

Compulsory retirement and discrimination on the grounds of old age*

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Abstract

Retirement on reaching a certain age has long been taken for granted. Moreover, older persons have as a matter of course, been regarded as lesser employees. Demographic trends during the last two to three decades have changed the scene entirely. People live longer and there is a general decline in the birth rate. Hence many countries are re-arranging the deck chairs by increasing the age of retirement, to make it possible to utilise the services of older persons, and by legislating to outlaw discrimination on the ground of old age.

This article deals with these new developments, focusing on South African legislation that still discriminates without regard to demographic, social and economic consequences.

Introduction

Age barriers/limits/gradations, in both civil and criminal law, relating to legal capacity, legal liability and legal protection¹ are well-known in contemporary legal cultures.² Compulsory retirement at a specific age represents a

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¹See for instance Triepel 'Das preußische Gesetz über die Einführung einer Altersgrenze' 1921 *Archiv des öffentlichen Rechts (AöR)* 349 351-352. For a critical evaluation see Labuschagne 'Strafregtelike aanspreeklikheid van kinders: geestelike of chronologiese ouderdom?' 1993 *SALJ* 148; 'Criminal responsibility of children in international human rights law' 2001 *SAYL* 198; and 'Die status van fiksies in 'n regstaat: opmerkinge oor ouderdomsgrense en die kind as dader en slagoffer in die strafreg' (2003) 1 *TRW* 19; Curlewis 'The role that age plays in the South African criminal law' (LLD-thesis, University of Pretoria, 1998) 1ff. See also Schaumann 'Alter, Krankheit und Behinderung im deutschen Strafrecht, insbesondere im Strafzumessungsrecht' (DJur-thesis, Marburg, 2000) 11-17.

²In an excellent recent article Angelika Nussberger 'Altersgrenzen als Problem des Verfassungsrechts' 2002 *Juristenzeitung (JZ)* 524 observes: 'Das Alter ist eine unverfügbare Eigenschaft des Menschen, ist, wie auch das Geschlecht, eine

labour-law manifestation of a fictional³ application of age gradations. It appears from Nussberger's⁴ exposition that, although the basic meaning of discrimination (*discriminatio*; *die Diskriminierung*) could be described linguistically as differentiation, it nowadays generally harbours a negative value-laden element of *unjustifiable* or *unjust* differentiation. Similarly, Spiros Simitis⁵ states that

[d]iscrimination is, therefore, indeed a correct description of an attitude which attaches to a particular group of persons... a label directly affecting their social status, their self-perception and their opportunity to participate actively in the societal process.

According to the South African Constitutional Court (CC)⁶ unfair discrimination 'principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity'. Disregard for the equal-in-dignity premise of the rule of law and the foundation of a constitutional state (*der Rechtsstaat*; *die regstaat*) is therefore the pivotal factor in establishing unfair discrimination. De Waal, Currie and Erasmus,⁷ correctly point out that the determining factor lies in the impact that the discrimination has on the victim(s), *ie* on the individual. Relying on the decision of the CC in *Harksen v Lane NO*,⁸ these authors⁹ explain that the following factors should be taken into consideration in determining whether discrimination impacts unfairly on individuals: (i) The societal status of the persons concerned. In this regard the question whether they had been victims of past discrimination patterns should also be taken into consideration. Discriminatory treatment 'that burdens people in a disadvantaged position is more likely to be unfair'; (ii) The nature and purpose of the discriminatory law is also of primary significance. A law or an action which is aimed at achieving a worthy and important societal goal will more likely be labelled as fair discrimination; (iii) The effect and extent of the discriminatory law or action on the impairment of the dignity or other

Grundkoordinate, die den Einzelnen bestimmt und auf die er keinen Einfluss zu nehmen vermag. Aber während das Geschlecht in aller Regel eins für allemal festgelegt ist, wandelt sich das Alter. Älterwerden ist ein unaufhörlicher Prozess, der sich stetig und gleichmäßig vollzieht. Die zumeist an die Vollendung einer bestimmten Zahl von Lebensjahren anknüpfende Vorstellung von Altersstufen, von Lebensabschnitten, ist eine Fiktion, ein Hilfsmittel, mit dem man versucht, Unterschiede zwischen Menschen verschiedenen Alters greifbar zu machen. Auf derartigen Fiktionen aufbauende Typisierungen sind die Grundlage dafür, an das Alter eines Menschen bestimmte Rechtsfolgen zu knüpfen.'

³Nussberger n 2 above at 524 also refers to age gradation (*die Altersstufen*) as a fiction. See in this respect also Labuschagne 'Regmatige verwagting, redematige administratiefregspeling en die menseregtelike status van fiksies' 1997 *SAPR/PL* 522; (2003) 1 *TRW* 19-35.

⁴Note 2 above at 524.

⁵'Denationalizing labour law: the case of age discrimination' 1994 *Comparative Labour Law Journal* 321-337.

⁶*Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 31; de Waal, Currie & Erasmus *The Bill of Rights Handbook* (2001) 210.

⁷Note 6 above at 210.

⁸1998 1 SA 300 (CC) para 52.

⁹Note 6 above at 210-211.

basic rights of the individual(s) concerned should be accorded substantial weight. These factors, judged objectively, should be utilised to realise 'precision and elaboration' in ascribing the content of unfairness in a particular factual environment. Various other factors may be taken into consideration in this regard; there is no closed list of relevant factors and considerations. This article considers whether compulsory retirement can be justified or tolerated in a constitutional state.

Demographic, economic, ethical and social background information

The world's ageing population is increasingly attracting the attention of governments. Until recently it was taken for granted that people retire at sixty-five years of age to live a few more years on an employee pension, interest on investments, or social benefits. Save for some developing countries, the average life expectancy has increased remarkably during the last two to three decades, while the birth rate has decreased to below replacement rate.¹⁰

The greying population has become a matter of grave concern for industrialised nations. Although the elderly people are still traditionally moved out of the economic system, there are insufficient entrants to sustain economic growth.¹¹ The demographic scenario in developing countries is somewhat different. It has been projected that by 2050, thirty-three percent of people in developed countries will be sixty or older, the percentage in developing countries is nineteen.¹²

In developing countries the fate of the elderly is actually worse, in that 'increased export dependency, international indebtedness and industrialization have drawn resources away from regions and sectors such as agricultural production and informal trade, where older persons, especially women, are more active'.¹³ In certain African countries informal systems have been subject to additional pressures from famine, war and AIDS.¹⁴ South Africa's position has been described as follows:

¹⁰*The Alzheimer's Disease International Facts Sheet* (4 March 1999) records the following figures. The first figure reflects the number as persons above the age of sixty-five, the second reflects this figure as a percentage of the relevant country's population. They also illustrate the increasing survival rate beyond sixty-five. (Population (m) to aged sixty-five + percentage.) Sweden 9m, 17,6; USA 25m, 712,7; UK 5m, 815,7; Japan 12m, 413,0; China 1m, 130 5,6. JR London 'The Canadian experience in mandatory retirement: a human rights perspective' 331; A Graycar 'Protecting the legal right of older people: state government initiatives in Australia' 401 in Eckelaar *et al An aging world: dilemmas and challenges for law and social policy* (1998).

¹¹See Buys 'Die knoop van moderne reuse se selfmoord trek al stywer' *Beeld* 11 Desember 2002.

¹²International Labour Conference (ILC) 91st Session 2003 'Time for equality at work: global report under the follow-up to the 120 Declaration of Fundamental Principles and Rights at Work' 35.

¹³ILC n 12 above at 35-36.

¹⁴See World Bank Policy Research Report 'Averting the old age crisis: policies to protect the old and promote growth' (1994) 32-35.

South Africa has experienced declining fertility rates for some years now, contributing to declining population growth. This decline is being hastened by the HIV/Aids pandemic, which seems to be contributing to the ‘natural’ decline in fertility rates and raising the death rates. The overall result is that, from 2008 onwards, negative growth is expected in the size of both the total population and the labour force The implication of the age structure of Aids deaths implies the evolution of a demographic pyramid similar to that of a developed country – lower fertility rates will lead to a lower percentage of children and a higher proportion of elderly people, compared with the current demographic pyramid.¹⁵

The 2001 census revealed that this is what the ageing population in South Africa looks like:¹⁶

Age group	Black African	Coloured	Indian or Asian	White	Total
60	730 835	93 952	35 959	204 547	1 065 294
65–69	540 092	68 532	23 091	156 212	787 927
70–74	442 551	43 950	14 621	130 348	631 469
75–79	241 287	24 974	7 961	93 314	267 537
80–84	194 353	13 476	3 881	59 236	270 945
85	108 265	8 832	1 887	38 348	157 333

ABSA is concerned about the loss of skills:

With the likelihood that measures to attract and retain greater levels of skills in South Africa will be insufficient to achieve significantly higher rates of economic growth, one possibility open to the economy is to make greater use of sections of the labour force that have been marginalized The older generation is one such group [which] may increasingly be used to alleviate the skills shortage in the years to come.¹⁷

The implementation of age related reform is easier said than done for several reasons. The first is the perceived lower productivity of elderly workers due to the decline in their physical and mental abilities. Although these negative beliefs are not fully and universally justified, they are a factor to be taken into account. The second is that training is mainly aimed at the young. Employers find it difficult to develop training programmes for elderly workers and costs may not be justified, where retirement is imminent. If there is substantial unemployment, it is hardly justifiable to employ older workers who are receiving pensions and who earn higher wages than younger ones.¹⁸ The main problem is that it is difficult to individualise the various manifestations of ageing. The capacities of the elderly differ from person to person; they have different socio-economic expectations; some

¹⁵ABSA *Long-term prospects for South African economy 2002–2016* (2002ed) 4.

¹⁶Statistics South Africa: *Census 2001 – census in brief* (2003) 27.

¹⁷ABSA n 15 above.

¹⁸Spiezia ‘The greying population: a wasted human capital or just a social liability?’ 2002 *International Labour Review* 100–105 deals at length with these aspects.

are more motivated to work than others. However, industrialised countries must develop age-related reforms. All the members of the Organisation for Economic Cooperation and Development (OECD) have already instituted ageing-related reforms: eight increasing the official retirement age, and all but one introducing incentives to discourage early retirement.¹⁹

Discrimination against elderly employees or 'ageism' however, remains the rule, rather than the exception. The word was originally coined by Dr Robert N Butler in 1968, who defined it as

(a)systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills Ageism allows the younger generation to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.²⁰

There are a number of reasons for continuing discriminatory practices.²¹

- Compared to racial and gender discrimination, ageism is not regarded as a serious issue. Most people would not even perceive that the manner in which they treat the elderly is discriminatory. Differential treatment is accepted as a matter of course.
- There is no fixed criterion for identifying an elderly person. The degree and rate of ageing vary between individuals without reference to chronological age; physiological, mental and cognitive changes tend to occur at different rates within the same person; and the elderly, when defined as a chronological group, are far more heterogeneous than homogeneous.²²
- Whitton²³ ascribes the classification into age groups to age consciousness and age segregation. '[C]hronological age has not [he says] always been the important means of social categorization and organization it has [become] today.'²⁴ But by the turn of the 20th century, 'the concept of age segregation had invaded education, industry and family life'.²⁵ Unfortunately this went hand in hand with a negative attitude of mental and physical decay and death. Although life expectancy and quality of life have in the meantime increased dramatically, the negative attitude persists.
- Classification into age groups is generally accepted and creates legal certainty. An age of majority is, for example, such a classification, as is a compulsory retirement age. Although these are arbitrary, they are to a

¹⁹*Id* at 107–108.

²⁰Quoted by Whitton 'Ageism: paternalism and prejudice' 1997 *De Paul Law Review* 451.

²¹*Id* at 467; Gerritsen *et al Onderscheid naar leeftijd en andere vormen van ongelijke behandeling* (1991) 1ff.

²²Whitton n 20 above at 467.

²³*Id* at 458ff.

²⁴*Id* at 458.

²⁵*Id* at 460.

certain extent essential for effective government. Persons of a certain age are obliged to attend school; at a certain age people are entitled to state pensions. Consequently, not all forms of age discrimination are *per se* without substance.

- Younger people need to be protected while elderly people are regarded as dispensable. It is more important to have maximum employment of young persons than to keep the elderly in employment.
- The financial burden of implementing an equal opportunity programme may be costly for companies. This, is of course, a serious matter. But, like minimum wages and taxes, this is a factor of which business must take account.
- Many people stereotype the elderly as sickly, incompetent and forgetful. This often results in outright bullying. More hurtful, however, is subtle bias. It is assumed that older workers have no interest in promotion, training, challenging tasks, or being consulted. It is assumed that they would like to retire and that their pension plus savings are adequate and that they do not need much to make ends meet. However, for many, retirement often marks the onset of a long period of rising prices, declining value of money and soaring medical expenses. At the same time loneliness and isolation could also become a problem.²⁶ The implications for health, welfare services and housing are colossal. Even if paid for by the elderly, the facilities must be made available, generally at state expense.
- The legislature assumes that it is justified in basing retirement on life expectancies that prevailed when pensions and social benefits for the elderly were introduced. The following are a few (South African) examples chosen at random.
 - In terms of section 45 (1) of the South African Police Service Act²⁷ a member of the Police Service may retire from the service and must be so retired, on the date of attainment of the age of sixty years. Employment may be extended beyond the age of sixty with the approval of the minister, but may not exceed five years, unless authorised by parliament. A member who reaches the age of fifty may on his or her request retire if there is sufficient reason, and the retirement will be to the advantage of the service.
 - Similar provisions are made for the retirement of correctional service officials²⁸ and comparable rules are embodied in sections 45, 84 and 86 of the Defence Act.²⁹
 - Provisions like these governing persons in state employment per-

²⁶In the United Kingdom one in three people over sixty-five lives alone. *Alzheimer's Disease International Fact Sheet* n 10 above.

²⁷68 of 1995.

²⁸Section 12 of the Correctional Services Act, 8 of 1959.

²⁹44 of 1957.

meate the statute book. The Government Service Pensions Act³⁰ provides for categories of retirement between fifty-one and sixty-five. In terms of the Aged Persons Act³¹ an aged person is a male of sixty-five years of age or older and a female sixty years or older. One would have thought that the categories of work are so varied that competence and not age should be the criterion. Fixing the compulsory age of retirement at sixty or even sixty-five, is unrealistic in view of the current high life expectancy.

These laws confirm the outdated assumption that sixty-five is the outer limit of human usefulness. It is submitted that the government employees' pension schemes and the state's social security system will not be able to bear the financial burden indefinitely.

It has been said of the situation in the United States³² that

[p]rincipally because of increasing life expectancy and the fact that the baby boom generation is reaching retirement age and is followed by a much smaller generation, the American Social Security System is facing a long-term funding deficit. [It has further been predicted that] unless corrective action is taken, social security benefits will exceed dedicated tax revenues by the year 2016, and the social security system will become insolvent, that is, unable to pay benefits in full, by the year 2038.

France has, for similar reasons, reformed its retirement system over the last decade.³³

The Council of the European Union has issued a directive establishing a general framework for equal treatment in employment and occupation.³⁴ One of its points of departure is 'the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force'.³⁵ The document contains specific directives on equal opportunities for older persons. Differences in treatment on grounds of age can be justified and dealt with in article 6 as differences that are 'objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. But the tenor of the directive is that chronological age as such, should not be a criterion. Member states were required to implement the directive by 2 December

³⁰57 of 1973. In Germany, a minimum (twenty-five years) and a maximum (seventy years) age is set for jurors (*Schöffen*) — s 33 *Gerichtsverfassungsgesetz*; Kissel *Gerichtsverfassungsgesetz. Kommentar* (1994) 1 ad Art 33. These age limits are not regarded as in conflict with the German Basic Law (*Grundgesetz; GG*) — *BVerfG* Beschl v 16/11/1990 NVwZ 1991 358; Nussberger n 2 above at 527.

³¹81 of 1967.

³²Moore 'The best of times and the worst of times: lessons from recent reforms of the French retirement' 2001 *Georgia Journal of International and Comparative Law* 441 443-444.

³³*Id* at 441ff.

³⁴Council Directive 2000/78 EC of 27 Nov 2000.

³⁵Preamble par (8).

2003.³⁶ A number of European countries have adopted laws implementing the directive. The Council Directive should be seen against the background that although all the member states have legislation outlawing discrimination, it is not adequate to address the peculiar and widespread discrimination on the ground of age. One may also assume that the directive is an economic imperative. Developed countries will be facing disaster if they continue to sideline older persons. The economies will not be able to sustain the immense and increasing numbers of economically inactive persons.³⁷

As long ago as 1967 the United States of America adopted the Age Discrimination in Employment Act which protects most workers of forty years and older against discrimination in recruitment, hiring, training, promotion, pay, benefits, firing, layoffs, retirement and other employment practices. The Equal Employment Opportunity Commission is responsible for receiving charges of age discrimination under the Act, investigating them, and working to remedy the causes.³⁸ That legislation is an important first step in eradicating unnecessary discriminatory practices in this regard is emphasised by the International Labour Conference³⁹

The State plays a key role in the elimination of discrimination and the realization of equality at work. Legislation can contribute to achieving this goal: directly by addressing the problem of discrimination at work... and indirectly, by guaranteeing equality in matters other than work. These include family life, inheritance, property and contractual rights, access to land and credit and education. In countries where there is legal pluralism the creation of an equality legal environment must also concern customary law.

German law: some general observations⁴⁰

Socio-legally, humans are divided into various mathematically calculated calendar age-groups intended to represent, *inter alia*, the phases for providing for old age, *ie* the pre-retirement phase, and the retirement phase. Hereby, the individual is protected against specific unforeseeable and uncontrollable risks and the loss of the ability to work. In addition, the activity of the elderly in the labour market is viewed as potentially dangerous to society. A variety of court decisions directed at the protection of diverse socio-juridical values are premised on this consideration. As far as the protection of public health (*die Volksgesundheit*) is concerned, the German Constitutional Court (*Bundesverfassungsgericht; BVerfG*)⁴¹ has decided that women above the age of seventy years could be barred from practising the profession of midwifery (*der Beruf der Hebamme*). In protecting public

³⁶Article 18.

³⁷See generally World Bank Report n 14 above at 32–35.

³⁸Administration on ageing — age discrimination: a pervasive and damaging influence. Source: <http://www.aoa.gov/factsheets/ageism.html>.

³⁹Note 12 above at 58.

⁴⁰In the exposition that follows, the article of Nussberger n 2 above at shall be used as guideline.

⁴¹Beschl v 16/6/1959 BVerfGE 9 338 346. See too, BVerfG Beschl v 20/3/2001, NJW 2001, 1779.

security, an age restriction of seventy years for an inspecting engineer was held to be justified.⁴² In maintaining a sound/reliable notary profession, an age limitation of seventy years was regarded by the *BVerfG*⁴³ as tenable. For purposes of securing and promoting scientific recruits/new blood (*der Nachwuchs*) an age limit of sixty-five years for professors/academicians was found to be warranted.⁴⁴

Traditionally, state officials/civil servants (*die Beamten*) were appointed for life, *ie* until they became incapable of performing their duties.⁴⁵ General retirement age directives were first introduced during the first half of the 20th century, the reason being the strained financial situation of the state and to thwart the over-ageing of the civil servant corps.⁴⁶ From the reasons given for the adoption of the Prussian *Altersgrenzenengesetz* of 15 December 1920, it emerges that the elderly were regarded as unable to adapt to the required transformation of the character/nature of the state.⁴⁷ In interpreting and analysing this statute the then highest German court, *Reichsgericht*, (*RG*)⁴⁸ opted for general age limits rather than the specific qualities and capabilities of the individual. Against the backdrop of this decision, Nussberger⁴⁹ correctly observes that the decision of the *RG* is premised on the notion of a generation justice (*die Generationengerechtigkeit*). In essence, the supreme value of human individuality and uniqueness had socio-legally been discarded in favour of purely chronological considerations. A similar attitude can be gleaned from a decision of the *BVerfG* in 1984.⁵⁰ From the tenor, principles and arguments expounded in these decisions, a uniform retirement age of all state officials/civil servants, irrespective of individual characteristics and abilities and professional demands, clearly emerged as an ideal.⁵¹

In contrast to state officials, the pension rights of other employees⁵² are not subject to the termination of employment at a fixed age. Although there

⁴²*BVerfG* Beschl v 4/5/1983, *BVerfGE* 64, 72 79ff. Cf *BAG* Urt v 23/1/2002 *NZA* 2002 669.

⁴³*BVerfG* Beschl v 29/10/1992 *NJW* 1993 1575. See also *BAG* Urt v 25/2/1998 *NZA* 1998 715; *BAG* Urt v 11/3/1998, *NZA* 1998 717. *BVerfG* Beschl v 25/7/1997, *NVwZ* 1997 1027.

⁴⁴*BVerfG* Beschl v 10/4/1984, *BVerfGE* 67, 1 14ff. See also Dreier-Wieland *Grundgesetz. Kommentar* (1996) 774–775.

⁴⁵Triepel n 1 above at 352; *BVerfG* Beschl v 30/3/1977, *BVerfGE* 44 249 264ff.

⁴⁶Nussberger n 2 above at 528.

⁴⁷Cf Triepel n 1 above at 353.

⁴⁸Urt v 14/3/1922, *RGZ* 104 58 62ff.

⁴⁹Note 2 above at 528.

⁵⁰Beschl v 10/4/1984 *BVerfGE* 67,1 13ff. Cf *BVerfG* Beschl v 8/11/1994, *NZA* 1995 45.

⁵¹See too Battis & Deutelmoser 'Qualifizierung der Altersgrenze, insbesondere im Beamtenrecht' 1994 *Recht der Arbeit (RdA)* 264 267–268; Nussberger n 2 above at 528.

⁵²*Die Angestellte*.

is no statutory age limit set in these cases,⁵³ sixty-five is generally determined by agreement.⁵⁴ Whether collective wage/employment agreements/settlements on age limits (*die tarifvertragliche Altersgrenzenvereinbarungen*), which are not directed at specific activities, are in compliance with article 12(1) of the Basic Law (*Grundgesetz; GG*), *ie* the right to freely choose one's trade, occupation and training, as well as with the general human-rights principle of equal treatment by the law, *ie* article 3(1) *GG*, is the subject of a heated debate in Germany.⁵⁵ In dispute, essentially, is whether one should proceed from a direct *Drittwirkung* of wage agreements (*tarifvertragliche Regelungen*) based on the relevant legislation and determine their conformity with fundamental rights, which represents the current case law,⁵⁶ or should one, according to the theory of the protection-duty function of state organs concerning fundamental rights (*Theorie von der Schutzpflichtfunktion der Grundrechte*), oblige the public addressee of fundamental rights to protect subjects from an incongruous restriction of their fundamental rights through private-autonomous settlements. It would appear obvious that only the latter approach properly and justifiably takes the function of fundamental rights adequately and effectively into consideration, *ie* to protect individuals against unnecessary and unjust public measures and conduct in this regard.⁵⁷ The principles underlying rules/directives resulting from wage settlements differ from those underlying legal rules created by state organs. Dietrich⁵⁸ refers to the former as a

⁵³See s 41(4)(1) SGB VI which provides in effect that an employee at the age of sixty-five is entitled to a pension; see Nussberger n 2 above at 528.

⁵⁴Article 12(1) *GG* reads: 'Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen. Die Berufsausübung kann durch Gesetz oder auf Grund eines Gesetzes geregelt werden.'

⁵⁵Waltermann 'Wieder Altersgrenze 65?' 1994 *Neue Zeitschrift für Arbeits- und Sozialrecht (NZA)* 822-830; Laux 'Altersgrenzen im Arbeitsrecht' 1991 *NZA* 967-974; Schlüter and Belling 'Die Zulässigkeit von Altersgrenzen im Arbeitsverhältnis' 1988 *NZA* 297-304; Lehmann 'Zur altersbedingten Beendigung von Arbeitsverhältnissen — zugleich eine Rückbesinnung auf das Individualvertragsrecht' 1994 *Neue Juristische Wochenschrift (NJW)* 3054-3057; Moll 'Altersgrenzen am Ende' 1994 *NJW* 499-501.

⁵⁶See *Bundesarbeitsgericht (BAG)* Urt v 15/1/1995 BAG 1 258; Nussberger n 2 above at 529 fn 61.

⁵⁷See Nussberger n 2 above at 529.

⁵⁸'Die Grundrechtsbindung von Tarifverträgen' in Schlachter, Ascheid & Friedrich (eds) *Tarifautonomie für ein neues Jahrhundert. Festschrift für Günter Schaub zum 65 Geburtstag* (1998) 117 121: 'Tarifverträge sind nicht die Realisierung staatlicher Regelungskonzepte oder Ausübung eines staatlichen Mandats. Sie sind — in ihrem normativen Teil — das Ergebnis autonomer Rechtsgestaltung, 'gebündelter Ausdruck individueller Selbstbestimmung'. Sie sind kollektiv ausgeübte Privatautonomie. Koalitionen, die sie vereinbaren, handeln dabei als gleichstarke Vertragspartner, die ihrem freien Gestaltungswillen folgen. Für sie streitet nicht nur ein spezielles Grundrecht, das dies gewährleistet (Art 9 Abs 3 *GG*). Sie können sich darüber hinaus auf die privatautonome Legitimation stützen, die ihnen durch den Verbandsbeitritt ihrer Mitglieder vermittelt wird. Dieser Beitritt geschieht im Vertrauen auf die Sachgerechtigkeit der Interessenvertretung, die Verhandlungsgestärke des Verbandes und die Richtigkeitsgewähr seiner Tarifabschlüsse. Er bedeutet also die freiwillige Unterwerfung unter bestehendes und künftiges Tarifrecht. Solche privatautonome Legitimation reicht grundsätzlich weiter als die Legitimation des staatlichen Gesetzgebers, weil Grundrechtsträger ihre Freiheit

result of the collective practice of private autonomy (*kollektive ausgeübte Privatautonomie*).

In accordance with the protection-duty theory, generally referred to as *die Schutzpflichttheorie*, the legislature, the judiciary, and the administration are not tasked to intervene in every restriction of fundamental rights by non-state agents. State organs are expected to protect subjects only from restrictions in respect of the core-sphere (*der Kernbereich*) of fundamental rights (the so-called *Untermaßverbot*).⁵⁹ As far as article 12GG is concerned, protection should be provided against an inappropriate encroachment on the freedom of choosing a profession/vocation/trade (the so-called *Berufswahlfreiheit*). According to the *BVerfG*,⁶⁰ article 12GG also encompasses protection in the concrete workplace. The termination of a labour relationship at the age of sixty-five years, in accordance with the rules of an employment settlement/contract, signifies, at least *de facto*, the end of the labour activity (*die Berufstätigkeit*) of the person concerned, as it is generally impossible to find new employment at that age. This effect on agreements concerning age limits should not be lost sight of because article 12GG is also directed at protecting subjects from its factual consequences.⁶¹ In this light, general retirement age limit agreements, according to Nussberger,⁶² should be seen as an individual work-choice arrangement (*eine subjective Berufswahlregelung*). Restrictions come in play only when the protection of interests concerning societal welfare, for instance public health, are at stake and should be relevant only where capabilities which place people of certain age groups at risk of seriously harming the well-being of the general public are involved.⁶³ Retirement policies and provisions are regarded by many businesses and institutions as an inevitable part of cost

selbst weitergehend beschränken können, als sie staatliche Eingriffe hinnehmen müßten.'

⁵⁹Dietrich n 58 at 122; Nussberger n 2 above at 529.

⁶⁰Urt v 24/4/1991 *BVerfGE* 84 133 142ff.

⁶¹See *BVerfG* Beschl v 30/10/1961 *BVerfGE* 13 181-190. In this case the *BVerfG* (at 185) points out that article 12(1)GG is only a manifestation of the art 2(1)GG right to free unfolding of an individual's personality — see for more information in this regard Labuschagne 'Regsubjektiviteit na die dood?' *Opmerkinge oor die regsteoretiese implikasies van die ontplooiing van die postmortale persoonlikheidsreg* 2003 *THRHR* 185 194ff. See too, Tettinger 'Das Grundrecht der Berufsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts' 1983 *AöR* 92 109ff regarding the personal right to self-realisation in this regard. He also points out (122ff) that jobs should be rationally proportioned in society, *ie* all labour active persons cannot be doctors, carpenters etc!

⁶²Note 2 above at 529.

⁶³Nussberger n 2 above at 529. *Cf* Dietrich n 59 above at 128: 'Tarifliche Beschränkungen der Berufsfreiheit überschreiten diese Grenze nach meiner Ansicht nur ganz ausnahmsweise bei außerordentlich einschneidenden Regelungen. Es muß sich um schlechthin unerträglichen Beschränkungen handeln, wie etwa den völligen Ausschluß von Kündigungen selbst bei Vorliegen wichtiger Gründe. Tarifliche Altersgrenzen tangieren hingegen m.E. nicht den unverzichtbaren Kern der Berufsfreiheit. Sie sind also verfassungsrechtlich zulässige Beschränkungen.'

efficient management.⁶⁴ The human right to equal treatment by the law, *ie* article 3(1)GG, would appear to allow that discrimination against the elderly only if a material/substantial reason for such differentiation exists.⁶⁵

In a decision of 1 March 1979⁶⁶ the *BVerfG* observed that labour as vocation has an equal value representing equal dignity for all people.⁶⁷ It must be emphasised that the special protection the German Constitution (article 3(3)(2)GG) bestows on the handicapped (*die Behinderten*) may, in certain circumstances, include persons handicapped by old age.⁶⁸

South African legislation

In essence, every South African has the right to work without fear of being subjected to unfair discrimination. This right is based on the overarching principles contained in the Constitution of South Africa.⁶⁹ Although not an enforceable right to the extent that any person seeking employment is entitled to force government or any other employer to provide him/her with a job, the right to work is indirectly protected by a number of constitutional values.

Section 22 of the constitution provides that '[e]very citizen has the right to choose their trade, occupation or profession freely'. In addition, section 9(3) of the constitution, as part of the equality clause, stipulates that 'the

⁶⁴Simitis 'Die Altersgrenzen — ein spät entdecktes Problem' 1994 *RdA* 257 261: '... die Diskriminierung wird als unentbehrliches Element kostenbewußter und effizienzbetonter Unternehmenspolitik offen einkalkuliert. Rationalität und Effizienz sind jedoch keine vorgegebenen, ein und für allemal verbindlich definierte Kategorien. Wie sie verstanden werden, richten sie sich primär nach der historisch und sozial bestimmten Wahrnehmung der Tätigkeit von Frauen oder älteren Menschen. Gerade die Vorurteile, die in jedem dieser Fälle bestanden haben und in vielerlei Hinsicht nach wie vor bestehen, wirken sich daher auch auf alle Annahmen zu den Voraussetzungen und Grenzen einer Erwerbstätigkeit aus. Nicht von ungefähr hat deshalb der Markt die Vorurteile nicht etwa behoben, sondern bestätigt und verfestigt. Rationalität und Effizienz sind zudem keine verfassungsindifferenten Kategorien. Die Unternehmenspolitik spielt sich im Rahmen einer ökonomischen Ordnung ab, die sich an den verfassungsrechtlichen Vorgaben, noch genauer, an der Verpflichtung, die Grundrechte der Betroffenen zu respektieren, orientieren muß. Ebensovienig daher wie es die nicht minder nachdrücklichen Hinweise auf Rationalität und Effizienz verhindern konnten, der Gleichberechtigung Rechnung tragen, eignen sie sich dazu, die Diskriminierung älterer Menschen zu rechtfertigen.'

⁶⁵See *BVerfG* Urt v 28/1/1992 *BVerfGE* 85 191 120; *BVerfG* Beschl v 16/3/1982; *BVerfGE* 60 123 132; *BVerfG* Beschl v 7/10/1980; *BVerfGE* 55 72 88ff; Nussberger n 2 above at 529,531: differentiation between age groups must be of such a nature and importance that unequal treatment is justified.

⁶⁶*BVerfGE* 50, 290 362.2

⁶⁷See too *BVerfG* Urt v 11/6/1958; *BVerfGE* 7 377 397; Von Münch & Gubelt *Grundgesetz-Kommentar* (2000) 797.

⁶⁸Nussberger n 2 above at 531 with reference to the definition of Dreier-Heun *Grundgesetz* (1996) Art 3 fn 121: 'Behinderte sind Personen, die an einer nicht nur vorübergehenden Beeinträchtigung aufgrund ihres körperlichen, geistigen oder seelischen Zustandes leiden und deshalb in erheblichem Umfang Hilfe benötigen, damit sie einen angemessenen Platz in der Gesellschaft wahrnehmen können.'

⁶⁹108 of 1996.

state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, ... age, [and] disability'. This is underpinned by section 9(4) in terms of which 'no person' may unfairly discriminate directly or indirectly against anyone on the same grounds (including, of course, age) listed in subsection (3).⁷⁰ The prohibition is understandably not absolute. Only unfair discrimination is proscribed and it would, for example, not constitute unfair discrimination if an employer were to refrain from employing older people who do not have the physical or mental capacity to render the services offered by that employer.⁷¹ But in terms of section 9(5), 'discrimination *per se* is unfair unless it is established that the discrimination is fair'. This creates a presumption in so far as a complainant would therefore only have to prove that there was discrimination, whereupon the onus will shift to the respondent to prove that it was fair.⁷²

Apart from the constitutional right to freedom of choice of trade, occupation or profession, and the protection against unfair discrimination, the South African Constitution is unique in so far as section 23(1) protects every person's right to 'fair labour practices'.⁷³ This umbrella right has a far-reaching effect on the courts with regard to the interpretation of the contractual relationship between the parties in the employment relationship.⁷⁴ The constitution compels all courts to 'apply, or if necessary develop, the common law to the extent that legislation does not give effect' to the

⁷⁰The inclusion of this section makes it clear that it is not only the state, in its capacity as employer, but also all other employers that may not unfairly discriminate on grounds such as age. Discrimination is not limited to the grounds listed in the constitution. In *Harksen v Lane NO* 1998 1 SA 300 (CC) it was made clear that an unlisted reason for differentiation would amount to unfair discrimination if it meets the following test: 'Whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.'

⁷¹This right must also be read in conjunction with the general limitations clause of the constitution, s 36, that provides that the rights in the Bill of Rights may be limited to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom'.

⁷²See Landman 'Tweaking the scales — reflections on the burden of proof in SA labour discrimination law' 2002 *ILJ* 1133; Dupper 'The burden of proof in US employment discrimination law: any lessons for South Africa' 2002 *ILJ* 1143.

⁷³*Cf* Ngcobo J in *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) par 33 made the following remark concerning s 23(1) of the constitution which provides that '(e)veryone has the right to fair labour practices': our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.'

⁷⁴In *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) par 14 Nugent AJA held that the constitutional right to fair labour practices might just have imported into the common-law employment relationship an implied right not to be unfairly dismissed.

rights contained in the constitution.⁷⁵ Although the term unfair labour practice is not defined in the constitution, and although in South Africa there is no comprehensive law dealing exclusively with discrimination on the ground of age, national legislation has been invoked to give effect to the right not to be unfairly discriminated against and the right to fair labour practices. The former right is given effect to in the Employment Equity Act (the 'EEA')⁷⁶ which deals specifically with the prohibition of unfair discrimination in the workplace. The latter right is given content in, amongst others, the Labour Relations Act (the 'LRA')⁷⁷ which regulates unfair dismissal. These rights are not to be compartmentalised and only sought under either the one or the other of the two statutes. The right not to be subjected to unfair discrimination is interlinked with and already subsumed within the right to fair labour practices.

Commencing with the prohibition against unfair discrimination, it is to be noted that there are two Acts of parliament which give effect to the constitutional equality clause. Whereas the Promotion of Equality and Prevention of Unfair Discrimination Act⁷⁸ operates in a broader arena and proscribes unfair discrimination in all spheres of society,⁷⁹ it is the more limited purpose of the EEA to prohibit unfair discrimination and implement

⁷⁵Section 8(3)(a) of the constitution. See also: section 173 of the constitution that vests the Constitutional Court and High Courts with the inherent power to develop the common law in accordance with the interests of justice; and *Coetzee v Comitis & others* (2001) 22 *ILJ* 331(C).

⁷⁶55 of 1998.

⁷⁷66 of 1995. Chapter VIII of the LRA regulates the law in relation to 'Unfair Dismissal and Unfair Labour Practice'. However, The right to fair labour practices is also given content in other legislative instruments such as the Basic Conditions of Employment Act 75 of 1997 that sets minimum and maximum basic conditions of service. Examples are to be found in aspects such as maximum hours of work (sections 6-18), minimum annual leave (sections 19-17) and prohibition of employment of children and forced labour (section 43-48).

⁷⁸4 of 2000. As is the case with the EEA, it is also one of the mentioned purposes of this Act to prevent unfair discrimination, on amongst other grounds age, as contemplated in s 9 of the constitution. See s 2 in this regard. To a large extent the enforcement of this Act revolves around 'prohibited grounds' as described in s 1 of the Act, where the discrimination adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination, inter alia, on the ground of age. The Act, in so far as it aims to prevent unfair discrimination on the ground of age, casts the net very wide. The Schedule to the Act, based on s 29(1), contains an illustrative list of unfair practices that are said to be unfair, widespread and need to be addressed. Using the illustrative list as point of departure older persons may rest assured that discrimination on any of the following grounds are or may be unfair: labour and employment; education; health care services and benefits; housing, accommodation, land and property; insurance services; pensions; professions and bodies; provision of goods, service and facilities; and clubs, sport and associations. For a discussion of this Act see Albertyn, Goldblatt & Roederer *Introduction to the promotion of equality and prevention of unfair discrimination Act 2001*. See also Kok 'The promotion of Equality and Prevention of Unfair Discrimination Act: why the controversy?' 2001 *TSAR* 294-310; Bohler 'Equality courts: introducing the possibility of listening to different voices in South Africa?' (2000) 63 *THRHR* 288.

⁷⁹Section 5(1) provides that this Act applies to the 'State and all persons'. Section 5(3) stipulates that: 'This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies'.

affirmative action in the workplace.⁸⁰ The EEA reflects the constitutional equality clause by prohibiting direct and indirect unfair discrimination against employees and job applicants⁸¹ in any employment policy or practice⁸² on, among others, the ground of age.⁸³ There are, however, in terms of section 6(2) of the EEA, two exceptions to this general right not to be subjected to unfair discrimination. Firstly, it is not unfair discrimination if affirmative action measures are implemented consistent with the purposes of the EEA.⁸⁴ Secondly, it is not unfair to distinguish, exclude or prefer any employee or job applicant on the basis of an inherent requirement of the job.

Inherent requirement of the job is not defined in the EEA but it relates to the fact that the nature of specific work requires that a person have specific characteristics.⁸⁵ It is, moreover, our submission that the attainment of a particular chronological age is not *ipso facto* sufficient to qualify as an inherent requirement of a job that would justify discrimination. Rather, the ability to perform specific work must be evaluated in relation to the facts of each case.

In terms of the EEA, the onus of proof is loaded against the employer in disputes regarding unfair discrimination. Section 11 provides that '(w)hen-ever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair'. An employee therefore merely needs to allege that it was unfair whereupon the onus passes to the employer to show that no discrimination took place, or that it was not unfair.⁸⁶ In this context, it is clear that should an employee

⁸⁰Section 2 provides as follows: 'The purpose of this Act is to achieve equity in the workplace.'

⁸¹Section 9 of the EEA provides that for purposes of ss 6, 7 and 8 'employee' includes an applicant of re-employment.

⁸²Section 1 of the EEA defines 'employment policy or practice' to include aspects such as recruitment procedures, job assignments, training and development, demotion and dismissal.

⁸³Section 6(1). It is to be noted that, similar to the constitutional provision, this section is amplified in so far as 'neither the State nor any person may unfairly discriminate against any person'.

⁸⁴In terms of s 15(1) of the EEA people to be advanced by affirmative action are suitably qualified people from the designated groups. Section 1 defines the designated groups as 'black people, women and people with disabilities. It is submitted that older employees cannot as a measure of course be dismissed to achieve affirmative action objectives. See Grogan *Workplace Law* (2003) 142-143 in this regard.

⁸⁵See Van Jaarsveld & Van Eck *Principles of labour law* (2002) 360 where it is mentioned that it would not constitute unfair discrimination where an employer refused to employ persons with poor vision as pilots and paralysed job applicants as rescue workers. In other jurisdictions, such as the USA, this concept is referred to as 'genuine occupational requirements/qualifications' for a job.

⁸⁶Section 9(5) of the constitution provides that 'discrimination *per se* is unfair unless it is established that the discrimination is fair'. Whereas a contention regarding unfair discrimination has to be 'established' or proven in terms of the constitution, a mere allegation would suffice in terms of the EEA. This makes it much easier for the complainant. It remains to be seen if the courts will find s 11 of the EEA to be in line with the corresponding section 9(5) of the constitution.

or job applicant allege unfair discrimination on the basis of age, it would be for the employer to prove that the discrimination was justified and therefore not unfair. Apart from the fact that there is a slight difference with regard to onus of proof in these cases, it is our submission that the rest of the principles as set out in the EEA are a fair reflection of the values spelt out in the constitutional equality clause.

In *Popcru on behalf of Baadjies and SA Police Service*,⁸⁷ the Commission for Conciliation Mediation and Arbitration (the 'CCMA') recently had to consider if differentiation based on age could serve as justification for discrimination.⁸⁸ *In casu* the applicant applied to be permanently appointed as a detective. This was declined because he did not meet with two of the requirements for appointment, namely that he had to be in possession of a matriculation certificate, and that he had to be between the ages of eighteen and thirty. The applicant referred a dispute concerning alleged unfair discrimination to the CCMA in terms of section 10 of the EEA. The commissioner accepted that age was one of the grounds listed in section 6(1) of the EEA; this was a case of unfair discrimination; and that the employer therefore had to prove that the discrimination was fair. The employer did not argue that age was an inherent requirement of the job and the commissioner found that the discrimination based on age was unjustified and unfair.⁸⁹ In this regard, the commissioner in our view quite correctly held that it would in any event have been futile to argue that age was an inherent requirement of the job in this instance 'since many capable detectives are over the age of 30'.⁹⁰ Turning to the applicant's qualifications, the commissioner held that there was no evidence that because he did not have a matric his ability was in any way impaired.⁹¹ In conclusion the commissioner found that the employer's refusal to appoint the applicant as detective constituted unfair discrimination on the basis of age and educational qualification and ordered the employer to appoint him to the position.⁹²

In the *Baadjies* case the applicant was denied a position *inter alia* on the

⁸⁷(2003) 24 ILJ 254 (CCMA).

⁸⁸See also one of the earlier cases of the CCMA dealing with unfair discrimination based on age, namely *Swart v Mr Video* (1998) 19 ILJ 1315 (CCMA). In this instance an advertisement was placed for a shop assistant under the age of twenty-five years. The applicant applied for the job, although she was twenty-eight years of age. The applicant was informed that she was not successful because she was over the age limit of twenty-five years of age. At 1318A the commissioner held as follows: 'Discrimination may be justified if based on inherent requirements of the job and I can find none here. If a person is prepared to work for the salary offered by the employer and is not averse to accepting instructions from a younger person, there is no reason why that person should not be able to perform the work. If the employer considers compatibility to be an important criterion in selection of staff, it should use other methods [rather than age] to test this.'

⁸⁹261C-E.

⁹⁰261B.

⁹¹262A.

⁹²262E.

ground that he was too old. In certain other instances employers demand that job applicants reach a prescribed age before qualifying for a position. If job applicants have not reached the minimum age set for these positions, they are discriminated against on the ground of youth. It is submitted that in certain circumstances a minimum age may be a justified inherent requirement of a job. It could, for example, be permissible for an employer to require that a person to be appointed as bus driver must be old enough to obtain a driver's licence. However, in the absence of such a clear requirement, we submit that differentiation on the basis of any age, whether it be too old or too young, must stand up to the test of whether the person has the ability to do the job irrespective of age, failing which it will constitute unfair discrimination.

The LRA is the primary legislative instrument regulating unfair dismissal law in the South African context. Section 188(1) provides that the 'dismissal' of an employee is unfair if the employer fails to prove that the reason for dismissal is a fair reason and that the dismissal was effected in accordance with a fair procedure.⁹³ It is clear that an elderly employee's services, as is the case with any other employee, may be terminated fairly on grounds of his either not being able to maintain satisfactory performance standards, due to incapacity or illness, or on the operational requirements of the employer.⁹⁴ It is the inability to render the required services, rather than the reaching of the particular age that justifies the termination of the employee's services. The inability to work becomes relevant at different ages for different people.⁹⁵

Before the LRA's unfair dismissal provisions become relevant, the employee must first prove that there has been a 'dismissal'⁹⁶ and that the termination cannot be ascribed to non-dismissal occurrences, such as for instance a

⁹³Section 188(1)(a) recognises misconduct, incapacity and an employer's operational requirements as fair reasons for dismissal.

⁹⁴Item 9 of the Code of Good Practice to the LRA provides guidelines for the dismissal of employees on grounds of poor work performance where the employee failed to meet a required performance standard and Item 10 of the Code provides guidance regarding dismissal on grounds of ill health or injury. Section 189 and 189A of the LRA describes the procedures to be followed in any operational requirements dismissal.

⁹⁵The now abolished Industrial Court in *Transport and General Workers Union and Others v SA Stevedores Ltd* (1993) 14 ILJ 1068 (IC) 1071 B-F made the following apposite remarks in this regard even before the adoption of the constitution and the new LRA, when it considered the application of the 'last in first out' principle *vis-à-vis* age as a selection criteria in a retrenchment exercise: 'What respondent needed was fit and agile workers, not necessarily younger workers. There is nothing to indicate why a worker of say 50 years old is not still fit and agile, or even fitter and more agile than say one of forty years. The criterion should therefore have been a fitness and agility test and not an age test, which age test the court finds to be an unfair criterion in these circumstances. In the premises the court finds that the termination of the applicants' employment prima facie constitutes an unfair labour practice.' See also *Badenborst v GC Baars (Pty) Ltd* (1995) 10 BLLR 19 (IC); *Maitbysen v De Beers Industrial Diamond Division (Pty) Ltd* (1995) 11 BLLR 61 (IC).

⁹⁶See the definition of 'dismissal' in s 186(1) of the LRA.

resignation, or the termination of a fixed term contract.⁹⁷ In addition, section 187 creates a special category of dismissals termed 'automatically unfair dismissals'. Although the EEA is the primary Act to deal with the proscription of unfair discrimination in the workplace, a dismissal is automatically unfair if, amongst others, the reason for the dismissal is 'that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground including but not limited to ... age'.⁹⁸ But the prohibition against unfair discrimination dismissals is qualified by section 187(2) in that:

- (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;
- (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.⁹⁹

Regarding section 187(2)(a), it is submitted that it is superfluous for the legislator to have specified that a dismissal is not unfair if it is based on an inherent requirement of the job. As stated above, an employer can in any event terminate an employee's services, irrespective of age, after following a fair procedure if: a position requires specific mental or physical abilities; if specific work standards have to be maintained; or if operational requirements necessitate the termination of the contract.

In relation to section 187(2)(b), a number of complicated questions need to be addressed, such as: what is the position if the parties have not agreed upon a retirement age; does it constitute a dismissal if the contract is terminated by the employer, not on, but after attainment of the retirement age; and would it be constitutional to agree on a fixed retirement age even if the employee is still capable of rendering the services?

Problems are bound to arise in those instances where the parties have omitted to agree upon a particular retirement age. Although large numbers of employees are appointed in terms of letters of appointment and/or contracts of employment which contain agreed upon retirement ages, there are also numerous employees who are still employed in terms of verbal agreements, or in terms of contracts that are silent with regard to a specific

⁹⁷Section 192 of the LRA stipulates as follows: '(1) In any proceedings concerning dismissal, the *employee* must establish the existence of the *dismissal*. (2) If the existence of the dismissal is established, the employer must prove that the *dismissal* is fair.'

⁹⁸Section 187(1)(f). The most important consequence, in terms of section 194 of the LRA, of an automatic unfair dismissal is that an employer may be ordered to compensate an employee up to a maximum of twenty-four months' remuneration calculated at the employee's rate of remuneration on the date of dismissal whereas the limit on compensation for all other unfair dismissals is twelve months' remuneration. See *Gqibitole v Pace Community College* (1999) 20 ILJ 1270 (LC) where it was held that it constituted an automatic unfair dismissal where an employee was dismissed on grounds of age before attaining the agreed retirement age.

⁹⁹Our emphasis.

retirement age.¹⁰⁰ Neither the common law nor the Basic Conditions of Employment Act provides guidance on South Africa's 'normal' retirement age.¹⁰¹ Although a labour practice could develop in relation to the normal retirement age in a particular workplace, this could take years to develop and it could also easily lead to inconsistent and arbitrary behaviour by those employers where such norms have not yet crystallised.

The issue of the 'normal' retirement age was raised in *Schmabmann Concept Communications Natal (Pty) Ltd.*¹⁰² The facts were that when the employee applicant turned sixty-five she was retired by the employer. She contended that as the company had no agreed retirement age, she should have been entitled to continue working while she was capable of doing so. In the absence of an agreed retirement age the judge said that 'one may assume that, at the very least, the retirement age for employees doing work such as the applicant is sixty-five years of age'. The applicant called an expert who testified that in her view sixty-five was no concept such as a mandatory or a normal retirement age for females doing the work that the applicant did, namely bookkeeping and office management. The judge rejected — or rather disregarded — the expert's evidence and held that in accordance with section 187(2)(b), on attainment of normal retirement age termination of the contract did not constitute dismissal.¹⁰³ In our view this is an incorrect decision in so far as a normal retirement age was not proven and the constitutionality of the section was not questioned.

In another labour court case, *Gqibitole v Pace Community College*,¹⁰⁴ a more acceptable approach was followed where parties to a contract had not agreed on a retirement age. The applicant, a teacher, was dismissed when she was almost sixty-eight years of age, purportedly on the basis of a statutory retirement age of sixty years for women. There was no such statute,¹⁰⁵ at least not proven, and the judge remarked that 'there was clearly no "normal" retirement age for teachers for the purposes of s 187(2)(b) of the Act'.¹⁰⁶ This is, in our view, a more realistic approach. Why, indeed, should it be 'normal' for a teacher to retire at sixty years of age?

Based on section 187(2)(b), a number of judges are adamant that termina-

¹⁰⁰This is despite s 29 of the Basic Conditions of Employment Act 75 of 1997 that requires that all employers must supply their employees, when they commence employment, with 'written particulars of employment'. It is submitted that this, in itself, is an example of a fair labour practice.

¹⁰¹However, see the reference to legislation regulating retirement for government employees *supra* at 13. In *SACTWU v Rubin Sportswear* (2003) 24 ILJ 429 (LC) it was quite correctly held that the attainment of ages set in a provident fund merely indicted at what age the member of the fund could claim benefits and that it did not mean that an employee must retire from the employer at that age.

¹⁰²(1997) 18 ILJ 1333 (LC).

¹⁰³1138 H-I.

¹⁰⁴(1999) 20 ILJ 1270 (LC).

¹⁰⁵Paragraph 9.

¹⁰⁶Paragraph 11.

tion of the contract after attainment of the agreed or normal retirement age cannot constitute an unfair dismissal. In *Schweitzer v Waco Distributors (A Division of Noltex (Pty) Ltd)*¹⁰⁷ the judge concluded:

Once it is established that ... the dismissal is one based on age, the statute itself pronounces on the fairness of the dismissal; it states that such dismissal 'is fair'. The conditions which must exist in order for a dismissal to be fair in terms of s 187(2)(b) are the following:

- (a) the dismissal must be based on age;
- (b) the employer must have a normal or agreed retirement age ... ;
- (c) the employee must have reached the age referred to in (b) above.

This reasoning has been criticised by Grogan¹⁰⁸ as illogical. Section 187(2)(b) seems to be aimed at the date of the agreed or normal retirement, not subsequent dismissals. He correctly points out that the judge's reasoning does not address the judge's own concern 'about the unfairness of giving employers carte blanche to dismiss employers whom they have permitted to work beyond retirement age'. Surely, if an employer permits an employee to work after the retirement date it must take place in terms of either a verbal or an implied contract of employment. At the very least there is still an employment relationship between the parties. It seems to us blatantly unconstitutional, in the absence of other grounds of justification, that the legislature could have contemplated condoning employers who terminate older employees' services without affording them the basic right to fair labour practices.¹⁰⁹

Bosch¹¹⁰ argues that another, more attractive interpretation, could be given to section 187(2)(b) in so far as:

the function of s 187(2)(b) is merely to qualify s 187(f). All that it does is prevent dismissals based on age from being viewed as unfairly discriminatory and thus automatically unfair. That does not mean that the inquiry into fairness of the dismissal ends there, however. It is arguably incumbent on the court to go on to enquire into the fairness of the dismissal in terms of the grounds set out in section 188, thus diminishing the incursion of s 187(2)(b) into employees' fundamental rights.¹¹¹

Although we find ourselves in agreement with the above criticism of section 187(2)(b), and with some of the decisions in relation to the section, it is submitted that the wording of the section is not open for the interpretation by Bosch. The wording of the section is quite clear in so far as it states that 'dismissal based on age is fair' if the employee has reached the normal or agreed retirement age. It would have been quite different had the section provided that: 'dismissal based on age is not an automatic unfair dismissal'. However, the mere fact that it does not seem that it can be interpreted as suggested by Bosch, does not imply that the section is necessarily in line

¹⁰⁷(1998) 19 ILJ 1573 (LC) par 30.

¹⁰⁸'No work for the aged' (1999) 14 *Employment Law* 6 9.

¹⁰⁹See also *Rubenstein v Prince's Daelite (Pty) Ltd* (2002) 23 ILJ 528 (LC).

¹¹⁰'Section 187(2)(b) and the Dismissal of Older Workers' (2003) ILJ 1283 at 1297.

¹¹¹Bosch (2003) ILJ 1283 at 1297 finds support for his argument in *Rubenstein v Prince's Daelite (Pty) Ltd* (2000) 23 ILJ 528 (LC).

with the overriding constitutional values guaranteeing employees their right not to be discriminated against and their right to fair labour practices. It is submitted that although section 187(2)(b) has the effect of automatically terminating contracts of employment on reaching the retirement date, it does not apply to situations where employees continue working after this date or that it gives employers a *carte blanche* to terminate contracts of employment after the continuance of the service agreement.¹¹²

Would it be in line with constitutional imperatives to agree on a fixed retirement age even if the employee is still capable of rendering the services after attaining his agreed upon retirement age? There is nothing that would prevent employers who have a particular dislike of older employees from offering only standard contracts to employees in terms of which they are compelled to retire at a very young age. However, it remains to be answered if it is in line with the constitutional guarantees of equality and the right to fair labour practices for an employer to set a relatively low compulsory retirement age where there is no clear and objective inherent requirement associated to the particular job.

It has been argued that contracts of employment containing a retirement age should be dealt with similarly to fixed term contracts.¹¹³ Parties to contracts of employment are free to determine the length of their contracts and once the contract reaches the expiry date it terminates automatically.¹¹⁴ As part of this argument, it is stated that the termination does not constitute a dismissal 'because in this situation the contract of employment comes to the end by the affluxion of time on the employee reaching that age without the

¹¹²The judgment by the industrial court in *Elsley v Global Cargo Systems (Pty) Ltd* (1995) 16 *ILJ* 1255 (IC) at 1254 F-H before the implementation of the constitution and the new LRA is more rational. In this instance the applicant was permitted to work beyond his retirement age of sixty without any express or tacit understanding about continued employment or retirement. The judge held that: '[B]y simply allowing the applicant to continue working beyond the age of 60 without any apparent proviso as to when he should retire, in my view amounts to a waiver of the respondent's erstwhile right to insist on retirement at any stage after the applicant reached the age of 60.'

¹¹³See *Schmabmann v Concept Communications Natal (Pty) Ltd supra*; *Coetzee v Moreesburgse Koringboere Koöperatief Bpk* (1997) 18 *ILJ* 1342 (LC).

¹¹⁴Problems could also arise where the contract of employment does provide for a retirement age but, where the retired employee is re-employed on relatively short, but consecutive fixed term contracts of employment after the attainment of the retirement age. In the event that a person continues to work for the employer after the retirement date provided for in the contract of employment the 'normal or agreed retirement age' cannot summarily be used to dismiss such employee, for then, the definition of 'dismissal' in section 186(b) would also come into play. In that section it is mentioned that: '(1) Dismissal means that- (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.' Should an employer with regards to consecutive fixed term contracts have created an expectation with a retired employee for continued employment, it is submitted that the decision not to enter a next contract would constitute a dismissal and all of the normal requirements for a fair dismissal will have to be complied with.

employer having to do anything'.¹¹⁵ Although it could be argued that it goes against the grain of the constitution to agree that a contract of employment comes to an end not on grounds of the inability of the employee to render services, but on the attainment of a particular age, it is submitted that this is not the case. The rights contained in the constitution have to be measured against the limitations clause. It is submitted that contractual freedom and sanctity of contract have not been limited to the extent that a person can no longer agree on how long a contract will last. Restraint of trade law has been considered by the courts since entering the constitutional era and the suggestion has been dismissed that the constitution had necessitated the revision of the law as laid down in *Magna Alloys & Research (SA)(Pty) Ltd v Ellis*.¹¹⁶

Conclusion and recommendations

South African law does protect older persons, but three problems bedevil the application: dismissal based on 'an inherent requirement of the particular job' can give rise to disparate interpretation by employers and judges; the concept of a normal retirement age for persons employed in a particular capacity is even more confusing; and section 187(2)(b), in our view, does not mean to be in line with constitutional values. There is no criterion. The issue should not be a fictitious normal retirement age, but whether the individual concerned can do the job.

The problems are not only legal ones. To 'avert the old age crisis' government should actively facilitate the participation of older persons in the economic life of the country. Instead of working with statutory, agreed and a fictitious 'normal retirement age' government and workers' associations should take all possible steps to keep older persons in productive employment for as long as possible. This would, among others, entail: education and training opportunities for older persons; recruitment of retirees with particular skills; and equal opportunities for workers irrespective of age. Last, but not least, the government and industry will have to keep an eye on the greying population with a view to the country's means for sustaining social security.¹¹⁷ Discrimination against the aged should only be regarded as fair if it is warranted by a compelling public interest. In contrast to the approach in German law to certain professions/jobs, discrimination of this nature, in the final instance, should be directed at the abilities and functionality of an individual and not of an age group.¹¹⁸ In conclusion, it

¹¹⁵See *Schweitzer v Waco* n 107 above at par 19.

¹¹⁶1984 4 SA 874 (A). See *Waltons Stationary Co (Edms) Bpk v Fourie* 1994 4 SA 707 (O); *Kotze & Genis (Edms) Bpk v Potgieter* 1995 3 SA 783 (C); *Knox D'Arcy Ltd v Sbau* 1996 2 SA 651 (W).

¹¹⁷See also *Simitis* n 64 above at 261-262.

¹¹⁸*Lehmann* note 55 above at 3056; *Simitis* n 64 above at 262: 'Eine Bewertung der Altersgrenzen, die sich ganz an der Bedeutung der Arbeit für das Selbstverständnis und die Entwicklung der Betroffenen orientiert, schließt grundsätzlich Ausnahmen aus. Wo also jemand arbeitet, in einer Fabrik, einem Ministerium, einer Werbeagentur, einer Bank oder einer Universität ist gleichgültig. Ebensowenig kommt es auf den formalen Status der Beschäftigten an. Feste Altersgrenzen

should be mentioned that retirement ages, world-wide, are being reconsidered.¹¹⁹ In this regard we should seriously consider adopting (at least) the general approach in the USA.¹²⁰ Contemporary compulsory retirement (chronological) ages are irrational, arbitrary and out of touch with modern scientific knowledge of the general physical, emotional and mental condition, usefulness and abilities of the ageing population. In *Jooste v Score Supermarkets Trading (Pty) Ltd*¹²¹ the CC observed that 'the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference ...'. How on earth can one call it fair discrimination to replace an able-bodied, mentally sound, experienced, and competent individual with another purely on his/her chronological age! One needs to search no further than the legal profession to find an example to explain the irrationality of fixed retirement (chronological) ages: Why should a judge retire at the age of seventy, a regional magistrate at sixty-five and a law professor at sixty or at certain universities at sixty-five years? As far as the limitation clause¹²² is concerned, De Waal, Currie and Erasmus¹²³ explain:

In principle, both unfair discrimination and differentiation without a rational basis can then be justified as limitations of the right to equality in terms of s 36. However, as we will argue below, it is a matter of considerable conceptual difficulty to justify unfairness and irrationality in "an open and democratic society, based on human dignity, equality and freedom".

bleiben eine Benachteiligung ohne Rücksicht darauf, ob sie sich auf Angestellte, Arbeiter oder Beamte beziehen. Allgemeine, wie immer gehaltene Aussagen reichen deshalb nicht aus, um die Beschäftigten daran zu hindern, über ein bestimmtes Alter hinaus zu arbeiten. Maßgeblich können allenfalls Gründe sein, die sich unmittelbar aus den je spezifischen Arbeitsbedingungen ergeben und die Fähigkeit der Beschäftigten in Frage stellen, den Anforderungen ihrer Tätigkeit zu entsprechen.'

¹¹⁹See Moll note 55 above at 500–501; Rademeyer 'Britse plan as deurbraak vir oues bestempel. Wet oor aftree verwelkom' *Beeld* Friday 4 July 2003 at 11. Häberle 'Altern und des Menschen als Verfassungsproblem' in Badura & Scholtz (eds) *Wege und Verfahren des 65. Verfassungslebens. Festschrift für Peter Lerche zum 65. Geburtstag* (1993) 189–211 correctly suggests that the status of the aged should be regarded as a constitutional issue. Cf Waltermann n 55 above at 829–830. See Rozenberg 'Pensioners lose ageism battle' (<http://www.telegraph.co.uk>) commenting on a recent English case: 'At the end of a lengthy ruling, Mr Justice Wall pointed out that the Government would be required under European law to prohibit age discrimination in employment and vocational training by December 2006.'

¹²⁰See too Schlüter and Belling note 55 above at 354 quoting Recommendation 37 of the World Assembly on Aging organised by the UN in 1982: 'Governments should facilitate the participation of older persons in the economic life of the society. For that purpose: (a) Appropriate measures should be taken, in collaboration with employers' and workers' organizations, to ensure to the maximum extent possible that older workers can continue to work under satisfactory conditions and enjoy security of employment;... (c) The right of older workers to employment should be based on ability to perform the work rather than chronological age ... (d) Despite the significant unemployment problems facing many nations, in particular with regard to young people, the retirement age for employees should not be lowered except on a voluntary basis.'

¹²¹1992 2 SA 1 (CC) par 17; De Waal, Currie & Erasmus note 6 above at 208–209.

¹²²Section 36 of the constitution.

¹²³Note 6 above at 203.

The whole idea of the naked possibility of constitutionally justifying a 'legal rule' or conduct which is not rationally founded, is not only unworthy of a constitutional state, but is an insult to the intelligence and dignity of legal subjects. As was pointed out elsewhere,¹²⁴ it is a socio-emotional anachronistic relic of the sovereignty-of-state concept which has no place in a modern rights-oriented legal system.

Although the content of the concept of disability is not clear in South African law,¹²⁵ a substantial percentage of old age people as such, or in conjunction with other afflictions may be regarded as disabled and should in law be treated on a par with other disabled persons.¹²⁶ Section 1 of the Employment Equity Act, 55 of 1998 defines 'people with disabilities' as people 'who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'.¹²⁷ Surely, in terms of this definition, certain of the aged should qualify as people with disabilities. Verster,¹²⁸ in making recommendations on the questions that should be included in an employment application form, suggests that:

¹²⁴Labuschagne 'Vrees, selfbedrog, pretensie en die dinamiese aard van geregtigheid: 'n Regsantropologiese evaluasie van die evolusie van die reëls van wetsuitleg' 1999 *SAPR/PL* 1 19–21; 'Die spanningsveld tussen regsekerheid en geregtigheidsekerheid: 'n Regsantropologiese evaluasie van die evolusie van die *stare decisis*-reël' 2000 *THRHR* 347 358–363; '*De minimis non curat lex* as strafregtelike verweer in 'n regstaat: opmerkinge oor strafsinnolheid en die groeiende rasionele dimensie van geregtigheid' 2003 *THRHR* 455 465–467; 'Die dinamiese regslandskap, doelaanpassing en -vervanging en die geregtigheidswaarde van die normdop by regsuitleg en -vorming: opmerkinge oor die anachronistiese kant van die stelreël *cessante ratiōne legis, cessat et ipsa lex*' 2004 *THRHR* 43. See too Labuschagne and Bekker 'Reason, science, and progress: observations on the process of dereligionisation of South African law' 2004 *SAPR/PL* (to be published in (2004) 1); Kastendieck 'Die Begriff der praktischen Vernunft in der juristischen Argumentation' (Dlur-thesis, Humboldt-University, Berlin, 1999) 186ff; Habermas *Moralbewußtsein und Kommunikatives Handeln* (1983) 190 and *Faktizität und Geltung* (1992) 541ff.

¹²⁵See in this regard Grobbelaar-du Plessis 'Who are the disabled? The quest for a legislative definition' 2003 *Obiter* 121–131.

¹²⁶See s 9(3) of the South African Constitution and Truter 'Disability: the quest for reform' 2000 *Law, democracy and development* 75. In s 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, discrimination against any person on the ground of disability is proscribed. Unfortunately, no definition of disability is provided. See too s 187(1)(f) of the Labour Relations Act 66 of 1995; Grobbelaar-du Plessis note 125 above at 129.

¹²⁷*Cf* section 1 of the Social Assistance Act, 59 of 1992: '[A]ny person who has attained the prescribed age and is, owing to his or her physical or mental disability, unfit to obtain by virtue of any service, employment of profession the means needed to enable him or her to provide for his or her maintenance.' See too Grobbelaar-du Plessis n 125 above at 130; Truter n 126 above at 77. In ch 50 par 1(1) 9 (Eng) of the Disability Discrimination Act 1995 a person is regarded as disabled if he 'has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'; see too, Wenbourne 'Disabled meanings: a comparison of the definitions of "disability" in the British Discrimination Act of 1995 and the Americans with Disabilities Act of 1990' 1999 *Hastings International and Comparative Law Review* 149 152–153.

¹²⁸'Enabling the disabled' 1996 *Juta's Business Law* 113 115.

An application form should restrict its questions to: whether an applicant would be able to perform the essential functions of the position; whether the applicant has the necessary educational, technical or professional qualifications to perform the essential functions outlined in the job description. (It would be permissible for an employer to specify the essential job functions and directly ask applicants whether they can perform those functions. But it would be inappropriate for an employer to ask at this early stage in the procedure whether an applicant has any disability which would limit performance of the job functions.)

We submit that, in principle, this suggestion should also apply to the aged, simply because it is based on individual abilities and characteristics and not on fictional chronological age gradations/categories. This point of departure is the only one that is just and tenable in a constitutional state in which individualism, self-realisation and personal uniqueness and personal abilities are respected, cherished and effectively utilised. In the final instance, this approach triggers societal progress, welfare and developmental justice. As was pointed out when discussing the attitude of German scholars above, the pivotal task of the legal system and of the courts in this respect is to protect individuals against encroachment on their fundamental rights in pursuance of these constitutional values and goals.