DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

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THE BENEFITS SAGA: IS IT FINALLY RESOLVED?

The definition of a 'benefit' as contemplated by s186(2)(a) of the Labour Relations Act, No 66 of 1995 (LRA) has plagued our courts since the promulgation of the LRA in 1995.

The question as to the definition of a benefit is has been the subject of at least three Labour Appeal Court (LAC) decisions. We now have a fourth decision that emanates from the LAC interpreting the word 'benefit'. Three LAC decisions, the most recent being as late as 2010, confirmed that in order for a person to lodge a dispute under s186(2)(a) of the LRA, either at the CCMA or a Bargaining Council, the employee must be able to illustrate that he/she has a right to the benefit that arises by virtue of contract, statute or collective agreement. If the employee is unable to illustrate that the benefit arises by virtue of contract, statute or collective agreement the CCMA and/or the Bargaining Council will not have the power to determine the dispute. The employee will have to embark on an industrial action in order to secure the benefit, or to ensure that he/she was dealt with fairly.

Understandably, this approach was met by criticism by the CCMA, Bargaining Councils and the Labour Court. However, their hands were tied as a result of the decisions of at least three Labour Appeal Courts.

In the matter of *Apollo Tyres South Africa (Pty) Limited v CCMA & Others* (unreported) handed down on 21 February 2013, the LAC broke ranks with its previous decisions. The Court indicated that earlier decisions defining a benefit were influenced by "policy considerations in order to keep the distinction between disputes of right and conflicts of interests pure and separate compartments".

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The LAC opted to follow the Labour Court in their decision in *Protekon (Pty) Limited v CCMA & Others (2005) 26 ILJ 1105 (LC)*. In essence this case held that disputes over the provision of benefits may fall in to two categories.

First, where the dispute concerns a demand by employees that their benefits are granted or reinstated irrespective of whether the employee's conduct in not agreeing to grant or in removing the benefit is considered to be unfair. This kind of dispute can be settled by way of industrial action.

Secondly, the dispute may concern the fairness of the employer's conduct. This kind of dispute must be settled by way of adjudication. The LAC, having endorsed the approach adopted in *Protekon* will certainly see a flood of disputes that are now lodged at the CCMA and Bargaining Council.

A Bargaining Council or the CCMA must, when determining whether to exercise jurisdiction or whether to exercise the power to adjudicate a dispute regarding benefits, first determine whether the claim is one where the employee is attempting to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided for by the employer. If the employee's claim is so based, the CCMA and/or Bargaining

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Council do not have the power to determine the dispute. The employee must embark on industrial action in order to persuade the employee to grant him/her the new benefit, new forms of remuneration or introduce new policies.

However, the CCMA or Bargaining Council may adjudicate a benefit's dispute in light of the *Apollo* decision in two instances.

- Where the employer fails to comply with the obligation that it has towards an employee.
- Where the employer has provided the employee with an advantage or privilege that has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion.

Some examples of disputes that may now be adjudicated by the CCMA are:

- A bonus scheme where the employer retains a discretion to grant a bonus or not.
- A car allowance scheme where the employer has the discretion whether to grant a car allowance or not.

Simply put, the CCMA or Bargaining Council will now have the power to scrutinise any discretion that the employer has under a policy, contract, practice or collective agreement. By this decision, we may find that an employer's power may further be eroded.

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