

Exploring Automatically Unfair Dismissals due to “Agreed” or “Normal” Retirement Age in South Africa



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ABSTRACT

This study aimed to critically evaluate the fairness of mandatory retirement policies under South African law and compare them with the legal frameworks in the United States (USA) and Canada, where retirement age dismissals are approached differently. This desktop study used a comparative legal research methodology to analyze statutory provisions, case law, and academic scholarship to evaluate the protections against age-based dismissals in these jurisdictions. According to the findings, South African labour law permits retirement age dismissals if appropriate; they may still be contested as automatically unfair under the Labour Relations Act if they lack a legitimate rationale. In contrast, the USA and Canada impose stricter anti-discrimination measures, making mandatory retirement more difficult to enforce. The study recommends reforms to South African retirement laws to align more closely with international best practices, ensuring greater protection for older workers. This research contributes to the discourse on labour rights and age discrimination, offering insights for policymakers, employers, and legal practitioners on balancing retirement policies with fundamental employment protections.

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INTRODUCTION

In South Africa there has been a challenge with regards to the retirement age, hence there is no fundamental legislation that regulates mandatory retirement. A person would be compelled to retire at a certain age because of that particular department’s policy, beyond willingness. John Grogan defines dismissal as, the termination of a contract of employment at the instance of the employer, whether for misconduct, incapacity, operational requirements, or any other reason recognized by law.¹ On the other side, Cheadle and Benjamin expand on the concept, stating a dismissal occurs when an employer unilaterally severs the employment relationship, whether through an express act (such as giving notice) or through constructive dismissal, where working conditions become intolerable. The termination of a contract of employment at the instance of the employer, whether for misconduct, incapacity, operational requirements, or any other reason recognized by law.² Van Niekerk and Botha provide a procedural perspective a dismissal must comply with substantive and procedural fairness under the Labour Relations Act (LRA). An unfair dismissal occurs when an employer fails to justify the termination with a valid reason or a fair process.³ Dismissals have been an ongoing issue, a lot of cases arose from this

¹ John Grogan, *Workplace Law*, 13th ed. (Cape Town: Juta Education, 2021).

² Halton, Cheadle and Paul Benjamin, *Labour Law: A Comprehensive Guide*, 6th ed. (Cape Town: Lexis Nexis, 2020).

³ Marius Van Niekerk and Christo Botha, *Labour Relations in South Africa*, 5th ed. (Durban: Oxford University Press Southern Africa, 2019).

uncertainty in the South African law raising a question about how fair South Africa regulates its retirement age. The LRA provides robust protections against unfair dismissals, including those based on age. It also states that a dismissal is automatically unfair if the employer unfairly discriminates against the 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.⁴ An employee's termination is automatically unfair if the employer's actions were motivated by unfair discrimination against them on the basis of the LRA. However, there have been a lot of legal discussions over how to interpret and apply these clauses, especially when workers stay on the job past their retirement age. This study's objective is to critically assess the legal implications and fairness of mandatory retirement plans under South African law, paying special attention to how well they adhere to the equality, dignity, and non-discrimination tenets of the constitution. In light of changing socioeconomic conditions and rising life expectancy, the study will evaluate whether such policies appropriately balance the rights of employees with the operational requirements of employers.

LITERATURE REVIEW

This section critically examines key scholarly works, legal texts, and other relevant sources that contribute to the discourse on mandatory retirement and unfair dismissal in South Africa. The literature review is structured thematically, focusing on (1) the legal framework governing dismissals, South Africa's dismissal regime is primarily governed by the Labour Relations Act 66 of 1995 (LRA),⁵ which distinguishes between fair and automatically unfair dismissals. Section 187(1)(f) of the LRA provides that a dismissal is automatically unfair if the reason is based on age, unless the employee has reached the normal or agreed retirement age for persons employed in that capacity. This provision has been the subject of judicial scrutiny in cases such as *Rubidge v Wesbank Transport (Pty) Ltd (2000) 21 ILJ 2407 (LC)*,⁶ where the Labour Court emphasized the need for a clear, consistently applied retirement policy to avoid arbitrariness. The Code of Good Practice: Dismissal (Schedule 8 to the LRA) further underscores the importance of substantive and procedural fairness in all dismissals, including those related to retirement. Scholars such as Grogan argue that while the LRA permits retirement-based dismissals, employers must still demonstrate that such dismissals are not a façade for age-based discrimination.⁷ Age discrimination and constitutional rights, the Constitution of the Republic of South Africa, 1996, enshrines the right to equality and prohibits unfair discrimination on the basis of age (Section 9).⁸ This constitutional guarantee is operationalized through the Employment Equity Act 55 of 1998 (EEA),⁹ which prohibits both direct and indirect age discrimination in employment practices.

The EEA allows for justification of discriminatory practices only if they are fair and serve a legitimate purpose. Academic commentary, such as that by Dupper and Garbers (2009), highlights the tension between the constitutional right to equality and the practical need for retirement policies. They argue that while retirement age may serve legitimate workforce planning objectives, it must not override the fundamental rights of older employees without compelling justification.

Comparatively, both the United States Age Discrimination in Employment Act (ADEA) and Canada's Charter of Rights and Freedoms impose stricter limitations on mandatory retirement. In *R v. Tétrault-Gadoury [1991] 2 SCR 22*, the Canadian Supreme Court held that mandatory retirement policies must be justified under Section 1 of the Charter, which requires proportionality and minimal impairment of rights. Balancing Employer Policies and Employee Rights, the balance between employer operational needs and employee rights is a recurring theme in South African labour jurisprudence. In *Scholtz v Dennilton Farms (Pty) Ltd (2007) 28 ILJ 195 (LC)*, the court held that an employer cannot rely on an unwritten or inconsistently applied retirement age to justify dismissal. This case underscores the importance of transparency, consistency, and mutual agreement in retirement policies.

⁴ Section 187(1)(f) of Labour Relations Act 66 of 1995

⁵ Labour Relations Act 66 of 1995 (LRA)

⁶ *Rubidge v Wesbank Transport (Pty) Ltd (2000) 21 ILJ 2407 (LC)*

⁷ Grogan, *Workplace Law*.

⁸ Republic of South Africa., "Constitution of the Republic of South Africa, 1996." (Cooperative Government., 1996).

⁹ The Employment Equity Act 55 of 1998 (EEA)

Scholars caution that without clear legislative reform; employers may exploit ambiguities in retirement provisions to circumvent protections against age discrimination. The literature suggests that South Africa could benefit from adopting elements of the Canadian model, where retirement is treated as a bona fide occupational requirement only in narrowly defined circumstances.

METHODOLOGY

This study adopted a comparative or a desktop research methodology, analyzing existing legal frameworks, case law, and scholarly literature to critically assess the regulation of mandatory retirement age in South Africa as compared to the USA and Canada. The research focuses on the LRA, constitutional principles, and judicial interpretations to evaluate the fairness and legal implications of mandatory retirement policies.

DISCUSSION

Positive Impact of the South African Constitution and Labour-related Legislations on Employees' Rights Regarding Retirement Age

To begin with, the Constitution of South Africa (1996), Section 9 (Equality Clause) states, that everyone is equal before the law and has the right to equal protection and benefit of the law.¹⁰ The main piece of law controlling dismissals is the LRA. Dismissals based on unfair discrimination, including age, are automatically considered unfair under Section 187(1)(f). However, there is legal ambiguity because the LRA does not specifically govern mandatory retirement. Conflicting case law interpretations have resulted from this statutory gap.¹¹ Brassey argues that mandatory retirement policies may violate this constitutional right.¹² Van Niekerk and Botha offer a procedural perspective, emphasizing that dismissals must comply with substantive and procedural fairness under the LRA.¹³ Their work is crucial in assessing whether mandatory retirement policies follow fair processes, but they do not sufficiently engage with the constitutional implications of age discrimination.¹⁴ Section 50(2) of the EEA provides that:¹⁵

‘If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including – (a) payment of compensation by the employer to that employee; (b) payment of damages by the employer to that employee; (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees; (d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer; (e) an order directing the removal of the employer's name from the register referred to in section 41; and (f) the publication of the Court's order.’

Section 187(1)(f) establishes a presumption that a termination constitutes discrimination and, as a result, the dismissal is inevitably unjust once an employee demonstrates that their age was the reason for the end of their employment contract. According to Section 191 (1) (a) of the LRA, an employee may take their grievance to the CCMA or bargaining council (if applicable) if they feel their termination was unfair.¹⁶ Since the LRA went into operation in 1996, this dispute method has been used. Section 6 (1) of the Employment Equity Act (EEA) prohibits unfair discrimination based directly or indirectly on race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.¹⁷

¹⁰ Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996

¹¹ South African Labour Relations Act (LRA) (No. 66 of 1995)

¹² Martin Brassey, *Employment and Labour Law*, vol. 1 (Cape Town: Juta Education, 1988).

¹³ A. Van Niekerk and M.M. Botha, *Law@ Work*, 6th ed. (Durban: LexisNexis South Africa, 2023).

¹⁴ Van Niekerk and M.M. Botha, *Law@ Work*.

¹⁵ Section 50(2) of the EEA

¹⁶ LRA(No. 66 of 1995)

¹⁷ Employment Equity Act 55 of 1998.

Section 194(4) provides that “the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.”¹⁸ Section 50(2) of the EEA provides that ¹⁹ ‘If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including – (a) payment of compensation by the employer to that employee; (b) payment of damages by the employer to that employee; (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees; (d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer; (e) an order directing the removal of the employer's name from the register referred to in section 41; and (f) the publication of the Court's order.

Recent Constitutional Court cases, such as *Solidarity obo Strydom v State Information Technology Agency*²⁰ and *Landman v Great South Autobody*,²¹ have highlighted the complexities surrounding post-retirement dismissals. In these cases, employees argued that dismissals were automatically unfair because they had not reached the retirement age specified in their pension fund rules, despite surpassing the agreed contractual retirement age. Due to illness, the employee in *SATAWU Obo Dube v. Fidelity Super Care Cleaning Services Group (Pty) Ltd* was momentarily unable to work. The employer was found to have been unjust for failing to look into the severity of the infirmity and consider other options like temporary replacement or sick leave.²² Before making a dismissal decision, the court stressed that employers must take into account all reasonable accommodations. In summary, this case highlights the need for employers to handle temporary incapacity in a fair and reasonable manner, guaranteeing that workers are treated with respect and given every opportunity to keep their jobs. The case of *Valla v SABC* primarily revolves around the principles of age discrimination and unfair dismissal. Ms. Famida Yacoob Valla, the applicant, challenged the South African Broadcasting Corporation (SABC) on several grounds, including the failure to renew her fixed-term contract and the discriminatory retirement age policies outlined in the SABC's Personnel Handbook and Pension Fund Rules.²³ Important takeaways from the case include, the Labour Court considered these allegations and underlined how crucial it is to match retirement plans with the equality and justice tenets of the constitution. The case emphasizes how difficult it is to strike a balance between more general anti-discrimination statutes and contractual agreements.

Negative Impact of the South African Constitution and Labour-related Legislations on Employees' Rights Regarding Retirement Age

Although there is a supreme law by the Constitution, in this case, section 9 (the equality Clause) there is also a Limitation Clause by section 36 of the South African Constitution, which now turns for rights that are not absolute as it states that. Limitation of rights 36.²⁴ (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.²⁵ According to section 187(2),²⁶ the employer then has the duty of demonstrating that the

¹⁸ South African Labour Relations Act (LRA) (No. 66 of 1995).

¹⁹ Section 50(2) of the EEA.

²⁰ *Solidarity obo Strydom and Others v State Information Technology Agency SOC Ltd (LC)* (unreported case no C 148/18; JS 49/18; JS 67/18; JS 68/18; JS 338/18; JS 195/18, 9-5-2022).

²¹ *Motor Industry Staff Association and Willem Frederick Landman v Great South Autobody CC t/a Great South Panel Beaters* (JA68/2021) [2022] ZALAC 103 (27 September 2022).

²² in *SATAWU Obo Dube v. Fidelity Super Care Cleaning Services Group (Pty) Ltd*.

²³ *Valla v South African Broadcasting Corporation SOC Ltd* (2015) ZALCJHB 17.

²⁴ Republic of South Africa, *Constitution of South Africa (108 of 1996)* (Pretoria: Government Printers, 1996).

²⁵ South African Labour Relations Act (LRA) (No. 66 of 1995).

²⁶ LRA (No. 66 of 1995).

dismissal was reasonable because the employee has either attained the "agreed" or "normal" retirement age, or the age is a necessary condition of the position for which the person was employed. According to the Labour Appeal Court, a mandated retirement age may be unjust discrimination if it is not specified in employment contracts. This ruling emphasizes the conflict between employee rights and employer policy.²⁷ The Constitutional Court affirmed that age-based dismissals must be justified, reinforcing constitutional protections against arbitrary discrimination.²⁸ Jackson explores how rising life expectancy and demographic changes are upending conventional retirement standards.²⁹ Shifrin makes the case for flexible work arrangements, arguing that strict retirement ages may no longer be justified.³⁰ In determining whether obligatory retirement is in line with contemporary labour trends, his work is crucial.

The case of *CCMA v. Standard Bank of South Africa and Others*, concerned a worker who had a medical problem that prevented them from doing their job for a while.³¹ The Labour Appeal Court ruled that the employer must look into the degree of the disability and take into account options like temporary substitution or light duties. The court emphasised how crucial fair procedures and appropriate accommodations are. In 2019, Van der Walt, The University of Cape Town's PhD dissertation, "The Impact of Mandatory Retirement on Older Workers" A socio-legal study indicating that forced retirement typically leads to financial uncertainty, suggesting that present regulations may be socio-economically unjust.³²

USA Constitution and Labour-related Legislations on Employees' Rights Regarding Retirement Age

The United States (US) Constitution does not specifically address retirement age or employees' rights about retirement. Retirement-related matters are, nevertheless, governed by a number of federal labour regulations and anti-discrimination acts, which are mainly concerned with guaranteeing pension protections and fighting age discrimination.

Generally, the US Constitution provides a framework for labour and employment laws through, Due Process Clause (5th & 14th Amendments): Which protects employees from arbitrary deprivation of employment benefits. The Due Process Clauses of the Fifth Amendment (federal government) and Fourteenth Amendment (state governments) protect individuals from arbitrary government actions that deprive them of life, liberty, or property without due process of law. In the context of employment benefits, including retirement rights, these clauses play a critical role in safeguarding employees from unjust termination of pensions or retirement-related benefits. Retirement Benefits with Property Interest. According to the Due Process Clause, the Supreme Court has acknowledged that some work perks, such as pension³³s, may qualify as "property interests." *Board of Regents v. Roth* is a significant case. The Court decided that only benefits where an employee has a rightful claim (such as vested pensions under legislation or contract) are property rights. Example: The 14th Amendment may be violated if a public sector employee is guaranteed a pension after 20 years of service and that benefit is terminated without due process.

Commerce Clause (Article I, Section 8):³⁴ Empowers Congress to regulate employment and retirement benefits under interstate commerce. Federal Labour and Pension Laws Are Based on the Commerce Clause, if employment, pensions, and retirement plans have an impact on interstate commerce, Congress may regulate them, even for small businesses, under the Commerce Clause. This constitutional power is essential to anti-discrimination laws, Social Security, and ERISA. Courts often

²⁷ *Standard Bank of South Africa v. SASBO* (2018)

²⁸ *Duncanmec (Pty) Ltd v Gaylard NO* (2018)

²⁹ William A. Jackson, "Retirement Policies and the Life Cycle: Current Trends and Future Prospects," *Review of Political Economy* 21, no. 4 (October 2009): 515–36, <https://doi.org/10.1080/09538250903215823>.

³⁰ Nicole V. Shifrin and Jesse S. Michel, "Flexible Work Arrangements and Employee Health: A Meta-Analytic Review," *Work & Stress* 36, no. 1 (January 2, 2022): 60–85, <https://doi.org/10.1080/02678373.2021.1936287>.

³¹ *CCMA v Standard Bank of South Africa and Others* [2007] ZALC 152.

³² Johannes L Van der Walt, "The Term 'Self-Directed Learning' Back to Knowles, or Another Way to Forge Ahead?," *Journal of Research on Christian Education* 28, no. 1 (2019): 1–20.

³³ *Board of Regents v. Roth* (1972)

³⁴ Constitution of the United States, art. 1, sec. 8

defer to Congress on labour and retirement legislation, while there are some restrictions (such as non-economic activities). However, most retirement and age-related employment protections stem from federal statutes, not direct constitutional provisions. The Age Discrimination Act of 1975 forbids age discrimination in activities and programs that receive funding from the federal government. All ages are covered by the Act,³⁵ which allows the use of specific age distinctions and other variables that satisfy its standards. The Civil Rights Centre enforces the Age Discrimination Act. Certain applicants and workers 40 years of age and older are protected from age discrimination in hiring, promotion, termination, compensation, and terms, conditions, or privileges of employment by the Age Discrimination in Employment Act of 1967 (ADEA).³⁶ The Equal Employment Opportunity Commission enforces the ADEA. Employee Retirement Income Security Act (ERISA) The ERISA Act of 1974 protects employees' retirement funds and health benefit plans.³⁷ It specifies basic norms for participation, vesting, benefit accrual, and funding. This helps guarantee that workers will truly get the benefits they have been promised.

Lesson for South Africa from US Retirement Regulations

South Africa can draw several key lessons from how the U.S. regulates retirement, even though the two countries have different legal and economic contexts. In a nutshell, a strong Legal Framework for Retirement Protection such as the US relies on federal statutes (like ERISA and the ADEA) rather than constitutional provisions to regulate retirement. South Africa already has some protections (e.g., the Pension Funds Act and Labour Laws), but gaps remain in enforcement and coverage, South Africa should strengthen statutory protections for retirement, ensuring that workers in both formal and informal sectors have access to secure, well-regulated retirement funds.

Protection Against Age Discrimination, The US ADEA prohibits bias against workers 40+, ensuring fair treatment in hiring, promotions, and benefits. South Africa's Employment Equity Act addresses unfair discrimination but does not explicitly focus on age-based retirement policies. Lesson for South Africa could introduce stronger anti-age-discrimination laws to protect older workers from forced early retirement or unfair dismissal.

Regulation of Retirement Funds (ERISA Model), ERISA sets strict rules on pension fund governance, vesting periods, and fiduciary duties. South Africa's Pension Funds Act has similar provisions but struggles with compliance and corruption in some retirement funds.³⁸ Lesson for South Africa should strengthen oversight of retirement funds, imposing stricter penalties for mismanagement and improving transparency. South Africa can enhance its retirement system by enacting clearer anti-age-discrimination laws similar to the US ADEA, treating pensions as a legal property right backed by due process protections,³⁹ and strengthening pension fund governance through strict fiduciary rules akin to those outlined in the US ERISA. Additionally, expanding private retirement savings options with tax benefits would encourage broader participation and investment. By adopting these measures, South Africa could foster a more secure, inclusive, and sustainable retirement framework for its workforce.

Canadian Constitution and Labour-related Legislations on Employees' Rights Regarding Retirement Age

The issue of employees' rights concerning retirement age is a significant aspect of labour law in Canada. It intersects with constitutional principles and labour-related legislation designed to safeguard individuals from age discrimination and ensure fairness in the workplace. With a growing workforce that includes older employees, the legislative framework has evolved to accommodate changing societal needs while balancing employers' operational requirements. At the heart of this topic is Canada's commitment to equality and human rights, as embodied in the Canadian Constitution and specific statutes such as the Canadian Human Rights Act and Canada Labour Code. These laws set the stage for addressing mandatory retirement policies, age discrimination, and unfair dismissal practices.

³⁵ Age Discrimination Act of 1975

³⁶ Age Discrimination in Employment Act of 1967 (ADEA)

³⁷ ERISA Act of 1974

³⁸ ERISA Act of 1974

³⁹ Age Discrimination in Employment Act (ADEA)

Additionally, Canadian case law has played a pivotal role in interpreting and applying these rights, further shaping workplace protections.

Exploring this topic involves analyzing the legal foundations, legislative provisions, and judicial decisions that collectively define employees' rights in Canada regarding retirement age. It also opens the door to discussions about fairness, dignity, and inclusivity in the workforce. *McKinney v. University of Guelph*, the Issue was Whether mandatory retirement at age 65 under university policy violated the Canadian Charter of Rights and Freedoms. Ruling, The Supreme Court of Canada (SCC) upheld mandatory retirement at 65, stating it was a legitimate workplace policy under Section 15 of the Charter.⁴⁰ The Court reasoned that mandatory retirement was based on pension and workforce planning, not just age discrimination. This case initially supported mandatory retirement, but later legal changes (e.g., human rights code amendments) weakened its precedent. Problem was that a legal firm's partnership agreement required a lawyer to retire at the age of 75. The forced retirement clause was declared unenforceable by the Ontario Superior Court due to its violation of the Ontario Human Rights Code.⁴¹

The court ruled that statutory human rights provisions cannot be superseded by partnership agreements. This case reaffirmed that age-based termination cannot be justified by private contracts, even between spouses. What section was exactly violated here in the Ontario Human Rights Code? Section 5(1) of the Ontario Human Rights Code states that "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability."⁴² The bona fide occupational requirement (BFOR) argument has occasionally been used to support mandatory retirement, especially in physically demanding occupations like law enforcement and firefighting and safety-sensitive positions like airline pilots. In *Air Canada Pilots Association v. Kelly*, mandatory retirement at the age of 60 was upheld for pilots due to the potential safety risks associated with ageing.⁴³ Similarly, in *Espey v. Saskatoon (City) Police Service, 2009 SKQB 159*, mandatory retirement at 60 for police officers was deemed justified, given the physical demands and operational requirements of the role.⁴⁴ The preceding instances show how BFOR can be used in certain situations to implement obligatory retirement plans. In *Espey v. Saskatoon (City) (2019 SKQB 48)*, the issue was that a firefighter was forced to retire at 60 due to a collective agreement clause. Ruling: The Saskatchewan Court of Queen's Bench struck down the mandatory retirement clause, finding it discriminatory under the Saskatchewan Human Rights Code.⁴⁵ The employer failed to prove beyond reasonable doubts⁴⁶ that age 60 was a BFOR.⁴⁷ Impact: Even unionized workplaces cannot enforce mandatory retirement unless it is a genuine job requirement. The Canadian Human Rights Act (CHRA) prohibits age-based discrimination, as outlined in sections 3, 7, and 10. While mandatory retirement was previously permitted under section 15(1)(c) if justified as a BFOR,⁴⁸ amendments introduced in 2012 effectively abolished mandatory retirement in federally regulated workplaces, except in cases where it can still be justified under the BFOR standard. before 2012, Section 15(1)(c) of the CHRA allowed mandatory retirement if "An individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual."⁴⁹

In Canada, the regulation of retirement age interacts with multiple laws, creating a complex but employee-protective framework. Under the Canada Labour Code (CLC) (R.S.C., 1985, c. L-2), while no fixed retirement age is set, Section 240 protects against unjust dismissal, meaning employers cannot

⁴⁰ *McKinney v. University of Guelph* [1990] 3 SCR 229

⁴¹ *Roussy v. Talon* (2014 ONSC 7458)

⁴² Section 5(1) of the Ontario Human Rights Cod

⁴³ In *Air Canada Pilots Association v. Kelly* (2012), [2012] F.C.J. No. 1048

⁴⁴ in *Espey v. Saskatoon (City) Police Service, 2009 SKQB 159*

⁴⁵ *Espey v. Saskatoon (City) (2019 SKQB 48)*

⁴⁶ *R. v. Lifchus*, [1997] 3 S.C.R. 320, 1997 CanLII 319 (SCC)

⁴⁷ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, 1999 SCC 48 (commonly referred to as the Meiorin case).

⁴⁸ Canadian Human Rights Act (CHRA)

⁴⁹ Canadian Human Rights Act (CHRA)

terminate employees solely based on age unless justified under the CHRA BFOR exception.⁵⁰ Pension laws, such as the Canada Pension Plan (R.S.C., 1985, c. C-8), allow flexible retirement between 60 and 70,⁵¹ while the Old Age Security Act (R.S.C., 1985, c. O-9) begins benefits at 65 but permits deferral.⁵² At the provincial level, most jurisdictions, like Ontario (Human Rights Code, R.S.O. 1990, c. H.19), have eliminated mandatory retirement unless it meets a BFOR, though some, such as Quebec, retain limited pension-related exceptions. As of 2024, federally regulated workplaces (e.g., banks, airlines, telecoms) cannot impose mandatory retirement unless justified under BFOR, while provincial employers must avoid blanket retirement policies, assess age-related job performance on a case-by-case basis, and consider accommodations before termination. This legal landscape emphasizes age equality, restricting forced retirement unless objectively necessary for occupational demands.

Lesson for South Africa from the Canadian Retirement Regulations

South Africa, like Canada, faces evolving workforce demographics, including an ageing population and the need to balance workplace fairness with operational demands. Canada's legal framework on retirement age offers several key lessons for South African policymakers, employers, and labour rights advocates. Canada's approach, grounded in constitutional equality rights (Charter of Rights and Freedoms, s. 15) and reinforced by human rights legislation (e.g., Canadian Human Rights Act, Ontario Human Rights Code),⁵³ demonstrates the importance of explicit legal protections against age discrimination in employment. South Africa's Employment Equity Act (EEA) and Constitution (s. 9) already prohibit unfair discrimination,⁵⁴ but Canada's experience shows that specific safeguards against mandatory retirement unless justified by BFOR are crucial. South Africa could strengthen its laws by clarifying that forced retirement policies are presumptively discriminatory, requiring employers to prove necessity under strict scrutiny. Canada's BFOR (bona fide occupational requirement) principle, as demonstrated in cases like *Air Canada Pilots Association v. Kelly* and *Espey v. Saskatoon*, permits mandatory retirement policies only when employers can provide concrete proof that an employee's age significantly affects their ability to perform job duties - particularly in high-risk occupations such as aviation or emergency services.⁵⁵ However, recent judicial trends (*Roussy v. Talon*, *Espey v. Saskatoon*) have moved away from automatic age-based retirement rules, instead favoring personalized evaluations of each worker's capabilities. This evolving legal stance suggests that South Africa might benefit from implementing a comparable individualized assessment system, where companies would need to present factual, job-related evidence such as medical data, physical capacity tests, or documented performance issues to validate any age-related employment decisions, rather than relying on generalized assumptions about older workers.

RECOMMENDATIONS

To enhance South Africa's approach to mandatory retirement, several theoretical and practical recommendations can be considered. Legislative clarity is essential, necessitating amendments to the LRA to explicitly regulate mandatory retirement, alongside imposing stricter judicial scrutiny requiring employers to justify retirement policies under Section 36. Practically, individualized assessments aligned with Canada's BFOR model can help determine an employee's fitness to work rather than enforcing universal retirement ages. Furthermore, pension flexibility should be enhanced, encouraging phased retirement options akin to Canada's Canada Pension Plan (CPP) deferral model. Additional research is needed to explore the socioeconomic impact of forced retirement on financial stability and to conduct comparative case law analyses, examining how other African jurisdictions manage retirement regulations. This multifaceted approach could address both theoretical and practical challenges while paving the way for informed policy development.

⁵⁰ Canada Labour Code (CLC) (R.S.C., 1985, c. L-2)

⁵¹ Human Rights Act's (CHRA)

⁵² Old Age Security Act (R.S.C., 1985, c. O-9)

⁵³ Canadian Human Rights Act,

⁵⁴ Constitution of the Republic of South Africa Act 108 of 1996

⁵⁵ *Air Canada Pilots Association v. Kelly*

CONCLUSION

This paper has critically evaluated the fairness of mandatory retirement policies under South African law and compared them with the legal frameworks in the US and Canada. The findings revealed that South Africa's legal framework provides strong protections against age discrimination, but ambiguities in mandatory retirement policies create risks of unfair dismissal. By adopting lessons from the US's ADEA and Canada's BFOR doctrine, South Africa can refine its laws to better balance employer needs and employee rights. Legislative amendments, stricter judicial scrutiny, and individualized assessments could ensure a fairer, more predictable retirement system. This study underscores the need for reform to align South Africa's labour laws with constitutional equality principles while accommodating modern workforce realities.

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