IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1148/2014

In the matter between:

RONALD MAILE **Applicant**

and

FOSKOR (PTY) LTD **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

NELSON LEDWABA *N.O* **Third Respondent**

Heard: **29 May 2018**

Delivered: **2 April 2019**

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JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The applicant (Mr Maile) seeks an order reviewing and setting aside the arbitration award issued by the third respondent (Commissioner) dated 24 April 2014 in terms of which his claim of an alleged unfair labour practice against the first respondent (Foskor) was dismissed.

[2] The review application was filed some three days outside of the statutory time periods. Foskor did not oppose the application for condonation in that regard, and given the obviously short period of the delay and the explanation proffered in that regard, condonation ought to be granted.

[3] Central to Maile's claim of an alleged unfair labour practice was whether he was entitled to a retainer/scarcity allowance introduced by Foskor at the workplace in 2008, which was applicable to technical trainers and as further extended to other trainers in 2011.

[4] Foskor introduced a scarcity allowance at the workplace in 2008 as a means to increase remuneration, and to attract and retain scarce and critical skills in the technical fields such as technical operators, artisans, technicians, planners, technologists, engineers, and technical trainers. The scheme was then in 2011 extended to operations trainers where Maine was employed as one of the SHEQ trainers. As at 1 April 2013, employees who qualified were paid R5000.00.

[5] Maine left the employ of Foskor in March 2017. He had started his employment with Foskor in 1994 as an Artisan. He moved up the ranks and was employed as SHEQ Trainer since 2010. Despite the scarcity skills allowance having been extended to the operations trainers, he was nonetheless excluded, hence he lodged an internal grievance in September 2013.

[6] The outcome of that grievance was essentially that Maile was not paid the scarcity allowance due to the fact that his remuneration was already significantly more than that of other SHEQ trainers and the rest of the operations trainers who were granted the allowance from November 2011. It

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was further established that as at October 2013, Maile's total remuneration was still more than that of his fellow trainers despite the fact that the other trainers' remuneration also included the scarcity allowance.

The arbitration proceedings and the award:

[7] Having referred an alleged unfair labour practice dispute to the Commission for Conciliation Mediation and Arbitration (CCMA), and when attempts at conciliation failed, the dispute came before the Commissioner for arbitration, where Maile's case was as follows;

7.1 He seeks to claim the scarcity allowance from 2011 when it was extended to other trainers. The basis of his claim was that other employees, *viz* Messrs Xulu and Vorster, who were employed in similar positions had benefitted from the scarcity allowance scheme, whilst he was excluded.

7.2 His contention was that the scarcity allowance was not based on employees' remuneration but was granted across the board in identified areas. He reiterated that some of those trainers at his level were paid more than him and were still granted the allowance. This was despite it being put to him under cross-examination and his concessions that other employees (Moshweu and Xulu) who were employed in the same position as Maile, earned less than him even if they were paid the allowance.

[8] Foskor's contentions were that the scheme was implemented in order to ensure that technical operators were paid a competent salary as opposed to getting an increase. After the scheme was extended to operational trainers, and upon Maile having lodged a grievance, investigations have revealed that Maine's salary (cash component and cost to company) was way above that of other trainers, which would have meant that if he benefitted from the scheme, this would have widened the gap between his salary and that of other SHEQ trainers at his level, thus making it unfair. The reason that Maile's package was higher than the others was that he was previously employed as a Superintendent SHEQ, and when his position became redundant, he was

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offered a lower position as an alternative, but had retained his then salary. It was then decided that he could not be eligible to receive the scarcity allowance.

[9] In substantiation of the above contentions, the evidence of Alexander Liversage on Foskor's behalf was that;

9.1 He was employed as the Specialists Operational Benefits responsible for benefits at Foskor. Foskor has three categories of trainers, *viz*, SHEQ Trainers, Operational Trainers, and Technical Trainers.

9.2 Liversage made reference to remuneration earned by other trainers such as Messrs Moshweu, Makhoba and Vorster and contended that the differences in their salary/remuneration as opposed to that of Maile was due to a variety of factors including different circumstances pertaining to their appointments such as moving up the ranks; salaries having changed over the years with increments; or that those employees could have negotiated their salaries at the time of their employment.

9.3 Maile according to Liversage was not granted the scarcity allowance as he was already highly remunerated before the allowance was introduced to other trainers in 2011, which was meant to increase salaries of trainers without increasing the cost to company component.

[10] The Commissioner having heard the evidence concluded that;

10.1 It should be accepted that on the evidence of Liversage, Maile earned more than the other SHEQ Trainer (Xulu) and other technical trainers.

10.2 In regards to whether Maile was a qualified Artisan or not, any evidence in that regard ought to be disregarded as it only came to light during his re-examination. The Commissioner further rejected the evidence in that regard as it was introduced without an application, and further since Foskor had not had an opportunity to rebut it.

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10.3 Maile's claim was not based on his contract of employment nor was it part of his remuneration, and that this was however a 'right and a benefit acquired subsequent to a policy discussion on the allowance'.

10.4 Liversage's evidence in regard to the background as to how the scheme came about remained unchallenged, and Maile did not fall within the category of the recipients, and thus could not demonstrate any unfairness in implementing the scheme.

10.5 Maile could not demonstrate that he was entitled to the allowance. There was nothing to suggest that besides being a trainer, he had executed similar work requiring the same tools of trade and benefits, and there was no unfairness established as he had earned way above most of his counterparts.

<u>The grounds of review:</u>

[11] Maile seeks to have the Commissioner's award reviewed and set aside on a variety of grounds including that;

11.1 The findings are defective and unreasonable.

11.2 The finding that no unfair labour practice was committed simply because he happened to earn more than what was paid to other technical trainers constituted misconduct and a failure by the Commissioner to apply his mind to the evidence.

11.3 The Commissioner ignored the evidence that he had skills required in order to qualify for the allowance, and had assumed without evidence that he did not have the required skills to execute his duties.

11.4 The Commissioner's decision to ignore evidence in re-examination which confirmed that Maile had the necessary qualifications for the payment of the allowance was defective, unreasonable and a misdirection, particularly since such evidence was not new evidence.

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11.5 The Commissioner's finding that the claim pertained to a benefit acquired from Foskor's policy is contradictory and demonstrated a failure to appreciate the issues for determination.

11.6 The Commissioner considered irrelevant evidence that he earned more than other trainers, and ignored the fact that an employee did not have to earn less than one's colleagues to be entitled to the allowance

[12] Foskor submitted that the award was not reviewable as the Commissioner's findings were rational, reasonable and consistent with the material before him. It was further submitted that the Commissioner considered all the relevant material before him, including the reasons for introducing the allowance and the manner with which Foskor had exercised its discretion. It was contended that the Commissioner reached a decision that cannot be said to be one which is unreasonable.

[13] It was further denied that the Commissioner committed misconduct by finding that Foskor's conduct was not an unfair labour practice; or that he failed to apply his mind to certain material evidence or issues before him. It was denied that the Commissioner had considered irrelevant evidence such as Maile's earnings; or that he ignored material facts such as the evidence of Maile's skills and qualifications as an artisan, which in any event was irrelevant to the payment of the allowance. It was submitted that Maile's case was not that he was entitled to an allowance by virtue of it being due and payable to artisans since 2008, but that he was entitled to the allowance as a SHEQ trainer and by it having been extended to trainers in 2011.

<u>Evaluation:</u>

[14] The test on review is trite as re-stated in *South African Breweries (Pty) Ltd v Hansen and Others*[1] in the following terms;

> 'The test that the Labour Court is required to apply in a review of an arbitrator's award was settled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*. It is that

[1] (2017) 38 ILJ 1766 (LAC); [2017] 9 BLLR 892 (LAC) at paragraphs 10 - 11

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an arbitration award is reviewable if the decision reached by the arbitrator was one that a reasonable decision-maker could not reach. Essentially, this test requires the Labour Court, sitting as a court of review, to enquire whether the decision under review is one that a reasonable decision-maker could not reach on the evidential material available. On this test, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required in reviews, provided that the result is one that a reasonable decision-maker could have reached. This was clarified by the Supreme Court of Appeal in *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)* as follows;

> 'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii) …the Arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable Arbitrator could not reach on all the material that was before the Arbitrator. Material errors of fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (Gold Fields),* this Court refined the *Sidumo* test by introducing *a* two-stage enquiry. In short, this requires the Labour Court to consider two issues: The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. The second is whether the applicant has established that the irregularity is material to the outcome by demonstrating that the outcome would have been different having regard to the evidence before the arbitrator. An arbitration award will, therefore, be considered to be reasonable when there is a material connection between the evidence and the result.' (Citations omitted)

[15] To the extent that Maile considered the non-payment of the allowance as an unfair labour practice, section 186(2)(a) of the Labour Relations Act, which was relied upon in referring the dispute to the CCMA provides that:

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(2) **'Unfair labour practice**' means any unfair act or omission that arises between an employer and an employee involving—

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee."

[16] In his referral before the CCMA, Maile alleged that; *'The employee is not getting company benefits in the form of scarcity allowance'*. To the extent that this is the case, it can be accepted on the authority of *Apollo Tyres South Africa (Pty) Ltd v CCMA*[2] that since the scarcity allowance came about as a result of Foskor's policy or practice of rewarding scarce skills with the objective of retaining them, and further since the payment of any such an allowance was discretionary as evinced from the outcome of the grievance hearing, the allowance is deemed to be a benefit. It follows that the

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[2] [2013] ZALAC 3; [2013 BLLR 434 (LAC); (2013) 34 ILJ 1120 LAC Where it was held that;

"[50] In *IMATU obo Venter v Umhlathuze Municipality,* the Labour Court followed the *Protekon* approach. It then concluded that:

'The more plausible interpretation is that the term "benefits" was intended to refer to advantages conferred on employees which did not originate from contractual or statutory entitlements, but which have been granted at the employer's discretion.'

It seems to me that the court in *IMATU* was concerned that if benefits include a statutory or contractual right or entitlement, the right to strike may be curtailed. As pointed out above employees will have an election to strike or go the arbitration/adjudication route in respect of many rights disputes. In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu or ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186 (2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. In as far as *Hospersa, GS4 Security* and *Scheepers* postulate a different approach they are, with respect, wrong.

[51] This approach will also put paid to the anomaly created by *Hospersa.* An employee who wants to use the unfair labour practice jurisdiction in section 186 (2) (a) relating to promotion or training does not have to show that he or she has a right to promotion or training in order to have a remedy when the fairness of the employer's conduct relating to such promotion (or non-promotion) or training is challenged. On the other hand where an employee wants to use the same remedy in relation to the provision of benefits such an employee has to show that he or she has a right or entitlement sourced in contract or statute to such benefit."

Commissioner's findings that the allowance arose out of a practice rather than out of the contract of employment cannot be faulted.

[17] The onus to establish that conduct complained of constitutes an unfair labour practice within the meaning of section 186(2) of the LRA rests on the employee[3]. The employee must therefore be able to lay the evidentiary foundation for his or her claim of an unfair labour practice.

[18] In this case, once it was accepted that the scarcity skills allowance was a benefit payable at the discretion of the employer, and that all the trainers except for Maile were paid such an allowance, the next enquiry was whether Foskor acted fairly[4] in exercising that discretion in depriving Maile of the allowance[5].

[19] In considering whether Foskor exercised its discretion fairly in denying Maile the allowance, the starting point is an examination of the scheme, its objectives, and criteria (if any), in implementing it. It needs to be said from the onset that the basis upon which the allowance in this case was payable and the criteria used in distinguishing Maile from the other trainers is not immediately discernible. This is so in that there is no written policy regulating

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[3] See *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) at para 19; and *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 248 (LAC) at para 73, where it was held that;

> "…An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2(1)(b) matters, the Act does not say so because it was not intended to be so..."

[4] See *Ehlanzeni District Municipality v South African Local Government Bargaining Council & others* (JR1163/10) [2014] ZALCJHB 368 (30 September 2014) at para [30], where it was held that;

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

[5]See *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC) at para 29; *Public Servants Association obo Motsekoa v Department of Sports, Arts and Culture (*2015) 36 *ILJ* 808 (BCA) ; *Apollo Tyres SA (Pty) Ltd* at para 47, where it was held that;

> '… Therefore even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits such conduct will be subject to scrutiny, by the CCMA, in terms of s 186(2)(a).'

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the granting and payment of the allowance. It was however not seriously disputed that the allowance was granted at Foskor's discretion.

[20] What is however clear is that the allowance came about as a result of a motivation to increase the remuneration of the trainers without increasing costs to company. The allowance was granted to all the trainers with the objective of retaining them as they were skilled. The department in which Maile is employed consisted of 13 trainers categorised as 6 Technical Trainers who had all received the scarcity allowance since 2008; 5 Operations Trainers who received the allowance from November 2011, and two SHEQ Trainers consisting of Maile and Xulu. Xulu received the allowance in the amount of R5000.00 as at October 2013, whilst Maile did not.

[21] Two main reasons were advanced for not paying Maile the allowance as evident from the grievance outcome[6]. In substantiation of these reasons, Foskor had at the arbitration proceedings, referred to various payslips of the other trainers and those of Maile, which reflected that the cash components of other trainers, *viz*, Xulu, Mosweu, Sekgobela, Paulse and Roos, even with the R5000.00 allowance, were still significantly lower than that of Maile. Even if comparisons were to be made with the only other SHEQ Trainer, Xulu, the latter's cost to company as already indicated was also lower than that of Maile. That evidence, despite Maile's protestations that he had a less cash component, was incontrovertible.

[22] In the light of the above reasons, the next enquiry would be to determine whether any criteria were used in granting the allowance. In this regard, on Liversage's version, the purpose of the allowance was to attract and retain technical staff due to skills shortage[7]. He further added that at the time that

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[6] Pages 26 – 27 of the Applicant's Bundle of Documents, where it was stated that;

11. "Upon investigation, it was established that Mr Maile was not paid the scarcity allowance due to the fact that his remuneration was already more than that of other SHEQ Trainers and the rest of the operations trainers who started getting the allowance since November 2011;
12. As at November 2013, Mr Maile's total remuneration was still more than that of his fellow trainers referred to in paragraph 11 above- despite the fact that the other trainers' remuneration included the scarcity allowance."

[7] Transcribed record Lines 1 – 6 P69.

the scheme was extended, Maile was not working as an Artisan to qualify for the allowance.

[23] It can be accepted from the record and the evidence presented before the Commissioner that the reasons for implementing the scheme in 2008 and as further extended in 2011 were not placed in dispute. The only difficulty however with Liversage's evidence, is that the fact that Maile was not an Artisan at the time the scheme was extended to other trainers was not the reason he was denied the allowance as evident from the grievance outcome. The contention that Maile was not an Artisan is equally without merit as it was always his case that he was a qualified Artisan[8]. The Commissioner's conclusions therefore that evidence in regards to Maile being an Artisan was raised for the first time under re-examination were not supported by the evidence before him. That issue was raised by his representative in his opening remarks and also attested to by him in his own evidence.

[24] From the above, it follows that the Commissioner's further conclusions that Maile was not granted the allowance because of his skills or lack thereof, or that he was not an Artisan at the time the scheme was implemented or extended is equally a misdirection, as it was never Foskor's case that skills or lack thereof was a consideration.

[25] Any further reliance by Foskor on the scheme having been extended to trainers according to categories is equally not sustainable, as Xulu, who was a SHEQ Trainer, was granted the allowance. The scheme was implemented across the board to the trainers without any further qualification and granted at Foskor's discretion. In the end, the Commissioner's findings that the onus was on Maile to prove that he had the necessary skills required for the granting of the allowance, or that Maile did not fall within the category of recipients are clearly without foundation and not supported by the evidence before him. Furthermore, in the light of the reasons given in the grievance outcome which laid the basis of an alleged unfair labour practice claim, Foskor could not adapt its reasons for denying Maile the allowance as its case progressed at the arbitration proceedings.

[8] See Lines 5 – 7 at page 6; Lines 11 – 12 at page 16; Lines 5-8 at page 37 Transcribed Record

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[26] In the light of the Commissioner's flawed reasoning and the errors and irregularities pointed out, the issue is whether these flaws, when assessed and determined, can be said to have a distorting effect on his conception of the enquiry, the determination of the issues before him, and the ultimate outcome[9]. As already pointed out and based on what was said in *Herholdt*, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required in reviews, provided that the result is one that a reasonable decision-maker could have reached.

[27] The determination of the issues then turned on whether Foskor's decision not to grant Maile the allowance on the basis of his remuneration being more than that of other SHEQ Trainers and the rest of the operations trainers who started getting the allowance since November 2011, and further due to his total remuneration being more than that of his fellow trainers as at November 2013, despite the fact that the other trainers' remuneration included the scarcity allowance, was fair or not.

[28] Maile considered his exclusion in the light the explanation proffered by Foskor as being unfair as he was part of a category of employees identified as beneficiaries. The issue however in the light of the common cause facts that other trainers were granted the allowance is whether Foskor's discretion in that regard in excluding him was exercised fairly. The Commissioner in arriving at his decision glibly addressed this issue by stating that; *'I am not convinced that the Applicant backed his assertions taking into cognisance the fact that he earned way above most of his counterparts'*

[29] Ordinarily, and to the extent that the Commissioner had not in detail dealt with the question whether the discretion in question was exercised fairly or not, there would have been cause to remit the matter back to the CCMA. It was however argued on behalf of Maile, and correctly so, that all the material is before the Court for it to determine the matter. In the circumstances, no purpose would be served by remitting the matter back to the CCMA, particularly since it is for the review court to determine whether the irregularities pointed out are so gross as to have led to an unreasonable

[9] See *Head of the Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC) at para 31

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outcome. As was stated in *Herholdt*, errors of fact, are not in and of themselves sufficient for an arbitration award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

[30] In determining whether in excluding Maile from the benefit of the allowance Foskor exercised its discretion fairly, and further based on the reasons and explanation proffered, it is my view that it was at that point that Maile's claim collapsed for the following reasons;

30.1 Notwithstanding Maile's protestations, the payslips of other individuals referred to at the arbitration proceedings clearly pointed that he earned significantly far more than the other trainers even if the latter benefitted from the allowance. In this regard, his cash component and cost to company were higher than the other trainers.

30.2 The fairness of the discretion exercised has to be assessed within the context of the primary purpose of implementing the allowance, which was primarily to retain scare skills. That issue was not in dispute. A second consideration was that the scheme was implemented in order to increase the remuneration of trainers without increasing their cost to company. Third, it was Foskor's case that to have granted Maile the allowance, it would have further increased his cost to company, and also created an unfair position for other trainers as he would have earned even far higher than them.

30.3 From Maile's evidence, I did not understand his case to be that he disputed the rationale that the allowance would have increased his cost to company and also created unfairness as he would have earned far higher than his colleagues. His main contention was that one's remuneration was not or should not have been a consideration when granting the allowance. This however cannot be so, in that, if he was granted the allowance, that would have resulted in an increase in his cash component and cost to company. This would clearly not only have defeated the purpose of the scheme, but also created an even wider gap between his cash component and that of colleagues.

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30.4 In the light of the above, it should be concluded that there was a rational basis for excluding Maile from benefitting from the allowance, and if he could not successfully attack the basis of the exercise of the discretion in not granting him the allowance, then there would be no basis for any conclusion to be reached that the discretion was exercised unfairly, arbitrarily, capriciously or in bad faith.

30.5 Thus, notwithstanding the flawed reasoning by the Commissioner and the errors and irregularities pointed out, his finding ultimately that Maile had not demonstrated that Foskor's conduct amounted to an unfair labour practice falls within a band of reasonableness.

[31] In the light of the above conclusions, it follows that the application for review ought to be dismissed. I have further had regard to the requirements of law and fairness in regards to the issue of costs. I am of the view that the facts and circumstances of this case do not warrant a costs order.

[32] Accordingly, the following order is made;

<u>Order:</u>

1. The late filing of the review application is condoned.

2. The Applicant's application to review and set aside the arbitration award issued by the Third Respondent is dismissed

3. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

<u>APPEARANCES:</u>

For the Applicant: P Mashishi

Instructed by: E.S Makinta Attorneys

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For the First Respondent:	M Edwards
Instructed by:	Bowman Gilfillan INC

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