IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg Case no J1907/98

In the matter between:

THE NORTHERN CAPE PROVINCIAL ADMINISTRATION **Applicant**

and

COMMISSIONER E HAMBIDGE NO **First respondent**

HOSPERSA **Second respondent**

ROOS, FREDERICA **Third respondent**

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JUDGMENT

LANDMAN J:

1. Ms Roos was a nursing sister employed at the Gordonia Hospital by the Northern Cape Provincial Administration. She is a civil servant. She was asked to act as matron (nursing service manager) for the period 7 August 1995 to 29 August 1997. She was not paid for acting in this higher rank. She applied for this post when it was advertised but was turned down. This was when she ceased to act in the post.

2. She was unhappy about not being paid for acting as the matron and applied for a conciliation board in terms of the Public Service

Bargaining council agreement. See item 15 of the 7th Schedule to the Labour Relations Act 66 of 1995 (the Act). She alleged that she was the victim of an unfair labour practice concerning the non-payment of a benefit. A conciliation board was not convened. Consequently Ms Roos referred a dispute to the CCMA for arbitration.

3. A commissioner, the first respondent, was appointed to arbitrate the dispute. She found that the dispute related to an alleged unfair labour practice in terms of item 2(1)(b) of the 7th Schedule to the Act and not to a matter of mutual interest. She concluded that she was in any event not bound by the collective agreement (of which the Staff Code, which indicated that officials acting in a higher post had no claim to increased salary, was a part) and found that the employer had committed an unfair labour practice. She ordered the employer to pay to Ms Roos: “an allowance in an amount which equals the difference in salary between her own position and the position she had been acting in for the period 11 November 1996 to August 1997".

4. The employer seeks to review the award of the commissioner in terms of s 145 of the Act on various grounds. I need only deal with some of them.

5. Before turning to the grounds of review I should state that this case was not approached on the basis that Ms Roos was engaged in an essential service, as prima facie, appears to be the case and for her dispute to be arbitrated in accordance with s 74 of the Act.

6. The first ground is that the commissioner lacked the jurisdiction to entertain the dispute concerning the alleged unfair labour practice. Mr Halgryn, who appeared for the employer, submitted that the Public Service Labour Relations Act of 1994 (Proclamation 105 of 1994) as modified by item 15 of the 7th Schedule to the Act is deemed to be a collective agreement. This is of course correct. See **T E Ngcobo v KwaZulu-Natal Health Services** (unreported, LC, D228/98). He contended that this agreement has it own dispute resolution mechanism. See ss 13 (read with s 21) and 18

of the collective agreement. In the face of the existence of these provisions it was impermissible for the CCMA to arbitrate the dispute. See s 24(2) of the Act. In my opinion there is no merit in this. The commissioner was not arbitrating in terms of the collective agreement she was arbitrating a dispute referred to her in terms of the LRA. See item 2(3) of the 7th Schedule to the Act. In any event it is clear that the dispute resolution mechanism in the collective agreement was inoperative and therefore, in terms of s 24(2) of the Act, the CCMA could attempt to conciliate or arbitrate the dispute.

7. The next attack was that the dispute concerned a matter of mutual interest and not a dispute about an unfair labour practice. The basis of this contention was founded on the definition of “mutual interest” in s 1 of the collective agreement read with s 13. The commissioner was not interpreting the collective agreement nor was she dealing with a dispute about its application. She was hearing a dispute concerning an alleged unfair labour practice. The definition of a matter of mutual interest in the collective agreement

(it includes:" ...employee compensation, remuneration and service benefits..") may assist in informing the concept as it is found in the Act but it cannot be decisive.

8. The commissioner was obliged to ask herself whether she had jurisdiction to entertain the matter. If the matter related to a dispute of mutual interest as contemplated by the Act, and was not a matter concerning an alleged unfair labour practice, she would not have jurisdiction. She found that she was not dealing with a matter of mutual interest.

9. Was the subject of the complaint a matter of mutual interest? The jurisdictional point impacts on the merits. I will deal with them together.

10. It was submitted that Ms Roos's complaint did not concern a benefit as contemplated in item 2(1)(b). The true meaning of the word "benefit" in this item is a vexed question. Its meaning is a matter of legal interpretation. A commissioner is not vested with

any power to determine the law subjectively and thus if a commissioner errs on a matter of law and the error is material to the decision, as it is in regard to jurisdiction, the award will be defective. The constitutional right to lawful and fair administrative process envisages that the decision-maker will apply the law properly and correctly. See s 33 read with item 23(2)(a) and (b) of the Schedule to the Constitution of the Republic of South Africa of 1996. Any deviation would, in my view, have to meet the test of justifiability set in s 36 of the Constitution. A private arbitrator may err in so far as the law is concerned, save as regards jurisdiction, as the parties have agreed to run the risk of the arbitrator being wrong in law. Not so parties who must submit by law to the decision of a CCMA arbitrator.

11. The commissioner had regard to the judgment in **Schoeman and another v Samsung Electronics (Pty) Ltd** (1997) 18 ILJ 1098 (LC). and stated:

12. I am of the opinion that the term `benefit' as found in Schedule 7, item 2(1)(b) of the LRA is inclusive of an acting

allowance.

13.

14. It is unnecessary for me to consider the meaning of the term benefit exhaustively. It was not argued in detail. For a useful compilation of the authorities and opinions on the meaning of benefit see **SA Chemical Workers Union v Longmile/Unitred** (1999) 20 ILJ 244 (CCMA) at 248-253.

15. A salary or wage or payment in kind is an essential element in a contract of service. See Basson et al **Essential Labour Law** Vol 1 22-23. The definition of remuneration read with the definition of employee in s 213 of the Act makes this clear. Remunerations in s 213 means: “any payment in money or kind or both in money or kind ....” remuneration is an essentialia of a contract of employment. Other rights or advantages or benefits accruing to an employee by agreement are termed naturalia to distinguish them from the essentialia of the contract of employment. Some naturalia are the subject of individual or collective bargaining. Others are conferred by law. In my view a benefit may be part of the naturalia.

It is not part of the essentialia. Some support for this distinction may be derived from the definition of fringe benefit in the Shorter Oxford Dictionary. It reads:

> Fringe benefit - a perquisite or benefit paid by an employer to supplement a money wage or salary.

e ILO **Wages - A Workers' Education Manual** (1988) 70 makes the point that a ge benefit is a supplement for which no work is done. Benedictus and Bercusson **bour Law** (1987) 158 speak of wages and non-wage benefits. The word benefit in m 2(1)(b) means, at least, a non-wage benefit. The decision of my sister Revelas n the **Samsung** case is to the same effect. She says at 1102J-1103A:

> 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 it is not. Remunerations is always a term and conditions of the employment contract.

17. It is unnecessary to refine a benefit further for the purposes of this case.

18. Mr Pio, who appeared for the second respondent and Ms Roos, submitted that the relief requested at the arbitration hearing was clearly a misnomer and should have been labelled compensation. This was submitted in the context of the remedy but it is precisely what ms Roos was complaining about. She wanted a monetary benefit for acting as matron.

19. In the instant case Ms Roos wanted to be paid for acting in the higher position; one carrying more responsibility. It certainly seems fair that she should be so paid. However a claim that an employer has acted unfairly by not paying the higher rate cannot be said to concern a benefit even if its receipt would be beneficial to the employee. Its is essentially a claim or a complaint that the complainant has not been paid more for a certain period for carrying extra responsibilities. It is a salary or wage issue. It is not about a benefit. It is about a matter of mutual interest. The interpretation by the commissioner is wrong in law. It was central to her decision. She did not have jurisdiction to entertain the dispute

and to decide it in the way she did.

20. Accordingly the review succeeds. Ms Roos was not unreasonable in opposing the relief sought. It was, so it was stated from the bar, in the nature of a test case. Cost should not be awarded against her.

21. The notice of motion which commenced these proceedings was signed on behalf of Andrew Levy and Associates (Pty) Ltd. It is common cause that this company has no rights of appearance in this court. This applies to the preparation of document and the conducting of pre-trial conferences. As the matter was of importance to the parties I was prepared to condone the irregularity. However I deem it fit to order that Andrew Levy and Associates (Pty) Ltd are not entitled to be paid for any services rendered in connection with litigation in this matter.

22. In the premises:

1. The award of the first respondent is hereby reviewed and set aside and replaced with an award that the employer did not commit an unfair labour practice in regard to Ms Roos.

2. There will be no order for costs.

3. Andrew Levy and Associates (Pty) Ltd are not entitled to be paid

for any services rendered in connection with litigation in this matter.

SIGNED AND DATED AT JOHANNESBURG THIS 24th DAY OF MARCH 1999.

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A A Landman

Judge of the Labour court

Date of hearing:	19 March 1999
Date of judgment:	24 March 1999
For applicant:	Adv L Halgryn instructed by Joubert Attorneys
For the third respondent:	Adv P C Pio