



A Million Rand Warning: Act When Employees Reach Retirement Age

“Retirement is for people who don’t like their jobs” (Paul McCartney)

Many employees reaching “retirement age” (often set at 60 or 65) are not ready to retire. Perhaps they need to carry on earning an income, often they are fit and healthy and want to remain engaged and productive. Increasingly, both factors are at play.

Regardless, the concepts of an aging workforce and “65 is the new 50” are here to stay, and employers and employees alike need to tackle the changing realities that come with them.

Agree a retirement date upfront!

Firstly, do not as an employer make the mistake of not specifying an agreed retirement age in your contracts of employment. Without such a clause you run the risk of being found guilty of “age discrimination” if in due course you force an unwilling employee to retire. As that is a class of “automatically unfair” dismissal, you are likely to pay dearly for your mistake.

Let’s consider however a recent case where an agreed retirement age was in place, but it came and went unnoticed (or perhaps noticed but ignored) ...

The engineer who carried on as usual after 65

- An engineer’s 1985 written contract of employment provided that his employment would terminate at the end of the month when he reached the age of 65 unless the parties agreed otherwise in writing. It also had a standard “no-variation-except-in-writing” clause.

- He turned 65 in 2013 but continued working as normal, uninterrupted, until he accepted a voluntary retrenchment in 2017. He had shortly before retrenchment been offered a two-year fixed-term contract which provided that he would not receive “any discharge or severance benefits” upon its termination – wisely, as it turned out, he had rejected that offer.

- When the business thereafter offered all employees a voluntary retrenchment package of one week’s compensation for every year of service, the engineer accepted. So far so good, but the problem arose at payout time. He was offered only 4 weeks’ compensation and was told that he had officially retired at 65 so only his post-retirement pay was taken into account in calculating his severance package.

- The employee was having none of that and demanded a recalculation based on his service since 1985. He took the dispute to the CCMA (Commission for Conciliation, Mediation and Arbitration), claiming for 29 weeks as the balance due after he had accepted the 4 weeks as part payment only. The CCMA awarded him the full amount (R1,010,625) and the Labour Appeal Court in due course confirmed the award.

Learning from the employer’s R1m lesson

The Court based its decision on its conclusion that although the 1985 employment contract had terminated when the employee had turned 65, he had carried on working “seamlessly” thereafter.

In terms of the Basic Conditions of Employment Act, length of service must take into account previous employment with the same employer if the break between the periods of employment is less than one year. In this case, said the Court, there was no break at all and the engineer’s “employment with the respondent was ‘continuous’, in the true sense of that term.”

The employer’s mistake seems therefore to have been that it had done nothing when its employee approached the agreed retirement age. The reason for it doing nothing is unclear, but one wonders how many employers ever bother to diarise all retirement dates with a note to take action before they arrive.

Regardless, through its lack of action the employer effectively landed itself with an open-ended contract of employment (i.e. with no agreed retirement or termination date). If it had been more alert it could perhaps have simply said “remember you retire soon, enjoy your retirement” - that would not have been a retrenchment, and no severance pay would have been payable. Perhaps it could then have safely offered the employee a new fixed-term contract for a specified period (a “clean break” would have been essential i.e. no untaken leave or the like carried forward from the original contract). Perhaps it could even have structured an agreement to extend the contract on terms that would have made it unnecessary to give the employee a retrenchment package at all. **Every case will be different and there are grey areas in the applicable law, so specific professional advice is essential here.**

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