REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no**:** CA9/13

Case no in the court *a quo*: C420/2006

In the matter between:

SOUTH AFRICAN AIRWAYS (PTY) LTD **Appellant**

and

GIDEON JACOBUS JANSEN VAN VUUREN **First Respondent**

AIR LINE PILOT'S ASSOCIATION OF

SOUTH AFRICA (ALPA-SA) **Second Respondent**

Heard: **18 March 2014**

Delivered: **12 June 2014**

Summary: Unfair discrimination based on age. Employer retirement policy age to 60. Employee reaching retirement age- Employee requested to stay on standby while negotiation on retirement age finalised. Collective agreement extending retirement age to 63. Collective agreement reducing employees' salary over the age 60. Employee alleging unfair discrimination- Labour Court upholding employee's claim. Appeal. Principles restated- two stage-enquiry in considering unfair discrimination claims: Whether discrimination occurred and whether it is unfair. EEA making no provision for justification collective agreement entered into by parties not justifying discrimination - employee unfairly discriminated against on the ground of age. Remedy. Distinction between compensation and damages emphasised- Requirement of fairness in

considering compensation. Labour Court award of compensation excessive and disproportionate. Quantum of award reduced.

Unfair labour practice. Labour Court sitting as arbitrator by agreement between parties. Employee paid with accumulated leave pay – Labour Court decision sitting as arbitrator subject to appeal only- test that of the correctness of the judgment and not the reviewability of the judgment. Accumulated leave pay included in benefit. Employer committed unfair labour practice in remunerating employee with his accumulated leave pay. Appeal dismissed with costs.

CORAM: TLALETSI DJP, DAVIS JA et COPPIN AJA

JUDGMENT

COPPIN AJA

[1] This is an appeal against a judgment of the Labour Court (Shaik AJ) with the necessary leave, in which it was held, *inter alia,* in terms of the Employment Equity Act 55 of 1998 ("the EEA"), that the appellant had discriminated unfairly against the first respondent, then employed by it as a senior airline pilot, on the basis of his age and consequently awarding him damages and monetary compensation.[1] It was also held by the court *a quo*, sitting as

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[1] The following order was made:

"*62.1 The respondent discriminated unfairly against the applicant on the basis of his age.*

62.2 The respondent is ordered to pay damages to the applicant the following amounts being the remuneration he would have earned:

1. Period 1 September 2005 to 30 May 2006 the sum of R225 886,66 together with interest thereon calculated at the rate of 15,5% as from 1 September 2005.

2. Period 1 June 2006 to 30 May 2007 the sum of R344 850,00 together with interest thereon calculated at the rate of 15,5% as from 1 June 2006.

3. Period 1 June 2007 to 2 September 2007 the sum of R88 810,26 together with interest thereon calculated at the rate of 15,5% as from 1 June 2006.

4. Back pay in the sum of R72 976,34 together with interest thereon calculated at the rate of 15,5% together with interest thereon as from 31 October 2006.

5. Special leave and 13th cheque payment. Re [31 October 2006] The sum of R30 507,65 being in respect of special leave, bonus and 13th cheque difference in pay, together with interest thereon calculated at the rate of 15,5% as from the 31st October 2006.

6. Service bonus 13th cheque. Re [30 April 2006] The sum of R25 167,50 together with interest calculated at the rate of 15,5% as from 30 April 2006.

7. Service bonus 13th cheque. Re [30 April 2007] The sum of R30 371,56 together with interest thereon calculated at 15,5% as from 30 April 2007.

62.3 The respondent is ordered to pay the applicant compensation in the sum equivalent to one (1) year remuneration calculated on the rate of pay applicable for his last year of service.

arbitrator, that the appellant had subjected the first respondent to an unfair labour practice by utilising his accumulated leave pay to remunerate the first respondent during the period he was on standby leave pending finalisation of an agreement between the appellant and the second respondent in terms of which, *inter alia*, the retirement age of pilots was to be increased from age 60 to age 63.[2]

[2] At the hearing in the court *a quo,* the first respondent gave oral evidence but the appellant led no evidence. The following facts were either common cause, or were otherwise not seriously disputed. The first respondent was employed by the appellant as a pilot with the rank of senior captain. He was also a member of the second respondent which represented him in his employment-related issues with the appellant.

[3] On 5 August 2005, the first respondent turned 60 years of age. Under the terms and conditions that applied at the time to the contractual relationship between the appellant and the pilots employed by it, including the first respondent, the retirement age was 60 and a pilot had to retire at the end of the month in which he or she reached the age of 60. The first respondent turned 60 on 5 August 2005 and was thus to retire at the end of August 2005.

[4] Seemingly, fortuitously, at the time the first respondent turned 60, his union, the second respondent, was engaged in collective bargaining with the appellant to, *inter alia*, increase the retirement age of pilots to the age of 63. On or about 19 August 2005, the second respondent and the representatives of the appellant had reached an "*in principle*" agreement that the retirement age of pilots would be 63. However, the collective agreement still had to be finalised and formalised. A circular was sent out by the second respondent

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62.4 The aforesaid amounts are to be paid within 14 days of this order.
62.5 Costs of suit including the costs of employing two counsel."

[2] The order made by the Labour Court in respect of the unfair labour practice is that:

"*(a) The respondent is to pay the applicant a sum equivalent to 71 days calculated on his daily rate of pay which applied on his last day of service.*
(b) The aforesaid sum shall bear interest at the rate of 15,5% calculated from the last day of service to date of payment."

The judgment of the Labour Court is reported as *Jansen van Vuuren v South African Airways (Pty) Ltd and Another* [2013] 10 BLLR 1004 (LC).

informing its members accordingly and that it would take some three to four weeks for the details of the collective agreement to be negotiated.

[5] In response to a query raised by the first respondent with the general manager of the second respondent, it was confirmed that because of the agreement regarding the extension of the retirement age, the first respondent would remain in the service of the appellant despite having reached the age of 60. This was also verified and confirmed by the Human Resources Manager of the appellant, a Mr Schmittdiel, who also informed the first respondent that he would be remaining in the service of the appellant until age 63 that is until 31 August 2008 which was his revised retirement date.

[6] Pending the finalisation and formalisation of the collective agreement, the first respondent was instructed to remain at home, but to be on standby. The first respondent, acting in accordance with the instruction, remained at home, but was on standby awaiting flying instructions from the appellant. He did not complete and hand in any documents relating to his retirement. At the time when he was asked to go on standby he was fit and ready to fly. He had completed a re-testing which would have permitted him to fly until January 2006, before further testing was required. According to the first respondent, he was ready and willing to render service at any time when called upon by his employer to do so. He made several calls to enquire when he would resume flying because he was aware that the appellant had a shortage of captains to fly the type of aircraft which he was flying, namely a B738. The first respondent testified that he wanted to assist instead of remaining at home and was unable to leave home in case he was called upon to resume his flying duties with the appellant.

[7] The collective agreement (which is titled a 'memorandum of understanding' ("*MOU*")) was only formally concluded and signed by the parties on or about 11 November 2005. It provided, *inter alia,* that its implementation date would be retrospective as from 1 August 2005 and that it would endure for a period of three years; that a pilot may retire at any time between the ages of 50 and 63 at the pilot's discretion and that such retirement would be final; that pilots who reached the age of 60 would be given the choice to continue to fly for the

appellant on either domestic or international routes; that pilots who choose to fly domestically will operate as captains and those who choose to fly internationally will operate in the position of first officer. More significantly, the agreement provided that pilots who elect to continue to fly until the age of 60, whether domestically or internationally, will be remunerated on the salary scale SC20 and that they would, however, retain their benefits and would continue to receive general annual increases, although not notch increases. The agreement also provided that this dispensation would endure for a period of three years after which any pilot in the service of the appellant, who was over the age of 60, would revert to his normal rank and salary notch, provided that the agreed operational limitations relating to long-range flights to certain destinations and in terms of which pilots over the age of 60 are not allowed to operate as the pilot in command of the aircraft, had been removed.

[8] When the collective agreement had been signed, the first respondent was called upon to resume his flying duties with the appellant. After attending a refresher course on 9 December 2005 and flight simulator activation checks on 10 and 11 December 2005, he embarked on his first flight, since going on standby, on 12 December 2005.

[9] After he had first been instructed to be on standby pending the conclusion of the collective agreement and without having applied for retirement, or to be paid out his accumulated leave pay, the appellant paid to the first respondent his accumulated leave pay as a lump sum. It came to an amount of approximately R330 000,00, after taxation. The first respondent, on becoming aware of the payment, informed Mr Schmittdiel that the payment was made in error since it was only due upon his retirement. The first respondent returned the payment to the appellant upon the request of Mr Schmittdiel. It is common cause that in a written communication addressed to one, Elize Smit, Mr Schmittdiel stated that he had been informed that the retirement age had been extended from age 60 to 63 years and he requested Ms Smit to "*reinstate*" the first respondent and establish with the IT Department how the tax directive, pertaining to the payment of the amount to the first respondent, could be reversed. Mr Schmittdiel also instructed Ms Smit as follows: "*Don't*

exit anyone else from the system unless the FDC requests that they be retired at the age of 60."

[10] However, in the same internal communication, Mr Schmittdiel directed Ms Smit to utilise the first respondent's accumulated leave amount "*for pay purposes until the final agreement had been signed*". This was without the first respondent's knowledge or consent. The first respondent only became aware later that instead of the appellant paying him a salary while he was on standby, his accumulated leave was utilised to remunerate him for that period. He was on standby leave from 1 September 2005 to 10 November 2005. From 11 November 2005 he was paid a salary but at the SC20 level as contemplated in the collective agreement. This was a lower level than he had been remunerated before. At the time he turned 60 he was earning at the SC34 level (total cost to employer). Translated into figures, at the SC34 level his annual earnings (total cost to employer) was about R1 476 150 and at the SC20 level his annual earnings (total cost to employer) were reduced to R1 113 680.

[11] Upon resuming his duties and becoming aware of the utilisation of the amount due to him in respect of his accumulated leave pay, the first respondent took issue with that and with the fact that, in terms of the collective agreement, he and other pilots, who had also reached the age of 60 and did not retire, were to be treated differently from the younger pilots for the period of the dispensation under the collective agreement. In respect of the differentiation the first respondent appears to have been particularly dispirited by the fact that he was to be paid less than what he earned before and less than pilots who were younger than 60. He also took issue with the provision in the agreement (albeit upon the condition of certain operational limitations that I have mentioned above having been removed) namely, that pilots who were 57 or younger at the time the agreement was concluded were entitled to work beyond age 60 until age 63 without a salary reduction or further differentiation on the grounds of age. The first respondent took these issues up with the second respondent and with the Chief Executive Officer of the appellant at the time.

[12] Dissatisfied with the response of the appellant the first respondent instituted proceedings in the Labour Court. His main claim, in essence, was that the appellant, by virtue of the collective agreement, unfairly discriminated against him on the basis of his age, in breach of the EEA and violated his rights to dignity, equality and his rights to be free from discrimination as contemplated in sections 9 and 14 of the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution'). The first respondent also alleged that the utilisation by the appellant of the amount due to him in respect of his accumulated leave pay, constituted an unfair act or omission and alleged that the claim had been referred to the Commission for Conciliation, Mediation and Arbitration ("*the CCMA*") for arbitration. The parties subsequently agreed that the Labour Court hearing the unfair discrimination claim should also hear the claim relating to the unfair labour practice, albeit sitting as arbitrator in respect of that dispute, which agreement the court *a quo* acceded to. The second part of the appeal deals with that claim.

[13] In respect of the unfair discrimination claim, the court *a quo*, dismissing, *inter alia*, arguments on behalf of the appellant that the first respondent consented to or authorised the second respondent to conclude the collective agreement that had caused him to suffer the discrimination and that the discrimination was accordingly fair, held that "*the collective agreement is subject to the Constitution and the EEA and that the parties to the agreement could not 'contract out of the fundamental rights and protections set out in the bill of rights"*; that the terms of the collective agreement "*were discriminatory and manifestly unfair*" and served no legitimate purpose which caused the employee, solely on the grounds of his age, to "*suffer reduction in remuneration and other detriment*". The court *a quo* went on to make the order to which I referred in the first paragraph of this judgment. The court *a quo* did not only award damages to the first respondent, being the difference between the amount which the first respondent earned in terms of the dispensation under the collective agreement and the amount which he should have earned if he was not discriminated against, but also compensation in an amount which was the equivalent of one year of the first respondent's

remuneration calculated at the rate applicable to his last year of service with the appellant. This is an amount in excess of R1,4 million.

[14] In respect of the unfair labour practice claim, the court *a quo*, sitting as arbitrator, as envisaged in terms of section 158(2)(b) of the Labour Relations Act 66 of 1995 ("*the LRA*"), gave an "award" to which I referred in the first paragraph of this judgment, in terms of which it found that the claim of the first respondent was "*in reality*" a claim for accumulated leave; that it was unfair for the appellant to place the first respondent on leave in circumstances where he was not being paid in the ordinary manner and where his leave account was debited by the appellant, thus reducing the number of leave days that stood to his credit. The court *a quo* also found that the conduct of the appellant "*in forcing*" the first respondent to go on leave, constituted an unfair labour practice.

[15] The appellant's appeal is in respect of both the judgment in the unfair discrimination claim and the "award" (or order) made by the Labour Court in respect of the first respondent's unfair labour practice claim. I shall now proceed to consider the appeals against these claims separately.

The unfair discrimination claim

[16] The appellant contends that the court *a quo* was wrong in its findings and conclusions regarding this claim. In particular, it was contended that the court *a quo* wrongly relied on a *dictum* from the matter of *Larbi-Odam and Others v Member of the Executive Council for Education (N-W Province) and Another.*[3] It was submitted that the Constitutional Court did not rule out the possibility of the significance of collective bargaining for the purposes of determining whether the discrimination complained of was justified in terms of the Constitution. From that premise, it was further contended on behalf of the appellant that the collective agreement in this case was significant. The first respondent and other pilots over the age of 60 had a choice to either retire finally or take advantage of the terms of the collective agreement by which the retirement age was extended to 63, and, accordingly, to be governed by the

[3] [1997] 12 BCLR 1655 (CC) par 28, per Mokgoro J.

terms of the collective agreement. It was submitted that it was made clear to the first respondent at the outset that although there was an agreement in principle, the extension of the retirement age was to be subject to terms and conditions that were still to be agreed upon between the appellant and the second respondent.

[17] On behalf of the appellant, it was also submitted that the court *a quo* had erred in equating the collective agreement to subordinate legislation, because the collective agreement in this case was not extended by the Minister of Labour to non-parties as contemplated in section 32 of the LRA, and that it was a collective agreement concluded by private parties and not under the auspices of a bargaining council. Furthermore, it was contended that the collective agreement had a legitimate purpose in that the extension of the retirement age to 63 was beneficial for pilots. It was also argued that, in any event, discrimination in terms of section 6(1) of the EEA was not proved. According to this argument, age was an inherent requirement of the job of a pilot. Any distinction or preference against pilots above the age of 60 was based on the inherent requirements of the job of pilot "and does not constitute unfair discrimination because of the provisions of section 6(2)(b) of the EEA".

[18] It was also submitted on behalf of the appellant that the appellant did not "unilaterally impose discriminatory terms", but that the terms were a product of collective bargaining in which everyone's interests were represented and that the members of the second respondent were forewarned of conditions to which they still had to agree. There were other considerations underpinning the conclusion of the collective agreement, other than age, namely, the benefits of extending the retirement age and the costs attendant upon the extension thereof. With regard to the latter, it was contended that the costs were not to impact severely on the appellant and therefore mechanisms had to be agreed to limit such financial impact in order to induce the appellant to agree to the extension of the retirement age.

[19] According to the argument made for the appellant, the first respondent had a choice either not to accept the benefits of the collective agreement by choosing to retire, or to accept the benefits and to only retire at the age of 63.

The first respondent could not elect both of those options, or elect the latter option without accepting all the terms of the collective agreement. It was contended that the collective agreement was not an extension or renewal of the first respondent's fixed term contract of employment which, according to this argument, had lapsed at the end of August 2005 after the first respondent had turned 60. It was argued that the collective agreement constituted a new contract which the first respondent could have either accepted or rejected.

[20] It was further submitted on behalf of the appellant that the collective agreement did not discriminate against the first respondent but benefitted him. Public policy was better served by enforcing collective agreements, which embodied distinctions between employees, if they, on the whole, improved the position of those employees. As an alternative argument, it was submitted on behalf of the appellant, that the appellant did not consider the collective agreement binding on it, but nevertheless honoured its terms in relation to the first respondent and that if it were to be accepted that the agreement was not binding on the appellant from the outset, then the first respondent's claim should fail because he could not have relied on it to found his claim of discrimination against the appellant.

[21] It was further submitted, in the alternative, that even if it was to be found that there was discrimination, it was justified for the following reasons: the extension of the retirement age to 63 benefitted pilots and particularly the first respondent whose fixed term contract had lapsed after he had turned 60; the reduction in the salary of pilots who elected to continue to work was intended to limit the cost impact on the appellant and was also necessitated by other external factors and restrictions that existed at the time and that the parties to the collective agreement accepted these considerations. It was submitted that the court *a quo* had failed to properly evaluate those factors and that, if it had done so, it would have found that the discrimination was justified.

[22] With reference to section 6 of the EEA, it was submitted on behalf of the first respondent, that through the collective agreement, the appellant discriminated unfairly and unjustifiably against the first respondent. The appellant's reliance on section 6(2)(b) of the EEA, which provides that it is not unfair

discrimination to distinguish, exclude or prefer any person on the basis of the inherent requirements of a job, was not sustainable on the basis of the following. On the facts, shortly before he was supposed to retire, the appellant had passed all necessary tests rendering him fit to fly for a further six months. The fact that age was an inherent requirement for the job could not justify paying a pilot less just because he reached or passed a certain age, particularly, if that person otherwise met the demands of the job. But, international case precedent showed that it is not age, but fitness to fly that is an inherent requirement of the job of a pilot. It was submitted that at all material times before his final retirement in 2008 the first respondent was fit to fly.

[23] In response to the appellant's argument that the collective agreement was a new agreement that presented a choice to the first respondent, it was submitted that the first respondent's employment contract did not lapse in August 2005, because the first respondent continued to be employed by the appellant subsequent to that date. In any event, so it was submitted, he was officially reinstated on instruction of the Human Resources Manager after he had pointed out that his accumulative leave pay had been wrongly paid out to him. The first respondent was requested by the appellant to remain on standby pending the finalisation of the collective agreement. The first respondent obliged and continuously tendered his services to the appellant for the period during which he was on standby. The first respondent was not free, nor was he unemployed during that period. According to this argument, the fact that the collective agreement might be said to be a new agreement was of no assistance to the appellant because that fact did not make it any less discriminatory, or justify its discriminatory terms.

[24] It was submitted that the first respondent's constitutional right to equality was protected and that he could not waive it, or contract out of its protection. As far as the appellant's justification argument was concerned, it was submitted on behalf of the first respondent, that no case for justification was made out by the appellant. In elaboration of this point, it was submitted with reference to the appellant's grounds of justification, that warning an employee of

impending discrimination cannot justify that discrimination; arguing that the person had a choice not to be employed and be discriminated against as a consequence of being employed, was absurd; and that arguing, that discrimination was justified because the first respondent benefited, was equally absurd. Furthermore, the argument, that discrimination was justified because it saved the employer costs, could never be valid and the mere fact that there were unfair discriminatory practices elsewhere against pilots did not justify such practices being perpetuated, or accommodated, locally against pilots.

[25] With regard to the status of the collective agreement, it was submitted on behalf of the first respondent that it was held by this Court in *Platinum Mine Investments (Pty) Ltd t/a Transition Transport v SATAWU and Another*[4] that a national collective agreement was not a contract but subordinate legislation. In *SACCAWU and Another v Shakoane and Others,*[5] it was held that the terms of a collective agreement do not prevail over the provisions of the LRA, unless the LRA specifically provides accordingly. By extension, the terms of a collective agreement will also not prevail over the EEA which provides in section 63 for its primacy where there is an apparent conflict between its provisions and any other law. It was further submitted that the *dictum* in *Larbi-Odam* was indeed applicable to the facts of this case.

The applicable law

[26] I now proceed to consider the relevant law. The first respondent's case was based on the provisions of the EEA and sections 9 and 14 of the Constitution. Section 6(1) of the EEA provides that no person may unfairly discriminate directly, or indirectly, against an employee in an employment policy or practice on one or more grounds including age. In terms of section 6(2), it is not unfair discrimination to take affirmative action measures consistent with the purposes of the EEA or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

[4] [2010] 10 BLLR 1038 (LAC) at 46.
[5] [2000] 10 BLLR 1123 (LAC) pars 15 and 16.

[27] Section 11 of the EEA provides that whenever unfair discrimination is alleged in terms of the EEA, the employer, against whom the allegation is made, must establish that the discrimination is fair.

[28] Two of the main objects of the EEA are to promote and protect the employee's constitutional rights to equality and dignity and to eliminate unfair discrimination in employment. In terms of section 5 of the EEA, every employer is obliged to promote equal opportunity in the workplace and to eliminate any unfair discrimination in any employment policy or practice.

[29] For cases of discrimination outside the sphere of employment, an infringement of the equality provision of the Constitution (section 9) is generally alleged, calls for an analysis under that section of the Constitution. The provisions of the EEA, including, in particular, section 6, are clearly based on the basic tenets of the equality provision in the Bill of Rights of the Constitution as well as, *inter alia*, the International Labour Organisation's Convention No. 111 of 1958 concerning discrimination in respect of employment and occupation, which the Republic of South Africa ratified in 1997. Accordingly, in the case of a claim based on section 6 of the EEA, material guidance is to be derived from the equality analyses that were conducted under the Constitution and the Interim Constitution. Cases that provide a framework for this kind of analysis are an indispensible guide in considering infringements under section 6 of the EEA. Similarities between, for example section 8(2) of the Interim Constitution and section 6(2) of the EEA, as well between section 9 of the Constitution and section 6 of the EEA, are obvious.

[30] Section 3(d) of the EEA provides that the EEA must be interpreted in compliance with the international law obligations of the Republic of South Africa, in particular those contained in the International Convention No. 111 of 1958 concerning discrimination in respect of employment and occupation. This is an important convention that, *inter alia*, requires ratifying states to declare and pursue national policy which are formulated to promote, by means which are appropriate to the conditions and practice of those states,

equality of opportunity and treatment in respect of employment with the intention to eliminate discrimination.

[31] In *Harksen v Lane NO and Others,*[6] the Constitutional Court undertook an analysis under section 8 of the Interim Constitution. Section 8(2) of the Interim Constitution provided as follows:

> '*No person shall be unfairly discriminated against, directly or indirectly and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.*'

[32] The Constitutional Court held in *Harksen* that:

> '*The determination as to whether differentiation amounts to unfair discrimination under section 8(2) requires a two-stage analysis. Firstly the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts to unfair discrimination. It is as well to keep these two stages of the enquiry separate.*'[7]

Referring to its decision in *Prinsloo v Van der Linde and Another,*[8] the Constitutional Court went on to explain that section 8(2) of the Interim Constitution contemplates two categories of discrimination. The first category consists of the fourteen specified grounds and grounds that were not specified in that section, but were analogous to the specified grounds. If the differentiation was on the basis of the specified grounds there is a presumption in favour of unfairness, but there was no such a presumption if the discrimination was not based on a specified ground. In those circumstances, the court still had to determine whether the discrimination was unfair. Where discrimination results in persons being treated differently in a manner which impairs their dignity as human beings it will clearly constitute a breach of section 8(2), but other forms of differentiation may also constitute a breach of that section. Regarding the second stage of the enquiry concerning

[6] [1997] 11 BCLR 1489 (CC).
[7] Para 45.
[8] [1997] 3 SA 1012 (CC); 1997 (6) BCLR 759 (CC).

the unfairness of the discrimination, the Constitutional Court held that the enquiry concerns the impact of the impugned measure on the complainant.[9]

[33] In *Larbi-Odam*[10] it was pointed out that if the discrimination was held to be unfair then the final question to be considered, if the court was dealing with the law of general application, was whether unfair discrimination was nevertheless justified in terms of the justification provision of the Interim Constitution.[11]

[34] In the International Labour Organization's Convention 111, "discrimination" is, in essence, defined as any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as determined by the member state concerned.

[35] Turning to the facts of this case, the first stage would be to determine whether the conduct or measure of the employer, which the employee is complaining about, constitutes 'discrimination'. The second stage is to consider whether it is 'unfair'.

[36] Section 6 of the EEA, like section 8(2) of the Interim Constitution and section 9(3) of the Constitution, also contemplates two categories of discrimination. The first category is the specified category of discrimination, namely, race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. The second category is the unspecified category which is analogous to the specified grounds. However, unlike the sections in the Interim Constitution and the Constitution, there is no express provision in the EEA which is to the effect that discrimination on one or more of the specified grounds is unfair unless it is established that the discrimination is fair. But, it is apparent from section 11 of the EEA that, unless the employer establishes that the discrimination is fair,

[9] See *Larbi-Odam* case *supra* at 1665 par 17 following *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1951 (6) BCLR 708 (CC) par 43.
[10] See par 18.
[11] That would be section 33(1) of the Interim Constitution which the court was dealing with in *Larbi-Odam*. Under the Constitution section 36 is the applicable provision. See also *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at 16 par 24.

it would be unfair. While the employee arguably has an *onus* to prove discrimination and the basis of the discrimination, he or she has no *onus* to prove that it is unfair. The effect is thus the same as in the case of section 9 of the Constitution where there is an express deeming provision.

[37] It was argued on behalf of the appellant that if it were to be found that there was unfair discrimination such discrimination was justified. Thus another matter that requires consideration is whether, in a case involving the violation of section 6(2) of the EEA, having found that the discrimination in question is unfair, the EEA allows for an enquiry whether the unfair discrimination is, nevertheless, justified?

[38] In a case which solely involves the alleged infringement of the equality provision in the Constitution, the third stage of the enquiry, namely justification, is embarked upon only if the law in question is of general application. Under the Interim Constitution, the matters enquired into are set out in section 33(1) and in the Constitution they are contained in section 36. The EEA does not have a justification provision similar or equivalent to that of the Constitution or the Interim Constitution. It appears on the face of it that the EEA does not allow for a justification of unfair discrimination. In terms of section 11, the employer has the *onus* to prove that the discrimination is fair. The reason(s) for difference between the Constitution and the EEA is not clear, but is perhaps due to the fact that the EEA was enacted to regulate unfair discrimination in the workplace or employment situation, whereas the relevant provision(s) in the Interim Constitution and the Constitution concerns unfair discrimination generally, including in the public sphere, where discriminatory provisions in laws are impugned.

[39] Although no clear distinction can be drawn between the considerations involved in determining fairness and those involved when determining justification, as is apparent from cases such as *Hugo*[12] and *City Council of Pretoria v Walker,*[13] ideally in determining fairness, moral considerations and the impact of the measure complained of by the complainant, should be

[12] *Supra.*
[13] [1998] 3 BCLR 257 (CC).

assessed. While justification would involve the consideration of the defences raised by the party who is alleged to be offending, including proportionality and other factors identified in the justification provision in the Constitution.

[40] In *Hoffman v South African Airways,*[14] the Constitutional Court decided an unfair discrimination case which was brought as an infringement of the employee's equality and dignity rights in terms of the Constitution. Because the measure complained about was not contained in a law of general application, the Constitutional Court did not embark on the third leg of the enquiry, namely, justification in terms of section 36 of the Constitution, but only considered the fairness of the discrimination complained of.[15] However, in considering the fairness of the discrimination, the Constitutional Court did not confine itself to a consideration of the morality and impact of the discrimination, but also considered a wide range of issues including economic and other defences raised by the Airways, such as the policies of other airlines, perceptions and prejudices and commercial requirements and applied a value judgment.

[41] There have been attempts to formulate a test for the 'fairness' envisaged in the EEA. In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd,*[16] the Labour Court dealt with a dispute that concerned an unfair labour practice within the meaning of item 2(1)(a) of Schedule 7 of the LRA, in particular involving unfair discrimination. One of the issues that had to be decided was whether there was discrimination and, if so, whether it was fair. Against the background of the Constitution, the Labour Court formulated a broad test for determining whether discriminatory conduct was fair. According to the court "*discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational*".

[14] 2000 (11) BCLR 1235
[15] See at 21 par 41.
[16] [1997] 11 BLLR (LC).

[42] In discussing fairness in relation to dismissals under the Labour Relations Act No. 28 of 1956, Smalberger JA stated in a dissenting, minority judgment in *NUMSA v Vetsak Co-operative Ltd and Others*[17]: *"fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness a court applies a moral or value judgment to established facts and circumstances (NUM v Free State Cons at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair."*

[43] There is no closed list of relevant factors that ought to be taken into account when determining the fairness of the discrimination and the factors to be considered depends on the facts of the case under consideration. In *Hoffmann*, Ngcobo J (as he then was) stated:

> '*At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim'*[18]

[44] What is clear is that in considering the issue of fairness under the EEA, the position and interests of the employee and employer must be considered and balanced, and that the objectives of the EEA must be the guiding light in applying a value judgment to established facts and circumstances. The determining factor, however, is the impact of the discrimination on the victim. This is consistent with the approach in *Hoffmann*.

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[17] [1996] 6 BLLR 697 (AD) at 706 [also reported at 1996 (4) SA 577 (A) and (1996) 17 ILJ 455 (A)].

[18] At 16 par 27, referring to dicta in *President of the Republic of South Africa and Another v Hugo* (supra) at par 41*, and Harksen v Lane* (supra) at pars 50 and 51.

[45] Unlike in the case of an equality analysis under section 9 of the Constitution which also allows for a further step, namely a justification analysis in terms of section 36 where one is dealing with the law of general application, the EEA does not allow for justification of unfair discrimination. Its language is clearly prohibitive. Section 6(2) does not contain justifications for unfair discrimination. The Act provides that it would not be unfair discrimination to take affirmative measures consistent with the purposes of the EEA or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. They are complete defences to an allegation of unfair discrimination. In section 11, the EEA recognises that there may be considerations other than those specifically referred to in section 6(2) which may render discrimination fair.

[46] The employer has an *onus* to establish fairness on a balance of probabilities. An enquiry into fairness contemplated in the EEA will necessarily involve more than a consideration of the moral issues and the impact of the discriminatory action on the complainant. It will also include a consideration and require a balancing of the defences raised by the employer for the discrimination as well as issues such as proportionality of the measure, the nature of the complainant's right that he alleges has been infringed, the nature and purpose of the discriminatory measure, and the relation between the measure and its purpose.[19]

[47] Since the *onus* is upon the employer to prove the fairness of the discriminatory measure, it would be incumbent upon it to ensure that all the necessary material and evidence is before the court in order to enable it to make a finding of fairness. As stated earlier, the *onus* is only discharged if fairness is found on a balance of all the relevant factors and evidence.

Consideration of the facts in this case

[48] The first respondent gave evidence, *inter alia*, concerning the impact of the discrimination he complained of, but the appellant chose to lead no evidence to contradict the first respondent and was, seemingly, satisfied that the cross-

[19] Compare *Hoffmann v South African Airways (supra)* at 16 par 27.

examination of the first respondent and the material he placed before the court before closing his case, as well as the submissions it made, were adequate to prove fairness.

[49] The first respondent testified concerning his long employment history with the appellant. Having qualified as a pilot at his own cost, the first respondent joined the appellant as a junior pilot in 1972 at the age of 26. By the time he was 60 on 5 August 2005, he had obtained the rank of senior Captain and was earning at the SC34 notch on the salary scale. The retirement age for pilots had previously been extended from 58 to 60. The first respondent related how, before he was due to retire at the end of August 2005, he was informed that the retirement age would be extended to age 63 as there has been an in principle agreement and that he had been requested to remain at home pending the finalisation of the "mechanics" of the agreement and that he would receive his full salary pending his call-up for duty. He testified about how he was requested by the employer to repay the accumulated leave pay that had been repaid to him in error. This was also borne out by the internal memorandum of Mr Schmittdiel to which I have referred earlier and in which Mr Schmittdiel also instructed that the first respondent had to be reinstated. The first respondent testified about his fitness and readiness to fly and his subsequent resumption of duties when he was called by the appellant in December 2009.

[50] The first respondent testified in which respects the collective agreement discriminated against him on the basis of his age. The provision in the collective agreement that pilots over the age of 60, who flew domestically, would retain their rank but would be paid on salary notch SC20, was discriminatory in that pilots, who, say were younger than 60, who held the same rank as him and did the same job as him, would be paid much more than him. The first respondent at age 58 or 60 held the rank of senior Captain and was already earning at SC34 level. In terms of the collective agreement, and just because of his age, he was going to be paid a substantial amount lesser than what he earned before.

[51] The collective agreement clearly contains further discriminatory provisions; for example pilots who were over 60 and who were senior captains at 60, would have a reduction in their rank and status if they elected to fly internationally. They would only be allowed to operate in the position of a first officer. Pilots over the age of 57 were not to be permitted to bid to transfer to a coastal base and those over 60 were forbidden to exercise a displacement bid for a category at a coastal base. Any leave that was to be paid out to a pilot, irrespective if he had previously earned on a higher level, would be paid on the lowest SC20 scale. The same did not apply to pilots who were under the age of 60 at the time of the collective agreement.

[52] Correctly it was not submitted that the provisions of the agreement were not discriminatory on the basis of age, because blatantly they are. The fact that the provisions are part of an agreement that was entered into between the appellant and the second respondent, of which the first respondent was a member, does not detract from the fact that they discriminated against pilots who were employed by the appellant and who were older than 60 at the time of the agreement.

[53] Because the discrimination was on a specified ground, as I have mentioned earlier, there is, in effect, a rebuttable presumption that it was unfair. Both, the Constitution, in section 9, and the EEA, in section 6, assumes that discrimination on the grounds specified in the respective sections would negatively impact on the dignity of a person discriminated against to an extent that justified specific protection. The lowering in rank and salary might well have stigmatised and marginalised pilots over 60. It is also conceivable that discrimination against pilots over 60, including the first respondent, would have caused the first respondent to feel humiliated and unappreciated. The selective nature of the discrimination, since only those who turned 58, 59 and 60 were to be affected by the discriminatory provisions that were to endure for a three year period, must have intensified those feelings.

[54] The contention on behalf of the appellant that the age of a pilot was an inherent requirement of the work of a pilot was not convincing at all. It is so that if the appellant had established as a fact that the first respondent had

been discriminated against on the basis of his age, because age was an inherent requirement of the job of a pilot it might well have discharged its *onus,* because in terms of section 6(2)(b) of the EEA it is not unfair discrimination to "*distinguish, exclude or prefer any person on the basis of an inherent requirement of a job*". However, in this case, there was no evidence by the appellant that age was an inherent requirement of the job of a pilot, but, even more specifically, how the reduction in rank and the lower payment of a pilot over 60 (i.e. and under the age of 64), who continued to do the same work that he was doing before and at the age of 60 and the same as those who were not over the age of 60, rationally connected and related to age being an inherent requirement of the job of a pilot. The first respondent's evidence that he was at all material times fit to fly was not countenanced or refuted. On the evidence it was established that it was indeed not his age, but his fitness to fly that was an inherent requirement of his job as a pilot.

[55] The appellant presented no evidence that it ceased to employ the first respondent after he turned 60, or that his contract of employment, which was in place when he turned 60, had lapsed. The evidence presented indicates the contrary, namely, that the appellant did not cease to employ the first respondent after he turned 60, or more specifically, after the end of the month in which he turned 60 (i.e. the end of August 2005). Before the end of that month, he was informed that there was an in principle agreement to extend the retirement age of pilots to age 63 and he was requested by the appellant to go on standby pending the finalisation of the "mechanics" of the collective agreement. The appellant accepted that the accumulated leave pay that had been paid to the first respondent at or after the end of August 2005, was paid to him in error and requested and accepted its repayment. Mr Schmittdiel also instructed that the appellant be reinstated. On the evidence and the probabilities there was therefore a continuing employment relationship between the appellant and the first respondent. Even after the appellant alleged, sometime in December 2005, and after the collective agreement had been signed, that it was not bound by the agreement, it continued its employment relationship with the first respondent. So any contention on behalf of the appellant, suggesting that there was not a continuous

employment relationship between the appellant and the first respondent, is without merit.

[56] The contention on behalf of the appellant that the collective agreement presented the first respondent with a choice and that he elected not to retire at age 60 and therefore could not complain about the consequences of his choice, is attractive on the face of it. However, the argument loses sight of the prohibition against unfair discrimination that is contained in section 6 of the EEA and, *inter alia*, section 9 of the Constitution.

[57] The fact that an individual has a choice to either not be, or to be unfairly discriminated against and had made the choice which causes the discrimination, can never as a factor on its own, render the discrimination fair. A number of examples could be thought of, generally, and more specifically in the employment context, which would illustrate the regressive and harmful consequences that would ensue if such a practice were to be permitted under the law. The very objects of the Constitution and the EEA, respectively, to free society and the workplace of unfair discrimination, would be seriously undermined to the point of being rendered nugatory.

[58] The court *a quo* correctly found[20] that the principle stated in *Larbi-Odam* was applicable. In respect of an argument by the respondent in that case, that the regulations, under consideration there, were negotiated in the Education Labour Relations Council where employee organisations and non-citizen teachers were also represented, Mokgoro J stated:

> '***Where the purpose and effect of an agreement provision is to discriminate unfairly against a minority, its origin in negotiated agreement will not in itself provide grounds for justification****. Resolution by majority is the basis of all legislation in a democracy. Yet it too is subject to constitutional challenge where it discriminates unfairly against vulnerable groups.*'[21] *(Emphasis added)*

[20] At 1015 par 49 of the reported judgment.
[21] Para 28.

[59] Thus, the fact that a collective agreement was a product of negotiation between the appellant's (alleged) representatives and the second respondent does not in itself make it fair, either constitutionally or in terms of the EEA, its discriminatory contents, because if it were to do so, it would undermine both the EEA and the Constitution in a fundamental respect. The first respondent continued to be an employee of the appellant in the knowledge that the age of retirement was to be extended to age 63 and could have legitimately anticipated that the "*mechanics*" of the collective agreement, that were to be concluded finally, would not undermine his constitutionally protected rights (including his rights under the EEA) relating, in particular, to equality and dignity and his right not to be unfairly discriminated against in the workplace.

[60] In my view, the appellant has not, commensurate with its *onus,* placed anything of substance before the court *a quo* which could have caused that court, and on appeal this Court, to come to a conclusion other than that the discrimination, complained of by the first respondent, had no legitimate purpose and was unfair in the sense contemplated in the EEA.

[61] The appellant disavowed the collective agreement, contending that it was not bound by it, because those who represented it in entering into the agreement had no authority to do so, but nevertheless applied and gave effect to its discriminatory provisions for a period. In a letter dated 2 August 2007, written by the appellant's General Manager of Human Resources to the representatives of the second respondent, the latter was informed of the appellant's decision to extend the retirement age of its employees (including pilots) to age 63 and in that same letter the appellant gave notice that the collective agreement (referred throughout the process as a "*memorandum of understanding"* and dated 11 November 2005) will be of no force and effect as of 3 September 2007. So for the period 1 August 2005 to 2 September 2007, despite disavowing it, the appellant, in effect, applied its provisions.

[62] There was no evidence regarding the proportionality of the discriminatory provision, in particular, the appellant led no evidence to indicate why it was necessary to include the discriminatory provision and what effect it would

have had on the cost of extending the retirement age and whether it was in the circumstances necessary.

[63] In my view, the court *a quo* correctly concluded that the discrimination of which the first respondent complained, was unfair.

The issue of compensation

[64] I shall now consider the compensation aspect of this claim in light of the submission made by counsel for the appellant in response to questions put by the court at the hearing, namely that the compensation awarded by the court *a quo* (over R1,4 million) far exceeds even what the first respondent claimed, namely R100 000,00. In its application for leave to appeal, the appellant raised as a ground, *inter alia*, that the court *a quo* erred in finding that the first respondent had quantified his loss and, generally, that the court *a quo* erred in making an order which included an award of damages in a specific amount and for compensation. In the application for leave to appeal it was *inter alia* also averred that the court *a quo* gave no reasons "*for granting full financial redress to the first respondent and one year's remuneration*. *The award was neither just nor equitable*".

[65] In the judgment dealing with the issue of leave to appeal, the court *a quo* granted leave to appeal against the whole of its "*judgment, order and award*". That would have included the quantum aspects of both the damages and the compensation awarded. The distinct impression given at the hearing before us, in response to questions posed by the court, was that the only unsatisfactory aspect about the quantum was that the compensation awarded was many times more than what was claimed. The first respondent's counsel did not address us on quantum and adopted the stance that compensation was never put in issue by the appellant.

[66] Shaik AJ, in the court *a quo,* dealt very briefly with the issue of damages in his judgment. The following, apparently with reference to the damages aspect, is stated:

'*[60] The employee quantified his loss suffered and a quantum of claim was prepared and submitted to counsel for the respondent. There was no objection to the quantum claimed.'*

[67] In fact, the first respondent gave evidence of his financial loss as a consequence of the collective agreement or "*MOU*". The first respondent had done a calculation of his damages. He also explained how he did the calculation. He testified what loss he suffered as a result of the discrimination, which was, essentially, the difference between the total cost of his employment on the SC34 salary notch and the total cost of his employment on the SC20 notch, as well as the difference in the total cost of employment on the SC35 salary notch (to which he, according to his case, ought to have progressed) and what he was paid on the SC20 notch. It also included back pay (calculated on the basis of the difference between the salary notches referred to earlier); special leave and a 13th cheque payment difference, as well as the difference in the service bonus and 13th cheque payment. The calculation was in writing and the first respondent testified in relation to it. The first respondent's evidence regarding his loss, including his calculation of that loss, was not challenged in cross-examination and the appellant produced no evidence to counter his version on those aspects. The first respondent's evidence regarding his patrimonial loss was reasonable and therefore the court could have found that his loss, as calculated, had been proved.

[68] The court *a quo,* however, did not deal specifically or expressly with the issue of 'compensation' in the body of the judgment, but merely indicated what factors were taken into account in making the entire order, which included the order for damages, which I referred to above, and for compensation. The compensation order, as I pointed out earlier in this judgment, is that the appellant pays the first respondent the equivalent of one year's remuneration at the rate of pay applicable to his last year of service. The rate of pay applicable then would have been on the SC34, or SC35 notch, which translates to an amount of between R1 400 000,00 and R1 800 000,00 per annum (total cost of employment), taking into account the first respondent's earning level as reflected in his written calculation of his damages, which was admitted in evidence.

[69] The court *a quo* stated the following in the penultimate paragraph of the part of the judgment dealing with the unfair discrimination claim:

> '*[61] I have taken note of the fact that SAA is a state-owned enterprise, that it cancelled the collective agreement and brought an end to the discrimination and that by resolution of the board, increased the retirement age. However, the applicant was made to suffer unfair discrimination on a proscribed ground, that the employer by discriminating thus sought to obtain an economic benefit, at the expense of the applicant at the time when he was most vulnerable on account of the fact that he was at the end of his working life he chose not to suffer the discrimination; he raised the matter with the recognised union and brought it to the personal attention of the Chief Executive Officer who, seemingly, ignored his appeal for relief, which gave rise to this suit without unreasonable delay. Equality, having regard to our past, is a most cherished value and it beholds us all to stand guard and defend any violation of it. The fact that the state-owned enterprise, did the violation and sought to justify it, betrays carelessness. This suit, as the record reveals, was hard fought, that was to cause the delay in the hearing of the matter and rise in the burden of cost. I have taken these factors into account in the order made.*'

[70] Despite what was said in this paragraph, it does not appear from the judgment or the record exactly how the court *a quo* arrived at the amount awarded as compensation. It seems to have been based on an estimate of what the court *a quo*, subjectively, considered to be fair taking into account the factors that it mentioned.

[71] As stated earlier, the court *a quo* awarded the difference in salary (i.e. what the first respondent earned on the SC20 level and what he ought to have earned on the SC34/SC35 level) and the difference in other payments as damages and a year's salary, based on the level at which the first respondent would have earned in his last year of employment with the appellant, as compensation. But this does not tally with the first respondent's claim, as set out in his statement of case, where he claims the loss of salary as "compensation" and only R100 000,00 as "damages" for the discrimination.

[72] In the first respondent's statement of claim there was seemingly a misconception of what constituted "*damages*" and what constituted "*compensation*". The court *a quo* seems to have been aware of that misconception and to have corrected it in its order by awarding the actual or patrimonial loss as damages and a *solatium* as compensation for the discrimination, even though the *solatium* appears to be as much as, or more than, the damages.

[73] Section 50(1) of the EEA empowers the Labour Court to make "*any appropriate*" order, including, *inter alia*, an order awarding "*damages*" and an order awarding "*compensation*", in any circumstances contemplated in the EEA. Section 50(2), which deals specifically with the situation where the Labour Court has found that the employer has unfairly discriminated against the employee, provides that the Labour Court may make 'any appropriate order that is just and equitable in the circumstances' including (*inter alia*) an order that the employer pay the employee "compensation" (s50(2)(a)) and an order that the employer pay the employee "damages" (s50(2)(b)).

[74] A survey of the cases shows, generally, that there is uncertainty and confusion concerning the meaning of the terms "compensation" and "damages" as used in section 50 of the EEA[22]. The terms are ambiguous to say the least. The result is that they are used interchangeably to refer to the same kind of loss or injury, and seemingly impact adversely on the discretion that has to be exercised. The confusion is particularly pronounced in cases involving claims in terms of both, the LRA and the EEA. The confusion also seems to be compounded, because section 193 of the LRA refers to "compensation" as a remedy for an unfair labour practices and unfair dismissals. Following a series of cases in the Labour Court where contradictory meanings where given to this term,[23] this Court in *Johnson &*

[22] The authors of the subject 'Damages', in LAWSA (First Reissue) Vol. 7 par 9, under the discussion of the confused nature of the terminology, quote Lord Hailsham, in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 (HL) 825, who aptly stated that the language of damages 'is more than usually confused'. Also see P Q R Boberg "The Law of Delict; Volume One; Aquilian Liability" (1984) pp 475-476.

[23] See for eg. *Chotia v Hall Longmore & Co. (Pty) Ltd* [1997] 6 BLLR 739 (LC); (1997) 18 ILJ 1090 (LC) and *NUMSA v Precious Metal Chains (Pty) Ltd* [1997] 8 BLLR 1068 (LC);(1997)18 ILJ 1346 (LC).

Johnson (Pty) Ltd v CWIU[24] held that the term "compensation" in section 193 of the LRA included and referred to both patrimonial losses and non-patrimonial losses, such as a solatium. Since, there has been a (wrong) tendency to give the term "compensation" in section 50 of the EEA, the same meaning as the term "compensation", as used in section 193 of the LRA even though there are fundamental differences between the terms. It is merely necessary at this juncture to emphasise the differences and give meaning to the terms "damages" and "compensation" in section 50 of the EEA so as to bring about more certainty. This judgment is not intended to be a treatise or an in depth exposition of the intricate topic of damages and compensation.

[75] In section 193, the LRA does not distinguish between "damages" and "compensation" as the EEA does in section 50[25]. While it is correct that the term in the LRA would include, patrimonial and non- patrimonial damages, the same is not true of the term "compensation" in the EEA. The EEA draws a distinction between "compensation" and "damages", and does not regard them as the same.

[76] The term "damages" is the more technical of the two. In ordinary parlance, it would be regarded as the plural form of the word "damage". According to the Shorter Oxford English Dictionary the word "damages" is used in a law context and means "a sum of money claimed or awarded in compensation for loss or injury". The dictionary meaning of the word "compensation" includes "the action of compensating" and also refers to "a thing that compensates or is given to compensate, a counter balancing feature or factor; amends, recompense; Money given to compensate loss or injury." These dictionary meanings are not of much assistance in giving the terms meaning in their context in the EEA. It could not have been intended that the terms should have the same meaning. The fact that the EEA distinguishes between them is clearly indicative of that fact. The intention must have been that they connote different kinds of award. In my view, the only rational meaning that can be given to the terms is that "damages" connotes a monetary award for

[24] [1998] 12 BLLR 1209 (LAC).
[25] Section 158 of the LRA does distinguish between "compensation" and "damages".

patrimonial loss and "compensation" connotes a monetary award for non-patrimonial loss (including a 'solatium').

[77] In an Aquilian action, a claimant, to be successful must, *inter alia,* prove "damage" in order to be compensated by way of "damages".[26] The latter is the monetary compensation that the court gives to the claimant for the damage he has suffered. The objective of the award of damages is to make good the damage that was suffered. According to one point of view, the primary meaning of "damage" ("*damnum*"), is patrimonial loss.[27] According to another point of view, "damage" includes both patrimonial and non-patrimonial loss[28] although it is not the primary meaning of the term. Purposively construed and in order to distinguish it from the ordinary or dictionary meaning of the word "compensation", the term "damages", as used in section 50(1)(2) and, particularly in section 50(2)(b), was intended to bear the narrow meaning of an money award to compensate for any patrimonial loss the claimant (employee) has suffered. Because of its breath, the term "compensation", purposefully construed, in circumstances where it is to be distinguished from "damages", refers to the award for non-patrimonial loss (such as injured feelings).[29]The monetary award under this head cannot restore the victim to the position he or she was in before the discrimination, but is merely a *solatium.*

[78] In the EEA, "damages" refer to an actual or potential monetary loss (i.e. patrimonial loss) and "*compensation*" refers to the award of an amount as a *solatium* (i.e. to non patrimonial loss). It is conceivable that cases of unfair discrimination may involve actual (or patrimonial) loss for the claimant, as well as injured feelings (or non-patrimonial loss).

[79] Thus, an award for damages, in respect of the patrimonial loss and a compensation award, for the injured feelings, may, depending on the facts

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[26] See PQR Boberg 'The Law of Delict; Volume One; Aquilian Liability' (1984) p475.
[27] See Boberg op cit p475 et seq.
[28] LAWSA First Re-Issue Vol. 7 par 10.
[29] The intention is consistent with a view expressed in *Warren and Another v King and Others* [1963] 3 ALL ER 521 at 528. There Harman LJ in relation to a claim for damages for personal or bodily injuries expressed the view that '*the remedy should not be called damages, for that connotes restitutio in integrum, a thing patently impossible when a man has lost a leg or a girl has her spinal cord severed- but "compensation".'*

and circumstances of the case, be justified. It is a matter for the discretion of the Labour Court, which discretion must be exercised in light of all the relevant facts and circumstances. Most importantly, as provided in section 50(1) of the EEA, the order must be "*appropriate"* and in terms of section 50(2) must be "appropriate" and "just and equitable in the circumstances". Interpreting section 38 of the Constitution in the *Hoffmann* matter, the Constitutional Court held that the term "*appropriate relief*", as used in that section, must be purposively interpreted in light of section 172(1)(b) of the Constitution and that it meant that the relief must be "*fair and just in the circumstances of the particular case*".[30]

[80] The purpose of an award of damages for patrimonial loss by means of a monetary award, is to place the claimant in the financial position he or she would have been in had he, or she, not been unfairly discriminated against. This is the common purpose of an award of damages for patrimonial loss in terms of the South African law in both the fields of delict and contract. In the case of compensation for non-patrimonial loss, the purpose is not to place the person in a position he or she would have otherwise been in, but for the unfair discrimination,[31] since that is impossible, but to assuage by means of monetary compensation, as far as money can do so, the insult, humiliation and dignity or hurt that was suffered by the claimant as a result of the unfair discrimination.[32]

[81] In *Hoffmann* it was held that "*fairness*" in a labour context requires a consideration of the interests of both the employee and the employer[33] as well as the interest of the community which resides in the recognition of the inherent dignity of all human beings and the eradication and prevention of all forms of discrimination. Moreover, the determination of appropriate relief in unfair discrimination cases calls for the balancing of all the interests that will be affected by the remedy. The same considerations will apply when the court

[30] See *Hoffman's* case para [42].
[31] Compare for example *Mutual & Federal Insurance Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 10-11.
[32] Very much like an award under the *actio injuriarum*.
[33] See *Hoffmann (supra)* par 43. See also the *dictum* of Smalberger JA in *NUMSA v Vetsak Co-operative Ltd & Others* (supra) at 706 B-C.

has to decide on an appropriate remedy in an unfair discrimination matter which is to be determined in terms of the EEA.

[82] Having decided to award compensation in addition to the damages awarded, the court *a quo* was required to carefully consider the quantum of such compensation so as to ensure that there would be no duplication and that it would not be excessive, but would be fair and equitable. Because the determination of a *solatium* is notoriously difficult, courts use awards in previous, similar, cases as guidelines and, when necessary, make adjustments in order to cater for the specific facts of the case under consideration and allow for the erosion in the value of money. Courts are also inclined to be conservative in fixing the quantum for non-patrimonial 'losses'.[34]

[83] In the determination of such quantum, the effect of the decision on future awards is another important consideration.[35] The court should endeavour to arrive at an amount that society at large will consider fair in the circumstances and based on how it values money.

[84] In *Christian v Colliers Properties,*[36] in emphasising the rational for damages for unfair discrimination, the court cited with approval from *Alexander v Home Office*[37] where the following was stated, which would also apply in the case under consideration:

> '*The objective of an award for unlawful racial discrimination is restitution. For the injury to feelings, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, award should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the result which it seeks as do nominal awards.'*

[34] See for example *Bay Passengers Transport v Franzen* 1975 (1) SA 269 (A).
[35] See for example *Signournay v Gillbanks* 1960 (2) SA 552 (A) at 556C.
[36] (2005) 26 ILJ 234 (LC); also reported at [2005] 5 BLLR 479 (LC) at 483.
[37] [1988] IRLR 190 (CA).

[85] The compensation awarded by the court *a quo* is in my view grossly excessive. It not only exceeded by far what the first respondent claimed but bears no reasonable relationship to the injury and humiliation that the first respondent testified he felt and the other factors the court *a quo* mentioned. It is also inconsistent and far in excess of the amounts awarded in (broadly) similar cases. For these reasons, this Court may interfere with the compensation award and determine the quantum thereof afresh. All the facts are before us and no good purpose will be served in referring the matter back to the court below for a re-assessment of the compensation to be awarded. This is an exceptional matter where this Court may determine the amount of afresh in the interest of justice.[38]

[86] The damages award was generous. The appellant was ordered to pay the first respondent the difference in the total cost to company amount for the period 1 September 2005 to 2 September 2007 and not only the difference in salary that would have been payable to him if he was not discriminated against. On the other hand, the very act of unfair discrimination is hurtful. It humiliates and denigrates. The dignity which every human being is to be accorded under our Constitution, is impaired. When the first respondent took issue with the discriminatory provisions, the appellant, a parastatal, which should be at the vanguard of protecting employees against unfair discrimination, did not relent and simply regularise the situation, but continued to defend its position in the appeal before us.

[87] There is a dearth of cases reported where compensation was awarded for unfair discrimination based on age. The cases that are reported are not very similar but do serve as a rough, but helpful guide as to what would be fair compensation in this case. A survey of the cases indicates that in making awards for compensation the Labour Court, generally, did not refer to previous, broadly similar cases, resulting in some inconsistency in awards. The confusion I referred to before also seemed to have had an effect on the assessment of this aspect in some instances.

[38] *NUMSA obo Sinuko v Powertech Transformers (DPM) and Others* [2014] 2 BLLR 133 (LAC).

[88] In *Evans v Japanese School of Johannesburg,*[39] the applicant was a 63 year old unmarried woman who was employed at the Japanese school. Her services were terminated on the basis that at 63 she had reached what the employer regarded as the normal retirement age. In her claim, she contended that the normal retirement age of the school's employees was 65 and that her dismissal was therefor automatically unfair and amounted to unfair discrimination. Her claim was for compensation under the LRA and for damages under the EEA. Having found in her favour that her dismissal was automatically unfair under the LRA, and amounted to unfair discrimination under the EEA, the Labour Court went on to determine the issue of quantum. Noting that under the LRA the claimant was entitled to a maximum of 24 month' remuneration, the court awarded her 24 month's remuneration as compensation under the LRA which came to an amount of R177 144.00. On the basis that there was no limitation in terms of the EEA and that there was an overlap between the two claims, the court held that she would have earned, had she remained in employment until age 65, an amount of R359 823.75. The Court regarded this amount as her loss. Taking into account the award under the LRA and the fact that she was able to earn about R2 000.00 from private teaching, the Court determined that an amount of R200 000.00 was just and fair compensation in respect of the unfair discrimination claim. The Court did not say distinguish between damages and compensation, but it clearly took into account the claimant's patrimonial loss which would have come to an amount of about R180 000.00 after her earnings and the LRA award were deducted. The *solatium* part of the award, presumably, was therefore about R20 000.00.

[89] In *Bedderson v Sparrow Schools Education Trust,*[40] an elderly teacher was dismissed after the employer unilaterally introduced a retirement age. The claimant brought claims under the LRA for automatically unfair dismissal and under the EEA for unfair discrimination. She claimed compensation for the automatic unfair dismissal in terms of the LRA, and compensation and damages in terms of Section 50 of the EEA. She did not specify an amount in

[39] [2006] 12 BLLR 1146 (LC).
[40] [2010] 4 BLLR 363 (LC).

her claim and left the amount in the discretion of the Court. The Court was sympathetic with the employer because of exceptional circumstances. It was a non-profit organisation that was involved with children from deprived backgrounds, and who had learning problems. Its funding came from donations. The Court, further taking in account that the discrimination was not *"mala fide"* and finding that it was not appropriate to introduce a punitive element into the compensation, awarded the claimant six (6) month's remuneration as compensation which came to an amount of R42 000.00. No award was made in respect of damages because the claimant did not prove such damages, nor was an award made in terms of the LRA for the dismissal

[90] In *Hospersa obo Venter v S A Nursing Council,*[41] which was a case brought under the EEA and involving unfair discrimination on the grounds of age. The employee was forced to retire at age 60 but allowed to work to age 65. Her request for an extension of her retirement age to age 70 had been rejected. All the time that she was employed, the retirement age was 70 with the option to retire at the end of the month in which the age of 65 was reached or thereafter. The court found that the employer had treated her differently because of her age and unfairly so. In considering the amount to be awarded the court took into account that even though the employee had lost three years' salary because of her forced retirement, she had earned a pension equal to about half her salary. The court awarded the complainant what she claimed, namely compensation equivalent to two years' remuneration which came to an amount of R180 000,00. The court did not indicate what portion constituted patrimonial loss and what constituted a *solatium*.Since it appears that her patrimonial loss was about R135 000,00 (that is a loss in salary if one deducts the pension she received), an amount awarded to her as a *solatium* was therefore about R40 000,00 to R45 000,00.

[91] Taking into account all the relevant facts in the present case, including the erosion in the value of money, I am of the view that a just and equitable amount for compensation as a *solatium*, in addition to the damages award

[41] [2006] 6 BLLR 558 (LC). The judgment in this matter was overturned by the Labour Appeal Court on the ground that the Labour Court had decided the merits of the matter on a different basis than was argued before it. (See *SA Nursing Council v Venter* (JA27/06) 2009 ZALAC 26 (16 July 2009)).

made in respect of the first respondent's patrimonial loss, which is not interfered with, is an amount of R50 000,00. The award made by the court *a quo,* namely, 24 months' remuneration in respect of the *solatium,* is accordingly to be set aside and substituted with an award of R50 000,00 (fifty thousand rands). It is clearly preferable as well as fair and proper to make an award in an actual amount. Making an award in the form of payment of a certain number of month's remuneration, which is clearly a vestige of compensation awards under the LRA, holds the danger that high earning individuals may (unwittingly) be awarded more as compensation than those that earn less, even though the injury suffered by the latter, as a result of unfair discrimination, was greater.

The unfair labour practice dispute

[92] This claim relates to the appellant's appropriation of the first respondent's accumulated leave pay and the utilisation of the same to pay him a *"salary*" during the period he was on standby pending the finalisation of the collective agreement ("*or MOU*").

[93] As mentioned at the outset, in respect of this claim, the court *a quo* sat as an arbitrator, purportedly, as contemplated in section 158(2)(b) of the LRA. The record indicates it was consequent an agreement reached between the parties, that is the appellant and the first respondent, through their respective legal representatives. We have not been called upon to decide whether the Labour Court had the power to sit as arbitrator in respect of this dispute and if it appropriately sat as such in respect of the said dispute. I shall accordingly, confine myself to the other difficulties raised that became apparent, but in respect of which the parties, or their legal representatives, filed additional written submissions.

[94] It was submitted on behalf of the first respondent that the court ***a quo's*** decision regarding the unfair labour practice issue was an arbitration award and that it could only be challenged by way of review. It was further submitted that there was no such review before this Court, alternatively, that even if there was effectively a review application before this Court, the court ***a quo's***

award was not to be reviewed because it was a decision that a reasonable decision-maker could have made. It was argued further, in the alternative, that if the award of the court *a quo* was appealable (as opposed to "*reviewable*") the appeal should be dismissed, because the decision (i.e. referred to as an "award" in the judgment) was correct.

[95] I will deal in due course with the the argument that the decision was correct, or one that a reasonable decision-maker could have made. At this stage, I deal with the issue which the first respondent raised namely, that whether the remedy of a litigant, where the dispute had been arbitrated by the Labour Court sitting as arbitrator as contemplated in section 158(2)(b) of the LRA, was a review, or an appeal against the outcome.

[96] Section 158 of the LRA deals with the powers of the Labour Court and section 158(2)(a) and (b), in particular, provides:

> '*If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the court may –*
>
> *(a) stay the proceedings and refer the further dispute to arbitration; or*
>
> *(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the court sitting as arbitrator,* ***in which case the court may only make any order that a commissioner or arbitrator would have been entitled to make.'*** (Emphasis added)

[97] Section 158(3) provides that:

> '*The reference to 'arbitration' in subsection (2) must be interpreted to include arbitration –*
>
> *(a) under the auspices of the commission;*
>
> *(b) under the auspices of an accredited council;*
>
> *(c) under the auspices of an accredited agency;*
>
> *(d) in accordance with a private dispute resolution procedure; or*

(e) if the dispute is about the interpretation or application of a collective agreement.'

[98] Section 166 of the LRA deals with appeals against judgments or orders of the Labour Court and section 166(1), in particular, provides that "*any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against* ***any final judgment or final order*** *of the Labour Court*". (Emphasis added)

[99] Section 174 of the LRA deals with the powers of the Labour Appeal Court when hearing appeals. It provides:

'*The Labour Appeal Court has the power –*

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and

(b) to confirm, amend or set aside ***the judgment or order*** *that is the subject of the appeal and to give any judgment or make any order that the circumstances may require.*' (Emphasis added)

[100] The problem confronting this Court has already been identified by the Legislature and an attempt has been made to address it by means of an amendment to section 158(2)(b) of the LRA. The Labour Relations Amendment Bill of 2012 was adopted by the House of Assembly in Parliament during August 2013. At the time of the writing of this judgment, the amendment had not yet come into effect. In terms of the amendment, the phrases in section 158(2)(b), namely, "*with the consent of the parties*" and "*with the court sitting as an arbitrator*", are to be deleted. In terms of an explanatory memorandum accompanying the Bill, the amendment seeks to empower the Labour Court to deal with the matter, not as arbitrator, but as a court and to provide that any challenge to its decision in such a matter would be by way of appeal to this Court and not by way of review to the Labour Court. The present case was decided in terms of the LRA before its

amendment, and pending the commencement of that amendment, interpretation is required to ascertain the current position. We have not been referred to any express provision in the LRA which readily yields an answer to this rather important issue that is being considered. However, in my view the answer lies in a proper construction of the relevant provisions of the LRA, in particular, those that I have quoted above for ease of reference.

[101] The argument made by the first respondent's legal representatives in their supplementary argument, duly truncated, is that section 158(2)(b) (in its unamended form) must be given its literal meaning. According to this argument, in terms of this section, the court sits as an arbitrator and not as a court, but the remedy available to a party is not by way of review, because section 145 of the LRA does not apply. It was further argued that this Court has the power to hear the appeal on a basis similar to the basis recognised in the *Sinuko* matter,[42] but that this Court must apply the test propounded in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[43] to the decision of the court *a quo* which sat as an arbitrator. This, it was argued, is necessary in order to promote consistency and finality. It was furthermore argued that it is the nature of the decision which determines which test ought to be applied, i.e. either the test applicable to appeals or that propounded in *Sidumo*, and not the identity of the person that made the decision.

[102] It is contended that this Court has the inherent power to reconsider the decision of the court *a quo* in the same manner it would reconsider the decision of the Labour Court in a matter involving a review of an arbitration award. It was submitted that in this matter the first respondent was not asking for the matter (relating to the unfair labour practice), to be remitted, but was submitting that the appellant did not make out a proper challenge before this Court. It approached this Court arguing grounds of appeal as if its remedy against the court ***a quo's*** determination of the unfair labour practice issue, was an appeal, whereas it should have challenged the court ***a quo's*** determination on review grounds. It was also argued that the appeal should accordingly be dismissed on the grounds that the appellant brought the appeal against that

[42] I.e. *NUMSA Sinuko v Powertech Transformers (Pty) Ltd (supra)*.
[43] [2007] 28 ILJ 2405 (CC).

determination on the wrong legal basis and further that, in any event, the court *a quo's* determination was reasonable, i.e. not one that a reasonable decision-maker would not make.

[103] The principles that apply to the approach to be adopted by a court when considering the meaning of a legislative provision are trite. They have been conveniently restated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[44] In my view, ultimately the key to the solution of the problem posed, lies in the meaning of the word "*order*", as used in section 158(2)(b), section 166 and the words "*judgment or order*", as used in the first part of section 184(b). There is nothing in the LRA that provides specifically that the determination of the Labour Court in a matter in which it sat as arbitrator, is an "*award*". But section 158(2)(b) specifically refers to the determination as an "*order*". It specifically provides that the judge's powers in making the order would be the same as that of the commissioner or arbitrator, who would otherwise have had to arbitrate the dispute, but does not thereby mean that the decision of the judge who sits as an arbitrator is an "award". The commissioners and arbitrators, appointed in terms of the LRA, do not make "*orders*" in the strict sense of that term, but make decisions that are referred to as "*arbitration awards*". The decision of the Labour Court, even if sitting as an arbitrator in terms of section 158(2)(b) is a "judgment" or "order". Even though section 143 of the LRA provides that arbitration awards issued by a commissioner are final and binding and may be enforced as if they were orders of the Labour Court, the LRA, in section 145, specifically only provides for the remedy of review in respect of arbitration proceedings conducted under the auspices of the CCMA, unless otherwise agreed to in a collective agreement.

[104] Section 158(2)(b) does not purport to regulate the "appealability" of the judge's order. Section 145 of the LRA which deals with the review of arbitration awards made by commissioners and arbitrators does not apply to the determination made by a judge acting in terms of section 158(2)(b). It is also not envisaged in the LRA that the judge's determination in terms of

[44] [2012] 4 SA 593 (SCA) at 604; [2012] 2 ALL SA 262 (SCA).

section 158(2)(b) requires to be made an order of court as envisaged in section 158(1)(c) read with section 158(1A) of the LRA. On the contrary, section 163 of the LRA provides that "*any decision, judgment or order of the Labour Court may be served and executed as if it were a decision, judgment or order of the High Court*". Even though there is a similar provision relating to awards made by a commissioner (under the auspices of the CCMA or an arbitrator under the auspices of an accredited bargaining council), namely, section 143 of the LRA, the awards of an arbitrator or commissioner are subject to review (in case of a council, unless the remedy of review is specifically excluded in terms of a collective agreement). An order of the Labour Court made in terms of section 158(2)(b) is subject to appeal only.

[105] It was never envisaged in the LRA that a determination of a judge of the Labour Court sitting as arbitrator would be the subject of review by another judge of the Labour Court. This would also be in keeping with the common principle or practice that applies to higher courts that a judge's order is not subject to review, but may be (and generally is) subject to appeal. In terms of the LRA, the Labour Court has the same status as a High Court.

[106] Section 166 of the LRA provides that any party to "*any proceedings*" before the Labour Court may apply for leave to appeal against its final judgment or order. "*Any proceedings*" would include the proceedings envisaged under section 158(2)(b). It is accordingly clear from sections 166 and 174 of the LRA that a final judgment or order of the Labour Court in any proceedings before that court is appealable to this Court and that this Court has the power envisaged in section 174 of the LRA in such an appeal.

[107] The situation that this Court dealt with in *Sinuko* differs in material respects from the present. The difficulty that was addressed there was whether this Court had the power to consider grounds of review that were not dealt with by the Labour Court and particularly because of the Supreme Court of Appeal's criticism of this Court doing so (i.e. exercising powers of review) in the *Shoprite Checkers* matter.[45] This Court held in *Sinuko* that it had the power to

[45] See *Shoprite Checkers (Pty) Ltd v CCMA and Others* 2009 (3) SA 493 (SCA) at 501 pars 29 and 30.

decide in certain exceptional circumstances, by virtue of the power given to it in terms the auxiliary provision, that is, the latter part of section 174(b) of the LRA. In deciding such grounds, i.e. grounds which the Labour Court did not decide in respect of a review of an arbitrator or commissioner's award, this Court applies the test propounded in *Sidumo*. This Court in those circumstances is acting as a court of first instance and, generally, of last instance (subject to a further appeal to the Constitutional Court), because there is no decision (judgment or order) of the Labour Court, in respect of those points, that is being appealed against.

[108] In a case where an order or judgment of the Labour Court is appealed against, that includes an order made in the proceedings contemplated in section 158(2)(b) of the LRA, this Court is dealing with an appeal and is not reviewing the judge of the Labour Court's order. The test on appeal is not reasonableness, but whether the Labour Court's order was right or wrong. This position is also consistent with the position that will pertain after the coming into operation of the amendments to section 158(2)(b) which I referred to earlier.

[109] Appellant's submissions are briefly the following: From the pleadings it is clear that the first respondent's unfair labour practice claim is related to the payment of his accumulated leave pay and not that he was put on compulsory leave by the appellant. The first respondent had no contract of employment with the appellant after his fixed term contract lapsed at the end of the month in which he turned 60. In the absence of an employment contract, the appellant had no duty to pay the first respondent and the first respondent had no right to claim a salary from the appellant. The latter was accordingly entitled to apply the first respondent's accumulated leave to "*remunerate*" him for the period 1 September to 9 November 2005. If the first respondent had any claim for remuneration for that period, which was not paid from his accumulated leave, the claim could only have arisen from the collective agreement (i.e. the MOU) and at the reduced level but this was not the claim which had been brought before the court *a quo*. Once the court *a quo* had accepted that "*leave pay*" was not a benefit within the meaning of section

186(2)(a) of the LRA it should have held that the first respondent's claim had to fail. The court *a quo* erred in not finding accordingly, but "*effectively construed the first respondent's claim to be what it was not*". It found that his claim was a claim not to be forced to go on leave and not a claim for accumulated leave pay and that the finding was incorrect. It was further argued that, in any event, it could not have been found that it was an unfair labour practice to place the first respondent on leave because the fixed term employment contract had terminated in August 2005 and the first respondent had no entitlement to remain in the appellant's employment. He only had an entitlement in terms of the collective agreement once all its terms were agreed to on 11 November 2005.

[110] On behalf of the first respondent it was submitted, in response, that this Court in *Apollo Tyres South Africa (Pty) Ltd v CCMA and Others,*[46] criticised the decision and approach in a case such as *Gaylard v Telkom*[47] which was to consider whether the claim (in that case accumulative leave pay) was a "*benefit*" as contemplated in item 2(1)(b) of Schedule 7 of the LRA, the wording of which was, in all material respects, identical to the wording of section 186(2)(a) of the LRA. In *Apollo Tyres,* it was held that the focus should be on the nature of the dispute. Where the dispute was about the fairness of the employee's conduct relating to the provision of a benefit it could be dealt with under the unfair labour practice jurisdiction. The first respondent challenged the appellant's conduct in depleting his accumulative leave entitlement. The Labour Court adjudicated the dispute as arbitrator by agreement between the parties on the supposition that the Labour Court's order constituted an award. It was further submitted that it was not one that a reasonable arbitrator would not have made. In the alternative, it was argued that the court *a quo's* decision (or order) was correct.

[111] It was submitted that the appellant's conduct, in utilising the first respondent's accumulated leave pay to remunerate him for the period when he was asked to remain at home on standby, was unfair in light of the following: The first respondent was on standby for the period; he was not informed of and did not

[46] [2013] 34 ILJ 1120 (LAC).
[47] [1998] 9 BLLR 942 (LC).

consent to the utilisation of his accumulated leave pay; the appellant did not reinstate the accumulated leave when the standby period ended even though the collective agreement had been concluded with retrospective effect (i.e. retrospective to 1 April 2005); the appellant did not pay the first respondent the accumulated leave pay he was entitled to when he finally retired on 31 August 2008 (i.e. at age 63); and the first respondent had remained in the appellant's employment after 31 August 2005 and throughout the period he was on standby.

[112] The essence of the decision in *Gaylard*[48] was that the conduct complained of that there was no unfair labour practice (i.e. in terms of Item 2 of Schedule 7 of the LRA) if it related to the payment of "*accumulated leave pay*" because accumulated leave pay was not a "*benefit*". According to decisions such as *Gaylard,* the "*benefit*" contemplated in Item 2(1)(b) of Schedule 7 of the LRA (now section 186(2)(a)) "*may include a range of rights enjoyed by a beneficiary employee but excludes such rights as a right to be paid*". The rationale, for construing the word "*benefits*" narrowly and as excluding the right to be paid, was thought to be to preserve the right to peaceful industrial action (i.e. in particular strikes and lockouts).[49] According to the reasoning in those cases, if the word "*benefits*" was given a generous or broad meaning so as to include any advance or right derived from the employment contract, that would "*all but preclude strikes and lockouts*".

[113] This Court in *Apollo Tyres* roundly rejected the *Gaylard* approach as "*artificial and unsustainable*"[50] and preferred the approach taken in *Protekon (Pty) Ltd v CCMA and Others,*[51] in terms of which one does not have to give a narrow meaning to the word "*benefits*" but to consider the nature of the benefit dispute in order to determine whether it is a dispute that must be settled by way of industrial action or adjudication (i.e. by way of arbitration). In terms of the approach endorsed by this Court in *Apollo*, where the dispute is about existing rights (whether derived from contract or law) it can and has to be settled by adjudication, but where it involves the creation of new rights there is

[48] See also *Schoeman v Samsung Electronics SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC).
[49] See also *Schoeman's* case (*supra*).
[50] See at page 1128 par 25.
[51] (2005) 26 ILJ 1105 (LJ).

an election to either resolve it by way of industrial action or by way of adjudication (i.e. arbitration).

[114] In light of *Apollo,* the word "*benefits*" in section 186(2)(a) may be construed broadly. Thus construed, the word would include the payment of accumulated leave pay.

[115] The court *a quo* was clearly wrong in describing the claim of the first respondent as something other than a claim for the payment of accumulated leave pay, because that was indeed the claim of the first respondent. However, even though the court *a quo* erred regarding the basis of entertaining the claim, it was correct in entertaining it. In terms of *Apollo* it could.

[116] I have already pointed out in dealing with the issue of unfair discrimination that uncontested evidence shows that the first respondent remained in the employment of the appellant after 31 August 2005. If the fixed term contract that was in place before that date had lapsed, which I do not find, then the first respondent was reinstated in his employment. It is uncontested that he was requested by or on behalf of the appellant to remain on standby pending the finalisation of the detail of the collective agreement (or "*MOU*"). The first respondent's evidence that he tendered his services to the appellant throughout the period he was on standby, was also uncontested. In those circumstances he was entitled to be paid a salary by the appellant. The utilisation, by the appellant, of the first respondent's own funds, i.e. his accumulated leave pay, which was payable to him upon his final retirement, to "*remunerate*" him while he was on standby, constituted an unfair labour practice. An order directing that the appellant pay (or repay) the first respondent the money that was wrongly and unfairly utilised, with interest, was accordingly appropriate and correct. The appeal insofar as it relates to the unfair labour practice claim must therefore fail.

[117] Regarding the costs on appeal, I am of the view that there is no reason why costs should not follow the result. Even though this Court interfered with the quantum of the award made in respect of compensation for the unfair

discrimination claim, the appellant's appeal was not substantively successful. Law and fairness dictates that the appellant bear the costs of the appeal.

[118] In the result, the following order is made:

1. The appeal is dismissed save to the extent that the order made in paragraph 62.3 of the judgment, directing the appellant to pay the first respondent compensation in the sum equivalent to one year's remuneration calculated at the rate of pay applicable to his last year of service, is set aside and is replaced with the following paragraph:

> "62.3 *The respondent is to pay the applicant R50 000,00 (fifty thousand rands) as compensation for the unfair discrimination.*"

2. The appellant is to pay the costs of the appeal.

_____

P Coppin

Acting Judge of Appeal of the

Labour Appeal Court

I agree

_____

P Tlaletsi

Deputy Judge President of the Labour

and Labour Appeal Court

I agree:

_____

D M Davis

Judge of the Labour

Appeal Court

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