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Bargaining Councils have a long history in South African labour law and industrial relations. The first industrial councils, the predecessors to bargaining councils, were established in the 1920’s in terms of the Industrial Conciliation Act of 1924.

In the 1970’s, the period in which many if not most of the unions currently affiliated to COSATU have their origins, industrial councils were the primary collective bargaining fora. They had four important characteristics. The first was that, as their name indicated, the collective bargaining that took place within these bodies took place at industry level. An industrial council had “jurisdiction” over an industry as defined in its constitution.

The second was that, although these councils required the co-operation and consent of both organised employers and unions to be established, the process of their establishment, and their powers and functions once established, were regulated in detail by statute i.e the Industrial Conciliation Act, 28 of 1956 or its predecessors.

The third was that trade unions that permitted Black persons to become members were not permitted to become parties to industrial councils. They were primarily institutions that catered for the interests of skilled “White”, “Coloured” and “Asian” workers.

The fourth was that collective agreements entered into by the trade unions and employers’ organisations that were parties to the council could be extended to employers and employees who were not members of these trade unions or employers’ organisations. The power to extend these agreements included the power to extend them to “Black” workers.

During the course of the late 1970’s and early 1980’s a series of legislative reforms which flowed from the recommendations of the Wiehahn Commission of Enquiry were introduced. The result was that trade
unions catering for the interests of Black workers became entitled to join industrial councils.

The initial reaction of these unions to this possibility was ambivalent, to say the least. The opposition to this possibility was occasioned primarily by two considerations. This first was pragmatic in that the organisational focus of many of these unions was still that of recruiting workers in larger factories. Why should they give up their power base in these large factories (where they were increasingly able to collectively bargain with the employers from a position of power) in favour of bargaining at industry level where their representation and power was diluted? The second was more ideological in nature in that industrial councils were viewed with suspicion. Their establishment and powers were based on statutes enacted by the Apartheid government and they were institutions from which these unions had been excluded by reason of the race of their members.

However, as the membership and powers of these unions grew the attraction of joining industrial councils became evident. By negotiating a minimum wage at industrial council level and then extending this agreement to all employers and employees within the industry (and perhaps retaining the power to negotiate wages in excess of the minimum set at council level with larger employers) the interests of their members could be catered for more efficiently.

By the time that the current Labour Relations Act was being negotiated under the auspices of the National Economic Development and Labour Council in the early 1990’s these unions had become fervent supporters of centralised bargaining at industry level. Indeed, COSATU proposed the establishment of an even more centralised system of collective bargaining within councils with far wider jurisdictional scopes.

Although COSATU did not succeed in its wider aims, the current Labour Relations Act, 66 of 1995 (LRA) states a clear preference for centralised bargaining at industry level though “bargaining councils” - the changed name reflecting the fact that these institutions would also now operate in the public sector. Bargaining councils were also given expanded dispute resolution functions in that unfair dismissal and unfair labour practice disputes falling within their jurisdiction could be conciliated and arbitrated under their auspices.

Bargaining councils have, in the intervening years, grown in importance and have become one of the central features of our industrial relations system. In recent years, however, increasing criticism has been expressed about one of the central features of these bodies, namely their power to negotiate terms and conditions of employment, especially in the form of minimum wages and then, to have these terms and conditions of employment extended to the whole industry over which they have jurisdiction. The argument has been that many councils are dominated by the large employers and unions, and that they use their economic power to impose wages and other terms and conditions of employment on smaller employers which the latter cannot afford – thus reducing competition especially in industries already exposed to the rigours of competition from low-wage countries. This opposition and counter-arguments have been reflected in numerous newspaper articles and the debate reflects divergent economic views and policy options.

This contribution will not deal with these arguments but will describe how these arguments have manifested themselves in at least three sets of litigation. Brief reference will also be made to the latest legal challenge to be brought by the Free Market Foundation.

Before doing so, however, it is necessary to set out the legal framework found in s 32 of the LRA in terms of which agreements can be extended.

**The legal framework**

Section 32 prescribes a two stage process for the extension of collective agreements entered into by bargaining councils.

The first step, prescribed by s 32(1), is that trade unions and employers’ organisations that have entered into a collective agreement, and which therefore bind them and their members, may decide to request the Minister of Labour to extend the agreement to employees and employers that are not members of these unions and employers’ organisations. Certain representivity requirements are set for such decision to be valid.
• The first involves a consideration of the representivity of the trade unions that vote in favour of a decision to request the Minister to extend the agreement. These unions must have as members the majority of union members represented by unions that are party to the council. For example, if Unions A, B and C are parties to a bargaining council and they have a total membership of ten thousand members within the industry, and if Unions A and B vote in favour of extension of the agreement, but Union C does not do so, the decision to extend the agreement will only be valid if Unions A and B have more than 5000 members in that industry.

• The second involves a consideration of the representivity of the employers’ organisations that vote in favour of the decision to request the Minister to extend the agreement. Here the members of the employers’ organisations that vote in favour of the decision must employ the majority of the employees who are employed by members of the employers’ organisation that are party to the council.

Once a valid decision to request the Minister to extend the collective agreement has been taken it is up to the Minister to consider this request. The Minister must take a decision within sixty days of receiving the request. In terms of s 32(2) the Minister must extend the agreement if certain further requirements are met. For example, the employers and employees to whom the agreement will be extended must fall within the bargaining council’s jurisdiction and the agreement must not discriminate against the trade unions, employers’ organisations and their members who did not enter into the agreement. For our purposes, however, two further requirements are the most important.

• The first of these is another representivity requirement set in s 32(3)(b) and s 32(3)(c) of the LRA. Whilst the first representivity requirement set out above, considers the representivity of the parties which supported the decision to request the Minister to extend the agreement within the council itself, the second deals with the requirement of representivity of the parties to the council within the industry over which the council has jurisdiction. As far as employees are concerned, s 32(3)(b) requires that the majority of the employees who will be bound by the extended agreement must be members of the unions that are party to the council – note not members of the unions that agreed to request the Minister to extend the agreement. As far as employers are concerned, representivity is determined with reference to the number of employees employed by members of the employers’ organisations that are party to the council. These employers must employ the majority of the employees who will be bound by the agreement if it is extended.

• The second is that provision must be made in the collective agreement for an independent body to consider appeals “as soon as possible” against decisions not to grant exemptions from the collective agreement. It is also provided that the collective agreement must provide criteria that are “fair and promote the primary objectives” of the LRA to be applied when the independent body considers these appeals. (This must be read with s 30(1)(k) which provides that the constitution of a council must make provision for the granting of exemptions from the council’s collective agreements.)

If the above requirements are met, the Minister must extend the agreement. There is, however, one important qualification to above. The Minister may, in terms of s 32(5), extend the agreement even if the second representivity requirement is not met, provided that she is satisfied that the parties to the bargaining council are “sufficiently representative” within the industry in respect of which the council is registered and further provided that she is satisfied that collective bargaining will be undermined within the industry concerned if the collective agreement is not extended.

If the Minister decides to extend the collective agreement a notice to this effect must be published in
the Government Gazette.

**Challenges to the extension of collective agreements.**

It is perhaps not surprising that the legal challenges (thus far at least) to the extension of collective agreements have arisen in the Metal and Engineering Industry and the Clothing Industry. The former has jurisdiction over one of the larger economic sectors; the latter faces competition from low wage countries.

**National Employers’ Association of South Africa v Minister of Labour (2012) 2 BLLR 198 (LC)**

The proceedings in the Labour Court dealing with this matter attracted significant attention – reflecting the increasing controversy surrounding centralised bargaining within bargaining councils and the power of the Minister of Labour to extend collective agreements. So much so that the Court deemed it necessary to make the following comment –

“[4] This application has aroused a great deal of interest, and generated enough paper to fill some 15 lever arch files, most of it irrelevant. It may be prudent, therefore, to commence this judgment by stating that despite what is suggested in certain of the affidavits filed in these proceedings and in the press, the application does not concern the legitimacy of sectoral bargaining arrangements (either generally or in the metal and engineering sector in particular) nor does it directly concern the constitutionality or legitimacy of the provisions of section 32 of the LRA in the form of the minister’s right to extend collective agreements concluded by bargaining councils to non-parties. The applicants do not seek to challenge the validity of the collective agreement itself; they accept that the signatories to the agreement are bound by its terms. Simply put, the applicants’ case is that the extension by the minister of the collective agreement concluded under the auspices of the bargaining council is invalid; first, because some of the preconditions to extension established by section 32 of the LRA had not been met and secondly, because the meeting of the bargaining council in which it was resolved to request the minister to extend the agreement was invalidly constituted.”

The Applicant in this matter, the National Employers’ Association of South Africa (NEASA) applied to the Labour Court for an order declaring that the decision of the Minister of Labour to extend a collective agreement entered into by the Metal and Engineering Industries Bargaining Council in July 2011 was invalid. It was argued that the decision to extend the agreement was invalid because: the meeting of the bargaining council at which the decision to request the Minister to extend the agreement had been taken was not properly constituted; the provisions in the agreement relating to the granting of exemptions did not comply with s 32; certain provisions of the agreement were void because they were too vague; and, because the employer should have given non-parties to the agreement an opportunity to be heard prior to extending the agreement.

In the alternative, the Court was requested to grant an interim order preventing the bargaining council from enforcing the agreement pending the outcome of an application to review the Minister’s decision to extend the agreement. The Court refused to grant the declaratory as well as the interim relief on the basis that the technical requirements for such relief had not been met. In particular, it refused to grant the order declaring the decision to extend the agreement invalid on the basis that NEASA should review the decision.

The review application was heard some months later in **National Employers’ Association of South Africa & Others v Minister of Labour & Others** (Unreported JR 3062/2011 21/12/2012).

Although NEASA raised other grounds for review, the Labour Court was only called upon to deal with the issue of the representivity of the trade unions that were party to the Council. It was common cause that the Minister had extended the agreement by utilising her powers in terms of s 32(2) of the LRA. In order for her to validly do so, she had to determine whether the unions that were party to the council had as members the majority of the employees who would be bound by the agreement if it were extended.

Shortly before the extension of the collective agreement...
the Registrar of Labour Relations, acting in terms of s 49(4) of the LRA, issued a certificate stating that the bargaining council was a “representative council”. This was based on information provided to the Registrar by the bargaining council itself. This certificate, on which the Minister relied in coming to the decision that both the employers’ organisations and the trade unions that were party to the council met the representivity requirements set in s 32(3), indicated that -

- The total number of employees employed within the jurisdiction of the council was 335 163.
- 172 799 of the employees in the industry were members of the trade unions that were party to the council – ie 51.56 per cent.
- 197 061 of the employees employed within the jurisdiction of the council were employed by members of the employers’ organisations that were party to the council.

The applicant argued that these figures did not enable the Minister to determine whether the unions that were party to the Council actually enjoyed majority representation amongst the employees who would be bound by the agreement. The mere fact that 172 061 employees (ie 51.56 per cent) were members of the trade unions that were party to the council did not mean that they were a majority of the employees that were bound by that agreement. This was because significant numbers of employees (employed by the larger employers) were excluded from the ambit of the collective agreement. After a consideration of the wording of the collective agreement concerned, the Labour Court accepted the applicant’s argument.

The result was that the Minister had based her decision on factual assumptions that were incorrect and this rendered the decision unlawful and reviewable. However, the Court also found that it was “appropriate, just and equitable” to suspend the order of invalidity of the collective agreement. This was because uncertainty would arise in the ranks of employers and employees as to the remuneration and benefits to be provided to employees. This would in all likelihood lead to tension and potentially serious disputes which could undermine orderly collective bargaining; and, there was also the possibility that the Minister of Labour would use the wider discretionary powers granted to her in terms of s 32(5) to extend the agreement. The order was suspended for a period of four months.

**Valuline CC & Others v Minister of Labour & Others (Unreported 5642/2011)**

This matter dealt with an application to the High Court by a group of employers in the clothing industry to set aside a decision taken by the Minister of Labour to extend a collective agreement entered into by the parties to the National Bargaining Council for the Clothing Industry. Alternatively, the Court was asked to declare s 32 unconstitutional and to set aside the Minister’s decision on this basis. It was alleged that s 32 infringed the right to freedom of trade, occupation and profession, and the rights to freedom of association, equality, human dignity and just administrative action.

Much of the judgment deals with issue whether the High Court had jurisdiction to hear the matter and whether the application should have been heard by the Labour Court. The judge found that the High Court did indeed have jurisdiction and proceeded to deal with the merits of the matter. The point in contention was whether or not the Minister of Labour had been entitled to find that the representivity requirement set by s 32(2) had been met.

Once again, in deciding to extend the agreement the Minister of Labour relied on a certificate issued by the Registrar of Labour Relations which did not provide the requisite information too enable the Minister to make a decision as to representivity as prescribed by s 32(2). In addition, the Court found that the Minister should also have taken into account the fact that the Bargaining Council itself, when applying for the extension of the agreement, had supplied information that indicated that the required representivity was not present. The Minister’s decision was set aside on this basis. The Court was also not prepared to suspend the order of invalidity as had occurred in the NEASA decision.

**Free Market Foundation v Minister of Labour & Others JR 13762/2013**

It appears that the Free Market Foundation is challenging the Minister of Labour’s power to extend
collective agreements on a more fundamental basis. Unlike the applicants in the decisions described above, the Applicant in this matter does not seek to challenge the extension of a specific bargaining council agreement. It seeks to challenge the Minister’s powers in a more far-reaching manner. Hence the fact that some fifty bargaining councils will be cited as respondents.

It appears that the Applicant will seek an order to the effect that section 32 of the LRA is unconstitutional. This is based on two primary arguments.

- The first is that the parties to a bargaining council are “private actors” to whom the State cannot delegate the “substantive power” of statutory regulation.
- The second is that the way in which the representivity requirements are set to permit a minority to set wages and other conditions of employment for a majority.

Although the first three decisions dealt with technical legal arguments, it seems clear that underlying these legal arguments are more fundamental economic, and industrial relations arguments concerning the extension of collective agreements and perhaps the continued existence and role of bargaining councils in our industrial relations system. This is evident in the Free Market Foundation’s arguments.

A good argument can be made that if the ability of bargaining councils to extend agreements is done away with, or more strictly controlled, many employers will question the utility of being represented on such councils.

Given the fact that bargaining councils have important dispute resolution functions and that the collective agreements they have entered into are not limited to fixing minimum term and conditions of employment and regulate matters such as medical aid schemes, retirement funds and training, the decline in their use could have far-reaching consequences.

What constitutes a 'benefit'?  

by PAK le Roux

Section 186(2) (a) of the Labour Relations Act, 66 of 1995 (LRA) provides that the unfair conduct of an 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 ...”

(emphasis supplied)

...constitutes an unfair labour practice.

Whilst the Labour Court and arbitrators have developed relatively clear guidelines as to what constitutes a promotion and a demotion and whilst there is clarity as to what constitutes probationary status, the same cannot be said for the concept of a benefit.

Why this is the case and the difficulties experienced in this regard have been the subject of numerous articles and comments, including contributions in CLL. This issue had been considered in some detail in the recent decision of the Labour Appeal Court in Apollo Tyres South Africa (Pty) Ltd v CCMA & Others (Unreported DA1/11 21/2/2013). The implications of this decision will be discussed in this contribution. Before doing so, however, an overview of the problems associated with the interpretation of this concept and, how the courts have so far dealt with this.

At the heart of the dilemma are s 191(5) and s 65(1)(c) of the LRA.

Section 191(5) states that disputes concerning alleged unfair labour practices must be referred to arbitration. Section 65(1)(c) states that a strike or a lock-out cannot be called on an issue that may be referred to arbitration in terms of the provisions of the LRA. The result is that if the term “benefit” is too widely interpreted -

- An employee who is dissatisfied with an employer’s decision not to grant some form of monetary or other advantage could refer a dispute to the CCMA or a bargaining council and to try to persuade an arbitrator to order the employer to grant that advantage.
• The right to strike could be significantly limited.
• In other words, issues that should be the subject of negotiation and agreement or, in the absence of agreement, the subject of strike action, could be converted into issues that can be decided by an arbitrator.

This has led to various attempts to limit the definition of a benefit. One approach has been to try to distinguish between a benefit and remuneration – disputes about the latter not being susceptible to arbitration but falling within the realm of negotiation and possible strike action. See, for example, the decisions in Schoeman & Another v Samsung Electronics SA (Pty) Ltd (1999) 20 ILJ 200 (LC) and Gaylard v Telkom South Africa Ltd (1998) 19 ILJ 1624 (LC).

The problem is that it has proved difficult, if not impossible, to draw a clear distinction between these concepts. The result, as Grogan (Employment Rights at 124) points out, is that no coherent jurisprudence can be extracted from the decisions.

The other approach, adopted by the Labour Appeal Court in HOSPERSA v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC), has been to argue that, in order to constitute a benefit, the employee must have a contractual or statutory right to the advantage. This approach has been the subject of much criticism, primarily on the basis that the purpose of the concept of the unfair labour practice is to provide employees with a remedy against unfair employer treatment in situations where the employee does not have a contractual remedy.

In at least two decisions the Labour Court has refused to follow this approach, relying at least in part on the decision of the LAC dealing with promotions. (See Protekon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others (2005) 26 ILJ 1105 (LC), IMATU obo Verster v Umhlathuze Municipality & Others [2011] 9 BLLR 882 (LC), and Department of Justice v Commission for Conciliation, Mediation & Arbitration & Others (2004) 25 ILJ 248 (LAC). But for a contrasting view see GS4 Security Services (SA) (Pty) Ltd v NASGAWU & Others (Unreported DA 3/08 26/11/2009).)

Given the uncertainty in our law it was overdue that the issue be reconsidered by the LAC in the Apollo Tyres decision. The employer in this matter, Apollo Tyres, decided to offer employees an early retirement package as a measure to reduce staff complement. However, the granting of the package was not an automatic entitlement and the employer reserved the right not to grant the package. Ms Hoosen applied for the package but the employer refused to grant it to her.

She resigned from her employment and referred an unfair labour practice dispute to the CCMA claiming that the refusal to grant her the early retirement package constituted an unfair labour practice relating to the provision of a benefit.

At the arbitration the employer argued that the CCMA did not have jurisdiction to consider the matter for two reasons. The first was that no employment relationship had existed at the time that she referred the dispute to the CCMA. The second was that the early retirement package did not constitute a benefit. Both arguments were rejected by the commissioner and it was held that the employer had committed an unfair labour practice by refusing to grant the package to Hoosen.

The employer lodged an application to review the award but this was unsuccessful. The employer was granted leave to appeal to the LAC.

The basis for the appeal as argued was that the early retirement package did not constitute a benefit – Hoosen was not entitled to the package in terms of her contract or in terms of a statute.
The Court first considered the approach that a distinction should be drawn between a benefit and remuneration. It came to the conclusion that this distinction was untenable. It did so in the following terms –

"[25] The distinction that the Courts sought to draw between salaries or wages as remuneration and benefits is not laudable but artificial and unsustainable. The definition of remuneration in the Act is wide enough to include wages, salaries and most, if not all extras or benefits. Remuneration is defined as:-

'Remuneration means any payment in money or 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.'

[26] 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 basis of the contract of employment."

The Court then went on to consider the argument that a benefit must be based on a contractual or statutory entitlement. This argument was also rejected.

After a detailed discussion of the Protekon, IMATU and GS4 decisions the Court came to the conclusion that the HOSPERSA approach was incorrect. It found that –

"[50] In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer’s discretion. In as far as Hospersa, GS4 Security and Scheepers postulate a different approach they are, with respect, wrong."

In the LAC’s view the early retirement package constituted a benefit and the employer, in refusing to grant it to Hoosen, had committed an unfair labour practice. It had the following to say on this regard –

"[48] The facts of this matter clearly illustrate that the Hospersa approach, that the benefit must be an entitlement that is rooted in contract or legislation, is untenable. Hoosen had, in terms of her employment contract, a right to retirement benefits. The contract did not make provision for a right to voluntary early retirement benefits. She would therefore, on the Hospersa approach, be able to challenge, by way of arbitration, any unfairness relating to the ordinary retirement benefits. When the appellant decided to accelerate the existing contractual benefits and retained a discretion to grant the accelerated benefits, the benefits would strangely morph into something less than benefits because according to the Hospersa approach she does not have a contractual right to the accelerated retirement benefits. The employer would then have a license to act with impunity. She would thus not have recourse in the civil courts, because no contract came into being, nor would she have a remedy in terms of section 186 (2) (a) of the Act to challenge the patent unfairness because there is no underlying contractual right to the benefits. Being a single employee she would in accordance with Schoeman v Samsung not have the right to strike. Clearly 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."

Comment

If one has regard to the above excerpt, as well as other comments made by the LAC, it seems that its views can be summarised as follows –
• A dispute with regard to the creation or establishment of some other advantage cannot constitute a dispute relating to the provision of a benefit. This must be the subject of negotiation and agreement and, if no agreement is reached, strike action.

• A right or entitlement to which an employee is entitled in terms of a contract or a statute can constitute a benefit. The same applies to a right created “judicially”. It follows that disputes on these issues must be referred to arbitration.

• A benefit can also include “existing advantages or privileges” to which an employee is entitled “as a right” or granted in terms of a policy or practice subject to the employer’s discretion. It follows that disputes on these issues must also be referred to arbitration.

At first sight this decision creates some certainty in our law but is this really the case? What are the implications of this approach? The following comments and questions can be raised.

• The finding that disputes concerning the creation of new rights cannot be benefits disputes seems correct. This deals with the concern, to some extent at least, that employees will refer these disputes to arbitration.

• The consequences of the statement that disputes arising from alleged contractual entitlements and statutory entitlements can constitute benefits disputes also needs to be considered. For example, in terms of the Employment Equity Act, 55 of 1998 employees have the right not to be unfairly discriminated against. This is a statutory claim. Does the CCMA now have the power to deal with a claim solely based on an allegation of unfair discrimination (ie outside the context of a claim, for example, of a promotion dispute)?

• How does the fact that contractual claims can now constitute benefits disputes impact on the right to strike? The statement made or accepted by the Court that employees often have both a legal claim to enforce a contract as well as the right to strike does not take the matter further. It is self-evident from s 64(4) of the LRA that employees may strike if the employer unilaterally changes terms and conditions of employment (ie breaches the contract). However, the fact that some forms of employer breaches of contract now also constitutes a potential benefit dispute potentially brings it within the ambit of s 191(5) and s 65(1)(c) of the LRA. These disputes must go to arbitration and cannot be the subject of strike action. The distinction between “rights disputes” and “interests disputes” and that employees may have the right to utilise the right to strike or to institute legal proceedings in respect of the same dispute is irrelevant. The question is whether s 65 is applicable to a certain dispute.
• What is meant by “judicially created rights” is not clear.

• The argument that the unfair labour practice concept should be developed to provide employees with a remedy to challenge discretionary decisions is attractive. It is precisely in these situations where the employees usually do not have contractual remedies. But what will constitute a privilege or an advantage? What constitutes a “policy” and perhaps more importantly a practice? Most employers have a “practice”, in the absence of collective bargaining, of deciding on an annual basis whether or not to implement wage increases for employees. Does the fact that an employer, after due consideration, decided that a particular employee should not be granted an increase, give that employee a right to argue that he has been unfairly deprived of a privilege or advantage and to refer a dispute on the issue to the CCMA or bargaining council? The probable answer is that this is not the type of discretionary decision, or the type of privilege or advantage envisaged by the courts. But if this is the case what types of decision, privilege or advantage are envisaged? The other argument may be that this will be a dispute concerning the creation of new rights and that this causes the decision not to relate to a benefit; but this then raises questions as to what is meant by a practice.

• One final example, an employer may have a policy of considering the annual payment of a discretionary “thirteenth cheque” bonus to its employees. The employer may also decide to exercise its discretion not to pay this bonus because of economic considerations. On the above formulation this decision will probably constitute one relating to the provision of a benefit. Employees may feel aggrieved by this decision, but knowing that the employer has an impeccable economic argument they may feel that they will not be able to win an arbitration. Will they be debarred from striking on the issue because the dispute must be referred to arbitration in terms of s 65(1)(c)? Will the employer be able to retract the policy at all?

**Conclusion**

The problems that surround the jurisprudence relating to what constitutes a benefit is not of the Courts’ making. They arise from the fact that the term is not defined and that it has a potentially wide ambit. The problem is exacerbated by the impact of the provisions of s 191(5) and 65(1)(c).

The only real solution is that the concept be done away with (as suggested by Halton Cheadle in "Regulated flexibility: Re-visiting the LRA and BCEA" (2006) 27 ILJ 663, or defined with greater precision. This is not likely in the near future.

Employers face the possibility, given the uncertain ambit of the terms “policy”, “practice”, advantage” and “privilege” that a large number of their decisions will be the subject to arbitral control in circumstances where this arbitral control can be invoked simply by an employee filling in a form with the minimum of specificity. It is scant comfort to argue that all employers have to do is to justify the fairness of their actions. As indicated by the courts on a number of occasions, the assessment of fairness involves a value judgement – the outcome of which is far from certain – especially when dealing with disputes that may have economic implications.

The debate surrounding the costs of imposing minimum wages and terms and conditions of employment on employers, and the effect that this may have or may not have, on employment levels is well known. It is submitted that the costs of litigating in the CCMA when the vague and often subjective concept of fairness is at issue is underestimated. This is all the more so when one is dealing with the uncertainty surrounding the law relating to benefits.