

EMPLOYMENT ALERT

IN THIS ISSUE

ARE COMPANIES LIABLE BY LAW TO PAY THEIR EMPLOYEES BONUSES?

The short answer: if payment of a bonus is a guaranteed right, either in terms of an employee's contract of employment, an employer's remuneration or bonus policy, or perhaps an industry regulated Bargaining Council Main Agreement, and the bonus is not dependent on the exercise of any discretion at the instance of the employer or the attainment of individual or company related performance objectives, then such a bonus should ordinarily be payable. Absent such a right, there is no legislation within South Africa which obliges employers to pay bonuses to its employees. Hence, the right must either be agreed at the time of contracting or bargained for, either individually or collectively, and subsequently agreed to.

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The majority of bonus schemes are made subject to an employer's discretion in assessing the extent to which an employee may have achieved previously agreed upon deliverables giving rise to payment of a bonus or a portion thereof.

It is now settled law that the payment of a performance bonus constitutes a "benefit" as contemplated by s186(2)(a) of the Labour Relations Act, 1995.



The short answer: if payment of a bonus is a guaranteed right, either in terms of an employee's contract of employment, an employer's remuneration or bonus policy, or perhaps an industry regulated Bargaining Council Main Agreement, and the bonus is not dependent on the exercise of any discretion at the instance of the employer or the attainment of individual or company related performance objectives, then such a bonus should ordinarily be payable. Absent such a right, there is no legislation within South Africa which obliges employers to pay bonuses to its employees. Hence, the right must either be agreed at the time of contracting or bargained for, either individually or collectively, and subsequently agreed to.

Uncertainty regarding the payment of bonuses is usually far more prevalent in cases where the employer reserves for itself the exercise of a discretion as to whether a bonus should be paid at all, alternatively, the calculation and quantum thereof. Indeed, arguably the majority of bonus schemes are made subject to an employer's discretion in assessing the extent to which an employee (or a team, department or the employer as a whole) may have achieved previously agreed upon deliverables giving rise to payment of a bonus or a portion thereof. In circumstances where employees may feel aggrieved by the manner in which an employer may have exercised such a discretion, the following constitutes a brief summary of the applicable guidelines in law which govern the exercise of an employer's discretion.

It is now settled law that the payment of a performance bonus constitutes a "benefit" as contemplated by s186(2)(a) of the Labour Relations Act, 1995 (LRA), and

the dicta in *Apollo Tyres v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 1120 (LAC) at para 47.

It is furthermore trite that in employment law terms, and under the auspices of the unfair labour practice jurisdiction, there is no such thing as an unfettered discretion; the exercise of the discretion must always be subject to being tested against basic tenets of fairness (see *Solidarity obo K Oelofse v Armscor (SOC) Ltd & Others*, case number JR 2004/15 at para 28). In *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC) it was said:

"Even if a benefit is subject to conditions and the exercise of a discretion, an employee could still, as part of the unfair labour practice proceedings, seek to have instances where the employee then did not receive such benefit adjudicated. So therefore, even if the benefit is not a guaranteed contractual

Michael Yeates was named the exclusive South African winner of the **ILO Client Choice Awards 2015 – 2016** in the category Employment and Benefits as well as in **2018** in the Immigration category.



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CONTINUED

It has been found that even if an employer may have been wrong in interpreting and applying bonus criteria, this would not automatically result in a finding that the exercise of its discretion had been unfair.



right per se, the employee could still claim same on the basis of an unfair labour practice if the employee could show that the employee was unfairly deprived of same. An example would be where an employer must exercise a discretion to decide if such benefit accrues to an employee, and exercises such discretion unfairly."

In relation to the question of fairness, the court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 11, held that the exercise of a discretion may be open to challenge if it:

"... had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

In *Apollo Tyres* the Court said the following in relation to fairness:

"... unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended."

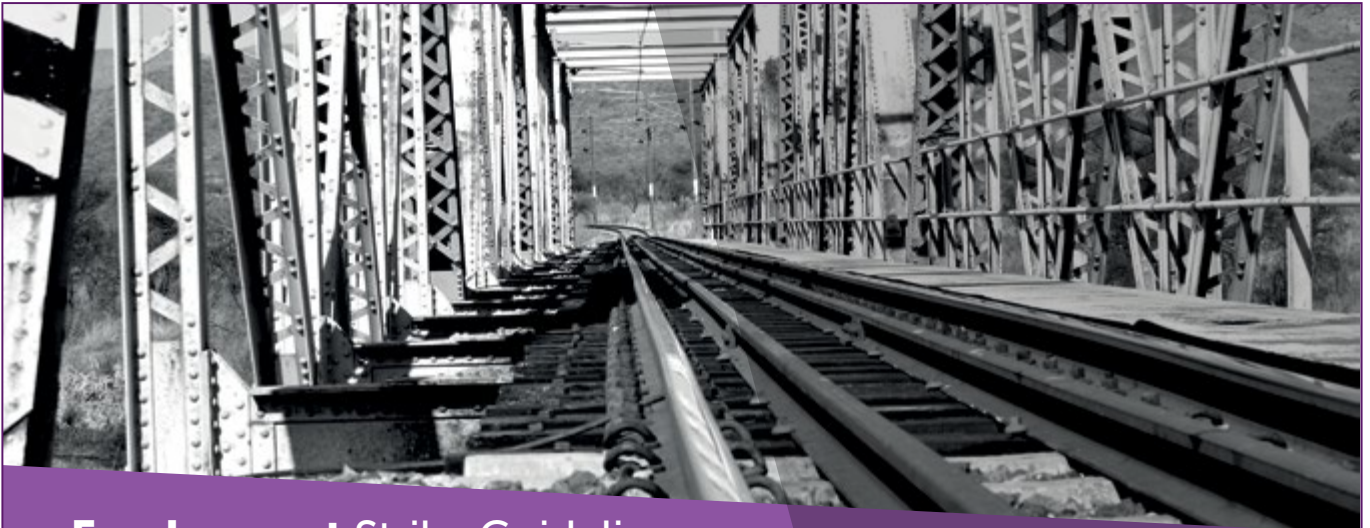
It follows that in those instances where an aggrieved employee wishes to challenge the exercise of an employer's discretion in relation to the payment or calculation of a bonus, the employee would bear the onus of showing that the employer, in exercising such discretion, acted irrationally, capriciously, grossly unreasonably or *mala fide*. In those instances where an employer is found to have exercised its discretion inconsistently amount different employees, or with a clear intention of favouring or prejudicing one employee over another, this would in all likelihood assist the aggrieved employee in the discharge of their onus.

Importantly, however, it has been found that even if an employer may have been wrong in interpreting and applying bonus criteria, this would not automatically result in a finding that the exercise of its discretion had been unfair (see *Solidarity obo K Oelofse v Armscor (SOC) Ltd & Others* at para 34). What is required to be shown, is proof of some form of behaviour on the part of the employer which meets the aforementioned test of irrational, capricious, grossly unreasonable or *mala fide*.

Gavin Stansfield



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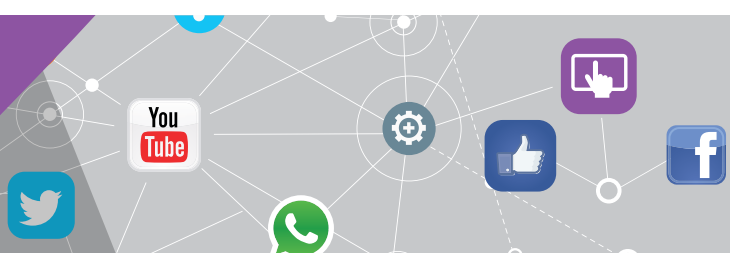
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