REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 293/2011

In the matter between:

SOUTH AFRICAN POST OFFICE LTD	**Applicant**
and	
CCMA	**First Respondent**
W F MARITZ N.O.	**Second Respondent**
ELTON JACOBS	**Third Respondent**

Heard: **29 May 2012**

Delivered: **18 June 2012**

Summary: Review – jurisdiction – whether acting allowance is a "benefit" as defined in LRA s 186(2)(a).

JUDGMENT

STEENKAMP J:

Introduction

1] This is a jurisdictional review of an *in limine* ruling by the second respondent, commissioner Bill Maritz ("the commissioner"). The crisp question is whether the first respondent (the CCMA) had the jurisdiction to arbitrate a dispute concerning an acting allowance as an unfair labour practice relating to "the provision of benefits" as contemplated by section 186(1)(a) of the LRA.[1]

2] The commissioner found that the CCMA had jurisdiction. He was persuaded that:

> "... where the terms of the employment provides for the payment of an acting allowance in appropriate cases that is the benefit and if the employer refuses it when it falls within the provisions of the particular rules I fail to see why should not be considered unfair conduct that could constitute an unfair labour practice."

3] The commissioner did not rule on a further objection relating to condonation. He noted:

> "I have noted the further contention to the effect that the applicant is out of time and needs condonation for a late referral. It is clear that there is a dispute about the date to be taken into account and the same applies to whether the payment of an allowance is prescribed and in my opinion I do not need to apply my mind that this time, as that will be based on evidence."

4] The applicant has raised two grounds of review:

4.1 The dispute was not a benefits dispute and the arbitrator therefore had no jurisdiction to require the CCMA set the matter down to determine the merits. The applicant raises three reasons:

4.1.1 the commissioner ignored binding authority;

4.1.2 the dispute had all the features of an interest dispute; and

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1 Labour Relations Act 66 of 1995.

4.1.3 even if it was a rights dispute, it was a dispute about remuneration and not benefits.

4.2 The commissioner failed to consider the applicant's second jurisdictional objection that the referral was out of time and that, as no application for condonation was brought, the proceedings were a nullity.

Background facts

5] The third respondent, Elton Jacobs ("the employee"), was employed as an operational manager from 1 July 2003. Clause 25 of his contract of employment pointed out the following:

> "There are various other benefits and conditions of employment, inter alia, pertaining to 13th cheque, housing loan schemes, housing allowance schemes, subsistence and other allowances, et cetera that apply under specific circumstances. The complete conditions of employment of employees are contained in the various staff codes available for perusal at personnel offices, which are subject to change from time to time. "

6] The applicant has a policy relating to "acting in higher positions." The policy deals with the situation where employees acted in positions that have become vacant temporarily. A "higher position" is defined as:

- "A position with a higher minimum than the comparable position and the same or higher maximum in the salary range; or
- A position with the same or lower minimum and higher maximum in salary range."

7] Under the heading, "delegation of authority", the policy specifies that all acting appointments up to grade level C5 in the bargaining unit must be approved by a person holding a rank of at least a manager. Appointments to act in management positions must it provides employee holding a rank of general manager or regional general manager.

8] The policy further provides for rotation after three months. The reason is

explained as follows:

> "Labour law recognises that in equity, allowing employees to act for unreasonably long periods in higher positions can be regarded as the creation of a legitimate expectation to ultimately be appointed in a higher position. Therefore, provided that the vacancy has been advertised, the acting period may exceed one month, but is limited to three months per occasion."

9] At best, therefore, the policy provided a limited right to an acting allowance for three months if it was approved. The fact that approval was required means that there was no automatic contractual right to claim the acting allowance in the absence of such approval.

10] On 20 December 2010 the employee referred an unfair labour practice dispute to the CCMA in terms of section 186(2)(a) of the LRA. He alleged that the applicant had committed an unfair labour practice by not paying him an acting allowance.

11] The dispute was set down for conciliation on 24 January 2011. It could not be resolved and the CCMA (i.e. the conciliating commissioner) issued a certificate accordingly. The employee referred the dispute to arbitration, claiming an acting allowance from June 2008 to 31 January 2011.

12] The arbitration was convened on 31 March 2008. The Post Office (the applicant in these proceedings) raised two points *in limine*. It contended that the dispute was not about benefits; and that it was about 4 ½ years late, and was not accompanied by any condonation application.

13] The employee has claimed an acting allowance on numerous occasions since April 2006. It was only approved once in April 2006. Subsequent to that date, no further acting allowances were granted by a general manager, as contemplated by the policy.

14] On the employee's own version, the dispute arose in July 2008 when, according to him, he learnt that other employees were paid acting allowances and he was not.

15] Despite this, the commissioner found that he did not need to deal with the question of condonation, as a dispute existed in respect of the date on which the dispute had arisen and this was a question of evidence to be dealt with at arbitration.

16] With respect to the first point *in limine*, the commissioner found that the payment of an acting allowance constituted a "benefit" and that it could be dealt with at arbitration as an unfair labour practice.

Evaluation / Analysis

First ground of review: Acting allowance a 'benefit' as contemplated by section 186(2)(a)?

17] Section 186(2)(a) of the LRA provides that:

> "(2) 'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving—
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> a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee."[2]

18] The CCMA does not have a general unfairness jurisdiction. An employee referring an unfair labour practice dispute in terms of section 186 must demonstrate that it falls within that section.

19] In considering whether the CCMA had jurisdiction, this court must decide the matter afresh on review and the *Sidumo* [3] test does not apply.[4]

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2 My emphasis.

3 *Sidumo & ano v Rustenburg PLatunum Mines Ltd & ors* (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC).

4 *SA Rugby Players Association & ors v SA Rugby (Pty) Ltd & ors* [2008] 9 BLLR 845 (LAC) paras [39] – [41]; *Fidelity Supercare Cleaning Services (Pty) Ltd v Busakwe N.O.& ors* (unreported, Labour Appeal Court, PA 1/10, 6 June 2012) para [9].

20] Does an acting allowance comprise a 'benefit' as contemplated in section 186(2)(a)? Although the weight of authority suggests that it does not, our case law has not been wholly consistent in deciding this question.

21] In *Northern Cape Provincial Administration v Hambidge NO & ors*[5] Landman J had regard to the similarly worded definition under the now repealed Item 2(1)(b) of Schedule 7 to the LRA. He commented as follows:

> "[12] 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.
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> [13] 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 at 22–23. The definition of 'remuneration' read with the definition of 'employee' in section 213 of the Act makes this clear. "Remuneration" in section 213 means: "any payment in money or kind or both in money and in 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:
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> > "Fringe Benefit – a perquisite or benefit paid by an employer to supplement a money wage or salary."
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> [14] The ILO *Wages – A Worker's Education Manual* (1988) at 70 makes the point that a fringe benefit is a supplement for which no work is done. Benedictus and Bercusson *Labour Law* (1987) at 158 speak of wages and non-wage benefits. The word "benefit" in item 2(1)(b) means, at least, a non-wage benefit. The decision of my sister Revelas J in the *Samsung* case is to the same effect. She says at 1102J–1103A:
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> > "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 not. Remuneration is always a term and condition of the employment contract."
>
> [15] It is unnecessary to refine a benefit further for the purposes of this case.
>
> [17] 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. It 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."

22] On appeal, the Labour Appeal Court[6] confirmed that an acting allowance is embodied in the concept 'remuneration' which is a matter of mutual

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5 [1999] 7 BLLR 698 (LC) paras [12] – [17] (my emphasis).

6 *Hospersa & ano v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC) para [12] per Mogoeng AJA (as he then was).

interest. The CCMA, it held, did not have jurisdiction to deal with the demand for an acting allowance as an unfair labour practice.

23] The Labour Appeal Court confirmed this approach in *Gauteng Provinsiale Administrasie v Scheepers & others*,[7] handed down two weeks later.

24] The Labour Court followed *Hospersa* in *Eskom v Marshall & ors*[8] when it held:

> "The Labour Appeal Court's decision in *HOSPERSA* is binding on me, not simply as a matter of precedent, but also in terms of the Labour Relations Act. As Dr Marshall does not have a contractual right to the resignation or separation package, I must find that the commissioner had no jurisdiction to arbitrate the dispute, even though he had been led by Eskom to believe that he had such jurisdiction. The award is consequently a nullity and must be declared to be so."

25] The court also followed *Hospersa* in *Polokwane Local Municipality v SALGBC & ors*[9] and held that the employer's refusal to pay an acting allowance did not constitute an unfair labour practice in the form of a dispute relating to 'benefits' as contemplated in s 186(2)(a) of the LRA.

26] A dissenting view was recently expressed by Lagrange J in *IMATU obo Vorster v Umhlatuze Municipality.*[10] After a thorough review of the case law and academic commentary, he held:

> "[22] What the brief review of the case law and academic commentary reveals is that there has been a shift in the conceptualisation of the ambit of the unfair labour practice claim at least in relation to the notion that a prerequisite for bringing such a claim is proof of a pre-existing right. Le Roux[11] argues that a rejection of the narrow approach in *HOSPERSA* is

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7 [2000] 7 BLLR 756 (LAC).

8 [2003] 1 BLLR 12 (LC) para [24}.

9 [2008] 8 BLLR 783 (LC).

10 [2011] 9 BLLR 882 (LC).

11 PAK le Roux, "What is an employment benefit?" *Contemporary Labour Law* Vol 15(1), August 2005 at 5-6.

implicit even in the majority decision in *Department of Justice*.[12] I agree.

> [23] Once this conceptual hurdle has been overcome, it stands to reason that an unfair labour practice dispute over an acting allowance, in which an employee is making the claim on the basis that it was granted to him or others in similar circumstances on other occasions, is a claim that the employer has unfairly refused to confer the benefit on the occasion in question. This does not amount to a demand to make the benefit obligatory in the future. The latter claim would properly be the subject-matter of collective bargaining. It is still true that if the employee is successful in his unfair labour practice claim this might clarify the factors the employer ought to consider in granting or refusing to grant the benefit in the future and might mean that it will be easier to predict when the benefit is likely to be granted, but that does not, in principle, make the dispute one about the creation of new rights."

27] The learned judge did not refer to the LAC judgment in *Scheepers*[13]. However, given his view that *Hospersa* had been overtaken by subsequent developments in the law, the same view would probably have prevailed. But there is a later judgment by the LAC to which he had not been referred.

28] In *G4S Security Services v NASGAWU & ors*[14] the LAC confirmed the approach taken in *Hospersa*. After quoting extensively from *Hospersa*, the court held:[15]

> "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* or *ex lege.* It is only then that, having established the right, the commissioner would have jurisdiction to entertain the dispute as a dispute of right."

29] Persuasive as the discussion by Lagrange J in *Umhlatuze Municipality* is, I

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12 *Department of Justice v CCMA & ors* [2004] 4 BLLR 297 (LAC); (2004) 25 *ILJ* 248 (LAC).

13 *Supra.*

14 Unreported (case no DA 3/08), 26 November 2009.

15 Para [25].

consider myself bound by the authority of the Labour Appeal Court.

30] The employee in the present case has not established a right to an acting allowance *ex contractu* or *ex lege* beyond the initial three month period in 2006. In seeking to establish a further entitlement to an acting allowance, the employee has strayed into the realm of a dispute of interest. In these circumstances, the commissioner had no jurisdiction to entertain an unfair labour practice dispute in terms of s 186(2)(b) of the LRA.

31] I find, therefore, that the commissioner had no jurisdiction to entertain an unfair labour practice dispute in terms of s 186(2)(b) of the LRA.

32] But even if I am wrong, the commissioner exceeded his powers by arbitrating the dispute without having ruled on condonation, where such a ruling was clearly required.

Second ground of review: Condonation

33] The commissioner was of the view that he need not consider the aspect of condonation. This was a clear misdirection based on the facts before him and on the applicable legal principles.

34] The applicant stopped paying the employee an acting allowance after the first three month period expired at the end of June 2006. The referral to the CCMA was about 1642 days or 4 ½ years out of time, based on that time period.

35] In his referral form[16] the employee indicated that the dispute had arisen on 25 August 2010, referring to an unresolved grievance process. But even on that construction, the referral was about 26 days late and the employee did not apply for condonation.

36] As this court has held in *Bombardier Transportation (Pty) Ltd v Mtiya N.O. & ors*[17] and in *Mickelet v Tray International Services & Administration (Pty)*

16 CCMA form 7.11.

17 (2010) 31 *ILJ* 2065 (LC).

Ltd,[18] the commissioner was duty bound to make a jurisdictional ruling at the conciliation stage. He could not simply defer it to arbitration, as he did with regard to the question of condonation. This approach was recently confirmed by the LAC in *BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members*.[19]

Conclusion

37] The commissioner's finding that the CCMA had jurisdiction cannot be sustained on either point of review raised by the applicant.

38] With regard to costs, I take into account that the law is not settled on the questions raised on review; and that the employee was armed with a ruling in his favour. He should not, in law or fairness, be held liable for the applicant's costs.

Order

39] The *in limine* ruling of the second respondent under case number WECT 18369/10 is reviewed and set aside. There is no order as to costs.

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Steenkamp J

APPLICANT:	Adv FA Boda
	Instructed by Eversheds, Sandton.
THIRD RESPONDENT:	Adv K Allen

18 (2012) 33 *ILJ* 661 (LC).

19 (2012) 33 *ILJ* 140 (LAC) para [30].

Instructed by Marais Muller Yekiso, Cape Town.