrimination, hate speech and harassment. S 6 provides for the prevention and general prohibition of unfair discrimination, S 7 contains a prohibition of unfair discrimination on ground of race and s8 a prohibition of unfair discrimination on ground of gender. Disability discrimination is prohibited in S 9. S 10 relates to hate speech and S 11 to harassment. S 12 prohibits the dissemination and publication of unfair discriminatory information that unfairly discriminates.

The general starting point for the discrimination provisions in Chapter II of the Employment Equity Act (“EEA”) is S 5. This broad section places a general duty on every employer (not only designated employers who employ more than 50 employees) to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

This general provision is amplified by the provisions of S 6 of the EEA, which contains a more focused prohibition of unfair discrimination: no person (including an employer) may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including the following: age, race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

It should be noted from the language of S 6 of the EEA that these discriminatory grounds do not constitute a closed list — discrimination on any arbitrary ground would fall under the general prohibition of S 6 of the EEA. For the purposes of the prohibition of unfair discrimination in S 6 of the EEA, applicants for

⁶⁶ Van Jaarsveld and others *Principles and Practice of Labour Law* Issue 23 par 700.

⁶⁷ Van Jaarsveld and others *Principles and Practice of Labour Law* Issue 23 par 701, S (1) (a) and (b) of Act 108 of 1996.

⁶⁸ IR Network *Discrimination, The elimination and prohibition of unfair discrimination*

employment also enjoy protection (see S 9). However, the Act recognises that the following two types of discrimination would not be unfair:

- (i) it would not constitute unfair discrimination on the part of the employer to take affirmative action measures consistent with the purposes of the Employment Equity Act 55 of 1998; and
- (ii) discrimination between employees or exclusion or preferring any person on the basis of the inherent requirements of the job will not be seen as unfair discrimination.

S 6 of the EEA prohibits unfair discrimination against an employee on arbitrary grounds including race, sex, disability, age and many others. Not all discrimination is unfair. In other words, certain types of discrimination can be fair. For example, giving company cars to managers and not to other employees is discrimination but is not unfair because the discrimination is based on legitimate business reasons and not on the employer's personal beliefs.

Employers and employees will not develop a clear understanding of the difference between unfair and fair discrimination until they understand what the concept of 'unfairness' means. 'Unfairness' occurs when an employer's conduct infringes the employee's entrenched rights, is one-sided, unnecessary and/or inappropriate under the circumstances.

2. Different Forms of Discrimination

Unfair discrimination can take many forms. For instance, where an employee is unnecessarily sidelined because he/she is disabled this could be unfair discrimination. If an employee is sexually harassed this is a form of unfair discrimination based on sex. If a worker is paid less than his/her colleagues because he is male or she is female this would constitute prohibited gender discrimination. If a job applicant is unsuccessful because he/she is white this could be found to be unfair on the grounds of race. For example in the case of **Consolidated Billing v IMATU**⁶⁹ the employees were turned down for internal appointments because they did not fit the desired racial profile. Because they internal applicants had already been short-listed and were thus acknowledged to have been suitably qualified the IMSSA arbitrator found the failure to appoint the employees to be unfair racial discrimination.

As already mentioned 'age' can also be ground for unfair discrimination. If the employer refuses to appoint a person aged 14 years this is discrimination based on age. However, it is not unfair discrimination because the law says that employers may not hire employees younger than 15 years old. But, other than this, discriminating against an employee or job applicant simply because he/she is 'too young' or 'too old' will normally constitute unfair discrimination.

⁶⁹ (1998) 8 BALR 1049.

It too often happens that an employer tries to get rid of an older employee. This could be for a number of reasons including:

- (i) The employer wants to employ a family member or friend and feels that the older employee has 'had his chance and should make way';
- (ii) The older employee may have 'old fashioned' ideas or finds it difficult to learn new technology;
- (iii) The company has been taken over by young management who only want young people in the business;
- (iv) The older employee has become slower which makes the employer impatient; and
- (v) The employer dislikes the employee.

While some of the above motives may appear to bear some merit the employer cannot merely get rid of the employee by forcing him/her to retire before the organisation's normal retirement age.

In the case of ***Evans v Japanese School of Johannesburg***⁷⁰ the school required the employee to retire at the age of 61 despite the fact that the employment agreement set her retirement age at 65. The Labour Court found that:

- (i) The dismissal was automatically unfair.
- (ii) The employer was required, in terms of the Labour Relations Act, to pay the employee 24 months' remuneration in compensation for the unfair dismissal. This amounted to R177 144,00.
- (iii) In addition, the employer was ordered to pay the employee further compensation of R200 000,00 for breaching the provisions of the Employment Equity Act prohibiting unfair discrimination.

The term "harassment" of an employee is not defined in the EEA. Generally, sexual harassment is seen as any unwanted physical, verbal or even non-verbal conduct or behaviour of a sexual nature which affects the dignity of the harassed employee in the workplace. Sexual harassment⁷¹ may also relate to the creation of a hostile working environment and it will be considerably aggravated if the harassor applies an element of force or abuses his or her power (such as seniority) in the situation.

In terms of S 6(3) of the EEA, the harassment of an employee constitutes a form of unfair discrimination and it is prohibited on any ground (or a combination of grounds) of unfair discrimination as listed in S 6 (1) of the EEA.

It is not only such crippling court orders that employers must expect if they fail to protect their employees. Damage to the employer's reputation and industrial

⁷⁰ (2006) 12 BLLR 1146.

⁷¹ As described in both *Reddy v University of Natal* 1998 ILJ 49 (LAC) and *Media 24 Ltd v Grobler* 2005 ILJ 1009 (SCA).

relations can have even worse effect on the employer's market position, bottom line and long-term viability.

These laws and their onerous provisions make it imperative that a comprehensive anti-discrimination strategy is devised by each and every employer.

The question may be asked: Is termination of employment due to old age actually an incapacity dismissal? For "poor performance" or for "ill health"? The answer is surely, it is not necessarily a termination due to incapacity.

F. CONCLUSION

It may be that employers would like all their employees to be young, enthusiastic, energetic, creative and, perhaps, malleable. Unless it is out searching for specific skills or experience, an employer would, no doubt, prefer the young and relatively innocent, motivated by the prospect of a long employment relationship and being able to mould, to some extent, the employee's development. Nevertheless, this preference does not justify age discrimination. Although hidden, age discrimination may persist at the beginning of the employment relationship through to the termination of the employment relationship. Not all employees are young and impressionable - but that does not mean that an employer is entitled to discriminate unfairly against those who have more experience and, perhaps, wisdom.

The question also arises: Is termination of employment due to old age actually an incapacity dismissal? If so, is it for "poor performance" or for "ill health"? Obviously it can not unqualifiedly be said that each termination of employment will necessarily be due to ill health, since that would be a supposition that all persons generally become incapacitated to perform a general work at a specific age and therefore it is rather left for the contractual freedom of the parties to the contract to agree upon a retirement age. That, however, does not mean that the employer may approach the employee at any given stage prior to the employee nearing his (contractually) agreed upon retirement age and to re-negotiate the (later) age that the employee will indeed retire, should it be clear that the employee is still more than capable of performing his work to the satisfaction of the employer's standards of expectation.

An agreed retirement age will always trump a normal retirement age. It is proposed that employers should place huge importance on inserting a retirement age clause in their pro forma contracts of employment and also to be extremely careful as to which age they (as employers) regard the retirement age to be and why that specific age! Employers often demand a "one pager" (or at most a "two pager") contract of service, merely because of the administrative hassle and more often nowadays, the high costs being asked by attorneys, paralegals or self-proclaimed labour law consultant specialists, whilst they (employers) should rather be made aware of the huge financial and other risks that claims of

automatic unfair dismissals (based on discriminatory grounds, such as old age) place on their businesses. That in turn has a huge impact on potential employees (entrepreneurs') enthusiasm to start their own business or purchase (totally or partially) any other business, and also has a detrimental impact on foreign investors' willingness to invest in the South African market.

It is clear that our Courts⁷² will not merely accept that there was a tacit or implied agreement between the parties that a specific age would be the employee's retirement age. In fact, it seems clear that the Courts simply will not accept such tacit or implied term-arguments.

The SA legislature should seriously contemplate the drafting of a "Code of Good Practice: Termination of Employment due to old age", whereby all aspects of non-discrimination, remedies, penalties/fines, etc. will provide a clear guideline to employers and employees, instead of especially employers having to fend for a huge financial penalty (of 24 months' payment of the employee's salary) when the employee cries "discrimination", whilst the employer had no intention of discriminating against such employee.

It is not a fair penalty or sanction to award an employee 24 months' salary⁷³, merely because the right that has been contravened (if we assume for a moment that an employer was guilty of discriminating against an employee due to his age) is a right that is protected by our Constitution in the Bill of Rights⁷⁴, especially whilst many other rights are just the same protected, but those other rights which may be infringed / contravened, such as the right to human dignity, the right to life, the right to freedom of security of the person, the right to freedom of movement and residence, do not all receive the same "double" sanction. For example, the right to freedom of residence is not in any Act, Regulation or other form of legislation, sanctionable "double as harsh as it would have been had it not been for the fact that such right is enshrined in the Bill of Rights. Labour Law is being discriminated against. In other terms, Labour law is being manipulated as a vehicle to bring across the severity of the sanctionability of unfair actions (mostly, naturally of course by employers), which inevitably leads to our country's image as having a hugely unfriendly attraction for investors in any aspect of job creation in the RSA.

The key finding of the Global Entrepreneurship Monitor (GEM)⁷⁵, where South Africa is one of 59 countries surveyed, was the destructive impact of labour, which report puts South Africa bottom of the pile. The World Economic Forums' Global Competitiveness report ranks SA 135th of 139 countries on the ability to hire and fire and 131st of 139 in labour flexibility. This is a shocking reality! This

⁷² *Botha v Du Toit Vrey and Associates* Labour Court case number: JS 749/03.

⁷³ *Evans v Japanese School of Johannesburg* (2006) 12 BLLR 1146; *Cash Paymaster Services (Pty) v Browne* (2006) 27 ILJ 281 (LAC); *SACTWU and others v Rubin Sportswear* (2003) 24 ILJ 429 (LC).

⁷⁴ S 9 Act 108 of 1996.

⁷⁵ Global Wage Report 2012/13 *Wages and equitable growth*, issued by the International Labour Office, Geneva.

puts us in a disadvantaged position in terms of global competitiveness. We are not competitive with regard to cost attached to labour. Because of this, we will not be able to attract investment in the labour intensive sectors. Instead foreign companies would take their capital elsewhere. We should start looking at our labour legislation and ask if this will be beneficial to the country in the long run. At this point, we are not moving in the right direction I'm afraid. If our legislature does not take drastic measures to do whatever it takes to better South Africa's labour competitiveness, by lessening the "choking grip / stronghold it has on employers' necks", it is writer's opinion that we will remain dead last on the list of countries' comparative survey for some time to come still in the future.

CHAPTER 4

PROCEDURES AND REMEDIES IN REGARDS OF AGE DISCRIMINATION

A. PROCEDURE IN REGARD OF AUTOMATICALLY UNFAIR DISMISSALS

Disputes about unfair discrimination must be resolved using the procedure set out in S 10 of the EEA¹. It is important to note that disputes about unfair dismissals based on unfair discrimination (these will usually amount to automatically unfair dismissals) are not to be resolved in terms of the EEA, but still in terms of the LRA.

Disputes about unfair discrimination may be referred to the CCMA in writing within six months after the discriminatory act or omission has taken place. The CCMA must attempt to resolve a dispute through conciliation and if the dispute remains unresolved after conciliation, any party may refer the dispute to the Labour Court for adjudication - unless the parties to the dispute consent to the arbitration of the dispute, in which case the dispute may be resolved through arbitration under the auspices of the CCMA.

The LRA² distinguishes between those disputes that, after conciliation, must be arbitrated by the CCMA or a Bargaining Council, and those disputes that fall within the jurisdiction of the Labour Court. Dismissal disputes that must be referred to the Labour Court for adjudication, include a dismissal in circumstances where the reason for dismissal is alleged to be automatically unfair.

¹ A brief summary of S 10:

An employee, or applicant for employment, may refer a dispute concerning alleged unfair discrimination (or medical or psychological testing) to the CCMA for conciliation. This must be done within six months of the alleged discrimination (or testing);

- (i) If a dispute is not resolved at conciliation, a party may refer it to the Labour Court for adjudication. The parties to a dispute may also agree to refer the dispute to arbitration.
- (ii) Unfair dismissal disputes in which unfair discrimination is alleged must be dealt with in terms of the Labour Relations Act. The dismissal must be referred to the CCMA within 30 days.

² S 191.

B. ONUS / BURDEN OF PROOF

S 11 of the EEA contains provisions relating to the burden of proof³ - whenever unfair discrimination is alleged in terms of the Act, the employer against whom the allegation is made must prove, on a balance of probabilities, that the discrimination is fair. It is important to note that the burden of proof shifts⁴ to the employer even after a mere allegation of unfair discrimination - it appears that it is not even necessary for the employee or applicant for employment to prove that there was discrimination.

When faced with allegations of discrimination in terms of the EEA, an employer would therefore normally seek to rely on two grounds:

- (i) there was no discrimination; and / or
- (ii) if there was discrimination, the discrimination was not unfair, because it was based on either:
 - (a) the inherent requirements of the job; or
 - (b) affirmative action.

If the Labour Court determines that the dispute is not one which is automatically unfair, the Court should still rule as such, meaning that the matter is then deemed finalised. An applicant will not have the option to refer the matter afresh to the CCMA for instance as one of (mere) unfair dismissal whereby the employee once again, for instance, does not state the apparent reason for dismissal – usually that is done by marking the applicable section on the LRA 7.11 referral form as “reason for dismissal”: “not known”.

An interesting question that may yet arise in a tribunal or Court, is whether the onus that rests on the applicant referring party (normally the employee), also necessarily “doubles”, or at least increases, when a matter is referred as an alleged automatic unfair dismissal? In other words, is it not only fair to employers (respondents / defending parties) that the employee (referring party) first has to overcome “double as high an hurdle as onus of proving a prima facie case of automatic unfair dismissal, before the onus shifts to the employer to prove that the dismissal was not automatically unfair? Then the next question is, which higher onus is legally the “new bar / benchmark / onus level / onus requirement”? Will it be, beyond any reasonable doubt? Since our law only recognises an onus “on a balance of probabilities” in labour law (which writer hereof is of the opinion that it should in fact be referred to as “on a preponderance of probabilities, since a “balance” still does not bring any one further than 50/50), it could therefore only be lifted to “beyond any reasonable doubt”.

³ *Rockliffe v Mincom* (2008) 29 ILJ 399 (LC) - The Labour Court held that the applicant bore the onus of proving that his dismissal amounted to unfair discrimination.

⁴ S 192 (2) of the LRA.

In respect of the onus of proof in unfair discrimination cases, in *Louw v Golden Arrow Bus Services (Pty) Ltd*⁵, the applicant alleged that the current disparity between his salary and that of a white colleague arose from the fact that the white (colleague) was employed at a higher salary than those of his ‘coloured’ colleagues when he was appointed, and that the difference had grown exponentially since then. The Labour Court rejected this claim on the facts and found that Louw (the applicant) had failed to prove that the work then performed by him and his white colleagues was comparable. What is important from this case is that the judgement indicates that had this been so, the applicant would probably have won his case.

C. REMEDIES IN TERMS OF SECTION 193 OF THE LRA

A dismissed employee who was the victim of unfair discrimination may request the Labour Court for the following relief:

- (i) reinstatement; reinstatement or re-employment⁶; and / or
- (ii) compensation⁷; and
- (iii) any other order which is appropriate in the circumstances⁸.

The employee will have to prove that he was a victim of discrimination; thereafter the onus shifts to the employer to prove that the (alleged) discrimination was fair (or rather, that it was not unfair).

It is deemed necessary to briefly elaborate on the jurisdiction of the appropriate Courts in regard to (alleged) automatic unfair dismissal disputes.

Since the Labour Court enjoys a status equivalent to that of the High Court, in addition to its inherent powers, the Labour Court has statutory powers to grant urgent relief, interdicts, declaratory orders, to award compensation and damages and to make orders for costs.

The Labour Appeal Court (hereinafter referred to as the “LAC”) has an appellate jurisdiction (it is a Court that hears appeals against judgments of lower courts), but S 175 of the LRA provides that the LAC may sit as Court of first instance. The LAC’s primary role is to hear appeals from the Labour Court both in respect of its judgments in respect of disputes over which it has jurisdiction and in respect of reviews by the Labour Court of arbitration awards.

⁵ (2000) 21 ILJ 188 (LC).

⁶ S 193 (1) (a), (b), (2), (3) of the LRA.

⁷ S 193 (1) (c), (3).

⁸ S 193 (3).

A dismissed employee who was the victim of unfair discrimination may request the Labour Court for the following relief:

- (i) reinstatement; reinstatement or re-employment⁹; and / or
- (ii) compensation¹⁰; and
- (iii) any other order which is appropriate in the circumstances¹¹.

The employee will have to prove that he was a victim of discrimination; thereafter the onus shifts to the employer to prove that the (alleged) discrimination was fair (or rather, that it was not unfair).

In terms of the LRA¹² the statutory limit that is placed on compensation, is stated in subsection (3):

“The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal”.

It is therefore an employee’s choice whether or not he (the employee) wishes to return to work – in other words, be reinstated (which has an “automatic” presumption that it includes retrospective back pay, as if the employee was never dismissed), or merely demands compensation. It is however, usually for the Labour Court judge to rule as to whether he (the judge) is of the opinion that reinstatement is the best option where the dismissal has not been substantively unfair.

D. CONCLUSION

It is not fair to “leave the door open” for an alleged aggrieved employee to be able to still refer a matter of alleged automatically unfair dismissal to the CCMA up to 6 months after the dismissal allegedly occurred on that basis. Surely, if the applicant (employee) is indeed grieved by the unfairness based on a breach of such employee’s fundamental right, the normal 30 day period wherein all other matters of unfair dismissal should be referred, is sufficient. My reasoning for this is that breaches of fundamental rights, should leave any employee even more aggravated than in the case of a normal unfair dismissal and should therefore drive such employee even more to want to receive justice! It is not fair to employers, in my opinion, to leave a “hanging sword above their heads” such a long period of 6 months, whilst employers still incur the risk that an employee might still refer a matter to the CCMA against such employee as an alleged automatic unfair dismissal.

⁹ S 193 (1) (a), (b), (2), (3) of the LRA.

¹⁰ S 193 (1) (c), (3).

¹¹ S 193 (3).

¹² S 194.

Our legislature should not even attempt find a middle way by reducing the 6 month time limit to 90 days (as with alleged unfair labour practices), since I am of the opinion that even such alleged unfair labour practices should be referred within 30 days (instead of within 90 days) as well.

The purpose of the CCMA, as well as that of our Labour Courts is, has always been and should remain to be, to resolve matters speedily and as cost effective as possible.

CHAPTER 5

THE IMPACT ON SOCIAL SECURITY

A. INTRODUCTION

Old age and retirement are aspects which are dealt with in South African law under social assistance, as well as under social insurance¹. The State social assistance system rests on two pillars:

- (i) The provision of various kinds of social services; and
- (ii) the payment of social grants, as well as social relief payments.

The main social grants (child support grant, disability grant and the old age grant) are all means-tested. The beneficiary must (as a rule) be both resident in the RSA and be a citizen of the RSA.

Although it is impossible to be able to present any statistics relating to automatically unfair dismissals due to old age's impact on our social assistance frameworks and to fathom how much such terminations (fair or not) impact on our social security State coffers, it is deemed necessary to elaborate on aspects such as what is deemed by our Government as old age, the definition of unemployment and to briefly elaborate on old age grants. It would be prevelant to be able to know, to some degree, how the amendment of the retirement age for men², has impacted on social security, in all senses of the word, in our country. However, there has not been any such direct study. Any statistics regarding unemployment is too vague to be able to provide a direct / causal link between the reduction in the age at which men may retire, and (as it may only be assumed) higher rate / increase at which have since 14 July 2008³ indeed chosen to retire.

It seems logically necessary to ask what any statistical evaluation regards, per definition, to be:

- a) "The labour force" is described as "*persons comprising persons who are employed plus all persons that are unemployed*". It is therefore an "optimistic" description by including persons who are able to work.
- b) "Economically active persons": Strangely only not economically active persons are defined⁴ – "*persons aged 15 to 64 year who are neither employed nor unemployed*". Firstly the age of 64 complicates any search for useful statistics in regard to this dissertation. Secondly, it is once again

¹ MP Olivier, N Smit, ER Kalula *Social Security: A Legal Analysis* (2003) 238.

² As per the Amendment of the Social Assistance Amendment Act, Act 6 of 2008.

³ When the Social Assistance Amendment Act, Act 6 of 2008 was published in the Government Gazette.

⁴ *Statistics South Africa*, Quarterly Labour Force Survey, Quarter 2, 2010, P0211, page xvii, par 7.

an optimistic description of persons who can probably work, but by including unemployed persons, too many questions are raised as to how those unemployed persons survive.

- c) “Working-age population”: It comprises all persons aged 15 to 64, which is also not in line with the amendment of the age at which men may also (together with woman) apply for old age grants. A difference of four years obviously seriously impacts any statistical survey hugely.
- d) “Employee status”: Although the focus is elsewhere limited to those situations where employee status is of serious importance (since being an employee influences that person’s right to protection by the LRA and therefore being able to approach our tribunals and Courts for assistance when being unfairly dismissed), in the social assistance regard, employee status entitles one to social security protection, such as disability, being able to claim for occupational injuries or diseases, etc.

B. UNEMPLOYMENT

1. Definitions

Unemployed persons are persons who⁵:

- a) were not employed in the reference period of any applicable survey;
- b) actively looked for work or tried to start a business in the four weeks preceding any applicable survey interview;
- c) were available for work, i.e. would have been able to start work or a business in the reference week; or
- d) had not actively looked for work in the past four weeks, but had a job or business to start at a definite date in the future and were available.

2. Old age benefits

The South African social security system envisages three ways in which a person can make provision for his financial security in old age:

- a) voluntary savings;
- b) membership of pension or provident fund schemes; or
- c) social assistance provided by the State.

2.1 Retirement Funds

Retirement Funds are non-profit organisations run for the benefit of their members. They can be seen as a form of group life assurance policy. Most employed South Africans are covered by employer sponsored group contracts because group policies have a number of advantages over individual contracts,

⁵ MP Olivier, N Smit, ER Kalula *Social Security: A Legal Analysis* (2003) 238.

such as a democratic benefit: group funds may contribute to greater economic democracy as they are likely to express the memberships' wishes in their investment policy⁶.

The freedom of association given in the South African Constitution makes it unacceptable to force people to join a particular retirement fund⁷.

A significant percentage of persons in employment in the RSA are members of a retirement fund as these funds are often the primary source of income for them in their old age.

2.2 Grants⁸

The Social Assistance Act (SAA) makes provision for the payment of various grants, such as old age grants⁹.

C. IMPACT OF AMENDMENTS OF SOCIAL SECURITY ACT

The progressive amendment of the retirement age for men from 65 to 63, from 63 to 61 and from 61 to 60 places a huge, extra financial burden on the State and that it was not only a bad economical decision, but it will also create even worse social conditions in the long run and is in direct contrast to the equality clause of our Constitution, a clause that is enshrined.

Although the previous unfair treatment between men and woman regarding retirement age has now been done away with, it leaves a huge unanswered question as to why the age at which a group of society (men) could retire, has been drastically reduced, whilst that of the other group of society (woman) has been unchanged.

Not only can this amendment most certainly not be justified in an open and democratic society, even taking into account the aspects set out in S 36 (1) of our Constitution¹⁰ as limitation factors, but it has set a precedent for the way the State intends to handle similar forthcoming legislative amendments, which is: irrational, unreasonable and possibly even discriminatory.

⁶ Olivier and others *Social Security: A Legal Analysis*, p238, par 8.2.4.2

⁷ Olivier and others *Social Security: A Legal Analysis*, p 238, par 8.2.4.2

⁸ In terms of the Social Assistance Act, Act 59 of 1992.

⁹ S 2 of the Social Assistance Act, Act 59 of 1992 makes provision for the payment of social grants 'aged persons' by the State.

¹⁰ Act 108 of 1996.

CHAPTER 6

COMPARATIVE SURVEYS

A. INTRODUCTION

Many countries have had “anti-ageism” laws for many years. Below comparative surveys will be conducted in two countries regarding discrimination based on old age in:

- A. England; and
- B. the United States of America.

B. ENGLAND

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been implemented on 02 October 2000 and applicable to the UK, but it does not have direct application on private institutions. Therefore the application of the ECHR will have indirect consequences for citizens of the UK¹.

1. Unfair Dismissal in General²

“Unfair dismissal” is the term used in UK labour law to describe an employer's action when terminating an employee's employment contrary to the requirements of the Employment Rights Act of 1996. It is automatically unfair for an employer to dismiss an employee, regardless of length of service, for a reason related to discrimination protected by the Equality Act of 2010, becoming pregnant, or having previously asserted certain specified employment rights. Otherwise, an employee must have worked for a year to have the right against unfair dismissal (2 years if the employment started on or after 6 April 2012). This means an employer may only terminate an employee's job lawfully if the employer follows a fair procedure, acts reasonably and has a fair reason. Fair reasons for dismissal are:

- (i) A reason related to the employee's conduct
- (ii) A reason related to the employee's capability or qualifications for the job
- (iii) Because the employee's job was redundant
- (iv) Because a statutory duty or restriction prohibited the employment being continued; and
- (v) Some other substantial reason of a kind which justifies the dismissal.

¹ Hein Olivier, *Dissipline, Ontslag en Menseregte* 3de Uitgawe (2006) hfst 2: Die Grondwet, Fundamentele Regte en Grondwetlike Waardes, par 2.3 bl 23.

² <http://www.agediscrimination.info/legislation/pages/intheuk.aspx>

The reason for dismissal will rarely be the basis for a successful unfair dismissal claim, as a Tribunal is not allowed to substitute its view of what is reasonable for that of the employer. The Employment Tribunal will judge the reasonableness of the employer's decision to dismiss on the standard of a "band of reasonable responses" assessing whether the employer's decision was one which falls outside the range of reasonable responses of reasonable employers.

2. What is Age Discrimination?

The Regulations make it unlawful on the grounds of age to:

- (i) discriminate directly against an individual i.e. treat them less favourably than others because of their age – unless such treatment can be objectively justified. An example would be requiring a job applicant to be under thirty;
- (ii) discriminate indirectly against an individual i.e. apply a criterion, provision or practice which is applied equally to all individuals regardless of age, but which puts people of a particular age at a particular disadvantage when compared with others unless it can be objectively justified. An example would be a requirement that job applicants have a minimum of ten years' experience which would indirectly discriminate against younger applicants on the basis that it is more likely that an applicant aged thirty could fill the requirement than one aged twenty.

Two other forms of discriminatory behaviour are prohibited by the Regulations:

- (i) Victimization – where an individual is treated less favourably because of raising an age discrimination complaint or for having done anything relating to such a complaint such as giving evidence in support of another individual.
- (ii) Harassment on the grounds of age is also forbidden where an individual, on the grounds of age, engages in unwanted conduct which has the purpose or effect of violating another person's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment for another.

3. Forms of Dismissal

A dismissal may be lawful or wrongful (insufficient notice) at common law. It may or may not involve discrimination under statute. It may be actual (with notice or intention) or constructive (by fundamental breach). It may be fair or unfair under statute. It can be absolutely any combination of these. Accordingly, discrimination, wrongful dismissal and constructive dismissal are best dealt with separately. This discussion addresses the statutory concept of "fairness":

- (i) *Wrongful dismissal*: in particular, a termination by the employer in breach of the employee's contract of employment (in other words a dismissal without notice, where the employer is obliged to give notice) is described as "wrongful dismissal", and not as unfair dismissal.
- (ii) *Discrimination*: Where an employee has grounds to believe that he or she has been discriminated against in being dismissed, other laws may be relevant, such as (in Britain) the Race Relations Act, the Disability Discrimination Act 1995 and the Sex Discrimination Act 1975.
- (iii) *Constructive dismissal*: Where the employee resigns or terminates his contract (without notice) due to some action on the part of the employer which would entitle the employee to terminate without notice (whether or not the employee actually gives notice), the resignation is known as *constructive dismissal*. The normal circumstances in which an employee would be so entitled, are in cases of a "fundamental breach of contract" (also known as a "repudiatory breach of contract") by the employer.

4. Procedure

Claims of unfair dismissal can only be brought before an Employment Tribunal. There are strict and very short time limits for claims of unfair dismissal. Normally a claim must be brought within three months of the last day of employment, counting the last day of employment as the first day of the three month period. This rule is often summarised as "three months less a day". The claim must be lodged using the prescribed form ET1 which can be obtained from the Employment Tribunals Service. Employees may bring such claims themselves, either with or without representation. Solicitors and certain other representatives regulated by the Ministry of Justice may represent employees in Employment Tribunal proceedings. Trade unions may support employees' claims, and independent arbitration and conciliation services may be called upon.

5. Potentially Fair Reasons

5.1 Introduction

Assuming the employee has proven dismissal, the first stage is to establish what was the reason for dismissal, e.g. was it a potentially fair reason or an automatically unfair reason. The burden of proof for this is on the employer. If the employer pleads a potentially fair reason, the burden is on him to prove it. As mentioned above, it would have to be capability or qualifications, conduct, redundancy or statutory requirements or "some other substantial reason".

5.2 Range of Reasonable Responses

The second stage is to establish whether the dismissal was reasonable, and that means whether the fair reason was sufficient to be also judged as reasonable. Even if the employer proves a fair reason, it often falls over on procedure when the tribunal looks at whether the decision was reasonable. Large employers will be expected to be professional.

To be unreasonable though, the employer's conduct would have to be outside the band of reasonable responses of any reasonable employer. Conduct is reasonable if some decent employers would have handled it differently, but unreasonable if no reasonable employer would have handled it the same or the dismissal was not based on an honest and genuine decision on reasonable grounds.

If the employee proves that there could have been a competing reason then the burden shifts back to the employer to prove that their alleged reason was the main one. The reason might not be as the employer said, as they might have been wrong on facts or law, short of evidence, or have been trying to be kind to the employee by dressing up capability as redundancy. The tribunal can decide the reason was different to what either party claims, as long as it gives the parties the chance to change their case. Employers can, at the risk of reducing credibility, plead alternative reasons. Where the dismissal was the employee's fault and he knew it, a fake reason given by the employer does not automatically mean unfairness.

To prove the reason, the employer cannot dredge up what it did not know until after the termination, nor can it blame events that happened after termination, although this could all be relevant to the remedy available, e.g. the compensation could be reduced to as low as nil. The employer can, however, take account of what happens between giving notice and termination.

6. Which Defences are Available to Discrimination on the Grounds of Age?

6.1 Introduction

Under the objective justification test, direct or indirect discrimination will be unlawful unless:

- (i) it pursues a legitimate aim; and
- (ii) it is a proportionate means of achieving that aim.

Any justification must be objective, and the employer must be able to show that it was necessary to achieve the legitimate aim, and that there was no less discriminatory way to achieve it.

6.2 What is a Legitimate Aim?

Examples of legitimate aims include particular training requirements of a job, protection of an employee's health and safety, encouraging and rewarding loyalty and the need for a reasonable period of employment before retirement. Economic factors, such as business needs and efficiency can be legitimate aims, but arguing that it could be more expensive not to discriminate will not be. A high street fashion shop wishing to employ younger staff in order to compliment a brand image is unlikely to be able to objectively justify this decision as a legitimate aim.

6.3 Which is a Proportionate Means of Achieving a Legitimate Aim?

The extent to which something is proportionate will depend upon the importance of the legitimate aim. The discriminatory effect of any age-based practice should be significantly outweighed by the importance and benefits of its legitimate aim and there should be no reasonable alternative available to the employer. An example might be a job which requires a high level of physical fitness where an employer may be able to set a maximum age for health and safety reasons e.g. work on a construction site.

An exception also exists for genuine occupational requirements where it will be lawful to discriminate against an individual on grounds of age if the person must be of a specific age and it is proportionate for the employer to apply that requirement. This is likely to be difficult to prove and employers must produce evidence to support any such defence.

7. What Retirement Age do the Regulations Allow?

A new default national retirement age of 65 was introduced by the Regulations. Employers are entitled to set a retirement age at or, if they so choose, above this age but compulsory retirement below 65 will be discriminatory and unlawful unless it can be objectively justified. It is difficult to envisage a situation where a lower retirement age than 65 could be justified.

A "duty to consider" procedure exists whereby an employer has a duty to inform an employee of his/her right to request not to be retired and of the impending retirement date. The employer must notify the employee in writing between six and twelve months before the proposed retirement date of the intention to retire the employee on that date. Upon receipt of the notification from the employer the employee may make a written request not to be retired no less than three months and not more than six months before the intended date of retirement. An employer has a duty to consider such a request and will usually have to hold a meeting with the employee to discuss that request at which the employee has a right to be accompanied. The employer must then inform the employee of its decision as soon as is reasonably practicable and which decision can be

appealed by the employee if the request is refused by the employer or if the request is allowed but for a shorter period than had been requested by the employee. If an employer fails to comply with the duty to notify the employee can complain to an Employment Tribunal and any dismissal that has taken place may be unfair and discriminatory.

8. Automatically Unfair Dismissals

Normally an employee must have completed one year's continuous employment and must not have reached the age of 65 years to be able to present a complaint of unfair dismissal to an employment tribunal.

However, certain categories of dismissal exist which will be regarded as automatically unfair even where the one year qualification has not been acquired and where an employee may be able to pursue a complaint to an employment tribunal whatever his length of service.

There are various categories of automatically unfair reasons for dismissal which do not require twelve months continuous service are, for example:

- dismissal relating to discrimination on grounds of age, sex, race, disability, religion or belief or sexual orientation;
- dismissal in circumstances where the employee took or sought to take parental leave, etc.

The burden is upon the employee to satisfy an employment tribunal that the reason for dismissal is one of the above.

9. Remedies and Compensation

If the tribunal finds unfair dismissal it can order re-instatement (old job back) or re-engagement (new job), and/or compensation.

Compensation mainly consists of a "basic award" equivalent to statutory redundancy pay of, as at 2009, up to £10,500, plus a "compensatory award" for loss of earnings, statutory rights and benefits and for expenses, of up to £66,200, or unlimited where the dismissal was due to health and safety, whistleblowing or union work. So even in an accidental unfair dismissal, the employer could be ordered to pay up to £76,700.

If the employee adds a claim for breach of contract, up to a further £25,000 could be awarded, taking the total potential compensation to £101,700.

10. Case Law on Age Discrimination

10.1 Age Related Employment Benefits and Justification

In ***Bloxham v Freshfields Bruckhaus Deringer***³ the Tribunal held that Mr Bloxham had suffered direct age discrimination by being less favourably treated on the grounds of age by virtue of the transitional arrangement. It went on to hold, however, that the treatment was justified because:

- (i) the overhaul of the pension scheme had been necessary for the firm as a whole and finding a fair and equitable solution had been difficult;
- (ii) one of the principle reasons for the overhaul had been the unfairness of the existing arrangements to younger partners;
- (iii) expert advice had been taken before any decisions had been made and many months of consideration had been given to the matter;
- (iv) Mr Bloxham had participated in the consultation process;
- (v) a large majority of the partners had consented to the overhaul of the pension scheme;
- (vi) payments under the pension scheme were subject to a finite sum (the firm's annual profits) which meant that increasing the rights of the younger partners by implication reduced the rights of the older partners. No less discriminatory way of achieving the aims of the overhaul could have been achieved.

10.2 Dismissal and Age Discrimination

In ***Wilkinson v Springwell Engineering Ltd***⁴ Miss Wilkinson, who was aged 18, was employed by Springwell as an Office Administrator having taken over the role of a more experienced individual. One month into her three month probationary period Springwell advised her that her work must improve as she was only carrying out 90% of her allocated tasks. They also asked an administrator from another office (who was older than Miss Wilkinson) to carry out some of her work. After two months she was dismissed on the grounds that she was "too young" for the job. There was no attempt by Springwell to follow the statutory disciplinary and dismissal procedures nor did they respond to an age discrimination questionnaire that was subsequently served upon them. The fact that Springwell had asked another older administrator to do some of Miss Wilkinson's work led the Tribunal to conclude that Springwell had made a stereotypical assumption that there was a relationship between experience and age and capability to the detriment of Miss Wilkinson. Her claim for age discrimination therefore succeeded and Springwell had failed to establish that

³ ET 2007. Other cases in this regard include: *Rolls-Royce Plc v Unite*, High Court 2008, *Seldon v Clarkson and Wright and Jakes* – EAT/2008, *Hampton v Lord Chancellor* 2008 – ET 2008

⁴ ET 2008.

age was not the reason for dismissal nor provide evidence that the less favourable treatment of her was objectively justified⁵.

11. Conclusion

It is a pity that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is only applicable to public institutions. In this regard, the protection offered by South African legislation, of which of Constitution⁶ is the most important, is far wider and greater than that of the UK. Although the permissible grounds for discrimination are more than three (in South Africa⁷), the grounds are rather similar in the UK⁸.

B. THE UNITED STATES OF AMERICA

1. Introduction and Applicable Principles

The United States of America has had federal age laws since 1967.

The Age Discrimination in Employment Act (ADEA) only forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40, although some states do have laws that protect younger workers from age discrimination. It is not illegal for an employer or other covered entity to favour an older worker over a younger one, even if both workers are age 40 or older. Discrimination can occur when the victim and the person who inflicted the discrimination are both over 40.

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment. An individual who seeks relief under the ADEA must demonstrate that he:

- (i) falls within the protected age group (e.g., that he is 40 years of age or older);
- (ii) was qualified for the position;
- (iii) he was nevertheless adversely affected; and
- (iv) the defendant sought someone younger than the plaintiff, but with similar qualifications, to perform the work.

⁵ Other similar cases include *Thomas v Eight Members Club* – 2007, *Martin v SS Photay Associates* – ET 2007 and *Court v Dennis Publishing Ltd* – ET 2007. For cases regarding wording in advertisements, see: *McCoy v McGregor and Sons Ltd* – 2007, *Rainbow v Milton Keynes Council* – 2008 and *Raines v Commission for Racial Equality* 2007.

⁶ S 23 (1).

⁷ The LRA⁷, together with the EEA⁷ lists 3 permissible grounds as exceptions to unfair discrimination: S187 (2) (a) and (b).

⁸ capability or qualifications, conduct, redundancy or statutory requirements or some other substantial reason.

The Supreme Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v Green*⁹ utilised in Title VII cases is appropriate in the ADEA context.¹⁰ Therefore, some courts still apply McDonnell Douglas to create a presumption of age-based discrimination once an individual demonstrates these four elements¹¹. If the employer rebuts the presumption by articulating a legitimate, non-discriminatory reason for its decision, the individual must demonstrate that the reasons offered by the employer are merely pretext for discrimination, and, ultimately, that his or her age was the "but-for" cause of the employer's adverse action¹².

In the USA, discrimination is very closely related to "harassment". It is unlawful to harass a person because of his or her age. An employment policy or practice that applies to everyone, regardless of age, can be illegal if it has a negative impact on applicants or employees age 40 or older and is not based on a reasonable factor other than age.

The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. The ADEA permits employers to favour older workers based on age even when doing so adversely affects a younger worker who is 40 or older.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labour organizations, as well as to the federal government. ADEA protections include:

- (i) Apprenticeship Programs;
- (ii) Job Notices and Advertisements;
- (iii) Pre-Employment Inquiries;

⁹ 441 U.S. 792 (1973).

¹⁰ *Gross v. FBL Financial Services*, 129 S. Ct. 2343, 2349, n.2 (2009).

¹¹ See, e.g. *Velez v. Thermo King de Puerto Rico*, 585 F.3d 441, 447, n.2 (1st Cir. P.R. 2009) (continuing to apply McDonnell Douglas to ADEA claims "until told otherwise by the Supreme Court").

¹² *Id.* at 447-48, applying *Gross v. FBL Financial Services*, in which the Supreme Court held that the burden-shifting analysis available in so-called mixed-motive cases under Title VII does not apply to claims of age discrimination under the ADEA. This means that an individual cannot merely claim that age played only a motivating part in the challenged decision. Rather, age must be the "but-for" cause of the employer's decision. *Gross*, 129 S.Ct. at 2352.

- (iv) Benefits; and
- (v) Waivers of ADEA Rights.

An employer may ask an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

- (i) be in writing and be understandable;
- (ii) specifically refer to ADEA rights or claims;
- (iii) not waive rights or claims that may arise in the future;
- (iv) be in exchange for valuable consideration;
- (v) advise the individual in writing to consult an attorney before signing the waiver; and
- (vi) provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

For termination cases, the US Supreme Court has held that a plaintiff does not have to show that the person who replaced him was less than 40 years of age (i.e., someone outside of the “protected class”). Rather, a plaintiff must merely show that he was replaced by someone younger than himself. Moreover, an individual can establish a valid claim for age discrimination even when the decision maker is over age 40, as long as he is younger than the complaining employee. In addition to the federal law, various states have laws that protect younger workers from age discrimination.

Generally, stray remarks, standing alone, will not give rise to an inference of discrimination. For example, one stray remark that management employees were too old, coupled with the fact that the remark was not made by a decision maker or made in connection with the termination, was deemed insufficient to establish a claim for discrimination. In *Carraher v Target Corporation*¹³, the US Court of Appeals for the Eighth Circuit held that age-related comments made by persons not involved in the decision to terminate an employee were not evidence of age discrimination. The statements at issue were:

- (i) a statement by a senior diversity representative who defined the company’s employees as persons who are “young and energetic;”
- (iii) a statement by a human resources manager that “older, more experienced candidates do not have fire in the belly;” and
- (iii) a district manager’s statement after interviewing a candidate in his mid-50’s that, “I felt like I was interviewing my dad. It felt bad. He should be retired.”

¹³ 503 F.3d 714 (8th Cir. 2007).

It is not unlawful to promote a candidate under age 40 over a candidate over age 40 if that decision is based on the younger candidate's superior experience or other work related qualifications. An employer may not, though, refuse to select a candidate for promotion simply because the individual is over age 40.

Further, while some courts have found an inference of non-discrimination where the same individual hires and fires the employee claiming age discrimination, the so-called "same actor" defence may be rebutted. For instance, if the terminated employee can demonstrate other evidence of age discrimination, he may overcome the "same actor" presumption and still succeed at trial.

The Equal Employment Opportunity Commission ("EEOC"), the federal administrative agency responsible for enforcing, among other statutes, Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, is also responsible for enforcing the ADEA. The ADEA's prohibitions apply to employers with 20 or more employees, as well as to labour organisations, employment agencies, apprenticeship programs, and training programs. Importantly, the Act's definition of "employee" includes citizens employed by covered employers in a workplace in a foreign country. Although employers can be held liable for the discriminatory actions of their supervisors, courts disagree on whether the supervisors themselves can be held individually liable for such discriminatory conduct.

2. What Enforcement / Remedies Exists ?

The ADEA provides for both legal and equitable remedies which include back pay, injunctive relief, front pay, liquidated damages, interest and attorney's fees. Compensatory and/or punitive damages are not available under the ADEA.

Back pay encompasses benefits like lost wages and pension benefits. There are, however, a number of circumstances which will limit the plaintiff's accrual of back pay, including, but not limited to, when s/he accepted a higher paying position, failed to reasonably seek comparable employment, or rejected an unconditional offer of reinstatement. Further, courts, in their discretion, may award front pay. Front pay is provided to compensate a plaintiff for future losses resulting from the discrimination. In addition, ADEA plaintiffs may also receive liquidated or double damages on unpaid wages and overtime compensation if the employer's wrongful acts are deemed wilful.

Last, courts may also grant reinstatement, unless there is a great deal of hostility between the parties that is so great that it would create a difficult work environment. Just as with back pay, entitlement to future reinstatement is lost if a plaintiff refuses to accept an unconditional offer of reinstatement.

3. Specific Exceptions in US Law

One of the statutory defences to a claim under the ADEA is where age is a *bona fide* occupational qualification (“BFOQ”) reasonably necessary to the operation of a business. To prove that age is a “bona fide occupational qualification,” the employer must prove that:

- (i) the age limit is reasonably necessary to the essence of the business;
- (ii) and either all or substantially all individuals excluded from the job involved are in fact disqualified, or
- (iii) some of the individuals so excluded possess a disqualifying trait that could not be ascertained except by reference to age.

Many of the decisions involving the invocation of a BFOQ to an age discrimination claim involve public safety jobs, such as pilots and police officers. An employer who asserts that public safety is the reason for making age a factor in an employment decision must successfully prove that the elimination of those individuals who are within the protected age group does in fact effectuate the stated goal of public safety and that no available alternative to advance the goal of public safety exists that has a lesser discriminatory impact.

In addition to the BFOQ defence, the ADEA also contains the following four exemptions from a claim of age discrimination:

- (i) where the action is based on reasonable factors other than age;
- (ii) where the action is in observance of a bona fide seniority system;
- (iii) when the action is in observance of a bona fide employee benefit plan; or
- (iv) where the employer has good cause to discipline or discharge the employee.

4. Retirement Ages

Generally, employers are prohibited from requiring employees within the protected class (i.e. 40 years of age or older) to retire because of their age. Therefore, seniority systems and benefits plans cannot permit the forced retirement of employees because of their age. However, early retirement incentive programs (“ERIP”) which are purely voluntary and offered to reduce costs are lawful.

Notwithstanding, the ADEA has an exception that permits the mandatory retirement of certain high ranking officials, assuming the following three conditions are met:

- (i) the employee must be at least 65 years old;
- (ii) the employee must have been employed for the two-years immediately prior to retirement in a bona fide executive or high policy making position; and

- (ii) the employee must be entitled to an immediate non-forfeitable annual retirement benefit from the pension, profit sharing, savings, or deferred compensation plan of at least \$44,000 a year.

5. Important Cases

In ***Smith v City of Jackson***¹⁴ the Supreme Court resolved a longstanding circuit split by holding that plaintiffs can rely on the disparate impact theory when bringing claims under the ADEA. Therefore, direct evidence of age discrimination is not required to maintain a claim. However, because the Court held that the “scope of the disparate impact liability under ADEA is narrower than under Title VII,” prevailing on an ADEA claim under a disparate impact theory is difficult. For example, a practice having a disparate impact on older workers need only be justified by “reasonable” non-age factors, and need not satisfy the “business necessity” defence applicable to Title VII. In addition, the burden of proof remains with the plaintiff and will only shift to the employer if the plaintiff can isolate a specific employment practice that has caused an observed statistical disparity. The employer will then have the opportunity to articulate a legitimate, non-discriminatory reason for adopting the challenged practice. The plaintiff will then have the burden of persuasion of disproving the employer’s reason. Illustrating this difficulty, the Smith plaintiffs failed to prove their case. There, the plaintiffs were police officers who alleged that the city violated the ADEA by giving older officers less generous salary increases compared to younger officers.

The Court found that the plaintiffs failed to isolate a specific test, requirement, or practice that was responsible for the statistical disparities between the older and younger officers. The Court also found that the city had proffered a reasonable basis for its pay plan: trying to make its police department more competitive by matching the salaries of surrounding communities. Consequently, the plaintiffs’ claims were dismissed.

These principles were affirmed in ***Meacham v Knolls Atomic Power Laboratory***¹⁵, where the Supreme Court emphasized that it is not enough for an ADEA plaintiff to cite a generalized policy which disparately impacts older workers. Consistent with Smith, plaintiffs must isolate and identify the *specific* employment practices that are allegedly responsible for any observed statistical disparities. However, when an employer raises the affirmative defence that its decision was based on a reasonable factor other than age, the employer bears not only the burden of production, but also the burden of persuasion, that the reasonable factor other than age is indeed reasonable.

¹⁴ 544 U.S. 228 (2005).

¹⁵ 128 S. Ct. 2395 (2008).

In ***Gross v FBL Financial Services***¹⁶ the Supreme Court held that the burden-shifting analysis available in so-called mixed-motive cases under Title VII does not apply to claims of age discrimination under the ADEA. In *Gross*, a plaintiff raised a "mixed motive" claim by presenting evidence that the employer's decision to reassign him was motivated in part by his age. The district court applied the ***Price Waterhouse v Hopkins***¹⁷ burden-shifting analysis for mixed-motive cases under Title VII by instructing the jury to find in favour of the plaintiff if he proved by a preponderance of the evidence that his age was a motivating factor in the employer's decision, and the employer could not prove that it would have taken the same adverse action regardless of plaintiff's age. The employer challenged the jury instruction, arguing that a mixed motive instruction was not warranted where plaintiff did not show direct evidence that age was a motivating factor. The Supreme Court vacated this decision.

6. Conclusion

It is interesting and a bold statement in American Federal legislation to set a specific age for discrimination against people who are age 40 or older, especially so low. That being said, it almost automatically and almost inevitably divides old age discrimination in two in some states (those states that does have laws that protect younger workers from age discrimination):

- (i) Discrimination towards individuals over 40; and
- (ii) Discrimination towards individuals younger than 40.

It is my opinion that our legislature should incorporate the distinction between direct and indirect age discrimination. I do, however, not suggest that the principles of victimization and harassment be incorporated into any legal section, but rather that it remain a description as per the respective words' meanings.

¹⁶ 129 S. Ct. 2343 (2009).

¹⁷ 490 U.S. 228 (1989).

CHAPTER 7

SUMMARY AND CONCLUSION

A. INTRODUCTION

This dissertation serves as a legal analysis of a crucial labour issue, namely old age and retirement, which inevitably affects, or at least concerns, all employees, this dissertation focuses on the legal analysis of the principles which currently regulates the fairness of any termination of employment due to an employee reaching a certain age.

The subject is deemed to be extremely relevant, due to the relatively new amendment to the Social Assistance Amendment Act, Act number 6 of 2008, whereby the retirement age of men has periodically been lowered from 65 to 60 from 1 April 2008 to 1 April 2010.

The introduction to the last mentioned Act states the purpose of the Amendment Act, namely: *“To amend the Social Assistance Act, 2004, so as to regulate afresh the eligibility of men for an older person's grant”*. This inevitably had an impact on employers' policies, relevant contractual clauses and the operational aspects of many businesses.

Our society needs to protect the norms of fairness in not only the dismissal of employees, but also with regard to pre-employment interviews, advertisements, requirements set by labour brokers, etcetera. Any such similar study will inevitably lead to the question of what the most severe sanction could be when it is ruled that a dismissal is automatically unfair.

The issue of retirement is a constitutionally enshrined and protected right and The Labour Relations Act honours this right by also providing “double protection” against discrimination due to old age.

This dissertation's focus is on the latter part of the scale of unfairness, namely automatically unfair dismissals, which inevitably leads to a study of the proverbial fine line between unfairness of a dismissal, which is not based on any arbitrary discriminatory ground, as opposed to those dismissals which are (arbitrarily discriminatory).

B. UNFAIRNESS IN AGE DISCRIMINATION

1. General

The starting point was the pre-requisites / requirements for dismissal.

Secondly distinction in labour law between “unfair dismissal” and “automatically unfair dismissal” was focused on, which entailed a look at the meanings as set out in S 186 (1) and S 187, especially S 187 (1) (f).

Thirdly a study of the Employment Equity Act’s prohibition of unfair discrimination as set out in Chapter II, S 5 to 11 provides more clarity on the reason why not only the Labour Relations Act deals with or should deal with discrimination.

Fourthly, the Social Assistance Amendment Act’s amendment of retirement age for males and the impact on the labour market in the RSA was examined.

Thereafter, a brief comparison of certain countries’ legislation, practice and procedure on unfair discrimination due to old age, was set out.

Although employees will be entitled to protection against discrimination:

- (i) as an applicant for employment;
- (ii) during the duration of his contract of employment, including if terminated by constructive dismissal; and
- (iii) during the termination of his services¹⁸,

our labour laws still places the onus on the claimant (applicant) to prove that he is entitled to protection by our laws, by proving:

- (i) firstly, that he classifies as an “employee”, and
- (ii) secondly, by discharging the onus of proving that the dismissal was both procedurally and substantively unfair (save for the onus shift).

Furthermore, only if the claimant / employee can prove that the substantive reason for termination of his service was based on an arbitrary ground, such as old age, then (only) will he be entitled to claim 24 month’s salary due to the fact that the dismissal is deemed to be automatically unfair.

2. Procedural Fairness / Unfairness

It should be clear from case law presented herein above, that as soon as the substantive unfairness is determined, or decided, then there is never really a deliberation or investigation to determine if the employer’s procedure followed was fair. Although it is not the focus of this dissertation to present an array of

¹⁸ Van Jaarsveld and others *Principles and Practice of Labour Law* Issue 23 par 832.

possible solutions how to fairly terminate a contract of employment due to old age where a contractual agreement is not in place, a few suggestions are presented in summary as possible solutions to ensure procedural fairness:

Two of the suggestions are presented by Judge President Zondo in *Rubin Sportswear v SACTWU and Others*¹⁹ wherein Judge President Zondo stated: *“The employer had some options: it could either have engaged in a consensus-seeking process with the employees to establish an agreed retirement age, or as a result of long practice, a certain age becomes the ‘normal’ retirement age. The employer could have instituted a lock-out, the Court added, to force the employees to agree to 60 as the retirement age’.*

2.1 Voluntary Consultations

This is probably the most viable solution, although employees would normally bargain for some sort of financial inspiration to conclude a voluntary agreement to terminate their services. Normally the payment of an amount which is based on what an employee would have been paid, had he/she been retrenched, would be a guideline for both parties. Obviously, this could amount to a substantial sum for the employer and “Chinese bargaining” in an attempt to reduce the settlement amount normally comes into play. Parties should refrain from being dishonest when completing the employee’s Unemployment Insurance Fund document, namely the UI-19 form, since it is the ethical and only way it should be done.

2.2 Consultations in terms of S 189 of the LRA

The question in this regard is, is it an “operational reason” to terminate an employee’s contract of service merely because that employee has reached an age that is deemed, by either or both parties, but normally by the employer itself, as a normal retirement age. This is, once again, normally an option in cases where there is no contractual agreement that the employee would retire at a certain age and the employee has reached that age.

The answer seems to be no. If it was an operational issue, then the employer would normally rely on the statutory justification (or permissible remedy) namely, “inherent requirements of the job”.

It is my opinion that it would indeed be much less risky for an employer to rely on the latter, namely (to be clear), inherent requirements of the job. This would, however mean that the employer should realise that he / it therefore needs to prove a general, fair and objective reason/s why it is fair to assume that the inherent requirements of the employee’s specific work, is of such nature that the employee is no longer fit for that work.

¹⁹ (2004) ILJ 1671 (LAC).

Consultations in terms of S 189 of the LRA is therefore not necessarily the best solution in an attempt to (if we assume that no *mala fides* on the part of the employer exist) terminate an employee's contract of service due to old age, but it is certainly an option.

2.3 Lock-outs

It has been suggested in *Rubin Sportswear v SACTWU and Others*²⁰ in Chapter 3 at paragraph C herein above, that: "*The employer could have instituted a lock-out, the Court added, to force the employees to agree to 60 as the retirement age*".

This option is rarely available to employers, since it would have to involve more than one employee reaching a specific age (and also for the facts to be that no contractual retirement age to exist for either employee) being locked out at a specific similar time.

In terms of S 213 of the LRA a "**lock out**" means: "*the exclusion by an employer of employees (thus more than one) from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion*".

The heart of this definition is (in my opinion): "...for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest...". Convincing a Judge that it was a matter of mutual interest that more than one employee's contract of service had to be terminated (merely) because those employees reached a certain age, will certainly be a challenge.

I personally do not regard this to be an option. It is, at the very least, a very risky attempt to attempt to justify the substantive fairness of a dismissal due to old age.

3. Substantive Fairness / Unfairness

Every case needs to be treated on its own merits. The Labour Relations Act indeed honours the protection of the fundamental right not to be unfairly discriminated against due to old age, not only by providing "double the protection" against discrimination, but also by allowing 6 times longer for employees who allege that they have been discriminated against on this ground, to refer a case to the CCMA.

It might remain a question for some time to come if these matters absolutely need to be referred to the Labour Court for arbitration, thereby taking up costly

²⁰ (2004) ILJ 1671 (LAC)

time of Labour Court Judges, but mostly because processes in the Labour Court are practically seldomly a speedy resolve for employees who do not understand the practices of our Labour Courts. In other words, especially when an employee feels vulnerable and needs to prove a very sensitive, emotional case, he/she is left to face a Court on the same level as the High Court, which is often in itself too overwhelming a thought for employees, who might then choose to base their allegations on nothing else than “reason for dismissal not known”.

From all of the above, it seems obvious that there are many problems with our current labour law process of dealing with discriminatory dismissals.

It is my conclusion that nevertheless, especially since the different, severe sanctions which employers currently face when they terminate an employee's contract of service due to old age, whilst they do not have a permissible ground for doing so, is such a “dark abyss”, employers should act with extreme caution in such cases and rather seek the advice of labour law experts.

C. CREATION OF NEW LEGAL TERMS

Old age discrimination will most probably become more and more a prominent issue, especially due to the relatively recent amendment of the age at which men may apply for old age pension.

Nevertheless, it (old age discrimination) has contributed to the possibility, in the opinion of writer hereof, of the creation of new legal terms such as:

(a) “Automatically Unfair Constructive Dismissals”

This might not as yet have caught on as a generally used term / phrase, but it is trite law that in constructive dismissal cases, it is such cases are the unconventional whereby it is the employee who, by means of some final act, terminates his employment, due the employer making continued employment intolerable. Should the reason for the employee terminating his employment be due to discrimination due to the employee's old age, then it can be described as automatically unfair constructive dismissal. *Decision Surveys International (Pty) Ltd v Dlamini and Others*²¹ is an example of a case in which the existence of such legal term could have been used.

(b) “Automatically Unfair Labour Practices”

Writer hereof might very well be opening a huge can of worms, but if certain dismissals are deemed to be automatically unfair, the certain actions short of termination of employment which are unfair labour practices, but which possess an element of discrimination, may just as well be deemed automatically unfair labour practices. An example would be promotion - if two equally competent,

²¹ (1999) 4 LLD 300 (LAC).

equally learned employees were candidates for a position that has become vacant, yet the employer does not promote one employee merely because he is already over the normal retirement age, or possibly nearing the normal retirement age, then that might also be regarded to be an “automatically unfair labour practice”.

ANNEXURES

A. BIBLIOGRAPHY

AC Basson, MA Christianson, C Garbers, PAK le Roux, C Mischke, EML Strydom

Essential Labour Law (2006) 4th Edition
Labour Law Publications

John Grogan

Dismissal, Discrimination and Unfair Labour Practices (2005)
Juta and Co Ltd Publications

John Grogan

Workplace Law (2005) 8th Edition
Juta and Co Ltd Publications

Honeyball and Bowers

Textbook on Labour Law (2002) 7th ed

MP Olivier, N Smit, ER Kalula, GCZ Mhone

Introduction to Social Security (2004)
Lexis Nexis, Butterworths

MP Olivier, N Smit, ER Kalula

Social Security: A Legal Analysis (2003) 1st Edition
Lexis Nexis, Butterworths

Hein Olivier

Dissipline, Ontslag en Menseregte (2006) 3de Uitgawe
Laboras

EML Strydom, PAK le Roux, AA Landman, MA Christianson, OC Dupper, PMyburgh, FS Barker, CJ Garbers, AC Basson, A Dekker, V Esselaar

Essential Social Security Law (2006) 2nd Edition
Juta and Co Ltd Publications

SR van Jaarsveld, BPS van Eck

Kompendium van Arbeidsreg (2006) 5de Uitgawe
Lexis Nexis, Butterworths

SR van Jaarsveld, BPS van Eck

Kompendium van Suid-Afrikaanse Arbeidsreg (1992)
Lex Patria

Van Jaarsveld, Fourie and Olivier

Principles and Practice of Labour Law (PPLL) 2008 to 2012
15th to 23rd Service Issue

A van Niekerk, MA Christianson, M McGregor, N Smit, BPS van Eck
Law at Work (2008) 1st Edition
Lexis Nexis, Butterworths

Whincup

Modern Employment Law (1997) 9th ed.

B. CASE LAW

Adriaanse and Swartklip Products [1999] 6 BALR 649 (CCMA)
Association of Professional Teachers and another v Minister of Education and Others [1995] 9 BLLR 29 (IC)
Botha v Du Toit Vrey and Associates, Labour Court case number: JS 749/03
Cash Paymaster Services v Browne (2006) 27 ILJ 281 (LAC)
City Council of Pretoria v Walker 1998 (3) BLLR 257 (CC)
Coetzee v Moreesburgse Koringboere Koöperatief Bpk (1997) 18 ILJ 1341 (LC)
Consolidated Billing v IMATU (1998) 8 BALR 1049
Decision Surveys (Pty) Ltd v Dlamini and Others (1999) 4 LLD 300 (LAC)
Discovery Healthy v CCMA and Others 2008 ILJ 1480 (LC)
Evans v Japanese School of Johannesburg (2006) 12 BLLR 1146
Harris L. v Bakker and Steyger (Pty) Ltd (1993) ILJ 1553 (IC)
Hoechst v CWIU 1993 ILJ 1449 (LAC)
Hoffman v South African Airways (2001) 21 ILJ 2357 CC
Jack v Director-General Dep of Environmental Affairs [2003] 1 BLLR 28 (LC)
Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v Numsa and Others (2002) 23 ILJ 391 (LC)
Kroukam v SA Airlink (Pty) Ltd 2005 26 ILJ 2153 (LAC)
Lagadien v University of Cape Town (2000) 21 ILJ 2469 (LC)
Langemaat v Minister of Safety and Security and Others (1998) 19 ILJ 240 (T)
Louw v Golden Arrow Bus Services (2000) 21 ILJ 188 (LC)
McInnes v Technikon Natal (2000) 21 ILJ 1138 (LC)
Ntsangani v Golden Lay Farms 1992 ILJ 1199 (IC)
Raol Investments (Pty) Ltd t/a Tekwini Toyota v Madala (2008) 29 ILJ 267 (SCA)
Riekert v CCMA 2006 ILJ 1706 (LC)
Rockliffe v Mincom (Pty) Ltd 2008 29 ILJ 399 (LC)
Rubin Sportswear v SACTWU 2004 ILJ 1671 (LAC)
SABC v McKenzie (1999) 20 ILJ 585 (LAC)
Schweitzer v Waco Distributors (a Division of Voltex (1998) 19 ILJ 1573 (LC)
Schmahmann v Concept Communications Natal (1997) 18 ILJ 1333 (LC)
Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others [2007] BLLR 1097 (CC)
Swart v Mr Video (1998) 19 ILJ 1315 (CCMA)

University of Cape Town v Auf der Heyde (LAC) (2002) 23 ILJ 658
Wallace v Du Toit (2006) 27 ILJ 1754 (LC)
Wanless v Fidelity (2000) 21 ILJ 2469 (LC)
Wardlaw v Supreme Mouldings (Pty) Ltd (2004) 25 ILJ 1094 (LC)
Woolworths v Whitehead 2001 ILJ 511 (LAC)
Wyeth SA v Manqele 2005 ILJ 749 (LC)

TOTAL WORDS: 29 347

SUMMARY

This dissertation serves as a legal analysis of a crucial labour issue, namely old age and retirement, which inevitably affects, or at least concerns, all employees, this dissertation will concentrate on the legal analysis of the principles which currently regulate the fairness of any termination of employment due to an employee reaching a certain age.

The subject is deemed to be both relevant and actual, due to the relatively new amendment to one the Social Assistance Amendment Act, Act number 6 of 2008, whereby the retirement age of men has periodically been lowered from 65 to 60.

The introduction to the last mentioned Act states to purpose of the Amendment Act, namely: *“To amend the Social Assistance Act, 2004, so as to regulate afresh the eligibility of men for an older person's grant”*.

This inevitably had an impact on employers' policies, relevant contractual clauses and the operational aspects of many businesses.

Our society needs to protect the norms of fairness in not only the dismissal of employees, but also with regard to pre-employment interviews, advertisements, requirements set by labour brokers, etcetera.

Any such similar study will inevitably lead to the question of what the most severe sanction could be when it is ruled that a dismissal is automatically unfair.

The issue of retirement is a constitutionally enshrined and protected right and The Labour Relations Act honours this right by also providing “double the protection” against discrimination merely due to old age.

This dissertation will concentrate on the latter part of the scale of unfairness, namely automatically unfair dismissals, which inevitably leads to a study of that fine line or balance between unfairness of a dismissal, which is not based on any arbitrary discriminatory ground as opposed to those dismissals which are.

Firstly, the starting point is the pre-requisites / requirements for dismissal.

Secondly distinction in labour law between “unfair dismissal” and “automatically unfair dismissal” is focused on. This entails a look at the meanings as set out in Sections 186 (1) and Section 187, especially Section 187 (1) (f).

Thirdly a study of the Employment Equity Act's prohibition of unfair discrimination as set out in Chapter II, Sections 5 to 11 will provide more clarity on the reason why not only the Labour Relations Act deals with or should deal with discrimination.

Fourthly, the Social Assistance Amendment Act's amendment of retirement age for males and the impact on the labour market in the RSA will be examined.

Thereafter, a brief comparison of certain countries' legislation, practice and procedure on unfair discrimination due to old age, will be set out.

It is the author of this dissertation's objectives to:

- (i) attempt to bring the impact of the Social Assistance Amendment Act, Act number 6 of 2008, to the attention of South African employers, employees and the State;
- (ii) highlight the need for employer's to tread carefully when dealing with aspects which may easily be deemed to be automatically unfair;
- (iii) clarify the murky waters between fair dismissals and automatically unfair dismissals;
- (iv) present the cases "walking the tightrope" to provide more clarity and insight into the reasoning of Commissioners and Judges;
- (v) elaborate on the compulsory referral of automatically unfair dismissals to the Labour Court;
- (vi) Analyse the relevant Constitutional clauses and consequences of contravention thereof;
- (vii) Point out all relevant aspects of the Prevention of Unfair Discrimination Act, Act number 4 of 2000;
- (viii) Shine a spotlight on the expanding realm of Social Security and the impacts thereof on this topic of discussion and 'visa versa';
- (ix) Attempt to provide answers to the self-posed question of whether or not the gap between unfair and automatically unfair dismissals should be broadened or narrowed, and;
- (x) take a brief, critical look into the cost effectiveness and accessibility of employees to our tribunals and Courts to satisfy employees that their rights are indeed easily enforceable.