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A time to go

Forced retirement examined

Introduction

Most employees retire voluntarily when they reach the agreed or normal retirement age. In several cases, to which I refer below, this has been held to be the automatic termination of a fixed-term contract of employment by the effluxion of time.

Several employees, unwilling to retire but forced to do so, have lodged claims against their employers on the basis of retrenchment or dismissal. The Labour Relations Act 66 of 1995 (LRA) uses the word ‘dismissal’ in relation to employees who have reached retirement age. So the legal bases for the termination of the contract of employment where an employee retires voluntarily, on the one hand, or where he or she is forced to retire on reaching or passing the agreed or normal retirement age, on the other, seem different from one another. Although none of the claims were upheld, and the results were identical, the approach of the Industrial Court, and later the Labour Court, also differed in these cases.

Here I shall try to reconcile the different decisions with one another and with the legal basis for voluntary retirement in order to offer an explanation for the use of the word ‘dismissal’ in the context of section 187(1)(f) of the LRA.

The duration of an employment contract

With regard to contracts that create continuous obligations, such as the employment contract, the law distinguishes between those that are concluded for a fixed period and those for which the duration of the contract is not fixed. In the latter case, the contract will endure until terminated by either party, by giving notice to the other party of intention to terminate the contract. At common law, the reason for the termination of an employment contract is irrelevant. In the case of a contract for a fixed period, the contract is subject to a resolutive time clause, stipulated either by way of a period of time or the occurrence of a stipulated event. The contract will terminate automatically when the period expires or the event occurs. In the employment contract, the stipulated event often takes the form of the completion of the task or project for which the employee is appointed. Such a contract may still provide that in spite of the fixed period agreed upon, a party may terminate the contract by giving notice before the period expires. In the absence of such a clause, premature termination will constitute breach of contract. By contrast, a contract for a fixed period may, on its expiry, be extended, either expressly, for another fixed period, or indeterminately; if no period is specified, or tacitly, in which case the extension would usually be on the same terms and conditions as the original contract, unless the contrary is clear (see A Basson & others Essential Labour Law 2 ed (2000) 37–39).

The common law on the termination of an open-ended contract of employment by the employer — commonly called ‘dismissal’ — was drastically altered by the LRA, and before it, by the decisions of the Industrial Court on unfair labour practice. Termination of the contract of employment by the employer is included in the definition of ‘dismissal’ (s 186(a)) and will be unfair unless the employer has a valid reason for the dismissal and follows a fair procedure.
(s 188). Fair reasons are limited to misconduct, incapacity, and operational requirements. The employee has to prove dismissal, after which the employer has to prove its fairness (s 192). But some forms of dismissal are automatically unfair, and the employer cannot attempt to prove that these dismissals are fair (s 187).

One instance of an automatically unfair dismissal is 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 (s 187(1)(f), emphasis added).

As regards discriminatory dismissal based on age, however, section 187(2)(b) provides an escape clause that, despite subsection (1)(f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age of persons employed in that capacity (emphasis added).

So although section 187(1)(f) provides that the termination of the contract of employment of a person who has reached retirement age is fair, it uses the word ‘dismissal’, which implies that such termination constitutes ‘dismissal’, rather than some other form of termination.

The case law

Two cases on the issue were heard by the Industrial Court in terms of its unfair labour practice jurisdiction.

Harris v Bakker & Steyger (Pty) Ltd

In Harris v Bakker & Steyger (Pty) Ltd (1993) 14 IIJ 1553 (IC), the employee had been retained after he had reached the normal retirement age, on the understanding that he would continue to work as long as he was able to perform his job. When his employer company was taken over by another company, restructuring took place and his position became redundant. He was still redeployed, but three years after his normal retirement age his employment contract was terminated on two and a half months’ notice. He claimed unfair retrenchment because of a lack of consultation and insufficient notice. The court distinguished between the termination of the employment contract on retirement age, and its termination at a stage later than retirement age. The court held that an employer is entitled to demand that an employee take retirement on reaching retirement, and that this would be a normal termination of employment by effluxion of time (at 1556). Regarding the period after the employee had reached retirement age, the court said that an employer and his employee were free to continue their employment relationship beyond the employee’s agreed date for retirement. If the employer had agreed to retain the employee’s services on humanitarian grounds but later could no longer afford to do so, the employer retained the right to demand from the employee that he take his retirement. The employer did not forfeit or waive this right simply because he agreed to retain the employee’s services, unless of course the parties specifically agreed otherwise. But the employer was obliged to exercise the right to terminate the contract in good faith, and reasonable notice had to be given. The employer merely had to meet these two requirements. The court did not require consultation, holding that if the employee had retired at the normal age, no consultation would have been necessary. In the present case, the employer’s action did not amount to an unfair labour practice.

This decision applies the ordinary common-law principles on contract. By categorizing the contract as one that terminated by the effluxion of time, the court effectively acknowledged that a contract that endures until the employee reaches retirement age is a contract for a fixed period that terminates automatically when the period has expired. The implication is that such a contract contains a tacit provision that it may be terminated by the employee, by resigning, in spite of its fixed term. In Harris, the latter provision was not utilized because the contract had endured.
The court also recognized that such a contract might be extended. As the parties had agreed on the extension, this was clearly not a tacit extension. (The tacit extension of a contract that endured until the employee reached retirement age would be problematic, because one of the terms and conditions of the original contract — duration until the employee reached retirement age — would no longer be possible.) What is less clear is whether the court considered the extension 'until the employee could no longer do his job' as an extension for an indefinite period or for a fixed period. Whatever the case may be, the employee's being beyond retirement age is clearly the reason for the court's allowing the termination of the contract without (another) substantive reason (which normally would have constituted an unfair labour practice in the case of an open-ended contract), or for the court's sanctioning the premature termination on the basis of its operational requirements (which would, normally, in the case of a fixed-term contract, have constituted breach of contract in terms of the common law). Neither did the court require the consultation normal in the case of dismissal for operational reasons. (The reference to the employer's no longer being able to afford to employ the employee who has retired, seems to imply termination for operational reasons (see Ferodo (Pty) Ltd v De Ruiter (1993) 14 IIJ 974 (LAC) on the necessity for consultation in the case of dismissal for operational reasons under the previous labour legislation).) The fact that the court in Harris required the decision to terminate to be in good faith shows the court importing some of its own principles of fairness into the labour law pertaining in that period.

Badenborst v GC Baars (Pty) Ltd

In Badenborst v GC Baars (Pty) Ltd (1995) 16 IIJ 1596 (IC), the employee wanted to remain in service after her retirement age in terms of the company's pension fund rules (60 in the case of female employees). Although the employer could consent to this, again in terms of the pension fund rules, he declined to do so. He only offered a three-month fixed-period contract beginning when the employee reached the relevant age. The employee declined this contract. She claimed that she had been unfairly retrenched. So the first issue was whether it amounted to retrenchment if an employer was not prepared to extend the period of employment of an employee beyond her retirement age. The Industrial Court held that the termination of the employee's services had nothing to do with retrenchment (at 1603). The employer had the right in terms of the pension fund rules to demand the retirement of the employee on reaching the retirement age of 65. The employer might consent to the employee's retiring later, although normally the employee's employment contract would terminate by effluxion of time on reaching 65 (the court mistakenly refers to 65 instead of 60, in the case of a female employee, in terms of the relevant pension fund rules).

The second issue pertained to consultation, which had not taken place in Badenborst. In spite of having held that the case was not about retrenchment, and that consultation was normally not necessary when retirement age was reached (at 1602), the court still considered whether consultation was required before an employer exercised its discretion not to extend the employee's period of service beyond retirement age. In this regard the court held that an employee who wished to retire at a later date should not only make this fact known to the employer, but should also make some representation in this regard to support the request, such as supplying the necessary information, to enable the employer to come to a fair decision. The court held that the employer had exercised his decision fairly, and that his offer of a limited extension did not amount to an unfair labour practice.

The court's acknowledgement that the employer has the discretion to agree to the extension of the service contract beyond the employee's normal retirement age, if the employee so requests, is a manifestation of the common-law principle that agreement between the parties is required for the conclusion of a valid contract. If an employee asks to continue working and an employer is unwilling to extend the fixed-term
service contract that terminated automatically by effluxion of time when the employee reached retirement age, no agreement is reached and no new contract arises. The court’s willingness to consider the necessity for consultation where the basis for termination is not retrenchment is another example of how the principle of fairness was imported into the common law. No consultation seems to be required unless the employee requests to extend the period of employment and provides information to substantiate the request.

Schmabmann v Concept Communications Natal (Pty) Ltd

The first case regarding the issue to be heard by the Labour Court in terms of the LRA (with its provision that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age of persons employed in that capacity) was Schmabmann v Concept Communications Natal (Pty) Ltd (1997) 18 HI 1333 (LC). The employee worked as bookkeeper. Her employer decided to implement a computerized bookkeeping system that would be fully operational by the time the employee turned 65, after which her services were to be terminated. No retirement age had been agreed upon. The employee had been informed of the arrangements about three months before the termination. The employee alleged that she had been retrenched, and claimed severance pay. She failed in trying to prove, by expert evidence, that 65 was not the normal retirement age for females doing the job that she did.

Landman J granted absolution from the instance, on the basis that the employee could not establish that she had been dismissed as required in terms of section 192 of the Act. In analysing the meaning of ‘dismissal’ in terms of the Act, he held that dismissal is the termination of services effected by the employer (Schmabmann at 1338), and not the result of agreement between the parties. Where the termination of the employment relationship is the effect of an agreement reached in advance or at the stage of termination of services, what occurs is not dismissal. So, if 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, there has been a dismissal by the employer although the relationship and the contractual obligations are terminated. According to the court, this is the position ‘whether it is an agreed age or the normal retirement age’ (at 1339). So the court confirmed that termination of the employment contract when the employee reaches retirement age is the expiry of a fixed-term contract of employment and not dismissal, regardless of whether this age is agreed upon expressly or by implication.

Regarding the use of the word ‘dismissal’ in the context of section 187(2)(b), Landman J held in passing that it means that ‘if there is a dismissal on the arbitrary grounds it will not be unfair if it coincides with the time that the employee reaches the agreed (express or implied) or normal retirement age’ (at 1339).

This interpretation is difficult to reconcile with the wording of the section. Whereas the section specifically refers to a dismissal based on age, the judge includes dismissal on ‘the arbitrary grounds’ (plural) as falling within the ambit of the section. The implication of this interpretation is that dismissal based on discrimination on any arbitrary ground would be fair once the employee had reached retirement age. It would, for example, be fair if an employer dismissed a disabled, Black employee who had reached retirement age, while retaining a White able-bodied employee of the same age. I doubt that Parliament could have intended this. The court doubted whether consultation was necessary, although it had taken place in Schmabmann.

Schweitzer v Waco Distributors

The first case heard in terms of the LRA and in which the employee’s employment contract had endured beyond his retirement age, was Schweitzer v Waco Distributors (a Division
A retirement age of 65 had been agreed upon under the rules of the employer’s provident fund, but the employer could agree to an earlier or a later age in a particular case, the minimum being 60 and the maximum 70. When the applicant turned 65, he continued to perform his duties as before. But when he was 67, his contract of employment was terminated with four months’ notice. He alleged unfair dismissal (substantive and procedural), and claimed compensation.

Although Zondo J did not refer to any of the above cases, he seemed to reach the same conclusion in respect of termination on the employee’s reaching retirement age. The judge held (at 1579) that
‘where a contract of employment came to an end on the employee reaching the normal or agreed retirement age… it cannot be said that, in such a situation, the employee is being dismissed. This is so because in that situation the contract of employment comes to an end by effluxion of time on the employee reaching that age without the employer having to do anything.’

With regard to termination after retirement age, and the use of the word ‘dismissal’ in section 187(2)(b), the judge held (at 1580, emphasis added) that
‘dismissal in 187(2)(b) cannot carry a meaning which is different from the meaning of dismissal in s 186. The fact that the coming to an end of the contract of employment by effluxion of time is not contemplated in the definition of dismissal in s 186 means that dismissal in s 187(2)(b) must include a dismissal after the employee has gone past the agreed or normal retirement age.’

Regarding the latter ruling, John Grogan says that the court’s reasoning is difficult to follow (‘No work for the aged: forced retirement’ (1999) 14(6) Employment Law 9). He points out that [1][J], as the Judge appears to suggest, every indefinite-period contract which contains a compulsory retirement clause is, in fact, a protracted fixed-term contract that terminates automatically when the employee reaches retirement age, what purpose is served by section 187(2)(b)? I agree with him that the judgment is not a model of clarity, but I argue that the decision amounts to an acknowledgement that if an employee is retained after having reached retirement age, the original fixed-term contract that expired by effluxion of time is replaced by a new contract, the termination of which by the employer could amount to ‘dismissal’.

So the word ‘dismissal’ in section 187(2)(b) does not refer to the termination of the contract on the employee’s reaching retirement age, but to termination by the employer in the period after that, if the original contract was renewed by agreement of the parties for an indefinite period. In Schweitzer it seems as though the contract was tacitly renewed when the employee reached 65. The fact that the employer could agree to a later retirement age suggests that the extended contract was for an indefinite period terminable at the discretion of the employer.

The court’s use of the word ‘include’ (Schweitzer at 1580) is problematic. If termination by effluxion of time is excluded from section 187(2)(b), what other forms of termination could be included? I argue that the use of the word ‘include’ means that section 187(2)(b) applies not only to dismissal, in this extended period, in terms of section 186(a), where the employer terminates the contract of employment with or without notice, but also to the other forms of dismissal listed in section 186(b)-(e) where age could be relevant. Section 187(2)(b) would, for example, provide an employer with an escape mechanism in the case of selective re-employment dismissal (s 186(d)), or in the case of dismissal by the non-renewal, or less favourable renewal, of a fixed-term contract where the employee had a reasonable expectation of renewal (s 186(b)).

But the court’s finding that the word ‘dismissal’ in section 187(2)(b) must carry the same meaning as ‘dismissal’ in section 186 means that other forms of termination of the service contract will not be protected by section 187(2)(b). In Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA),
the court concluded that the premature termination of a fixed-term contract was not included in the definition of ‘dismissal’ in section 186. This would mean that if an employment contract were renewed for a fixed period after the employee had reached the retirement age, the termination of the contract within this period would not amount to dismissal, and the employer would not be able to rely on section 187(2)(b), unless the new contract provided that it could be terminated by notice although the duration was fixed for a period of time. If the contract were renewed for an indefinite period, termination by the employer would amount to dismissal. Then the employer could rely on the employee’s age as justifying termination in terms of the section.

The wording used in section 187(2)(b) — that ‘a dismissal based on age is fair’ — raises three questions: Does the word ‘fair’ mean that such a dismissal is not automatically unfair, and so, is such a dismissal only substantively fair, or also procedurally fair? Because all the forms of automatically unfair dismissals in section 187 deal with substantive fairness and not with procedural fairness, and because section 188 requires dismissals that are not automatically unfair to be effected in accordance with a fair procedure, section 187(2)(b) could be interpreted to mean that procedural fairness is required to render a dismissal based on age fair. Zondo J held that a dismissal based on age after normal retirement age is ‘not automatically unfair’, and that such a dismissal could still fall into the category of ‘simply unfair dismissals’ (Schweitzer supra at 1578). This ruling implies that the relevant section refers only to substantive fairness. But in the end the court did not require any reason additional to age, such as incapacity or operational requirements, for the dismissal to be fair (at 1579). The court also held that, except for the giving of contractual notice, no procedure had to be followed. The court’s reason for this was that section 187(2)(b) states categorically that ‘a dismissal based on age is fair’, rather than ‘may be fair’, which limited the court’s enquiry to whether the conditions for section 187(2)(b) had been met (at 1583) — the dismissal was based on age, and the employer had a normal or agreed retirement age, which the employee had reached (at 1578 and 1583). This conclusion seems correct, because Parliament did not use the possible alternative expressions ‘not automatically unfair’ or ‘not substantively unfair’. So the word ‘fairness’ as used in the section refers to substantive and procedural fairness. The dismissal of an employee retained in terms of a new contract after the original contract has expired by effluxion of time, then, is an ‘automatically fair dismissal’, if the new contract was for an indefinite period.

In Schweitzer the court states (at 1576) that ‘it was common cause between the parties that the dismissal of the applicant was not based on any complaints about his work performance or conduct’. The court’s ruling that the employee’s being beyond retirement age was the only requirement for dismissal in terms of section 187(2)(b) to be fair is supported by the fact that section 188 provides reasons for substantively fair dismissals, generally. Those reasons in section 188 would be at an employer’s disposal in the case of the employee’s misconduct or incapacity or the employer’s operational requirements, whatever the employee’s age. If an additional reason for dismissal were required, section 187(2)(b) would have been superfluous.

Schweitzer touched on another interesting issue. Another employee, also beyond retirement age, had not been dismissed. The employer alleged that no suitable replacement had been found for this person, but that he would be dismissed as soon as such a replacement had been found (supra at 1576). As the employer’s evidence in this regard was not challenged, the court did not pursue the matter. Whereas section 187(1)(f) prohibits dismissal based on discrimination, the escape clause of section 187(2)(b) does not refer to discrimination at all, but only to age. The question of the possible application of section 187(2)(b), which refers to section 187(1)(f), remains. Must an employer unjustifiably treat two employees who have reached retirement age differently from one another for section 187(2)(b) to apply? Or is treating these employees differently from younger employees sufficient? Or is the status
of having reached the relevant age in itself the thrust of the section? Would section 187(2)(b) protect an employer against a claim of unfair dismissal if all employees beyond retirement age were not treated in the same way? From the above cases it seems that discrimination by an employer between two retireable employees is not required for the section to be invoked.

*Rubenstein v Price's Daelite (Pty) Ltd*

*Rubenstein v Price's Daelite (Pty) Ltd* (2002) 23 All J 528 (LC) is a further case in point. The applicant had worked continuously since 1957 for a company whose name and ownership had changed through the years, until her contract was terminated in 2001, when she was already 72. She claimed automatically unfair dismissal resulting from unfair discrimination based on age. The original company had no pension fund, but after a merger with a company that did have one, the applicant’s application for membership was twice refused, because of her age, which was in both instances beyond the normal retirement age of 65. Also, her monthly salary was more than double the ordinary salary paid for an equivalent post. The managing director had been appointed under pressure from a major creditor of the company, and needed to review its operating costs. This fact showed that the applicant’s services were terminated for financial operational reasons. After several alternative options had been discussed and found unsuitable, the applicant’s employment was terminated with one month’s notice.

It was common cause that the ground for the dismissal was the applicant’s age. The court dismissed the application on the basis that the applicant failed to discharge the onus upon her to establish that her dismissal was unlawfully discriminatory and therefore automatically unfair (at 536). Neither was there any evidence that suggested that it was unfair for any other reason. The applicant did not challenge the dismissal as procedurally unfair. As the employer had not been the employer when the applicant reached retirement age, he could not have waived the right to terminate her employment at that time.

The decision is rather unclear on several issues. As I have concluded that section 187(2)(b) refers to the termination of an open-ended contract in the period after retirement age has been reached, I agree that the employee was dismissed, and that, in terms of section 192(1), the employee had to establish this fact and furnish the court with the basis for the dismissal. But the employee did not have to prove that the dismissal was unfair. Rather, the employer had to show that the dismissal was fair, in terms of section 192(2). This the employer could have achieved by relying on section 187(2)(b), but there is no evidence that the employer did indeed rely on this section. Although the court discusses *Schrannmann* and agrees with Grogan’s criticism of Zondo J’s interpretation of section 187(2)(b), it still seems to follow *Schrannmann*, without giving any reason for agreeing with the criticism or providing a clear basis for the decision. Nowhere does the court state that the dismissal was fair, or pronounce on the meaning of section 187(2)(b).

The court considered the possibility that the applicant had had a reasonable expectation of continued employment at the time it was terminated (*Rubenstein supra* at 535–536). The court held that on the facts the applicant had no such reasonable expectation, but merely a hope (a spes), of her continuing employment by the respondent (at 536). I argue that under section 186(6), a ‘reasonable expectation’ would be relevant only where the employee worked in terms of a fixed-term contract, of which there was no evidence in this case in the period beyond the applicant’s retirement age, and that non-renewal would be relevant only when such a period neared conclusion. As the employee was already beyond retirement age, even a proven reasonable expectation would not have helped her to avert dismissal. The reason is that although such non-renewal would have qualified as a dismissal in terms of section 186, all forms of dismissal are rendered fair by section 187(2)(b), in terms of the *Schrannmann* decision, if the employee has reached retirement age. I argue that should an employer refuse to renew the contract of employment of an employee when the latter reaches retirement age, even if the
employer did create a reasonable expectation that the contract would be extended beyond the employee’s retirement age, section 187(2)(b) would still save the employer, because the employee would in any event by that time have reached retirement age, which makes the section applicable.

**Conclusion**

When a contract of employment is terminated on the employee’s reaching the normal or agreed retirement age, dismissal does not occur. Instead, the contract automatically terminates by effluxion of time as the fixed-term contract of employment expires. This conclusion is confirmed by the wording of the section — ‘when the employee has reached retirement age’, rather than ‘on the employee reaching retirement age’, a distinction noted by Grogan (loc cit).

In none of the cases discussed did the court distinguish between a ‘normal’ and an ‘agreed’ retirement age, although in two of them no retirement age seems to have been agreed upon. In the others, the retirement age had apparently been incorporated into the employment contract by way of pension or provident fund rules.

It has been suggested that where a retirement age has been agreed upon, the contract could be held to be one for a fixed term, but that in the case of a ‘normal’ retirement age the contract could not be said to terminate by effluxion of time, and that in these circumstances what occurs is dismissal (see Craig Bosch ‘Section 187(2)(b) and the dismissal of older workers — is the LRA nuanced enough?’ (2003) 24 ILJ 1283 at 1285). I disagree: an agreement to retire on reaching the ‘normal’ retirement age could be construed as an implied term of the employment contract, as Landman J indicated in *Schmalhann* (supra at 1338). In terms of the officious bystander test, it should be possible to prove that when the contract was originally concluded, the employee intended retiring on reaching the normal retirement age for persons employed in that capacity, and in terms of trade usage, it is standard practice that persons retire when they reach a certain age (see Robert Sharrock *Business Transactions Law* 5 ed (1999) 153-156).

I argue that if, in the period beyond the employee’s normal or agreed retirement age, the contract is tacitly or expressly renewed for an indefinite period beyond this time, termination of the contract will constitute dismissal. But this dismissal will be fair, because of section 187(2)(b), without the employer’s having to provide any other fair reason for such dismissal and without following any fair procedure, short of giving the employee reasonable notice of such termination. But if the contract is renewed for a fixed term, termination of the contract before the expiry of the period would not constitute dismissal, but would constitute unlawful termination of the contract in terms of the Wolfardt decision. Section 187(2)(b) does not provide a defence for this, unless a court extended the section to include unlawful termination in the case of employees who had reached retirement age. So employers who allow employees to work beyond retirement age should renew the relevant contract expressly for an indefinite period.

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It should remain the employer’s prerogative to decide whether the cost of an employee who has reached retirement age is sufficiently offset by that person’s labour contribution.

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The last question is whether it is fair for Parliament to determine that persons beyond a certain age may be dismissed with impunity, given that section 185 of the LRA protects every employee against unfair dismissal, and that section 23 of the Constitution of the Republic of South Africa Act 108 of 1996 guarantees everyone the right to fair labour practices. In none of the cases discussed was the fairness of section 187(2)(b) itself challenged, and none was taken on appeal to the Labour Appeal Court, which, in addition to being a court of law, is also a court of equity in terms of section 167(1) of the Act. Senior employees,
generally, cost employers more than juniors, and usually have had the opportunity of proving their worth to their employers before reaching retirement age. The current labour dispensation protects employees at the expense of fostering a culture of excellence among employees, which would make employers reluctant to part with their services, whatever their age. I suggest that it should remain the employer’s prerogative to decide whether the cost of an employee who has reached retirement age is sufficiently offset by that person’s labour contribution. After all, many valuable retirees are requested to remain in service, although they would prefer not to do so.

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