THE UNFAIR LABOUR PRACTICE
RELATING TO BENEFITS

by

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SUMMARY

At the outset of this treatise the development of the unfair labour practice is traced. The point is made that common law knows nothing about fairness and it is pointed out that the concept was introduced as a statutory concept in 1979. In 1995 the development of unfair labour practices since 1979 was relied upon to provide a list of unfair labour practices.

The main thrust of the treatise concerns an evaluation of an unfair labour practice relating to benefits – listed presently in section 186(2) of the Labour Relations Act. Reference is made to Industrial Court cases and case law since 1996 is considered and commented upon. In particular, the issue of remuneration not being a benefit, and the fact that interest disputes are not justiciable as unfair labour practices for instance are canvassed.
CHAPTER 1
THE DEVELOPMENT OF THE
UNFAIR LABOUR PRACTICE CONCEPT

1.1 INTRODUCTION

South Africa, like any other industrial country, has developed its labour laws through a number of statutory enactments. In the process the courts have played an important role in the interpretation of such statutes and invariably, the development of the labour laws of the country.

Our country though, has a history of racial segregation, which was enforced through legislation even in the workplace. The problems of industrial unrest were exacerbated by the unequal treatment of employees in the same workforce, which was categorised according to their skin pigmentation. The roots of all legislative industrial enactments can be found in the early twentieth century, when the Industrial Conciliation Act\(^1\) was promulgated.

The previous applicable statutes at the time were inadequate to maintain a state of workplace tranquillity of which the white miners’ revolt of 1922 in the Rand is especially indicative. The statute provided, \textit{inter alia}, for the registration of the employers organizations and trade unions excluding pass-bearing African workers. It introduced a framework for collective bargaining and a system for the settlement of disputes, and regulated strikes and lock-outs. This resulted in an improvement of the conditions in the industrial scenario. Voluntary centralised collective bargaining was promoted by providing for the establishment of industrial councils by agreement between employers’ organization and a registered trade union or unions.

In so limiting the capacity of employers and employees to regulate the nature of their relationship, South Africa has followed developments in Western industrialised countries. The Industrial Conciliation Act of 1924\(^2\) also made provision for the Minister of Labour to

\(^1\) Act 11 of 1924 – The first labour legislation of note in South Africa. It was also exclusive and did not include employees of African origin.

\(^2\) See ft 1.
specify on the recommendation of an industrial council conciliation board, the minimum wage rates and maximum working hours for persons excluded from the definition of employee. The purpose was to protect white workers from being undercut by cheap African labour rather than to benefit pass-bearing African workers. The function of dispute settlement was also given to councils and conciliation boards.

In 1937 the Act\(^3\) was replaced by the consolidated Industrial Conciliation Act 36 of 1937. None of these enactments brought about any solution to the South African industrial problems. In 1952 there came the new Act,\(^4\) which was a brainchild of the Botha Commission. The new government of the National Party, with its policy of apartheid, further introduced the Native Labour Settlement Dispute Act\(^5\) thus creating a separate dispensation for African workers, with plant-based works committees, Regional Native Labour Committees and the Central Native Labour Board. The new Industrial Conciliation Act\(^6\) further entrenched the racial division of workers by prohibiting the registration of new unions having both white and coloured members.

The Wiehahn Commission\(^7\) recommended in 1979 that a new Industrial Conciliation Act be enacted by the amendment of the old Industrial Conciliation Act.\(^8\) In addition, a new Basic Conditions of Employment Act\(^9\) was promulgated in 1983, which, for the first time in our labour law history, set general minimum working conditions for virtually all employees in the private sector, with the exclusion of agriculture and domestic workers. This act was later amended in 1994 to include farm workers and domestic workers. However, it was further amended in 1997 by repealing the old Act of 1983 and introduced the new Basic Conditions of Employment Act.\(^10\)

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\(^3\) The Industrial Conciliation Act 11 of 1924.
\(^4\) A Commission was established in 1951 to address the labour problems which introduced the new Act known as Native Laws Amendment Act 54 of 1952. That Act extended the influx control to African women thereby effectively took away the status of employee accorded to them by the Industrial Conciliation Act 36 of 1937.
\(^5\) Act 48 of 1953 which created a separate dispensation for African workers.
\(^6\) Act 28 of 1956 which was promulgated in terms of the recommendations of the Botha Commission.
\(^7\) A Commission established in 1979 to address the labour problems which introduced the new Act know as the Industrial Conciliation Act 28 of 1956.
\(^8\) Act 28 of 1956 (hereinafter referred to as LRA).
\(^9\) Act 3 of 1983 (hereinafter referred to as the BCEA of 1983).
\(^10\) Act 75 of 1997 (hereinafter referred to as the new BCEA).
The concept of the unfair labour practice, the origin of which will be discussed in more detail in chapter 3, was introduced into our law for the first time, by the Industrial Conciliation Amendment Act of 1979.\textsuperscript{11} This Amendment Act also established the Industrial Court as a new labour tribunal with powers to identify and undo the effects of the new Act.\textsuperscript{12} The Industrial Court and others like the Labour Appeal Court, which were later added to the statutory judicial hierarchy, developed new principles in the exercise of their unfair labour practice jurisdiction. The result was a rich but confusing, sometimes contradictory jurisprudence from which the rights of employees and employers had been inferred.

With the replacement of the previous Labour Relations Act 28 of 1956 a modification of the unfair labour practice was made by the introduction of the residual unfair labour practice.\textsuperscript{13} Both the Interim Constitution Act 200 of 1993\textsuperscript{14} as well as the final Constitution Act 108 of 1996\textsuperscript{15} provide that everyone has a right to fair labour practice.

\subsection*{1.2 THE WIEHAHN COMMISSION}

The government accepted the recommendations of the Wiehahn Commission and the Industrial Conciliation Act\textsuperscript{16} defined unfair labour practice as:

\begin{quote}
“any labour practice, which, in the opinion of the Industrial Court, is an unfair labour practice”.
\end{quote}

It was, therefore, left to the Industrial Court to determine what conduct amounts to unfair labour practice and for the court to develop that notion. Although this open-ended definition was amended the following year, the definition remained general and the Industrial Court continued its role as a “law maker” in this regard. The notion was a balanced one and gave effect to both the employer and employee’s interests.\textsuperscript{17}

The concept of unfair labour practice under the 1956 Labour Relations Act was a catch-all category of conduct by employers, employees and their organizations which, in the opinion of

\begin{itemize}
\item \textsuperscript{11} Act 94 of 1979, which was later called the Labour Relations Act 28 of 1956.
\item \textsuperscript{12} Labour Relations Act 28 of 1956.
\item \textsuperscript{13} See item 2(1)(a) of schedule 7 of the LRA and sections of the Employment Enquiry Act 55 of 1998.
\item \textsuperscript{14} S 27.
\item \textsuperscript{15} S 23.
\item \textsuperscript{16} Act 28 of 1956 in its amended form in terms of the Wiehahn Commission recommendations.
\item \textsuperscript{17} See \textit{NUMSA v MacSteel (Pty) Ltd} (1992) 13 ILJ 826 (A).
\end{itemize}
the Industrial Court, fell within the definition of an unfair labour conduct of various types which were explicitly dealt with.

1.3 THE EFFECT OF THE 1988 AND 1991 LABOUR RELATIONS AMENDMENTS

The short definition of unfair labour practice was not of sufficient assistance to the Industrial Court in its adjudication of unfair labour practice disputes. The legislature, as already stated, amended the Act and introduced a longer definition of unfair labour practice.\(^\text{18}\) The decisions of the Industrial Court on the determination of what constituted unfair labour practice was initially not appealable. This was so until the Labour Appeal Court was created in 1988.\(^\text{19}\) However, the aggrieved party could approach the Supreme Court, by way of review action. At that time the Industrial Court could also not make a binding legal ruling that a refusal to recognise a registered and representative union should give rise to an unfair labour practice complaint.

The original definition of unfair labour practice as well as the 1980\(^\text{20}\) amendment having failed to assist the Industrial Court in determining what conduct amounted to unfair labour practice the legislature introduced another amendment of the definition of the unfair labour practice in 1988.\(^\text{21}\) Before this amendment the Industrial Court had no power to grant urgent relief to prevent continuing unfair labour practices.

\(^{18}\) S 1(c) of the Industrial Conciliation Amendment Act 95 of 1980 defined ULP as

(a) Any labour practise or any change in any labour practice other than a strike or a lock out. Or any action contemplated by s 66(1) which has or may have the effect that: -

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardised thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between the employer and employee is or may be detrimentally affected thereby;

(b) Or any other labour practice or any other change in any labour practice which has or may have an effect mentioned in paragraph (a).

\(^{19}\) See s 17(a) of the Labour Relations Amendment Act 83 of 1988.

\(^{20}\) S 1(e) of the Industrial Conciliation Act 94 of 1979 and s 1(c) of the Industrial Conciliation Amendment Act 98 of 1980 effective from 1 October 1979 and 1 August 1980 respectively.

\(^{21}\) By the enactment of the Labour Relations Amendment Act 83 of 1988 effect on 1 September 1988 whose wording beings as follows:

“Unfair labour practice means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and, shall include the following …” (It goes on to enlist fifteen sub-components.)
This amendment consisted of thirty-one sections and, in my view, was an attempt to codify the unfair labour practice concept. It reflected an expansive view of labour relations while recognising individual concerns. It addressed sex discrimination in explicit terms and it also highlighted the need for both procedural and substantive fairness in dismissal cases. The new definition also allowed the Industrial Court to adjudicate on fairness or otherwise of a strike and lock-out. Another important section of the amendment was the prohibition of the unfair unilateral amendment of the terms of employment of an employee or employees. The Industrial Court was, in terms of these amendments, able to grant urgent interim relief until an order was made by the Industrial Court. This included unfair labour practice disputes.

The 1991 amendments effectively re-introduced the earlier unfair labour practice definition. The effect was to, inter alia, deprive the Industrial Court of its powers to brand strikes as unfair. It was also given the power to grant interdicts against illegal strikes. The Act further introduced section 17(D) which effectively banned ex parte orders and required employers to give reasonable notice of any intention to interdict strikes. This was a response to the 1988 amendments which allowed the granting of interdicts against strikes even on short notice and even ex parte. Seemingly the employers had been abusing this remedy to the detriment of the employees who had a genuine reason to engage in strike action.

The deeming provision in terms of section 79(2) of the Act which held unions vicariously liable for certain delicts of its members and officials were also abolished. The Appeal Court structure in respect of unfair labour practice disputes was not nationalized, but followed the structure of the then Supreme Court.

The 1991 Labour Relations Amendment Act 9 of 1991 appeared to have provoked the predominantly Black Trade Unions like the Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions (NACTU). They campaigned vigorously against the altered labour laws and embarked on mass stay-aways. The 1988
amendments seem to be much accepted by the trade unions hence the sharp response when those favourable to the employees, as highlighted above, were amended in 1991. Following the first democratic election in 1994 a new Labour Relations Act was promulgated in 1995. It contained no open-ended unfair labour practice definition, but a list of residual unfair labour practices was contained in Schedule 7 to the Act. Initially unfair discrimination was included, but was removed and placed in the Employment Equity Act in 1998. The list of unfair labour practices was included in the main body of the Labour Relations Act with the 2002 amendments.
CHAPTER 2
COMMON LAW

2.1 INTRODUCTION

One of our sources of labour law is common law, which has its roots in the Roman law and Roman Dutch law. In Roman law the letting and hiring of the labour as a service of free man could be regulated by two species of *locatio conductio operis* and *locatio conductio operarum*. These concepts were adopted and formed part of the Roman Dutch Law.

*Locatio conductio operarum* is a letting and hiring of personal services, a consensual contract whereby a workman or a servant as employee (*locatio operarum*) undertakes to place his personal services (*operae suae*) for a certain period of time at the disposal of an employer (*conductor operarum*) who in turn undertakes to pay him the wages or salary (*merces*) agreed upon in consideration of his services.

*Locatio conductio operis* (*faciendi*) is the letting and hiring of a particular piece of work or job to be done as a whole (*opus faciendum*). This was a consensual contract whereby the workman as employee or hirer (*conductio or redemptor operis*) undertook to perform or execute a particular piece of work or job as a whole (*opus faciendum*) for the employer as letter or lessor (*locatio operis*) in consideration for a fixed money payment (*merces*).

The difference between the two was that in the former the subject matter is the labour or unskilled services and the workman was subject to the supervision and directions of the employer whereas in the latter the subject matter is the execution or performance of a certain piece of work and therefore the results of such work becomes the subject matter thereof. The later kind of contract labour is not regulated by the Labour Relations Act but by the common law of contract. The *locatio conductio operarum* is the one whose conduct of the parties’ performance of their obligations and duties is governed by various statutes like the Labour Relations Act etc.

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31 See Van Warmelo in ft 30 supra.
32 Act 28 of 1956.
Our labour law has been unavoidably governed by statutory regulations, which have introduced fairness as a determining factor in the conduct of the employer.\textsuperscript{33} Common law knows only a contract between two parties, the employer and the employee, and no fairness or otherwise is to be attributed to their conduct during the duration of the contract of employment. Fairness was brought about by the 1979 Industrial Conciliation Act\textsuperscript{34} and was inherited by the present Labour Relations Act.\textsuperscript{35} In common law, whether the employer or employee’s conduct was fair is irrelevant as the contract and its conduct is left to the parties themselves to govern. Each party is at liberty to terminate the employment contract and to give notice of termination to each other. The employer is obliged to pay the employee a month or week’s wages, as the case may be, on his notice of termination. There is no such obligation placed on the employee. As much as the employee has a duty to give notice of termination of the contract, the employer also has a duty not to unfairly dismiss the employee. This is a statutory provision, which is not known by common law. In common law an employer need not give a reason to dismiss the employee.

Likewise, as long as the other labour practices of an employer are lawful, namely, that they are in accordance with the contractual terms, and not \textit{contra bonos mores}, the employee cannot complain or allege that unfair labour practice is perpetuated. The requirement of fairness in labour practices is a purely statutory requirement. It was introduced into our law in 1979\textsuperscript{36} and remains part of the law as a result of the 1995 Labour Relations Act.\textsuperscript{37}

\textbf{2.2 ABSENCE OF FAIRNESS}

It is important to note that when statutory fairness is determined, lawfulness is not enough. Institutions entrusted with the task of interpreting the unfair labour practices have always accepted that mere compliance with the principles of lawfulness is insufficient. The act or conduct should be fair as well in order to avoid being branded as unfair labour practice. The Appellate Division in \textit{National Union of Mineworkers v East Rand Gold & Uranium Co Ltd}\textsuperscript{38}
held that the unfair labour practice concept could have the effect of suspending common law and contractual consequences. The court stated as follows:

“In the exercise of its powers and the discretion given to it, the Industrial Court is obliged to have regard not only or ever primarily to the contractual or legal relationship between the parties to a dispute. It must have regard to the application of principles of fairness.”

Brassey\(^{39}\) says it is indeed peculiar to an unfair labour practice determination that it may have the effect of suspending the common law and can have contractual consequences. One of the consequences of this approach is that the lawfulness of a dismissal (\textit{eg} when the employer had given the required notice of termination) was regarded as insufficient. In addition thereto there must be sufficient reason for the dismissal (substantive fairness) and a proper procedure should have preceded the dismissal (procedural fairness). In a similar vein the employee could also be guilty of an unfair labour practice if the conduct \textit{vis-à-vis} the employer had been unfair, despite the fact that they might have acted within their rights.\(^{40}\)

It would appear that the question as to whether conduct amounted to an unfair labour practice involved questions of law and fact as well as a moral judgement. In \textit{NUMSA v MacSteel (Pty) Ltd}\(^{41}\) it was stressed that the court is expressly enjoined to have regard not only to law but also to fairness. In my mind a decision of the court pursuant to these directions is not a decision of a question of law in the strict sense of the term, but it is the passing of a moral judgement or of a combination of findings of fact and opinions.

\(^{39}\) Brassey \textit{The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice} 354.
\(^{40}\) See \textit{NUMSA v MacSteel (Pty) Ltd} supra.
\(^{41}\) See ft 40 supra.
CHAPTER 3
THE UNFAIR LABOUR PRACTICE IN THE 1956 ACT

3.1 THE HISTORY AND INTRODUCTION OF THE UNFAIR LABOUR CONCEPT IN 1977

As mentioned above major problems of political origin in several areas of South African society began to manifest themselves especially in the late nineteen 70’s. An example in this regard is the student revolt of 1976 and the industrial actions that followed as well as the many political disturbances which all affected the industrial peace. In 1977 a Commission of Enquiry was established to investigate labour laws, the main aim being to bring about ways of improving the labour relations in all work places. The Commission, consisting of a panel of fifteen people, headed by Professor Nic Wiehahn, was established. In a little more than two years it produced a series of reports, which led to a sweeping and rapid overhaul of the country’s labour laws. As a consequence of the commission’s recommendations, which were forwarded to the government, a deracialised set of labour laws was enacted thus marking the acceptance of the then radical principle of equality. Amongst those introduced to the recommendations of the Wiehahn Commission was the concept of unfair labour practice.

Section 1 of the Industrial Conciliation Act defined unfair labour practice as

“any labour practice, which in the opinion of the Industrial Court, is an unfair labour practice”.

The above definition says much about who was entrusted with the task of the final decision as to what conduct amounts to unfair labour practice. This body was the Industrial Court. This is confirmed by the commission’s reported recommendation, which described the proposed Industrial Court as:

“[a] court with a wide area of competence which may settle disputes of rights and of interests. Matters such as unfair dismissals, unfair labour practices and the interpretation of laws and agreements are part of its functions. The court functions with the flexibility

42 See chapters 1 and 2 supra.
43 Industrial Conciliation Amendment Act 94 of 1979.
44 A court established by s 17(1) of the Industrial Conciliation Amendment Act 94 of 1979 (which was later called the Industrial Conciliation Act 28 of 1956). The Act came into operation on 1 October 1979.
of an arbitration body, an equity court and a judicial body applying the rules of law. Its principal aim is the achievement of labour peace and the attainment of the objective of social and economic development of the country.”

The above extract clearly shows that the Industrial Court had to operate as a quasi-legislative body. It is evident that in determining unfair labour practice disputes, the Industrial Courts fix the individual parties’ rights and duties in terms of a relatively integrated body of rules, which they themselves, and not the lawgiver, have authored.46

The Industrial Court changed the existing law, and has thus acted legislatively. This is more so when, in interpreting what conduct amounts to unfair labour practice, they use their own interpretation and discretion. Fairness is, however, the most important criteria used and did not matter whether the employer had acted lawfully or not. Until 1988 when the Labour Appeal Court was introduced47 a determination by the Industrial Court what constituted an unfair labour practice was not appealable. However, such a determination could be tested in the Supreme Court by way of review.

3.2 THE CONTENT OF THE INDUSTRIAL CONCILIATION ACT AND BENEFITS

Unlike the present Labour Relations Act48 the old Labour Relations Act49 did not specifically deal with unfair labour practice relating to benefits, nor does it mention residual unfair labour practice as a point of discussion. By its definition unfair labour practice was inclusive of the labour activities. Under the 1956 Labour Relations Act the unfair labour practice was a catchall category of conduct by employers, employees and their organizations, which in the opinion of the Industrial Court fell into the definition of an unfair labour practice. The concept was an open-ended one, as its intended aim was to balance and give effect to both employer and employee interests.50

49 Act 28 of 1956.
50 See NUMSA v MacSteel Pty Ltd supra. In this case the court per Goldstone JA held that a refusal by employees to work overtime in excess of the statutory maximum as laid down by s 8(1) of the Basic Conditions of Employment Act 3 of 1983 was legitimate.
3.3 DISTINCTION BETWEEN RIGHTS AND INTEREST DISPUTES

As already alluded to in this discussion it was the Industrial Court’s duty to determine whether an act complained of amounted to unfair labour practice or not. The nature of the dispute was irrelevant and therefore the Industrial Court adjudicated the rights disputes on unfair labour practice. In terms of the new Labour Relations Act\textsuperscript{51} as will be discussed more fully in the topics to follow, benefits fall under rights disputes and not interest disputes. The distinction is very important to determine the procedure which the employee has to follow, because all rights disputes are determined by adjudication, and not by strike action as is the case with interest disputes.

3.4 THE REASON AND EFFECT OF THE 1980 AMENDMENT

According to Reichman and Mureinik:\textsuperscript{52}

“The first definition of unfair labour practice was an embarrassment to the Industrial Court itself. It amounted to a licence to legislate without more and did not survive enough to embarrass the court in its duties.”

This is so because by it’s wording it left a cumbersome task to the Industrial Court to fill in the lacuna left by the legislature.\textsuperscript{53} The definition of the term unfair labour practice was changed by way of an amendment in 1980,\textsuperscript{54} which declared that an unfair labour practice meant:

\[(a)\] Any labour practice or any change in any labour practice other than a strike or a lockout or any action contemplated in section 66(1) which has or may have the effect of:

\[(i)\] any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced is jeopardised thereby;

\[(ii)\] the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

\textsuperscript{51}Act 66 of 1995. The Act deals with residual unfair labour practice and item 2 (1) of Schedule 7 to the LRA introduces for the first time in our labour law protection against unfair labour practice relating to benefits.

\textsuperscript{52}Reichman and Mureinik “Unfair Labour Practices” (1980) 1 ILJ 22.

\textsuperscript{53}By the Industrial Conciliation Amendment Act 94 of 1979 effective from August 1980.

\textsuperscript{54}Inserted by s (1)(c) of the Industrial Conciliation Amendment Act 95 of 1980.
(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby;

(b) Or any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a)."

Thompson and Benjamin\textsuperscript{55} quoted \textit{supra} have this view of this definition:

“The Act allowed the court to determine a dispute ‘on such terms as it may deem reasonable’. Does this mean the court must simply be guided by a gut sense of fairness in dealing with the diverse disputes that are brought before it? Ad hoc justice is no justice at all. At minimum, rules must be devised and like cases treated in like manner. But a modern system of labour relations cannot rest on such a flimsy base. The judiciary must act on the legislature’s delegation and waywardness by searching for statutory cues and developing a jurisprudence that makes good the silences. The Industrial Court has in fact been engaged in exactly such a task since the beginning of the eighties.”

The statute is the necessary starting point in discovering the ceilings and angles of the potential unfair labour practice edifice. The moulding and development of the unfair labour practice concept was left squarely on the shoulders of the courts. Reichman and Mureinik\textsuperscript{56} opine on page 113:

“Whatever the niceties of a review-driven classification, it is quite clear that the definition empowered the court to make industrial relations law.”

The criticism levelled against the Industrial Court is sometimes without justification.\textsuperscript{57} This is so because the country was faced with industrial problems, which necessitated a cautious approach to it. On the whole the courts succeeded in its development of the industrial law. In a country with diverse cultures and a history of inequality surely the court could be entrusted with a duty to develop the new legislation as the one \textit{in casu}.\textsuperscript{58} The exclusion of legal representation was, in my view, not a wise decision.\textsuperscript{59} Legal representatives always play a pivotal role in the development of the law especially a completely new Act that no one was

\textsuperscript{55} See ft 45.
\textsuperscript{56} See ft 17.
\textsuperscript{57} See also Thompson and Benjamin A1-60.
\textsuperscript{58} The LRA 28 of 1956 as amended.
\textsuperscript{59} S 45(9)(a) provided parties to the dispute to appear in person or be represented by another individual or trade union members.
familiar with its provisions. This is so more especially that the purpose of the enactment was to assist the previously disadvantaged communities like Blacks who were unfamiliar with trade unionism. The whole approach was new especially with the introduction of the concept of fairness. In *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd.*\(^{60}\) Goldstone J held that unfair labour practice determination may take precedence over common law. The principles of fairness were held to be paramount. In this case the employer had promised to give a benefit (of backdated increase in wages) to non-striking employees. The court held that the fact that only those employees who did not strike would receive the benefit amounted to a conditioned offer and therefore to unfair labour practice.

Reichman and Mureinik\(^{61}\) suggest that the definition of an unfair labour practice is derived from the American National Labour Relations Act of 1935. They put it as follows:

> “Furthermore, two deficiencies in the procedure that was then used for settling unfair labour disputes namely:

> (a) that a party affected by an unfair labour practice cannot approach the Industrial Court but must go through the cumbersome, time-consuming and conceivably impassable conciliation process in an industrial or a conciliation board; and

> (b) that it is not clear that the victim of an unfair labour practice can claim a remedy as of right”.

These weaknesses also limited the efficiency of the machinery in the Act for dealing with employee unfair labour practices. Until such were removed the expectations generated by the careless injection into common parlance of the phrase unfair labour practice would by far outstrip the ability of the law to fulfill them. This was especially so in that it was left to the courts to determine whether a particular conduct complained of amounted to an unfair labour practice. Furthermore, the unfair labour practice protection was not available to all categories of employees.\(^{62}\) All industrial legislation including the Labour Relations Act 28 of 1956 did not apply to civil servants, farm employees and domestic workers. Such categories of employees did not get the benefit of the unfair labour practice remedy. As will appear from

\(^{60}\) *Supra.*

\(^{61}\) In his article “Unfair Labour Practice” 1.

\(^{62}\) In terms of s 2(2) of Wage Act 5of 1957 the following categories of employees were excluded:

- (a) persons employed in farming operations;
- (b) person employed in domestic service in private households;
- (c) officers of Parliament in respect of their employment as such;
- (d) government employees and those employed by a provincial administration.
the discussion to follow in the next chapters various Acts were introduced to cover all categories of employees to which labour law legislation was applicable.
CHAPTER 4
THE UNFAIR LABOUR PRACTICE
IN THE CURRENT DISPENSATION

4.1 THE RESIDUAL UNFAIR LABOUR PRACTICE

As the origin of unfair labour practice is the Labour Relations Act 28 of 1956, the term residual unfair labour practice is also derived from statute. The relevant portion in the discussion is item 2(1)(b) of Schedule 7 to the Labour Relations Act, which includes unfair conduct relating to benefits due to the employee. Although item 2(1)(b) of Schedule 7 has been repealed and replaced by section 186(2)(a) of the new Labour Relations Act its origin is worth mentioning especially that the cases that have developed it dealt with item 2(1)(b).

In 1998 the Employment Equity Act was promulgated. The Act provides for the prohibition of unfair discrimination and the institution of affirmative action by means of employment equity plans. The basic protection of employees and work-seekers against unfair discrimination is defined in terms very similar to those in item 2(1)(a), but with three main differences relating to its implementation. Whereas the prohibition contained in item 2(1)(a) related only to employers, section 6 of the Employment Equity Act prohibits all persons from discriminating unfairly against employees and applicants for employment.

Section 11 of the Employment Equity Act reverses the onus of proving unfairness and requires the employer against whom unfair discrimination is alleged to establish that such

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63 Item 2(1)(a) and (b) of Schedule 7 to the Labour Relations Act 66 of 1995. In terms of the schedule unfair labour practice means any unfair act or omission that arises between an employer and an employee involving –
(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, mental status or family responsibility;
(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;
(c) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.
(2) For the purposes of sub-item (1)(a)-
(a) “employee” includes an applicant for employment;
(Only relevant portions of the schedule have been quoted.)
64 Act 55 of 1998 (hereinafter referred to as the EEA).
65 See s 6(1) of the EEA 55 of 1998.
conduct was fair. Employers are now under a duty to eliminate unfair discrimination in any employment policy or practice.

Although discriminatory conduct may also be unfair in a general sense not all unfair conduct is necessarily discriminatory. The victim of unfair conduct need not belong to any of the designated groups. This means that the ambit of the sub-item is wider than that of the section. The legislature in the item seems to exclude victims of unfair treatment in other forms, eg transfers. In view of the fact that they have not been employed, job seekers are excluded from the protection of this provision as they are ineligible for training, benefits, promotion etc. An employer is guilty of an unfair labour practice if any form of unfair conduct relating to the promotion, demotion or training of an employee is committed. Unfair in this sense implies failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intentional. With regard to promotion no employee has an automatic right to promotion. An employer can only be guilty of an unfair labour practice in failing to promote if it can be shown that the employer acted in bad faith or had expressly or implicitly agreed to promote the employee. The unfairness may be either procedural or substantive, and will depend upon the circumstances of a particular case. Mere unhappiness or a perception of unfairness does not necessarily amount to unfair conduct. According to Grogan unfair conduct is a wider concept than unfair discrimination as conduct may be unfair without being discriminatory, although discrimination is clearly a species of unfair conduct.

4.2 DISPUTES ABOUT UNFAIR LABOUR PRACTICES

Any person who alleges an unfair labour practice may refer the matter to a council or, if no council has jurisdiction, to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation in terms of item 3(1) of Schedule 7. If conciliation fails, the

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66 S 6(1) of the EEA 55 of 1998 dealing with prohibition of unfair discrimination. Designated employers are furthermore required to include in their employment equity plans measure to eliminate forms of unfair discrimination, which adversely affect persons from designated groups. The above clearly indicates that the EEA has effectively removed item 2(1)(a) of Schedule 7 to the LRA in all provisions relating to unfair discrimination but left in place the remainder of item 2(1) dealing with other forms of unfair conduct termed "residual unfair labour practices".

67 See PSA obo Badenhorst v Department of Justice (1999) 20 ILJ 253 (CCMA).

68 See NETU and Hulett Aluminium (Pty) Ltd (1988) 8 (CCMA) 6.9.7.


Commission for Conciliation, Mediation and Arbitration (CCMA) has jurisdiction to arbitrate the dispute.

Item 4(1) provides that the Labour Court may determine a dispute referred in terms of item 3 on terms, which it deems reasonable, including re-instatement and compensation. An arbitrating Commissioner, on the other hand, is empowered to determine a dispute on reasonable terms thus allowing substantial scope for framing an unfair labour practice remedy in terms of item 4(2) of Schedule 7. *In Mitusa v Transnet Ltd*\(^{71}\) where Zondo J P held as follows:

“A dispute of right is not excluded from the ambit of an unfair labour practice dispute under item 2(1)(b) of Schedule 7. There can be no doubt that, where there is a dispute of right that relates to training, it is possible to have conduct by an employer that can be described as unfair conduct or as unfair labour practice as contemplated in item 2(1)(b). Such a dispute would be arbitrable in terms of item 3(4) of Schedule 7 and the CCMA would have jurisdiction to arbitrate it if there was no council with jurisdiction to arbitrate it.”

4.3 UNILATERAL VARIATION OF CONDITIONS OF SERVICE

Under common law an employer has no right to unilaterally change the terms of the service contract with the employee, and if he or she does so the employee would have an election to either resile from the contract and sue for damages in terms of the agreement. The prohibition on variation includes such things as the lowering of the employee’s status and any change in the nature of the employee’s work. Contractual terms of the contract of employment can also not be amended otherwise such an act can be declared an unfair labour practice by the Labour Court under paragraph (b) of the residual unfair labour practice jurisdiction if it can be shown to amount to unfair conduct in relation to demotion or the provision of benefits to an employee. The Labour Appeal Court held as follows:\(^{72}\)

“A dispute about unilateral change to terms and conditions of employment, which, as already stated above, is a dispute in respect of which a strike is competent, may arguably also be said to fall within the ambit of an unfair labour practice as defined in item 2(1)(b) especially in relation to training, demotion and the provision of benefits to an employee. A dispute falling under item 2(1)(b) is, of course, subject to arbitration in terms of item 3(4)(b). The idea of giving such a choice is also to be found in the Labour Relations Amendments Act 12 of 2002.”

\(^{71}\) (2002) 11 BLLR 1023 (LAC) 1054G-H.
\(^{72}\) See *Mitusa ’s case in ft 71 supra* 1056E-F.
A change in the method of performance of work may amount to a unilateral variation of the terms of the contract only if it entails a change to the essential nature of the job.\textsuperscript{73} Any unilateral change by an employer can only be unlawful if it amounts to a change of terms and conditions of employment. However an employer can change benefits, such as loan schemes, special leave privileges or discretionary bonuses to which employees are not contractually entitled.

Any unilateral demotion of an employee without a valid reason could also amount to unfair labour practice.\textsuperscript{74} The Industrial Court has held that in certain circumstances a unilateral alteration of an employee’s terms and conditions of employment can constitute an unfair labour practice even when the alteration is to the advantage of employees.\textsuperscript{75} Any disregard by an employer of a binding collective agreement which governs terms and conditions of employment will amount to a unilateral variation. In certain instances, if there is a commercial rationale for doing so, an employer is entitled to alter an employee’s remuneration package provided that the final decision to do so was arrived at after proper consultation with the employee.\textsuperscript{76}

Unilateral amendments of conditions of employment can amount to unfair labour practise if they concern benefits.\textsuperscript{77} This is so because if the conditions of employment include the provision of specified benefits the employer cannot make amendments to such conditions without being in breach of the contract of employment. If he does so his conduct will amount to unfair labour practice and could result in the employee seeking a remedy through adjudication or arbitration.\textsuperscript{78}

In \textit{NUM v Gold Fields of SA Ltd}\textsuperscript{79} it was held that the unilateral amendment of an employment agreement or working conditions relating to promotion, demotion or benefits by

\textsuperscript{73} See \textit{A Mauchle (Pty) Ltd v/ Precision Tools v NUMSA} (1995) 16 ILJ 349 (LAC).
\textsuperscript{74} See \textit{Usher v Linvar (Pty) Ltd} (1992) 13 ILJ 243 (1C).
\textsuperscript{75} See \textit{National Union of Mineworkers v Gold Fields of SA Ltd} (1989) 10 ILJ 86 (1C).
\textsuperscript{76} \textit{WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen} (1997) 2 BLLR 124 (LAC).
\textsuperscript{77} \textit{Kubeka v Woolworths (Pty) Ltd} (1999) 20 ILJ 3020 (CCMA).
\textsuperscript{78} See \textit{IMATU obo Baker v East London Transitional Local Council} 2000 (3) BALR 280 (CCMA).
\textsuperscript{79} (1989) 10 ILJ 861 (LC). See also \textit{Yichiho Plastics and SACTWU} (1991) 12 ILJ 1395 (ARB) and \textit{Usher v Linvar Pty Ltd supra}. 

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an employer, unless done to give effect to statutory provisions or the provisions of a collective agreement, will constitute an unfair labour practice.\textsuperscript{80}

4.4 THE IMPACT OF THE 2002 AMENDMENTS ON RESIDUAL UNFAIR LABOUR PRACTICES

Chapter 8 of the Labour Relations Act\textsuperscript{81} has been amended to also include residual unfair labour practice provisions, which were originally dealt with in part B of Schedule 7 to the labour relations act. The old chapter 8 previously catered for unfair dismissals only. One of the most important changes brought about by amendments\textsuperscript{82} in chapter 8 is that every employee has the right not to be subjected to unfair labour practice of any type. Originally the act protected employees against unfair labour practice only in respect of those situations specified in item 2(1)(a) and (b) of Schedule 7 to the Labour Relations Act.\textsuperscript{83} However unfair discrimination in the work place has already been repealed by the Employment Equity Act.\textsuperscript{84} The new amendments have also done away with the definition of employer which also includes an applicant for employment. The protection against unfair conduct by the employer includes unfair conduct of an employer relating to probation.

Despite the problems encountered by the courts in defining benefits which exclude remuneration the new amendments have not touched that ground and the situation remains a grey area.

\textsuperscript{80} See also s 23(1)(c)(1) of the LRA 66 of 1995 which provides that a collective agreement binds the member of a trade Union and employers who are members of a registered employers’ organisation agreement regulates, \textit{inter alia}, terms and conditions of employment. See also s 186(2)(a) of the LRA.

\textsuperscript{81} See in particular Schedules 185 and 186 of the Labour Relations Act 66 of 1995.

\textsuperscript{82} S 41(a) of the Labour Relations Act 12 of 2002.

\textsuperscript{83} The original unfair labour practice in terms of the part B of Schedule 7 included practices of discrimination in the work place, other unfair acts arising between employer and employee relating to promotion, training, the provision of benefits, unfair suspension or any other disciplinary action short of dismissal.

\textsuperscript{84} Act 55 of 1998.
CHAPTER 5
BENEFITS AS UNFAIR LABOUR PRACTICE – THE
PRE-1995 POSITION

5.1 INDUSTRIAL COURT CASES DEALING WITH BENEFITS

In following the rights based approach in determining and settling the unfair labour practice disputes the primary task was to determine or delineate and protect the rights of the respective parties. It has been generally accepted that it is not the task of the courts to interfere in disputes which relate to the interests as opposed to the rights of the parties such as disputes concerning a change in conditions of service or the determination of a new remuneration package. As a result the courts have generally not been prepared to involve themselves in the cut and thrust of collective bargaining and have restricted their task in this regard to stipulating and enforcing the rules relating to the bargaining process, and to demarcate the rights of the respective parties. This was aptly illustrated in the following terms by Conradie J in the case of Metal and Electrical Worker’s Union of SA v National Panasonic:85

“A strike or a lockout is like a boxing match. Each opponent tries, within the rules, to hurt the other as much as possible. There is a referee to see that the rules are observed. The court is the referee. It does not intervene simply because one of the opponents is being hurt … that is the idea of the contest. The referee may intervene if one of them is struck a blow below the belt, but would be astounded while the fight is in the progress to receive a complaint that something had gone wrong within the weigh-in.”

The Industrial Court did intervene when it felt that a right (established in equity had been infringed, but it was generally careful not to intervene in interest disputes. Determining an unfair labour practice involved a two-staged approach. In the first stage it has to be determined whether the unfair labour practice has indeed been committed. In the second stage a remedy (akin to the arbitration award) has to be granted once it is clear that an unfair labour practice has been committed. The two stages can aptly be termed adjudicative and quasi-arbitral stages respectively. The remedy should have as its purpose the correction of the unfair conduct. A wide discretion was therefore left to the Industrial Court to determine the nature and extent of the remedy to be granted. The Act86 empowered the Industrial Court to

85 (1991) 12 ILJ 533 (C) 536E-G.
86 Labour Relations Act 28 of 1956.
grant any remedy that it believed reasonable, including, but not limited to, reinstatement and/or compensation.

In terms of the new Labour Relations Act\(^87\) unfair labour practice is defined to include any unfair conduct by the employer relating to provision of benefits. The old Labour Relations Act definition of the unfair labour practice did not mention the provision of benefits as specifically protected under the unfair labour practice remedy. However, any conduct, which the Industrial Court interpreted as unfair, fell foul of the definition that prevailed at the time. The old Labour Relations Act\(^88\) as well as common law allowed the parties\(^89\) to enter into an industrial council agreement relating to all matters including benefits enjoyed by the employees. Section 24(1)\(^90\) also made provision for the establishment of pension, sick leave, medical aid, unemployment, holiday, provident fund, insurance funds and the levying-upon employers and employees of contributions towards such funds or towards similar funds established by or in terms of the constitution of the council.

Any dispute arising from the provision of the above rights which would have been contained in an agreement would, if not resolved by the industrial council or conciliation board, be referred to the Industrial Court.\(^91\)

All discrimination in the workplace is regarded as an unfair labour practice conduct. Although there is no express prohibition against discriminatory wage policies in the 1956 Labour Relations Act, the Industrial Court has long set its face against them. In *SA Chemical Workers Union v Sentrachem Ltd*\(^92\) the court ruled that wage discrimination based on race or

\(^87\) See s 186(2) of the Labour Relations Act 66 of 1995 which defines ULP as “any unfair act or omission that arises between an employer and an employee involving-
(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 provision of benefits to an employee;
(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of an agreement; and
(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 200 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act”.

\(^88\) See s 48 of the LRA 28 of 1956.
\(^89\) See s 24 of the LRA 28 of 1956.
\(^90\) LRA 28 of 1956.
\(^91\) S 17(1)-(2) provides for the establishment and functions of the Industrial Court, which includes the settling of all workplace disputes justiciable in that court.
\(^92\) (1988) 9 ILJ 410 (IC).
any other differences between employees other than skills or experience was unfair. The Supreme Court commented in this matter as follows:

“It was common cause between the parties that any practice in which a black person is paid a different wage than a white person for doing the same job having the same length of service, qualification and skills is a labour practice of wage discrimination based on race and that it constitutes an unfair labour practice.”

This principle of inequality of treatment of black employees was taken further in *Chamber of Mines of SA v Council of Mining Unions*[^93] in which it was ruled that the refusal by an employer to allow black workers to join a pension fund membership of which was confined to white employees constituted an unfair labour practice, even though black workers had a separate fund. The court commented that the doctrine of separate but equal was inherently unequal. This latter case clearly concerned an unfair labour practice concerning benefits. Under the present system it would of course have been dealt with as an unfair discrimination matter under the Employment Equity Act.

By the same method of reasoning not all forms of differentiation amounted to discrimination and therefore, unfair. In *Raad van Mynvakbonde v Minister van Mannekrag*[^94] the Supreme Court stated that it was not the intention of the legislature that any condition of service of a group of employees, which is less favourable than a similar condition of service for another group of employees, would be regarded as an unfair labour practice. The court went further to hold that conditions of service of a particular group of employees may inevitably differ from those of another group in the same industry because of the different working conditions. The test in regard to the unfairness of such differentiation revolved around the question whether injustice, prejudice, jeopardy or detriment existed in the given circumstances.

In *National Union of Mineworkers v Henry Gould (Pty) Ltd*[^95] the Industrial Court per Landman AM (as he then was) held that the Industrial Court may intervene in the collective bargaining process to remedy a tactic which constitutes an unfair labour practice. However, as a general rule the court will be reluctant to intrude into the cut and thrust of collective bargaining. Where the employer agrees to divide a bargaining unit into two groups (one subgroup represented by a recognised union and the other group consisting of non-union

[^93]: (1990) 11 *ILJ* 52 (IC).
[^94]: (1983) 4 *ILJ* 202 (T).
[^95]: (1988) 9 *ILJ* 1149 (IC).
employees also are merely consulted in respect of their terms and conditions of employment
which the employer implements unilaterally) it is not fair for the employer thereafter to treat
the employees as a single bargaining unit in such manner as to prefer one subgroup above the
other. Granting to non-union employees the benefits of collective bargaining but not granting
union members the benefits of individual bargaining is unfair. In this case the Industrial
Court declared the employer’s conduct as unfair labour practice.

It is clear from the development of the law in the Industrial Court that benefits fell under
rights disputes unless the issue concerned negotiation over the establishment of a new benefit,
or the amendment of a benefit. However, it was held that a change to a practice did not
constitute an alteration of the employee’s contractual rights, such as where a discretionary
bonus was granted, no unfair labour practice was committed.\textsuperscript{96}

It is suggested that the approach in terms of the new Act\textsuperscript{97} may be different and that the
question as to whether the granting of the benefits was fair under the circumstances should
prevail. For example, it is clear that where a workplace forum is in existence, the employer
would have to consult the forum on the granting of a discretionary bonus.\textsuperscript{98}

According to Grogan\textsuperscript{99} pension rights are difficult to enforce under the labour law because the
beneficiaries of them have by definition ceased to be employees and pension funds are often
handled by organisations which are independent of the employer. However, in the past the
courts were prepared to intervene where the employer had control or was in a position to exert
direct pressure over the scheme for the benefit of the employee.

In terms of the decision in \textit{Yskor Bpk v Meyer}\textsuperscript{100} section 86(1)(d) of the new Labour Relations
Act now subjects any change to pension fund rules to the consent of the workplace forum if
the employer or its representative controls the board of such a fund.

In the area of wages and cash benefits the problem of determining a rational basis for

\textsuperscript{96} See \textit{NUMSA v Iscor} (1992) 13 \textit{ILJ} 1190 (IC).
\textsuperscript{97} Act 66 of 1995.
\textsuperscript{98} See s 84(1)(b) of the Labour Relations Act 66 of 1995.
\textsuperscript{99} \textit{Workplace Law} 241.
\textsuperscript{100} (1995) BLLR 28 (LAC); see also \textit{Van Coppenhagen v Shell & BP SA Petroleum Refineries (Pty) Ltd}
differentials is a complex one. The starting point is the principle of equal pay for equal work. A person complaining of discrimination in this area must be able to show that he or she is not receiving dues accorded to others doing like work.

The role of the Industrial Court was both adjudicative in deciding whether an unfair labour practice has been committed and an arbitral function in deciding on equitable relief. The court could also give protection of an unfair labour practice conduct by granting an interim relief.

It is clear from the foregoing as well as the development of case law, as shown above, that the Industrial Court and the erstwhile Labour Court dealt with each and every act of unfair labour practice based on the principle of fairness. Unfair labour practice determination may take precedence over common law and in so doing the principles of fairness were and are still paramount. To the extent that the Industrial Court could determine what conduct amounted to unfair labour practice especially in relation to benefits’ disputes it was able to provide protection in favour of employees. The Industrial Court also played a pivotal role in protecting employees and enforcing their rights to benefits, unequal treatment relating to benefits like leave benefit as well as unemployment benefits.

An investigation of the case law over this period indicates therefore that the Industrial Court was prepared to declare unfair (mostly unilateral) action regarding benefits as unfair labour practices. It by and large steered clear of interest disputes and rightly so.

There was, interestingly, not a flood of cases in this regard and most unfair labour practice cases dealt with dismissal or collective bargaining rights.

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101 See BTR Dunlop Ltd v National Union of Metal Workers of SA (2) (1989) 10 ILJ 701 (IC).
102 See Langeberg Food Ltd (Boksburg) v Food & Allied Workers Union (1989) 10 ILJ 1093 (IC).
104 See Van Coppenhagen v Shell & BP SA Petroleum Refineries (Pty) Ltd supra where the employer refused to consent to payment of deferred pension was declared ULP. See Yskor Bpk v Meyer (1995) 16 ILJ 864 (LAC) and Tseleng v Chairman, Unemployment Insurance Board (1995) 16 ILJ 830 (T).
CHAPTER 6
THE CONSTITUTION AND THE
STATUTORY POSITION AFTER 1995

The right to fair labour practice is now entrenched in the Constitution. However, the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA) does not contain a general right not to be subjected to unfair labour practices. As previously narrated in the preceding chapters the unfair labour practice concept arose from the recommendations of the Wiehahn Commission and was subsequently defined and redefined in several amendments from the Labour Relations Act 28 of 1956 up to until the introduction of the present Act. This right was first entrenched by the interim Constitution. In addition to the provision of the right to fair labour practices the interim Constitution also provided that

“[t]he provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislation”.

Any legal provisions in conflict with the spirit of this section and which were in force at the commencement of the Constitution could not be allowed to survive in the light of the above provisions. This was in fact illustrated in the case of George v Western Cape Education Department where the court held that the unfair labour practice was to be interpreted in the light of the Constitutional provisions. In this case a married woman, the applicant, whose husband was not permanently disabled, was denied a housing subsidy by the department of Education of the Western Cape, the respondent, on the basis of gender and marital status. The court held that this was discrimination on the grounds of sex. The state, according to the court, had discriminated against women by not affording them benefits of a house owner’s allowance on the ground of gender and or marital status. The Industrial Court was therefore empowered to afford the correct remedy. The respondent was ordered to provide the

105 S 23(1) of the Republic of South Africa Constitution Act 108 of 1996 which reads thus “everyone has the right to fair labour practices”.
107 See s 27(1) of the interim Constitution of the Republic of South Africa Act 200 of 1993, which provides that “every person shall have the right to fair labour practices”.
108 See s 35(5) of the constitution Act 200 of 1993.
110 This case is of course also a good example of Industrial Court jurisprudence on unfair labour practices regarding benefits as dismissed in the previous chapter.
applicant with the housing subsidy. This judgement was well received in all judicial circles as it gave effect to the provisions of the constitution regarding discrimination and unfair labour practice. The Constitution protects the employee against unfair labour practice as defined in the Act. The definition of unfair conduct by the employer also includes disputes relating to training or provisions of benefits to an employee. It is therefore clear that the provisions of benefits to an employee is Constitutionally protected and can be enforced in court under the unfair labour practice doctrine in terms of section 23(1) of the Constitution. In my view if the conduct complained of is committed by an employer against his or her employee the rights of the employee can be enforced even in the High Court, which has concurrent jurisdiction with the Labour Court in all constitutional issues. Several benefits are also provided for in terms of the Basic Conditions of Employment Act.

Originally, residual unfair labour practices were dealt with in part B of Schedule 7 to the Labour Relation Act. These included practices of discrimination in the workplaces as well as other unfair acts arising between the employer and employee relating to, inter alia, promotion or training, and the provision of benefits. Since the coming into operation of the Employment Equity Act prohibition of unfair discrimination and its remedies in the workplace are dealt with by that Act. The Act lists all grounds upon which the employer

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111 See s 186 of the Labour Relations Act 66 of 1995 which provides that “unfair labour practice” means any unfair act or omission that arises between the employer and an employee involving:
(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;
(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
(c) a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement; and
(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 2000 (Act No 26/2000) on account of the employee having made a protected disclosure defined in that Act.

112 Act 108 of 1996.
113 Act 75 of 1997.
115 See s 6 of Act 55 of 1998 which came into operation.
116 Act 55 of 1998 on 9 August 1999. S 6 provided as follows:
(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender sex, pregnancy, marital status, family responsibility, ethnic or social organ, colour, sexual orientation, age, disability, religion, HIV status conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to:
(a) take affirmative action measures consistent with the purpose of this Act; or
(b) distinguish, exclude or prefer any person on the basis of a inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one or a combination of grounds of unfair discrimination listed in ss (1).
could be unfairly discriminating against the employee. The definition of the employee for the purpose of sections 6, 7 and 8 of Employment Equity Act includes an applicant for employment. Section 10 of the Employment Equity Act deals with the procedure to be followed in all disputes concerning unfair discrimination.

This has been included in the definition of unfair labour practice as provided for by section 186(2) of the Labour Relations Act in its amended form. These 2002 amendments have removed the remaining residual unfair labour practice provisions from part B of schedule 7, and they are now dealt with in the amended chapter 8 of the Labour Relations Act as already stated above. The Labour Relations Act in its amended form does not confer a general protection against an unfair labour practice on employees. Victims of conduct that could be termed an unfair labour practice but is not listed in section 186(2) must therefore seek protection elsewhere. This includes unfair conduct in respect of the allocation of ad hoc merit award or transfers not related to discipline or division of work. Does this mean that protection for unfair labour practice falling outside the definition can only be sought in terms of Section 23 of the Constitution? It follows therefore that such protection can be obtained from the common law courts like the High Court, which has concurrent jurisdiction with the Labour Court in constitutional issues. This is so because the individual employee’s act complained of would have been excluded by the definition in the Act. Such employee cannot strike, cannot claim breach of contract nor can he or she proceed on the basis of unfair labour practice as defined. The Constitution is open to cover all acts of unfair labour practice and it is the supreme law of the land.

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See s 41(a) and (b) and (c) of the Labour Relations Amendment Act 12 of 2002.
CHAPTER 7
THE INTERPRETATION OF THE UNFAIR LABOUR PRACTICE RELATING TO BENEFITS – THE POST-1995 POSITION

7.1 THE MEANING OF BENEFITS

Controversy has arisen in both the Commission for Conciliation Mediation and Arbitration (CCMA) and labour courts around the meaning of the term benefit. The focal points, in a number of decided cases, have been particularly in the context of whether, *inter alia*, a dispute falls within the ambit of section 186(2)(a) of the Labour Relations Act\(^{118}\) (previously item 2(1)(b) of the Labour Relations Act). One problem has been whether employees have a right to strike in respect of such dispute or have to resort to arbitration in respect thereof, or whether both remedies remained available. A second question related to the meaning of the word “benefits”.

Does the word benefits as it appears in section 186(2)(a) include remuneration for instance? Both the CCMA and Labour Court decisions on this point have not been consistent. In the first three decisions that came before the CCMA a wide meaning to benefits was attached. It was thus held that benefits included the laying on of free transport, deductions of amounts from the remuneration of employees and where employees were given the option of a reduction of salary or termination of employment.

The complication of the problem is exacerbated by the provisions of section 65(1)(c) of the Labour Relations Act\(^{119}\) which provides that employees may not strike over issues that may

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119 S 186(2)(a) of that act provides that an unfair labour practice means “any unfair act or omission that arises between an employer and an employee involving; 
(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”. Section 186(2)(a) has in terms of s 41(c) of Act 12 of 2002 replaced item 2(1) of Schedule 7 which provided as follows:
“Residual unfair labour practices” are defined as follows in item 2(1) of Schedule 7
(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and employee, involving –
(a) …;
(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;
(c) …;
(d) …;
be referred to arbitration in terms of the Labour Relations Act. It is clear that a dispute over benefits as it is a rights dispute may be referred to arbitration. If benefits is taken to include remuneration would this mean that employees may not strike over wages and salaries in section 65(1)(c) of the Labour Relations Act?

According to Van Jaarsveld et al\textsuperscript{120} a widest possible meaning should be attached to the concept “benefits” in correspondence with the purpose of the Labour Relations Act and a restricted interpretation given to the term “remuneration”. The term benefit means a non-wage or non-salary benefit. It is something extra, apart from remuneration. It could also be regarded as a supplement to remuneration for which no additional work is done. Examples of benefits are allowances, subsidies, bonuses, fringe benefits such as leave, medical aid, motor vehicle, pension benefits and so forth.

The sources of the above definitions will appear from the analysis of the cases that are discussed in the following paragraphs.

\textbf{7.2 THE INTERPRETATION OF BENEFITS BY THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA)}

In \textit{South African Catering and Clothing Allied Workers Union (SACCAWU) v Garden Route Chalets Pty Ltd},\textsuperscript{121} the first Commission for Conciliation Mediation and Arbitration (CCMA) case dealing with this issue, the commissioner appeared to have equated “benefit” with “pay” as including virtually any consideration which accrues to an employee by virtue of the employment relationship \textit{eg} concessionary travel facilities and ex gratia payments. He relied on a British case of \textit{Garland v British Railways Board}.\textsuperscript{122} That court further stated that even payments made \textit{ex gratia} by the employer fall within the concept, provided that they are granted in respect of the employment. The commissioner \textit{in casu} therefore held that the laying on of free transport constitutes a benefit in terms of item 2(1)(b) irrespective of whether it is granted in terms of a contract \textit{ex gratia} to suit the needs of the employer.

\begin{flushright}
120 Act 66 of 1995.
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(Only the relevant provision is mentioned. It is apparent that the provisions are identical.)
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122 (1997) 3 BLLR 325 (CCMA).
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122 1982 ECR 359 where the European Court of Justice found that concessionary travel facilities granted voluntarily to ex-employees fell within the scope of the concept “pay”.
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The wide approach to the interpretation of benefits resulted in the commissioner holding that the travel allowance formed part of the benefits enjoyed by other employees to the exclusion of others thus making the employer’s conduct unfair.

Since then the later decisions of both the Commission for Conciliation Mediation and Arbitration (CCMA) and the labour court have favoured the narrow interpretation of the term benefits so as to exclude all payments that could be interpreted as falling under a broad scope of remuneration.

Commissioner Snyman in *AUBTW v Lumber Laminator (Edms) Bpk*\(^{123}\) held that it did not appear that the legislature intended to exclude remuneration when it referred to benefits under paragraph (b) of the unfair labour practice definition. The commissioner, therefore, ruled that it had jurisdiction to hear the matter of mutual interest where the employee’s salaries were reduced by the employer. In this case, although the commissioner came to the correct conclusion that the employer’s conduct was not unfair, he had, in my view, no jurisdiction to hear the case because it is clearly that he was dealing with an interest dispute which would be dealt with by resorting to industrial strike action as a remedy.

In *Food and Allied Workers Union (FAWU) v Enterprise Bakery*\(^{124}\) a dispute arose over whether the employer company should pay certain employees overtime and commission. The commissioner held that he did not have jurisdiction to decide the issue of the commission and overtime pay dispute in terms of the residual unfair labour practice. The basis for his decision was the fact that he regarded the dispute as falling within the jurisdiction of the Department of labour in terms of the Basic Conditions of Employment Act.\(^{125}\)

### 7.3 THE LABOUR COURT INTERPRETATION OF BENEFITS

The Labour Court was, for the first time, required to adjudicate over a dispute involving benefits in *Schoeman v Samsung Electronic SA (Pty) Ltd.*\(^{126}\) In this case the first applicant had been appointed as a sales executive on a basic salary with a car allowance. Her employment contract made no mention of any commission. The first applicant refused to

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\(^{123}\) (1997) 9 BLLR 1237 (CCMA).

\(^{124}\) (1997) 5 BLLR 626 (CCMA).

\(^{125}\) Act 3 of 1983.

\(^{126}\) (1997) 10 BLLR 1364 (LC) 1368G-H.
accept a reduction in her sales commission and the respondent prohibited her from returning
to work by an action which both parties termed “lock out”. Applicant sought an order that the
lock-out was illegal and an order directing the respondent to restore her salary package and
her reduced commission.

The court held that since a lock-out could not be effected against a single employee the
respondent’s conduct amounted at most to a breach of contract. The court per Revelas J held
further that commission as claimed by the applicant was not a benefit as contemplated by item
2(1)(b) of the residual unfair labour practice definition and expressed his views as follows:

“The commission payable by the employer, forms part of the employee’s salary. It is a quid
pro quo for services rendered, just as much as a salary or a wage. It is therefore part of
the basic terms and conditions of employment. 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.”

The court even sought assistance from the dictionary. The judgement is often referred to
and established quite clearly that remuneration does not constitute a benefit.

The next Labour Court case was Gaylord v Telkom South Africa Ltd. The crucial question
before the same Revelas J was that of accumulated leave pay amounting to R147 577-00. The
court characterised this issue as a contractual dispute and as regards the interpretation and
application of item 2(1)(b) the court re-affirmed its position taken in the Schoeman case and
linked a dispute about the non payment of accumulated leave to remuneration and the judge
stated as follows:

“If the term benefit is so generously interpreted so as to include any advantage or right in
terms of the employment contract, even wages, item 2(1)(b) would all but preclude strikes
and lockouts. This was plainly not what the legislature had in mind. Therefore, wages
and salaries, in other words, remuneration, should be excluded from the term benefit. In
the same vein, accumulated leave pay should also be excluded as it is nothing more than
remuneration based on the contract between the parties.”

In my view leave pay is money paid for which no work has been done by the employer. It

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127 The Concise Oxford Dictionary, 6th ed (edited by J B Sykes) where the meaning of the word benefit is
defined as “advantage or an allowance to which a person is entitled under insurance or social security
(sickness, unemployment, supplementary benefit) or as a member of benefit club or society”.
128 (1998) 9 BLLR 942 (LC) 945I-J.
cannot be characterised as a remuneration for nothing is done by the employee for him to be remunerated. It is not a *quid pro quo* for services rendered for no services have been rendered at all. It is, in view, a fringe benefit. I cannot, therefore, concur with the conclusion reached by Revelas J in this regard.

In the case of *Sithole v Nogwaza NO*\(^{129}\) De Villiers A J held as follows:

> “Although opinion as to what constitutes a benefit (as opposed to remuneration) differ, the common thread running through all the decisions and the academic writings is that a ‘benefit’ constitutes a material benefit such as pensions, medical aid, housing subsidies, insurance, social security or membership of a club or society. In other words the benefit must have some monetary value for the recipient and be a cost to the employer. It is also something which arises out of a contract of employment.”

What is important and of note in the above extract is that the beneficiary of the benefit must not have performed any act or service in order to receive the benefit. It must have been an extra payment which was agreed upon at the time of the contract.

In another well-known judgement of *Northern Cape Provincial Administration v Hambidge NO*\(^{130}\) Landman J also held that a benefit is a supplementary advantage conferred on our employee for which no work is required. It was found that a claim for higher salary was not a benefit. The court stated that the word “benefit” in item 2(1)(b) means at least a non–wage benefit.

In the case of *Gauteng Provisiale Administrasie v Scheepers*\(^{131}\) Conradie JA held that disputes of right concern the application or interpretation of existing rights. Disputes of interest relate to proposals for the creation of new rights or the diminution of existing rights. Disputes of interest are ordinarily resolved through collective bargaining. Such disputes were defined in the Public Service Labour Relations Act\(^ {132}\) as “matters of mutual interest” and are considered to mean, *inter alia*, matters relating to terms and conditions of employment, compensation, remuneration and service benefits.

\(^{129}\) (1999) 12 BLLR 1348 (LC) 1355E.

\(^{130}\) (1999) 7 BLLR 698 LC.

\(^{131}\) (2000) 7 BLLR 756 (LAC).

\(^{132}\) Act 105 of 1994, this Act, before it was repealed, did not permit any disputes other than a dispute of right to be submitted to the Industrial Court.
In this case respondents, all hospital workers holding posts in the occupational class “administration clerk”, had for some time been required to perform tasks ordinarily performed by incumbents of a higher occupational class. The industrial court held that their employment in such work without extra remuneration constituted an unfair labour practice. On appeal the Labour Appeal Court (per Conradie JA) held that it was not the intention of the legislature to create further source of rights under the general unfair labour practice definition of the 1956 Act. It was held that the dispute in casu was one that could only be resolved through collective bargaining.

Moshoana\textsuperscript{133} opined that it was out of this judgement that a dramatic turn was taken to categorise benefits with a reference to right or interest disputes. He further states that the court’s reasoning in the above case ought to be understood in the context of the 1956 Act which had a general definition of unfair labour practice.

It should also be noted that in the new Labour Relations Act\textsuperscript{134} there is no definition of a benefit.

The Labour Appeal Court provided a sensible approach to the problem in the decision in *Horspersa v Northern Cape Provincial Administration*\textsuperscript{135}.

The question before court was whether the second appellant, who had been acting in a more senior position than her own, was entitled to be paid an acting allowance. The court per Mogoeng AJA held that the term benefits in the definition of an unfair labour practice only includes benefits *ex contractu* and *ex lege* - benefits that already exist in terms of a contract or law. The court declared that the acting allowance dispute was one of interest and not a rights dispute. The court differentiated between disputes of interest and of rights as follows:

“Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, while disputes of

\textsuperscript{133} “The Vexed Concept of ‘Benefits’ ” published as an option in (November 2004) *De Rebus* 47.

\textsuperscript{134} Act 66 of 1995.

\textsuperscript{135} (2000) 21 *ILJ* 1066 (LAC) 1070H – see also *Gauteng Provinciale Administrasie v Scheepers* (2000) 7 *BLLR* 756 (LAC). See *Eskom v Marshall* (2003) 1 *BLLR* 12 (LC) where the court although he declared that frustration of employee’s legitimate expectation of promotion, training or benefit may constitute unfair labour practice but was bound by the Labour Appeal Court decisions that such benefits must exist “*ex contractu or ex lege*”.
interest (or economic disputes) concern the creation of fresh rights, such as higher wages, modification of existing collective grants etc.”

It is clear from the above judgement that if the dispute is about the application of pre-existing policy or right to leave or the right to an acting allowance or a transport allowance, that it is a dispute of right and, would fall within the scope of “benefit”. If the dispute relates to the creation of a new right and therefore amounts to a dispute of interest, it will not be a benefit, and the parties may strike or lock-out over the matter.

According to Du Toit et al\textsuperscript{136} although transport allowance\textsuperscript{137} and provident funds\textsuperscript{138} have been held to be “benefits” the weight of authority suggests that both should be considered as forms of remuneration. Whether or not a car allowance forms a benefit was left open in Legal Aid Board v John NO\textsuperscript{139} but in Van Amstel v Eskom\textsuperscript{140} benefit was defined as including a car allowance.

7.4 UNFAIR CONDUCT RELATING TO THE PROVISION OF BENEFITS AS INTERPRETED BY THE COURTS

An employer may commit an unfair labour practice through unfair conduct relating to the provision of benefits.

In AUBTW v Lumber Laminators (Edms) Bpk\textsuperscript{141} in the Commission for Conciliation Mediation and Arbitration (CCMA) the Commissioner had to decide whether an employer, by adjusting the salaries of certain employees downwards in line with other employees in the company and in the employment –market generally, had committed unfair labour practice. The employees in question were given the option of accepting the reduced salaries or terminating their employment. This action of the employer took place in the context of a retrenchment. The employer argued that it had consulted with employees in following the guidelines set out in section 189 of the Labour Relations Act. The consultation with the affected employees was to avoid retrenchment. The Commission for Conciliation Mediation and Arbitration (CCMA) commissioner, on the basis of the fact that the reduction of salaries

\textsuperscript{136} Labour Law through the Cases (2003) LRA8-18.
\textsuperscript{137} SACCWU v Garden Route Charlets (Pty) Ltd (1997) 3 BLLR 325 (CCMA).
\textsuperscript{138} SA Chemical Workers Union v Longmile/Unitred (1999) 20 ILJ 244 (CCMA).
\textsuperscript{139} (1998) 4 BLLR 400 (LC).
\textsuperscript{140} (2002) 9 BALR 995 (CCMA).
\textsuperscript{141} (1997) 9 BLLR 1237 (CCMA).
is the only alternative to possible retrenchment, held that the employer had not committed an unfair labour practice.

In *South African Railways and Harbours Workers Union (SARHWU) v Jegels* 142 some employees received scarcity allowance of R200,00 a month, while other employees were receiving R3500,00 per month on the same basis. The purpose of the scarcity allowance being retaining the services of skilled labour. The Independent Mediation Services of South Africa (IMSSA) panelist, on the facts, came to the conclusion that the differentiation in the scarcity allowance was unfair.

We are therefore left with the conclusion that the range of employer conduct that can be categorised as relating to the provision of benefits is so limited that item 2(1)(b) has hardly any application, or that it should be read more widely than the case of *Samsung* suggests. The clue, perhaps, lies with the context. Item 2(1)(b) does not hit any dispute concerning conduct of any employer that relates to the provision of benefits, that only unfair conduct relating to the provision of benefits to an employee. Thus if the employer unilaterally alters an employee’s benefits in the wide sense, as did in *Samsung* the CCMA should first look at whether this amount to unfair conduct. The focus ought not to be on the term “benefits” but on the conduct by which they are provided. If the employer as in *Samsung* claimed it was exercising its rights in terms of section 64 (lockout) to resolve the dispute, then it was not acting unfairly and its conduct was not hit by item 2(1)(b). If, however, the employer was to change the method or timing of payment of wages, a dispute over the change would not be excluded from item 2 (1) (b) simply because wages were involved, but because the change would amount to alleged unfair conduct in relation to the way it is provided. 143

The changing or variation of provision of benefits, may in certain circumstances also amount to the unfair unilateral variation of the contract of employment. 144

The general view taken by the Labour Court as well as the commissioners and arbitrators is that remuneration due to the employee in terms of the employment contract does not constitute a benefit for the purposes of item 2(1)(b) of Schedule 7(now section 186(2)(a) of

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144 See *Kubeka v Woolworths (Pty) Ltd supra*. 

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the Labour Relations Act). Such dispute should therefore be excluded from the definition of unfair labour practice.

The courts have made it difficult to distinguish and draw a line between remuneration and the employment benefits. This is evinced by the approach in the case of *Staff Association for the Motor and Related Industries [SAMRI] v Toyota of South Africa Motor (Pty) Ltd.*

The Labour Court in that judgement indicates that this distinction is difficult to draw, because that which is couched in the terms of an employment benefit (such as a vehicle scheme or a transport allowance) may have a bearing on the employee’s remuneration. The possible link between the two herein is closer than expected, for it may well be that a benefit forms part of the employee’s remuneration. The category of remuneration is generally wider than that of a benefit. A dictionary definition, although useful may not be a solution either.

The approach adopted in *HOSPERSA v Northern Cape Provincial Administration* seems to be useful and a good guide to determine what a benefit entails. If the dispute is about a pre-existing policy or right then it is a dispute of right. According to this judgement the term benefits in the definition of unfair labour practice only include benefits *ex contractu* and *ex lege* which were already existing in terms of the contract or law. Once you determine which dispute you are dealing with you have a starting point to guide you which forum to use. The effect of this case is that item 2(1)(b), now section 186(2)(a) of the new Labour Relations Act, should be used to enforce existing contractual rights.

Mischke suggests that a benefit and remuneration are not discrete concepts, but a continuum on a single line. There is no clear distinguishing line between them. This is also the view of Grogan. The author (Mischke) goes on to say that both a benefit and remuneration are advantages of employment and both are dependent upon employment. They are, as such, in the words of the Labour Court, *quid pro quo’s* of employment. Both provide something “positive” to the employee in exchange for the employee’s service.

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However, although this approach may appear convenient, according to Mischke, it does not solve the problem of jurisdiction. Disputes about benefits can be arbitrated by the CCMA whereas other disputes (such as remuneration disputes) cannot. Contractual disputes may, however, be heard and determined by the Labour Court in terms of section 77(3) of the Basic Conditions of Employment Act.

In view of the difficulties by the courts in giving guidance in respect of the meaning of the phrase “provision of benefits” in cases like Schoeman v Samsung Electronics SA (Pty) Ltd\textsuperscript{148} and Northern Cape Provincial Administration v Commissioner Hambidge NO,\textsuperscript{149} it is rather surprising that parliament did not see it fit to provide clarity when enacting the new amendments effected in 2002. This is so especially in the light of the significant grey area where the two concepts of benefits and remuneration overlap.

\textsuperscript{148} (1997) 18 ILJ 1098 (LC).
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