REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable
C602/2019(B)

In the matter between:

BUSINESS CONNEXION (PTY) LTD **Applicant**

and

BELLA GOLDMAN N.O. **First Respondent**

COMMISSION FOR CONCILIATION, ARBITRATION AND MEDIATION **Second Respondent**

COMMUNICATION WORKERS UNION obo MEMBERS **Third Respondent**

SOUTH AFRICAN COMMUNICATION UNION obo MEMBERS **Fourth Respondent**

Date heard: 21 July 2021 by means of virtual hearing; supplementary heads received by 4 August 2021
Delivered: January 18 2022

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an award under case number WECT12014-18, dated the 13 August 2019. The first respondent (the Commissioner) awarded as follows:

"AWARD

54. I find that the applicants CWU and SACU's members were subjected to an unfair labour practice relating to benefits by the respondent Business

Connexion (Pty) Ltd not paying the qualifying employees STIs for the year 2017/2018 for the reasons stated.

55. The respondent Business Connexion (Pty) Ltd is ordered to pay the members of CWU and SACU qualifying for STIs, their STIs out of 40% of the pool allocated to the applicants for payment of STIs.

56. As per time scales, the parties still have to identify the employees who qualified as per their evaluation for an STI.

57. The respondent, Business Connexion (Pty) Ltd must have completed the verification and paid qualifying employees who are members of the applicant unions, CWU and SACU their STIs by no later than 15 October 2019."

[2] The Commissioner dealt with the issue for determination as follows:

"6. It was common cause that the performance bonus in question was a benefit as per section 186(2)(a) of the Labour Relations Act 1995 as amended (LRA). I have to determine whether or not the employees transferred from Telkom to the respondent via a section 197 transfer in 2016 were subjected to an unfair labour practice in terms of section 186(2) by not being paid a performance bonus, known by the parties as a Short Term incentive (STI) for the year 2017/2018."

[3] At the hearing of the matter, I asked the parties to submit additional argument to clarify for the court that the dispute indeed fell within the jurisdiction of the CCMA in view of the section 197 implications, if any. Both parties are *ad idem* that the STI for the year in question was a benefit within the meaning of section 186(2) of the LRA. Having read their submissions, I am satisfied that there is no jurisdictional issue *in casu* for the Court to determine.

[4] The factual matrix of the dispute is dealt with comprehensively in the Award and bears recording:

"**BACKGROUND TO THE ISSUE**

7. The following facts are common cause issues unless otherwise indicated. The employees were transferred as part of a section 197(2) of the LRA process from a business unit in Telkom SA SOC to a wholly owned subsidiary, Business Connexion (Pty) Ltd (BCX) in 2016. Telkom SA

transferred employees to a number of companies, one of which was the respondent. The companies are known collectively as the Telkom Group and consist of: Telkom SA SOC Ltd, Gyro (Pty) Ltd, Yellow Pages (Pty) Ltd, previously called Trudon (Pty) Ltd and the BCX Group Ltd of which the respondent is a subsidiary. The respondent ringfenced the benefits of these employees until 31 March 2017. Included in the transferred benefits was a performance bonus known as a Short Term Incentive (STI). *The criterion for receiving an STI for the year in 2016/2017 was that the Telkom Group meet its financial targets and that employees qualify as per their performance evaluation score.* (emphasis mine)

8. For the year 2017/2018 employees who obtained the qualifying scores did not receive an STI, the respondent's reasons therefore, was that for the year 2017/2018 the criteria for receiving an STI were that the Telkom Group meet at least 95% of its financial targets, the respondent, BCX meet at least 95% of its financial targets and the employees qualifying as per their performance management evaluation.

9. The applicants' case was that the fact that the respondent did not pay qualifying employees an STI for reasons relating to the respondent not attaining its financial target amounted to an additional criteria (from the 2016/2017 situation) and that this change was never communicated to the applicants and that the non-payment of the STI amounts to an unfair labour practice. The applicants claimed that the only target communicated was that the Telkom Group had to reach its financial target.

10. The respondent substantiated its case by way of a document headed FY18[1] STI plan for BCX Management and FY18 STI plan for BCX Non-Management employees which were sent to management and non-management employees which it claimed set out all criteria, including that BCX had to reach its financial target.

11. The contents of both documents were the same. The respondent claimed that the applicant did not meet its financial targets for the year 2017/2018 and that this was reflected as one of the criteria in the FY18 document. The

[1] i.e. Financial Year 18

applicants disputed that either of those documents included a criterion relating to the respondent reaching its financial target. Further the applicants claimed that they were never provided with the information to confirm whether or not BCX reached their financial targets.

12. The applicants are claiming that its qualifying members should have received their STI for the year 2017/2018 on the same basis they did for the year 2016/2017; that is the Telkom Group meeting its financial targets and the employee's performance evaluation results. *As stated the unfair labour practice was to change the criteria without communicating it.* (emphasis mine)

13. The respondent's claimed that employees of Trudon, one of the three subsidiaries, did not receive STIs as Trudon did not meet its financial targets. This was disputed by the applicants and was found to be true as per the evidence of Mr Brian Swanepoel, CFO of Trudon.

14.There was initially much debate as to which employees would be beneficiaries of such an STI should the applicants be successful in the arbitration and the respondent requested names of employees. It was finally agreed that such employees could be identified as they would be the ones who reached the level required per their performance evaluation."

[5] The applicant initially had two grounds of review in this application. The second ground of review amounted to an allegation of bias against the Commissioner, was not relied on in argument. In respect to the first ground, the applicant first quoted the Commissioners analysis of the evidence before her i.e.:

"47. I have noted that neither the applicants' witnesses nor those of the respondents were clear about the meaning of FY18 with regard to the respondent meeting its financial targets.

48. The respondent's witnesses raised the issue of the discretion referred to in FY18 under the heading of Additional Measures. The first bullet point thereafter provided that:

The final STU payment available at the end of the year will be allocated based on the discretion of the GCEO based on the relative BU performance.

Divisional Amounts would be allocated at the discretion of various CEOs based on the Division's relative performance.

49. That paragraph gave no indication of what relative means and is contrary to the respondent's case which was that if targets are not met **no** STIs are payable. The respondent made no mention of the discretion as per their opening statement. The issue of discretion was raised by the respondent's witnesses and such an issue was not put to the applicants' witnesses.

50. For the reasons stated above I find that the criteria relating to the respondent meeting 95% its financial target or its target in general was not communicated to the applicants as an additional hurdles and I find that this was unfair and amounted to an unfair labour practice relating to benefits as per section186(2)(a) of the LRA. As a result thereof I find it to be unfair that none of the qualifying employees of the respondent received an STI for the year 2017/2018 and that this conduct amounted to an unfair labour practice.

51. The respondent argued that the applicants during cross-examination of Brikkles conceded that the payment of STIs were based on the respondent meeting its financial target and on that basis the applicants requested that 40% of the pool allocated to the respondent be used to pay STIs. The respondent claimed that this interpretation was unsupported by any of the applicants' witnesses and was contrary to the evidence of the applicants' witnesses and as such negated the applicants' claim for payment of STIs for the year 2017/2018.

52. The issue to be determined is whether the respondent should have paid qualifying employees STIs, the applicants claimed that they should have been. The respondent claimed that no STIs were payable as the respondent had not made its financial targets. The concession of the applicants does not negate the applicants' case as they are still claiming that STIs should have been paid, albeit from a smaller pool and STIs were not paid. Their concession related to a possible interpretation of the table/diagram referred to above.

53. The issue of 40% was not as stated by the respondent raised for the first time at the end of proceedings. It was raised by Mr Abrahams when he gave

evidence. Mr Abrahams was the first witness who referred to the diagram where the percentages were set out."

[6] The applicant submits that the Commissioner did not determine the real issue in dispute, namely whether BCX meeting the BCX Financial Target was a requirement which had to be met before the affected employees would be paid a STI for FY18. This, it is submitted is in itself a reviewable irregularity. It appears that this submission is aimed at suggesting that the Commissioner misconceived the nature of the enquiry before her. In my view the dispute before her was amplified in her Award – was there unfair conduct by the applicant when it failed to inform the affected employees that the critieria for receiving the STI had changed.

[7] It is further submitted that the affected employees were already employees of BCX during FY2018. According to Mr van Ass for the applicant, there was simply no evidence before the Commissioner that, after the section 197 transfer in 2016, the affected employees would be entitled to a STI or a portion of a STI based solely on the performance of Telkom. However, as the respondent unions point out, the evidence before the Commissioner was that the applicant did not have a STI plan when the Telkom ring fences benefits came to an end. The applicant continued with this benefit on the Telkom Group Conditions from 1 April 2017 until October 2017 and thereafter the applicant used the rules communicated by both Telcom and BCX on the 31st of October 2017.

[8] The applicant communicated the FY18 STI plan for the both management and non-management STI eligible employees on the 3 October 2017. These were the same as those communicated to Telkom employees. The email sent out by BMX HR stated that it was intended for eligible Short Term Incentive Plan employees only. It states in terms the following:

"The Telkom and BCX Boards have approved several changes to the FY17/18 short terms incentive (STI) plan for non-management employees. The eligibility for the STI plan remains unchanged.

The amended STI plan is based on overall Telkom results and applies to all Telkom/BCXSTI eligible employees as outlined below.

STI plan changes:

The following fundamental changes were made to the plan:

- Financial performance is measured at Group Level (Group Financial performance). The Telkom Group comprises of Corporate Centre, Consumer and Small Business, BCX, Gyro Openserve and Trudon
- Due to the changes, integration and consolidation process of finanacial results at Group level, the 25% interim payment was withdrawn and there will only be one payment a year.
- No STI is payable if Group targets are not achieved, irrespective of Telkom/BU/subsidiary performance."

[9] The above evidence was before the Commissioner, and dealt with in testimony. The submission by Mr van As that: "there was simply no evidence before the Commissioner that after the section 197 transfer in 2016, the Affected Employees would be entitled to a STI or a portion of a STI based solely on the performance of Telkom" is therefore confounding. The additional submissions regarding there being no reasonable expectation that the STI would remain ringfenced in 2018, take the applicant's case no further. The Commissioner was dealing with the question of whether there had been unfair conduct by the applicant in that it did not inform the affected employees of a change of policy in regard to the determination of the criteria upon which the provision of the STI was based. The affected employees were not informed that they were no longer 'ring fenced' but, when they queried the non-receipt of their STI, that receipt of the STI was now dependent on the applicant's performance and not the overall performance of the Telkom Group.

[10] I am in agreement with the respondents that if the financial results of the Applicant had to be considered before any STI payments would have been paid, the communication sent on the 31st of October 2017 to the Telkom/BCX STI eligible employees would have explicitly stated such. Applicant's witnesses could not testify that this was explicitly stated as the transcribed record reflects. They tried to read the communication in a way that supported the company's case and not on its plain meaning. That the applicant had to meet its own target was however explicitly stated in the FY19 STI Plan.

[11] Given the evidence before her, I am therefore of the view that the Commissioner reached a reasonable conclusion in finding that an unfair labour practice had been committed. The Commissioner is also challenged in her decision to award a 40 per cent pro-rata STI to those of the effected employees who met their performance targets. Her powers in this regard are set out in section 192(4) of the LRA i.e. that "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."

[12] The Commissioner states in paragraph 31 of the Award that:

"At the end of the arbitration the applicants adjusted their claim from 100 per cent of the pool allocated to BCX for payment of STIs to 40% of the pool allocated to BCX for payment of STIs on the basis that they would accept that BCX did not reach its financial target."

[13] It was Mr Abrahams evidence for the union, that a table included on FY18 depicting weightings within the Group, supported this interpretation in a situation in which a subsidiary did not reach its financial targets. Given that the issue in dispute was the unfair conduct of the employer in not informing the unions that the DSTI would change, I see no basis to interfere with the Commissioners' award which is within the bounds of reasonableness.

[14] I order as follows:

Order

1. The review application is dismissed.
2. The verification, identification and payment of the employees who qualified as per their evaluation for an STI in the 2018 Financial Year must be completed by no later than 25 February 2022.

3. There is no order as to costs.

_____

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: MJ Vas As instructed by Fluxmans Attorneys

Third and Fourth Respondents: Union Official