THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 207/19

In the matter between:

JAN WALTERS KRUGER **Plaintiff**

and

UNIVERSITY OF SOUTH AFRICA **Defendant**

Heard: **29 and 30 May 2025**

Delivered: **20 June 2025**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 20 June 2025.

JUDGMENT

PRINSLOO, J

Introduction

[1] The following facts are common cause between the parties or were undisputed: In 2004, the Defendant (Unisa) merged with Technikon Southern Africa and a component of the Vista University. At the time, the retirement age for Unisa employees was 60 years, and the 2007 'conditions of employment agreement'

entered into between Unisa, NEHAWU and the Unisa Bargaining Forum made provision for the retention of the retirement age, as applied prior to the merger. The said agreement provided for a retirement age as follows:

> 'The official retirement age will be 60 years for all newly appointed employees (as from 1 January 2006). The retirement ages for current employees (those employed prior to the merger of January 2004) will be retained at either 60 or 65, whichever is applicable to the employees' previous conditions of service.
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> Employees wishing to remain in the employ of Unisa beyond their retirement age will be given consideration by the management of Unisa, but such consideration will be based on operational requirements. Such employees will still be required to retire from the institution, but may be re-employed on a contract basis, which contracts will not be extended beyond the age of 65.
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> Employees may apply to retire (in writing on 3 months' notice) after the age of 55. Employees have the option to retire in December of the year in which they reach their retirement age.'

[2] Unisa appointed the Plaintiff as an independent contractor during 2001. In January 2008, he was employed as a senior lecturer, promoted to an associate professor in November 2012 and to full professor in January 2018. At the time of his employment as a senior lecturer, the retirement age was 60 years.

[3] After negotiations with the trade unions in the bargaining council, Unisa's Council resolved on 23 November 2012 that the retirement age be extended to 65. This applied to existing and new employees, and the aim was to achieve consistency in the retirement age after the merger of the different higher education institutions. On 19 February 2013, the following communique was sent to all Unisa employees:

> 'This communique serves to confirm that Council approved the extension of the retirement age from 60 to 65 years with effect from 23 November 2012. This implies that the official retirement age in Unisa is 65 years for all employees within the institution as well as new employees that join Unisa. An employee may choose to apply for early retirement from age 55 years. Should you have any enquiries in this regard, please contact…'

[4] The 2013 'Policy for Termination of Employment' (the policy) provides for the termination of employment of permanent employees of Unisa and it *inter alia* provides for early retirement, which is the option to retire before the normal retirement age, as from the age of 55 years onwards, normal retirement is the option to retire at the end of the month in which an employee attains retirement age and extended retirement, which refers to the option to retire at the end of December of the year in which an employee is to retire.

[5] Dr van Staden, Unisa's Human Resource manager for benefits since October 2010, explained that there is a long-standing practice at Unisa that every employee who is to retire, would stay on until the end of the year in which they turn 65. The practice is well known and established, and it ensures that employees who are due to retire can finalise their students and responsibilities for the academic year. This practice is what is referred to in the policy as 'extended retirement.'

[6] The Plaintiff turned 65 on 10 April 2018, and he was placed on retirement by 31 December 2018, in accordance with the policy, which provides that an employee had to retire by no later than 31 December in the year he or she had turned 65.

[7] The Plaintiff subsequently approached this Court for relief. His claim is premised on section 187(1)(f) of the Labour Relations Act[1] (LRA). He seeks retrospective reinstatement, alternatively, 24 months' compensation.

The pleadings and pre-trial minute

[8] Before I deal with the merits of the case and the evidence adduced, it is necessary to say something about the pleadings filed. It is trite law that the court and the parties are bound by the pleadings and the pre-trial agreement[2] and the issues they agreed to in the pre-trial minute.[3] This Court cannot and should

[1] Act 66 of 1995, as amended.
[2] *Chemical, Energy, Paper, Printing, Wood & Allied Workers Union and Others v CTP Ltd and Another* [2013] 4 BLLR 378 (LC).
[3] *Professional Transport & Allied Workers Union on behalf of Khoza and Others v New Kleinfontein Gold Mine (Pty) Ltd* (2016) 37 ILJ 1728 (LC); *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 ILJ 142 (LAC).

not go beyond the issues it is required to determine, with reference only to the pleadings and the pre-trial minute.

[9] Jacob and Goldrein[4] aptly capture the position as follows:

> 'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings… For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.
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> The Court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties…
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> The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.'

[10] In *Candy and others v Coca Cola,*[5] the Court considered the purpose of a statement of claim and held that:

> 'In its simplest terms, the statement of case must at least inform the Respondent party what the pertinent facts are on which the Applicant will rely in the case, and further, what the cause of action is that the Applicant will pursue as founded on these facts. That must be done in sufficient particularity so as to enable the Respondent to provide a proper answer to these facts and the related cause of action. The statement of claim and the answering statement thereto are not just for the benefit of the parties. They also serve the court, in that the issues in dispute are properly determined and other possible

[4] JHI Jacob, IS Goldrein, '*Pleading: Principles and Practice',* Sweet & Maxwell, at pp 8 - 9.
[5] (2015) 36 ILJ 677 (LC) at para 38.

alternative causes of action are eliminated from having to be considered by the court. A proper statement of claim and answering statement are imperative to the fundamental requirement of expeditious resolution of employment disputes in terms of the LRA. As the court said in *Harmse v City of Cape Town (Harmse):*

> "[6] The statement of claim serves a dual purpose. The one purpose is to bring a Respondent before the court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the Respondent of the material facts and the legal issues arising from those facts upon which Applicant will rely to succeed in its claims.
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> [7] The material facts and the legal issues must be sufficiently detailed to enable the Respondent to respond, that is, that the Respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the Applicant is relying upon to succeed in its claim.'"

[11] In *SA Breweries (Pty) Ltd v Louw*[6] (*Louw*), the Labour Appeal Court (LAC) was required to, *inter alia*, determine a complaint by the appellant that the court *a quo* decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pre-trial conference minute. The LAC held that:[7]

> '[4] To state the obvious, litigation is complex. Among the duties of legal practitioners is to conduct cases in a manner that is coherent, free from ambiguity and free from prolixity. True enough, the holy grail of translating what is complex into simplicity is not always attainable, but the ground rules are irrefrangible: say what you mean, mean what you say and never hide a part of the case by a resort to linguistic obscurities. The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up one's case as you go along is an

[6] (2018) 39 ILJ 189 (LAC).
[7] Ibid at paras 4 – 5.

anathema to orderly litigation and cannot be tolerated by a court. Counsel's duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.

[5] The critical complaint in this matter is that the court a quo decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pretrial conference minute. The complaint had been raised during the hearing and in argument at the conclusion of the trial, considered by the court a quo and dismissed. In our view, the complaint is justified and the court a quo was in error.'

[12] The LAC further held that:[8]

'The relationship between the pleadings and the pretrial conference minute has been the subject of several judicial pronouncements[9]. In short, a minute of this sort is an agreement from which one cannot unilaterally resile. Also, a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with the leave of the court. The case pleaded cannot be changed or expanded by the terms of a minute; if it does, it is necessary that that change go hand in hand with a necessary amendment. The chief objective of the pretrial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, the giving of an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pretrial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic

[8] Ibid at para 8.
[9] See: *Price NO v Allied - JBS Building Society* 1980 (3) SA 874 (A) at 882D - E; *Zondo and others v St Martin's School* (2015) 36 ILJ 1386 (LC) at paras 10 – 11.

> choices made in a pretrial conference need to be carefully thought through, seriously made, and scrupulously adhered to. It is not open to a court to undo the laces of the straitjacket into which the litigants have confined themselves.'

[13] In summary, a statement of claim must inform the defendant of the material facts and the legal issues arising from those facts upon which the plaintiff will rely to succeed in its claims. Those must be sufficiently detailed to enable the defendant to respond and to be informed of the nature or essence of the dispute. Each side must be given an unambiguous warning of the case they are to meet.

[14] The issues raised by the Plaintiff must be considered against the backdrop that pleadings give the architecture and that the evidence at the trial provides the detail and texture. However, it is not for this Court to decide the case on factual issues not properly pleaded or refined in the pretrial conference minute.

The pleaded case

[15] In his statement of claim, the Plaintiff stated the facts as that he registered a grievance with the employee relations directorate in July 2018, stating that compulsory retirement '*is a violation of human rights as it discriminates on* (sic) *adults based on their age. This discrimination is unfair, particularly in a country where there is a shortage of scarce skills'*. He received a response in September 2018 to the effect that the policy for termination of employment that was adopted by all stakeholders in the Unisa bargaining council on 4 July 2017 does not discriminate against employees based on age. On 24 December 2018, the Plaintiff addressed correspondence to the Defendant about his position as he had reached the age of 65 and did not intend to retire or resign.

[16] On 11 January 2019, the Plaintiff received a letter confirming that the employment relationship had terminated on 31 December 2018. The Plaintiff referred an automatic unfair dismissal dispute to this Court in terms of section 187(1)(f) of the LRA, as he claims that the termination of his employment is automatically unfair, as he was dismissed on account of his age.

[17] The Plaintiff's statement of case contains several references to and quotations from case law, which is wholly inappropriate for purposes of pleadings. References to authorities belong in heads of argument, not in a statement of case.

[18] The Defendant pleaded that the Plaintiff was never dismissed as his employment contract merely came to an end when he attained the retirement age of 65. The Defendant's case is that at the time of his employment, the Plaintiff's agreed retirement age was 60, but it was subsequently extended to 65, after the council resolved to extend the retirement age of all Unisa employees to 65, with effect from November 2012.

[19] In June 2024, the Plaintiff filed an addendum to his statement of claim and contended that his dismissal was automatically unfair because there is no normal retirement age, since there are people employed in the same capacity as the Plaintiff, who are over the age of 65. He also contended that there was no agreed age at the time of the termination of his services, since his employment contract stated that he should retire at the age of 60, but he worked until the age of 65.

[20] The parties signed a pre-trial minute, and it is common cause between them that at the time the Plaintiff took up employment with Unisa, the retirement age was 60 years and that on 23 November 2012, the Defendant's council resolved to extend the retirement age to 65 years. It is further common cause that the Plaintiff was placed on normal retirement in line with Unisa's policy and that he had to retire by no later than 31 December of the year in which he turned 65, thus 31 December 2018.

[21] Discrimination based on the Plaintiff's age is disputed, and the Defendant's case is that the termination of the Plaintiff's employment was in accordance with section 187(2)(b) of the LRA. The Plaintiff contended that he was discriminated against because he had attained the retirement age of 65, but other employees of the same age continued to be employed at Unisa, despite them reaching the retirement age.

[22] The precise relief sought by the Plaintiff is to be retrospectively reinstated or to be paid maximum compensation.

[23] I have alluded to the importance of pleadings. The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case, but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings and narrowed in the pre-trial minute.

[24] It is unfortunate that when the evidence was presented, the legal representatives of both parties lost sight of the narrow scope of this matter, as pleaded, and they could not resist the temptation to adduce evidence that was either not relevant to the issues in dispute or that was of no assistance to this Court in deciding the issues. I have no intention to deal with the unnecessary and irrelevant evidence and will deal only with the evidence relevant to the issues pleaded and recorded in the pre-trial minute and the narrow issue this Court has to decide.

[25] The main issue for this Court to decide is whether the termination of the Plaintiff's employment, based on his age, constituted an automatically unfair dismissal.

The evidence adduced

The Plaintiff's case

[26] In recording the Plaintiff's evidence, I will not repeat the facts that are common cause between the parties and already recorded *supra,* nor will I record the evidence that is not necessary for purposes of this judgment.

[27] The Plaintiff referred to the information of certain individuals, obtained from the Defendant's Oracle database, to illustrate that others were still employed by Unisa post the retirement age of 65. He referred to *inter alia* Prof Neuland, who worked until he was 84 years old, Prof Klopper, who worked until he was 72 years old, Prof Strydom, who worked until he was 77 years old and Prof Pellissier, who worked until she was 66 years old. He testified that there is no

normal retirement age at Unisa in light of the many exceptions, as referred to, where individuals were still employed after the age of 65.

[28] In cross-examination, it was put to the Plaintiff that all the individuals on the list he had referred to had retired and were offered some fixed-term or short-term contract post-retirement. Unisa's version was that they did not keep on working without retiring first, when they attained retirement age, and they were subsequently offered other employment, depending on the operational needs of the Defendant. No individual was employed on a permanent basis after they reached retirement age. The appointment of the said individuals was for specific projects or on a fixed-term basis, after their appointment was motivated for and approved. It was different from the permanent employment contracts they previously had with Unisa.

[29] The Plaintiff conceded that it was the prerogative of Unisa to offer further employment, based on its operational needs. He conceded that there was no motivation for his further employment post-retirement and that he was not offered a fixed-term contract. He further conceded that he could not compare himself to scenarios which did not find application to his position.

[30] It was not disputed that the Plaintiff's contract of employment provided for a retirement age of 60 and that the policy subsequently changed, and the retirement age was extended until 65. The Plaintiff however testified to the effect that it did not apply to him because he was intending to leave Unisa at the end of the year he was turning 60, but the CEO of the 'School of business leadership' (SBL), where he was employed, told him that he would not retire at the age of 60 or 65 because he has such a scarce skill that the business school would not be able to operate without him. His version was that the CEO verbally said that he would not retire at 65, as Unisa would keep him indefinitely, as long as he performs.

[31] The Plaintiff testified that he wanted retrospective reinstatement as he wants to go back to work; he has been in the academic world since 1974 and has scarce skills. He believes that he is still capable and can contribute to the country.

[32] In cross-examination, the Plaintiff confirmed that he had signed a contract of employment with the understanding that he would retire at the age of 60. He conceded that he was bound by Unisa's policies and that he knew about the policy that increased the retirement age to 65. The Plaintiff agreed that the policy was valid and that he knew that his retirement age was 65. He, however, disputed that he had to leave Unisa's employment when he retired because others kept on working after the age of 65.

[33] The Plaintiff conceded that it was the employer's prerogative to offer an employee a fixed-term contract or further employment post-retirement and that his contract of employment did not make any provision for him to be employed after he had reached retirement age. The Plaintiff insisted that the CEO of the SBL assured him that he would not leave at 65 because of his scarce skills. He, however, conceded that he was not entitled to work after retirement, but that he rather had such an expectation.

[34] Ultimately, the Plaintiff's case boiled down to: '*If others can work beyond 65, why can't I?*'

[35] The Plaintiff did not call any witnesses and closed his case.

The Defendant's case

[36] The Defendant called Dr van Staden, Unisa's Human Resource manager, as its first witness. He explained that in February 2013, it was communicated to all staff that the council had approved 65 as the retirement age. There has not been any deviation from the policy since then, and everyone retires at the age of 65. Retirement is mandatory at the age of 65, and it has been a longstanding practice at Unisa for employees to retire at the end of December of the year that they turn 65.

[37] Dr van Staden confirmed that no one is employed on a permanent basis after the age of 65. However, if there is an operational need, a line manager may request that a certain individual be retained post-retirement. Such a request is based on the employer's operational needs, and depending on what the operational requirement is, the relevant individual would be offered a fixed-term

contract or would be appointed as an independent contractor. This is a new agreement post-retirement with a new contract, because the previous contract of employment expired upon retirement.

[38] In cross-examination, Dr van Staden conceded that there were individuals working at Unisa over the age of 65, but he explained that everybody at Unisa retires at 65. If they work beyond retirement age, it is in terms of a new and different contract, based on Unisa's operational requirements.

[39] It was put to Dr van Staden that there is no normal retirement age at Unisa, because if there were, nobody above the age of 65 would be working at Unisa. Dr van Staden disputed this and testified that there is a formally negotiated retirement age at Unisa – before November 2012, it was 60, and after December 2012, it is 65 for all employees. Everybody retires at 65, and after that, employees could enter into a new contract with a different regime, if so required, but not on a permanent basis.

[40] Mr Latola testified that he is a human resources manager at Unisa, responsible for the administration of short-term contracts and independent contractors. He was provided with the list of individuals, as testified to by the Plaintiff, and he confirmed the information on the HR information system. He testified in respect of some of the names on the list but made it clear that none of the individuals are employed on a permanent basis. Prof Neuland and Prof Klopper were appointed as independent contractors post-retirement.

[41] Mr Latola explained that if there is a specific operational need, for example, a project that must be completed or a sudden increase in student numbers, there is a process in terms of which there is a request and approval for the appointment of an independent contractor or fixed-term employee. Such is a new contract and not a continuation of the old employment contract, and it is based on a specific need, for a temporary period.

[42] Dr Sinoamadi testified that he was the deputy HR director at the SBL when the Plaintiff was employed at the SBL. He confirmed that no one is working at the SBL on a permanent basis beyond the age of 65. If there is an operational need, such as the marking of exam papers or a specific project, an individual may be

employed or appointed as a fixed-term employee or an independent contractor for that specific need or purpose.

[43] Dr Sinoamadi confirmed in cross-examination that the compulsory retirement age at Unisa is 65.

The issues to be decided

[44] The issue to be decided is whether the Defendant's conduct in terminating the Plaintiff's employment constituted an automatically unfair dismissal based on age.

[45] This Court has empathy for the Plaintiff, who is 72 years old and still believes that he has a contribution to make in the workplace and wants to remain employed for as long as he is able to perform, but in deciding the issues before Court, the law must be applied dispassionately, with the focus on the relevant legal questions and the applicable principles.

[46] Section 187(1)(f) of the LRA provides that a dismissal is automatically unfair if the reason for dismissal is:

> 'That the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.'

[47] In section 187(2) the LRA provides that:

> '(2) Despite subsection (1)(f)—
>
> (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;
>
> (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.'

[48] Section 187(2)*(b)* of the LRA pronounces a termination of a contract of employment at a normal or agreed retirement age to be fair.

[49] In *HOSPERSA on behalf of Venter v SA Nursing Council*[10], it was effectively found that section 187(2)(b) provides a justification or defence for termination based on age when it was held that:

> 'The proviso in s 187(2)*(b)* of the LRA that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity, appears to me to be no more than a justification for what would otherwise amount to unfair discrimination based on age.'

[50] In *Rockliffe v Mincom (Pty) Ltd*[11] (*Rockliffe*), the Court also considered an automatically unfair dismissal dispute based on age and held that:

> '[38] In a discrimination case, an applicant has the evidential burden to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place (*Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC)). In this matter I have already found that age was the basis to dismiss the applicant, therefore the onus was on the respondent to justify the dismissal so as to make it fair even if it is based on age (a prohibited ground).
>
> [39] The onus in this regard is for the respondent to prove that there was an agreed retirement age and same was reached at the time of dismissal. This once shown renders the dismissal fair.'

[51] The position was confirmed by the LAC in *Motor Industry Staff Association & Another v Great South Autobody CC t/a Great South Panelbeaters*[12], where it was held that:

> '[14] Section 187(2)*(b)* of the LRA is clear and unambiguous. On its ordinary meaning, once the employer proves that the dismissed employee has reached the agreed or normal retirement age, the dismissal is deemed fair. The use of the phrase 'if the employee has reached his agreed or

[10] (2006) 27 ILJ 1143 (LC) at para 22.
[11] (2008) 29 ILJ 399 (LC) at paras 38 and 39.
[12] (2022) 43 ILJ 2326 (LAC).

normal retirement age' is decisive in denoting that for the dismissal in terms of s 187(2)*(b)* to be fair, the employee must have passed his or her normal or agreed retirement age.

[15] Section 187(2)*(b)* does not prescribe a time frame within which the dismissal should take place, provided it is after the employer has reached his or her agreed or normal retirement date. Properly construed, s 187(2)*(b)* affords an employer the right to fairly dismiss an employee based on age at any time after the employee has reached his or her agreed or normal retirement age. This right accrues to both the employee and the employer immediately after the employee's retirement date and can be exercised at any time after this date. The focus is not so much on when the employee reached his or her retirement date, but rather that the employee has already reached or passed the normal or agreed retirement age.

[16] For a dismissal in terms of s 187(2)*(b)* of the LRA to be insulated against a claim of unfair discrimination on the grounds of age, the reason for, or proximate cause of the dismissal must be that the employee has already reached retirement age. The appellants contend that if an employer is permitted, on the employee having reached his or her retirement age, to rely indefinitely on an agreed or normal retirement age, this will leave the employee in a vulnerable position by enabling the employer to abuse its position to dismiss the employee based on his age. I disagree. On a proper construction of s 187(2)*(b)* read in the context of the LRA, it is impermissible for an employer to invoke the defence in s 187(2)*(b)* where the real reason for the dismissal is based on operational requirements or misconduct or incapacity. For example, if the most proximate cause of the dismissal is proven to be one based on operational requirements and not age, as contemplated in s 187(2)*(b)*, then it will be open to the Labour Court to, inter alia, order the employer to pay the employee severance pay.

[17] Section 187(2)*(b)* of the LRA contemplates that where an employee continues to work for the employer uninterrupted after reaching retirement age, the employment relationship and employment contract continue. In other words, for purposes of a dismissal in terms of s 187(2)*(b)*, the employment contract does not terminate by the effluxion

of time when the employee reaches his or her retirement age but is deemed to continue. This effectively means that the agreed or normal retirement age of the employee remains unchanged.

[18] On this interpretation, a dismissal contemplated in s 187(2)*(b)* would have the same meaning as the definition of dismissal in s 186 of the LRA, which does not include the termination of a contract by effluxion of time as the latter is not a dismissal. Properly construed, s 187(2)*(b)* does not contemplate a new tacit contract coming into existence between an employer and employee (by virtue of their conduct) which governs their employment relationship when the employee continues to work for his or her employer after reaching the normal or agreed retirement age. In the same vein, s 187(2)*(b)* does not envisage a tacit amendment of the contract to the effect that the employee would continue to work indefinitely or that a new retirement age applies, as is contended for by the appellant in this appeal.'

[52] This interpretation gives effect to the right that accrues to an employer in terms of section 187(2)*(b)* to fairly dismiss an employee who has passed the agreed or normal retirement age. Significantly, it is consistent with the purpose of section 187(2)*(b),* which is to allow the employer to dismiss employees who have passed their retirement age to create work opportunities for younger members in society. This interpretation was endorsed by the LAC.

[53] It is common cause that the Plaintiff's contract of employment terminated at the end of the year in which he had turned 65 and that this was done in accordance with the Defendant's policy. The reason for termination of employment was the Plaintiff's age.

[54] The question is whether such termination was automatically unfair. The Defendant has to prove that there was an agreed or normal retirement age at the time of termination. *In casu,* Unisa's defence is that there was an agreed retirement age, which the Plaintiff had attained, and as such, there is no automatically unfair dismissal.

Analysis

[55] In terms of section 187(1)*(f)* of the LRA, a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including age. In the same breath, section 187(2)*(b)* provides that a dismissal based on age is fair if the employee has reached the agreed or normal retirement age for persons employed in that capacity. The converse is also true, and it would obviously be unfair to permit an employer to dismiss an employee on account of age if there was no normal or agreed retirement age applicable to the employee.

[56] A dismissal 'based on age' is non-specific in the sense that it does not prescribe the age on which the dismissal is based, save that the employee must satisfy the condition of having reached the agreed or normal retirement age.

[57] In *Rubin Sportswear v SA Clothing & Textile Workers Union and Others*[13]*,* the LAC found that the retirement age dispensation provided for in section 187(2)(b) of the LRA is one that works on the basis that, if there is an agreed retirement age between an employer and employee, that is the retirement age that governs the employee's employment. This is the case even when there is a different normal retirement age for employees employed in the capacity in which the employee concerned is employed. The provision relating to the normal retirement age only applies in cases where there is no agreed retirement age between the employer and the employee.

[58] The onus in this regard is for the respondent to prove that there was an agreed retirement age, and once that is shown, it renders the dismissal fair.

[59] *In casu,* when the Plaintiff was employed by Unisa, the agreed retirement age was 60 years. In November 2012, the council resolved that the retirement age for all employees be extended until 65. The undisputed evidence was that for the past 13 years, all Unisa employees retired at the age of 65.

[13] (2004) 25 ILJ 1671 (LAC) at para 25.

[60] In *Rockliffe,* it was confirmed that in instances where an employee alleges that some other retirement age was agreed upon, then the onus is on that employee to prove that agreement. The Plaintiff disputed that either 60 or 65 was the agreed retirement age because of a discussion he had with the CEO of the SBL, who allegedly told him that he would not retire at the age of 60 or 65 – in fact, he would not retire for as long as he was able to perform. The onus is on the Plaintiff to prove the agreement he alleges. His evidence was that it was an oral agreement with the CEO.

[61] The Plaintiff did not call the relevant CEO to testify, and notwithstanding the onus he had to prove the agreement he alleged, he adduced no reliable evidence to prove it. The Plaintiff failed to prove the agreement, and considering the evidence and the probabilities, it is improbable that such an agreement was reached.

[62] In my view, it has been established that Unisa's agreed retirement age is 65.

[63] For the defence contemplated in s 187(2)*(b)* to succeed, all that has to be shown is the fact that the employee had reached the agreed age.

[64] *In casu,* it is common cause that at the time of the termination of the Plaintiff's employment, he had reached the age of 65 years. As already found, 65 years is the agreed retirement age for Unisa employees. This establishes the defence set out in section 187(2)*(b),* and the Plaintiff's dismissal is not automatically unfair.

[65] It is clear from the evidence that was presented that the Plaintiff knew that the retirement age of 60 years, which he had agreed to when he was employed, was subsequently extended to 65 years. This is supported by his conduct in that he had made no attempt to retire at the age of 60. Furthermore, the undisputed evidence was that he was approached to sign forms and complete documents in 2018, in anticipation of his retirement at the end of December 2018, but he had refused to cooperate to facilitate his retirement. In fact, he made it clear that he had no intention whatsoever to retire.

[66] In my view, this case is rather one of dissatisfaction or discontent about the fact that the Plaintiff was not retained or offered a contract post his retirement, while others were. Alternatively, it is premised on the Plaintiff's incorrect belief that others did not retire, but merely continued with their employment at Unisa, past their retirement age. In fact, the essence of this case was captured in the Plaintiff's testimony when he questioned Unisa's motives and expressed the question, '*If others can work beyond 65, why can't I?*'

[67] There is nothing in law which prohibits employment post-retirement, and an employer and employee are free to conclude a new contract of employment to govern the extended employment beyond the initially agreed retirement age date.

[68] Unisa's evidence was that all the individuals on the list presented by the Plaintiff had retired at the age of 65 years, and based on the employer's operational needs, they were either offered fixed-term contracts or were appointed as independent contractors post their retirement. The evidence that no employee was employed on a permanent basis after they had reached the retirement age of 65 was undisputed. The Plaintiff was unable to present any version or evidence to paint a different picture.

[69] In my view, this is a case where the Plaintiff either did not understand or did not know the true position of the individuals he wanted to compare himself to, and this unfortunately informed his idea that he was treated differently, when others above the age of 65 were allowed to keep on working.

Conclusion

[70] A termination of employment based on age is fair, as contemplated in section 187(2)*(b)* of the LRA if *(a)* the dismissal is based on age; *(b)* the employer must have an agreed or normal retirement age for employees employed in the capacity of the employee concerned; and *(c)* the employee must have reached the normal or agreed retirement age.

[71] *In casu,* there was an agreed retirement age of 65, which the Plaintiff had reached.

[72] The Plaintiff failed to make out a case for automatic unfair dismissal based on his age, and it follows that his case must be dismissed.

[73] This Court has a broad discretion in awarding costs. In considering the facts of this case and the Plaintiff's position, I am of the view that the interests of justice and fairness will be best served by making no order as to costs.

[74] In the premises, I make the following order:

Order

1. The Plaintiff's claim is dismissed.

2. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff:	Advocate Matime
Instructed by:	K I Mphahlele Attorneys
For the Defendant:	Advocate Maponya and Advocate Sipuma
Instructed by:	Nadeem Mahomed Inc Attorneys