

EMPLOYMENT

Riding Off Into The Sunset – Labour Appeal Court Settles Questions On Retirement Age

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There is no specified retirement age for employees in terms of South African law. Employers are, however, entitled to rely on a consistent, agreed upon retirement age which is often specified in either an employee's contract of employment or in terms of an employer's internal policies.

The usual retirement age may also be established with reference to the retirement benefit scheme that employees join when they take up employment with their employer. If the rules of the scheme stipulate a retirement age, this may also set the retirement age for the employer's workplace.

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In practice, determining and enforcing the workplace retirement age usually involves considering two sources of legal rights and protections afforded to employees.

The first arises from [section 187\(1\)\(f\) of the Labour Relations Act No.66 of 1995 \("LRA"\)](#), which specifies that where an employee has been dismissed on the basis of age alone, such dismissal is considered automatically unfair and carries, inter alia, a possible maximum compensation award equivalent to 24 months' remuneration.

[Section 187\(2\)\(b\) of the LRA](#), however, 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. Notwithstanding section 187(2)(b) of the LRA, our Courts have had to determine the question of whether or not the termination of an employee on the basis that they have reached retirement age constitutes an automatically unfair dismissal for the purposes of section 187(1)(f) of the LRA.

The second, practical issue arises when an employee who has reached and surpassed the agreed retirement age is permitted to continue working without the conclusion of any further written agreement between the parties. The question which arises in these circumstances is, can an employer terminate such an employee's employment on the basis that the employee has reached the agreed retirement age, anytime thereafter. In other words, does the employer lose the right to terminate based on retirement age by failing to do so upon the employee's attainment of retirement age.

The Labour Appeal Court dealt with both these issues in the case of *Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panel Beaters* (JA68/2021) [2022] ZALAC 103 ("**the Great South Case**").

In the *Great South Case*, the employee and employer entered into a written employment agreement which, amongst other things, provided that the employee's retirement age would be 60 years of age. On 15 March 2018, the employee turned 60 years old. However, the employer did not terminate his contract of employment and allowed him to continue working.

On 14 January 2019, the employer informed the employee that his services would terminate with effect from 12 February 2019 as he had reached the agreed retirement age of 60. At this time, nine months had passed since the employee turned 60 years old. The employee referred an automatically unfair dismissal dispute to the Labour Court in terms of section 187(1)(f) of the LRA.

The Labour Court dismissed the dispute and the employee subsequently appealed to the Labour Appeal Court.

The Labour Appeal Court upheld the Labour Court's decision and found that

- in terms of section 187(2)(b) of the LRA, an employer has the right to dismiss an employee that has reached the agreed or normal retirement age. This right accrues to both the employer and employee immediately after the employee's retirement date and can be exercised at any time after this date;
- section 187(2)(b) does not prescribe a time frame within which the dismissal should take place, provided it is after the employee has reached the agreed retirement date. This section affords an employer the right to fairly dismiss an employee based on age at any time after the employee has reached his/her agreed retirement age. Allowing an employee to work beyond the agreed retirement age does not constitute a waiver of this right by the employer.

In the *Great South* case the Labour Appeal Court provides much needed certainty to the questions which arise in respect of the application of an agreed retirement age in South African law.

Specifically, this case settles the position that a dismissal based on an agreed retirement age does not amount to an automatically unfair dismissal, and that an employer may fairly terminate an employee who has worked beyond his/her retirement age at any time after the attainment of such age.

Employers should take careful note of this judgement to terminate the service of employees who have reached their retirement age and who have continued working, by simply giving the required amount of notice. Of course, if a new fixed term contract, or indefinite contract has been entered into with the employee, the terms of such contract must be honoured. As always, a careful consideration of the rights and entitlement of all parties must be undertaken before the employee is allowed to continue working without a new contract, or is allowed to work with a specific contract, or if the employer compels the employee to leave service on reaching the retirement age.



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