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What is a normal retirement age in a post-normal working world?

By Paul Williams and Kirsty Gibson

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Benjamin Franklin famously noted that there are two certainties in life: death and taxes. Until not that long ago, a third could have been added: retirement. You worked until you reached a defined age, at which point you duly received your carriage clock before heading off into the sunset to enjoy the fruits of your labour. These days, the notion of a defined retirement age seems as outdated as a carriage clock, and the pandemic (of course) has only served to accelerate this. Further, some employees have had to rethink their retirement plans in light of financial hardship, and the dramatic shift towards remote working has made flexi-retirement that much easier.

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It is hardly surprising, therefore, that employers are struggling with the notion of when they can and can't dismiss an employee on the grounds of age. A couple of recent cases before the Labour Court in South Africa highlight some of the pitfalls for employers in this area, but equally help us understand how those pitfalls can be avoided.

Dismissal on the grounds of age is automatically unfair unless the employee "has reached the normal or agreed retirement age for persons employed in that capacity" (section 187(2)(b) of the Labour Relations Act, 1995) – a deceptively simple test.

Employers often run into issues when they seek to amend the retirement age unilaterally. By definition, a unilateral change cannot be "agreed" and so an employer would need to argue that the revised retirement age was the "normal" retirement age all along. This is essentially what the respondent municipality argued in *Imatu obo SP Hlabisa and 7 others v Umkhanyakude District municipality*, when it sought to dismiss a number of employees aged between 60 and 63. The municipality argued that as the "normal retirement date", as defined in the pension funds of which the employees were members, was 60, this was their "normal retirement age" and so it was lawful for it to dismiss employees aged 60 and above.

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Despite this, the Court found that the “normal” retirement age was 65 for two main reasons. Firstly, the employer’s policy (in practice; this was not documented), which was to allow employees to retire from age 60 but to require them to retire at age 65, supported the position that 65 was the “normal” retirement age. Secondly, the Court was persuaded by the applicants’ argument that the “normal retirement date” as referred to in the context of the pension funds was that the date after which, if an employee were to take a pension from the fund, the pension would not be reduced for early payment.

Enforcing retirement

More helpfully from an employer’s perspective, in another recent case, the Court confirmed in *Solidarity obo Gerhardus Viljoen Strydom v Sita* that an employer can enforce an agreed retirement age even when the employee works past this age. This decision follows a consistent line of authorities which stem from the fact that section 187(2)(b) says that a dismissal is fair if employees “have reached” retirement age, not "when they reach" – in other words, the section refers to a continuing right rather than a right which arises at a single point in time.

In this matter, Sita served notices of retirement on a number of employees aged over 60. It was common cause that age 60 was the agreed retirement age, but the applicants claimed that their dismissals were automatically unfair on grounds of age, because the parties had tacitly agreed to extend the retirement age to 67. The employees’ position derived from a contractual term that an employee who has reached normal retirement age of 60 may, subject to Sita’s consent, remain in service until age 67. The employees contended that Sita had given its consent as it had previously provided them with salary adjustment letters. The Court found that the scope of application of these letters was limited to an amendment of the employees’ salaries and so did not constitute consent on Sita’s part to the employees remaining in service. It found that on the evidence, the agreed retirement age of 60 remained "uninterrupted and binding".

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All in the contract

Although the employer was successful, this case demonstrates that even though the principle is clear that employers have an ongoing right to dismiss an employee once they have reached an agreed or normal retirement age, the evidence, and in particular the wording of employment contracts, policies and retirement fund rules, is crucial in establishing whether an employer has compromised this right.

What these cases have in common is that they demonstrate how important it is that either normal retirement age is specified in the employment contract or that the contract refers to a policy or the retirement fund rules, where normal retirement age is clearly stated. Similarly, any retirement policy must be unambiguous. And if an employer is seeking to make a change to the normal retirement age, it cannot do so unilaterally.

In the present working environment, many employers will want to give their employees the option to continue working beyond normal retirement date, but in so doing, they should not open themselves up to risk.

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