PROPOSING A LEGISLATIVE REFORM FOR AGE DISCRIMINATION IN THE NIGERIAN EMPLOYMENT SECTOR

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Abstract

Like many developing countries in the world, Nigeria has been witnessing not only a rapid population growth but also a rapid ageing of its population. This growth has brought with it many social, political and economic challenges: Formal education has driven up the age at which young people join the workforce; Globalisation and specialization continue to push up the standards of skill, expertise and experience required; public sector retirement age has continued to increase leaving young people qualified but unemployed; top administrative positions in government, civil service and even the private sector continue to be dominated by older persons. The most common form of age discrimination in high unemployment economies like Nigeria is age specification for job seekers that insist on youthfulness combined with work experience and academic qualifications. In order to eliminate the practice of age discrimination in employment, there is a need to promote equality of opportunity and equality of treatment. To do this effectively this paper proposes a legal framework which underpins the prohibition against discrimination in employment. This is achievable through the commitment of the government and employers to ensure that the law is implemented in order to combat discrimination and promote equal treatment and opportunities.

Keywords: Age discrimination, employment, recruitment, retirement.

Introduction

Discrimination has been defined as the prejudicial or distinguishing treatment of an individual based on his or her membership - or perceived membership - in a certain group or category. It involves the group's initial reaction or interaction, influencing the individual's actual behavior towards the group or the group leader, restricting members of one group from opportunities or privileges that are available to another group, leading to the exclusion of the individual or entities based on logical or irrational decision making. Moral philosophers have defined discrimination as disadvantageous treatment or consideration. This is a comparative definition. An individual need not be actually harmed in order to be discriminated against. He or she just needs to be treated worse than others for some arbitrary reason. If for instance, someone decides to donate to help orphan children, but decides to donate less, say, to black children out of a racist attitude, he or she will be acting in a discriminatory way even though the people he discriminates against are actually benefitted by having some money donated to them.¹

Employment discrimination is defined in economic terms by the International Labour Organisation (ILO) a violation of a human right that entails a waste of human talents, with detrimental effects on productivity and economic growth, and generates socioeconomic inequalities that undermine social cohesion and solidarity and act as a brake on the reduction of

poverty. For the purpose of this work, discrimination refers to unfair or unjust treatment of or decisions affecting an individual because of factors not related to the ability of such individual to perform the job such as sex, race, age, marital status, disability, union membership, personal activities and similar factors. Moreover, there is a need to separate discrimination from a mere differentiation. Situations abound in which there are cogent reasons to differentiate between workers in the workplace but the grounds for such differentiation should be reasonable. Differentiation is an enduring feature of labour markets everywhere in the world provided it takes place for a good reason.

Consequently, employers have the rights to determine not only the jobs that are available but the skills, capacities and qualifications that workers require in order to carry out these jobs, the wages to be paid (subject to minimum wage laws), the working conditions and the scale/criteria for advancement in the job. To some extent, these reasons are plausible and the employer need only apply them within the ambit of the law. However, from an ethical perspective, differentiation will automatically become discrimination once that differentiation takes place for an unacceptable reason such as refusing to employ based on age, race, ethnicity, gender or religion. Such considerations are prohibited in most liberal societies and as such, there are legal remedies available to employees who have been subjected to invidious discrimination or inequality. Discrimination which manifests in the Nigerian workplace is a combination of our socio-cultural values, economic considerations and the drive to create a more efficient workforce rather than a more inclusive one.

In traditional African societies, intergenerational relationships existed where the younger and older generations lived in sustained mutual cooperation and coordination that benefit both members of each of these generations. In these societies, children would provide care and support for their aged parents as a means of repaying the tremendous debts owed their parents for producing and caring for them in infancy and childhood. It was not surprising that the old-old were not allowed to engage in hard work. Thus, the ability of the aged persons to cope with changes in health, income, social activities etc depended to a very large extent on the care and support they receive from young family members. Children took care of their aged parents irrespective of negative or positive perceptions and feelings that existing between them. They dared not shirk this duty without running the risk of being socially sanctioned.

Age Discrimination in Employment

Age discrimination in the employment occurs when a person is denied a job due to his age, or is denied access to learning or training based on age, or is forced to take early retirement based on age. Some other acts identified as examples of age discrimination include assigning older workers to duties that limit their ability to compete for high level jobs in the organization; requiring older workers to pass physical examination as a condition of continued employment; indicating an age preference in advertisements for employees such as ‘young dynamic person wanted’; choosing to promote a younger worker rather than an older worker because the older worker may be retiring in several years; and cutting healthcare benefits for workers over age sixty-five etc. The age-discrimination phenomenon is a two-way thing, combining biases against people adjudged to be ‘too old’ and those reckoned ‘too young’ and therefore unsuitable for certain offices or posts in spite of possession of all the requisite attributes and qualifications. But the commonest form is the bias against older persons. Age discrimination varies from nation to nation depending on employment indices.

The most common manifestation in countries with minimal unemployment is in the area of compulsory early retirement and difficulty in getting rehired after leaving a prior job. Research has shown that employees in Europe can be forced to retire between ages fifty-five and sixty-five depending on the country. Also, Europeans over age forty-five who lose their jobs have a harder time finding employment again than their counterparts in the United States. The common form of age discrimination in high unemployment economies like Nigeria is age specification for job seekers such as ‘must be below 25 years with 5 years working experience’. The question is, has the job seeker who graduates at the age of 29, and did his National Youth service for a year not been discriminated against? The answer should be in the affirmative: this is age

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Age discrimination is ongoing because if someone lied about their age they are likely to lie on raining and experience will stay longer within the company or remuneration of civil servants; the Court of Appeal awarded him damages equivalent to his remuneration. There are also cases of premature retirement in Nigeria. In Achimagu v Minister Federal Capital Territory the plaintiff appellant was compulsorily retired at the age of sixty two before attaining the minimum age of sixty-five prescribed for the compulsory retirement of civil servants; the Court of Appeal awarded him damages equivalent to his salary for the period of three years he was denied due to premature retirement. A certain sum was also awarded to the appellant as gratuity.

### Reasons for Employment Age Discrimination in Nigeria

Why employers both public and private in Nigeria discriminate against some graduates on the grounds of age? The answer can be traced to the past. Up till the 1990s, public and private companies were required to pay pensions and gratuities. These were tokens for appreciation of the year of work a person may have put in during his/her service with a company. Employers back then felt that the longer a staff stayed with the company, the farther it pushed the responsibilities of pensions and gratuities away. Younger employees where favored by this assumption. There was and is the notion that younger to-be employees have more up-to-date knowledge than their older counterparts. Additionally, employers want employee with ‘longer life expectancy’ so that on-the-job training and experience will stay longer within the company or establishment. There also is a psychological front to this employer behaviour. Employers prefer persons that will be susceptible to manipulation. Nigeria is an age sensitive country.

When a manager is far younger than his subordinates, the tendency that there will be friction in the flow of authority, loyalty and work is perceived as inevitable. These employer-learned attitudes have become hardwired in the hiring system in Nigeria. It was and still is supported by the outdated but still-in-use organizational structure of authoritarian-hierarchy. Authoritarianism worked when knowledge was reposed with a few who then had to influence the knowing, following and doing of work. Today, we live in a global knowledge economy- a world where knowledge is becoming free, translating into a right for everyone. This development alone should change the requirements of hiring in Nigeria. Age discrimination is unrealistic. The foundations that supported it are no more. Employees are no longer tied to one company for a life-time. They move from one to another as dictated by financial benefit, career goals and other factors. The younger the employee, the more likely that he/she will leave to another company. The Nigerian pension policy is now centralized and accommodates more than one place of work in the career years of an individual.

Work organizations are becoming flat as knowledge circulates everywhere. Age and position power no longer rule, knowledge power rules and knowledge knows no age. Corporate employers should embrace this philosophy and become change initiators in the rest of the Nigerian public service. It is not a question of whether one wishes to inject fresh blood into ones company or not. Who says a 35 or 40 year old is not fresh blood when it comes to delivering on the job, who says a 20 or 22 year old is more intelligent or subservient or easily subjected to the manipulations of employers? It is a question of fairness and equity especially given the realities on ground in Nigeria. If Nigeria will change for good, there are some fundamentals we need to address. A system that encourages people to lie about everything will not go too far. The companies that demand unrealistic criteria for jobs don't last long because if someone lied about their age they are likely to lie on matters on the job. The reason why people do not lie when seeking employment in the developed countries of the world is because their governments have made employment discrimination on the grounds of age illegal and a serious crime.

In Nigeria, fresh graduates that are above thirty years of age are not allowed by the National Youth Service Corps Act to serve the nation, but are given exemption certificates; this is without doubt age discrimination against many older graduates who may be willing to serve this nation. Factor in the moribund educational system in Nigeria that ensures young people don't graduate early enough to meet the unrealistic requirements of companies vis-a-vis age. In a country where an average student graduates at between 27 and 29 years of age and adding the trouble of NYSC to it, they are not ready for the labour market until around between 28 and 30. Given the ‘ideal’ entry level age of between 22 and 25 most companies ask for today, there is a yawning need for legislation against age discrimination. The increasing retirement age is another factor that has affected youth employment as openings for fresh employment remain inaccessible.

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9 (1998)11 NWLR (Pt 574)467; see sections 3(2)(a) & (b), 4(2) and 24 Pension Reform Act Cap P4 LFN 2004.

10 For instance, in 2012 the retirement age of staff of tertiary educational institutions was increased from 60 years to 65 years for non-teaching staff and from 65 years to 70 years for teaching staff who are professors. See ‘Act to further amend the Universities Miscellaneous Provisions Act No 11 1993; the Retirement age of staff of
The current trends is now to focus on the legal framework which underpins the prohibition against discrimination; what the public authority is doing by way of laws, policies and enforcement to ensure gradual eradication of workplace discrimination. In order to eliminate the practice of discrimination in the workplaces, there is a need to promote equality of opportunity and equality of treatment. The European Social Fund\textsuperscript{11} asserts that equal opportunities initiatives typically happen because the law has compelled organisations to create a ‘level playing field’ in the workplace or to ensure equal access to services. This is achievable through the commitment of the government and employers to ensure that the law is implemented in order to combat discrimination and promote equal treatment and opportunities. This is reflected in the contemporary trends at the international level which has led, in the past years, to the steadily increasing number of ratifications by a lot of countries of the ILO Equal Remuneration Conventions, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).\textsuperscript{12}

Legislating Against Age Discrimination

In many countries today, notably the United Kingdom, United States and South Africa, the culture of age discrimination has been legally banned from the socio-economic life. Thus no employer, be it in public or private establishment, can discriminate against a job seeker or (even existing employees) solely on the basis of age. In the United States, the Age Discrimination in Employment Act (ADEA)\textsuperscript{13} prohibits discrimination in employment against persons over age forty. It further provides that all employers, private and public who have twenty or more employees must comply with this statute. It has been suggested that courts must, as in cases of race or sex discriminations look to see whether age discrimination can be inferred by studying practices at the place of employment. In Reeves v Sanderson Plumbing Products Inc\textsuperscript{14}, Reeves (fifty seven) and Oswalt (in his thirties) were supervisors in a department known as Hinge Rooms which was managed by Caldwell (forty-five). Reeves helped handle recording attendance of employees. Caldwell reported to Chesnut (director of manufacturing) that production was down because employees’ attendance was not good, but the record did not indicate an attendance problem. Chesnut ordered an audit which found problems with attendance records.

On his recommendation Caldwell and Reeves were fired. Reeves sued for age discrimination. At trial, respondent contended that the dismissal was justified because Reeves had failed to maintain accurate attendance records. Reeves (petitioner) contended that was a pretext for age discrimination, providing evidence that his record keeping was acceptable and that Chesnut had shown age-based hostility toward him. The jury found for Reeves. The Appeals Court reversed, holding that Reeves had not presented sufficient evidence to show that he was fired because of his age. Reeves (petitioner) appealed. At the Supreme Court, Reeves testified that Chesnut had told him that he ‘was so old he must have come over on the Mayflower’ and, on one occasion when petitioner was having difficulty starting a machine, that he ‘was too damn old to do his job’. Oswalt, roughly 24 years younger than Reeves, corroborated that there was an ‘obvious difference’ in how Chesnut treated them. The Supreme Court held that there was sufficient evidence for the jury to find that respondent had intentionally discriminated. For these reasons, the judgment of Court of Appeals was reversed. The Reeves case is just one out of thousands of age discrimination oriented dismissals, terminations of employment; redundancies and compulsory retirements.\textsuperscript{15}

The American Age Discrimination in Employment Act (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. The protections of the ADEA apply to both employees and job applicants. It is also unlawful to discriminate against a person because of his or her age, according to the U.S. Equal Employment Opportunity Commission (EEOC). That includes hiring, firing, promotion, layoffs, compensation, benefits, job assignments and training. While the ADEA does not specifically forbid an employer from asking an applicant’s age or date of birth, such inquiries may deter older workers from applying for employment. But requests for age information are closely scrutinized in lawsuits to make sure that the inquiry ‘was made for a lawful purpose’, according to the EEOC. An employee may sue

polytechnics and colleges of education harmonization act 2012. The general retirement age in the civil service is 60 years or after 35 years of employment, whichever comes first.

\textsuperscript{11} The European Social Fund on Equality and Diversity Good Practice, 2007 available at http://esf.hr accessed 18/12/12.

\textsuperscript{12} Equal Remuneration Conventions, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

\textsuperscript{13} Enacted in 1967 and has been amended several times,

\textsuperscript{14} 530 U.S. 133, 120 S. ct 2097 (2000).

\textsuperscript{15} See also Grosjean v First Energy, 349, F. 3d 332 (6th Cir., 2003); Erie County Retiree’s Association v County of Erie (2000) Code of Federal Regulations, Title 29, Section 1625.10.
his employer if he believes he was discriminated against because of age but there are very few successful cases. The ADEA applies to companies with 20 or more workers.16

In the United Kingdom, the law banning age discrimination in the workplace came into force on October 1, 2006 via The Employment Equality (Age) Regulations.17 Anybody under the age of 65 cannot be denied offer of job or forced to resign from existing employment on account of his/her age. Any deviation can result in liability in damages imposed by the Employment Tribunal or Employment Appeal Tribunal. The rationale for this is the imperative to ensure that no artificial barrier is allowed to preponderate over merit which rarely has anything to do with age. There is, of course, also the issue of human rights as it is believed that all kinds of discrimination run contrary to the principles of equity and that they promote injustice. It is for these reasons that legislations have been used in the developed countries to dissuade the practices of ageism in all its varieties. It would be a welcome idea if the legislative machinery in Nigeria is also invoked to check practices of unconscionable age discrimination in our country.

In Nigeria, the only forms of discrimination prohibited under the Constitution or any other statute are non-discrimination on the grounds of circumstances of birth, sex, ethnicity, religion, political opinion and allied matter; there is practically nothing that comes close to banning discrimination on age ground, hence the imperative of specific law on this issue like we have in other countries. A casual look at job advertisements on the pages of newspapers in Nigeria prominently warns applicants not to apply if they have reached a certain age. Foreign companies who know the illegality of such actions in their homeland have no qualms about including age requirements in their job advertisements in Nigeria. How do individuals feed their families if they lost their job? Banks in Nigeria are notorious in engaging in ageism, as this discrimination is known, often drawing the line at age twenty eight and denying opportunities to older applicants. The question then is, what happens to individuals who have reached their thirtieth birthday and are still strong and need work? There is need for anti-age discrimination law in Nigeria to protect the youth.

Discrimination in Dismissals based on an Attainment of Retirement Age

The question raised under this segment is whether the dismissal of an employee who has reached the normal or agreed retirement age can qualify as discriminatory dismissal on grounds of age when the contract of employment is terminated?

Retirement is the withdrawal from ones position or occupation or from active working life. A person who is retired is one who has given up office. The Oxford Dictionary defined retirement as the act of stopping ones regular work especially because one has reached a particular age; the event of retiring or state of having retired from work. It is the withdrawal from active function of one’s means of livelihood.18 An individual may retire at whatever age he pleases. However, a country’s tax’s laws and/or state pension rules usually mean that in a given country, a certain age is thought of as the ‘standard/normal’ retirement age. The normal retirement age varies from country to country but it is generally between 55 and 70 years.19 In some countries this age is different for males and females, although, this has been challenged as being discriminatory.20

In Nigeria there are three ways a civil or public servant may retire or give up his office. They are voluntary retirement; statutory retirement and compulsory retirement. By statute, on attaining the age of sixty years chronologically one is bound to retire. Otherwise, on completing thirty-five years in the service one is similarly qualified to retire from the service. Statutory retirement attracts payment of gratuity and pension.21 Voluntary retirement is self-imposed. In other words, a person may consider by himself whether to retire or to remain in the service and make it his life career. Prospects in the service are considered and where one is not satisfied with the career or one lacks job satisfaction such person is at liberty to retire voluntarily. The snag in voluntary retirement is that where the retiree has not worked for a minimum of ten years, he forfeits his gratuity and pension but if he has put in fifteen years in the service, he becomes entitled to payment of gratuity

16 Neumark, op cit.
17 2006 (UK Age Regulations).
19 For an example in the United States, a person holding the rank of a General or Admiral must retire after 40 years of service unless he or she is reappointed to serve longer: (10 USC 636). Retirement for years of service: Regular Officers in grades above Brigadier and Real Admiral (lower half) (America Heritage Dictionary, 2005, Compact Oxford Dictionary, 2005 and OCED, 2005).
20 Such as Austria, and in some countries the ages are being brought in to line.
and pension. Compulsory retirement is externally imposed by the authority which may consider that continuing in office of the individual is no longer in the interest of the service.

The law that guides termination of employment in Nigeria, generally, is the Labour Act which provides that a contract shall be terminated –

(a) By expiry of the period for which it was made, that is to say by effluxion of time
(b) By the death of the worker before the expiry of the period fixed. However, the termination of a contract by the death of the worker shall be without prejudice to the legal claims of his personal representatives or dependants.
(c) By notice as provided in the Act or in any other way in which a contract is legally terminable or held to be terminated.

The implication is that ordinarily, the duration of and manner by which a contract of employment is to be commenced or terminated is entirely at the discretion of the parties to it (employers and employees) that is to say, it is a matter dependent on their intention. This intention can be expressly stated in the terms of contract, or can be implied therefrom or may be implied from the surrounding circumstances of the said contract. Therefore an employer and employee may mutually agree to terminate their contract of employment and indeed, any other contract. But where no age or maximum duration of employment is agreed, the Public Service Rules apply.

With regard to the question whether the dismissal of an employee who has reached the normal or agreed retirement age can qualify as unfair dismissal by way of age discrimination, the Courts have consistently adopted the view that when an employee reaches the normal or agreed retirement age, the contract of employment expires automatically, and a termination of employment in these circumstances does not constitute a dismissal. The position is similar in South Africa as illustrated in Schmahmann v Concept Communications Natal (Pty) Ltd. The applicant was employed as a bookkeeper until age 64. The employer intended switching to a computerized accounting system and, in light of that and the employee's age, informed her that she was being retired. It was common cause that the employer had no fixed retirement date and the applicant had intended to carry on working while she remained in good health and capable of doing her job.

The court was of the view that: ‘When an employer and employee agree specifically or by implication (retirement on normal retirement age) in advance that the effluxion of time is to operate as the guillotine which severs their employment relationship then it cannot be said that when this date arrives that there has been a dismissal by the employer although the relationship and the contractual obligations are terminated.’ The court found that Ms Schmahmann could not claim to have been dismissed because her contract had been terminated by the effluxion of time. I would point out, however, that the 'guillotine' of time, can only operate in the manner envisaged by the court where the retirement age is agreed, i.e. set by the parties and is specific. If not, one cannot speak of there being a fixed term contract between the parties.

In support of this decision the court in Rubenstein v Prices Daelite (Pty) Ltd. said that a dismissal based on an employee reaching the 'normal or agreed' retirement age is not unfair. Another example of where the Labour Court has held in favour of the above position is to be found in Gqibitole v Pace Community College. In this case the employee, Ms Gqibitole, claimed that she had been dismissed, and that the dismissal was automatically unfair based on age. In perusing the facts of the case the court came to the conclusion that the agreed retirement date was set at 1 March 2000, but that the applicant was dismissed on 30 June 1998. The agreed retirement age was contained in a retirement policy which the respondent had actually

23 S. 11
25 J.M. J. Asinobi v Nigerian Breweries Plc (unreported), Suit No: NIC/ EN/05/2009 decided on October 18, 2010 by Hon. Justice B. B. Kanyip. See also Lateef Alao Adesigbin & ors v Nigerian Breweries Plc (unreported) Suit No NIC/78/2008, delivered on 15th July 2009; Ativie v Kabel Metal Nig. Ltd [2008] 164 LRCN 71 at 84; Kato v CBN (1997) 69 LRCN 1119; Chukwumah v SPDC Plc [1993] 5 KLR 93 at 110-111. In the Nigerian cases, the question whether a dismissal of an employee who has reached the normal or agreed retirement age is in fact a dismissal was never canvassed as a fact in issue but only mentioned as obiter. An examination of South African cases better illustrates the point.
26 (1997) 18 ILJ 1333 (LC).
helped the applicant to draft in 1994. Moreover, the court discovered that there was no ‘normal’ retirement age for employees employed in the applicant’s capacity, seeing as though there were other teachers employed with the respondent who taught well beyond the age of 60, and even into their early 70’s. In the closing stages of the judgment, Basson J made the following assessment;

‘I find that the applicant’s dismissal by the respondent took effect on 30 June 1998. Second, I find that the employer unfairly discriminated against the applicant directly on the basis of age in so dismissing the applicant. I make this finding because the dismissal based on age is not fair as the employee has not reached the normal retirement age for persons employed in that capacity (there being no such barrier) and also she did not reach the agreed retirement age as at 1 March 2000.’

Thus, as far as the question as to whether or not dismissing an employee or otherwise terminating the employment relationship, upon reaching an agreed or normal retirement age is concerned, the courts have consistently found that such a state of affairs does not amount to a dismissal. But where an employer does dismiss an employee before reaching the agreed or normal retirement age, once such an age is determined, it will be regarded as an automatically unfair dismissal based on age.

**Recommendations: Overview of South Africa’s Position on Age Discrimination: a Call to Emulate.**

In South Africa, the principal statutory protection against discrimination in the workplace is established by the Employment Equity Act 29 (EEA) and section 2 thereof reads as follows: ‘The purpose of this Act is to achieve equity in the work place by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination …’This provision is extended to all employers, regardless of the type of business or size thereof, and places a positive duty on them to ‘take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice on specified grounds’ of which age is one, amongst other grounds. 30 Another key statute is the Labour Relations Act 31 (LRA) which is aimed inter alia, at promoting effective labour relations, as well as the advancement of labour peace. It handles the practical effect of discrimination i.e. unfair dismissal. Section 187(1) of the LRA provides that:

‘(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for 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.’

The effect of this provision is that if a person is unfairly discriminated, and subsequently dismissed, on the basis of their age it will automatically amount to an unfair dismissal. When considering whether there has been an automatically unfair dismissal on the basis of age, it must first be established whether the reason for the dismissal was indeed the employees’ age. Therefore selecting, excluding or differentiating between employees solely by reason of their age will be automatically unfair and if an employee is dismissed as a result thereof, the dismissal will also be automatically unfair. In *POPCRU obo Baadjies v SA Police Service*, 32 it was said that a ‘refusal to appoint a person solely on the unsubstantiated assumption that the person is too old or too young would constitute a clear case of direct age discrimination’.

A ‘blanket policy’ laying down age restrictions, without reference to employees’ ability to do the work in question will likewise be open to challenge. 33 A blanket policy when referring to the ability of employees introduces the danger of over and under inclusivity in using age as a determining factor when dismissing. Mandatory retirement laws may force certain

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29 Employment Equity Act, 55 of 1998
30 S 5 EEA.
individuals out of jobs who are still capable of performing competently or even superbly. Moreover, those same laws may have no effect at all on younger employees who have already declined in both mental and physical reliability. Even if an age restriction is placed on job applicants because of ordinary attributes usually given to people who fall within that age group, then age alone should not be the overriding consideration because there will always be applicants who fall outside the age group and yet nonetheless meet the criteria consistent with the purpose behind that restriction.34

However, section 187(1) of the LRA is not absolute. Section 187(2)(a)(b) contain a justification where a seemingly discriminatory act may be adjudged as fair:

(a) a dismissal may be fair if the reason for the dismissal is based on the inherent requirements of the job;
(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.

The effect that this provision has on employment law and more particularly, dismissal law where unfair discrimination is alleged is that if an employer dismisses an employee who has reached the normal or agreed retirement age, on the grounds of age, the dismissal will be fair. This is the only justification for discriminating against an employee on the grounds of age. In order to benefit from the protection of section 187(2)(b) an employer must be able to show that a dismissal was ‘based on age’, and not some other reason. If the reason for the dismissal was not the employee’s age but some other reason, the fairness of the dismissal must be treated against the requirements of other relevant sections. It is not clear, however, whether age must be the sole reason, or simply one of the reasons for the dismissal’. It goes without saying that where an employer attempts to disguise an automatically unfair dismissal with a justification of age, while the true reason for the dismissal is perhaps disability, the court must engage into an enquiry as to the authentic rational behind the dismissal.

This approach was followed in Ackerman v United Cricket Board of SA.35 Here, the employers’ advertisement called for an ‘energetic person’ but on the basis of his age the employee’s fixed term contract was not extended when he applied for the position. The arbitrator held that it was incumbent on the employer to prove that discrimination based on age was justified by reference to a genuine occupational requirement (inherent requirement of the job). The employer also had to prove that age was a valid predictor of ‘energy’. As the employer was unable to prove this, the arbitrator found that the employer had discriminated against the employee based on age’. Again in Gqibitole v Pace Community College36 the Labour Court held that it was automatically unfair to dismiss an employee based on age before she attained an agreed retirement age.

In 2013, the 7th National Assembly considered a bill that would stop age discrimination in employment in the country so that age will no longer be an impediment to getting a job. The House of Representatives passed a motion criticising employers who placed age limit on graduates before they could be offered certain jobs and encouraging employers to be more concerned about skill and competence rather than age.37 These deliberations have not been taken up by the current 8th National Assembly. It is hereby recommended that the Legislative houses to consider adopting the South African position as it is adaptable to our tribally diverse socio-capitalist economy. In South Africa the Commission for Conciliation, Mediation and Arbitration (CCMA) is the body which enforces employment laws using mediation, conciliation and arbitration. We have similar machinery in Nigeria in the form of our National Industrial Tribunal which must be visited before recourse is had to the Industrial Court.

Conclusion

Age discrimination, like other forms of prejudice has economic consequences and affects the development of a country. It contributes to high rates of unemployment and prevents a section of the population from contributing to the national

34 Ibid.
wealth. Older workers with their years of experience are denied the opportunity of using and sharing such experience. When a society discriminates and discounts the contribution of a large segment of its population, it denies itself the opportunity to benefit from such contribution. Ageism discounts the contribution of older workers and renders that segment of the population jobless. The result is that despite an increase in the standard of living, the quality of life is diminished for some. These individuals who are forced out and discriminated against discover that the only opportunity available is politics and we wonder why individuals refuse to accept defeat and would do anything to get into political office.

The advanced countries with anti-age discrimination laws have made enviable strides in social justice by creating a level-playing ground for all their capable citizenry at the workplace and make their private and public establishments equal opportunity employers. Ironically, Nigeria needs the law even more than these developed societies, given the peculiarities of our socio-political and economic system. It is in Nigeria that a student would go to university to study a four-year course and ends up spending seven years as a result of numerous strikes by varsity lecturers and forced recesses occasioned by students’ unrests. It is in Nigeria that graduates would be searching frantically for jobs seven, nine and ten years after graduation without success. No wonder many Nigerians nowadays have two (or more) dates of birth! One is the official age and the other biological. This is what happens when a society has a hypocritical approach of running her affairs – an approach that discounts its undeniable realities.