REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

JOHANNESBURG

JUDGMENT

Case no: JR 1638/2010

In the matter between:

T V MAKAU	**Applicant**
and	
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**First Respondent**
ZODWA MDLADLA (*N.O.*)	**Second Respondent**
THE MINISTER: DEPARTMENT OF TRADE AND INDUSTRY	**Third Respondent**

Heard: **4 May 2011**

Delivered: **10 March 2012**

Summary: (Review- unfair labour practice - jurisdiction).

JUDGMENT

LAGRANGE, J

Introduction

1] This is an application to review and set aside an jurisdictional ruling by the second respondent, an arbitrator appointed by the General Public Service Sectoral Bargaining Council ('the GPSSBC' or 'bargaining council') to arbitrate over an unfair labour practice dispute referred by the applicant.

2] The essential question before the court is whether the arbitrator was wrong or right in her assessment that the disputes which were referred to arbitration did not fall within the jurisdiction of the bargaining Council to determine an unfair labour practice claim as described in section 186 (2) (a). This in turn resolves itself into the determination of two issues. Firstly, whether or not the applicant actually referred all the issues above under his unfair labour practice claim to the bargaining Council. Secondly, were those issues that were referred as part of the unfair labour practice dispute, matters which can indeed be decided under the unfair labour practice jurisdiction of the bargaining Council.

3] The applicant objected to the late filing of the respondent's heads of argument. The respondent filed its heads on 15 April 2011, less than five court days before the hearing set down originally for 20 April 2011. The hearing in fact took place on 04 May 2011. The respondent was clearly in breach of the directive issued on 21 October 2010 to file its heads of argument. However, a second directive was issued on 17 March 2011 requiring the respondent to file heads five days before the hearing on 20 April 2011. It filed them only three court days prior to the hearing on 20 April 2011. However, for reasons which are not apparent from the file, the matter was removed to the roll on 04 May 2011. The effect of this is that the applicant and the court had more than five court days to peruse the respondents heads of argument and were not prejudiced by the late filing thereof. In the circumstances, the late filing of the respondent's heads of argument is condoned.

<u>The jurisdictional ruling</u>

4] The arbitrator concluded that the bargaining council did not have jurisdiction to consider the applicant's dispute because the dispute that was referred was not an unfair labour practice in terms of section 186 (2) of the Labour relations act 66 of 1995 ('the LRA').

5] The arbitrator's factual summary of the dispute in outline was that:

5.1 The applicant had lodged a grievance against his line manager and chief director complaining about the way in which they conducted themselves as managers including abusing their authority, behaving in a discriminatory manner and inconsistency in applying policies and guidelines.

5.2 The applicant had been subjected to abusive behaviour by his line manager.

5.3 The Deputy director-general who dealt with the grievance recommended that the applicant should be transferred from the position as a Deputy Director: Monitoring and Complaints to being Deputy Director: Investigations.

5.4 The applicant was not content with this outcome and felt the matter should have been referred to the Head of Department for further investigation. Nonetheless, he was transferred in terms of the recommendation.

5.5 The applicant declared an unfair labour practice dispute in which he alleged that the employer had failed to comply with the grievance procedure by not referring his complaint to the head of Department. He also complained that he had not been paid his performance bonus for the financial period ending 2008/2009 and that he should have received an increase in his salary and benefits in order to be on a par with other deputy directors in his unit.

6] In determining whether the bargaining council had jurisdiction to arbitrate the applicant's dispute, the arbitrator reasoned as follows:

6.1 Section 186 (2)(a) of the LRA defines an unfair labour practice as an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to promotion, demotion or training of an employee or relating to the provision of benefits to an employee.

6.2 The applicant’s dispute with the respondent over the matters summarised in paragraph 4.5 above did not fall within the definition in section 186 (2) (a).

6.3 Instead of complaining of an unfair labour practice, the applicant ought to have referred the alleged failure of the respondent to comply with the grievance procedure as a dispute about the interpretation and application of the collective agreement dealing with the grievance procedure. Similarly, his claim over the failure to pay the performance bonus and salary increase also concerned the interpretation and application of the collective agreements governing those issues.

6.4 Lastly, in so far as the applicant complains that the respondent failed to fulfil its constitutional obligations and continued to harass and victimise him, those are disputes that should have been referred to the High Court or the Constitutional Court as the case may be.

7] When the applicant referred this dispute over his unresolved grievance to the bargaining Council, he described it as one concerning a unilateral change to terms and conditions of employment and an unfair labour practice relating to the provision of benefits. In expanding on the details of the dispute he complained that firstly the outcome of the grievance had been determined by the director of the Employment Relations Unit even though "she was neither involved to investigate the grievance nor authorised in terms of the rules to decide on the matter (grievance)." In setting out the facts of the dispute he complained that:

7.1 he had been singled out and treated increasingly unfairly by his supervisor making his working environment and conditions unbearable.

7.2 He had been victimised for lodging the grievance against his supervisor and chief director and that no steps had been taken to discipline his supervisor.

7.3 The procedure for investigating the grievance outlined in the grievance policy was not followed and the actions taken to supposedly resolved it made the procedure defective, apart from the fact that it was not impartially applied.

7.4 He had been victimised with the threat of disciplinary action for lodging the grievance.

8] As an outcome he wanted the bargaining Council to accept the referral of the grievance and confirmed that the employer had committed an unfair labour practice. Apart from this he wanted appropriate action taken against people whom he had complained about and compensation for entry of feelings suffered by him as a result of his treatment. He also sought the reversal of his transfer to the directorate: investigations unless his salary and working conditions were reviewed.

9] Further on in the referral form he identified certain special features of the dispute. It is here that he expanded on what he perceived to be his unequal treatment by the employer which required him to continue performing his previous functions in contravention of the Labour Relations Act and the Public Service Act. He states that he is not being paid the same as other Deputy Directors in the Investigations section, and that his transfer was imposed on him to protect the people he had lodged grievance against. Attached to the referral was his grievance which he lodged with the employer. The causes of complaint set out in the grievance were concerned almost exclusively with the treatment he claims he suffered at the hands of his supervisor and the failure of the employer to address his pleas regarding that treatment.

10] In his founding affidavit in the review application, the applicant summarises the unfair labour practices he complains of in the following terms:

> *"(i) Non-compliance with Public Service Grievance Handling Rules,(ii) Non-payment of performance bonus,(iii) Differentiation in Salary-Principle of equal salary for work of equal value not applied,(iv) Applicant expected to perform in terms of two job descriptions,(v) Harassment in terms of attitude, behaviour and door incident, (vi) Harassment in terms of an acceptable working relationship,(vii) Unilateral Change on conditions of employment, (viii) Ongoing victimisation,(ix) Failure to execute constitutional obligations and (x) Prejudice suffered by applicant."*

11] Further on in the founding affidavit, the applicant sets out the actions of the employer which he believes constitute an unfair labour practice in more detail in these terms:

> *'59.11.1 there has been non-payment of applicants performance bonus for the financial period 2008/09 which act or omission committed by the third respondent constitutes an unfair labour practice in terms of section 186 (2) of the Labour Relations Act.*
>
> *59.11.2 there have been gross acts of non-compliance with the Public Service Grievance Handling Rules committed by the third respondent. The outcome of the investigation of the grievance was decided by individuals not supposed to be involved in the investigation of the grievance.*
>
> *59.11.3 I have been subjected to a situation of, until to date, having to perform my duties in terms of two job descriptions for the positions deputy director: monitoring and complaints and deputy director: investigations.*
>
> *59.11.4 there is a differentiation of salaries for the deputy directors: investigations in view that the principle of equal salary for work of equal value is not being applied by the DTI/third*

respondent to all deputy directors: investigations,

59.11.5 I have been harassed in terms of the following, namely attitude, behaviour, door incident and unacceptable working conditions perpetrated by the line manager and chief director,

59.11.6 there has been unilateral change in conditions of employment of applicant and ongoing victimisation an applicant has been unfairly affected by such conduct or act; and

59.11.7 there has been gross substantive unfairness, procedural unfairness and the grossly unreasonable decisions as taken by the DTI/Third Respondent which impacted negatively on my own rights to fair labour practice as contemplated in terms of the Labour Relations Act and section 23 of the Constitution.

59.11.8 there has been existence of unfair conduct on the part of DTI/Third Respondent in terms of not upholding their Constitutional obligations to fair labour practice."

12] The certificate of outcome issued on 9 December 2010, described the dispute as one concerning a “unilateral change to conditions and unfair labour practice (benefits).”

The merits of the review application

13] The applicant nominally identified five grounds of review, though most of them contain more than one basis for attacking the arbitrator's ruling. It will also be apparent from the analysis below that there is also considerable repetition and overlap of the grounds of review raised by the applicant.

The first ground of review

14] The applicant complains that the arbitrator acted irregularly and *ultra vires* in not dealing with his preliminary complaint and preliminary issues raised by the employer. The applicant's preliminary issue was that the employer had failed to provide information he had requested to prove his case. The employer's preliminary complaints concerned to jurisdictional questions and whether it had received various documentation. The applicant claims that the Commissioner acted beyond their powers by not considering all the points and only considering the jurisdictional ones.

15] In principle, I cannot see anything wrong in principle with the arbitrator only addressing jurisdictional questions if the answer to those questions might render other issues irrelevant.

16] However, the applicant further contends that the arbitrator should not have entertained the *in limine* objections of the respondent because the respondent had not objected to the certificate of the outcome when it was issued nor at any time thereafter. Further, the arbitrator ought to have allowed the applicant to address her on the statement of his claims before making her ruling. As a result of these actions, he claims the arbitrator effectively altered the conditions on which the certificate of outcome was issued to be altered. He reasoned also that because the employer had not challenged all the statements of claim in the applicant's bundle of documents, the arbitrator ought to have accepted that there was no objection to those matters being dealt with under the unfair labour practice jurisdiction.

17] It is well established that a jurisdictional issue can be raised at the arbitration stage even if it was not raised previously. An exception to this principle is if the referral was late and the employer party only raises an objection to this after conciliation has taken place.[1] In such a case, an employer may be barred from raising such an objection unless it applies to set aside the certificate. However, where the objection concerns the nature of the dispute, because description of the dispute in the certificate of outcome is only indicative and not determinative of the nature of the

1 See ***Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others*** **(2000) 21 *ILJ* 2382 (LAC)**

dispute[2], there is no reason why an objection based on lack of jurisdiction on account of the nature of the dispute cannot be raised at the arbitration proceedings.

18] Moreover, even if the employer had not raised the issue, the arbitrator was obliged to consider whether or not she had jurisdiction in the matter, as she could not assume the power to arbitrate over anything before her merely because parties were silent on issues relating to her jurisdiction. The scope of her power to arbitrate is determined by the LRA, irrespective of what the parties say or do not say.

Second ground of review

19] The arbitrator referred to the applicant's statement of his case set out in his bundle of documents, even though there was a dispute whether or not that bundle had been properly served on the respondent, and despite the fact that he neither gave evidence based on the bundle nor was he cross-examined on it. According to the applicant, the arbitrator was not entitled to rely on his bundle of document in these circumstances. Under this ground of review, the applicant repeats his complaint about the arbitrator acting beyond her powers in 'altering' the certificate of outcome. In particular, he criticises her for not investigating why the conciliator issued the certificate, and for not validating the employer's claims that jurisdictional issues were raised in the conciliation proceedings against the record of the conciliation proceedings.

20] The applicant is correct that the arbitrator does not have the power to review the actions of her predecessor who handled the conciliation proceedings. Nevertheless, she must be satisfied of her own jurisdiction to hear the matter, particularly in the absence of a ruling on jurisdiction having been made at the conciliation stage. As mentioned, the description of the dispute in the certificate of outcome does not amount

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2 ***Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg & Bean Suncoast & Others* (2009) 30 *ILJ* 2968 (LC)** at 2972-3,[8]

to a ruling on jurisdiction.

21] Conciliation proceedings are confidential and evidence of what transpired during those proceedings may not be disclosed unless the parties agree to this in writing.[3] It may well be the case that jurisdictional issues were debated in the conciliation, but there is no evidence that the parties actually requested the conciliator to make a ruling on jurisdiction at that stage. In the absence of such a written ruling, the arbitrator was entitled to consider the matter of jurisdiction afresh.

Third ground of review

22] The primary attack on the arbitrator's approach under this ground of review is that she made the jurisdictional finding on the basis of the statement of the applicant's claim set out in the bundle, without hearing the parties' representations, and without conducting a factual enquiry into the issues set out in the statements of claim. The applicant also criticises her for not complying with her own ruling because she had undertaken to set the matter down for further deliberation once she had made a ruling on the *in limine* points raised by both parties.

23] The applicant provided a transcript of the proceedings. Although the proceedings were relatively short, it is apparent that the arbitrator focussed her attention on trying to clarify the issues in dispute. The parties made a number of oral submissions in this regard. It is true that the applicant wanted to lead evidence of his various complaints which he claimed fell under his unfair labour practice referral and that the arbitrator declined to hear such evidence.

24] Was the arbitrator obliged to hear evidence for and against the existence of the facts on which the applicant based his complaint? In most respects I think not. The applicant and his representative had ample opportunity to articulate the nature of the dispute. It was only when the arbitrator

3 Rule 16(1).of the CCMA Rules

remarked that it appeared that the dispute did not appear to fit with the requirements of section 186(2) that the applicant then sought to make further submissions on each aspect of the dispute. At that preliminary stage of proceedings the arbitrator was not concerned with whether or not the applicant was able to prove his claims. Rather, she had to determine if his claims fell within the scope of the unfair labour practice definition. This is what she did, and I cannot find anything wrong with her approach to determining the jurisdictional issue, with one exception.

25] The exception relates to her determination of her jurisdiction over his complaint about the unfairness of not receiving a performance bonus. While it was not necessary for her to have heard evidence on this dispute as such, she ought to have enquired into whether the applicant was claiming the bonus as an automatic entitlement or whether he was complaining of the employer's alleged unfair exercise of a discretion to pay the bonus. It was not sufficient to determine whether or not it related to an unfair labour practice dispute based solely on the label attached to the supposed benefit.

<u>Fourth ground of review</u>

26] The applicant attacks the arbitrator's evaluation of the evidence before her. In particular, the applicant claims that it is clear that the arbitrator misconstrued the evidence before her and failed to properly consider the evidence. In support of this ground the applicant identifies approximately 16 instances of conclusions drawn by the arbitrator in her ruling, which he alleges demonstrate these defects. These are considered below.

27] The first complaint is that the arbitrator misidentified representatives in the hearing. Nothing material hangs on this error, and it does not constitute grounds for setting aside her ruling.

28] The applicant's second and third complaints are that the arbitrator did not characterise the dispute correctly. He contends that the correct description of the dispute he referred is set out in paragraph [9] above.

29] Assuming that his description is correct, do his different claims constitute claims under section 186(2)(a) ?

29.1 The first claim relating to non-compliance with Public Service Grievance Handling Rules appears most obviously to be a complaint about compliance or the application of the collective agreement containing such rules.

29.2 The differentiation in salary-principle of equal salary for work of equal value, at best for the applicant, might have been raised under the EEA but not as an unfair labour practice under the LRA.

29.3 The dispute about whether or not he was required to perform two jobs simultaneously is not a dispute that resorts under section 186(2)(a), but more properly is a dispute about contractual entitlements and obligations.

29.4 Likewise, the claims of harassment relating to his working relationship with his supervisor are not ones that find a remedy under the unfair labour practice jurisdiction.

29.5 A dispute about unilateral changes to conditions of employment is a dispute that either can lead to strike action or it might be resolved by means of an order for specific performance but it is not remotely described by the provisions of section 186(2).

29.6 In so far as the complaint of victimisation is simply one of being unfairly singled out, there is no assistance to be obtained from the LRA.

29.7 If, on the other hand, the complaint of victimisation relates to the applicant's claim that the non-payment of the bonus was linked to hisresolute pursuit of his grievance, then that is a matter dealt with in terms of section 5 and 9 of the LRA, which is discussed in paragraph [36] of this judgment. However, the consequence of those provisions is that it is a matter for this court to deal with, not an arbitrator.

29.8 The unfair labour practice jurisdiction of the LRA is not simply a catch-all category for any constitutional rights the applicant might have. It only deals with the Constitutional right to fair labour practices to the extent described in section 186(2).

29.9 Lastly, prejudice or disadvantage as such is not the basis for an unfair labour practice claim. At best it is just an element of such a claim, but the prejudice suffered must be one that the legislature has determined should be prevented.

30] The fourth complaint is that the arbitrator mischaracterised what transpired with his grievance. The arbitrator said that the Deputy director-general had investigated and recommended that he be transferred. He objects to this and emphasises that the recommendation was only made on the basis that he would accept such a transfer and form clearly indicated that the grievance was not resolved. I do not see his expanded description of the grievance as contradicting what the arbitrator stated.

31] He further takes objection to the arbitrator characterising the recommendation of the Deputy director-general as an 'outcome' of the grievance and therefore a resolution of the matter. I do not understand the arbitrator to have made a finding that the grievance was resolved. Although she does use the term 'outcome' to describe the Deputy directors' recommendation, she clearly acknowledged that he was not satisfied with that result, so it appears that she was alive to the fact that the recommendation was unsatisfactory from his point of view.

32] Whether or not the arbitrator described the dispute over the failure to comply with the grievance procedure in as much detail as the applicant would have liked, and whether or not she used terminology more loosely than she might have, correcting these discrepancies would not have had a material impact on her analysis from a jurisdictional perspective. Consequently, I do not regard them as reviewable errors on her part.

33] The applicant also criticises the Commissioner's characterisation of his complaint about the employer's failure to comply with the grievance procedure. She described the complaint as being about the fact that "... the grievance was not further referred to the head of Department after he was dissatisfied with the recommendation by the DDG." The applicant points out that he mentioned in the referral form that both the Head of Department and Executive Authority were approached to address the grievance but failed to do so and the dispute concerned their failure to resolve the matters. It seems that the applicant is correct in this criticism, in that the arbitrator did not seem to appreciate his claim that the executive authority and head of Department had both been approached about the grievance.

34] However, I do not believe this error affects the classification of the dispute in any meaningful way. In essence, this aspect of the dispute remains one about the failure of the employer to comply with the grievance procedure. The details of that failure are a matter for evidence if the matter proceeds.

35] The applicant accuses the arbitrator of not applying her mind to the nature of his complaint about the non-payment of his performance bonus for the 2008/2009 financial period. He contends that his dispute did not simply concern the non-payment of the bonus, but the fact that the non-payment was an instance of a discriminatory practice and inconsistent application of the performance management policies of the employer and these were issues that were something apart from remuneration and fell within the definition of the unfair labour practice.

36] The arbitrator said that part of the applicant's complaint was that he should have received an increase in his salary and benefits in order to put him on a par with other deputy directors in his unit. The applicant claims that this description 'contradicts' the arbitrator's own statement that he lodged a grievance alleging discriminatory practices and inconsistent application of policies and guidelines. He then goes on to explain that the criteria used for the determination of the salary of the position of the deputy director: investigations were not applied to him when he was transferred to the position, and the salary differentiation which he experienced amounted to direct and indirect discrimination and therefore an unfair labour practice.

37] To the extent that he links this discriminatory treatment to anything, it seems to be that he is of the view he was being victimised for pursuing his original grievance and hence the differential treatment. But if it was for that reason then that concerns an alleged infringement of section 5(2)(b) or (3) of the LRA which state:

> *"(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-*
>
> *(a) …*
>
> *(b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act;*
>
> *(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute."*

38] The enforcement of that right does not resort under the unfair labour practice remedy but in a referral to the Labour Court under section 9(4) of the LRA.

39] As mentioned previously, the applicant also contends that the arbitrator was wrong in deciding that the parties agreed that the jurisdictional issues had not been addressed by the conciliator. He reiterates his view that the certificate of outcome, which stated that two issues were to be arbitrated namely the alleged unilateral change of terms and conditions of employment and the unfair labour practice relating to benefits, effectively disposed of the discussion of jurisdictional points at the conciliation.

40] The applicant claims that the commissioner erred in entertaining the employer’s jurisdictional challenge, when the respondent did not challenge what was set out in his statements of claim showing that the dispute fell within the ambit of the unfair labour practices jurisdiction. This point essentially covers the same ground dealt with in paragraphs [15] to [17] above. The applicant makes a similar point in relation to the arbitrator's citation of section 186 (2) (a).

41] The applicant also finds fault with the arbitrator’s finding that the conduct summarised in paragraph 6 of her award does not fit within the meaning of an unfair labour practice. The applicant says that in reaching this conclusion the commissioner showed a lack of knowledge of the legal principles and decided cases which she ought to have considered but did not.

42] He takes issue too with the Commissioner's conclusion that the employer's alleged failure to comply with the grievance procedure is a dispute about the interpretation or application of that procedure. The applicant says that this conclusion is at odds with the arbitrator’s finding that the complaints of the applicant do not fit the meaning of an unfair labour practice. He contends that this demonstrates that the commissioner did not understand his complaint and he has been prejudiced thereby. The applicant’s criticism is difficult to understand. Indeed, if the applicant says that a procedure has not been complied with, that is *prima facie* a dispute about the employer’s failure to apply the grievance procedure and not an unfair labour practice matter.

43] In a similar vein, he takes issue with the arbitrator's conclusion that a dispute over the payment of a performance bonus and a salary increase also concerns the interpretation and application of a collective agreement. He reiterates that the non-payment issues concern discrimination and the inconsistent application of performance management policies and guidelines. Once again he emphasises that performance bonuses and merit awards are matters falling within the definition of benefits in terms of section 186 (2) of the LRA, and that the Commissioner committed a gross irregularity in not applying her mind to this issue. These two issues are addressed in paragraphs [53] to [55] of the judgment.

44] In relation to the arbitrator's finding that the failure of the employer to execute its constitutional obligations and ongoing victimisation and harassment should be referred to the High Court and Constitutional Court, the applicant argues that this contention was never raised in the hearing and he had no opportunity to present evidence on these issues. Accordingly he argues that there is nothing to suggest that the arbitrator considered supporting evidence in his statement of claim on these issues. This criticism is curious in the light of the applicant's more general complaint that the arbitrator should not have had regard to his bundle without evidence being led.

45] Be that as it may, it does seem that the arbitrator simply assumed that victimisation and harassment are matters for the High Court. In relation to the applicant's complaint about his supervisor's alleged conduct which led him to submit a grievance it appears that the applicant is not arguing a case of victimisation as described in section 5 of the LRA, which addresses prejudice suffered by employees at the hands of an employer for exercising their employment rights. The applicant seems to mean that he has simply been the victim of prejudicial treatment without justification. Section 186(2) of the LRA does not extend to cover such conduct, and other than pursuing it as a grievance to the full extent of the grievance procedure, there is no obvious legal remedy, unless the discrimination was based on an unacceptable reason, such as race, religious belief or similar personal qualities.

46] I have no doubt the applicant feels deeply aggrieved about the conduct he claims he was subjected to, and if his claims could be substantiated that conduct might have been grounds for claiming constructive dismissal. It might also have been the basis for obtaining an order interdicting conduct which prevented him from performing his duties. However, the applicant's claim of unjustified bad treatment, cannot be squeezed into the narrow definition of what constitutes unfair labour practices in terms of section 186(2)(a). Labour law does not provide a legal solution to every form of grievance in the form of a final adjudication of rights.

47] Thus, even though the arbitrator may have been wrong in assuming there are available remedies in the forums mentioned, it does not assist the applicant because the absence of such remedies does not mean the issues can therefore be dealt with by default under the unfair labour practice jurisdiction of the LRA. To the extent that the constitutional right invoked by the applicant relates to the right to fair labour practices, then the first hurdle the applicant must overcome is to demonstrate that his complaints' fall under section 186(2), failing which he must make out a cogent argument why his constitutional right not to be subject to unfair labour practices ought to be more widely interpreted than the scope of practices described in section 186(2).

48] The applicant also tackles the arbitrator's conclusion that the bargaining Council did not have jurisdiction to entertain the dispute because it did not concern an unfair labour practice. He claims that this conclusion has no rational connection to the evidence before her in his bundle, which the employer did not object to. As discussed below, the determination of jurisdiction by the arbitrator is either correct or not. It is not a matter which is assessed by the standard of reasonableness. Accordingly, this line of criticism does not warrant further consideration.

<u>Fifth round of review</u>

49] Lastly, the applicant attacks the reasonableness of the ruling in that he says the arbitrator:

49.1 failed to apply her mind to the evidence and issues concerning his complaint about the respondent's nondisclosure of information and unreasonably and irregularly took account of his bundle of documentation when making her ruling;

49.2 also failed to consider the evidence that he had been performing the job description of two directors for some time and misunderstood the issues in this regard thereby prejudicing him, which amounted to a gross irregularity on her part, and

49.3 ahe did not apply her mind to the issue of the non-payment of the performance bonus and merit awards and failed to appreciate that in terms of the case of ***SAPU obo Louw & Others v SAPS*** **(2004) BALR (1) 22** the non-payment of those items had been held to constitute an unfair labour practice.

50] The first issue mentioned in the previous paragraph does not require consideration for the reasons mentioned above, namely that a review of a jurisdictional ruling is not a matter of assessing the reasonableness othe arbitrator's decision.

51] The second issue, I understand relates to the applicant's claim that he was not paid on the principle of equal pay for work of equal value. This court has recognised such a claim, provided that the basis on which the differentiation is claimed to be unfair is on some or other prohibited ground, such as race or sex. In that case, the claim might be entertained by the Labour Court in terms of the provisions of the Employment Equity Act 55 of 1998 ('the EEA'). In this regard see ***Mangena & Others v Fila SA (Pty) Ltd & Others*** **(2010) 31 *ILJ* 662 (LC) at 668-9, [5]-[7]**. It might be argued that the definition of prohibited grounds in section 6(1) of the EEA ought to extend to include differentiation for an arbitrary reason, and thereby include a simple failure to pay equal wages for work of equal value without a rational justification, though the cogency of this argument is by no means certain.[4] However, the unfair labour practice as described in section 186(2) of the LRA certainly does not embrace such disputes.

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4 Section 6 of the EEA prohibits unfair differential treatment based on a number of specified grounds , but those grounds do not constitute a closed list, viz :

"*6 Prohibition of unfair discrimination*

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, <u>on one or more grounds</u>, <u>including</u> race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth."

(emphasis added)

52] The third issue raised by the applicant is a theme which runs through more than one of his points of review mentioned above .[5] In relation to whether or not the dispute over the fairness of not awarding the applicant a performance bonus and merit award is concerned, the arbitrator in *Louw's* case held that:

> *"26. Having decided that the matter before me is not one concerning interests, I now have to turn to the definition of "benefit".*
>
> 27. *Both parties have referred me to some views on what would be included in and excluded from the concept of "benefit". It is apparent that, apart from a few clearly established principles, arbitrators have different views in this regard.*
>
> *28. In my view the starting point would be to determine what a benefit is not. As I understand the authorities –*
>
> *28.1 remuneration in return for services rendered such as a salary or wage or commission or overtime pay is not a benefit (Schoeman & Another v Samsung Electronics (SA) [1997] 10 BLLR 1364 (LC));*
>
> *28.2 depending on the circumstances, any other term and condition of employment may or may not be a benefit (Schoeman-case);*
>
> *28.3 a claim for leave pay is nothing other than a claim for remuneration for work rendered (Gaylard v Telkom South Africa [1998] 9 BLLR 942 (LC); and*
>
> *28.4 a claim for an acting allowance is similar to a salary or wage issue and is not a claim for a benefit (Hospersa case).*

5 See paragraphs [34] and [42] of the judgment

29. The next question is what a benefit is or could be. My understanding of the authorities is the following :

29.1 A benefit constitutes a material benefit such as pensions, medical aid, housing subsidies, insurance, social security or membership of a club or society – there must be some monetary value for the recipient, and it is something arising out of the employment relationship (Sithole v Nogwaza & Others [1999] 12 BLLR 1348 (LC)).

29.2 A benefit is something extra or apart from remuneration (Schoeman-case).

29.3 The concept "would seem to include . . . discretionary (performance related bonus . . . and the like" (Basson and others Essential Labour Law volume 1 (1ed) at 252).

29.4 The dictionary meaning is broad, with synonyms including "extras" and "fringe benefits", and it seems to refer to "additional matters" (Du Toit and others Labour Relations Law 4ed at 467).

30. In my view participation in or potential participation in an incentive or performance recognition or bonus scheme is something extra or apart from remuneration, is material and has monetary value, and is not typical remuneration in return for services rendered, and I am satisfied that the subject matter of the dispute before me does concern a benefit as contemplated in section 186 of the LRA."[6]

(emphasis added)

53] By contrast, Musi, AJ, as he then was took a different approach in ***Department of Justice & Constitutional Development v Van der***

6 At 27-28

***Merwe NO & Others* (2010) 31 *ILJ* 1184 (LC)**:

“[31] The applicant's second argument, ie that performance bonuses and pay progression awards are not benefits, is also compelling.

[32] It is common cause that the union members <u>did not have a right ex contractu (in terms of their employment contracts or the collective bargaining agreement) or ex lege to performance bonuses and pay progression</u>. <u>The commissioner correctly, in my view, found that those rewards were given annually, to those who qualified, at the discretion of the applicant</u>. An employee cannot utilize his/her right not to be subjected to unfair labour practices where the employee believes that he/she ought to enjoy certain benefits which the employer is not willing or unable to give to him/her, to create an entitlement to such benefit through arbitration in terms of the LRA. <u>Likewise if an employer is not willing or able to spend an amount, on bonuses , in excess to that contractually agreed upon, the employees cannot create an entitlement thereto by way of arbitration. Section 185(b) sought to bring under the definition of unfair labour practice, as defined in s 186(2), disputes about benefits to which an employee is entitled ex contractu or ex lege.</u>

[33] Remuneration is defined in s 213 of the LRA as 'any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the state and remunerate has a corresponding meaning'.

[34] The LRA does not define benefits . In Schoeman & another v Samsung Electronics SA (Pty) Ltd<u>(1997) 18 ILJ 1098 (LC)</u> at 1102-3 it was said that:

'Remuneration is different from benefits. A benefit is

something extra apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contact.'

[35] Todd AJ correctly states that the court in Schoeman v Samsung was concerned that if the notion of benefits is interpreted too widely, this would in effect give parties the right to refer to arbitration disputes that are in essence disputes about remuneration. This would obviously preclude industrial action over a range of disputes over remuneration that properly fall within the realm of collective bargaining. See Protekon (Pty) Ltd v CCMA & others (2005) 26 ILJ 1105 (LC); [2005] 7 BLLR 703 (LC) at para 18. The rationale for this is clear that where a dispute is an interest or remuneration dispute it cannot be arbitrated under the guise of a benefits dispute because that would subvert collective bargaining.

[36] Performance bonuses and pay progressions are not given arbitrarily or to every employee irrespective of performance. The performance of the individual employee is assessed over a fixed period of time. If the performance of the employee is good, 61% to 79% of the performance objectives met, or outstanding, 80% and more of performance objectives met, that employee qualifies to be rewarded by way of merit and/or pay progression.

[37] These awards are clearly a quid pro quo for good and outstanding services rendered. It is nothing else but remuneration for services rendered. It is therefore remuneration and not a benefit .

[38] The complaint is not that the performance awards or pay progressions were unfairly given to a select few or unfairly taken from others. The unfairness or otherwise of the process was not an issue.

[39] The commissioner's ruling that he had jurisdiction to

adjudicate the dispute is clearly wrong. He has no jurisdiction to adjudicate an interest dispute."[7]

(Emphasis added)

54] From the two decisions above, it is apparent that the determination of whether an unfair labour practice claim concerning non-payment of a bonus seems to depend to a significant extent on whether the bonus is not part of normal remuneration and where there are grounds for believing that the employer did not exercise its discretion properly when deciding who would and would not get the bonus. Whether the appearance of discretion is in fact illusory because the bonus is always paid according to a consistent and pre-determine formula and therefore a claim for a portion of remuneration due to an employee arising in contract or in statute, is a matter that requires investigation of the type of bonus the employee is claiming.

55] This is not something the arbitrator in this instance appears to have considered. It required her to do more than simply look at the label of the entitlement under consideration.

56] However, in relation to his salary dispute, that is not a dispute about a benefit, but an interest dispute which the unfair labour practice cannot resolve. On the other hand if the dispute is simply one about what he is entitled to as a salary, that is plainly a remuneration dispute regulated by statute and contract, and cannot be construed as a benefit dispute under section 186(2)(a).

<u>Conclusion</u>

57] In short only one of the applicant's grounds of review succeeds, namely relating to the classification of the performance bonus dispute as an unfair labour practice dispute in terms of section 186(2)(a). By not probing the basis for this claim in more depth with the parties, the arbitrator failed to canvass sufficient submissions for making a determination of the type of

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7 At 1192

claim she was dealing with.

Order

58] The award is reviewed and set aside only in respect of the arbitrator's finding that the applicant's dispute over the non-payment of his performance bonus in the 2008/2009 financial year was not an unfair labour practice.

59] The matter is remitted back to the first respondent to set it down before another arbitrator other than the second respondent, to determine if the dispute concerning the non payment of a performance bonus to the applicant for the 2008/2009 financial year was a dispute over a benefit in terms of section 186(2)(a) of the LRA, after hearing further submissions and, if necessary, evidence on this issue.

60] In the event the arbitrator appointed to determine this question finds that the dispute falls within the provisions of section 186(2)(a), the arbitrator must proceed to arbitrate the merits of the applicant's claim on this issue.

61] No order is made as to costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	**In person**
FIRST RESPONDENT:	**M Mphaga**
	Instructed by the State Attorney (Pretoria)