EMPLOYMENT

IN THIS ISSUE

RETHINKING RETIREMENT – WHEN MUST EMPLOYEES RETIRE?

The question often arises as to when employees should retire and when employers can compel such employees to retire. There is no statutory retirement age applicable to all employees. The retirement age should be agreed between the parties. Where there is no agreed retirement age, an employer may retire an employee who has reached the retirement age that is the norm. Parties normally agree in the employment contract on a retirement ages or often agree that the retirement age will be as per a company policy or the rules or a retirement fund.

This was the subject of the dispute in the recent case of *Hilary Truter v Carecross (Pty) Ltd C956/2013* (2015, unreportable judgement) where the Applicant (employee) referred a claim to the Labour Court where she sought to declare her dismissal from the Respondent (employer) automatically unfair as she alleged that she was discriminated against based on her age. The facts of the case, briefly, were as follows: the employee was informed by the employer that she had reached the employer's retirement age of 65 and that she would therefore be placed on compulsory retirement. The employee stated in defence that she was the first person from the employer to be formally retired at the age of 65 and that the only other person who had been formally retired by the employer was an employee of 70 years. The employer alleged that it had adopted a resolution declaring its retirement age to be 65 and its normal retirement age is therefore 65. The court set out the appropriate law and analysed the facts accordingly.

The court followed the authority set out in *Rubin Sportswear v SA Clothing & Textile Workers Union & Others (2004) 25 ILJ 1671 (LAC)* where the court stated that the retirement age of a company is determined firstly where there is an agreed retirement age between the employer and employee or, failing such, where the employee reaches the 'normal' retirement age applicable to employees of that employer. The latter normal retirement age is generally established through a recognised practice of employees of that employer retiring at that age over a long period of time.

Section 187(1)(f) of the Labour Relations Act, No 66 of 1995 (LRA), states that if an employee is dismissed based on prohibited grounds, including age, such dismissal will be automatically unfair. However, the employer is protected by s187(2)(b) in that a dismissal based on age is not automatically unfair *if the employer bases such dismissal on the agreed or normal retirement age.*

In Carecross, there was no reference to retirement age in the employee's employment contract and the resolution of the board declaring the retirement age to be 65 was never formally discussed or communicated to the employee. The court therefore ruled that there could be no agreed retirement age. Secondly, no other employee had in the past retired at the age of 65 and further, the only other employee who had retired, retired at 70 years old. The employed could, therefore, also not establish that there was a normal retirement age. The court thus held that the dismissal was automatically unfair and ordered the reinstatement of the employee with costs.

Based on the above, it is advisable for employers to ensure that they include an agreed retirement age when concluding contracts of employment. Employers should also bear in mind that if they are relying on the concept of normal retirement age, they must ensure that such a norm has been ongoing and that it applies the norm consistently. Should an employer be unable to show that it retired an employee based on the agreed or normal retirement age, the dismissal does not enjoy the statutory protection of s187(2)(b). This means that the dismissal (for reaching a certain age) will be unfair as it is on a prohibited ground and falls outside the s187(2)(b) defence. Such a finding could be accompanied by an order for reinstatement or compensation of up to 24 months' remuneration.

Mohsina Chenia and Sean Jamieson

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

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