

AN APPRAISAL OF THE PROVISION OF “BENEFITS” AS AN UNFAIR LABOUR
PRACTICE IN SOUTH AFRICAN LABOUR LAW

by

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ABSTRACT

This thesis seeks to resolve the ambiguities surrounding the use of the unfair labour practice relating to the provision of “benefits” as a dispute resolution mechanism in South African labour law. This mechanism has been plagued with uncertainty, primarily because of the lack of a statutory definition of benefits. Evidently, the interpretation and application of benefits have been left to the courts, resulting in two diverse approaches being endorsed. The first one sought to confer a narrow connotation on benefits, the rationale being to separate benefits from the definition of “remuneration”. It further sought to limit the use of this unfair labour practice to instances where the benefit claimed was exclusively provided for *ex contractu* or *ex lege*. The primary objective was to protect the divide between disputes of right and disputes of interest, a distinction that is recognised and encouraged in our law. The second approach was one that fostered an expansive interpretation of the term, deeming it to be part of remuneration. Needless to say it resulted in countless items being subject to determination as benefit disputes. Furthermore, it extended benefits beyond those rooted in contract or legislation, including those granted or offered subject to the exercise of managerial discretion.

The supplementary challenges firstly relate to the absence of statutory direction on the standards of fairness to be applied in evaluating employer conduct. Secondly, the judiciary has provided opportunities for employees to utilise recourse other than the unfair labour practice provisions to address benefit disputes. Such leeway comes in the form of contractual recourse as well as the ability to institute strike action.

In search of solutions to the problems identified above, the study explores and analyses the history of the unfair labour practice concept. Thereafter, an extensive examination of the developments in this area of the law is undertaken. This includes a comprehensive analysis of legislation, case law and academic writings. Having documented and analysed the South African position both pre- and post-democracy, the study critically evaluates these sources of law. The study further involves a diagnostic assessment of international legal instruments and foreign law in order to extract best practices.

The conclusions reached are, firstly, that an expansive interpretation of benefits is warranted. This is in line with a purposive interpretation of the LRA, which promotes the constitutional right to fair labour practices and international law. This study therefore proposes a wide-ranging definition of the term benefits. Secondly, standards of substantive and procedural fairness have been found to be applicable in evaluating employer conduct. As such, fairness guidelines based on these standards have been developed. Thirdly, in respect of the alternate avenues available to resolve benefit disputes, it has been found that although there are strong indicators that point to a conclusion that contractual recourse has been supplanted by statutory recourse, such a finding cannot be definitively made. Furthermore, section 64(4) as it stands provides for the right to strike over unilateral changes to terms and conditions of employment, which includes unilateral changes to pre-existing benefits. However, the judiciary can limit the use of this section in benefit disputes by prioritising the substance of the dispute over its form.

This thesis ultimately proposes the incorporation of a Code of Good Practice into the LRA. The Code of Good Practice: Benefits adopts the principal research findings of this study. It encourages the enforcement of benefit disputes through the dispute resolution institutions set up by the LRA. The adoption of this Code (The Code of Good Practice: Benefits) will bring certitude to this field of labour law.

LIST OF ABBREVIATIONS

AJ	-	Acta Juridica
AJCR	-	African Journal on Conflict Resolution
AULR	-	Auckland University Law Review
BCEA	-	Basic Conditions of Employment Act
BCLR	-	Boston College Law Review
CC	-	Constitutional Court
CCMA	-	Commission for Conciliation, Mediation and Arbitration
CKLR	-	Chicago-Kent Law Review
CLJ	-	Coventry Law Journal
CLL	-	Contemporary Labour Law
CLR	-	Canterbury Law Review
CLLJ	-	Comparative Labour Law Journal
CLLPJ	-	Comparative Labour Law and Policy Journal Contemporary Labour Law and Policy Journal
CompLL	-	Comparative Labor Law
CSLR	-	Cleveland State Law Review
CWILJ	-	California Western International Law Journal
EEA	-	Employment Equity Act
ECA	-	Employment Contracts Act
EJCL	-	Electronic Journal of Comparative Law
ELB	-	Employment Law Bulletin
ELJ	-	Employment Law Journal
ELR	-	Edinburgh Law Review Erasmus Law Review
ERA	-	Employment Relations Act
ERISA	-	Employee Retirement Income Security Act
GGULR	-	Golden Gate University Law Review
HC	-	High Court

HL	-	Hamlyn Lectures
IC	-	Industrial Court
IJCLLR	-	International Journal of Comparative Labour Law and Industrial Relations
IJLM	-	International Journal of Law and Management
ILJ	-	Industrial Law Journal
ILO	-	International Labour Organisation
ILR	-	International Labour Review
		Indiana Law Review
JLR	-	Japan Labor Review
JT	-	Juridical Tribune
LAC	-	Labour Appeal Court
LC	-	Labour Court
LDD	-	Law, Democracy and Development
LLJ	-	Labour Law Journal
LQR	-	Law Quarterly Review
LRA	-	Labour Relations Act
NZLR	-	New Zealand Law Review
NLRA	-	National Labour Relations Act
NZJIR	-	New Zealand Journal of Industrial Relations
OLR	-	Ottawa Law Review
PER	-	Potchefstroom Electronic Law Journal
QLJ	-	Queen's Law Journal
QLRPB	-	Quarterly Law Review for People in Business
RLR	-	Rutgers Law Review
SAHR	-	South African Human Rights
SAJHR	-	South African Journal of Human Rights
SALJ	-	South African Law Journal
SA Merc LJ	-	South African Mercantile Law Journal
SCA	-	Supreme Court of Appeal
SLR	-	Stellenbosch Law Review

STLJ	-	South Texas Law Journal
SWLJ	-	Southwestern Law Journal
UK	-	United Kingdom
ULP	-	Unfair Labour Practice
USA	-	United States of America
VUWLR	-`	Victoria University Wellington Law Review
YLJ	-	Yale Law Review

PUBLICATIONS AND CONFERENCE CONTRIBUTIONS RELEVANT TO THESIS

Articles

1. Newaj K “Resolving the ‘Benefits’ Dilemma” (2018) 30 *South African Mercantile Law Journal* 91-114.
2. Newaj K and Van Eck BPS “Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments” (2016) 19, *Potchefstroom Electronic Law Journal* 1-30.

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TABLE OF CONTENTS

	PAGE
CHAPTER 1: INTRODUCTION	
1.1 Introduction.....	1
1.2 Problem Statement.....	5
1.3 Research Objective and Questions.....	11
1.3.1 Research Objective.....	11
1.3.2 Research Questions.....	11
1.4 Significance of Study.....	11
1.5 Limitations of Study.....	16
1.6 Research Methodology	17
1.7 Framework of Study	19
 CHAPTER 2: THE DEVELOPMENT OF THE UNFAIR LABOUR PRACTICE	
2.1 Introduction.....	21
2.2 Role of the Common Law.....	23
2.3 Need for Statutory Intervention.....	26
2.4 Introduction of ULP into Labour Legislation.....	28
2.5 Introduction of ULP into South African Labour Legislation.....	33
2.5.1 Objective of the ULP.....	33
2.5.2 Attempts to Define the ULP	38
2.5.3 Attempts to Codify the ULP.....	40
2.5.4 Redefining the ULP.....	41
2.5.5 Fairness as the Determining Factor.....	42
2.5.6 Benefit Disputes.....	45
2.5.7 Criticisms and Commendations.....	47
2.6 Conclusion.....	49

CHAPTER 3: THE CURRENT DISPENSATION

3.1	Introduction.....	51
3.2	The Labour Relations Act.....	53
3.2.1	Intention of the Legislature.....	53
3.2.2	The LRA’s Stated Purpose.....	54
3.2.3	Residual Unfair Labour Practice.....	55
3.2.4	Current Unfair Labour Practice.....	57
3.3	The Constitutional Right to Fair Labour Practices.....	60
3.4	The Role of International Labour Standards.....	66
3.5	Dispute Resolution.....	70
3.5.1	Introduction.....	70
3.5.2	Disputes of Right versus Disputes of Interest.....	71
3.5.3	Background to Dispute Resolution Structures.....	76
3.5.4	Current Dispute Resolution Structures.....	77
3.5.4.1	The CCMA.....	78
3.5.4.2	The Labour Court.....	79
3.5.4.3	The Labour Appeal Court.....	80
3.6	Conclusion.....	81

CHAPTER 4: CRITERIA TO DEFINE “BENEFITS”: DELINEATION BETWEEN “BENEFITS” AND “REMUNERATION”

4.1	Introduction.....	83
4.2	Determining Whether “Benefits” are Part of “Remuneration”...	85
4.2.1	The LRA.....	85
4.2.2	Narrow Approach Adopted by the LC.....	87
4.2.3	Support for the Narrow Approach.....	92
4.2.4	Indicators Against the Narrow Approach.....	97
4.2.4.1	Later Decisions of the LC and LAC	97
4.2.4.2	International Law.....	99
4.2.4.3	Foreign Law.....	103
4.2.5	The Reason for the Narrow Approach.....	105

4.3	Separating Disputes of Interest from Disputes of Right	112
4.4	Wide Range of Disputes	116
4.5	Conclusion.....	120

CHAPTER 5: CRITERIA TO DEFINE “BENEFITS”: WHAT CONSTITUTES A PRE-EXISTING BENEFIT?

5.1	Introduction.....	122
5.2	Determination of a Pre-Existing Benefit.....	123
	5.2.1 <i>Ex Contractu</i> and <i>Ex Lege</i>	123
	5.2.2 <i>Ex Lege</i> Right Established by Section 186(2)(a).....	126
	5.2.3 Policy and Practice.....	129
	5.2.4 Employer Discretion.....	132
	5.2.5 Legitimate Expectation.....	134
5.3	Criteria Endorsed in <i>Apollo Tyres</i>	138
	5.3.1 Facts.....	138
	5.3.2 Assessment of the <i>Apollo Tyres</i> Approach.....	141
5.4	Foreign Law.....	145
	5.4.1 Introduction.....	145
	5.4.2 Position in New Zealand.....	146
	5.4.3 Position in the United Kingdom.....	151
	5.4.4 Lessons Learnt.....	156
5.5	Conclusion.....	157

CHAPTER 6: CRITERIA TO DETERMINE UNFAIRNESS

6.1	Introduction.....	159
6.2	Understanding Fairness.....	161
6.3	Benefit Disputes: Guidance from the Courts.....	164
	6.3.1 Introduction.....	164
	6.3.2 Substantive Fairness.....	165
	6.3.3 Procedural Fairness.....	169

6.4	Unfair Dismissals: Guidance from the LRA and Codes.....	169
6.4.1	Introduction.....	169
6.4.2	Substantive Fairness.....	170
6.4.3	Procedural Fairness.....	175
6.5	New Zealand’s Justification Test.....	180
6.5.1	Introduction.....	180
6.5.2	The Justification Test.....	181
6.5.3	Lessons Learnt.....	186
6.6	Conclusion.....	187

CHAPTER 7: OVERLAP BETWEEN STATUTORY AND CONTRACTUAL RE-COURSE

7.1	Introduction.....	191
7.2	Explaining the Dual Recourse.....	192
7.3	Impact of the Unfair Labour Practice on Contractual Recourse	195
7.3.1	Introductory Remarks.....	195
7.3.2	Intention of the Legislature.....	199
7.3.3	Legislative Provisions.....	200
7.3.3.1	The LRA.....	200
7.3.3.2	The Constitution.....	201
7.3.3.3	The BCEA.....	202
7.3.4	Principles Espoused by the Judiciary.....	202
7.3.4.1	Initial Views.....	202
7.3.4.2	Expansion of Dual Jurisdiction.....	204
7.3.4.3	Attempts by CC to Settle Dual Jurisdiction	207
7.3.4.4	Consideration of Further Developments	214
7.3.5	Role of the BCEA.....	217
7.3.6	Position in Foreign Jurisdictions.....	221
7.3.6.1	The United Kingdom.....	221
7.3.6.2	New Zealand.....	227
7.4	Conclusion.....	231

CHAPTER 8: OVERLAP BETWEEN UNFAIR LABOUR PRACTICE AND STRIKE ACTION

8.1	Introduction.....	233
8.2	Legislative Framework.....	235
8.2.1	Introduction.....	235
8.2.2	Unilateral Change to Conditions of Service.....	235
8.2.3	Prohibition Against Strikes: Arbitration and Adjudication.....	236
8.3	Unilateral Changes: Interpreting Section 64(4).....	238
8.4	Prohibition Against Strikes: Interpreting Section 65(1)(c)	243
8.5	Conclusion.....	248

CHAPTER 9: CONCLUSION

9.1	Introduction.....	250
9.2	Conclusions in Respect of Question One.....	252
9.3	Conclusions in Respect of Question Two.....	256
9.4	Conclusions in Respect of Question Three.....	260
9.5	Conclusions in Respect of Question Four.....	262
9.6	Overall Conclusions.....	263
9.7	Recommendations: Code of Good Practice.....	265

BIBLIOGRAPHY.....	275
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CHAPTER 1
INTRODUCTION

	Page
1.1 Introduction.....	1
1.2 Problem Statement.....	5
1.3 Research Objective and Questions.....	11
1.3.1 Research Objective.....	11
1.3.2 Research Questions.....	11
1.4 Significance of Study.....	11
1.5 Limitations of Study.....	16
1.6 Research Methodology	17
1.7 Framework of Study	19

1.1 INTRODUCTION

The Labour Relations Act (LRA)¹ places a high premium on the use of collective bargaining, which requires negotiation between parties, to determine wages and other terms and conditions of employment.² Added to this, the LRA confers enforceable rights on employees. Fundamental among these rights are the right not to be unfairly dismissed and the right not to be subjected to an “unfair labour practice”.³

¹ The LRA 66 of 1995.

² Section 1(c) of the LRA 66 of 1995, read with Chapter III. Van Staden and Smit (2010) *TSAR 710* refer to various provisions of the LRA which protect and promote collective bargaining.

³ Section 185 of the LRA 66 of 1995. The right not to be subjected to an unfair labour practice as provided for in section 185 is more comprehensively detailed in section 186(2) of the LRA 66 of 1995. This provision is discussed in Chapter 3, paragraph 3.2.4.

The unfair labour practice concept is not new to South African labour law. The notion was first introduced in 1979, when it appeared in the Industrial Conciliation Amendment Act.⁴ The term was broadly described as any practice that in the opinion of the Industrial Court (IC) constituted an unfair labour practice.⁵ This concept promoted the principles of fairness and equity, which are the foundational values upon which labour law is premised.⁶ It laid the foundation for employees to challenge arbitrary and unjust action of their employers, thereby giving them some muscle, in a relationship that was otherwise characterised by the inequality of bargaining power and the subordinate status of employees.⁷

Following South Africa's transition into the democratic era, the concept was transplanted and became a constitutional imperative.⁸ Section 23(1) of the Constitution⁹ states that "everyone has the right to fair labour practices". This constitutionally entrenched right has been given effect to in the LRA, through among others the unfair labour practice provisions.¹⁰ It was initially classified as "residual unfair labour practices" under Schedule 7 of the LRA. However, the 2002 amendments saw the concept being brought directly within the ambit of the main body of the LRA. The term was included, along with unfair dismissals, under section 186 of the LRA where it currently finds application.¹¹

However, the unfair labour practice concept was transplanted in a different form to that which existed under the previous labour relations dispensation. The previous definition did not prescribe the specific practices that fell within the ambit of an unfair labour practice. Instead, it focussed on whether or not the conduct complained of,

⁴ Act 94 of 1979. Landman (2004) *ILJ* 806 explains that it was the Industrial Conciliation Amendment Act 94 of 1979 that introduced the unfair labour practice concept into South African law.

⁵ Section 1(f) of the Industrial Conciliation Amendment Act 94 of 1979.

⁶ Landman (2008) *ILJ* 885. When commenting on the impact of modern labour law on the common law, Cohen (2009) *ILJ* 2273 described it as a fairness-based dispensation which placed a high premium on considerations of equity.

⁷ Rycroft and Jordaan (1992) 25. As explained by Fudge (2006-2007) *QLJ* 530 the employer has a unilateral right of control, while the employee has a duty to obey. See further Betten (1995) 5 who refers to the notion of subordination being the central aspect of a contract of employment.

⁸ The Constitution of the Republic of South Africa, 1996. See the discussion in Chapter 3, para 3.3.

⁹ The Constitution of the Republic of South Africa, 1996.

¹⁰ See further the right not to be unfairly dismissed contained in section 185(a) of the LRA 66 of 1995. This section gives effect to the constitutional right to fair labour practices. Le Roux (2014) *ILJ* 42 explains that dismissal constitutes a labour practice within the ambit of the constitutional right to fair labour practices.

¹¹ Section 186(2) of the LRA 66 of 1995.

irrespective of what that conduct was, had an unfair effect on the employee concerned.¹² This stands in contrast to the current definition, where the specific practices that constitute an unfair labour practice are clearly listed.¹³ Le Roux describes the current definition as a “closed list”, as only the commission of the listed practices by employers falls within the scope of an unfair labour practice.¹⁴

The reference to the definition being a closed list is easily understood from a reading of section 186(2)(a)-(d) of the LRA. Section 186(2)(a) defines an unfair labour practice 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”, “training” of an employee or relating to the “provision of benefits” to an employee. The further practices encapsulated in section 186(2)(b)-(d)¹⁵ are not discussed further as this study deals specifically with the unfair labour practice relating to the provision of benefits.

An employee who has been subjected to unfair conduct in relation to one of the listed practices has the right to challenge such conduct by lodging an unfair labour practice

¹² This is evident from the various pre-democratic definitions of the unfair labour practice concept, as contained in section 1(f) of the Industrial Conciliation Amendment Act 94 of 1979, section 1(c) of the Industrial Conciliation Amendment Act 95 of 1980, section 1 of the Labour Relations Amendment Act 51 of 1982, section 1(h) of the Labour Relations Amendment Act 83 of 1988 and section 1(a) of the Labour Relations Amendment Act 9 of 1991. These definitions are discussed in Chapter 2.

¹³ This was evident from Part B, Schedule 7 of the LRA 66 of 1995 (prior to the 2002 amendments) and is further evident from section 186(2) of the LRA 66 of 1995 (subsequent to the 2002 amendments). These provisions are discussed in Chapter 3.

¹⁴ Le Roux (2002) *CLL* 92 states that the provisions of item 2 of schedule 7 (now s 186(2)) were such that practices not mentioned in the list were interpreted as not constituting unfair labour practices. Similarly, Van Niekerk and Smit (2018) 201 refer to the specific unfair labour practices mentioned in subsections (a) to (d) as a “numerus clausus” and state that the list is closed. See also Le Roux (2002) *ILJ* 701 who explains that the LRA as amended does not confer general protection against unfair labour practices. As such, unless a violation can be fitted into one or more of the specific unfair labour practices listed, it falls outside the ambit of the LRA. Grogan *Employment Rights* (2014) 109 also states that “the current Act does not contain an ‘open-textured’ definition of the term ‘unfair labour practice’, the lawmakers opted instead for a form of codification which lists impermissible employer actions”.

¹⁵ Section 186(2)(b) of the LRA 66 of 1995 refers to “unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee”; section 186(2)(c) refers to “a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement”; and section 186(2)(d) refers to “an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act”.

dispute.¹⁶ However, unfair labour practice dispute resolution relating to the provision of benefits has been contentious and has received much attention over the years.¹⁷

The most significant problem experienced with the inclusion of this term is understanding what the word “benefits” actually entails. This obstacle arose because of the absence of a definition of benefits in the LRA. This resulted in the interpretation and application of this provision being left to the courts – an exercise which has proven to be problematic.¹⁸ The challenges experienced are well articulated by Myburgh and Bosch who state that “the progress of the law relating to unfair labour practices in respect of benefits has been torturous and rendered a body of jurisprudence that is complex and confusing”.¹⁹

Unfortunately the Explanatory Memorandum to the 1995 LRA provides no assistance in this regard.²⁰ This document, which sought to provide background and context to the principal features of the 1995 Labour Relations Bill, merely described the retention of the unfair labour practice concept as uncontroversial and generally welcomed.²¹ This leads one to the conclusion that policy makers at the time saw this as a positive feature of the LRA.

Unfortunately, this sentiment is not shared by all. Cheadle, a key role player in the development of the LRA of 1995, questioned the inclusion of benefits within the unfair labour practice concept.²² A decade after the inclusion of benefits, he stated that “on reflection, it is difficult to explain its inclusion in the definition of the residual unfair

¹⁶ Section 191(1)(a) of the LRA 66 of 1995.

¹⁷ This is evident from the various articles written on this topic. See, for example, Grogan (1996) *ELJ* 65; Grogan (1998) *ELJ* 11; Le Roux (1997) (7) *CLL* 67; Le Roux (1997) (11) *CLL* 93; Le Roux (2002) *CLL* 91; Le Roux (2005) *CLL* 1; Le Roux (2002) *ILJ* 1699; Le Roux (2015) *ILJ* 888; Levy (2009) *ILJ* 1451; Cohen (2010) *SA Merc LJ* 417; Cohen (2014) *ILJ* 79.

¹⁸ This is apparent from the plethora of court decisions in which the controversies surrounding the concept of benefits were highlighted. See, for example, *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 *ILJ* 1098 (LC); *Gaylard v Telkom SA Ltd* (1998) 9 BLLR 942 (LC); *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 *ILJ* 1910 (LC); *Hospersa and another v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC); *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703; *IMATU obo Verster v Umhlathuze Municipality & others* [2011] 9 BLLR 882 (LC).

¹⁹ Myburgh and Bosch (2016) 385.

²⁰ Explanatory Memorandum (1995) *ILJ* 278.

²¹ See Benjamin and Cooper (1995) *ILJ* 276 who commented on the Explanatory Memorandum.

²² See Le Roux (2006) *ILJ* 55 who suggests that its inclusion was based on the misinterpretation of the IC decision of *SA Society of Bank Officials v Bank of Lisbon International Ltd* (1994) 15 *ILJ* 555 (LAC).

labour practice because there appears to be no prior jurisprudence on the issue justifying its inclusion”.²³

Notwithstanding the reservations raised, it has ultimately found its way into the unfair labour practice concept and forms part of South African labour law. As such, a clear understanding of the exact meaning of this unfair labour practice is needed.

1.2 PROBLEM STATEMENT

There are two primary controversies regarding the definition of the term benefits. The first is whether the term falls within the definition of “remuneration” as contained in section 213 of the LRA. The second concerns the principles that must be applied by decision makers in establishing whether the benefit that forms the subject of the unfair labour practice dispute is indeed a dispute of right as opposed to a dispute of interest.

In respect of the first aspect, one of the central principles that have arisen from the earlier decisions of the Labour Court (LC) is the necessity to maintain boundaries between benefits and remuneration, primarily to protect the distinction that exists in labour law between disputes of right and disputes of interest.²⁴ Accordingly, in *Schoeman & another v Samsung Electronics SA (Pty) Ltd (Schoeman)*,²⁵ it was held that the term benefits does not fall within the definition of remuneration.²⁶ While the initial response of the LC was to support this conclusion,²⁷ later cases disagreed.²⁸ A significant case that offered a dissenting view is *Protekon (Pty) Ltd v CCMA & others (Protekon)*,²⁹ a decision which was later supported by the Labour Appeal Court (LAC)

²³ Cheadle (2006) *ILJ* 689.

²⁴ See *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 *ILJ* 1098 (LC); *Gaylard v Telkom SA Ltd* (1998) 9 *BLLR* 942 (LC); and *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 *ILJ* 1910 (LC).

²⁵ (1997) 18 *ILJ* 1098 (LC).

²⁶ *Schoeman* 1102-1103J.

²⁷ See *Gaylard v Telkom SA Ltd* (1998) 9 *BLLR* 942 (LC); and *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 *ILJ* 1910 (LC).

²⁸ *Protekon (Pty) Ltd v CCMA & others* [2005] 7 *BLLR* 703 (LC); and *IMATU obo Verster v Umhlathuze Municipality & others* [2011] 9 *BLLR* 882 (LC). In *Trans-Caledon Tunnel Authority v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 *ILJ* 2643 (LC) para 17 the court found that there was no persuasive argument for excluding the employee's claim to his bonus from being a benefit merely because the benefit claimed fell within the definition of remuneration in the LRA.

²⁹ [2005] 7 *BLLR* 703 (LC).

in the hallmark case of *Apollo Tyres South Africa (Pty) Ltd v CCMA (Apollo Tyres)*.³⁰ *Apollo Tyres* found that the definition of remuneration as stated in the LRA is wide enough to include benefits.³¹

In respect of the second issue, the LAC in *Hospersa and another v Northern Cape Provincial Administration (Hospersa)*,³² found that in order for an employee to lodge an unfair labour practice dispute, the employee must either have an *ex contractu* or *ex lege* right to the benefit being claimed.³³ In other words, an employee would only be eligible to utilise the unfair labour practice provisions if it can be shown that the benefit in dispute was afforded to the employee in a contract of employment, collective agreement or in legislation governing the employment of the employee. The reason for this approach was once again to protect the divide between disputes of right and disputes of interest.³⁴

While this decision was subsequently supported by the LAC,³⁵ this approach was not unconditionally endorsed in the later case of *Apollo Tyres*.³⁶ The court held that there are broader instances than contractual or statutory rights that may give rise to a pre-existing benefit.³⁷ *Apollo Tyres* found that an advantage or privilege offered or granted to an employee in terms of a policy or practice subject to the employer's discretion could also constitute a pre-existing benefit.³⁸ The court found 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.³⁹

³⁰ *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC).

³¹ *Apollo Tyres* para 25.

³² (2000) 21 ILJ 1066 (LAC).

³³ In *Hospersa* Mogoeng AJA stated at para 9 that he did not think that item 2(1)(b) 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 disputes about benefits to which an employee is entitled *ex contractu* or *ex lege* under the residual unfair labour practice jurisdiction.

³⁴ *Hospersa* paras 8 and 9.

³⁵ *GS4 Security Services (SA) (Pty) Ltd v NASGAWU* unreported case no DA3/08, 26 November 2009 (LAC).

³⁶ *Apollo Tyres* para 48 illustrates that the LAC was not in support of a narrow interpretation of the term benefits.

³⁷ *Apollo Tyres* para 50.

³⁸ *Apollo Tyres* para 50.

³⁹ *Apollo Tyres* para 48.

As stated, the difficulties in interpreting and applying this provision stems from the absence of a definition of benefits in the LRA. While the LAC in *Apollo Tyres* sought to provide clarity on what constitutes a benefit, the practical effect of the judgment has been an expansion of the type of issues that fall within the ambit of benefits. The term benefits now includes issues such as early retirement benefits;⁴⁰ accumulated leave pay;⁴¹ motor vehicle or travel allowances;⁴² free transport;⁴³ performance bonuses;⁴⁴ pay progression;⁴⁵ job grading;⁴⁶ acting allowances;⁴⁷ financial allowances;⁴⁸ and a refusal to grant temporary disability benefits.⁴⁹

In employing this broad approach, the courts will undoubtedly accept many more issues as falling within the realm of benefits, resulting in this term becoming more and more expansive. While this thesis supports an expansive definition of benefits, there must be clear parameters that indicate what the limits are and where they should be drawn. As such, this expansive approach requires an in-depth evaluation, taking account of international and foreign law and considering the feasibility of awarding discretionary benefits statutory protection under the unfair labour practice dispute resolution provisions. In this regard Bhorat and Van der Westhuizen have succinctly suggested that “the solution may be to provide guidelines in the LRA or Code of Good Practice on the boundaries of unfair conduct relating to the provision of benefits”.⁵⁰

⁴⁰ *Apollo Tyres* para 60.

⁴¹ *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 ILJ 2774 (LAC).

⁴² *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) and *Ehlanzeni District Municipality v South African Local Government Bargaining Council & others* case no JR1163/10, 30 September 2014 (LC).

⁴³ *United Association of South Africa obo Members v De Keur Landgoed (Edms Bpk)* [2014] 7 BALR 738 (CCMA).

⁴⁴ See *Charlies v The South African Social Security Agency & others* case no JR1272/2011, 13 May 2014 (LC); *Aucamp v SA Revenue Service* [2014] 2 BLLR 152 (LC); *Public Servants Association obo Motseka v Department of Sports, Arts and Culture* (2015) 36 ILJ 808 (BCA); and *Rainbow Farms (Pty) Ltd v CCMA & Others* case no C377/2012, 29 May 2015 (LC).

⁴⁵ See *Western Cape Gambling & Racing Board v CCMA & others* case no 973/2013, 20 February 2015 (LC).

⁴⁶ See *Thiso & 6 others v Moodley & others* (2015) 36 ILJ 1628 (LC).

⁴⁷ See *National Union of Metalworkers of SA obo Jooste v Atlantis Foundries (Pty) Ltd* (2014) 35 ILJ 829 (BCA); and *South African Post Office Limited v Gungubele & others* case no JR2947/2010, 25 February 2014 (LC).

⁴⁸ See *Pretorius v G4S Secure Solutions (SA) (PTY) LTD & others* case no JR2498/13, 4 November 2015 (LC).

⁴⁹ See *South African Post Office Ltd v Kriek & others* case no P190/12, 22 April 2016 (LC).

⁵⁰ Bhorat and Van der Westhuizen (2009) Working Paper 09/135 16.

The provision of clear parameters is essential as the Commission for Conciliation, Mediation and Arbitration (CCMA) and Councils⁵¹ only have jurisdiction to consider an unfair labour practice dispute if the issue in dispute falls within one of the practices specified in section 186(2) of the LRA.⁵² An alleged unfair labour practice dispute relating to the provision of benefits may therefore only be considered if the issue in dispute is indeed a benefit. As such, there must be a clear indication of the factors that must be considered by adjudicators in determining whether they have jurisdiction to consider these disputes, which is the first stage of the benefits inquiry. It is therefore imperative that the meaning of benefits be comprehensively investigated in order for boundaries to be developed. This will prevent the unfair labour practice from being utilised as a *carte blanche* entitlement.

Apart from the lack of a statutory definition of benefits, which has caused much controversy as detailed above, there are further uncertainties that create challenges in this area of the law.

Once a commissioner establishes that he or she has the necessary jurisdiction to consider a benefits dispute, the inquiry moves to the second stage, which is determining the fairness of the employer's conduct in relation to the provision of benefits.⁵³ Notwithstanding the fairness imperatives strictly embedded in the unfair labour practice concept, guidelines for the determination of fairness similar to those provided for unfair dismissals are glaringly absent from the LRA.⁵⁴

In this regard Chicktay mentions that unlike instances of dismissal which have their own code providing guiding principles for determining fairness, the determination of

⁵¹ This refers to Bargaining and Statutory Councils as provided for in sections 27 and 40 of the LRA 66 of 1995. As explained in Chapter 3, para 3.5.4, such Councils may apply to the CCMA for accreditation to conciliate and arbitrate disputes. Section 191(1)(a) of the LRA 66 of 1995 therefore allows for unfair dismissal and unfair labour practice disputes to be handled by adjudicators of accredited Bargaining and Statutory Councils.

⁵² *South African Post Office Ltd v CCMA & others* case no C293/2011, 18 June 2012 (LC) para 18.

⁵³ *Protekon* paras 26 and 27 explains these two stages. The judgment makes it clear that even though the subject of the dispute may constitute a benefit within the meaning of the unfair labour practice provisions, a separate inquiry is needed to determine whether the employer's conduct in relation to the provision of the benefit can be described as unfair.

⁵⁴ This is evident from the wording of the LRA 66 of 1995. The LRA provides for a Code of Good Practice on Dismissal (Schedule 8) that sets out the factors that must be considered when determining whether a dismissal is unfair.

fairness in relation to unfair labour practice disputes is left to the discretion of the adjudicator.⁵⁵

A further challenge is the sanctioned existence of more than one avenue being available to employees to address disputes that are quintessentially unfair labour practice disputes relating to the provision of benefits.⁵⁶ This arises when the dispute stems from the employer's action of unilaterally changing terms and conditions of employment, where the term or condition constitutes a benefit within the meaning of section 186(2)(a).

The first apparent overlap is between the use of contractual recourse and the unfair labour practice remedy. This arises from the fact that the source of a pre-existing benefit may well be based on a contract of employment. Therefore, if the benefit is expressly provided for in a contract of employment and the employer unilaterally changes the benefit by failing to provide the benefit or by reducing the benefit, this would constitute a change to an employee's terms and conditions of employment. As such, an employee would, in terms of the ordinary principles of contract law and in terms of section 77(3) of the Basic Conditions of Employment Act (BCEA),⁵⁷ be entitled to challenge the employer's actions as a breach of contract.⁵⁸ The failure of the LAC in *Apollo Tyres* to dispel the relevance of contract in the context of unfair labour practices has consequently been met with scepticism.⁵⁹

The second overlap is the possible reliance on strike action to challenge a unilateral change to terms and conditions of employment where the term or condition constitutes

⁵⁵ Chicktay (2007) SA Merc LJ 111. See further Smit and Le Roux (2015) CLL 102 who comment about the lack of guidance provided to arbitrators on the standard of fairness to be applied.

⁵⁶ See cases such as *Maritime Industries Trade Union of South Africa v Transnet Limited* (2002) 23 ILJ 2213 (LAC); *Sibanye Gold Ltd v The Association of Mineworkers & Construction Union & others* (2017) 38 ILJ 1193 (LC); *Fredericks and others v MEC for Education and Training, Eastern Cape, and others* (2002) 2 SA 693 (CC). These aspects are discussed in Chapters 7 and 8.

⁵⁷ The BCEA 75 of 1997.

⁵⁸ As affirmed in among others *Fedlife Assurance Ltd v Wolfaardt* 2001 (2) SA 112 (C); *Boxer Superstores Mthatha & another v Mbenya* 2007 (5) SA 450 (SCA); and *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA). See further Grant and Whitear-Nel (2013) SALJ 311; and Grogan (2009) 3 ELJ 5.

⁵⁹ Le Roux (2015) ILJ 888.

a benefit.⁶⁰ While the architecture of the LRA prohibits strike action in relation to disputes concerning unfair labour practices,⁶¹ it does not generally prohibit strike action over disputes of right, such as a dispute concerning a unilateral change to terms and conditions of employment.⁶² This implies that a benefit dispute, such as a reduction of a car allowance which arises from a unilateral change to terms and conditions of employment, may be challenged as an unfair labour practice dispute or strike action may be embarked upon. *Apollo Tyres* has confirmed that benefit disputes are among those disputes in respect of which parties enjoy a legitimate election on whether to resort to industrial action or to refer the dispute to arbitration.⁶³

The result is that there is a *prima facie* overlap in the recourse available to address benefit disputes. This overlap occurs not only in terms of the LRA itself,⁶⁴ but also between the unfair labour practice recourse provided for in the LRA and contractual recourse for breach of contract, which apart from being a common law remedy is also catered for in the BCEA.⁶⁵

The difficulties associated with the use of this dispute resolution mechanism were highlighted as early as 1997.⁶⁶ Le Roux stated that it was clear that the interpretation and application of the unfair labour practice relating to the provision of benefits was going to be the subject of much debate and judicial scrutiny. He opined that its formulation was such that a suitable answer was difficult to determine and that amendments would be necessary to resolve it.⁶⁷

⁶⁰ This arose in *Maritime Industries Trade Union of SA & others v Transnet Ltd & others* (2002) 23 ILJ 2213 (LAC). At para 106 the LAC explained that where a dispute about a unilateral change to terms and conditions of employment falls within the provisions of item 2(1)(b) of Schedule 7 (now section 186(2)), an employee would have a choice between resolving the dispute either by way of arbitration or power-play.

⁶¹ Section 65(1)(c) of the LRA 66 of 1995.

⁶² *Monyela & others v Bruce Jacobs t/a LV Construction* (1998) 19 ILJ 75 (LC) 82.

⁶³ *Apollo Tyres* paras 28 and 29.

⁶⁴ Resultant from an employee's election between pursuing arbitration or strike action, a dispute which is essentially an unfair labour practice dispute relating to the provision of benefits may also constitute a unilateral change to a term or condition of employment.

⁶⁵ Section 77(3) of the BCEA 75 of 1997 gives the LC 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.

⁶⁶ Le Roux (1997) (7) CLL 70.

⁶⁷ Le Roux (1997) (7) CLL 70.

This assessment, which was made shortly after the introduction of the unfair labour practice, has proven to be true. Despite all of the developments that have come about in this area of the law, there remain weaknesses and unanswered questions in relation to this dispute resolution mechanism, which this thesis seeks to resolve.

1.3 RESEARCH OBJECTIVE AND QUESTIONS

1.3.1 Research Objective

In line with the challenges identified above, this thesis seeks to answer the research questions that are detailed below. The ultimate aim of this thesis is to develop a Code of Good Practice: Benefits which will address the problems associated with the scope and definition of the notion of benefits.

1.3.2 Research Questions

In line with the main objective, the research questions are as follows:

- 1.3.2.1 What should the definition of benefits, as referred to in section 186(2)(a) of the LRA, entail?
- 1.3.2.2 What standards should be applied in determining whether employer conduct relating to the provision of benefits is unfair?
- 1.3.2.3 Has an employee's right to rely on contractual recourse been supplanted by the unfair labour practice remedies relating to the provision of benefits?
- 1.3.2.4 Should strike action be permitted to resolve disputes regarding benefits?

1.4 SIGNIFICANCE OF THE STUDY

Considering the imbalance in power that characterises most employment relationships, employees are often left vulnerable to arbitrary, discriminatory or unfair treatment by employers. While not all employers abuse their positions of superiority, some certainly do, and such realities justify the need for legal controls to regulate employer

conduct, thus providing a measure of protection to employees who are treated unfairly.⁶⁸

The unfair labour practice relating to the provision of benefits is a statutory device that provides employees with a substantive right and which in turn imposes obligations on employers. While it provides an important source of protection to employees, the value of this protective instrument is severely diminished due to the shortcomings with which it is plagued.⁶⁹

In order for this worker's right to be optimally utilised and for employees to enjoy its full value, the problems that afflict this area of labour law needs to be settled. Such resolution is equally important for employers. While they have an obligation to treat their employees fairly, they similarly have a right to know under what circumstances their conduct may be challenged and what standard they will be held to.

While the inclusion of protection against unfair conduct relating to the provision of benefits has been questioned and criticised, employment benefits are commonly provided to employees and will inevitably give rise to conflict. Therefore, it is not difficult to understand the inclusion of employee protection in this area. The importance of such protection is further evident from the fact that some foreign jurisdictions equally provide protection against unfair conduct in relation to employment benefits.

While there are no unfair labour practice provisions that provide protection against unfair conduct relating to the provision of benefits in the United Kingdom (UK), New Zealand or the United States of America (USA), these countries all provide some form of open-ended legal protection to employees. This allows them to dispute unfair conduct by their employers in respect of employment benefits.⁷⁰

⁶⁸ Creighton and Stewart (2010) 527. See further Davidov and Langille (2006) 138 who explain that "the basic characteristic of an employment relationship – which is also the background reason for all protective labour and employment regulations – is the inequality of bargaining power between the individual employer and individual employer".

⁶⁹ Owens *et al* (2011) 621 explain that "without workable mechanisms for enforcement, obligations are meaningless". While there are mechanisms to address unfair labour practices, these mechanisms understandably become hindered when there is legislative ambiguity.

⁷⁰ See Chapter 5, para 5.4 for a discussion of the protection afforded by the UK and New Zealand.

In the UK, an important source of employee protection arises from the implied contractual obligation of mutual trust and confidence, also known as “fair dealing”.⁷¹ This notion implies that employers have a positive duty to deal even-handedly with employees.⁷² It provides a general instrument by which courts may strike a balance between the employer’s interest in managing the business as it sees fit and the employee’s interest in not being unfairly and improperly exploited.⁷³

This employer obligation applies to a range of circumstances.⁷⁴ It has been endorsed in the context of employee remuneration,⁷⁵ pensions,⁷⁶ benefit entitlements,⁷⁷ the provision of bonuses,⁷⁸ as well as redundancy benefits.⁷⁹ While employees in the UK do not have statutory protection against unfair employer conduct relating to the provision

⁷¹ The obligation of mutual trust and confidence was defined by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606 at 621 as the obligation of an employer not to “without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”. *Owens et al* (2011) 287 explain that this House of Lords decision is consistently cited as authority for the existence of a duty of “mutual trust and confidence” in employment relationships. *Collins et al* (2012) 141-142 espouse this duty as being one of the most remarkable and significant developments of the common law contract of employment in recent decades, as it brings the common law closer into line with modern views about fairness. See further Anderson and Bryson (2006) *VUWLR* 492 who explain the importance of the implied term of trust and confidence.

⁷² *Owens et al* (2011) 290. See also *Barnard et al* (2004) 109 who explain that the implied term of mutual trust and confidence has been developed as a general “portmanteau” obligation which requires the employer to refrain from engaging in conduct likely to undermine the trust and confidence which the employment contract implicitly envisages.

⁷³ *Collins et al* (2012) 137. Cohen (2010) *SALJ* 452 affirms that “the obligation of mutual trust and confidence or fair dealing requires both employer and employee to conduct themselves in a manner that is not likely to damage or destroy the employment relationship. This obligation guards against employers’ abuse of power and ensures that employers’ interests in deriving the maximum benefit from their businesses are equitably balanced against the interests of employees in being treated fairly”.

⁷⁴ *Deakin and Morris* (2012) 364.

⁷⁵ See cases such as *Clark v BET plc* [1997] *IRLR* 348; *Taylor v Motability Finance Ltd* [2004] *EWHC* 2619; *Clark v Nomura International plc* (2000) *IRLR* 766; and *Horkulak v Cantor Fitzgerald International* (2004) *IRLR* 942. See further Cohen (2010) *SALJ* 452.

⁷⁶ *Boyle* (2008) *ELR* 232 referring to *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] *ICR* 524; and *British Coal Corporation v British Coal Staff Superannuation Fund Scheme Trustees* [1995] 1 *All ER* 912.

⁷⁷ Cohen (2010) *SALJ* 452.

⁷⁸ This is evident from cases such as *Clark v Nomura International plc* [2000] *WL* 1213073 and *Horkulak v Cantor Fitzgerald International* (2004) *IRLR* 942 where despite express contractual provisions reserving an employer’s unlimited discretion to award performance bonuses to employees, courts are interrogating such discretion and require employers to exercise such discretion rationally, reasonably and in good faith. These and other cases are discussed in Chapter 5, para 5.4.2.

⁷⁹ *BG Plc v O’Brien* [2001] *UKEAT* 1063_99_1405. *Owens et al* (2011) 290 explain that in this case the UK Employment Appeals Tribunal upheld the claim by the employee to receive the benefit of a redundancy package that was never part of his original employment contract.

of benefits, they do have recourse to challenge the type of conduct, which in South African labour law has been found to fall within the ambit of an unfair labour practice relating to the provision of benefits.

Unlike the UK, New Zealand provides for statutory protection against unjustifiable employer conduct in respect of a range of practices. This is provided for in the personal grievance procedure, which is one of the most significant features of New Zealand's employment relations structure that has been in existence since the 1970s.⁸⁰ This concept was carried forward into the Employment Relations Act (ERA),⁸¹ which is New Zealand's primary labour legislation.

Although its principal use was initially in relation to dismissals,⁸² it covers a number of dissatisfactions experienced by employees, as is evident from its definition.⁸³ Where an employment benefit constitutes a condition of employment, grievances about the reduction or removal of such benefit would qualify as a personal grievance for which recourse is available.⁸⁴ This results in protection being provided against unfair conduct in respect of aspects akin to unfair labour practices relating to the provision of benefits.

⁸⁰ The personal grievance procedure is contained in the ERA 24 of 2000, Part 9. However, it existed prior to the enactment of the ERA as discussed by Nolan (1998) 42. Spell (1998) *CWILJ* 200 explains that the personal grievance procedure first became part of New Zealand industrial law in 1970, being introduced in an amendment to the Industrial Conciliation and Arbitration Act of 1984. As clarified by Anderson (2010-2011) *CLLPJ* 692 the personal grievance procedure was enacted by Parliament in 1973 to protect employees covered by an award. However, this protection was extended to all employees in 1991.

⁸¹ The ERA 24 of 2000, Part 9.

⁸² Nolan (1998) 42.

⁸³ The ERA 24 of 2000, Part 9 section 103 (1)(b) defines a personal grievance to include any employee grievance arising from a claim that one or more conditions of employment is or are affected to the employee's disadvantage by some unjustifiable action of the employer. There are other components that form part of the definition, such as unjustifiable dismissals, discrimination, sexual harassment, racial harassment and more. See section 103(1)(a), (c) and (d). According to Spell (1998) *CWILJ* 202 the employment tribunal could hear disputes over wage rates and attempts by individuals to recover wages or other compensation. See further Anderson (2010-2011) *CLLPJ* 687 who indicates that the personal grievance procedure requires employers to justify not only dismissals but a range of other actions that cause disadvantage to employees.

⁸⁴ In *ANZ National Bank Ltd v Doidge* unreported, Colgan J, 1 August 2005, AC 42/05 the unilateral removal of transport allowances was challenged. *Wyatt v Simpson Grierson (A Partnership)* AC 45/07 [2007] NZEmpC 89 dealt with dissatisfaction regarding the payment of salaries. In *Carrington v Tayside Springs Limited* [2014] NZERA Christchurch 152 the employee challenged its employer's change to working hours. In *FGH v RST* [2018] NZEmpC 60 the removal of overtime work was challenged. *Cooper v Unit Services Wellington Limited* [2018] NZERA Christchurch 102 dealt with the employee's dissatisfaction with the reduction of guaranteed hours of work. In *Kilpatrick v Air New Zealand Limited* [2016] NZEmpC 1 the employee's personal grievance related to her being given an insufficient rest period.

In the USA, such protection is embedded in the Employee Retirement Income Security Act (ERISA),⁸⁵ which was enacted to regulate privately-established employee benefit plans to protect beneficiaries from the unfair practices of employers.⁸⁶ ERISA sought to remedy the previous system, which failed to provide effective methods of protecting employee benefits, as courts viewed such benefits as “mere gratuities” which employers could grant and withdraw freely.⁸⁷

While ERISA only protects benefit plans and not employee benefits in general there is still a measure of protection provided against unfair conduct relating to the provision of employee benefits.⁸⁸

It is apparent from the brief review of the statutory and non-statutory protection provided for in the UK, New Zealand and the USA that it is important to provide employees with the means to counter and limit employer power as comprehensively as possible. If such mechanisms are not provided for, employer power will be unconstrained, thereby rendering meaningless the fairness imperatives embodied in the employment relationship. South African labour law, through its unfair labour practice provisions, has come a long way in regulating employer power and promoting the fundamental principles of fairness. However, the use of such protections become hindered when engulfed by uncertainty and ambiguity, such as the unfair labour practice relating to the provision of benefits. As such, answering the research questions posed in this thesis is fundamental to the development of a coherent and sustainable jurisprudence.

⁸⁵ Employee Retirement Income Security Act of 1974. See also Rhodes (1986-1987) *BCLR* 723.

⁸⁶ Conison (1998) 2 explains the definition of “benefit plan” as contained in section 3(1)-(3) of ERISA as a regularly conducted, employment-based program or practice, the purpose of which is to afford certain kinds of benefits to employees. See further Langbein *et al* (2006) 100 where the definition of a benefit plan is discussed. Rhodes (1986-1987) *BCLR* 724, 725 and 731 clarifies that benefit plans are defined to include both “welfare benefit plans,” which provide for medical, disability, vacation and severance pay benefits, as well as “employee pension benefit plans”, which provide for retirement or other income benefits. Langbein *et al* (2006) 732 discuss the right of a beneficiary to sue under ERISA in order to recover benefits that are due or to enforce or clarify rights in terms of the plan. See further Blanpain *et al* (2007) 124.

⁸⁷ Rhodes (1986-1987) *BCLR* 727-728. See further Conison (1998) 68.

⁸⁸ Conison (1998) 1. O’ Brien (2000) *GGULR* 216 explains that in *Friedrich v Intel Corporation* 181 F.3d 1105 (9th Cir. 1999) the Appeals Court upheld the District Court’s finding that *Intel*, by denying long-term disability benefits, contravened ERISA.

1.5 LIMITATIONS OF STUDY

The traditional approach to writing a thesis is to have at least one separate chapter devoted to a comparative analysis of foreign jurisdictions on the topic under discussion. While some foreign jurisdictions recognise the broad notion of an unfair labour practice, none of these foreign jurisdictions provide for a specific statutory unfair labour practice relating to the provision of benefits in particular.⁸⁹

In view of the above, it is not possible to compare the South African approach pertaining to benefits with similar mechanisms in foreign jurisdictions. This thesis consequently does not contain a comparative chapter. Notwithstanding this, research has been done regarding the UK, New Zealand and the USA in order to establish how they define the concept of remuneration, which has assisted in determining what the definition of the term benefits should entail.⁹⁰ Similarly, the jurisprudence of the UK and New Zealand has been considered in determining whether it is justifiable to extend the concept of a benefit to include discretionary benefits.⁹¹ The test for justifiability applied in New Zealand to personal grievances has been considered regarding the development of standards of fairness.⁹² The legal positions in the UK and New Zealand have likewise been utilised in considering the extent to which common law recourse should apply when statutory recourse is available to address specific areas of labour law.⁹³

The law of the foreign jurisdictions on the specific issues identified above is not contained in one chapter, but rather appears in each chapter of this thesis that discusses the issues in question. The reasons why these countries were selected, are set out in paragraph 1.6 below.

Also, this thesis does not seek to cover the unfair labour practice concept in its entirety. As stated in paragraph 1.1, section 186(2) of the LRA lists several practices that constitute unfair labour practices, with the provision of benefits being just one of them.

⁸⁹ The countries that recognise the broad notion of the unfair labour practice are discussed in Chapter 2, para 2.4. Paragraph 2.4 discusses the definitions of the unfair labour practice concept used by these countries. From these definitions it is evident that these foreign jurisdictions do not recognise unfair labour practices relating to the provision of benefits.

⁹⁰ See Chapter 4, para 4.2.4.3.

⁹¹ See Chapter 5, para 5.4.

⁹² See Chapter 6, para 6.5.

⁹³ See Chapter 7, para 7.3.6.

While the general unfair labour practice concept is discussed in Chapter 3 to give context to the study, the emphasis of this thesis is specifically on the unfair labour practice relating to the provision of benefits.

As mentioned in paragraph 1.3, this thesis seeks to address the various problems identified in the operation of the unfair labour practice relating to the provision of benefits. However, the study excludes an appraisal of the remedies available in the LRA to bring redress where an unfair labour practice has been committed.⁹⁴ This is due to the fact that the legislation provides relative certainty in this regard. Furthermore, a study into the available remedies requires an evaluation of the unfair labour practice concept in its entirety, which the study does not do.

Lastly, this thesis deals with the law up to 31 August 2018.

1.6 RESEARCH METHODOLOGY

The study is substantially based on a doctrinal analysis of existing sources of law regulating the unfair labour practice jurisprudence of South Africa, specifically the practice relating to the provision of benefits.⁹⁵ This involves a description and critical evaluation of the constitutional framework, labour statutes, case law, books, journal articles and similar sources.⁹⁶ The essential purpose of this doctrinal analysis is to improve the law regulating benefit disputes through the proposal of a Code of Good Practice.

⁹⁴ Section 193(4) of the LRA 66 of 1995 provides that “an arbitrator appointed in terms of this Act may determine any unfair labour practice *dispute* referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation”.

⁹⁵ Hutchinson (2015) *ELR* 132 explains that doctrinal research identifies and analyses the current law. According to the author good quality doctrinal research goes beyond the description, analysis and critique of the law by making recommendations to amend the law in order to improve it. See further Chynoweth (2008) 29 who explains that doctrinal research is characterised by the study of legal texts and is therefore often described as “black-letter law”. Significantly Chynoweth (2008) 31 makes it clear that doctrinal analysis remains “the defining characteristics of academic legal research”.

⁹⁶ Hutchinson (2015) *ELR* 130 describes the essential features of doctrinal scholarship as a critical conceptual analysis of all relevant legislation and case law. At 131 the author explains that arguments are derived from authoritative sources, such as existing rules, principles, precedents and academic publications.

The study further explores and analyses the history of the unfair labour practice concept because the jurisprudence in this area changed with the advent of democracy. However, understanding the historical development of the concept provides a clearer understanding of the aims sought to be achieved by the introduction of the unfair labour practice into South African labour law. It therefore provides perspective in understanding the provision's current application, serving as an important starting point in interpreting the unfair labour practice relating to the provision of benefits.⁹⁷

As discussed in paragraph 1.5 above, a comparative study has been undertaken. Van Hoecke explains that comparing domestic laws with the laws of other countries is an important component of doctrinal legal research,⁹⁸ as it is always necessary to look at “the other side of the borders” in trying to improve domestic law.⁹⁹

Notwithstanding the fact that no other foreign jurisdiction directly provides statutory protection in the form of an unfair labour practice relating to the provision of benefits, both foreign (notably the USA, the UK and New Zealand) and international law provide valuable insight into various aspects discussed in the study. For that reason, international legal instruments and foreign law in the applicable areas have been analysed, critically evaluated and compared to the South African position. Through the evaluation of these foreign systems of law, best practices within the selected jurisdictions have been identified and utilised to resolve the research questions posed and to make recommendations.

The reasons for the predominant use of New Zealand and the UK as comparative jurisdictions are that they have a similar legal environment to South Africa. Firstly, both countries are common-law jurisdictions as opposed to civil jurisdictions.¹⁰⁰ Secondly, they are similar in structure to South Africa being unitary as opposed to federal

⁹⁷ Van Hoecke 18 at <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001> accessed on 31 August 2018 explains that one can only fully understand how the law functions when there is an understanding of where it comes from and why it is the way it is today. See further Hofstee (2010) 125 who states that historical research involves looking at the past through whatever sources may be available in order to shed light on a contemporary issue.

⁹⁸ Van Hoecke 1.

⁹⁹ Van Hoecke 2.

¹⁰⁰ Anderson (2015) 40 explains that New Zealand has a common-law based legal system derived from England. See further Epstein (2001) *Case WRLIL* 362.

states.¹⁰¹ Thirdly, although not identical, the individual statutory employment rights present in these jurisdictions are comparable to the domestic position. New Zealand provides for the mechanism of personal grievances as discussed under paragraph 1.4 above, while the UK provides for unfair dismissal protection.¹⁰² Furthermore, it is undeniable that South Africa has close historical ties to the UK, resulting in the English legal system having influenced the development of South African law.¹⁰³

Although the USA operates as a federal state, there are two aspects from the USA that are relevant to this study.¹⁰⁴ These aspects have been included in the study as they provide a valuable contribution. However, the reference to the legal dispensation of the USA plays a minor role in comparison to the UK and New Zealand.

1.7 FRAMEWORK OF STUDY

The research questions posed in this thesis are addressed in nine chapters. An overview of these chapters is provided below.

Chapter 1 provides a general introduction to the study and formulates the research questions.

Chapter 2 explores the shift away from the common law to a labour law dispensation characterised by the unfair labour practice concept. Importantly, it considers the principles that may be imported from the pre-democratic unfair labour practice concept, to assist in defining the term benefits.

Chapter 3 discusses the constitutional right to fair labour practices and the objectives sought to be achieved by the LRA. This is done in order to extract principles that may be used to give meaning to the term benefits. The chapter further discusses the delineation between disputes of right and disputes of interest, which in line with the LRA

¹⁰¹ Epstein (2001) *Case WRLIL* 362. See further Anderson (2015) 38.

¹⁰² See Chapter 7, para 7.3.6.

¹⁰³ See discussion by Le Roux (PhD Thesis, University of Cape Town, 2008) 11.

¹⁰⁴ See Chapter 2, para 2.4 and Chapter 4, para 4.2.4.3.

determines the dispute resolution mechanisms available to deal with each respective category of dispute.

Chapters 4 and 5 analyse what the definition of benefits must entail by looking into two primary elements. The first is the type of items or issues that fall within the ambit of benefits, thereby resolving the debate around the delineation between benefits and remuneration. The second deals with the factors that determine whether a benefit is pre-existing, as only pre-existing benefits may be dealt with in terms of section 186(2)(a).

Chapter 6 determines the standards of fairness that must be applied in considering whether employer conduct relating to the provision of benefits is unfair, as the LRA does not provide any guidance in this regard.

Chapters 7 and 8 explore whether labour legislation allows for the utilisation of recourse other than the unfair labour practice dispute resolution mechanisms, to address benefit disputes arising from a unilateral change to terms and conditions of employment. The alternative remedies that are evaluated are contractual claims and the institution of strike action.

Chapter 9 highlights the main findings in respect of the research questions posed. It provides a detailed explanation of what the definition of section 186(2)(a) benefits entails; it sets out the standards of fairness that are applicable and how these standards should be applied; and it resolves the use of alternative recourse, namely, contractual claims and strike action. Therefore it recommends the incorporation of a Code of Good Practice: Benefits into the LRA.

CHAPTER 2
THE DEVELOPMENT OF THE UNFAIR LABOUR PRACTICE

	Page
2.1 Introduction.....	21
2.2 Role of the Common Law.....	23
2.3 Need for Statutory Intervention.....	26
2.4 Introduction of ULP into Labour Legislation.....	28
2.5 Introduction of ULP into South African Labour Legislation.....	33
2.5.1 Objective of the ULP.....	33
2.5.2 Attempts to Define the ULP	38
2.5.3 Attempts to Codify the ULP.....	40
2.5.4 Redefining the ULP.....	41
2.5.5 Fairness as the Determining Factor.....	42
2.5.6 Benefit Disputes.....	45
2.5.7 Criticisms and Commendations.....	47
2.6 Conclusion.....	49

2.1 INTRODUCTION

The starting point in evaluating the unfair labour practice relating to the provision of “benefits” is to consider the shortcomings in the common-law contract of employment. According to Cohen “the common law of contract has been regarded by its critics as being an inappropriate vehicle for the delivery of fairness to the employment relationship”.¹ This resulted in the development of labour law.

¹ Cohen (2009) *ILJ* 2271. The author states that the static and one-dimensional nature of the common law coupled with its “rigid adherence to the principles of freedom and sanctity of contract” has resulted in it being criticised for being “incapable of accommodating the nuanced relational nature of the employment contract”. Le Roux (PhD Thesis, University of Cape Town, 2008) 1 explains that the common-law contractual regime provided minimal protection against arbitrariness, instead allowing the employer to dictate the terms.

When analysing contemporary legislative provisions that regulate employment relationships it is important to reflect firstly on the key foundational principles upon which labour law is built.² This assists in interpreting inarticulate labour provisions that create uncertainty in the field of labour law. This equally applies to the notion of benefits.

While a discussion of the role of the common law and the development of labour law does not directly assist in answering the research questions posed, it does bring to the fore key principles that govern labour law and which must be considered in giving meaning to the term benefits. It further highlights the importance of the concept of fairness and the obligations imposed on the parties to the employment relationship.

The second aspect, which forms a larger part of the chapter, involves an assessment of the unfair labour practice concept, first from an international perspective and then from a domestic perspective. It must be emphasised that the unfair labour practice concept is not new to the field of labour law. The concept was developed in the United States of America (USA) and it currently exists in other foreign jurisdictions.³ Therefore it is instructive to consider the concept as described in foreign jurisdictions with the aim of determining whether clarity can be gained for defining the term benefits. This requires a brief analysis of the form that this practice takes in the identified foreign jurisdictions.⁴

Significantly, the unfair labour practice concept was introduced into the South African legal system in the pre-democratic era.⁵ As such, this study deems it important to consider its historical context. While it is trite that the unfair labour practice concept as

² See, for example, Currie and De Waal (2005) 502 who in seeking to understand the constitutional right to fair labour practices as contained in section 23(1) of the Constitution of the Republic of South Africa, 1996, examine the unfair labour practice jurisprudence developed by the Industrial Court. An analysis of the previous unfair labour practice concept is similarly important in examining the unfair labour practice provisions contained in the LRA 66 of 1995.

³ See, for example, section 8 of the National Labor Relations Act of 1935 (USA); chapter 5 of the Employment Relations Act 32 of 2008 (Mauritius); sections 48-50 of the Labour Act 11 of 2007 (Namibia); Article 7 of the Labor Union Act 174 of 1949 (Japan); the fifth Schedule of the Industrial Disputes Act 1947, as amended (India); section 15 of the Industrial Relations Ordinance, 23 of 1969 (Bangladesh); and articles 247 to 249 of the Labor Code of the Philippines, Presidential Decree no 442, as amended.

⁴ See discussion in para 2.4 below.

⁵ See the Labour Relations Act 28 of 1956 as amended by the Labour Relations Amendment Act 9 of 1991. There were many earlier definitions of an unfair labour practice. The first definition was introduced into the Labour Relations Act 28 of 1956 following amendments contained in the Industrial Conciliation Amendment Act 94 of 1979. The various definitions are discussed in paras 2.5.2, 2.5.3 and 2.5.4 below.

it stands today takes on a different form to its predecessor,⁶ there are important aspects that may be discerned from the previous unfair labour practice definitions in addressing the research questions posed.

2.2 ROLE OF THE COMMON LAW

Traditionally, employment relationships were governed by the common-law contract of employment, which originated from the contract of letting and hiring.⁷ Within the sphere of work, Roman law provided for two types of contracts, one being a contract for work and the other a contract of service.⁸ In terms of the common-law contract for work, an employee placed his or her personal services at the disposal of an employer in exchange for remuneration.⁹ The law of master and servant regulated contracts of work, providing the terms and conditions governing the relationship.¹⁰ Vettori mentions that the main aim of such law was to “legitimise an individual employer’s control over employees and to provide employers with a predictable, tractable, and relatively inexpensive supply of labourers”.¹¹

Although the employment contract developed from the law of master and servant,¹² the primary idea governing the common-law contract has always been freedom and sanctity of contract.¹³ This was explained as being “rooted in the political and economic philosophies of laissez-faire liberalism and individualism”.¹⁴

⁶ The unfair labour practice concept was first introduced into the Labour Relations Act 66 of 1995 under Schedule 7 where it was classified as “residual unfair labour practices”. The definition is discussed in Chapter 3, para 3.2.3. The concept was later transferred into the main body of the Labour Relations Act 66 of 1995 under section 186(2) where it is defined in a similar manner. The current definition is discussed in Chapter 3, para 3.2.4.

⁷ See Grogan (2017) 2 and Swanepoel (1988) 1. Le Roux (PhD Thesis, University of Cape Town, 2008) 13 discusses the Industrial Revolution that commenced in 1750 leading to the enactment of several Master and Servant Acts. It was these laws enacted between 1747 and 1867 that gave rise to the master and servant relationship founded in contract.

⁸ Vettori (2007) 3.

⁹ Cohen (2009) *ILJ* 2272. Van Wezel (1981) *YLR* 1512 effectively explains that during the nineteenth century the wage contract was defined as a private arrangement between a seller and a buyer of service, which was not amenable to legislative intervention.

¹⁰ Vettori (2007) 4. See further Fudge (2006-2007) *QLJ* 530.

¹¹ Vettori (2007) 4-5. The author also explains that the master and servant laws sought to preserve the “social status of employees vis-a-vis their employers”, resulting in breaches by employees being met with severe sanctions such as imprisonment.

¹² Fudge (2006-2007) *QLJ* 530.

¹³ Hutchison *et al* (2011) 23.

¹⁴ Hutchison *et al* (2011) 23. See further Scott *et al* (2012) 45-46 who explain that the classical model developed in the late nineteenth century assumed that the best way to create wealth

*Printing & Numerical Registering Company v Sampson (Sampson)*¹⁵ appositely described the sanctity of contract as follows:

“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts of justice.”¹⁶

In keeping with the primary principles regulating contracts of employment, it was accordingly the express terms of the contract that reflected the mutual intention of the contracting parties and which in the “interests of legal certainty, were enforced by the courts free from considerations of equity and fairness”.¹⁷ Questions of fairness did not enter the realm of the inquiry,¹⁸ as the rights and obligations of parties to the employment relationship were determined largely with reference to lawfulness.¹⁹

This model was based on the “notion that there was equality of bargaining power between the parties”,²⁰ thereby ignoring the reality that the employment relationship was characterised by disparity.²¹ This inequality arises from the subordinate role of the employee, which is the hallmark of the employment relationship.²² As explained by Fudge, “the employer has a unilateral and residual right of control and the employee

was for people to regulate their own matters based on complete freedom of contract. The sole purpose of the law is to give effect to the agreement between the parties. Vettori (2007) 6 explains that the concept “laissez faire” complemented the classical theory of the law of contract, which assumed that individuals were free to enter into contracts and in so doing to regulate their own affairs.

¹⁵ (1875) LR 19 Eq 462 as discussed in Hutchison *et al* (2011) 24. See further Fridman (1967) OLR 1. See further Brassey *et al* (1987) 2 who refer to *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600. Here, despite argument that a specific provision of the employment contract should not be enforced as it was oppressive towards the employee, the judge held that the fact that the provision was not in the interest of the employee was insufficient to justify a declaration that the agreement was *contra bonos mores* as it was freely entered into by the parties.

¹⁶ *Sampson* 465.

¹⁷ Cohen (2009) *ILJ* 2272. Grogan (2005) 37 aptly explains that the common law failed to recognise and uphold notions of fairness and equity.

¹⁸ Cohen (2009) *ILJ* 2273.

¹⁹ Tanner (1991) *Indicator SA* 88. See further Grogan (2017) 3 who states that at common law, an employer was free to terminate the contract at any stage, for any reason, for no reason, or for the worst possible reason, provided only that the requisite notice was given.

²⁰ Scott *et al* (2012) 46.

²¹ Rycroft and Jordaan (1992) 25. As indicated by Collins (1986) *ILJ (UK)* 2 “we have become so accustomed to the characterisation of employment as a contractual relation, that is a market transaction, that the significance of the dimension of bureaucratic power has escaped our notice with deleterious results”.

²² Rycroft and Jordaan (1992) 25.

has an open-ended duty of obedience”.²³ The consequence of this inequality was described as being “the creation of forms of oppressive subordination under the disguise of freely chosen agreements”.²⁴ As indicated by Davies and Freedland:

“But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the ‘contract of employment’.”²⁵

While the common law endorsed the principle of freedom of contract, it was essentially inadequate,²⁶ as it failed to recognise the unequal strength of the parties to the employment contract. The common law was also criticised for being unable by itself significantly to support new forms of modern social relationships.²⁷

The shortcomings of the application of the common law within the employment sphere were effectively summarised as follows by Brassey *et al*:

“The common law, in short, offers little protection against arbitrariness. It allows the party with the greater bargaining power to extract any bargain he wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral. It allows him to change it when it no longer suits him, by threatening to terminate the relationship unless the other party submits to the change. It allows him to flout the bargain whenever he likes, provided that he does not mind paying a paltry sum, which is invariably all the

²³ Fudge (2006-2007) *QLJ* 530.

²⁴ Collins (1986) *ILJ (UK)* 1 explains that the contract of employment gives management the power to direct the work of employees, and while the common law legitimises the authority of management because the employee consents to the contract, “this consensual source of authority has been criticised on the ground of the inequality of the bargaining power of the parties”.

²⁵ Davies and Freedland (1983) 18. See further Lewis (1979) *ILJ (UK)* 207 who, referring to Kahn-Freund’s writings on labour law, mentions that Kahn-Freund viewed the individual contract of employment as a “command under the guise of an agreement”. Cohen (2009) *ILJ* 2273 made similar reference to the work of Kahn-Freund. The deficiencies of freedom of contract is evident from the writings of Davies and Freedland (1983) 25 who state that it may be necessary to restrain an individual’s freedom of contract to protect that person from oppression which he may impose on himself by entering into a contract which is actually “an act of his legally free and socially unfree will”.

²⁶ Grogan (2017) 3 states that the common law can encourage, or at least does not discourage, exploitation of labour. As explained, the employer is the owner of the means of production, while employees are entirely dependent on supply and demand for their welfare and job security. The common law further gave workers no say in management decisions which directly affected their working conditions and legitimate interests. See also Davies and Freedland (1983) 12-13.

²⁷ Wedderburn (1987-1988) *CLLJ* 224. See further Freedland (1976) 1 who refers to the social irrelevance of the law of “master and servant” and its failure to take account of the “contemporary employment relationship”.

damages amount to. And all this he is allowed to do without consulting the other party first or paying him the slightest heed.”²⁸

Although the common-law contract of employment was the foundation for the establishment of employment relationships, it was evident that contractual principles were unable to regulate these relationships in a manner that protected the interests of both the employer and employee. In essence, employees had no right to be treated fairly by their employers. As long as the employer complied with the terms of the employment contract, which were in any event determined by the employer, there was no legal basis on which employees could challenge their decisions and actions, irrespective of how unmerited or prejudicial these decisions may have been. It became remarkably clear that the regulation of the employment relationship could not be left up to the common law.²⁹ In order to counter the absence of legal protection against unfair treatment, labour law was born.³⁰

2.3 NEED FOR STATUTORY INTERVENTION

While the common-law contract of employment has been described as “the cornerstone of the edifice of labour law”,³¹ an interventionist approach was required. This took the form of legislative involvement in the employment relationship which was motivated by the recognition that contractual rules ignored the fundamental inequality between the parties.³²

Intrinsically, Kahn-Freund described the main object of labour law as being a response to the unequal distribution of power through his expression that:

“The main object of labour law has always been, and we venture to say will always be, a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation – legislation on the employment of women, children and young persons, on

²⁸ Brassey *et al* (1987) 5.

²⁹ Freedland (1976) 3.

³⁰ Poolman (1984) 55 explains that the rules of labour law are an attempt to correct the imbalance which the common law ignores. See further Blanpain and Weiss (2003) 181 who observe that “the starting point of the founders of the discipline of labour law in the first part of the twentieth century was the inequality of the supplier and purchaser of labour power”.

³¹ Henrico and Smit (2010) *Obiter* 248. See further Lewis (1979) *ILJ (UK)* 207 who refers to Kahn-Freund’s suggestion that the individual contract of employment was “the cornerstone of British labour law”.

³² Van Niekerk and Smit (2018) 4.

safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether – must be seen in this context.”³³

Legislative intervention through the establishment of labour laws has not escaped criticism. The development of a special set of labour law rules resulting in common-law principles giving way to statutory law has been questioned.³⁴ However, such a view fails to appreciate the fact that the law governing the employment relationship is “one of the centrally important branches of the law”, as it forms the legal basis “on which the very large majority of people earn their living”.³⁵ Rycroft and Jordaan, aptly explain the importance of such statutory intervention:

“We have become a nation of employees. We are dependent upon others for our means of livelihood, and most people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all their means is something new in the world. For our generation, the substance of life is in another man’s hands.”³⁶

Based on the above quote there can be no doubt that it was imperative for employees to be provided with protection against arbitrary employer decisions. This pertains to decisions that could result in the termination of their work, as well as decisions that would affect them negatively during the duration of their employment. This illustrates that at the heart of the development of labour law lies the principle that the decisions and actions of employers are required to be fair and just. As such, labour law is correctly viewed as being the injection of fairness “into the most important legal relationship”.³⁷ Although the procedures that sought to govern labour law were seen as somewhat complicated, the justification for such was appreciated and described as being the “remarkably simple notion that labour relationships must be regulated by considerations of fairness and equity”.³⁸

³³ Davies and Freedland (1983) 18. See further Wedderburn (1987-1988) *CLLJ* 223.

³⁴ Epstein (1983) *YLJ* 1357 sought to answer the question whether the special treatment of labour law is justified and concluded that labour legislation was a mistake and that a sensible common law regime should be adopted.

³⁵ Davies and Freedland (1983) 13. See further Rycroft and Jordaan (1992) 2.

³⁶ Rycroft and Jordaan (1992) 2.

³⁷ Landman (2008) *ILJ* 885. It is significant that labour rights are included in the Constitution of the Republic of South Africa, 1996, thus constituting a fundamental right. This is discussed in Chapter 3, para 3.3.

³⁸ Roos (1987) *AJ* 96. See further Blanpain and Weiss (2003) 182.

2.4 INTRODUCTION OF THE ULP INTO LABOUR LEGISLATION

Flowing from the discussion above it is evident that statutory intervention in the form of labour law is concerned with establishing a more equal balance in the relationship between employer and employee. Labour law seeks to do this by equipping employees with armoury in the form of legislative protection to enable them to challenge arbitrary and unjust action of employers. An important statutory provision that provides such protection is the concept of the unfair labour practice.³⁹

The unfair labour practice concept has its origins in the USA and found its way into the United Kingdom (UK), albeit for a short period of time.⁴⁰ It is also a provision that finds application in the legislation of other jurisdictions, notably that of Japan, India, Mauritius, Namibia, Bangladesh and the Philippines.⁴¹

From a USA perspective, this concept formed part of the National Labor Relations Act (NLRA), also known as the Wagner Act,⁴² which was enacted in 1935. Section 7 of the NLRA was of significance in this regard, and provided as follows:

³⁹ Le Roux (PhD Thesis, University of Cape Town, 2008) 1 explains that the introduction of the unfair labour practice concept in 1979 sought to remedy the deficiencies of the common law.

⁴⁰ As indicated by Reichman and Mureinik (1980) *ILJ* 1, "the legislative choice of the phrase 'unfair labour practice' suggests the inspiration of the sophisticated United States unfair labour practice jurisprudence". See also Landman (2004) *ILJ* 805 who explains that "one of the United States of America's lesser known exports is the concept or more accurately the taxonomy 'unfair labour practice'". He goes on to say that "the notion crossed the Atlantic and landed on British shores where it was promptly anglicized and incorporated for a brief period, into English labour legislation as 'an unfair labour practice'". Ehlers DP in *Bleazard & others v Argus Printing and Publishing Co Ltd & others* (1983) 4 *ILJ* 60 (IC) 70 emphasises that although the unfair labour practice concept is new to South African law "it is a concept that has been known for some time in some overseas countries, more particularly the United States of America, resulting in a well-established connotation".

⁴¹ Cooper (2004-2005) *CLLPJ* 201. Landman (2004) *ILJ* 805 explains that apart from South Africa, the unfair labour practice concept is incorporated in the laws of a number of countries, including India, Japan, Bangladesh and the Philippines. See further section 54 of the Employment Relations Act 32 of 2008, which defines the concept of the unfair labour practice in Mauritius; chapter 5, sections 48-50 of the Labour Act 11 of 2007, which defines the unfair labour practice concept in Namibia; section 15 of the Industrial Relations Ordinance, 23 of 1969 which defines the concept of the unfair labour practice in Bangladesh; articles 247 to 249 of the Labor Code of the Philippines, Presidential Decree no 442, as amended. Also of relevance is Sankaran at <http://14.139.60.114:8080/jspui/bitstream/123456789/731/15/Unfair%20Labour%20Practices%20an%20Overview.pdf> accessed on 10 April 2018 who discusses the unfair labour practice concept in India. Note further Yamakawa (2015) *JLR* 57 who explains the unfair labour practice concept in Japan.

⁴² The NLRA of 1935. See Van Wezel (1981) *YLR* 1512.

“[E]mployees shall have the right to self-organization, to form, join, or assist labor organisations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁴³

Section 7 essentially provided employees with rights in the collective bargaining arena,⁴⁴ giving them an “effective voice” to determine their terms and conditions of employment.⁴⁵ The expectation and promise of the Wagner Act was to create a system of industrial democracy for employees.⁴⁶ Consequently, the NLRA made it an unfair labour practice for an employer to dominate unions, to discriminate against employees because of union membership and to refuse to bargain collectively with the representatives of its employees.⁴⁷

The purpose of the unfair labour practice concept was held to be the elimination of “evils thought to exist within the ranks of industry”.⁴⁸ These evils have been explained to be the interference by employers in union activities thereby frustrating the collective bargaining process.⁴⁹

Interestingly there was a view that “evils” also existed within the ranks of unions,⁵⁰ which was not addressed within the NLRA, as it only provided for the commission of unfair labour practices by employers. In order to address this concern, the NLRA was amended in 1947 by the Labor Management Relations Act (LMRA).⁵¹ The LMRA continued to house unfair labour practices that could be committed by employers as set

⁴³ Summers (1979) *CSLR* 33-34. See further Epstein (1983) *YLR* 1386 who discusses the protection provided to workers by section 7.

⁴⁴ Travis (1948) *SWLJ* 195. Note further Fairweather and Van Aken (1955) *ULF* 52 who assert that the NLRA sought to grant employees “the right to organise into unions and bargain with their employer” and to further provide employees with “the right to engage in concerted activities to increase their bargaining strength when they were dealing with their employer”.

⁴⁵ Summers (1979) *CSLR* 34. See further Poolman (1984) 132 who describes the essence of the NLRA of 1935 as providing protection for employees’ rights to “self-organization for the purpose of collective bargaining”.

⁴⁶ Summers (1979) *CSLR* 34.

⁴⁷ George (1947) *RLR* 57. See further Travis (1948) *SWLJ* 195-202 and Van Wezel (1981) *YLR* 1513. Fairweather and Van Aken (1955) *ULF* 52 explain that “to make these rights of real value, the Act went on to prohibit any practice that interfered with the exercise of these rights”.

⁴⁸ Travis (1948) *SWLJ* 194.

⁴⁹ Travis (1948) *SWLJ* 194.

⁵⁰ Travis (1948) *SWLJ* 194.

⁵¹ As indicated by Travis (1948) *SWLJ* 194, since recourse was also needed to address the ills committed by trade unions, the LMRA of 1947 was enacted to subject both employers and unions “to orders and penalties for unfair practices”.

forth in the previous Act, but added six unfair labour practices on the part of labour organisations.⁵² Notwithstanding these amendments, the scope of the unfair labour practice concept remained intact, being relevant only to undesirable conduct in the realm of collective bargaining.

As explained by Landman, while the unfair labour practice concept emerged in South African law many years later,⁵³ it had a different meaning, namely, “one divorced from its USA roots”.⁵⁴ In *Diamond Workers Union v the Master Diamond Cutters’ Association of SA (Diamond Workers Union)*⁵⁵ Ehlers DP, in appreciating these differences, made it clear that the use of foreign law will not assist in obtaining clarity on the interpretation of the South African unfair labour practice concept, as the legal systems of these foreign jurisdictions attribute a different meaning to the term.⁵⁶

This difference in meaning is evident from the fact that in the USA, the unfair labour practice is related to the collective relationship,⁵⁷ initially used to address conduct by the employer, which sought to oppose union activities and interests.⁵⁸ Individual aspects such as the unfair dismissal of an employee, unrelated to reasons of union affiliation, are not considered to constitute an unfair labour practice.⁵⁹

⁵² Walsh (1949-1950) *LLJ* 1095. See further Travis (1948) *SWLJ* 202-208 who lists the unfair labour practices that could be perpetrated by trade unions as follows: restraint or coercion by a union of an employee’s exercise of the rights guaranteed in section 7, union discrimination against an employee, union refusal to bargain, secondary boycotts and jurisdictional strikes, excessive or discriminatory initiation fees and exactions for work not performed.

⁵³ As it appeared in the Industrial Conciliation Amendment Act 94 of 1979, following the recommendations of the Wiehahn Commission.

⁵⁴ Landman (2004) *ILJ* 805. Le Roux (2012) *AJ* 42 explains that the concept as understood and applied in the South African context never resembled its US namesake. (1982) 3 *ILJ* 87 (IC).

⁵⁵ *Diamond Workers Union* 120.

⁵⁶ Ehlers (1982) *ILJ* 11. See further Coleman (1990-1991) *CLLJ* 199 who states that the USA’s unfair labour practice provisions would only protect an individual’s rights not to be dismissed or discriminated against when the dismissal or discrimination is based on union affiliation.

⁵⁷ George (1947) *RLR* 93.

⁵⁸ George (1947) *RLR* 88 refers to *NLRB v Sands Manufacturing Co*, 306 U.S. 332 (1939) where the court stated that “it is not an unfair labor practice for an employer to discharge employees for repudiating a collective agreement establishing priority among workers to be laid off and to be transferred between departments”.

A similar situation prevails in Japan,⁶⁰ Mauritius,⁶¹ Bangladesh⁶² and the Philippines.⁶³ In all of these countries, similar to the USA, the unfair labour practice concept is used to provide protection within the sphere of collective bargaining.

India has a lengthy definition of what constitutes unfair labour practices.⁶⁴ The definition partly relates to the collective labour relationship, similar to that of the USA. An employer is considered to commit an unfair labour practice by interfering with, restraining from or coercing employees in the exercise of their right to organise, join or assist a trade union for the purposes of collective bargaining.⁶⁵ However, the definition goes further than the collective labour relationship. It includes the dismissal of an employee for a variety of reasons unrelated to union affiliation.⁶⁶ It also includes the *mala fide* transfer of an employee; the display of favouritism or bias to a group of workers regardless of merit; and the employment of workers on a temporary or casual basis in order to deprive them of the status and privilege of permanent workers.⁶⁷

⁶⁰ Article 7 of the Labor Union Act 174 of 1949. See further Yamakawa (2015) *JLR* 54 who explains that the provisions prohibiting unfair labour practices by employers in the Labor Union Act are similar to those of the USA's NLRA.

⁶¹ Section 54(4) of the Employment Relations Act 32 of 2008 defines an unfair labour practice as an act or omission by any party which undermines the bargaining process.

⁶² Section 15 of the Industrial Relations Ordinance 23 of 1969 defines an unfair labour practice as actions of the employer that restrain an employee's right to join a trade union or to continue membership of a trade union. This includes the refusal to employ or to continue to employ a person on the ground that such person is a member or officer of a trade union; discrimination on the ground that such person is a member of a trade union; the dismissal of a person for being or wanting to become a member of a trade union or for participating in the activities of the trade union.

⁶³ Article 248 of the Labor Code of the Philippines, Presidential Decree no 442, as amended, describes unfair labour practices as the interference with or coercion of employees in the exercise of their right to self-organisation, interference with the formation or administration of a labour organisation, discrimination based on union membership, violating a duty to bargain collectively, among other similar acts.

⁶⁴ Fifth Schedule of the Industrial Disputes Act 1947 as amended.

⁶⁵ Section 1 of the Fifth Schedule of the Industrial Disputes Act 1947 as amended. See further Sankaran who explains at 192 that the 1982 amendments to the Industrial Disputes Act provide a framework that encourages collective bargaining by specifying as unfair labour practices conduct by employers that obstructs the process.

⁶⁶ Section 5 of the Fifth Schedule of the Industrial Disputes Act 1947 as amended.

⁶⁷ Sections 7, 9 and 10 of the Fifth Schedule of the Industrial Disputes Act 1947 as amended. See further Sankaran 192 who explains that "the description of what constitutes an unfair labour practice under this Act is not confined to acts which hamper collective bargaining".

Namibia, similar to India, has a definition that only partly relates to conduct of the employer which obstructs collective bargaining.⁶⁸ It further regulates unfair dismissals unrelated to union affiliation⁶⁹ and the unilateral change to terms or conditions of employment.⁷⁰

The concept as it exists in the USA, Japan, Mauritius, Bangladesh and Philippines seeks to protect what in South African labour law is referred to as freedom of association.⁷¹ While the labour law legislation of these countries recognises the unfair labour practice concept, it serves to provide protection unrelated to the employee rights being discussed in this thesis.⁷² Consequently, delving deeper into the unfair labour practice jurisprudence of these jurisdictions does not assist in answering the research questions posed.⁷³

Even though the unfair labour practice definitions of India and Namibia seek to protect individual employee rights, such as the right of an employee not to be unfairly dismissed, neither of these jurisdictions specifically recognises the reduction or removal of employment benefits by an employer as an unfair labour practice. As such, it will not provide direct assistance in helping to solve the challenges surrounding the unfair labour practice relating to the provision of benefits in the South African context.

From the above it can be discerned that there is no other jurisdiction that provides for the distinctive right of employees not to be subjected to an unfair labour practice relating to the provision of benefits. It is probably for this reason that judgments such as

⁶⁸ Section 50(1)(a)(b)(f) and (g) of the Labour Act 11 of 2007 states that it is an unfair labour practice for an employer to refuse to bargain, to bargain in bad faith, to seek to control a trade union and to engage in conduct that subverts orderly collective bargaining.

⁶⁹ Section 48 of the Labour Act 11 of 2007.

⁷⁰ Section 50(1)(e) of the Labour Act 11 of 2007.

⁷¹ Chapter II, sections 4 to 5 of the LRA 66 of 1995.

⁷² Ehlers (1982) *ILJ* 13. See further Cooper (2004-2005) *CLLPJ* 201 who states that "foreign law is not helpful as a source in defining the right, for where it appears in such law, such as in the United Kingdom, United States, Japan and India, the concept has been developed in contexts very different from ours". See also Landman (2004) *ILJ* 805 who observes that the concept found its way into South African legislation, but in a different context than that in the USA.

⁷³ As explained in Chapter 1, para 1.5.

*Bleazard & others v Argus Printing & Publishing Co Ltd & others (Bleazard)*⁷⁴ cautioned against placing reliance on foreign sources in interpreting and developing the concept of the unfair labour practice.⁷⁵

Therefore, a traditional comparative analysis of the unfair labour practice cannot be undertaken with specific foreign jurisdictions. Notwithstanding this, comparisons are drawn with the UK, New Zealand and the USA on relevant aspects in the succeeding chapters, as explained in Chapter 1.⁷⁶

2.5 INTRODUCTION OF THE ULP INTO SOUTH AFRICAN LABOUR LEGISLATION

2.5.1 Objectives of the ULP

Based on South Africa's history of apartheid, there were turbulent socio-economic and political developments in South African labour law during the 1970s.⁷⁷ These were characterised by industrial action of emerging black trade unions who sought to contest the dual system of labour rights, which was premised on racially divided lines.⁷⁸ It goes without saying that a need was identified to revise the labour system and labour legislation. For this purpose, the Wiehahn Commission (the "Commission") was established;⁷⁹ its terms of reference being:

"[t]o enquire into, report upon and make recommendations in connection with the existing legislation administered by the Departments of Labour and of Mines, with specific reference to modernising the existing system for the regulation of labour relations and the prevention and settlement of disputes, eliminating bottlenecks and problems within the sphere of labour, and laying a sound foundation for labour relations in the future".⁸⁰

⁷⁴ (1983) 4 *ILJ* 60 (IC).

⁷⁵ *Bleazard* 73.

⁷⁶ Chapter 1, para 1.5. These comparisons are discussed in Chapters 4; 5; 6 and 7.

⁷⁷ As explained by Du Toit *et al* (2015) 10 the outbreak of strikes among African workers in Durban in 1973 marked "the beginning of the end" of the racially divided system, as the dual system became practically unworkable by the late 1970s. See further Davis (1990) *AJ* 49.

⁷⁸ Landman (2004) *ILJ* 805. See further Du Toit *et al* (2015) 10 and Thompson (2004) *ILJ* iv.

⁷⁹ Venter (2003) 33 explains that in the late 1970s the government appointed the Wiehahn Commission to revamp the labour market, due to the strikes by black workers, as well as international discontent about South Africa's policies.

⁸⁰ White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation 5.

In terms of the White Paper, the Commission's primary approach to industrial relations in South Africa was the "preservation of industrial peace".⁸¹ Cognisance was taken of the fact that to achieve this stated objective, an effective method of resolving labour disputes was essential. In this regard, drawing from the experiences of foreign jurisdictions the Commission acknowledged the positive role that could potentially be played by industrial courts.⁸² Consequently, the Commission recommended the establishment of an Industrial Court (IC) in South Africa, which would replace the former Industrial Tribunal. This recommendation was accepted by Government.⁸³

The aim was for the IC to be responsible for adjudicating a number of issues, notable amongst them being the investigation and hearing of cases in respect of unfair dismissal; inequitable changes in terms and conditions of employment; underpayment of wages; unfair treatment; and other cases of grievances.⁸⁴ The adjudication of the legality of strikes, lock-outs and other forms of industrial action was a further function to be assigned to the IC.⁸⁵

It is evident from a reading of the White Paper that the Commission saw labour law as the vehicle through which the notion of equality could be achieved.⁸⁶ Therefore, an important aspect of the Commission's recommendations on the role of the IC was that

⁸¹ White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation 10. Other aspects of its approach were "the establishment and growth of a unitary and integrated industrial relations system incorporating both the industrial council and committee systems; the fullest possible expression of the principle of self-governance; and the simultaneous promotion of decentralised consultation and negotiation at regional and enterprise levels".

⁸² Wiehahn (1979) 47-48.

⁸³ White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation 21. According to Thompson (1993) *JJCLLIR* 186 the work of the Wiehahn Commission can be categorised into three main conclusions, one of them being the establishment of a specialised Industrial Court to deal with industrial disputes. See further Barnard *et al* (2004) 284.

⁸⁴ Wiehahn (1979) 50 and White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation 22. See further Kooy *et al* (1979) *SALDRU* 28 – 30; and Poolman (1988) 1 where the functions of the IC are explained.

⁸⁵ Wiehahn (1979) 50 and White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation 22. See further Van Niekerk (2004) *ILJ* 855.

⁸⁶ White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation 18 states that "the principle which gave rise to the entire concept of industrial relations is that where a power imbalance exists which permits of unfair actions to the detriment of a particular party, the position of the weaker party vis-à-vis the stronger party must be strengthened; hence the emergence of trade unions and the official protection which they enjoy". See further Cooper (2004) *ILJ* 814.

it would develop a body of case law, which would by judicial precedent contribute to the formulation of fair employment guidelines.⁸⁷

This body of case law was envisaged to be developed through the unfair labour practice concept, which was given effect to in the Industrial Conciliation Amendment Act of 1979.⁸⁸ This definition of unfair labour practice was unique to the South African legal system. It was expansive in nature and was initially defined as any practice that in the opinion of the IC constituted an unfair labour practice.⁸⁹

There were great expectations placed on the IC. It was envisaged as a dispute resolution body that would not only give effect to judicial considerations, but also to “considerations of equity”.⁹⁰ During the 1979 parliamentary debate on the Industrial Conciliation Amendment Bill, the Minister remarked as follows:

“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.”⁹¹

At face value it appears that the reforms introduced by the Commission were benevolent in nature, seeking to advance the rights of all employees. Unfortunately, this was not the case, as the reforms were prejudicially motivated.⁹²

⁸⁷ Wiehahn (1979) 50. See further Wiehahn Vol 2 (1980) 357 which refers to the decisions of the IC as “an invaluable cumulative guide in the development of an unfair labour practices code”.

⁸⁸ The Industrial Conciliation Amendment Act 94 of 1979. As indicated by Coleman (1990-1991) *CLLJ* 178 “in 1979, the South African Parliament passed the revolutionary Industrial Conciliation Amendment Act which legalized black labour unions, abolished the job reservation system based on race and introduced the concept of ‘unfair labour practice’”. See also Grogan (1993) 3 who explains that one of the primary recommendations made in the Wiehahn Commission reports was the replacement of the existing Industrial Tribunal with a new IC with extended powers to interdict unfair labour practices. Thompson (1993) *IJCLLR* 186 indicates that one of the three main conclusions reached by the Wiehahn Commission was that the court should have at its disposal a flexible unfair labour practice-type jurisdiction.

⁸⁹ The definition of unfair labour practice is contained in section 1(f) of the Industrial Conciliation Amendment Act 94 of 1979. A literal reading of the concept illustrates its expansive nature. Academics such as Brassey (1980) *ILJ* 82 describe the discretion given to the court in terms of the unfair labour practice jurisdiction as being too wide.

⁹⁰ White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation 21.

⁹¹ Van Niekerk (2004) *ILJ* 858.

⁹² Thompson (2004) *ILJ* v explains that “today, on a superficial reading, we would say that the Wiehahn Commission gifted the country a non-racial workplace, specialist tribunals, an overarching labour policy body and, of particular interest to lawyers, trade union recognition through a legal obligation to bargain and protection against unfair dismissal. That is all substantially

One of the most far reaching proposals of the Commission was permitting African workers to join registered trade unions and consequently being represented on industrial councils and conciliation boards.⁹³ Furthermore, the removal of statutory job reservation for white workers was endorsed,⁹⁴ along with the establishment of the IC which would be given an extensive unfair labour practice jurisdiction.⁹⁵ While all of these initiatives appear to be commendable, the rationale behind the unfair labour practice concept was for it to serve as the mechanism that would protect the encroachment of black persons on the jobs of white workers in light of the removal of job reservation.⁹⁶ As explained by Thompson “the Wiehahn reforms had more to do with a search for social control by an increasingly besieged minority than a quest for industrial emancipation”.⁹⁷ The rationale for the Commissions reforms is most aptly captured by Van Niekerk who stated:

“The inescapable conclusion after a reading of the debates is that a deal was done between the government of the day and trade unions representing white workers. The deal, foreshadowed by the terms of the Wiehahn Report, contemplated the repeal of statutory job reservation in return for the establishment of a mechanism that was intended to offer a guarantee of work security and protection against the forced imposition of less favourable conditions of employment in the face of an extension to black workers of access to occupations previously reserved for whites.”⁹⁸

Notwithstanding the motives behind the labour law reforms initiated by the Commission, the reforms have had a significant impact.⁹⁹ This is largely due to the fact that the IC did not advance racial privilege even though this is what was envisaged.¹⁰⁰ Van

true, but perhaps not what the commission had in mind”. Van Niekerk (2004) *ILJ* 854 similarly questions whether unfair dismissal protection brought about by the Wiehahn Commission “was a conscious component of the Wiehahn package of reforms at all”.

⁹³ Du Toit *et al* (2015) 10.

⁹⁴ Van Niekerk (2004) *ILJ* 861.

⁹⁵ Du Toit *et al* (2015) 10.

⁹⁶ Landman (2004) *ILJ* 806. Du Toit *et al* (2015) 9 clarify that job reservation was introduced into the Industrial Conciliation Act of 1937. It reserved certain work for persons of a specified race. As explained “white workers were clearly the intended beneficiaries of this protection”.

⁹⁷ Thompson (2004) *ILJ* iii. See further Cooper (2004) *ILJ* 813-814 who explains that the Commissions focus was not solely motivated by a need to remedy disadvantage but to protect the work security of minority groups under the new non-racial labour dispensation.

⁹⁸ Van Niekerk (2004) *ILJ* 861. The author explains that the statutory protection brought about through the Wiehahn Commissions labour reforms was a “racist one” as the interest sought to be served was the protection of white workers who stood to lose their job reservation and whose racially-based privilege in the workplace stood to be undermined.

⁹⁹ Van Niekerk (2004) *ILJ* 866.

¹⁰⁰ Van Niekerk (2004) *ILJ* 867.

Niekerk explains that the IC supported “the unintended beneficiaries of the unfair labour practice jurisdiction in the form of black employees and the union movement”.¹⁰¹ Needless to say, the IC developed a jurisprudence that extended security of employment to employees of all races and in all occupations.¹⁰²

The IC has undoubtedly played a crucial role in the development of South African labour law through its application of the unfair labour practice concept, being described as the body that changed the face of labour relations and with it the legal nature of the labour relationship.¹⁰³ Davis referring to the review conducted by Edwin Cameron in 1988 recalls his sentiments that the IC has been “incontestably influential in the past nine years”.¹⁰⁴ Cameron remarked that the IC had “delivered a substantial rebuff to employers” and “brought a measure of enlightenment, consistency and job security to a field which knew only the entrenched rights of arbitrary action before”.¹⁰⁵

Regardless of the intentions, the unfair labour practice concept regulated and controlled employer conduct and thereby influenced them to act fairly towards employees. While such protection was geared towards white employees, the progressive stance taken by the IC essentially resulted in it rejecting and sanctioning arbitrary and unfair treatment by employers against any of its employees.

Notwithstanding the important role played by the unfair labour practice in protecting employee rights, it must be noted that all subsequent definitions of the concept as discussed below, recognised the commission of unfair labour practices by employees

¹⁰¹ Van Niekerk (2004) *ILJ* 867.

¹⁰² Van Niekerk (2004) *ILJ* 867. See further Thompson (2004) *ILJ* vii who explains the positive advancements brought about by the Commissions work. Notably, it accelerated the organisation and mobilisation of black workers and their unions; it provided a platform for litigation that greatly advanced the cause of workers and significantly brought about a more balanced industrial relations system; and it set in progress negotiations that produced an uncompromised set of labour laws for the new era.

¹⁰³ Roos (1987) *AJ* 98. See further Davis (1985) *ILJ* 425-426.

¹⁰⁴ Davis (1991) *ILJ* 1181.

¹⁰⁵ Davis (1991) *ILJ* 1181.

against their employers. This essentially related to practices that had the effect of unfairly affecting or disrupting the business of an employer.¹⁰⁶ However, the IC's protection in this regard is not evaluated because the focus of the study is on the safeguards afforded to employees by the unfair labour practice. This chapter seeks to establish whether the protection provided to employees by the previous unfair labour practice concepts may assist in interpreting the term benefits, which is a protective measure designed exclusively for employees.

2.5.2 Attempts to Define the ULP

Due to the concept's capacious nature, there were a number of amendments made to the definition of an unfair labour practice.¹⁰⁷ The first amendment in 1980 was significant for its removal of the court's legislative function, as it no longer required the court to define the concept of an unfair labour practice but merely to interpret it.¹⁰⁸ An unfair labour practice on the part of employers was described as any labour practice or change in labour practice that had the potential to unfairly affect an individual employee or class of employees. It also constituted instances where an employee or employees were prejudiced in respect of employment opportunities, work security, or

¹⁰⁶ Section 1(c)(ii) of the Industrial Conciliation Amendment Act 95 of 1980; section 1(h)(o)(ii) of the Labour Relations Amendment Act 83 of 1988; and section 1(a)(ii) of the Labour Relations Amendment Act 9 of 1991.

¹⁰⁷ See section 1(c) of the Industrial Conciliation Amendment Act 95 of 1980; section 1 of the Labour Relations Amendment Act 51 of 1982; section 1(h) of the Labour Relations Amendment Act 83 of 1988; and section 1(a) of the Labour Relations Amendment Act 9 of 1991. See also Le Roux (2002) *ILJ* 1699–1700 who explains that the concept was amended and refined in 1980 with reference to four consequences that might arise from 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 that of the 1980 definition. The 1988 and 1991 amendments are discussed in paras 2.5.3 and 2.5.4.

¹⁰⁸ Rycroft and Jordaan (1992) 158.

physical, economic, moral or social welfare.¹⁰⁹ Notably, strikes and lock-outs were excluded from the ambit of the definition.¹¹⁰

It is evident that the definition did not prescribe the specific practices performed by an employer that would constitute an unfair labour practice. Rather, the emphasis fell on the impact of the practice, notably whether the employee was unfairly affected or prejudiced in respect of employment opportunities or work security. As a result, a large range of employer practices was envisaged for determination under the concept. *Diamond Workers Union v the Master Diamond Cutters' Association of SA (Diamond Workers Union)*¹¹¹ confirmed that the phrase “employment opportunities” could include aspects such as “remuneration” and “fringe benefits”. The court held that “in short, probably everything connected with the employment situation may be said to be embraced by the word ‘employment opportunities’”.¹¹²

Furthermore, the use of the words “unfairly affected” by the legislature caused the IC to interpret the term by using principles of fairness to determine whether an unfair labour practice had been committed.¹¹³ For that reason the employer practice which led to the claim of an unfair labour practice dispute was of no relevance to the inquiry

¹⁰⁹ Section 1(c) of the Industrial Conciliation Amendment Act 95 of 1980 defined an unfair labour practice as (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 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;
(iii) The relationship between employer and employee is or may be detrimentally affected thereby; or (b) 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)”.

It should be noted that there was a further amendment made in 1982, as reflected in the Labour Relations Amendment Act 51 of 1982. However, this definition remained the same as the 1980 definition, albeit for the removal of the words “or any action contemplated in section 66(1)”.

¹¹⁰ Section 1(c) of the Industrial Conciliation Amendment Act 95 of 1980.

¹¹¹ (1982) 3 ILJ 87 (IC). The case involved the interpretation of an agreement in relation to short-time worked, notably whether an employee’s employment could be terminated upon the expiry of 40 days special short-time (94-95).

¹¹² *Diamond Workers Union* 117. See further *A Clothing & Textile Workers Union & others v SA Clothing Manufacturers Ltd* (1991) 12 ILJ 1066 (IC) 1068 where an unfair labour practice was described as an act which affected the working relationship between an employer and its employees.

¹¹³ See, for example, *Food & Allied Workers Union v Spekenham Supreme (2)* (1988) 9 ILJ 628 (IC) 637 where the court referred to fairness as the overriding consideration in labour relations.

by the IC. All that was of relevance was whether the practice, irrespective of what the practice was, was unfair or had a prejudicial impact on the employee.

This definition was not well received. In *United African Motor & Allied Workers Union & others v Fodens (SA) (Pty) Ltd*¹¹⁴ it was described as being extremely broad in nature resulting in it opening up “almost limitless fields of conjecture”. Mureinik shared similar sentiments, referring to the definition as being “open texture in the extreme”.¹¹⁵ As explained by Landman, the definition after being in place for some time was regarded as being too liberal, resulting in it being amended.¹¹⁶

2.5.3 Attempts to Codify the ULP

The meaning attributed to the concept was further refined in 1988 where an unfair labour practice was held to be any act or omission which in an unfair manner infringed or impaired the labour relations between an employer and employee, arising from a number of specified practices.¹¹⁷ Included amongst these practices were unfair dismissal; unfair unilateral suspension; unfair unilateral amendment of the terms of employment; and unfair discrimination on the grounds of race, sex or creed. Notably, it also contained a general provision, very similarly worded to parts of the 1980 definition. It provided for any other labour practice or change in any labour practice which had the effect of unfairly prejudicing or jeopardising an individual employee’s or class of employees’ employment opportunities or work security.¹¹⁸ Strikes and lock-outs were notably included.¹¹⁹

¹¹⁴ (1983) 4 *ILJ* 212 (IC) 224. See further Reichman and Mureinik (1980) *ILJ* 17.

¹¹⁵ Mureinik (1980) *ILJ* 113.

¹¹⁶ Landman (2004) *ILJ* 806 -807.

¹¹⁷ Section 1(h) of the Labour Relations Amendment Act 83 of 1988.

¹¹⁸ Section 1(h) of the Labour Relations Amendment Act 83 of 1988. It should be noted that the aspects of the 1988 definition mentioned in the main body of this thesis are not exhaustive of the definition. However the discussion in this thesis is limited to relevant aspects of the definition. It should further be noted that the 1988 definition also contained issues which were not regarded as unfair labour practices. Examples of these can be found under sub-paragraphs (a) and (b).

¹¹⁹ Section 1(h)(l-m) of the Labour Relations Amendment Act 83 of 1988. Section 1(h)(l) refers to any strike, lock-out or stoppage of work, if the employer is not directly involved in the dispute which gives rise to the strike, lock-out or stoppage of work. Section 1(h)(m) refers to any strike, lock-out or stoppage of work in respect of a dispute between an employer and employee which dispute is the same or virtually the same as a dispute between such employer and employee which gave rise to a strike, lock-out or stoppage of work during the previous 12 months. Section (1)(h)(n) refers to any strike, lock-out or stoppage of work in contravention of section 65.

The amendments were regarded as an attempt to codify the jurisprudence of the IC.¹²⁰ It may have been thought that this would be welcomed as it was distinguishable from its more expansive predecessors, which faced their own critiques.¹²¹ While some described it as a balancing act by attempting, on the one hand, to provide a measure of certainty, while on the other allowing the court a wide discretion to develop the concept further,¹²² it was largely unwanted. Some viewed it as an attempt to restrict the IC's freedom by changing "its analysis from fairness based on the particular circumstances to statutory interpretation".¹²³

The amendments were confronted by union opposition, as the definition was viewed as a significant departure from the expansive nature of the previous definition,¹²⁴ and it included certain types of strikes and lock-outs, issues which had previously been excluded from the definition.¹²⁵ This gave the IC the power to pronounce on the validity of demands made during collective bargaining, resulting in the court involving itself in disputes of interest, which was viewed as being an aspect that was beyond "its legitimate terrain".¹²⁶ Following large-scale industrial unrest and mass action the definition of the unfair labour practice was once again amended.¹²⁷

2.5.4 Redefining the ULP

Ultimately, an open-ended definition of the concept was preferred to the codification brought about by the 1988 amendments. Coleman states that the IC required flexibility

¹²⁰ Le Roux and Van Niekerk (1994) 25. See further Coleman (1990-1991) *CLLJ* 197 who comments on 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 labour practice and to prevent unnecessary litigation".

¹²¹ Reichman and Mureinik (1980) *ILJ* 1 at 17. See further Mureinik (1980) *ILJ* 1 at 113. The wide-ranging nature of the definition was also criticised in *United African Motor & Allied Workers Union & others v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC) 224.

¹²² As indicated by Le Roux (1987) *ILJ* 198 this was achieved through its wording, which defined certain practices that could be categorised as unfair labour practices, which defined practices that could not be categorised as unfair labour practices and by also providing a more general definition.

¹²³ Coleman (1990-1991) *CLLJ* 197.

¹²⁴ O'Regan (1997) *ILJ* 899. See further Le Roux (2002) *ILJ* 1700 who explains that the 1980 definition was reintroduced following objections raised by COSATU.

¹²⁵ O'Regan (1997) *ILJ* 899.

¹²⁶ Rycroft and Jordaan (1992) 162.

¹²⁷ Rycroft and Jordaan (1992) 163. Benjamin (1991) *ILJ* 239 discusses the opposition of trade unions to the 1988 amendments.

in order to develop guidelines and to respond to changes in the labour arena.¹²⁸ This resulted in the enactment of the 1991 amendments in order to resolve the protests caused by the 1988 amendments.

The 1991 amendment was the final amendment made to the concept in the pre-democratic dispensation. It stipulated that an unfair labour practice meant any act or omission, other than a strike or lock-out, which had the potential to unfairly affect an individual employee or employees; or to prejudice their employment opportunities or work security.¹²⁹ In effect, the 1991 definition sought to repeal the most “controversial features” of its predecessor and took on a form very similar to the 1980 definition, albeit for a few exclusions.¹³⁰

2.5.5 Fairness as the Determining Factor

It is evident that notwithstanding the various definitions given to the unfair labour practice, aspects of fairness took centre stage. Even the 1988 definition, which sought to specify the types of practices that fell within the definition of an unfair labour practice, provided an open-ended provision to cater for practices that were not codified, but which could have had an unfair impact on an employee or group of employees.

The approach adopted by the legislature in defining the concept, in all of its forms, can be appreciated as it would have been impracticable if not impossible to compile a list of all practices that could lead to unfair consequences.¹³¹ Accordingly, the emphasis fell on the fairness of the conduct or practice. This catered for a wide range of disputes since the term fairness has a very wide meaning.¹³² As such, great emphasis fell on

¹²⁸ Coleman (1990-1991) *CLLJ* 197.

¹²⁹ Section 1(a) of the Labour Relations Amendment Act 9 of 1991 defined an unfair labour practice as “any act or omission, other than a strike or lockout, 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 or work security is or may be prejudiced or jeopardized 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 labour relationship between employer and employee is or may be detrimentally affected thereby”.

¹³⁰ Rycroft and Jordaan (1992) 163. See further Benjamin (1991) *ILJ* 241.

¹³¹ Ehlers (1982) *ILJ* 13.

¹³² Du Toit *et al* (2015) 539 note that fairness is somewhat of an elusive concept. In Wiehahn Vol 2 (1980) 347 the one question asked in considering whether a code of fair labour practices should be introduced in South Africa was what is meant by the term “fair”. The report at 349 describes the term as wide and conveniently vague.

the words “unfair” and “unfairly” which appeared markedly in the definitions. Fairness was consequently of crucial importance in determining whether a matter constituted an unfair labour practice requiring adjudication by the IC, and also in determining whether an unfair labour practice had indeed been committed.¹³³ As commented by the IC in *Diamond Workers Union*:

“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.”¹³⁴

This is illustrated by the fact that allegations of dismissal were considered by the IC under the unfair labour practice concept, even though the practice of dismissing an employee was not provided for within the description of the term, albeit for the 1988 definition. However, since dismissing an employee could result in unfairness or prejudice to the employee, such practices found application within the concept.¹³⁵

¹³³ Ehlers (1982) *ILJ* 13. See further Olivier (1982) *De Rebus* who states that “considerations of fairness are paramount when an unfair labour practice dispute is determined”.

¹³⁴ *Diamond Workers Union* 119. See further *United African Motor & Allied Workers Union & others v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC) 231 where the court found that various practices complained of by the union, such as management’s interference with the lawful activities of the union; the use of derogatory remarks by management towards employees; the request to employees to join the union of management’s choice; and the failure to pay retrenchment compensation, among other issues, would be deemed to constitute an unfair labour practice if they could be proved by the union, as all these practices had the effect of detrimentally affecting the relationship between employer and employee.

¹³⁵ A number of alleged unfair dismissal cases were heard by the IC. Examples are *Diamond Workers Union v the Master Diamond Cutters’ Association of SA* (1982) 3 *ILJ* 87 (IC); *National Union of Mineworkers v Marievale Consolidated Mines Ltd* (1986) 7 *ILJ* 123 (IC); *Van Renen v Rhodes University* (1989) 10 *ILJ* 926 (IC); *United African Motor & Allied Workers Union & others v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC); and *Randall v Progress Knitting Textiles Ltd* (1992) 13 *ILJ* 200 (IC). The reason for the alleged unfairness varied from case to case. In *Van Renen v Rhodes University* (1989) 10 *ILJ* 926 (IC) 928 the complaint was that the employee was dismissed without being afforded a fair opportunity to have the allegations tested. In *Randall v Progress Knitting Textiles Ltd* (1992) 13 *ILJ* 200 (IC) 200 the unfairness complained of was the termination of the employee’s services because of her pregnancy. In *National Union of Mineworkers v Marievale Consolidated Mines* (1986) 7 *ILJ* 123 (IC) 151 the alleged unfairness was the dismissal of striking workers. In *United African Motor & Allied Workers Union & others v Fodens SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC) 231 the unfairness complained of was the summary dismissal of an employee prior to the expiry of his fixed-term contract.

The IC also dealt with alleged unfair labour practices in respect of the employer's failure to bargain in good faith;¹³⁶ failure to re-employ employees;¹³⁷ non-promotion of employees;¹³⁸ demotion of employees;¹³⁹ suspension of employees;¹⁴⁰ aspects relating to the issuing of warnings;¹⁴¹ discriminatory treatment of employees engaged in

¹³⁶ Cooper (2004-2005) *CLLPJ* 208-209 explains that the court found aspects such as a refusal to bargain; bad faith bargaining; a failure to accord rights relevant to the bargaining process; the use of unfair bargaining tactics; and the resort to industrial action before deadlock had been reached in negotiations, as promoting labour unrest and undermining the employment relationship. In *Metal & Allied Workers Union & others v Natal Die Casting Co (Pty) Ltd (Natal Die Casting)* (1986) 7 *ILJ* 520 (IC) several employees were dismissed consequent to embarking on a strike as a result of failed negotiations on a production bonus system. The court held that the employer's failure to negotiate in good faith in respect of the bonus system constituted an unfair labour practice (543). In *National Union of Metalworkers of SA v Iscor* (1992) 13 *ILJ* 1190 (IC) 1195-1197, the employer's decision to unilaterally determine and pay out a bonus was found to constitute an unfair labour practice. The court acknowledged that an employer is allowed to award a bonus, a gift or gratuity over and above wages, which does not come to be expected or to be regarded as part of the remuneration package, without negotiating such a bonus with the employees' union. However, the bonus awarded in this instance did not fall into this category as the employer regarded it to be part of the remuneration package. In *Food & Allied Workers Union v Spekenham Supreme* (1988) 9 *ILJ* 628 (IC) the court found that the employer's failure to negotiate in good faith with a *bona fide* trade union was unfair. This was premised on the fact that fairness was the overriding consideration in labour relations in South Africa (637). See further *National Union of Mineworkers v Gold Fields of SA Ltd & others* (1989) 10 *ILJ* 86 (IC) 87 where the union contended that the unilateral implementation of wage increases by the employer constituted an unfair labour practice as the employer failed to negotiate with them. At 99 the court found that unilateral action by an employer "is to be deprecated" due to the negative effect that it has on collective bargaining and its potential to result in labour unrest.

¹³⁷ In *Food & General Workers Union & others v Lanko Co-op Ltd* (1994) 15 *ILJ* 876 (IC) 884-885 the court found that the refusal to re-employ seasonal workers who had been employed by the respondent in previous seasons amounted to an unfair labour practice. This was because the past practice of re-employing workers amounted to a tacit undertaking to re-employ the applicants on a preferential basis.

¹³⁸ In *George v Liberty Life Association of Africa Ltd* (1996) 17 *ILJ* 571 (IC) an employee declared an unfair labour practice, as an advertised post was awarded to an external candidate. The employee contended that he was a suitable internal candidate and the post should never have been advertised externally. At 599-600, the court found that on a proper interpretation of the respondent's job posting and placement policy, the employee was entitled to be given preferential consideration to an external candidate. Consequently, the respondent's failure to conform to its policy constituted an unfair labour practice.

¹³⁹ See *Ndlela v SA Stevedores Ltd* (1992) 13 *ILJ* 663 (IC) and *Taylor v Edgars Retail Trading* (1992) 13 *ILJ* 1239 (IC).

¹⁴⁰ In *Mhlauli v Minister of Department of Home Affairs & others NNO* (1992) 13 *ILJ* 1146 (SE) 1153-1154 the court found that the lapse of about 16 months from the date of the applicant's suspension to the date fixed for the holding of the inquiry was unreasonable and it rendered the applicant's suspension invalid and entitled him to have it set aside.

¹⁴¹ See *Cholata v Trek Engineering (Pty) Ltd* (1992) 13 *ILJ* 219 (IC).

strike action;¹⁴² discriminatory treatment based on sex;¹⁴³ and complaints regarding retrenchment.¹⁴⁴

From the plethora of cases considered by the IC, it was trite that any practice undertaken by the employer within the employment context was subject to the tenets of fairness based on the universal duty of an employer to act fairly.¹⁴⁵ Where unfairness was alleged, the protective measures provided for by the unfair labour practice concept applied.

2.5.6 Benefit Disputes

While unfair labour practice disputes relating to the reduction of, removal of, or refusal to provide existing or discretionary benefits were not common practices brought before the IC,¹⁴⁶ the following cases are of some relevance. In *Van Copenhagen v Shell & BP SA Petroleum Refineries (Pty) Ltd & another (Van Copenhagen)*,¹⁴⁷ the employee applied in terms of the rules of his pension fund for deferred pension due to early retirement. The employee had been a member of the pension fund for more than 20 years and in terms of the rules of the fund, the employer was required to approve the

¹⁴² In *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) 1241 the SCA upheld the decision of the IC, which found that the employer's unequal treatment of its employees who were engaged in a strike over wage increases and those not involved in the strike amounted to an unfair labour practice. See further *National Union of Mineworkers v Henry Gould (Pty) Ltd & another* (1988) 9 ILJ 1149 (IC), 1160-1161 where the conduct of the employer in refusing to implement wage increases retrospectively to union members, as it did for non-union members, was found to constitute an unfair labour practice.

¹⁴³ *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (IC) involved differential treatment between male and female teachers in respect of a housing subsidy. The applicant was a professional teacher and principal of a primary school who was denied a subsidy for a housing loan on the ground that she was married and that her husband was in full-time employment. At 1088-1090 the court held that when exercising its unfair labour practice jurisdiction, it is entitled to "override contractual rights if the exercise of those rights is inequitable". The court held that an unfair labour practice had been perpetrated as the employee's employment opportunities, terms and conditions of employment or work security had been prejudiced and jeopardised in a way that detrimentally affected the labour relationship between her and her employer.

¹⁴⁴ See *Jacob v Prebuilt Products (Pty) Ltd* (1988) 9 ILJ 1100 (IC).

¹⁴⁵ Poolman (1984) 62. As explained by Currie and De Waal (2005) 502 the Industrial Court handed down decisions in respect of virtually all aspects of the employment relationship, ranging from unfair dismissals, employment opportunities, appointment, selection criteria and promotion opportunities to training.

¹⁴⁶ Le Roux (2006) ILJ 5.

¹⁴⁷ (1991) 12 ILJ 620 (IC).

application for deferred pension.¹⁴⁸ The court found that the employer's refusal to grant consent constituted an unfair labour practice,¹⁴⁹ as the employer exercised the discretion given to it in terms of the pension fund rules improperly and unfairly.¹⁵⁰

In *Scott v WP Market Agency (Pty) Ltd (Scott)*¹⁵¹ the employer's reduction of an employee's wages was found to constitute an unfair labour practice.¹⁵² Relatedly, the IC considered it an unfair labour practice to utilise employees in higher positions without paying them the better salaries and benefits attached to the position.¹⁵³

Noting its broad application based on principles of fairness, it is not surprising that grievances relating to the provision of benefits, including wages, were considered under the unfair labour practice jurisdiction. As indicated earlier, the practice that gave rise to the unfair labour practice dispute was not of relevance. It stands to reason that practices relating to the provision of benefits would have found application under the notion, as long as unfairness was seen to be present, which usually took the form of substantive or procedural unfairness.¹⁵⁴

It is, however, significant to note that the IC had no reservations in intervening in the exercise of an employer's discretionary powers in relation to pension benefits, as this is a contentious issue under the current unfair labour practice provisions, as discussed in Chapter 5.

¹⁴⁸ *Van Coppenhagen* 622.

¹⁴⁹ *Van Coppenhagen* 628.

¹⁵⁰ *Van Coppenhagen* 628. This illustrated that the court frowned upon the employer's failure to give the employee an opportunity to discuss his application with management. In *Archibald v Bankorp Ltd (Now ABSA Ltd) & another* (1992) 13 *ILJ* 1538 (IC) 1543 the court found that the failure or refusal of the employer to take steps to amend its pension fund rules so that a retrenched employee was not unfairly penalised by the loss of long-term pension benefits to which he would have been entitled had he not been prematurely retrenched, constituted an unfair labour practice. See further *Ward v Sentrachim Ltd* (1992) 13 *ILJ* 252 (IC) where the enterprise for which the applicant worked was sold, and terms and conditions no less favourable than the existing terms of employment were guaranteed (at 253). However, when the employee resigned a few years later he discovered that the pension benefits available to him were significantly less than he would have received had he remained a member of the seller's pension scheme (at 254). At 260 the court found that the respondent did not provide the applicant with the benefits to which he was entitled, amounting to a breach of the employment contract and thereby constituting an unfair labour practice.

¹⁵¹ (1991) 12 *ILJ* 1338 (IC).

¹⁵² *Scott* 1338C and 1340J.

¹⁵³ As explained in *Gauteng Provinsiale Administrasie v Scheepers & others* (2000) 21 *ILJ* 1305 (LAC) paras 4-5.

¹⁵⁴ *Scott* 1338C.

What this illustrates is that one must not lose sight of the foundational principles upon which the unfair labour practice jurisdiction was premised. This was the combatting of unfair employer practices or actions. The ultimate objective was to protect employees against unfairness, irrespective of the practice or action from which the unfairness emanated.

2.5.7 Criticisms and Commendations

While it is acknowledged that the IC developed a fair body of labour law and through its jurisprudence created an equitable system,¹⁵⁵ the IC's enforcement of the unfair labour practice jurisdiction has not been without controversy.¹⁵⁶ However, it must be borne in mind that the IC worked with the definition of the concept as contained in the legislation, a concept which was adequately described as an "enigmatic innovation",¹⁵⁷ illustrating its perplexing and wide scope.

Adjudicating the unfair labour practice jurisdiction based on what was fair and what was not, was criticised for undermining the "principal basis of the law", as the concepts of "fairness" and "equity" were held to be vague and unhelpful.¹⁵⁸ The concern was the uncertainty that could be created amongst employers in terms of what they were allowed to do and not allowed to do.¹⁵⁹

Brassey *et al* voiced similar concerns, finding that the IC continuously shifted the goal post, thereby creating ambiguity and a lack of certainty. The following comments made by them are of importance:

¹⁵⁵ Coleman (1990-1991) *CLLJ* 178.

¹⁵⁶ Coleman (1990-1991) *CLLJ* 178. See further Thompson (1993) *IJCLLIR* 204 who states 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". See further Brassey (1980) *ILJ* 82.

¹⁵⁷ Reichman and Mureinik (1980) *ILJ* 1 state that the reference to the unfair labour practice being "enigmatic" was because the courts' power to remedy such practices was unclear, leaving it up "to the court to define the offending practices". See further Thompson (1993) *IJCLLIR* 189 who states that the IC 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 (1984) 176 simply describes the introduction of the unfair labour practice as complex.

¹⁵⁸ Roos (1987) *AJ* 103. See further Ehlers (1982) *ILJ* 14 and 19.

¹⁵⁹ Roos (1987) *AJ* 103.

“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.”¹⁶⁰

It cannot be forgotten that in implementing fairness, the interests of both employers and employees have to be considered. The Wiehahn Report in its discussion of the development of fair labour standards highlighted this.¹⁶¹ This principle was also acknowledged by the IC in *Food & Allied Workers Union v Spekenham Supreme*.¹⁶² As such, the failure to provide a level of certainty in the law for employers could certainly have created the perception that the unfair labour practice jurisdiction was biased towards the interests of employees, which was not its intended objective.¹⁶³

Notwithstanding the above criticisms, others supported the flexibility bestowed upon the IC through the unfair labour practice jurisdiction.¹⁶⁴ They appreciated the unlimited discretion afforded to the IC to define and expand the meaning of unfair labour practices.¹⁶⁵

This concept in its expansive form undoubtedly had a significant influence on the development of South African labour law, as it emasculated the judicial doctrine of freedom of contract,¹⁶⁶ altering the discipline of labour law to include considerations of

¹⁶⁰ Brassey *et al* (1987) 61.

¹⁶¹ Wiehahn Vol 2 (1980) 364. From the employer’s side, all considerations affecting the growth and profitability of the business; production and productivity; the protection of markets; property; goodwill; and a positive public image, and from the employee’s side, their social and moral welfare; physical well-being; economic and job security; job advancement; freedom of association; and bargaining rights.

¹⁶² *Spekenham Supreme* 638. See further *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court & others* (1986) 7 ILJ 489 (A) 495 and *National Union of Metal Workers of SA v Vetsak Co-operative Limited & others* 1996 (4) SA 577 (A) 589 C-D. This is in keeping with the comments expressed by Cooper (2004-2005) CLLPJ 207 that 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 Act’s objective of labour peace.

¹⁶³ Wiehahn Vol 2 (1980) 364.

¹⁶⁴ Roos (1987) AJ 108.

¹⁶⁵ Coleman (1990-1991) CLLJ 189. See further Le Roux and Van Niekerk (1994) 19 and Rycroft and Jordaan (1992) 156.

¹⁶⁶ Cassim (1984) CILSA 341. See further Le Roux (PhD Thesis, University of Cape Town, 2008) 1.

fairness.¹⁶⁷ In 1984, Poolman described the concept as being “perhaps the single most important innovation introduced into the South African labour relations system in the last 30 years”.¹⁶⁸ This cannot be disputed as practice has shown that it was the unfair labour practice concept that established a “charter of industrial rights”, without which South Africa’s labour law would have been “stunted”.¹⁶⁹ As indicated by Thompson the unfair labour practice jurisprudence provided the avenue through which labour law was brought in line with the broader legal traditions of fairness.¹⁷⁰

While the unfair labour practice provided employees with much-needed protection, it is undeniable that it did little to promote certainty. There was always room within this broadly-described concept to challenge the fairness of a range of employer practices. While this was a positive development at the time,¹⁷¹ advancements in labour law require a somewhat different approach, one that strikes a balance between ensuring that employees are treated fairly, while at the same time promoting a level of certitude within the law.

2.6 CONCLUSION

Having traversed the role of the common law and the early developments of the notion of unfair labour practices abroad and in South Africa, the following conclusions may be drawn.

Firstly, it is indisputable that that the common-law was inept in regulating employment relationships in a manner that advanced the interests and rights of both parties. These inefficiencies led to the development of labour law. Even though employment contracts continue to be recognised, the successful regulation of the employment relationship can only be achieved through the application of statutorily defined labour law principles.

¹⁶⁷ Du Toit *et al* (2015) 539, referring to the unfair labour practice concept state that the definition of the term, “marked the beginning of an equity-based labour jurisprudence”, which implied an enquiry not only into the lawfulness but also into the fairness of conduct.

¹⁶⁸ Poolman (1984) 10.

¹⁶⁹ Thompson (1993) *IJCLLIR* 192.

¹⁷⁰ Thompson (1993) *IJCLLIR* 200.

¹⁷¹ According to Roos (1987) *AJ* 108 the emphasis of South African labour law at the time was on justice rather than certainty.

Secondly, the enactment of the unfair labour practice concept in 1979 pioneered the advancement of labour law in South Africa. While the intention was to protect white workers, the new system was the beginning of equal labour rights for all workers. Significantly, it was the first step in South African labour law towards a fairness-based jurisdiction, thereby fulfilling a central objective of labour law, which was non-existent at common law.

Thirdly, despite the concept of the unfair labour practice being an import from the USA, the USA definition bears a different meaning and provides no assistance in evaluating the unfair labour practice relating to the provision of benefits. While the unfair labour practice concept in the legal jurisdictions of India and Namibia protects individual employee rights, such as that against unfair dismissal, none of them provides protection in respect of benefits.

Fourthly, the unfair labour practice concept has undoubtedly made great inroads in the protection of individual employee rights. However, it was an all-encompassing mechanism with no limitations, as any practice or action could constitute an unfair labour practice, as long as unfairness was present. Due to the lack of clear parameters in the use of this mechanism it attracted justifiable criticism.

Fifthly, while protection of individual employee rights through mechanisms such as the unfair labour practice concept has an important role to play in South African labour law, such protections must be well defined. This will provide a set of labour law rules that seek to promote the fair treatment of employees, while at the same time eliminating legal uncertainty. These two principles must be borne in mind in defining the term benefits. In other words, benefits must be defined in a manner that promotes the fairness imperatives that developed in the pre-democratic era, while at the same time setting well-defined boundaries regarding its use. This is what the Code of Good Practice: Benefits developed at the end of this thesis seeks to do.

CHAPTER 3
THE CURRENT DISPENSATION

	Page
3.1 Introduction.....	51
3.2 The Labour Relations Act.....	53
3.2.1 Intention of the Legislature.....	53
3.2.2 The LRA's Stated Purpose.....	54
3.2.3 Residual Unfair Labour Practice.....	55
3.2.4 Current Unfair Labour Practice.....	57
3.3 The Constitutional Right to Fair Labour Practices.....	60
3.4 The Role of International Labour Standards.....	66
3.5 Dispute Resolution.....	70
3.5.1 Introduction.....	70
3.5.2 Disputes of Right versus Disputes of Interest.....	71
3.5.3 Background to Dispute Resolution Structures.....	76
3.5.4 Current Dispute Resolution Structures.....	77
3.5.4.1 The CCMA.....	78
3.5.4.2 The Labour Court.....	79
3.5.4.3 The Labour Appeal Court.....	80
3.6 Conclusion.....	81

3.1 INTRODUCTION

Chapter 2 established that, from a historical perspective, the unfair labour practice concept was a formidable mechanism. It was the first step in South African labour law

towards a fairness-based jurisdiction, which sought to protect employee rights.¹ However, it was not without shortcomings, the primary one being its expansive nature which created legal uncertainty.²

This chapter analyses the notion of the unfair labour practice that has been carried forward into the new labour law dispensation.³ This concept took on a new form, following the introduction of the Constitution⁴ and the inception of the Labour Relations Act (LRA).⁵ One of the practices included under the new definition of “unfair labour practice” is the provision of “benefits”. Regrettably, no definition is provided for this term, which has led to challenges in interpreting this unfair labour practice.

This chapter sets out to identify key principles that must be used in defining benefits. This is done by firstly considering the LRA’s Explanatory Memorandum,⁶ the purpose and objectives of the LRA⁷ and the unfair labour practice provisions. Secondly, two of the LRA’s stated objectives are evaluated. These are the obligations to give effect to both the right to fair labour practices enshrined in section 23 of the Constitution and the standards set by the International Labour Organisation (ILO).⁸

Lastly, the chapter investigates the differences between disputes of right and disputes of interest.⁹ It also considers the dispute resolution mechanisms established in terms of the LRA for purposes of resolving these categories of disputes. In Chapter 1, reference was made to the fact that a number of the limitations placed on the ambit of the term benefits, was the need to protect the divide between disputes of right and of interest.¹⁰ This chapter provides the foundation for these two categories of disputes. This groundwork sets the scene for an in-depth discussion of where disputes relating to benefits should be categorised.

¹ See Chapter 2, paras 2.5.1 and 2.5.5.

² See Chapter 2, para 2.5.7.

³ The full definition of the unfair labour practice concept is discussed in paragraph 3.2.4.

⁴ The Constitution of the Republic of South Africa, 1994.

⁵ The LRA 66 of 1995.

⁶ See para 3.2.1 below.

⁷ See para 3.2.2 below.

⁸ See paras 3.3 and 3.4 below.

⁹ See para 3.5 below.

¹⁰ See Chapter 1, para 1.2.

3.2 THE LABOUR RELATIONS ACT

3.2.1 Intention of the Legislature

The description of unfair labour practices as provided for in the current LRA takes on a different identity to that which existed in the previous labour relations dispensation. Notwithstanding this difference in form, the emphasis on fairness has unquestionably been carried forward.¹¹ However, while fairness and justice remain important 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.

The Ministerial Legal Task Team¹² appointed in July 1994 to draft a Labour Relations Bill¹³ sought to formulate legislation written in language that would be understandable by the users of the legislation, notably workers and employers.¹⁴ The policy makers further sought to specify the rights and obligations of workers, trade unions, employers and employer organisations in order to avoid a case-by-case determination of what constituted fair labour practices.¹⁵

These aspects were regarded as being essential and were seen as the key in remedying problems that were identified with the pre-existing laws. One of these was “the reliance on after-the-event rule-making by the courts under the unfair labour practice jurisdiction”.¹⁶ The Ministerial Task Team acknowledged that the unfair labour practice jurisprudence which existed under the Industrial Court (IC) era created difficulties for parties to understand their obligations from a reading of the law. One of the things that

¹¹ See Chapter 2, para 2.5.5 where it was explained that fairness took centre stage in defining the unfair labour practice concept during the Industrial Court era. Section 186(2)(a) of the LRA 66 of 1995 makes frequent references to the word “unfair”. It states 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.

¹² Explanatory Memorandum (1995) 16 *ILJ* 280 explains that the Task Team was made up of lawyers who represented both trade unions and employers. Some of these lawyers possessed special knowledge of law in the public sector. Importantly, the Task Team was assisted by the ILO which provided the Task Team with three world-class labour law experts; as well as access to consult with renowned experts from within the ILO itself.

¹³ General Notice 97 *Government Gazette* 16259 of 10 February 1995.

¹⁴ Explanatory Memorandum (1995) 16 *ILJ* 279.

¹⁵ Explanatory Memorandum (1995) 16 *ILJ* 279.

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

the Labour Relations Bill vowed to do was to create much-needed certainty, thereby leaving very little to the discretion of the decision makers.¹⁷

3.2.2 The LRA's Stated Purpose

Like all other provisions of the LRA, the application and interpretation of the unfair labour practice concept must be considered in line with the overall purpose of the Act.¹⁸ The LRA's stated purpose is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the four primary objects of the Act.¹⁹ The first object is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.²⁰ The second is to give effect to the obligations incurred by the Republic as a member state of the ILO.²¹ The third is to provide a framework within which parties may collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest,²² while the fourth is to promote orderly collective bargaining, the establishment of workplace forums and the effective resolution of labour disputes.²³

It is further clear from the LRA's codification of the unfair labour practice concept that the statute sought to give effect to the legislature's objective of creating certainty. This was appropriately explained by the Labour Court in *Jonker v Okhahlamba Municipality & others (Jonker)* where it was stated that:²⁴

"The legislature elected to define unfair labour practice in relation to very specific employer conduct (s 186 of the LRA). One of the objectives for doing so is to provide certainty and clarity about what amounts to an unfair labour practice and to avoid the ad hoc-ism which plagued the jurisprudence under the LRA 1956."²⁵

¹⁷ Explanatory Memorandum (1995) 16 *ILJ* 283.

¹⁸ Section 3 of the LRA 66 of 1995 states that any person applying the Act must interpret its provisions to give effect to its primary objects.

¹⁹ Section 1 of the LRA 66 of 1995.

²⁰ Section 1(a) of the LRA 66 of 1995.

²¹ Section 1(b) of the LRA 66 of 1995.

²² Section 1(c) of the LRA 66 of 1995.

²³ Section 1(d) of the LRA 66 of 1995.

²⁴ (2005) 26 *ILJ* 782 (LC).

²⁵ *Jonker* para 22.

3.2.3 Residual Unfair Labour Practice

In order to bring about the much-needed certainty intended by the legislature, employee protection against unfair labour practices was initially included in the LRA under Schedule 7, where they were defined as “residual unfair labour practices”.²⁶ In Schedule 7 an unfair labour practice was defined as any unfair act or omission that arose between an employer and an employee, involving unfair discrimination;²⁷ 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;²⁸ the unfair suspension of an employee or any other disciplinary action short of dismissal;²⁹ and the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.³⁰

One of the most notable features of the new LRA was the absence of a general unfair labour practice definition, as the new Act replaced it with specific practices.³¹ As alluded to by Currie and De Waal the residual unfair labour practice provisions were distinguishable from the IC era under which “virtually all aspects of the employment relationship” were dealt with.³²

Notwithstanding the criticisms levelled at the unfair labour practice concept that existed under the IC era as discussed in Chapter 2,³³ and despite the anticipation that

²⁶ Schedule 7, part B, items (2)(1)(a)-(d).

²⁷ Schedule 7, part B, item (2)(1)(a) involved direct or indirect discrimination 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; marital status; or family responsibility.

²⁸ Schedule 7, part B, item (2)(1)(b).

²⁹ Schedule 7, part B, item (2)(1)(c).

³⁰ Schedule 7, part B, item (2)(1)(d).

³¹ Cohen (2004) *SAJHR* 484 states that the unfair labour practice concept had been reduced to a narrow band of residual conduct by an employer towards an employee. See further Grogan *Employment Rights* (2014) 109 who states that “the current Act does not contain an ‘open-textured’ definition of the term unfair labour practice, the lawmakers opted instead for a form of codification which lists impermissible employer actions”. A similar explanation is given by Du Toit (2008) *SALJ* 100.

³² Currie and De Waal (2005) 502.

³³ See Chapter 2, para 2.5.7. Note also Grogan (1996) *ELJ* 65 who is of the view that the wide nature of the unfair labour practice jurisdiction as it existed in the IC era brought about subjectivity and unpredictability of court decisions making it difficult to ascertain which labour practices were fair and which were not.

future legislation would limit the “legislative licence” that was given to the IC,³⁴ there was still dissatisfaction with the residual unfair labour practice provisions.³⁵ While fairness in hiring, promoting, training and disciplining staff was considered important, it was thought that this should be achieved not by judicial review but through collective bargaining and structured worker participation.³⁶ Similarly, the inclusion of practices such as unfair conduct relating to the provision of benefits was anticipated to open the floodgates to challenges of managerial prerogative.³⁷ Another concern was that the codification would leave certain practices without a remedy as the unfair labour practice concept did not cater for all labour practices.³⁸

Despite these criticisms, this thesis deems the limitations placed on the unfair labour practice concept as a positive development of the law. The form in which it was brought forward into the LRA set out to strike a balance between providing a level of protection to employees, which is required, while at the same time clearly demarcating the types of practices which received statutory protection. Furthermore, the types of practices protected by the unfair labour practice provisions were issues that would inevitably affect individual employees. As such a rights-based recourse was required as these issues could not be left to determination through collective bargaining. While it is apparent that not all practices were covered by the provisions of the residual unfair labour practice, Schedule 7, part B, items (2)(1)(a)-(d) still provided substantial discouragement of unfair employer conduct.

Unfortunately, while the intention of the LRA was to create much-needed legal certainty,³⁹ this intention was not satisfied in all respects. Schedule 7 of the LRA, much like the Explanatory Memorandum, failed to provide a definition of benefits, resulting in uncertainty being caused by the extent of protection intended to be conferred by

³⁴ Thompson (1993) *IJCLLIR* 205.

³⁵ Cheadle (2006) *ILJ* 675 regards the codification of unfair labour practices to be “rough and ready”, while Grogan (1996) *ELJ* 65 views it as being an “afterthought”.

³⁶ Cheadle (2006) *ILJ* 676.

³⁷ Grogan (1996) *ELJ* 69.

³⁸ Cheadle (2006) *ILJ* 673 explains that an employee who regarded his transfer from one job to another as unfair did not have recourse within the unfair labour practice definition of the LRA.

³⁹ Explanatory Memorandum (1995) 16 *ILJ* 283.

this unfair labour practice. This has resulted in unnecessary litigation, delays in the finalisation of cases and wasted legal costs.⁴⁰

3.2.4 Current Unfair Labour Practice

It was initially thought that the inclusion of the definition of residual unfair labour practice under the LRA was only a temporary arrangement pending the review of the law regulating individual employment relations.⁴¹ However, the 2002 amendments brought the unfair labour practice concept directly within the ambit of the main body of the LRA.⁴² Sections 185 and 186 of the LRA now regulate both unfair dismissal and unfair labour practices.⁴³ This is in line with the explanation provided in the Explanatory Memorandum to the 2002 amendments.⁴⁴ The Explanatory Memorandum discussed the intention to remove unfair discrimination from the ambit of unfair labour practices

⁴⁰ This is evident from cases such as *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC); *Gaylard v Telkom SA Ltd* (1998) 9 BLLR 942 (LC); and *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 ILJ 1910 (LC). In the absence of a definition of “benefits” the courts had to establish whether the subject matter of the dispute constituted a benefit. In all three of these cases the employees were not successful, despite incurring expenses in bringing their cases to court. In *Gaylard* and *Northern Cape Provincial Administration* the employees were represented by legal representatives (see *Gaylard* 946 and *Northern Cape Provincial Administration* 1910 and 1914), whereas in *Schoeman* the employee was in a vulnerable financial position and had to be funded by a friend (see *Schoeman* 1104). The case of *Northern Cape Provincial Administration* was taken on appeal in *Hospersa and another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC). This resulted in further delays in the resolution of the matter and added costs. Even though a more expansive approach was endorsed by the court in later cases, employers were not satisfied with such an approach and this resulted in the appeal of many decisions. One such appeal was *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC). This inevitably resulted in delays and increased costs. The litigation that came about in the above-mentioned cases and many others could have been avoided if a definition for benefits were provided in the LRA. This would have provided clarity on the type of disputes that could be brought under the unfair labour practice provisions, resulting in the successful resolution of such cases by bodies such as the CCMA. These cases are referred to in Chapter 1 but are discussed more comprehensively in Chapters 4 and 5.

⁴¹ Landman (2004) ILJ 807 explains that the residual unfair labour practice was seen as a measure to cope with some odds and ends as regards discrimination until a dedicated Act was introduced. See further Cheadle (2006) ILJ 671.

⁴² Section 186(2) of the LRA 66 of 1995 as amended by the Labour Relations Amendment Act 12 of 2002. There were only a few minor changes. Firstly, section 1(a) of the residual unfair labour practices that dealt with unfair discrimination was not absorbed into the main body of the LRA, but rather into the Employment Equity Act 55 of 1998. Secondly, unfair employer conduct relating to probation was added. Thirdly, an occupational detriment in contravention of the Protected Disclosures Act 26 of 2000 was added.

⁴³ Section 186(1) regulates unfair dismissal while section 186(2) regulates unfair labour practices.

⁴⁴ Explanatory Memoranda (2000) ILJ 2228.

and to fully regulate it in the Employment Equity Act (EEA).⁴⁵ The intention was further to include the unfair labour practice concept into the unfair dismissal provisions.⁴⁶

The amendment involved no substantive change to the law, as section 186(2)(a) of the LRA still defines an unfair labour practice 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 or training of an employee or relating to the provision of benefits to an employee.⁴⁷ Protection against these practices was similarly provided for by the residual unfair labour practice provisions, together with other practices, which continue to fall within the scope of the unfair labour practice provisions.⁴⁸

As was the case with the residual unfair labour practice, criticisms were levelled against the inclusion of the unfair labour practice concept into the main body of the LRA.⁴⁹ Cheadle expressed his discontent as follows:

“The concept of the unfair labour practice has had a charmed life. It started off for the flimsiest of reasons. It spawned an ad hoc jurisprudence providing remedies for anything that could fit within the loose language of its formulation. It took a constitutional form to protect the apartheid appointed public service. It was preserved as a transitional provision pending the review of the law regulating individual employment relations. And finally, it was moved from its temporary shelter in the transitional provisions into the main body of the LRA. All this without ever any serious review of the need and scope for such regulation.”⁵⁰

However, the study is of the view that this was a favourable development. There can be no doubt that the unfair labour practice concept provides fundamental protection to employees whilst still engaged in an employment relationship. While employees are

⁴⁵ Act 55 of 1998.

⁴⁶ Explanatory Memoranda (2000) *ILJ* 2228.

⁴⁷ Le Roux (2002) *ILJ* 1707, referring to the 2002 LRA amendments, states that except for the inclusion of unfair conduct relating to the probation of an employee, the definition remained otherwise unaltered.

⁴⁸ Section 186(2)(b) to (d) of the LRA further provides protection against the unfair suspension of an employee or any other unfair disciplinary action short of dismissal against a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and against an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 26 of 2000, on account of the employee having made a protected disclosure as defined in the Act. Except for the last practice, all other practices were previously catered for under the residual unfair labour practice provisions.

⁴⁹ Van Niekerk (2007) Working Paper 07/119 30-31.

⁵⁰ Cheadle (2006) *ILJ* 671.

protected against unfair dismissals,⁵¹ the unfair labour practice provisions protect them against unfair decisions relating to specific labour practices during their tenure as employees. It is therefore logical that the two primary sources of rights-based protection, the one being unfair dismissal protection and the other being protection against unfair labour practices, be housed together in the LRA.

Notwithstanding the above, justifiable criticism has been levelled against the legislature's inclusion of the unfair labour practice provisions into the LRA without providing Codes of Good Practice to guide workers, employers, arbitrators and courts.⁵² This is evident from the problems that have been encountered in interpreting the unfair labour practice relating to the provision of benefits.⁵³ These challenges were identified prior to the 2002 amendments and should have been dealt with in the amendments. Unfortunately, like their predecessors the current unfair labour practice provisions fail to clarify what was intended by the term benefits.

The notion of the unfair labour practice has gained a mark of permanence in South African labour law,⁵⁴ making it imperative to address its existing shortcomings. Due to the absence of a statutory definition of benefits, one has to be found, which this thesis seeks to do. In doing so, a number of factors must be considered, one of them being the impact of the constitutional right to fair labour practices.

⁵¹ Section 185 of the LRA states that every employee has the right not to be unfairly dismissed. Section 188 regards an unfair dismissal to be a dismissal that is substantively and procedurally unfair.

⁵² Cheadle (2006) *ILJ* 670.

⁵³ See, for example, *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 *ILJ* 1098 (LC); *Gaylard v Telkom SA Ltd* (1998) 9 *BLLR* 942 (LC); *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 *ILJ* 1910 (LC); *Hospersa and another v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC); and *Protekon (Pty) Ltd v CCMA & others* [2005] 7 *BLLR* 703.

⁵⁴ Landman (2004) *ILJ* 812 explains that the "unfair labour practice has crept into the heart of our labour law jurisprudence and it may be expected that it will continue to grow, by conventional and unconventional means, as long as lawful, unilateral action is regarded by the courts, in their capacity as custodians of industrial justice, as unfair and inequitable. This is the legacy of the Wiehahn Commission". See also Le Roux (2002) *ILJ* 1714.

3.3 THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

One of the LRA's stated objectives is to give effect to section 23 of the Constitution.⁵⁵ Section 23(1) states that "everyone has the right to fair labour practices". The other labour rights embodied in section 23 are the right to freedom of association, the right to engage in collective bargaining and the right to strike.⁵⁶ It is important briefly to consider the values espoused in the Constitution and the bearing that section 23(1) has on the interpretation and application of LRA rights.

South Africa's transition into the democratic era was characterised by the introduction of the Interim Constitution,⁵⁷ and thereafter the Constitution of 1996. This signalled "the birth of a free and democratic South Africa".⁵⁸ The preamble to the Constitution explains that the Constitution is the supreme law of the country and that it seeks to "heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights".⁵⁹

The Constitution must be interpreted in a manner that accords with the protection of these values. In order to give effect to these values, an essential element of the Constitution is the Bill of Rights,⁶⁰ which sets out several fundamental rights. Included among these rights are socio-economic rights, which are part of the wider concept of human rights.⁶¹ Labour relations rights⁶² have been positioned as socio-economic rights⁶³ thereby falling within the ambit of human rights.

⁵⁵ The Constitution of the Republic of South Africa, 1996.

⁵⁶ The other labour rights as set out in section 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 employer's 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, employer's organisation and employer has the right to engage in collective bargaining."

⁵⁷ The Constitution of the Republic of South Africa, 1994.

⁵⁸ *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (IC) 1076.

⁵⁹ Preamble to the Constitution.

⁶⁰ Chapter 2 of the Constitution of the Republic of South Africa, 1996. Ferreira (2004) *Politeia* 76 explains that the Bill of Rights, which sets out an array of rights, lies at the heart of South Africa's democratic dispensation.

⁶¹ Heyns and Brand (1998) *LDD* 153 and 157.

⁶² Section 23 of the Constitution of the Republic of South Africa, 1996.

⁶³ Heyns and Brand (1998) *LDD* 163.

The inclusion of labour rights in a country's constitution is not regarded as commonplace.⁶⁴ However, these rights seek to provide redress to the social and economic injustices that culminated during the apartheid era.⁶⁵ Hence the emphasis on the achievement of social justice. Furthermore, there was a progressive advancement of labour rights during the IC era through the application of the unfair labour practice concept.⁶⁶ It is clear that the architects of the Constitution were mindful of the jurisprudence that developed during that time and wanted to "constitutionalise the gains" that had already been made in this field of the law.⁶⁷

While the Constitution does not contain a definition of fair labour practices, and while this concept has been described as being "incapable of precise definition",⁶⁸ it is notable that it comprises of two important elements. The first is the idea of fairness and the second is the notion of a labour practice.

From the preceding chapter on the IC's unfair labour practice jurisdiction, it is evident that principles of fairness were a primary consideration. In view of the relationship between the IC's jurisprudence and the subsequent inclusion of the right to fair labour practices in the Constitution, it is a sustainable conclusion that the constitutional right to fair labour practices "is essentially about infusing into employment a degree of fairness not guaranteed by the common law".⁶⁹ This aligns to the values of the Constitution and the obligation that it places on courts to interpret and apply the concept of an unfair labour practice within a human rights culture.⁷⁰

⁶⁴ Cooper (2004-2005) *CLLPJ* 200. Currie and De Waal (2005) 501-502 explain that the Bill of Rights was originally intended to regulate legislation and public power and not the conduct of employers. The authors state that the right to fair labour practices is unique to the South African Bill of Rights. Wiehahn Vol 2 (1980) 370-371 illustrates that while the Wiehahn Commission advocated for the development of fair employment practices legislation, it did not regard it appropriate for such practices to be accommodated in the Constitution, but rather called for its inclusion in labour legislation. See further Heyns and Brand (1998) *LDD* 156 who refer to this aspect of the Constitution as "unique".

⁶⁵ Heyns and Brand (1998) *LDD* 153.

⁶⁶ See Chapter 2, para 2.5.1.

⁶⁷ Currie and De Waal (2005) 501.

⁶⁸ *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) para 33.

⁶⁹ Le Roux (2014) *ILJ* 42. Note further Cohen (2009) *ILJ* 2273 who explains that the Bill of Rights guarantees equal treatment and the protection of human dignity thereby infusing the employment relationship with considerations of equity and fairness.

⁷⁰ See *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 *ILJ* 1048 (IC) 1077.

In respect of labour practices, Cooper defines the term as matters of mutual interest that arise from the employment relationship. She appreciates that a wide range of individual matters could potentially fall within the constitutional right to fair labour practices.⁷¹ Similarly, in *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & others (NEWU)*⁷² labour practices are referred to as the “interaction between employers and employees regarding workplace relations”,⁷³ which illustrates its expansive nature.

Although various types of workplace conduct could potentially fall within the ambit of a labour practice and therefore receive constitutional protection, it is trite that the LRA only provides protection against specific labour practices.⁷⁴ It is further commonplace that litigants cannot bypass a provision of the LRA and rely directly on the Constitution.⁷⁵ This means that an employee seeking to challenge the withdrawal or reduction of a benefit, as an example, will have to utilise the unfair labour practice protection provided for in the LRA and cannot rely directly on the constitutional right to fair labour practices.

Despite this, the constitutional right to fair labour practices still plays an important and positive role in interpreting and applying LRA provisions that come under scrutiny. The Constitutional Court (CC) case of *National Education Health & Allied Workers Union v University of Cape Town (NEHAWU)*⁷⁶ is a case in point.

⁷¹ Cooper (2004-2005) *CLLPJ* 206. See further Poolman (1988) 101 who explains that “it is hardly conceivable that any conduct arising within labour relations is not a labour practice”.

⁷² (2003) 24 *ILJ* 2335 (LC).

⁷³ *NEWU* 2340. See further *National Education Health & Allied Workers Union v University of Cape Town & others* 113 where it is explained that the focus of the constitutional right to fair labour practices is on the relationship between the parties and the continuation of that relationship in a manner that is fair to both.

⁷⁴ Cooper (2004-2005) *CLLPJ* 211-212 explains that the LRA is not capable of embracing anyone and any kind of matter. Similarly, Le Roux (2002) *ILJ* 1699 states that the LRA 66 of 1995 does not provide for a “general right not to be subjected to unfair labour practices”.

⁷⁵ In *South African National Defence Union v Minister of Defence and Others (SANDU)* [2007] 9 BLLR 785 (CC) para 51 O’Regan J discussed the question of whether a litigant may bypass legislation that has been enacted and instead rely directly on the Constitution. She made reference to Ngcobo J’s judgment in *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and Others* (Treatment Action Campaign and Another as Amici Curiae) 2006 (1) BCLR 1 (CC) at paras 434-437 where it was explained that to allow a litigant to bypass legislation and rely directly on the Constitution may lead to “the creation of dual systems of jurisprudence under the Constitution and under legislation”. O’Regan J agreed with this approach stating that “where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard”. See further Bosch (2008) *SLR* 376 who discusses this principle.

⁷⁶ (2003) 24 *ILJ* 95 (CC).

Here, the CC sought to determine the meaning of section 197 of the LRA, which deals with the transfer of a business as a going concern.⁷⁷ The question pertained to whether the section required that workers be transferred automatically upon the transfer of a business as a going concern, despite there being no prior agreement in this regard.⁷⁸ The CC highlighted the importance played by the constitutional right to fair labour practices when interpreting a provision of the LRA. Notably, the CC emphasised the fact that the LRA was enacted to give content to section 23 of the Constitution, which requires that the LRA be applied and construed in a manner that accords with section 23.⁷⁹ Essentially, LRA provisions must be understood in the context of the constitutional right to fair labour practices,⁸⁰ a right which seeks to permeate the employment relationship with principles of fairness.

The CC remarked that the focus of the right to fair labour practices is “broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both”.⁸¹ While the CC found that fairness depends on the circumstances of a particular case and involves a value judgment,⁸² it held that the LRA must be construed in a balanced manner that accommodates the interests of employers and the interests of workers.⁸³ Cooper refers to this as “an equivalence of interest approach”.⁸⁴

The CC in deciding the matter, considered the divergent views on the purpose of section 197, the one being to facilitate the transfer of businesses, the other being to protect workers in the event of a transfer of a business.⁸⁵ While the CC concluded that

⁷⁷ *NEHAWU* para 1.

⁷⁸ *NEHAWU* para 1.

⁷⁹ *NEHAWU* para 14.

⁸⁰ *NEHAWU* para 16.

⁸¹ *NEHAWU* para 40.

⁸² *NEHAWU* para 33.

⁸³ *NEHAWU* para 40. Notwithstanding the pronouncements made by the CC, Van Niekerk and Smit (2018) 46 indicate that there is still a lack of clarity on how to give effect to this balance that ought to be struck when interpreting the LRA. Cooper (2004-2005) *CLLPJ* 212-213 suggests that these interests involve on the one hand the employers’ right to the economic development of the enterprise through enhanced production and efficiency; on the other, the workers’ interest to social justice in the workplace, including, job security and advancement, a democratic work environment, and treatment illustrative of dignity and equality.

⁸⁴ Cooper (2004-2005) *CLLPJ* 216.

⁸⁵ *NEHAWU* para 45.

section 197 has a dual purpose,⁸⁶ it found that the correct interpretation of section 197 is that workers must be transferred to the new owner upon the transfer of a business as a going concern, irrespective of the non-existence of a prior agreement to that effect.⁸⁷ The CC came to this conclusion by considering the purpose and context in which section 197 appears in the LRA, notably the fact that it is found in the chapter dealing with unfair dismissals.⁸⁸ The CC also looked at foreign instruments in giving meaning to section 197,⁸⁹ as well as the overall purpose of the LRA.⁹⁰

While the right to fair labour practices does not seek to override or replace rights provided for in the LRA, LRA provisions are ultimately subject to constitutional scrutiny.⁹¹ Even though the LRA has not been drafted in the same broad terms as the Constitution and only provides protection against a closed list of specific employer practices,⁹² the meaning attributed to these specific practices must give effect to the constitutional right to fair labour practices.⁹³ As remarked by the CC in *NEHAWU*, “our constitutional democracy envisages the development of a coherent system of law that is shaped by the Constitution”.⁹⁴

⁸⁶ *NEHAWU* para 53. That dual purpose is facilitating commercial transactions and protecting workers against unfair job losses.

⁸⁷ *NEHAWU* para 71.

⁸⁸ *NEHAWU* para 62.

⁸⁹ *NEHAWU* paras 46-50.

⁹⁰ *NEHAWU* para 62.

⁹¹ Du Toit *et al* (2015) 74. Section 3 of the LRA 66 of 1995 requires that the provisions of the LRA be interpreted in a manner that gives effect to its primary objects, one such object being compliance with the constitutional right to fair labour practices.

⁹² See Le Roux (2002) *CLL* 92, Le Roux (2002) *ILJ* 701 and Van Niekerk and Smit (2018) 201.

⁹³ *NEHAWU* para 16. See further Cohen (2004) *SAJHR* 485 who explains that when interpreting the unfair labour practice provision, the meaning to be preferred must be one which best accords with the Constitution. Du Toit (2008) *SALJ* 118 describes the important role played by the Constitution as follows: “Legislation is the product of deliberate policy, informed by constitutional imperatives and values, setting out to mould, supplement or replace common-law rules in the light of those values as well as governmental duties and socio-economic objectives derived from the Constitution.”

⁹⁴ *NEHAWU* para 16.

In giving meaning to the term benefits one has to interpret the LRA in a purposive manner, which requires consideration of the overall intention of the LRA⁹⁵ and a construction that best advances the LRA's objects.⁹⁶ One such objective is to give effect to section 23 of the Constitution. Ultimately the interpretation should be generous, and apart from the above-mentioned factors, aspects such as the language used to articulate the right; the purpose of the right; the history of the right; and the meaning and purpose of other associated rights should be considered.⁹⁷

If one considers all the above factors, the common value espoused is the promotion of fairness. This is commendable as it ties in with the primary purpose of the LRA, which is to ensure that there is social justice in the workplace, thereby placing a high premium on the fair treatment of employees.⁹⁸ The term benefits must, therefore, be given an interpretation that best promotes the principle of fairness. Evidently, it is not meant to bear an overly limited meaning, which seeks to exclude rather than to include.

Notwithstanding the fairness imperatives of both parties as enshrined in the constitutional right to fair labour practices, one cannot overlook the fact that the LRA does not

⁹⁵ *Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC) para 110 held that "the primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. Thus, where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA".

⁹⁶ Du Toit *et al* (2015) 82. Matlou (2016) *SA Merc LJ* 553 refers to section 3 of the LRA and states that the importance of the section "is that it lays down the correct approach to be adopted by those interpreting and applying the LRA. The section expressly endorses the 'purposive' as opposed to the 'literal approach' to statutory interpretation". See further Davidov (2016) 16 who states that when courts are faced with the challenge of interpreting a legislative provision it must be interpreted in a manner that gives effect to what the legislation seeks to achieve.

⁹⁷ Matlou (2016) *SA Merc LJ* 553.

⁹⁸ Matlou (2016) *SA Merc LJ* 546 mentions that "social justice in labour law is central to the promotion of workplace justice". See further Cohen (2009) *ILJ* 2273 who states that the LRA, which was enacted to give content to the constitutional right to fair labour practices, creates a protective framework that regulates the fair and equal treatment of employees.

provide for the perpetration of unfair labour practices by employees against their employers.⁹⁹ This is an indication that the main object of the unfair labour practice provisions is to protect employees from unfair employer conduct.¹⁰⁰ Therefore, an interpretation of benefits that best promotes fairness towards employees must be encouraged. However, it should be noted that by clearly defining benefits, employers' interests will also be advanced as they will be fully aware of what the obligation placed upon them by the unfair labour practice entails.

3.4 THE ROLE OF INTERNATIONAL LABOUR STANDARDS

As indicated earlier, a further objective of the LRA is to give effect to the obligations incurred by South Africa as a member state of the ILO. The CC adheres to this principle, and as alluded to in the previous part, *NEHAWU* relied on international standards in giving effect to section 197 of the LRA 66 of 1995.¹⁰¹ It follows that an evaluation of the relevant ILO principles is imperative.

The introduction of principles of fairness and equity into the employment relationship continues to be championed by the ILO. It is one of the institution's primary purposes to achieve social justice.¹⁰² As early as the nineteenth century, the plight of workers

⁹⁹ It is noteworthy that all previous definitions of unfair labour practice (prior to the definition in the LRA 66 of 1995) provided for the commission of an unfair labour practice by an employee towards his or her employer. This was discussed in Chapter 2, para 2.5.1.

¹⁰⁰ Cooper (2004-2005) *CLLPJ* 215. See further Bosch (2008) *SLR* 374 who comments that "much of our labour legislation was introduced to provide protections for employees against exploitation by their employers".

¹⁰¹ *NEHAWU* paras 46-51.

¹⁰² As discussed by Naidoo (1994) *ILJ* 737, the ILO was established in 1919 to defuse the polarisation between the prosperous and the poor. This is evident from the preamble to the ILO Constitution. It states that "whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures". See further the report of the Director-General on Decent Work, presented at the International Labour Conference 87th session (1999) Geneva 1. Also see Langille (1998) *ILJ* 1014.

came under the spotlight. It was recognised that workers were often viewed by employers as being a mere commodity and this needed to be changed.¹⁰³ As explained by Hepple, “labour is ‘human flesh and blood’. It is not a commodity to be exchanged because a person’s working power cannot be separated from her or his existence as a human being”.¹⁰⁴ The ILO’s mission since its inception has been to improve the treatment of human beings in the “world of work”.¹⁰⁵

The vision of the ILO is advanced through the 1944 Declaration of Philadelphia,¹⁰⁶ which espouses the ILO’s mandate of creating conditions of freedom and dignity, economic security and equal opportunity.¹⁰⁷ Likewise, the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR) promote the right to favourable conditions of work.¹⁰⁸ Equally significant is the Declaration on Fundamental Principles and Rights at Work, which was adopted in 1998, the aim of which is to ensure that “social progress goes hand in hand with economic progress”.¹⁰⁹ The clear message embedded in these declarations and

¹⁰³ Alcock (1971) 6. O’Higgins (1997) *ILJ (UK)* 226 discusses the address by Dr Ingram on “work and the workman” in 1880 when invited to the British TUC to address their congress. In his address, he made profound remarks stating that “labour is spoken of as if it were an independent entity, separable from the personality of a workman. It is treated as a commodity, like corn or cotton – the human agent, his human needs, human nature, and human feelings, being kept almost completely out of view”.

¹⁰⁴ Hepple (2001) *ILR* 9. However, as aptly stated by Epstein (1983) *YLJ* 1364, the common-law rules did not “refer to flesh-and-blood individuals, but to those lifeless abstractions”.

¹⁰⁵ Report of the Director-General on Decent Work 3.

¹⁰⁶ Rodgers *et al* (2009) 6. See further Poolman (1984) 75.

¹⁰⁷ Report of the Director-General on Decent Work 3. See further Declaration of Philadelphia 1944 (II)(a) where it is explained that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

¹⁰⁸ Article 2(1) of the Universal Declaration of Human Rights provides that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to being protected against unemployment. Article 7 of the International Covenant on Economic, Social and Cultural Rights provides for the “right of everyone to the enjoyment of just and favourable conditions of work”. See further Poolman (1984) 79-80.

¹⁰⁹ ILO Declaration on Fundamental Principles and Rights at Work. See also its follow-up, adopted by the International Labour Conference at its 86th session (1998) Geneva 1. The Report of the Director-General on Decent Work 7 explains that the guarantee of rights at work enables people to claim freely a fair share of the wealth they have helped to generate and to seek more and better work. The provision of such rights guarantees the translation of economic growth into social equity and employment. See further the “decent work agenda”, which seeks to promote equality. The decent work agenda is advanced in the ILO’s Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference at its 97th Session (2008) Geneva 2, which has as its strategic objectives “employment, social protection, social dialogue, and rights at work”.

covenants is the ILO's agenda of advancing the rights of employees and improving conditions of work.

The ILO's objectives in this regard have been realised through the formulation of international labour standards,¹¹⁰ which over the years have resulted in the adoption of approximately 189 conventions and 203 recommendations.¹¹¹ These labour standards provide employees with fundamental workplace rights on a range of aspects, including the right not to be unfairly dismissed; the right not to be unfairly discriminated against; the right to protection of wages; and the right to freedom of association.¹¹² As such, through its introduction of conceptions of fairness, equity, and justice into the employment sphere, the ILO dispelled the notion that it was acceptable to treat workers as commodities. This approach emphasises the dignity of labour and the recognition of its value.¹¹³

Notwithstanding all of the significant work done by the ILO, there is no ILO labour standard that specifically provides for the right not to be subjected to an unfair labour practice.¹¹⁴ There is similarly no right not to be unfairly treated in relation to the provision of benefits or a right to be protected against the unfair removal or reduction thereof. However, as discussed in Chapter 4 the definition of concepts such as wages and remuneration as contained in the ILO's Equal Remuneration Convention (Convention 100) and the Protection of Wages Convention (Convention 95) assists in interpreting the term "benefits".¹¹⁵

¹¹⁰ Poolman (1984) 73. Van Niekerk and Smit (2018) 25 note that ILO standards assume a variety of forms, the most important being conventions, followed by recommendations. Valticos (1969) *ILR* 219 explains that the difference between conventions and recommendations lies in the fact that once a convention has been ratified it is binding, whilst a recommendation is not designed to create any international obligations but rather seeks to provide guidance to countries in developing policies. Mischke (1993) *ILJ* 64-65 in discussing the research of Körner-Damman explains that "international labour standards include not only ratified conventions, but 'everything', within the framework of the ILO, which serves the preparation, creation, supplementing, definition and interpretation of basic principles for labour relations".

¹¹¹ <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12030:0::NO::> accessed on 18 September 2018 provides a list of all the conventions and recommendations adopted by the ILO. See also Du Toit *et al* (2015) 76.

¹¹² Du Toit *et al* (2015) 76 to 78.

¹¹³ Rodgers *et al* (2009) 7.

¹¹⁴ Cooper (2004-2005) *CLLPJ* 201.

¹¹⁵ See Chapter 4, para 4.2.4.2.

What is important at this point in the discussion is that a summation of the work done by the ILO is indicative of its commitment towards employee protection. This illustrates that the ILO would definitely support an approach to the interpretation of statutory provisions which enhance employee protection rather than limit it. In this regard, it is apt to note that ILO principles resonated with the Wiehahn Commission in its endeavour to reform the industrial relations system in South Africa.¹¹⁶ The Commission advocated for South Africa's labour and industrial relations law and practice to be aligned to the fullest possible extent with international labour conventions, recommendations and other international instruments.¹¹⁷ It is significant to note that the ILO provided fundamental support to the South African Ministerial Task Team appointed by Cabinet in 1994 to draft a Labour Relations Bill.¹¹⁸

Poolman once alluded to the fact that the test of "fairness" of a country's labour standards is the satisfactory application of international labour standards.¹¹⁹ In this regard, South Africa has ratified the core conventions of the ILO.¹²⁰ However, in total it has only ratified twenty-seven conventions,¹²¹ which appears low in comparison to the number of conventions adopted by the ILO.¹²² Notwithstanding these statistics, it is

¹¹⁶ White Paper on Part 5 of the Report of the Commission of Inquiry into Labour Legislation 19.
¹¹⁷ White Paper on Part 5 of the Report of the Commission of Inquiry into Labour Legislation 19.

Even though South Africa has since ratified Convention 100 of 1951, which is one of the core ILO conventions, it was not ratified at the time that the case of *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (IC) was considered. Notwithstanding this, the court pointed out that although the convention is not binding on the court (due to it not being ratified) it is of "great persuasive value" and "it is a pointer to what is world-wide regarded as a good labour practice, a goal for which this court strives" (1074-1075).
¹¹⁸ Explanatory Memorandum (1995) 16 ILJ 280.

¹¹⁹ Poolman (1984) 186. The author refers to the Governing Bodies Preliminary Report on Fair Labour Standards of 1972.

¹²⁰ Du Toit *et al* (2015) 77. Van Niekerk and Smit (2018) 26-27 list the core conventions as being Freedom of Association and the Right to Organise Convention 87 of 1948; Right to Organise and Collective Bargaining Convention 98 of 1949; Forced Labour Convention 29 of 1930; Abolition of Forced Labour Convention 105 of 1957; Minimum Age Convention 138 of 1973; Worst Forms of Child Labour Convention 184 of 1999; Equal Remuneration Convention 100 of 1951 and Discrimination (Employment and Occupation) 111 of 1958.

¹²¹ www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 accessed on 17 September 2018.

¹²² Notwithstanding South Africa's ratification of only 27 conventions, it is noted that this is more than the ratifications undertaken by South Africa's neighbours. See, for example, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103303 accessed on 18 September 2018, which illustrates that Botswana has ratified 15 conventions; https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103008 accessed on 18 September 2018, which illustrates that Namibia has ratified 11 conventions; https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103183 accessed on 18 September 2018, which illustrates that Zimbabwe has ratified

evident that international law plays a significant role in South Africa, as it forms part of the constitutional mandate.¹²³ When South Africa re-joined the ILO in 1994 it confirmed its commitment to human and workers' rights,¹²⁴ which has been fulfilled through its constitutional recognition of international law.

While international law is not devoid of the conflicting interests that exist between employers and employees when giving effect to the notion of fairness,¹²⁵ it is apparent that ILO standards seek to promote worker protection.¹²⁶ As indicated by Cooper, this does not suggest that the notion of fairness excludes employers' legitimate commercial interests, but is an indication that a central concern of modern employment law is to guarantee the protection of workers.¹²⁷ A general principle that can be garnered from ILO standards and instruments is that the ILO supports developments in the law that improve employee protection. To give effect to ILO objectives, the term benefits should not be accorded an overly restrictive description as this would hinder employee protection.

3.5 DISPUTE RESOLUTION

3.5.1 Introduction

This part of the chapter examines the distinction drawn in South African labour law between disputes of right and disputes of interest. It further discusses the relevant dispute resolution bodies responsible for resolving these respective categories of disputes.

26 conventions; https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103188 accessed on 18 September 2018, which illustrates that Lesotho has ratified 23 conventions.

¹²³ The Constitution of the Republic of South Africa, 1996. Section 39(1) of the Constitution makes it mandatory for a court, tribunal or forum to consider international law when interpreting the Bill of Rights.

¹²⁴ Mboweni (1994) *ILJ* 737.

¹²⁵ Cooper (2004-2005) *CLLPJ* 212-213. The author describes the interests of employers as being underpinned by the right to the economic development of their businesses by way of improved production and efficiency, while the interest of workers is said to be the principle of social justice in the workplace.

¹²⁶ Cooper (2004-2005) *CLLPJ* 213.

¹²⁷ Cooper (2004-2005) *CLLPJ* 213-214.

While the differences between disputes of right and of interest is not the focus of this thesis, the outline that follows is significant for understanding the discussion that takes place in succeeding chapters. Chapter 4 discusses the narrow interpretation initially conferred by the LC on the term “benefits”. This approach was based on the need to protect the distinction that exists in labour law between disputes of right and of interest. In order to fully appreciate the LC’s rationale for following such an approach and to evaluate the conclusions reached in this thesis about this narrow approach, it is necessary at the onset to explain these aspects in some detail.

The divide between disputes of right and of interest is also significant in considering benefit disputes that stem from unilateral changes to terms and conditions of employment as discussed in Chapter 8.¹²⁸ Furthermore, an examination of the statutory dispute resolution structures set out in the LRA provides the basis for addressing the third research question. This deals with the extent to which common-law remedies have been supplanted by the unfair labour practice provisions as discussed in Chapter 7.

In summation, while the relevance of the discussion that follows may not be readily discernible, it seeks to lay a solid foundation for the discussions that take place in the chapters below.

3.5.2 Disputes of Right versus Disputes of Interest

Although a multitude of disputes may arise between employers and employees, labour disputes can be divided into two broad categories for legal purposes.¹²⁹ These are disputes of right and disputes of interest.¹³⁰ While the LRA does not expressly distinguish between these two types of disputes by providing a definition or description of each,¹³¹ disputes of right are regarded as disputes arising from a legal claim under instruments such as an individual employment contract,¹³² or from a violation of legally

¹²⁸ See Chapter 8, para 8.2.

¹²⁹ Grogan (1993) 57.

¹³⁰ Du Toit *et al* (2015) 286. See further Grogan *Employment Rights* (2014) 118. Of further relevance is Thompson 1999 *ILJ* 757 who confirms that the “starting-point is the reminder that our system works explicitly with the distinction between disputes of right and disputes of interest”.

¹³¹ Grogan (1993) 57.

¹³² Thompson 1999 *ILJ* 757.

enforceable rights or the non-application of required standards.¹³³ In other words, it is a dispute about a pre-existing right.¹³⁴ On the other hand, disputes of interest are about the creation of new rights or about the alteration of existing rights.¹³⁵

The distinction between disputes of right and of interest are fundamental as each type of dispute has its own dispute resolution mechanisms.¹³⁶ Collective bargaining and industrial action are generally regarded as the most appropriate avenues for the settlement of disputes of interest,¹³⁷ while arbitration and adjudication are regarded as appropriate methods for resolving disputes of right.¹³⁸

The categorisation of disputes and the applicable mechanisms for the resolution of each can be identified through the wording of the LRA. One of the objectives of the LRA is:

“To provide a framework within which employees and their trade unions, employers and employers’ organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.”¹³⁹

¹³³ Blanpain (2004) 596 explains that disputes of right arise in circumstances where an employee has not been treated in line with what is due to him or her or where an employee’s rights or entitlements have not been respected.

¹³⁴ Thompson 1999 *ILJ* 757. Blanpain (1982) 260 explains that “disputes over rights involve the interpretation or application of existing rights created by statutes; individual contracts of employment or collective bargaining agreements; theoretically, at least, they are not concerned with efforts to achieve rights that concededly are not presently in being”.

¹³⁵ *National Union of Metalworkers of SA & others v Fry’s Metals (Pty) Ltd* (2001) 22 *ILJ* 701 (LC) para 25. See further Rycroft and Jordaan (1992) 169 who indicate that disputes of interest were held to concern the creation of fresh rights, such as higher wages. Cameron *et al* (1989) 96 refer to interest disputes synonymously with economic disputes which arose in cases where negotiations for the conclusion, renewal, revision or extension of a collective agreement ended in deadlock. It should be noted that the distinction between disputes of right and interest is not merely a characteristic of the current labour law dispensation but was held to be inherent in the scheme of the pre-1995 LRA as discussed by Rycroft and Jordaan (1992) 170. See also Grogan *Employment Rights* (2014) 118 who explains that “to grasp this issue it must be understood that a distinction has always been drawn in labour law between, ‘disputes of right’ which can be arbitrated and adjudicated, on the one hand, and ‘disputes of interest’ which must be resolved by negotiation or, failing agreement, industrial action. This distinction was merely implicit in the 1956 LRA”. This is further evident from the fact that the Wiehahn Commission’s report, from which the establishment of the IC was borne, recognised the need to distinguish between these two types of disputes as discussed by Kooy *et al* (1979) *SALDRU* 27.

¹³⁶ Newaj and Van Eck (2016) *PER* 6. Blanpain (2004) 595 states that the mechanisms and procedures to be utilised to resolve a dispute will depend on the category into which the dispute has been classified.

¹³⁷ Rycroft and Jordaan (1992) 169. Le Roux (2016) 41. See also Cohen (2004) *ILJ* 1884-1885 who states that in terms of the LRA 1995, interest disputes are intended to be resolved through the collective bargaining process.

¹³⁸ Rycroft and Jordaan (1992) 169. Le Roux (2016) 41.

¹³⁹ Section 1(c) of the LRA 66 of 1995.

In order to fulfil this objective, the LRA provides organisational rights to trade unions and establishes bargaining and statutory councils.¹⁴⁰ A key function of these councils is to provide a platform for parties to negotiate with each other in respect of new terms and conditions or changes in terms and conditions with the purpose of reaching an agreement.¹⁴¹ Such agreements are regarded as collective agreements, which are essentially written agreements that set out specific terms and conditions of employment or other matters of mutual interest agreed upon by the employer and employee.¹⁴²

Interest disputes inevitably arise from the parties' failure to reach an agreement during collective bargaining on the establishment of new terms and conditions, or on the renewal or modification of existing terms or conditions.¹⁴³ The LRA recognises the fact that consensus between parties is not always possible and consequently allows for such disputes to be resolved through the use of industrial action in the form of protected strikes and lock-outs.¹⁴⁴

The LRA defines a "strike" as follows:

"The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee."¹⁴⁵

¹⁴⁰ Sections 11-16 of the LRA 66 of 1995 provide for organisational rights. Sections 27 and 40 of the LRA 66 of 1995 provide for the establishment of Bargaining and Statutory Councils. See further Newaj and Van Eck (2016) *PER* 3 who explain that while the LRA of 1995 does not contain an enforceable duty to engage in collective bargaining, "section 1 of the LRA in no uncertain terms promotes collective bargaining as the means by which 'wages, terms and conditions of employment and other matters of mutual interest' should be determined. Collective bargaining is also bolstered in so far as trade unions are accorded organisational rights".

¹⁴¹ Sections 28(1)(a) and 43(1)(d) of the LRA 66 of 1995.

¹⁴² Section 213 of the LRA 66 of 1995 provides the definition of a collective agreement. See further Blanpain (1982) 220 who explains collective bargaining as a negotiation process between employer and employee parties with the aim of concluding a written agreement.

¹⁴³ Blanpain (2004) 595.

¹⁴⁴ Section 64(1) of the LRA 66 of 1995 which provides for the right to strike and the right to lock-out. Newaj and Van Eck (2016) *PER* 3 explain that section 64(1) of the LRA is proof of its "unambiguous recognition" of the right to strike.

¹⁴⁵ Section 213 of the LRA 66 of 1995. Lock-out is defined as "the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees contracts of employment in the course of or for the purpose of that exclusion".

A key characteristic of the definition of a strike is the fact that a strike may be embarked upon to resolve a dispute regarding “any matter of mutual interest” that arises in the employment relationship. While a matter of mutual interest is not defined in the LRA, Van Niekerk and Smit correctly regard it as being wide enough to include both disputes of right and of interest.¹⁴⁶

In *De Beers Consolidated Mines Ltd v CCMA (De Beers)*,¹⁴⁷ it was held that the term “matter of mutual interest” must be interpreted literally to mean “any issue concerning employment”.¹⁴⁸ Considering this explanation, it is apparent that the term allows for strike action to be embarked upon to resolve both disputes of right and disputes of interest.

However, this understanding is qualified by the LRA. The LRA makes it clear that no person may take part in a strike or a lock-out if the issue in dispute is one that a party has the right to refer to arbitration or to the LC in terms of the LRA or any other employment law.¹⁴⁹

Section 185 of the LRA states that every employee has the right not to be unfairly dismissed or subjected to an unfair labour practice, denoting an unfair dismissal and unfair labour practice as a dispute of right. Section 191 of the LRA, in turn, requires that such disputes be referred to arbitration and in limited circumstances to the LC.¹⁵⁰

Under the LRA, unfair labour practice disputes, including those relating to the provision of benefits, cannot be resolved through strike action and instead must be referred to arbitration. Likewise, a dispute of interest, such as a dispute over what the annual

¹⁴⁶ Van Niekerk and Smit (2018) 473 explain that “dispute about a matter of mutual interest should not be equated with an interest dispute – these are very different concepts. Interest disputes, like rights disputes, when they arise in the context of an employment relationship, are subsets of the broader category of disputes about matters of mutual interest. In other words, disputes about ‘matters of mutual interest’ include disputes of right as well as disputes of interest”. See further Le Roux (2016) 41. The CC in *Department of Home Affairs v Public Servants Association & others* 2017 (9) BCLR 1102 (CC) para 7 explained that “what constitutes a matter of mutual interest is not defined in the LRA. The term ‘serves to define the legitimate scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute-resolution mechanisms, and matters which may legitimately form the subject of a strike or lock-out’. Interest and rights disputes are both matters of mutual interest”.

¹⁴⁷ (2000) 5 BLLR 578 (LC).

¹⁴⁸ *De Beers* para 16.

¹⁴⁹ Section 65(1)(c) of the LRA 66 of 1995.

¹⁵⁰ Section 191 of the LRA 66 of 1995.

salary increase should be, cannot be referred to arbitration but must be resolved through strike action where collective bargaining fails.

While the LRA attempts to distinguish between disputes of right and disputes of interest through the mechanisms employed to resolve each type of dispute, it must be noted that this is not a definitive divide.¹⁵¹ The following dictum by Aaron explains this aptly:

“However, the line between disputes over rights and conflicts over interests is not always an impregnable wall; rather, it sometimes is more analogous to a semi-permeable membrane, through which disputes that are nominally of one type pass and are handled under procedures usually reserved for disputes of the other type.”¹⁵²

Cameron *et al* confirm that the unfair labour practice provisions that existed during the IC era contributed to the difficulty in maintaining a clear distinction between these two types of disputes.¹⁵³ While the IC attempted to maintain a strict divide between disputes of right and of interest¹⁵⁴ this was not always possible.¹⁵⁵ This illustrates that this distinction was not always easy to apply in practice and presented legal challenges.¹⁵⁶

¹⁵¹ See Van Niekerk and Smit (2018) 474 who explain that “this is not a clean distinction – there are at least two categories of dispute where parties have a choice of either arbitration or adjudication on the one hand or industrial action on the other”.

¹⁵² Aaron (1985) 335. See also *Metal & Electrical Workers Union of SA v National Panasonic Co (Parrow Factory)* (1991) 12 ILJ 527 (C) 531F where the court in referring to rights and interest disputes states that the two categories are not “hermetically sealed”.

¹⁵³ Cameron *et al* (1989) 96 explain that “our indigenous system of labour laws has clouded the penumbra still further through the amorphous unfair labour practice jurisdiction”.

¹⁵⁴ The IC in *SA Yster, Staal & Verwante Nywerhede Unie v Yskor Bpk* (1991) 12 ILJ 1038 (IC) found that the dispute did not constitute an unfair labour practice, as it was merely an attempt to acquire better employment conditions making it a dispute of interest (1038H-1039A). As explained by Cooper (2004-2005) *CLLPJ* 208-209 the IC largely declined to consider bargaining aspects, “on the basis that this would have constituted an unwarranted descent into the collective bargaining arena”. Cooper (2004-2005) *CLLPJ* 208-209 further states that the IC regarded its function to be the adjudication of disputes of right, including striking down practices that were unfavourable to the process of fair collective bargaining, thus viewing disputes over new terms and conditions of work as falling outside its jurisdiction.

¹⁵⁵ Le Roux (1987) *ILJ* 196 in discussing the IC and the functions it performed states that it heard interest disputes and rights disputes, as well as various disputes which would be difficult to classify in those terms. See also Cameron *et al* (1989) 97 who in referring to the 1988 amendment to the concept of an unfair labour practice state that the wide definition of the term would appear to allow an almost “limitless range of disputes” to be brought before the IC.

¹⁵⁶ Rycroft and Jordaan (1992) 168. Also refer to Davis (1990) *AJ* 59 who explains that while on one level the distinction between disputes of interest and disputes of right is clear; it has become evident from cases that there are “penumbral controversies which blur the distinction”.

One would have expected that the explicit prohibition by the LRA on the use of strike action to resolve benefit disputes would have eliminated all problems in maintaining a strict divide between these two categories of disputes. However, this expectation was not met, as the distinction between disputes of right and of interest caused controversy in interpreting the unfair labour practice relating to the provision of benefits¹⁵⁷ as discussed in Chapters 4 and 5.

3.5.3 Background to Dispute Resolution Structures

While the IC was a court of equity, where principles of fairness were taken into consideration in its unfair labour practice determinations,¹⁵⁸ a number of shortcomings were identified. One of the challenges was the technicality of processes which resulted in inaccessibility to the layperson.¹⁵⁹ A further concern was that the IC was a court in name only and lacked judicial status because it was not part of the hierarchy of the court system.¹⁶⁰ Disturbingly, the dispute resolution processes were inefficient and expensive, as appeals had to be referred to the LAC and from there to the Appellate Division (SCA).¹⁶¹ As highlighted in the Explanatory Memorandum, a major shortcoming of the previous system was the fact that no court had exclusive jurisdiction over labour matters, as there was a role to be played by the IC, the LAC, the SCA and the civil and criminal courts.¹⁶² Due to overlapping and competing jurisdictions, an impediment of the previous system was that it was not possible to establish a coherent and developing jurisprudence over labour matters.¹⁶³

¹⁵⁷ Grogan *Employment Rights* (2014) 152 explains that questions have been raised regarding how one distinguishes between benefit disputes which should properly form the subject of collective bargaining and those which may be properly enforced by arbitration. See further *SA Chemical Workers Union v Longmile/Unitred* (1999) 20 *ILJ* 244 (CCMA) where the CCMA in dealing with an unfair labour practice relating to the provision of benefits explained that vexed questions are raised in attempting to distinguish between “interest” and “rights” disputes and that it is often difficult to draw a clear line of distinction between the different concepts.

¹⁵⁸ De Villiers (1991) *Consultus* 55 and Poolman (1988) 3 and 6.

¹⁵⁹ Steenkamp and Bosch (2012) *AJ* 121. See further Explanatory Memorandum (1995) *ILJ* 326 where the statutory conciliation process that existed under the IC era is described as not being user friendly.

¹⁶⁰ Explanatory Memorandum (1995) *ILJ* 326. Steenkamp and Bosch (2012) *AJ* 121. Note further Poolman (1988) 3 who explains that while the IC performed the functions of a court of law this did not vary its status as an administrative tribunal.

¹⁶¹ Steenkamp and Bosch (2012) *AJ* 121. See further Explanatory Memorandum (1995) *ILJ* 326 where concerns are expressed over the lengthy delays due to the appeal process.

¹⁶² Explanatory Memorandum (1995) *ILJ* 326.

¹⁶³ Explanatory Memorandum (1995) *ILJ* 326. See further 283 where the dispute resolution procedures that existed under the IC era are described as being ineffective.

In order to address these shortcomings, the objective was to draft a LRA which would, among other goals, provide simple procedures for dispute resolution through statutory conciliation, mediation and arbitration; and to provide a system of labour courts to determine disputes of right in an accessible, speedy and inexpensive manner.¹⁶⁴

3.5.4 Current Dispute Resolution Structures

As mentioned earlier, one of the stated objectives of the LRA is to promote the effective resolution of labour disputes.¹⁶⁵ In order to achieve this objective, the LRA provides for the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA),¹⁶⁶ which is the LRA's "key agency".¹⁶⁷ Bargaining and statutory councils also have the authority to resolve certain disputes, such as unfair dismissal and unfair labour practice disputes,¹⁶⁸ subject to receiving the necessary accreditation.¹⁶⁹ Provision is further made for the establishment of Labour Courts and a Labour Appeal Court.¹⁷⁰

Considering the afore-mentioned structures, it is evident that the intention was to establish a single system of dispute resolution procedures to address these disputes.¹⁷¹

¹⁶⁴ Explanatory Memorandum (1995) *ILJ* 279.

¹⁶⁵ Section 1(d) of the LRA 66 of 1995.

¹⁶⁶ Section 112 of the LRA 66 of 1995.

¹⁶⁷ Du Toit *et al* (2015) 117.

¹⁶⁸ Sections 27 and 40 of the LRA 66 of 1995 provide for the establishment of Bargaining and Statutory Councils. Section 191(1)(a) of the LRA 66 of 1995 allows for unfair dismissal and unfair labour practice disputes to be dealt with by these Councils. See further Van Niekerk and Smit (2018) 483.

¹⁶⁹ In terms of section 127 of the LRA 66 of 1995, such councils may apply to the CCMA for accreditation to conciliate and arbitrate disputes, including unfair dismissal and unfair labour practice disputes. Grogan *Workplace Law* (2017) 478 explains that once bargaining councils are accredited they may perform most of the functions performed by the CCMA. See further Van Niekerk and Smit (2018) 483.

¹⁷⁰ Sections 151 and 167 of the LRA 66 of 1995.

¹⁷¹ Van Eck (2010) *TSAR* 126-127. See further Steenkamp and Bosch (2012) *AJ* 121.

3.5.4.1 The CCMA

The CCMA was touted as the vehicle through which the new dispute resolution dispensation was to be achieved,¹⁷² being described as “the centrepiece of the statutory dispute resolution system”.¹⁷³ The purpose behind the design of the CCMA was for it to be a “one-stop shop” for dispute resolution.¹⁷⁴ The CCMA has indeed fulfilled these expectations as thousands of disputes are referred to the CCMA every year.¹⁷⁵

The primary functions of the CCMA are to resolve the referred disputes through conciliation, and where resolution through conciliation fails, to arbitrate the dispute.¹⁷⁶ This is in line with section 191 of the LRA which requires unfair dismissal and unfair labour practice disputes to be referred to the CCMA or Council¹⁷⁷ to undergo conciliation and arbitration.¹⁷⁸

It often happens that adjudicators have to address preliminary points before hearing the case, which relate to whether they have jurisdiction to consider the dispute before

¹⁷² Bendeman (2006) *AJCR* 82. Steenkamp and Bosch (2012) *AJ* 122 describe the CCMA as the primary dispute resolution mechanism established under the LRA. See further Ferreira (2004) *Politeia* 74.

¹⁷³ Van Niekerk and Smit (2018) 477.

¹⁷⁴ Explanatory Memorandum (1995) *ILJ* 327.

¹⁷⁵ Ferreira (2004) *Politeia* 83 states that from 1 April 2002 to 31 March 2003 an average of 470 referrals per day were made to the CCMA, totalling 118 051 disputes in that year. Bernikow (2007) *LDD* 16 points out that since the CCMA's formation in November 1996 over 1 million disputes had been referred to them by January 2007. The number of disputes referred to the CCMA on a yearly basis can be found in the annual reports. The CCMA's most recent annual report 2016/2017 indicates that 188 449 cases were referred in 2016/2017, while 179 528 cases were referred during the 2015/2016 period. See CCMA annual reports at <https://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports> accessed on 9 May 2018.

¹⁷⁶ Section 115(1)(a) and 115(1)(b) of the LRA 66 of 1995. Steenkamp and Bosch (2012) *AJ* 122 describe the CCMA's primary functions as the resolution of disputes by conciliation and arbitration. See further Fergus (PhD Thesis, University of Cape Town, 2013) 54. As explained by Van Niekerk and Smit (2018) 477, conciliation involves intervention by a CCMA commissioner who is an independent third party. As discussed by Du Toit *et al* (2015) 140 the commissioner assists parties to come together and reconcile their differences with the aim of reaching a mutually-agreed solution or settlement. Van Niekerk and Smit (2018) 481 describe arbitration as a much more formal process, which involves the CCMA commissioner conducting a hearing into the matter in dispute, which entails the leading of written and oral evidence, including evidentiary processes of cross-examination.

¹⁷⁷ Section 191(1)(a) of the LRA 66 of 1995.

¹⁷⁸ Sections 191(4) and 191(5) of the LRA 66 of 1995. There are, however, certain categories of unfair dismissal and unfair labour practice disputes that do not have to be referred to the CCMA or bargaining council. In respect of unfair dismissals, this applies to dismissals for operational reasons 1915(b)(ii). In respect of unfair labour practices it applies to occupational detriments in contravention of the Protected Disclosures Act 26 of 2000 as per section 191(13) of the LRA 66 of 1995.

them.¹⁷⁹ When considering benefit disputes, adjudicators have had to consider firstly whether the issue in dispute constituted a benefit of such nature that the dispute could be classified as an unfair labour practice.¹⁸⁰

A pertinent question that has arisen is whether an employee may elect to lodge a benefits dispute as a contractual dispute. In other words, whether there is room to side-step the dispute resolution mechanisms set out in section 191 of the LRA. This aspect is discussed in Chapter 7.

3.5.4.2 The Labour Court

The LC was established to address the problems caused by the status of the IC and therefore has been set up as a superior court with the same status as that of the High Court (HC).¹⁸¹ The objective of this specialised LC is to determine disputes of right in an accessible, speedy and inexpensive manner with only one tier of appeal.¹⁸²

¹⁷⁹ The CCMA explains that “in limine is a hearing on a specific legal point, which takes place before the actual case referred, can be heard. It is a process that addresses the technical legal points, which are raised prior to getting into the merits of the case and relates to matters of jurisdiction” (at <https://www.ccma.org.za/Advice/CCMA-Processes/In-Limine> accessed on 16 May 2018). Govindjee and Van Der Walt (2010) *Obiter* 486 explain that the CCMA’s jurisdiction refers to the authority of the CCMA to conciliate and arbitrate disputes between parties.

¹⁸⁰ Smit and Le Roux (2015) *CLL* 102 explain that in a number of decisions “the question as to whether a decision of an employer amounted to a decision regarding a benefit was considered to be a jurisdictional issue”. In *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC) para 15 the employer challenged the CCMA’s jurisdiction to consider the dispute based on the allegation that the early retirement package, which formed the basis of the unfair labour practice dispute, was not a benefit. See also *South African Post Office Limited v Gungubele & Others* case no JR2947/2010, 25 February 2014 (LC); *Charlies v South African Social Security Agency & Others* case no JR1272/2011, 13 May 2014 (LC); *South African Post Office Ltd v Kriek & Others* case no P190/12, 22 April 2016 (LC). Jurisdictional challenges also arise in respect of unfair dismissals. In *SA Rugby (Pty) Ltd v SARPU* [2008] 9 BLLR 845 (LAC) the LAC acknowledged that a challenge regarding whether or not there was a dismissal is a jurisdictional issue. The LAC explained that it is important to establish whether or not there was a dismissal, as this determines whether the CCMA has jurisdiction to entertain the dispute.

¹⁸¹ Landman (1988) *Consultus* 29. As explained in section 151(2) of the LRA 66 of 1995 “the Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to matters under its jurisdiction”.

¹⁸² Explanatory Memorandum (1995) *ILJ* 279. See further Landman (1988) *Consultus* 29.

Section 157(1) of the LRA gives the LC exclusive jurisdiction to determine matters conferred upon it by the LRA and any other law.¹⁸³ This essentially gives the LC exclusive jurisdiction in all matters where applicants may obtain relief under the LRA.¹⁸⁴ The justification for conferring exclusive jurisdiction on the LC is the fact that its judges have the necessary knowledge, experience and expertise in the field of labour law.¹⁸⁵

The LC has various powers¹⁸⁶ but for the purposes of this thesis, the most important one is its power to review arbitration awards in respect of unfair dismissal and unfair labour practice disputes, as set out in section 145 of the LRA.¹⁸⁷

3.5.4.3 The Labour Appeal Court

Section 166(4) of the LRA provides that “subject to the Constitution and despite any other law, an appeal against any final judgment or final order of the Labour Court in any matter in respect of which the Labour Court has exclusive jurisdiction may be brought only to the Labour Appeal Court”.

The afore-mentioned section gives the LAC exclusive jurisdiction to hear and determine all appeals against judgments of the LC.¹⁸⁸ It has the power to confirm, amend or set aside a LC judgment.¹⁸⁹ Effectively, the LAC is the highest court of appeal in labour disputes and has equal standing to the Supreme Court of Appeal (SCA).¹⁹⁰ This is subject, of course, to the right of the Constitutional Court to hear a further appeal on any matter, if the matter raises “an arguable point of law of general public importance”.¹⁹¹

¹⁸³ Section 157 of the LRA 66 of 1995. Note further Du Toit *et al* (2015) 185.

¹⁸⁴ Grogan (2017) 480.

¹⁸⁵ Du Toit *et al* (2015) 185.

¹⁸⁶ Section 158 of the LRA 66 of 1995.

¹⁸⁷ Section 145 of the LRA 66 of 1995 allows an award to be set aside if there was a defect in the arbitration proceedings as a result of misconduct by the commissioner in relation to his or her duties; the commission of a gross irregularity in conducting the proceedings; or in instances where the commissioner exceeded his or her powers. See further Van Niekerk and Smit (2018) 488 and Du Toit *et al* (2015) 196.

¹⁸⁸ Section 173 of the LRA 66 of 1995. See further Van Niekerk and Smit (2018) 496 and Du Toit *et al* (2015) 118.

¹⁸⁹ Du Toit *et al* (2015) 211.

¹⁹⁰ Du Toit *et al* (2015) 209.

¹⁹¹ Du Toit *et al* (2015) 118.

Judgments of the LAC are binding on the LC and on adjudicators.¹⁹² Due to the precedent created by decisions of the LAC, it is of vital importance that controversial principles established through such judgments be resolved.

As is seen in Chapters 4 and 5, the LAC has played an important role in attempting to define benefits. However, the LAC has delivered divergent judgments regarding benefit disputes. While recent cases have followed the LAC decision in *Apollo Tyres South Africa (Pty) Ltd v CCMA*,¹⁹³ this decision along with the contrary decisions of the LAC require a circumspect analysis. This analysis is undertaken in the succeeding chapters.¹⁹⁴

3.6 CONCLUSION

Having traversed the current dispute resolution dispensation established by the LRA, the following conclusions can be drawn.

Firstly, the unfair labour practice provisions set out in the LRA sought to address the shortcomings that existed under the IC era by restricting the use of the unfair labour practice dispute resolution mechanisms to challenge only specified practices. Unfortunately, it failed to bring about legal certainty in the field of benefits, which could have been done by providing a clear definition for the term.

Secondly, while the unfair labour practice provisions set out in the LRA take on a different form to the constitutional right to fair labour practices, the constitutional right plays an important role in interpreting such provisions. The preamble to the Constitution, coupled with the inclusion of socio-economic rights in the Bill of Rights, illustrates the human rights element that is present. This plays a fundamental role in interpreting the term benefits and requires that the notion be given a wider interpretation as opposed to a narrow one. A more expansive interpretation will best promote fairness to employees.

¹⁹² Section 182 of the LRA 66 of 1995. See further Grogan (2017) 483.

¹⁹³ [2013] 5 BLLR 434 (LAC).

¹⁹⁴ See Chapters 4 and 5.

Thirdly, the definition must promote the objectives sought to be achieved by the ILO. Considering the social justice perspective enshrined in ILO instruments, a broader definition must be afforded to benefits, which will support the provision of a higher level of protection to employees. This will align to the fundamental principles endorsed by the ILO.

Fourthly, the divide between disputes of right and interest is not watertight. While difficulties have been experienced in maintaining a strict divide between these two categories, the LRA prohibits strike action in relation to unfair labour practices, requiring such disputes to be resolved through arbitration. The term benefits must accordingly be defined in a manner that respects this divide and that takes cognisance of the different dispute resolution mechanisms assigned to resolve these respective categories of disputes.

The above findings make it clear that greater clarity pertaining to the definition of benefits will resolve some, if not all, of the challenges that have been experienced by the judiciary. It will also enhance the legislature's goal of effective dispute resolution and ensure that constitutional and ILO imperatives are met. This will be achieved in the Code of Good Practice: Benefits.

CHAPTER 4

CRITERIA TO DEFINE “BENEFITS”: DELINEATION BETWEEN “BENEFITS” AND “REMUNERATION”

	Page
4.1 Introduction.....	83
4.2 Determining Whether “Benefits” are Part of “Remuneration”...	85
4.2.1 The LRA.....	85
4.2.2 Narrow Approach Adopted by the LC.....	87
4.2.3. Support for the Narrow Approach.....	92
4.2.4 Indicators Against the Narrow Approach.....	97
4.2.4.1 Later Decisions of the LC and LAC	97
4.2.4.2 International Law.....	99
4.2.4.3 Foreign Law.....	103
4.2.5 The Reason for the Narrow Approach.....	105
4.3 Separating Disputes of Interest from Disputes of Right	112
4.4 Wide Range of Disputes	116
4.5 Conclusion.....	120

4.1 INTRODUCTION

As discussed in Chapter 1, this thesis concerns an analysis of the unfair labour practice relating to the provision of “benefits”, as provided for in section 186(2)(a) of the Labour Relations Act (LRA).¹ This is one of the unfair labour practice provisions that have received much attention over the years.² The biggest obstacle is understanding

¹ The LRA 66 of 1995.

² As discussed in Chapter 1, para 1.1 this is evident from the various articles written on this topic. Furthermore, there is a plethora of court decisions highlighting the controversies surrounding the concept of benefits. See, for example, *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC); *Gaylard v Telkom SA Ltd* (1998) 9 BLLR 942 (LC); *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 ILJ 1910 (LC); *Hospersa and another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC); *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703; *IMATU obo Verster v Umhlatuze Municipality & others* [2011] 9 BLLR 882 (LC).

what the term actually entails. This has been triggered by the absence of a definition of benefits in the LRA.³

The emphasis on defining the notion is premised on the fact that unfair labour practices have been strictly codified in the LRA.⁴ Evidently, there is no longer a general overarching right not to be subjected to an unfair labour practice in terms of the LRA.⁵ Needless to say, an employee would only have recourse to the unfair labour practice dispute resolution mechanisms if the issue in dispute falls within one of the practices explicitly provided for.

The first inquiry to be performed by the Commission for Conciliation, Mediation and Arbitration (CCMA) or Council in considering a benefits dispute is to assess whether they have jurisdiction to consider the dispute. As correctly explained in *Walter Sisulu University v CCMA & others (Walter Sisulu)*,⁶ “the issue of jurisdiction is dispositive of a matter because a decision taken without the necessary jurisdiction is a nullity”.⁷

Unfortunately, defining the term benefits has not been an easy task. The Labour Court (LC) has described the true meaning of the word as a “vexed question”, being a matter of legal interpretation.⁸ The complexities in its definition are further evident from the statements made by the Labour Appeal Court (LAC) in *Apollo Tyres South Africa (Pty) Ltd v CCMA (Apollo Tyres)*.⁹ Here the LAC stated that while there is no shortage of judgments and academic writings endeavouring to capture the essence of and define the word benefits in the context of section 186(2)(a) of the LRA, “the word is, in this context, imprecise and defies definition”.¹⁰

³ As indicated by Levy (2009) *ILJ* 1451 the term is not defined in the LRA, nor in any other labour statute. See further Le Roux (2005) *CLL* 1 who states that the difficulty in interpreting and applying the unfair labour practice arises from the meaning to be attached to the word “benefits”.

⁴ See Chapter 3, para 3.2.3.

⁵ *South African Post Office Ltd v CCMA & others* case no C293/2011, 18 June 2012 (LC) para 18.

⁶ Case no P274/12, 5 November 2015 (LC).

⁷ *Walter Sisulu* para 5. See further Myburgh and Bosch (2016) 378 who state that “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”.

⁸ *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 *ILJ* 1910 (LC) para 10.

⁹ [2013] 5 *BLLR* 434 (LAC).

¹⁰ *Apollo Tyres* para 20.

One of the difficulties surrounding the characterisation of the term is understanding whether a distinction should be drawn between benefits on the one hand and “remuneration” on the other.¹¹ The need to maintain such a distinction was initially recognised by the LC in order to protect the divide between disputes of right and disputes of interest.¹²

Considering the above, this chapter seeks to establish whether benefits referred to in section 186(2)(a) form part of the concept of remuneration as defined in section 213 of the LRA. This is an important feature, which will provide clarity on the items that fall within the ambit of this concept, and which therefore may be referred to arbitration as unfair labour practice disputes.

This is done by firstly analysing the two different approaches, namely, the narrow and the broad view, followed by the judiciary. Secondly, international and foreign law are explored to ascertain whether guidance can be gained there. Thirdly, the impact of the divide between disputes of right and disputes of interest is assessed.

A resolution of these matters will move the study one step closer to resolving the first research question, which is determining what the definition of benefits should entail.

4.2 DETERMINING WHETHER “BENEFITS” ARE PART OF “REMUNERATION”

4.2.1 The LRA

Section 186(2)(a) of the LRA defines the term “unfair labour practice” as follows:

“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.”¹³

¹¹ See Chapter 1, para 1.2.

¹² See *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC) as discussed below. See Chapter 3, para 3.5.1 for a discussion on the distinction between disputes of right and of interest.

¹³ Section 186(2)(a) of the LRA 66 of 1995.

While there is no definition for the term benefits in South African labour legislation, there is a very specific definition for the term remuneration. It is important at the outset to introduce the statutory definition of remuneration, based on the fact that earlier cases, as will be seen from the subsequent discussion, placed a great deal of emphasis on this concept in its quest to define section 186(2)(a) benefits.¹⁴

Remuneration is defined in the LRA as:

“Any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and ‘remunerate’ has a corresponding meaning”.¹⁵

The Basic Conditions of Employment Act (BCEA)¹⁶ and the Employment Equity Act (EEA)¹⁷ contain equivalent definitions.

An analysis of the definition of remuneration illustrates that there are two criteria that make up the concept. The first criterion is that of payment being made, which may take the form of money, and/or in kind. The second criterion is the fact that this payment is specifically made in exchange for work done.¹⁸ Differently stated, remuneration is payment made to a person in exchange for that person working and rendering services to another person or organisation.

Prior to the judiciary intervening and providing its interpretation of the concept, Grogan held the view that:

“By benefits the legislature seems to envisage all the rights which accrue to an employee by virtue of the employment relationship – from wages through leave to additional matters like pension, medical aid, housing and so on”.¹⁹

¹⁴ As alluded to in Chapter 1, para 1.2.

¹⁵ Section 213 of the LRA 66 of 1995. See further Levy (2009) *ILJ* 1455, who explains that remuneration is payment made to a worker as a result of the sale of his or her labour.

¹⁶ Section 1 of the BCEA 75 of 1997. The BCEA 75 of 1997 seeks to give effect to the right to fair labour practices enshrined in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment.

¹⁷ Section 1 of the EEA 55 of 1998. The EEA seeks to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment and to further implement affirmative action measures to redress the previous disadvantages in employment.

¹⁸ These conclusions are evident from the definition of “remuneration” in section 213 of the LRA 66 of 1995.

¹⁹ Grogan (1996) *ELJ* 69.

His comments suggest that all aspects which fall within the concept of remuneration, being salaries together with what is commonly referred to as “employee benefits”, constitute benefits within the meaning of section 186(2)(a).

However, as seen in the discussion below the afore-mentioned interpretation was not shared by the LC.²⁰

In the discussion that follows there are two different references used to refer to unfair labour practices relating to the provision of benefits. In some instances, it is referred to as item 2(1)(b) of the LRA, which is how it initially appeared under the “residual unfair labour practice” provisions of the Act. In other instances, it is referred to as section 186(2)(a), which reflects its current position in the LRA.

4.2.2 The Narrow Approach Adopted by the LC

Because of the void created by the absence of a statutory definition for benefits, the courts in considering disputes alleged to be unfair labour practices resorted to considering the dictionary definition of terms such as “benefit” and “fringe benefit”. In *Schoeman & another v Samsung Electronics SA (Pty) Ltd (Schoeman)* Revelas J considered the following facts. The applicant, Ms Schoeman, challenged the variation in the commission sought to be paid to her from 0.5% to 0.23%.²¹ This was after the company that she worked for was taken over by a new employer, who assured her that her terms and conditions of employment would remain unchanged.²² The applicant sought to challenge the change in her commission as an unfair labour practice relating to the provision of benefits.²³

Revelas J considered the *Concise Oxford English Dictionary* definition of the term benefit, which described it as an “advantage or an allowance to which a person is entitled under insurance or social security (sickness, unemployment, supplementary,

²⁰ See *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC); *Gaylard v Telkom SA Ltd* (1998) 9 BLLR 942 (LC); and *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 ILJ 1910 (LC) as discussed in para 4.2.2 below.

²¹ *Schoeman* 1099G.

²² *Schoeman* 1100D-F.

²³ *Schoeman* 1102G-H.

benefit) or as a member of a benefit club or society”.²⁴ Relying on this dictionary definition *Schoeman* sought to draw a clear distinction between remuneration on the one hand and benefits on the other, categorically stating that “a benefit is something extra, apart from remuneration”.²⁵ Revelas J furthered her distinction between these two concepts by stating that remuneration is always a term and condition of an employment contract (in other words an *essentiale*), while benefits are not always a term and condition of an employment contract.²⁶

Schoeman disagreed with the applicant’s contention that the unfavourable change in her commission constituted a benefits dispute. Instead, the LC found that the conduct of the employer constituted a breach of the employment contract.²⁷ The reasons for the judge’s disagreement were as follows:

“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. Item 2 of schedule 7 of the Act list a numerus clausus of types of disputes. In my view, if the legislature wanted to list something as important as remuneration as a dispute under the heading of ‘Residual Unfair Labour Practices’, this would have been done.”²⁸

Revelas J was requested to have regard to the objectives of the LRA and the constitutional right to fair labour practices in interpreting the term.²⁹ In other words, the judge was required to interpret benefits in a purposive manner. However, she was not amenable to ascribing a wide meaning to the term, such that it could be defined as being part of remuneration. As the dispute at hand related to remuneration, the conclusion was that the dispute constituted nothing other than an enforcement of the employment contract, which the LC had no jurisdiction to address.³⁰ Therefore, her judgment was

²⁴ (1997) 18 ILJ 1098 (LC) 1102H-I. Further definitions of “benefits” were enunciated in *SA Chemical Workers Union v Longmile/Unitred* (1999) 20 ILJ 244 (CCMA) 248E-H. Benefits were held to constitute “non-monetary compensation such as sick leave, vacations, company discounts and retirement and medical plans”.

²⁵ *Schoeman* 1102-1103J.

²⁶ *Schoeman* 1103J.

²⁷ *Schoeman* 1102C.

²⁸ *Schoeman* 1102I-J - 1103A.

²⁹ *Schoeman* 1103A-B.

³⁰ *Schoeman* 1103B -C.

decisive of the fact that neither the LC nor the CCMA had jurisdiction to consider disputes relating to remuneration.³¹

This distinction between benefits and remuneration espoused in *Schoeman* was supported by the LC in *Gaylard v Telkom SA Ltd (Gaylard)*.³² Here the court found that accumulated leave pay, which was being claimed by the applicant, was not a benefit.³³ The court held that:

“Wages and salaries, in other words remuneration, should be excluded from the term ‘benefits’. 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.”³⁴

In *Northern Cape Provincial Administration v Commissioner Hambidge NO & others (Northern Cape Provincial Administration)*, the LC had to decide whether the non-payment of an acting allowance constituted an unfair labour practice concerning the non-payment of a benefit.³⁵ The Bargaining Council Commissioner confirmed that an acting allowance does constitute a benefit.³⁶

The LC maintained the distinction between benefits and remuneration by holding that the definition of remuneration, as contained in section 213 of the LRA, is an *essentiale* of a contract of employment, whereas benefits may be part of the *naturalia* of the contract of employment. Landman J expanded on this by stating that “some *naturalia* are the subject of individual or collective bargaining. Others are conferred by law. In my view, a benefit may be part of the *naturalia*. It is not part of the *essentia*”.³⁷

³¹ *Schoeman* 1103F-G.

³² (1998) 9 BLLR 942 (LC).

³³ *Gaylard* para 21.

³⁴ *Gaylard* para 22. See further Du Toit *et al* (1998) 444 who state that the definition of an unfair labour practice relating to the provision of benefits appears to include a range of rights enjoyed by an employee, but excludes ordinary employment rights such as the right to be paid a wage. See further *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd* [1998] 6 BLLR 616 (LC) 619 where the court found that the granting of the use of a motor vehicle by the employer to an employee is a *quid pro quo* for work done and therefore constitutes a form of remuneration. The court stated that: “it is, in fact, part of the employee’s salary, albeit it on a somewhat different basis”.

³⁵ (1999) 20 ILJ 1910 (LC) para 2.

³⁶ *Northern Cape Provincial Administration* para 1.

³⁷ *Northern Cape Provincial Administration* para 13.

Landman J in supporting the afore-mentioned contention referred to the dictionary definition of a fringe benefit, which was found to be a “perquisite or benefit paid by an employer to supplement a money wage or salary”.³⁸ However, by relying on an ILO manual,³⁹ he concluded that a fringe benefit is a supplement for which no work is done.⁴⁰ Landman J supported the view espoused in *Schoeman* that benefits do not fall within the definition of remuneration. Rather, it is something extra awarded to an employee, but which is not awarded in exchange for work done. In other words, it is not a *quid pro quo* for services rendered.

In conclusion, the court found that while it may appear to be fair to pay the employee, the employer has not acted unfairly by failing to pay a higher rate as this does not concern a benefit, even though it would be “beneficial” to the employee. The claim was found to be a “salary or wage issue”.⁴¹

An analysis of these LC cases illustrates that a section 186(2)(a) benefit was viewed as being something awarded to an employee but not awarded for work done, whereas remuneration was specifically awarded for work done. These two terms were viewed as being characteristically different and any aspect that fell within the definition of remuneration could not be a benefit. These decisions present a narrow approach, as on such an interpretation, the term excludes any money paid to an employee or anything in kind awarded to an employee in exchange for that employee working. This approach goes against the purposive interpretation of LRA provisions that is required by both the constitutional right to fair labour practices and international law.⁴² Instead, it limits the protection afforded by the unfair labour practice provisions.

The LC in *Sithole v Nogwaza & others (Sithole)*⁴³ brought in a further dimension to the definition of this term. De Villiers AJ acknowledged that there are differing views as to what constitutes benefits, but concluded that:

³⁸ *Northern Cape Provincial Administration* para 13.

³⁹ Landman J in *Northern Cape Provincial Administration* para 14 refers to the ILO *Wages – A Workers’ Education Manual* (1988) at 70.

⁴⁰ *Northern Cape Provincial Administration* para 14. See further Levy (2009) *ILJ* 1467.

⁴¹ *Northern Cape Provincial Administration* para 17.

⁴² See Chapter 3, paras 3.3 and 3.4.

⁴³ (1999) 20 *ILJ* 2710 (LC).

“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 that arises out of a contract of employment.”⁴⁴

Although the judgment in *Northern Cape Provincial Administration* was cited with approval in *Sithole*,⁴⁵ the study agrees with Smit’s view that the decision is at odds with previous judgments.⁴⁶ Firstly, the court mentions a number of items that it considers to be a benefit. If one considers these items and the fact that they contribute to the employer’s compensation costs, it cannot be said that they are not awarded in exchange for services rendered. Secondly, the court requires a benefit to be stipulated in a contract of employment which contradicts *Schoeman* where it was stated that a benefit will not always be provided for in a contract. The wording of *Sithole* correctly illustrates support for a conclusion that the concepts of remuneration and benefits are intertwined.

Notwithstanding the above, *Sithole* did not unequivocally refute the distinction drawn between these two terms. However, academic writers have rightly rejected this separation.⁴⁷ The distinction sought to be drawn between benefits and remuneration is undoubtedly premised on an “artificial distinction”⁴⁸ and has correctly been referred to as “impractical and illusory”.⁴⁹

As aptly indicated by Smit, an application of the principles laid down in *Schoeman* would result in the unfair labour practice having a very limited scope of application.⁵⁰ This is because of the wide ambit of the definition of remuneration, which according

⁴⁴ *Sithole* para 47. The LC found that Sithole’s claim for private arbitration, which was the subject of the unfair labour practice dispute, did not constitute an unfair labour practice relating to the provision of benefits, and as such the CCMA did not have jurisdiction to consider the matter. This was due the fact that while the provision of private arbitration has value for the employee as he gets to choose the arbitrator and to frame the terms of reference, it does not have monetary value and does not arise out of the contract of employment.

⁴⁵ *Sithole* para 46.

⁴⁶ Smit (2000) *TSAR* 639.

⁴⁷ See Le Roux (1997) (11) *CLL* 97; Le Roux (2005) *CLL* 2; Smit (2000) *TSAR* 636; Grogan (1998) *ELJ* 14; and Le Roux (2006) *ILJ* 56.

⁴⁸ Le Roux (1997) (11) *CLL* 97 states that the example of benefits referred to in *Schoeman* may in practice be regarded as a *quid pro quo* for services rendered in the same way as a wage or commission.

⁴⁹ Le Roux (2005) *CLL* 2.

⁵⁰ Smit (2000) *TSAR* 636.

to *Schoeman* can never be a benefit. Consequently, section 186(2)(a) benefits exclude anything with a monetary value that arises from the employment relationship, as these items constitute remuneration.⁵¹

Grogan shared similar sentiments regarding the unfeasibility of this distinction stating that:

“Samsung tells us that commission forms part of ‘remuneration’. And it also tells us that remuneration is not a ‘benefit’. But its explanation of how to divine the dividing line between remuneration and benefits is hardly helpful. Salary, says the judgment, is a ‘*quid pro pro* for services rendered’ and therefore part of the ‘basic terms and conditions of employment’. A benefit, on the other hand, is ‘something extra, apart from remuneration’. One assumes therefore, that one identifies benefits by asking whether they form part of the basic conditions of employment. But then we are told that a benefit may be one as well but need not be. Where one goes from here the court does not explain.”⁵²

4.2.3 Support for the Narrow Approach

Notwithstanding the justifiable criticism levelled against *Schoeman*, there has been support for this narrow interpretation. Levy sought to extract the definition of benefits by drawing a distinction between remuneration, “allowances” and benefits. Importantly, he made the point that none of these concepts can be defined with reference to “their value, cost or utility, but rather on the reason for which they are paid”.⁵³

With regard to remuneration, he explains that payment is made for the sole reason of one person working for another, what he described as the “effort-reward relationship”. The form of the payment is irrelevant.⁵⁴

⁵¹ Smit (2000) *TSAR* 636. See further Grogan (1998) *ELJ* 14 who states that “if everything that amounts to ‘remuneration’ under this expansive definition is not a ‘benefit’ hardly anything remains that can be described as such”. Le Roux (2006) *ILJ* 56 considered the definition of remuneration in section 213 of the LRA and found that it is difficult to think of any extras that would not be covered by the definition. The appellants’ legal representative in *Hospersa* para 13 made a similar legal argument stating that “the legislature intended the word ‘benefits’ in item 2(1)(b) to bear such a wide meaning as to encompass ‘remuneration’”.

⁵² Grogan (1998) *ELJ* 13. See further Le Roux (1997) (11) *CLL* 97 who expresses his concern with the uncertainty created by *Schoeman* stating that “the rationale for the distinction between ‘benefits’ that may, but need not be, part of the contract of employment, and ‘remuneration’, that will always be part of the contract, is also not clear”.

⁵³ Levy (2009) *ILJ* 1457. This goes contrary to what was stated in *Sithole* where a benefit was regarded as being of monetary value with a cost to the employer.

⁵⁴ Levy (2009) *ILJ* 1457. His reference to the fact that the form of payment is irrelevant illustrates that payments in kind will constitute remuneration and not benefits, as long as the payment is made for work done.

According to Levy an allowance is any payment not arising out of work done, but a payment made in order to allow work to take place or to enable an employee to work.⁵⁵ The definition of an allowance was discussed in *Minister of Justice v Bosch & others (Bosch)*.⁵⁶ Here the LC had to decide whether the CCMA was correct in finding that the employer's failure to grant its employee a subsistence and travel allowance constituted an unfair labour practice.⁵⁷

The LC considered the dictionary definition of the word "allowance", which is defined as "a limited quantity or sum especially of money or food granted to cover expenses or other requirements".⁵⁸ The LC found that the CCMA failed to take account of the fact that the allowance was paid due to the employee being away from his normal place of work. It therefore sought to re-imburse him for the additional expenses that "he would have of necessity incurred".⁵⁹ It stood to reason that the payment did not constitute a benefit but was made to allow work to take place.

According to Levy neither remuneration nor allowances constitute a benefit.⁶⁰ He gives a very narrow definition of benefits by explaining that it is something enjoyed by an employee because of his association with the employer, and not as a result of the work that he performs or as a payment to allow work to be done.⁶¹ The example cited by Levy is that of an employee who works for a bank and by virtue of working for a bank enjoys easier access to home loans.⁶² In such an instance the favourable interest

⁵⁵ Levy (2009) *ILJ* 1458.

⁵⁶ (2006) 27 *ILJ* 166 (LC).

⁵⁷ *Bosch* para 44. The CCMA arrived at this finding as the allowance was held to constitute a material benefit with a monetary value for the employee and cost for the employer; it amounted to a supplementary advantage for which no work was required; and it arose from a contract of employment, collective agreement or statute.

⁵⁸ *Bosch* para 47.

⁵⁹ *Bosch* para 48.

⁶⁰ Levy (2009) *ILJ* 1458. Based on his assessment that remuneration and allowances do not constitute benefits, he states that "the term 'benefits' as found in the unfair labour practice jurisdiction – s 186(2)(a) – must therefore be something other than 'remuneration' or 'allowances' – just what, I have yet to suggest".

⁶¹ Levy (2009) *ILJ* 1460.

⁶² Levy (2009) *ILJ* 1460. A further example cited by Levy is that of employees who worked in supermarkets and who were able to purchase goods that had expired from their employer. See further Tchawouo Mbiada (2014) *ILJ* 97 who in referring to Levy's article gave the example of buying goods at a wholesale price as something that an employee enjoyed because of his association with the employer.

rate awarded to the employee will not fluctuate based on the employee's level of performance, as it is not part of the employee's remuneration, but instead a benefit as envisaged by section 186(2)(a) of the LRA.⁶³

The implication of this interpretation is that material benefits such as access to pension funds, medical aids, housing subsidies and more, while commonly referred to as employee benefits, rather fall within the definition of remuneration and do not constitute section 186(2)(a) benefits. Essentially, a distinction must be drawn between employee or fringe benefits, which are nothing more than remuneration, and section 186(2)(a) benefits. Furthermore, as allowances denote payments made to re-imburse an employee for expenses incurred, these do not constitute either remuneration or section 186(2)(a) benefits.

While this approach appears unconvincing, there have been attempts to support a narrow approach through the use of the BCEA. Section 35(5)(b) of the BCEA of 1997 was postulated as providing clarity on the items that fell within the ambit of section 186(2)(a) benefits.⁶⁴ It was stated that all aspects excluded from an employee's remuneration, as per section 35(5)(b), should be regarded as a benefit within section 186(2)(a).⁶⁵

Section 35(5)(b) provided that:

"For the purposes of calculating an employee's annual leave pay in terms of section 21, notice pay in terms of section 38 or severance pay in terms of section 41, an employee's remuneration would exclude (a) gratuities; (b) allowances paid to an employee for the purposes of enabling an employee to work; and (c) any discretionary payments not related to the employee's hours of work or work performance."⁶⁶

However, as explained by Grogan, section 35(5)(b) of the BCEA was replaced in the 2002 amendments with a provision that allowed the Minister to regulate the forms of payment that should be included in the calculation of remuneration for purposes of

⁶³ Levy (2009) *ILJ* 1460.

⁶⁴ Grogan (2003) 234. See also Le Roux (2002) *ILJ* 1709 who refers to similar sentiments expressed by Grogan, though reference in her article was made to the earlier (6th) edition of *Workplace Law*.

⁶⁵ Le Roux (2002) *ILJ* 1709.

⁶⁶ Section 35(5)(b) of the BCEA 75 of 1997.

annual leave, notice pay and severance pay.⁶⁷ This has been done by way of a *Government Gazette*, which has expanded on the items of payment which do not form part of remuneration for the purpose of these calculations.⁶⁸ According to the new definition the following items are, amongst others, now excluded from an employee's remuneration: any cash payment or payment in kind provided to enable the employee to work (for example, any equipment, tool or similar allowance or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work); gratuities (for example, tips received from customers) and gifts from the employer; discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme); and a relocation allowance.⁶⁹

The wording of the *Government Gazette* illustrates that well-known employee benefits, such as pension, medical aid, housing allowances and car allowances, form part of remuneration. If one accepts the view that only aspects excluded from the calculation of remuneration constitute section 186(2)(a) benefits, this would result in a narrow interpretation of the unfair labour practice provisions, similar to that advocated by Levy. However, the difference is that utilising the BCEA as the yardstick would result in re-imbursive allowances constituting a benefit. Notwithstanding these differences, both approaches limit the definition of section 186(2)(a) benefits.

It does not seem justifiable that statutory intervention in the form of the unfair labour practice was specifically introduced to cover such a limited range of aspects. The intention of the legislature as discussed in Chapter 3 was to codify unfair labour practices in order to bring about a level of certainty.⁷⁰ This was done by specifying the type

⁶⁷ Grogan (2003) 234 and footnote 33 at 234.

⁶⁸ *Government Gazette* 24889, 23 May 2003. Importantly, para 1 of the *Government Gazette* states that the following payments are *included* in an employee's remuneration for the purposes of calculating annual leave; notice pay and severance pay: housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind; car allowance or provision of a car, except those listed as exclusions in terms of this schedule; any cash payments made to an employee, except those listed as exclusions in terms of this schedule; any other payments in kind received by an employee, except those listed as exclusions in terms of this schedule; employer's contributions to medical aid, pension, provident fund or similar schemes; and employer's contributions to funeral or death benefit schemes.

⁶⁹ *Government Gazette* 24889, 23 May 2003, para 2.

⁷⁰ See Chapter 3, para 3.2.1.

of practices that constituted unfair labour practices.⁷¹ However, the over-riding intention of the unfair labour practice provisions is to provide protection against unfair conduct by the employer in relation to such practices.⁷² It does not, therefore, seem rational that a provision envisioned to protect employees would be so narrowly circumscribed.

Furthermore, the exclusion of allowances fails to appreciate that not all allowances are provided to re-imburse an employee for expenses incurred. If one considers acting allowances or housing allowances as examples, these are provided as part of an employee's salary or compensation. While it may be justifiable to conclude that re-imbursive allowances merely seek to compensate an employee for expenses incurred, allowances cannot generally be held to be of a re-imbursive nature.

One would have hoped that the LAC decision of *Hospersa and another v Northern Cape Provincial Administration (Hospersa)*⁷³ would provide further clarity on the matter. This was an appeal against the LC's decision in *Northern Cape Provincial Administration* where it was found that an acting allowance did not constitute a section 186(2)(a) benefit. The LAC in considering the matter took note of the argument by the appellant that the "legislature intended the word benefits in item 2(1)(b) to bear such a wide meaning as to encompass remuneration".⁷⁴ However, the LAC did not consider whether the statutory definition of remuneration encompassed benefits. This was because the LAC considered itself bound by the Public Service Labour Relations Act 105 of 1994, which provided specific definitions of both service benefits and remuneration.⁷⁵

⁷¹ See Chapter 3, para 3.2.3.

⁷² This is in line with the stated purpose of the LRA as discussed in Chapter 3, para 3.2.2. (2000) 21 *ILJ* 1066 (LAC).

⁷³ *Hospersa* para 13.

⁷⁴ *Hospersa* para 13. The definition of service benefits expressly excluded remuneration. The definition stated that "service benefits means privileges, *natura* items and moneys, excluding remuneration and employee compensation, provided to employees in exchange for the execution of their assigned tasks and their compliance with the employer's code of conduct". Remuneration was defined as "salaries, wages, bonuses, remunerative allowances and payment for overtime, including the determination of bonuses and rates thereof, payable to employees in exchange for the execution of their assigned tasks and their compliance with the employer's code of conduct".

The LAC took the definition of service benefits at face value and came to the conclusion that because the definition excluded remuneration, remuneration could not form part of benefits.⁷⁶ The LAC, while pronouncing on other important aspects, which are discussed later in the Chapter,⁷⁷ unfortunately did not further the debate around the distinction between remuneration as defined in the LRA and benefits as referred to in the unfair labour practice provisions. Therefore, the LC's narrow interpretation of section 186(2)(a) benefits remained intact.

4.2.4 Indicators Against the Narrow Approach

4.2.4.1 Later Decisions of the LC and LAC

In later LC cases there was a shift away from the distinction sought to be drawn between benefits and remuneration. In *Protekon (Pty) Ltd v CCMA & others (Protekon)*⁷⁸ the LC had to decide whether the withdrawal of travel concessions by the employer constituted section 186(2)(a) benefits.⁷⁹ The court rejected the principle endorsed in *Schoeman* that a benefit is something extra apart from remuneration:

“In my view, there is little doubt that remuneration in its statutory sense (as defined in the LRA) is broad enough to encompass many forms of payment to employees that may, in the ordinary use of language, properly be described as benefits. There is no closed list of employment benefits that fall within what is contemplated in s186(2)(a). But there can be little doubt that most pension, medical aid and similar schemes fall within the scope of that term. This is so despite the fact that employer contributions to such schemes fall within the statutory definition of remuneration.”⁸⁰

The approach followed in *Protekon* is indeed one that many can identify with, as it gives credence to the common understanding that the receipt of remuneration for work

⁷⁶ *Hospersa* para 13.

⁷⁷ See para 4.3.

⁷⁸ [2005] 7 BLLR 703 (LC).

⁷⁹ *Protekon* para 15.

⁸⁰ *Protekon* paras 19-20. This approach was supported in *IMATU obo Verster v Umhlathuze Municipality & others* [2011] 9 BLLR 882 (LC). Here the LC endorsed a dispute about the payment of an acting allowance as an unfair labour practice (para 23). Similarly, *Trans Caledon Tunnel Authority v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 ILJ 2643 (LC) agreed that a claim to an incentive bonus constituted a benefit dispute, even though it fell within the definition of remuneration (para 30). At para 17 the court stated 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.

done does not only comprise of money in the form of wages and salaries but can include a range of benefits.⁸¹

This principle was supported by the LAC in *Apollo Tyres* where the court considered whether an employer's refusal to grant its employee entry into an early retirement scheme constituted a benefits dispute.⁸² The LAC considered the decision in *Schoeman*, but correctly found that the distinction sought to be drawn between salaries or wages as remuneration and benefits was "artificial and unsustainable".⁸³ The LAC held that the definition of remuneration as stated in the LRA is "wide enough to include wages, salaries and most, if not all extras or benefits".⁸⁴ The court made the following important pronouncements:

"Many benefits that are payment in kind form part of the essentialia of practically all contemporary employment contracts. Many extras are given to employees as a *quid pro quo* for services rendered just as much as a wage is given as a *quid pro quo* for services rendered. The cost to employer package has become, for many employees and employers, a standard contract of employment."⁸⁵

Further support for the integration of benefits and remuneration emanates from the absurd complexities that arise in attempting to distinguish between these two concepts. The chaos caused by such a separation is well illustrated in the case of *Aucamp v South African Revenue Service (Aucamp)*.⁸⁶ Here, the unfair labour practice dispute concerned a claim for a performance bonus. The court, relying on *Schoeman* and *Northern Cape Provincial Administration*,⁸⁷ held that the issue of withholding a bonus could only be an unfair labour practice if it did not fall within the concept of remuneration.⁸⁸ In this instance the performance bonus claimed constituted an unfair labour practice dispute,⁸⁹ as it was not awarded for services rendered and fell outside of the ambit of remuneration.⁹⁰

⁸¹ Le Roux (2002) *ILJ* 1707 explains that attempts to draw a dividing line between benefits and remuneration loses sight of the fact that extras are often included in employment contracts and form part of the cost of employment.

⁸² *Apollo Tyres* paras 2 and 18.

⁸³ *Apollo Tyres* para 25.

⁸⁴ *Apollo Tyres* para 25.

⁸⁵ *Apollo Tyres* para 26.

⁸⁶ [2014] 2 BLLR 152 (LC).

⁸⁷ *Aucamp* paras 26 and 27.

⁸⁸ *Aucamp* paras 25-27.

⁸⁹ *Aucamp* paras 24 and 25.

⁹⁰ *Aucamp* para 25.

However, the LC conceded that certain bonuses are awarded in exchange for services rendered and therefore constitute remuneration.⁹¹ The attempt made to distinguish between these two types of bonuses is extremely confusing. The court referred to the distinction between bonuses paid for working in general and those paid for the nature and fulfilment of the work itself. It held that bonuses paid in the latter instance do not constitute remuneration, while bonuses paid in the former instance would constitute remuneration.⁹²

Keeping the concepts of benefits and remuneration separate, and instead resorting to an inquiry as conducted in *Aucamp*, causes greater ambiguity and leads to a higher degree of legislative uncertainty, which the LRA sought to counter. This clearly goes against the intention of the LRA.⁹³

4.2.4.2 International Law

From an International Labour Organisation (ILO) perspective, there are two conventions that are of some relevance in addressing the interaction between benefits and remuneration, namely, the Protection of Wages Convention (Convention 95) and the Equal Remuneration Convention (Convention 100).⁹⁴

ILO Convention 95 of 1949 forms part of the ILO's commitment towards achieving decent wage levels and fair labour remuneration practices by seeking to protect workers' rights in respect of remuneration.⁹⁵ It provides a definition of the term "wages", which is used synonymously with the term "remuneration". The term "wages" is defined as:

"Remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by

⁹¹ *Aucamp* para 28.

⁹² *Aucamp* para 28.

⁹³ See Chapter 3, para 3.2.1.

⁹⁴ As discussed in Chapter 3, para 3.4, South Africa has ratified 27 Conventions. One of these is Convention 100. However, South Africa has not ratified Convention 95.

⁹⁵ Report of the Committee of Experts (2003) para 2.

an employer to an employed person for work done or to be done or for services rendered or to be rendered.”⁹⁶

Article 4 of the Convention recognises and endorses the partial payment of wages in the form of allowances in kind. The term “wages” is evidently not confined to monetary payments, as there is acknowledgment of the fact that workers frequently receive part of their remuneration “in kind”, which can take the form of goods or services.⁹⁷

While the emphasis of ILO Convention 100 of 1951 is on promoting equal pay amongst the sexes for work of equal value, it provides a definition of the term “remuneration”. Remuneration is defined as being inclusive of 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.⁹⁸

More comprehensive insight into Convention 95 is provided for in the report of the Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts), which was presented at the 2003 International Labour Conference. While Convention 95 was enacted more than 60 years ago, the content of the Convention still has relevance to modern methods of remuneration. As indicated in the report, the intention of the drafters of the Convention was to use the term “wages” not in a technical sense but in a generic sense, the purpose being to cover all forms and components of labour remuneration.⁹⁹ As such, this long-standing Convention remains apposite to remuneration models in modern societies where payments in kind have come to be known as fringe benefits. This is regarded as additional forms of remuneration accruing to the employee over and above the basic pay levels.¹⁰⁰

⁹⁶ Article 1 of ILO Convention on Protection of Wages 95 of 1949.

⁹⁷ Report of the Committee of Experts (2003) para 93.

⁹⁸ Article 1 of ILO Convention on Equal Remuneration 100 of 1951.

⁹⁹ Report of the Committee of Experts (2003) para 37.

¹⁰⁰ Creighton and Stewart (2010) 347 explain that apart from wages, employers can provide fringe benefits, such as a company car, accommodation, superannuation contributions, health insurance and more. Upex and Shrubbsall (1997) 66 similarly explain that it is common for employers to provide their employees with benefits in kind or fringe benefits such as pensions, company cars and access to medical schemes, among others. See further Duggan (2003) 134 who recognises that aspects such as company cars constitute fringe benefits.

The purpose of fringe benefits is seen as a way of keeping up with the cost of living, but also as a way of providing rewards and incentives.¹⁰¹ The Committee of Experts held that fringe benefits may take the form of monetary and non-monetary benefits.¹⁰² Monetary benefits include aspects such as commissions, bonuses, tips, travel or relocation expenses, family, education or training allowances and profit sharing. Non-monetary benefits are described in the report as being inclusive of benefits such as meals, housing and work clothing.¹⁰³

It is generally recognised that in most industrialised countries employee benefits tend to form an increasingly large part of employees' total earnings and that the non-cash element has been growing over the past two decades.¹⁰⁴ The report cites the example of Australia where there has been an increasing trend for the use of salary sacrificing or salary packaging schemes which entail converting an amount of an employee's wage into non-cash benefits, such as a company car.¹⁰⁵ This accommodates aspects raised by South African academics about the change that has prevailed in respect of employee compensation.¹⁰⁶

The report shows that many countries in their national legislation follow a similar approach to Convention 95 in defining terms such as "wages" and "remuneration". This

¹⁰¹ Report of the Committee of Experts (2003) para 100.

¹⁰² Report of the Committee of Experts (2003) para 100.

¹⁰³ Report of the Committee of Experts (2003) para 100.

¹⁰⁴ Report of the Committee of Experts (2003) para 101. This is supported by Creighton and Stewart (2010) 348.

¹⁰⁵ The Report of the Committee of Experts (2003) para 101 refers to other non-cash benefits such as private health insurance coverage and payment of children's school fees. See further Berger (1999) *ILR* 314 who suggests that a similar trend is prevalent in the USA. He states that "the importance of workplace benefits in the American economy can be seen in the dramatic increase in the percentage that benefits represent of total employee compensation. According to U.S. Chamber of Commerce estimates, employee benefits accounted for 3% of total compensation paid to employees in 1929, but this figure had risen to 41.9% by 1996. While some of these costs represent required benefits, such as social security and unemployment insurance, others reflect programs which have become increasingly important in the contemporary economic environment, though not mandatory". Such an approach is also recognised in New Zealand, as is evident from cases such as *Gillespie v Tertiary Education Commission* unreported, V Campbell, 16 September 2005, AA 365/05. Paras 2 and 15 explain that the employer moved away from a single salary package to a total remuneration package, which included a base salary along with other cash benefits. In *Sears v Attorney-General* WEC 36/94 [1994] 2 ERNZ 39 at 3 the total remuneration package offered to Mr Sears was made up of a basic salary, motor vehicle benefit and pension benefit.

¹⁰⁶ Le Roux (2006) *ILJ* 64 indicates that "separating 'benefits' from 'remuneration', considering the nature of modern pay packages, will always be hard".

is in order to ensure that the protection offered by national laws and regulations covers a variety of wage components.¹⁰⁷

The ILO provisions illustrate that the types of benefits envisaged within the concept of wages or remuneration are expansive in nature, being made up of monetary and non-monetary benefits. From an ILO perspective there is no distinction drawn between remuneration and benefits; instead, wages and remuneration are terms used to provide holistically for all forms of employee compensation, including all forms of benefits provided to employees.¹⁰⁸ The term is not limited to benefits provided to employees in exchange for services rendered but includes re-imbursive allowances which are awarded in order to enable an employee to work, such as travel and relocation expenses.

The ILO states that this wide-ranging definition of wages, inclusive of various forms of benefits, seeks to ensure that the protection offered by the national laws and regulations of member states covers a variety of wage components. Considering the wide-ranging array of benefits that fall within the concept of wages and the intention behind such a wide-ranging definition of wages, it is inconceivable that South African legislation through its unfair labour practice provisions seeks to provide protection for benefits that fall outside the ambit of employee remuneration. From an international perspective, benefits are nothing other than benefits linked to compensation and remuneration. Consequently, an approach that separates section 186(2)(a) benefits from employee remuneration is untenable.

¹⁰⁷ The Report of the Committee of Experts (2003) para 3. The wage components referred to are family benefits, production bonuses, commissions and increments, profit shares, non-pecuniary allowances, allowances paid in consideration of the workers seniority, overtime, annual awards and other extra compensatory payments.

¹⁰⁸ Ebrahim (2014) *PER* 604 refers to the definition of remuneration provided for in the Equal Remuneration Convention, as well as the definition of pay in article 141(2) of the EC Treaty. The definition of pay in the EC Treaty also provides for an expansive definition, which is stated 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”. Ebrahim concluded that “it is thus clear that the international practice is to interpret the term remuneration to include benefits”.

4.2.4.3 Foreign Law

If one considers the definition of “wages” and “remuneration” of other jurisdictions, it is apparent that the ambit of these concepts is broad in nature, similar to the ILO approach discussed above. A number of the states in the United States of America (USA) define “wages” as:

“Any non-discretionary compensation due to an employee in return for labour or services rendered by an employee for which the employee has a reasonable expectation to be paid whether determined by a time, task, piece, commission or other method of calculation. Wages include sick pay, vacation pay, severance pay, overtime pay, commissions, bonuses and other amounts promised as well as payments to the employee or to a fund for the benefit of the employee, such as payments for medical, health, hospital, welfare, pension when the employer has a policy or practice of making such payments.”¹⁰⁹

The view is that remuneration is essentially “payment for services rendered”.¹¹⁰ It is acknowledged that such payment can take more than one form. A fringe benefit is recognised as a form of payment and is described as “an economic benefit conferred upon an employee by his employer as compensation for services rendered by the employee”.¹¹¹ In the USA, like in many other countries,¹¹² health insurance and pension benefits are regarded as the key fringe benefits. However, it is recognised that many other benefits are “frequently tied to employment”.¹¹³ Fringe benefits are essentially seen as part of the cost of hiring and retaining a worker, “merely a part of total compensation”.¹¹⁴

The United Kingdom (UK) also has a comprehensive definition of “wages”, as outlined in its Employment Rights Act.¹¹⁵ Wages are defined as sums payable to a worker in

¹⁰⁹ The Report of the Committee of Experts (2003) para 39 refers to legislation from a number of US states, including Arizona, New York, Kentucky, New Hampshire, North Carolina and Texas.

¹¹⁰ Goldman (1984) *CompLL* 229. At footnote 1 it is stated that remuneration is made up of transfers, which have value to workers or their beneficiaries by virtue of the workers’ employment status.

¹¹¹ Sullivan (1965-1966) *STLJ* 59. See further Berger (1999) *ILR* 302 who observes that “the workplace has also become the focal point for securing a number of critical and often expensive employment related benefits. These benefits include such essentials as health insurance and pensions”.

¹¹² Such as South Africa as discussed in para 4.2.1, Australia as discussed above and the UK as discussed below.

¹¹³ Berger (1999) *ILR* 316 refers to other employment benefits such as paid time off from work for sick leave and vacations.

¹¹⁴ Hylton (2004) *CKLR* 639.

¹¹⁵ The Employment Rights Act 1996.

connection with employment and include any fee, bonus, commission, holiday pay or other emolument referable to the worker's employment, whether payable under his contract or otherwise. Wages include statutory sick pay and maternity pay, as well as non-contractual bonus payments.¹¹⁶

In the UK benefits are referred to as things in addition to a worker's basic salary, such as a pension scheme, a bonus or commission scheme, private health insurance, long-term disability insurance, death in service insurance, a company car (or car allowance) and more.¹¹⁷ In a discussion paper on the determinants of pay levels and fringe benefit provision in Britain, aspects discussed as fringe benefits were pensions, enhanced sick pay, job security guarantees and performance-related pay.¹¹⁸

There are two pieces of legislation in New Zealand that shed light on how remuneration is defined. The Remuneration Act,¹¹⁹ which sought to determine rates of remuneration and other conditions of employment,¹²⁰ described remuneration as:

“Salary or wages and all other payments of any kind whatsoever payable to any employee, or to the holder of any office, for his services; and includes any payment by way of expenses, refunds, or allowances to meet expenditure already incurred”.¹²¹

¹¹⁶ Section 27 of the Employment Rights Act 1996. However, aspects excluded from wages are payment made in respect of expenses incurred by a worker in carrying out his employment, any payment of a pension, allowance or gratuity in connection with the worker's retirement or for loss of office, and any payment based on the worker's redundancy.

¹¹⁷ A Guide to UK Employment Law para 2.2(c).

¹¹⁸ Forth and Millward (November 2000) Discussion Paper No.171 at 62.

¹¹⁹ The Remuneration Act 13 of 1979.

¹²⁰ Roper (1982) *NZJIR* 1 states that “the Remuneration Act was introduced into Parliament on 27 July and became law on 10 August. Under it, regulations could be issued for two purposes: to make general adjustments to wages and to set wage rates and conditions for specific groups of workers”. However, as indicated by Roper (1982) *NZJIR* 2 the Act was repealed on 4 November 1980.

¹²¹ The Remuneration Act 13 of 1979.

The Wages Protection Act¹²² defines wages as salary or wages, which includes overtime, bonus or other special payments agreed to be paid to a worker for the performance of service or work.¹²³ In *Attorney-General v Sears*,¹²⁴ the Court of Appeal, referring to the definition of wages in the Wages Protection Act, found that total remuneration is made up of two components, namely, the basic salary and benefits.¹²⁵

These foreign jurisdictions provide convincing authority for the fact that benefits cannot be separated from remuneration. While the definition of wages or remuneration in the abovementioned jurisdictions is broader than the South African definition of remuneration, a common feature of these definitions is that remuneration constitutes more than the actual payment of a wage or salary. In these foreign jurisdictions, similar to the ILO approach, all types of benefits are inextricably linked to compensation received in connection with one's employment. In other words, inextricably linked to remuneration. There are no alternate meanings attached to the word benefits in the context of the employment relationship. As such, benefits as envisaged within section 186(2)(a) of the LRA, with this foreign perspective in mind, cannot be a reference to benefits other than those linked to employee remuneration.

4.2.5 The Reason for the Narrow Approach

The above discussion points to a conclusion that the initial decisions of the LC, which sought to exclude section 186(2)(a) benefits from the definition of remuneration were incorrect. However, before definitively concluding that benefits fall within the ambit of remuneration, a fundamental aspect that must be considered is the reason behind the narrow approach initially adopted by the LC.

Le Roux stresses the point that the courts adopted this narrow interpretation of benefits to protect the distinction that exists in labour law between disputes of right and

¹²² The Wages Protection Act 143 of 1983.

¹²³ Section 2 of the Wages Protection Act 143 of 1983.

¹²⁴ [1995] 1 ERNZ 627.

¹²⁵ *Gillespie v Tertiary Education Commission* unreported, V Campbell, 16 September 2005, AA 365/05 para 18. As stated in *Gillespie* the court in *Attorney-General v Sears* therefore concluded that the employer's contribution to the Government Superannuation Fund (similar to a pension fund contribution) constitutes a benefit over and above the basic salary.

disputes of interest.¹²⁶ He explained the impact of a wide interpretation of benefits on the right to strike shortly after the introduction of the unfair labour practice, by way of the following two examples.¹²⁷ The first involves a dispute between an employer and its employees over the implementation of a provident fund where the employer refuses to introduce such a fund. The second involves the scenario where two middle managers of a company are of the opinion that they should receive a car allowance, due to such an allowance being standard practice in the industry in which they worked, but their request was refused.

If one considers these two scenarios it is evident that they constitute disputes of interest as the employees seek to create new rights.¹²⁸ However, on a literal interpretation of the meaning “any unfair act or omission between an employer and an employee involving unfair conduct by the employer relating to the provision of benefits to an employee”, the above two examples qualify as alleged unfair labour practice disputes. This is because both scenarios involve a request by employees to be provided with employee benefits and the employees regard the employer’s refusal to provide such benefits as being unfair.

It follows that the unfair labour practice had the potential to bring about compulsory arbitration over disputes of interest.¹²⁹ Allowing such a situation would go against the rights/interest divide, which the LRA seeks to protect.¹³⁰ As discussed in Chapter 3,

¹²⁶ As explained by Le Roux (2005) *CLL* a wide interpretation of the term “benefits” would result in disputes which should typically be resolved through negotiation and possible strike action becoming the subject of compulsory arbitration. For this reason, adjudicators limited the meaning of a benefit as per the decisions in *Schoeman*, *Gaylard* and *Hospersa*. Furthermore, the court in *IMATU* para 13 clarified the rationale for the decision taken in *Hospersa*. It explained that “a strong policy consideration underlying the decision in *Hospersa*, supra, was that to widen the concept of benefits to include claims to receive some material advantage, which an employee is not entitled by virtue of either a contract, collective agreement or statute, would seriously undermine the distinction between rights and interest disputes. Consequently, it would also blur the concomitant division between disputes that must be decided by an adjudicative process and those that fall to be decided in the cut and thrust of collective bargaining”. See further Thompson (1999) *ILJ* 757.

¹²⁷ Le Roux (1997) (7) *CLL* 67.

¹²⁸ See Chapter 3, para 3.5.2 where the characteristics of a dispute of interest are discussed.

¹²⁹ Le Roux (2005) *CLL* 2 states that in practice employees who sought to demand better terms and conditions of employment but who did not have the economic muscle to enforce such demands through a strike could simply characterise the dispute as an unfair labour practice dispute relating to the provision of benefits and have the dispute arbitrated.

¹³⁰ Le Roux (1997) (7) *CLL* 67 referring to the work of the IC is of the view that while there was a fear that the wide definition of unfair labour practice that was introduced in 1979 would be used to enforce compulsory arbitration, this was not the case. The IC instead chose not to intervene in disputes over economic issues, leaving these to be resolved through power play. He states

disputes of interest must be resolved through collective bargaining and industrial action,¹³¹ while arbitration and adjudication are the mechanisms prescribed in the LRA for unfair labour practice disputes.¹³²

By requiring compulsory arbitration of interest disputes through the use of the unfair labour practice provisions, employees' right to strike would become impeded. This is because section 65(1)(c) of the LRA prohibits strike action if the issue in dispute is one that the party is entitled to refer to arbitration.¹³³ This has, therefore, prompted the need to limit the interpretation of the term benefits.¹³⁴ As explained by Le Roux:

"If the term benefit is widely interpreted, this would constitute a significant limitation of the right to strike. An interpretation of item 2(1)(b) has to be found that prevents the arbitration of what would otherwise be interest disputes and which does not unduly limit the right to strike or lock out, but which gives effect to the constitutional right to fair labour practices."¹³⁵

As a result thereof, the courts restricted the meaning of section 186(2)(a) benefits by excluding benefits from the definition of remuneration. Although the court in *Schoeman* when pronouncing that benefits are not part of remuneration did not specifically refer to the rights/interests divide, it appears that this is what Revelas J had in mind. This is evident from the comments of Revelas J in *Gaylard*, a case adjudicated shortly after *Schoeman*. Revelas J stated the following:¹³⁶

"In *Schoeman and another v Samsung Electronic SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC) a strict approach was adopted as to the scope of item 2(1)(b) of the residual unfair labour practice. In this matter I found that the commission component of remuneration is not a benefit. If the term 'benefit' is so generously interpreted so as to include any

that "the Industrial Court actually adopted the approach of leaving to collective bargaining the determination of what demands are reasonable because once the Court embarks on determining the reasonableness of the parties' demands to a dispute, it no longer performs the role of protector of the system of collective bargaining and begins to insinuate itself into its very processes and begins to perform a semi-arbitral function". While Le Roux expresses the view that the 1995 LRA also envisaged a system that would leave interest disputes to collective bargaining, he opines that such an intention has been undermined by the unfair labour practice provisions.

¹³¹ See Chapter 3, para 3.5.2.

¹³² See Chapter 3, para 3.5.2.

¹³³ See Chapter 3, para 3.5.2.

¹³⁴ Le Roux (2005) *CLL* 2 states that the possibility exists for the unfair labour practice provisions to be utilised to resolve disputes of interest. This resulted in the courts and arbitrators limiting the scope of what constitutes a benefit.

¹³⁵ Le Roux (1997) (7) *CLL* 68. See further Grogan (1998) *ELJ* 11.

¹³⁶ *Gaylard* para 22.

advantage or right in terms of the employment contract, even wages, item 2(1)(b) would all but preclude strikes and lock-outs. This was plainly not what the legislature had in mind”.

In *Gaylard*, the court adopted a narrow approach to protect the divide between disputes of interest and disputes of right and to appreciate the fact that the unfair labour practice provisions were designed only for disputes of right.¹³⁷ The court held that if the distinction between disputes of interest and disputes of right would become distorted it would undermine the process of collective bargaining.¹³⁸

Similarly in *Northern Cape Provincial Administration*, Landman J, considering the non-payment of an acting allowance, was primarily concerned with whether or not the dispute related to a matter of mutual interest as contemplated by the Act. The judge was of the view that if it constituted a matter of mutual interest it could not be regarded as an unfair labour practice dispute.¹³⁹ Landman J held that the dispute “is essentially a claim or a complaint that the complainant has not been paid more for a certain period for carrying extra responsibilities. It is a salary or a wage issue. It is not about a benefit. It is about a matter of mutual interest”.¹⁴⁰ It must be noted that the use of the words “mutual interest” were previously concomitant exclusively to disputes of interest.¹⁴¹ The LC concluded that any matter that constituted a dispute of interest could not be entertained as an unfair labour practice.¹⁴²

¹³⁷ *Gaylard* para 22. However, it should be noted that Le Roux (2005) *CLL 2* criticises this narrow approach for the inadequate protection that would be provided to employees.

¹³⁸ *Gaylard* para 22.

¹³⁹ *Northern Cape Provincial Administration* paras 8-9.

¹⁴⁰ *Northern Cape Provincial Administration* para 17.

¹⁴¹ This is evident from the LC’s categorisation of a salary or wage issue as a matter of mutual interest. The salary or wage issue according to the court related to the employee wanting to be paid more yet having no right to receive the higher wage. The court’s categorisation of the dispute was in essence one about the creation of new rights, which constitutes a dispute of interest. See further the categorisation of a dispute of interest as a dispute of mutual interest in *Eskom v Marshall & Others* (2002) 23 *ILJ* 2251 (LC).

¹⁴² A similar approach was followed by the LC in *Eskom v Marshall & others* (2002) 23 *ILJ* 2251 (LC) and *SA Chemical Workers Union v Longmile* (1999) 20 *ILJ* 244 (CCMA). The court in *Eskom v Marshall & others* found that disputes of interest are not contemplated within the concept of unfair labour practice disputes relating to the provision of benefits. Disputes of interest were regarded as relating to matters of mutual interest, which were subject to negotiation on an individual or collective level (para 19). In *SA Chemical Workers Union v Longmile* a dispute regarding the unequal contributions made by the employer to two provident funds established for the benefit of employees, was referred to the CCMA as a “residual unfair labour practice” in terms of section 2(1)(a) and in the alternative section 2(1)(b), specifically in respect of benefits (246C-D). The CCMA commissioner supported the approach followed in *Schoeman* holding that “in the final analysis, I am of the view that the most expedient approach to follow is that which was adopted in the Samsung judgment which narrowly circumscribes the ambit of what constitutes a benefit” (252G-J and 253A-B). The CCMA acknowledged that while it is often

The possibility of the unfair labour practice curtailing the right to strike was viewed in a very serious light, considering the fact that both the Constitution¹⁴³ and the LRA¹⁴⁴ enforce this right. As stated by Grogan:

“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 lock-outs. 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. That clearly was not the intention of a legislature bound by the Constitution to uphold the right to strike. So wages and salaries must be excluded from the term benefits.”¹⁴⁵

Smit explains that while a narrow interpretation of benefits would lead to the unfair labour practice having a limited scope of application, a wide interpretation of benefits to include aspects of remuneration would have dire consequences, as almost all strikes relating to remuneration would be unprotected.¹⁴⁶

From the above discussion it is clear that the intention behind the narrow interpretation of “benefits” was to prevent disputes relating to the establishment or creation of new forms of remuneration being dealt with as unfair labour practices. The objective was to ensure that the unfair labour practice provisions dealt exclusively with disputes of right.

The LC cannot be faulted for seeking to keep disputes of interest outside the ambit of an unfair labour practice dispute, as unfair labour practices do not cater for disputes over the creation of new rights, such as new forms of remuneration.¹⁴⁷ However, the question is whether it was logical for this to be done in the manner in which it was.

difficult in principle to draw a clear line of distinction between the different concepts, viz interest and rights disputes, the adoption of a broad definition of unfair labour practices relating to the provision of benefits would result in disputes traditionally falling within the domain of interest disputes being subject to arbitration (249B).

¹⁴³ The Constitution of the Republic of South Africa, 1996.

¹⁴⁴ The LRA 66 of 1995.

¹⁴⁵ Grogan (1998) *ELJ* 11. See further Smit (2000) *TSAR* 635 who explains that “on the one hand, anything that is included under the term benefit cannot be the subject of a protected strike in terms of section 65(1)(c) of the Act. Contrarily, 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”.

¹⁴⁶ Smit (2000) *TSAR* 636.

¹⁴⁷ This is evident from the fact that section 191 of the LRA requires unfair labour practice disputes to be resolved through arbitration or adjudication. Furthermore, section 65(1)(c) of the LRA prohibits strike action “where the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this act or any other employment law”.

Le Roux advances the convincing argument that a narrow approach to the interpretation of benefits, which seeks to preserve the right to strike, loses sight of the fact that the ability to embark on protected industrial action is not determined by whether the subject-matter of the dispute relates to remuneration. The question is rather whether there is an alleged infringement of rights.¹⁴⁸ Therefore, arbitration would be permissible in respect of an alleged unfair application of a remuneration policy, the timing of payment and the method of payment, despite the fact that these issues relate to remuneration.¹⁴⁹

Furthermore, the definition of remuneration in the LRA refers to payments in money and/or in-kind given to an employee in exchange for work done. On a plain reading of the definition of remuneration, it denotes agreed-upon payments, and there is no suggestion that these payments could in any way be referring to salary or wage demands. Furthermore, from the context in which the term “remuneration” is used in other parts of the LRA, it is evident that it refers to actual employee compensation and not demands for compensation that would be the subject of collective bargaining.¹⁵⁰ Therefore, the LC in its earlier decisions misconstrued the use of the word “remuneration” as being a reference to demands for wages, salaries or other employee benefits – in other words, claims that could give rise to disputes of interest. The courts failed to take account of the fact that remuneration cannot only be seen from this one perspective as there are other connotations attached to the term.

¹⁴⁸ Le Roux (2002) *ILJ* 1708-1709.

¹⁴⁹ Le Roux (2002) *ILJ* 1708-1709. The view of Le Roux is supported by cases such as *MEC of Department of Sport, Recreation, Arts and Culture Eastern Cape v GPSSBC & others* case no P206/2013, 26 June 2015 (LC) and *Mathibeli v Minister of Labour* (2015) 36 *ILJ* 1215 (LAC). Both of these cases, which dealt with the upgrading of posts, endorsed the fact that a claim for a higher salary can constitute a dispute of right. The mere fact that the dispute relates to salaries does not automatically result in it constituting a dispute of interest. In *MEC* para 61 the LC made important pronouncements about the fact that a claim for a higher salary can constitute a dispute of right and will not necessarily amount to an interest dispute. However, at para 73 the court found that it can never constitute a rights dispute where there is merely a demand for the upgrading of posts. In *Mathibeli* para 19 it was similarly held that a claim based on being paid the wrong amount is not necessarily a dispute of interest. It can be a dispute of a right depending on the circumstances of the dispute.

¹⁵⁰ This is evident from the use of the term “remuneration” in section 194 of the LRA, where it is used in the context of existing remuneration. A similar connotation is given to the term in other sections, such as sections 198B (10), 199(1a) and 170(4).

In addition, this narrow approach was in total discord with the history of the unfair labour practice concept. It must be kept in mind that the unfair labour practice provisions contained in section 186(2)(a) are a remnant of the unfair labour practice jurisprudence that developed under the IC era.¹⁵¹ Significantly, the IC dealt with rights disputes relating to issues such as pension funds and the payment of wages.¹⁵² It is inconceivable that the contemporary unfair labour practice provisions drawing on the fairness imperatives established by the IC were enacted to provide protection in relation to benefits, but then limit the protection to benefits that fall outside of the concept of remuneration. Such protection would be negligible as all employment benefits are components of remuneration. Even the benefits referred to by Levy, such as lower interest rates, may be regarded as non-monetary fringe benefits. This is still part of wages or remuneration as explained by the ILO.¹⁵³

However, it is indeed troubling that despite the intention of the legislature as discussed in Chapter 3, which was to create certainty, it failed to word the unfair labour practice relating to benefits differently. A lot of confusion would have been eliminated if the notion was worded as an unfair labour practice relating to the provision of remuneration. The exclusion of remuneration from the list of items that constitute an unfair labour practice has given rise to assumptions that disputes relating to remuneration was not meant to be dealt with as unfair labour practices.¹⁵⁴

Notwithstanding the above, the study does not support the narrow interpretation of benefits. The *lacunae* that exist in the law are attributed to the legislature's failure to appreciate the potential complexities that could arise through its wording. As indicated by Cheadle, the unfair labour practice provisions, which were imported into the 1995 LRA, were not subjected to careful scrutiny, except for the unfair dismissal provisions.¹⁵⁵

¹⁵¹ Cheadle (2006) *ILJ* 671.

¹⁵² See Chapter 2, para 2.5.6.

¹⁵³ See para 4.2.4.2 above.

¹⁵⁴ See comments by Revelas J in *Schoeman* 1102I-J - 1103A.

¹⁵⁵ Cheadle (2006) *ILJ* 664 explains that "because the remedies for unfair labour practices in the Labour Relations Act (LRA) have never been subject to any careful scrutiny, the need for, and effect of, providing these remedies need to be thoroughly reviewed – not just for small employers but for all employers".

While it is disappointing to note that opportunities to amend the LRA were not seized,¹⁵⁶ these *lacunae* cannot be linked to a legislative intention to keep benefits outside the ambit of remuneration. This is because of the overwhelming influences that point to a contrary objective. These factors are the purpose of the LRA and the unfair labour practice provisions; the terminology used to describe remuneration; the stance taken in cases such as *Protekon* and *Apollo Tyres*; and the approach garnered from the ILO and foreign law jurisdictions.

Considering all of the above, the only plausible conclusion that can be reached is that benefits referred to in section 186(2)(a) fall within the statutory definition of remuneration.

4.3 SEPARATING DISPUTES OF INTEREST FROM DISPUTES OF RIGHT

It is unquestionable that the unfair labour practice was only intended to address rights disputes and not interest disputes. While the distinction between remuneration and benefits was not the correct way of ensuring this divide, a mechanism is needed to distinguish between benefit disputes which should be the subject of collective bargaining, as opposed to rights disputes that should be arbitrated in line with the unfair labour practice provisions. This is evident from cases such as *Protekon* and *Apollo Tyres*, which, while disagreeing with the approach of separating benefits from remuneration, were mindful of the need to maintain a divide between interest and rights disputes.¹⁵⁷

Both *Protekon* and *Apollo Tyres* made two important pronouncements on the manner in which this divide should be maintained.

¹⁵⁶ Le Roux (2002) *QLRPB* 87 referring to the 2002 amendments to the LRA observes that “in view of the difficulties experienced by the courts in giving guidance in respect of the meaning of the phrase ‘provision of benefits’, it is rather surprising that Parliament did not see fit to provide clarity”. Le Roux (2002) *ILJ* 1709 refers to this as a missed opportunity by the legislature. It is further noted that amendments have been effected in other instances where the LC wrongly interpreted legislative provisions. Newaj and Van Eck (2016) *PER* 18 explain the amendments made to section 187(1)(c) of the LRA in the Labour Relations Amendment Act 6 of 2014. The reason for the amendment was the fact that the court’s interpretation of section 187(1)(c) in *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA* 2003 *ILJ* 133 (LAC) did not give effect to the true intention of the provision.

¹⁵⁷ *Protekon* paras 32-34 and *Apollo Tyres* para 44.

The LC in *Protekon* appreciated the fact that if some forms of remuneration constituted section 186(2)(a) benefits, it might unduly curtail industrial action in an area typically regarded as the proper subject of collective bargaining.¹⁵⁸ However, the court found that this concern need not persist,¹⁵⁹ based on the following reasoning:

“Disputes over the provision of benefits may fall into two clearly identifiable categories: the first is where the issue in dispute concerns a demand by employees that certain benefits be granted (or reinstated) irrespective whether the employer’s conduct in not agreeing to grant the benefit (or in removing it) is considered to be unfair; the second is where the issue in dispute is the fairness of the employer’s conduct. No party has a right to refer disputes in the first category to arbitration, and there is consequently no barrier to industrial action at the point of impasse. The converse is true of disputes in the second category.”¹⁶⁰

The LAC in *Apollo Tyres* accepted the approach adopted in *Protekon*,¹⁶¹ stating that the earlier approach of limiting the scope of a benefit in order to protect the right to strike was not at issue, because the determining fact would be the nature of the benefit dispute.¹⁶² The issue to be considered was whether or not the dispute concerned the fairness of the employer’s conduct. Where fairness was at issue, it would constitute a dispute of right to be resolved in terms of the unfair labour practice provisions.¹⁶³

To summarise, the first important pronouncement made was that the distinction between rights and interest disputes is adequately achieved by assessing whether the benefit dispute concerns the fairness of the employer’s conduct.

¹⁵⁸ In *Protekon* para 18 the court took note that previous decisions were concerned that if benefits were interpreted too widely it would give parties the right to refer a wide range of disputes to arbitration, which would include disputes about remuneration. Therefore, section 65(1)(c) of the LRA would disallow industrial action over a range of remuneration disputes that properly fell within the realm of collective bargaining.

¹⁵⁹ *Protekon* para 21. This stance is supported by Le Roux (2006) *ILJ* 61.

¹⁶⁰ *Protekon* para 22. The LC in *IMATU* para 18 agreed with this approach stating that: “*Protekon*, supra, also usefully makes the point that concerns about blurring the line between those issues which are justiciable and which are the subject-matter of collective bargaining are not best resolved by trying to draw a bright line between remuneration and other benefits. Rather, the question can be decided by a proper conceptualisation of the true nature of the dispute between the parties and not how they have characterised, or ‘packaged’ it”.

¹⁶¹ In *Apollo Tyres* para 28 it is stated that “in *Protekon (Pty) Ltd v CCMA and others*, it was correctly, in my view, stated that the concern that a wide definition of ‘benefit’ might curtail the right to strike needs not persist”.

¹⁶² *Apollo Tyres* para 28.

¹⁶³ *Apollo Tyres* para 28.

Although the removal of the distinction between benefits and remuneration is welcomed, the LAC's conclusion is unconvincing. A challenge to the fairness of the employer's conduct does not translate into the dispute automatically constituting a dispute of right. The fairness of the employer's conduct can similarly be challenged in respect of a benefit still to be established.¹⁶⁴ Hence the utilisation of fairness as the yardstick to identify disputes of right will lead to different interpretations, thereby accentuating the ambiguity and continuing to blur the lines.

Determining whether the subject of the dispute constitutes a dispute of right requires a separate inquiry, in which fairness does not play a role. There should be two inquiries, the first inquiry being whether the matter before the arbitrator is a dispute of right, as opposed to a dispute of interest. Only once it has been established that the benefit dispute is a dispute of right, can the inquiry proceed to the second stage, which is determining the fairness of the employer's conduct. Interlinking these two independent stages of the inquiry obfuscates the process and prevents the development of a clear and concise approach to deal with this unfair labour practice.

Fortunately, this was not the end of the matter. The LC in *Protekon* went on to discuss its agreement with the sentiments expressed by the LAC in *Hospersa*.¹⁶⁵ This related to the fact that the unfair labour practice jurisdiction cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided by the employer.¹⁶⁶ The court in *Protekon* agreed that allowing an employee to utilise the unfair labour practice jurisdiction to establish new contractual terms would go against the intention of the LRA, which contemplates that such issues be left to a process of bargaining between the parties.¹⁶⁷

The LAC in *Apollo Tyres* quite correctly confirmed this approach, finding that the unfair labour practice jurisdiction cannot be used to create new benefits or new forms of remuneration which were not previously provided by the employer.¹⁶⁸

¹⁶⁴ Grogan (1998) *ELJ* 11 explains that "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".

¹⁶⁵ *Protekon* paras 32-34.

¹⁶⁶ *Protekon* paras 32-34.

¹⁶⁷ *Protekon* paras 32-34.

¹⁶⁸ *Apollo Tyres* para 44.

Considering the above discussion, the second important pronouncement was that rights and interest disputes can be separated based on whether the contingency being claimed is pre-existing. The study agrees that this is the correct manner in which to distinguish between a rights and interest dispute.¹⁶⁹ It was therefore unnecessary for the LC and LAC to have postulated fairness as the mechanism that should be used to separate the divide between these categories of disputes, since they recognised that the unfair labour practice provisions may only be used to challenge existing benefits.

In view of the above summation, the restrictive interpretation given by the courts to the term benefits in order to protect the divide between rights and interest disputes was flawed. The courts should have interpreted benefits and remuneration as being part of the same concept and when faced with an unfair labour practice dispute, the question should merely have been whether the dispute related to pre-existing benefits. In cases where the dispute related to existing benefits, it would be a matter that the judicial bodies could entertain. Distinctively, in cases where it did not relate to existing benefits, judicial bodies would not have had jurisdiction to deal with it as an unfair

¹⁶⁹ This principle was also established in earlier cases. In *SA Chemical Workers Union v Longmile* (1999) 20 ILJ 244 (CCMA) a dispute regarding unequal contributions made by the employer to two provident funds established for the benefit of employees was referred to the CCMA (246C-D). While the CCMA agreed with the narrow approach to the definition of a benefit as adopted in *Schoeman*, it found that the unfair labour practice provisions apply only to existing benefits (252G-J and 253A-B). The CCMA stated as follows: "I think that even on a narrow construction of the meaning to be attributed to the word benefit, it may be appropriate to distinguish between existing benefits that are conferred or unfairly withheld from certain employees and benefits that are not provided at all. It is only the unfair conduct relating to the provision of existing benefits and not for instance of application to the case of the employer who does not provide any medical or pension benefits at all. The latter scenario favourably lends itself to collective bargaining and industrial action." The LAC in *Hospersa* (2000) 21 ILJ 1066 (LAC) gave authority to this principle through the following important pronouncements: "It appears to me that the legislature did not seek to facilitate, through item 2(1)(b), the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(1)(b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give him or her, to create an entitlement to such benefits through arbitration in terms of item 2(1)(b)" (para 8). Similarly, the LAC in *Gauteng Provinsiale Administrasie v Scheepers & others* (2000) 21 ILJ 1305 (LAC) held that since a rights dispute must be one about a right or rights, the applicants were obliged to show what the right was and where it was located (para 8). Although the court in *Scheepers* did not deal with an unfair labour practice dispute relating to the provision of benefits, as it was an appeal from a judgment of the IC, it nonetheless made relevant findings. The court found that there is a valuable collection of authorities stemming from the IC on what is to be comprehended under the notion of dispute of right. The court held that these authorities illustrate that, by and large, disputes of right concern the application or interpretation of existing rights. The LAC in *Scheepers* held that even though the employees should be given better conditions of employment, the awarding of more favourable conditions is a dispute of interest, which can only be resolved through the mechanisms of collective bargaining (para 12).

labour practice dispute. Instead, it would have had to be resolved in line with the procedures available for disputes of interest.

4.4 WIDE RANGE OF DISPUTES

Because there is no distinction between benefits and remuneration, a wide range of disputes fall to be considered as unfair labour practices under benefits. These are claims for accumulated leave pay;¹⁷⁰ travel and transport allowances;¹⁷¹ performance bonuses;¹⁷² notch increases and pay progression;¹⁷³ disability leave and additional

¹⁷⁰ See *SA Airways (Pty) Ltd v Jansen van Vuuren* (2014) 35 ILJ 2774 (LAC) where the LAC held that a claim for accumulated leave pay constituted a benefit. The LAC relied on the broad interpretation given to the term “benefits” in *Apollo Tyres*, stating that “in light of *Apollo*, the word ‘benefits’ in section 186(2)(a) may be construed broadly” (para 114). It is important to note that this is the only LAC decision following *Apollo Tyres* that dealt with the interpretation of benefits.

¹⁷¹ See *South African Revenue Services v Ntshintshi & others* (2014) 35 ILJ 255; *Ehlanzeni District Municipality v South African Local Government Bargaining Council & others* case no JR1163/10, 30 September 2014 (LC); *City of Cape Town v SA Local Government Bargaining Council & others* (2014) 35 ILJ 163 LC; and *Harris v Msunduzi Municipality & others* case no D1101/13, 20 April 2017 (LC).

¹⁷² See *Charlies v South African Social Security Agency & others* case no JR1272/2011, 13 May 2014 (LC). Here the employee referred a claim for a pay progression and bonus as an unfair labour practice. The employer argued against the categorisation of the dispute as an unfair labour practice stating that: “For the purposes of s 186, a benefit is excluded from the definition and scope of what can be defined as remuneration and following this, the applicant is precluded from relying on 186(1)(b), more particularly that relating to benefits for the simple reason that his dispute is in fact a claim for remuneration” (para 8). The LC held that the argument that “benefits and remuneration are mutually exclusive stands to fall and with that, the arbitrator’s findings on jurisdiction must further fall away” (para 12). See further *Rainbow Farms (Pty) Ltd v CCMA & others* case no C377/2012, 29 May 2015 (LC); *Aucamp v South African Revenue Service* [2014] 2 BLLR 152 (LC); and *Solidarity obo Oelofse v Armscor & others* case no JR2004/15, 21 February 2018 (LC).

¹⁷³ See *Western Cape Gambling & Racing Board v CCMA & others* case no 973/2013, 20 February 2015 (LC).

sick leave;¹⁷⁴ acting allowances;¹⁷⁵ job grading;¹⁷⁶ and reduction in salary¹⁷⁷ among others.¹⁷⁸

If one considers the above aspects, benefits can be classified into three broad categories. These are pre-existing employee or fringe benefits; pre-existing salaries or wages; and pre-existing allowances.

Aspects such as leave would typically be regarded as employee or fringe benefits, which are forms of remuneration in addition to actual salaries and wages, similar to employer contributions to pension and medical aid schemes. Employee or fringe benefits also constitute aspects such as the provision of housing, food and a company car, which illustrates that they comprise of both monetary and non-monetary benefits. This ties in with the definition of remuneration, which refers to payment in money and/or in kind.

Items such as pay progression and acting allowances more accurately fall within the salary or wage component of remuneration. However, it must be noted that the LC in

¹⁷⁴ In *South African Post Office LTD v Kriek & others* case no P190/12, 22 April 2016 (LC) the employee applied for temporary disability leave, but her application was disapproved on the basis that there was evidence of sick leave abuse and no medical evidence to justify her prolonged absence (para 1). Her employer started making deductions from her salary, as she was paid in full during her prolonged absence, pending the outcome of her temporary disability application (para 1). At arbitration, the employer challenged the jurisdiction of the CCMA, but the arbitrator found that the refusal of temporary disability benefits (additional sick leave) constituted an unfair labour practice (para 2). The LC relying on the LAC decision in *Apollo Tyres* found that the arbitrator's reasoning was in line with the LAC's classification of benefit disputes (para 11). See further *Dauids-Paulse v MEC for Department of Education Northern Cape & others* case no 825/15, 4 December 2015 (HC) which concerned a dispute about additional sick leave (paras 9-10). Notwithstanding the fact that the HC did not consider the matter, it stated that with reference to the LAC decisions of *Apollo Tyres* and *Jansen van Vuuren*, cases like that of the applicants "would stand on solid ground if they go the Labour Court route" (para 24).

¹⁷⁵ See *South African Post Office Limited v Gungubele & others* case no JR2947/2010, 25 February 2014 (LC). Here the applicant sought to review and set aside an arbitration award which found that the applicant had perpetrated an unfair labour practice relating to benefits due to the non-payment of an acting allowance. The court relying on the judgment of *Apollo Tyres* found that the CCMA had jurisdiction, as the issue in dispute constituted a benefit (para 11).

¹⁷⁶ See *Thiso & others v Moodley & others* (2015) 36 ILJ 1628 (LC).

¹⁷⁷ See *Pretorius v G4S Secure Solutions (SA) (PTY) LTD & others* case no JR2498/13, 4 November 2015 (LC).

¹⁷⁸ In *Makhoba v CCMA & others* case no JR1820/12, 25 October 2017 (LC) the CCMA found that the non-payment of a shortfall to the employee, which arose as a result of the employee selling his property below market value as he was transferred, fell within the scope of an unfair labour practice relating to the provision of benefits (para 14).

Walter Sisulu rejected a claim to be paid a higher salary as an unfair labour practice.¹⁷⁹ Here the employee who was appointed as a Clinical Associate Teacher became aware that other teachers having the same job description as hers were employed on a higher grade. The arbitrator found that the employer's failure to offer the same salary and benefits for the same category of employee was inconsistent and unfair.¹⁸⁰ On review the LC found that the issue in dispute fell outside the ambit of section 186(2)(a) of the LRA,¹⁸¹ stating that "even an expansive interpretation of an unfair labour practice excludes disputes involving levels of remuneration".¹⁸²

It is concluded that this decision was erroneous and would not have survived the scrutiny of the LAC. *Apollo Tyres*, the leading case in this regard, in no way excluded disputes relating to the salary component of remuneration from the ambit of an unfair labour practice. This is evident from the pronouncements made by the LAC that the term benefit includes a right to which an employee is eligible.¹⁸³ This would be inclusive of established wage or salary levels.

The key component in establishing whether the dispute falls within the confines of an unfair labour practice is whether there is a right or entitlement to receive the item being claimed as a benefit. In other words, it cannot be a claim for remuneration that is currently not provided for (that is a dispute of interest). In *Walter Sisulu*, the salary grades, levels of overtime payments and provision of a scarce skills and rural allowance was in place but was not being consistently applied. As such, the employee was not asking to be provided with remuneration that was not in existence.

Many cases give credence to the fact that the circumstances that were present in *Walter Sisulu* would in terms of the *Apollo Tyres* approach constitute an unfair labour practice relating to the provisions of benefits.¹⁸⁴ Consequently, pre-existing salaries and wages cannot be excluded from section 186(2)(a) benefits.

¹⁷⁹ *Walter Sisulu* para 5.

¹⁸⁰ *Walter Sisulu* para 2.

¹⁸¹ *Walter Sisulu* para 3.

¹⁸² *Walter Sisulu* para 5.

¹⁸³ *Apollo Tyres* para 50.

¹⁸⁴ In *Thiso & others v Moodley & others* (2015) 36 ILJ 1628 (LC) there were seven applicants who were on job category A3. A job evaluation process recommended that the positions be upgraded to A2, but the employer did not implement the decision (para 2). The matter was referred as an unfair labour practice, but the arbitrator found that he did not have jurisdiction to consider

In respect of allowances, notwithstanding the decision of the LC in *Bosch*, which was discussed earlier in the chapter,¹⁸⁵ there is support for the fact that allowances fall within the definition of benefits. As alluded to, not all allowances are of a re-imbursive nature, such as the type discussed in *Bosch*.¹⁸⁶ In many instances allowances are nothing more than remuneration, either falling within the ambit of the employee or fringe benefit component of remuneration or falling within the ambit of the salaries or wage component of remuneration.

In respect of re-imbursive allowances, the LC judgment in *Bosch* correctly explains the difference between re-imbursive allowances and benefits. Benefits are part of remuneration as they are awarded as a *quid pro quo* for services rendered. Needless to say they form part of the cost to employer package.¹⁸⁷ Re-imbursive allowances, on the other hand, are not given as a *quid pro quo* for services rendered,¹⁸⁸ but merely serve to re-imburse an employee for expenses incurred.¹⁸⁹

Despite the above, recent cases illustrate that re-imbursive allowances are being dealt with as unfair labour practices, based on *Apollo Tyres*. In *City of Cape Town v SA Local Government Bargaining Council & others (City of CT)*¹⁹⁰ the LC referring to the wide interpretation given to the term benefits in *Apollo Tyres* found that the essential

the matter, as he was of the view that disputes concerning regrading of posts did not fall within the ambit of section 186(2)(a) (para 4). The LC found that the arbitrator was wrong relying on the decision of *Apollo Tyres* (paras 14 and 16). *Western Cape Gambling & Racing Board v CCMA & others* Case no 973/2013, 20 February 2015 (LC) involved senior employees being excluded from the employer's adjustment of salaries policy (paras 2 and 4). The adjudicator found that the employer's policy conferred a benefit in terms of the LRA and that the employees were subjected to unfair labour practices relating to benefits as a result of the employer's failure to apply the policy to them (para 11 and 23). In *Pretorius v G4S Secure Solutions (SA) (Pty) Ltd & others* Case no JR2498/13, 4 November 2015 (LC) an employee employed as a security guard was redeployed to another site due to alleged negligence. Her placement at the alternate site resulted in her monthly salary being reduced by R3 872 (para 1). The CCMA found that the dispute did not fall within the ambit of an unfair labour practice (para 8). The LC disagreed, finding that the dispute fell within the ambit of a benefit as contemplated by section 186(2)(a) in line with *Apollo Tyres* (para 17). In this case, the LC was willing to deal with a dispute, which was in essence about a reduction in salary, as an unfair labour practice relating to the provision of benefits.

¹⁸⁵ See para 4.2.3.

¹⁸⁶ See para 4.2.3.

¹⁸⁷ *Apollo Tyres* para 26.

¹⁸⁸ Levy (2009) *ILJ* 1458.

¹⁸⁹ *Bosch* para 48.

¹⁹⁰ (2014) 35 *ILJ* 163 LC.

user scheme must fall within the wider definition of benefit.¹⁹¹ The court found that the reasoning in *Bosch* would no longer stand considering the broad interpretation adopted in *Apollo Tyres*.¹⁹²

As can be gleaned from these decisions, it would be very difficult to keep re-imbursive allowances outside the ambit of benefits. Furthermore, if employees are not permitted to utilise section 186(2)(a) of the LRA to deal with the unfair conduct by an employer in relation to the granting and payment of these re-imbursive allowances, what recourse will they have? Recent cases illustrate that there are inconsistencies in granting such re-imbursive allowances, which is evidence of the fact that recourse is needed in such circumstances. Therefore, pre-existing re-imbursive allowances cannot be excluded from the ambit of benefits.

4.5 CONCLUSION

This chapter was the first step in establishing what the definition of benefits entails. It sought to address a fundamental aspect, namely, whether benefits referred to in section 186(2)(a) of the LRA fall within the concept of remuneration as defined in section 213. This was done by analysing South African case law and exploring international and foreign law. Having traversed these aspects, the following conclusions can be drawn.

Firstly, there were two approaches followed by the judiciary. The narrow approach sought to keep benefits outside the ambit of remuneration, while the wide approach found that the concept of remuneration is broad enough to encompass benefits.

¹⁹¹ *City of CT* para 22. See further *Harris v Msunduzi Municipality & others* case no D1101/13, 20 April 2017 (LC), where the employer's failure to approve a locomotion allowance for the employee was referred to the bargaining council as an unfair labour practice dispute relating to benefits. The LC relying on *Apollo Tyres* found that the adjudicator correctly dismissed this point and correctly found that the transport allowance was a benefit.

¹⁹² In *City of CT* para 22 the court stated as follows: "In *Bosch* the court held that a travel and subsistence benefit was not a benefit as defined because it was a reimbursive payment. It was not a supplementary advantage for which no work is required or an entitlement by virtue of the contract of employment or any other agreement. But in *Apollo Tyres* the LAC has now held that a benefit includes a right or entitlement to which the employee is entitled *ex contractu*, as well as an advantage or privilege which has been granted to an employee in terms of a policy or practice subject to an employer's discretion. On this wide interpretation, it seems to me that the essential user scheme must fall within the wider definition of a benefit." See further *South African Revenue Services v Ntshintshi & others* (2014) 35 ILJ 255.

Secondly, the wide approach as endorsed in *Apollo Tyres* is found to be justifiable. Such a conclusion is supported by international and foreign law. It accords with the imperatives laid down by the IC, as well as the objectives of the LRA, which include giving effect to the constitutional right to fair labour practices. It is further congruent with the manner in which the term remuneration is defined in the LRA.

Thirdly, it is indisputable that the unfair labour practice provisions were only intended to address disputes of right. It follows that the courts were correct in seeking to prohibit disputes of interest from being dealt with as unfair labour practices in order to maintain the divide between benefit disputes that constitute disputes of right as opposed to those that constitute disputes of interest. However, the approach of excluding benefits from remuneration in order to maintain this divide was flawed. Disputes of interest may be kept outside the unfair labour practice provisions by assessing whether the benefit which is the subject of the unfair labour practice dispute is pre-existing.

Fourthly, having concluded that benefits form part of remuneration, benefits can be classified into three broad categories. These are pre-existing employee or fringe benefits; pre-existing salaries or wages; and pre-existing re-imbursable allowances.

The above-mentioned classification of benefits will provide clarity and certainty to adjudicators in addressing benefit disputes. As such, this categorisation of benefits is included in the Code of Good Practice: Benefits.

CHAPTER 5
CRITERIA TO DEFINE “BENEFITS”: WHAT CONSTITUTES A PRE-EXISTING
BENEFIT?

		PAGE
5.1	Introduction.....	122
5.2	Determination of a Pre-Existing Benefit.....	123
	5.2.1 <i>Ex Contractu</i> and <i>Ex Lege</i>	123
	5.2.2 <i>Ex Lege</i> Right Established by Section 186(2)(a).....	126
	5.2.3 Policy and Practice.....	129
	5.2.4 Employer Discretion.....	132
	5.2.5 Legitimate Expectation.....	134
5.3	Criteria Endorsed in <i>Apollo Tyres</i>	138
	5.3.1 Facts.....	138
	5.3.2 Assessment of the <i>Apollo Tyres</i> Approach.....	141
5.4	Foreign Law.....	145
	5.4.1 Introduction.....	145
	5.4.2 Position in New Zealand.....	146
	5.4.3 Position in the United Kingdom.....	151
	5.4.4 Lessons Learnt.....	156
5.5	Conclusion.....	157

5.1 INTRODUCTION

One of the important principles established in the previous chapter is that the unfair labour practice provisions may only be utilised to challenge unfair conduct in relation to pre-existing benefits.¹ This protects the divide that exists in South African labour law between rights and interest disputes.²

¹ See Chapter 4, para 4.3.

² See Chapter 3, para 3.5.2.

In line with the above, the criteria used to determine whether a pre-existing benefit exists still require consideration. This chapter seeks to analyse the various approaches adopted in this regard.³ The approach highlighted by the Labour Court (LC) and Labour Appeal Court (LAC) prior to the decision of *Apollo Tyres* is analysed first.⁴ This is followed by a discussion of the criteria adopted in *Apollo Tyres*.⁵ Thereafter, the principles laid down in New Zealand and the United Kingdom are considered.⁶ The final part of the chapter contains findings and recommendations.

5.2 DETERMINATION OF A PRE-EXISTING BENEFIT

5.2.1 *Ex Contractu and Ex Lege*

The LAC in *Hospersa and another v Northern Cape Provincial Administration*⁷ held that a pre-existing benefit arises from a contract of employment or collective agreement (*ex contractu*) or from the Public Service Act⁸ or any other applicable legislation (*ex lege*).⁹

Based on this principle, the court in *Hospersa*, dealing with the applicable legislation,¹⁰ held that it did not provide for the payment of an acting allowance, which was the benefit being claimed.¹¹ It was further evident that there was no collective agreement that provided for the payment of an acting allowance, nor was such payment provided for in the employee's contract of employment.¹² This led the court to the conclusion that the employee was seeking to establish a new benefit, as she had no pre-existing

³ See para 5.2 and 5.3 below.

⁴ See para 5.2.

⁵ See para 5.3.

⁶ See para 5.4.

⁷ (2000) 21 *ILJ* 1066 (LAC).

⁸ Public Service Labour Relations Act 105 of 1994.

⁹ *Hospersa* para 8.

¹⁰ It is significant to note that the LAC considered the Public Service Labour Relations Act 105 of 1994, as this was the legislation that governed the terms and conditions of a public servant. Therefore, the use of the word *ex lege* by the LAC was specifically in respect of legislation that provided for the benefit being claimed.

¹¹ *Hospersa* para 19. See further Chapter 4, para 4.2.3 where the facts of the case are discussed in more detail.

¹² *Hospersa* paras 22-23.

right to an acting allowance.¹³ Mogoeng AJA concluded that this would constitute a dispute of interest, which cannot be arbitrated as “the result would inevitably be a fundamental subversion of the collective bargaining process itself”.¹⁴

Hospersa essentially informs one that proof of a pre-existing benefit may be in the form of a contract of employment, a collective agreement or specific legislation that provides for the benefit being claimed. The benefit must be definitively provided for. In other words, it must be reflected as a term or condition of employment in any one of these sources. If the benefit is not indicated as such, the conclusion to be reached is that the employee is seeking to create a new right. The result of this is that the unfair labour practice jurisdiction will not apply. It is apparent that the LAC attempted to limit the ambit of benefits in order to protect the divide between disputes of right and disputes of interest.

It is clear that the LAC in *GS4 Security Services (SA) (Pty) Ltd v NASGAWU (GS4)*¹⁵ unconditionally accepted *Hospersa*. *Apollo Tyres* quotes the following from *GS4*:

“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.”¹⁶

The *Hospersa* approach was followed by the LC in a number of cases. In *Polokwane Local Municipality v South African Local Government Bargaining Council (Polokwane)*,¹⁷ the LC found that the employee had no right to have the post upgraded,¹⁸ neither was there evidence to suggest that the employee had a right to be paid an acting allowance.¹⁹ The LC held that the dispute was one of interest as a right to the items claimed was not provided for in the contract of employment.²⁰

¹³ *Hospersa* para 8 stated that “the dispute is not about something to which the second appellant is already entitled. It is about a benefit which she hopes to create through arbitration”.

¹⁴ *Hospersa* para 10.

¹⁵ Case no DA3/08, 26 November 2009 (LAC). It must be noted that specifics regarding the LAC decision of *GS4 Security Services (SA) (Pty) Ltd v NASGAWU* are not provided as the case was unreported and could not be traced.

¹⁶ *Apollo Tyres* para 36.

¹⁷ Case no JR1843/05, 7 March 2008 (LC).

¹⁸ *Polokwane* para 26.

¹⁹ *Polokwane* para 30.

²⁰ *Polokwane* para 28.

In *South African Post Office Ltd v CCMA & others (SA Post Office)*²¹ the LC held that the employee had an obligation to demonstrate that the acting allowance claimed fell within the ambit of section 186(2)(a) of the LRA.²² The applicant failed in this regard, as he could not illustrate that he had an *ex contractu* or *ex lege* right to the acting allowance. This persuaded the court that the employee in seeking to establish an entitlement to the acting allowance “strayed into the realm of a dispute of interest”. Considering itself bound by the authority of the LAC in *Hospersa*,²³ the court held that the CCMA did not have jurisdiction to entertain the dispute.²⁴

While there has been support for the view that an unfair labour practice may only be utilised by an employee in respect of a pre-existing benefit,²⁵ well-founded criticism has been levelled against the approach endorsed by the LAC in *Hospersa*.

One of the main concerns raised is the limitation that the approach places on the use of the unfair labour practice provision. Le Roux states that such an approach appears to be too narrow, especially if one has regard to its historical perspective:²⁶

“The concept of the unfair labour practice was originally introduced to grant legal protection to employees against unfair employer actions in situations where existing law, especially contract principles, did not provide this protection. To equate the unfair labour practice jurisdiction regarding benefit disputes with contractual (and statutory) claims seems to limit it unduly. Indeed, it can be argued that in these cases employees already have an adequate contractual remedy at their disposal.”²⁷

²¹ Case no C293/2011, 18 June 2012 (LC).

²² *SA Post Office* para 18.

²³ *SA Post Office* para 29.

²⁴ *SA Post Office* para 30.

²⁵ See *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703 (LC) para 32.

²⁶ Le Roux (2005) *CLL* 3. Goldstein AJA, who delivered the minority judgment in *Department of Justice v CCMA & others* [2004] 25 *ILJ* 248 (LAC), found that Mogoeng AJA's decision in *Hospersa* where he stated that item 2(1)(b) provided only for rights which arose *ex contractu* or *ex lege* was “clearly wrong” (288B-C). His reasoning for this was as follows: “Just as the LRA provides for disputes arising from unfair dismissals in respect of which there are no contractual remedies or remedies at common law, to be resolved by arbitration, so was item 2(1)(b) designed for situations where neither the contract of employment nor the common law provide an employee with a remedy” (288D). See further Cheadle (2006) *ILJ* 675.

²⁷ Le Roux (2005) *CLL* 3. Borat and Van Der Westhuizen (2009) Working Paper 09/135 16 suggest that if the unfair labour practice provisions apply to benefits that are created contractually, unfair treatment in relation to the provision of benefits should be removed from the definition of an unfair labour practice. This view is premised on the fact that if a benefit is included in an employment contract or a collective agreement, the contract or collective agreement would provide the process to be followed and possible solutions where unfair treatment is experienced, thus removing the need to have the unfair labour practice dispute resolution mechanism.

While the study supports the criticism levelled against this narrow approach, legal instruments such as contracts of employment and collective agreements undeniably set out terms and conditions of employment. It stands to reason that they are important sources in establishing pre-existing benefits and must be adopted as a criterion.

The argument that the unfair labour practice was not meant to cater for benefits that constitute terms and conditions of employment, due to the existence of civil law remedies to cater for breach of contract, has been noted. However, it must be kept in mind that the dispute resolution procedures set up in the LRA are meant to provide inexpensive, accessible and efficient services.²⁸ Disallowing benefit disputes that arise from contracts and legislation to be dealt with as unfair labour practices will disadvantage employees, as they will be required to institute claims for breach of contract in the Magistrate's Court or High Court (HC).²⁹

Notwithstanding the above, a wider and more balanced approach is required. It is logical that the establishment of a pre-existing benefit should not be solely predicated on the contents of a contract, collective agreement or legislation. Essentially, a benefit cannot be limited to aspects that constitute terms and conditions of employment. There must be broader categories of criteria that apply in establishing the existence of a pre-existing benefit.

5.2.2 Ex Lege Right Established by Section 186(2)(a)

The LAC in *Department of Justice v CCMA & others (Department of Justice)*³⁰ took a different approach to that of *Hospersa*. The court found that item 2(1)(b) of the residual unfair labour practice provisions (now section 186(2)(a) of the LRA) is itself the legislative source that confers pre-existing status on the benefit being claimed.³¹

While *Department of Justice* dealt with an unfair labour practice relating to promotion, the majority judgment delivered by Zondo J made important pronouncements on the

²⁸ See Chapter 3, para 3.5.3 and Chapter 7, para 7.1.

²⁹ See Chapter 7, para 7.1.

³⁰ [2004] 25 ILJ 248 (LAC).

³¹ *Department of Justice* 267A-B.

jurisdiction of the CCMA to entertain unfair labour practice disputes beyond those relating to promotion. These findings were made in response to the argument raised by the employer that the dispute in question constituted a dispute of interest rather than a dispute of right.³² Zondo J commented as follows:

“The answer to this argument is simply that item 2 of schedule 7 is one of the statutory provisions that seek to give content to the constitutional right to fair labour practices which is entrenched in the Constitution. It creates a statutory right not to be subjected to an unfair labour practice that takes the form of conduct spelt out therein ... Item 2(1)(b) confers on an existing employee a right not to be subjected to an unfair labour practice that takes the form of conduct relating to promotion, demotion, training of an employee, disciplinary action short of dismissal and the provision of benefits to an employee.”³³

Importantly, Zondo J found that the rights that employees have under item 2(1)(b) are rights conferred on them *ex lege*.³⁴ Le Roux explains that the result of *Department of Justice* is that when an applicant refers an unfair labour practice it relies on a statutory right not to be unfairly treated.³⁵ Therefore, such a dispute constitutes a dispute of right.³⁶

The court in *IMATU obo Verster v Umhlathuze Municipality & others (IMATU)* shared the above sentiments, holding that “an unfair labour practice claim is a distinct statutory right which an employee may assert independently and it is not one that is merely contingent on the existence of some other legal obligation”.³⁷ Similarly the LC in *Trans Caledon Tunnel Authority v Commission for Conciliation, Mediation & Arbitration & others (Trans Caledon)* supported the decision of Zondo J, stating that he could not have made it clearer that an employee’s claim under the unfair labour practice provisions is not founded on a dispute of right arising *ex contractu* or *ex lege* as contended in *Hospersa*. Instead, it is a claim that arises *ex lege* as a result of being founded on the special unfair labour practice jurisdiction created by the LRA.³⁸

³² *Department of Justice* 267A.

³³ *Department of Justice* 267A-B.

³⁴ *Department of Justice* 267E.

³⁵ Le Roux (2005) *CLL* 4.

³⁶ Le Roux (2005) *CLL* 4.

³⁷ *IMATU* para 14.

³⁸ *Trans Caledon* para 23.

While the LRA gives employees a statutory right not to be subjected to an unfair labour practice relating to benefits, this can never imply that an adjudicator is not required to assess whether the dispute referred and categorised as an unfair labour practice dispute, is indeed one. In assessing whether or not the referred matter constitutes a dispute relating to the provision of benefits, the adjudicator must determine whether the subject of the dispute concerns an aspect that constitutes a benefit and whether the benefit is pre-existing.

This is similar to the application of the right not to be unfairly dismissed.³⁹ While the LRA prohibits unfair dismissals, an employee who refers an unfair dismissal dispute must illustrate at the outset that the conduct that he or she is dissatisfied with constitutes a dismissal.⁴⁰ In other words, the employee must first prove that the conduct complained of falls within the definition of dismissal in the LRA.⁴¹

An assessment of the LAC's decision in *Department of Justice* illustrates that it does not provide any answers on how to discern whether or not the benefit being claimed is pre-existing. Instead, it merely contests the approach adopted in *Hospersa* that the existence of a right to a benefit must be provided for contractually or legislatively.

The study does not agree with the conclusions reached by the LAC in *Department of Justice*. An unfair labour practice relating to a benefit does not acquire the status of a dispute of right merely because employees have a statutory right not to be subjected to an unfair labour practice.

³⁹ Section 192 of the LRA 66 of 1995.

⁴⁰ Section 192(1) of the LRA 66 of 1995 explains that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

⁴¹ Section 186(1) of the LRA 66 of 1995 provides a comprehensive explanation of the types of actions that constitute a dismissal. See, for example, *James & another v Eskom Holdings SOC Ltd & others* (2017) 38 ILJ 2269 (LAC) para 16 where the LAC held that in order for an arbitrator to be "clothed with jurisdiction" a dismissal by the employer must have been established. See further *SA Rugby Players' Association (SARPA) & others v SA Rugby (Pty) Ltd & others* [2008] 9 BLLR 845 (LAC) para 39 where the court pronounced that "the issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA".

5.2.3 Policy and Practice

While *Hospersa* acknowledged that a pre-existing right to a benefit arises *ex contractu* and *ex lege*, benefits arising from an employer's work practices⁴² and policies⁴³ cannot be discounted.

The judiciary has confirmed that conditions of work will not always constitute terms and conditions of employment, but may constitute work practices.⁴⁴ The courts have endorsed the fact that employers have managerial prerogative to alter such practices, and an alteration thereof will not constitute a unilateral change to terms and conditions of employment.⁴⁵ During the tenure of the employment relationship it is accepted that all work practices, including those that constitute benefits should be capable of change. As explained by the LAC, employees do not have a vested right to preserve their conditions of work "completely unchanged as from the moment when they first begin work".⁴⁶ However, this equally applies to terms and conditions of employment

⁴² As explained by Levy (2009) *ILJ* 1471 the provision of a benefit may not always be reduced to writing in a contract or policy but may be established through a common practice that exists in the organisation. In *National Union of Metalworkers of South Africa and Others v Eskom Holdings Soc Limited* case no JS1086/12, 19 August 2015 (LC) the Court explained that while most terms and conditions of employment are established in a written contract of employment, these may be supplemented by implied terms and conditions, which arise through the conduct of the parties. This can arise through custom and practice. In such instances a practice that has developed over a period of time can arguably amount to implied terms and conditions of employment (para 12).

⁴³ See *Eskom v Marshall & others* (2002) 23 *ILJ* 2251 (LC) para 8 where the refusal of the benefit claimed was provided for in a policy and not a contract of employment or collective agreement.

⁴⁴ The Court in *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* [1995] 4 BLLR 11 (LAC) 20 found that an alteration to a work practice which required machine operators to operate two machines instead of one did not constitute a change to terms and conditions of employment. See further *Ram Transport (SA) Pty Ltd v South African Transport Allied Workers Union* (2011) 32 *ILJ* 1722 para 7, which dealt with a change to the shift time. Also, of relevance is *National Union of Metalworkers of South Africa and Others v Eskom Holdings Soc Limited* case no JS1086/12, 19 August 2015 (LC) para 15.

⁴⁵ *Ram Transport (SA) Pty Ltd v South African Transport Allied Workers Union* (2011) 32 *ILJ* 1722 para 6. In *Apollo Tyres South Africa (Pty) Ltd v National Union of Metalworkers Union of South Africa (NUMSA) and Others* (2012) 33 *ILJ* 2069 (LC) the Court sought to establish whether the proposed changes to a shift system constituted a unilateral change to terms and conditions of employment or whether it constituted a work practice which management had the prerogative to change (para 7). The Court referred to previous decisions where it was found that if the previously agreed shift patterns were not enshrined as a contractual right, the regulation of shift times amounted to a work practice and could be changed subject to management prerogative (para 16).

⁴⁶ *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* [1995] 4 BLLR 11 (LAC) 18. In *Minister of Justice and Correctional Services and Another v Naude and Others* case no JR693/15, 2 December 2016 (LC) para 49 it was stated that a practice can never be cast in stone. "By its very nature, a practice must be susceptible to change if circumstances so dictate". It is for this reason that dismissals can be justified in instances where employees are not willing

as there may be operational requirements that can justify the alteration of such terms, although the procedure to be followed in changing a term and condition of employment as opposed to a work practice will differ.⁴⁷

Even though changes to terms and conditions of employment may be justifiable, the LAC in *Hospersa* acknowledges that alleged unfair conduct by the employer in relation to benefits provided for in contracts of employment, in other words benefits that constitute terms and conditions of employment, can give rise to an unfair labour practice dispute. Considering the fact that the unfair labour practice provisions seek to protect employees against unfair conduct perpetrated by employers, they should equally receive protection in instances where employers are at liberty to make decisions that may prejudice them, even in instances where the decision does not directly relate to a term or condition of employment. Even though employers have the right to change work practices, the fairness of such decisions must be subject to scrutiny. Furthermore, it is trite that a practice which has developed in an organisation can acquire the force of a right.⁴⁸ As explained by Levy, practice is an important source of workplace rules.⁴⁹

In many instances disputes arise from the previous practices of an employer in awarding certain benefits, such as acting allowances. In *IMATU* past practice was used as the basis for establishing a pre-existing benefit. The Court held that non-adherence to the practice of awarding an acting allowance fell within the ambit of an unfair labour practice.⁵⁰

to accept changes to work practices as was the case in *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* [1995] 4 BLLR 11 (LAC) 20. Van Niekerk and Smit (2018) 258 explain that there is nothing that precludes an employer from dismissing employees who refuse to accept a changed work practice, such as a changed shift configuration if these are related to its operational requirements and if the true intention is to replace those employees with others who are willing to work in accordance with the altered practice.

⁴⁷ See the discussion on procedural fairness in Chapter 6, para 6.4.3.

⁴⁸ Levy (2009) *ILJ* 1471.

⁴⁹ Levy (2009) *ILJ* 1471. Nagel *et al* (2015) 12 para 2.03 and 2.05 explain that legal rules can be created by custom (practice). Similarly, Scott *et al* (2012) 26 indicate that legal rules can be created by practice if it can be shown that they are long established, certain, reasonable, and uniformly observed. See further Painter and Puttick (1998) 50 who share a similar view.

⁵⁰ *IMATU* para 23.

Although such benefits may not be provided for in a written document, if there are sufficient facts to establish that the awarding of a certain benefit has become a practice, it should take the benefit outside of the ambit of a dispute of interest. In *Trans Caledon* the LC found that employees may utilise the unfair labour practice provisions as long as they can show that they have some form of claim to the benefit which will set it apart from the creation of a new benefit.⁵¹ The court resultantly found that a claim to a benefit may arise through past practice.⁵² Employees cannot be denied protection where they are seeking to be provided with a benefit which has indisputably been afforded to them and/or other employees on various occasions in the past, such that it has come to be considered as an unwritten right or entitlement. The referral of such disputes should be permissible as an unfair labour practice.

It is trite that human resource policies commonly govern conditions of service in large organisations.⁵³ The definition of “policy” refers to a course or principle of action adopted by an organisation.⁵⁴ Therefore, policy is not confined to written employer policies, but it could also refer to notices, circulars, personnel manuals and other written documents which provide for the granting of benefits. In *Trans Caledon* the LC endorsed the fact that a claim to a benefit may arise out of a company rule or policy.⁵⁵ In this instance the basis for conferring the benefit already exists in the employment structure and is comparable to instances where the benefit is provided for in an employment contract.⁵⁶

This study supports the view that pre-existing rights can be established in workplace policies. The fact that the right to receive a benefit is provided for in a policy document takes the benefit out of the realm of a dispute of interest, as an employee will not be demanding a new benefit. The rationale of the decision in *Hospersa* was specifically to ensure that employees were prevented from using the unfair labour practice provisions to create a right to a new benefit. Benefits that are provided for in a policy should be treated in the same manner as a benefit provided for in a contract of employment,

⁵¹ *Trans Caledon* para 26.

⁵² *Trans Caledon* para 26.

⁵³ Anderson *et al* (2017) 70-71.

⁵⁴ *Concise Oxford English Dictionary*. See further Painter and Puttick (1998) 49.

⁵⁵ *Trans Caledon* para 26.

⁵⁶ *Trans Caledon* para 26.

collective agreement or legislation. In all these instances the benefit already exists, though the written instrument used to provide for the benefit differs.

It follows that a policy document of an organisation that provides for the granting of a benefit is a criterion that may be used to establish the existence of a pre-existing benefit. The provision of a benefit that has manifested into a practice is a further criterion that can be used for this purpose.

5.2.4 Employer Discretion

The LC in *Protekon* endorsed an even broader approach to pre-existing benefits. Here the court accepted the principles established in *Hospersa* that a pre-existing benefit is established through the provisions of a contract of employment or collective agreement. However, the LC introduced a further criterion. This relates to instances where a contractual scheme confers discretion on the employer regarding the allocation of benefits.⁵⁷

The court correctly explained that the unfair labour practice jurisdiction was a “legislative response to the complexity of the reciprocal employer and employee rights and obligations that exist in many employee benefit schemes”.⁵⁸ As many of these employee benefit schemes (such as pension funds and medical aid schemes) give the employer a range of discretionary powers, the unfair labour practice provisions may be utilised in cases where the employer is entitled to exercise a discretion on aspects such as the amount of any benefit to be provided, the terms upon which a benefit is to

⁵⁷ *Protekon* para 36. As indicated by Damant (2003) *ILJ* 713 contractual discretion may arise from two sources. The first is where discretion is incorporated from the rules of a pension fund into the employment contract. The second is where the discretion is granted by the employment contract itself, independent of pension fund rules. The LC in *Trans Caledon* and *IMATU* also supported the notion that a dispute about a benefit awarded subject to an employer’s discretion falls to be considered within the unfair labour practice provisions. In *IMATU* (para 21), the LC noted that it did not make sense for the legislature to have singled out disputes over one narrow class of contractual employment conditions for adjudication by arbitration when those disputes could just as easily have been dealt with under the ordinary law of contract. The more logical conclusion was that the unfair labour practice provisions were meant to address dissatisfactions over the granting of advantages which were awarded subject to the employer’s discretion. The LC in *Trans Caledon* similarly found that while the benefit being claimed must be pre-existing, it is not only a contract, legislation or a policy that confers pre-existing status, as this can equally arise through the exercise of employer discretion (para 17).

⁵⁸ *Protekon* para 34.

be provided or whether a benefit is to be provided at all.⁵⁹ Therefore, the court held that benefits which are subject to the exercise of employer discretion do not take the benefit outside the ambit of the unfair labour practice jurisdiction.⁶⁰ This means that a benefit should be conferred with pre-existing status where a contract provides an employee with the right to apply for a benefit, but where the conditions of the benefit, such as value, are not provided for in the contract. While the foundation of the benefit is contractually provided for, the decision on whether or not to grant the benefit requires the exercise of employer discretion.

Confining benefit disputes to those benefits provided for in written instruments does not align with the purpose of the LRA, which seeks to give effect to the constitutional right to fair labour practices. As stated by Grogan, the true value of the unfair labour practice jurisdiction is the fact that it confers powers on arbitrators to go beyond the contract.⁶¹ He correctly states that to narrow the scope of arbitrator's powers by allowing them to consider only unfair labour practices which involve breach of contract, collective agreements or specific statutes, "is to ignore the purpose of the statutory definition, which is to give expression to the general right to fair labour practices conferred by the Constitution".⁶²

Therefore, the provision of a benefit which is awarded or granted subject to the exercise of employer discretion is a further criterion that can be used to establish the existence of a pre-existing benefit for the purposes of section 186(2)(a) of the LRA. However, an employee's right to challenge an employer's discretion should not be limited to discretion provided for in terms of a contract, as was held in *Protekon*. Employer discretion may stem from a number of sources, namely, a contract of employment, a collective agreement, legislation, policy and practice.

⁵⁹ *Protekon* paras 34 and 35. It should be noted that the proposition that a discretionary benefit can be grounded in a contractual right was advocated by Damant (2003) *ILJ* 730 before *Protekon*. Damant states that while a discretionary benefit does not give the employee the right to the benefit, it does provide the employee with the right to be considered for the benefit. Similarly, Campbell *et al* (2003) 219 explain that many contracts confer discretionary powers on the parties. They state that "contrary to the conventional image of a contract that fixes by agreement a set of precise rights and obligations, the express terms of the contract may confer a discretion on one party to determine the content of some of the obligations in the contract".

⁶⁰ *Protekon* paras 34 and 35.

⁶¹ Grogan (2005) 46.

⁶² Grogan (2005) 46.

5.2.5 Legitimate Expectation

In *Eskom v Marshall & Others (Eskom)*⁶³ the LC had to decide whether the CCMA was correct in holding that the severance package being claimed by the employee constituted a benefit for the purposes of section 186(2)(a) of the LRA.⁶⁴ Eskom argued that the adjudicator lacked jurisdiction to determine the dispute as the separation package was provided for in the policy on separation, which was merely a guideline and which did not create any contractual entitlement.⁶⁵

The LC concurred with *Hospersa* and agreed that disputes of interest do not fall within the ambit of an unfair labour practice but are rather subject to negotiation on an individual or collective level.⁶⁶ However, the LC was of the view that the determination of whether the dispute was one of right should not be limited to benefits created *ex contractu* or *ex lege*. Instead, the LC referred to the middle ground that exists between disputes of right and disputes of interest, explaining that such middle ground arises where the employee has a “legitimate expectation” to the benefit claimed.⁶⁷ The court explained that while a legitimate expectation to receive a benefit is of lesser status than a legal right, it also does not have the status of a dispute of interest.⁶⁸ Although the LC found that the separation package constituted a benefit,⁶⁹ it considered itself bound by *Hospersa*.⁷⁰

The concept of legitimate expectation has to be examined in view of the above pronouncements. This principle can be traced back to *Administrator of the Transvaal & others v Traub & others (Traub)*.⁷¹ Here, Corbett CJ had to decide whether it was justifiable for the Director of Hospital Services to deny senior house officers and interns placed at Baragwanath Hospital re-appointments and appointments.⁷² The respondents alleged that they had a legitimate expectation to be appointed based on

⁶³ *Eskom v Marshall & others* (2002) 23 ILJ 2251 (LC).

⁶⁴ *Eskom* para 6.

⁶⁵ *Eskom* para 8.

⁶⁶ *Eskom* para 19.

⁶⁷ *Eskom* para 20.

⁶⁸ *Eskom* para 20.

⁶⁹ *Eskom* para 23.

⁷⁰ *Eskom* para 24.

⁷¹ (1989) 10 ILJ 823 (A). See further *Dierks v University of South Africa* [1999] 4 BLLR 304 (LC) para 119.

⁷² *Traub* 825-826C.

their qualifications, previous service rendered at the hospital and the recommendations from their heads of department.⁷³

Corbett CJ explained that the respondents had no right to be appointed to the respective posts, as the obligation of the Department only extended as far as considering the applications. The decision not to appoint them did not affect any of their existing rights.⁷⁴ However, relying on English authority the court concluded that “it is clear from these cases that in this context ‘legitimate expectations’ are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis”.⁷⁵ *Traub* ultimately endorsed the principle of legitimate expectation in the field of administrative law.⁷⁶

Notwithstanding the endorsement of this principle, it gave rise to a debate as to whether it protected both substantive and procedural expectations.⁷⁷ Olivier is of the view that although a claimant’s expectation could be both substantive and procedural, the courts as a rule were merely prepared to grant procedural protection.⁷⁸ In other words, claimants could only rely on the principle of legitimate expectation in asserting a right to be heard prior to a decision being taken. Similarly, in *Meyer v Iscor Pension Fund (Meyer)*⁷⁹ the SCA found that the doctrine of legitimate expectation is used as a mechanism for the enforcement of procedural fairness and not to compel a substantive result.⁸⁰

⁷³ *Traub* 832A-B.

⁷⁴ *Traub* 833A-C.

⁷⁵ *Traub* 835C-D.

⁷⁶ *Traub* 841C-I.

⁷⁷ *Traub* 837A.

⁷⁸ Olivier (1996) *ILJ* 1028.

⁷⁹ [2003] 5 BLLR 439 (SCA).

⁸⁰ *Meyer* para 25. This case involved an employee’s challenge to the pension fund benefits paid to him. Subsequent to him leaving employment the method used to calculate pension benefits was changed, resulting in employees who left after him receiving substantially more than him (paras 1-4). One of his arguments was that he had a legitimate expectation to receive the better pension benefits as the employer had promised that improved retrenchment benefits would be implemented with retrospective effect (para 19).

Initially, this principle was restricted to utilisation by public servants because it is an administrative law concept.⁸¹ However, this position changed as a result of the decisions of the Constitutional Court (CC) in *Chirwa v Transnet* and *Gcaba v Minister for Safety and Security*.⁸² The court held that the right to fair administrative action guaranteed by section 33 of the Constitution does not regulate employment and labour relations.⁸³ In other words, the CC found that public service employees should no longer rely on administrative law principles and remedies to challenge labour disputes. They should rely on the LRA. As stated by Cohen, the concept of legitimate expectation had no continued role to play in the determination of labour matters.⁸⁴

While it is indisputable that the CC ruled that administrative law should not be used by employees to challenge labour disputes, the study finds that the principle of legitimate expectation is not a term exclusively used in the field of administrative law. While this principle has its origins in the decision of the Appellate Division in *Traub*,⁸⁵ it is a principle recognised in the LRA. The LRA introduced the concept of reasonable expectation into the unfair dismissal provisions.⁸⁶ While the word “reasonable” instead of “legitimate” is used, case law illustrates that these two concepts are synonymous.⁸⁷ From a labour law perspective the concept of legitimate expectation has been discussed in various unfair dismissal cases.⁸⁸ It has also been relied on in unfair labour practice

⁸¹ Cohen (2010) SALJ 2010 444-445. She explains that public servants have relied on the principle of legitimate expectation to challenge the fairness of promotion and benefit decisions.

⁸² [2008] 2 BLLR 97 (CC) and [2009] 12 BLLR 1145 (CC).

⁸³ See Chapter 7, para 7.3.4.3. See further Cohen (2010) SALJ 2010 446.

⁸⁴ Cohen (2010) SALJ 2010 446.

⁸⁵ *Dierks v University of South Africa* [1999] 4 BLLR 304 (LC) para 119.

⁸⁶ Section 186(1)(b) of the LRA 66 of 1995 states that dismissal means “an employee employed in terms of a fixed-term contract of employment reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it”.

⁸⁷ *Traub* 835G-H. This is further illustrated by cases such as *Zungu v Premier, Province of KwaZulu-Natal & others* (2017) 38 ILJ 1644 (LAC) para 8 where the applicant’s cause of action was summarised by the LAC as being her legitimate expectation of a renewal of her appointment. See further *Joseph v University of Limpopo & others* [2011] 12 BLLR 1166 (LAC) para 35 where the word legitimate is used as an alternative to the word reasonable.

⁸⁸ See *SA Rugby Players Association (SARPA) v SA Rugby Pty Ltd & Others* [2008] 9 BLLR (LAC); *Public Servants Association of South Africa & others v Statistics South Africa & others* case no J2074/17, 20 September 2017 (LC); *Agricultural Research Council v CCMA & others* case no JR254/15, 31 January 2018 (LC); *Zungu v Premier, Province of Kwazulu-Natal & others* (2017) 38 ILJ 1644 (LAC); *NUM obo Mphaki v CCMA & others* case no JR1983-2014, 17 August 2016 (LC); *Ekurhuleni West College v ELRC & others* case no JR2213/13, 2 March 2016 (LC). See further Olivier (1996) ILJ 1027 where the notion is discussed in the context of unfair dismissals pertaining to an employer’s failure to renew a fixed term contract despite the employee having a reasonable expectation of renewal.

disputes relating to promotion.⁸⁹ Du Toit holds the view that an employer commits an unfair labour practice where “it fails to promote an employee after expressly or impliedly agreeing to do so, or holds out a reasonable expectation that an employee may be advanced and then frustrates it without adequate reason”.⁹⁰

Therefore, the use of legitimate expectation cannot be dismissed on the basis that it is an administrative law concept, which no longer finds application in labour law disputes. Olivier also acknowledges that the reasonable expectation notion provided for in the LRA envisages substantive protection and is not limited to procedural protection.⁹¹

The question that needs to be answered is whether legitimate expectation should be regarded as a separate criterion for the establishing of a pre-existing benefit. The basis of legitimate or reasonable expectation may arise from an allegation that an express promise was made by the employer. It may also stem from the existence of an existing practice that the employee reasonably expected to be continued.⁹² It has already been concluded that one of the criteria to be utilised to establish a pre-existing benefit is past practice.⁹³ As such, it does not add value to include legitimate expectation based on past practice as a further criterion in the determination of a pre-existing benefit.

While legitimate expectation based on an express promise is used in claims in relation to promotion,⁹⁴ it does not apply in respect of benefits. The importance of defining criteria that establish pre-existing benefits is to separate demands for new benefits from benefits that already exist. The use of a promise as a criterion for establishing a

⁸⁹ In *Ga-Segonyana Local Municipality v Venter & others* case no JR961/13, 11 October 2016 (LC) the employer sought to challenge the findings of the commissioner that an unfair labour practice had been committed by not promoting the employee. The decision was reached on the basis that a legitimate expectation had been created by the employer that the employee would be promoted as he acted in the position for an extended period of time and was the best and only suitable candidate for the post (paras 1 and 5). See further *Monyakeni v SSSBC & others* case no JA 64/13, 19 May 2015 (LAC).

⁹⁰ Du Toit *et al* (2015) 552.

⁹¹ Olivier (1996) *ILJ* 1028.

⁹² *Traub* 835 E-F. See further Cohen (2010) *SALJ* 2010 444.

⁹³ See para 5.3.3.

⁹⁴ See, for example, *Agricultural Research Council v CCMA & others* case no JR254/15, 31 January 2018 (LC) para 14 where it is stated that the employee's case of reasonable expectation was based on the fact that both the Human Resource Executive and CEO had promised him that the contract would be extended.

pre-existing benefit would allow the unfair labour practice provisions to be utilised to create new benefits, which is not their intended purpose.

It is further evident from cases such as *Eskom* that the LC's basis for discussing legitimate expectation in the context of benefit disputes arose from the fact that though the benefit was not contractually provided for, it was provided for in a policy that made it subject to the employer's discretion.⁹⁵ The LC found that in order for a legitimate expectation to exist the benefit claimed must be an advantage or privilege that is ascertainable as a result of being created by the employer (for example, provided for in a policy) or one which the employer has undertaken to consider conferring (for example, a benefit subject to employer discretion).⁹⁶ As discussed above, these criteria already apply.⁹⁷

In conclusion, there is no justification for legitimate expectation to be added as a separate criterion for the establishment of a pre-existing benefit.

5.3 CRITERIA ENDORSED IN APOLLO TYRES

5.3.1 Facts

The facts of *Apollo Tyres* were briefly explained in Chapter 4.⁹⁸ However, further details of the case are discussed below as they lay an important foundation for understanding the conclusions reached by the LAC.

The LAC had to consider whether the employer's failure to grant one of its employee's (Ms Hoosen) entry into an early retirement scheme constituted an unfair labour practice relating to the provision of benefits.⁹⁹ The notice sent out by the employer stated that there were two requirements for entry into the scheme. The one entailed that applicants had to be monthly paid staff, the second being that applicants had to be between the ages of 46 and 59.¹⁰⁰ The notice further stated that entry into the scheme

⁹⁵ *Eskom* paras 8-14.

⁹⁶ *Eskom* para 20.

⁹⁷ See paras 5.2.3 and 5.2.4.

⁹⁸ See Chapter 4, para 4.2.4.1.

⁹⁹ *Apollo Tyres* paras 2 and 18.

¹⁰⁰ *Apollo Tyres* para 4.

was subject to management's discretion.¹⁰¹ Ms Hoosen, who was 49 years of age and a monthly paid employee, complied with the requirements for entry into the scheme but her application was rejected.¹⁰²

The employer argued that section 186(2)(a) of the LRA cannot be relied upon to create a right that does not exist. Apollo Tyres contended that the section is intended to provide recourse in cases of unfair conduct in relation to an existing right. It advocated the view espoused in *Hospersa* arguing that:

"*Hospersa* provides clarity, 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".¹⁰³

Hoosen argued for a broad interpretation of section 186(2)(a), where employees have no other remedy. She argued for a wide construction of the term benefits.¹⁰⁴

The LAC firstly agreed with *Department of Justice* that employees have a statutory right created by section 186(2)(a) of the LRA not to be unfairly treated in relation to the provision of benefits.¹⁰⁵ However, the court held that the majority decision in *Department of Justice* did not overrule *Hospersa*, which stated that the source of the benefit must exist in a contract or legislation.¹⁰⁶ The LAC upheld the approach endorsed in *Hospersa*.¹⁰⁷

Secondly, the LAC accepted with qualification the principles adopted in *Protekon* regarding the application of employer discretion in benefit disputes.¹⁰⁸ The court did not

¹⁰¹ *Apollo Tyres* para 4.

¹⁰² *Apollo Tyres* para 4.

¹⁰³ *Apollo Tyres* para 31.

¹⁰⁴ *Apollo Tyres* para 32.

¹⁰⁵ *Apollo Tyres* para 41 where the court, referring to *Department of Justice*, held that it was clear from the reasoning in both the majority and minority judgment as well as the judgment in *Scheepers* that "the unfair labour practice dispensation creates rights and that an employee has an ex lege right created by section 186(2)(a) not to be treated unfairly in relation to promotion, demotion, training and the provision of 'benefits'".

¹⁰⁶ *Apollo Tyres* para 42.

¹⁰⁷ *Apollo Tyres* paras 46 and 47.

¹⁰⁸ *Apollo Tyres* para 46.

agree with the contention that the employer's discretion must emanate from a contract.¹⁰⁹ The LAC was of the view that the court in *Protekon* used the words "contractual terms" loosely.¹¹⁰

Apollo Tyres effectively widened the scope of employer discretion. The effect thereof is that unfair labour practices may be sustained in cases where employer discretion is exercised in terms of a policy or practice.¹¹¹ The following extract from the judgment is important:

"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."¹¹²

The LAC quite correctly was averse to a narrow construal of the term benefits.¹¹³ *Apollo Tyres* explained that a restricted interpretation would leave employees in many cases without a remedy. In the case in question, the court appropriately surmised that 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 section 186(2)(a) of the LRA because there is no contractual right to the benefit. Furthermore, being a single employee, she would not according to *Schoeman* have the right to strike. Evidently, 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.¹¹⁴ The court concluded that Ms Hoosen's dispute did indeed fall within the unfair labour practice provisions.¹¹⁵

¹⁰⁹ *Apollo Tyres* para 47.

¹¹⁰ *Apollo Tyres* para 47 states that "it is in my view clear that if one has regard to the context of the whole judgment and the Labour Court's conclusion that it actually meant when the employer exercises a discretion under the terms of the scheme conferring the benefit. Therefore, even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of 'benefits' such conduct will be subject to scrutiny, by the CCMA, in terms of section 186(2)(a)".

¹¹¹ *Apollo Tyres* para 50.

¹¹² *Apollo Tyres* para 50.

¹¹³ *Apollo Tyres* para 48.

¹¹⁴ *Apollo Tyres* para 48.

¹¹⁵ *Apollo Tyres* para 52.

The LAC also considered the views expressed in *Eskom* regarding reliance on the principle of legitimate expectation.¹¹⁶ However, the LAC rejected the use of this principle based on the fact that only procedural and not substantive rights could be acquired through legitimate expectation.¹¹⁷

5.3.2 Assessment of the *Apollo Tyres* Approach

Apollo Tyres correctly accommodates the position expressed in *Hospersa*, *Protekon*, *IMATU* and *Trans Caledon*. It interprets the unfair labour practice in an expansive manner, thereby enhancing the level of protection provided to employees.¹¹⁸ However, *Apollo Tyres* has gone further by endorsing reliance on the use of the unfair labour practice provisions where employees have the right to apply for benefits, as was the case with Ms Hoosen.

This approach accommodates the imperatives of interpreting LRA provisions in a purposive manner.¹¹⁹ This requires that both the constitutional right to fair labour practices and South Africa's obligations under international law be given effect to in conferring meaning to a provision of the LRA. Having assessed the constitutional right to fair labour practices and the principles established by the ILO, it is evident that benefits must be defined in a manner that will offer employees a greater deal of protection and which will best promote fairness towards employees.¹²⁰ This judgment is further in line

¹¹⁶ *Apollo Tyres* para 39.

¹¹⁷ *Apollo Tyres* para 39. As indicated earlier, legitimate expectation must not be seen solely from an administrative law perspective. Therefore, the reasons advanced in *Apollo Tyres* for rejecting the use of legitimate expectation are incorrect, but the study supports the conclusion of declining its use in benefit disputes.

¹¹⁸ Following the legal authority flowing from *Apollo Tyres*, the LC has been endorsing this principle. See *Ehlanzeni District Municipality v South African Local Government Bargaining Council & others* case no JR1163/10, 30 September 2014 (LC). Here, the LC stated that "many employee benefit schemes confer rights and create obligations and confer discretion on employers, and that one of the objects of section 186(2)(a) of the LRA is to provide a remedy when such discretion is exercised unfairly" (para 29). Similarly, in *Rainbow Farms (Pty) Ltd v CCMA & others* case no C377/2012, 29 May 2015 (LC) the court endorsed the use of the unfair labour practice provisions in instances where a bonus was granted at the employer's discretion (para 15). In *Thiso & others v Moodley & others* (2015) 36 *ILJ* 1628 (LC) a claim for the upgrading of posts was found to fall within the ambit of section 186(2)(a) as the employer had a discretion whether or not to upgrade the posts.

¹¹⁹ See Chapter 3, para 3.3.

¹²⁰ See Chapter 3, para 3.6. It is also noted that a similar trend is followed in other areas of labour law, notably discrimination law. Section 6 of the EEA provides various grounds on which unfair discrimination is prohibited. These grounds are race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion,

with the jurisprudence that developed during the Industrial Court era, and which played an important role in the development of the current unfair labour practice provisions.¹²¹

Despite the study's support of the approach adopted by *Apollo Tyres*, it is argued that the LAC was misguided in as far as it held that pre-existing benefits may arise from "judicially created rights".¹²² While the judgment does not clarify what is meant by judicially created rights,¹²³ it presumably refers to rights created through court decisions. The problem with such an approach is that it fails to respect the fact that despite labour courts being courts of law and equity,¹²⁴ the essential function of these courts is to interpret and apply the legislation and not to create rights that were never intended.¹²⁵ The legislature sought to codify the unfair labour practice concept¹²⁶ and it would go against this intention to allow the notion of benefits being defined by the courts to continue.

Furthermore, there are two *lacunae* in the *Apollo Tyres* characterisation of a benefit. It failed to recognise benefits that are provided for non-contractually or subject to past practice, but that are not granted through the exercise of employer discretion. In many cases, policies and past practice of the employer provide for benefits, not contracts of employment, collective agreements or legislation. This applies to benefits that are provided for automatically and not only benefits that are granted subject to the employer's discretion. However, the role of policy and practice in *Apollo Tyres* is only recognised in relation to the exercise of employer discretion.

Linked to this, an employer's discretion may also arise from the contract of employment, collective agreement or legislation. *Protekon* endorsed contract as the source

HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground. The inclusion of arbitrary grounds seeks to expand the protection afforded to employees, as it does not limit the aspects that can give rise to an unfair discrimination claim but rather leaves room for the grounds of unfair discrimination to develop.

¹²¹ See *Van Coppenhagen v Shell & BP SA Petroleum Refineries (Pty) Ltd & another* (1991) 12 ILJ 620 (IC) and *Archibald v Bankorp Ltd (Now ABSA Ltd) & another* (1992) 13 ILJ 1538 (IC) 1543 as discussed in paragraph 2.5.6, which both dealt with the exercise of employer discretion in relation to pension benefits.

¹²² *Apollo Tyres* para 50.

¹²³ Fourie (2015) *PER* 3310 explains that "the judgment does not clarify what exactly can be understood by judicially created rights".

¹²⁴ Sections 151(1) and 167(1) of the LRA 66 of 1995.

¹²⁵ See Chapter 3, para 3.2.1 where the intention of the legislature to avoid a case-by-case determination of what constituted fair labour practices is discussed.

¹²⁶ See Chapter 3, para 3.2.3.

of employer discretion. *Apollo Tyres* agreed with this, though the LAC found that the ambit of employer discretion must be widened. However, if one considers the wording of *Apollo Tyres*, employer discretion is limited to discretion that stems from a policy or practice.¹²⁷

It is also important to evaluate the criticisms that have been levelled against the judgment. Firstly, Smit and Le Roux criticise the unlimited challenge to managerial prerogative that arises.¹²⁸ However, this is not surprising as stepping into the arena of employer prerogative was previously met with scepticism. While Levy agrees that benefits need not be contractual, but could equally arise out of the exercise of the employer's discretion, he acknowledges that "this now leads us into the dangerous waters of employer's discretion and the 'managerial prerogative'".¹²⁹

It is submitted that these concerns are unjustified as limiting employer prerogative must be considered against the background of the inequality of power that characterises the employment relationship.¹³⁰ It is argued that a challenge to managerial prerogative through the unfair labour practice remedy is a method of addressing this vast inequality.¹³¹ In this context, the expansive interpretation of benefits in *Apollo Tyres* is appropriate. Effective measures are needed to counteract the immense power that employers have, in order to curb employer abuse and to protect employees.¹³² This

¹²⁷ *Apollo Tyres* para 50.

¹²⁸ According to Smit and Le Roux (2015) *CLL* 93, while it appears that the LAC provided a degree of certainty regarding the concept of a benefit, the interpretation formulated by the LAC also presented certain obvious challenges.

¹²⁹ Levy (2009) 30 *ILJ* 1470.

¹³⁰ See Chapter 2, para 2.3. As explained by Davidov (2016) 172, the power to command is the employers' managerial prerogative, which gives employers the power to make unilateral decisions with regard to the business, including decisions that affect its employees. "Otherwise put, the managerial prerogative is the legal recognition of the subordination characterising the employment relationship". Le Roux (2006) *ILJ* 62 similarly states that the exercise of discretion is "simply another manifestation of employer power".

¹³¹ Loots (LLD Thesis, University of Stellenbosch) (2011) 47.

¹³² As correctly indicated by Cheadle (2006) *ILJ* 675 the concept of the unfair labour practice is essentially about the judicial regulation of the exercise of such power. Damant (2003) *ILJ* 730 states that the wording of section 186(2)(a) of the LRA illustrates that the section seeks to regulate the manner in which an employer behaves. In other words, it seeks to regulate the decision-making process and there is no reason why this is not inclusive of the manner in which discretion is exercised. As explained by Cohen (2014) *ILJ* 80, discretionary benefits have increasingly been relied upon by employers to motivate employees to increase their remuneration through improved performance. These benefits may take the form of discretionary performance bonuses, travel allowances, acting allowances and early retirement benefits. While provision for the payment of such discretionary benefits is generally incorporated into workplace policies or employment contracts, either expressly or impliedly, such clauses invariably stipulate that

gives effect to the LRA's objective of achieving social justice. Furthermore, this is not the only provision that seeks to challenge employer power. As indicated by Shooter, statutory protection in all its forms has become an impediment to managerial prerogative.¹³³ The LC in *Solidarity obo Oelofse v Armscor & others*¹³⁴ stated that "simply put, and in employment law terms, and under the auspices of the unfair labour practice jurisdiction, there is no such thing as an unfettered discretion".¹³⁵

Giving an expansive interpretation to benefits should not be seen as being unduly burdensome on employers. Extending the ambit of a benefit does not automatically translate into an adverse finding being made against an employer. All that it does is to allow adjudicators to interrogate the manner in which an employer exercises its discretion. In other words, it compels an employer to exercise discretion fairly, which is after all what they are required to do.

The second criticism relates to the uncertainty created by concepts such as "policy", "practice", "advantage" and "privilege" used in *Apollo Tyres*. The concern is that the use of these concepts, which are not defined, will result in an interpretation that indefinitely extends the scope of a benefit.¹³⁶

The concepts of practice and policy were discussed above.¹³⁷ If one considers the definition of advantage, it is a condition or circumstance that puts one in a favourable position,¹³⁸ while privilege is defined as a special right or advantage available only to a particular person or group.¹³⁹

Stemming from the above, advantages and privileges would pertain to a situation where an employee does not have a right to receive a particular benefit. However, the

employees have no legal entitlement to such benefits and reserve the payment or extension of such benefits to the discretion of the employer. Therefore, it is an important aspect that requires regulation as it can be open to abuse.

¹³³ Shooter (2010) *SA Merc LJ* 540.

¹³⁴ Case no JR2004/15, 21 February 2018 (LC).

¹³⁵ *Oelofse* para 28.

¹³⁶ Smit and Le Roux (2015) *CLL* 93. See further Fourie (2015) *PER* 3310 who also questions what is meant by policy or practice and concludes that *Apollo Tyres* leaves one with unclear concepts.

¹³⁷ See para 5.2.3.

¹³⁸ *Concise Oxford English Dictionary*.

¹³⁹ *Concise Oxford English Dictionary*.

foundation of the benefit exists and there is potential to receive the benefit, subject to employer discretion.¹⁴⁰ This is an advantage that may arise from policy or practice. Where the potential to receive the benefit only applies to a certain group of employees it would constitute a privilege.

These terms are not inexplicable. However, if not properly clarified they may lead to ambiguity. Therefore, the Code of Good Practice: Benefits formulated at the end of the study, in which a definition for benefits is provided, avoids using concepts that perpetuate uncertainty.

From a domestic perspective the expansive approach endorsed by *Apollo Tyres* is supported. However, it is important to consider whether foreign jurisdictions treat the legal protection that is available to their employees in a limiting or expansive manner. This is specifically in relation to the extent to which employees are allowed to challenge the exercise of employer discretion. This will assist to determine whether the wide-ranging interpretation that has developed in South African labour law is comparatively reasonable or whether the term “pre-existing” should be given a more limited interpretation.

5.4 FOREIGN LAW

5.4.1 Introduction

As explained in Chapter 1, the United Kingdom (UK) and New Zealand do not provide for unfair labour practice protection as found in South African labour legislation.¹⁴¹ However, both countries protect employees against unfair conduct in relation to a number of different disputes, including aspects akin to what is identified as benefits in South African labour law. An analysis of the protective measures offered in these foreign jurisdictions is helpful in determining whether pre-existing benefits should be limited to contractual benefits or whether they extend to benefits provided for subject to the exercise of employer discretion.

¹⁴⁰ As stated by Smith and Randall (2002) 46, the employer’s adoption of a policy on a matter is a way of keeping the matter non-contractual and within management’s prerogative.

¹⁴¹ See Chapter 1, para 1.4.

5.4.2 Position in New Zealand

While the Employment Relations Act (ERA)¹⁴² is the primary statute regulating labour law in New Zealand,¹⁴³ it is appropriate to consider previous statutes.¹⁴⁴ The dispute resolution mechanisms and institutions provided for in the earlier statutes assist in understanding the discussions that follow in this and succeeding chapters.¹⁴⁵

As alluded to, the resolution of personal grievances has formed part of New Zealand's employment law for a long time.¹⁴⁶ This concept was first recognised in the Labour Relations Act 77 of 1987.¹⁴⁷ In terms of the Act, the Labour Court had jurisdiction to deal with personal grievances.¹⁴⁸ When the Act was replaced by the Employment Contracts Act (ECA)¹⁴⁹ in 1991, the Employment Tribunal and Employment Court initially assumed the dispute resolution function.¹⁵⁰ The ERA which replaced the ECA and is currently in place, also provides for two fora. However, the Employment Tribunal has been replaced by the Employment Relations Authority, while the Employment Court remains in place.¹⁵¹

A personal grievance, as currently provided for in the ERA,¹⁵² is defined as any grievance that an employee has against his or her employer or former employer because of a claim that the employee has been unjustifiably dismissed¹⁵³ or that the employee's employment, or one or more conditions of the employee's employment, is or was affected to the employee's disadvantage by some unjustifiable action of the employer.¹⁵⁴

¹⁴² The ERA 24 of 2000.

¹⁴³ Anderson (2015) 71.

¹⁴⁴ Anderson (2015) 50-54.

¹⁴⁵ See Chapter 6, para 6.5 and Chapter 7, para 7.3.6.2.

¹⁴⁶ See Chapter 1, para 1.4.

¹⁴⁷ Section 210 of the Labour Relations Act 77 of 1987.

¹⁴⁸ Section 217 of the Labour Relations Act 77 of 1987.

¹⁴⁹ The ECA 22 of 1991. See Anderson (2015) 51.

¹⁵⁰ Sections 77 and 103 of the ECA 22 of 1991. See further Roth (2013) *CLLPJ* 884 who explains that the Employment Tribunal was responsible for mediation and adjudication, while the Employment Court had an appellate and supervisory judicial review jurisdiction as well as a first-instance jurisdiction over more complex legal matters.

¹⁵¹ Sections 156 and 186 of the ERA 24 of 2000. See further Anderson (2015) 174 and 176.

¹⁵² The ERA 24 of 2000, Part 9. See further Chapter 1, para 1.4.

¹⁵³ The ERA 24 of 2000, Part 9 section 103(1)(a).

¹⁵⁴ The ERA 24 of 2000, Part 9 section 103(1)(b). There are other components that form part of the definition, such as discrimination, sexual harassment and racial harassment. Refer to sections 103(1)(c)(d). See further Department of Labour Te Tari Mahi (2006) *Themes in Employment* 1-2 where it is stated that the definition comprises of three elements. The first is that the

It is apparent from this definition that New Zealand provides statutory protection against both unfair dismissals and unjustified employer conduct during the employment of an employee.¹⁵⁵ This provision serves a similar objective to the unfair labour practice provisions that exist in South African labour law and includes recourse against unfair employer conduct during the tenure of employment.¹⁵⁶ However, it is evident that the protection provided for in New Zealand is much broader in nature and does not seek to limit the type of practices allegedly committed by an employer that may give rise to a personal grievance.¹⁵⁷

If one considers the definition of “personal grievance”, there are essentially two instances in which a personal grievance may be raised outside of the dismissal context. The first is where the employer conduct complained of has affected the “employee’s employment” to the employee’s disadvantage. The second instance is where the employer conduct complained of has affected one or more of the employee’s “conditions of employment” to the employee’s disadvantage.¹⁵⁸

The term “employee’s employment” has been interpreted broadly and is not restricted to contractual terms of employment.¹⁵⁹ An employee’s employment may be negatively affected or disadvantaged flowing from the employer’s exercise of discretionary powers.¹⁶⁰ Using this provision, employees have successfully challenged the conduct of

employee’s employment or one or more of the employee’s conditions of employment is affected; the second is that the employee’s employment or conditions of employment are affected to the employee’s disadvantage; and the third is that the disadvantage was caused by the unjustified actions of the employer.

¹⁵⁵ Anderson (2015) 130 explains that the personal grievance provides a range of protection that goes well beyond unjustified dismissal. See further Roth (2001) *ELB* 85 who mentions that the statutory right of employees to fair treatment stems from the personal grievance procedure. Vranken (1999) *IJCLLIR* 307 states that personal grievances are grievances that individual workers have against their employer in relation to allegedly unjustifiable dismissals and also in relation to disadvantageous treatment short of actual termination of the employment relationship.

¹⁵⁶ This relates to all aspects covered by the unfair labour practice provisions, which include promotions; demotions; training; probation; benefits and disciplinary action short of dismissal.

¹⁵⁷ Anderson (2015) 134 states that the wide definition of personal grievances provides employee protection against a range of actions that affect both security of employment and an employee’s security in that employment.

¹⁵⁸ This is evident from the definition of a personal grievance, specifically section 103(1)(b).

¹⁵⁹ Anderson (2010-2011) *CLLPJ* 693.

¹⁶⁰ Anderson (2010-2011) *CLLPJ* 693.

employers relating to disciplinary action short of dismissal,¹⁶¹ denial of access to redundancy provisions, demotion and change in status.¹⁶²

Employer conduct which affects an employee's conditions of employment has been relied on to challenge unjustified employer conduct in respect of "employee benefits", "allowances" and salary issues. The definition of "conditions of employment" has been analysed in cases that dealt with the withdrawal of a mileage allowance,¹⁶³ the withdrawal of a company car¹⁶⁴ and the reduction in the amount paid in respect of a profit-based incentive plan, described as a bonus system.¹⁶⁵

To illustrate the point, the following cases are of relevance. In *NZ Storeworkers etc IUOW v South Pacific Tyres (NZ) Ltd (NZ Storeworkers)*¹⁶⁶ the employee contended that his conditions of employment had been changed to his disadvantage because of the employer's removal of a company vehicle which he used for many years.¹⁶⁷ The employer denied that the use of the vehicle was part of the contract of employment, contending that it was merely a privilege which the company could revoke at will.¹⁶⁸ The Labour Court concluded that the use of the vehicle went with the job and was part of the remuneration package, even though it was not provided for in a contract of employment.¹⁶⁹ The court had regard to the definition of the word "conditions" as it appeared in section 210 of the Labour Relations Act.¹⁷⁰ Significantly, the court noted that a condition of employment is not limited to contractual conditions.¹⁷¹

¹⁶¹ See, for example, *Neu v The Vice Chancellor of Victoria University of Wellington* [2016] NZERA 362 and *Collins v Chief Executive of the Ministry of Social Development* [2018] NZERA 1008 which dealt with personal grievances regarding the issuing of final written warnings. *Reid v Andrews t/a Alterations & Designer Garments* [2017] NZERA 335 was a personal grievance concerning unpaid suspension, among other aspects.

¹⁶² *Anderson* (2015) 147.

¹⁶³ *ANZ National Bank Ltd v Doidge* [2005] 1 ERNZ 518.

¹⁶⁴ *NZ Storeworkers etc IUOW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR.

¹⁶⁵ *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] NCZA 63.

¹⁶⁶ [1990] 3 NZILR.

¹⁶⁷ *NZ Storeworkers* 452 and 456.

¹⁶⁸ *NZ Storeworkers* 456.

¹⁶⁹ *NZ Storeworkers* 456.

¹⁷⁰ Section 210 of the Labour Relations Act 77 of 1987. Section 210(1)(a-b) stated as follows: "Personal grievance means any grievance that a worker may have against the worker's employer or former employer because of a claim - (a) that the worker has been unjustifiably dismissed; or (b) that the worker's employment, or one or more conditions thereof, is or are affected to the worker's disadvantage by some unjustifiable action by the employer".

¹⁷¹ *NZ Storeworkers* 457.

Fifteen years later a similar position was endorsed in *ANZ National Bank Ltd v Doidge (Doidge)*.¹⁷² This case involved a challenge to the withdrawal of a mileage allowance previously paid to the employee. The employer contended that the payment of the allowance was not a contractual term or condition of employment and that the employer therefore was entitled to withdraw payment of the allowance.¹⁷³ Here the Employment Court considered the definition of conditions, more specifically conditions of employment as provided for in the existing section 103(1)(b) of the ERA.¹⁷⁴ It came to the important conclusion that a personal grievance is broader than a breach of contract.¹⁷⁵ This conclusion was reached through the court's recognition that "not everything that an employer provides, or an employee expects to receive, during employment is either a term or a condition of the employment contract between the two".¹⁷⁶ The court stated that conditions of employment must be given a broad meaning and it supported the conclusions reached by the Court of Appeal in *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc) (Tranz Rail)*.¹⁷⁷

Therefore, *Doidge* held that the mileage allowance was a condition of the employee's employment in a broad sense and the withdrawal thereof disadvantaged the employee.¹⁷⁸ The judgments in *Tranz Rail* and *Doidge*, although handed down many years ago, remain authoritative.¹⁷⁹

¹⁷² [2005] 1 ERNZ 518.

¹⁷³ *Doidge* para 1.

¹⁷⁴ *Doidge* paras 45-46.

¹⁷⁵ *Doidge* para 45.

¹⁷⁶ *Doidge* para 46.

¹⁷⁷ [1999] NCZA 63 as discussed in *Doidge* para 52. *Tranz Rail* dealt with whether a profit-based incentive plan, which was regarded as a bonus system to reward staff when the company achieved its financial targets, could be withdrawn or modified as the company saw fit as it did not form part of the employment contract (para 3). The Court of Appeal found that the terms of employment go beyond the terms and conditions contained in a formal collective employment contract or individual employment contract (para 49). It stated that "broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment contract" (para 26).

¹⁷⁸ *Doidge* para 67.

¹⁷⁹ This is evident from cases such as *Downer New Zealand Limited v Jones* [2018] NZEmpC 77 and *Spotless Facility Services NZ Limited v MacKay* [2017] NZEmpC 15. The Employment Court in *Jones* relied on *Doidge* in deciding whether the employer's decision to change a roster resulted in a condition of the employee's employment being affected to his disadvantage. The court considered the comments made in *Doidge* that conditions of employment are not confined to breaches of contract, as a personal grievance is a much broader notion (para 104). In *MacKay*, the Employment Court, referring to the decisions of *Tranz Rail* and *Doidge*, stated that "the meaning of 'conditions' of employment is well established. It includes all the rights, benefits and obligations arising out of the employment relationship; the concept is necessarily wider

In assessing whether an employee benefit is a condition of employment, the approach in New Zealand, appropriately so, is to go beyond contractual provisions. As explained by Anderson, the personal grievance provisions are used to constrain employer power and the exercise of its discretion.¹⁸⁰ Evidently, the disadvantage suffered by an employee does not have to emanate from the terms of the contract but “extend to all the rights, benefits and obligations arising out of the employment relationship”.¹⁸¹

Apart from the personal grievance procedure, section 4 of the ERA requires parties to the employment relationship to deal with each other in good faith.¹⁸² The duty of good faith is broad in nature and applies to all matters that arise from employment.¹⁸³ As discussed by Colgan, while the concept is often linked to the word “bargaining”, the requirement to act in good faith is not limited to collective bargaining, as the obligation is pervasive, affecting all employment relations and interactions.¹⁸⁴ The obligation of good faith is a statutory mechanism to constrain the exercise of an employer’s discretions and powers and the methods by which decisions are made.¹⁸⁵ It requires employers to take proper account of legitimate worker interests, which include their economic, physical and psychological security in their employment.¹⁸⁶ According to Anderson the duty of good faith goes to the heart of the individual employment relationship and to management prerogative.¹⁸⁷

than the terms of an employment agreement” (para 50). See further *Cross v Air New Zealand Limited* [2018] NZERA Auckland 305.

¹⁸⁰ Anderson (2010-2011) *CLLPJ* 695. See further Anderson and Bryson (2006) *VUWLR* 493 who regard the personal grievance procedure as a constraint on management prerogative.

¹⁸¹ Anderson *et al* (2017) 106.

¹⁸² Sections 4 and 60(c) of the ERA 24 of 2000. See also Anderson (2010-2011) *CLLPJ* 685.

¹⁸³ These aspects are set out in the ERA 24 of 2000. Section 4(4)(b) provides for any matter arising under or in relation to a collective agreement while the agreement is in force. Section 4(4)(bb) provides for any matter arising under or in relation to an individual employment agreement while the agreement is in force. Section 4(5) stipulates that the obligation of good faith applies to matters broader than those set out in the Act. It is indicated that the matters to which the duty of good faith applies as specified in the Act are examples and do not seek to limit the application of this duty. See Anderson (2015) 94.

¹⁸⁴ Colgan (2008) 1.

¹⁸⁵ Anderson and Bryson (2006) *VUWLR* 491. See also Anderson (2007) *VUWLR* 429 who discusses the two major second-generation legislative developments constraining an employing entity’s unilateral decision-making power. The first is the personal grievance procedure and the second is the duty of good faith which forms a fundamental basis of the ERA 24 of 2000. See further Anderson (2010-2011) *CLLPJ* 714.

¹⁸⁶ Anderson (2010-2011) *CLLPJ* 686-687.

¹⁸⁷ Anderson (2007) *VUWLR* 431.

The approach followed in applying the personal grievance procedure and the duty of good faith ties in with the objectives of the ERA. This is to build productive employment relationships by acknowledging and addressing the inherent inequality of power in employment relationships.¹⁸⁸ Because the employer is the dominant party in the relationship, the law on personal grievances and the duty of good faith have the effect of curbing the exercise of employer discretion.¹⁸⁹

The approach followed in New Zealand provides comprehensive protection to employees. This is supported as it advances the notion that employees should not be seen as commodities. It undoubtedly establishes a more equal balance in the power relations between the parties during the tenure of employment.

5.4.3 Position in the United Kingdom

A brief overview of the hierarchy of courts in the UK that deal with labour law disputes assists in understanding the discussions that follow in this and succeeding chapters.¹⁹⁰

In the UK, labour law disputes can be divided into two broad categories. The one relates to claims for breach of contract¹⁹¹ and the other emanates from statutory claims such as unfair dismissals.¹⁹² While the UK does not have an Employment or Labour Court, the Employment Rights Act made provision for unfair dismissal disputes to be referred to the Industrial Tribunal.¹⁹³ The Industrial Tribunal has since been replaced by the Employment Tribunal.¹⁹⁴

Claims for breach of contract are referred to the County Court or High Court.¹⁹⁵ The High Court consists of three divisions, namely, the Queen's Bench and the Family and

¹⁸⁸ Part A section 3(a)(ii) of the ERA 24 of 2000.

¹⁸⁹ Anderson *et al* (2017) 96. See further Anderson and Bryson (2006) *VUWLR* 494.

¹⁹⁰ See Chapter 7, para 7.3.6.1.

¹⁹¹ This evident from cases such as *Clark v Nomura International Plc* [2000] WL 1213073; *Reinhard v Ondra* [2015] EWHC 26; and *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287.

¹⁹² Section 94 of the Employment Rights Act 1996.

¹⁹³ Section 111 of the Employment Rights Act 1996.

¹⁹⁴ Section 1 of the Employment Rights (Dispute Resolution) Act 1998.

¹⁹⁵ Korn and Sethi (2011).

Chancery Divisions.¹⁹⁶ Appeals are referred to the Court of Appeal and Supreme Court.¹⁹⁷ The Supreme Court is the highest court and has replaced the House of Lords.¹⁹⁸

As previously mentioned,¹⁹⁹ the UK does not provide statutory protection against unfair conduct arising during the tenure of the employment relationship. It only provides statutory protection against unfair dismissals.²⁰⁰

The contract of employment is the central feature of individual employment law in the UK and this results in a substantial number of employment disputes being concerned with the actual contents of the contract.²⁰¹ The contract of employment is the basis on which rights and obligations become legally enforceable.²⁰²

Notwithstanding the absence of statutory protection, employees have relied on the implied duty of mutual trust and confidence to challenge a range of employer conduct.²⁰³ This positive development arose in *Malik v Bank of Credit and Commerce International SA*.²⁰⁴

¹⁹⁶ See <https://www.hierarchystructure.com/hierarchy-of-civil-courts-in-england/> accessed on 7 November 2018. See further <https://www.judiciary.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf> 6 accessed on 7 November 2018.

¹⁹⁷ Maican (2013) *JT* 41. See further <https://www.hierarchystructure.com/hierarchy-of-civil-courts-in-england/> and <https://www.judiciary.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf> 6 accessed on 7 November 2018.

¹⁹⁸ Sections 23 and 40 of the Constitutional Reform Act 2005 read with schedule 9. See Maican (2013) *JT* 41 and Phillips (2013) *AULR* 19. See further <https://www.parliament.uk/documents/lords-information-office/hoflbpjudicial.pdf> 2 accessed on 7 November 2018.

¹⁹⁹ See Chapter 1, para 1.4.

²⁰⁰ Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by the employer.

²⁰¹ Painter and Puttick (1998) 41.

²⁰² Painter and Puttick (1998) 53.

²⁰³ Conduct related to the awarding of performance bonuses; the awarding of additional sick leave; the awarding of pension benefits and more have been challenged using the implied duty of mutual trust and confidence.

²⁰⁴ [1997] ICR 606. The applicants in *Malik* were employees of a bank in respect of which provisional liquidators were appointed. Shortly thereafter, it became widely known that the bank was found to have carried out its activities fraudulently. Therefore, dismissals took place on grounds of redundancy. Thereafter, neither applicant was able to obtain employment in the financial services industry, due to the stigma attached to them as former employees of the bank (at 609). Hepple and Morris *ILJ* 2002, referring to *Malik*, state that “in recent years the courts have affirmed that implied terms, most notably the duty to maintain trust and confidence, may govern the exercise of a variety of express contractual powers”. See further Fudge (2006-2007) *QLJ* 540; and Boyle (2008) *ELR* 231.

An important feature of this duty is the fact that the courts have acknowledged that there is a general legal obligation on employers which requires fair management behaviour.²⁰⁵ It provides a general instrument by which courts may strike a balance between the employer's interest in managing the business as it sees fit and the employee's interest in not being unfairly and improperly exploited.²⁰⁶

Similar to the objectives of the ERA in New Zealand, the duty of mutual trust and confidence seeks to balance the inherent inequality of power in the employment relationship. This is done by guarding against abuse, especially where the employer possesses discretionary powers under the contract of employment.²⁰⁷ This duty has considerable potential for controlling managerial prerogative, as all sorts of conduct may be held to fall within the scope of this duty.²⁰⁸ As explained by Hodder, this duty may apply to "all aspects of the employer's prerogative".²⁰⁹ In other words, it is a way of infusing fairness into the employment contract.²¹⁰

²⁰⁵ Collins *et al* (2012) 136.

²⁰⁶ Collins *et al* (2012) 137. See further Brodie (2002) *ELR* 258 who explains that one of the most interesting features of this duty is its role in restricting the scope of an employer's express powers under a contract. See further *Malik v Bank of Credit and Commerce International S.A. (In Compulsory Liquidation)* [1997] ICR 606 at 610 where the judge stated that "this implied obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages".

²⁰⁷ Brodie (2002) *ELR* 259.

²⁰⁸ Pitt (2004) 106.

²⁰⁹ Hodder (2002) *VUWLR* 502. See further *BG Plc v O'Brien* [2001] UKEAT 1063-99-1405. This case involved the granting of an enhanced redundancy package, which was not provided for in a contract (paras 4 and 7). While the employer argued that the implied term of trust and confidence cannot apply to a non-contractual benefit (para 21), the court held that the implied term of trust and confidence does apply to the exercise of discretion by an employer (para 32). See further Brodie (1997) *ELB* 4 for a discussion of *Clark v BET* [1997] IRLR 348. Brodie states that the employee's contract of employment contained a clause that salary would be reviewed annually and could be increased by an amount which was in the absolute discretion of the board. The wording of the provision meant that all questions concerning the increases were within the employer's prerogative. However, the court found that it was only the amount to be paid that was in the absolute discretion of the board and that if the board capriciously or in bad faith exercised its discretion in a manner that resulted in the amount of the increase being nil, that would have amounted to a breach of contract. Brodie remarks that the restriction of the employer's discretion in *Clark* is "consonant with the development of the implied obligation of mutual trust and confidence".

²¹⁰ Hodder (2002) *VUWLR* 501. Accordingly, this obligation is a core common-law duty which dictates how employees should be treated during the course of the employment relationship.

Collins *et al* regard this implied duty to be one of the most remarkable and significant developments of the common-law contract of employment in recent decades.²¹¹ The authors view it as bringing the common law closer in line with modern views about fairness in employment relations by controlling the abuse of managerial power in the workplace.²¹²

The potential scope of the implied term has been described as “almost limitless”, as it may apply to any action that affects the employment relationship.²¹³ This duty has been endorsed in the context of bonuses,²¹⁴ illness benefits,²¹⁵ pay and pensions.²¹⁶ It has also been applied in a manner that has allowed employees in certain instances to claim an entitlement to rights not provided for in the contract of employment.²¹⁷

An important case which illustrates the application of the duty of mutual trust and confidence in respect of benefits is *Clark v Nomura International Plc (Clark)*.²¹⁸ Here the employee challenged the fact that no bonus was awarded to him.²¹⁹ The bonus in issue was awarded in terms of the company’s discretionary bonus scheme, which was clearly stated in the letter of offer along with an express provision that the bonus was not guaranteed in any way and was dependent on individual performance.²²⁰ The High Court²²¹ found that the employer’s discretion was not unfettered and could not be exercised in an irrational or perverse manner.²²² The court considered the performance

²¹¹ Collins *et al* (2012) 141-142. See further Brodie (2002) *ELR* 258 and Anderson *et al* (2017) 118.

²¹² Collins *et al* (2012) 141-142. See further Brodie (2002) *ELR* 258.

²¹³ Irving (2008) *CLJ* 24. See further Deakin and Morris (2012) 364.

²¹⁴ See *Clark v Nomura International Plc* [2000] WL 1213073; *Clark v BET* [1997] IRLR 348; *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287; and *James Keen v Commerzbank AG* [2006] EWHC 785 (Comm).

²¹⁵ See *Scottish Courage Ltd v Guthrie* [2004] WL 1174134.

²¹⁶ The court in *Imperial Group Pension Fund Ltd & others v Imperial Tobacco Ltd & others* [1991] 2 All ER 597 at 606-607 held that the implied duty of trust and confidence owed by an employer also applies to the exercise of the employer’s powers under a pension scheme. See further Cohen (2010) *SALJ* 452 and Boyle (2008) *ELR* 232.

²¹⁷ See *BG Plc v O’Brien* [2001] UKEAT 1063_99_1405. See further Owens *et al* (2011) 290. [2000] WL 1213073.

²¹⁸ *Clark* para 5.

²¹⁹ *Clark* para 7.

²²⁰ Queen’s Bench Division.

²²¹ *Clark* para 40. Similarly, in *Reinhard v Ondra* [2015] EWHC 26 para 445 the High Court found that the employer had failed to exercise its discretion properly. Therefore, the decision was found to be irrational or perverse.

of the employee and held that the employer's decision not to award a bonus was perverse, irrational and did not comply with the terms of the discretion.²²³

*Commerzbank AG v James Keen (Keen)*²²⁴ also dealt with a challenge by an employee in respect of the amounts paid to him as a discretionary bonus.²²⁵ The Court of Appeal confirmed that there is, in general, an implied mutual duty of trust and confidence between employer and employee.²²⁶ Consistent with this duty is an employer's obligation to supply an employee with an explanation of the reasons for the exercise of discretion.²²⁷

Cases such as *Clark* have established the principle that employees are entitled to a *bona fide* and rational exercise of their employer's discretion.²²⁸ The Court of Appeal in *Keen* has endorsed this principle and has emphasised the obligation placed on an employer to give reasons for the manner in which discretion is exercised.²²⁹

Employees continue to challenge the alleged unfair exercise of employer discretion in relation to bonus payments and other entitlements.²³⁰ The legal principles set out in cases such as *Clark* and *Keen* continue to be of relevance in deciding such cases.²³¹

²²³ *Clark* para 80. Similarly, *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287 dealt with the application of a discretionary bonus clause contained in the employment contract (para 2). The Appeal Court referred to numerous cases, which all found that an employer has to exercise its discretion in a reasonable and rational manner and that the exercise of such discretion is subject to the implied term of trust and confidence (paras 37 to 45). *Horkulak* found that the employee was entitled to a *bona fide* and rational exercise by the employer of their discretion in deciding whether to award a bonus and the sum to be awarded (para 46).

²²⁴ [2006] EWCA Civ 1536.

²²⁵ *James Keen v Commerzbank AG* [2006] EWHC 785 paras 7 to 9 explains the details of the case. The employer subsequently took the case on appeal.

²²⁶ *Keen* para 43.

²²⁷ *Keen* para 44.

²²⁸ Wynn-Evans (2007) *ILJ (UK)* 208.

²²⁹ Wynn-Evans (2007) *ILJ (UK)* 213.

²³⁰ See, for example, *Brogden v Investec Bank Plc* [2014] EWHC 2785 (Comm) which concerned dissatisfactions by employees in respect of discretionary bonuses paid to them (para 4). The High Court therefore interrogated the manner in which the employer exercised its discretion (paras 107-114). In *Parmar v HSBC Private Bank (UK) Limited* [2018] EWHC 2468 (QB) the employee challenged the employer's decision not to provide him with additional remuneration in the form of invested stock and a cash award (para 3). Both benefits were discretionary (para 4).

²³¹ In *Threlfall v ECD Insight Limited* [2012] EWHC 3543 (QB) the High Court considered the manner in which the employer exercised its discretion when taking the decision not to provide the employee with a bonus (para 101). The court in considering this issue duly considered the tests set out in *Clark* and *Keen* (paras 97 and 98). In *Patural v DB Services (UK) Ltd* [2015] EWHC 3659 (QB) the High Court considered *Keen* in assessing the manner in which the employer

Even though no statutory protection exists in the UK, the judiciary has constructively developed the implied duty of mutual trust and confidence to enhance the level of protection available to employees. Even where contractual provisions provide for the unfettered discretion of an employer, this is still subject to challenge.²³² This duty positively advances the principles of fairness required in the employment relationship.

5.4.4 Lessons Learnt

Firstly, both the UK and New Zealand endorse an approach that allows the courts to interrogate the manner in which employer discretion is exercised in awarding benefits to employees. This is despite the fact that the legal framework of these two countries differ. In the UK there is no statutory protection to deal with unfair conduct of the employer (apart from unfair dismissal protection), as there is in New Zealand.

Secondly, the courts in New Zealand in enforcing the personal grievance provisions have not limited their authority to cases where the benefit in respect of which discretion is exercised is provided for contractually. Instead, the courts have embraced an expansive approach, which allows the personal grievance procedure to be utilised in instances where the employer's discretionary powers to grant benefits emanate from other sources, such as policy and practice. Furthermore, New Zealand limits the exercise of employer power through the statutory duty of good faith.

Thirdly, the courts in the UK have used the implied duty of mutual trust and confidence to limit the unfettered discretion awarded to employers in contracts of employment.

exercised its discretion in deciding on the bonus amount awarded to the employee (paras 40-44). In *Daniels v Lloyds Bank Plc* [2018] EWHC 660 (Comm) *Clark, Horkulak and Keen* were considered (paras 161-163). This related to the employer's failure to vest shares in the employee in line with the bank's long-term incentive plan, which the employer argued it was allowed to do in line with a discretionary rule (paras 1-2).

²³²

In addition to *Clark, Horkulak and Keen*, see further *Mallone v BPB Industries plc* [2002] EWCA Civ 126. As discussed by Collins *et al* (2012) 140 the employer withdrew all of the employees' share option entitlements based on the employer's discretion. The Court of Appeal found that the manner in which the discretion was exercised constituted a breach of contract. The court explained that even where the employer has an unfettered discretion, such discretion cannot be exercised dishonestly, for an improper motive, capriciously or arbitrarily. See also *Scottish Courage Ltd v Guthrie* [2004] WL 1174134 where the adjudicator stated that "the cases in recent years show a decided trend away from the concept of construing contractual terms which allow of a discretion to the employer, as permitting an unlimited discretion" (para 19). In this case the employee challenged the non-payment of illness benefits (para 12).

Fairness requirements have been developed regarding the exercise of employer discretion. Notably, such discretion must be exercised rationally and reasons must be provided for the decisions that flow from the exercise of employer discretion.

The afore-mentioned approaches stem from the fact that both countries recognise the inequality of power that is inherent in the employment relationship. Stemming from this, the courts have adopted an expansive approach to dealing with employee dissatisfactions in order to counteract this prevalent power imbalance.

Drawing from the level of protection provided to employees in the UK and New Zealand, the expansive approach to the interpretation of benefits in South African labour law is justifiable. One of the stated purposes of the LRA is to bring about social justice, which acknowledges the inequality in the employment relationship. It makes sense that provisions of the LRA be interpreted in a manner that recognises the weaker position of employees. Consequently, an interpretation of benefits that brings about greater employee protection as opposed to an interpretation that proffers less employee protection is warranted.

5.5 CONCLUSION

This chapter sought to determine what the definition of benefits entails. This was done by identifying and analysing the criteria that apply in establishing the existence of a pre-existing benefit. In this regard, the chapter traversed South African case law and the positions in the UK and New Zealand. The following conclusions may be drawn.

A pre-existing benefit was initially narrowly circumscribed by the courts. The courts only recognised benefits that were expressly provided for *ex contractu* or *ex lege*. In a positive turn of events the ambit of a pre-existing benefit was expanded to include benefits provided for in a policy or awarded in terms of a practice. It was further extended to accommodate benefits awarded or granted subject to the exercise of employer discretion. The recognition of a judicially-created right to a benefit was also endorsed. In addition, the existence of a legitimate expectation to receive a benefit was considered in conferring pre-existing status, but was subsequently rejected.

There are well-founded reasons for broadening the scope of a pre-existing benefit. Firstly, it gives effect to the objectives of the LRA. Secondly, it complies with a purposive interpretation of the LRA, which promotes fairness towards employees. Thirdly, it promotes the positive developments of the Industrial Court era. Fourthly, it is in line with the approach followed in the UK and New Zealand.

While an expansive approach to the interpretation of pre-existing benefits is justifiable, the criteria to be applied should be better clarified to address the shortcomings that have been identified, namely, the recognition of judicially-created rights to benefits, the non-recognition of benefits automatically provided for in policies and the limitations placed on the source of an employer's discretion.

Such clarification is provided in the Code of Good Practice: Benefits. The Code does not limit pre-existing benefits to those provided for in contracts of employment, collective agreements or legislation. Instead, a benefit is regarded as pre-existing if it is provided for in a policy or granted in terms of practice. This includes benefits that are provided for or offered subject to the exercise of employer discretion irrespective of whether the discretion is exercised in terms of a contract, collective agreement, legislation, policy or practice.

To sum up, the criteria that establish pre-existing benefits are employment contracts, collective agreements, legislation, policies, practice and the exercise of employer discretion in granting or awarding the benefit. However, a legitimate expectation to receive a benefit has quite correctly been ruled out as a criterion, along with a judicially-created right to a benefit. This would expand the notion of benefits into the arena of disputes of interest and judge made law.

The interpretation of benefits while being expansive in nature does not perpetuate the shortcomings of the unfair labour practice concept that existed under the Industrial Court era. While benefits have been generously formulated to promote fairness of employees, it likewise provides clarity. This interpretation of benefits builds on the positive developments of the pre-democratic era, but equally addresses the shortcomings identified during that time.

CHAPTER 6
CRITERIA TO DETERMINE UNFAIRNESS

	Page
6.1 Introduction.....	159
6.2 Understanding Fairness.....	161
6.3 Benefit Disputes: Guidance from the Courts.....	164
6.3.1 Introduction.....	164
6.3.2 Substantive Fairness.....	165
6.3.3 Procedural Fairness.....	169
6.4 Unfair Dismissals: Guidelines from the LRA and Codes.....	169
6.4.1 Introduction.....	169
6.4.2 Substantive Fairness.....	170
6.4.3 Procedural Fairness.....	175
6.5 New Zealand’s Justification Test.....	180
6.5.1 Introduction.....	180
6.5.2 The Justification Test.....	181
6.5.3 Lessons Learnt.....	186
6.6 Conclusion.....	187

6.1 INTRODUCTION

As mentioned, the determination of whether an unfair labour practice relating to the provision of “benefits” has taken place involves a two-stage inquiry.¹ The first stage entails establishing whether the applicable dispute resolution bodies have jurisdiction to consider the benefit dispute.² This will depend on whether the benefit falls within the definition of a benefit for the purposes of section 186(2)(a) of the Labour Relations

¹ See Chapter 1, para 1.2 and Chapter 4, para 4.3.

² See Chapter 1, para 1.2 and Chapter 4, para 4.1.

Act (LRA). The types of disputes, and criteria that apply in defining a benefit, have been analysed in Chapters 4 and 5.³

Once it has been confirmed that the subject of the dispute constitutes a benefit, the second stage of the inquiry entails establishing whether the conduct or decision of the employer was fair. Considering the characterisation of a benefit,⁴ the dispute could *inter alia* relate to the fairness of not granting a benefit, removing or reducing a benefit or rejecting an application for a benefit. These are the types of decisions in relation to benefits that have the potential to disadvantage an employee.

Notwithstanding the fact that fairness is firmly embedded in the unfair labour practice concept, the standards and principles that must be applied in evaluating the fairness of the employer's conduct are glaringly absent from the LRA. While the LRA provides guidance in assessing the fairness of unfair dismissals,⁵ the determination of fairness in unfair labour practice disputes is left to the discretion of arbitrators of the Commission for Conciliation, Mediation and Arbitration (CCMA) or Councils.⁶

The approach of utilising principles of substantive and procedural fairness in relation to benefit disputes has been followed sporadically.⁷ As explained by Cohen, there should be a fair reason for the decision coupled with the utilisation of a fair procedure.⁸ While assessing benefit disputes against the standards of substantive and procedural fairness appears to be plausible, the content and aptness of these standards require careful consideration. This chapter seeks to define the standards of fairness applicable to benefit disputes against which employer conduct must be measured.

³ See Chapter 4, paras 4.3 and 4.4 and Chapter 5, paras 5.2 and 5.3.

⁴ *Apollo Tyres* para 50. See further Chapter 5, para 5.3.1.

⁵ See the discussion regarding sections 188-189; and the Code of Good Practice that follows in para 6.4 below.

⁶ Chicktay (2007) *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. Smit and Le Roux (2015) *CLL* 102 similarly explain that very little guidance has been provided regarding the standard that commissioners and arbitrators should apply in assessing the fairness of unfair labour practice disputes relating to the provision of benefits.

⁷ In *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703 (LC) para 43 the court took into account both substantive and procedural fairness in considering an unfair labour practice dispute relating to the provision of benefits.

⁸ Cohen (2014) *ILJ* 85-86.

The chapter firstly traverses the meaning of fairness. Secondly, the chapter considers the limited judicial authority relating to the standards of fairness that have developed in benefit disputes. Thirdly, the standards of fairness documented in the LRA pertaining to misconduct and operational requirement dismissals are explored. Fourthly, the justification test applied in New Zealand is evaluated. In the final instance, findings are formulated and recommendations are advanced.

6.2 UNDERSTANDING FAIRNESS

As explained by Rycroft, since the introduction of the notion of the unfair labour practice into South African labour law in 1979, “fairness rather than lawfulness became the new norm in South African industrial relations”.⁹ Added to this, with the introduction of the constitutional right to fair labour practices in 1994,¹⁰ fairness has been enshrined as a human right.¹¹ The LRA’s unfair dismissal and unfair labour practice provisions, among others, aim to give effect to this right in the sphere of the employment relationship.¹²

The entrenchment of statutory fairness has resulted in a considerable curtailment of employer power in the workplace. As aptly indicated by Thompson, “no employer decision bearing on employment is immune from industrial or legal challenge”.¹³ The limitations placed on the employer’s power is not uncalled for considering the history

⁹ Rycroft (1996) *SAHR* 6. According to Grogan (2005) 37 in the common-law contract of employment there was no general notion of fairness that could be used by the courts to develop remedies for victims of unfair conduct. The unfair labour practice was introduced into South African law in 1979 to provide a remedy. See further Brassey *et al* (1987) 49-58 where the five requirements of an unfair labour practice are discussed, with the final requirement being that the conduct must have been unfair.

¹⁰ Section 27 of the Constitution of the Republic of South Africa, 1993 (The Interim Constitution). Now section 23(1) of the Constitution of the Republic of South Africa, 1996.

¹¹ As discussed by Cohen (2010) *SALJ* 449, the constitutional promise of fair labour practices has resulted in the employer no longer having unfettered authority over the employment of an employee. See also *SACCAWU v Garden Route Chalets (Pty) Ltd* [1997] 3 *BLLR* 325 (CCMA) para 9 where the arbitrator held that “unquestionably, the attainment of equality is the centrepiece of our new constitutional order”.

¹² Orrie (1994) *QLRPB* 141 mentions that the idea of an unfair labour practice rested on considerations of fairness and equity. Furthermore, the wording of sections 185 and 186 of the LRA 66 of 1995 emphasises the important role played by considerations of fairness. The role of fairness is also evident from the courts’ change in approach from a narrow to an expansive interpretation of benefits. See the discussion in Chapter 4, para 4.2.4.1 in this regard. See further Grogan (2005) 46 who mentions that the value of the unfair labour practice is to go beyond the contract into the realm of fairness.

¹³ Thompson (1999) *ILJ* 758-9. See further Shooter (2010) *SA Merc LJ* 540.

of labour law and the prevalent characteristic of the employer being the bearer of power.¹⁴ The legislature, rightfully so, has put measures in place to curb employer power by providing recourse to employees who are, or have been, unfairly treated. These employee protections establish a more equitable balance into the employment relationship, as they require employers to treat employees fairly.¹⁵

It is indisputable that employers should act fairly when making decisions that impact on employees, which include decisions regarding the provision of benefits. However, what is less evident is how the concept of fairness must be applied to benefit disputes.

When considering the notion of fairness, a number of terms come to mind. In her thesis, Loots refers to words such as “‘equitable’, ‘equity’, ‘unbiased’, ‘reasonable’, ‘impartial’, ‘balanced’, ‘just’, ‘honest’, ‘free from irregularities’, ‘according to the rules’, ‘equality’”.¹⁶ Cooper explains that the concept of fairness in the context of labour “should be seen as relating to practices which are in line with tenets of justice”.¹⁷

Unfairness bears a converse meaning. Du Toit *et al* define the concept 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”.¹⁸ However, while this may appear simple to understand, it is not as easy to apply.¹⁹

¹⁴ In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 72 the CC mentioned that an employee’s vulnerability arises from the inequality in the employment relationship. Similarly, the CC in *Food and Allied Workers Union obo Gaoshubelwe v Pieman’s Pantry (Pty) Limited* [2018] ZACC 7 para 79 explained that “labour legislation, including the LRA, was a response, in part at least, to the inequity against workers inherent in the common law employment relationship”.

¹⁵ As discussed by Loots (LLD Thesis, University of Stellenbosch, 2011) 47 considerations of fairness have resulted in a restriction of managerial prerogative through recourse such as the unfair labour practice. See further Smit (PhD Thesis, University of Pretoria, 2010) 5 who states that one of the most basic labour rights of any employee in South Africa is the right to be treated fairly.

¹⁶ Loots (LLD Thesis, University of Stellenbosch, 2011) 52.

¹⁷ Cooper (2004) *ILJ* 813. See further Collins (1986) *ILJ (UK)* 11.

¹⁸ Du Toit *et al* (2015) 546. This definition has been referred to in cases such as *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC) para 53 and *Ehlanzeni District Municipality v South African Local Government Bargaining Council & others* case no JR1163/10, 30 September 2014 (LC) para 30.

¹⁹ Loots (LLD Thesis, University of Stellenbosch, 2011) 52 states that while it is a relatively uncomplicated exercise to identify (un)fairness, the general scope of the concept of fairness evades jurists. See further Smit (PhD Thesis, University of Pretoria, 2010) 7 who states that the quest for fairness in is not easy.

In *National Education Health & Allied Workers Union v University of Cape Town & others (NEHAWU)*,²⁰ the Constitutional Court (CC) defined fairness as an intentionally flexible concept, dependent upon the individual circumstances of the dispute. The notion is intended to accommodate and balance the conflicting interests and rights of both employers and employees.²¹

The CC has highlighted two significant principles in determining fairness. Firstly, it stated that “the fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee”.²² This principle was entrenched in the previous unfair labour practice dispensation.²³ Secondly, the CC explained that fairness depends upon the circumstances of the case and “essentially involves a value judgment”.²⁴

NEHAWU established two broad values that must be considered when determining whether an employment decision is fair. However, in order to apply these values, adjudicators must first understand the standard of fairness that applies to benefit disputes. The next part seeks to establish these standards.²⁵

²⁰ (2003) 24 *ILJ* 95 (CC).

²¹ *NEHAWU* paras 38 and 40. Cohen (2004) *SAJHR* 483 confirms that the constitutional right to fair labour practices guarantees “the equitable and unbiased protection of both employers and employees”. An apt illustration of these competing interests can be found in *Chemical Workers Union v Afrox* 1999 20 *ILJ* 1718 (LAC), which Bosch (2008) *SLR* 386 explains as involving the weighing-up of the employees’ right to strike against the employer’s right to have their economic interests protected by way of their right to dismiss employees for a fair reason based on their operational requirements. See further Cohen (2014) *ILJ* 85-86 and Cheadle (2006) *ILJ* 672.

²² *NEHAWU* para 38. Elias (1981) *ILJ* 211 indicates that the function of fairness is to reconcile the interests of the employer and employee. In the case of dismissal these conflicting interests are explained as follows: “It is accepted that the employer has the right to dismiss employees where it is necessary to protect their business interests. However, this does not mean that the employer can remorselessly pursue their own interests as the interests of the worker must also be considered.”

²³ In *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court & others* (1986) 7 *ILJ* 489 (A) 495 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”. See further *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others* (1996) 17 *ILJ* 455 (A). Cooper (2004-2005) *CLLPJ* 207 states that 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. The acknowledgement by the IC that fairness applied 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.

²⁴ *NEHAWU* para 33. Elias (1981) *ILJ* 202 states that inherent in the concept of fairness is the fact that each case must be considered on its own merits.

²⁵ See paras 6.3 and 6.4 below.

6.3 BENEFIT DISPUTES: GUIDANCE FROM THE COURTS

6.3.1 Introduction

Although the LRA does not provide guidance regarding fairness in respect of unfair labour practice disputes, the courts have to a limited extent formulated standards in this regard.

In *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen (Ochse Webb)*²⁶ the LAC considered a decision of the Industrial Court (IC) regarding changes made to a remuneration package.²⁷ *Ochse Webb* confirmed that fairness has both a substantive and procedural component.²⁸

More recent authority comes from the Labour Court (LC) in *Protekon (Pty) Ltd v CCMA & others (Protekon)*.²⁹ Here, the LC dealt with the provisions of the current LRA relating to the provision of benefits. The LC supported the two requirements of fairness identified by the CCMA, being substantive and procedural fairness. The court held that:

“The commissioner’s approach to assessing the fairness of the applicant’s conduct was to look separately at the question whether there was a fair reason for the conduct and the question whether a fair procedure was followed. Although the LRA itself does not prescribe this separate analysis of questions of substance and procedure, as it does for example in relation to the question of the fairness of dismissal (in section 188), this approach was well established under the general unfair labour practice jurisdiction of the 1956 LRA.”³⁰

Protekon provided the foundation for applying standards of procedural and substantive fairness in the determination of benefit disputes. The LC is applauded for this positive development.³¹ However, what requires determination is the guidance that can be extracted from case law in developing criteria to be applied by adjudicators

²⁶ [1997] 2 BLLR 124 (LAC).

²⁷ *Ochse Webb* 125-126.

²⁸ *Ochse Webb* 129.

²⁹ [2005] 7 BLLR 703 (LC). Chicktay (2007) *SA Merc LJ* 111 highlights the fact that “the *Protekon* judgment adopted a meticulous mode of determining fairness in unfair labour practice disputes”.

³⁰ *Protekon* para 43.

³¹ Chicktay (2007) *SA Merc LJ* 111.

when assessing whether a decision in relation to the provision of benefits is substantively and procedurally fair.

6.3.2 Substantive Fairness

Ochse Webb found that substantive fairness involves a consideration of whether there was a fair reason for the decision.³² It confirmed that a commercial need constituted a fair reason.³³ Similarly, the LC in *Protekon* agreed that the decision was substantively fair as the employer had a genuine commercial reason for withdrawing the travel concessions.³⁴

The LAC in *Apollo Tyres South Africa (Pty) Ltd v CCMA (Apollo Tyres)*³⁵ found that the employer's decision not to grant the employee early retirement benefits constituted an unfair exercise of discretion, as there was no acceptable, fair or rational reason why the employee was not permitted to participate in the early retirement scheme.³⁶ Although the court did not pronounce on the standards of fairness applicable to benefit disputes, as was done in *Protekon*, consideration was inevitably given to the substantive fairness of the employer's conduct. Importantly, the court espoused rationality as a factor in determining substantive fairness.

The LC in *City of Cape Town v SA Municipal Workers Union obo Sylvester & others (Sylvester)*³⁷ similarly found that irrationality goes to the issue of fairness.³⁸ Cohen views this case, which dealt with an unfair labour practice relating to promotion, as providing the yardstick for determining substantive fairness in benefit disputes.³⁹ An essential element to be discerned from this case is that in determining the fairness of the employer's actions one must not readily accept the decision of the employer by

³² *Ochse Webb* 129.

³³ *Ochse Webb* 129.

³⁴ *Protekon* para 44.

³⁵ [2013] 5 BLLR 434 (LAC).

³⁶ *Apollo Tyres* paras 59-60. The LAC referred to the fact that the employer kept shifting the goal post in an attempt to conjure up an acceptable reason why Ms Hoosen did not qualify for the scheme. However, based on the criteria set by the employer she qualified to participate in the scheme but was unfairly disallowed entry into the scheme.

³⁷ (2013) 34 ILJ 1156 (LC).

³⁸ *Sylvester* para 14.

³⁹ Cohen (2014) ILJ 85.

relying on the *dictum* that the employer knows its business best and should be allowed substantial leeway in exercising its discretion. This case requires the decision maker to assess objectively the rationality of the employer's decision, and not to limit its intervention to cases that are "manifestly or demonstrably unfair" or where the employer decision is "so excessive as to shock one's sense of fairness".⁴⁰

In *Solidarity obo Oelofse v Armscor & others (Oelofse)*,⁴¹ the LC had to consider whether the employer's decision not to award an employee a performance bonus, based on the fact that she had been found guilty of misconduct, constituted an unfair labour practice.⁴² Ms Oelofse met all the individual requirements set out in the employer's policy to qualify for the performance bonus.⁴³ However, the policy stated that the performance bonus was an annual non-guaranteed, discretionary payment based on the attainment of organisational, departmental, divisional, team and individual goals.⁴⁴

The LC found that it was not unfair of the employer not to pay the performance bonus,⁴⁵ as meeting the individual qualifying criteria set out in the policy was not the only requirement that had to be considered. The employee had a duty to adhere to the employer's values and objectives, which she did not do, as was evident from her being found guilty of misconduct.⁴⁶ The court explained that a decision would only be unfair

⁴⁰ In the aforementioned case, on face value, there was a fair reason provided by the employer for not appointing the employee, which was the fact that the employee failed the written assessment (para 3). Notwithstanding this reason, the adjudicator found that the decision was unfair, considering a range of factors. This included the employer's failure to provide the rationale for the pass mark of the written assessment; the failure to explain the method of allocation of the marks; the fact that the employee acted in the post for five years; the fact that he continued to act in the post after his unsuccessful candidature for the post, among other factors (para 14 and 16). See further Van Niekerk and Smit (2018) 309. See also *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 31.

⁴¹ Case no JR2004/15, 21 February 2018 (LC).

⁴² *Oelofse* paras 13 and 14.

⁴³ *Oelofse* para 12. At para 7 the judge explained that the requirements were an individual performance score of at least 90%, the employee had to be in employment on the last day of the financial year for which payment was calculated, the employee must have been in employment for more than six months and the employee must not have been absent from work for longer than six months.

⁴⁴ *Oelofse* para 7.

⁴⁵ *Oelofse* para 38.

⁴⁶ *Oelofse* para 38.

if employer discretion was exercised in an arbitrary, capricious, *mala fide*, irrational or grossly unreasonable manner.⁴⁷

Essentially, *Oelofse* built on the factors for determining substantive fairness laid down in *Apollo Tyres*. Substantive unfairness would result not only from irrational decisions, but also from arbitrary, grossly unreasonable, capricious and *mala fide* decisions.

There were two further important principles dealt with in *Oelofse*. The first is the need to assess objectively all relevant circumstances applicable to both the employer and the employee in determining fairness.⁴⁸ This accords with the standards set out by the CC in *NEHAWU*. The second is the court's affirmation of earlier LC decisions that inconsistent treatment is a factor to be considered in determining substantive fairness.⁴⁹

The principles set out in *Oelofse* are indeed helpful in formulating criteria to be applied in determining substantive fairness. One area of discontent, however, is the strict onus placed on employees to prove inconsistency.⁵⁰ The LC requires the employee to prove that another employee in the same or similar circumstances was treated differently,

⁴⁷ The LC referred to the LAC decisions of *Apollo Tyres* and *Ncane v Lyster NO and others* (2017) 38 ILJ (LAC) in reaching this decision.

⁴⁸ *Oelofse* paras 32-40.

⁴⁹ *Oelofse* para 51. In *South African Revenue Services v Ntshintshi & others* (2014) 35 ILJ 255 (LC) the court acknowledged that the employee may not have met the requirements to receive a travel allowance. However, it found that based on the principle of consistency it was unfair not to grant her the allowance as it was given to other employees (para 42). In *Ehlanzeni District Municipality v South African Local Government Bargaining Council & Others* Case no JR1163/10, 30 September 2014 (LC) while the employee did not meet the requirements to receive the travel allowance, the employer's decision was held to be unfair as the allowance was awarded to other employees who did not meet the requirements either (paras 34 and 41). See further *South African Post Office Limited v Gungubele & Others* Case no JR2947/2010, 25 February 2014 (LC). Here, the employer did not pay an acting allowance to anyone who acted in managerial positions, as these positions were aimed at developing managerial skills. This was evident from the fact that the employee who acted for thirteen months prior to the respondent was not paid for his acting appointment. Therefore, the employer's conduct was found to be fair as there was consistent treatment of employees (paras 20 and 21).

⁵⁰ In order to pass the test, the employee was required to conduct a like-for-like comparison, which illustrated that the employer's conduct in treating employees differently was motivated by arbitrariness, *mala fides*, capricious conduct or a discriminatory management policy (para 51). The LC consequently found that the employee failed to prove that the employer acted inconsistently (para 52). This was because the employee's basis for the inconsistency was merely that three employees who were dismissed in 2012 still received their performance bonuses for the 2011/2012 period. The employee failed to provide the circumstances in which this alleged payment of performance bonuses took place, followed by an indication that what happened in those cases were comparable to the current case.

for which there was no valid basis. The onus placed on the employee is probably a result of the fact that it is commonly accepted, while not prescribed in the LRA, that the employee has the onus to prove that an unfair labour practice has been committed.⁵¹ However, it is rather unreasonable to expect an employee to have detailed information regarding the inconsistency and to be able to convince an adjudicator of the circumstances in which the alleged inconsistency took place.

While inconsistency is a definite factor that must be considered, the strict test endorsed in *Oelofse* is not supported. The onus should be on the employee to raise inconsistency and to make attempts to obtain information from the employer to illustrate the inconsistency. However, where the employer refuses to provide such information or ignores the employee's request, the adjudicator must place the onus on the employer to show that there was no inconsistency, or where there was inconsistency, to provide justification.

The afore-mentioned cases provide support for the view that substantive fairness is an important standard that must be applied when considering benefit disputes. Relevant factors for determining substantive fairness have been established. Firstly, there must be a fair reason for the decision relating to the provision of benefits. The commercial or operational requirements of an organisation may constitute a fair reason. However, a decision based on an irrational, arbitrary, unreasonable, capricious and *mala fide* reason is unfair. Secondly, inconsistent treatment is a factor that points towards unfairness and must be considered. Thirdly, the adjudicator must interrogate the conduct of the employer and not easily defer to the employer's decision. Fourthly, the totality of circumstances from both an employer and employee perspective must be assessed when determining fairness.

The information garnered from the afore-mentioned court decisions provide an important starting point for determining substantive fairness. However, considering the fact that there are statutorily defined criteria for determining substantive fairness in dismissal disputes, an exploration of applicable LRA provisions and the Code of Good

⁵¹ *Ehlanzeni* para 33 explained that "it is trite that the onus in establishing the existence of an unfair labour practice is on the employees". However, thereafter there is an obligation on the employer to rebut the unfairness. See in this regard Cohen (2014) *ILJ* 85-86.

Practice: Dismissal⁵² and the Code of Good Practice on Dismissal Based on Operational Requirements (Code of Good Practice: Operational Requirements)⁵³ is important. A holistic consideration of all these factors will aid the development of the key principles relating to substantive fairness that must be included in the Code of Good Practice: Benefits. This discussion follows in 6.4.2 below.

6.3.3 Procedural Fairness

Ochse Webb stated that procedural fairness “manifests itself in the requirements of consultation and negotiation on decisions that affect employees in their working relationship”.⁵⁴ *Protekon* confirmed that an employer’s failure to consult with its employees when removing existing benefits constitutes procedural unfairness.⁵⁵

Disappointingly, there have been no further discussions on the requirement of procedural fairness. However, from the little that is available from *Ochse Webb* and *Protekon*, it is clear that there must be some form of engagement with the employee prior to a decision being taken regarding the provision of benefits. The question is what this engagement should entail. Guidance on this will have to be extracted from other sources, such as the Code of Good Practice: Dismissal and Operational Requirements as contained in the LRA, as well as from New Zealand’s justifiability test.

6.4 UNFAIR DISMISSALS: GUIDELINES FROM THE LRA AND CODES

6.4.1 Introduction

The preceding exploration of case law illustrated that the courts have not developed detailed and coherent guidelines. In order to ascertain the standards of fairness that are applicable to benefit disputes, the fairness imperatives that are documented in the

⁵² The Code of Good Practice: Dismissal was published in GN 1877 in *Government Gazette* 16861 of 13 December 1995 and is contained in the LRA 66 of 1995, as Schedule 8.

⁵³ The Code of Good Practice on Dismissal Based on Operational Requirements was published in GN 1517 in *Government Gazette* 20254 of 16 July 1999, and is contained in the LRA 66 of 1995.

⁵⁴ *Ochse Webb* 129.

⁵⁵ *Protekon* para 46.

LRA regarding unfair dismissals are considered. The aim is to establish to what extent these principles apply to benefit disputes.

Section 188 of the LRA states that a dismissal is unfair if the employer cannot prove that the dismissal was effected for a fair reason⁵⁶ and in accordance with a fair procedure.⁵⁷ The LRA recognises three reasons for a fair dismissal, namely, the misconduct of the employee, the incapacity of the employee and the operational requirements of the employer.⁵⁸ In deciding whether an employer has fairly dismissed an employee, the adjudicator must evaluate whether the employer has upheld the standards of fairness imposed by section 188 of the LRA. In addition, section 189 of the LRA provides more detail on the fairness requirements that apply to dismissals based on operational requirements.

The fairness imperatives contained in the LRA are not limited to sections 188 and 189. Firstly, the Code of Good Practice: Dismissal provides further particulars regarding the standards of fairness relevant to misconduct and incapacity dismissals. The LRA requires that any person considering whether a dismissal has been effected in accordance with the standards of substantive and procedural fairness must take into account the Code of Good Practice: Dismissal.⁵⁹ Secondly, the Code of Good Practice: Operational Requirements addresses the obligations of employers in effecting such dismissals.

In the part that follows guidance is sought from the spheres of dismissal based on operational requirements and misconduct. The provisions of the LRA and Code of Good Practices are considered below in assessing substantive and procedural fairness respectively.

6.4.2 Substantive Fairness

The Code of Good Practice: Operational Requirements requires that there must be a fair reason to dismiss. A fair reason is one that falls within the ambit of the definition

⁵⁶ Section 188(1)(a) of the LRA 66 of 1995.

⁵⁷ Section 188(1)(b) of the LRA 66 of 1995.

⁵⁸ Section 188(1)(a) of the LRA 66 of 1995.

⁵⁹ Section 188(2) of the LRA 66 of 1995.

of an operational requirement. Section 213 of the LRA defines operational requirements as requirements based on the economic, technological, structural or similar needs of an employer.⁶⁰

In *South African Commercial, Catering and Allied Workers Union v Woolworths (Pty) Limited (Woolworths)*⁶¹ the CC had to determine whether the retrenchment of 92 workers was substantively fair.⁶² The court explained that in determining the rationality of the employer's decision to retrench, adjudicators must assess whether it was a rational commercial or operational decision. In this regard, the CC found that Woolworths failed to show that the retrenchments were operationally justifiable on rational grounds. In essence the CC supported the stance taken by the LAC in *Havemann v Secequip (Pty) Ltd (Havemann)*⁶³ where it was found that a fair reason to retrench is a *bona fide* and rationally justified reason, which is informed by proper and valid commercial rationale.⁶⁴ In other words, in retrenchments the employer must be able to illustrate that the dismissals were *bona fide* and necessary in light of its operational requirements, as opposed to being a sham.⁶⁵

⁶⁰ See further item 1 of the Code of Good Practice: Operational Requirements where economic reasons are defined as those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which results in the redundancy of existing jobs. Structural reasons are defined as the redundancy of posts following the restructuring of the enterprise. Note also Du Toit *et al* (2015) 473.

⁶¹ (2018) JDR 1918 (CC).

⁶² *Woolworths* para 18. These retrenchments were effected as Woolworths wanted a workforce comprising solely of flexi-time workers (para 30). The workers retrenched were full-time workers who were willing to convert to flexi-time work but not on all the terms proposed (para 31).

⁶³ Case no JA 91/2014, 22 November 2016 (LAC). Here the employer sought to rationalise its operations following a substantial decrease in profits (para 5). Mr Havemann was one of the employees whose posts were affected by the rationalisation (para 6). Three meetings were held with Mr Havemann and at the third meeting he was informed that his position was redundant. He was offered an alternative position with a marked reduction in salary. He refused the alternative position and was therefore retrenched (paras 7-10). He declared an unfair dismissal dispute alleging that his dismissal on grounds of operational requirements was substantively unfair as it was effected for reasons unrelated to the respondent's operational requirements as it was without a valid, *bona fide* or fair reason. The appellant also contested the procedural fairness of his dismissal on the basis that the employer had not consulted with him in a *bona fide* manner and that there had been no meaningful joint consensus-seeking process (para 11).

⁶⁴ *Havemann* para 28. See further *South African Commercial, Catering and Allied Workers Union v Woolworths (Pty) Limited* 2018 JDR 1918 (CC) para 25 where it is explained that the court in determining the rationality of the employer's decision to retrench must assess whether it was a rational commercial or operational decision.

⁶⁵ Van Niekerk and Smit (2018) 339-340.

Likewise, alterations to the provision of benefits may be effected for commercial reasons as confirmed in *Protekon*. However, having regard to the substantive fairness requirements for operational requirement dismissals, commercial reasons can only be considered a fair reason to alter benefits if these reasons are *bona fide* and rationally justifiable.

Turning to dismissals for misconduct, there are a number of factors that have been identified and which must be considered by adjudicators in determining whether the conduct that gave rise to the dismissal can be substantiated as a fair reason for the dismissal. In other words, the factors that follow must be applied in establishing whether the employer's actions were substantively fair.

Firstly, it must be considered whether the employee contravened a rule or standard regulating conduct in the workplace.⁶⁶ Secondly, where a rule or standard was contravened, the adjudicator has to consider whether the rule or standard was valid or reasonable;⁶⁷ whether the employee was aware of the rule or standard;⁶⁸ whether the rule or standard was consistently applied by the employer to other employees;⁶⁹ and whether the dismissal of the employee for contravening the rule or standard was an appropriate sanction.⁷⁰

The test for substantive fairness can be broken down into two clearly identifiable categories. The first relates to the determination of whether the employee committed the misconduct that he or she was accused of and the second is the fairness of the determination of a sanction or penalty. Myburgh and Bosch confirm that determining whether misconduct was committed is “a conventional process of factual adjudication”, which is “governed by the ordinary rules of evidence and procedure, and no value

⁶⁶ Item 7(a) Code of Good Practice: Dismissal. See further Van Niekerk and Smit (2018) 304; and Du Toit *et al* (2015) 444.

⁶⁷ Item 7(b)(i) Code of Good Practice: Dismissal. See further Van Niekerk and Smit (2018) 304.

⁶⁸ Item 7(b)(ii) Code of Good Practice: Dismissal. See further Van Niekerk and Smit (2018) 305.

⁶⁹ Item 7(b)(iii) Code of Good Practice: Dismissal. See further Van Niekerk and Smit (2018) 305.

⁷⁰ Item 7(b)(iv) Code of Good Practice: Dismissal. See further Van Niekerk and Smit (2018) 308 and Du Toit *et al* (2015) 445.

judgment is involved”.⁷¹ However, there has been much controversy on how to determine whether the sanction or penalty of dismissal imposed for the commission of misconduct is fair.

In *Sidumo & another v Rustenburg Platinum Mines Ltd & others (Sidumo)*,⁷² the CC established a significant test to be applied by adjudicators when considering whether dismissal is the appropriate penalty. This is whether the dismissal viewed from the perspective of the reasonable decision maker (being the CCMA or Council) is fair.⁷³ The CC emphasised that “the ultimate test that a commissioner must apply is one of fairness”.⁷⁴ The starting point in the determination of fairness is an approach that accommodates the interests of both employers and employees.⁷⁵ Significantly, the CC remarked that “it is manifest from the very conception of fairness that the commissioner must hold the balance evenly between the worker and the employer”.⁷⁶

This is similar to the principles laid down in *NEHAWU*.⁷⁷ However, the CC in *Sidumo* went further and explained that while the employer has the discretion to decide which of the disciplinary sanctions is most appropriate, the adjudicator in determining whether the sanction imposed by the employer is fair, must not defer to the employer or start with bias in favour of the employer.⁷⁸

⁷¹ Myburgh and Bosch (2016) 271. The authors refer to *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 59 and *Theewaterskloof Municipality v SALGBC & others* [2010] 11 BLLR 1216 (LC) para 8.

⁷² [2007] 12 BLLR 1097 (CC).

⁷³ *Sidumo* paras 61, 74, 75 and 178. Here the CC had to consider whether the decision of the CCMA was reviewable. The CCMA found that while an employee was guilty of misconduct, the sanction of dismissal meted out by the employer was too harsh and it was replaced with a final written warning (para 7).

⁷⁴ *Sidumo* para 168.

⁷⁵ *Sidumo* para 171.

⁷⁶ *Sidumo* para 172.

⁷⁷ See para 6.2 above.

⁷⁸ *Sidumo* paras 74, 75 and 178. See further Navsa AJ's comments in para 61. The following comments made by Navsa AJ are also significant: “The Constitution and the LRA seek to redress the power imbalance between employees and employers ... Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute ... It is therefore all the more important that a scrupulous even-handedness be maintained” (paras 74-75).

On the other hand, Ngcobo J explained that an adjudicator is likewise not permitted to start with a blank page and to determine afresh what the appropriate sanction is.⁷⁹ While it is the adjudicator's sense of fairness that must prevail, he or she is required to conduct an inquiry to determine whether the decision of dismissal imposed by the employer was fair having regard to the interests of both parties.⁸⁰ In conducting this inquiry the adjudicator must take into account the totality of circumstances,⁸¹ and pass a value judgment.⁸² The essence of this CC judgment was a change in approach from the reasonable employer test to the reasonable decision maker test.⁸³

As is evident from the preceding discussion,⁸⁴ the test set out in *Sidumo* was followed by the courts in determining fairness in benefit disputes.⁸⁵ The LC in *Oelofse* objectively assessed all relevant circumstances in respect of both the employer and employee in determining whether the decision of the employer was fair.⁸⁶

It is apparent that not all of the substantive fairness requirements applicable to misconduct dismissals will be relevant to the determination of substantive fairness in benefit disputes. However, what is applicable to both types of disputes is firstly, the assessment of whether there was a fair reason. In misconduct disputes, it is whether there was a fair reason to dismiss, while in benefit disputes it is whether the employer had a fair reason not to grant; to remove; to reduce, or to reject an application for a

⁷⁹ *Sidumo* para 178. See further *Sidumo* para 79 where Navsa AJ explains that "a commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair".

⁸⁰ Van Niekerk and Smit (2018) 260. See further Sanders (2017) *ILJ (UK)* 520 who states that an objective approach must be followed requiring adjudicators to decide for themselves whether the decision is fair rather than simply reviewing the employer's decision.

⁸¹ These circumstances include the importance of the rule that was breached; the reason the employer imposed the sanction of dismissal; the harm caused by the employee's conduct; whether further training and instruction may result in the misconduct not being repeated; and the effect of the dismissal on the employee (para 78).

⁸² *Sidumo* para 179.

⁸³ Van Niekerk and Smit (2018) 260 explain that the reasonable employer test advocated by the Supreme Court of Appeal in *Rustenburg Platinum Mines Ltd v CCMA & others* [2006] 11 BLLR 1117 (SCA) was overturned by the CC. In essence the CC replaced the reasonable employer test, which required that deference be given to the decision of the employer, with the reasonable decision maker test.

⁸⁴ See para 6.3.2 above.

⁸⁵ *Oelofse* para 15.

⁸⁶ See para 6.3.2 above. The LAC decision in *Sylvester* as discussed in para 6.3.2 above also accords with *Sidumo*. Both cases state that in determining the fairness of the employer's actions one must not readily accept the decision of the employer by relying on the dictum that the employer knows its business best and should be allowed substantial leeway in exercising its discretion.

benefit.⁸⁷ While, a fair reason can be based on operational requirements as discussed earlier,⁸⁸ there may be other fair reasons. Secondly, consistency of the decision will be an important factor. In the same way that disciplinary rules must be applied consistently, the provision of benefits must be consistent. Thirdly, the factors set out in *Sidumo* would be relevant when assessing the fairness of the employer's decision, as the determination of fairness involves an assessment of a range of circumstances applicable to both parties and the passing of a value judgment.⁸⁹

6.4.3 Procedural Fairness

In considering procedural fairness, existing principles pertaining to dismissals based on operational requirements as well as dismissals based on misconduct are once again traversed.

In terms of operational requirement dismissals, substantial emphasis is placed on the need to consult with the affected employees.⁹⁰ In this regard, the employer is required to issue a written notice to consult.⁹¹

The concept of consultation requires that the employer invite parties to consult on a number of issues.⁹² The purpose of consultation is to engage in a meaningful joint consensus-seeking process.⁹³ The aim is to reach consensus on a number of aspects, notably, measures to avoid dismissals; minimise the number of dismissals; change

⁸⁷ See para 6.1 above.

⁸⁸ See para 6.3.2 above.

⁸⁹ Cohen (2014) *ILJ* 85.

⁹⁰ Item 3 of the Code of Good Practice: Operational Requirements. See further section 189(1) of the LRA 66 of 1995 and Du Toit *et al* (2015) 481.

⁹¹ Section 189(3) of the LRA 66 of 1995.

⁹² Section 189(5) of the LRA. See Le Roux (2016) 71. Du Toit *et al* (2015) 402 explain that the meaning to be attributed to consultation has developed mostly from operational requirement dismissals. It is important to note that consultation is also referred to in section 85 of the LRA 66 of 1995 in the context of workplace forums. Section 85(2)-(4) sets out the requirements of the consultation process. The employer is required to give the workplace forum an opportunity to make representations and to advance alternative proposals. The employer is required to consider and respond to the representations, and where the employer disagrees to provide reasons for disagreement. If consensus cannot be reached the employer must invoke any procedure agreed on to resolve differences before implementing the proposal. This process is similar to the consultation process for operational requirement dismissals as documented above.

⁹³ Section 189(2)(a) of the LRA 66 of 1995. See *Woolworths* para 39.

the timing of dismissals; and to mitigate the adverse effects of the dismissals.⁹⁴ The employer is required to consider and respond to the representations made by the other consulting party.⁹⁵ Where the employer does not agree, the employer must provide reasons.⁹⁶

Adjudicators in establishing fairness must assess whether the employer has complied with its obligations of notifying the employees about the proposed dismissals and thereafter consulting with them in an attempt to reach agreement.⁹⁷ As articulated by the LAC in *Havemann* consultation must be genuine and must be conducted with the purpose of seeking alternatives to dismissal, the ultimate goal being to avoid dismissal if reasonably possible. As such, the alternatives put forward by the consulting parties must be considered appropriately.⁹⁸

If one considers the definition of consultation in the context of operational requirements, it can be summarised as follows: firstly, the employer must invite the other party to consult on the proposed retrenchments. Secondly, at the consultation meeting the employer must allow the other party to make representations. Thirdly, the employer must give due regard to the representations made by the other party, as the aim of the consultation process is to reach consensus. Fourthly, if the employer disagrees with the representations made by the other party it must provide reasons for its disagreement.

The need for consultation in operational requirement dismissals stems from the impact that such decisions will have on employees. The key purpose is the protection of employment, which is imperative as security of employment is a core constitutional value protected through the LRA.⁹⁹ While there is a similar obligation on employers to en-

⁹⁴ Section 189(2)(a) of the LRA 66 of 1995. See further item 3 of the Code of Good Practice: Operational Requirements.

⁹⁵ Section 189(6)(a) of the LRA 66 of 1995.

⁹⁶ Section 189(6)(a) of the LRA 66 of 1995.

⁹⁷ *Havemann* para 30.

⁹⁸ *Havemann* para 31.

⁹⁹ *Havemann* para 32.

gage employees prior to dismissing them for misconduct as discussed below, the consultation imperatives in operational requirement dismissals are higher as these are regarded as “no fault” dismissals.¹⁰⁰

Decisions taken by the employer regarding the provision of benefits have a similar impact on employees. Furthermore, similar to dismissals for operational requirements, changes to benefits will in most cases not be linked to employee conduct. Essentially, they will arise due to no fault of the employee. While not all the factors discussed above will be relevant to the determination of procedural fairness in benefit disputes, consultation with the employee is needed prior to a decision being taken.

However, the study concludes that the consultation process in respect of benefit disputes should not be as stringent as the consultation process set out for operational requirement dismissals. While a decision regarding the removal or reduction of a benefit will negatively affect an employee, the loss of a job is undoubtedly more prejudicial. Therefore, it is justifiable that the consultation process in relation to operational requirement dismissals is more rigorous than that for benefit disputes.

Turning to procedural fairness for misconduct dismissals, the Code of Good Practice: Dismissal requires an employer to investigate whether there are grounds for charging an employee with misconduct.¹⁰¹ The employer must then notify the employee of the misconduct allegations made against him or her.¹⁰² Importantly, the employee must be allowed the opportunity to state a case in response to the allegations.¹⁰³ In this regard, the employee must be given reasonable time to prepare a response and has the right to be assisted by a trade union representative or fellow employee.¹⁰⁴ After the inquiry, the employer must communicate its decision.¹⁰⁵

¹⁰⁰ Item 2 of the Code of Good Practice: Operational Requirements explains that no fault dismissals mean that the employee is not responsible for the termination of employment. The opposite is true in misconduct dismissals, where the dismissal arises due to bad behaviour on the part of the employee. As operational requirement dismissals are no fault dismissals, obligations are placed on the employer to explore alternatives to dismissal and ultimately to ensure that employees are treated fairly.

¹⁰¹ Item 4(1) Code of Good Practice: Dismissal. See further Van Niekerk and Smit (2018) 311.

¹⁰² Item 4(1) Code of Good Practice: Dismissal. See further Du Toit *et al* (2015) 455.

¹⁰³ Item 4(1) Code of Good Practice: Dismissal. See further Du Toit *et al* (2015) 456.

¹⁰⁴ Item 4(1) Code of Good Practice: Dismissal. See further Du Toit *et al* (2015) 456-457.

¹⁰⁵ Items 4(1) and 4(3) Code of Good Practice: Dismissal. See further Van Niekerk and Smit (2018) 312.

The most fundamental element of procedural fairness is that the employee must have been given an opportunity to state his or her case before a decision is taken. The rationale behind notifying employees of misconduct allegations and then giving them an opportunity to make representations comes from the Latin maxim *audi alteram partem*.¹⁰⁶ This requires that both sides of the case must be considered before a decision is made.¹⁰⁷ As stated in *Avril Elizabeth Home for the Handicapped v CCMA (Avril)*¹⁰⁸ the Code of Good Practice requires that there must be dialogue and an opportunity for reflection before a decision to dismiss is taken.¹⁰⁹ This principle is fundamental considering the fact that a decision to charge an employee with misconduct and the resultant outcome of such a process negatively impacts on him or her.

While procedural fairness in misconduct dismissals does not refer to the term consultation, a form of consultation is required as it calls for engagement and communication with the employee. However, it is apparent that the procedural fairness requirements for misconduct dismissals are less stringent than those for operational requirement dismissals, which can be attributed to the fact that the one is a “fault” dismissal while the other is a “no fault” dismissal.

Drawing from the procedural fairness requirements of these two types of dismissals, the consultation process in benefit disputes should comprise of the following: firstly, the employer must inform the employee/s of the intended action and the reason(s) for it. This can be done either through a meeting or through written correspondence. Secondly, the employee(s) must be given an opportunity to make representations. Thirdly, these representations must be considered by the employer when making the final decision. Fourthly, the employer must communicate the final decision to the employee(s), preferably in writing.

However, the consultation process outlined above will not apply to all benefit disputes. It will only apply to decisions in relation to benefits provided for in terms of a policy; in terms of an established practice; or subject to the exercise of employer discretion

¹⁰⁶ Smit (PhD Thesis, University of Pretoria, 2010) 122.

¹⁰⁷ Van Niekerk and Smit (2018) 313.

¹⁰⁸ (2006) 27 *ILJ* 1644 (LC).

¹⁰⁹ *Avril* 1654A.

(whether in terms of a contract; collective agreement; legislation; policy or past practice). This is because under these circumstances consultation is sufficient, as there is no legal obligation to obtain the consent of the employees.¹¹⁰

If, on the other hand, the decision is in relation to a benefit provided for in a contract of employment, collective agreement or legislation, a consultation process will not suffice. In terms of employment contracts, terms and conditions agreed to may only be altered through agreement between the parties.¹¹¹ If the employee party fails to agree, such changes cannot be given effect to.

Similarly, collective agreements are the products of collective bargaining, which come about through negotiation and agreement between the parties.¹¹² Changes to the terms and conditions set out in a collective agreement must be by consent.

With regard to legislation, while employers are required to implement legislation, they have no authority to change terms and conditions enforced by legislation. Parliament is the national legislature, making it the law-making body of the country.¹¹³ As such, any amendments to legislation must be done through Parliament and cannot be realised through negotiation and agreement between the respective parties.

Essentially, changes to benefits provided for in contracts of employment and collective agreements can only pass the test of procedural fairness if the employer engaged in negotiation with the other party, and through this process the other party agreed to the

¹¹⁰ There are no provisions in the LRA 66 of 1995 regarding procedures to be followed in the alteration of benefits that are provided for in policies, subject to past practice or based on employer discretion. However, sections 84 to 86 of the LRA 66 of 1995 provide for consultation with workplace forums. Some of the aspects about which consultation is required are changes in the organisation of work; job grading; criteria for merit increases; criteria for payment of discretionary bonuses; and additional matters. Even in the absence of a workplace forum, healthy employment relations may be established through consultation about issues that affect employees, where there is no legal obligation to negotiate.

¹¹¹ See Chapter 7, para 7.1 and 7.2 where the legal effect of a contract of employment is discussed. See further *Monyela & others v Bruce Jacobs t/a LV Construction (Monyela)* (1998) 19 ILJ 75 (LC). Here the LC explained that where the employer decided to take away benefits that the employee was entitled to, it constituted a unilateral change to terms and conditions of employment as the employer had no right to do this (82A-C).

¹¹² See discussion in Chapter 3, para 3.5.2.

¹¹³ Chapter 4 of the Constitution of the Republic of South Africa, 1996. See further an outline of the legislative process at www.justice.gov.za/legislation/legalprocess.htm accessed on 5 November 2018.

changes. There is no room to alter or remove benefits provided for in legislation, as negotiation is not an option in such instances.

6.5 NEW ZEALAND'S JUSTIFICATION TEST

6.5.1 Introduction

It must be stated at the onset that only New Zealand is discussed below. The position in the United Kingdom is not considered as there are no relevant developments regarding aspects of fairness. New Zealand, in contrast, implements a statutory test that must be applied by the courts in determining whether the actions of an employer which give rise to a personal grievance are fair.

As discussed in earlier chapters, New Zealand provides for the lodgement of personal grievances by employees where the actions of the employer disadvantage them.¹¹⁴ In order for a personal grievance claim to be substantiated three factors must be proven. These are that the employee's conditions of employment were affected; they must have been affected to the employee's disadvantage; and the disadvantage must have been caused by an unjustified action of the employer.¹¹⁵

In *Wellington Road Transport Union of Workers v Fletcher Construction Company Limited* the court defined unjust, which is an integral feature of the word "unjustified", as unfair; without due cause; unreasonable; improper; unwarranted; or arbitrary.¹¹⁶ Roth is of the opinion that it means conduct that is not in accordance with justice or fairness.¹¹⁷

¹¹⁴ See Chapter 1, para 1.4 and Chapter 5, para 5.4.3.

¹¹⁵ These three elements can be garnered from the definition of a personal grievance, as provided for in section 103(1)(b) of the Employment Relations Act 24 of 2000. These factors are discussed in *FGH v RST* [2018] NZEmpC 60 para 19 and *Cross v Air New Zealand Limited* [2018] NZERA Auckland 305 para 100. See further Department of Labour Te Tari Mahi (2006) *Themes in Employment Law* 1-2.

¹¹⁶ [1982] ACJ 653 at 666.

¹¹⁷ Roth (2001) *ELB* 85 referred to the sentiments expressed by the Court of Appeal in *Auckland City Council v Hennessey* [1982] ACJ 699 at 703.

The word unjustified as used in New Zealand's employment legislation is therefore akin to the word unfair used in South African labour legislation.¹¹⁸ As such, the discussion in this part is focused on New Zealand's approach to assessing fairness in personal grievance claims. The aim is to extract principles that can be used in formulating fairness requirements for benefit disputes in the Code of Good Practice: Benefits.

6.5.2 The Justification Test

Although the personal grievance procedure was introduced into New Zealand's employment law decades ago,¹¹⁹ employment legislation did not initially provide for the factors that needed to be taken into account in determining whether the employer's actions were justified.¹²⁰

Legislative intervention came in the form of a test of justification which was introduced into the Employment Relations Act (ERA) in 2004.¹²¹ The test of justification read as follows:

"For the purposes of section 103(1)(a) and (b), the questions of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer 'would' have done in all the circumstances at the time the dismissal or action occurred."¹²²

¹¹⁸ Refer to para 6.2 above.

¹¹⁹ Nolan (1998) 42.

¹²⁰ Anderson *et al* (2017) 213 explain that there was no statutory test for "justification". Therefore, the interpretation of the term was left to the courts. See further Anderson (2010-2011) *CLLPJ* 693.

¹²¹ The Employment Relations Amendment Act (No 2) 2004 section 103A. Roth (2004) *NZLR* 728. See further Department of Labour Te Tari Mahi (2006) *Themes in Employment Law* 3, which explains that the section came into force on 1 December 2004.

¹²² Section 103A of the ERA 24 of 2000.

The legislature sought to provide a test that did not result in the adjudicator deferring to the decision of the employer, but rather one in which the justifiability of the employer's actions was measured from an objective perspective.¹²³ The test was similar to the reasonable decision maker test developed by the CC in *Sidumo*.¹²⁴

The aim of the test was for adjudicators to decide on an objective basis what a hypothetical employer would have done, and if necessary, to substitute that action with the action of the actual employer.¹²⁵ Even though the wording of the justification test did not refer to substantive and procedural fairness, these standards of fairness were implicit in the test.¹²⁶

The justification test was amended in April 2011.¹²⁷ The amended test states that for the purposes of personal grievances, the question of whether a dismissal or an action

¹²³ Roth (2004) *NZLR* 728. Prior to the introduction of the justification test the courts promoted deference to the decision of the employer. See in this regard *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483; *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601; and *W and H Newspapers Ltd v Oram* [2000] 2 ERNZ 448.

¹²⁴ See *Air New Zealand Limited v Hudson* [2006] AC30/06 Employment Court para 113 where the justification test was discussed as follows: "The first element of this section confirms expressly that justification for dismissal must be determined on an objective basis. This means that the matter must be viewed from the point of view of a neutral observer. This element of objectivity is expanded on in the second part of the section. To decide whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances the court must judge all the circumstances objectively." See further Roth (2004) *NZLR* 729. Roth states that the test essentially requires that "fairness and reasonableness be measured by an objective standard, not by the standard of what an employer, from its own perspective, could view as fair and reasonable". See further Anderson (2010-2011) *CLLPJ* 694 who states that the essential element of the test was that justification be determined on an objective basis.

¹²⁵ Anderson (2015) 139. However, as explained in *Air New Zealand Limited v Hudson* para 120, the test does not give adjudicators an unbridled licence to substitute their views for that of the employer. See further *Hoddon v Van den Bergh Food* [1999] ICR 151 para 24 where it was stated that the requirement that the tribunal must not substitute their own decision for that of the employer is another way of saying that the tribunal must go somewhat further than simply asking what they themselves would have done.

¹²⁶ Anderson (2007) *VUWLR* 429 states that the rights created by the personal grievance procedure represents a fundamental shift in employment, as an employee is no longer regarded as a commodity but as a person who has the right to fair treatment. This means that employees should not be deprived of their economic security and the investment in their employment without justifiable reasons and then only if the principles of natural justice are observed. It must also be noted that standards of substantive and procedural fairness were endorsed by the courts long before the introduction of the justification test. In *BP Oil NZ Ltd v Northern Distribution Workers Union* [1989] 3 NZLR 582 the Court of Appeal stated that "questions of procedural fairness and substantive fairness arise in determining whether a dismissal has been unjustifiable for the purposes of the [Labour Relations] Act". See further *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 487 and *W and H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 para 33.

¹²⁷ The ERA 24 of 2000 states at the end of section 103A(5) that section 103A was substituted, on 1 April 2011 by section 15 of the Employment Relations Amendment Act 2010 (2010 No 125).

was justifiable must be determined on an objective basis.¹²⁸ The test to be applied is whether the employer's actions and how the employer acted, were what a fair and reasonable employer "could" have done in all the circumstances at the time the dismissal or action occurred.¹²⁹

An obvious difference between the new and old test is the substitution of the word "would" with "could".¹³⁰ While it has been confirmed that the test is still an objective one,¹³¹ there has been debate about the impact of this change. In *Angus v Ports of Auckland Limited (Angus)*¹³² the Employment Court stated that the change cannot be regarded as "ineffectual" or "insignificant".¹³³ The court explained that adjudicators may no longer determine the justification of the employers actions by a single standard of what a fair and reasonable employer would have done in the circumstances,¹³⁴ as the word "could" denotes several available possibilities.¹³⁵ Similarly, the Court of Appeal in *Ramkissoon v Commissioner of Police*¹³⁶ acknowledged that the change is significant, stating that the change in wording lowers the threshold of justification.

Notwithstanding the above, Roth holds a different view, stating that there was practically very little difference between the use of these two words,¹³⁷ as the issue to be decided by adjudicators was still whether the employer acted fairly and reasonably in the circumstances.¹³⁸

¹²⁸ Section 103A(1) of the ERA 24 of 2000.

¹²⁹ Section 103A(2) of the ERA 24 of 2000.

¹³⁰ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 para 19.

¹³¹ Section 103A(1) of the ERA 24 of 2000 explicitly states that justification must be determined on an objective basis. See further *Angus* para 31. [2011] NZEmpC 160.

¹³² *Angus* para 22.

¹³³ *Angus* para 22.

¹³⁴ *Angus* para 33.

¹³⁵ [2018] NZCA 304 para 45.

¹³⁶ Roth (2011) *NZLR* 752.

¹³⁷ Roth (2011) *NZLR* 752. He states that to say that the Employment Authority or the court would be "putting itself in the shoes of the employer", whether "would" or "could" is the operative word misrepresents the situation, as the specialist employment law institutions will always be assessing the actions of the employer from an objective perspective. Roth does not see any real difference between whether the focus was on the particular action of the employer viewed on its own (based on the use of "would"), or as an option among a range of possible responses (based on the word "could").

The study supports the conclusion that the test is still an objective one, which requires adjudicators to consider all relevant factors pertaining to both parties when determining whether a fair decision was reached. However, the use of the word “could” provides more than one possibility of what constitutes a fair decision.¹³⁹ Therefore, the new test is less stringent on the employer than the previous one.

Apart from the replacement of the word “would” with “could”, the new test significantly outlines the factors that must be considered in determining procedural fairness.¹⁴⁰ It states that adjudicators must consider whether, having regard to the resources available to the employer, he or she sufficiently investigated the allegations against the employee before dismissing or taking action against the latter; whether the employer raised his or her concerns with the employee before dismissing or taking action against the employee; whether the employer gave the employee a reasonable opportunity to respond to the employer’s concerns before dismissing or taking action against the employee; and whether the employer genuinely considered the employee’s explanation (if any) in relation to the allegations before dismissing or taking action against the employee.¹⁴¹ The test allows adjudicators to consider, apart from the four factors listed above, any other factors they think are appropriate.¹⁴²

If one assesses these factors, it essentially requires notification to the employee; provision of an opportunity to respond; and a genuine consideration of the employee’s representations in reaching a decision.

While the procedural fairness requirements are meant to apply to all personal grievances,¹⁴³ not only to unjustified dismissals, it has unfortunately not been worded in an all-encompassing manner. If one considers the factors to be taken into account in determining procedural fairness, they are relevant to misconduct.¹⁴⁴ They resemble

¹³⁹ *Angus* para 37. Therefore, the effect of the new justification test is that the actions of the employer will be justified as long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in the circumstances could have decided upon.

¹⁴⁰ *Angus* para 47.

¹⁴¹ Section 103A(3) of the ERA 24 of 2000.

¹⁴² Section 103A(4) of the ERA 24 of 2000.

¹⁴³ See *Air New Zealand Limited v V* AC 15/09 [2009] NZEmpC 45 para 37 where it is explained that the same test applied in determining the justifiability or fairness of the employer’s actions where one or more conditions of the employee’s employment were affected to the employee’s disadvantage.

¹⁴⁴ *Angus* para 46.

the requirements for procedural fairness as set out in the Code of Good Practice: Dismissal.¹⁴⁵

This is problematic as there are a number of circumstances which lead to disadvantages in employment which do not originate from allegations of misconduct.¹⁴⁶ However, it is noteworthy that the test does allow for a consideration of other factors.¹⁴⁷ One such factor is the need to ensure “broad parity of sanction”.¹⁴⁸ The general approach is that employees in like circumstances should be treated alike unless there are good reasons to differentiate.¹⁴⁹ Inconsistency is a factor to be considered in determining the justifiability of an employer’s actions.

While substantive fairness is not specifically mentioned in the test, it is implicit in the wording. One of the aspects to be considered in determining justifiability is whether the actions of the employer were fair and reasonable.¹⁵⁰ In other words, whether there was a fair reason for the decision.

The substantive and procedural fairness requirements embedded in the ERA can be discerned further from the practical explanation provided in *Angus*.¹⁵¹ The Employment Court explained that adjudicators must first determine what the employer did leading to the employee’s dismissal or disadvantaging of the employee, and how the employer did it. Relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the adjudicator must, by having regard to all relevant circumstances, determine what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Relevant circumstances to be considered include those of the employer,

¹⁴⁵ See para 6.4.3 above.

¹⁴⁶ *Angus* para 51.

¹⁴⁷ Section 103A(4) of the ERA 24 of 2000.

¹⁴⁸ *Angus* para 55. See further *Nel v ASB Bank Limited* [2017] NZEmpC 97 paras 25, 47 and 52 and *Wikaira v The Chief Executive of Department of Corrections* [2016] NZEmpC 175 paras 171-176.

¹⁴⁹ *Angus* para 55.

¹⁵⁰ *A Ltd v H* [2016] NZCA 419 para 46. Anderson (2015) 137 explains that justification has two elements, the first being substantive fairness.

¹⁵¹ *Angus* paras 57-59. See further *Cooper v Unit Services Wellington Limited* [2018] NZERA Christchurch 102 para 19 where the Employment Relations Authority in considering justification of the employer’s action noted that there are two parts to justification. This is whether a fair process was followed in effecting the change (reduction of the employees working hours) and whether the change was substantively justified.

of the employee, of the nature of the employers' enterprise or the work, and any other circumstances that may be relevant. Finally, the adjudicator must determine whether what the employer did and how the employer did it, were what a notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The court or the authority is required to act objectively and not to substitute their own decisions for those of the fair and reasonable employer.

6.5.3 Lessons Learnt

There are a number of similarities between New Zealand's justification and the test employed in South African labour law for misconduct dismissals. Firstly, it endorses the use of substantive and procedural fairness in assessing whether the actions of the employer are justified.

Secondly, the factors to be taken into account in determining procedural fairness are similar to the procedural fairness requirements set out in the Code of Good Practice: Dismissal. Essentially, employers are required to inform employees of their alleged wrongdoing. Furthermore, they must give them an opportunity to provide their side of the story. In other words, the test endorses the *audi alteram partem* rule.

Thirdly, the test endorses the use of consistency in determining the justifiability of an employer's decision.

Fourthly, both the justifiability test and the test endorsed in *Sidumo* require that an objective decision be made by the adjudicator, taking a range of factors relating to both parties into account.

Essentially the justification test confirms the justifiability of employing standards of both substantive and procedural fairness in determining benefit disputes. It supports the use of inconsistency as a criterion in determining fairness and it endorses the key principles set out in *Sidumo*.

6.6 CONCLUSION

Having considered the limited guidelines on fairness developed by the courts in benefit disputes, the fairness guidelines on unfair dismissals provided for in the LRA, the Codes of Good Practice and New Zealand's justifiability test the following conclusions may be drawn.

There are no statutory guidelines for the determination of fairness in benefit disputes. Notwithstanding this, it is justified to require that adjudicators assess both the substantive and procedural fairness of the employer's decision. This finding is based on the following:

Protekon, which is the most progressive decision in relation to the establishment of fairness requirements in benefit disputes, has confirmed that there must be a fair reason for the alteration of benefits. In this regard, the commercial rationale of the employer was held to be a fair reason. This is similar to the substantive fairness criteria applied in operational requirement dismissals, where the courts have endorsed commercial or operational rationale as a fair reason, thereby denoting substantive fairness, provided that these requirements are *bona fide* and rationally justifiable. While commercial requirements will play a role in a number of benefit disputes, there may be other reasons for the decision. Other reasons will be acceptable, as long as they are fair. This is in keeping with the fairness requirements for misconduct dismissals. Here one looks at whether there was a fair reason to dismiss, while in benefit disputes adjudicators must assess whether the employer had a fair reason not to grant, to remove, to reduce or to reject an application for a benefit.

Consistency of the decision will be an important factor to be considered in determining substantive fairness. This factor has been endorsed in cases such as *Oelofse*. It equally applies to misconduct dismissals.

The reasonable decision maker test endorsed by the CC in *Sidumo* is relevant in determining whether the decision is substantively fair. It is imperative that adjudicators have regard to a range of circumstances that apply to both the employer and employee

and that the decision of the employer be assessed objectively against these circumstances.

New Zealand's justifiability test endorses substantive fairness in assessing personal grievance cases. It also emphasises an objective consideration of the employer's decision having regard to a range of circumstances applicable to both parties.

Turning to procedural fairness, *Protekon* confirmed the applicability of this standard in benefit disputes. In this regard it made reference to the requirement of consultation. In benefit disputes that stem from policy, established practice and the exercise of employer discretion, consultation applies. The use of consultation is supported by the procedural fairness requirements for operational requirement dismissals. Even though the procedural requirements for misconduct dismissals do not refer to the term consultation they equally require engagement and communication with the employee.

While consultation will be required in certain benefit disputes, this form of procedure will not apply to all benefit disputes. Consultation is insufficient in benefit disputes that arise from a change to an employment contract, collective agreement or legislation. Essentially, changes to benefits provided for in contracts of employment and collective agreements can only pass the test of procedural fairness if the employer engaged in negotiation with the other party, and through this process the other party agreed to the changes. There is no room to alter or remove benefits provided for in legislation, as negotiation is not an option in such instances.

New Zealand's justifiability test endorses the use of procedural fairness in assessing personal grievances. It essentially requires that the employee be given an opportunity to make representations prior to a decision being taken.

The study recommends that clear fairness guidelines be formulated for benefit disputes in the Code of Good Practice: Benefits. These fairness guidelines must entail the following:

In respect of substantive fairness there must be a fair reason not to grant, to remove, to reduce or to reject an application for a benefit. A fair reason can be based on commercial or operational requirements provided that these are *bona fide* and rationally justifiable. There may also be other fair reasons. Decisions based on reasons that are irrational, arbitrary, unreasonable capricious and *mala fide* will constitute substantive unfairness. Inconsistency is a factor that must be taken into account and which points towards substantive unfairness. Adjudicators must interrogate the conduct of the employer and not easily defer to the employer's decision in determining fairness. The totality of circumstances from both an employer and employee perspective must be assessed and a value judgment must be made.

In respect of procedural fairness, the following procedure must be applied in cases where consultation is relevant: The employer must inform the employee(s) of the intended action and the reason(s) for it. This can be done either through a meeting or through written correspondence. The employee(s) must be given an opportunity to make representations. These representations must be considered by the employer when making the final decision. Finally, the employer must communicate the decision to the employee(s), preferably in writing.

In respect of benefits provided for in contracts of employment and collective agreements, procedural fairness will only be achieved if the employer negotiated the changes to benefits with the employee(s) and agreement was reached.

CHAPTER 7

OVERLAP BETWEEN STATUTORY AND CONTRACTUAL RECOURSE

	PAGE
7.1 Introduction.....	191
7.2 Explaining the Dual Recourse.....	192
7.3 Impact of the Unfair Labour Practice on Contractual Recourse	195
7.3.1 Introductory Remarks.....	195
7.3.2 Intention of the Legislature.....	199
7.3.3 Legislative Provisions.....	200
7.3.3.1 The LRA.....	200
7.3.3.2 The Constitution.....	201
7.3.3.3 The BCEA.....	202
7.3.4 Principles Espoused by the Judiciary.....	202
7.3.4.1 Initial Views.....	202
7.3.4.2 Expansion of Dual Jurisdiction.....	204
7.3.4.3 Attempts by CC to Settle Dual Jurisdiction	207
7.3.4.4 Consideration of Further Developments	214
7.3.5 Role of the BCEA.....	217
7.3.6 Position in Foreign Jurisdictions.....	221
7.3.6.1 The United Kingdom.....	221
7.3.6.2 New Zealand.....	227
7.4 Conclusion.....	231

7.1 INTRODUCTION

The objective of labour law has been to counteract the deficiencies prevalent in the common law contract of employment.¹ Notwithstanding these inadequacies it is indisputable that the contract of employment in many instances remains the foundation of the employment relationship.² This gives rise to a further challenge as explained in Chapter 1. Notably, the latitude available to employees to utilise more than one avenue to address unfair labour practice “benefits” disputes.³ This arises when the dispute stems from the employer’s action of unilaterally changing terms and conditions set out in the employment contract, where the term or condition constitutes a benefit within the meaning of section 186(2)(a) of the Labour Relations Act (LRA).

This overlap arises in two instances. The first relates to every employee’s right to rely on contractual recourse instead of the unfair labour practice provisions. The second is the entitlement of employees to institute strike action, instead of relying on a rights-based recourse. This chapter deals with the first overlap while the next chapter addresses the second issue.

The first problem arises from the fact that the source of a pre-existing benefit may well be a contract of employment.⁴ In *Maritime Industries Trade Union of South Africa v Transnet Limited (MITUSA)*,⁵ the Labour Appeal Court (LAC) explained this overlap with the following example. If an employer contractually agrees to pay its employee a certain salary and to provide him or her with a company car and accommodation but subsequently withdraws the employee benefits, this amounts to a unilateral change to

¹ See Chapter 2, para 2.2

² See Chapter 2, para 2.3. However, it is noted that there have been amendments made to the LRA 66 of 1995, which seeks to advocate for the fact that the contract of employment is not the only instrument that denotes the existence of an employment relationship. To illustrate this, section 186(1)(a) has been amended to state that dismissal means that an employer has terminated employment with or without notice. The section previously made specific reference to the employment contract stating that dismissal means that an employer has terminated a contract of employment with or without notice. It is evident that a contract of employment is not needed for the establishment of an employment relationship but in many instances contracts of employment do exist, thus serving as the foundation of the employment relationship.

³ See Chapter 1, para 1.2.

⁴ See Chapter 5, paras 5.2.1 and 5.3.2.

⁵ (2002) 23 ILJ 2213 (LAC).

terms of employment.⁶ Such employer action may constitute both a breach of contract and an unfair labour practice.⁷

Cohen alludes to the fact that the statutory right to unfair labour practices does not abrogate an employee's common-law entitlement to enforce contractual rights. It follows that an employee retains the option of pursuing a contractual breach arising from an unfair benefits dispute.⁸

At face value, this dual recourse is not ideal.⁹ It creates fertile ground for forum shopping, adds to the uncertainty prevalent in this area of the law and frustrates the development of clear guidelines. Therefore, this chapter seeks to ascertain to what extent contractual recourse should remain relevant in addressing benefit disputes. This is done by firstly discussing the overlap between contractual recourse and recourse in terms of labour legislation. Secondly, relevant legislative provisions are analysed. Thirdly, the principles and insight provided by the judiciary are assessed. Fourthly, the approach followed in the UK and New Zealand to address the contest between labour legislation and contract law is evaluated. In the final instance findings and conclusions are formulated.

7.2 EXPLAINING THE DUAL RECOURSE

As discussed in Chapter 2, the common-law contract of employment continues to play a role in regulating employment relationships despite the enactment of labour legislation.¹⁰

⁶ *MITUSA* para 99. See further *Monyela & others v Bruce Jacobs t/a LV Construction* (1998) 19 *ILJ* 75 (LC) where the applicants contended that the employer reduced their wages and paid them less than they were entitled to, which they viewed as a unilateral change to their terms and conditions of employment (77B and D).

⁷ *MITUSA* para 101.

⁸ Cohen (2014) *ILJ* 87-88. See further *Trans Caledon* para 15. Furthermore, provision is made for the pursuit of contractual claims in section 77(3) of the BCEA 75 of 1997, which gives the LC concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment.

⁹ As discussed in Chapter 5, a benefit provided for in a contract of employment falls within the ambit of benefits as referred to in section 186(2)(a) of the LRA 66 of 1995, in respect of which an unfair labour practice dispute may be instituted. See further Le Roux (2006) *CLL* 1.

¹⁰ See Chapter 2, para 2.2. See further Vettori (2010) *SLR* 173 who refers to the comments made by Kahn-Freund that "even when the employment relationship is heavily regulated in terms of legislation, a contract has always been a necessary foundation for the creation of the employment relationship". See also Vettori (2007) 49; Du Toit *et al* (2015) 104; Freedland (1976) 1; and Henrico and Smit (2010) *Obiter* 248.

A contract of employment is essentially an agreement between two parties (the employer and employee), in terms of which the employee “places labour potential at the disposal and under the control of the other party (the employer) in exchange for some form of remuneration”.¹¹ In terms of the BCEA,¹² a number of aspects must be detailed in writing and provided to the employee. Such aspects include the wage to be paid to the employee, other cash payments to which the employee is entitled and any payment in kind.¹³

In many instances the aspects referred to above are determined through the process of collective bargaining.¹⁴ This is in line with one of the primary objectives of the LRA which seeks to provide a framework within which the parties to the employment relationship may collectively bargain regarding, amongst others, wages and terms and conditions of employment.¹⁵ Aspects such as the payment of pension contributions, medical aid contributions, housing allowances and bonuses are often negotiated on and included in contracts of employment. The BCEA also sets out a number of “basic conditions of employment” pertaining to aspects such as leave, the regulation of overtime and hours of work, which form part of the terms of a contract of employment.¹⁶

Once certain aspects are included in contracts of employment, this constitutes the terms of the contract,¹⁷ which are regarded as being the rights and duties agreed on by the parties.¹⁸ According to the general principles of contract law, the obligations that ensue from the terms of the contract are required to be performed. Where they

¹¹ Hock (2003) *ILJ* 1232. See further Qotoyi (2012) *Obiter* 428.

¹² The BCEA 75 of 1997.

¹³ Section 29 of the BCEA 75 of 1997. Other aspects include the place of work, hours of work and leave.

¹⁴ As explained by Van Niekerk and Smit (2018) 411 collective bargaining is a process through which workers and employers “make claims upon each other”, which are resolved through negotiation leading to the conclusion of a collective agreement that is mutually beneficial.

¹⁵ Section 1(c) of the LRA 66 of 1995. A collective agreement is defined in section 213 of the LRA 66 of 1995 as a written agreement that details terms and conditions of employment or any matter of mutual interest.

¹⁶ Section 4 of the BCEA 75 of 1997. However, in line with section 4(a) and 4(c) these minimum conditions are superseded where another law provides a more favourable term and where contracts of employment are more favourable than those outlined in the BCEA 75 of 1997.

¹⁷ Todd and Laubscher (2008) 48.

¹⁸ Christie and Bradfield (2011) 159. See Further Cornelius (2007) 154 who explains that “the express terms of a written contract are those promises and matters incidental thereto, which the parties have set out in words in the operative part of the contract concerned”.

are not, it constitutes breach of contract.¹⁹ Breach of contract is essentially malperformance, as it amounts to a contracting party's failure to comply with the promise to perform as contained in the contract.²⁰ Like with any other contract, if a party to an employment contract fails to comply with the terms thereof it would give rise to a claim for breach of contract.²¹

However, it is evident that several terms contained in the employment contract also constitute benefits as denoted under section 186(2)(a) of the LRA.²² As explained in Chapter 5, a contractual benefit constitutes a pre-existing benefit to which the unfair labour practice provisions apply.²³ Damant questions the need for such disputes to be dealt with as unfair labour practices, as an employee may adequately enforce breaches through ordinary contractual remedies.²⁴ Ruling out contractual benefit disputes as unfair labour practices would certainly be a way of preventing dual recourse. However, such an approach is unjustifiable and misguided.²⁵ Allowing this would place employees at a disadvantage, as they will be excluded from utilising the services provided by dispute resolution bodies such as the Commission for Conciliation, Mediation and Arbitration (CCMA). These fora were established to provide an accessible, quick and inexpensive dispute resolution mechanism to challenge unfair employer conduct.²⁶ In the absence of having access to such bodies, employees will be forced to

¹⁹ Christie and Bradfield (2011) 515. See further Hutchison *et al* (2011) 276; Hock (2003) *ILJ* 1231; and Qotoyi (2012) *Obiter* 428.

²⁰ Van der Merwe *et al* (2012) 282.

²¹ Van Niekerk and Smit (2018) 100. Van Jaarsveld (2008) *EJCL* 5 refers to the resurfacing of contractual principles in individual employment relationships which is evident from case law decided along typical contractual principles regardless of the availability of statutory measures. For example, Damant (2003) *ILJ* 723 explains that guaranteeing membership to a pension fund results in it becoming a term or condition of employment.

²² See Chapter 5, para 5.2.1 where the LAC decision in *Hospersa and another v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC) is discussed. This case endorsed the applicability of the unfair labour practice to contractual benefits.

²³ See Chapter 5, para 5.2.1 where the LAC decision in *Hospersa and another v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC) is discussed. This case endorsed the applicability of the unfair labour practice to contractual benefits.

²⁴ Damant (2003) *ILJ* 727-728 states as follows: "However, it is not clear what value is brought to the jurisprudence at this stage to create a further contractual remedy – which seems to have been the effect of HOSPERSA. As discussed above, where benefits are contractual terms their fulfilment can be adequately enforced through ordinary contractual remedies. The failure to provide such benefits, or the provision of a lesser benefit, could conceivably constitute a breach of contract. The need for a further contractual remedy is, therefore, not clear". Le Roux (2015) *ILJ* 888 criticises the LAC judgment in *Apollo Tyres South Africa (Pty) Ltd v CCMA (Apollo Tyres)* for failing to dispel the relevance of contract in the context of unfair labour practices relating to the provision of benefits.

²⁵ See discussion in Chapter 5, para 5.2.1.

²⁶ Chapter 3, para 3.5.3. See further Explanatory Memorandum (1995) *ILJ* 279 and Van Niekerk and Smit (2018) 471.

institute legal proceedings in the courts for breach of contract, even though they seek to challenge the fairness of employer conduct.

Therefore, removing contractual benefits from the ambit of the unfair labour practice provisions is not the answer. This means that the unfavourable contest between contract law I and labour legislation remains an issue in respect of benefit disputes.²⁷

7.3 IMPACT OF THE UNFAIR LABOUR PRACTICE ON CONTRACTUAL RECOURSE

7.3.1 Introductory Remarks

Following the statutory intervention to address unfair dismissals and unfair labour practices, questions arose regarding the continued role of contractual recourse. The pertinent question raised by Du Toit is whether these statutory remedies superseded contractual remedies.²⁸

Many commentators have argued that common-law contractual recourse remains intact.²⁹ Ngcukaitobi is of the view that there is nothing in the language of the LRA which evidences an intention to limit the remedies available to a dismissed employee to those provided in the LRA. Instead, he opines that there are strong indicators that the

²⁷ Wedderburn (1987) *ILJ (UK)* 13 aptly explains that the common law and labour law have been in battle for an extended period of time. The conflict between the use of common law contractual rights and statutory rights to deal with benefit disputes is yet another illustration of the contest between these two fields of law. Van Niekerk and Smit (2018) 89 comment that "it is not uncommon for aggrieved employees to rely on common-law rights to bypass the jurisdiction of the CCMA to deal with unfair dismissal and unfair labour practice and to proceed to the High Court and the Labour Court with their concurrent jurisdiction to entertain disputes concerning contracts of employment". This is evident from cases such as *Erasmus & others v Senwes Ltd & others* (2006) 27 *ILJ* 259 (T) where the applicants approached the HC for an interdict to prevent the employer from implementing its decision unilaterally to reduce pension subsidies, alleging that this constituted a breach of their employment contracts.

²⁸ Du Toit (2008) *SALJ* 105. See further Wallis (2005) *LDD* 181 who in discussing the shortcomings of the common-law contract of employment asks: "Does that, however, mean that the common law has no role to play in the field of labour law?" A similar question was posed by Garbers (2002) *LDD* 104.

²⁹ See, for example, *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA). Van Eck (2005) *Obiter* 556 and 557 notes that the LRA is not responsible for all disputes that flow from the employer/employee relationship, as it was not the intention to exclude the jurisdiction of the civil courts to adjudicate disputes stemming from the common-law contract of employment, administrative matters and constitutional matters.

legislature sought to “preserve parallel mechanisms of dispute resolution in labour matters”.³⁰

Furthermore - and at face value the BCEA appears to support the preservation of contractual rights in labour matters, as it provides specific recourse in disputes emanating from contracts of employment.³¹

As early as 2001, Zondo JP in *Langeveldt v Vryburg Transitional Local Council & Others (Langeveldt)*,³² quite correctly raised his disconcert with the difficulties that arise in the dispute resolution system applicable to labour and employment matters. The LAC succinctly explained that dual jurisdiction “provides fertile ground for the unacceptable practice of forum-shopping”,³³ and thereby “creates uncertainty in the law because the various courts have different jurisdictions and powers in relation to virtually the same dispute”.³⁴

It is evident that the problem lies in the wording of the legislative provisions. As explained by Cohen:

“Much of the uncertainty that has prevailed can be attributed to the ambiguous wording of ss157(1) and 157(2) of the LRA that, although enacted to regulate the competing jurisdictions of the civil and labour courts, has ironically hindered the development of a coherent labour jurisprudence.”³⁵

³⁰ Ngcukaitobi (2004) *ILJ* 18. See further Bosch (2006) *ILJ* 29 who explains that “the common law of employment has certainly not been obliterated by labour legislation, voluminous as such legislation is. Rather, it is something, as one author recently noted that, like death and taxes, will always be with us in some form or another”. Qotoyi (2012) *Obiter* 433-435 disagrees with the decision of the LAC in *National Union of Mineworkers on behalf of Employees v Commission for Conciliation, Mediation & Arbitration* (2011) 32 *ILJ* 2104 (LAC) that the common-law remedy of *exceptio non adimpleti contractus* is no longer available as a defence to employees who choose to withhold their labour. He disagreed with the finding that employees have to follow the strike procedures prescribed in the LRA. He holds the view that common-law principles can co-exist with the LRA in the arena of labour law. Wallis (2005) *LDD* 190 suggests that attempts to suppress the common law in the area of labour law should be stopped.

³¹ Section 77(3) of the BCEA 75 of 1997.

³² (2001) 22 *ILJ* 1116 (LAC).

³³ *Langeveldt* paras 48, 49 and 64.

³⁴ *Langeveldt* para 64.

³⁵ Cohen (2010) *SA Merc LJ* 427. See further *Langeveldt* para 65 where the legislature is criticised for awarding the HC jurisdiction in employment and labour disputes, thereby undermining and defeating the objectives of the LRA.

It is for this reason that *Langeveldt* called for the streamlining of the dispute resolution system,³⁶ notably “a single hierarchy of courts”, being the Labour Courts, to have jurisdiction over all employment and labour matters.³⁷ Zondo JP requested that Parliament amend the statutory provisions which provided jurisdiction to the HC in labour and employment matters, notably section 157(2) of the LRA and section 77(3) of the BCEA.³⁸

The challenges created by these statutory provisions have arisen not only in the context of contract law and labour legislation but also in the context of administrative law and labour legislation. This is evident from the Constitutional Court (CC) case of *Chirwa v Transnet Ltd (Chirwa)*,³⁹ where the CC had to decide whether South Africa’s legislative framework afforded a public servant who had been dismissed the right to approach the HC to set aside her dismissal in terms of the Promotion of Administrative Justice Act (PAJA),⁴⁰ instead of proceeding to arbitrate her unfair dismissal dispute.⁴¹ Ngcobo J described the issues that presented in the case as familiar problems that have occurred since the enactment of section 157(2) which confers concurrent jurisdiction on the LC and HC in certain matters. He went on to describe these problems as being mystifying and of jurisdictional complexity.⁴²

It is clear that these overlapping avenues are not limited to dismissal disputes but are as apt with regard to unfair labour practices. Zondo JP in *Langeveldt* explained that an employee who is demoted has the right to approach the CCMA with an unfair labour practice dispute, but on the same set of facts could also allege that the demotion is

³⁶ *Langeveldt* para 42.

³⁷ *Langeveldt* paras 66 and 67. Here the judge called on Parliament and the responsible Ministries to take a policy decision to transfer the HC’s jurisdiction in labour and employment matters to the LC and to transfer the SCA’s jurisdiction in employment and labour matters to the LAC.

³⁸ *Langeveldt* para 68. At para 69 Zondo JP stated that his concern about the dual jurisdiction emanating from court decisions was the failure to give effect to the objectives sought to be achieved by the dispute resolution procedures of the LRA, being efficiency, expedience and a cost-effective system.

³⁹ [2008] 2 BLLR 97 (CC).

⁴⁰ Act 3 of 2000. The enactment of PAJA arises from the provisions of section 33 of the Constitution of the Republic of South Africa, 1996. Section 33 states that everyone has the right to lawful, reasonable and procedurally fair administrative action and called for the enactment of national legislation to give effect to these rights.

⁴¹ *Chirwa* paras 13 and 19.

⁴² *Chirwa* para 81.

unlawful or that it amounts to a breach of his employment contract.⁴³ This is exactly the problem that presents in respect of unfair labour practices relating to the provision of benefits.

It is appreciated that contractual remedies provide additional recourse to employees to challenge unfair conduct perpetrated by employers in certain instances. It is by no means bad for employees to have choices. However, the LRA was enacted to regulate the relationship between employers and employees. One way in which it seeks to do this is by providing for effective dispute resolution procedures.⁴⁴ Considering the comprehensive recourse that is established in terms of the LRA to deal with unfair dismissal and unfair labour practice disputes, it is apparent that employees are provided with sufficient recourse to address such disputes. It therefore does not seem fair that employees should be permitted to bypass the tailor-made dispute resolution institutions that have been set up in an accessible and cost-effective manner.

Considering the fact that appropriate recourse is provided for in the LRA, the accessibility of other avenues to resolve what is essentially an unfair dismissal or unfair labour practice dispute, opens the door to manipulation. Equally troubling is the inevitable progression of a class-based system that stems from the permissibility of dual jurisdiction.⁴⁵ The rich who have financial resources will pursue contractual remedies and litigate in the courts, while the less privileged will have to utilise the dispute resolution systems provided for in the LRA.⁴⁶ Pretorius and Myburgh correctly ask the question “will there be one jurisdiction for those who can afford it (the HC) and another for those who can’t (the CCMA)?”⁴⁷ This certainly should not be the case.

Furthermore, it must not be forgotten that the LRA seeks to give effect to the constitutional right to fair labour practices.⁴⁸ As explained by the CC in *National Education Health & Allied Workers Union v University of Cape Town (NEHAWU)*⁴⁹ the right to fair labour practices is about ensuring that the relationship between an employee and

⁴³ *Langeveldt* para 54.

⁴⁴ See Chapter 3, para 3.2.2.

⁴⁵ Van Eck (2008) *Obiter* 346.

⁴⁶ Van Eck (2008) *Obiter* 346. See further Du Toit (2010) *ILJ* 26.

⁴⁷ Pretorius and Myburgh (2007) *ILJ* 2176.

⁴⁸ See Chapter 3, para 3.2.2.

⁴⁹ *National Education Health & allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC).

an employer operates on terms that are fair to both parties.⁵⁰ Allowing dual remedies creates a situation where employment decisions may be attacked under contract or statute. Most troubling is the fact that the employer would not know “from which direction the attack is coming until it is launched (and that may take several years after the event)”.⁵¹ Allowing this creates legal uncertainty, which goes against the intention of the LRA, as discussed below.⁵²

7.3.2 Intention of the Legislature

It could never have been the intention of policy makers to allow for coinciding and opposing jurisdictions to develop from common-law contractual rights on the one hand and statutory rights on the other.⁵³ The Explanatory Memorandum to the Labour Relations Act (Explanatory Memorandum) confirms that the drafters were aware of the problems experienced regarding the “competing jurisdictions of the former Industrial Court and Supreme Court [now the High Court] and that they aimed to avert the overlapping and competing jurisdictions”.⁵⁴ The intention clearly was to create a LC which would have exclusive jurisdiction in labour matters.⁵⁵

Hepple explains that the South African model was not based on the British model, as it sought to avoid the pitfalls faced by the employment tribunals in Britain, which were not immune from the undermining influence of the common law.⁵⁶

⁵⁰ See Chapter 3, para 3.3.

⁵¹ Benjamin (2009) *ILJ* 769. See further Du Toit (2008) *SALJ* 97 who contends that “the trend towards the establishment of two parallel regimes of employment law – one based on statute and one on common law” is not conducive to legal certainty.

⁵² See also Chapter 3, para 3.2.1.

⁵³ Fabricius (1998) *ILJ* 438 convincingly explains that the intention of the legislature with the establishment of the labour courts was to keep labour disputes and their consequences in the wide sense outside the jurisdiction of the HC and strictly under the umbrella of the specialist Labour Courts. Similarly, Wedderburn (1987) *ILJ (UK)* 26 states that the only way for labour law to escape the clutches of the common law was the establishment of specialised courts. See further Du Toit (2010) *ILJ* 23-24.

⁵⁴ Explanatory Memorandum (1995) *ILJ* 326. See further Van Eck (2008) *Obiter* 2008 348.

⁵⁵ Steenkamp and Bosch (2012) *AJ* 134. See further Benjamin and Cooper (1995) *ILJ* 275.

⁵⁶ Hepple (1999) *ILJ* 2. Explanatory Memorandum (1995) *ILJ* 279-280 states that Hepple, Weiss and Adiogun were the three world-class experts sponsored by the ILO to assist the Cheadle task team with the drafting of the new LRA.

The wording of the Explanatory Memorandum bears testament to the above assertions. The objective was to draft a Bill which would, among other goals, provide simple procedures for dispute resolution through statutory conciliation, mediation and arbitration; and to provide a system of Labour Courts to determine disputes of right in an accessible, speedy and inexpensive manner.⁵⁷ One of the LRA's stated objectives is to promote the effective resolution of labour disputes by establishing a single system of dispute resolution.⁵⁸ In *Langeveldt Zondo JP* endorsed this approach stating that:

“Through the new system with its specialist institutions and courts which are run by experts in the field, the stakeholders and parliament sought to ensure a certain efficient, cost-effective and expeditious system of resolving labour disputes.”⁵⁹

Unfortunately, due to poor legislative drafting this goal has not been achieved.⁶⁰

7.3.3 Legislative Provisions

Before discussing the principles and views espoused by the judiciary, this section briefly discusses relevant legislative provisions. This is necessary, as these provisions are referred to later in the chapter.

7.3.3.1 The LRA

Section 157 of the LRA deals with the jurisdiction of the LC. Section 157(1) gives the LC exclusive jurisdiction in respect of all matters assigned to the LC by the LRA or any other law. However, the LC's jurisdiction is excluded where the LRA provides otherwise. Its jurisdiction also remains subject to the Constitution and the jurisdiction of the

⁵⁷ Explanatory Memorandum (1995) *ILJ* 279.

⁵⁸ Section 1(d) of the LRA 66 of 1995. See Van Eck (2010) *TSAR* 126-127.

⁵⁹ *Langeveldt* para 65. See further Van Eck (2005) *Obiter* 552 who explains that the justification for the introduction of labour courts was to ensure expeditious finalisation of disputes; an inexpensive system; accessibility based on simplified procedures and the development of coherent labour law principles. Similar pronouncements were made by Steenkamp and Bosch (2012) *AJ* 120 who describe the objectives of labour dispute resolution as speed, accessibility and legitimacy. See further Ngcukaitobi (2004) *ILJ* 1.

⁶⁰ See Van Eck (2010) *TSAR* 126-127. Du Toit (2008) *SALJ* 132 is of the view that there were more pressing problems, resulting in the regulation of the individual employment relationship falling by the wayside.

LAC.⁶¹ Section 157(2) provides for the LC's concurrent jurisdiction with the HC, specifically in respect of alleged or threatened violations of any fundamental right entrenched in the Bill of Rights and arising from employment and labour relations.⁶²

Another important provision is section 210 which states that:

“if any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail”.

This section supports the dominance of labour legislation over contract law.⁶³

7.3.3.2 The Constitution

Because the role of the HC in section 157(2) of the LRA is influenced by section 169 of the Constitution, it is imperative to consider the wording of this section. Section 169 gives the HC the authority to decide any constitutional matter, subject to certain exclusions. The first exclusion relates to any constitutional matter that can only be decided by the CC. The second exclusion refers to any constitutional matter that is assigned through an Act of Parliament to another court of a status similar to the HC.⁶⁴ Added to this, section 169 gives the HC authority to decide any other matter (other than constitutional matters), but only if such matter is not assigned to another court by an Act of Parliament.⁶⁵

It is also significant to note that section 33 of the Constitution states that everyone has the right to lawful, reasonable and procedurally fair administrative action. The Constitution calls for the enactment of national legislation to give effect to these rights.⁶⁶ In

⁶¹ Section 157(1) of the LRA 66 of 1995. See further Van Niekerk and Smit (2018) 492.

⁶² Section 157(2)(a) of the LRA 66 of 1995. There are other circumstances set out in sections 157(2)(b) and (c) which provide for the concurrent jurisdiction of the HC and LC. However, only section 157(2)(a), which relates to employment and labour relations is referred to, as this aspect is relevant to the discussion in this chapter.

⁶³ *Chirwa* para 50.

⁶⁴ Section 169(a)(i) and (ii) of the Constitution of the Republic of South Africa, 1996.

⁶⁵ Section 169(b) of the Constitution of the Republic of South Africa, 1996.

⁶⁶ Section 33(3) of the Constitution of the Republic of South Africa, 1996.

response, the Promotion of Administrative Justice Act (PAJA)⁶⁷ was promulgated.⁶⁸ PAJA gives effect to section 33 of the Constitution (right to fair administrative action) in the same way as the LRA gives effect to section 23 of the Constitution (right to fair labour practices).

7.3.3.3 The BCEA

Section 77(3) of the BCEA states that the LC has concurrent jurisdiction with the civil courts to consider and determine any matter in respect of a contract of employment, irrespective of whether any basic condition of employment constitutes a term of the contract. In other words, this section gives jurisdiction to both the LC and HC to consider contractual disputes.⁶⁹

However, it is essential that section 77(3) be read in conjunction with section 77(1). Section 77(1) mirrors the provisions of section 157(1) of the LRA⁷⁰ and gives the LC exclusive jurisdiction in respect of all matters governed by the BCEA. However, the LC's jurisdiction is excluded where the BCEA provides otherwise and is subject to the Constitution and the jurisdiction of the LAC.

7.3.4 Principles Espoused by the Judiciary

7.3.4.1 Initial Views

Initially, the civil courts held the view that the LRA did not merely supplement the common law but rather substituted it.⁷¹ In *IMATU v Northern Pretoria Metropolitan Substructures & others (IMATU)*⁷² the court stated as follows:

⁶⁷ Promotion of Administrative Justice Act 3 of 2000.

⁶⁸ The introductory remarks in PAJA explain that the Act seeks to give effect to lawful, reasonable and procedurally fair administrative action as contemplated in section 33 of the Constitution.

⁶⁹ Section 77(3) of the BCEA 75 of 1997.

⁷⁰ *Langeveldt* para 14.

⁷¹ *IMATU v Northern Pretoria Metropolitan Substructures & others* (1999) 20 ILJ 1018 (T) and *Ampofo & others v MEC for Education, Arts, Culture, Sports and Recreation: Northern Province & another* (2001) 22 ILJ 1975 (T). See further Garbers (2002) LDD 101.

⁷² (1999) 20 ILJ 1018 (T). In this case the employer failed to comply with its staffing policy contained in a collective agreement when dealing with the selection, appointment and promotion of employees (1020C-D). The court had to address the employer's objection that the HC did not have jurisdiction to consider the matter (1020E). The court found that the HC's jurisdiction was excluded as the clear intention of the legislature was to have a specialised set of courts to

“In my view where the powers and procedures provided for in the Act indicate that a specialist tribunal or specialist hierarchy of tribunals is created with powers significantly distinct from the powers and procedures governing the function of the High Court it becomes both conceptually and practically inappropriate to view these as being in addition to the common-law remedies of the High Court. They must be viewed as being in substitution thereof.”⁷³

The HC’s approach soon changed. In *Naptosa and Others v Minister of Education, Western Cape, and Others (Naptosa)*⁷⁴ the Department of Education offered to employ dismissed temporary educators on fixed-term contracts on a salary without accompanying benefits.⁷⁵ This was subsequent to dismissing the temporary educators because of budgetary constraints.⁷⁶ Notwithstanding the signing of these contracts, the educators argued that they were still entitled to benefits as these were statutory rights provided for in specific Regulations.⁷⁷

The HC held that while the LC has exclusive jurisdiction over unfair dismissal and unfair labour practice disputes, it does not have exclusive jurisdiction over the issue in dispute, which was the validity of a clause in the employment contract.⁷⁸ This case illustrates that the HC was willing to meddle in the terrain of labour legislation when it concerned the employer’s failure to award employee benefits. Needless to say, this clearly resembled an unfair labour practice and arguably should have been dealt with in terms of the LRA.

deal with labour-related matters. Furthermore, the Act created procedures designed to accomplish the object of simple, inexpensive and accessible resolution of labour disputes (1022F-I). The court concluded that the LRA creates an all-embracing labour dispute resolution system, leaving no room for intervention by another court (1022F-I).

⁷³ *IMATU* 1023E. This sentiment was endorsed in *Ampofo & others v MEC for Education, Arts, Culture, Sports and Recreation: Northern Province & another* (2001) 22 ILJ 1975 (T). This case involved a group of foreign nationals with temporary residence in South Africa who were employed by the Department of Education, who sought to compel the Department to assist them to extend their work permits by writing letters to the Department of Home Affairs stating that they were permanently employed (paras 2 and 3). The Department of Education refused, and the applicants approached the HC for a declaratory order that they were permanent employees of the Department (para 4), relying on a collective agreement to support their contention. The court stated that “the procedures and remedies under the LRA are in substitution of and not in addition to the common-law ones available in the High Court” (para 46).

⁷⁴ 2001 (2) SA 112 (C).

⁷⁵ *Naptosa* 117I to 118A.

⁷⁶ *Naptosa* 117H.

⁷⁷ *Naptosa* 119E-F where the employees’ representative argued that the teachers could not have lawfully relinquished their rights contained in legislation (the Regulations) by subscribing to their contracts of temporary employment.

⁷⁸ *Naptosa* 120A-B.

7.3.4.2 Expansion of Dual Jurisdiction

The SCA strengthened the HC's role in the field of labour law. In *Fedlife Assurance Ltd v Wolfaardt (Fedlife)*⁷⁹ the SCA considered the employer's premature termination of a fixed-term contract, which was referred to the HC as a breach of contract.⁸⁰ The employer challenged the HC's jurisdiction on the basis that Chapter VIII of the LRA codified the rights and remedies available to all employees arising from the termination of their employment. This, it was argued, deprived employees of their common-law remedies.⁸¹

The SCA disagreed, finding that the LRA does not expressly retract an employee's entitlement to enforce contractual remedies.⁸² The court commented as follows:

"In my view chapter VIII of the 1995 Act is not exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. Whether approached from the perspective of the constitutional dispensation and the common-law or merely from a construction of the 1995 Act itself I do not think the respondent has been deprived of the common-law right that he now seeks to enforce."⁸³

The SCA's affirmation of an employee's right to utilise contractual remedies is unconvincing. What the employee was complaining about was undoubtedly a dismissal to which LRA procedures apply. Therefore, it was not necessary for the SCA to try to distinguish between an unlawful and an unfair dismissal in order to fit the dispute within the ambit of a breach of contract.⁸⁴

⁷⁹ 2002 (1) SA 49 (SCA).

⁸⁰ *Fedlife* para 5. See further *Denel (Pty) Ltd v Vorster* (2004) 25 ILJ 659 (SCA) where the SCA entertained a claim for breach of contract arising from the summary dismissal of an employee (para 1). It was dealt with as a breach of contract as the procedures to be followed when instituting disciplinary action as contained in the disciplinary code was expressly incorporated in the conditions of employment (para 5).

⁸¹ *Fedlife* para 11. See further Grogan (2001) ELJ 5 who explains the employer's argument in *Fedlife* to be that the LRA had abolished an employee's right to enforce employment contracts under the common law in the civil courts.

⁸² *Fedlife* para 17.

⁸³ *Fedlife* para 22. See further Van Eck (2008) *Obiter* 341 who refers to *Fedlife* as the first significant case dealing with the overlap between common law and unfair dismissal provisions, the outcome of which is that existing common law remedies have not been abolished. As explained at 342 the court in *Denel v Vorster* (2004) 25 ILJ 659 (SCA), referring to *Fedlife*, found that the fairness imperatives introduced into the employment relationship do not eradicate the binding effect of contractual terms.

⁸⁴ Grogan (2001) ELJ 10 disagrees with the inference drawn by the SCA that the LRA's intention by not defining the premature termination of contracts as a dismissal was for the common law to continue to apply in such instances. Grogan is of the view that this assumption is untenable considering the wording of section 37(6) of the BCEA 75 of 1997, which states that nothing

While Garbers and Du Toit accept that the principles laid down in *Fedlife* apply to unfair dismissals,⁸⁵ they are of the view that it did not provide authority that breach of contract can serve as an alternative cause of action to an unfair labour practice dispute.⁸⁶ However, there is no justifiable reason why the same principles would not have been adopted by the court in unfair labour practice disputes.⁸⁷ Essentially, *Fedlife* endorsed the approach that the jurisdiction of the HC to adjudicate labour disputes was dependent on how the case was pleaded.⁸⁸

The SCA in *Boxer Superstores Mthatha & another v Mbenya (Boxer Superstores)*⁸⁹ also endorsed the jurisdiction of the HC in labour disputes.⁹⁰ Here a dismissed employee applied to the HC for an order declaring that her disciplinary hearing was unlawful and that she be reinstated to her former position.⁹¹ The SCA, relying on *Fedlife*, accepted the HC's jurisdiction as the employee was careful to formulate her claim as an unlawful dismissal and did not complain about its unfairness.⁹² The SCA went even

affects the right of a dismissed employee to challenge the lawfulness or fairness of the dismissal in terms of chapter VIII of the LRA. This provides a clear indication that the legislature intended section 191 of the LRA to cater for all dismissals irrespective of whether the complaint related to a breach of contract or unfairness. See further Du Toit (2008) SALJ 121 who questions the majority decision in *Fedlife* as being a case of "judge-made law taking precedence over legislative policy".

⁸⁵ Garbers (2002) LDD 106 states that there must be an acknowledgment that unfairness and unlawfulness do not go hand in hand and that therefore an applicant will have a choice as to the desired remedy, which will inform the forum before which the matter is brought. See also Du Toit (2008) SALJ 129.

⁸⁶ Garbers (2002) LDD 106. See further Du Toit (2008) SALJ 129.

⁸⁷ In *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 ILJ 1957 (SCA) the SCA found that the unfair labour practice remedies provided for in the LRA are not exhaustive of the remedies that may be available to employees during the employment relationship, as conduct by an employer might constitute both an unfair labour practice and give rise to other rights (para 4). See further *Boxer Superstores Mthatha & another v Mbenya* 2007 (5) SA 450 (SCA) para 5 where the court commented that while the LRA provides protection against unfair labour practices, conduct that gives rise to such unfair labour practices may also give rise to other rights of action provided that the employee formulates the claim in a way that does not fall within the exclusive jurisdiction of the LC.

⁸⁸ While the applicant in *Fedlife* chose to refer the case as a breach of contract, the employee's dispute equally fell within the bounds of an unfair dismissal and could have been pleaded as such. *Buthlezi v Municipality Demarcation Board* Case no JA37/2002, 22 September 2004 (LAC) dealt with a similar issue (the premature termination of a fixed-term contract). However, here, unlike in *Fedlife* it was challenged as an unfair dismissal (paras 4 and 5). *Fedlife* set a very bad precedent as the LC itself started accepting that the boundaries between labour legislation and the common law depended on the right that was claimed and the manner in which it was pleaded, as is evident from cases such as *Jonker v Okhahlamba Municipality & others* (2005) 26 ILJ 782 (LC) para 23.

⁸⁹ 2007 (5) SA 450 (SCA).

⁹⁰ *Boxer Superstores* paras 2 and 9.

⁹¹ *Boxer Superstores* para 1.

⁹² *Boxer Superstores* para 9.

further and endorsed the conclusion reached in *Old Mutual Life Assurance Co SA Ltd v Gumbi*⁹³ that the common-law contract of employment had been developed in line with the constitutional right to fair labour practices, to include the right to a pre-dismissal hearing.⁹⁴ The SCA concluded that every employee has a common-law contractual claim to a pre-dismissal hearing which may be adjudicated in the High Court.⁹⁵

This is an inconceivable approach, as the development of the common law is only called for in circumstances where there is insufficient recourse provided in legislation.⁹⁶ As convincingly argued by the employer, the substance of this case was about fairness, in respect of which the LRA provides sufficient dispute resolution mechanisms.⁹⁷ However, the court, quoting from *Fedlife*, disagreed:

“Whether a particular dispute falls within the terms of s 191 depends on what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the ‘fairness’ of the dismissal is the subject of the employee’s complaint. Where it is not, and the subject of the dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee’s complaint is about.”⁹⁸

The above cases provide a clear indication that relying on form rather than substance severely subverts the architecture of the LRA. The study does not support the latitude provided by cases such as *Fedlife* and *Boxer Superstores* regarding the expansion of a dual jurisdiction.⁹⁹ It undermines the certainty of the law by eroding the existence of a single set of rules.¹⁰⁰ As aptly stated by Pretorius and Myburgh “in short, most (if not

⁹³ (2007) 28 ILJ 1499 (SCA).

⁹⁴ *Boxer Superstores* para 6.

⁹⁵ *Boxer Superstores* para 6.

⁹⁶ *SA Maritime Safety Authority v McKenzie* (2010) 3 SA 601 (SCA) para 55 explained that there is no need for the common law to be developed by importing into contracts of employment rights flowing from the constitutional right to fair labour practices, as the LRA gives effect to this constitutional right. Therefore, duplicating the rights provided for in the LRA through the development of the common law is not warranted.

⁹⁷ *Boxer Superstores* para 11.

⁹⁸ *Boxer Superstores* para 12.

⁹⁹ See Benjamin (2009) ILJ 769. See further Van Staden and Smit (2010) TSAR 714 who regard the decisions as controversial and criticised them for opening the door to a dual jurisprudence in which common law principles were allowed to compete with the protection provided for in the LRA in respect of unfair dismissals and unfair labour practices.

¹⁰⁰ In *Jonker v Okhahlamba Municipality & others* (2005) 26 ILJ 782 (LC) the court highlighted that the problem in allowing dual jurisdiction is that it results in the development of two parallel streams of labour law, one under the common law and the other under labour legislation (para 27). The court explained that this requires courts to respond to cases based on how they are pleaded, leaving the door open for litigants to frame their cases “opportunistically” (para 27).

all) unfair dismissals can now be dressed up as a contractual claim and plated out in the HC".¹⁰¹ This would also apply to unfair labour practices relating to the provision of benefits.

7.3.4.3 Attempts by CC to Settle Dual Jurisdiction

While the SCA was considering cases about whether dual jurisdiction existed between the HC and LC in the context of labour law claims presented as contractual claims, the CC also had to pronounce on the jurisdiction of the HC, but in the context of labour law claims presented as administrative law claims.

The focus of this chapter is to establish the relevance of common-law contractual claims in light of the statutory recourse provided for by the LRA. However, cases that deal with the overlap between administrative and labour law bring to the fore important principles that are equally applicable to the overlap between contractual and labour law claims.¹⁰² Therefore, these cases need to be considered.

Soon after the SCA's decision in *Fedlife*, the CC in *Fredericks and others v MEC for Education and Training, Eastern Cape and others (Fredericks)*,¹⁰³ had to determine whether the employer's refusal to approve its employees' request for voluntary re-trenchment constituted a breach of their constitutional right to administrative justice.¹⁰⁴ The HC found that it did not have jurisdiction to consider the matter, as its jurisdiction was barred by the provisions of the LRA.¹⁰⁵

The CC made the following important pronouncements: Firstly, it agreed with the decision reached in *Fedlife* that the LRA does not confer a general jurisdiction on the LC

¹⁰¹ Pretorius and Myburgh (2007) *ILJ* 2174.

¹⁰² Pillay J in *Mohlaka v Minister of Finance* 2009 30 *ILJ* 662 LC para 5 found that the majority judgment in *Chirwa* was relevant to the case even though it dealt with the overlap between contract law and labour law, whilst *Chirwa* dealt with the overlap between administrative law and labour law.

¹⁰³ 2002 2 SA 693 (CC).

¹⁰⁴ *Fredericks* para 1.

¹⁰⁵ *Fredericks* para 1.

to deal with all disputes arising from employment.¹⁰⁶ Due to this lack of a general jurisdiction, the HC's jurisdiction was not barred by section 157(1) of the LRA.¹⁰⁷ Secondly, section 169 of the Constitution gives the HC jurisdiction to consider constitutional matters and section 157(2) of the LRA confirms the HC's concurrent jurisdiction in this area.¹⁰⁸ As this case dealt with a constitutional matter, the CC found that section 157(2) expressly provided for concurrent jurisdiction and as such the HC's jurisdiction was not ousted by the LC's jurisdiction.¹⁰⁹

It is difficult to accept the approach followed in *Fredericks*, which required the court to look at the form of the dispute, instead of the substance, similar to what was done in *Fedlife*. These judgments are contrary to the earlier principle established by the LAC, which required that substance be put before form.¹¹⁰ Placing substance above form will root out the misuse of the law and will ensure that specialist courts serve the purpose that they were intended to serve and that their functions are not usurped.

Fortunately, the CC adopted a different approach in *Chirwa*.¹¹¹ Here, a dismissed public servant approached the HC seeking an order to set aside the disciplinary proceedings that resulted in her dismissal.¹¹² The explanation offered for approaching the HC instead of the CCMA was that the employee had two causes of action available; one under the LRA and the other flowing from the Bill of Rights read with the provisions of PAJA.¹¹³

¹⁰⁶ *Fredericks* para 38.

¹⁰⁷ *Fredericks* para 40.

¹⁰⁸ *Fredericks* paras 12 and 43.

¹⁰⁹ *Fredericks* para 41.

¹¹⁰ See *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)* (1997) 18 ILJ 671 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others* (10 (1998) 19 ILJ 260 (LAC); and *Coin Security Group (Pty) td v Adams & others* (2000) 21 ILJ 925 (LAC). As stated in *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703 (LC) para 23, these cases support the substance over form approach, providing authority for the fact that the characterisation of a dispute by a party should not be conclusive, but instead the court should assess the facts of each case in order to determine the true nature of the dispute, which will inform whether the court or forum has jurisdiction.

¹¹¹ [2008] 2 BLLR 97 (CC).

¹¹² *Chirwa* para 13.

¹¹³ *Chirwa* para 19.

There were two majority decisions delivered by the CC, both of which found that Ms Chirwa did not have a claim under PAJA.¹¹⁴ Important comments regarding the framework of the LRA and its intended purpose were made in both decisions.

Skweyiya J stated that the existence of a purpose-built framework in the LRA implies that labour processes and forums must take precedence in employment-related disputes, as opposed to non-purpose-built processes and forums. Consequently, employees must pursue claims through the mechanisms established by the LRA and not through alternative causes of action.¹¹⁵ The LRA was correctly described as providing “a one-stop shop for all labour-related disputes”,¹¹⁶ and it is with this perspective in mind that section 157(2) of the LRA must be interpreted.

In the second decision, Ngcobo J correctly rejected the endorsement of form over substance. He explained that “astute litigants” will formulate their claims very carefully to avoid reliance on fairness in order to bypass the dispute resolution machinery created by the LRA.¹¹⁷ It was pointed out that this could never have been the intention of the legislature in enacting section 157(2) of the LRA.¹¹⁸ Sections 157(1) and 157(2) must consequently be understood against the objective of creating specialised forums to deal with labour and employment matters.¹¹⁹ With this context in mind, the primary purpose of section 157(2) cannot be construed as conferring jurisdiction on the HC to deal with labour and employment relations disputes. It rather seeks to empower the LC to deal with causes of action that are founded on the provisions of the Bill of Rights which arise from employment and labour relations.¹²⁰

¹¹⁴ This went against the findings of the SCA that “the High Court had concurrent jurisdiction with the Labour Court in relation to the applicant’s claim. He reasoned that if an employment dispute raises an alleged violation of a constitutional right, a litigant is not confined to the remedy provided under the LRA and that the jurisdiction of the High Court is therefore not ousted” (*Chirwa* para 25).

¹¹⁵ *Chirwa* para 41.

¹¹⁶ *Chirwa* para 54.

¹¹⁷ *Chirwa* para 95. Van Eck (2010) *TSAR* 126 observes that the CC, referring to *Chirwa*, “is averse to the idea of determining jurisdiction on the formulation of the wording and that the determining factor should be the substance rather than the form of the dispute”.

¹¹⁸ *Chirwa* para 95.

¹¹⁹ *Chirwa* para 113.

¹²⁰ *Chirwa* para 120.

Importantly, Ncgobo J held that even though section 157(2) applied to instances where a party relied directly on the provisions of the Bill of Rights,¹²¹ this situation would not commonly arise. This is based on the principle that a litigant may not bypass the LRA and rely directly on the constitutional right to fair labour practices.¹²² Ncgobo J also found that an employee cannot avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of some other constitutional right, such as a violation of the right to fair administrative action.¹²³

Ncgobo J's findings that the substance of a dispute is an important consideration, is very significant.¹²⁴ Furthermore, the majority judgment must be applauded for championing the predominance of the LRA's procedures and remedies. The narrow interpretation afforded to section 157(2) is convincing, as there is no plausible reason why the LRA would seek to confer jurisdiction on the HC. The more plausible option is that section 157(2) sought to give effect to section 169(a)(ii) of the Constitution, by affording the LC jurisdiction in constitutional matters arising from labour and employment matters. In any event, the use of section 157(2) has been severely curtailed¹²⁵ and should not continue to be a drawback in enforcing the supremacy of the dispute resolution processes set out in the LRA to deal with unfair dismissal and unfair labour practice disputes.

¹²¹ *Chirwa* para 123. See further para 71 where Skweyiya J interpreted section 157(2) as extending the LC's jurisdiction to deal with employment matters that involve constitutional rights.

¹²² The CC in *Chirwa* para 123 referred to the CC case of *South African National Defence Union v Minister of Defence and Others (SANDU)* [2007] 9 BLLR 785 (CC) where this principle was laid down. Cheadle (2009) *ILJ* 744 explains that the constitutional principle laid down in *SANDU* prevents the HC from going behind the LRA and basing one's cause of action directly on the constitutional right to fair labour practices. Similar sentiments were expressed by Cheadle AJ in *Booyesen v SAPS & another* (2009) 30 *ILJ* 301 (LC) paras 37-38 where, referring to *SANDU*, it was stated that "the right to fair labour practices is given effect to by the LRA and other labour legislation. Apart from challenges to the constitutionality or interpretation of that legislation or the development of the common law where there is no legislation, the right plays no other role and does not constitute a separate source for a cause of action".

¹²³ *Chirwa* para 124.

¹²⁴ This is despite the criticism advanced by the minority judgment of Langa CJ at para 173 who held that the mere fact that the claim arose from the employment context did not take away its administrative nature. Langa CJ unconvincingly supported the view adopted in *Fedlife* and *Fredericks* that pleadings are the determining factor.

¹²⁵ As explained earlier, this is due to the fact that the CC in *SANDU* held that an employee is not allowed to bypass the LRA and to rely directly on the constitutional right to fair labour practices. Furthermore, *Chirwa* confirmed that an employee cannot bypass the LRA and rely on any other constitutional right, as was allowed in *Fredericks*.

Another significant CC case is *Gcaba v Minister for Safety and Security (Gcaba)*.¹²⁶ Here, a police officer complained about the South African Police Service's failure to promote him to the upgraded position of station commissioner.¹²⁷ After withdrawing his dispute from the Bargaining Council, he instituted action in the HC, alleging that his right to fair administrative action was violated.¹²⁸ The HC dismissed his claim for lack of jurisdiction in employment matters, in accordance with *Chirwa*.¹²⁹

The CC supported the decision of *Chirwa*. In other words, it endorsed the use of the dispute resolution mechanisms provided for in the LRA to address labour disputes. The CC stated as follows:

"Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. If litigants are at liberty to relegate the finely tuned dispute resolution structures created by the LRA a dual system of law could fester in cases of dismissal of employees."¹³⁰

The CC denounced forum shopping, which was viewed unfavourably in *Chirwa*.¹³¹ The CC in *Gcaba*, like *Chirwa*, aligned itself to an approach that recognised and advanced the primacy of the rights and remedies contained in the LRA.¹³² This suggests that a dispute, which is essentially an unfair dismissal or unfair labour practice dispute, must be dealt with in line with the dispute resolution mechanisms set out in the LRA.¹³³

Though *Gcaba* and *Chirwa* strongly suggest that common-law contractual rights have been supplanted by the LRA, both judgments alluded to the fact that the LC does not

¹²⁶ [2009] 12 BLLR 1145 (CC).

¹²⁷ *Gcaba* paras 4 and 6.

¹²⁸ *Gcaba* para 7.

¹²⁹ *Gcaba* para 8.

¹³⁰ *Gcaba* para 56.

¹³¹ *Gcaba* para 57.

¹³² Du Toit (2010) *ILJ* 33.

¹³³ Grogan (2014) 85. See further Grogan (2009) 6 *ELJ* 11 who states that "If, according to *Chirwa*, an employee's claim falls within the exclusive jurisdiction of the LC because the claim is 'essentially' about the procedural fairness of a dismissal, and if, according to *Gcaba*, an employee's claim likewise falls within the exclusive jurisdiction of the LC because it is 'essentially' about promotion, it seems that all claims covered by section 191(5) of the LRA must likewise do so". Van Niekerk and Smit (2018) 494-495 comment that "*Gcaba* can certainly be read to call into question the assumption of jurisdiction by the High Court in disputes that are regulated by labour legislation, and it reinforces the role of the LC as the sole forum for their resolution". Grogan (2017) 486 holds a similar view. See also Cohen (2010) *SA Merc LJ* 422-423.

have jurisdiction over labour matters in general.¹³⁴ However, these comments could not have been made with common-law contractual rights in mind,¹³⁵ as the CC in both decisions clearly clarified that where recourse is provided for in the LRA that is the recourse that must be utilised, irrespective of how the claim is framed. To my mind, these comments relate to aspects of the employment relationship that are not regulated by the LRA.¹³⁶ Resultantly, these comments do not detract from LRA recourse reigning supreme over contractual rights, where the issue in dispute is one that can be dealt with by the procedures set up in the LRA.

However, there is a contradiction in *Gcaba*. The CC states that it is not up to the court to say that the facts relied upon by the applicants would also sustain another claim to be adjudicated in another court.¹³⁷ Essentially, *Gcaba* was in agreement with the minority judgment in *Chirwa* that jurisdiction is determined on the basis of the pleadings.¹³⁸ This statement stands in stark contrast to the CC's earlier statements. There is certainly a contradiction in requesting the court, on the one hand, to interpret statutory provisions in line with the purpose and objectives of the LRA when assessing a cause of action, while on the other hand requesting the court to simply address the claim based on how it is pleaded.¹³⁹ Furthermore, these pronouncements do not correspond with the decision reached in *Gcaba*. The CC found that it did not have jurisdiction to hear the matter, as the complaint was one essentially rooted in the LRA,¹⁴⁰ yet the claim was couched in administrative law terms.¹⁴¹

¹³⁴ *Gcaba* para 73. Cheadle (2009) *ILJ* 754. See further *Chirwa* para 60 where Skweyiya J stated that the provisions of section 157(1) do not confer exclusive jurisdiction on the LC "generally in relation to matters concerning the relationship between employer and employee".

¹³⁵ This is despite commentary from Grogan (2014) 85 that *Gcaba* leaves unanswered the question whether employees may still approach the HC with claims for alleged breach of contract where they would also have a remedy under the LRA, as the SCA said they may do. Du Toit (2010) *ILJ* 34 makes a similar assessment and states that *Gcaba* is silent on the validity of contractual claims competing with statutory remedies.

¹³⁶ This caters for labour matters addressed in legislation such as the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Unemployment Insurance Act 63 of 2001. The labour matters addressed in these statutes are not regulated in the LRA.

¹³⁷ *Gcaba* para 75.

¹³⁸ *Gcaba* para 75.

¹³⁹ Mupangavanhu (2012) *SLR* 47–48.

¹⁴⁰ *Gcaba* para 76. See further Mupangavanhu (2012) *SLR* 49.

¹⁴¹ *Gcaba* para 44.

After *Gcaba*, the courts have eagerly relied on the CC judgment to found jurisdiction based on the pleadings of a case.¹⁴² However, the conclusions reached in *Gcaba* should not be interpreted as approval of a mere literal reading of the pleadings. An interrogation of the legal basis of the claim is required.¹⁴³

Therefore, the conclusion to be drawn is that when an employee institutes a labour-related dispute in the HC, the court must rule that it lacks jurisdiction if the dispute is one that may be referred as an unfair dismissal or unfair labour practice dispute. This will ensure that framing a claim in an alternate manner, such as a right to fair administrative action or a breach of contract; will not alter the essential nature of the claim.¹⁴⁴

Lastly, it is significant to note that the application of PAJA supports an approach that statutory recourse provided for in the LRA supplants common law contractual rights.¹⁴⁵ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others (Bato Star)*,¹⁴⁶ O'Regan J stated that under the new constitutional order there are not two systems of law regulating administrative action. Rather, the court's power to review administrative action flows from PAJA and not from the common law.¹⁴⁷

Referring to these pronouncements, Du Toit correctly observes that PAJA, like the LRA, does not contain a provision that expressly abolishes common-law remedies. Despite the absence of such a provision, the CC had no difficulty in concluding that PAJA takes precedence over the common law by necessary implication. Likewise, the LRA must take precedence over the common law, a proposition that is strengthened by the inclusion of section 210 in the LRA. It would be "incongruous" for the LRA to prevail over other legislation, but not to prevail over common-law rules where there is conflict.¹⁴⁸

¹⁴² See *SA Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) para 7. See further *Greater Tzaneen Municipality v Le Grange* [2015] JOL 32985 (SCA) para 11 and *Xako v Nelson Mandela Bay Municipality* [2015] 12 BLLR 1276 (LC) para 6.

¹⁴³ *Gcaba* para 75.

¹⁴⁴ Grogan (2009) 6 *ELJ* 9.

¹⁴⁵ Du Toit (2010) *ILJ* 23–24.

¹⁴⁶ 2004 4 SA 490 (CC), which dealt with an administrative decision taken to award fishing quotas.

¹⁴⁷ *Bato Star* para 22. See further para 25 which explains that the cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past.

¹⁴⁸ Du Toit (2010) *ILJ* 24.

Considering everything that has been discussed thus far, there is a convincing argument to be made for the fact that common law contractual claims have been supplanted by the statutory unfair dismissal and unfair labour practice dispute resolution mechanisms. However, it is unfortunate that this was not expressly stated by the CC in *Gcaba*.¹⁴⁹ Rather, the CC made some conflicting statements, which has obscured the outcome of the case.¹⁵⁰

7.3.4.4 Consideration of Further Developments

Notwithstanding a number of positive pronouncements made by the CC, the SCA has continued in its approach of affording the HC jurisdiction to consider employment matters. In *SA Maritime Safety Authority v McKenzie (McKenzie)*,¹⁵¹ the employee alleged that his dismissal was procedurally and substantively unfair.¹⁵² He pursued the unfair dismissal procedures provided for in the LRA and after reaching a settlement with his former employer, he then lodged action in the HC claiming 5.2 million rands for breach of contract.¹⁵³ The employer challenged the jurisdiction of the court on the basis that the remedies for unfair dismissal are those provided for in the LRA and that the HCs have no jurisdiction to grant such remedies.¹⁵⁴

While the SCA correctly dismissed the notion that contracts of employment are subjected to an implied term not to be unfairly dismissed,¹⁵⁵ the court did not oust the jurisdiction of the HC.¹⁵⁶ The court emphasised that the question must be whether the court has jurisdiction over the pleaded claim and not whether it has jurisdiction over another claim which could arise from the same set of facts.¹⁵⁷ Therefore, the SCA

¹⁴⁹ Grogan (2014) 85 and Du Toit (2010) *ILJ*34. See further Grogan (2009) 6 *ELJ*4-5 who explains that Skweyiya J in *Chirwa* did not completely oust the jurisdiction of the HC in disputes relating to employment.

¹⁵⁰ See para 7.3.4.3.

¹⁵¹ 2010 3 SA 601 (SCA).

¹⁵² *McKenzie* para 1.

¹⁵³ *McKenzie* paras 1 and 7. His claim for breach of contract was based on his contention that his contract of employment contained an explicit or implied term that the contract would not be terminated without just cause.

¹⁵⁴ *McKenzie* para 6.

¹⁵⁵ *McKenzie* paras 55-56.

¹⁵⁶ *McKenzie* para 58.

¹⁵⁷ *McKenzie* para 7.

found that the HC's jurisdiction to consider breach of contract claims arising from labour disputes is uncontroversial.¹⁵⁸

Despite the SCA acknowledging that the decisions in both *Chirwa* and *Gcaba* endorsed a view that employees should not be allowed to circumvent the LRA, it allowed that very thing to be done.¹⁵⁹

The approach adopted by the SCA is undesirable as it undermines the effective resolution of labour disputes in terms of the LRA.¹⁶⁰ Even though the claim failed for lack of merit,¹⁶¹ the outcome might have been different if the employee was able to prove an express term in the contract of employment that provided for the right being claimed.¹⁶²

This case opens the door to forum shopping, a practice that was viewed with disapproval in both *Gcaba* and *Chirwa*.¹⁶³ A further concern is that the judgment does not merely provide an employee with a choice of recourse but allows an employee to pursue more than one claim. If McKenzie's claim was successful, he would have received damages in addition to the compensation that he was already awarded through the settlement. It is obvious that the only reason why McKenzie pursued a further claim in the HC was that he wanted more. The court by allowing this creates an untenable situation for employers and fails to take account of the fact that fairness within the employment sphere applies to both parties.¹⁶⁴

¹⁵⁸ *McKenzie* para 46. See further Grant and Whitear-Nel (2013) SALJ 311.

¹⁵⁹ *McKenzie* para 57.

¹⁶⁰ As explained by Grant and Whitear-Nel (2013) SALJ 316 such an approach creates a lot of apprehension on the part of employers who, after resolving a dispute in one forum, may still be expected to defend the same set of facts in another forum, which may lead to further financial liability.

¹⁶¹ *Mckenzie* para 58. The claim failed as there was no evidence of an express term providing for the right claimed and the court disagreed that his contract contained an implied term that he should not be unfairly dismissed.

¹⁶² Grogan (2014) 93.

¹⁶³ *Chirwa* para 121 and *Gcaba* para 57. See further Grant and Whitear-Nel (2013) SALJ 316 who state that the problem that arises in allowing jurisdiction of the civil courts in such cases is that it allows for the undesirable practice of forum shopping, as it allows an aggrieved employee to be awarded remedies in two different fora based on two different causes of action arising from the same set of facts.

¹⁶⁴ See Chapter 3, paragraph 3.3.

The issue of jurisdiction between the HC and LC once again came before the SCA in *Motor Industry Staff Association v Macun NO & others (Macun)*.¹⁶⁵ In this case, the SCA respected the primacy of LRA rights and remedies.¹⁶⁶ However, a different stance was taken by the SCA in *Greater Tzaneen Municipality v Le Grange (Le Grange)*.¹⁶⁷ Here the SCA dismissed the argument of jurisdiction raised by the employer on the basis that jurisdiction is determined on the basis of pleadings and not on the substantive merits.¹⁶⁸ The court explained that the fact that the matter and relief sought stemmed from employment did not mean that it was rooted in the provisions of the LRA.¹⁶⁹

Despite the contradicting approaches adopted by the SCA, the CC continued to advocate for the use of LRA remedies, as opposed to contractual remedies. The majority of the CC in *Steenkamp and others v Edcon Limited (Steenkamp)*¹⁷⁰ held that the applicants had “dressed” up their complaint as something else in order to avoid the mechanisms and remedies under the LRA, stating the following:

“The principle is that, if a litigant’s cause of action is a breach of an obligation provided for in the LRA, the litigant as a general rule should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.”¹⁷¹

This case concerned a failure by the employer to comply with the time-frames set out in the LRA for large-scale retrenchments.¹⁷² The applicants chose not to deal with the dispute on the basis of an unfair dismissal but instead approached the LC with a contractual claim challenging the validity of the dismissals.¹⁷³ While this case did not deal

¹⁶⁵ (2016) 37 ILJ 625 (SCA). This case dealt with the question whether the HC had jurisdiction to review and set aside a decision of the Minister to extend a collective bargaining agreement to non-parties (para 6).

¹⁶⁶ *Macun* para 20.

¹⁶⁷ [2015] JOL 32985 (SCA). Here, Mr Le Grange was appointed as a CFO on a three-year contract. However, upon expiry of the contract he continued to attend work as he contended that there was an amendment to his original contract which entitled him to a further contract of employment. He took the matter to court in order to force the employer to perform in terms of the agreement.

¹⁶⁸ *Le Grange* para 11.

¹⁶⁹ *Le Grange* para 11.

¹⁷⁰ 2016 (3) BCLR 311 (CC).

¹⁷¹ *Steenkamp* para 137. The use of words such as “obliged” illustrates the peremptory nature of the use of such remedies.

¹⁷² *Steenkamp* para 6.

¹⁷³ *Steenkamp* para 6.

with the HC's jurisdiction in respect of labour matters, it made important pronouncements regarding the rights of litigants to discard the remedies for unfair dismissal provided for in the LRA and rather utilise alternate remedies, even where those alternate remedies are enforced in the LC itself.

The court's use of peremptory language such as "litigants are obliged to utilise the dispute resolution remedies provided for in the LRA",¹⁷⁴ illustrates that a litigant may not bypass the procedures set out in the LRA where these are relevant to the dispute.¹⁷⁵ This coincides with the sentiments expressed in *Gcaba* and *Chirwa*.

However, the CC stated that "where the law permits forum-shopping, a litigant cannot be denied relief just because it is engaging in forum-shopping".¹⁷⁶ This suggests that employees would not always be confined to LRA remedies. However, it is not clear from the judgment in which instances such an election would be available to litigants. Furthermore, these statements were made *obiter*, which implies that the considered views of *Chirwa* and *Gcaba* in respect of forum-shopping take precedence. Unfortunately, this decision, very much like *Gcaba*, does not expressly state that common law contractual recourse is supplanted by the unfair dismissal and unfair labour practice procedures.

7.3.5 Role of the BCEA

The LRA has not clothed either the CCMA or the LC with jurisdiction to adjudicate contractual disputes. However, such jurisdiction was afforded to the LC by section 77 of the BCEA two years after the enactment of the LRA.¹⁷⁷ Unfortunately these provisions add further complexity to the use of contractual remedies in unfair labour practice disputes.

¹⁷⁴ *Steenkamp* para 137.

¹⁷⁵ The CC in *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7 also supports the view that if statutory rights provide remedies for their breach, these are the only remedies that are available in case of infringement of such rights (para 121). The CC concluded that the Prescription Act does not apply to unfair dismissals and adopted the approach endorsed in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) that specialised provisions, as provided for in the LRA, trump general provisions (para 127).

¹⁷⁶ *Steenkamp* para 125.

¹⁷⁷ Du Toit (2008) SALJ 101.

A literal reading of the provision suggests that both the HC and LC have concurrent jurisdiction in contractual matters.¹⁷⁸ However, it is important to understand that section 77(3) falls within the section titled “Jurisdiction of the Labour Court”, which requires that it be read in conjunction with section 77(1) which confers exclusive jurisdiction on the LC.

Grogan convincingly explains that section 77(3) may require the same interpretation as that given to section 157(2) of the LRA by the CC, namely, that the intention of the section was not to confer concurrent jurisdiction on the HC and LC, but rather to extend the LC’s jurisdiction to consider contractual matters.¹⁷⁹ Therefore, if section 77(3) is merely meant to extend the LC’s jurisdiction in the same manner as section 157(2) of the LRA, this would result in the LC having exclusive jurisdiction over everything that it is empowered to determine under the BCEA.¹⁸⁰

However, even on such an approach, there would still be two dispute resolution paths. The one would be the unfair dismissal and unfair labour practice procedures provided for in the LRA, while the second would be contractual procedures over which the LC has jurisdiction in terms of the BCEA. While the study endorses the position that an employee cannot discard LRA recourse in favour of common law contractual recourse, this position is somewhat altered by the fact that this contractual remedy is no longer just a general remedy offered in terms of the law of contract but is now entrenched in labour legislation.

The court in *Mohlaka v Minister of Finance (Mohlaka)*,¹⁸¹ attempted to provide a solution to this problem. The court explained that both the LRA and the BCEA were enacted in response to the problems plaguing labour law,¹⁸² among them being the uncertainty created by the adjudication of labour matters in different fora.¹⁸³ The essence

¹⁷⁸ See para 7.3.3.3.

¹⁷⁹ Grogan (2014) 96 explains that “the highest court found that s 157(2) of the LRA did not confer concurrent jurisdiction on the Labour Court and the High Court but was rather intended to extend the Labour Court’s jurisdiction to deal with constitutional matters”.

¹⁸⁰ Grogan (2014) 96.

¹⁸¹ (2009) 30 *ILJ* 622 (LC). This case dealt with an employee who resigned and claimed constructive dismissal. He initially lodged his case with the CCMA, but it was dismissed because it was a late referral. Two years later he lodged an application in the LC in terms of section 77(3) of the BCEA 75 of 1997 (paras 2-3).

¹⁸² *Mohlaka* para 15

¹⁸³ *Mohlaka* para 15. See further Grogan (2009) 3 *ELJ* 5.

of *Mohlaka* is that these sections must be read consistently,¹⁸⁴ leading to an interpretation that section 77(3) of the BCEA does not pertain to disputes that is regulated in the LRA.

Mohlaka accordingly held that concurrent jurisdiction between the LC and the CCMA would resuscitate the problems that existed under the old labour laws.¹⁸⁵ In light of the approach by the majority in *Chirwa*, the LC found that dismissed employees could not sue for breach of contract in terms of the BCEA.¹⁸⁶

The essence of this judgment is that if the dispute stems from an unfair dismissal or unfair labour practice (such as reduced benefits), it remains a dispute that must be pursued in line with the unfair dismissal and unfair labour practice procedures, even if provisions relating to dismissal or benefits are contained in the contract of employment. In other words, if the dispute would never have arisen, but for the alleged dismissal or alleged unfair labour practice, it amounts to an LRA dispute and cannot be dealt with as a contractual dispute in terms of the BCEA. Section 77(3) is consequently reserved to deal with other contractual matters.

The SCA in *Makhanya v University of Zululand (Makhanya)*¹⁸⁷ came to a different conclusion. The court, relying on section 77(3) of the BCEA, found that the HC has not been divested of their jurisdiction to enforce contracts of employment.¹⁸⁸

¹⁸⁴ *Mohlaka* para 20. See further Grogan (2014) 100 and Van Eck (2010) TSAR 126.

¹⁸⁵ *Mohlaka* para 20.

¹⁸⁶ *Mohlaka* para 44. See further Grogan (2009) 3 ELJ 5.

¹⁸⁷ [2009] 8 BLLR 721 (SCA). Professor Makhanya instituted action in the HC contending that the University failed to pay him his remuneration and other monies to which he was entitled in terms of his contract (para 1). The university challenged the jurisdiction of the HC. The HC upheld the challenge and dismissed the case on jurisdictional grounds (paras 2 and 3). The SCA found the jurisdictional challenge to be peculiar stating that it was “commonplace” for enforcement of contractual claims to be brought before the HC (para 2). See further Grant and Whitear-Nel (2013) SALJ 311.

¹⁸⁸ *Makhanya* para 2. A similar approach was followed by the LC in *Mogothle v Premier of the North West Province & another* (2009) 30 ILJ 605 (LC). Here an employee who sought to set aside his precautionary suspension did not base his claim on the LRA, but rather on breach of contract, breach of statute and PAJA, as a number of provisions, including aspects relating to precautionary suspension, were incorporated into the employee’s contract (paras 1, 2 and 7). *Mogothle* found that an employee has the right to pursue a contractual claim, either in the LC by virtue of the provisions of section 77(3) of the BCEA, or in a civil court with jurisdiction. It held that the creation of specific statutory remedies to address unfairness does not deprive an employee of exercising contractual rights (para 28). Significantly, the court also stated that the enactment of the BCEA, which came two years after the LRA, was an acknowledgment that disputes concerning contracts of employment had not been eclipsed by the LRA (para 29).

The SCA explained that while the LRA creates certain rights for employees, such as the right not to be unfairly dismissed or to be subjected to an unfair labour practice, referred to as “LRA rights”, there are other rights that employees are entitled to.¹⁸⁹ While labour forums have exclusive jurisdiction to enforce “LRA rights” this is not the case with contractual and constitutional rights, as the HC retains its jurisdiction in respect of these categories of rights.¹⁹⁰

Even though *Makhanya* attempted to draw a distinction between “LRA rights” and “other rights”, the court failed to implement the principle endorsed in *Gcaba* and *Chirwa*. In line with this principle, where “other rights” are essentially “LRA rights”, a litigant cannot bypass the LRA structures. It therefore is clear that these two rights are intertwined in most cases, as espoused in *Mohlaka*. However, a valid point raised in *Makhanya* is that the provisions contained in section 77(3) of the BCEA were enacted after the LRA. It can further not be denied that neither *Chirwa* nor *Gcaba* dealt with the implications of section 77(3).

While divergent views continue to be advocated by the judiciary,¹⁹¹ it could not have been the intention of the BCEA to allow the LC to take over the functions of the labour forums established in terms of the LRA. It was probably never anticipated that litigants would become so creative and opportunistic as to utilise the avenues created by section 77(3) to address the types of disputes regulated by the LRA. The only logical conclusion that can be drawn is that section 77(3) of the BCEA sought to regulate dissatisfactions arising from contracts of employment that could not be located within the dispute resolution procedures provided for in the LRA. This would include disputes about ambiguity or contradictions in a contract of employment.¹⁹² This argument is further strengthened by the provisions of section 210 of the LRA, which expressly states that the LRA prevails over any other law (except for the Constitution) if there is a conflict about the matters dealt with in the LRA. To the extent that section 77(3)

¹⁸⁹ *Makhanya* para 11.

¹⁹⁰ *Makhanya* paras 13, 18 and 26.

¹⁹¹ In cases such as *Chibi v MEC: Department of Co-operative Governance and Traditional Affairs* (2012) 33 ILJ 855 (LC) and *Aucamp v South African Revenue Service* [2014] 2 BLLR 152 (LC), LRA recourse was given preference over contractual rights. A different approach was adopted in cases such as *Mdluli v Acting National Commissioner of the South African Police Service* [2012] 9 BLLR 897 (LC) and *Xako v Nelson Mandela Bay Municipality* [2015] 12 BLLR 1276 (LC).

¹⁹² As was the case in *PSA obo Sehlolo & 2 others* Case no C63/15, 4 May 2017 (LC).

conflicts with the unfair labour practice and unfair dismissal procedures set out in the LRA, the LRA takes precedence.

7.3.6 Position in Foreign Jurisdictions

7.3.6.1 The United Kingdom

Hepple depicts British labour law as an area over which the common law continued to prevail.¹⁹³ This is illustrated by way of a wrongful dismissal, which is defined as a dismissal without notice or without adequate notice.¹⁹⁴ It is described as an “ancient common law remedy, which focuses on the question: did the employee receive adequate notice?”¹⁹⁵ Wrongful dismissal constitutes a breach of contract,¹⁹⁶ for which damages are awarded.¹⁹⁷ These claims are more commonly brought in the High Court and County Court (the civil courts)¹⁹⁸ based on the sum of damages involved.¹⁹⁹

Notwithstanding the right of employees, in certain instances, to utilise common law contractual remedies in employment matters, there has been a concerted effort in the UK to disallow the use of common-law remedies in the area of unfair dismissal law.²⁰⁰ This is because unfair dismissals in the UK are regulated by statute,²⁰¹ similar to the position regarding unfair dismissals in South Africa. Part X, section 94(1) of the Employment Rights Act states that an employee has the right not to be unfairly dismissed

¹⁹³ Hepple (1999) *ILJ* 2.

¹⁹⁴ UK Employment Guide 23 where it is described as a termination by the employer without giving the required period of notice, as stated in the employment contract, or without paying an employee in lieu of notice.

¹⁹⁵ Holland and Burnett (2013) 229.

¹⁹⁶ Section 91(5) of the Employment Rights Act 1996.

¹⁹⁷ Holland and Burnett (2013) 229.

¹⁹⁸ See discussion of the structure of the courts in Chapter 5, para 5.4.3.

¹⁹⁹ Korn and Sethi (2011) 3.

²⁰⁰ As explained by Hepple (2005) *HL* 39 “this is the ‘great structural problem’ of the unsatisfactory relationship between common law and statutory rights”.

²⁰¹ Section 94(1) of the Employment Rights Act 1996 states that the employee has the right not to be dismissed by the employer. Section 98 deals with aspects of fairness. Although the Act does not specifically discuss procedural fairness, section 98(4) is relevant. Furthermore, there is ample authority to support the fact that procedural fairness is one of the requirements prescribed by British law (see *Upex* (1997)161). As stated by Collins (2003) 177 “just as the criminal law system insists upon a fair procedure prior to any punishment, so too, before depriving a person of their livelihood and tarnishing them with a label of misconduct or incompetence, an employer should follow a procedure that gives the employee a fair opportunity to defend him or herself. In their interpretations of the standard of fairness in dismissals, the tribunals in the UK have acknowledged the importance of fair disciplinary procedures”.

by his employer. Importantly, Employment Tribunals have authority to consider unfair dismissal disputes.²⁰² Part X, section 98 deals with the factors that must be taken into account in determining the fairness of a dismissal.²⁰³ The Employment Rights Act comprehensively sets out the remedies available to employees where Employment Tribunals have established the existence of an unfair dismissal.²⁰⁴

In the landmark case of *Johnson v Unisys Ltd (Johnson)*,²⁰⁵ the House of Lords enforced the principle that contractual claims cannot be utilised to address cases of unfair dismissal. In this instance Mr Johnson was dismissed without a proper procedure being followed.²⁰⁶ He lodged an unfair dismissal dispute and was awarded compensation by the Employment Tribunal.²⁰⁷ Approximately two years later he instituted proceedings in the County Court for breach of contract based on his employer's failure to follow a proper procedure prior to dismissing him.²⁰⁸ The contractual claim was based on his employer's breach of its implied obligation of mutual trust and confidence.²⁰⁹

Lord Hoffman explained that while at common law the contract of employment was regarded by the courts as any other contract, the nature of the employment contract has been transformed through the introduction by Parliament of statutory employee rights, as provided for in the Employment Rights Act.²¹⁰ The court held that this implied term cannot be extended to areas of unfair dismissal, as judges in developing the law must give effect to the policies expressed by Parliament in legislation.²¹¹ As explained by Lord Millett "the co-existence of two systems, overlapping but varying in matters of

²⁰² Section 111(1) of the Employment Rights Act 1996 read with section 1 of the Employment Rights (Dispute Resolution) Act 1998.

²⁰³ Brodtkorb (2010) *IJLM* 434 explains that the evaluation of fairness as set out in section 98 can be divided into two stages, the first is establishing and categorising the reason for the dismissal, while the second is determining the reasonableness of the employer's conduct in treating that reason as a justifiable reason to dismiss.

²⁰⁴ Part X, Chapter II, Employment Rights Act 1996 sections 112 to 124.

²⁰⁵ (2001) WL 239756.

²⁰⁶ *Johnson* para 6.

²⁰⁷ *Johnson* para 6.

²⁰⁸ *Johnson* para 8. See further para 32.

²⁰⁹ *Johnson* para 11. The implied contractual term on which Mr Johnson sought to rely was confirmed in *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606, as referred to in Chapter 1, para 1.4 and Chapter 5, para 5.4.3. Duggan (2003) 105 states that following from *Malik*, the House of Lords in *Johnson* considered to what extent the implied term of trust and confidence impacts on a dismissed employee.

²¹⁰ *Johnson* para 35.

²¹¹ *Johnson* para 36.

detail and heard by different tribunals, would be a recipe for chaos. All coherence in our employment laws would be lost”.²¹²

The court noted that the intention of Parliament in respect of unfair dismissals is to give exclusive jurisdiction to Employment Tribunals which form “part of the fabric of English employment law”.²¹³ The judge noted that the Employment Rights Act contains comprehensive provisions dealing with the definition of dismissal and with the concepts of substantive and procedural fairness.²¹⁴ Therefore, Lord Hoffman stated the following:

“The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies.”²¹⁵

Lord Hoffman pertinently questioned why there would a special statutory framework if employees were allowed to circumvent it through a possible second bite in common law.²¹⁶ He concluded therefore that Part X of the Employment Rights Act gave Mr Johnson a remedy for the exact conduct of which he complained, resulting in his claim for breach of contract failing.²¹⁷

²¹² *Johnson* para 80.

²¹³ *Johnson* para 51.

²¹⁴ *Johnson* para 52. See further Korn and Sethi (2011) 3 who describe employment tribunals as having exclusive jurisdiction over unfair dismissal claims. Holland and Burnett (2013) 229 describe the employment tribunal as the sole arena for determining unfair dismissal claims.

²¹⁵ *Johnson* para 54. See further para 80 where Lord Millett stated “but the creation of the statutory right has made any such development of the common law both unnecessary and undesirable. In the great majority of cases the new common law right would merely replicate the statutory right; and it is obviously unnecessary to imply a term into a contract to give one of the contracting parties a remedy which he already has without it”.

²¹⁶ *Johnson* para 56.

²¹⁷ *Johnson* para 56. The *Johnson* principle was followed in later cases such as in *Eastwood v Magnox Electric Plc*; *McCabe v Cornwell* CC [2004] UKHL 35, [2004] WL 1476578. In *Eastwood* the employer used underhanded tactics, such as getting co-employees to make false statements, in order to get rid of Mr Eastwood. Subsequent to Mr Eastwood’s dismissal, and prior to his unfair dismissal dispute being heard, a settlement was reached. Thereafter he proceeded to institute a claim in the county court for damages based on the employer’s breach of the implied term of mutual trust and confidence. However, the claim for damages was dismissed by the Court of Appeal on the basis of the decision in *Johnson*. In other words what he complained of constituted an unfair dismissal, for which statutory remedies were available (paras 18-23). In *McCabe* the employer’s failure to investigate the allegations against Mr McCabe properly and to conduct a proper disciplinary hearing resulted in a finding of unfair dismissal for which the statutory recourse provided for in the ERA applied, in accordance with *Johnson* (para

Importantly, the court also dealt with the question of whether an express contractual term relating to the disciplinary procedure would give an employee a cause of action under the common law. In this regard, Lord Hoffman stated that one has to appreciate the intention for which disciplinary procedures are included as express contractual terms in contracts of employment.²¹⁸ Section 1 of the Employment Rights Act provides that when an employee commences employment, he or she must be given a written statement of particulars. This statement must provide for a number of aspects, including any applicable disciplinary rules, in line with section 3(1).²¹⁹ The question that Lord Hoffman sought to answer is whether such express disciplinary provisions were intended to operate within the scope of the law of unfair dismissal or whether they were intended also to be actionable at common law, giving rise to claims for damages in the ordinary courts.²²⁰ He concluded that it could never have been the intention of Parliament when enacting section 3(1) that these disciplinary rules should give rise to a common-law claim for damages.²²¹

Lord Dyson in the Supreme Court decision of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*²²² agreed that express contractual terms in respect of discipli-

24). However, in *McCabe*, the Court of Appeal found that he had a claim for breach of contract, in addition to the unfair dismissal claim. His claim for breach of contract arising from the psychiatric illness sustained by him was not impaired by the subsequent dismissal (para 26). The House of Lords explained that an employee's remedy for unfair dismissal is a statutory remedy. However, if before the dismissal, an employee acquired a cause of action at law for breach of contract, that cause of action remains unimpaired by any subsequent unfair dismissal (para 27). See further Hepple (2005) *HL* 42.

²¹⁸ *Johnson* para 63.

²¹⁹ Section 3 of the Employment Rights Act 1996. See further *Johnson* para 66.

²²⁰ *Johnson* para 63.

²²¹ *Johnson* para 66. Section 1 of the Employment Rights Act 1996 obliges an employer to provide the employee with "a written statement of particulars of employment". Section 3(1) provides: "A statement under section 1 shall include a note— (a) specifying any disciplinary rules applicable to the employee or referring the employee to the provisions of a document specifying such rules which is reasonably accessible to the employee,(aa) specifying any procedure applicable to the taking of disciplinary decisions relating to the employee, or to a decision to dismiss the employee, or referring the employee to the provisions of a document specifying such a procedure which is reasonably accessible to the employee." See further Holland and Burnett (2013) 3.

²²² [2011] UKSC 58. In this case Mr Edwards, an orthopaedic surgeon, was summarily dismissed on the ground of gross misconduct (para 5). He claimed that the disciplinary procedure, which formed part of the express contractual terms of his employment contract, was not fully complied with, notably that the disciplinary hearing was inappropriately constituted (para 6). Rather than claiming unfair dismissal, he instituted proceedings in the HC claiming damages for breach of his employment contract (paras 8, 9 and 11).

nary procedures are not actionable at common law, based on the existence of statutory unfair dismissal procedures.²²³ This case illustrates that approximately ten years later the principle adopted in *Johnson* continued to enjoy support. As indicated by Cabrelli, “post-Edwards, we now know that the breach of an express term of the contract of employment regulating disciplinary procedures leading to dismissal does not give rise to a common-law claim for damages”.²²⁴

Notwithstanding the criticism levelled against *Johnson*,²²⁵ the study supports the conclusions reached, notably that statutory recourse has supplanted the common-law. *Johnson* justifiably requires employees with unfair dismissal claims to utilise the statutory recourse provided for in the Employment Rights Act. They are precluded from bringing a common law contractual claim, either on the basis that the employer breached an express disciplinary rule, or that the employer breached its implied obligation of mutual trust and confidence.²²⁶

The decision reached in *Johnson* supports the principles that have been endorsed in South African labour law. However, *Johnson* was much more direct about the substitution of common law recourse, which was lacking in cases such as *Chirwa* and *Gcaba*.²²⁷

In the UK, common-law recourse would still apply in respect of conduct akin to unfair labour practices as there are no statutory rights provided for in this area of the law.²²⁸

²²³ *Edwards* para 39.

²²⁴ Cabrelli (2016) *ILJ (UK)* 217. See further Anderson *et al* (2017) 222.

²²⁵ Lord Steyn gave a dissenting judgment in *Johnson* (para 26), which Freedland (2003)166 regards as regrettable. Hepple and Morris (2002) *ILJ (UK)* 253-255 regard the decision as having “disturbing implications for employment rights in general” as statutory rights essentially weakened an employee’s contractual position. It created the anomalous situation that employees are better protected by implied terms, which would apply in areas in which Parliament has failed or chosen not to legislate, rather than in those areas in which it has legislated. Vettori (2007) 128-129 also states that the judgment created an unfavourable paradox in areas of employment law protected by statute, juxtaposed against those areas not protected by statute. See further Brodie (2001) *LQR* 624–625 and Sanders (2017) *ILJ (UK)* 512.

²²⁶ Anderson *et al* (2017) 221.

²²⁷ As explained by Grogan (2014) 85 *Gcaba* leaves unanswered the question whether employees may still approach the HC with claims for alleged breach of contract where they would also have a remedy under the LRA. Du Toit (2010) *ILJ* 34 raises similar concerns.

²²⁸ In *Steven v University of Birmingham* [2015] EWHC 2300 (QB) the employer’s refusal to allow a medical professor to take a representative from the medical protection society to his disciplinary meeting was dealt with as a breach of contract. While the case related to employment law it was not about an unfair dismissal (para 19). Hepple (2005) *HL* 42 explains that in *Gogay v*

However, the important principle to be taken from English law is that common law and statutory law do not comfortably co-exist and where rights and remedies are created in terms of statute, common-law rights and remedies in that area are defeated.

Furthermore, similar to section 1 of the Employment Rights Act, the BCEA requires a number of particulars to be supplied to the employee in writing,²²⁹ including a list of documents that form part of the contract of employment.²³⁰ Many of these particulars relate to employee remuneration, such as salaries or wages and employee or fringe benefits. Documents such as disciplinary policies would also form part of an employee's contract of employment. Needless to say, like the position in the UK, it could not have been the intention of the legislature for employees to use these express contractual terms to enforce contractual rights where statutory recourse is available.

The questions that have arisen in the UK regarding the relationship between statutory unfair dismissal recourse and common-law contractual recourse are the same type of questions that have arisen in South African labour law between unfair dismissals and unfair labour practices on the one hand, and common law recourse on the other. English law confirms that statutory recourse serves to substitute common law contractual recourse.

Considering the principles endorsed in the UK in respect of unfair dismissals, it is evident that similar principles would have applied to unfair labour practices if this area of employment law was regulated by UK employment legislation. Consequently, English law provides support for a conclusion that the South African unfair labour practice provisions supplant common-law contractual recourse.

Hertfordshire County Council [2000] IRLR 703 CA, a residential care worker was allowed to claim damages for breach of trust and confidence when she was unjustifiably suspended by her employer, as Parliament provided a remedy for unfair dismissal, but not for unfair suspension. Cabrelli (2016) *ILJ (UK)* 211, referring to *Steven v University of Birmingham*, explains that this judgment served as a reminder that in order to determine whether a common law claim is excluded, the first line of inquiry must be whether there has been a dismissal. In the absence of a dismissal there can be no exclusion of a claim for breach of contract at common law.

²²⁹ Section 29(1) of the BCEA 75 of 1997.

²³⁰ Section 29(1)(p) of the BCEA 75 of 1997.

7.3.6.2 New Zealand

New Zealand also had to grapple with the contest between common law and labour legislation.²³¹ When the Employment Contracts Act (ECA)²³² was still in operation many called for the abolition of specialist labour law in favour of reliance on the common law.²³³

Under the ECA the Employment Court had exclusive jurisdiction to deal with the rights of parties to employment contracts.²³⁴ This exclusive jurisdiction prevented the ordinary courts of law from dealing with such matters.²³⁵ As explained by Hughes, the tribunal and the court were afforded exclusive jurisdiction to hear and determine any proceedings founded on an employment contract, the intention being to create a single employment law and jurisdiction.²³⁶ The creation of a system that would expose the same defendant to litigation at the suit of the same plaintiff in respect of the same subject matter but in two different courts was regarded as undesirable.²³⁷

Although the ECA sought to establish a coherent system of labour law, which was free from the interference of the common law, it was regarded as being “philosophically incoherent”.²³⁸ A major concern related to the impracticality and undesirability of the jurisdictional divide between the Employment Court and the High Court, which deprived citizens of the right to access ordinary courts.²³⁹

However, there remained advocates for specialist labour law, emphasising the need for a specialist approach based on historical evidence, which proved that the common law was flawed.²⁴⁰ The advantages of specialised institutions were said to be its

²³¹ Gay and MacLean (1997) *CWILJ* 57.

²³² The ECA 22 of 1991.

²³³ Gay and MacLean (1997) *CWILJ* 57.

²³⁴ Section 76 of the ECA 22 of 1991.

²³⁵ Vranken (1999) *IJCLLIR* 309. See further Hughes (1991) *NZJIR* 176.

²³⁶ Hughes (1991) *NZJIR* 175-176.

²³⁷ Robertson (1994) *NZJIR* 34.

²³⁸ Robertson (1994) *NZJIR* 34.

²³⁹ Robertson (1994) *NZJIR* 34.

²⁴⁰ Gay and MacLean (1997) *CWILJ* 57. See further 61 where it is stated that the abolition of the Employment Court would lead to absurdities and would reinforce employer power over workers in the most absolute manner. Nolan (1998) 21 states that this specialist jurisdiction was regarded as a way of overcoming the failure of the common law to protect employees from the arbitrary behaviour of employers.

speed, affordability, informality and expertise compared to ordinary courts.²⁴¹ The Employment Court was regarded as the procedural device that ensured that the substantive rules of labour law were applied in the spirit in which they were enacted.²⁴² As explained, it would have been detrimental to allow labour law to function without a specialised judiciary, in other words, to be dealt with in the ordinary courts, which are steeped in their own common law tradition.²⁴³ Nolan states that “in the absence of a separate labour judiciary – distinct from the courts of general jurisdiction – the application and the enforcement of the substantive rules of labour law in their correct spirit cannot be ensured”.²⁴⁴

Despite the arguments advanced for the removal of specialist labour law institutions and the use of ordinary courts, the importance of these specialised institutions continues to be recognised. This is evident from the Employment Relations Act (ERA)²⁴⁵ which provides for an Employment Relations Authority (Authority) and the Employment Court.²⁴⁶ The Authority has the responsibility to resolve employment relationship problems,²⁴⁷ which are defined to include a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship, but exclude problems relating to the fixing of new terms and conditions of employment.²⁴⁸ The Authority is given exclusive jurisdiction in this regard.²⁴⁹

All common-law claims in respect of termination of employment are abolished, based on the wording of section 113(1), which states that the only recourse for an employee seeking to challenge his or her dismissal is to refer it as a personal grievance to the authority.²⁵⁰ While this section pertains specifically to dismissals, the abolition of common law recourse appears to apply equally to other forms of personal grievances

²⁴¹ Vranken (1999) *IJCLLIR* 304. This is similar to the views held in South Africa for setting up specialised forums and institutions to deal with labour law, notably the CCMA and the Labour Courts, as discussed in Chapter 3.

²⁴² Vranken (1999) *IJCLLIR* 304.

²⁴³ Vranken (1999) *IJCLLIR* 304. See further Wedderburn (1987) *ILJ (UK)* 16.

²⁴⁴ Nolan (1998) 21.

²⁴⁵ The Employment Relations Act 24 of 2000.

²⁴⁶ Sections 156 and 186 of the ERA 24 of 2000.

²⁴⁷ Section 157(1) of the ERA 24 of 2000.

²⁴⁸ Section 5 of the ERA 24 of 2000.

²⁴⁹ Section 161(1) of the ERA 24 of 2000. Roth (2013) *CLLPJ* 888 explains that the Employment Relations Authority was established as an informal low-level forum for determining factual issues and the merits of a case at first instance.

²⁵⁰ Section 113(1) of the ERA 24 of 2000. See further Roth (2000) *NZLR* 327.

based on the authority's exclusive jurisdiction. Furthermore, the ERA gives employees with personal grievances a choice to refer the personal grievance under the Human Rights Act in cases where the subject of the personal grievance constitutes a complaint that can be made under that Act.²⁵¹ However, the ERA is very explicit about the fact that an employee has to choose between a claim under the ERA and a claim under the Human Rights Act and cannot pursue dual claims.²⁵² In addition, no further choices of fora are provided for the referral of personal grievances.

The Employment Court²⁵³ has exclusive jurisdiction in respect of a number of matters,²⁵⁴ including questions of law referred to it by the authority²⁵⁵ and challenges to decisions of the authority.²⁵⁶

Notwithstanding the elimination of the jurisdiction of the ordinary courts in labour law matters through the establishment of the Authority and the Employment Court, the Court of Appeal being a court of general jurisdiction has a role to play in labour law.²⁵⁷ Decisions of the Employment Court on points of law may be referred to the Court of Appeal.²⁵⁸ However, it is significant that the legislature has limited the interference of this court.²⁵⁹ This limitation serves to protect the specialist labour institutions as is manifest from section 216 of the ERA, which provides that in determining appeals from the specialist institutions, the Court of Appeal is required to have regard to the special jurisdiction and powers of the Employment Court and the object of labour legislation.²⁶⁰

²⁵¹ Section 112(1) of the ERA 24 of 2000.

²⁵² Section 112(1) of the ERA 24 of 2000.

²⁵³ Section 186 of the ERA 24 of 2000.

²⁵⁴ Section 187(3) of the ERA 24 of 2000. Roth (2013) *CLLPJ* 888 explains that if a matter cannot be handled by the authority, a question of law can be referred to the Employment Court or the matter can be removed entirely to the court.

²⁵⁵ See section 177 of the ERA 24 of 2000.

²⁵⁶ See section 179 of the ERA 24 of 2000.

²⁵⁷ Vranken (1999) *IJCLLIR* 305.

²⁵⁸ Section 214(1) of the ERA 24 of 2000 provides that a party who is dissatisfied with a decision of the court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) on the basis of it being wrong in law, may with leave of the Court of Appeal challenge the matter in that court. See further Vranken (1999) *IJCLLIR* 305.

²⁵⁹ Roth (2013) *CLLPJ* 895 explains that the Court of Appeal may only grant leave to appeal if "the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision".

²⁶⁰ Roth (2013) *CLLPJ* 896. See further *New Zealand Air Line Pilots Association Incorporated v Air New Zealand Limited* [2017] NZSC 111 (Supreme Court of New Zealand) para 156 where the Supreme Court explained that Appellate Courts must take care not to assume jurisdiction

Section 216 thereby requires deference by the Appellate Court to the specialist employment law jurisdiction.²⁶¹

Even under the ECA, the Court of Appeal adopted a hands-off approach to appeals from the Employment Court.²⁶² This was based on the Court of Appeal's recognition that the ECA sought to depart from the common law contract through its provision for unjustifiable dismissals and other personal grievances and its provision of the personal grievance procedure, which provided for specific procedures and remedies.²⁶³ The Court of Appeal saw its responsibility as giving effect to the intent of Parliament as expressed in the ECA, despite the tension that inevitably existed between a contractual approach to employment issues and the social and economic concerns inherent in the employment relationship.²⁶⁴

New Zealand advances the position that the establishment of specialist institutions and courts to deal with employment matters serves to replace common law contractual recourse and with it the jurisdiction of the ordinary courts.

If one compares New Zealand's employment statutes to that of South Africa there are indeed similarities. However, New Zealand's legislation is written in much more explicit terms and seeks to eliminate any ambiguity. Despite the provisions of the LRA which create uncertainty in ascertaining whether common law contractual recourse is ousted by LRA recourse, a common feature of both countries is that the intention behind the establishment of specialised labour laws and institutions was to address the inadequacy of the common law. With this common purpose in mind, it is a justifiable conclusion that the intention of South African labour law, similar to the position in New Zealand, was for LRA recourse to supplant common law recourse, despite the fact that the LRA has not been worded in such express terms.

where there is no relevant error of principle. By excluding appeals on the construction of individual or collective employment agreements, Parliament envisaged that an Employment Court decision on construction would be final, even if its interpretation of a contractual provision was wrong.

²⁶¹ Roth (2013) *CLLPJ* 896.

²⁶² Vranken (1999) *IJCLLIR* 309.

²⁶³ Vranken (1999) *IJCLLIR* 319.

²⁶⁴ Vranken (1999) *IJCLLIR* 319-320.

7.4 CONCLUSION

Having considered the relevant legislative provisions, the principles espoused by the judiciary and the legal position in the UK and New Zealand, the following conclusions may be drawn.

The contest between contract law and labour legislation has a long history and is not unique to South Africa. Employment contracts continue to play an important role, as it forms the foundation of the employment relationship. However, this does not translate into a conclusion that the remedies provided for in contract law should continue to apply in light of the comprehensive statutory recourse enacted to deal with disputes that emanate from the employment relationship. The aspect that requires resolution is whether contractual remedies can be supplanted in the light of statutory recourse.

To my mind there is a convincing argument to be made for the discontinuation of contractual remedies in the light of statutory recourse. Firstly, the CC has brought about positive developments in resolving the contest between contract and statutory recourse by giving precedence to the institutions created in the LRA. Secondly, such a conclusion endorses the approach followed in the foreign jurisdictions considered, where common law contractual recourse enforced in the civil courts has been relegated through the establishment of labour law with its specialised institutions. Thirdly, if one considers the fairness imperatives of both employers and employees as required by the CC,²⁶⁵ the unfairness suffered by employers in allowing dual recourse outweighs the prejudice suffered by employees.²⁶⁶ As explained, employees have adequate recourse to address benefit disputes. The protection afforded to them is further enhanced by the extension of the definition of benefits.²⁶⁷

While the use of dual remedies is not supported for the reasons espoused above, the legislation as it stands does not fully support such a conclusion. If one considers the wording of section 157(2) of the LRA and section 77(3) of the BCEA, these provisions are open to interpretation, which has given rise to many of the challenges that currently

²⁶⁵ See para 7.3.1 above.

²⁶⁶ See paras 7.3.1 and 7.3.4.4 above.

²⁶⁷ See Chapter 5, paras 5.4.4 and 5.5.

exist. The contest between contract law and labour legislation should therefore be settled through legislative amendments. Despite the fact that such amendments are beyond the scope of this thesis, it is recommended that policy makers revisit the provisions of the LRA and BCEA. Specifically, the sections that aid an interpretation that contract law still has a role to play in resolving labour disputes should be revised.²⁶⁸

Furthermore, there has been no express disavowal of the use of contractual recourse by the CC. This has led to continued uncertainty in this field of the law, resulting in divergent decisions of the judiciary persisting.

A final word from the CC which provides unambiguous clarity about the fact that labour law recourse has replaced contractual recourse is required.

While I am of the view that employees should not be permitted to utilise contractual recourse to challenge benefit disputes, a firm endorsement of such an approach is lacking. This could take the form of legislative amendments that removes the existing ambiguity, or alternatively an unequivocal decision from the CC. It is further appreciated that the contest between contractual and statutory recourse is relevant not only to unfair labour practices in respect of benefits but to other unfair labour practices and unfair dismissals, as well. It would therefore be ill-considered to propose the removal of contractual recourse in one area of labour law (unfair labour practices relating to benefits), whilst the contest between contractual and statutory recourse applies to broader areas of labour law.

However, the proposed Code of Good Practice: Benefits has been worded in a manner that encourages the enforcement of benefit disputes through the dispute resolution institutions set up by the LRA, without expressly removing an employees' right to utilise contractual recourse.²⁶⁹

²⁶⁸ It is for this reason that Grant and Whitear-Nel (2013) *SALJ* 317 express the view that *Gcaba* has not closed the door on forum-shopping and calls on the legislature to close the door by affirming that the dispute resolution mechanisms of the LRA find exclusive application in unfair termination cases irrespective of whether the unfairness stems from a breach of contract.

²⁶⁹ This is done by emphasising the procedures set out in the LRA and the role assigned to councils and the CCMA (para 3 of the Code of Good Practice: Benefits). The expansive definition of a pre-existing benefit, which specifically makes reference to benefits provided for in contracts of employment also contributes to encouraging the use of the dispute resolution procedures provided for in the LRA (para 4(1) of the Code of Good Practice: Benefits).

CHAPTER 8
OVERLAP BETWEEN UNFAIR LABOUR PRACTICE AND STRIKE ACTION

	PAGE
8.1	Introduction..... 233
8.2	Legislative Framework..... 235
	8.2.1 Introduction..... 235
	8.2.2 Unilateral Change to Conditions of Service..... 235
	8.2.3 Prohibition Against Strikes: Arbitration and 236
	Adjudication
8.3	Unilateral Changes: Interpreting Section 64(4)..... 238
8.4	Prohibition Against Strikes: Interpreting Section 65(1)(c) 243
8.5	Conclusion..... 248

8.1 INTRODUCTION

As mentioned earlier, a unilateral change to terms and conditions of employment may give rise to both an unfair labour practice “benefits” dispute and a contractual dispute.¹ A benefit such as a car allowance, may, for example, constitute a term of a contract of employment. If an employer unilaterally decides to cancel or reduce the employee benefit, it constitutes a benefits dispute but may also give rise to a contractual dispute.²

The judiciary has confirmed that employees have the right to strike in instances where employers have implemented unilateral changes to pre-existing terms and conditions

¹ See Chapter 7, para 7.2.

² See Chapter 7, para 7.1.

of employment.³ This is despite the fact that such disputes are regarded as disputes of right,⁴ which should ordinarily be resolved through arbitration and adjudication.⁵

This interpretation has arisen from the application of two provisions in the Labour Relations Act (LRA).⁶ Both of these provisions regulate disputes of interest. The first is section 64(4), which seeks to halt unilateral changes to conditions of service during collective bargaining. The second is section 65(1)(c), which prohibits the engagement in strike action where the dispute is susceptible to arbitration or adjudication. Despite these provisions being interpreted as allowing strike action, recent decisions have questioned employees' right to strike in such instances.⁷

This chapter aims to establish whether strike action remains a viable option whilst employees have the right to refer a benefit dispute to arbitration. This is done by first having regard to the legislative framework. Secondly, an analysis of section 64(4) is done by analysing the key court decisions that have considered this provision. Thirdly, section 65(1)(c) is evaluated against relevant court decisions. Findings and conclusions are formulated thereafter.

³ *Maritime Industries Trade Union of South Africa v Transnet Limited* (2002) 23 ILJ 2213 (LAC) and *Monyela & others v Bruce Jacobs t/a LV Construction* (1998) 19 ILJ 75 (LC). See further Le Roux (2006) CLL 1 who states that there are three types of recourse that can be used by employees to deal with dissatisfaction arising from changes to terms and conditions of employment. The first is an unfair labour practice dispute relating to the provision of benefits, the second a contractual claim for breach of contract and the third remedy is the right to institute strike action. See also Du Toit *et al* (2015) 351.

⁴ *Monyela & others v Bruce Jacobs t/a LV Construction* 821. See further *Maritime Industries Trade Union of South Africa v Transnet Limited* para 99 where the court explained that "a clear case of a dispute about a unilateral change of terms and conditions of employment is a case where an employer changes existing terms and conditions of employment of an employee embodied in a contract of employment to the detriment of the employee without the employee's consent". See Chapter 3, para 3.5.2.

⁵ The LRA 66 of 1995.

⁶ See *Sibanye Gold Limited v The Association of Mineworkers and Construction Union* Case no J1785/16 (LC) 26 August 2016 and *Mawethu Civils v National Union of Mineworkers & Others* (2016) 37 ILJ 185 (LAC).

8.2 LEGISLATIVE FRAMEWORK

8.2.1 Introduction

In terms of section 64 of the LRA, which primarily confirms the right to strike,⁸ employees must comply with certain requirements prior to withholding their labour. The principal requirements are (a) that the issue in dispute must have been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or Council;⁹ (b) a certificate must have been issued stating that the dispute remains unresolved,¹⁰ or a period of 30 days must have lapsed since the referral was received by the CCMA or Council;¹¹ and (c) employees must comply with the notice periods set out in the LRA.¹² Employees must give 48 hours' notice in writing to the employer before commencing with the strike.¹³ Once these requirements have been met, employees may embark on industrial action.

However, there is a special provision contained in section 64(4) of the LRA, which pertains to unilateral changes to terms and conditions of employment. This provision is of specific relevance to the chapter under discussion and is considered below.

8.2.2 Unilateral Change to Conditions of Service

Section 64(4), provides as follows:

“Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions of employment to a *council* or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a)-
(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.”

⁸ Section 64 also provides for recourse of employers to lock out employees.

⁹ Section 64(1)(a) of the LRA 66 of 1995.

¹⁰ Section 64(1)(a)(i) of the LRA 66 of 1995.

¹¹ Section 64(1)(a)(ii) of the LRA 66 of 1995.

¹² Section 64(1)(b) of the LRA 66 of 1995 and section 64(1)(d) in case of public servants.

¹³ Section 64(1)(b) of the LRA 66 of 1995. In case of public servants seven days' notice must be given.

There are two sections of relevance in interpreting section 64(4). The first is section 64(5), which explains that the employer must comply with the requirements set out in section 64(4) within 48 hours of the referral being served on him or her. The second is section 64(3)(e), which provides that the requirements set out in section 64(1) (relating to referral of the dispute, the receipt of a certificate and 48 hours' notice) do not apply to a strike stemming from an employer's failure to comply with the requirements set out in sections 64(4) and 64(5).

A reading of these provisions raises two significant questions. Firstly, should the reference to "a dispute about a unilateral change to terms and conditions of employment" in section 64(4) be interpreted to constitute a dispute of right, which constitutes an unfair labour practice relating to benefits?

Secondly, does section 64(4) read with sections 64(5) and 64(3)(e) only provide for a temporary right to strike? Recall that employees have the right to retaliate against unilateral changes to conditions of service with a strike without the need to comply with the requirements for a protected strike. However, the employers' obligation to refrain from implementing the unilateral changes only applies for the period referred to in section 64(1)(a),¹⁴ in other words, until a certificate has been issued or a period of 30 days has passed. Whilst it is evident that there is a right to strike over changes to unilateral terms and conditions of employment, the question that remains is whether this right is temporary.¹⁵

The above questions form the basis of the discussion in 8.3 below, which seeks to provide clarity on the correct interpretation of section 64(4).

8.2.3 Prohibition Against Strikes: Arbitration and Adjudication

Section 65(1) of the LRA limits the right to strike in a number of instances. Amongst others, section 65(1)(c) states that no person may take part in a strike if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court

¹⁴ See section 64(4) and (5) of the LRA 66 of 1995. See further Du Toit *et al* (2015) 347.

¹⁵ See the discussion of *Sibanye Gold Limited v The Association of Mineworkers and Construction Union* Case no J1785/16, 26 August 2016 (LC) in para 8.3 below.

(LC) in terms of the LRA or any other employment law.¹⁶ In essence this relates to the distinction between disputes of right and disputes of interest.

It must be pointed out that prior to January 2015, section 65(1)(c) read slightly differently. It stated that no person may take part in a strike if the issue in dispute is one that a party has the right to refer to arbitration or to the LC in terms of the LRA.¹⁷ The reason for the change in wording was to eliminate the anomalous distinction between disputes over which industrial action was restricted due to such disputes being capable of adjudication under the LRA, as opposed to disputes over which strike action was unrestricted merely because they were capable of being adjudicated under some other employment law, not under the LRA.¹⁸

In terms of section 65(1)(c) it is evident that a strike cannot be initiated over an unfair labour practice benefits dispute, as such a dispute must be referred to arbitration.¹⁹ However, controversy has arisen in instances where disputes are not characterised as unfair labour practice disputes, but rather as unilateral changes to terms and conditions of employment. This is despite the fact that the dispute relates to changes to pre-existing benefits.

One of the arguments advanced is that a dispute must be dealt with according to how it is pleaded.²⁰ In line with this contention, if a dispute is classified as a unilateral change to terms and conditions of employment, strike action over such a dispute is not precluded by the provisions of section 65(1)(c). This is because there is no provision in the LRA which requires such disputes to be referred to arbitration or the LC.

¹⁶ Section 65(1) also limits the right to strike if the employee is bound by a collective agreement that prohibits a strike, if the employee is bound by an agreement that requires the issue in dispute to be referred to arbitration and if the employee is engaged in an essential or maintenance service.

¹⁷ As indicated under section 65(1)(c) of the LRA 66 of 1995 the provision was substituted by section 7(a) of Act 6 of 2014.

¹⁸ The Labour Relations Amendment Bill 2012 at 5 stated the intention as “to eliminate the anomalous distinction between disputes that can be adjudicated under the LRA in respect of which industrial action is currently restricted and those under other employment laws in respect of which there is no equivalent restriction”.

¹⁹ Refer to Chapter 3, para 3.5.2.

²⁰ See the discussion of *Sibanye Gold Ltd v The Association of Mineworkers & Construction Union & others* (2017) 38 ILJ 1193 (LC) in para 8.4.

A contrasting and more convincing argument is that the substance of a dispute rather than its form should be the determining factor.²¹ This allows the judiciary to interrogate the true nature of the dispute, instead of relying on the characterisation of the dispute by the employee.

These contrasting arguments, as well as possible solutions, are discussed in 8.4 below.

8.3 UNILATERAL CHANGES: INTERPRETING SECTION 64(4)

Monyela & others v Bruce Jacobs t/a LV Construction (Monyela) was the first case to endorse the right to strike in respect of unilateral changes to pre-existing terms and conditions of employment.²² In this case the employees contended that the employer reduced their wages and paid them less than they were entitled to, resulting in their terms and conditions being unilaterally changed.²³ The LC recognised the employees' right to strike based on section 64(1)(a) read with sections 64(4) and (5) of the LRA.²⁴

In *Maritime Industries Trade Union of South Africa v Transnet Limited (MITUSA)* the Labour Appeal Court (LAC) confirmed this position.²⁵ Here, employees complained that their employer failed to provide them with training, as set out in their contracts of employment.²⁶ The matter proceeded to arbitration,²⁷ where it was dealt with as an unfair labour practice dispute and the arbitrator found in favour of the employees.²⁸ On review to the LC, the court held that the jurisdiction of the CCMA was ruled out.²⁹ The LC concluded that unilateral changes of conditions of service constituted a dispute of interest and the workers should have relied on section 64(4) and retaliated with a strike.³⁰

²¹ See the discussion of *Mawethu Civils v National Union of Mineworkers & Others* (2016) 37 ILJ 185 (LAC) in para 8.4.

²² (1998) 19 ILJ 75 (LC).

²³ *Monyela* 77B and 77D.

²⁴ *Monyela* 82I-J and 83A.

²⁵ (2002) 23 ILJ 2213 (LAC) paras 106 and 107.

²⁶ *MITUSA* paras 9-12.

²⁷ *MITUSA* para 13.

²⁸ *MITUSA* paras 59-62.

²⁹ *MITUSA* para 94.

³⁰ *MITUSA* paras 95-97 and 104.

The LAC disagreed that a dispute regarding a unilateral change to terms and conditions of employment always constitutes a dispute of interest.³¹ However, it agreed that strike action is permissible to resolve such disputes based on sections 64(1) and (4) of the LRA.³² *MITUSA* recognised that such disputes are indeed arbitrable and held that an employee may choose which avenue to pursue.³³ The following findings by the LAC are important:

“Strikeable and arbitrable disputes do not necessarily divide into watertight compartments. Although in relation to dispute resolution the Act contemplates the separation of disputes into those that are resolved through arbitration, those that are resolved through adjudication and those that are resolved through power-play, there are disputes in respect of which the Act provides a choice between power-play, on the one hand, and, arbitration, on the other, as a means of their resolution.”³⁴

In *Protekon (Pty) Ltd v CCMA & others*³⁵ the LC followed *MITUSA*³⁶ and explained that:

“Where disputes over benefits are concerned, it seems to me, there can be little objection to workers choosing to tackle the employer in the collective bargaining arena rather than trying to demonstrate unfairness in the sense contemplated in the unfair labour practice definition.”³⁷

This line of reasoning was also followed in the LAC decision of *Apollo Tyres South Africa (Pty) Ltd v CCMA (Apollo Tyres)*.³⁸

³¹ *MITUSA* paras 99 and 100.

³² *MITUSA* paras 104 and 106.

³³ *MITUSA* para 106. See further *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC) para 30 where it was stated that the LAC in *MITUSA* found that the whole scheme of the Act is to give employees an election.

³⁴ *MITUSA* para 106. Cameron *et al* (1989) 96 also state that the line between disputes over rights and conflicts over interests is not always an impregnable wall. Rather, it sometimes is more analogous to a semi-permeable membrane, through which disputes that are nominally of one type pass and are handled under procedures usually reserved for disputes of the other type. See also *Metal & Electrical Workers Union of SA v National Panasonic Co (Parrow Factory)* (1991) 12 ILJ 537 (C).

³⁵ [2005] 7 BLLR 703 (LC).

³⁶ *Protekon* para 24.

³⁷ *Protekon* para 25. It should be noted that while the court did not specifically state that the election between strike action and arbitration in benefit disputes arises in circumstances where there is a unilateral change to terms and conditions of employment (in other words a unilateral change to benefits), it appears that this is what the court had in mind. This is because reference was specifically made to paragraphs 106-108 of *MITUSA* where the issue of unilateral changes to terms and conditions is discussed.

³⁸ *Apollo Tyres* paras 28 and 29. Ebrahim (2014) *PER* 606 states that the LAC in *Apollo Tyres* failed to explain whether an election between strike action and arbitration existed with regard

In the more recent case of *Sibanye Gold Limited v The Association of Mineworkers and Construction Union (Sibanye)*,³⁹ the employer unilaterally implemented amendments to a number of its policies, including the home adoptions policy, the business travel policy and the acting allowance policy.⁴⁰

The employees contended that the changes to the policies constituted a unilateral change to their conditions of employment and they sought to embark on a strike.⁴¹ The employees relied on sections 64(4) and (5) of the LRA to support their contention that their strike was protected.⁴²

The LC found that section 64(4) does not support the contention that the strike was protected, as section 64(4) is only an interim measure. The court explained that once the period referred to in section 64(4) has expired, the dispute resolution procedure must continue on the basis that is normally prescribed in the LRA.⁴³ Snyman J concluded as follows:

“Insofar as the respondents seek to rely on section 64(4) so as to establish their right to strike, this reliance is misplaced. The underlying causa of the unilateral change to employment conditions dispute is one of right, which must ultimately be referred to arbitration. The right to strike in terms of section 64(4), as an interim measure, has already lapsed in *casu*, because the time limit in terms of section 64(1)(a) has already expired. For this reason as well, the proposed strike action by the respondents would be unprotected.”⁴⁴

Snyman J’s basis for finding that the dispute in question had to be referred to arbitration was that the contents of the policies that were unilaterally changed constituted benefits within the meaning of the unfair labour practice provisions.⁴⁵ He therefore

to a benefit “dispute”, which was regarded as a serious omission. However, the pronouncements made by the LAC indicate that the court endorsed that an employee has a choice between using rights-based and interest-based recourse in case of benefit disputes. If the court disagreed with the decision reached in *Protekon*, it would have stated so categorically. Instead, it merely explained its disagreement with the proposition that both avenues of recourse could be used, instead favouring an approach which requires an employee to choose between the two avenues of recourse.

³⁹ Case no J1785/16, 26 August 2016 (LC).

⁴⁰ *Sibanye* paras 38-39.

⁴¹ *Sibanye* paras 1 and 8.

⁴² *Sibanye* para 66.

⁴³ *Sibanye* para 67.

⁴⁴ *Sibanye* para 76. See further *Sibanye Gold Ltd v The Association of Mineworkers & Construction Union & others* (2017) 38 *ILJ* 1193 (LC) para 21 where it is stated that while a strike is permissible it is independent of the interim remedy afforded by section 64(4).

⁴⁵ *Sibanye* paras 39 and 62.

granted a rule nisi in terms of which the strike was declared unprotected and interdicted pending the return date.⁴⁶

It is evident that both *MITUSA* and *Sibanye* accepted that a strike is competent in respect of a unilateral change to pre-existing terms and conditions of employment. However, *Sibanye* found that the right to strike is only an interim measure, while *MITUSA* postulated strike action as an alternative to arbitration.⁴⁷

Firstly, section 64(4) read with sections 64(5) and 64(3)(e) provides for an interim right to strike for the period referred to in section 64(1)(a), in cases where the employer does not comply with the section 64(4) request.⁴⁸ However, as correctly explained by Van Niekerk and Smit, the right to strike is not limited to this period.⁴⁹ Once a certificate has been issued or 30 days (or any longer period agreed on between the parties) has lapsed the employer is free to implement the change and the employees are likewise free to pursue strike action.⁵⁰ It stands to reason that it cannot be concluded that an employee only has an interim right to strike in respect of such disputes, as contended in *Sibanye*.

While an ordinary strike is permissible in respect of unilateral changes to terms and conditions of employment, it is problematic that the reference to this phrase in section 64(4) has been applied in cases of unilateral changes to pre-existing terms and conditions, in other words to disputes of right.

Disputes about unilateral changes as provided for in section 64(4) of the LRA most often arise in the course of wage negotiations where the employer implements the

⁴⁶ *Sibanye* para 1.

⁴⁷ In *MITUSA* no reference was made to section 64(4) providing an interim measure to strike. Similarly, *Monyela* 82I-J and 83A did not view strike action in such disputes as a temporary measure.

⁴⁸ Du Toit *et al* (2015) 347. See further Van Niekerk and Smit 457 who explain that section 64(4) seeks to interdict the employer temporarily from unilaterally implementing changes to terms and conditions until the period for statutory conciliation has been exhausted.

⁴⁹ Van Niekerk and Smit (2018) 457-458. See further Du Toit *et al* (2015) 347 and Grogan (2010) 173.

⁵⁰ Van Niekerk and Smit (2018) 457-458. See further *Monyela* 82I-J and 83A.

wage increase offered without reaching an agreement, and particularly when threatened with strike action.⁵¹ Van Niekerk and Smit give credence to this conclusion by explaining that the recourse provided by section 64(4) seeks to counter the undermining influence on the collective bargaining process, which arises through the unilateral implementation of terms and conditions by the employer, such as wage increases. The objective of section 64(4) therefore is to preserve the integrity of the bargaining process.⁵²

Section 64(4) is located under the provisions that deal with the “right to strike”, which is a mechanism typically reserved for disputes of interest.⁵³ It is also noteworthy that the phrase unilateral change to terms and conditions of employment only appears in section 64(4) of the LRA. As such, it is only referred to in the context of the right to strike. Considering the location of section 64(4) in the LRA it is arguable that the use of this section should be limited to unilateral changes that takes place during the process of collective bargaining over new terms and conditions of employment. In my view section 64(4) could not have been intended to deal with disputes of right, where, for example, an employer after providing an employee with a monthly car allowance written into the employee’s contract of employment, unilaterally removes the car allowance. Although the LRA does not specifically prohibit strikes over disputes of right, the Explanatory Memorandum to the LRA explicitly stated that “strikes over disputes of right are not permitted”.⁵⁴

Perhaps the use of the phrase “unilateral change to terms and conditions of employment” was an unfortunate choice of words, as it can be interpreted to include changes to pre-existing terms and conditions. Alternatively, the phrase should have been qualified in the LRA.

Notwithstanding my disconcert with the use of section 64(4) to address unilateral changes to pre-existing terms and conditions, the legislation as it stands permits this. However, section 65(1)(c) can be used to counter the permissibility of section 64(4) in

⁵¹ Van Niekerk and Smit (2018) 457. See further Du Toit *et al* (2015) 347 who explain that a unilateral change constitutes a change introduced after bargaining or consultation has deadlocked.

⁵² Van Niekerk and Smit (2018) 457.

⁵³ See Chapter 3, para 3.5.2.

⁵⁴ Explanatory Memorandum (1995) 16 *ILJ* 303.

disputes of right, notably unilateral changes to pre-existing benefits. Although the LC in *Sibanye* was incorrect in its pronouncements that an employee only has an interim right to strike, it must be commended for finding that the unilateral changes complained of constituted an unfair labour practice relating to the provision of benefits, which had to be arbitrated. The judiciary can limit the use of section 64(4) by unearthing the true nature of the dispute. Where the dispute constitutes an unfair labour practice, section 65(1)(c) does not permit the use of strike action, thereby relegating the applicability of section 64(4).

8.4 PROHIBITION AGAINST STRIKES: INTERPRETING SECTION 65(1)(c)

Notwithstanding the reliance placed on section 65(1)(c) in limiting the use of section 64(4) as highlighted above, the application of section 65(1)(c) is not void of challenges. An important aspect that requires attention is whether section 65(1)(c) can be interpreted to justify the right to strike in such instances.

In *Sibanye*, the dispute was found to constitute an unfair labour practice. therefore, the dispute had to be resolved by means of arbitration in line with section 191(5) of the LRA⁵⁵ and the employees were precluded from engaging in strike action in terms of section 65(1)(c).

There are sound reasons why disputes, such as those relating to benefits, should be referred to arbitration or adjudication rather than being the subject of strike action.⁵⁶ However, the difficulty arises when the dispute is not characterised as an unfair labour practice benefits dispute even though the dispute emanates from changes made to benefits.

⁵⁵ *Sibanye* para 62.

⁵⁶ Du Toit *et al* (2015) 347-348 state that section 64(4) does not apply to changes to benefits that may be characterised as unfair labour practices. This means that if the dispute is in relation to a change to benefits an employee cannot in terms of section 64(4) request the employer not to implement the change or restore the previous conditions, failing which the employee has the right to strike after 48 hours.

On the return date, Van Niekerk J in *Sibanye Gold Ltd v The Association of Mineworkers & Construction Union & others (Sibanye 2017)*⁵⁷ disagreed with the finding of Snyman J.⁵⁸ Van Niekerk J held that it was not for the court to categorise the matter as an unfair labour practice when the matter was referred as a unilateral change to terms and conditions of employment. Accordingly, it should have been dealt with in the way in which it was referred,⁵⁹ resulting in Snyman J's utilisation of section 65(1)(c) to limit the employees' right to strike being incorrect.⁶⁰

Van Niekerk J said that there was more than one way to lodge the dispute in question. He explained that it could be referred as an unfair labour practice dispute, a breach of contract or a unilateral change to terms and conditions of employment.⁶¹ He held that there is a choice between the use of economic power, arbitration or adjudication in the resolution of such disputes. Significantly, he stated that the dispute resolution mechanisms applicable in resolving the dispute, are dependent on the manner in which the dispute is lodged.⁶²

Flowing from this, *Sibanye 2017* held that strike action would only be limited should the employee in terms of section 65(1)(c) be compelled to refer the dispute to arbitration or to the LC.⁶³ As the LRA or any other employment law does not require the arbitration or adjudication of disputes about unilateral changes to terms and conditions of employment, section 65(1)(c) does not apply.⁶⁴ The implication of this is that strike action can be initiated in respect of such disputes.⁶⁵ As stated below, the study disagrees with *Sibanye 2017*.

⁵⁷ *Sibanye Gold Ltd v The Association of Mineworkers & Construction Union & others (2017) 38 ILJ 1193 (LC)*.

⁵⁸ *Sibanye (2017)* para 16.

⁵⁹ *Sibanye (2017)* para 16.

⁶⁰ *Sibanye (2017)* para 21. Van Niekerk states that courts should be cautious when they seek to determine the true issue in dispute and should not substitute one dispute for another. He points out that the starting point is the referral form and the description of the dispute contained in the form.

⁶¹ *Sibanye (2017)* para 20.

⁶² *Sibanye (2017)* para 20.

⁶³ *Sibanye (2017)* para 16.

⁶⁴ *Sibanye (2017)* para 16.

⁶⁵ *Sibanye (2017)* para 17.

In *Mawethu Civils v National Union of Mineworkers & others (Mawethu)*,⁶⁶ the employer required employees to work an additional five and a half hours in the week preceding a public holiday without extra remuneration. The company would then give the employees a day off close to a weekend.⁶⁷ The employees refused to work in the week preceding the public holiday and did not report for work on the day following the public holiday. The employer regarded this as leave without pay.⁶⁸ The employees referred a dispute regarding the non-payment of wages to the CCMA.⁶⁹ The CCMA identified the dispute as one of interest and this permitted the employees to embark on a strike.⁷⁰

On review, the employer attempted to convince the LC that the strike was unprotected based on the provisions of section 65(1)(c).⁷¹ Even though section 65(1)(c) at the time did not disallow strike action where the dispute could be referred to the LC in terms of the BCEA,⁷² the employer argued for an expansive interpretation of section 65(1)(c). The rationale was to keep the resolution of disputes of right outside the ambit of industrial action, which is reserved for the resolution of disputes of interest.⁷³ Unfortunately, the LC was not willing to interpret section 65(1)(c) extensively and instead preferred a strict interpretation.⁷⁴ The court found that section 65(1)(c) did not bar strike action where a matter could be referred to the LC in terms of the BCEA.⁷⁵

In *Mawethu* the LAC overturned the LC decision and found that the dispute was indeed a dispute of right. This was based on the fact that the employees were not demanding rights that they did not have.⁷⁶ While the court recognised that the dispute was amenable to a process of adjudication,⁷⁷ it found that the dispute more correctly involved

⁶⁶ (2016) 37 ILJ 185 (LAC).

⁶⁷ *Mawethu* para 4.

⁶⁸ *Mawethu* paras 5-6.

⁶⁹ *Mawethu* paras 4, 7 and 9.

⁷⁰ *Mawethu* paras 10 and 12.

⁷¹ *Mawethu* para 13.

⁷² *Mawethu* para 14.

⁷³ *Mawethu* para 14.

⁷⁴ *Mawethu* para 15.

⁷⁵ *Mawethu* para 15.

⁷⁶ *Mawethu* para 18.

⁷⁷ This was in terms of the BCEA. See *Mawethu* para 18.

an alleged unfair labour practice relating to the provision of benefits.⁷⁸ This precluded strike action.⁷⁹

At the time that the matter came before the LAC, the amendment to section 65(1)(c), which came into effect on 1 January 2015, was already in place.⁸⁰ It is safe to conclude that in the event that the LAC in *Mawethu* did not find that the dispute constituted an unfair labour practice, it would have ruled that strike action was prohibited because of the contractual recourse available in terms of the BCEA.⁸¹

It is significant to note that the LAC in *Mawethu* overrules the narrow approach followed in *Sibanye 2017*.⁸² It is certainly a positive development that *Mawethu* prioritised the substance of the dispute over its form.⁸³ As discussed in the previous chapter,⁸⁴ the significance of considering form over substance was endorsed by the CC in *Chirwa v Transnet Ltd*.⁸⁵ There can be no doubt that the true characterisation of the dispute

⁷⁸ *Mawethu* para 19-20. This decision was reached on the basis that the practice of giving employees a full day's paid leave in exchange for unremunerated work in the preceding week of a lesser period constituted a "benefit".

⁷⁹ *Mawethu* para 21.

⁸⁰ *Mawethu* para 16.

⁸¹ In *City of Johannesburg Metropolitan Municipality v SAMWU* Case no J1799/17, 10 August 2017 (LC) para 10 the court referred to the LAC decision of *Mawethu* as support of the fact that if a dispute is actionable in terms of section 77(3) of the BCEA, a strike over it is not permissible by virtue of section 65(1)(c) of the LRA. In *Vector Logistics v National Transport Movement* Case no J2876/17, 6 March 2018 (LC) para 18 the court found that as the employees had a right to refer their dispute to the LC under section 77(3) of the BCEA, strike action was prohibited in terms of section 65(1)(c) of the LRA.

⁸² Even though the dispute in *Mawethu* was not referred to the CCMA as an unfair labour practice dispute, the LAC found it to be one, explaining that one has to consider whether the dispute can be referred to arbitration in fact and in law (paras 19 and 22). This illustrates that *Mawethu*, like *Sibanye*, was correct by looking beyond the manner in which the dispute was referred.

⁸³ This was in line with the principle advocated in cases such as *Coin Security Group (Pty) Ltd v Adams & others* (2000) 21 ILJ 924 (LAC). Here the LAC had to determine whether the strike embarked upon was protected in light of section 65(1)(c). The employees contended that the dispute was a wage dispute in respect of which strike action was competent (para 1) but the LAC found that the strike was unprotected as the dispute constituted an unfair labour practice which meant that the dispute had to be arbitrated. The LAC stated that courts have a duty to determine the true or real issue in dispute, which is done by looking at the substance of the dispute and not the form in which it is presented (para 16). See Van Niekerk and Smit (2018) 452 who explain that the court found that how a party defines the dispute is not conclusive and that it will favour substance over form in order to establish the true nature of the dispute. See further Du Toit *et al* (2015) 351 who, referring to the LAC decision in *Coin Security*, state that in order to determine whether industrial action is excluded by section 65(1)(c), a court must identify the issue in dispute, as a party's characterisation of a dispute is not necessarily conclusive. See also Chapter 7, para 7.3.4.3 which refers to further cases that endorsed this principle.

⁸⁴ See Chapter 7, para 7.3.4.3.

⁸⁵ [2008] 2 BLLR 97 (CC).

must be determined in order to protect the divide between disputes of right and disputes of interest.

The true nature of the dispute in *Sibanye* was that of an unfair labour practice relating to benefits, as it involved a change to pre-existing benefits, the removal or reduction of which disadvantaged the employees.⁸⁶ Therefore, Van Niekerk J's finding that strike action was permissible is disconcerting.

A further problem with the findings in *Sibanye 2017* is that it leaves a single employee without a remedy. *Schoeman & another v Samsung Electronics SA (Pty) Ltd*⁸⁷ clarified a single employee's inability to strike and was followed in subsequent cases.⁸⁸ The prejudice that this brings to a single employee is evident from *Ngobeni v Commission for Gender Equality (Ngobeni)*.⁸⁹ Here, a single employee referred her dispute as a unilateral change to terms and conditions of employment, but she was not permitted to strike.⁹⁰ This left the employee without a remedy.⁹¹

As discussed earlier, adopting an approach that leaves an employee without a remedy is undesirable and was frowned upon by the LAC in *Apollo Tyres*.⁹² For the reasons discussed above, the principles established in *Sibanye 2017* cannot be supported. It stands to reason that by prioritising substance over form, disputes in respect of unilateral changes to pre-existing terms and conditions of employment will not be subject to strike action in terms of section 65(1)(c). In such instances, the dispute would either

⁸⁶ *Sibanye* paras 38-39.

⁸⁷ (1997) 18 ILJ 1098 (LC).

⁸⁸ See *Abrahams v Drake & Scull Facilities Management (SA) Pty Ltd* (2012) 33 ILJ 1093 (LC) and *Du Randt v Ultramat South Africa (Pty) Ltd* [2013] 6 BLLR 573 (LC).

⁸⁹ Case no C685/16, 29 November 2017 (LC).

⁹⁰ *Ngobeni* paras 12 and 13.

⁹¹ The court in *Ngobeni* considered the approach taken by the LC in *Abrahams v Drake & Scull Facilities Management (SA) (Pty) Ltd & another* where the LC found that it had jurisdiction to grant an order for specific performance based on section 77(3) of the BCEA, even though this was not what was pleaded by the employee (para 14). However, *Ngobeni*, persuaded by the decision in *Num obo Maponya & others v Eskom Holdings SOC Ltd* Case no JS1018/12, 12 November 2014 (LC), found that it did not have any jurisdiction over the pleaded claim (para 18). In *Maponya*, Van Niekerk J followed a similar approach to that in *Sibanye 2017*. He found that the court had no jurisdiction to consider the matter as the case was not pleaded in terms of section 77(3), but as a unilateral change to terms and conditions of employment (para 16).

⁹² See Chapter 5, para 5.3.1.

constitute an unfair labour practice to be arbitrated, or require adjudication in terms of the BCEA.

8.5 CONCLUSION

In view of the above discussion, the conclusion that can be drawn is that the right to strike should not be permitted in disputes over unilateral changes to pre-existing benefits. Such a conclusion is supported by the following findings.

Firstly, although section 64(4) of the LRA provides for the right to strike over unilateral changes to terms and conditions of employment the indicators point to a conclusion that this provision is reserved for unilateral changes that are implemented during the process of collective bargaining over new terms and conditions of employment.

Secondly, the applicability of section 64(4) over disputes in respect of unilateral changes to pre-existing benefits can be curtailed through the use of section 65(1)(c) of the LRA. Section 65(1)(c) specifically prohibits strike action over disputes that must be referred to arbitration in terms of the LRA, or to the LC for adjudication in terms of the LRA or any other employment law. While there is no provision in the LRA or any other employment law that requires a dispute characterised as a unilateral change to terms and conditions of employment to be referred to arbitration or adjudication, this does not imply that section 65(1)(c) does not find application. The substance of the dispute must take precedence over the form. This requires the courts to interrogate the true nature of the dispute. This approach is aligned to the sentiments expressed in the Explanatory Memorandum, as well as to the *Mawethu* and *Chirwa* decisions.

Thirdly, the narrow approach adopted in *Sibanye 2017* should not be supported. Apart from contradicting the conclusions reached by both the LAC and CC that the substance of a dispute must be prioritised over its form, it prejudices employees. It leaves a single employee without a remedy, as strike action is not available in such instances. This creates an undesirable situation.

Fourthly, an approach which prioritises the substance of a dispute over its form respects the divide between disputes of right and disputes of interest which our law

seeks to protect. Even though these two categories of disputes do sometimes overlap, there is no justifiable reason to allow the use of strike action where legal recourse is available to address the dispute.

Notwithstanding the above findings, the use of strike action in benefit disputes cannot be definitively ruled out based on the existence of section 64(4). It is recommended that policy makers should revisit section 64(4). The phrase “a dispute about a unilateral change to terms and conditions of employment” should be reworded to indicate that it does not apply to disputes over unilateral changes to pre-existing terms and conditions of service. This will eliminate employees’ reliance on section 64(4) when seeking to strike over unilateral changes to pre-existing benefits.

In the absence of legislative amendments, the proposed Code of Good Practice: Benefits has been worded in a manner that encourages the enforcement of benefit disputes through the dispute resolution institutions set up by the LRA, without explicitly removing an employees’ right to strike in such instances. This should discourage employees from seeking to rely on section 64(4) of the LRA.⁹³

⁹³ In section 4(1) of the Code of Good Practice, the use of the word pre-existing is emphasized in defining a benefit. The manner in which a benefit is defined and the procedure that is set out in the Code to resolve such disputes highlights that these disputes are disputes of right. Furthermore, the Code makes it clear that benefit disputes can arise from refusing to grant, reducing, or removing a benefit provided for in a contract of employment. If an employee can locate a dispute about a unilateral change to benefits within the Code of Good Practice, it is my considered view that they will be encouraged to refer it as unfair labour practice dispute, instead of embarking on strike action by relying on section 64(4) of the LRA.

CHAPTER 9
CONCLUSION

	PAGE
9.1	Introduction..... 250
9.2	Conclusions in Respect of Question One..... 252
9.3	Conclusions in Respect of Question Two..... 256
9.4	Conclusions in Respect of Question Three..... 260
9.5	Conclusions in Respect of Question Four..... 262
9.6	Overall Conclusions..... 263
9.7	Recommendations: Code of Good Practice..... 265

9.1 INTRODUCTION

The remedy pertaining to the provision of “benefits” in terms of the definition of “unfair labour practice” remains a contentious aspect of South African labour law. Despite the vast body of academic literature and numerous judgments regarding this aspect of law,¹ stubborn weaknesses and unanswered questions remain in place in relation to this dispute resolution mechanism.²

This thesis sought to resolve these challenges by answering four vexed research questions.

¹ As stated by the LAC in *Apollo Tyres South Africa (Pty) Ltd v CCMA (Apollo Tyres)* [2013] 5 BLLR 434 (LAC) para 20, there is no shortage of judgments and academic writings endeavouring to capture the essence of and define the word “benefit” in the context of section 186(2)(a) of the LRA. This is also evident from the contributions on this topic by authors such as P Le Roux, L Le Roux, Cohen, Cheadle and Grogan. See, for example, Le Roux (2002) *CLL* 91; Le Roux (2015) *ILJ* 888; Cohen (2014) *ILJ* 79; Cheadle (2006) *ILJ* 663; and Grogan (1998) *ELJ* 11. Key judgments include *Schoeman & another v Samsung Electronics SA (Pty) Ltd (Schoeman)* (1997) 18 *ILJ* 1098 (LC); *Hospersa and another v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC); *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703 (LC); and *Apollo Tyres*.

² Writers such as Myburgh and Bosch (2016) 385 refer to the progress in this field of the law as torturous, as the body of jurisprudence that has developed is complex and confusing. See further *Apollo Tyres* para 20 where the word “benefits” was found to defy definition. Similarly, in *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 *ILJ* 1910 (LC) para 10 the meaning of the word was regarded as a “vexed question”.

The first research question focused on establishing what the definition of a benefit entails, considering the fact that there is no statutory definition thereof. To answer this question the two primary controversies that exist in defining benefits were investigated. The first is whether the term “benefits” falls within the statutory definition of “remuneration”.³ The second relates to the appropriate criteria that should be used to establish whether a dispute falls under the concept of benefits, in other words whether the disputed benefit constitutes a benefit of right.⁴

An answer to the first research question is imperative as it provides adjudicators with a clear understanding of what the term entails. This is key, as dispute resolution bodies only have jurisdiction to consider an unfair labour practice dispute if the issue in dispute is indeed a benefit.⁵

The second research question focused on the second stage of the unfair labour practice inquiry. This concerns the type of employer conduct that constitutes “unfair” behaviour in relation to the provision of benefits. Although fairness is clearly embedded in the unfair labour practice concept, guidelines for the determination of fairness in unfair labour practice disputes are glaringly absent from the LRA.⁶

The third and fourth research questions focused on resolving the problems associated with the existence of more than one dispute resolution avenue available to employees to address disputes that are essentially benefit disputes. This primarily arises when the dispute stems from the employer’s action of unilaterally changing pre-existing

³ In cases such as *Schoeman* 1102-1103J the court sought to draw a clear distinction between remuneration on the one hand and benefits on the other, categorically stating that “a ‘benefit’ is something extra, apart from ‘remuneration’”.

⁴ This was confirmed by the LAC in *Hospersa and another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) para 8. The court stated that the legislature, through the unfair labour practice relating to the provision of benefits, did not seek to facilitate the creation of an entitlement to a benefit which an employee does not have. See further *Protekon* paras 32-34 where the court supported these sentiments. The LAC in *Apollo Tyres* para 44 confirmed this approach, finding that the unfair labour practice jurisdiction cannot be used to create new benefits or new forms of remuneration which were not previously provided by the employer.

⁵ See cases such as *South African Post Office Ltd v CCMA & others* case no C293/2011, 18 June 2012 (LC) para 18.

⁶ This is evident from the wording of the LRA 66 of 1995 and the Code of Good Practice: Dismissal (Schedule 8). See further Chicktay (2007) SA Merc 111 and Smit and Le Roux (2015) CLL 102.

terms and conditions of employment.⁷ The question in this regard is whether employees should be permitted to rely on contractual remedies and whether they are permitted to engage in strike action.

This thesis has explored the four research questions. In the parts that follow the findings are formulated and recommendations are detailed, before a proposed Code of Good Practice: Benefits is set out.

9.2 CONCLUSIONS IN RESPECT OF QUESTION ONE

- What should the definition of benefits, as referred to in section 186(2)(a) of the LRA, entail?

The concept of the unfair labour practice was introduced into South African labour law in 1979 when the Industrial Court was established.⁸ It originated from the United States of America (USA), but in a different context.⁹ The definition given to the notion in South African terms was wide and all encompassing and included any action or practice constituting an unfair labour practice, as long as unfairness was present.¹⁰

The unfair labour practice was transplanted into the LRA of 1995 with the view of resolving previous problems, such as a lack of certainty and after-the-event rule-making by the Industrial Court.¹¹ This resulted in the codification of the concept in the LRA of 1995.¹² Unfortunately, it failed to bring about legal certainty regarding benefit disputes, as the LRA of 1995 does not provide a definition of the term.¹³ This has given rise to uncertainty on the types of benefit disputes that should be included within the unfair labour practice concept.

⁷ As discussed in cases such as *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA); *Jonker v Okhahlamba Municipality & Others* (2005) 26 ILJ 782 (LC); *Maritime Industries Trade Union of South Africa v Transnet Limited* (2002) 23 ILJ 2213 (LAC); and *Monyela & others v Bruce Jacobs t/a LV Construction* (1998) 19 ILJ 75 (LC) 82I-J and 83A.

⁸ See Chapter 2, para 2.5.1.

⁹ See Chapter 2, para 2.4.

¹⁰ See Chapter 2, paras 2.5.1 to 2.5.5.

¹¹ See Chapter 3, para 3.2.1.

¹² See Chapter 3, paras 3.2.3 to 3.2.4.

¹³ See Chapter 3, para 3.2.4.

The courts initially attempted to limit its scope to maintain the divide between disputes of right and disputes of interest.¹⁴ This was done by, firstly, excluding benefits from the ambit of the concept of remuneration.¹⁵ Secondly, while it was recognised that only pre-existing benefits fell within the scope of an unfair labour practice, only those provided for in a contract or legislation were recognised as pre-existing.¹⁶

The courts gradually started extending the notion. The LRA definition of remuneration was found to be broad enough to encompass benefits.¹⁷ Furthermore, the ambit of a pre-existing benefit was expanded to include benefits provided for in a policy, or awarded by an employer in terms of a practice, as well as benefits awarded or granted subject to the exercise of employer discretion.¹⁸

New Zealand and the United Kingdom (UK) both endorse a broad interpretation of the term benefits. These jurisdictions support the *Apollo Tyres* approach that benefits cannot be divorced from the concept of remuneration.¹⁹ This is also championed by the International Labour Organisation (ILO), which advocates a position where there is no distinction between remuneration and benefits.²⁰ Instead, wages and remuneration are terms used to provide holistically for all forms of employee compensation. This includes all forms of benefits and allowances.²¹ New Zealand and the UK further give credence to extending the use of the unfair labour practice provisions to challenge not only contractual benefits, but those provided subject to the exercise of employer discretion.²²

The courts' approach of keeping disputes of interest outside of the ambit of the unfair labour practice provisions is justified, as the law recognises the distinction between

¹⁴ See Chapter 4, para 4.2.1 and 4.2.5.

¹⁵ See Chapter 4, para 4.2.1. This was evident from the following cases: *Schoeman & another v Samsung Electronics SA (Pty) Ltd (Schoeman)* (1997) 18 ILJ 1098 (LC); *Gaylard v Telkom SA Ltd* (1998) 9 BLLR 942 (LC); and *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 ILJ 1910 (LC).

¹⁶ See Chapter 5, para 5.2.1.

¹⁷ *Apollo Tyres* para 25 as discussed in Chapter 4, para 4.2.4.1.

¹⁸ See Chapter 5, para 5.2.3, 5.2.4, 5.3.1 and 5.3.2.

¹⁹ See Chapter 4, para 4.2.4.3.

²⁰ See Chapter 4, para 4.2.4.2.

²¹ See Chapter 4, para 4.2.4.2.

²² See Chapter 5, paras 5.4.2 to 5.4.4.

disputes of right and disputes of interest.²³ This divide must be respected, as there are different dispute resolution mechanisms that pertain to the resolution of the respective disputes. Disputes of right must be resolved through arbitration, while disputes of interest must be resolved through collective bargaining and strike action.²⁴ Unfair labour practice disputes are disputes of right and can only be utilised to challenge pre-existing benefits. Unfortunately, the LRA does not provide any guidance on what constitutes a pre-existing benefit. While *Apollo Tyres*, the key authority on benefit disputes, has provided some guidance there are still aspects that require more concise explication.

Considering the findings, it is recommended that benefits must be broadly interpreted. A broad interpretation firstly requires that benefits should not be separated from the statutory definition of remuneration. As such, pre-existing forms of salaries and wages, including employee or fringe benefits, constitute section 186(2)(a) benefits. Secondly, pre-existing benefits must not be limited to contractual or legislative benefits.

There are many indicators that justify this broad interpretation. Firstly, such an approach will ensure the promotion of social justice, as effective measures are needed to counteract the vast inequality that exists in the employment relationship, arising from the employer's power to command and the employee's duty to obey.²⁵ This will curb employer abuse and protect employees, thereby giving effect to a key objective of the LRA.

Secondly, this ties in with the purposive approach which is to be followed when interpreting LRA provisions.²⁶ A purposive approach requires that both the constitutional right to fair labour practices and South Africa's obligations under international law be given effect to in conferring meaning to LRA provisions, such as the term benefits.²⁷ An assessment of the constitutional right to fair labour practices and the principles

²³ See Chapter 4, para 4.2.5.

²⁴ See Chapter 3, para 3.5.2 and Chapter 4, para 4.2.5.

²⁵ See Chapter 5, para 5.3.2.

²⁶ See Chapter 3, para 3.3.

²⁷ This is because the LRA must be interpreted in a manner that advances the objectives of the LRA. Two of the LRA's four stated objectives as set out in sections 1(a) and 1(b) of the LRA 66 of 1995 are to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution and to give effect to the obligations incurred by the Republic as a member state of the ILO. See Chapter 3, para 3.2.2.

enshrined by the ILO requires that benefits be defined in a manner that will offer employees a greater deal of protection, as opposed to a definition that will award less protection.²⁸ This will ensure an interpretation of benefits that best promotes fairness towards employees.²⁹

Thirdly, the unfair labour practice provisions are a remnant of the jurisprudence that developed during the IC era.³⁰ The IC through the unfair labour practice concept sought to infuse fair treatment of employees into the employment relationship by curbing employer power in respect of a wide array of aspects.³¹ One such aspect was in relation to employee benefits, such as pension funds and payment of salaries, which are components of employee remuneration.³²

Fourthly, a broad interpretation is supported by New Zealand and the UK where the term benefits is inextricably linked to remuneration.³³ Furthermore, they provide authority for the fact that the unfair labour practice provisions should be interpreted in a generous rather than restricted manner.³⁴ In these jurisdictions, employees have been given the latitude to challenge employer discretion through the use of the personal grievance procedure and the implied duty of mutual trust and confidence.³⁵

Based on the fact that section 186(2)(a) benefits comprise of remuneration, it is recommended that a benefit must be classified into three broad categories. These are:

- (a) Pre-existing employee or fringe benefits, which can be of a monetary or non-monetary nature. This includes items such as leave, employer contributions to pension funds and medical aid schemes, provision of housing and company cars.
- (b) Pre-existing salaries or wages, such as pay progressions and acting allowances.
- (c) Pre-existing re-imbursive allowances, such as travel allowances.³⁶

²⁸ See Chapter 3, paras 3.3 and 3.4.

²⁹ See Chapter 3, para 3.6.

³⁰ Cheadle (2006) *ILJ* 671.

³¹ As explained by Davis (1991) *ILJ* 1181, the IC, being the vehicle through which the unfair labour practice concept was implemented, was regarded as having “delivered a substantial rebuff to employers” and bringing “a measure of enlightenment, consistency and job security to a field which knew only the entrenched rights of arbitrary action before”.

³² See Chapter 2, para 2.5.6.

³³ See Chapter 4, para 4.2.4.3.

³⁴ See Chapter 5, para 5.4.

³⁵ See Chapter 5, paras 5.4.2-5.4.4.

³⁶ See Chapter 4, para 4.4.

These categories should be included in the Code of Good Practice: Benefits.

Considering that section 186(2)(a) benefits in terms of the LRA of 1995 exclusively constitute pre-existing benefits, it is recommended that the following criteria should apply in determining whether the disputed benefit is one that can be dealt with as an unfair labour practice. Firstly, the benefit must be contained in a contract, collective agreement or legislation. Secondly, a benefit contained in a workplace policy may also constitute a benefit of right. The term policy has a wide meaning and it may be embodied in any written policy, circular, notice or personnel manual. Thirdly, past workplace practices may establish an entitlement to benefits. However, such practices must be well established and clear. Fourthly, an employee may be entitled to a pre-existing benefit under circumstances where the provision of a benefit or right to apply for a benefit is subject to the employer's discretion. This is irrespective of whether the employer discretion is founded in the contract, collective agreement, legislation, policy or past practice.³⁷ These criteria should be included in the Code of Good Practice: Benefits.

To sum up: the definition of a benefit entails a pre-existing benefit that falls into any of the following three categories: employee or fringe benefits, salaries or wages and reimbursive allowances. A benefit should be regarded as pre-existing if it is provided for in a contract of employment, collective agreement, legislation, policy or is subject to past practice. This includes benefits provided for or offered subject to the exercise of employer discretion. Employer discretion can be founded on any of the sources stated above.

9.3 CONCLUSIONS IN RESPECT OF QUESTION TWO

- What standards should be applied in determining whether employer conduct relating to the provision of benefits is unfair?

³⁷ See chapter 5, para 5.5.

While there are no statutory guidelines for the determination of fairness in benefit disputes, the courts have alluded to the use of the criteria of substantive and procedural fairness.³⁸ However, there has been limited guidance in this regard.

As regards substantive fairness, it has been held that there must be a fair reason for the alteration of benefits. The commercial rationale of the employer was held to be a fair reason.³⁹ Other factors that point towards substantive fairness are rational decisions which are not arbitrary, grossly unreasonable, capricious, *mala fide* and inconsistent.⁴⁰

Less guidance has been provided in respect of procedural fairness. The requirement of consultation has been alluded to, which suggests that there must be some form of engagement with the employee prior to a decision being taken regarding the provision of benefits.⁴¹

Because no detailed and coherent guidelines relating to standards of fairness in benefit disputes have been developed by the courts, the fairness imperatives documented in the LRA and the Code of Good Practice: Operational Requirements and Code of Good Practice: Dismissal were delved into.⁴²

An investigation into operational requirement dismissals revealed that the courts have endorsed commercial or operational rationale as a fair reason to dismiss, provided that these requirements are *bona fide* and rationally justifiable.⁴³ While commercial requirements will play a role in a number of benefit disputes, there may be other reasons for the decision taken, which may be acceptable as long as it is a fair reason. This is in line with the fairness requirements for misconduct dismissals.⁴⁴ Flowing from misconduct dismissals, consistent treatment in the application of disciplinary rules are

³⁸ See *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* [1997] 2 BLLR 124 (LAC) and *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703 (LC) as discussed in Chapter 6, para 6.3.1.

³⁹ See Chapter 6, para 6.3.2.

⁴⁰ See Chapter 6, para 6.3.2.

⁴¹ See Chapter 6, para 6.3.3.

⁴² See Chapter 6, para 6.4.1.

⁴³ See Chapter 6, para 6.4.2.

⁴⁴ See Chapter 6, para 6.4.2.

emphasised as a factor in determining substantive fairness.⁴⁵ A further significant aspect is that the determination of substantive fairness involves an assessment of a range of circumstances applicable to both the employer and employee, after which a value judgment must be made. These factors were set out by the Constitutional Court (CC) in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*.⁴⁶

Turning to procedural fairness, substantial emphasis is placed on the process of consultation in operational requirement dismissals.⁴⁷ Despite the absence of a reference to the word consultation in misconduct dismissals, such dismissals equally require engagement and communication with the employee.⁴⁸

Some form of consultation should be a key procedural requirement that must apply in a substantial number of benefit disputes, namely, those that arise from policy, established practice and the exercise of employer discretion.⁴⁹ However, it has been found that consultation will be insufficient in benefit disputes that arise from a change to an employment contract, collective agreement or legislation. Essentially, changes to benefits provided for in contracts of employment and collective agreements can only pass the test of procedural fairness if the employer engaged in negotiation and through this process obtained consent from the employees for the changes. In respect of legislative benefits, there is no room to alter or remove these, as negotiation is not an option in such instances.⁵⁰

New Zealand's justifiability test endorses substantive fairness. It also places emphasis on an objective consideration of the employer's decision having regard to a range of circumstances applicable to both parties.⁵¹ It further endorses the use of procedural fairness in assessing personal grievances. Essentially, it requires that the employee be given an opportunity to make representations prior to a decision being taken.⁵²

⁴⁵ See Chapter 6, para 6.4.2.

⁴⁶ [2007] 12 BLLR 1097 (CC) as discussed in Chapter 6, para 6.4.2.

⁴⁷ See Chapter 6, para 6.4.3.

⁴⁸ See Chapter 6, para 6.4.3.

⁴⁹ See Chapter 6, para 6.4.3.

⁵⁰ See Chapter 6, para 6.4.3.

⁵¹ See Chapter 6, para 6.5.2.

⁵² See Chapter 6, para 6.5.2.

The study recommends that clear guidelines pertaining to fairness be formulated for benefit disputes in the Code of Good Practice: Benefits. It is recommended that the standards of both substantive and procedural fairness be included. These guidelines have been proposed drawing from the LRA, the Codes of Good Practice for dismissals and New Zealand's justifiability test.

These guidelines must entail the following:

In respect of substantive fairness there must be a fair reason not to grant, to remove, to reduce or to reject an application for a benefit. A fair reason can be based on commercial or operational requirements provided that these are *bona fide* and rationally justifiable. There may also be other fair reasons. Decisions based on reasons that are irrational, arbitrary, unreasonable, capricious and *mala fide* will constitute substantive unfairness. Inconsistency is a factor that must be taken into account and which points towards substantive unfairness. Adjudicators must interrogate the conduct of the employer and not easily defer to the employer's decision in determining fairness. The totality of circumstances from both an employer and employee perspective must be assessed and a value judgment must be made.⁵³

In respect of procedural fairness, the following applies in cases where consultation is relevant: The employer must inform the employee(s) of the intended action and the reason(s) for it. This can be done either through a meeting or through written correspondence. The employee(s) must be given an opportunity to make representations. These representations must be considered by the employer when making the final decision. Finally, the employer must communicate its decision to the employee(s), preferably in writing.⁵⁴

In respect of benefits provided for in contracts of employment and collective agreements, procedural fairness will only be achieved if the employer negotiated the change to the benefit and agreement was reached.⁵⁵

⁵³ See Chapter 6, para 6.6.

⁵⁴ See Chapter 6, para 6.6.

⁵⁵ See Chapter 6, para 6.6.

9.4 CONCLUSIONS IN RESPECT OF QUESTION THREE

- Has an employee's right to rely on contractual recourse been supplanted by the unfair labour practice remedies relating to the provision of benefits?

The overlap between contractual and statutory recourse arises from the fact that a contract of employment can be the source of a pre-existing benefit.⁵⁶ Where an employer decides unilaterally to change the terms and conditions of employment as provided for in the contract, an employee would in terms of the ordinary principles of contract law be able to challenge the employer's actions as a breach of contract.⁵⁷

The CC in both *Gcaba v Minister for Safety and Security (Gcaba)*⁵⁸ and *Chirwa v Transnet Ltd (Chirwa)*⁵⁹ advocated that employees utilise the rights and procedures provided for in the LRA to raise disputes relating to unfair dismissals and unfair labour practices.⁶⁰ This approach is based on the fact that the "purpose-built" forums and processes established in the LRA must take precedence in resolving employment matters, which is achieved through litigating in terms of the LRA, as opposed to pursuing an alternative cause of action.⁶¹

The UK and New Zealand both give pre-eminence to statutory labour law processes and the specialised institutions established by labour legislation.⁶² In the UK the court in *Johnson v Unisys Ltd*⁶³ was explicit about the fact that the procedure to deal with unfair dismissals contained in the Employment Rights Act had supplanted an employee's right to pursue common law contractual recourse.⁶⁴

⁵⁶ See Chapter 7, paras 7.1 and 7.2.

⁵⁷ Smit and Le Roux 2015 *CLL* 102 explain that in many cases the provision of benefits will overlap with a contractual claim, which will accordingly leave an employee with an election as to which claim to proceed with. See further Chapter 7, para 7.2.

⁵⁸ [2009] 12 *BLLR* 1145 (CC).

⁵⁹ [2008] 2 *BLLR* 97 (CC).

⁶⁰ *Gcaba* para 56 and *Chirwa* para 41.

⁶¹ *Gcaba* para 56.

⁶² This is evident from provisions contained in New Zealand's ERA 24 of 2000, such as section 113(1) which states that the only recourse for an employee seeking to challenge his or her dismissal is to refer it as a personal grievance to the Authority, thereby abolishing all common law claims in respect of termination of employment.

⁶³ (2001) WL 239756.

⁶⁴ *Johnson* paras 54 and 80.

Allowing unfair labour practices to be dealt with as contractual disputes perpetuates the co-existence of two systems, which is a recipe for chaos.⁶⁵ Based on the pronouncements made by the CC and the manner in which foreign jurisdictions have dealt with the contest between contractual and statutory law, there are strong indications to support a conclusion that contractual recourse has been supplanted by the unfair labour practice provisions.⁶⁶

Notwithstanding these conclusions, one cannot ignore the wording of section 157(2) of the LRA and section 77(3) of the BCEA.⁶⁷ These provisions are open to interpretation, which has given rise to many of the challenges that currently exist. Furthermore, there has been no express disavowal of the use of contractual recourse by the CC, which has led to continued uncertainty in this field of the law, resulting in divergent decisions of the judiciary.

The contest between contract law and labour legislation should therefore be settled through legislative amendments. Despite the fact that such amendments are beyond the scope of this thesis, it is recommended that policy makers revisit the provisions of the LRA and BCEA. Specifically, the sections that aid an interpretation that contract law still has a role to play in resolving labour disputes should be revised.⁶⁸ A final word from the CC which provides unambiguous clarity about the fact that labour law recourse has replaced contractual recourse will also assist in providing a firm endorsement to this effect.

While I am of the view that employees should not be permitted to utilise contractual recourse to challenge benefit disputes, it is appreciated that the contest between contractual and statutory recourse is relevant not only to unfair labour practices in respect of benefits but to other unfair labour practices and unfair dismissals, as well. It would therefore be ill-considered to propose the removal of contractual recourse in one area of labour law (unfair labour practices relating to benefits), whilst the contest between contractual and statutory recourse applies to broader areas of labour law.

⁶⁵ *Johnson* para 80.

⁶⁶ See Chapter 7, paras 7.3.4.3 and 7.3.6.

⁶⁷ See Chapter 7, para 7.4.

⁶⁸ See Chapter 7, para 7.4.

However, the proposed Code of Good Practice has been worded in a manner that encourages the enforcement of benefit disputes through the dispute resolution institutions set up by the LRA, without removing an employees' right to utilise contractual recourse.⁶⁹

9.5 CONCLUSIONS IN RESPECT OF QUESTION FOUR

- Should strike action be permitted to resolve disputes regarding benefits?

In addition to a dispute regarding a unilateral change to benefits constituting a contractual dispute, the judiciary has confirmed that strike action can also be utilised to address such disputes.⁷⁰ This position is based on an interpretation and application of sections 64(4) and 65(1)(c) of the LRA.⁷¹

Although section 64(4) of the LRA provides for the right to strike over unilateral changes to terms and conditions of employment the indicators point to a conclusion that this provision is reserved for unilateral changes that are implemented during the process of collective bargaining over new terms and conditions of employment. Notwithstanding these indicators, section 64(4) as it stands allows for strike action even where the unilateral change is in respect of pre-existing terms and conditions of employment, such as pre-existing benefits. The use of section 64(4) in benefit disputes can only be eliminated through a legislative amendment. It is therefore recommended that policy makers should revisit section 64(4). The phrase “a dispute about a unilateral change to terms and conditions of employment” should be reworded to indicate that it does not apply to disputes over unilateral changes to pre-existing terms and conditions of service. This will eliminate employees' reliance on section 64(4) when seeking to strike over unilateral changes to pre-existing benefits.⁷²

However, in the absence of legislative amendments the applicability of section 64(4) over disputes in respect of unilateral changes to pre-existing benefits can be curtailed through the use of section 65(1)(c) of the LRA.

⁶⁹ See Chapter 7, para 7.4.

⁷⁰ See Chapter 8, para 8.1.

⁷¹ See Chapter 8, para 8.1.

⁷² See Chapter 8, para 8.5.

Section 65(1)(c) specifically prohibits strike action over disputes that must be referred to arbitration in terms of the LRA, or to the LC for adjudication in terms of the LRA or any other employment law. While there is no provision in labour statutes that requires a dispute characterised as a unilateral change to terms and conditions of employment to be referred to arbitration or adjudication, this does not automatically imply that section 65(1)(c) does not find application.⁷³

Section 65(1)(c) is relevant to such disputes, as the substance of a dispute must take priority over its form. This approach has been endorsed by the LAC and the CC.⁷⁴ Giving precedence to the substance of a dispute will result in all disputes relating to pre-existing benefits being justiciable in terms of section 65(1)(c).⁷⁵ The above interpretation respects the divide between disputes of right and disputes of interest, which our law seeks to protect.⁷⁶

In addition to the above, the proposed Code of Good Practice has been worded in a manner that encourages the enforcement of benefit disputes through the dispute resolution institutions set up by the LRA, without explicitly removing an employees' right to strike in such instances. This should discourage employees from seeking to rely on section 64(4) of the LRA.⁷⁷

9.6 OVERALL CONCLUSIONS

The determination of whether an unfair labour practice has been committed, involves a two-stage inquiry. The first stage is to establish whether the applicable dispute resolution bodies have jurisdiction to consider the referred dispute. This will depend on whether the benefit being claimed falls within the definition of a benefit for the purposes of section 186(2)(a). As indicated, a section 186(2)(a) benefit is a pre-existing benefit relating to employee or fringe benefits, salaries or wages and/or re-imbursive allowances.

⁷³ See Chapter 8, para 8.4.

⁷⁴ See Chapter 8, para 8.4.

⁷⁵ See Chapter 8, para 8.4.

⁷⁶ See Chapter 8, para 8.5.

⁷⁷ See Chapter 8, para 8.5.

A benefit acquires pre-existing status if it is provided for in a contract of employment, collective agreement, legislation, a policy or in terms of past practice. In addition, pre-existing status is conferred where the provision of the benefit or right to apply for the benefit is subject to the exercise of employer discretion. This is irrespective of whether the employer discretion stems from a contract, collective agreement, legislation, policy or past practice.

Once it has been confirmed that the subject of the dispute constitutes a benefit, the second stage of the inquiry is to establish whether the conduct of the employer was unfair. The standards that should be applied are both substantive and procedural fairness. An assessment of substantive fairness will determine whether the employer had a fair reason to make the decision that it did. An assessment of procedural fairness will determine whether the employer followed a fair procedure in making the decision.

Despite the fact that there are strong indicators which point to a conclusion that contractual recourse has been supplanted by statutory recourse, such a finding cannot be definitively made. However, the Code of Good Practice: Benefits seeks to position the unfair labour practice as the appropriate means for resolving benefit disputes, without explicitly removing an employee's right to pursue contractual recourse. The Code of Good Practice: Benefits therefore encourages the enforcement of benefit disputes through the dispute resolution institutions set up by the LRA.

Section 64(4) of the LRA provides for the right to strike over unilateral changes to terms and conditions of employment, which has been interpreted by the courts to include unilateral changes to pre-existing benefits. However, the judiciary can limit the use of this section in benefit disputes by prioritising the substance of the dispute over its form. This will bring section 65(1)(c) into operation as employees cannot strike over disputes that are arbitratable. Apart from the role that can be played by section 65(1)(c) in averting strikes over benefit disputes, the Code of Good Practice: Benefits promotes the pre-eminence of the dispute resolution institutions set up by the LRA, without expressly removing an employees' right to strike. This should encourage employees to utilise the procedures set out in the Code of Good Practice, instead of seeking to rely on section 64(4) of the LRA in enforcing their right to strike.

9.7 RECOMMENDATIONS: A CODE OF GOOD PRACTICE: BENEFITS

This thesis has developed a Code of Good Practice: Benefits. The use of this Code will address the challenges that plague this area of the law. It is therefore suggested that the Code be considered for adoption⁷⁸ and subsequently for incorporation as a Schedule to the LRA, similar to the Code of Good Practice: Dismissal.⁷⁹ This will compel adjudicators to apply the Code when interpreting section 186(2)(a) of the LRA in resolving benefit disputes.⁸⁰

A flow diagram has been formulated and is provided following the Code of Good Practice: Benefits. This diagram provides a summary of the dispute resolution process. It seeks to explain the process in a simple and accessible manner, thereby aiding the understanding of the benefits inquiry.

⁷⁸ Section 203(1) of the LRA 66 of 1995 gives the National Economic Development and Labour Council (NEDLAC) the authority to issue Codes of Good Practice. As per section 203(2) this must be done through publication in the *Government Gazette*.

⁷⁹ The Code of Good Practice: Dismissal is incorporated into the LRA 66 of 1995 as Schedule 8.

⁸⁰ Section 203(3) requires that any person who is interpreting or applying the LRA must take into account any relevant Code of Good Practice.

CODE OF GOOD PRACTICE: BENEFITS

1. Introduction

- (1) This Code is intended to provide practical guidance to commissioners (of the CCMA and Councils) on how to deal with unfair labour practices relating to the provision of benefits, as provided for in section 186(2)(a) of the Labour Relations Act (LRA). This Code must also be taken into account by the Labour Courts when reviewing unfair labour practice disputes and by the Labour Appeal Court when considering appeals.
- (2) The employment relationship is characterised by inequality, with the employer being the ultimate bearer of power. As a result of the subordinate and dependent position occupied by employees, employers have the authority to make decisions which may negatively impact on or disadvantage employees during their tenure of employment. Effective measures are needed to regulate employer power in order to curb employer abuse and to protect employees, thereby giving effect to the objectives of the LRA. One such measure is the unfair labour practice relating to the provision of benefits, which provides recourse to employees who are or have been unfairly treated in relation to employer decisions that affect their rights or entitlements to various forms of existing employee remuneration.
- (3) The protection of employee rights through this mechanism plays an important role in the law, thus requiring that such protection be well defined. This will ensure that this dispute resolution mechanism achieves its intended role of ensuring the fair treatment of employees.
- (4) The objective of this Code is to emphasise what the definition of benefits entail and to outline the standards of fairness that must be applied when considering whether employer conduct is fair.
- (5) The Code enhances fairness towards employees by providing a clear understanding of the types of disputes that qualify as unfair labour practices. It further sets out the responsibilities of employees in proving such disputes. In addition, it promotes fairness towards employers by providing clarity on the type of employer conduct that may be challenged as a benefits dispute.

- (6) This Code aims to promote legal certainty in an important area of the law, thereby positioning the unfair labour practice as an effective tool in encouraging fair employee treatment.

2. Preventing Benefit Disputes

While this Code seeks to set out the inquiry that must be conducted to determine whether an unfair labour practice has been perpetrated by an employer, it is important that attempts be made by employers to prevent such disputes. This may be achieved by firstly formulating proper contracts of employment, collective agreements and policies. If these are properly formulated there should be minimal disputes regarding the types of benefits to which employees are entitled. Secondly, employers must correctly implement their duties and responsibilities as set out in these written instruments. This requires that employers take full cognisance of the implications of the benefits provided for. It is imperative that contracts of employment, collective agreements and policies create certainty and consistency regarding the provision of benefits.

3. Benefit Dispute Inquiry

Section 191 of the LRA sets out the procedure that must be followed by an employee alleging that an unfair labour practice has been committed. This includes an unfair labour practice relating to the provision of benefits. Section 191(1) requires that the dispute be referred in writing to a council, or if no council has jurisdiction, to the CCMA. The resolution of benefit disputes is therefore the responsibility of the council or CCMA.

In addressing unfair labour practice disputes relating to the provision of benefits, the commissioner of the council or CCMA must embark on a two-stage inquiry. The first stage of the inquiry requires the commissioner to determine whether the subject of the unfair labour practice dispute constitutes a section 186(2)(a) benefit.

If the subject matter of the dispute does not constitute a benefit, the dispute must be dismissed. If it is confirmed that the subject matter does constitute a benefit, the commissioner must proceed to the second stage of the inquiry, which is determining whether the employer's conduct in relation to the provision of the benefit(s) was fair.

4. Stage One of the Inquiry

(1) Defining Benefits

Benefits, as envisaged by section 186(2)(a), constitute "pre-existing" forms of employee remuneration. Employee remuneration comprises both employee or fringe benefits and salaries or wages. Employee or fringe benefits constitute both monetary and non-monetary benefits. In addition, benefits are inclusive of reimbursive allowances. This is an allowance in money that is awarded to an employee to compensate for expenses incurred by the employee in carrying out his or her duties. An example of a re-imbursive allowance is a travel or transport allowance which is intended to compensate an employee for the expenses incurred in utilising his or her private vehicle for work purposes.

"Pre-existing" entails the following:

- (a) Benefits that are provided for in a contract of employment, collective agreement, legislation or policy (written policy, circular, notice, personnel manual or any other written communication issued by the employer), irrespective of whether such benefits are automatically provided for, or are provided for subject to compliance with certain requirements and/or are provided subject to the exercise of employer discretion.
- (b) Benefits for which the employee has the right to apply. This right may arise from a contract of employment, collective agreement, legislation or policy (written policy, circular, notice, manual or any other written communication issued by the employer).
- (c) Benefits that are claimed based on the previous actions of the employer in granting the benefit to the employee concerned and/or to other employees,

irrespective of whether such benefits were automatically provided for, or were provided for subject to compliance with certain requirements and/or were provided subject to the exercise of employer discretion.

- (d) Benefits that are claimed based on the previous actions of the employer in allowing the employee concerned and/or other employees to apply for the benefit.

(2) Onus in Establishing Pre-Existing Benefit(s)

Based on the above definition, a commissioner in determining an unfair labour practice dispute must first establish whether the subject matter of the dispute or the item being claimed as a benefit, constitutes a pre-existing benefit.

To establish whether the applicant's dispute relates to a pre-existing benefit, the commissioner must assess whether:

- (a) There is a written instrument that provides for the granting of the employee or fringe benefit, salaries or wages or re-imbursive allowance being claimed, or
- (b) there is a written document that provides for the right to apply for the employee or fringe benefit, salaries or wages or re-imbursive allowance being claimed, or
- (c) if no written document exists, whether the employer has in the past granted the employee the fringe benefit, salaries or wages or re-imbursive allowance being claimed, or allowed the employee to apply for the employee or fringe benefit, salaries or wages or re-imbursive allowance being claimed.

The onus is on the employee to produce the written document that provides for the granting of the benefit or the right to apply for the benefit.

Unlike with items (a) and (b) as set out in 4(1) above, the commissioner cannot when considering items (c) and (d) as set out in 4(1) above, assess a document to determine whether it provided for the granting of a benefit or a right to apply

for a benefit. An employee who seeks to rely on past practice for the existence of a pre-existing benefit must produce evidence to show that the benefit was granted to him or her and/or to other employees in the past, or that he or she and/or other employees were allowed to apply for the benefit in the past.

5. Stage Two of the Inquiry

(1) Standards of Fairness

The standards of fairness that must be applied in order to establish whether the conduct of the employer in relation to the provision of benefits is fair, are both substantive and procedural fairness.

(2) Substantive Fairness

- (a) The assessment of substantive fairness seeks to establish whether the employer had a fair reason to make the decision that it did in relation to the benefit being disputed. The employer's commercial or operational rationale can be a fair reason, provided that these are *bona fide* and rationally justifiable operational requirements. Other reasons will be acceptable, as long it is found to be a fair reason.
- (b) A decision that is arbitrary, capricious, biased, unjustifiably inconsistent or based on insubstantial reasons will generally constitute an unfair decision.
- (c) Any person determining whether the employer's conduct is substantively fair must establish the following:
 - (a) Whether the employer infringed the employee's right or entitlement to receive the benefit in question.
 - (b) An employer infringes an employee's right or entitlement to a benefit by doing one of the following:
 - (i) Refusal to grant the benefit; and/or
 - (ii) removal of the benefit; and/or
 - (iii) reduction of the benefit; and/or
 - (iv) rejection of an application for the benefit.

- (c) If the employer committed an infringement as in (b) above, it must be established whether the infringement was fair.
- (d) The factors to be taken into account in assessing fairness includes aspects such as:
 - (i) The reason(s) why the employee considers the decision to be unfair;
 - (ii) the justification provided by the employer to support the fairness of the decision;
 - (iii) all the relevant facts and evidence provided by both parties;
 - (iv) where applicable, the impact on the employer's business if the decision in question was not taken;
 - (v) the impact or consequences of the decision on the employee;
 - (vi) whether the objective sought to be achieved by the employer in taking the decision, could have been achieved through an alternative decision;
 - (vii) any inconsistency with other or previous decisions taken by the employer in respect of the same or a similar matter;
 - (viii) where inconsistency is present, the employer's reasons for the inconsistent treatment; and
 - (ix) any other factors that may be relevant.
- (e) In respect of inconsistency, the onus is on the employee to raise this aspect. The employee is required to produce evidence to illustrate the inconsistent treatment, after which the employer must provide an explanation for the inconsistent treatment. However, where the employee does not possess such evidence, the employee must at least be able to show that attempts were made to obtain evidence from the employer relating to the alleged inconsistency. Where the employer refused to provide such information or ignored the employee's request, the commissioner must place the onus on the employer to show that the inconsistency raised by the employee did not occur.

- (f) After objectively assessing the totality of factors relevant to the dispute, the commissioner must make a value judgment as to whether the employer's decision was fair or not.

(3) Procedural Fairness

- (a) The assessment of procedural fairness seeks to establish whether the employer followed a fair procedure in making the decision in respect of the provision of the benefit/s at issue.
- (b) In assessing procedural fairness, a distinction must be drawn between three categories of decisions. These are decisions in respect of:
 - (i) benefits provided for contractually (including those provided for in collective agreements),
 - (ii) benefits provided for legislatively, and
 - (iii) benefits provided for in policy, in terms of practice or granted or offered subject to employer discretion, irrespective of whether the employer discretion is exercised in terms of a contract, collective agreement, legislation, policy or past practice.
- (c) For the first category, a process of negotiation must have been embarked upon and agreement must have been reached to change the contractual terms.
- (d) For the second category, there is no procedure that can result in the alteration or removal of benefits being fair, as negotiation is not an option in such instances.
- (e) For the third category, a consultation process must have been followed. The consultation process entails the following:
 - (i) Informing the employee of the intended decision and the reason(s) for the decision. This can be done either through a meeting or through written correspondence.
 - (ii) Affording the employee a reasonable opportunity to make representations.
 - (iii) Giving due consideration to the representations made when making the final decision.

- (iv) Communicating the final decision to the employee, preferably in writing.

6. Summary of the Process

The unfair labour practice relating to the provision of benefits can be used by an employee to challenge an employer's alleged refusal to grant a benefit; and/or the employer's conduct of removing a benefit; and/or the employer's conduct of reducing a benefit and/or an employer's rejection of an application for a benefit.

When such a dispute comes before a commissioner, the commissioner must embark on a two-stage inquiry. The first stage of the inquiry must determine whether the benefit complies with the definition as set out in this Code. Two aspects must be considered in this regard. The first is whether the benefit constitutes an employee or fringe benefit, and/or whether it constitutes a form of salaries or wages and/or whether it constitutes a re-imbursive allowance. The second is whether the benefit is a pre-existing benefit, as per the definition of "pre-existing" outlined in the Code.

If it is established that the issue in dispute qualifies as a benefit, the commissioner must proceed to the second stage of the inquiry. Here, the commissioner must first establish whether the alleged contravention by the employer took place. If the employer did engage in conduct that contravened the provision of a benefit, the commissioner must determine whether the contravention was fair. In order to determine fairness, the commissioner must examine whether the decision of the employer was substantively fair (did the employer have a fair reason) and whether the decision of the employer was procedurally fair (did the employer follow a fair procedure). If the employer's actions were both substantively and procedurally fair, an unfair labour practice has not been committed. However, if the employer's actions were substantively and procedurally unfair, or either substantively or procedurally unfair, an unfair labour practice has been committed.

A flow diagram depicting the inquiry documented above follows.

FLOW DIAGRAM: ULP BENEFIT DISPUTES



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