REPORTABLE ZLR (29)

Judgment No. S.C. 48/2000
Civil Appeal No. 21/99

MUTARE BOARD AND PAPER MILLS (PRIVATE) LIMITED

v WILLIAM KODZANAI

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, MAY 18 & JUNE 1, 2000

P Nherere, for the appellant

V M Mazengero, for the respondent

GUBBAY CJ: At a works council meeting, held on 14 November 1997, a management representative of the appellant announced that as a cost-cutting measure, alleged to be essential for the business of the appellant to remain financially viable, the decision had been taken to reduce the number of the workforce by retiring all those male employees who were fifty-five years of age, or over. No less than thirty-eighty employees, including the respondent, were affected. Five days later the employees so identified received official notifications that the operative retirement date was 1 January 1998. Their objections were to no avail, and on 21 December 1997 the appellant issued a directive prohibiting them from reporting for duty and from setting foot upon its premises.

In proceedings brought before the High Court, the respondent protested that in retiring himself and the other employees, the appellant had failed to comply with the requirements and procedures of the Labour Relations (Retrenchment) Regulations 1990, SI 404 of 1990. These Regulations, he claimed, were applicable because "early retirement" under the appellant's Pension Fund Rules ("the Rules") - admittedly part of the conditions of service of the employees - was to all intents and purposes a retrenchment. He further contended that "early retirement" could only be effected with the consent of the employee concerned; and none of the thirty-eight had consented. In the event, the respondent sought an order: (i) declaring the termination of his employment to be invalid; (ii) reinstating him in employment; and (iii) that he be paid salary and other benefits to which he was entitled, until such time as he was retrenched in terms of the applicable Regulations.

Clause 5:1 of the Rules contains the following provisions:

> "An annual pension shall become payable to a member on:
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> (i) retirement at the normal retirement date.
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> (ii) retirement before the normal retirement date (early retirement).
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> A member who has attained age 55 (or 50 in respect of a female member participating hereunder immediately prior to 1 July 1976) and has completed five years of continuous service with the employer (unless the employer waives this requirement) may, with the employer's consent or at the instance of the employer, retire or be retired from the service of the employer on the first day of any month prior to his normal retirement date."

The Rules were framed in compliance with the Pension and Provident Fund Regulations 1991, SI 323 of 1991, s 15 of which reads in relevant part:

> "(1) The rules of a pension fund or provident fund shall specify the normal retiring age for all its members, which shall not be less than fifty-five years or more than seventy years:
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> Provided that –
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> (i) if in a particular trade or occupation it is customary that the normal retiring age is less than the fifty-five years, a lower age may, with the approval of the Registrar, be provided;
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> (ii) the rules may provide that if the normal retiring age is the age on an anniversary of the date of entry or the date of the end of a policy year, the earliest normal retiring age shall be that date which is nearest to the fifty-fifth anniversary of the birthday;
>
> (iii) …
>
> (2) The rules of a pension fund or provident fund may provide for the early retirement or late retirement of a member:
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> Provided that subject to the proviso to subsection (1), they shall not permit a member to retire before his fifty-fifth birthday or after his seventieth birthday."

It is clear that these Regulations require a pension or provident fund to specify a normal retiring age of between fifty-five years and seventy years for all its members. What is optional is that the fund may also make provision for the early or late retirement of its members, save that retirement before the age of fifty-five years or after the age of seventy years is not permissible.

The appellant's argument was that the respondent's contract of employment was one the duration of which had been fixed by mutual agreement at his attaining the age of fifty-five years. For that was the earliest age at which the appellant could either grant consent to a male employee retiring from its service, or exercise the right to require him to do so. Thus, between the ages of fifty-five and the normal retirement date (specified as the attainment of age sixty-five) the male employee was accorded no enforceable right to retire on annual pension. He had to

obtain the appellant's consent; on the other hand, he could be required to retire prior to the normal retirement date even if desirous of continuing in the service of the appellant. Only upon reaching the normal retirement date, that is at age sixty-five, did the employee acquire an absolute right to retire.

In her rejection of the argument the learned judge reasoned as follows:

> "It is for the purpose of the present case important to make a clear distinction between normal retiring age which is 65 and early retirement age which is 55 to 64 years. The normal retiring age is the only clear life of the employment contract and is, in my view, the contractual retiring age. The normal retirement age is not synonymous with the pensionable age. I have not been able to trace any statutory provision which excludes the right to a retrenchment package for workers in the position of the applicant and would consider the correct position to be that an employee is excluded from being considered for a retrenchment package only if he or she has reached the normal retiring age. For the employer to enforce an early retirement reasons must be given to support the decision to terminate employment otherwise an unfair labour practice will have been committed. The employee must be incapable of performing his duties to the required standards for whatever reason for the employer to invoke this. On the other hand, the employee can elect to go on early retirement.
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> If one were to accept … that because there is no statutory provision that the reasons for early retirement to be investigated … are irrelevant to early retirement, the effect would be contrary to the intention and spirit of the labour laws. The result would be that the employer would be entitled to hold employees at his beck and call for ten years, i.e. between the ages of 55-65 years old, and could literally 'dismiss' them at will whether or not they are good employees. To allow this would be to discriminate against this group of employees, denying them job security and the normal protection of the law.
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> It would appear that the spirit of the law is best served if early retirement is by mutual consent between the employer and the employee. In my view, the effect of an early retirement initiated by the employee is that it is a resignation with early retirement benefits accruing because of age. If initiated by the employer the effect is that of a dismissal and reasons must be given."

Consequently Her Ladyship held that the action taken by the appellant was simply an attempt to retrench the thirty-eight employees. And, since it did not comply with the

Labour Relations (Retrenchment) Regulations, it was invalid as amounting to an unfair labour practice.

At the outset the fundamental question to be decided is the proper meaning to be given to clause 5:1(ii) of the Rules, which was binding upon the thirty-eight employees.

I do not think that a rational distinction can be drawn between agreeing a "normal retiring age", (which under the Pension and Provident Fund Regulations may be set at an age between fifty-five and seventy years), and agreeing a range in ages between which the right to opt for, or to be placed on, retirement applies. Both situations fix the duration of the contract of service. Recognising the one yet not the other, is not supportable. In each instance, the occurrence of the event brings about the termination of the contract by effluxion of time and does not constitute a retrenchment or unfair labour practice. See *Metal & Allied Workers Union of South Africa & Ors v Screenex Wire Weaving Manufacturers (Pty) Ltd* (1985) 6 ILJ 75 (IC) at 88 E-G; *Badenhorst v G C Baars (Pty) Ltd* (1995) 14 ILJ 1596 (IC) at 1601 A-E.

The provisions of clause 5:1(ii) are thus to be seen as creating a contract of fixed term, commencing with the date of employment and terminating with the date of normal or early retirement. So if sixty-five is the specified normal retiring age the contract of employment is terminated by effluxion of time when the employee attains that age. But where it has been agreed that between the ages of fifty-five and sixty-five the employer may place the employee on early retirement, the

contract remains one of fixed duration, even though the termination point for individual employees may vary within the age parameters of fifty-five to sixty-five, or whatever age less than seventy has been specified as the normal retiring age.

In terms of s 17 of the Labour Relations Act [*Chapter 28:01*] the Minister is empowered to make regulations dealing with both retirement and retrenchment. The two concepts are separate and distinct, albeit each results in a termination of the contract of employment.

This does not mean, however, that where an employer has decided to effect a needed retrenchment of a body of employees, but is not desirous of following the procedures laid down and be subject to the scrutiny and delays inevitably to be incurred, he may proceed to terminate their service contracts by requiring them to take early retirement pursuant to the applicable pension or provident fund rules. For to adopt such a device would be to defeat the essential purpose of the Retrenchment Regulations. Although it is legitimate conduct to avoid the provisions of a statute by deliberately keeping outside its reach (see *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 395), the position is different where the resultant effect is the achievement of that prohibited or curtailed by law.

It is thus my view that even though an employer may have the right to resort to termination, founded on the authority of the Pension and Provident Fund Regulations, if the object and effect of such action is to retrench, then the applicable Regulations must be complied with. See *van Eck, NO and van Rensburg, NO v Etna Stores* 1947 (2) SA 984 (A) at 997 and 998; *Sehume v Atteridgeville City Council &*

Anor 1992 (1) SA 41 (A) at 57J-58A. Put differently, the right to require early retirement remains exercisable but is curtailed by the requirement that whenever exercised it must not amount to, or be used to effect, a retrenchment.

How then would one be able to distinguish, in a given case, if an employer was legitimately and genuinely exercising a right to retire some employees, or was in fact retrenching them? The particular circumstances would surely reveal the true purpose. If large numbers of employees of the same class by age or type of occupation were suddenly and simultaneously required to proceed on early retirement then, in the absence of a convincing explanation, their retrenchment would be inferred.

That is precisely the situation in this matter, if not even clearer, because the thirty-eight employees were advised that the reason for requiring them to take early retirement was the need to reduce the strength of the workforce. In the result the exercise by the appellant of the right under the Rules to place the thirty-eight employees on early retirement was curtailed by the Labour Relations (Retrenchment) Regulations.

While respectfully differing from the approach of the learned judge, I am satisfied, nonetheless, that the order granted was correct and must be confirmed. It follows that the remaining thirty-seven employees, albeit not parties to the proceedings, should obtain the same relief as the respondent.

The appeal is accordingly dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Dube, Manikai & Hwacha, appellant's legal practitioners

Muvingi & Mugadza, respondent's legal practitioners