

Unfair dismissal based on age: Labour Court's landmark ruling

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A recent judgment by the Labour Court confirms the current untenable position that many working-class South Africans find themselves in - being unable to retire comfortably at the standard retirement age, thus necessitating working beyond retirement.



Image source: Pavel Danilyuk from [Pexels](#)

In *Seokwane v Bidvest Prestige Cleaning Services (Pty) Ltd*, the Labour Court found that a general worker was discriminated against because of her age upon being dismissed by her employer. As a result, the dismissal was accordingly automatically unfair.

The employee was employed on a standard three-year fixed-term employment contract, even though the employee was already 62 years old, which was over the stipulated retirement age (60 years) as stated in the employer's retirement policy. The Court found that the true reason for the employee's dismissal was based on the employer's operational requirements, which means that the employer was not able to use section 187(2)(b) of the Labour Relations Act (LRA) as a defence for its conduct.

Section 187(2)(b) of the LRA allows employers to be protected from claims of unfair discrimination on the grounds of age if the reason for, or proximate cause of the dismissal is that the employee has already reached the standard or agreed retirement age. The Court reasoned that the employee was subjected to an automatically unfair dismissal (based on age discrimination) and should be compensated in an amount equivalent to 12 months' remuneration at her rate of remuneration on dismissal.

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Retirement woes

A recent report by 10X Investments cited figures provided by the National Treasury, indicating that only 6% of South Africans are on track to retire comfortably. The report further identified that many economically active South Africans have not formally planned their retirement and those who had, were unsure whether they were on track to be able to support themselves in old age. According to the report, various factors are to blame, which include, but are not limited to the current economic climate, the high interest rates and the impact of the Covid-19 pandemic.

Many employees, like the employee in this particular judgment, are in a similar situation because they have not saved enough for retirement and envisage life after retirement as a period in which they will have to take up further employment to afford the cost of living.

Employers are thus encouraged to ensure that they evaluate whether re-employing retired employees or those who are approaching or have reached retirement age constitutes waiving of the employers' rights associated with employees reaching retirement age. After doing so, employers cannot later rely on the stipulated retirement age as a reason to terminate their employment. This is because if the employee's termination was actually due to something other than reaching retirement age, they may be able to argue that they were a victim of an automatically unfair dismissal and that they were unfairly discriminated against based only on their age.

Employers must ensure that they stringently implement their retirement policies, and if they deviate from the provisions in these policies, they must ensure that the employment agreements in respect of the specific employees cater for the bespoke needs of the factual circumstances at hand.

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