

Firing employees over retirement age 'fair' - Labour Court

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The dismissal of employees who have reached and worked beyond the normal retirement age has been found to be fair. Employers do not waive their rights to enforce the normal retirement age by serving salary adjustment letters after their employees reach the normal age of retirement.



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Facts

This was the issue considered by the Labour Court (LC) in the case of *Solidarity obo Gerhardus Viljoen Strydom & 5 others v State Information Technology Agency Soc Ltd*.

In this matter, the employment contract of the employees provided that their retirement ages would be regulated by their relevant pension fund rules. The pension fund rules provided that, subject to the employer's consent, an employee who reached the normal retirement age of 60, "may remain in service and retire at a date not later than the last day of the month in which the member attains the age of 67". In short, members of the pension fund were permitted to remain in service beyond the normal retirement age but no later than the age of 67 years.

After the employer had allowed the employees to work beyond the normal retirement age, the employer enforced the normal retirement age and served the employees with retirement notices. The notices informed the employees that they had reached their retirement age and as a result, their employment contracts would terminate. The employees lodged grievances challenging the company's decision to enforce the retirement age.



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The employees argued that the employer had consented to the employees remaining in service beyond the normal retirement age. In support of this contention, the employees relied on the letters the employer served on the employees which communicated the decision to approve annual salary increases. The employees argued that the letters constituted tacit consent to allow the employees to remain in service beyond the normal retirement age. These letters were issued after the employees reached the normal retirement age.

In contrast, the employer contended that the employees' employment automatically came to an end when they reached the retirement age of 60 years, as stipulated in their contracts of employment. Furthermore, the employer contended that there had been no written amendment to provide a termination date beyond the normal retirement age of 60.

Labour Court findings

The LC found that the employer's contention that the contracts of employment automatically terminated when they reached the normal retirement age had no merit as the employees had continued to render services. The LC found that the employees' contention that the salary adjustment letters constituted consent to extend the retirement age to 67 ("agreed retirement age") had been "a bit of a stretch". The LC found that the scope of the letter had been limited to the amendment of the employees' salaries and nothing more. The LC affirmed that the normal retirement age remained as stated. Therefore, an agreed retirement age could not be relied upon as the agreed retirement age and the normal retirement age, were mutually exclusive.



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The LC further relied on, amongst others, *Bank v Finkelstein t/a Finkelstein and Associates [2016]* (Finkelstein), in which the Court found that an employee who works beyond an agreed or normal retirement age had, in effect, been working on "borrowed time". Similarly, the LC relied on *Kumta and Others v Limpopo Legislature [2014]* (Kumta) and *Marais v Aveng Grinaker-Lta [2019]* (Marais). The Kumta and Marais matters confirmed the position that once reached, the normal retirement age cannot be reversed unless the normal retirement age is replaced by a new agreement. The *Finkelstein* case further noted that unless an employer specifically waived its rights to apply the retirement age, the employer is entitled to "at any point after the employee attained the normal or agreed retirement age place the employee on retirement".

The LC found that the normal retirement age remained "uninterrupted and binding". The dismissal of the employees had therefore been fair.

Importance of case

The case reaffirms that if there is no agreement on the retirement date once the employee reaches the normal retirement age, then the employer is entitled to enforce the normal retirement age at any time thereafter.

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