IN THE EDUCATION LABOUR RELATIONS COUNCIL

HELD AT CAPE TOWN

Case No PSES 463-05/06WC

In the matter between

JJ MARKGRAAFF Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 20 MARCH 2006

DELIVERED: 27 MARCH 2006

SUMMARY: ***Labour Relations Act 66 of 1995 – alleged unfair labour practice relating to benefits in terms of section 186(2)(a) – whether claim relating to non-payment of compulsory annual bonus and arrear wages consisting of basic salary and contributions to pension and medical aid constitutes benefits for purposes of section 186(2)(a)***

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This is a dispute concerning an alleged unfair labour practice referred to this tribunal in terms of section 191 of the Labour Relations Act No 66 of 1995 (hereinafter referred to as the "LRA"). The arbitration hearing took place on 20 March 2006 at the offices of the Western Cape Department of Education in Cape Town. The applicant was present at the arbitration and represented by Mr. D E Heradien, an official of CPTA, a registered trade union of which applicant is a member. Respondent was represented by Mr. K Petersen, an employee of the Labour Relations Department of the Western Cape Provincial Department of Education.

[2] During the arbitration hearing, both applicant and Mr Heradien gave evidence on applicant's behalf. Respondent called one witness. Applicant handed in a copy of his pay slip for the month of June 2005, marked as exhibit "A" and by agreement between the parties a further bundle, containing 16 pages, consisting of various documents, was handed in as exhibit "B". The proceedings were conducted in Afrikaans and mechanically recorded on three cassette tapes.

THE ISSUES IN DISPUTE

[3] I have to decide whether there was any unfair conduct by respondent relating to the provision of benefits as intended in section 186(2)(a) of the LRA, and if so, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[4] Applicant, who has been employed by respondent for many years as an educator, was once the school principal of Zisukahanyo High school in Phillippi. The year 2000 was quite a stormy year for applicant. He was disciplinary charged with various charges, amongst others racism, he was held hostage at the school by pupils and on 15 May 2000, he was placed on compulsory paid leave by respondent pending a disciplinary hearing. After the disciplinary hearing, he was convicted on some of the charges and demoted to the position of deputy school principal. Although he was acquitted on the charge of racism, it was considered in everybody's best interest that he should not return to Zisukahanyo High school at that stage, because apparently the stigma of racism remained.

[5] On 17 July 2002, applicant for the first time since 15 May 2000, commenced working again. This was at EMDC South. He was eventually placed by the EMDC at Spine Road High School where he was asked to assist the principal, Mr Najaar as from 16 January 2003 when the schools re-opened for the first school quarter. There is a dispute of fact as to how long applicant remained at that school, but even on applicant's own version, it is clear that he only attended the school until 9 February 2003 when he suffered a heart attack. Between 9 February 2003 and June 2004, applicant did not work at all, but still received his full salary. Due to negotiations between applicant's union and respondent, applicant was eventually transferred to the EMDC North and was placed by EMDC North at Rosendal Secondary school where he acted as mentor for the school principal and where he in fact worked from June 2004 until the end of June 2005. Since the beginning of July 2005, applicant has been at home. For most of the period as from 1 July 2005, applicant was booked off by a medical practitioner and this is currently still the position.

[6] Until the end of July 2005, applicant, who is still listed in respondent's records as a staff member of Zisukahanyo High school, where he has not been since May 2000, still received his full monthly salary every month. During August 2005, E TV apparently broadcasted a program where applicant's absence from of Zisukahanyo High school was placed under the spotlight. When being confronted with applicant's case during this broadcast, a director of education apparently promised that he would ensure that applicant would not get paid for the period in respect of which he was not at Zisukahanyo High school. Shortly thereafter, applicant's salary was indeed stopped and he has not received any payments from respondent since the end of July 2005. Respondent's current attitude is that applicant is not working, has exhausted all his sick leave and that it is under no legal obligation to pay applicant whilst he is not working. On 3 October 2005 applicant applied for temporary incapacity sick leave, but respondent has not yet made a decision as to whether such temporary incapacity sick leave will be granted or not.

SUMMARY OF EVIDENCE AND ARGUMENT

[7] Due to the approach I intend to adopt in this award, I do not intend to summarise all the evidence in detail. To the extent that I may not mention aspects raised in the evidence or during argument, this would only be with the intention of keeping this award as short as possible and should therefore not be seen as an indication that I did not take that evidence or argument into account.

Evidence on behalf of applicant

[8] *Joseph Jacobus Markgraaff*, the applicant, testified that the last salary which he had received from respondent, was on 31 July 2005. Although there is nothing outstanding until 31 July 2005, no payments whatsoever had been made since then. He is currently at home, having been booked off by a medical practitioner. Although he had been off sick for several periods during the past few years, he had always handed in sick certificates when he was off sick. During the times that he worked under a principal, he handed the sick certificates to the school principal and during the times when he did not work under a principal, he handed the certificates to his union to forward to respondent. Until December 2005, respondent has never communicated with him to warn him that his salary may be stopped. On 12 December 2005, for the first time, he received correspondence in this regard from respondent when he was informed that his salary was suspended since August 2005 until further notice.

[9] When he commenced working at EMDC South on 22 July 2002, his union had meetings with the Director, Mr Daniels. Applicant had concerns that since he had not been working at any school for a lengthy period, he might not be totally au fait with recent developments and therefore requested training, which Daniels agreed to. It was also agreed that he would be suitably placed by the EMDC. He never received any training. He did not consider his placement at Spine Road High School as from January 2003 as a suitable placement, for various reasons. He did not have any specific duties or job description at that school and there was actually nothing for him to do there. When he raised this with Daniels, he was informed that he is actually in excess at that school and that he could apply to be retrenched, which he was not prepared to do.

[10] After the heart attack which he suffered on 9 February 2003, he was booked off until August 2003 by a medical practitioner. He however never returned to Spine Road High School again because he was not suitably placed there and also did not receive the training he was promised. Eventually his union succeeded in arranging for him to be transferred to the EMDC North. The EMDC North then placed him at Rosendal Secondary school as a mentor where he worked from June 2004 until the end of June 2005.

[11] During the course of 2004, he suffered a second heart attack, but he cannot say at all how long he was incapacitated as a result of that heart attack. In fact he cannot even give an indication whether it was for days, weeks or months. When asked why he did not report to Zisukahanyo High School on 22 August 2005, as directed to do by respondent in a letter dated and send to applicant's union on 18 August 2005, applicant replied that he never received this letter. It was then put to applicant by Mr. Petersen that it is a coincidence that the day after this letter was sent to applicant's union, applicant produced another sick certificate booking him off as from 19 August 2005.

[12] Applicant explained that the reason why he applied for temporary incapacity leave on 3 October 2005, was because he was advised to do so by Mr. Daniels who suggested that this would be the solution to the problem so that his salary could be restored again.

[13] His monthly salary before it was stopped, amounted to R14363,00 before deductions. The deductions include tax, membership fees paid to his union and the ELRC as well as his contribution to the pension fund and medical aid. His birthday is during August 2005 and respondent is contractually bound to pay to him an annual bonus, equal to his monthly salary, less tax during the month of his birthday. This is not a discretionary bonus. This bonus which he was due to receive in August 2005, has not been paid yet.

[14] *Derick Everton Heradien* is an official of the CPTA, being applicant's trade union. He has constantly been negotiating with respondent in order to arrange a suitable placement for applicant after his demotion, because it was not in anybody's interest that applicant returned to Zisukahanyo High School in Phillippi. The Director, Mr. Daniels who was supposed to solve the problem hopelessly failed in this task.

[15] When an educator's sick leave is exhausted, respondent normally sends a letter to the educator warning him that his sick leave has been exhausted and that future leave would be considered as unpaid leave. This was not done in applicant's case. The expectation was created by respondent that the application for temporary incapacity sick leave during October 2005, would solve the whole problem and that such sick leave would be granted retrospectively.

Evidence on behalf of respondent

[16] Paul Augustinus Adams is respondent's Chief Personnel Officer in its leave department. He has been employed by respondent for the past 24 years and has been in the leave department since 2001. All leave forms and sick certificates in respect of all educators in the Western Cape come to his department where the leave forms in respect of each educator are kept in a separate leave file. In order to qualify for sick leave, an educator must submit an official form, called the Z1, known as an "Application for leave of absence" form. Together with this form, a sick certificate must also be submitted.

[17] He is familiar with applicant's case and brought his leave file to the arbitration hearing. The first time, he took interest in applicant, was when he received a letter from the school principal of Spine Road High School, Mr Najaar. The letter was dated 24 June 2004 and reads as follows:

> *"I hereby wish to inform you that since Mr J J Markgraaff has been placed at our school, he only reported for duty during the first week, since then he submitted Dr. certificates up to June last year 2003.*
>
> *We have subsequently learned that Mr. Markgraaff has suffered a heart attack and is currently recuperating. We have not received any leave documentation regarding his absence. …."*

[18] The only leave forms and sick certificates, which the leave department has received in respect of applicant, are in respect of the following periods:

18.1 9 June 2003 until 27 June 2003 (consisting of form Z1, duly completed together with sick a certificate)

18.2 22 July 2003 until 22 August 2003 (consisting of form Z1, duly completed together with a sick certificate)

18.3 19 August 2005 until 4 September 2005 (consisting of a sick certificate only)

18.4 8 September 2005 until 23 September 2005 (consisting of a sick certificate only)

18.5 3 October 2005 until 6 December 2005 (consisting of a sick certificate only)

[19] There is apparently also a sick certificate in respect of the current school quarter, but that has not reached applicant's leave file yet. Applicant's current 3 years sick leave sick cycle started on 1 January 2004 and will end on 31 December 2006. Applicant is only entitled to 36 days paid sick leave in a 3 year cycle. Since applicant had been continuously absent from work since early 2003 until June 2004, applicant's 36 days sick leave for his current 3 year sick leave cycle was exhausted on 8 March 2004, being 36 days after the first school quarter of 2004 started on 16 January 2004. Applicant can therefore not be paid in respect of any further periods of absence during the current sick leave cycle which ends on 31 January 2006, unless temporary incapacity leave is applied for and granted.

[20] On 3 October 2005 applicant wrote a letter applying for paid temporary incapacity leave. That application can however not be processed at this stage because applicant has not yet completed the necessary Z1 application form and has also not submitted a report from a medical practitioner justifying why temporary incapacity leave should be granted. Once these documents are submitted, the Director will exercise his discretion and will decide whether paid temporary incapacity will be granted or not. If this leave is granted it may indeed be granted retrospectively. Apart from the periods mentioned hereinbefore, respondent is not in possession of any sick leave forms or certificates in respect of applicant. In particular respondent has no sick certificates or applications for sick leave in respect of applicant for the whole of 2004.

[21] He was actually instructed during October 2004 already to stop applicant's salary, but because he was in possession of some sick certificates and because he also learnt about applicant having been used as a mentor, he decided to give applicant the benefit of the doubt and did not stop his salary at that stage. This decision he made, actually caused him to get into trouble with his superiors, because he did not carry out the instruction. The matter was then referred to the Labour Relations department to deal with. On 28 August 2005 he was once again instructed to stop applicant's salary, which he did.

Closing arguments

[22] Mr Heradien argued that there cannot be any doubt that applicant's bonus, as well as the contributions to the medical aid and pension fund which form part of his salary package constitute benefits as intended in section 186(2)(a). He also submitted that applicant's whole salary constituted benefits. He argued that applicant had been unfairly treated. He also submitted that respondent's actions constituted unfair administrative action in that the *audi alteram partem* rule had not been complied with. He asked that I must order respondent to restore applicant's salary and pay back pay to applicant as from August 2005 as well as the annual bonus. Mr Petersen submitted that since applicant's 36 days sick leave for the current sick leave cycle is exhausted, respondent is under no legal obligation to remunerate applicant whilst he is not working. He also submitted that I should find that this forum has no jurisdiction to grant any relief.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

WHETHER APPLICANT'S CLAIM IS IN FACT IN RESPECT OF BENEFITS

The applicable legal principles

[23] The statutory provision, in terms of which this tribunal may arbitrate disputes relating to the provision of benefits, is to be found in section 186(2)(a) of the LRA, the relevant parts of which read as follows:

> " '*Unfair Labour Practice*' means any unfair act or omission that arises between an employer and an employee involving …unfair conduct by the employer relating to …..the provision of benefits to an employee"

[24] Our courts have placed two important restrictions on the interpretation of 'benefits' for purpose of the residual unfair labour practice definition as contained in section 186(2)(a) of the LRA. In the first place, the Labour Appeal Court has through its interpretation of the section, restricted the jurisdiction to entertain residual unfair labour practice disputes relating to benefits, to those benefits to which an employee is entitled *ex contractu* (by virtue of the contract of employment or collective agreement) or *ex lege* (by virtue of for example the Public Service Act or any other applicable Act)(see *HOSPERSA & another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) para 9).

[25] In addition, the contents of the definition of 'benefits' has also been restricted. Our Courts favour a narrow, restrictive interpretation of the term "benefits" as referred to in the statutory unfair labour practice definition. In the two leading cases of *Schoeman v Samsung Electronics (Pty) Ltd* (1997) 18 ILJ (1098) (LC) and *Gaylard v Telkom SA Ltd* (1998) 19 ILJ 1624 (LC), it was held that remuneration was not a benefit for purposes of the statutory unfair labour practice definition (*contra Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703 (LC) para 19). In the Schoeman case, Revelas J made the following remarks:

> "Remuneration is different from 'benefits'. A benefit is something extra apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract"(see *Schoeman v Samsung Electronics (Pty) Ltd supra* at 1102J - 1103A)

[26] It seems as if this approach to distinguish between remuneration and benefits as being mutually exclusive terms, has been approved by the Labour Appeal Court when it appeared to agree that a claim for wages do not to fall within the ambit of the statutory unfair labour practice dispute relating to the provision of benefits (see *3M SA (PTY) LTD v SA Commercial Catering & Allied Workers Union & others* (2001) 22 ILJ 1092 (LAC)) and when it endorsed the approach that benefits do not encompass remuneration(see *Department of Justice v CCMA* (2004) 25 ILJ 248 (LAC) at 288 para 14; *HOSPERSA & another v Northern Cape Provincial Administration supra* at 1071).

[27] In the recent case of *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703 (LC), Todd AJ favoured a much wider interpretation of benefits, contrary to the more restrictive interpretation in the *Schoeman* and *Gaylard* cases. The case of *Protekon*, in my view, is not of much practical assistance to lower tribunals such as the CCMA and ELRC. The reason why I say this is because the Court in *Protekon* was not required at all to interpret what exactly the legislature intended with "benefits" as contemplated in section 186(2)(a) of the LRA. This was not an issue which the Court was called on to decide. It is trite law that when a High Court pronounces on an issue which it was not called on to decide, such comments are considered to be an *obiter dictum*, which means that it only has persuasive force and is not binding on any lower courts or tribunals. Had *Protekon* been the only case of the Labour Court dealing with the definition of benefits, lower tribunals such as the CCMA and ELRC could and should indeed have relied on the comments made by Todd AJ regarding benefits.

[28] However, as pointed out earlier, the Labour Court in the *Schoeman* and *Gaylard* cases, already authoritatively pronounced on what exactly is meant by the term benefits. Unlike the *Protekon* case, the comments of the Labour Court in *Schoeman* and *Gaylard* were not made *obiter dictum* but formed part of the Court's *ratio decidendi*, in that it involved issues which the Court was called on to decide in those cases. In terms of the rules of *stare decisis* (judicial precedent), this means that all lower tribunals such as the CCMA and ELRC have no choice and must follow the *Schoeman* and *Gaylard* cases. It is for this reason that I say that the *Protekon* case is not of much assistance, because I am in any event not allowed to follow it to the extent that it differs from the *Schoeman* and *Gaylard* cases regarding the interpretation of the term benefits.

[29] Even if I am wrong and even if *Protekon* (advocating the wider interpretation of benefits) has as much force as the *Schoeman* and *Gaylard* cases(advocating the much more restrictive interpretation to benefits), which would mean that I am free to choose which approach I prefer, I am of the view that the *Schoeman* and *Gaylard* cases have been correctly decided and prefer to follow these cases.

[30] There are several policy reasons why I prefer the *Schoeman* and *Gaylard* cases and why I believe that the legislature could never have intended benefits to be so wide as suggested in the *Protekon* case. If the term "benefits" is construed too widely, thereby treating claims for remuneration as unfair labour practice disputes, this could flood employment tribunals such as the CCMA, ELRC and similar employment tribunals with disputes, which belong in the civil courts, which would in turn congest the rolls of the employment tribunals. This would be to the detriment of the general body of litigants in unfair dismissal disputes in the employment tribunals who might have to end up waiting for months or years before they could have their cases heard. The employment tribunals were not created in the first place to deal with disputes which could be adjudicated in the civil courts. The purpose of the free dispute resolution services of the employment tribunals, was to deal with unfair conduct by employers in the form of unfair labour practices and unfair dismissals in respect of which the civil courts do not have jurisdiction in terms of the common law.

[31] There are however a more important factor which leads me to believe that the legislature could never have intended benefits as contemplated in section 186(2)(a) of the LRA to be so wide that it includes remuneration.

[32] One should bear in mind that many CCMA commissioners and arbitrators in other employment tribunals such as the ELRC, simply do not have any legal background or training. Even those who are legally trained, are often not experienced, trained and equipped to deal with contractual disputes. A claim for arrear wages will necessarily involve the application of principles of contract and very complex contractual law issues can in fact be raised during such claims. Right from the start when the LRA was enacted the idea was to recruit experts in labour law, who were not necessarily legally trained, to conciliate and arbitrate labour disputes. It was never intended that arbitrators should necessarily also be experts in other areas of law and arbitrators are indeed not selected for their skills, training and experience in the law of contract when being interviewed for appointment.

[33] To allow arbitrators in employment tribunals to deal with contractual issues, could therefore potentially lead to great injustice because many arbitrators would simply not know how to handle such matters and would have no idea how to apply even basic principles of contract, let alone deal with complex contractual issues. In this regard one must bear in mind that there is no limit to the amount involved in claims which arbitrators may arbitrate in unfair labour practice disputes. It could never have been the intention of the legislature to allow arbitrators to arbitrate contractual claims especially claims involving huge amounts, because even in the Small Claims Court, where contractual claims up to only R7000 can indeed be heard, commissioners are required to have a minimum of 5 years experience as a practicing attorney or practicing advocate before being appointed as a commissioner, which in turn means that he or she must have a law degree, which necessarily entails that he would have passed a university course in the law of contract

[34] There are therefore good policy considerations why disputes which are essentially contractual in nature, such as a claim for arrear remuneration, should best be left to be adjudicated by Judges, Magistrates and Small Claims Court Commissioners, who are trained and qualified to deal with such matters. The mere fact that I am experienced in dealing with contractual matters through my practice as an attorney and advocate and being a commissioner in the Small Claims Court, does not really take the matter further because the jurisdiction of this tribunal cannot be determined merely because of the qualifications and experience of the arbitrator who happens to preside over the case. In conclusion of this part of my judgement, I can summarise by stating that I intend to follow the more restrictive interpretation of benefits as set out in the *Schoeman* and *Gaylard* cases, because I believe that this is the correct interpretation, which I believe is also binding on me.

[35] In terms of the *Schoeman* and *Gaylard* cases, a clear distinction must be drawn between 'benefits' on the one hand and 'remuneration' on the other hand. 'Remuneration' is defined in section 213 of the LRA to mean: "any payment in money or kind or both in money and in kind". Further guidance as to what constitutes remuneration is given by Revelas J who held that whatever amounts to a quid pro quo for services rendered, is deemed to be part of an employee's remuneration(see *Schoeman v Samsung Electronics (Pty) Ltd* supra 1368; *Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd* [1998] 6 BLLR 616 (LC)). Any economic advantage that positively effects the employee's actual cash take-home pay will constitute remuneration and therefore be excluded from the definition of 'benefits'(see *Mischke* "Employment benefits and the unfair labour practice" Contemporary Law Vol 8 (11) June 1999 101 at 110).

[36] On this narrow interpretation, the following have been held not to constitute benefits, but remuneration: commission (see *Schoeman v Samsung Electronics (Pty) Ltd supra),* accumulated leave pay (see *Gaylard v Telkom SA Ltd supra),* travel and substance allowance (see *Minister of Justice & another v Bosch No & others* (2006) 27 ILJ 166 (LC)*,* car allowance (see *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd* [1998] 6 BLLR 616 (LC); *Khuzwayo and Somta Tools (Pty) Ltd* (2005) 26 ILJ 947 (BCA); *Du Toit* Labour Relations Law (4th ed) 469), non-pensionable allowance (see *Roberts v Agricultural Research Council* (2001) 22 ILJ 2112 (ARB)), discretionary annual bonus (see *Ndou v Amerotti Designs CC* [2004] 11 BALR 1417 (CCMA); *Labuschagne v Techno Plastics* (Pty) Ltd [2005] 6 BALR 610 (MEIBC)), performance bonus (see *ESKOM v NUM* [2003] 6 BALR 708 (CCMA); *FAWU v Kelvin Grove Club* [2000] 9 BALR 999 (CCMA)), temporary acting allowances (see *SALSTAFF v Spoornet* [2002] 10 BALR 1025 (AMSSA); *Lindsay v Ithala Development Finance Corporation Ltd* (1) (2002) 23 ILJ 408 (CCMA) and *HOSPERA v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC)), housing allowance (see *AWAWU obo Lotter v Safcol* [2002] 5 BALR 470 (CCMA); *Du Toit* Labour Relations Law (4th ed) 469). To this list Professor Darcy Du Toit adds contributions to pensions and medical aid, as not constituting benefits but remuneration(*Du Toit* Labour Relations Law (4th ed) 469).

[37] A similar approach as to what constitutes remuneration, is to be found in the determination made by the Minister of Labour in terms of section 35(5) of the Basic Conditions of Employment Act, in terms of which the following is considered to form part of an employee's remuneration: housing allowances or subsidies, car allowances, contributions to medical aid, pension or provident fund, funeral or death benefit schemes.(see Government Gazette Vol. 455 No. 24889, Notice No 691 of 23 May 2003).

[38] What could be considered as benefits would for example be, discounts on purchases, insurance, social security, free membership of a club or society, subsidised housing (as opposed to a housing allowance), travel concessions (as opposed to a car or travel allowance), an allowance for equipment, tools or similar allowances or other similar advantages which is not a *quid quo pro* for services rendered and do not effect the employee's actual cash take-home pay.

Application of these principles to applicant's claim

[39] Applicant's claim for arrear salary for the period of August 2005 until present, which salary respondent refuses to pay, is unmistakably a contractual claim for arrear wages or remuneration and does not fall within the scope of 'benefits' as defined in section 186(2)(a) of the LRA. To the extent that a certain part of applicant's salary consists of contributions to medical aid and pension funds, I am in agreement with the weight of authority which suggest that such advantages also constitute remuneration and not benefits for purposes of section 186(2)(a) of the LRA(see the authorities referred to in para 36 and 37).

[40] As to bonuses, the weight of authority suggest that bonuses, be it discretionary or non-discretionary, do not constitute benefits but simply form part of remuneration. Regarding the annual bonus which was payable to applicant during August, it should be borne in mind that this bonus is actually nothing else but a 13th cheque, which in terms of applicant's conditions of service is payable during the month of his birthday. This type of bonus is payable to many civil servants in most if not all of the different state departments. It is not a discretionary bonus dependant on performance, but something to which the employee is entitled as of right in terms of his conditions of service provided that he is still in service. It is included in the employee's annual gross salary and taxable. This type of bonus is nothing else but remuneration, conveniently paid to the employee in one month, being the month of his birthday, instead of spreading it out over 12 months. As such this type of remuneration also does not fall within the definition of "benefits" as contained in section 186(2)(a) of the LRA.

[41] In the circumstances my finding is that applicant's claim relating to arrear salary (including the contributions to pensions funds and medical aid) for the months of August 2005 until present as well as the annual bonus, constitutes a purely contractual claim for arrear remuneration and not benefits as contemplated in section 186(2)(a) of the LRA.

The effect of my finding that applicant's claim is a contractual claim

[42] This tribunal, like the CCMA, is a creature of statute whose powers are only those set out in the relevant legislation, being the Labour Relations Act No 66 of 1995 and the Basic Conditions of Employment Act No 75 of 1998. As a creature of statute it is not capable of doing anything or performing any act without being expressly empowered thereto by legislation (see *Department of Justice v CCMA & others* [2004] 4 BLLR 297 (LAC) par 97; *Bezuidenhout v Ellerine Holdings* [2003] 3 BLLR 304 (EC) 308; *Norman Tsie Taxis v Pooe NO & others* [2004] 3 BLLR 258 (LC) 263).

[43] The only statutory provision, in terms of which this tribunal may arbitrate disputes relating to the provision of benefits, is to be found in section 186(2)(a) of the LRA. In terms of that section, applicant's claim does not qualify as a claim relating to benefits. The Labour Court has held on numerous occasions that a wage claim or claim for arrear remuneration is nothing more than a contractual claim, which can only be adjudicated in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997(see *Schoeman v Samsung Electronics (Pty) Ltd* (1997) 18 ILJ (1098) (LC) and *Gaylard v Telkom SA Ltd* (1998) 19 ILJ 1624 (LC); *Ackron & others v Northern Province Development Corporation* [1998] 9 BLLR 916 (LC); *Botha & another v Department of Education, Arts, Culture & Sports, Northern Province Government & others* (1999) 20 ILJ 2590 (LC)). Section 77(3) of the Basic Conditions of Employments Act No 75 of 1997 reads as follows:

> "The Labour Court has concurrent jurisdiction with all civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

[44] This tribunal is not a civil court and being a creature of statute, it is not within its power to assume the jurisdiction of a civil court of law(see *Dube v Classique Panelbeaters* [1997] 7 BLLR 868 (IC) 873). In terms of section 77(3) of the BCEA only the Labour Court, and civil Courts(being the High Court, Magistrate's Court and Small Claims Court) have jurisdiction to entertain claims relating to the non payment of wages or other remuneration. In the circumstances, I have no choice but to find that this tribunal has no jurisdiction to grant any relief which is purely based on contract.

[45] I frequently hear the argument that the CCMA and ELRC have been created for purposes of settling employment disputes quickly, without the formalities and legal costs occasioned by litigating in the civil courts and that jurisdiction should therefore be interpreted widely in favour of employees. This argument does not take the matter further. The mere fact that it may be cheaper and quicker for an employee to refer a dispute to the ELRC instead of to a court of law, cannot be a consideration which should be taken into account when considering the issue of jurisdiction. This tribunal either has jurisdiction or it does not. In the *Schoeman* case Revelas J held that neither the objectives of the LRA as contained in section 1 of the LRA, nor section 23 of the Constitution which guarantees fair labour practices, confer jurisdiction to enforce contracts of employment(see *Schoeman v Samsung Electronics (Pty) Ltd supra 1368).* Furthermore Zondo JP held in *3M SA (Pty) Ltd v SACCAWU & Others* [2001] 5 BLLR 483 (LAC) that even the Labour Courts are not allowed to have regard to general considerations of fairness extraneous to the LRA in adjudicating employment disputes. This once again confirms that an employment tribunal can only pronounce on the fairness or unfairness of conduct by an employer, if there is a specific statutory provision which enables it to do so.

[46] Mr. Heradien's argument that respondent's conduct at the very least constituted unfair administrative action in that the rules of natural justice in particularly the *audi alteram partem* rule (loosely translated as hear the other side first before making a decision) have not been complied with, also does not assist the applicant because the unfairness of administrative acts may only be reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000. Even assuming, without deciding, that respondent's conduct did indeed constitute unfair administrative action, this tribunal has not been given any review powers in terms of the Promotion of Administrative Justice Act and aggrieved employees who want to rely on unfair administrative conduct as a cause of action has no choice but to approach the High Court or Labour Court for relief.

[47] Employees and trade unions should not abuse the free dispute resolution services of this tribunal by referring disputes which belongs in the civil courts. I therefore trust that the union will in future carefully consider the facts of similar disputes before referring them to the ELRC instead of the civil Courts or Labour Court. Apart from the inconvenience caused to other litigants whose cases are delayed as a result of incorrect referrals, it is also not in the interest of taxpayers and educators who make monthly contributions to the ELRC, that the time of this tribunal is taken up by having to deal with disputes which do not fall within its jurisdiction

"NO WORK NO PAY "

[48] At common law, an employee who does not work, is not entitled to be paid in terms of the well known principle "no work, no pay", which originated from the maxim "*exceptio non adimpleti contractus*" (see *3M SA (Pty) Ltd v SACCAWU & Others* [2001] 5 BLLR 483 (LAC); *Rycroft & Jordaan* A Guide to South African Labour Law (2nd ed) page 70; *Grogan* Workplace Law (8th ed) page 68 – 69; *Johannes Voet* Commentarius ad Pandectas 19.2.27). The only exception to this rule in terms of the common law, is where an employee actually shows up for work, remains there and tenders his service, but the employer does not provide him with any work. In such circumstances, the employer is compelled to pay him. The only changes to the common law position, is to the extent that in terms of the Basic Conditions of employment Act No 75 of 1997, an employer is compelled to pay an employee whilst away on annual leave, sick leave and certain other leave periods which is not necessary to discuss at length for present purposes. The periods of paid leave and paid sick leave are however specifically determined and prescribed by legislation. In the case of educators, the applicable legislation is paragraph 8(1) of Chapter J of PAM (Personnel administration measures), which was promulgated by the Minister of Education on 14 December 2001, as amended. In terms of paragraph 8(1) of Chapter J of PAM, an educator is entitled to 36 working days sick leave with full pay over a three –year cycle and unused sick leave shall lapse at the expiry of the three-year cycle.

[49] The undisputed evidence of Adams is that applicant's current sick leave cycle started on 1 January 2004 and will end on 31 December 2006. On applicant's own version he had not been at work between 9 February 2003 when he had a heart attack and June 2004. Quite correctly, Adams indicated that by 8 March 2004, being 36 days after the re-opening of the schools on 16 January 2004, applicant's sick leave of 36 days for his current three-year leave cycle would have been exhausted. Even if it was not exhausted exactly on 8 March 2004, it would have been exhausted at some stage during the first five months of 2004 because on applicant's own admission, he never worked during that whole period. It is therefore an indisputable fact, that applicant's 36 days sick leave for the current three year leave cycle had been exhausted long before August 2005. In terms of the maxim "no work no pay" respondent is under no legal obligation to remunerate applicant in respect of any period when he is not at work. Exactly why applicant was at home and not at work between 1 August 2005 and 19 August 2005, when he was booked off sick once again, is not totally clear, but it is common cause that as from 19 August 2005 he has constantly been booked off by a medical practitioner during school quarters, albeit not during school holidays.

[50] Whatever the reason for applicant's absence may have been during this extended period of time, the fact remains that respondent is under no legal obligation to pay applicant whilst he is not actually at work, because of the maxim "no work no pay" and the fact that applicant has exhausted his statutory sick leave. For these reasons I am satisfied that applicant would not have been entitled to any relief, even if I could find that the amounts which were not paid to him, constitute "benefits" as contemplated in section 186(2)(a) of the LRA. These same considerations would off course apply should applicant institute action against respondent in a civil court for breach of contract.

TEMPORARY INCAPACITY LEAVE

[51] The whole issue of temporary incapacity leave which was raised during the evidence and arguments, is actually not that relevant for purposes of this award, because applicant did not refer a dispute relating to temporary incapacity leave. I am only entitled to deal with issues which have specifically been raised and pleaded in the referral form. Even if this issue was pleaded in the referral form, I would not have been able to grant any relief due to the following reasons.

[52] In terms of clause 9 of ELRC Resolution 7 of 2001, which has been incorporated and in fact duplicated in paragraph 9 of Chapter J of PAM, the Head of Department is granted a discretion to grant paid temporary incapacity leave to an educator who has exhausted all his sick leave. Such discretion is of such a nature that courts and tribunals may not interfere with it, unless it has been exercised in an irrational, capricious or arbitrary manner or male fide. More importantly no court or tribunal will be allowed to interfere until such time as the Head of Department has actually exercised his discretion or refused to exercise his discretion. It is common cause that applicant has only submitted a request for temporary incapacity leave during October 2005. It is also common cause that respondent has not refused that request yet. In fact it has not made a decision yet, because it is still awaiting certain documents from applicant. Until such time as respondent has either refused to exercise its discretion (within a reasonable time after it was provided with all the required documents which is required to be submitted in order to consider such a request) or actually made a decision (by either having decided to grant or refuse the request), any litigation or referral of a dispute (be it in the High Court or to this tribunal) will be regarded as premature and relief will have to be refused on that ground alone until the matter is "ripe" for hearing, which will only be when a decision has been made or when there was a refusal to make a decision.

THE FAIRNESS OF RESPONDENT'S CONDUCT

[53] Having decided that applicant's claim does not constitute a claim for benefits, and that even if it did, respondent is in terms of the maxim no work no pay, not under any legal obligation to remunerate applicant, it is strictly speaking not necessary to deal with the fairness of respondent's conduct for purposes of section 186(2)(a) of the LRA, since applicant has failed to prove other essential elements of the alleged unfair labour practice relating to the provision of benefits. However, in case I am wrong with regard to my interpretation of benefits and for sake of completeness of my award, I believe that it is indeed necessary to make a finding as to whether respondent did indeed act unfairly as contemplated in section 186(2)(a). In order to do this, I first need to make factual and credibility findings.

[54] After having listened to the evidence and having had the unique benefit of seeing and hearing the witnesses testify, being able to judge their demeanour and the manner in which they fared under cross-examination, and having considered the probabilities, I wish to make the following comments. The evidence of Adams cannot be criticised. It was of a formal nature. He was placed in an embarrassing position in the sense that he had to explain why applicant was paid for such lengthy periods whilst being absent from work. He explained that he was actually reprimanded by his superiors for not having stopped applicant's salary already in 2004 when he was first instructed to do so. I accept his evidence in all respects. The evidence of Heradien did not really take the matter any further and it is therefore not necessary to make any further comments regarding his evidence.

[55] I was not impressed with applicant's evidence. Not with its contents and not with the manner in which it was given. His evidence was haphazard. He was argumentative, uncooperative and his memory was intentionally selective. The impression which I was left with is that he was trying his best to keep me in the dark regarding his extended periods of absence from work over the past few years. His insistence to blame every one else but himself for his dilemma, the fact that important aspects were only mentioned for the first time during re-examination and his reluctance during cross-examination to answer certain straightforward questions in fear that there may be documentation in his personnel file which respondent would be able use to discredit his answers, seriously scarred his credibility.

[56] Inasmuch as it is may appear unacceptable for the State, without any prior warning, to completely stop the salary of an educator, it is equally unacceptable for an educator, for extended periods of time over years, simply to sit at home doing nothing while receiving his full salary. Although I have not personally seen the program broadcasted on E TV but was only informed about it by the parties, I am not surprised that there was a public outcry. If applicant thinks that he has evoked my sympathy during this hearing, he is mistaken. My honest impression is that he is busy and has been busy for the past few years, to play a cat and mouse game with respondent, which has now backfired on him. I will accept that during the periods when applicant suffered heart attacks, he was genuinely incapacitated and could not work. Many and lengthy periods of absence however simply seem to be unaccounted for. In the period between February 2003 and June 2004 he simply did not do one single day's work and still received his full salary with taxpayers money. Even if one accepts that he was genuinely incapacitated for the period of February 2003 until August 2003 when he was booked off by a medical practitioner, there is still the unaccounted period between August 2003 and June 2004 when he simply did not work, and stayed at home.

[57] The excuse which applicant has raised for his failure to work between August 2003 and June 2004, is that he was not "suitably placed" at Spine Road High School because he was given no specific tasks at that school. Accordingly his union was negotiating with respondent so that he could be more "suitably placed" which eventually occurred in June 2004 when he commenced working again. He also mentioned that he had not been adequately trained. I find these explanations completely unacceptable. To expect taxpayers to be satisfied with such feeble excuses as justification for the fact that an educator who does not work still receives his full salary, is seriously asking for too much. There is no obligation on an employer to provide an employee with work. As long as an employee is being paid, he cannot complain simply because he is not being provided with work. Hence, applicant had no right to decide that he did not want to be at Spine Road High School simply because he did not like the conditions there or because he felt that there was nothing for him to do there. The fact that he was not given any work to do there, gave him no right to insist on being placed somewhere else, as he instructed his union to arrange. His absence from that school between August 2003 and June 2004 is simply unacceptable and I am surprised that respondent has not yet instituted legal proceedings to recover the salary which applicant has received during that period.

[58] Further support for my finding that applicant is playing games, is to be found in the fact that after respondent sent a letter to applicant's union on 18 August 2005, ordering him to report to Zisukahanyo High school in Phillippi on 22 August 2005, applicant immediately provided respondent with a new sick certificate booking him off as from 19 August 2005, being the very next day after this letter was written and sent to applicant's union. Although applicant disputes that he ever received the letter of 18 August, the coincidence is just to great that the medical certificate was issued the very next day after respondent's letter was written and delivered. In addition the last two sick certificates for 2005, issued by a physiatrist, being the one covering the period 8 September until 23 September and the one covering the period 3 October until 6 December, just coincidently happen to cover the periods during the school quarters when applicant was supposed to work, but not the periods during the school holidays, when he was not required to work. The third school quarter ended on 23 September and the fourth school quarter started on 3 October. Coincidently the one sick certificate only covers the period up to 23 September and the next one only covers the period as from 3 October until 6 December when the fourth school quarter ended. The same criticism can be levelled at the sick certificate for the first quarter of 2006 which coincidently also just covers the period of 16 January 2006 (when the schools re-opened) until 31 March 2006 (which is the last day of the first school quarter of 2006). This certificate which was handed in as part of exhibit B, was issued on 6 February 2006, incidentally just two days before the arbitration hearing in this matter of 8 February 2006(when no evidence was heard and the matter was postponed).

[59] All of this seem suspicious and creates the impression that applicant only consults medical practitioners as soon as the school holidays are over and as soon as he is required to work again. If this was not so, one would have expected applicant to call his physiatrist to testify about his condition or at least to hand in a detailed report from his physiatrist, explaining why the medical certificates coincidently did not cover the periods of the school holidays. Applicant's timing with regard to sick certificates and the periods covered by these certificates, certainly suggest a certain suspicious pattern and is consistent with other probabilities which suggest that applicant is playing a cat and mouse game with respondent. I get the impression that because applicant is unhappy about his demotion, he has been uncooperative and intentionally makes it difficult for respondent to manage his situation. It also seems to me as if applicant wants to dictate to respondent where he wants to work and what he wants to do.

[60] Emphasis was placed by applicant on the fact that the demotion did not stipulate that he was demoted to deputy principal at Zisukahanyo High. This seems to be a further reason why he believes that it is not necessary for him to return to Zisukahanyo High. The mere fact that the demotion did not specify that applicant is demoted to deputy principal at Zisukahanyo High, does not mean that he can refuse to work there, if instructed to do so by respondent. In any event, the demotion could not have meant anything else, but that applicant was demoted to deputy principal at Zisukahanyo, because unless section 8 of the Employment of Educators Act was expressly invoked by the Head of the Department, to transfer applicant to another school, there is no way how, in law, whoever made the decision to demote applicant, could have legally demoted applicant to be the deputy principal of any other school but Zisukahanyo. Only the Head of the Department has such powers. If there are already too many deputy principals there, as alleged by applicant, that is respondent's problem and not applicant's. It is then up to respondent to either start retrenchment procedures or alternatively for the Head of the Department to transfer applicant or one of the other deputies in terms of section 8 of the Employment of Educators Act, to wherever respondent sees fit to re-deploy applicant or one of the other deputy principals.

[61] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement(see *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) para 33). The fairness required in the determination of an unfair labour practice must be fairness toward both employer and employee. Fairness to both means the absence of bias in favour of either(see *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (A) 589C-D; National *Education Health & Allied Workers Union v University of Cape Town supra* para 38).

[62] Given the factual findings I have made, and given the fact that fairness is essentially a value judgement which involves fairness to both the employee and employer, I am satisfied that respondent did not act unfairly when it stopped applicant's salary. If respondent did err, it erred by having waited so long before it stopped applicant's salary, allowing this situation to get out of hand by allowing applicant to dictate to it for a considerable time where he wants to work and what he wants to do and by allowing applicant to stay at home for lengthy periods of time (when not booked off by a medical practitioner or when no medical certificates were submitted) whilst receiving his full salary.

[63] This situation was obviously intolerable because applicant was being paid with taxpayers money and has no right to dictate to respondent where he wants to work or to stay at home whilst his union negotiates “the suitability” of his placement. It is also unfair towards other educators and may create an unwanted precedent. Under the circumstances, respondent’s decision to stop applicant’s salary, was fair.

[64] As to Mr Heradien’s submissions that that *the audi alteram partem* rule should have been complied with in that applicant should have been given warning that his salary will be stopped or an opportunity to be heard, I respectfully cannot agree. When applicant’s salary was stopped at the end of August 2005, he was not working and his sick leave had been exhausted many months before. The only manner in which applicant could at that stage, lawfully, receive any remuneration, was if he specifically applied for and was granted additional paid temporary incapacity leave, and that we know was not done. Respondent is not allowed to act outside the parameters of the law and give illegal hand outs with tax payers money. In terms of the law, it was simply illegal and unlawful to continue paying applicant after he stopped working in July 2005.

[65] What respondent therefore essentially did when it stopped applicant’s salary, was to stop an illegal and unlawful process where applicant was being paid, whilst not working, whilst his sick leave was exhausted months ago and whilst additional paid temporary incapacity leave had neither been applied for, nor granted. It was therefore respondent’s statutory duty to forthwith stop applicant’s salary when he stopped working. It is regrettable and embarrassing that this was only done after the media sensationalised the matter on national television. Since applicant had no right to remuneration (because it was actually illegal and unlawful to continue paying him), his rights were not affected when his salary was stopped. Hence, the only basis upon which he could possibly claim that he had to be given an opportunity to be heard or given a warning before his salary was stopped, was in terms of the doctrine of legitimate expectation, by claiming that he had a legitimate expectation that he would be afforded an opportunity to be heard before his salary was stopped. However, it is jurisprudentially axiomatic that a person can only have a legitimate expectation to something lawful, which means that no person could ever have a legitimate or reasonable expectation to something unlawful or that an official would act unlawfully or illegally(see the comments of Hlope J, as he then was, in *Western Cape v MEC for Health and Social Services* 1989 (3) SA 124 (C); *Devenish* Administrative Law and Justice in South Africa 319).

[66] In the circumstances, in law, applicant could therefore never have had any reasonably or legitimate expectation that respondent would act unlawfully or illegally by continuing to pay him remuneration, in circumstances where it would objectively and clearly have been illegal and unlawful for respondent to continue doing so. I am therefore satisfied that applicant had no right or legitimate expectation to be heard before the decision to stop his salary was made or to receive prior warning of such actions. Hence, respondent did not act unfairly in any manner.

FINAL COMMENTS AND RECOMMENDATIONS

[67] Unfortunately it seems to me that respondent, not quite knowing how to manage applicant's situation, has now decided to also resort to playing games. One of the reasons why I say this, is because Adams testified that applicant's request for temporary incapacity leave cannot be considered at the moment because he has not yet submitted a medical report and completed form Z1. Yet, no correspondence advising applicant that his application is incomplete, had been addressed to applicant in this regard to date, although the request for paid temporary incapacity sick leave had already been made in October last year. If the parties are serious to resolve this dilemma and prevent further embarrassment in the media, these games will have to stop. This situation cannot endure and needs to be sorted out as a matter of urgency. If applicant has not submitted all the necessary documents which is necessary in order to consider his temporary incapacity leave, applicant needs to be advised immediately what else is outstanding, because a decision needs to be taken urgently as to whether fully paid temporary incapacity leave will be granted or not to enable applicant to decide what course of action to adopt.

[68] Even though respondent has the right to instruct applicant to report at Zisukahanyo and insist that he works there, it does not make any sense for respondent to force applicant against his will to go to Zisukahanyo if applicant is strongly opposed to being employed there and will be unhappy there. In this regard one cannot loose sight of the fact that applicant had once been held hostage by pupils at that school, albeit many years ago in the year 2000. The emotional and psychological scars probably remained and forcing applicant to go there against his will, will in the long run not be in the interest of applicant or respondent. More importantly it would also not be in the best interests of the learners because if applicant is extremely unhappy at that school and is opposed to being there, he will not be able to render a good service to the learners, even if he tries his best. That should be avoided at all costs because the best interests of the learners are after all really the determining factor.

[69] Therefore consultation with applicant as to where he should be deployed is of the utmost importance. However, inasmuch as consultation implies that respondent does not simply make a decision without interacting with applicant about his needs, preferences and regarding suggestions as to where he should be placed, consultation also does not imply that applicant may dictate to respondent where he wants to work and what he wants to do. From a bargaining point of view, respondent, in this regard, is certainly in the stronger position when it comes to making the final decision as to where applicant will be placed and what he will do there.

[70] Whether applicant is granted fully paid temporary incapacity leave or not, a firm decision about his future in the department should be taken by respondent as a matter of urgency, because the manner in which applicant's case is being handled at present, is causing increasing embarrassment to respondent as the situation is getting more and more out of hand. If applicant is fit to return to work, firm decisions urgently need to be taken by respondent as to how applicant's talents could be most constructively applied, where he will be placed and what will happen to him if he does not comply with instructions to work where respondent instructs him to work. If applicant is not fit to work and continues to be incapacitated more often than not as is presently the case, firm decisions might have to be taken as to whether it is viable to retain applicant as an employee or whether dismissal for reasons of incapacity should not be considered in terms of clause 3(6) of Schedule 1 to the Employment of Educators Act No 76 of 1998 and Clause 10 of Resolution 7 of 2001.

[71] The manner in which applicant's situation has been handled can be aptly described as a public embarrassment. Hopefully the situation will now be handled in such a manner that it would not be necessary for the media to sensationalize the matter again and cause further embarrassment. I sincerely hope that senior officials of respondent will ensure that applicant's situation receive immediate, urgent and serious attention to avoid any further public embarrassment, unnecessary litigation and waste of taxpayers money.

AWARD

In the premises I make the following order:

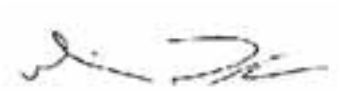
1. Respondent has not committed any unfair conduct relating to the provision of benefits to applicant as contemplated in terms of section 186(2)(a) of the LRA.

2. The dispute which applicant has referred to this tribunal for resolution is a contractual claim for arrear remuneration, in respect of which this tribunal does not have any jurisdiction.

3. Even if I am wrong in my interpretation of "benefits" and even if applicant's claim does constitute a claim relating to the provision of benefits as contemplated in terms of section 186(2)(a) of the LRA, applicant is in any event not entitled to any relief, firstly because respondent is under no legal obligation to remunerate applicant in respect of periods when he does not work, and secondly because respondent did not act unfairly by stopping applicant's remuneration and refusing to pay any remuneration whilst applicant is not working.

4. The recommendations made in paragraphs 67 to 71 were only made in the form of an advisory award to assist the parties to reach a settlement, and are not binding on the parties.

5. No order as to costs is made.



adv D P Van Tonder BA LLB LLM
Arbitrator/Panelist: ELRC