

Do employers have the right to change an employee's retirement date?

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13 Nov 2020

As many people are now forced to work for longer, the question of when an employee is obliged to retire has become topical and much discussed.



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The obligation to retire depends on a number of factors which include the industry of the particular employee and, more particularly, the rules and policies of their employer in relation to prescribing a retirement age.

A retirement age is often prescribed in an employee's contract of employment or may well be imposed by virtue of an employer's retirement policy. In most instances, employees are aware of when they would be obliged to retire and thus make provision for this so that they have sufficient financial resources to cover their expenses after they have stopped working.

It is important for employers to have certainty and to create consistent policies so that there can be no ambiguities or confusion as to when employees will need to retire.

Unfair discrimination

However, what is the position where an employer does not consent to the change of his employee's retirement age? And does this constitute an automatically unfair dismissal on account of age discrimination?

This issue was considered in the Labour Appeal Court in the matter between BMW South Africa and National Union of Metalworkers of South Africa on behalf of Karl Deppe.

Without going into lengthy detail about the factual background to the dispute, Deppe's age of retirement was changed from 65 to 60. However, Deppe had not consented to the change in as much as he did not receive the relevant election form to indicate whether he was prepared to retire at age 65 or 60 as the case may be.

Deppe's case contending for an automatically unfair dismissal was brought in terms of Section 187(1)(f) of the Labour Relations Act (LRA). He argued that BMW unfairly discriminated against him on the grounds of his age by forcing him to retire at 60 years when he believed that his agreed retirement age was 65.

In the trial Court, BMW bore the onus to prove that the reason for Deppe's dismissal did not constitute unfair discrimination on the basis of age.

BMW relied on the provisions of Section 187(2)(b) of the LRA and suggested that they did not dismiss Deppe on account of his age but rather as he had reached the normal retirement age in the industry.

The Labour Appeal Court, however, confirmed that, in fact, Deppe's dismissal was automatically unfair.

The effects of Covid-19 on retirement

As a practitioner, one is often faced with clients seeking advice on whether they could fairly terminate an employee's contract on the basis that such employee had reached retirement age.

This is particularly in vogue now with the advent of the Covid-19 pandemic which has caused wide scale restructuring amongst many organisations and, in many instances, employees who the employer believed had reached retirement may not legally have their contracts of employment terminated on that basis.

An automatically unfair dismissal based on a discriminatory ground including age could well result in the Labour Court awarding up to a maximum of 24 months' remuneration as compensation to an employee who was dismissed where the employer contended that the employee had reached an agreed or normal retirement age, which argument was not accepted by the trial court.

Employer's considerations

Employers are therefore urged to include very clear provisions in employee's contracts of employment to regulate the specific retirement age of the employee as they, particularly in these trying economic times, do not want to face uncertain and unnecessary litigation.

What is furthermore noteworthy from the BMW judgment is that where employers seek to amend or alter the date of a retirement age of an employee, it must be done with the appropriate degree of care, and the employer must have documentary evidence/records of any amendment made.

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