Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no:C823/2018

In the matter between:

BLOEM WATER	**Applicant**
And	
K NYARELI	**First Respondent**
M GOBUSANG	**Second Respondent**
DAVID FANAPI (*N.O.*)	**Third Respondent**
THE COMMISSION FOR MEDIATION, CONCILIATION & ARBITRATION	**Fourth Respondent**

Date of Set Down: 28 October 2020

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court

website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 23 November 2010[1]

Summary: (Review - unfair labour practice - benefits - vehicle allowance- arbitrator's failure to consider the practical implementation of the policy-exclusive focus on the wording of the policy-misdirection- Jurisdiction-condonation not required owing to ongoing nature of alleged unfair labour practice)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant ('Bloem Water'), seeks to review and set aside an arbitration award in which the arbitrator found that the first and second respondents, Mr K Nyareli and Ms M Gobusaeng ('Nyareli' and 'Gobusaeng', jointly referred to as 'the respondents'), where unfairly excluded from its motor vehicle allowance team benefit policy.

[2] The applicant has also applied for condonation for the late filing of the review application, which was nine days late. The respondent did not assist in their opposition to the condonation at the hearing of the arbitration and I am satisfied on a consideration of the extent of the delay, a reasonable explanation, and the lack of any material prejudice to the respondent that condonation should be granted.

The policy

[3] The policy in question, in effect from 11 May 2017, is entitled 'Vehicle Policy Travel and Subsistence Reimbursement'. Clause 3 of the policy states that its purpose is "to ensure that private and Bloem Water official vehicles, selected, acquired and used in ways that provide the best possible support to operations." Clause 7 of the policy reads:

[1] As varied on 27 October 2021

"7. POLICY

Bloem Water offers the following policy on vehicle schemes two different categories of employees and board members:

- A private vehicle is used with payments of compensation for kilometres travelled.
- Employees/Board member utilizing their own vehicle for official purposes.
- A pool vehicle is utilized for official purposes.'

[4] The policy specifies four types of schemes, namely:

4.1 Section 1- Employees participating in official scheme: This category applies to "employees qualified to participate in the vehicle scheme of the board [bands 7-8]". Under this scheme an employee is responsible for providing their own vehicle and different rates of allowance of up set out for different employee bands. The last category provides for a R 5000 per month allowance for "Plant Superintendents and other [entry and middle and 7]". Participants in this scheme may also claimed fuel and running costs based on distance covered on official business and a maximum amount of private use. In the provisions of the Section 1 scheme it was stated:

> "Employees must at all times provide their own transport may not utilize any of the scheme in the event that the vehicle is due for appraisal services.
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> CEO to consider and approve alternatives in special circumstances."

4.2 Section 2 - Board Members: This scheme reimburses board members for running and fixed costs of a vehicle.

4.3 Section 3 - Pool vehicles: Employees who do not qualify to participate in the board's vehicle scheme but require a vehicle for working purposes may have the use of a dedicated vehicle, stationed at an official venue, but use for private purposes is excluded. The employee must submit a monthly logbook of distances traveled.

4.4 Section 4 - Other: This scheme is available for employees and "external members" that do not qualify for any of the other schemes.

In terms of this scheme, an individual may be reimbursed for using their private vehicle for official purposes, subject to the use of their private vehicle for this purpose being approved.

The arbitrator's award

[5] Nyareli and Gabusaeng are Admin and Finance Officer and Supply Chain Officer respectively. Both are remunerated in band 7. They contended that they qualified for inclusion in the Section 1 scheme outlined above, and accordingly should have received the monthly allowance. They compared themselves to other colleagues on the same level who did participate in the scheme.

[6] The essence of the arbitrator's reasoning in concluding that the respondents were unfairly excluded from the scheme was that:

6.1 Other plant supervisors, entry and middle Band 7 employees who were on the same level as the respondent received the car allowance in terms of Section 1.

6.2 Despite oral evidence that the employer had a discretion whether to admit employees to the scheme under section 1, the policy itself made no mention of the exercise of any discretion, and if that had been the intention, it would have been clearly expressed in the policy. The employer's attempts to suggest that it had a discretion as to who qualified for the scheme was an afterthought.

6.3 He dismissed the suggestion made by one of the employer's witnesses, Mr O Stadler ('Stadler') that the extract from section 1 cited in paragraph 3.1 above indicated that the CEO had a discretion as to who received the benefit of that scheme. The CEO's discretion plainly referred to situations where the employee's vehicle was undergoing repairs.

6.4 Although evidence was led that traveling was a qualifying requirement for an employee to participate in the scheme, the employer's other witness, Mr T Kheane ('Khaeane'), testified that he never travelled but

did receive the allowance. Accordingly, there was no operational reason for not awarding the allowance to the respondents.

6.5 He also dismissed an argument that granting the benefits to the respondent would be wasteful expenditure in terms of the Public Finance Management Act ('PFMA'), since the PFMA could not be used to unfairly exclude employees from benefits enjoyed by others.

[7] As a remedy, the arbitrator ordered the employer to pay the allowance to the respondent with retrospective effect to the inception of the policy in May 2012, amounting to R 380, 333.36 for each respondent. He also found that qualified to participate in the scheme with effect from 1 August 2018.

Grounds of review

[8] Bloem Water's grounds of review, in short, are that the arbitrator:

8.1 while expressly acknowledging that the dispute was not an interpretation dispute misconstrued the issue as being one of interpreting the written policy;

8.2 in so doing, he found that if the policy did not clearly state that the employer has a discretion as to who qualified for the scheme and if the criteria for exercising a discretion were not set out in the policy document, then the employer had no discretion as to who qualified, and no criteria existed;

8.3 the arbitrator prevented its main witness, Ms S Meyer from testifying;

8.4 the arbitrator ignored the fact that 27 out of 60 employees in salary band 7 did not receive the benefit; and

8.5 the arbitrator failed to appreciate that Kheaene received the allowance as part of his remuneration package as a manager.

[9] At the hearing of the review application, Bloem Water focused in argument firstly on the Commissioner's reasoning on the existence of a discretion. Secondly, it raised a jurisdictional issue relating to the respondent only having referred the dispute to conciliation in February 2018, whereas the dispute arose when the policy was implemented in 2012, and no condonation had been granted for the 'late' referral. Bloem Water contended

therefore that the arbitration proceedings in their entirety were a nullity, because the arbitrator lacked jurisdiction to hear the dispute in the absence of condonation been granted.

[10] The applicant did not pursue the issue of the failure of Meyer to testify. Nonetheless, the arbitrator's conduct in this regard does bear mentioning. It is true, as the respondents pointed, out that the arbitrator did not actually prevent Bloem Water from calling her as a witness. However, when the respondent's representative objected to her testifying on the basis that she had been present when the respondents testified, the arbitrator made it clear that this might negatively affect his assessment of her evidence. He compared her situation to that of Gabusaeng who had been absent while her colleague, Nyareli, had testified. In this regard, the arbitrator clearly misunderstood the difference between the inferences to be drawn from a respondent's witness hearing the case against the respondent and the value attached to one co-witness not been present when another testifies. Clearly, the arbitrator's remark, which he should not have made, directly influenced the applicant's decision not to call Meyer as a witness. Be that as it may because the applicant did not pursue this issue, the review has been determined on the grounds set out below.

Jurisdictional issue

[11] It is common cause that the respondents only articulated the grievances about not qualifying under Section 1 of the scheme in 2017 and referred the dispute to conciliation early the following year. Bloem Water contends that the alleged unfair labour practice must have arisen when the vehicle policy was introduced in 2012, at which stage the respondent were not made beneficiaries of the Section 1 scheme. The respondents retort that their exclusion from the scheme is an ongoing unfair labour practice and did not simply arise at one point in time, though they concede that the fact that the respondents had to refer their unfair labour practice claim within 90 days of becoming aware of it in terms of section 191(1)(b)(ii) of the Labor Relations Act 66 of 1995 ('the LRA') would probably have limited the retrospectivity of their claim.

[12] On the question of whether or not the labour practice in question was a single occurrence which took place when the policy was implemented in 2012 and the respondents were not made beneficiaries of Section 1 scheme of the policy, both parties relied on the same authorities. In *City of Johannesburg v South African Local Govt Bargaining Council and Others* (JR3204/10) [2014] ZALCJHB 85 (10 February 2014) the labour court it was considering a review of a demotion decision in which a similar issue of condonation had arisen. The court found:

> '[11] It was submitted on behalf of the third respondent that the nature of the dispute was continuous, one akin to a discrimination dispute and that since it continued well into 2009 (and indeed to the date of referral), the referral was not late. I have difficulty appreciating the logic of this submission. I see no reason why a demotion does not fall into the same category as a dispute concerning a dismissal or any other disciplinary penalty, both of which are the subject of strict time limits which run from the date of the employer's actions. Of course, an act of demotion has consequences in the form of a diminution of status perhaps, and those consequences may well be ongoing. But it is not so as it necessarily is in the case of an act of unfair discrimination, where the unfair act complained of is continuous, uninterrupted or repeated. For example, in a claim for equal pay, the fact that the employer continues each month to pay a lower wage on one or more discriminatory grounds, has the result that the act of discrimination is continuous. But an act of demotion is not continuous in the same sense. This much is acknowledged by the wording of s 191 (1) (b) (ii) which requires a referral within 90 days 'of the date of the act or omission which allegedly constitutes an unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence'. The case in which the third respondent relies in support of its submission, SABC Ltd v CCMA & others [2010] 3 BLLR 251 (LAC), supports this analysis. That was a case that concerned unfair discrimination in the form of continuous conduct rather than a single act. Not only is it distinguishable on that basis, but the court drew a clear distinction between ongoing unfair labour practices (unequal pay) and 'one-off' decisions or single acts that are not repetitive in nature. Were an act of demotion (or dismissal or the issuing of a final warning for a 12 month period) to be regarded as continuous for the purposes of s 191, that would make a

> mockery of the time limits imposed by the section. An employee need only allege that he or she continues to suffer the consequences of dismissal, some lesser disciplinary measure or demotion to avoid the prescribed time limits altogether.'

[Emphasis added]

[13] The extract above was cited with approval in *Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kaya and others* [2017] 8 BLLR 797 (LC), and the court in that matter went on to expand on the distinction as follows:

> '[59] I consider the above reasoning in *City of Johannesburg v South African Local Government Bargaining Council and Others* to be sound, and equally applicable to an unfair labour practice based on promotion. The ratio in SABC[2] is clearly distinguishable. The point can be illustrated by way of a simple example. Two employees apply for a promoted position and one employee is promoted whilst the other is not. Accepting that the decision not to promote the one employee is unfair, does this now mean that that every month after that decision was taken the employer commits a continuous unfair labour practice because the employee does not occupy the promoted position and is paid less? Surely not. This would render the 90 day time limit under Section 191(10 completely valueless. The employee

[2] This is a reference to *SABC Ltd v CCMA and Others* [2010] 3 BLLR 251 (LAC) in which the LAC held:

> '[27] The ruling of the Commissioner would therefore be open to be reviewed and set aside if the dispute constituting the unfair labour practice was said to occur in 1998 as alleged by the appellant. The problem however is that the argument presented by the appellant is premised upon the belief that the unfair labour practice/unfair discrimination consisted of a single act. There is however no basis to justify such belief. While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.'

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> can in effect do nothing about an employer's decision not to promote for a year, and then decide to pursue it because it is purportedly "continuous". This flies in the face of the primary consideration of the expeditious resolution of ointment disputes. I accept that one mistreated failure to promote for example based on race differently, but that would be proposed the course of the action is founded on discrimination, and not an unfair labour practice *per se*, with discrimination requiring a different level of continuous protection.
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> [60] Another comparable example case be found in *South African Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[3]. In that case, the employer stopped paying the employee an acting allowance, but the employee only pursued the dispute as an unfair labour practice to the CCMA more than four years later, contending that the dispute had been ongoing because of a pending grievance. The Court did not accept this contention and held that the dispute was pursued late.'

[14] Considering the authority above, there is nothing to suggest that when the policy was introduced in 2012 that there was a decision taken on the eligibility of every employee of Bloem Water to become members of one or other of the schemes contained in the policy. The benefit obtainable from the policy is a recurring one in the form of an allowance due every month. If the respondents qualify for the scheme today, they are just as much entitled to it now as they would have been if they had qualified for it in 2012, everything else being equal. This is very different from a situation where a clear decision is taken at a point in time to reduce someone's benefits, or to promote somebody else, and similar examples where the alleged prejudice suffered can be identified as originating in a distinct positive decision by the employer. In the circumstances, I am satisfied that the alleged exclusion from the Section 1 scheme was an ongoing matter and it was not necessary for the respondents to apply for condonation for referring an unfair labour practice dispute which arose in 2012.

[3] [2015] 12 BLLR 1224.

Arbitrator's finding on the absence of any discretion

[15] It is noteworthy that despite the evidence given by Stadler on why only half the employees on level 7 received the vehicle allowance under Section 1, the arbitrator focused almost exclusively on his answers when being cross-examined on the wording of the policy. Similarly, he completely ignored the detailed evidence on why the respondent had been declined a vehicle allowance under that part of the scheme, but nonetheless qualified for use of a pool car or reimbursement of their business travel in their private vehicle.

[16] The evidence was that there was a period when Gabusaeng, a supply chain officer, stationed at the head office in Bloemfontein, had done a certain amount of traveling. Stadler explained this was partly related to her filling in duties for an assistant manager who was absent, and she had been a reimbursed for the mileage travelled. He explained that in general her work related duties did not require her to travel extensively. Gabusaeng herself confirmed that over a period of four years she only took 21 trips on official business.

[17] In the case of Nyareli, an administration and finance officer, his own evidence and that of Kheane showed that he was chiefly office bound. His complaint was that the pool vehicle was not always available when needed, but he had not made use of the option of being reimbursed for the use of his private vehicle because he claimed he was not aware of it until the matter came to arbitration. He disputed that his job function was the reason that he was not included in the Section 1 scheme and that it was not sufficient to warrant his inclusion that he had to use a vehicle once a week or a couple of times a month. Stadler testified that none of the other regional administration and finance officers qualified for the vehicle allowance either.

[18] Stadler also testified that the list of those who were included and excluded from the Section 1 scheme was considered on a continuous basis, and had been re-examined by management and the CEO in 2018, that they had concluded that the number of participants out of the 60 persons employed in band 7, should remain at 33.

[19] The arbitrator did not deal with any of this factual evidence, but seized on a statement by Kheaene that he never travelled, yet qualified for the allowance. This single observation did no justice to Kheaene's evidence. In his evidence he explained that the HR department explained to him that he qualified for the vehicle allowance because of his duties in terms of which he was expected to go to regional offices and to certain meetings outside the province as well. The reason he had not travelled since his appointment four months prior to the arbitration was that he had to familiarize himself with how worked before he started to travel to the regions.

[20] Considering all of the above, the arbitrator was only able to reach the conclusion he did by focusing exclusively on the text of the policy, which was not a model of drafting. As a result, he failed to appreciate that the differentiation between employees to qualified for the vehicle allowance was not simply arbitrary, but was linked to job functions and the normal transport requirements linked to those positions, which was reviewed on a regular basis by management. By focusing exclusively on the policy and ignoring how it was implemented in practice was possible for him to adopt a literal reading of the policy that all employees on band 7 qualified for the vehicle allowance automatically, and to conclude that there was no scope for the exercise of any property discretion as to who received it and who did not. Had he not done this he would not have been able to come to the conclusion he did.

[21] In the circumstances, the award stands to be set aside.

[22] On the question of costs, neither party pressed this issue and the interests of law and fairness do not justify a cost award being made.

Order

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

[2] The arbitration award of the Third Respondent issued on 6 August 2018 under case number FSBF1019-18 is reviewed and set aside.

[3] No award of costs is made.

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Lagrange J
Judge of the Labour Court of South Africa

Representatives -

For the Applicant:	F Boda SC, instructed by Phatsoane Henney Attorneys
For the Third Respondent:	J G Rautenbach SC, instructed by Thaanyane Attorneys.