

Baby Boomers: At What Age Must You Retire?

Employers need to be particularly on their guard for cases in which a workplace dismissal is *automatically* unfair. Our courts take a particularly dim view of discrimination cases falling into this category.

Age discrimination is one such instance, and an employer faced with such a claim can defend it only by proving (the onus is on the employer) that the employee has reached "the normal or agreed retirement age for persons employed in that capacity".

With "Baby Boomers" (people born between 1946 and 1964) now retiring in record numbers, expect to see a spike in disputes and litigation over retirement issues. A recent Labour Court decision illustrates just how costly any mistake in this regard is likely to be for the employer.

Forced to retire at 63, awarded nearly R1.3m

1. An employee of an informally-run, family oriented business believed his agreed retirement age to be 65, although this was not specified in his contract of employment, and the business had no staff manual
2. The business was sold twice, each time to larger corporations with more formal policies in place
3. The employee refused to sign a new employment contract specifying an agreed retirement age of 60, saying it would be difficult to find new work at that age
4. When he was forced to retire on turning 63, he approached the Labour Court for assistance, asking for 2 years' remuneration as compensation in terms of the LRA (Labour Relations Act) and another 2 years' remuneration as damages for violation of the EEA (Employment Equity Act)
5. The employer defended this claim on the basis that retirement age for employees was governed by its standard retirement policy which set retirement age at 63 (previously 60)
6. On the facts however it was unable to prove this defence, and the Court found the dismissal to be unfair and awarded the employee compensation of R1,283,760 (16 months' remuneration).
7. Note that the Court accepted that the employer had acted in good faith, genuinely believing that it was entitled to apply the standard retirement policy in the absence of a written agreement to another retirement age. **Had the employer acted in bad faith, the Court would doubtless have made a much higher award** – and whilst claims for automatically unfair dismissal in terms of the LRA are capped at 24 months' remuneration, EEA awards have no such limit.

Employers: your essential action plan

- No matter how small or informally-run your business may be, have all new employees sign written employment contracts specifying a compulsory retirement age
- If your existing employment contracts don't stipulate a retirement age, remedy that now. Note that this must be a matter for negotiation; you cannot unilaterally impose new terms like these on employees.

Employees: fight any form of discrimination

You have strong legal protection from all forms of unfair discrimination, direct or indirect, "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."

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