THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 2055 /2014

In the matter between:

P LEBELO AND 407 OTHERS **Applicants**

And

CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY **Respondent**

Heard: 9 – 12 October and 28 November 2023

Delivered: 22 January 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 22 January 2024.

JUDGMENT

PRINSLOO J

Introduction

[1] The Respondent (Municipality) took a decision in 2003 to make use of fixed term contracts for certain of its positions. In application of this decision, the Respondent invited existing permanent employees to convert their permanent contracts of employment into fixed term contracts, and after the decision was implemented, fixed term contracts were offered to newly recruited employees.

[2] All permanent employees who took up positions as fixed term contract employees would have their guaranteed remuneration calculated on an annual 'total

cost to company' basis, which would cover both the basic salary and all the allowances and benefits that permanent employees were entitled to. It was a general principle of conversion that when an employee took up a fixed term contract, they should be no worse off than before the conversion and their total remuneration after conversion should incorporate all the allowances they had previously received as permanent employees. The Respondent offered an incentive, or "sweetener" of a salary increase of between 5% and 10% to employees who were prepared to convert their contracts of employment to fixed term.

[3] The permanent employees who converted to a fixed term contract, were offered certain advantages, such as additional variable pay in addition to their guaranteed pay, in the form of an annual performance bonus if they met certain performance standards during the year; they were offered flexibility to structure their monthly remuneration as they wished and they could, for example, designate part of their remuneration as a cell phone or entertainment allowance, which advantage was not available to permanent employees and they received annual wage increases applied to their total remuneration and not simply their basic salary.

[4] The Respondent's decision to make use of fixed term contracts was challenged by IMATU and SAMWU and the said unions referred a dispute about it to arbitration in 2004.

[5] In 2006, a representative of the South African Local Government Association (SALGA) purported to reach a settlement on behalf of all its member municipalities, including the Respondent, but without a mandate from either SALGA or any of the municipalities. In 2008, review proceedings were launched in this Court to set aside the settlement agreement and in August 2012, the Respondent and the unions agreed to resolve the dispute and they entered into a collective settlement agreement (the collective agreement). The parties agreed that the settlement concluded in 2006 would be treated as null and void, the Municipality would withdraw the review application launched in 2008 and all the Respondent's employees identified in the collective agreement would have their fixed term contract employment converted into permanent employment on the terms set out in the collective agreement.

[6] The relevant terms of the conversion were set out in clause 7 of the collective agreement, which provided *inter alia* as follows:

6.1. All affected employees would be converted to permanent status on the effective date – which was 1 October 2012 (Clause 7.1 read with clause 2.2.9);

6.2. The affected employees would retain their total package remuneration (clause 7.2) and this would be inclusive of "*the basic salary, allowances, subsidies, benefits (employer and employee contributions) and the service bonus*" (clause 7.3);

6.3. In respect of future wage increases, these would be applied to the affected employees' basic salary, not their total remuneration, as was done with all permanent employees. In order to determine this basic salary, the collective agreement included a method of calculation to break down an affected employee's annual total remuneration package into a basic remuneration, or technical basic salary, and benefits, as set out in annexure D to the collective agreement (clause 7.4);

6.4. Where the affected employee's basic remuneration exceeded the salary band for his or her position, the 'sunset clause' would be implemented and the employee would not be granted a salary increase until his or her basic remuneration fitted into the approved salary band for the position, as adjusted annually (clause 7.5 read with clause 2.2.23);

6.5. All the fixed term contract employees would be placed in positions in the Respondent's approved structure, without any reduction in remuneration, even if the new position was at a lower level than the fixed term contract position (clause 7.15).

[7] The dispute before this Court has its genesis in the conversion of fixed-term contracts to permanent employment, which took place on 1 October 2012.

[8] It is common cause that the Applicants were all previously fixed-term employees, prior to becoming permanently employed. There are however two categories of employees for purposes of this judgment. The first category is the previously permanent employees, (such as Mr Lebelo) whose permanent employment was converted to fixed term contracts in terms of the process that took place in 2003 and 2004 (after the 2003 decision of the Respondent) and who converted back to become permanent employees in 2012, in terms of the collective agreement. The second category of employees is those who were newly recruited (after the 2003 decision of the Respondent) and

employed on fixed term contracts and whose contracts were converted to permanent employment in 2012, in terms of the collective agreement.

[9] The parties have agreed that a representative witness may be called to represent each category of Applicants. Mr Lebelo gave evidence for both categories and Ms Fuhri was the witness for the second category of employees.

<u>The pleaded case</u>

[10] The Applicants' pleaded case is that they were fixed term employees, who were converted to permanent employees and that, except for the applicants, all other permanent employees of the Respondent have been paid service bonuses and wage increases for the year 2012/13. The Respondent refused to pay wage increases and annual service bonuses to the Applicants and consequently, the Applicants have suffered discrimination in the provision of benefits on the grounds of their status as previous fixed term contract workers.

[11] The Applicants' case is premised on the provisions of section 6(1) of the Employment Equity Act[1] (EEA). They pleaded that they have been discriminated against on the basis of their prior status as fixed term employees. This is not a listed ground of discrimination but is an analogous ground to the grounds listed in section 6(1), as the discrimination is arbitrary, offensive and has been applied to a vulnerable class of employees, namely fixed term employees. The discrimination is unfair and not justified and the Applicants pleaded that there is no warrant to refuse to compensate them for service and inflation, but do so for other permanent employees, the Respondent's conduct offends the dignity of the Applicants and they have always received annual salary increases and bonuses as fixed term employees, which they no longer receive.

[12] In short: the Applicants should be entitled to the same bonuses and salary increases provided to other permanent employees in the workplace.

[1] Act 55 of 1998, as amended.

[13] The Applicants seek orders from this Court declaring that the failure to pay them annual wage increases and service bonuses from 2012 – 2022 constitutes unfair discrimination, directing that they each be paid wage increases for every year from 2013 to 2022 and an annual service bonus for every year from 2013 to 2022. They also seek payment of compensation.

[14] In its response to the statement of claim, the Respondent denied that it has engaged in any form of discrimination. The Respondent's case is that the Applicants' remuneration is a total package, inclusive of basic salary, allowances, subsidies, benefits and the annual service bonus. In respect of the annual wage increase, the Respondent in the alternative pleaded that any discrimination that it may have engaged in was not unfair.

<u>The evidence adduced</u>

The Applicants' case

[15] Mr Lebelo is the General Manager Corporate Services since 2019 and before that, he was the Respondent's Director: Employee Relations. He is familiar with both categories of Applicants – those who were permanent and converted to become fixed term employees and those who were employed as fixed term contract employees.

[16] Mr Lebelo was permanent and he converted to a fixed term contract employee in 2004. Fixed term contract employees were entitled to a performance bonus, which permanent employees were not entitled to. Permanent employees were entitled to an annual service bonus. Fixed term contract employees had the flexibility to structure their salaries as they wanted, something permanent employees could not do. He conceded that the salaries of the permanent employees who converted to fixed term contracts were increased by 10% as an incentive to convert and his own salary was increased and adjusted accordingly.

[17] Mr Lebelo did not structure his salary as a fixed term contract employee to include a service bonus, because a performance bonus was provided for.

[18] The ‘SALGBC Joburg Division conditions of service, national disciplinary procedure and code collective agreement and grievance procedure’ (Joburg Conditions of Service) provides for the payment of an annual service bonus to full-time, part-time and seasonal employees. It does not include fixed term contract employees.

[19] The mayoral committee report of 28 May 2003 on the remuneration of employees indicated that the Municipality operates on a total cost to company package (CTC), an annual guaranteed bonus or thirteenth cheque is not included as part of the remuneration, notwithstanding the fact that an employee can structure their package over 12 or 13 months. Mr Lebelo testified that this was in place at the time he had signed a fixed term contract with the Respondent.

[20] In December 2006, Mr Lebelo became the Director: Labour Relations and he signed a fixed term contract, confirming that he was paid a total cost to employer remuneration package and that he could receive an annual performance bonus. Mr Lebelo testified that when he had signed the contract, it was not discussed how the CTC package was calculated and no service bonus was discussed.

[21] In respect of the second category of applicants, Mr Lebelo testified that he was aware of the terms of their contracts and those contracts too were quiet on the issue of an annual service bonus.

[22] The contracts in the two categories contain, in substance, similar clauses, *inter alia* that the Respondent shall pay the employee a total cost to employer remuneration package, that the employee is entitled to an annual performance bonus to the maximum of 15% of the package, to be determined with reference to fulfilment of such performance agreements concluded annually.

[23] The Applicants continued on a fixed term contract basis until the collective agreement was concluded in October 2012. The collective agreement dealt with the conversion of fixed term contract employees. It provided for a ‘sunset clause’ to be implemented where the affected employee’s basic remuneration exceeded the salary

band for his or her position, and the employee would not be granted a salary increase until his or her remuneration fitted into the salary band for the position, as adjusted annually. “TCTC” is defined to mean total cost to company remuneration package, which included the affected employee’s basic salary, allowances, benefits and employer and employee contributions.

[24] Mr Lebelo testified that before 2012, fixed term contract employees received salary increases and performance bonuses, but after 2012, no fixed term contract employee received a service bonus. Mr Lebelo did not receive a salary increase until July 2017, when he received a 4,7% increase, as the sunset clause applied to him. All other permanent employees received service bonuses and annual increases.

[25] In cross-examination, Mr Lebelo was referred to the SALGBC ‘salary and wage collective agreement’ (wage agreement) which provided for salary and related increases for the financial years 2012/2013, 2013/2014 and 2014/2015. The said agreement made provision for applications for exemption from any or all of the provisions of the wage agreement and it prescribed a procedure for an application for exemption, set out criteria and other factors to be considered by the exemptions committee and provided for an application for condonation if an application for exemption was referred outside of the prescribed time limits. It is undisputed that the Respondent applied for and was granted an exemption for 2013/2014. The next wage agreement was signed in August 2015 and it provided for salary and related increases for the financial years 2015/2016, 2016/2017 and 2017/2018. It also made provision for applications for exemption from any or all of the provisions of the wage agreement and it prescribed a procedure for an application for exemption and set out criteria and other factors to be considered by the exemptions committee. It is undisputed that the Respondent applied for and was granted an exemption for 2015/2016, 2016/2017 and 2017/2018. The exemption so granted applied to all the Respondent’s employees who were subject to the sunset clause, including Mr Lebelo.

[26] Clause 7 of the collective agreement recorded ‘the placement principles’ and clause 7.3 specifically stated that:

'The affected employee's total package remuneration is inclusive of the basic salary, allowances, subsidies, benefits (employer and employee contributions) and the service bonus.'

[27] Mr Lebelo denied the correctness of clause 7.3 and insisted that the service bonus was not included in the Applicants' remuneration after their conversion to permanent employees. In cross-examination, he however conceded that the conversion and subsequent placement happened in terms of the collective agreement and the placement principles set out in the collective agreement. The parties entered into a new agreement in terms of which the affected employees would retain their total remuneration packages, which included a service bonus, as per clause 7.3. of the collective agreement.

[28] Paragraph 7.4 of the collective agreement recorded that the affected employees' remuneration, as calculated in accordance with annexure 'D', would form the basis of calculations related to salary increases and benefits, where applicable, with effect from 1 October 2012. Annexure D sets out the fixed term contract conversion calculation. Mr Lebelo conceded that permanent employees could only get a medical aid contribution if they belonged to a medical aid but for fixed term contract employees, it was included as a cash amount, irrespective of whether they belonged to a medical aid or not, which was an advantage fixed term contract employees enjoyed. He did not dispute that the fixed term contract employees had more advantages than the permanent employees.

[29] Mr Lebelo was referred to the 'fixed term contract dispensation' presentation that was done by the Respondent's city manager during September 2012 regarding the conversion process. The following was explained in respect of the sunset clause: 'Parity in salaries: The City shall either claim back the 10% salary enhancement added to the converted employees' remuneration packages at the time of converting them to FTC or place a moratorium on salary increments for a period equal to there being parity in the salary scales i.e sunset clause.'

[30] Mr Lebelo conceded that he knew by October 2012 that the sunset clause was going to be applicable to him. He knew that the conversion would take place on the

terms and conditions set out in the collective agreement and at the time of the conversion, Mr Lebelo earned a salary of 33% (R 19 238,94 per month) more than a permanent employee on the same salary band.

[31] The presentation also dealt with the principles for conversion and recorded that:

'• Convert to permanent status;
- Fairness and equity;
- Retain same annual total package;
- Total cost to company inclusive of basic salary, benefits, allowances and service bonus (13th cheque).'

[32] Mr Lebelo conceded that he understood that his total package would include an 8,33% service bonus and that the sunset clause would apply by November 2012. He further conceded that after the 2013 wage increase, his salary was still 24,8% higher than the maximum salary for his salary band and as such, he was not paid the annual wage increase in 2013. In 2017, Mr Lebelo received a partial wage increase and in 2018 he received the full wage increase and he conceded that it was because he was earning above the maximum in his salary band for permanent employees.

[33] Mr Lebelo conceded that on 1 March 2013, he accepted the offer of placement, wherein it was specifically recorded that the conditions of the collective agreement and the placement principles referred, and were as such, applicable.

[34] He claimed that they suffered discrimination because they were employees of the same employer, but treated differently for untenable reasons and the different treatment is the fact that a service bonus is not included in the Applicants' remuneration, but it is paid to all other permanent employees. According to Mr Lebelo, the Respondent's policy is clear on the fact that a service bonus cannot be included in salary and as the Applicants no longer receive performance bonuses, they are prejudiced.

[35] Mr Lebelo testified that he is frustrated, and he feels degraded by the fact that he is not treated the same as other permanent employees. He lost his house, he had

to relocate, had to move his children from their school and he had to sell a vehicle. He further testified that the Applicants are mocked by employees who did not convert to fixed term contracts, he feels betrayed and degraded and his morale was very low. In cross-examination, the aforesaid issues were painted in a different light and the reality was rather that Mr Lebelo sold his house for a profit and moved one of his children to another, but similar, school as it was closer to their new house. He was unable to explain how he was mocked when he earned 33% more than the permanent employees on his level, who did not convert to a fixed term contract.

[36] Mr Lebelo testified that a service bonus is paid to every employee as a reward for completing a year of service with the Municipality, but the Applicants do not receive such a bonus for their years of service and they feel like "*black sheep or an unwanted child*".

[37] In respect of the Municipality's defence that the Applicants are bound by the terms of the collective agreement, Mr Lebelo testified that the parties could not contract to be discriminated against and where the collective agreement does not comply with the law, it must be challenged.

[38] Mr Lebelo referred to Ms Petersen and Mr Semako, who were also fixed term contract employees who converted to permanent employees, yet service bonuses were paid to them, as reflected on their salary advice. Mr Lebelo's salary advice indicated no payment that was made in respect of a service bonus. In cross-examination, it was put to Mr Lebelo that the positions of Ms Petersen and Mr Semako were different from that of the Applicants in that Ms Petersen and Mr Semako were employed as fixed term contract employees, but they applied for permanent positions and after their applications were successful, they were promoted to higher, permanent positions. They were not part of the conversion process which took place in terms of the settlement agreement, but they were promoted to permanent positions in terms of a different process and on different dates than the Applicants. Mr Lebelo could not dispute the version put to him and in fact, he accepted that the promotion of Ms Petersen and Mr Semako was distinguishable from the conversion of the Applicants. The effect of this is that Ms Petersen and Mr Semako cannot be considered comparators *in casu.*

[39] Ms Fuhri testified that she joined the Respondent in 2004 on a one-year fixed term contract. She was employed as a legal advisor and the position was advertised as a CTC all-inclusive package, with no mention of a service bonus. After the expiry of her first fixed term contract, she entered into further fixed term contracts with the Respondent, the third one was signed in April 2011 and terminated on 31 May 2015.

[40] Ms Fuhri was not subject to the sunset clause and she received annual wage increases. Her claim is in respect of the payment of the service bonus, which she testified was never included in her remuneration.

[41] Ms Fuhri testified that the collective agreement is discriminatory because the Applicants are part of a vulnerable group of employees. Her dignity was affected, and she felt that she was not worth working for the Municipality, she felt cheated and misled and it had a bad impact on her life. In 2016 she was at a low point in her life and had to go for debt review.

[42] She testified that as fixed term contract employees, they received performance bonuses, which assisted in paying for things that could not be paid for from their salaries and a 13th cheque would have helped with her financial position. She went for debt review before she lost her house and her car.

[43] Ms Fuhri denied that an annual service bonus was included in her CTC and that she received it in monthly instalments together with the rest of her monthly remuneration. Instead, after the conversion the performance bonus was taken away and it was not replaced by anything else.

[44] Ms Fuhri testified that even after being converted to permanent employees, they never felt part of the Municipality's permanent employees, they were treated unfairly and in a discriminatory manner. Her morale, self-respect and productivity had been affected.

[45] In cross-examination, Ms Fuhri conceded that they experienced insecurity being employed on fixed term contracts and that the conversion to permanent

employment provided a sense of job security. She also confirmed that fixed term contract employees could structure their CTC packages for purposes of tax benefits, a flexibility which permanent employees did not have.

[46] Ms Fuhri structured her salary to include allowances for entertainment, travel and a cell phone and she agreed that the ability to structure her salary as such, gave her more money in her pocket, although she had to provide for her own medical aid and pension fund. This was not a benefit other permanent employees enjoyed. Ms Fuhri conceded that the total CTC could have been structured to include a 13th cheque, but she insisted that a service bonus was not included in her remuneration. She also conceded that the allowances she structured, such as an entertainment allowance, were merely an allowance in name and for purposes of obtaining a tax benefit, as she never entertained as part of her job and never used the allowance for that purpose.

[47] The Respondent's 2003 remuneration policy provided for guaranteed pay which included items such as basic salary, car allowance, medical aid, retirement fund and guaranteed allowances and variable pay which takes the form of either a bonus or an incentive and is over and above guaranteed remuneration. It was put to Ms Fuhri that a performance bonus was part of variable pay and a service bonus is included in guaranteed pay. She disagreed and insisted that a service bonus was not included in guaranteed pay.

[48] In respect of the collective agreement, Ms Fuhri disputed clause 7.3 thereof and testified that she never gave a mandate for the collective agreement and the trade unions had never explained the terms and conditions of the collective agreement to her. She also testified that she did not attend the presentation by the municipal manager and the content of the presentation was never communicated to her.

[49] Ms Fuhri received a conversion letter in November 2012, wherein there was a breakdown of her salary. In the calculation, the formula as per Annexure D to the collective agreement, was applied. It is evident from the calculation that the total was divided by factor 1.2333, which is a service bonus of 8,33% and a pension fund of 15%.

[50] Ms Fuhri's salary was confirmed in March 2013 to be a total annual package of R 479 684 and a monthly salary of R 23 103. Ms Fuhri was employed on salary level 6 and the Respondent's approved all-inclusive salary scales for October 2012 indicated that the all-inclusive package, including benefits and a service bonus of 8,33% and pension fund of 15%, for salary scale 6 was R 23 103 monthly and R 479 684 annually. It was put to Ms Fuhri that after the conversion to permanent, she received the maximum package on the minimum band which a permanent employee on salary level 6 could earn, including the service bonus and pension fund and she was unable to dispute it.

[51] In cross-examination, Ms Fuhri accepted that since her conversion to permanent, the amount she received annually as remuneration was the equivalent of what a permanent employee would receive, including an 8,33% service bonus.

[52] Ms Fuhri conceded in cross-examination that she understood since November 2012 that the conversion to permanent would be on the terms and conditions set out in the collective agreement and she knew that her salary would be calculated to include a service bonus. She also agreed that the Respondent converted the Applicants to permanent employees on the basis that they accepted the terms of the settlement agreement.

The Respondent's case

[53] Ms Pienaar, the Respondent's Director: Strategic Management Services, testified that she first joined the Midrand Council in 1996 and was transferred to the Respondent in 2001 when the Midrand Council amalgamated with the Respondent. In 2003, her permanent position was converted to a fixed term contract.

[54] In 2012 she was subject to the conversion project and at the time, she held the position of Deputy Director: Management Support. She was involved in the technical rollout of the conversion project and the placement of employees.

[55] Ms Pienaar testified that when they converted from permanent to fixed term contract employees in 2003, they received a 10% salary increase incentive and her

salary too was increased. She interrogated her new salary before she signed the fixed term contract and it was explained to her that the package was calculated as a total CTC and it included a basic salary, pension fund employer contribution, medical aid employer contribution, an annual service bonus (13th cheque) and other allowances.

[56] Ms Pienaar explained that the 2003 remuneration policy made provision for guaranteed pay, which included a basic salary and the service bonus as well as variable pay, which was a performance bonus. A performance bonus was not guaranteed, as opposed to the service bonus, as it was only payable if certain goals were achieved and it was only applicable to fixed term contract employees, in terms of a separate performance management policy.

[57] The 2003 remuneration policy also permitted fixed term contract employees to structure their salaries. Permanent employees were not permitted to structure their salaries – they received their basic salary and the employer's contribution on benefits they qualified for, for instance, a permanent employee had to belong to a medical aid to receive the employer's contribution for medical aid. Fixed term contract employees could structure their salary packages over 12 or 13 months to provide for a 13th cheque.

[58] In respect of the 2012 conversion process, Ms Pienaar testified that at the time, she was employed in the human resources department and the implementation of the collective agreement fell within the remit of her department and they were involved in the rollout and the placement of employees. The affected employees were first handed conversion letters, whereafter they received placement letters. Ms Pienaar testified that after the collective agreement was concluded, it was distributed to the Respondent's employees, and she had several discussions with employees regarding the terms of the settlement agreement.

[59] Ms Pienaar testified about the placement principles, as set out in the collective agreement, and confirmed that the affected employees retained their total remuneration packages, which were inclusive of basic salary, allowances, subsidies, benefits and the service bonus. The calculation of salary was done in accordance with

Annexure D to the collective agreement. The ‘factor’ referred to in Annexure D is the fixed percentage pension (15%) and service bonus (8,33%).

[60] Ms Pienaar testified in respect of Ms Fuhri’s salary that to get to an annual CTC package of R 479 684,09, as Ms Fuhri earned after the conversion, it had to include an additional 8,33%, which represents the service bonus.

[61] She explained that the fixed term contract employees who converted to permanent had a more beneficial dispensation than permanent employees. Converted employees retained the flexibility to structure their salary packages to get the best possible tax benefit, other permanent employees could not do this. Converted employees received allowances as part of their total remuneration packages, calculated at the maximum of the allowance whereas other permanent employees received allowances based on actuals. For instance, the medical aid allowance for permanent employees was calculated, based on their actual medical aid contribution. For converted employees the allowance was calculated at its maximum, irrespective of whether the affected employee belonged to a medical aid or not.

[62] Ms Fuhri did not belong to a medical aid, yet the maximum employer contribution of R 3 440 was included in her CTC package.

[63] In September 2012, the city manager made a presentation to inform the fixed term contract employees about the content of the settlement agreement and how it would affect them. Ms Pienaar was present when the presentation was made and she testified that all the affected fixed term contract employees were supposed to attend the presentation. The city manager explained that the affected employees would retain the same annual package and that the CTC would include a basic salary, benefits, allowances and a service bonus.

[64] Ms Pienaar testified that the sunset clause affected only 97 of the Respondent’s employees. The Respondent applied for exemption from the payment of salary increases, as agreed to in the wage agreement, in respect of the 97 employees, who were subject to the sunset clause. The bargaining council granted the exemption for 2015 – 2018. The sunset clause applied to Ms Pienaar until July 2015.

[65] Ms Pienaar agreed that there is a differentiation between the employees who were affected by the sunset clause and other permanent employees. The root cause of the sunset clause was the fact that in 2003, when permanent employees were invited to convert to fixed term contracts of employment, they were offered an incentive of a 10% salary increase to convert, which rendered their salaries higher than that of the other employees who remained permanent.

[66] In cross-examination, Ms Pienaar was questioned about the 2003 remuneration policy, which provided that, in respect of non-bargaining unit employees, the municipality operated on a total annual cost to company package and that an annual guaranteed service bonus or 13th cheque is not included as part of remuneration and the Respondent's version that the Applicants received a service bonus, included in their remuneration. Ms Pienaar conceded that there was a contradiction but insisted that the annual bonus is included in the CTC and she said that a calculation of the package showed that an 8,33% service bonus is included.

[67] Ms Pienaar was given a fixed term contract in 2003 which was similar to Mr Lebelo's fixed term contract. She agreed that an annual service bonus was payable to permanent employees, irrespective of their salary scale and the fact that Mr Lebelo earned above the maximum threshold for his salary level was irrelevant to the question as to whether he would be entitled to receive a service bonus. A service bonus is payable after a year of service and the collective agreement on conditions of service provides that the annual service bonus is payable to permanent employees in the month following their qualifying date – the qualifying period is each completed year of service, terminating on 31 October, wherefore the service bonus is paid in November to qualifying employees. It was put to Ms Pienaar that the Respondent's version that the Applicants were effectively paid their service bonus on a monthly basis, as it is included in their CTC remuneration, is at odds with the aforesaid collective agreement, which provides that the annual service bonus is payable annually to qualifying employees and is inconsistent with the remuneration structure agreed to. Ms Pienaar did not respond to the proposition put to her.

<u>General principles</u>

[68] The issue to be decided is whether the Respondent's failure to pay some of the Applicants' annual wage increases and all of the Applicants' service bonuses for the years 2012/2013 and further, in circumstances where other permanent employees were paid annual wage increases and service bonuses, constitutes unfair discrimination in terms of section 6(1) of the EEA. I will deal with these issues in turn, but before dealing with the merits of this case, it is prudent to set out the general principles applicable where unfair discrimination based on an arbitrary ground is alleged.

[69] The EEA does not prohibit differentiation, it prohibits unfair discrimination. More specifically, section 6(1) of the EEA does not prohibit differentiation or arbitrariness, it prohibits unfair discrimination on an 'arbitrary ground'. 'Arbitrary ground' as provided for in section 6(1), read in conjunction with section 11(2), makes it clear that the irrationality of differentiation *per se* will not win a discrimination case based on an arbitrary ground. The conduct complained of must amount to unfair discrimination in that it must cause an injury to human dignity.

[70] Differentiation *per se* does not constitute discrimination. Differentiation on a specified ground of discrimination is presumed to constitute unfair discrimination, which presumption is rebuttable. Given that an arbitrary ground is synonymous with an unlisted/unspecified ground, the test for whether discrimination is established is as set out in *Harksen v Lane NO and others*[2] *(Harksen)*, namely, if there is differentiation based on an unspecified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.[3]

[71] Section 6(4) of the EEA does not impose a blanket prohibition on wage differentiation. It prohibits such differentiation where it is directly or indirectly based on any one or more of the grounds listed in section 6(1). An applicant pursuing a claim in

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[2] [1997] ZACC 12; 1998 (1) SA 300 (CC).
[3] *Naidoo and others v Parliament of the Republic of South Africa* (2019) 40 ILJ 864 (LC) (*Naidoo*).

terms of section 6(4) of the EEA must demonstrate more than mere differentiation. Such an applicant must not only clearly identify and plead an identifiable ground of discrimination that qualifies as an arbitrary ground, within the contemplation of section 6(1), but must also prove that the differentiation is based on such an arbitrary ground.

[72] In *Naidoo and others v Parliament of the Republic of SA,*[4] this Court considered the interpretation of the phrase any arbitrary ground and held that:

'[36] Given that an arbitrary ground is synonymous with an unlisted/unspecified ground, the test for whether discrimination is established, is that set in *Harksen,* namely, if there is differentiation based on an unspecified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

[37] Although the Constitutional Court did not provide a comprehensive description of what 'attributes and characteristics' would comprise, it held that:[5]

"What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features."

[38] The test set out in *Harksen v Lane NO and others*[6] will apply and, in order for the alleged grounds of arbitrary discrimination to qualify as such, they must, objectively, constitute grounds based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner to a listed ground. In short: the

[4] *Naidoo* at paras 36 - 38, which was upheld by the Labour Appeal Court in *Naidoo and others v Parliament of the Republic of South Africa* [2020] ZALAC 38; (2020) 41 ILJ 1931 (LAC).

[5] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 50.

[6] ibid.

unequal treatment must be based on attributes and characteristics attaching to a person before it will fall within the meaning of 'discrimination'.'

[73] In *Naidoo and others v Parliament of the Republic of South Africa,*[7] the Labour Appeal Court (LAC) endorsed the narrow compass interpretation of the phrase 'any other arbitrary ground' in section 6(1) of the EEA.

[74] The LAC considered whether there was a cognisable case pleaded on the narrow compass interpretation and held that:

'[29] The next step is to consider whether, upon the narrow compass construction of s 6(1), the appellants have pleaded a cognisable case. What exactly is averred by the appellants? Allusions are made to nepotism, differences in years of service and recruitment of the chamber support officers from the ranks of persons who were members of the SAPS at that moment of recruitment. The responsibility for this grievance is alleged to be the brainchild of their manager, Van der Spuy. A fair reading of these averments reveals that the critical allegation is that a group of persons have been given preferential treatment based on their affinity with Van der Spuy who is a fan of the SAPS: in a word, this is nepotism.

[30] Do these averments that the protection officers are the victims of nepotism meet the test in *Harksen v Lane NO*? in my view they do not. Nepotism, in any case, cannot be countenanced, even more so in the case of parliament. However this court is required to determine this dispute in terms of the EEA and nepotism is not a necessary affront to human dignity, in neither the sense contemplated by s 9 of the Constitution, nor in s 6(1) of the EEA. To be neglected because of nepotism implies no characteristic of a person so victimised nor does it invoke any pejorative perspective of such person, whether inherent or adopted. Nepotism differs from, for example racism, where the bearer of authority or of power rejects X because of X's race and prefers Y because of Y's race. If what Van der Spuy has done is indeed to prefer his chums to the appellants, ie behaved nepotistically, that conduct, however wrongful, is not unfair discrimination within the purview of s 6(1).'

[7] (2020) 41 *ILJ* 1931 (LAC)

[75] In short: it is not sufficient to simply allege differentiation or that the differentiation is arbitrary or that an employee's dignity has been impaired. An applicant must allege a specific ground of discrimination, and must prove that the pleaded ground of discrimination is the basis for differentiation and that it is unfair. There is a distinction to be drawn between differentiation and discrimination and differentiation *per se* does not constitute discrimination on an arbitrary ground, which must be clearly identified and pleaded.

[76] The Applicants' case is that they are discriminated against on the basis of their prior status as fixed term contract employees. It is not a listed ground of discrimination, but a ground analogous to the grounds listed in section 6(1) of the EEA and the Applicants' case is that the discrimination is arbitrary, offensive and has been applied to a vulnerable class or category of employees, namely fixed term contract employees. The conduct complained of is unjustified, unfair and irrational as there is no justifiable, fair or rational reason to refuse to compensate the Applicants, but to do so for other permanent employees and it offends the dignity and the right to equality of the Applicants.

[77] I already alluded to the fact that the *Harksen* test will apply in a case such as this one. Not every differentiation is discrimination and to qualify as such, the ground(s) for discrimination relied upon must, objectively, constitute a ground(s) based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner to a listed ground. The unequal treatment must be based on attributes and characteristics attached to a person before it falls within the meaning of 'discrimination', as contemplated in the EEA.

[78] The Appellant's witnesses testified about the fact that they have less spending power than the comparator employees, that they are unhappy about their level of earnings, and that they feel that their dignity has suffered as a result of their lower level of earnings. They further explained how they are adversely affected by the wage differentiation and how they feel prejudiced by that, but the reality is that an arbitrary ground for discrimination cannot be established by the existence of prejudice, or put differently, by the mere fact that an employee testifies that his or her dignity has

suffered. The fact that an employee may profess to have suffered an insult to his or her dignity is not sufficient to establish discrimination, as outlawed by the EEA – more is indeed required.

[79] Irrational differentiation does not automatically constitute unfair discrimination, just as rational differentiation might nevertheless amount to discrimination. As was held in *Harksen*:

'If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.'

[80] To succeed with their case, the Applicants must prove all three elements set out in section 11(2) of the EEA.

<u>The applicable test</u>

[81] The applicable test is as per *Harksen*[8] where it was held as follows:

'(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even If it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then

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[8] *Harksen supra* at para 54.

unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).'

[82] Differentiation must be established in the first place.

[83] If differentiation is established, the second question is whether the differentiation bears a rational connection to a legitimate purpose, or put differently, whether the conduct complained of is rational. Even if it is rational, it might still amount to discrimination.

[84] The last question is whether the conduct constitutes unfair discrimination. To determine whether the differentiation amounts to unfair discrimination, a two-stage analysis must be followed. The first stage is to determine whether the differentiation amounts to discrimination and if it does, the second stage is to determine whether the discrimination is unfair.

<u>Analysis</u>

Wage increases

[85] It is undisputed that permanent employees are entitled to receive an annual wage increase, as per the various national wage agreements that have been periodically concluded between SALGA, IMATU and SAMWU in terms of the Main Collective Agreement, concluded between them in June 2007.

[86] The 'sunset clause' in the collective agreement however qualified this entitlement. It provided that where a converted employee's technical basic salary exceeded the maximum basic salary for the employee's level, then the employee

would not be awarded a salary increase until their calculated basic salary fell within the maximum basic salary for their level.

[87] The sunset clause applied to 97 of the 916 employees who were converted to permanent employment (the sunset employees). Only a few of the sunset employees are applicants before this Court. Mr Lebelo is one of them and he testified on behalf of this category of the Applicants. Mr Lebelo's technical basic salary at the time of conversion was 33% higher than the maximum basic salary for his level.

[88] The clause did not apply to all the sunset employees for the same period as the clause operated only for as long as the converted employees' calculated basic salary exceeded the maximum basic salary for their level. The amount by which the remuneration of the converted employees subject to the sunset clause exceeded the maximum basic salary differed from employee to employee. For example, Mr Lebelo was subject to the operation of the sunset clause until July 2017, because he was earning so much more than the maximum for his level, whilst other sunset employees were only subject to the operation of the clause for one or two wage increases, such as Ms Pienaar, who testified on behalf of the Respondent.

[89] The differentiation with respect to the sunset employees is admitted. They were denied a wage increase for a period until their basic remuneration fitted into the approved salary band for the positions they occupied. It is undisputed that the Applicants who were subject to the operation of the sunset clause were treated differently from other permanent employees in that they did not receive the wage increases the other permanent employees received.

[90] The Applicants' case is that the only basis for the denial is their status as fixed term employees as the denial was based only on the fact that they had negotiated and agreed to fixed term contracts with higher salaries. The denial is arbitrary and irrational.

[91] As differentiation is established, the second question is whether the differentiation bears a rational connection to a legitimate purpose, or put differently, whether the conduct complained of is rational.

[92] It is common cause that in 2003 when the sunset employees converted from permanent to fixed term contract employees, they were offered an incentive, or "sweetener" of a salary increase of between 5% and 10% to convert their contracts of employment to fixed term. The effect of this was that the converted employees earned approximately 10% more than the permanent employees, and this gap increased even more over time when the fixed term contract employees were given annual salary increments on their total packages.

[93] Mr Boda for the Applicants submitted that the 10% increase which was offered as an incentive at the time of conversion from permanent to contract, was not a selective offer, but was an offer made to all employees in the same grades, hence it was not rooted in discrimination. He submitted that the offer and acceptance were rational and that in this, the Respondent achieved the benefit that it extracted better performance at a lower cost because the fixed term contract employees had to work harder to obtain performance bonuses. Mr Boda submitted that the Respondent's denial of wage increases to the sunset employees was based on a flawed and discriminatory premise that it was obliged to suspend salary increases to them to achieve equality. He argued that it was nothing but an attempt to claw back what was agreed.

[94] The Respondent's case is that the application of the sunset clause was necessary, fair and rational. The sunset clause provided a mechanism to equalise the limited number of converted employees whose remuneration exceeded the maximum permissible remuneration for their level in order to bring them back within the agreed salary bands for the level they were on.

[95] In my view, the sunset clause is rational as it bears a rational connection to a legitimate purpose, namely to serve as an equalisation process.

[96] The rationale for the sunset clause is evident - the sunset employees were being paid well above their pay grade upon conversion, and as such, they were in a position far more advantageous than the other permanent employees. The operation of the sunset clause had a limited effect and it did no more than place each affected employee in the same position as the highest-paid permanent employee on the same

level. It did so in the least intrusive way as the sunset clause did not require that the remuneration of any converted employee be reduced but rather provided that the converted employee would not receive further salary increases for a limited period in the future. The result is that the converted employees continued to be paid above the maximum remuneration for their level for the entire duration of the sunset clause.

[97] Mr Lebelo continued to receive an annual total remuneration that exceeded the maximum remuneration that an ordinary permanent employee at his level could earn for some four years after conversion. He was earning 33% more than the maximum remuneration of an equivalent permanent employee. It took equivalent permanent employees four years (assuming they received maximum benefits) to reach the salary level Mr Lebelo was enjoying from the date of conversion.

[98] There is no merit in the argument that the Municipality was attempting to claw back what was agreed. The offer to pay a 10% increase as an incentive to convert from permanent employment to fixed term contract, was offered at the time when a specific conversion process was embarked upon. When the converted employees, many years later converted back to permanent employment, the incentive was no longer relevant. It was not intended to be implemented on a permanent basis but was specifically offered to employees to convert to fixed term contracts. The 10% incentive was not only applicable to the conversion as aforesaid, but it resulted in a differentiation, to the benefit of the fixed term contract employees. When those employees converted back to permanent employment, their positions had to be equalised with those of other permanent employees, because they were no longer in a different category, but they too became permanent employees.

[99] The dispensation in terms of which the Applicants were entitled to a salary of 10% higher than permanent employees, ended when they converted back to permanent employment in 2012 and the Municipality had to equalise the position of all permanent employees.

[100] Having found that the differentiation was rational, the next issue for consideration was whether the differentiation amounted to discrimination because even if the differentiation is rational, it might still amount to discrimination.

[101] The Constitutional Court has interpreted 'discrimination' and concluded that the word 'discrimination' is used in a pejorative sense, and not in a merely neutral sense. In *Prinsloo v Van der Linde and another,*[9] the Court considered the concepts of differentiation and discrimination, and it was held that:

'The proscribed activity is not stated to be "unfair <u>differentiation</u>" but is stated to be "unfair <u>discrimination</u>". Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.'

[102] The Constitutional Court confirmed that the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment.

[103] This Court observed in *Ntai and others v SA Breweries Ltd*[10] *(Ntai)*:

'However, it also means that a mere differentiation in pay between employees who do similar work or work of equal value does not mean, in itself, that an act of discrimination is being perpetrated. It is only when such differentiation is based on or linked to an unacceptable ground that it becomes discrimination within its pejorative meaning.'

[104] The Applicants' alternative suggestion for equalisation was that the Respondent should have increased every permanent employee's remuneration at the time of conversion to match the converted employees. This suggestion was put to Ms Pienaar in cross-examination. This was obviously possible in principle, as Ms Pienaar acknowledged.

[105] In my view, the proposed alternative of increasing salaries across the board so that every employee received a basic salary that was higher than the maximum for their level, would be a nonsensical solution to the problem. It would have been outrageous to increase salary levels across the board (increasing salaries by up to 33%) to accommodate 97 out of the 916 employees who were converted, a figure that would be much higher if the other existing permanent employees were also included.

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[9] [1997] ZACC 5; 1997 (3) SA 1012 (CC) at para 31.
[10] [2000] ZALC 134; (2001) 22 ILJ 214 (LC) at para 17.

Such would have exposed the Municipality to a significant increase in its wage bill and would have undermined the very purpose of having salary scales at all.

[106] Be that as it may, the relevant question is whether what the Respondent did amounted to unfair discrimination. To determine whether the differentiation amounts to unfair discrimination, a two-stage analysis must be followed. The first stage is to determine whether the differentiation amounts to discrimination and if it does, the second stage is to determine whether the discrimination is unfair.

[107] The question at the first stage of the enquiry was whether, objectively, the arbitrary ground alleged by the Applicants, is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

[108] Following the *Harksen* test, an applicant for relief arising from discrimination on an arbitrary ground must show that the differentiation is based on attributes and characteristics which impair the fundamental dignity of persons as human beings or affect them adversely in a comparably serious manner. An attribute or characteristic is an immutable human characteristic or a quality or attribute which belongs to a person and which is inherently part of someone and it should be this characteristic or quality that is the reason for the differential treatment.

[109] In my view, the application of the sunset clause did not constitute discrimination. The clause was not based on any immutable human characteristic or attribute, but it was based on the need to ensure equality amongst permanent employees, working for the same employer and performing similar or the same functions.

[110] In *Ntai,* the Court remarked that
'The premium placed on the achievement of equality is evident where this ideal is identified as a value on which the democratic South African state is founded (in terms of section 1(a) of the Constitution). In other words, not mere formal equality but

substantive equality is the constitutional goal in the sense of outcome of results and not merely equality of treatment…'[11]

[111] The Applicants failed to establish the cumulative requirements that the differentiation is not rational and that it amounts to discrimination and they failed to prove that the differentiation caused by the implementation of the sunset clause amounts to discrimination. In the absence of a finding that discrimination exists, there is no need to consider the second stage of the enquiry, namely whether the discrimination was unfair. That is the end of the enquiry.

Annual service bonus

[112] It is common cause that the Joburg Conditions of Service provides that permanent employees are entitled to receive an annual service bonus for each completed year of service terminating on 31 October, in the month following that date. The service bonus is equivalent to $1/12^{th}$ of the employee's annual salary and it is paid as an 8,3% proportion of the basic salary.

[113] As fixed term contract employees, the Applicants were entitled to performance bonuses, but upon conversion to permanent employment, their entitlement to performance bonuses ceased. Since the Applicants became permanent employees, they accept that they cannot continue to receive a performance-linked bonus and their case is that they should be treated in the same manner as other permanent employees, and receive an annual service bonus, thus being treated with equality regarding this benefit.

[114] The Applicants' case is that they do not receive an annual service bonus as provided for in the Joburg Conditions of Service and that it demoralised them, and caused them to suffer indignity and financial prejudice, as they were in effect earning less than before, since they did not receive any bonus.

11 *Ntai* at para 14.

[115] The Respondent's case on the other hand is that the annual service bonus is included in the total annual remuneration package that the Applicants receive as permanent employees. They receive a portion of the bonus each month as part of their monthly remuneration. The Respondent submitted that the only way the Applicants were treated differently from other permanent employees in respect of the annual service bonus, is that they receive their bonus as instalments with their monthly remuneration, while other permanent employees receive it as a lump sum at the end of the year. The Respondent's case is articulated as:

'The respondent has treated all of the applicants in exactly the same manner. The respondent admits that in 2013 [it] differentiated between the applicants and other permanent employees in relation to the manner in which their annual bonuses were paid and the manner in which their entitlement to an annual increase was determined. The respondent however denies that such differentiation amounts to discrimination. The basis on which the applicants were treated differently is as follows: in respect of the annual bonus that all permanent employees are entitled to receive, the only basis on which the applicants were treated differently is that they received their bonus in monthly instalments, together with the rest of the monthly remuneration, where other permanent employees receive their bonus as a lump sum at the end of the year.'

[116] In *Mbana v Shepstone & Wylie,*[12] the Constitutional Court held that:

'[26] The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in s 9 of the Constitution, it is presumed to be unfair.

[27] It must be noted, however, that once an allegation of unfair discrimination based on any of the listed grounds in s 6 of the EEA is made, s 11 of the EEA places the burden of proof on the employer to prove that such discrimination did not take place or that it is justified. Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.'

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[12] [2015] ZACC 11; (2015) 36 ILJ 1805 (CC) at paras 26 - 27.

[117] The Applicants' case is that they were not paid service bonuses at all and as such, they were treated differently from other permanent employees and in a manner that is irrational and/or unfair. Such differentiation will amount to arbitrary unfair discrimination.

[118] The Respondent's case is that the only way the Applicants were treated differently from other permanent employees, is that they received their bonus as instalments with their monthly remuneration, while other permanent employees received it as a lump sum at the end of the year.

[119] The first question to be considered is whether the Applicants were treated differently from other permanent employees in respect of the payment of an annual service bonus. The first step is to establish whether the Respondent differentiated between the Applicants and other permanent employees in respect of the payment of an annual service bonus.

[120] The Applicants submitted that they want to be treated the same as other permanent employees in respect of the payment of an annual service bonus. The annual service bonus is equivalent to 1/12th or 8,3% of an employee's basic salary and in my view, the pertinent question is whether the Applicants' total CTC remuneration includes the 8,3% service bonus or not. If it is not included in the Applicants' total CTC remuneration, the Applicants are entitled to it, as are all permanent employees, but if the 8,3% is indeed included, their claim must fail as they are not entitled to receive 8,3% more than other permanent employees – on their own version, they deserve equal treatment and they are only entitled to the same. In short: the Applicants must get what other permanent employees get.

[121] If this Court finds that there was no differentiation, the effect is that an essential element of the Applicants' case is not established. Mr Boda conceded that if the service bonus is indeed included in the Applicants' remuneration, there is no differentiation and that would be the end of the case.

[122] Is there merit in the Respondent's case that the Applicants' annual service bonus is indeed included in their total CTC remuneration?

[123] The conversion to permanent employment happened in terms of the collective agreement. Clause 7 of the collective agreement provided that notwithstanding their conversion to permanent employment, all converted employees would continue to be remunerated on an annual total cost to company basis, expressed as a single annual amount. Other permanent employees are not paid on this basis. They receive a monthly basic salary, contributions from the Respondent in the form of allowances and benefits insofar as they qualified for them and a service bonus once a year. Ms Pienaar explained that the effect of the collective agreement was that the existing annual remuneration of each converted employee was to be equalised so that it matched the total remuneration to which a permanent employee would be entitled if they received the maximum benefits and allowances to which they were entitled.

[124] Clause 7.3 of the collective agreement provided that the total remuneration package of the affected employees is inclusive of "*the basic salary, allowances, subsidies, benefits (employer and employee contributions*) *and the service bonus."* Annexure D to the collective agreement provided the actual formula to be used for this purpose.

[125] The Applicants all expressly consented to the conversion of their fixed term contracts to permanent employment and accepted the placement principles and the terms and conditions of the conversion, as set out in the collective agreement.

[126] The evidence presented showed that the calculation, in accordance with the aforesaid formula, starts with the total package of the fixed term contract employee. It then deducts the maximum amounts a permanent employee could receive as an employer contribution to medical aid, a housing subsidy and a travelling allowance. It was not in dispute that these are all the allowances and subsidies that a permanent employee is entitled to. The calculation then treats the nett amount as comprising the basic salary, the pension fund contribution and the service bonus, as the pension fund contribution and service bonus are paid as a proportion of the basic salary, at 15% and 8.3% respectively. To determine the basic salary, the nett amount is then divided up into these three separate components (basic, pension fund and service bonus). The calculated "technical basic salary" can then be compared to the maximum

permissible basic salary for the relevant level of the employee, as per the approved salary scales.

[127] The calculation includes an amount for the annual service bonus when making the comparison between the actual remuneration being paid to the fixed term contract employee and the maximum remuneration that an equivalent permanent employee could earn. The formula in Annexure D makes clear that the amount of the annual service bonus was recognised as a component of the total remuneration which all fixed term contract employees, including the Applicants, would receive after their conversion to permanent employment.

[128] The annual service bonus was included when the total annual remuneration a permanent employee could earn, was calculated. This appears from the formula set out in Annexure D to the collective agreement. It was confirmed in the application of the formula to all of Ms Pienaar, Mr Lebelo and Ms Fuhri, where remuneration included the basic salary, the maximum benefits and subsidies that a permanent employee could receive, as well as the amount (8,3%) that such an employee on the same level would receive as an annual service bonus.

[129] Although Ms Fuhri insisted that her total remuneration after conversion did not include an amount in respect of the annual service bonus, mathematically this is not possible. It was evident from the calculations presented in Court that it was only possible to achieve an annual remuneration of R479 684.09 from a basic salary of R23 103 per month if the service bonus is included as part of the remuneration calculation. The basis for Ms Fuhri's denial was simply that she was not told that the annual service bonus was included in her remuneration, and this also did not appear on her payslip. However, Ms Fuhri acknowledged that the descriptions of the components of her remuneration on her payslip were not necessarily a reflection of reality. They were structured for tax purposes, and she was at liberty to structure her salary and descriptions the way she deemed fit.

[130] Ms Fuhri testified that the Applicants as fixed term contract employees are a vulnerable class of employees. This might be so, but the collective agreement converted them to permanent employees and removed that vulnerability.

[131] It is undisputed that the annual service bonus is equivalent to 1/12th of an employee's annual salary and it is paid as an 8,3% proportion of the basic salary. To show differentiation, the Applicants must show that they were paid 8,3% of their basic salaries less than other permanent employees. The labels attached to the 'allowances' and 'bonuses' are meaningless and insignificant, as the Applicants were allowed to structure their remuneration packages, to include for instance a computer or entertainment allowance, which was nothing more than to name or create a label in respect of certain portions of their salaries, primarily for tax purposes.

[132] The Applicants' case is not about a breach of contract, or the unlawfulness of or non-compliance with a collective agreement or a policy, but it is a claim for unfair discrimination. It is not a claim about the label that was used to structure portions of their total remuneration, and even if a wrong label was used, it does not constitute discrimination. The substance of the claim is differentiation in that the Applicants were not paid what was paid to other permanent employees and that they received less than other permanent employees.

[133] The Applicants could not show that the Respondent did not pay them an annual service bonus, as the evidence adduced, showing the inclusion of an 8,3% bonus in the Applicants' total remuneration packages, as a matter of mathematical calculation, was not seriously challenged or rebutted during the trial. This must be distinguished from what the Applicants perceived to be the factual case, from their contention that it was not discussed with them or the version that they did not make the calculations themselves.

[134] The question of whether or not the service bonus is included in the Applicants' total remuneration and therefore paid to them, does not hinge on the Applicants' subjective beliefs or perceptions, but is a factual and objective one.

[135] The Applicants stated that they must get what other permanent employees get. They are not entitled to a further lump sum service bonus payout, in addition to the service bonus amount already built into their total packages, as that would create differentiation and be unfair towards other permanent employees, who would not earn

this additional amount, over and above the 8,3% bonus component they are currently enjoying.

[136] Following the *Harksen* test, an applicant for relief arising from discrimination on an arbitrary ground, has to show that the differentiation is based on attributes and characteristics which impair the fundamental dignity of persons as human beings or affect them adversely in a comparably serious manner. Put differently: the Applicant must show that they were treated differently from other permanent employees, in a manner that is irrational and unfair, and that such differentiation amounted to arbitrary, unfair discrimination.

[137] In my view, the Applicants failed to show that there is differentiation in respect of the annual service bonus. There is a difference in the way the annual bonuses were paid, but the evidence showed that the Applicants received remuneration which included 8,3% of their basic salary, which is the equivalent of the annual service bonus, irrespective of what label was attached to it or how the Applicants were permitted to structure their packages for tax purposes. The difference in manner of payment is not differentiation for purposes of establishing a claim for discrimination in terms of the EEA.

[138] Neither of the parties sought a cost order and in my view, this is a matter where the interests of justice and fairness will be best served by making no order as to costs.

[139] In the premises, I make the following order:

<u>Order</u>

1. The Applicants' case is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Advocate F A Boda SC

Instructed by: Dockrat Inc Attorneys

For the Respondent: Advocate M Wesley SC with Advocate Y Peer

Instructed by: Mchunu Attorneys