



EMPLOYMENT

Too old for the package? Labour Court draws the line on age-based severance

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The Labour Court's decision in *Bosch v Passenger Rail Agency of SA* provides employers with a useful warning: when designing voluntary severance or early-retirement programmes, age may be an administratively convenient dividing line, but convenience does not make discrimination lawful. The dispute arose from PRASA's efforts to reduce its wage bill and headcount. It introduced a voluntary severance package ("VSP") for employees generally, while employees between the ages of 60 and 63 were instead offered voluntary early retirement ("VER") where the VSP would have produced a higher amount. The financial distinction was significant. Employees younger than 60 could receive a VSP incorporating a "sweetener" of 2.5 weeks' salary for every completed year of service. Employees between 60 and 63 were limited to a lump sum calculated according to the months remaining until retirement.

Bosch was 62 and had more than 44 years' service. He initially obtained a VSP quote exceeding R2 million and submitted his application. He was subsequently informed that his application had been treated as one for early retirement and that he would receive R657,906.67 – effectively seven months' salary plus notice pay. After unsuccessfully pursuing PRASA's internal grievance process, Bosch challenged the distinction as unfair discrimination based on age under section 6(1) of the Employment Equity Act ("EEA"). The difficulty for PRASA was straightforward: the different treatment was expressly determined by age. The Court found that the only reason Bosch received the substantially lower VER package rather than the VSP was that he was over 60.

Once discrimination on a listed ground such as age is established, section 11(1) of the EEA places the burden on the employer to prove that the discrimination did not occur, or that it was rational and not unfair, or otherwise justifiable. PRASA struggled at

this crucial stage. Its witnesses had not made the decision to differentiate between employees according to age and could not explain why the board had done so. No board member, or anyone else involved in the decision, testified. The Court was therefore left without admissible evidence explaining why the distinction had been adopted or demonstrating the savings supposedly achieved by it.

PRASA also argued that Bosch could have withdrawn his application once he knew what he would receive and that, by accepting the VER payment, he had effectively waived his right to complain. The Court rejected this argument. It held that Bosch's acceptance of the payment did not waive his right to challenge the discriminatory treatment. PRASA's reliance on a "full and final settlement" provision similarly could not rescue the differentiation. This is an important practical point for employers. A signed separation document should not be treated as an automatic cure for an underlying discrimination problem.

The Court ultimately held that PRASA's policy breached the EEA and that the failure to pay Bosch the VSP constituted unfair age discrimination. PRASA was ordered to pay a global amount of approximately R1.59 million, subject to tax, together with interest and costs. The judgment does not mean that employers can never differentiate between employees when designing restructuring, severance or retirement arrangements. It does, however, emphasise that where the differentiation is directly linked to a listed ground such as age, the employer must be able to justify both the distinction and the rationale underlying it with evidence. For employers contemplating voluntary retrenchment or early-retirement programmes, that justification should therefore be interrogated – and documented – when the scheme is designed, rather than reconstructed when the matter reaches court.



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