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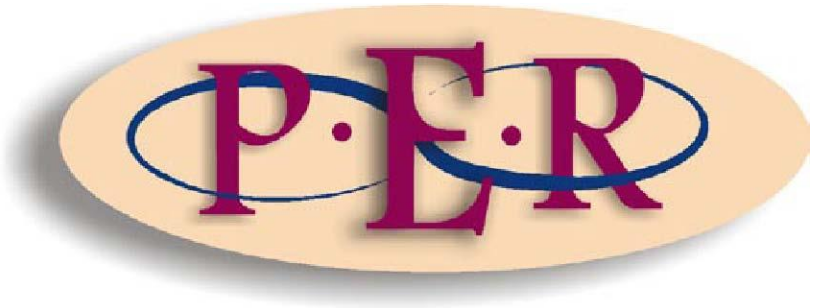

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WHAT CONSTITUTES A BENEFIT BY VIRTUE OF SECTION 186(2) OF THE *LABOUR RELATIONS ACT* 66 OF 1995? *APOLLO TYRES SOUTH AFRICA (PTY) LTD V CCMA* 2013 5 BLLR 434 (LAC)

E Fourie*

1 Introduction

In the *Apollo* case[1] the court once again had to determine the content of benefits in terms of section 186(2)(a) of the *Labour Relations Act* 66 of 1995 (hereafter the LRA). Although the distinction between remuneration and benefits often seems unclear, it is an important distinction, as unfair conduct by an employer in relation to the provision of benefits may constitute an unfair labour practice in terms of section 186(2)(a). An unfair labour practice dispute can be resolved through conciliation and arbitration; however, disputes about remuneration are excluded from the jurisdiction of the CCMA. The court in this case firstly had to determine what constitutes a benefit as contemplated by section 186(2) of the LRA, and secondly had to determine if a benefit was limited to an entitlement which arises *ex contractu* or *ex lege*, or if it could also include a grant in terms of a policy or practice subject to the employer's discretion.

2 The facts in the *Apollo* case

The facts are summarised in the judgment of the Labour Appeal Court.[2]

Hoosen, a 49-year-old female, was employed by Apollo Tyres South Africa (Pty) Ltd (the appellant) from 1 April 1984. Apollo Tyres, a tyre manufacturing company, struggling under economic pressures, introduced an early retirement scheme for certain employees. Through the introduction of this scheme the company tried to reduce the number of employees in accordance with the decrease in demand for its products. Employees were informed of this decision through various meetings and notices placed on the notice boards at the premises of the appellant. According to the said notice the scheme applied only to staff between the ages of 46 and 59 who were

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1 *Apollo Tyres South Africa (Pty) Limited v CCMA* 2013 5 BLLR 434 (LAC) (hereafter the *Apollo* case).

2 *Apollo* case paras 2-13.

paid on a monthly basis. The successful applicant would receive two months' additional pay and an *ex gratia* payment calculated on a sliding scale based on the age of the applicant.

The third respondent (Hoosen) enquired about the scheme; however, she was refused entry into the scheme and was informed that to qualify for the early retirement scheme applicants had to be between 55 and 59. When asking for reasons she was sent from pillar to post. She enquired if she could appeal against the decision and mentioned that the phrase "subject to the management's discretion" could be abused, but was told by her immediate senior that his mind was made up and that she was to be replaced. Hoosen resigned and whilst serving notice she referred an unfair labour practice dispute to the CCMA. The argument raised at the CCMA was that the early retirement package was not a benefit in terms of section 182(2) and in any event that it was not unfair not to grant Hoosen the early retirement package. The commissioner found that it was unfair to deny Hoosen entry into the scheme. The court *a quo* found that the commissioner's ruling that the scheme was a benefit within the ambit of section 186(2)(a) of the LRA was a decision that fell within the band of reasonableness. According to the Labour Appeal Court the question before the court should not have been whether the commissioner reached a conclusion that a reasonable commissioner could not reach, but whether the second respondent was correct in his ruling that the CCMA did have jurisdiction to adjudicate the dispute. In other words, was his finding right or wrong?[3] Leave to appeal was granted by the Labour Appeal Court.

3 The judgment

The issue that this court (the Labour Appeal Court) had to consider was formulated in the appellant's petition:

> The principal issue on which the Applicant seeks leave to appeal is whether the early retirement scheme initiated by the Applicant and for which Hoosen applied and was refused entry, constituted a benefit as contemplated in section 186(2) of the Labour Relations Act 66 of 1995.[4]

[3] *City of Cape Town v SAMWU obo Jacobs* 2009 9 BLLR 882 (LAC).
[4] *Apollo* case para 18.

The court thus had to determine the meaning of benefits as provided for by section 186(2)(a) of the LRA.[5] In numerous cases courts in South Africa have endeavoured to give content to this concept left undefined by the legislature.

In 1997 the Labour Court delivered judgment in *Schoeman v Samsung Electronics SA (Pty) Ltd,*[6] concluding that commission is a part of remuneration. The court made reference to the definition of benefits as contained in the 6th edition (edited by JB Sykes) of the *Concise Oxford Dictionary*, as an advantage or an allowance to which a person is entitled under insurance or social security, or as a member of a benefit club or society. However, it is clear that this definition does not uniquely provide for benefits in terms of an employment contract.[7] Considering that a wide interpretation of benefits may indirectly limit the right to strike, the court stated:

> Commission payable by the employer, forms part of the employee's salary. It is *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 it is not. Remuneration is always a term and condition of the employment contract.[8]

The judgment does not provide a definition of "something extra". Distinguishing employer arrangements for a pension, a provident fund or medical aid from remuneration provides an artificial distinction, as these contributions to different schemes are often agreed to because this is a tax-effective way of structuring an employment package.[9] According to Revelas J, if the legislature wanted to include remuneration under the auspices of the residual unfair labour practice, it would have done so expressly.[10] It is clear from the above that in the *Schoeman* judgment the court endeavoured to distinguish between the concepts of remuneration and benefits

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5 S 186(2)(a) of the *Labour Relations Act* 66 of 1995 (hereafter the LRA) states: "Unfair labour practice means any unfair act or omission that arises between an employer and employee involving- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provisions of benefits to an employee".

6 *Schoeman v Samsung Electronics SA (Pty) Ltd* 1997 10 BLLR 1346 (LC).

7 *Schoeman v Samsung Electronics SA (Pty) Ltd* 1997 10 BLLR 1346 (LC) 1368. The employee in this case did not claim a new right, but was trying to hold on to an existing entitlement, namely her commission, and was seeking to enforce the terms of her contract.

8 *Schoeman v Samsung Electronics SA (Pty) Ltd* 1997 10 BLLR 1346 (LC) 1368G.

9 Le Roux 1997 *CLL* 97.

10 *Schoeman v Samsung Electronics SA (Pty) Ltd* 1997 10 BLLR 1346 (LC) 1368.

and, as subsequently illustrated by numerous other decisions, this was not an easy task. Given the wide definition of remuneration in section 213, it was clear that the court would experience difficulties in finding what something extra or apart from remuneration was.[11] In this case, a strict approach was adopted as to the scope of item 2(1)(b) of the residual unfair labour practice.

In *Northern Cape Provincial Administration v Commissioner Hambridge*[12] the court upheld the narrow definition of benefits and categorised remuneration as *essentialia* of a contract of employment and that other rights or advantages or benefits accruing to an employee by agreement are termed *naturalia*.[13] Landman J then stated that the word benefit as provided in item 2(1)(b) means at least a non-wage benefit, hereby concurring with Revelas J in the *Samsung* case.[14] This decision by the Labour Court has been criticised, as the distinction between benefits and remuneration seems artificial, as there is often an overlap between benefits and remuneration.[15]

On appeal, Mogoeng AJA stated that the legislature did not intend to facilitate the creation of new benefits through item 2(1)(b), but to provide for disputes about benefits to which an employee is entitled *ex contractu* or *ex lege*.[16] The court somehow lost touch with the purpose of the unfair labour practice concept, namely to provide employees with a remedy where the employee does not have a contractual remedy.[17] The court once again highlighted that disputes of interest should be dealt with through the collective bargaining process.

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11 S 213 of the LRA defines remuneration as "any payment of money or in kind, or both in money and kind, made or owing to any person in return for that person working for any other person, including the State, and that remunerate has a corresponding meaning".

12 *Northern Cape Provincial Administration v Commissioner Hambridge* 1999 20 ILJ 1910 (LC).

13 *Northern Cape Provincial Administration v Commissioner Hambridge* 1999 20 ILJ 1910 (LC) paras 13F-G, 13G-H. The court found some support for the distinction in the *Shorter Oxford Dictionary*, where the term "fringe benefit" is defined as "a perquisite or benefit paid by an employer to supplement a money wage or salary". In para 14H, the court also referred to the 1988 ILO *Wages – A Worker's Education Manual,* where it states that a fringe benefit is a supplement for which no work is done.

14 *Northern Cape Provincial Administration v Commissioner Hambridge* 1999 20 ILJ 1910 (LC) para 14I.

15 Du Toit *et al Labour Relations Law* 561.

16 It must be pointed out that the term *ex lege* was used by Moegoeng AJA with reference to the *Public Service Act* 103 of 1994, as the relevant statutory provision was examined in an attempt to determine what the obligations of the public servant are. On appeal the case was reported as *HOSPERSA v Northern Cape Provincial Administration* 2000 21 ILJ 1066 (LAC) para 9.

17 Du Toit *et al Labour Relations Law* 559.

In *Gaylard v Telkom SA Ltd*[18] the court emphasized that too wide an interpretation of the term "benefit" so as to include even wages was not the legislature's intention, as it would undermine the rights to strike and lock-out. In *Sithole v Nogwaza*[19] the court referred to a common thread running through all the decisions, namely that a benefit constitutes a material benefit and the benefit must have some monetary value to the recipient and cost to the employer. These judgments confirm the underlying policy considerations by the courts to keep the distinction between disputes over rights and disputes of interest separate.[20]

In the *Apollo* case the Labour Appeal Court criticized the distinction between salaries and remuneration drawn by the courts and described it as artificial and unsustainable. According to the court the definition in section 213 of the Act is wide enough to encompass wages, salaries, and most if not all extras or benefits.[21] Today many benefits are payment in kind and form part of the *essentialia* of employment contracts.[22]

The court supported the statement in *Protekon (Pty) Ltd v CCMA*[23] that the concern that a wide definition of benefit might curtail the right to strike is no longer valid. The judge remarked that there is no closed list of benefits that fall within the ambit of the statutory provision and that there can be little doubt that most pension, medical aid and similar schemes fall within the scope, despite the fact that employer contributions to these schemes are covered by the definition of remuneration.[24] This remark by

18 *Gaylard v Telkom SA Ltd* 1998 19 ILJ 1624 (LC) para 22. The court excluded wages and salaries, as well as accumulated leave from the concept.

19 *Sithole v Nogwaza* 1999 20 ILJ 2710 (LC).

20 A wide definition could undermine the constitutionally entrenched right to strike in s 23. In paras 52A-B the court referred to interpretation provided by PAK Le Roux in a conference paper: Rights disputes are normally seen as disputes concerning the existence, content and extent of legal rights and the interpretation of a legal rule. Disputes of interest, on the other hand, are generally regarded as being concerned with the creation of new rights rather than the interpretation and application of existing rights. See Le Roux "Criteria in Interest Arbitrations".

21 *Apollo* case para 26.

22 The court referred to Le Roux's discussion of the *Samsung* case, where he highlights that pension, provident, medical aid, group life and disability schemes are often important issues during the negotiation of an employment contract, and contributions to these schemes are often agreed to on the basis of a "salary sacrifice", because it is beneficial for tax purposes. *Apollo* case para 26. Also see Le Roux 1997 *CLL* 97.

23 *Protekon (Pty) Ltd v CCMA* 2005 7 BLLR 703 (LC). The employer in the *Protekon* case agreed that the travel concession did constitute a benefit in terms of s 186(2)(a).

24 *Protekon (Pty) Ltd v CCMA* 2005 7 BLLR 703 (LC) para 20.

Todd AJ, although *obiter*, seems to be more realistic and in line with Le Roux's notions stated above. In the *Protekon* case, with reference to the *HOSPERSA*[25] case, the judge confirmed that the unfair labour practice jurisdiction cannot be used to assert an entitlement to new benefits or to new forms of remuneration or new policies, as this should be left to the collective bargaining process.[26]

Although the Labour Appeal Court found that this might be true, it seems to have found the above statement contrary to what was held in the *Maritime Industries* case. This case does make reference to the hybrid nature of some disputes, and Zondo JP stated that:

> However, if a dispute about a unilateral change of conditions of employment can properly fall within the provisions of item 2(1)(b) of Schedule 7, it will nevertheless be arbitrable. "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.[27]

Although the Act provides employees with a choice in certain instances, where, for example, a rights dispute may also give rise to a lawful strike, this does not mean that employees involved in strike action can resort to arbitration or adjudication at the same time over the same dispute.[28]

The arguments before this court were that an employee may not utilise the provisions of section 186(2)(a) to create a new right and that section 186(2)(a) intended to give employees recourse only in the case of unfair conduct in terms of an existing right. It was submitted that the purpose of section 186(2)(a) was to assist employees such as Hoosen who have no other remedy in legislation or the common law. This notion

25 *HOSPERSA v Northern Cape Provincial Administration* 2000 21 ILJ 1066 (LAC).
26 *Protekon (Pty) Ltd v CCMA* 2005 7 BLLR 703 (LC) para 22.
27 *Maritime Industries Trade Union of SA v Transnet Ltd* 2002 23 ILJ 2213 (LC) para 106.
28 Le Roux 2006 *ILJ* 62. See s 65(2)(a) of the LRA in terms of matters dealt with in ss 12-15 and s 189A of the LRA, which affords employees the election to resort to industrial action on the substantive basis of the dismissal or referral to the Labour Court.

supports the purpose and effect of the residual unfair labour practice jurisdiction and is in contrast to the findings in *HOSPERSA.*[29]

In the *Apollo* judgment, Musi AJA supported the statement in *Protekon* that the mere existence of a discretion exercised by an employer does not deprive the CCMA of jurisdiction. In line with the *Protekon* judgment the court highlighted two instances where the CCMA would have jurisdiction to consider the fairness of the employer's conduct, namely where the employer fails to comply with a contractual obligation that it has towards the employee and where the employer exercises a discretion that it enjoys in terms of a contract of the scheme conferring the benefits.[30] According to the *Apollo* case the second instance will include matters where the employer enjoys a discretion in terms of a policy or practice relating to the provisions of benefits, as the court in *Protekon* used the words "contractual terms" loosely, and in the context of that judgment this meant when the employer exercises a discretion under the terms of the scheme.

In this case the contract did not provide for early retirement benefits and according to the *HOSPERSA* judgment, the acceleration of the benefits (early retirement) diminished its value as a benefit, as Hoosen (the respondent) had no contractual right to the accelerated retirement benefits. The *HOSPERSA* premise that a benefit must be *ex contractu* or *ex lege* leaves the employee in this case without a remedy, and the implications are that an employee who refers an unfair labour practice relating to training or promotion does not have to show that he or she has a right to promotion or training in order to qualify for a remedy. However, when an employee wants to use the same remedy in relation to benefits, he or she now has to show a right or entitlement *ex contractu* or *ex lege*. Being the only employee affected, Hoosen would also be denied the right to strike. The court then stated:

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29 *HOSPERSA v Northern Cape Provincial Administration* 2000 21 ILJ 1066 (LAC) paras 52A-B. The court referred to interpretation provided by PAK Le Roux in a conference paper: Rights disputes are normally seen as disputes concerning the existence, content and extent of legal rights and the interpretation of a legal rule. Disputes of interest, on the other hand, are generally regarded as being concerned with the creation of new rights rather than the interpretation and application of existing rights. See Le Roux "Criteria in Interest Arbitrations" and *HOSPERSA v Northern Cape Provincial Administration* 2000 21 ILJ 1066 (LAC) para 9.

30 *Apollo* case para 46.

> Clearly the notion that the benefit must be based on an *ex contractu* or *ex lege* entitlement in a case like this would render the unfair labour practice jurisdiction sterile.[31]

After an evaluation of the various attempts by our courts to provide a definition, the Labour Appeal Court stated:

> … a benefit in terms of section 186(2)(a) can be defined 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 offered or granted to an employee in terms of a practice or policy subject to the employer's discretion.[32]

The court found that the early retirement scheme was a benefit, and that by not granting it to Hoosen the employer committed an unfair labour practice. Hoosen did not have a contractual entitlement to the early retirement benefits and the granting of this benefit was subject to the employer's discretion. This definition means that the judgments in *HOSPERSA, GS4 Security* and *Scheepers* are incorrect. The only other issue that must then be considered is if the discretion was exercised unfairly. Only two qualifying criteria for the early retirement benefits were conveyed to the employees, namely age and being an employee paid on a monthly basis. It was only later on that the disqualifying age factor (between 55 years and 59 years old) was added, and that in order to qualify if aged below 55 the employee must suffer from ill-health. The employer kept on changing the criteria and it is evident that there was no fair, acceptable or rational reason to deny the respondent participation in the scheme. The employer was not exercising his discretion fairly. It was decided that the employer in this case had committed an unfair labour practice relating to the provision of benefits in terms of section 186(2)(a).

4 Evaluation

Clear guidelines had been developed with regard to promotion, demotion and probationary status by our courts and arbitrators, so why was it so difficult to give content to the provision of benefits? The term "benefits" is not defined in this Act or any other legislation, and the South African courts were tasked with defining and clarifying this concept – something that turned out to be an onerous task. It seems

31 *Apollo* case para 48.

32 *Apollo* case para 50.

that in their endeavours not to unduly limit the right to strike, the courts somehow neglected the original aim of categorizing some labour practices as unfair, namely to protect employees who are without a remedy. The courts insisted that a benefit is something arising out of a contract or law; however, in these instances employees would have recourse to the ordinary courts. The narrow interpretation of the term "benefits" by South African courts can perhaps be ascribed to the courts' quest to uphold the distinction between disputes of right and disputes of interest, and therefore in their attempt to separate benefits form remuneration they created a very artificial divide.[33] The courts therefore upheld the restrictive interpretation of benefits to uphold the divide between disputes of interest and disputes of rights and to ensure that issues that should be the subject of negotiation could not become issues that can be decided by an arbitrator.[34]

In the *Apollo* case the Labour Appeal Court declined to follow three earlier Labour Appeal Court judgments, namely, *HOSPERSA v Northern Cape Administration*,[35] *Gauteng Provinsiale Administrasie v Scheepers*[36] and the unreported judgment of *G4S Security Services (SA) (Pty) Ltd v NASGAWU.*[37]

The judgment in *Protekon* represented a wider interpretation of the concept of benefits and a focus on employer conduct. According to this case the purpose of the unfair labour practice provision with reference to benefits is to scrutinize employer conduct where the employer exercises discretion in relation to the provisions of benefits, and to regulate these discretionary powers. In the *Protekon* case the court divided the provisions of benefits into two categories, namely an issue in dispute regarding a demand by employees that certain benefits be granted or reinstated

33 A dispute of right refers to an infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or legislation, while a dispute of interest refers to the creation of a new right.

34 S 191(5) of the LRA provides that disputes in respect of unfair labour practices must be referred to arbitration and s 65(1)(c) prohibits strikes or lock-outs when an issue can be referred to arbitration. Since unfair labour practices are disputes about rights and not disputes of interest, a dispute over benefits must be classified as a dispute of rights to fall within the scope of the protection offered by the unfair labour practice regime.

35 *HOSPERSA v Northern Cape Provincial Administration* 2000 21 ILJ 1066 (LAC).

36 *Gauteng Provinsiale Administrasie v Scheepers* 2000 7 BLLR 756 (LAC).

37 *G4S Security Services (SA) (Pty) Ltd v NASGAWU* unreported case number DA3/08 of 26 November 2009.

without consideration of the fairness of the employer's conduct, and, secondly, where the issue in dispute concerns the fairness of the employer's conduct.[38] As no party has a right to refer the first issue to arbitration, there seems to be no restriction to industrial action; however, when a dispute concerns the fairness of the employer's conduct it is clearly justiciable. It is important that the court considers the substance of the dispute and not the form in which it is presented. This will require an assessment of the facts pertaining to each case and determining the true nature of the dispute. The fact that granting a benefit might be discretionary does not oust the CCMA of jurisdiction.

What becomes clear from the *Apollo* case is that the unfair labour practice jurisdiction cannot be used to assert an entitlement to new benefits, new forms of remuneration or new policies, and this finding appears to be correct. Under the unfair labour practice regime the conduct of the employer may be scrutinised by the CCMA in at least two instances, namely when an employer fails to comply with a contractual obligation, an entitlement or right that an employee may have in terms of a statute, and secondly when an employer exercises a discretion under the contractual terms of a scheme conferring a benefit, including situations where the employer enjoys a discretion in terms of benefits provided in terms of a policy or practice – rights created judicially. This decision places the emphasis on the employer's actions and the unfairness of such acts or omissions.[39]

After a court has established that the issue falls under the ambit of section 186(2)(a) and involves the discretion of the employer, it must then consider if the discretion was exercised unfairly. In determining the issue of unfairness the court referred to the 2nd edition of Du Toit *et al*, though the 5th edition, known as *Labour Relations: A Comprehensive Guide* (2006), referred to the concept at page 486, and stated that unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether through neglect or intended. The court found that the employee qualified to participate and was unfairly disallowed

38 *Protekon (Pty) Ltd v CCMA* 2005 7 BLLR 703 (LC).
39 Also see *IMATU obo Verster v Umhlathuse Muncipality* 2011 9 BLLR 882 (LC).

to do so as the employer did not exercise its discretion fairly and continued to shift the goal posts.

It is clear from the judgment that a dispute that arises *ex contractu* or *ex lege* can fall within the scope of section 186(2)(a); however, the court found the *HOSPERSA* approach untenable – ie that the benefit must be an entitlement rooted in a contract or legislation. As such, an employee will be able to refer a contractual dispute to arbitration or to the Labour Court on the basis of its being a contractual claim. The arbitration option will avoid the expense of litigating in the Labour Court and will certainly be the more speedy option. However, as indicated by Le Roux, the cost of litigating in the CCMA may be underestimated when dealing with a vague and often subjective concept of fairness and the uncertainty surrounding the law relating to benefits. He also indicates that the employer will now be able to raise not only contractual defences but also broader fairness defences during arbitration.[40]

The court's approach that discretionary decisions by the employer should be covered by section 186(2)(a) must be applauded, as employees previously left without a contractual remedy can now be covered. This means that the unfair labour practice provision in terms of benefits was designed for cases where the employee has no remedy in contract or common law. However, the judgment does not clarify what exactly can be understood by judicially created rights or what constitutes a policy or a practice and we are once again left with concepts that are not given clear content. Although Cheadle argued in 2006 that the inclusion of unfair conduct relating to benefits appears not to have any independent reason for inclusion, the Apollo decision illustrates one of the reasons for inclusion, as employees affected by a discretionary decision are now provided with a remedy.[41]

An employee bringing a claim under section 186(2) of the LRA merely needs to show that a disputed payment or practice exists in the workplace and that the entitlement is rooted in a contract, legislation, judicial ruling, discretionary advantage or privilege and was unfairly denied to him. It is clear from this judgment that the employee

40 Le Roux 2013 *CLL* 79.
41 Cheadle 2006 *ILJ* 663.

cannot use the provisions in section 186(2) to create new rights. Claims brought under the auspices of section 186(2) will be decided on the specific facts and the conduct of the employer will be the focus. The employer can endeavor to show fair reasons for not providing the benefit.

The uncertainty surrounding the concept benefit was created not by the courts but rather by the legislature, as it is not defined and clearly has a wide ambit. Cheadle's[42] argument in 2006 that the time had come to abandon the concept now seems futile; however, dare we hope for a new, precise definition from the legislature? This judgment also illustrates the concluding remarks by Adolph Landman that unfair labour practice has crept into the heart of our labour law jurisprudence, and, as he predicted then, 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 being unfair and inequitable.[43]

42 Cheadle 2006 *ILJ* 663.
43 Landman 2004 *ILJ* 812.

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Legislation

Labour Relations Act 66 of 1995

Public Service Act 103 of 1994

LIST OF ABBREVIATIONS

CLL	Contemporary Labour Law Journal
CCMA	Commission for Conciliation, Mediation and Arbitration
ILJ	Industrial Law Journal
IJCCLIR	International Journal of Comparative Labour Law and Industrial Relations
LRA	Labour Relations Act 66 of 1955