CONTEMPORARY LABOUR LAW
your monthly online journal & library
Volume 24 No. 10 May 2015

Employee 'benefits' and the unfair labour practice

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Section 186(2)(a) of the Labour Relations Act, 66 of 1995 (LRA) states that the unfair conduct of an employer relating to the provision of a 'benefit' constitutes an unfair labour practice. What constitutes a benefit has been the subject of controversy. Central to much of the uncertainty in this regard is the fact that the term is not defined in the LRA and that it provides no guidance as to how the concept ought to be approached. Linked to this is the dilemma that, if the concept is applied too widely, it could lead to the limitation of the right to strike; if it is too limited in its application, it would not serve the purpose for which it was introduced.

In *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 *ILJ* 1120 (LAC) the Labour Appeal Court (LAC) reassessed its previous decisions dealing with this question and formulated a new approach. This approach is set out in the following passage from the decision -

> *'[50] …In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. In as far as Hospersa, GS4 Security and Scheepers postulate a different approach they are, with respect, wrong.'*

This approach was confirmed by the LAC in *South African Airways (Pty) Ltd v V & another* (2014) 35 *ILJ* 2774 (LAC) where it was held that accumulated leave pay constituted a benefit in accordance with the approach adopted in the *Apollo Tyres* decision.

Whilst at first blush it appears that the LAC provided a degree of certainty regarding the concept of a benefit,

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Published by
Gavin Brown & Associates
INDUSTRIAL RELATIONS

Box 31380 Tokai 7966
Tel: +27 21 788 5560
ISSN-1995-218X
e-mail: cll@workplace.co.za
www.workplace.co.za

the interpretation formulated by the LAC also presents certain obvious challenges. For one, the concepts of "policy", "practice", "advantage" and "privilege" creates uncertainty and begs the question: how far will our arbitrators and Labour Courts extend the concept of a benefit in light of *Apollo Tyres*? Does the interpretation represent a potentially unlimited challenge to managerial prerogative?

This contribution is aimed at scrutinising how arbitrators and Labour Courts have approached the concept of a benefit in light of the *Apollo Tyres* decision.

Vehicle/travel allowance schemes/ policies

There have been several decisions and awards dealing with disputes arising from a refusal by an employer to grant an employee various financial or other advantages flowing from policies reimbursing employees for using their own motor vehicles when fulfilling their duties as employees.

The decision of the Labour Court in *City of Cape Town v SA Local Government Bargaining Council & others* (2014) 35 *ILJ* 163 (LC) dealt with a claim by a Mr Christopher Esau, who was employed by the City of Cape Town as a traffic officer. He had participated in an 'essential user scheme' regulating the use of private vehicles for work purposes for 14 years; in terms of the scheme he received a re-imbursive allowance from the employer. The employer terminated Esau's participation in the scheme because he failed to submit daily log sheets as required by the rules of the scheme, apparently because he was under the impression that he could claim more favourable rates from SARS as a tax deduction. Esau referred an unfair labour practice dispute to the relevant bargaining council and argued that the failure to pay the allowance constituted unfair conduct relating to the provision of a benefit. The arbitrator held that his participation in the essential user scheme constituted a benefit for purposes of s 186(2)(a) of the LRA, and that the employer had acted unfairly by terminating his participation in the scheme. She accepted that Esau acted in breach of the provisions of the essential user scheme but held that this was justified because he was under the impression that he could claim more favourable rates from SARS and because he was not fraudulent in his behaviour. The employer was ordered to reinstate Esau's participation in the essential user scheme.

On review, the Labour Court held that:

> *'[22] … a "benefit" includes a right or entitlement to which the employee is entitled ex contractu, as well as an advantage or privilege which has been granted to an employee in terms of a policy or practice subject to an employer's discretion. On this wide interpretation, it seems to me that the essential user scheme must fall within the wider definition of a 'benefit', even it is intended to be a reimbursive payment. In terms of the policy, the employee is paid for the fixed cost as well as the running costs of using his own vehicle. It is an entitlement that arises from the scheme. Whether the withdrawal of that payment is unfair, must fall within the unfair labour practice jurisdiction of the bargaining council on the Apollo Tyres approach. …*
>
> *It is this broad interpretation of "benefit"' that has now been endorsed by the LAC in Apollo Tyres. On that authority, it appears to me likely that the LAC would also hold that a reimbursive travel allowance constitutes a benefit as contemplated by s186(2)(a)….' And in any event, even though the city ceased paying the employee the (reimbursive) running costs, it continued to pay him the fixed or capital cost.'*

Nevertheless, the Court found that the employer had been entitled to terminate Esau's participation in the essential user scheme because of his breach of the provisions of the scheme by not

submitting daily log sheets. It found that the arbitrator's conclusion that the employer's termination of Esau's participation in the scheme was unfair was unreasonable and issued an order to the effect that the employer had not acted unfairly.

The employer in *Ehlanzeni District Municipality v South African Local Government Bargaining Council & others* (Unreported JR 1163/10 30/9/2014) operated a motor vehicle allowance scheme. In terms of the scheme, the municipal manager had a discretion to determine which employees qualified for participation in the scheme. Factors which informed the municipal manager's discretion included *inter alia,* affordability, reasonableness and whether the employee's work duties required travelling on a regular basis at an average of 1000 kilometres per month. Once the municipal manager approved an application, this was submitted to the relevant employer committee for final approval.

Three employees applied to participate in the scheme but their applications were turned down. They referred a dispute to the relevant bargaining council – this was arbitrated on the basis that it constituted a dispute relating to the provision of a benefit. The employer defended its decision not to permit them to participate in the scheme on the basis that they did not meet the requirements set for participation.

Whilst the arbitrator appeared to accept that none of the employees complied with the requirement that they travel at least 1000 kilometres per month, he concluded that the scheme was applied inconsistently by the Municipality; other similarly placed employees were granted participation in the scheme even though they did not travel at least 1000 kilometres per month. The arbitrator took issue with the fact that the Municipality had failed to place any evidence before him to explain the inconsistencies and found in favour of the employees on this basis.

On review before the Labour Court , the employer raised two issues of relevance to the debate as to what constitutes a benefit.

- The first was that participation in the scheme did not constitute a benefit but rather a 'managerial discretion matter'.
- The second was that this was an 'interests issue', i.e., that it involved the creation of new rights (which should be a matter for negotiation and perhaps strike action) rather than the enforcement of a right to some existing benefit.

The Court rejected both arguments and referred with approval to the *Apollo Tyres* decision, and confirmed that –

> *'[29] … many employee benefits schemes confer rights and create obligations and confer discretion on employers, and that one of the objects of s186(2)(a) of the LRA is to provide a remedy when such discretion is exercised unfairly'.*

The Court also stated that –

> *'[30] .. The concept of unfairness denotes a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended. Linked to the concept of fairness in my view is whether the discretion was exercised in good faith.'*

The Labour Court agreed with the arbitrator and held that the employer exercised its discretion in relation to the employees unfairly because the employer applied the scheme inconsistently. It found that, in the absence of justifiable grounds to differentiate between the employees, the discretion exercised in declining the employees' participation in the Scheme could not be said to have been fair, rational, consistent or reasonable.

Also of interest is how the Labour Court dealt with the onus of proof in this case. It accepted that it was 'trite law' that the onus in establishing the existence of an unfair labour practice

rested with the employee. However, it also accepted that an onus rested on the employer to justify the inconsistent treatment. The outcome could have been different had the employer led evidence to justify the apparent discrepancies in the manner in which the scheme was applied to employees.

The decision in *SARS v Ntshintshi & others* (2014) 35 *ILJ* 255 (LC) dealt with the question of whether an employee was entitled to receive a travel allowance. The employer in this matter had concluded a collective agreement with its two recognised trade unions in terms of which field workers were entitled to receive travel allowances. The employee in this matter, Ms Ntshintshi, applied to be paid a travel allowance. Her application was refused. Ntshintshi then referred an unfair labour practice dispute to the CCMA.

The commissioner held that the travel allowance constituted a benefit, that Ntshintshi was entitled to this benefit, and that the employer had unfairly refused to grant it. It appears that the arbitrator's conclusion was based on the inconsistent application of the scheme insofar as other similarly placed employees received travelling allowances in terms of scheme.

On review, the Labour Court accepted that, in light of the *Apollo Tyres* decision, the travel allowance constituted a benefit for purposes of s 186(2)(a). It went on to find that the arbitrator's decision was not unreasonable in the light of the employer's inconsistencies.

Interestingly, the employer also argued that its refusal to pay the allowance was not unfair because to pay the allowance would have constituted 'fruitless and wasteful expenditure' in terms of the Public Finance Management Act, 1 of 1999 (PFMA). The Court rejected this argument on the basis that, whilst evidence was presented at the arbitration regarding the avoidance of fruitless and wasteful expenditure, the employer did not pertinently refer to the PFMA and the commissioner therefore could not have been expected to consider a statutory obligation not raised during the arbitration.

Finally, under this heading brief reference can be made to the award in *United Association of South Africa obo Members v De Keur Landgoed (Edms Bpk)* [2014] 7 BALR 738 (CCMA) where the employer withdrew the benefit of free transport to and from work which had been granted for at least 15 years. The commissioner accepted that, in the light of the long standing practice of providing transport, this constituted a benefit as envisaged in the *Apollo Tyres* decision.

Allowances

There have also been a decisions and awards dealing with a failure by an employer to grant an employee various forms of allowances flowing from employer policies and practices. When the applicant employee in *Ngwanamokolane v Stallion Security (Proprietary) Limited* (2014) 35 *ILJ* 811 (CCMA), a Ms Ngwanamokolane, was offered employment by her prospective employer in January 2012 it was indicated to her that she would be granted a salary increase in April 2012. It seems that this increase would have coincided with the expiry of her probationary period. Instead of granting her the salary increase, the employer, represented by its general manager at the time, paid her a monthly 'allowance' She received the allowance until May 2013 when the employer ceased to pay it. The employee referred an unfair labour practice dispute to the CCMA. The employer attempted to justify the discontinuation of the allowance on the basis that the general manager had not had the necessary authority to grant the allowance and that there was no documentary proof that the employer was obliged to pay her the monthly allowance. The employer also contended that, after the general manager's depar-

ture, it was discovered that he had made several 'unlawful' payments to employees. As a consequence, the employer decided to put an end to such payments. As proof of her entitlement to receive the monthly allowances, Ngwanamokolane relied on a note made by the general manager on her offer letter as well as her payslips, which reflected the allowance. The commissioner found, on the strength of the *Apollo Tyres* decision that the allowance constituted a benefit and that the failure to pay it constituted an unfair labour practice. Although the commissioner could probably have found that Ngwanamokolane had a legal entitlement to the payment of the allowance the commissioner appears to have argued that the payment of the allowance constituted a practice.

In *National Union of Metalworkers of SA obo Jooste v Atlantis Foundries (Pty) Ltd* (2014) 35 *ILJ* 829 (BCA) the dispute concerned an acting allowance that had been was paid to the employee when he performed additional duties, over and above the duties for which he was employed. He was re-deployed to a new job which included the duties he had performed and for which he had received the allowance. As a result he no longer received the allowance. He argued that the failure of the employer to pay the allowance constituted an unfair labour practice. Applying the principle formulated in the *Apollo Tyres* the arbitrator found that this allowance constituted a benefit but that the employer had not acted unfairly in ceasing to pay the allowance.

Performance appraisals and performance bonuses

There have also been several decisions and awards that deal with the issue of bonuses. The award in *SACCAWU obo Skosana & Others v Triptra (Pty) Ltd t/a Denneboom Station Pick n Pay* (2013) 34 *ILJ* 3356 (CCMA) deals with the most basic form of a bonus, i.e a payment in the form of a '13th cheque' usually payable in December of each year. The employees in this case could be sub-divided into two groups. The first group of employees had previously been employed by Score Supermarkets and had been entitled to receive a 13th cheque in December of each year. In 2009 their employment was transferred to the employment of Tiptra (Pty) Ltd by virtue of the provisions of s 197 of the LRA. They received their 13th cheques in December 2009, 2010 and 2011. The second group of employees had been employed by Tiptra itself and had not been transferred to its employment in terms of s 197. Initially these employees did not receive a 13th cheque but in December 2011 Tiptra entered into a collective agreement with the South African Commercial Catering & Allied Workers Union (SACCAWU) in terms of which it was agreed that these employees would also receive a 13th cheque. The employer complied with the collective agreement in December 2011 but failed to pay both groups 13th cheques in December 2012. The reason for this was that the employer was in serious financial difficulties. SACCAWU then referred an unfair labour practice dispute to the CCMA.

The arbitration proceeded on the basis that the dispute related to the failure to provide a benefit in the form of a bonus. The arbitrator found that the employees that had been transferred in terms of s 197 had an *ex lege* entitlement to the payment of the bonus 'by virtue of the provisions of s 197' of the LRA and that the bonus therefore qualified as a benefit. He also found that the second group of employees were entitled to a bonus by virtue of the provisions of the collective agreement and that this *ex lege* entitlement meant that this bonus also constituted a benefit. The commissioner then considered whether the failure to pay the bonus was unfair. It found that the employer had not acted unfairly. The precarious financial situation of the employer justi-

fied the non-payment. Its approach is reflected in the following excerpt from the award -

> *'[50] The documentation tabled by the respondent confirmed that the applicant had been kept informed of the respondent's financial difficulties, that the respondent had made every effort to consult with the applicant in an attempt to avoid dismissals due to operational requirements, that the respondent had been forced to implement various measures in a desperate attempt to escape bankruptcy and that there is no prospect of any drastic improvement in the foreseeable future. There is, in fact, a real danger that the respondent might be liquidated and that all the employees will lost their jobs.*
>
> *[51] The applicant's insistence on year-end bonuses was, in these circumstances, incomprehensible and indefensible. Mr Mathaba tried to hide behind the fact that the applicant is a worker controlled trade union, but there comes a time for the trade union leadership to stand up and be counted. It cannot be in the best interest of the employees short-sightedly to blunder on and sacrifice the goose that lays the golden eggs on the altar of foolhardy populist opportunism'"*

The commissioner accordingly concluded that the applicant employees had failed to discharge the onus of proving that the respondent was guilty of an unfair labour practice and dismissed the matter.

The employer in *Charlies v the South African Social Security Agency & Others* (JR1272/2011) [2014] ZALCJHB 172 (13 May 2014) had implemented a performance management policy. In terms of this policy an employee's performance would be assessed four times a year by his/her supervisor and an average rating would be calculated at the end of the financial year. This rating would form the basis for the payment of bonuses and the payment of salary increments. During the year of relevance to this matter the employee achieved a rating that entitled him to receive a bonus of eleven percent and a two notch pay increase. This notwithstanding, the employer only granted the employee a single notch increase in salary. After unsuccessfully raising a grievance the employee referred an unfair labour practice dispute to the CCMA. The CCMA refused to consider the matter on the basis that the claim made by the employee did not relate to a benefit as envisaged in s 186(2)(a).

On review the Labour Court dealt with an issue that had given rise to some controversy in the past, namely the distinction drawn between 'remuneration' and a benefit. In early decisions such as *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 *ILJ* 1098 (LC) this distinction was drawn and it was held that remuneration could not constitute a benefit. The employer in the *Charlies* matter appears to have argued that the employee's claim was in fact one related to remuneration and did not relate to the provision of a benefit. The Court referred with approval to the *Apollo Tyres* decision and held that the debate as to whether a benefit is excluded from the definition of remuneration has been settled. The Court referred to the following extract from the *Apollo Tyres* judgment:

> *'The distinction that the courts sought to draw between salaries or wages as remuneration and benefits is not laudable but artificial and unsustainable.'*

In this regard the Court also referred to the Labour Court decision in *Trans-Caledon Tunnel Authority v CCMA & others* (2013) 34 *ILJ* 2643 (LC) that was handed down shortly before the *Apollo Tyres* decision where the Court held as follows:

> *'I respectfully associate myself with the views expressed by my brother judges in Protekon and IMATU differing from the court's approach in Samsung Electronics that remuneration as defined in the LRA does not include benefits contemplated in s186(2)(a) which were held in that case to be 'something extra', apart from remuneration. Thus, whilst I accept that employee's claims to entitlement to the full bonus falls under the head of remuneration in the*

employment contract and in terms of the LRA definition, this does not, in my view, serve to bar him from referring a ULP claim relating to benefits to arbitration in terms of the section'

On the strength of the above authorities, the Court held that the employer's argument that benefits and remuneration are mutually exclusive could not be accepted. The CCMA had jurisdiction to consider the dispute and the matter was referred back to the CCMA to be decided on the merits

Importantly, the Court was clearly aware of the danger that if the concept of a benefit was too widely interpreted it could lead to employee having a statutory right to a wage increase. It dispelled this notion in the following excerpt from the decision –

'[13] It is worth mentioning that in finding that the CCMA does have jurisdiction to hear the applicant's claim, specifically relating to whether the applicant is entitled to a further notch increase in his salary, does not imply, nor should it be interpreted to imply, that if successful in his claim, the applicant has established a right to further increases in salary. As pointed out in Apollo the focal point at arbitration would be limited to whether or not the employer's decision not to award the employee the benefit claimed, is fair or not. Should an arbitrator find the first respondent has failed to provide adequate and just reasons as to why it did not give the applicant a salary increase and on the strength of this order it to increase the applicant's remuneration by a further notches, does not mean the applicant has established a future right to the same increase in the years to come. If the applicant does not meet the required performance standard in the future, the first respondent would be justified in not increasing his remuneration, likewise if the applicant did meet such standard in the future and the first respondent does on that occasion provide a fair reason why it has not rewarded the applicant with the structured increase, an arbitrator could do little but to find the applicant did has not suffer an unfair labour practice.

It is also worth mentioning that on the merits before me, the salary increase sought is intrinsically linked to the first respondent's performance policy. If this were not the case, the applicant would be prevented from referring his dispute to arbitration.'

The bonus that was the subject of dispute in *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC) was determined in accordance with a detailed performance management and development system. The introduction of this system arose from a collective agreement entered into between the employer and its recognised unions in terms of which the parties agreed that such a system should be established. Its details were then fleshed out in a policy formulated by employer in accordance with the principles set out in the collective agreement. The performance of the applicant employee in this matter was assessed by his line manager as envisaged in the policy. In terms of this assessment he would have been entitled to be paid a bonus but, in one of the subsequent 'moderation stages' envisaged in the policy, he was accorded a lower assessment which resulted in him not being entitled to a bonus.

He referred an unfair labour practice dispute to the CCMA. The commissioner found that the CCMA did not have jurisdiction to consider the dispute because the employee had left the employer's employment. This decision was clearly wrong but the employee did not take the matter on review; instead he referred a dispute to the Labour Court. The Court then had to decide whether it had jurisdiction to consider the dispute. The Court appears to have accepted that the dispute before it could be characterised in two ways. The first was that it dealt with the application and interpretation of a collective agreement. The second was that it was an unfair la-

bour practice dispute relating to the provision of a benefit. It therefore found that it did not have jurisdiction to consider the dispute. It ordered that a dispute regarding the interpretation and application of the collective agreement be referred to arbitration in terms of the arbitration process included in the collective agreement that established the performance management and development policy. For technical reasons that need not be addressed here, it did not refer the unfair labour practice dispute to the CCMA.

Of interest in the decision is the Court's approach to what constituted an unfair labour practice. This decision seems to accept that if an employer fails to comply with the principles and requirements found in a performance management policy, or if they are incorrectly or improperly applied, this could form the basis of a claim based on an allegation of an unfair labour practice relating to the provisions of benefits. Also of interest is that the Court seems to resurrect the distinction between remuneration and a benefit adopted in earlier decisions but which has been rejected in subsequent decisions, including the Apollo Tyres decision.

This is evident from the following excerpt –

> *'[28] Based on the above principles, it is my view that in terms of the relevant statutory framework, remuneration as contemplated by law requires payment to the employee to be a quid pro quo for the employee actually working. In other words, the fact that the employee discharges duties or renders services in terms of his or her contract of employment in general terms is the direct cause for the payment being made. Therefore, bonuses forming part of remuneration would be bonuses which an employee receives because the employee is working for the employer per se, which would include, for example, 13th cheques and other guaranteed bonuses as a salary sacrifice and as part of a gross remuneration and a cost to company package. The employee is entitled to be paid this kind of bonus for tendering service and whilst the employee remains employed, and there is no real nexus between the specific work to be done and the bonus. The moment there is a direct nexus between the payment of the bonus and the performance of actual and designated work to be done, or the content thereof, or the discharging of such actual work, or the standard of the work so discharged, then the bonus is a quid pro quo for the nature and fulfilment of the work itself and not simply for working. In such instance, the bonus would not form part of the employee's remuneration, and a specific example would actually be the performance bonus in the current matter. The employee would still be entitled to these kinds of bonuses, depending on contractual provisions, but this would be as a benefit, and not remuneration.'*

Finally, brief reference can be made to two CCMA awards where this issue was discussed. In *Public Servants Association obo Motsekoa v Department of Sports, Arts and Culture* (2015) 36 *ILJ* 808 (BCA) the commissioner found that the failure by the employer to pay a bonus and to grant a one notch increment could constitute an unfair labour practice dispute relating to a benefit. However, the employee had failed to show that the employer had exercised its discretion *'arbitrarily, capriciously or for no justifiable reason'*. In *Moloi v Department of Health:Free State* [2013] 9 BALR 923 (PHSDSBC) the uncontested evidence showed that the employee was assessed in terms of the employer's performance and development management system and it was recommended that he receive a cash bonus of 5 per cent. The employer failed to pay the bonus. After a review of the decisions dealing with what constitutes a benefit, including the *Apollo Tyres* decision, the arbitrator found that, in the absence of evidence to justify the employer had committed an unfair labour practice. See also *Public Servants Association obo Motsekoa v Department of Sports, Arts and Culture* (2015) 36 *ILJ* 808

(BCA) and *National Democratic Change & Allied Workers Union obo Mokoena v MTN (Pty) Ltd* [2014] 1 BALR 49 (CCMA).

The deduction of overpayments in respect of bonuses i.t.o section 34 of the Basic Conditions of Employment Act, 75 of 1997

The decision in *Solidarity obo Members v SFF Incorporated Association not for Gain & others* (JR197/14) [2015] ZALCJHB 40 (13 February 2015) dealt with the decision of an employer to deduct certain amounts from the salaries of some 23 employees. The employer argued that they had been paid performance bonuses in excess of the amounts that they had been entitled to – hence the deduction. The employees referred a dispute to the CCMA and argued that the employer's conduct constituted an unfair labour practice related to the provisions of a benefit

The CCMA held that the dispute was not one relating to the provision of a benefit and that it therefore did not have jurisdiction to deal with the dispute; it should have been dealt with in terms of s 34 of the BCEA. On review the Labour Court upheld the commissioner's arbitrator's award. It made the following point –

> *'[16] The fact that the First Respondent seeks to make deductions from employee's remuneration to reverse wrongly overpaid amounts will not render such deductions an unfair labour practice, more especially since an overpayment cannot for all intents and purposes be an entitlement. There is clearly a distinction between payments to which an employee is entitled and payments where there is no such entitlement. The latter category usually involves payments made to employees in error, and employers would ordinarily be entitled to adjust payments made so as to reflect what the employee is legitimately entitled to. It further follows that where there is a dispute as to whether the deductions should be made or not, and which deductions can only be made in accordance with the provisions of section 34 of the BCEA, any such disputes must be adjudicated by the Labour Court, in terms of Section 77 of the BCEA...'*

Public entities

The Labour Court's decision in *Western Cape Gambling & Racing Board v CCMA & Others* (Unreported 973/2013) 20/2/2015) also raises an interesting issue: can public entity employees' right to fair labour practices be limited by their employer's obligations in terms of the PFMA? The employer in this case implemented a policy with the purpose of *inter alia* adjusting the remuneration packages of its employees appointed on entry-level remuneration packages to equal those of other employees appointed on higher salary levels. The policy was not applied to two senior employees and they raised concerns regarding their exclusion from the policy. It appears that an investigation was undertaken and a resolution adopted by the board to apply the policy to the two senior employees. Concerns were then expressed regarding the legality of the application of the policy to the two senior employees and the board approached the relevant MEC for guidance on the matter. The MEC informed the employer that its earlier resolutions required the MEC's approval and that the payment of remuneration adjustments were considered to be unauthorized and irregular. The MEC instructed the employer recover the monies paid to the two senior employees in terms of the earlier resolutions. As a result, the two senior employees did not receive increases as envisaged in the policy. They then referred an unfair labour practice dispute to the CCMA. They alleged that the employer had committed an unfair labour practice by excluding them from the application of its pay progression policy.

The CCMA held that the employer had committed an unfair labour practice by excluding the two senior employees from the policy, and or-

dered the employer to adjust their remuneration in accordance with the provisions of the policy. On review, the employer argued that the payments would have been unlawful and in contravention of the PFMA because the MEC had not approved the payment thereof. The Labour Court found that the payment did constitute a benefit as envisaged in the *Apollo Tyres* decision and found that an employee's right to fair labour practices could not be limited by the PFMA.

Short time

It would also seem that employees, in many cases, will have an election to refer a contractual claim to the Labour Court (where there is an underlying contractual provision from which the entitlement or advantage stems) or an unfair labour practice claim to the CCMA or a bargaining council (where the entitlement or advantage stems from a policy or practice which is not necessarily incorporated into the contract of employment by reference thereto). For example, in *Galane v Green Stone Civils CC* (2015) 36 *ILJ* 303 (CCMA) the employer required ten of its employees to work short time. The result was that these employees, who were paid at an hourly rate, received a reduced salary.

One of these employees, a Mr Galane, then referred an unfair dismissal dispute to the CCMA. The commissioner found that the dispute was not one relating to a dismissal but rather one relating to an unfair labour practice dispute. The commissioner relied on the *Apollo Tyres* decision in coming to the conclusion that Galane's right to be paid his remuneration in exchange for tendering his services, constituted a benefit.

On this basis the commissioner held that the CCMA had the necessary jurisdiction to arbitrate the dispute.

Dispute of right vs dispute of interest

As indicated at the beginning of this contribution, one of the concerns expressed about interpreting the concept of a benefit too widely was that it would be utilised to create new rights for employees rather than to enforce existing rights. This issue was directly dealt with by the commissioner in *Mbiza v National Youth Development Agency* (2015) 36 *ILJ* 326 (CCMA). The employer in this case came into existence when the National Youth Commission (NYC) merged with the Umsombovu Youth Fund. Prior to the merger, the applicant, Mr Mbiza, had been employed by the NYC as its supply chain manager. After the merger he was appointed as the NYC's senior manager (corporate support). The employer then appointed two external appointees to fill two other positions which were graded at the same level as his post. However, they negotiated higher salaries for themselves. Mbiza felt aggrieved by the fact that he was paid a lower salary and referred an unfair labour practice dispute to the CCMA. The commissioner rejected the claim. He found that Mbiza's claim was not based on any entitlement rooted in contract or legislation or based on a policy or practice subject to the employer's discretion. He was, in effect, attempting to create a new right to a higher salary. This was not envisaged in the *Apollo Tyres* decision.

Another case worth mentioning in this regard is *Thiso & others v Moodley NO & others* (Unreported JR2209/13 2/12/ 2014). The seven applicants in this case were all employed by the employer in jobs graded as 'A3'. A job evaluation committee recommended that the position be upgraded to A2, but the employer successfully 'appealed' against this decision (presumably in terms of the rules of the job grading scheme) and the position therefore remained at A3.

The applicants thereafter referred an unfair labour practice dispute to the CCMA. The commissioner held that the CCMA did not have jurisdiction because the dispute (i.e. re-grading of

posts), concerned a matter of mutual interest that should be resolved through collective bargaining.

The applicants launched review proceedings in the Labour Court. The Court referred with approval to the *Apollo Tyres* and *Trans-Caledon* decisions and held that since the parties agreed that the employer in this case had a discretion whether to upgrade the positions, the applicants could elect to either strike in support of that demand, or to challenge the exercise of the discretion as an unfair labour practice dispute in terms of s 186(2)(a). On this basis, the Court held that the CCMA had jurisdiction to deal with the matter as an unfair labour practice dispute.

Comments

It is apparent from these decisions that the wide interpretation of a benefit will mean that a wide range of disputes will fall within its ambit. However, it seems that at least certain arbitrators are aware of the danger that 'disputes of interest' could be converted into disputes of right. Nevertheless many employers will be surprised, if not concerned, that disputes over job grading fall within the ambit of the concept as found in the *Thiso* .

The result is that a wide range of employer decisions are now subject to the scrutiny of arbitrators and employers will be required to justify the fairness of their decisions in this regard. Very little guidance has been provided as yet as to what standard the arbitrators should apply in this regard. In *Ehlanzeni District Municipality* decision the Labour Court referred to 'arbitrary, capricious or inconsistent conduct, whether negligent or intended.' It also required that discretionary decisions be exercised in good faith; but this is the extent of the discussion. As a consequence, employers would be wise to also concentrate on whether or not they can justify the fairness of their decision relating to the provision of benefits. Of particular importance is the willingness of arbitrators to consider the fairness of decisions relating to bonuses and salary increments.

From these decisions it seems clear that in many cases an unfair labour practice dispute relating to the provision of benefits will overlap with a contractual claim or a claim based on the interpretation and application of a collective agreement and that the employee will have an election as to which claim to proceed with. Whilst it may be easier and less costly for an employee to classify a dispute as an unfair labour practice and to refer a dispute to arbitration, it is very clear that arbitrators reserve the right to determine the matter on the basis of fairness rather than strict contractual entitlements. The most obvious decision in this regard is that in the *Triptra* award. It is also evident in the *Trans Caledon Tunnel Authority* decision. In some cases it may therefore be more advantageous to rely on a contractual claim and to refer a dispute to the Labour Court where fairness will not be a consideration and where strict contractual rights will prevail. For examples in the case of dismissals see *Denel (Pty) Ltd v Vorster* [2005] 4 BLLR 313 (SCA) and *Hendriks v Cape Peninsula University of Technology & others* (2009) 30 *ILJ* 1229 (C). It is also apparent from the *Aucamp* decision that fairness may play a role when disputes based on the interpretation and application of a collective agreement are considered.

Finally, it is interesting to note that in a number of decisions the question as to whether a decision of an employer amounted to a decision regarding a benefit was considered to be a jurisdictional issue. The result is that, on review, the Labour Court must decide whether or not the finding of the arbitrator in this regard is legally correct; the 'reasonableness' test usually applied in review proceedings does not apply to this question. However, the finding of the arbitrator as to whether the employer acted fairly is subject to the normal test for review.

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