INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA84/2017

In the matter between:

BRIAN JOFFE t/a J AIR **Appellant**

and

THE COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATION **First Respondent**

LARRY SHEAR N.O. **Second Respondent**

G.P. HARRISON **Third Respondent**

Heard: **20 March 2018**

Delivered: **07 June 2018**

Summary: Normal retirement age for a co-pilot of an aircraft engaged in international commercial air transport operations. Regulations prohibit pilots engaged in international commercial air transport operations who have attained the age of 60 from flying - such pilot may be allowed to fly if he or she is a member of a multi-pilot crew and is the only member of the multi-pilot crew who has attained the age of 60 or if authority of a foreign state has given permission for that pilot to be a member of the aircraft flight crew notwithstanding his or her age

Held that, the regulations do not contain a normal retirement age for a co-pilot – further that the employer had not considered the employee's suggestion and was presented with a *fait accompli* – Labour Court's judgment upheld appeal dismissed with costs.

Coram: CJ Musi JA, Jappie AJA and Savage AJA

JUDGMENT

MUSI JA

[1] This appeal concerns the normal retirement age for a co-pilot of an aircraft engaged in international commercial air transport operations. The appeal is with the leave of the Labour Court (Steenkamp J).

[2] The appellant is a local and international commercial air transport operator. The third respondent (Harrison) was employed by the appellant as a co-pilot. The chief pilot was Mr David Pratt (Pratt). The latter commenced his employment with the appellant on 1 June 2005 and the former on 13 June 2005. They both turned 60 during 2015. Harrison turned 60 on 23 January 2015 and Pratt on 29 May 2015.

[3] It is common cause that their employment was subject to the South African Civil Aviation Regulations (SACAR).[1] Part 61.01.11 of the regulations provide as follows:

> '(1) A holder of a pilot licence who has attained the age of 60 years may not act as pilot of an aircraft engaged in international commercial air transport operations, except as a member of a multi-pilot crew and provided that such holder is the only member of the multi-pilot crew what has attained the age of 60 years or where the relevant authority of a foreign state has given

[1] 'Civil Aviation Regulations 2011, GN R.425, *GG* 35398, 1 June 2012' The Regulations were promulgated by the Minister of Transport in terms of section 155 (1) of the Civil Aviation Act 13 of 2009.

permission for a pilot to be a member of the aircraft's flight crew notwithstanding his or her age.

(2) A holder of a pilot licence with has attained the age of 65 years may not act as PIC of an aircraft engaged in international commercial and transport operations.'

[4] Pratt and Harrison were the only pilots in the appellant's employ. The fact that they turned 60 in the same year created a dilemma for the appellant's business because of the provisions of the aforementioned Regulations.

[5] In January 2014, Pratt informed Harrison that the latter's license would not be renewed in 2015 because the appellant is thinking of employing someone else. Subsequent to this discussion, the appellant sent the following message to Harrison via his Short Message System (sms):

'Hi Gary, hope you are well. Firstly, I apologise for the manner in which David dealt with what I consider to be a very sensitive matter. I hope we can have a cup of tea on our return. I am sure you however understand the dilemma. I assure you that your salary for 2014 is assured and that in 2015 you (sic) will continue to keep you current in order to enable you to fly on charter in 2015. This, I understand, Dave never conveyed. So we will train three pilots next cycle. I was hoping to chat to tomorrow with () Training (sic). I am really sorry and hope you are not too upset with me. Promise I will not just drop you.'

[6] During 2015, Harrison met with the appellant and suggested that the latter use a Pick 'n Pay pilot because Pick 'n Pay had a pool of pilots. If implemented, the suggestion would have entailed that they rotate. One of them (Pratt or Harrison) would always fly with one of the pool pilots. The appellant intimated that he would discuss the suggestion with Pratt. This was never done. When Harrison found out that his suggestion was not discussed with Pick 'n Pay's chief pilot, he sent an e-mail to the appellant informing him that Pratt did not discuss his suggestion with Pick 'n Pay's chief pilot. The appellant thanked him for bringing it to his attention and requested Harrison to leave it to him because he would deal with. Nothing happened. He kept asking Pratt whether the appellant had made up his mind but could not get a clear answer.

[7] On 4 May 2015, he had a meeting with Pratt. Pratt informed him that the appellant had employed another pilot on 1 May 2015 and that his (Harrison) contractual three months' notice period was effective from 1 May 2015. His last day in the appellant's employ would be on 31 July 2015. The new pilot would be undergoing training from 1 May 2015 to 31 May 2015, and would officially commence with his duties on 1 June 2015.

[8] Pratt recorded the minute of the meeting as follows:

> 'The objective of the meeting was for Pratt to formalise the termination of employment of G Harrison. This was due to the known operational requirements of SACAR part 61.01.11. Harrison's employment would be terminated in accordance with his letter of employment dated 1 June 2005. Letter of employment state employment may be terminated for operational reasons (sic).
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> Harrison was advised he was given three a months' notice period (sic). After that period his services would be used on an ad hoc basis should the need arise while he was still simulator qualified on the aircraft. As he had completed simulator training at Mr Joffe's expense in March 2015, he would work for us until the end of March 2016 as, if and when needed by our operation (sic). This was also dependent the flight being a local flight of meaning within the border of South Africa in accordance with SACAR part 61.01.11. (sic).
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> Harrison acknowledged he understood all of this as we had discussed the matter on several occasions during the previous year (sic). At the beginning of 2014 during a meeting with Mr Joffe present (in Mr Joffe's office) the matter was also discussed but as it was still more than 12 months before SACAR 61.01.11 would affect the operation, the issue was not pursued further at that time (sic).'

[9] The appellant had a scheme in place in terms of which the two pilots were each paid 25c for each kilometre flown. Harrison received his share in the form of a lump sum payment of R220 000.

[10] Harrison was dissatisfied with the manner in which his service was terminated. He referred the dispute to the first respondent. Conciliation failed. He referred the dispute to arbitration. He characterised the dispute as a

"substantially and procedurally unfair dismissal related to operational requirements".

[11] The arbitrator found that the fact that the appellant was unable to continue to employ Pratt and Harrison, beyond May 2015, because they respectively attained the age of 60 was an operational requirement. He further found that Harrison's employment was terminated due to the appellant's operational requirements and concluded that the appellant did not comply with the provisions of section 189 of the Labour Relations Act 66 of 1995 (the Act).

[12] He found that Harrison was dismissed and that the dismissal was substantively and procedurally unfair. He ordered the appellant to pay Harrison the equivalent of three months' salary as compensation and to pay him severance pay.

[13] The appellant launched a review application against the award. In the Labour Court, the appellant contended that Harrison's employment was terminated by operation of law and not because of his operational requirements. The Labour Court rejected the appellant's argument and found that the arbitrator's award was reasonable.

[14] The appellant contended before us that the Labour Court's conclusion is wrong. He contended that the Labour Court should have found that Harrison reached normal retirement age as regulated by Part 61.01.11 of the SACAR. He submitted that Harrison was not dismissed based on his (appellant's) operational requirements. Mr Whittington, on behalf of the appellant, conceded that section 189 of the Act was not applied. He, however, argued that there was no need to apply section 189 because Harrison's employment was terminated in terms of section 187(2)(b) of the Act, that is, because he reached the normal retirement age for a co-pilot.

[15] Mr Cook, on behalf of Harrison, contended that the regulations do not determine the normal age of retirement for a co-pilot. He further contended that the appellant's reliance on section 187(2)(b) was an afterthought because Pratt informed Harrison that the reason for his dismissal was the appellant's operational requirements and in the tax directive sought from SARS, the

reason for Harrison's dismissal was indicated as severance benefit/retrenchment.

[16] Section 187(2)(b) of the Act reads as follows:

> '(2) Despite subsection (1) (f) –
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> (a) a dismissal may be fair in the reason for dismissal is based on an inherent requirement of the particular job;
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> (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.'[2]

[17] It is common cause that the parties did not agree on a retirement age. The appellant also did not have a normal retirement age for its pilots. The appellant only relies on the provisions of the regulation for his contention that 60 years was the normal retirement age. What is a normal retirement age?

[18] In *Rubin Sportswear v SACTWU and Others,*[3] Zondo JP (as he then was) investigated the different contexts in which the adjective "normal" and the adverb "normally" were used in different statutes in order to discern what "normal" means in the context of section 187(2)(b). He came to the following conclusion:

> '[19] It seems to me that the word "normal" as used in section 187(2)(b) really means what it says. It means that which accords with the norm. However it is important to bear in mind that that word is used in relation to persons employed in the same capacity as the person whose dismissal on the basis of having reached normal retirement age is in issue. Section 187(2) (b) must, therefore, not be read as if it says: "Despite subsection (1)1(f), a dismissal based on age is fair if the employee has reached the normal or agreed

[2] Section 187 (1) (f) provides as follows:
'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, in the reason for the dismissal is –…
(f) 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.'

[3] [2004] 10 BLLR 986 (LAC).

> retirement age." It includes the words at the end "for persons employed in that capacity". What the section does not make clear is whether the words "persons employed in that capacity" refer to such persons who are in the same employer's employ or whether it also refers to persons who are employed in the same capacity by other employers in the same industry or in general.
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> [20] It seems to me conceivable that one employer could have different normal retirement ages for different categories of employees within its workforce. There may, for example, be different normal retirement ages for professionals and artisans. In such a case the employer cannot retire an employee on the basis of a normal retirement age applicable to employees employed in a capacity different from that of his own. In other words, where an employer seeks refuge in the provisions of section 187(1)(b) against a claim of unfair dismissal and his defence is that the employee had reached normal retirement age, he must show not only that the employee had reached normal retirement age but that the retirement age is normal to employees employed in the same capacity as the employee concerned.'[4] I agree.

[19] The regulations define a "co-pilot" as follows:

> 'co-pilot means a licensed, type-rated pilot required by these regulations to serve in any piloting capacity other than as PIC[5], but excluding a pilot or is on board the aircraft for the purpose of receiving flight instruction.'

A pilot-in-command (PIC) is defined as "the pilot designated by the operator as being in command and charged with the safe conduct of a flight, without regard to where the or not he or she is manipulating the controls". It is common cause that Pratt was the PIC.

[20] In order to properly grasp what the regulations regulate, one must discern what it says in order to understand what it does not say. It says, firstly, that a pilot who has attained the age of 60 years may act as a pilot of an aircraft engaged in international commercial air transport operations if he or she is a member of a multi-pilot crew and is the only member of the multi-pilot crew who has attained the age of 60. Secondly, a pilot who has attained the age of

[4] Ibid at para [19] and [20].
[5] Pilot-in-command.

60 may act as a pilot of an aircraft engaged in international commercial air transport operations, where the relevant authority of a foreign state has given permission for that pilot to be a member of the aircraft flight crew notwithstanding his or her age.

[21] The regulations do not prohibit a pilot who has attained the age of 60 to fly an aircraft engaged in international commercial transport operations. It permits such pilot to be a member of a multi-pilot crew if certain conditions are met. The conditions are, firstly, that the other pilot must be younger than 60 years of age and, secondly, irrespective of the age of the second pilot, the pilot who is above the age of 60 may be part of a multi-pilot flight crew if the relevant authority of a foreign state has given permission for the pilot to be a crew member. Foreign authority is defined, in the regulations, as "the authority of a foreign State that issues the air operator certificate and oversees the operations of its air operators."

[22] The regulations expressly prohibit a pilot who has attained the age of 65 years to be a pilot-in-command of an aircraft engaged in international commercial air transport operations. There is, however, no prohibition against a 65-year old co-pilot being a member of a multi-pilot crew if the other pilot is younger than 60 years. The regulation therefore determines the normal retirement age for a PIC of an aircraft engaged in international commercial air transport operations. It contains no such provision for a co-pilot.

[23] The argument that the normal retirement age for a co-pilot is, in terms of the regulations, 60 years is absurd. This is so because it would mean that a PIC who has more responsibilities and is responsible for the safe conduct of a flight may retire at 65 whereas a co-pilot who generally has lesser responsibilities should retire at the age of 60 years. In my view, the regulations do not contain a normal retirement age for a co-pilot. At best it sets conditions for a co-pilot to meet before such pilot may be engaged in international commercial air transport operations. I hasten to mention that the conditions only apply to a co-pilot who is engaged in international commercial air transport operations and not to a pilot who is engaged in local commercial air transport operations.

[24] The appellant's reliance on section 187(2)(b) of the Act is therefore misplaced. It is glaringly ironic that the appellant allowed Harrison to fly with Pratt after the former had attained the age of 60. That on its own belies the fact that the appellant genuinely thought that the normal retirement age for a co-pilot engaged in international commercial air transport operations is 60 years. It is not in dispute that Harrison's employment was terminated. It is also not in dispute that no alternatives to the termination of Harrison's employment were explored. Harrison made concrete proposals, which, if implemented would have saved his job. Those were not considered.

[25] When Harrison and Pratt met on 4 May 2015, the appellant already engaged Harrison's replacement. The termination of Harrison's employment was a *fait accompli*. In fact, Harrison, Pratt and the appellant accepted that one of the two pilots had to go. They were both affected employees, yet the one was used as the harbinger of bad news to the other. There was no attempt to consult with Harrison before his dismissal; he was simply informed about the appellant's decision.

[26] The court *a quo* correctly found that this is one of those cases where the procedural and substantive unfairness of the dismissal are intertwined. It properly rejected the appellant's contention that the arbitrator should have found that the dismissal was substantively fair but procedurally unfair. The court *a quo*'s finding that the arbitrator's award is one which a reasonable decision-maker could reach is unassailable. The appeal ought to be dismissed.

[27] There is no reason in law or fairness why a costs order should not be made in favour of the successful party.

[28] I, accordingly, make the following order:

The appeal is dismissed with costs.

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C.J. Musi JA

Jappie AJA and Savage AJA concur with CJ Musi JA.

APPEARANCES:

FOR THE APPELLANT:	Adv Whittington
	Instructed by Fluxmans Inc
	Johannesburg.
FOR THE RESPONDENT:	Adv Cook
	Instructed by Howes Inc
	Johannesburg.