Resolving the 'benefits' dilemma

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Abstract

This article considers whether the ambiguities that have existed in labour law for some time now, in respect of the unfair labour practice relating to the provision of benefits, have been resolved following the Labour Appeal Court decision in Apollo Tyres. This unfair labour practice has been widely discussed, based on the varying interpretations of what constitutes 'benefits'. The courts initially adopted a narrow approach to defining the term 'benefits', a term that is not defined in the Labour Relations Act 66 of 1995. However, this approach was replaced by an expansive and wide-ranging interpretation. This article seeks to assess the suitability of the Apollo Tyres judgment in view of the fact that it appears to be reverting to the broad approach adopted under the Industrial Court dispensation in its quest to interpret and apply the general right to unfair labour practices. The question that arises is whether this is an appropriate approach considering the codification effected by the Labour Relations Act, which has undoubtedly resulted in an altered manifestation of the unfair labour practice concept.

I Introduction

Unfair conduct by the employer relating to the 'provision of benefits' is one of the practices against which employees are protected under section 186(2)*(a)* of the Labour Relations Act [1] (the LRA). Unfair labour practice is defined as

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

The unfair labour practice relating to the provision of benefits has

received considerable attention over the years. Commentators have questioned the inclusion of this concept as an unfair labour practice, holding that there is no earlier jurisprudence on the issue justifying its inclusion. [3]

While the reason for its inclusion may not be easily discernible, resulting in questions being raised as to its relevance as well as a call to review its continued inclusion, [4] it has ultimately found its way into the LRA and now forms part of South African labour law. As such, a clear understanding of the operation of this unfair labour practice is needed in order to ensure the proper use of this dispute resolution mechanism.

An examination of the development of this concept illustrates that an increasing number of practices are being classified as falling within the definition of 'benefits'. Unfortunately, the term 'benefits' is not defined in the LRA and its interpretation is left up to the courts. While courts initially adopted a narrow approach to practices that could constitute a benefit, its scope has expanded over the years, creating a great deal of uncertainty as to what actually constitutes a benefit. [5] As a result disputes relating to benefits have rightfully been described as one of the 'thorniest issues' in this field of law. [6]

The progressively expansive approach to the concept has been criticised as developing into what has been termed a 'flag of convenience' that can be used to claim anything alleged to be a benefit. [7] This broad approach continues to be advocated as is evident from the Labour Appeal Court's (LAC) decision in *Apollo Tyres SA (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration (Apollo Tyres)*. [8]

While some have applauded the *Apollo Tyres* judgment for providing a measure of much-needed clarity, [9] others have questioned the sustainability of the approach taken. [10] Notwithstanding these reservations, the judgment has become authority for decision makers faced with such disputes, resulting in this unfair labour practice continuing on its unrestricted path. This is not dissimilar to the approach adopted by the Industrial Court (IC) during the pre-democratic dispensation in its quest to interpret and apply the unfair labour practice concept — an approach which indisputably led to positive gains. [11]

This article considers whether the broad approach followed in *Apollo Tyres* moves us closer to resolving the 'benefits dilemma'. This is done through an exposition of the uncertainties in this field of the law, followed by an analysis of the judgment in *Apollo Tyres*. Thereafter the jurisprudence that developed under the IC is assessed in order to establish whether its expansive approach remains apposite considering the substantial developments that have taken place in the field of labour law post-1994 — notably the constitutional right to fair labour practices, and the provisions in the LRA which seek to give effect to this constitutional right. As a result, the article seeks to discern and to make recommendations on whether this unfair labour practice requires further codification by way of a definition of 'benefits', or whether it would be more appropriate to revise it in a way that firmly extends its

scope of application rather than continuing to accord it a wide-ranging meaning.

II Understanding the uncertainties

One of the central issues that has arisen from the unfair labour practice relating to the provision of benefits, is whether 'benefits' can be accommodated under the term 'remuneration', or whether they should be strictly distinguished. In earlier cases, [12] the necessity for boundaries between 'benefits' and 'remuneration' became relevant in protecting the distinction in labour law between disputes of right and disputes of interest. [13] Accordingly, one of the most significant approaches taken by the courts in determining the meaning of 'benefits', is that a benefit does not form part of remuneration. [14] In *Schoeman v Samsung Electronics (Schoeman*), the Labour Court (LC) came to the conclusion that the commission claimed by the employee, which was the subject of the unfair labour practice dispute, formed part of the employee's salary and therefore fell within the ambit of remuneration. [16] The LC found that this did not constitute a benefit as a benefit is something extra — distinct from remuneration — which is not always a term or condition of employment. [17] Notably, the LC held that if the legislature had wished

aspects relating to remuneration to fall within the ambit of an unfair labour practice, it would have stated this. [18]

The view espoused in *Schoeman* has been criticised as premised on an 'artificial distinction' [19] and 'impractical and illusory'. [20] According to Smit, an application of the principles laid down in *Schoeman* would result in the unfair labour practice relating to the provision of benefits having a very limited scope of application in that anything with a monetary value and which arises within the employment relationship, would form part of remuneration and not constitute a benefit. [21]

Notwithstanding the criticism levelled against the *Schoeman* judgment, there has also been support for the narrow interpretation given to the concept of a 'benefit'. Levy sought to distinguish remuneration from benefits with reference to the reason for which they are paid. [22] With regard to remuneration, he explains that payment is made for the sole r
'effort-reward relationship'. [23] He goes on to offer a very narrow definit
employee because of his or her association with the employer, and not

While the judiciary considered it important to distinguish remuneratio
not draw this distinction. The International Labour Oorganisation's (ILO) Convention 95 of 1949 [25] recognises and endorses the partial payment of wages in the form of allowances in kind. [26] The term 'wages' is not confined to monetary payments, in that it is acknowledged that workers frequently receive part of their remuneration 'in kind' in the form of goods or services. [27]

ILO Convention 100 of 1951 similarly defines remuneration as including the ordinary, basic or minimum wage or salary, as well as any additional emoluments paid directly or indirectly, whether in cash or in

kind, by the employer to the worker as a result of the worker's employment. [28]

A further source in this regard is article 141(2) of the European Community (EC) Treaty, which defines pay as 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.' [29] As correctly pointed out by Ebrahim, 'it is thus clear that the international practice is to interpret the term remuneration to include benefits'. [30]

Another important aspect considered by the judiciary was the foundation of a right to a benefit. An important principle endorsed by the courts was that the employee must have a right to the benefit being claimed either ex contractu or ex lege. [31] In *Hospersa & another v Northern Cape Provincial Administration (Hospersa*), [32] the LAC found that non-payment of an acting allowance did not constitute an unfair labour practice relating to the provision of benefits, as the dispute did not involve something to which the employee was already entitled. The court held that in order to challenge unfair conduct relating to the provision of benefits, the benefit in question cannot be one which does not exist. [33] Similarly, in *Gauteng Provinsiale Administrasie v Scheepers & Others (Scheepers*), [34] the court held that as a rights dispute must be one about a right or rights, the applicants were obliged to show the right and where it was located. [35] It was held that the right could be derived from statute, collective agreement, or an employment contract, but rejected

that the intention of the lawgiver was to create a broad, general right not to be treated unfairly. [36]

However, both of these approaches were discredited by the LC in *Protekon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (Protekon).* Here, the court rejected the statement in *Schoeman* that a benefit is something extra, distinct from remuneration. In addressing the withdrawal of travel concessions, the court held that there is no closed list of employment benefits. It further stated that there can be no doubt that pension, medical aid, and similar schemes fall within the scope of a benefit, despite the fact that employer contributions to such schemes fall within the statutory definition of remuneration. This approach was supported in *Independent Municipal & Allied Workers Union on behalf of Verster v Umhlathuze Municipality & others (IMATU*), [38] where the court, relying on the dictum in *Protekon,* regarded an acting allowance as falling within the ambit of an unfair labour practice relating to the provision of benefits. [39] Similarly, *Trans-Caledon Tunnel Authority v CCMA* endorsed this approach, as the court agreed that a claim to an incentive bonus constituted an unfair labour practice relating to the provision of benefits, even though it fell within the definition of remuneration. [41]

With regard to entitlement to a benefit arising ex contractu or ex lege, the court in *Protekon* found that employer conduct would constitute an unfair labour practice if the employer failed to comply with a contractual obligation it owed the employee, or where the employer exercised a discretion it enjoyed under the contractual terms of the scheme conferring

the benefit. [42] Unfair conduct by the employer on the basis of the exercise of an employer's discretion was supported in *IMATU*. The court found that the more plausible interpretation is that the term 'benefits' was intended to refer to advantages conferred on employees which did not originate from contractual or statutory entitlements, but which were granted at the employer's discretion. [43]

III Assessing the judgment in *Apollo Tyres*

While in *GS4 Security Services (SA) (Pty) Ltd v NASGAWU,* the LAC is said to have unconditionally accepted the earlier decision of the court in *Hospersa*, [45] a different approach has been advocated by the LAC in the much-discussed case of *Apollo Tyres*. [46] The dispute concerned the failure by Apollo Tyres to grant one of its employees (Ms Hoosen) entry into an early retirement scheme. [47] The notice sent out by the employer regarding the scheme stated that there were two requirements for entry: first, that applicants must be monthly-paid staff; the second, that applicants must be between the ages of 46 and 59. The notice further stated that entry into the scheme was subject to management's discretion. Hoosen complied with the requirements for entry into the scheme, but her application was rejected. [48] Upon enquiring about the rejection, she was given no plausible explanation. It appeared that the employer was only considering applicants between the ages of 55 and 59 — a fact not initially communicated to Hoosen. [49]

The CCMA ruled in favour of Hoosen by finding that Apollo Tyres had committed an unfair labour practice relating to the provision of benefits. Dissatisfied with the decision, Apollo Tyres referred the matter to the LC for review, but was unsuccessful. [50] Apollo Tyres then appealed the LC judgment. The question to be answered by the LAC was whether

an employee who alleges that an unfair labour practice relating to the provision of benefits has been perpetrated against him or her by his or her employer, would only have a remedy if the employee could prove that he or she had a right or entitlement to the benefit in question ex contractu or ex lege. [51]

Mr Pretorius, on behalf of Apollo Tyres, argued that section 186(2)*(a)* cannot be relied upon to create a right that does not exist. He stated that section 186(2)*(a)* is intended to provide recourse in cases of unfair conduct in relation to an existing right. He argued that *Hospersa* provides clarity in that, 'it respects the rights/interest divide which permeates the Act, it avoids a situation where new rights may be created by recourse to the unfair labour practice jurisdiction, and it successfully avoids a duplication of remedies.' [52] Hoosen was represented by Mr Purdon who argued for a broad interpretation of section 186(2)*(a)*. He explained that section 186(2)*(a)* was intended to be used in cases such as these, where employees have no other remedy. Accordingly, he argued that a wide construction of the term 'benefits' would be in sync with the purpose and effect of the residual unfair labour practice jurisdiction. [53]

As a starting point the LAC voiced its concern over the shortcomings with regard to the definition of benefits. It stated that while there is no shortage of judgments and academic writing which seek to capture the essence of and define the term 'benefit' in the context of section 186(2) *(a)* of the Act, 'the word is, in this context, imprecise and defies definition'. [54] Similar sentiments were expressed in *Northern Cape Provincial Administration v Commissioner Hambidge*, [55] where the true meaning of the word benefit was described as a 'vexed question', being a matter of legal interpretation.

The court in *Apollo Tyres* considered the decisions in preceding cases, but found that the distinction sought to be drawn between salaries or wages as remuneration and benefits was artificial and unsustainable. [56] The LAC held that the definition of remuneration as stated in the LRA is wide enough to include most, if not all, extras or benefits. [57] It further

found that the earlier approach of limiting the scope of a benefit in order to protect the right to strike, was not at issue as the determining fact is the nature of the benefit dispute. [58] It accepted the approach adopt
two categories. The first concerns a demand by employees that a benef
conduct in not agreeing to grant it or in removing it, is considered unfai
industrial action. This is presumably so because the nature of the dispute is not necessarily about unfair conduct on the part of the employer. The second category is a dispute as to the 'fairness' of the employer's conduct, which would qualify to be settled by way of adjudication. [59]

The court agreed with the decision in *Department of Justice v CCMA (Department of Justice)* that employees have a statutory right created by section 186(2)*(a)* of the LRA, not to be unfairly treated in the provision of benefits, among other labour practices. [61] It further agreed with the dictum of the LC in *Protekon*, which held that an employee's right to a benefit need not be embedded in a contract, as section 186(2)*(a)* of the LRA provides that it 'is the legislature's way of regulating employer conduct by super-imposing a duty of fairness irrespective of whether that duty exists expressly or implicitly in the contractual provisions that establishes the benefit'. [62] The court in *Apollo Tyres* concluded that the employer's conduct relating to the provision of benefits can be applied under the unfair labour practice jurisdiction where an employer fails to comply with a contractual obligation that it has towards an employee, and also where the employer exercises a discretion in terms of a policy or practice relating to the provision of benefits. [63] Notably, the court stated that the notion that a benefit could only be based on an ex contractu or ex lege entitlement would render section 186(2)*(a)* sterile. [64]

The LAC ultimately concluded on the matter by summarising its position as follows

> the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. [65]

The approach postulated in *Department of Justice* is convincing and it is accepted that there is a valid argument to be made that the unfair labour practice jurisdiction should apply to instances broader than those in which an employee has a contractual right. Limiting the use of this unfair labour practice to instances where contractual rights exist, would not be of much benefit to employees who, in any event, have alternative rights of recourse in instances of breach of contract. Although the statutory unfair labour practice provision may be relied upon to regulate benefit disputes (and as per *Apollo* this includes discretionary benefits), it is correctly pointed out by Cohen [66] that 'it is trite that a statutory provision cannot be used to abrogate an employee's common-law entitlement to enforce contractual rights and an employee retains the option of pursuing a contractual breach arising out of an unfair ''benefits'' dispute either in the High Court or the LC'. [67]

Consequently, the approach taken in *Apollo Tyres* to broaden an employee's ability to utilise the unfair labour practice provisions, is not without merit and is in line with international practice. [68] However, the determining factor as to whether or not an employee has a remedy under the unfair labour practice relating to the provision of benefits, is whether or not the unfair conduct complained of indeed involves a benefit. As correctly explained, 'the scope of the unfair labour practice definition is limited and arbitrators have no jurisdiction over complaints which do not relate to the matters listed in the LRA'. [69] The approach as formulated in *Apollo Tyres* is that the emphasis should be on the nature of the dispute, which is whether the fairness of the employer's conduct is being challenged. While fairness is an essential element, it cannot eliminate the enquiry of first establishing whether the alleged unfairness relates to the

provision of a benefit or not. The existence of a benefit should be established in the same way as in the case of a promotion, or in the case of any other unfair labour practice. As an example, decision makers would only have jurisdiction to consider promotion disputes if they fall within the definition of a promotion, which has been defined as an elevation or appointment to a position that carries greater authority and status, including non-promotion where a final decision to fill the post has been taken. [70]

The LAC has not been of much assistance in defining the term 'benefits'. Other than recognising the difficulties in describing the term, it endorses an open-ended approach as to what can constitute a benefit. First, it states that the definition of remuneration is wide enough to include all benefits. [71] Secondly, it states that any right or entitlement set out in law or contract, constitutes a benefit. Thirdly, it states that a benefit is an advantage or privilege which is offered or granted to an employee in terms of a policy or practice which is subject to the exercise of the employer's discretion. [72]

Defining concepts such as 'policy', 'practice', 'advantage', and 'privilege', has justifiably been questioned and it emphatically creates uncertainty. [73] The vagueness of these concepts certainly gives arbitrators and Labour Courts a licence to extend the definition of a benefit, which may result in the creation of rights never intended by the legislature. It is also notable that the courts have endorsed the right of employers' to amend work practices. [74] However, based on the *Apollo Tyres* judgment, it becomes clear that if an employer were, in the exercise of its discretion, to change work practices in a manner unfavourable to employees, an employee would have recourse against an employer under the unfair labour practice provisions. [75]

Subsequent decisions illustrate an unwavering acceptance of the approach followed in *Apollo Tyres*. In *SA Airways (Pty) Ltd v Jansen van Vuuren and another*, [76] the LAC referred to the approach followed in *Apollo Tyres*, notably that it is preferable to consider the nature of the benefit dispute, rather than giving the term 'benefits' a narrow meaning. [77] Following this approach, the court concluded that the term benefit must be construed broadly and therefore found that it includes the payment of accumulated leave pay. [78]

Since the *Apollo Tyres* decision the scope of what constitutes a benefit has expanded substantially, with aspects such as: motor vehicle or travel allowances; [79] free transport; [80] performance bonuses; [81] job grading; [82] acting allowances; [83] abolition of a recess practice; [84] refusal of disability leave; [85] all falling within the realm of 'benefits'. While the court in *Apollo Tyres* has described the definition given to benefits in earlier cases as artificial and unsustainable, one cannot but question the sustainability of the new approach, and the extent to which this approach creates ambiguity and leads to this unfair labour practice migrating to an open-ended definition. This decision appears to be taking us back to the broad approach adopted during the IC era. The question arising is whether this is an appropriate approach considering the codification by the LRA, which has resulted in an altered manifestation of the unfair labour practice concept.

IV Looking back at the industrial court's application of the unfair labour practice

While it is undisputed that the IC developed a fair body of labour law and, through its jurisprudence, created an equitable system, [86] the IC's enforcement of the unfair labour practice jurisdiction has not been without controversy. [87] It is perhaps justifiable to contend that such criticism was due to the inadvertence of the legislation itself, being somewhat similar to the omissions that exist in the current LRA — specifically with regard to benefits.

Initially, the definition of the unfair labour practice concept was expansively defined as any practice which, in the opinion of the IC, constituted an unfair labour practice. [88] It was indeed open-ended in the extreme, [89] being referred to as an 'enigmatic innovation'. [90] Because of the concept's capacious nature, a number of amendments were made to the definition. [91] The first amendment, in 1980, retained the concept's broad nature but excluded strikes and lockouts, and sought to specify the effect that the practice ought to have on the employee or employer if it is to be regarded as an unfair labour practice. One such effect was

whether it had the potential to affect an employee's employment opportunities.

A somewhat polemic definition of the concept was introduced in 1988. This set out a list of 14 specific components that could constitute an unfair labour practice, together with a general category. [92] Some regarded this as an attempt to codify the jurisprudence of the IC. [93] It may have been expected that this would have been welcomed as it could be distinguished from its more expansive predecessors, which faced its own critique. [94] However, it was viewed as an attempt to restrict the IC's freedom by changing 'its analysis from fairness based on the particular circumstances to statutory interpretation'. [95] Consequently, the 1991 amendments sought to repeal the most 'controversial features' of its predecessor, and reintroduced a definition similar to that under the Industrial Conciliation Amendment Act 95 of 1980. [96]

It is clear that, notwithstanding the various amendments, the definition remained permissive in nature, providing the IC with the required flexibility to develop guidelines and to respond to changes in the labour arena. [97] Due to this flexibility, it gave the IC virtual carte blanche to develop the concept as it deemed appropriate. [98] However, what is very clear is that in developing this concept the court used fairness as the yardstick. [99] As indicated by Brassey et al, [100] 'unfairness does seem to have been intended as a touchstone by which to measure all the conduct mentioned'. It is clear that great emphasis was placed on the words 'unfair' and 'unfairly' that are prominent in the definitions and led to the conclusion that it was of crucial importance in the interpretation of the

definition, and consequently in the determination of an unfair labour practice. [101]

The practical effect of the open-ended application of the unfair labour practice concept by the IC, and its emphasis on fairness, can be gleaned from its approach in *SA Diamond Workers Union v the Master Diamond Cutters' Association of SA Diamond Workers Union*. [102] This case involved the interpretation of an agreement in relation to short-time worked, notably whether an employee's employment could be terminated upon expiry of 40 days' special short-time. [103] While the 1980 definition of unfair labour practice, applicable at the time, did not specifically state that termination of employment fell within the ambit of an unfair labour practice, [104] the court found it to be an unfair labour practice. The crux of the matter was whether the conduct of the employer was unfair, and that the determination of unfairness was left to the IC. [105] The IC was of the view that such conduct was unfair as it had the possibility of prejudicing or jeopardising an employee's employment opportunities. [106] Profoundly, the court remarked that 'one may deduce that what the legislature had in mind was that any labour practice or change therein which has or may have inequitable or unjust consequences for an employee or category of employees has to be deemed to be unfair'. [107]

The IC's trademark in its consideration of unfair labour practice disputes was that any act or omission by the employer within the employment context which is viewed to be unfair by an employee or employee representative can be referred as a dispute regarding an unfair labour practice if it prejudiced or negatively affected the employee. This is in keeping with the definition of unfair labour practice as enunciated by Poolman

> unfair labour practice may be defined as any act of commission or the omission to act arising from or in the course of employment by any one or more of the subjects of labour relations who knowingly or intentionally causes substantial prejudice to another or to other subjects of labour relations or to the public interest, as a result of a failure under the universal duty to act fairly. [108]

One of the primary concerns raised in respect of the approach followed by the IC, was that addressing the unfair labour practice jurisdiction on the basis of what is fair and what is not, could ultimately 'undermine the principle basis of the law', as the concepts of 'fairness' and 'equity' have been held to be vague and unhelpful. [109] The concern was the uncertainty that could be created amongst employers in terms of 'what they are allowed to do and not allowed to do'. [110] Brassey complains that the unfair labour practice lacked certainty and was ambiguous, due to the goalpost continuously shifting. As Brassey indicated:

> Unless people know what is expected of them, they cannot act accordingly, and become justifiably angry if they do all they can to act correctly but are still condemned as wrong. The court's approach may keep it from going astray, but others are getting quite lost in the wilderness of instant cases. It used to be said disparagingly of the Equity jurisdiction in England that it was administered according to the 'length of the Chancellor's foot'. Much the same will be said of the industrial court unless it gives people a ruler to measure their actions by. [111]

Notwithstanding the criticisms levelled at the IC, one must remember that the emphasis in South African labour law at that time was on justice rather than certainty. [112] As a result, the open-ended definition of unfair labour practice, and the flexibility that it allowed the IC, were justifiable, considering the objectives sought to be achieved by the IC. [113] As explained by Landman, the functions of the IC were extended to the extent that the IC, 'instead of simply interpreting and applying the law', was responsible for 'discovering, developing and making the law through the ambit of the unfair labour practice jurisdiction.' [114] While he acknowledges that it was not ideal because it gave vast power to the

judiciary, he explains that it was the only way to advance the rights of employees. [115]

We once again see fairness taking centre stage in determining unfair labour practice disputes (specifically relating to benefits) without much restriction or consideration of whether the issue complained of fell within the scope of the provision of a benefit. The question that remains to be answered is whether this open-ended approach, which is rooted in fairness rather than certainty, remains relevant under the current dispensation.

V Understanding the intention of the legislature

South Africa's democracy is characterised by the Constitution, which provides that 'everyone has the right to fair labour practices'. [116] This constitutional right presumably has its origins in the epoch of the IC, as the drafters of the Constitution were mindful of the jurisprudence that developed during that time, and wanted to 'constitutionalise the gains that had been made'. [117] The constitutional right to fair labour practices 'is essentially about infusing into employment a degree of fairness not guaranteed by the common law'. [118] However, the concept as it stands in the Constitution has been held to be 'incapable of precise definition'. [119]

While one of the primary purposes of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution, [120] it is apparent from the wording of the LRA that the legislature sought to give content to this general right against unfair labour practices. In doing this, the emphasis on unfairness has unquestionably

been carried forward. [121] However, while fairness and justice continue to be of paramount importance in the determination of unfair labour practice disputes, the drafters of the LRA were cognisant of the fact that a level of certitude was needed. It was exactly this realisation that led to the codification of unfair labour practices in the LRA. The Ministerial Legal Task Team appointed in July 1994 to draft a Labour Relations Bill, sought to draft a Bill written in language that would be comprehensible to the users of the legislation, notably workers and employers. The legislation further sought to specify the rights and obligations of workers, trade unions, employers and employers' organisations, in order to avoid a case-by-case determination of what constitute fair labour practices. [122] These aspects were regarded as essential as they would remedy problems identified in the existing laws, one being 'the reliance on after-the-event rule-making by the courts under the unfair labour practice jurisdiction'. [123] The drafters referred to the broad discretion enjoyed by the IC in determining unfair labour practices, with an appreciation for the fact that from a reading of the law, it was not easy for parties to understand their obligations. One of the things the Labour Relations Bill vowed to do was to create much-needed certainty thereby leaving very little to the discretion of the decision makers. [124]

It is clear that the LRA sought to give credence to this intention, as it has been worded in a manner that does not provide for a general right of employees not to be subjected to unfair labour practices. It rather sets out very specific grounds that can be relied upon by employees when invoking the protection provided under the unfair labour practice provisions. The legislature had a very clear goal in mind when it included the unfair labour practice relating to the provision of benefits. Unfortunately, that intention remains elusive, as the explanatory memorandum

provides no clue as to what was intended by 'benefits'. However, it does seem justifiable, as stated in *Schoeman,* that if the legislature intended aspects relating to remuneration to fall within the ambit of an unfair labour practice, it could easily have stated this. The LRA does, after all, provide a very specific definition for remuneration, and if remuneration was intended to encompass 'benefits' this could easily have been included in the definition. While *Apollo Tyres* came to the decision that

the definition of remuneration is wide enough to encompass 'benefits', it is interesting to note that there are certain sections in the LRA which refer to 'benefits' and 'remuneration', as two distinct concepts. [125]

VI Utilising fairness as the foundation

The last aspect that requires consideration is the aspect of fairness itself, considering the fact that this has become the cornerstone by which unfair labour practice disputes relating to the provision of benefits are judged.

Fairness is a very broad concept referred to as 'a failure to meet an objective standard and may be taken to include arbitrary, capricious, biased or inconsistent conduct, or conduct based on ''insubstantial reasons'' or ''wrong principles'', whether negligent or intentional'. [126] The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town & others* explained that fairness depends upon the circumstances of the case and 'essentially involves a value judgment'. [127] It is apparent that fairness is a somewhat elastic concept that will be applied in line with the circumstances of the case. However, in applying fairness it is important to acknowledge that it is intended to accommodate and balance the conflicting interests and rights of both employers and employees. [128]

During the IC era, the interests of both parties were considered in applying the standards of fairness. As indicated by Cooper, the IC developed a body of rights-based rules in terms of which the notion of equity was seen broadly as encompassing a balancing of employer's and employee's interests in order to achieve the LRA's objective of labour peace. [129] In this regard, reference was made to the statement by Nicholas AJA, that the legislature intended the IC to exercise the powers given to it 'reasonably and equitably, and with due regard to the interests not only of the employees but also of the employers'. [130]

While the Constitution in its advancement of fair labour practices, seeks to protect a wide-ranging group, [131] the unfair labour practice provisions as espoused in the LRA are primarily concerned with the protection of employees. Notwithstanding this and in line with the intention of creating certainty amongst all parties sought to be achieved by the LRA, it is important that in interpreting unfair labour practice disputes relating to the provision of benefits, the interests of employers are also considered.

It is evident that over the years there has been a considerable curtailment of employer power in the workplace. While managerial prerogative, which Brassey explains as the right to manage consisting of a wide discretion in respect of countless matters, [132] management prerogative has undoubtedly been restricted as a result of collective bargaining and the right to strike. These restrictions are aptly captured by Thompson:

> It is the right to strike (alternatively, litigate) on *anything* impacting on the employment relationship that signals, by definition, the absence of any managerial prerogative in our system of labour law. No employer decision bearing on employment is immune from industrial or legal challenge. [133]

The limitations placed on the employers' power is not necessarily uncalled for considering the history of labour law and the prevailing unequal bargaining position between employers in relation to their employees. The legislature, and rightfully so, has put measures in place to curb employer abuse and to provide a greater sense of protection to employees. However, the impact of this is that increasing the power of one group, has resulted in the decline in power of the other, with grave consequences for the employer. [134]

One of the main objectives of the LRA is to promote collective bargaining, [135] which essentially leaves it up to the parties to negotiate matters of mutual interest — notably wages and terms and conditions of employment. The ultimate deal struck during this process is not always foreseeable and often requires compromise by both parties — understandably, this is after all the nature of collective bargaining. However,

where the legislature creates rights for employees which can be enforced by rights-based remedies, these rights must be well defined. However, this has not happened as regards the unfair labour practice relating to the provision of benefits, and this lack of certainty disadvantages employers. Furthermore, the consequences of unfair labour practice disputes are becoming increasingly serious, as a wide range of employer decisions are subject to scrutiny by decision makers. Notwithstanding the fairness imperatives strictly embedded in the unfair labour practice concept, something that is glaringly absent from the LRA are guidelines for the determination of fairness, similar to those provided for unfair dismissals. [136] While the approach of using unfair dismissal standards is being adopted, it is imperative for the principle of fairness to include standards that are specific to unfair labour practice disputes.

VII Conclusion

While a broad approach to unfair labour practices may be beneficial, it is clear that the legislature intended to move away from viewing unfair labour practice disputes broadly, and to bring about a level of certainty. It is also apparent that the legislature did not intend the unfair labour practice provisions to cater for all alleged unfairness on the part of the employer, as alleged unfair conduct relating to transfers, for example, is not addressed. The legislature had something very precise in mind when it included the practice relating to benefits. It is opined that it was never the intention of the legislature to use the benefits provision to cater for all alleged unfair conduct by the employer, which could not find application under any of the other unfair labour practice provisions. If this was the intention it would have been more practical for a general unfair labour practice clause to be included, something to the effect that: 'unfair labour practice means any unfair act by the employer, which unfairly prejudices or negatively affects an employee in the course of his/her employment'. There is full appreciation of the fact that the unfair labour practice provisions are ultimately concerned with the protection of employees' rights. However, the importance of certainty cannot be overlooked, as it is beneficial to both those wishing to use the remedy, as well as those against whom the remedy is used.

The legislature has failed in its duty to create the certainty required — or perhaps the existence of such a dilemma was not foreseen at the time. Ultimately, the courts find themselves having to interpret an ambiguous provision and have chosen to interpret and apply it permissively. While the criticism of the narrow approach advocated in *Hospersa* is not without merit, the current interpretation of 'benefits' as articulated in *Apollo Tyres,* signifies a shift back to the broad approach of the IC. This does not comply with the provisions set out in the current dispensation, which provide for very specific unfair labour practices, as opposed to a broad general right not to be unfairly treated. [137] Notwithstanding that the Labour Court is a court of law and equity, quintessentially, the function of the court is to give effect to the legislation and not to create rights that were never intended.

Given the current approach by the courts, it is likely that the interpretation and application of this unfair labour practice concept will become still more expansive. Legislative intervention is, therefore, required to address the uncertainty created by the wording of the provision. [138] Consequently, this unfair labour practice should either be further codified by providing a precise definition for the term 'benefits', or the legislature should abolish the unfair labour practice relating to the provision of benefits. Further, a more open-ended category of unfair labour practices should be added to the current provisions, which must have a very clear set of imperatives to ensure much needed certainty.

The provision should state that any unfair conduct by an employer towards an employee which does not qualify as an unfair labour practice under one of the existing grounds (promotion, demotion, training, and probation), can be included in this open-ended category. However, any exclusions to the use of this remedy should be specifically stipulated, and there must be a clear indication of the fairness requirements to be applied in adjudicating an unfair labour practice of this nature. Ultimately, employers must know exactly to what standard they will be held.

In considering these two options, preference should be given to the first option. This is based on the fact that the LRA already provides a great deal of protection to employees, and South Africa has certainly come a long way in correcting the unequal bargaining power in the employment relationship. This has restricted the powers and prerogatives of employers in no small measure. Of particular importance, in its promotion of collective bargaining the LRA creates a powerful platform

for employees to negotiate a better deal, thereby improving their terms and conditions of employment. Furthermore, one cannot ignore interrelated factors and the impact that further regulation of the LRA will have on extant problems such as unemployment. As such, adding to the rights-based remedies available to employees is not regarded as the optimal solution.

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1 *Appollo Tyres SA (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration* (2013) 34 *ILJ* 1120 (LAC)

2 Section 186(2)*(a)* of the Labour Relations Act 66 of 1995.

3 Cheadle, 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663 at 689 states that 'on reflection, it is difficult to explain its inclusion in the definition of the residual unfair labour practice because there appears to be no prior jurisprudence on the issue justifying its inclusion.' See also Le Roux 'The anatomy of a benefit: A labyrinthine enquiry' (2006) 27 *ILJ* 55, which suggests that its inclusion is as a result of the misinterpretation of an Industrial Court decision.

4 Cheadle, (2006) 27 *ILJ* 689 and at 690, where he states that 'the real mischief is its inclusion in the definition of unfair labour practice — it blurs the line between a dispute of right and a dispute of interest with all the implications that has for the right to strike'.

5 Levy, 'The unfair labour practice and the definition of benefits — Labour Law's Tower of Babel?' (2009) 30 *ILJ* 1451 1451, where the author states that 'as yet, there is no single clear and incisive judgment which allows us to say, that for now at least, we know just what benefits are'.

6 Moshoana, 'The vexed concept of benefits' (2004) *De Rebus* 47 describes the issue of benefits as one of the 'thorniest issues' which impacts on the issue of jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA) when having to deal with unfair labour practice disputes.

7 Levy, (2009) 30 *ILJ* 1451 particularly at 1453, where it is explained that the fact that a thing may have value or be of benefit to an employee, does not mean that it must be called a 'benefit' or be defined as such.

8 *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* (2013) 34 *ILJ* 1120 (LAC).

9 Ebrahim 'The interpretation to be accorded to the term "benefits" in s 186(2)*(a)* of the LRA continues: *Apollo Tyres South Africa (Pty) Limited v CCMA* (DA1/11) [2013] ZALAC 3' (2014) 17 *PER* 596 at 604, where it is stated that the court correctly rejected the decision in *Schoeman* as it appreciated the need for a purposive approach to the LRA. See also Tchawouo Mbiada 'The Meaning of a Benefit in terms of the LRA: The end of the road?' (2014) 35 *ILJ* 96 at 99, where it is held that the decision is to be welcomed as it defines in unambiguous terms the meaning of a benefit (in addition to a right or entitlement to which the employee is entitled ex contractu or ex lege, including rights judicially created, a benefit encompasses three components. First, it refers to a privilege or an advantage; second, the employee should be entitled to this privilege or advantage in terms of a practice or policy; and, third, the advantage or privilege should be subject to the employer's discretion).

10 Smit & Le Roux 'Employee benefits and the unfair labour practice' (2015) 24 *CLL* 93, argue that while it appears that the LAC provided a degree of certainty regarding the concept of a benefit, the interpretation formulated by the LAC also presents certain obvious challenges. It raises the question of whether the interpretation represents a potentially unlimited challenge to managerial prerogative. See further Le Roux 'Benefits: Have we found the way out of the labyrinth?' (2015) 36 *ILJ* 888, where it is stated that the judgment explicitly fails to dispel the relevance of contract in the context of this unfair labour practice.

11 Roos 'Labour law in South Africa 1976–1986: The birth of a legal discipline' (1987) 94 *Acta Juridica* 98, described the IC as the body that changed the face of labour relations and with it the legal nature of the labour relationship. Davis 'Refusing to step beyond the confines of contract: The jurisprudence of Adv Erasmus SC' (1985) 6 *ILJ* 425–426 relays the sentiments expressed by David and Corder, notably that 'the industrial court has become the most successful part of the Wiehahn strategy'.

12 For instance, *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 *ILJ* 1098 (LC).

13 Grogan 'Unfair conduct: The meaning of "benefits"' (1998) *ELJ* 11 asks what exactly the legislature had in mind when it used this phrase 'provision of benefits'. He goes on to illustrate that the question is important because the LRA disallows industrial action over any issue that the parties can refer to arbitration or the Labour Court, which provides that no person may engage in a strike or lockout if the issue in dispute can be arbitrated. It is further stated that 'if the term benefits is interpreted so widely as to include any advantage that employees derive from work, including wages, item 2(1)*(b)* would all but preclude strikes and lockouts. For at the heart of any wage dispute lies the allegation by the employees that the employer is acting unfairly by not paying what they demand'. See also Smit 'The residual unfair labour practice' (2000) 4 *TSAR* 635, where it is stated that on the one hand, anything that is included under the term 'benefit' cannot be the subject of a protected strike in terms of s 65(1)*(c)* of the Act. To the contrary, anything that is not included under the term 'benefits' cannot be arbitrated but must be resolved by means of industrial action, which involves the economic strength of the respective parties. See also Thompson 'Bargaining, business restructuring and the operational requirements for dismissal' (1999) 20 *ILJ* 757, where the author states that we must be reminded that our system works explicitly with the distinction between disputes of right and disputes of interest.

14 As per cases such as *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 *ILJ* 1098 (LC); *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 *ILJ* 1910 (LC); and *Gaylard v Telkom SA Ltd* (1998) 19 *ILJ* 1624 (LC).

15 *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 *ILJ* 1098 (LC).

16 *Schoeman v Samsung Electronics* 1102J.

17 *Schoeman v Samsung Electronics* 1103A.

18 *Schoeman v Samsung Electronics* 1103A.

19 Le Roux 'Preserving the status quo in economic disputes' (1997) 11 *CLL* 97.

20 Le Roux 'What is an employment "benefit"?' (2005) 15 *CLL* 2.

21 Smit 'Practice' (2000) 4 *TSAR* 636. See further Grogan (1998) 14 *ELJ* 15.

22 Levy (2009) 30 *ILJ* 1457.

23 Levy (2009) 30 *ILJ* 1457.

24 Levy (2009) 30 *ILJ* 1451 at 1460.

25 Protection of Wages Convention 95 of 1949.

26 Protection of Wages Convention 95 of 1949, art 4.

27 Report of the Committee of Experts concerning the Protection of Wages Convention (No 95) and the Protection of Wages Recommendation (No 85) 2003 51 para 93, presented at the International Labour Conference 91st session.

28 Equal Remuneration Convention 100 of 1951 art 1.

29 Ebrahim (2014) 17 *PER* 603.

30 Ebrahim (2014) 17 *PER* 604.

31 *Hospersa & another v Northern Cape Provincial Administration* (Hospersa) (2000) *ILJ* 1066 (LAC).

32 *Hospersa* para 8.

33 In *Hospersa* para 9 Mogoeng AJA states that he does not think that item 2(1)*(b)* of Schedule 7 to the LRA was ever intended to be used by an employee to create an entitlement to a benefit through arbitration where an employee believes that he or she ought to enjoy certain benefits, while the employer is not willing to provide such benefits. According to the court, item 2(1)*(b)* simply sought to bring under the residual unfair labour practice jurisdiction, disputes about benefits to which an employee is entitled ex contractu or ex lege.

34 *Gauteng Provinsiale Administrasie v Scheepers & others (Scheepers)* (2000) 21 *ILJ* 1305 (LAC).

35 *Scheepers* para 8. See also *Eskom v Marshall & others* (2002) 23 *ILJ* 2251 (LC), where the court regarded the *Hospersa* decision as binding and, therefore, found against the employee as he had not shown a right to the severance package in terms of an agreement or statute. Notably, the court suggested that employees should be allowed to bring unfair labour practice claims in instances where the employer refused to grant a benefit to which the employee had a legitimate expectation.

36 In *Gauteng Provinsiale Administrasie v Scheepers* para 11 it was stated that if Van der Merwe were correct that an unfair labour practice included a broad general right not to be unfairly treated, all practices which were unfair would, under the PSLRA, have qualified as unfair labour practices. However, the court was of the view that this was clearly not the intention of the lawgiver.

37 *Protekon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (Protekon)* (2005) 26 *ILJ* 1105 (LC). See also *Department of Justice v CCMA & others* [2004] 4 BLLR 297 (LAC) para 14, where the court held that the unfair labour practice provision provides a statutory right to employees against unfair conduct. While the majority decision did not directly reject the decision of *Hospersa*, the minority decision did.

38 *Independent Municipal & Allied Workers Union on behalf of Verster v Umhlathuze Municipality & others* (2011) 32 *ILJ* 2144 (LC).

39 *IMATU obo Verster v Umhlathuze Municipality* para 23.

40 *T rans-Caledon Tunnel Authority v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 *ILJ* 2643 (LC) para 17, where the court found that there was no persuasive argument based on the purposive interpretation of the section, for excluding a claim to a full bonus as a benefit, merely because the benefit claimed fell within the definition of remuneration in the LRA.

41 *Trans-Caledon v CCMA* para 30.

42 *Protekon v CCMA* para 36.

43 *IMATU v Umhlathuze Municipality* para 21.

44 *GS4 Security Services (SA) (Pty) Ltd v NASGAWU* unreported judgment case no DA3/08, 26 November 2009 (LAC).

45 In *Apollo Tyres v CCMA* para 36, the judge quotes the following from *GS4 Security Services v NASGAWU*: 'My understanding of what Mogoeng AJA is inter alia saying is that, in order for respondents to bring a successful claim under item 2(1)*(b)* of Schedule 7 they have to show that they have a right arising *ex contractu* or *ex lege*. It is only then that having established the right, that the commissioner would have jurisdiction to entertain the dispute as a dispute of right'.

46 *Apollo Tyres v CCMA* paras 25 and 26.

47 *Apollo Tyres v CCMA* para 2.

48 *Apollo Tyres v CCMA* para 4.

49 *Apollo Tyres v CCMA* para 5.

50 *Apollo Tyres v CCMA* para 2.

51 *Apollo Tyres v CCMA* para 1.

52 *Apollo Tyres v CCMA* para 31.

53 *Apollo Tyres v CCMA* para 32.

54 *Apollo Tyres v CCMA* para 20.

55 *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 *ILJ* 1910 (LC) para 10.

56 *Apollo Tyres v CCMA* para 25. See also para 26, where the court states that many benefits that are payment in kind form part of the essentialia of virtually all contemporary employment contracts. The court explained that many extras are given to employees as a quid pro quo for services rendered just as much as a wage is given.

57 *Apollo Tyres v CCMA* para 25.

58 *Apollo Tyres v CCMA* para 28.

59 *Apollo Tyres v CCMA* para 28.

60 *Department of Justice v CCMA* para 14.

61 *Apollo Tyres v CCMA* para 41.

62 *Apollo Tyres v CCMA* para 45.

63 *Apollo Tyres v CCMA* paras 46 and 47.

64 *Apollo Tyres v CCMA* para 48, where the court explained that in the case in question the employee would not have recourse to the civil courts, because no contract came into being, nor would she have a remedy in terms of s 186(2)(1) because there is no underlying contractual right to the benefits. Furthermore, being a single employee she would not, according to *Schoeman,* have the right to strike, which means that the notion that the benefit must be based on an ex contractu or ex lege entitlement would, in a case like this, render the unfair labour practice jurisdiction sterile.

65 *Apollo Tyres v CCMA* para 50.

66 Cohen 'Discretionary benefits disputes' (2014) 35 *ILJ* 87–88. See also *Trans-Caledon Tunnel Authority v CCMA* para 15.

67 Provision is made for this in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997, which gives the Labour Court concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

68 As per the definitions provided for wages and/or remuneration in arts 1 and 4 of the Protection of Wages Convention 95 of 1949, art 1 of the Equal Remuneration Convention 100 of 1951, and art 141(2) of the EC Treaty.

69 Myburgh & Bosch *Review in the Labour Courts* (2016) 378.

70 Du Toit et al *Labour Relations Law: A Comprehensive Guide* (2015) 546.

71 *Apollo Tyres v CCMA* para 25.

72 *Apollo Tyres v CCMA* para 50.

73 Smit & Le Roux 'Employee benefits and the unfair labour practice' (2015) 24 *CLL* 93. See also Fourie 'What constitutes a benefit by virtue of section 186(2) of the Labour Relations Act 66 of 1996? *Apollo Tyres South Africa (Pty) Ltd v CCMA* 2013 5 BLLR 434 (LAC)' (2015) 8 *PER* 3300 at 3310, where the author states that the judgment does not clarify what exactly can be understood by judicially created rights or what constitutes a policy or practice, and we are once again left with concepts that are not given clear content.

74 Workman, Davies, Badal & Moonsamy 'As ever the case in SA, delicate lines in labour law' (2013) Feb *Without Prejudice* 57–58. The article refers to the LC decision in *Ram Transport Ltd v SATAWU* (2011) and the LC decision in *Apollo Tyres South Africa v NUMSA* (2012). See further Shooter 'Managerial prerogative: A cosseted preserve of our labour system or a fool's safe haven?' (2010) 22 *SA Merc LJ* 537–538.

75 This is based on an interpretation of the court's pronouncements in *Apollo Tyres v CCMA* para 50.

76 In *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 *ILJ* 2774 (LAC) para 114 the court noted that, in the light of the judgment in *Apollo Tyres*, the word 'benefits' in s 186(2)*(a)* may be construed broadly to include the payment of accumulated leave pay.

77 *SA Airways v Janse van Vuuren* para 113.

78 *SA Airways v Janse van Vuuren* para 114.

79 *South African Revenue Services v Ntshinthshi & others* (2014) 35 *ILJ* 255 (LC). See also *City of Cape Town v SA Local Government Bargaining Council & others* (2014) 35 *ILJ* 163 (LC).

80 *United Association of South Africa on behalf of Members v De Keur Landgoed (Edms Bpk)* [2014] 7 BALR 738 (CCMA).

81 See *Charlies v the South African Social Security Agency & others* (JR1272/2011) [2014] ZALCJHB 172, 13 May 2014; *Aucamp v SA Revenue Service* (2014) 35 *ILJ* 1217 (LC); *Public Servants Association on behalf of Motseka v Department of Sports, Arts and Culture* (2015) 36 *ILJ* 808 (BCA).

82 *Thiso & 6 others v Moodley & others* case no: JR 2209/13, 2 December 2014.

83 *National Union of Metalworkers of SA on behalf of Jooste v Atlantis Foundries (Pty) Ltd* (2014) 35 *ILJ* 829 (BCA).

84 *Minister of Justice and Correctional Services v Carine Naude and 13 others* JR 693/15, 2 December 2016 para 44 states that the GPSSBC found that the Department had committed an unfair labour practice towards the secretaries of the SCA judges by abolishing the recess practice that existed.

85 *South African Post Office Ltd v SN Kriek* P190/12, 22 April 2016.

86 Coleman 'South Africa: The unfair labour practice and the Industrial Court' (1990–1991) 12 *CLLJ* 178.

87 Coleman (1990–1991) 12 *CLLJ* 178. See further Thompson 'Borrowing and bending: The development of South Africa's unfair labour practice jurisprudence' (1993) *The International Journal of Comparative Labour Law and Industrial Relations (IJCLLIR)* 204, where it is stated that: 'The South African law-giver chose to be ambiguous in its re-modelling of the principal labour statute and devolved an almost unparalleled amount of power down to the fledging industrial court'.

88 Section 1*(f)* of the Industrial Conciliation Amendment Act 94 of 1979. Brassey 'The new Industrial Court' (1980) 1 *ILJ* 82 describes the discretion given to the court in terms of the 'unfair labour practice' jurisdiction as too wide.

89 Mureinik 'Unfair labour practices: Update' (1980) 1 *ILJ* 113.

90 Reichman & Mureinik 'Unfair labour practices' (1980) 1 *ILJ* 1 clarifies that the reference to the unfair labour practice as being 'enigmatic' is because the extent of the courts' power to remedy them is unclear and it is left 'to the court to define the offending practices'. See further Thompson (1993) *IJCLLIR* 189, where the author opines that the Industrial Court was provided 'an embarrassingly indeterminate jurisdiction' where 'virtually any conduct by an employer, union or employee could be attacked, branded and reversed by the court'. Poolman *Principles of Unfair Labour Practice* (Juta 1984) 176 simply describes the introduction of the unfair labour practice as complex.

91 See s 1(1)*(c)* of the Industrial Conciliation Amendment Act 95 of 1980, s 1 of the Labour Relations Amendment Act 51 of 1982, s 1*(h)* of the Labour Relations Amendment Act 83 of 1988, and s 1*(a)* of the Labour Relations Amendment Act 9 of 1991. Le Roux 'The impact of the 2002 amendments on residual unfair labour practices' (2002) 23 *ILJ* 1699–1700 explains that the concept was amended and refined in 1980 with reference to four consequences that might arise out of committing an unfair labour practice. These included any act or omission that may prejudice an employee in an unfair manner, or the business of an employer in an unfair manner, or disrupt the relationship between the employer and its employees. In 1988, yet another definition was introduced, listing 14 specific labour practices. The definition was again amended in 1991, which was worded similarly to the 1980 definition.

92 Section1*(h)* of the Labour Relations Amendment Act 83 of 1988.

93 Le Roux & Van Niekerk *The South African Law of Unfair Dismissal* (Juta 1994) 25. See further Coleman (1990–1991) 12 *CLLJ* 197, where the author espouses the government's claim that it codified the unfair labour practice, as per the 1988 definition to 'create a greater certainty as to what constitutes an unfair labor practice and to prevent unnecessary litigation.'

94 Reichman & Mureinik (1980) 1 *ILJ* 17. The definition was discussed in *United African Motor & Allied Workers Union & others v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC) 224, where it was described as being so wide that its analysis would open up almost limitless fields of conjecture.

95 Coleman (1990–1991) 12 *CLLJ* 197.

96 Section 1*(a)* of the Labour Relations Amendment Act 9 of 1991.

97 Coleman (1990–1991) 12 *CLLJ* 197.

98 See Le Roux & Van Niekerk (1994) 19 and Rycroft & Jordaan *A Guide to South African Labour Law* (Juta 1992) 156.

99 See, for example, *Food & Allied Workers Union v Spekenham Supreme* (2) (1988) 9 *ILJ* 628 (IC) 637, where the court refers to fairness being the overriding consideration in labour relations.

100 Brassey et al *The New Labour Law* (Juta 1987) 58.

101 Ehlers 'Dispute settling and unfair labour practices' (1982) 3 *ILJ* 13.

102 *SA Diamond Workers Union v The Master Diamond Cutters' Association of SA* (1982) 3 *ILJ* 87 (IC).

103 *Diamond Workers Union* 94–95.

104 Refer to the 1980 definition.

105 *Diamond Workers Union* 101.

106 *Diamond Workers Union* 104–105.

107 *Diamond Workers Union* 119.

108 Poolman (1984) 62. See further Swanepoel *Introduction to Labour Law* (1988) 31, where the author explains that the Industrial Court attempted to examine the dictionary meaning of the words used in the definition of unfair labour practice. The author concludes by saying that the definition 'is very little about words and everything about policy'.

109 Roos (1987) 94 *Acta Juridica* 103.

110 Roos (1987) 94 *Acta Juridica* 103.

111 Brassey et al (1987) 61.

112 Roos (1987) 94 *Acta Juridica* 108.

113 As indicated in the White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation 21, the IC was envisaged as the body that would not only give effect to judicial considerations but importantly also to considerations of equity. Van Niekerk 'In search of justification: The origins of the statutory protection of security of employment in South Africa' (2004) 25 *ILJ* 858 reminds us of the remarks made by the Minister during the 1979 parliamentary debate on the Industrial Conciliation Amendment Bill. The Minister remarked that, 'the Government expects great things of the new industrial court as a body which will see that justice is done in labour disputes and which will serve as an important protective mechanism for individual workers in cases where their security is threatened in an illegitimate way'.

114 Landman 'What role for justice in a world class labour relations system?' (2001) Autumn/Winter *South African Journal of Labour Relations* 71.

115 Landman (2001) Autumn/Winter *South African Journal of Labour Relations* 71.

116 Section 23 of the Constitution of the Republic of South Africa, 1996. The other labour rights as set out in s 23 are:
(2) Every worker has the right — *(a)* to form and join a trade union; *(b)* to participate in the activities and programmes of a trade union; and *(c)* to strike.
(3) Every employer has the right — *(a)* to form and join an employers' organisation; and *(b)* to participate in the activities and programmes of an employers' organisation.
(4) Every trade union and every employers' organisation has the right — *(a)* to determine its own administration, programmes and activities; *(b)* to organise; and *(c)* to form and join a federation.
(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

117 Currie & De Waal *Bill of Rights Handbook* (2005) 501.

118 Le Roux 'Employment: A dodo, or simply living dangerously?' (2014) 35 *ILJ* 42.

119 *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) para 33.

120 Section 1*(a)* of the LRA.

121 Section 186(2)*(a)* similarly makes frequent references to the word 'unfair', holding that any unfair act or omission that arises between an employer and an employee involving, among others, unfair conduct by the employer relating to the provision of benefits to an employee; constitutes an unfair labour practice.

122 Explanatory Memorandum (1995) 16 *ILJ* 279.

123 Explanatory Memorandum (1995) 16 *ILJ* 281.

124 Explanatory Memorandum (1995) 16 *ILJ* 283.

125 Section 159(9) of the LRA refers to a member of the rules board for Labour Courts being entitled to remuneration, allowances, benefits and privileges. If benefits fall within the ambit of remuneration what would be the need to refer to it separately.

126 Du Toit et al *Labour Relations Law: A Comprehensive Guide* (LexisNexis 2015) 546.

127 *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) 110.

128 Cohen (2014) 35 *ILJ* 85–86. See also H Cheadle (2006) 27 *ILJ* 672.

129 Cooper 'Right to fair labour practices' (2004–2005) 26 *CLLPJ* 207.

130 *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court & others* (1986) 7 *ILJ* 489 (A) 495. The acknowledgement by the IC that fairness applies to both parties, was expressed in the Wiehahn Report Vol 2 (1980) 364, where in its discussion of the development of fair labour standards it was noted that these standards would need to take account of the interests of both parties.

131 Section 23 of the Constitution states that 'everyone has the right to fair labour practices'.

132 Brassey et al (Juta 1987) 74.

133 Thompson (1999) 20 *ILJ* 758–9.

134 Shooter 'Managerial prerogative: A cosseted preserve of our labour system or a fool's safe haven?' (2010) 22 *SA Merc LJ* 540 explains that in some instances, this reduction of power has been of so great a consequence as effectively to neuter the employer's discretion to implement changes within its workplace without the approval of its employees.

135 Section 1*(c)* of the LRA states that one of the primary objects of the Act is to provide a framework within which the parties can collectively bargain, among other aspects.

136 Chicktay 'An unfair labour practice jurisprudence pertaining to benefits? A critical analysis of Protekon Ltd v CCMA' (2007) 19 *SA Merc LJ* 111 states that unlike with dismissals which have their own code providing guiding principles in determining fairness, the determination of fairness in relation to unfair labour practice disputes is left to the discretion of the adjudicator.

137 In *Gauteng Provinsiale Administrasie v Scheepers* para 11.

138 The unfair labour practice relating to the provision of benefits, as espoused in s 186(2)*(a)* of the Labour Relations Act 66 of 1995.