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EMPLOYMENT ALERT

WILL THE BENEFIT SAGA EVER END?

The development of the law relating to benefits has been interesting for litigants. It may make for interesting jurisprudential debate. However, for litigants it has become costly, time consuming and frustrating.

The Labour Appeal Court (LAC) has handed down judgments concerning the issue of 'what is a benefit' on no less than three occasions. The Labour Court (Court) has, it seems, attempted to analyse itself out of these judgments.

The latest decision in the saga as to what is a benefit was handed down by Steenkamp J in the matter of *SAPO v CCMA and others C293/2001 (LC) (unreported)*.

The CCMA does not have a general jurisdiction to entertain any disputes concerning the fairness of any employer conduct. An employee referring an unfair labour practice dispute must demonstrate that it falls within in terms of s186 of the Labour Relations Act, No 66 of 1995 (LRA). The LAC (in the seminal decisions of *Hospersa & another v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC)* and *Gauteng Provinsiale Administrasie v Scheepers & others [2007] 7 BLR 756 (LAC)*) found that in order for a payment or similar consideration to qualify as a 'benefit' - as envisaged by the LRA - it must arise by virtue of statute, collective agreement or other contract. If not, the CCMA lacks jurisdiction and cannot arbitrate the dispute. The parties must use their economic power to resolve the issue. Thus, employees seeking a new benefit (that does not exist in statute or contract) may strike in support of a demand that they are granted such a right. For example, employees seeking an employer contribution for medical aid may strike in support of a demand that their employer grant them the right to payment for medical aid where there is no statute or contract that grants them such a right at present.

Understandably, the Court has expressed doubt over this interpretation of the law by the LAC. A single employee that does not yet have the statutory or contractual right to a benefit will never be able to go on strike in support of his or her demand for the creation of that right. A strike, by definition, involves industrial action by more than one person. Refusal to work or a retardation of work by one person is not a strike. In the decision of *Eskom v Marshall [2003] 1 BLLR 12 (LC)*, the employee claimed that he was entitled to a separation package on resignation. He claimed that Eskom acted unfairly by failing to provide him with the package. The Court held that it was bound to follow the decision of the LAC in *Hospersa*. Therefore, as the employee did not have a statutory or contractual right to the package, the CCMA did not have jurisdiction to determine the dispute.

In the matter of *Protekon v CCMA and others [2005] 7 BLLR 703 (LC)* the judge reasoned that he was not bound to follow *Hospersa* based on the facts of the matter before him. He held that travel concessions (although it did not arise by virtue of contract, statute or collective agreements) were subject to be arbitrated by the CCMA under the guise of a benefit. The judge identified the issue regarding the utility of the benefits section if the interpretation of the LAC was adopted. In this regard, the Court reasoned, why would an employee need to approach the CCMA if he had a contractual, or statutory right to a 'benefit' when he could simply approach the High Court or Labour Court. Having noted this dilemma, the Court found that the terms benefit cannot be restrictively construed and must mean something different. The Court therefore stated that:

"Disputes over the provision of benefits may fall into two clearly identifiable categories: the first is where the issue in dispute concerns a demand by employees that certain benefits be granted (or reinstated) irrespective whether the employer's conduct in not agreeing to grant the benefit (or in removing it) is considered to be unfair; the second is where the issue in dispute is the fairness of the employer's conduct. No party has a right to refer disputes in the first category to arbitration, and there is consequently no barrier to industrial action at the point of impasse. The converse is true of disputes in the second category."

continued

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This is the manner in which the Court worked around the decision of the LAC. Despite the decision in *Protekon,* the LAC confirmed in *G4S Security Services v NASGAWU & others DA 3/08 (LAC) (unreported)*, the approach taken in *Hospersa*. After quoting extensively from *Hospersa*, the Court held:

"My understanding of what Mogoeng AJA is *inter alia* saying is that, in order for the respondents to bring a successful claim under Item 2(1)(b) of Schedule 7, they have to show that they have a right arising *ex contractu* [contractually] or *ex lege* [statutorily]. It is only then that, having established the right, the commissioner would have jurisdiction to entertain the dispute as a dispute of right."

In *IMATU obo Vorster v Umhlatuze Municipality D64/09 (LC) (unreported)* the Court did not follow the decisions of the LAC in *Hospersa*. As the *G4S* judgment was unreported, it is likely that it was not brought to the Court's attention.

However, Steenkamp J in *SAPO* followed the road traversed by the Court in *Eskom v Marshall* by saying that persuasive as the discussion by Lagrange J in *Umhlatuze Municipality* is, he considers himself bound by the authority of the LAC.

It is of importance to all employers and employees that any confusion on this issue be resolved. The law on this issue is settled, despite the concerns raised by the Court in the cases referred to above. The LAC decisions remain the authoritative law on the matter. The most recent Court authority on this point has accepted as much. The CCMA may only arbitrate a benefits dispute if it arises by virtue of statute, contract or collective agreement. If it does not, the parties must use their economic weapons to create rights sought. Until these rights have been created, employees cannot use the provisions of s186(2) to create these rights via the CCMA.

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