

Employment & Labour - South Africa

Retirement age challenges South African employers

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Employers in South Africa continue to be troubled and to make mistakes about retirement. This is clear from the number of cases that come before the Labour Court. The Labour Relations Act says that a dismissal based on age is not unfair if the employee has reached the agreed or normal retirement age. However, employers frequently forget that what is 'normal' must be proved, and that for there to be an agreed retirement age, both parties must agree to it. Employers cannot simply declare a particular age to be the retirement age and think that this will automatically apply to all existing employees regardless of how long they have been employed for and what age they currently are.

The best way of proving an agreed retirement age is to stipulate one in the employment contract. But what if there is no such provision in the contract? Can the employer introduce one and will it be binding on employees? Again, employers seem to forget about the fundamental principle in South African law that a contract is concluded between two parties and to change a contract, both parties must agree. These principles eluded the employer in a recent case before the Labour Court, from which a number of valuable lessons about retirement age can be learned.

Mrs Bedderson was employed by the Sparrow Schools Education Trust as a teacher just three months before she turned 65. Her contract said nothing about retirement age. She taught at the school for five years, rising to the position of head of department. The trust then introduced a mandatory retirement age of 65, but said that current staff could remain on temporary contracts until they reached age 70. The problem was that Bedderson had already reached age 70. She was told that her contract would not be renewed. She took the trust to the Labour Court, claiming automatically unfair dismissal and unfair discrimination.

The Labour Court agreed. It was clear that Bedderson had been dismissed only because of her age. When she was employed (just before she turned 65), it was on a permanent, not a temporary, contract. Even though the trust had unilaterally introduced a mandatory retirement age, this could not alter the terms of her contract. It also could not have the effect of automatically terminating her contract. Employers are not free unilaterally to introduce terms that contracts will expire on the occurrence of a stated event. Even if the employer could justify introducing a mandatory retirement age as an operational requirement (to ensure accreditation as an educational institution), it could not use this provision to dismiss an employee who had already reached the age when the retirement age was set. The dismissal was ruled to be automatically unfair.

Employers would be advised to pre-empt these retirement problems by having properly drafted employment contracts in place, stipulating a retirement age. However, if existing contracts do not deal with retirement, they cannot be unilaterally changed. Changes must be agreed with the incumbent employees.

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