

## The Pension Promise: Regulating Employer Conduct (2003) 24 ILJ 712

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### I Introduction

In an earlier article entitled 'The Pension Promise: Pension Benefits and the Employment Contract'<sup>1</sup> we explored the extent to which pension benefits are incorporated into the employment contract. We presented three possible ways of understanding the relationship between pension benefits and the employment contract and considered the difficulties associated with each approach. The intention was for these to serve as frameworks, which could then structure and support the relevant discussions and debates as to how best to regulate employer conduct in a pension context. In this article we look at the regulatory mechanisms presented within each framework and at how these function in the context of pension matters.

*Is there a need for the regulation of employer conduct?*

We use the term 'pension benefits' to encompass the range of benefits provided by funds, such as pensions, disability benefits, death benefits, spouses benefits, withdrawal benefits, and the like. A unique and important feature of these benefits is that they are intended to provide for the employee and his or her family in the circumstances of social and economic vulnerability that many face upon retirement, retrenchment or the death of family members. It is for this reason that the question arises as to whether those entrusted with the powers to alter such benefits ought to do so responsibly and fairly.

To this end, much emphasis has been placed on the conduct of the fund's trustees, as should be the case, but it is important not to underestimate the employer's role in determining the employee's pension destiny. The view that the extent of the employer's responsibility and influence lies merely in ensuring membership to the fund and paying contributions is not always sustainable. An employer is often given powers or the discretion to make decisions that significantly impact on the delivery of the pension promise. The source of these powers and discretion may be either the employment contract or the rules or both.

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In terms of the fund rules, two situations could arise. The first is where the employer is given no direct powers or discretion under the rules to influence the content of the benefits themselves. This is then wholly a matter for the trustees and the question of regulating employer conduct under the rules in this respect does not arise. This is unlikely to be the case in a defined benefit fund as an employer is generally not comfortable with the relinquishing all control over what benefits it can be required to fund. However, this is possible in a defined contribution fund where there are no defined benefits, each party pays in a defined contribution, and the employee bears the risk of the investments - which are ultimately to be the benefits.

However, the employer may still be in a position to influence the delivery of the pension promise, even though it has no power under the rules to define what the benefits may be. This would be possible if, for example, an employer were to exercise its powers of withdrawal or liquidation, or initiate a transfer of members or conversion of the fund.

The second situation one may encounter under the rules is where, in addition to the above powers, the employer is also given the discretion to control, or at least influence, the content and delivery of the pension promise. For example the employer may be required to consent to rule amendments that would alter benefits, change contribution rates, approve pension increases or enhanced withdrawal benefits, or approve early retirement applications. In some instances, the employer may be empowered under the rules to make decisions that are entirely independent of the trustees.

With respect to the employment contract, the employer's powers or discretion may arise from two sources. The first may be powers or discretion that are incorporated from the rules as terms and conditions into the employment contract. The second may be powers or discretion granted by the employment contract (independently of the rules) to make decisions that would have an impact on the pension promise. These would include, for example, the power or discretion to set or change the retirement age,<sup>2</sup> or to determine the reason for termination of

employment,<sup>3</sup> or to decide whether an employee is to be a permanent or temporary worker.<sup>4</sup> The exercise of this contractual discretion could require regulation and the question is what regulatory mechanisms are available for this purpose.

Granting the employer a power or discretion to do or not do certain things, presumes that there are a range of permissible options that the employer may choose from. The concern of this article is to explore the manner in which the various regulatory mechanisms would limit

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or shape that decision-making process. A number of questions arise in this regard: Are these powers or is the discretion absolute or unfettered, or are there limits that derive from the various regulatory mechanisms? Are such limits the same or do they vary depending on which mechanism one uses? Precisely what is the extent of an employer's obligation to fulfil the pension promise? If, for example, a fund is liquidated through no fault of the employer, would the various regulatory mechanisms require that the employer provide the promised benefits? If an actuary recommends an increased contribution from an employer, and by virtue of the employer's financial position such an increase is not affordable, what would the regulatory mechanisms suggest ought to be an appropriate response to the employer's conduct? The answers to these questions are not always easy and it is hoped that by understanding the regulatory mechanisms that are available, one would be better able to understand whether there are limits to the exercise of employer discretion.

This article does not purport to be an exhaustive analysis of the various regulatory mechanisms at play. Rather it seeks merely to outline these mechanisms, with some consideration of their nature and functioning, and to highlight the relevant issues they raise in a pension context. The aim is to help facilitate a better understanding of the pension landscape one must navigate when faced with a particular kind of pension promise.

In our earlier article the three frameworks which we presented to help understand the relationship between pension benefits and the employment contract were as follows: The first was that pension benefits are not incorporated into the employment contract and are entirely governed by the fund rules. The second was that all the rules are incorporated into the employment contract in their entirety. The third was partial incorporation, which assumes that the only rules that are incorporated are those relating to the pension benefits themselves and other rules that are necessary to give meaning and content to the pension promise.

It is impossible to say conclusively that a particular framework will apply in all circumstances. Rather, this will depend on the particular terms and conditions in the employment contract, the fund rules, workplace policies, and any oral or other undertakings that may have been communicated between the employer, the fund and the employee. Often, it will be clear what the content of the pension promise is, but sometimes it will not and it is in these situations that complications arise. One would, therefore, need to give careful consideration to the factual scenario in order to determine the content of the particular pension promise made in each instance and to establish within which framework one is operating. This will then determine the mechanisms at one's disposal to regulate employer conduct in relation to pension matters. The primary regulatory mechanisms considered in this article are

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the duty of good faith, the unfair labour practice and contractual remedies. There are, however, other mechanisms that may be relied upon. As a start, it should be stressed that where all other remedies are inadequate or unavailable one may always have recourse to the Constitution. The Pension Funds Adjudicator has resorted to constitutional protection in various instances.<sup>5</sup> The development of the constitutional right to fair labour practices is also an issue that will undoubtedly be watched keenly to determine its application in the pension arena.<sup>6</sup> When seeking to challenge discriminatory conduct of the employer, the employee may also have resort to the Employment Equity Act<sup>7</sup> (EEA), where such conduct arises from the employment contract, and arguably also where it arises from the rules.<sup>8</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>9</sup> (Equality Act) would certainly find application in all instances where the EEA is found not to apply.<sup>10</sup> These issues are beyond the scope of this article and will not be considered in any detail.

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We draw attention to them to highlight the possibilities they offer when determining the limits of employer discretion.

With respect to the structure of the article, we first consider the regulatory mechanisms within the framework of no incorporation. We thereafter consider incorporation broadly as giving rise to two categories of rights, namely discretionary rights or benefits, and non-discretionary or unconditional rights. We then consider the regulatory mechanisms that arise with respect to each of these categories of rights.

## II No Incorporation

In understanding the relationship between pension benefits and the employment contract, the first framework we explored in our previous article was that there is no incorporation of the pension benefits into the employment contract at all. On this theory, while these benefits arise from the employment relationship, their content and delivery are wholly governed by the fund rules. They are, therefore, subject to amendment under the rules, making them discretionary benefits. The employee's pension destiny is also subject to the employer's exercise of its powers of termination, withdrawal, conversion and the like.

Within this framework, the primary regulatory mechanisms of employer conduct would be located within the realm of the fund rules, as opposed to the employment contract. It seems that the duty of good faith has been developed by the courts and by the adjudicator as the primary mechanism for protection.

*The duty of good faith applied to discretion granted by the rules*

A participating employer's duty of good faith, in the context of a pension scheme, was given express recognition by the Supreme Court of Appeal in *Tek Corporation & others v Lorentz*.<sup>11</sup> The adjudicator, commenting on this decision, noted that while the court referred to English authority for its finding, it offered little guidance on the source, content or operation of the duty in the context of pension schemes.<sup>12</sup>

For this the adjudicator, when seeking to apply this duty, looked to the same English authority for some sense of content. In this regard, *Imperial Group Pension Fund Ltd & others v Imperial Tobacco Ltd & others*<sup>13</sup> defined the duty as follows:

'[I]n every contract of employment there is an implied term - "that the employers will not, without reasonable and just cause, conduct themselves in a

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manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". . . I will call this implied term "the implied obligation of good faith". In my judgement, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer.'

The duty of good faith offers an attractive manner of regulating employer conduct in circumstances where pension benefits, although arising from the employment relationship, are not accepted as being incorporated into the employment contract as contractual terms. Pension benefits are generally offered as a component of remuneration or an employment benefit. Where the rules entrust certain functions<sup>14</sup> to the employer in the provision of such pension benefits the duty of good faith, which arises from and derives its force from the employment contract, would encompass the manner in which these functions are fulfilled.<sup>15</sup> In this way the duty governs the employment relationship as a whole and not just the specific terms and conditions of the employment contract.

The limits of the duty, as imposed by English courts,<sup>16</sup> have also been accepted into our law.<sup>17</sup> These were summarized by the adjudicator<sup>18</sup> as (a) that the employer not exercise a veto capriciously; (b) that it exercise its rights for the efficient running of the scheme; (c) that it not exercise its rights for the purpose of forcing the members to give up their accrued rights; (d) that the duty is not a fiduciary duty and in deciding whether or not to give its consent the employer is free to look after its own interests, financial or otherwise, in the future operation of the fund; (e) that the employer may not announce a blanket policy of refusing to consider benefit increases but rather that it should be willing to review its decision in changed circumstances; and (f) that the employer may not use the power to wind-up, make transfers, veto

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amendments or discontinue contributions in a manner which forces the sacrifice of existing rights.

Since *Tek*, the adjudicator has further explored the content and operation of this duty. There seems to have been some change in the adjudicator's thinking as to whether the duty imposes purely procedural constraints on the decision-making process or whether it also imposes substantive constraints. In *Wilson v Orion Fixed Benefit Pension Fund*<sup>19</sup> the adjudicator appears to have interpreted the duty as imposing substantive requirements in the form of proportionality. It was held in this case that the employer must act reasonably and justifiably, and that there must be a proportional relationship between the objectives of the decision, which should be 'legitimate and related to concerns that are valid in a free and democratic society',<sup>20</sup> and the means adopted to give effect to that decision. This aspect of the enquiry focuses on the decision itself and not just the decision-making process.

However, in the later case of *IBM Pensioners Action Group v IBM SA (Pty) Ltd & another*, the adjudicator held that -

'in determining whether there has been compliance with good faith the focus is on the decision-making process rather than the substantive conclusion of the decisional process'.<sup>21</sup>

What one seeks, therefore, is not a substantively reasonable outcome that others would necessarily accept as legitimate but rather the use of a fair and reasonable procedure in arriving at that outcome. This fair procedure would require, for example, that the employer not act irrationally or arbitrarily and that all relevant factors be taken into account while irrelevant factors be discounted.<sup>22</sup>

In this regard the duty of good faith was held to import a requirement of 'dialectical reasonableness rather than substantive reasonableness'.<sup>23</sup> Borrowing from administrative law principles, the adjudicator approved the following comments:<sup>24</sup>

'Dialectical reasonableness has just been described as relating to the decision-making process; it reflects an appeal to reasons which are recognised to be legitimate or relevant even if they are not accepted as finally dictating the decision. Substantive reasonableness refers to the conclusion of the decisional process; the conclusion is reasonable in the substantive sense when it is a conclusion that others will accept as one which, given all the (dialectically reasonable) arguments which have invoked for and against it, may legitimately be drawn. This implies a mutual acceptance of the weight to be attached to each argument and the kind of inference to be drawn from it.'

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Further evidence of the shift in the adjudicator's thinking regarding whether the duty is a procedural one or a substantive one is evident from his consideration of what weight ought to be accorded to certain factors in the decision-making process. In *Wilson*,<sup>25</sup> for example, it was held that the employer, in deciding not to pay the employer's contributions as part of a withdrawal benefit, had given undue weight to the need to preserve the existing surplus in the fund as a precaution against fluctuations in the stock market. However, in the subsequent decision of *Hunt v Liebherr-Africa Managed Pension Plan & another (3)*<sup>26</sup> it was held that while a discretion is curtailed by the requirement that all relevant factors be taken into account, the weight to be attached to those factors is a matter for the employer's prerogative.

Issues such as rationality and arbitrariness are very much a part of an enquiry into dialectical reasonableness, but it would be the decision-making process that one would challenge as irrational or arbitrary as opposed to the actual substantive decision. While the end result might be the same, conceptually the distinction is an important one for it precludes the adjudicator and the courts from substituting their own decision for that of an employer merely because an alternative outcome is preferred, and in circumstances where the decision-making process cannot be faulted in any way.

The application of this duty illustrates that it is by no means a static or rigid concept. Its strength seems to lie in its in-built flexibility. The duty has been adapted and applied to a range of different circumstances. In so doing, its use has at times been innovative. In *Johannesburg Municipal Pension Fund v The City of Johannesburg*,<sup>27</sup> for example, the High Court held that 'any summary, abrupt or unreasonable termination [of the fund] would not only be in conflict with the Rules but also contrary to the demands of good faith'. The court came to the conclusion that in giving notice of its intention to terminate the fund, the employer was required by the duty of good faith to give notice that was reasonable. The court then went on to assess what would be reasonable notice in the circumstances and concluded that the notice given in this case was not reasonable.

The duty is also been used to find implied obligations of an employer in an employment contract. In *Aucamp & others v University of Stellenbosch*,<sup>28</sup> for example, despite the absence of any contractual obligation to provide group life assurance benefits to the employee, the

employer was held to have breached the duty of good faith in not ensuring that an employee was fully and properly apprised of the availability of such

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benefits and in not ensuring that he was given an adequate opportunity to subscribe for these.<sup>29</sup>

The duty has also been used to protect not only rights but also the legitimate expectations of members. In *Woodroffe v Tongaat Hulett Pension Fund & another*,<sup>30</sup> the employer's decision to use almost a third of the surplus to fund the inclusion of a fixed-cost car allowance in the pensionable emoluments of 475 senior employees was found not to be in accordance with the duty of good faith as the employer had ignored the legitimate expectations<sup>31</sup> of members that the surplus would be distributed only after a process of negotiation.

While the duty does not grant a member the right to have a particular discretion exercised in his or her favour, it does afford the member a right to demand that the discretion be exercised. In effect, the failure to exercise the discretion would amount to an improper exercise of power. Blind adherence to a certain position or policy, without consideration of the individual circumstances, would amount to an unlawful fettering of an employer's discretion.<sup>32</sup>

The duty of good faith, as developed to regulate employer conduct under the rules, is a procedural duty and seems to envisage and apply a test that is flexible and permits a wide range of factors to be considered. It also appears to require a broader view to be taken of the conduct in question, the reasons motivating such conduct as well as the rights and/or legitimate expectations of the employer and employee.

Given these developments it is interesting to note that the decision of the Supreme Court of Appeal in *Telecall (Pty) Ltd v Logan*<sup>33</sup> appears to contradict the jurisprudence on the duty of good faith. The issue in this case was whether a former employee and member was entitled to have a complaint, relating to a decision by the employer made in terms of the fund rules, referred for arbitration. The rules provided two bases for calculating pension and the employee's pension was calculated in terms of the lower formula. Accepting that the employer was acting in terms of a discretion conferred by the rules, the court held that the only question that remained was whether that discretion

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was an unfettered one or one that was subject to restraints or limitations. Finding no explicit textual restraints on the discretion, and arguing that no material was presented to enable it to formulate a set of restraints, the court concluded that it was indeed an unfettered discretion. Noting that fraud or mala fides were not alleged, the court asked: 'If one accepts that the employer's discretion is unfettered what would there be for the arbitrator to decide?'<sup>34</sup> A discretion that is lawfully exercised in terms of the explicit restraints imposed could nonetheless still be unfair. *Telecall*, however, would seem to suggest that there would be no basis on which to scrutinize a discretion that is not explicitly fettered in order to determine if it was otherwise exercised properly and fairly - unless fraud or mala fides were alleged. Aside from textual restraints, the court was prepared to accept that mala fides might act as a limit on the exercise of discretion, but did not consider the duty of good faith and the overarching requirements of fairness and rationality that the duty of good faith imposes on the employer's exercise of discretion.

The concept of mala fides is generally associated with an ulterior motive, or a deliberate or grossly negligent disregard of the legal requirements for the performance of the function in question.<sup>35</sup> In this regard, mala fides appears narrower and significantly different from the duty of good faith, as developed in the pension context, which is much wider in its ambit. Where there is no incorporation of pension rights into the employment contract, employer conduct falls to be regulated under the rules and the duty of good faith will be a primary source of protection for employees. In addition to the duty of good faith, it may be possible that the exercise of an employer's powers and discretion in terms of the rules could also be scrutinized under the unfair labour practice provision. This issue will be considered below once we have discussed the unfair labour practice.

### III Incorporation

The second and third frameworks we explored in our earlier article were full incorporation and partial incorporation. One will recall that advocates of full incorporation argue that because pension benefits arise out of the employment relationship, the rules governing the granting and administering of such benefits would be wholly incorporated into the employment contract. If the rules were wholly incorporated, then the rules permitting the employer to vary the benefits would similarly be incorporated. The content and delivery of such benefits would then be subject to amendment, which would make

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these discretionary benefits. In addition, the employer's powers of termination, liquidation, withdrawal, transfer and the like would similarly be incorporated into the employment contract. The theory on partial incorporation is that only those rules that are necessary to give content and meaning to the pension promise are tacit terms of the employment contract. Based on the factual scenario one is dealing with, there may be many variations on what the exact formulation of the contractual term might be and these are considered further below. With respect to full incorporation and partial incorporation, an employee could have two parallel sets of remedies. The first would arise from those regulatory mechanisms that govern employer conduct under the rules. In this respect the employee could ground his or her challenge in the duty of good faith, as discussed above in relation to no incorporation. The second set of remedies could arise from those mechanisms that govern employer conduct under the employment contract. These are the mechanisms we are concerned with in this section and we will consider three of these. The first are the simple contractual remedies that apply in all employment contracts, the second is the unfair labour practice located in s 186(2) of the Labour Relations Act<sup>36</sup> (LRA), and the third is the contractual duty of good faith which is an implied term in all employment contracts.

Determining which regulatory mechanisms could be relied upon in the case of full incorporation, as opposed to partial incorporation, depends upon the nature of the contractual obligation that is under scrutiny. If the contract and rules are clear, the formulation of the obligation and the consequences of its breach should be relatively simple to determine. However, it is where the obligation is not textually obvious that difficulties arise. It must be stressed that the precise formulation of the obligation would depend largely on the facts. The contractual entitlement to benefits may be non-discretionary, in the sense that the entitlement to the benefit is not subject to an amending power. This would arise in the case of partial incorporation where the contract guarantees membership only or where the contract guarantees certain benefits. It would also apply if a court were to find that the rules pertaining to benefits are incorporated but that the amending powers are not similarly incorporated. We will refer to these as unconditional rights or benefits. In this regard we consider the contractual remedies available as well as the unfair labour practice provision.

The entitlements may also be discretionary in the sense that the benefit is subject to the amending power. This is most likely to be the case in full incorporation and in partial incorporation where an amending power is also incorporated into the contract. In these circumstances

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the focus of an appropriate regulatory mechanism would be to monitor the employer's exercise of its discretion.

*Unconditional rights*

(i) *Contractual protections*

If it is found on the facts that pension benefits have been incorporated into the employment contract as unconditional rights (ie not subject to the amending power) what would be the precise content of that contractual obligation, and what would be the consequence of a breach of that obligation?

Benefits are most likely to be incorporated into the employment contract as unconditional rights in the case of partial incorporation. The precise contractual term is dependent on the factual circumstances. One possibility could be a simple guarantee of membership to the fund specified at the time of contracting, and perhaps the contribution rates. A second possibility could be to ensure delivery of the benefits as initially set out in the rules.

The former may appear to be the least onerous on the employer but its implications are significant. Guaranteeing membership to a particular fund makes it a term or condition of

employment. This has serious consequences for any attempts at a unilateral exercise of the powers of transfer, withdrawal, termination or liquidation of the fund by the employer. Any change to the nature and identity of the fund, to which employees will be required to belong, could arguably amount to a change in terms and conditions of employment, which would then have to be effected in the same manner as changes to any other terms and conditions of employment. In essence, it means that such decisions by the employer cannot be taken unilaterally without the consent of the employees, or without resorting to legitimate power-play in order to procure such consent.

A second possibility is that the contractual obligation could be interpreted as being to provide the initial benefits promised. On this interpretation the right or the benefits would be unconditional and the fund would be the vehicle used to make good on the pension promise. There would be no discretion given to the employer unilaterally to vary the benefits by way of a rule amendment, by terminating or liquidating the fund, by withdrawing from the fund and transferring members to another fund, or by converting the fund from a defined benefit to a defined contribution fund. Such changes, if effected under the rules, would not alter the pension promise made by the employer to the employee and the employer would have to find another vehicle through which to deliver on the promise. Alternatively, the employer would have to effect changes to the pension promise with the consent of the employees, failing which legitimate power-play could be determinative of the outcome.

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Where entitlements to the benefits are unconditional would the employer be obliged to provide such benefits if, for example, the fund is liquidated through no fault of the employer? This would seem to be a very onerous obligation and the adjudicator has stated in *Kransdorff v Sentrachem Pension Fund & another*<sup>37</sup> that ordinarily, unless the contract or rules provide otherwise, the employer incurs no direct liability to pay the benefits. That is the obligation of the fund. Would a contractual obligation, formulated or interpreted to guarantee certain benefits without adverse changes, be an example of the 'contract providing otherwise'? In *Ward v Sentrachem Ltd*<sup>38</sup> the business was sold and the buyer had to offer employment to all employees of the business on terms and conditions no less favourable than their existing terms of employment. The employee was assured he would be 'no worse off'. However, upon resigning a few years later, he discovered that the benefits due to him under the buyer's pension scheme were substantially less than would have been available to him had he remained with the seller's scheme. The court accepted that there was a contractual obligation on the employer that he provide certain pension benefits to ensure that the employee was no worse off than previously. How the new employer chose to do that, the court held, would be its own affair. The court found no basis for implying into the contract the power to diminish benefits and concluded that -

'the respondent (whose bona fides in the matter are not in doubt) did not perform its obligation towards the applicant upon termination of the employment contract, to procure or provide the benefits to which he was entitled. The respondent was therefore in breach of a material term of the contract, thus entitling the applicant to damages on the ordinary basis applicable in law'.<sup>39</sup>

This would suggest that it is certainly possible that a failure to provide benefits promised in the employment contract could amount to a breach of contract. The fact that this may, depending on the circumstances, amount to an onerous obligation on the employer does not detract from the legal principle that makes it possible. In defending an alleged breach, an employer would be free to rely on the full range of defences for a contractual breach - to the extent that these may be relevant.

With respect to unconditional benefits, the argument is not that pension benefits should be given special protection in the employment contract but rather that it should be deserving of the same protection as is given to the employee's right to receive a promised remuneration or any other employment benefit. If these obligations are breached, the employer could be liable. If the employer was unable to continue

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providing for such a benefit, it would be obliged to embark on a process of consultation and negotiation with employees as to the best way to manage the situation and, upon failing to reach any agreement, to embark on strategies of power-play. This would be the required process to change a term or condition of employment, and it is arguable that there is no reason why it ought to be different in the case of pension benefits.

(ii) *Unfair labour practice*

The relevant part of the unfair labour practice is defined in s 186(2) of the LRA as - 'any unfair act or omission that arises between an employer and an employee involving - (a) unfair conduct by the employer relating to the . . . provision of benefits to an employee'.

Pension benefits are accepted in law as being part of remuneration or deferred pay.<sup>40</sup> Should these benefits be found to be unconditional contractual terms (expressly or by implication), a question that arises is whether they would be considered 'benefits' for purposes of the unfair labour practice provision.

Much attention has been focused on how widely 'benefits' ought to be interpreted. Aside from providing a convenient way to distinguish disputes that are to be resolved through adjudication and those to be resolved through collective bargaining, this aspect of the provision offers the most flexibility when dealing with disputes that do not fall neatly within any of the other more specific categories of the unfair labour practice.<sup>41</sup> For these reasons the scope of the term 'benefits' has provoked considerable interest.

Case law and commentators have at times interpreted 'benefits' widely. In *SACCAWU and Garden Route Chalets (Pty) Ltd*, for example, the commissioner endorsed and followed the approach advocated by Professor Grogan<sup>42</sup> that '[b]y "benefits" the legislature seems to envisage all rights which accrue to an employee by virtue of the

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employment relationship - from wages through leave to additional matters like pension, medical aid, housing subsidies and so on'.

The problem with according such a wide interpretation to 'benefits', however, has been that it appears to blur the distinction between disputes of right, to be resolved by adjudication, and disputes of interest, to be resolved by power-play. The fear is that disputes over remuneration, for example, which is generally accepted as a dispute of interest, could be the subject of arbitration if found to be a 'benefit' under a wide interpretation.

For these reasons, some support for a more restrictive interpretation of 'benefit', arguing that it ought to refer only to non-monetary compensation such as sick leave, vacations, company discounts and the like.<sup>43</sup> This approach was seen in *Schoeman & another v Samsung Electronics (Pty) Ltd*<sup>44</sup> where the Labour Court held the following:

'Commission payable by the employer forms part of the employee's salary. It is a quid pro quo for services rendered, just as much as a salary or a wage. It is therefore part of the basic terms and conditions of employment. Remuneration is different from "benefits". A benefit is something extra, apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract.'

On the strict interpretation of *Schoeman*, pension benefits ought to be 'benefits' for purposes of the unfair labour practice provision if they form part of an employee's remuneration.

However, one runs into difficulties with the view that a 'benefit' can only be something extra, apart from remuneration, if one considers that many extras are considered a quid pro quo for work rendered. Such extras are often structured as part of the cost of employment and agreed to on the basis of a salary sacrifice for reasons of tax efficiency.<sup>45</sup> This is evident from the Labour Court's finding in *Staff Association for the Motor & Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd*<sup>46</sup> that:

'The use of a motor vehicle by an employee granted by the employer is in my view a quid pro quo for work rendered and is a form of remuneration. It is, in fact, part of the employee's salary. . . . Any changes to this benefit have the result that the employee's salary or remuneration package is potentially or in fact affected.'

For a long time the 'benefits' debate appeared stuck on determining the ambit of its operation. This was until the Labour Appeal Court in *HOSPERSA & another v Northern Cape Provincial Administration*<sup>47</sup>

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shifted the enquiry from 'Is it a benefit?' to 'Is it a benefit granted by virtue of contract or some other law?' As the oft-quoted finding of Mogoeng AJA,<sup>48</sup> set out below, makes clear the issue is now not so much the content of the benefit but rather whether it derives from contract or some other law:

'It appears to me that the legislature did not seek to facilitate, through item 2(1)(b), the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(1)(b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give to him or her, or to create an entitlement to such benefits through arbitration in terms of item 2(1)(b). It simply sought to bring under the residual unfair labour practice jurisdiction disputes about benefits to which an employee is entitled ex contractu (by virtue of the contract of employment or a collective agreement) or ex lege (the Public Service Act or any other applicable Act.)'

It is submitted that this finding once again clears the way for a wider interpretation to be accorded to 'benefits'. The requirement that a benefit be grounded in a contractual or other legal right removes the concern that a wide interpretation of 'benefits' will permit the unfair labour practice to be used to create new rights. Applying this approach in the context of remuneration disputes Le Roux<sup>49</sup> argues that -

'the ability to embark on protected industrial action is not determined by whether the subject-matter of the dispute relates to remuneration as such, but rather whether there is an alleged infringement of rights. Such an approach will allow the arbitration of an alleged unfair application of remuneration policy, the timing of payment and the method of payment despite the fact that these relate to remuneration'.

On this approach, it would not matter whether contractual pension benefits are seen as being part of remuneration or not. The crucial issue is that, being derived from the fund rules or from the employment contract, they would be 'benefits' for the purpose of the unfair labour practice provision. This would mean that where the contract guarantees the provision of these benefits, which is not subject to a discretion, then such an obligation would be capable of enforcement through the unfair labour practice jurisdiction.

It is submitted that *HOSPERSA* has brought more focus to the 'benefits' debate and will have the effect of steering the development of the unfair labour practice jurisprudence in a different direction. However, it is not clear what value is brought to the jurisprudence at this stage to create a further contractual remedy - which seems to have been the effect of *HOSPERSA*. As discussed above, where benefits

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are contractual terms their fulfilment can be adequately enforced through ordinary contractual remedies. The failure to provide such benefits, or the provision of a lesser benefit, could conceivably constitute a breach of contract. Protection from discrimination in the provision of benefits is also adequately granted under the EEA. The need for a further contractual remedy is, therefore, not clear. However, it is our view that the unfair labour practice provision could function as an ideal regulatory mechanism of employer discretion and this is what *HOSPERSA* now opens the way for. We will consider this issue in some detail below.

*Discretionary benefits*

(i) *The contractual term*

As discussed above, pension rights or benefits will be discretionary in the case of full incorporation because the amending powers would also be incorporated into the employment contract. These rights may also be discretionary in the case of partial incorporation. The implied contractual obligation might be to ensure delivery of the benefits, subject to the power of amendment as contained in the rules. Incorporating an amending power into the employment contract as an implied term is not a course of action that a court will embark upon lightly. Careful consideration will no doubt be given to the surrounding circumstances and the implications of such incorporation. Nonetheless, where implied terms are incorporated on this basis, they will be discretionary benefits and the effect of this will be the same as in the case of full incorporation.

If it were explicitly stated in the employment contract that the employee would be entitled to the benefits, subject to the rules then it might be possible to interpret the express term as permitting the power of amendment. This would again make the benefits discretionary. This was the approach taken by the English courts in *Cadoux v Central Regional Council*<sup>50</sup> in which the employee was promised benefits in accordance with the conditions of service and 'as supplemented by the authorities and as amended from time to time'. The court held that these words suggested that it was within the contemplation of the parties that the benefits may be amended and that such amendments would determine the extent of the obligation.

It seems then that under the framework of full incorporation, and in the case where the amending powers are also made implied terms of

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the contract under partial incorporation, the pension rights or benefits in question would be discretionary.<sup>51</sup>

(ii) *The unfair labour practice and discretionary benefits*

To what extent can the unfair labour practice provision be used to test the exercise of an employer's contractual discretion? This issue was raised by the Labour Court in *Eskom v Marshall*<sup>52</sup> in which the court explored the possibility of a middle ground between disputes of right and disputes of interest in which was located a spes. This was described as a private

interest of a status less than a legal right but more than a hope or a wish. This legitimate expectation had to be 'an ascertainable advantage or privilege which has been created by the employer concerned; or one which the employer has declared it will consider conferring upon employees'.<sup>53</sup>

As support for its view that such a spes or legitimate expectation to a benefit is sufficient to constitute a residual unfair labour practice, the court pointed to the inclusion of promotions and training in the provision.<sup>54</sup> An employee very rarely has an unencumbered right to a promotion or to training. As such these can also be argued to be discretionary advantages, yet no problem has arisen with their being located in the unfair labour practice provision. The court, in *Eskom*, interpreted *HOSPERSA* as not permitting discretionary benefits to be covered by the provision and, therefore, despite its reasoning stopped short of actually making a finding to this effect.

Soon after *Eskom*, the Labour Appeal Court again had cause to examine the unfair labour practice in the case of *MITUSA & another v Transnet Ltd & others*.<sup>55</sup> This case involved a dispute as to whether employees were entitled to training as a term and condition of employment. The CCMA commissioner held that, on the evidence, there was a contractual right to the training. His alternative finding was that employees also had a reasonable expectation to training which then created a right worthy of protection. The court seemed to adopt the

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*HOSPERSA* approach and sought a contractual or other legal right in order for the unfair labour practice (relating to the provision of benefits) to apply. However, the court concluded that there was no evidence of a contractual right. On the question of there being a reasonable expectation which could found such a right, the court held that a reasonable expectation, without anything more, could not automatically become a term and condition of employment.<sup>56</sup>

Neither *HOSPERSA* nor *MITUSA* dealt explicitly with the question of whether discretionary benefits fall within the ambit of the unfair labour practice provision, but we submit that their findings do not exclude this possibility. The essence of *HOSPERSA* is firstly, that the relevant benefit has to derive from a contractual or other legal right in order to fall within the ambit of a 'benefit' for purposes of the unfair labour practice and secondly, that the provision was not intended to allow an employee to acquire an entitlement that he or she is not otherwise entitled to. *MITUSA* reinforced this by seeking a contractual right on which to peg the reasonable expectation.

It is submitted that there is no reason why a discretionary benefit cannot be grounded in a contractual or other legal right, such as the employment contract or the fund rules. A right to a discretionary benefit does not give an employee the right to the benefit itself. Rather, it gives the employee the right to be properly considered for that benefit. On this analysis, a discretionary benefit does not in any way entitle the employee to something he or she would not otherwise have been entitled to and does not in any way create new rights. The essence of *HOSPERSA* is, therefore, not disturbed by the notion that discretionary benefits can fall within the ambit of the unfair labour practice provision.

In our view, the wording of the provision itself supports this argument. What s 186(2) (a) is concerned with is an act or omission that involves the unfair 'conduct' of the employer. Conduct is defined in *Black's Legal Dictionary*<sup>57</sup> as 'personal behaviour, whether by action or inaction; the manner in which a person behaves'. It can be argued, therefore, that the section seeks to regulate the manner in which an employer behaves. Put differently, one could say that it seeks to regulate the decision-making process and there is no reason why this would not include the manner in which a discretion is exercised.

The old Industrial Court seemed willing to accept that discretionary benefits could fall within the ambit of an unfair labour practice, and that the focus in such matters would be on the conduct of the employer in granting or withholding such a benefit. An example of this is the

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case of *Van Copenhagen v Shell & BP Petroleum Refineries (Pty) Ltd & another*<sup>58</sup> in which the court was considering the employer's power to consent to an employee's application for deferred pension due to early retirement. It was held that:

'The discretion is not absolute nor is it unfettered. It is not a quasi-judicial decision. [The employer] need not adhere strictly to the audi alteram partem principle. It must, however, do that which is necessary to ascertain all the facts which are needed to enable it to exercise its discretion for the purpose it was intended to serve. Exercising that discretion for some other purpose would be an improper exercise of the discretion and thus an unfair labour practice.'<sup>59</sup>

More recently, in the case of *Mans v Mondi Kraft Ltd*,<sup>60</sup> the Labour Court seemed comfortable in holding that:

'Mr Mans does not have a contractual right to an increase. He has a contractual right that each year his employer must exercise a discretion whether to increase his salary or not . . . Mr Mans alleges no breach of the duty to exercise a discretion for he pleads that a salary increase . . . has been made to him. Contractually he is not entitled to more than this. His complaint is that he is unhappy with the exercise of that discretion. This does not constitute a breach of contract.'

It seems that the court was in the past willing to test the exercise of a contractual discretion under the unfair labour practice provision. In our view, there seems to be a mistaken assumption that the narrowing of the unfair labour practice definition as well as the finding in *HOSPERSA* have somehow changed this position. It is submitted that the changes made to the unfair labour practice definition in recent years are of no consequence to the question of whether a contractual discretion is properly an issue for consideration under the provision. As argued above, there is also nothing in the *HOSPERSA* judgment that would appear to suggest that this is the case.

*Would the unfair labour practice provision apply to employer conduct under the rules only?*

Having argued that the unfair labour practice would apply to pension benefits, whether these are unconditional or discretionary rights, the one remaining issue is whether they could apply where the powers and discretion are not incorporated into the contract, but remain located in the rules. This issue would be relevant as a potential regulatory mechanism of employer conduct under no incorporation.

Early cases decided under the wider definition of the unfair labour practice provision seemed to accept that employer conduct need not be based on obligations rooted in an employment contract only in

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order for the provision to apply. In *Archibald v Bankorp Ltd (now Absa Ltd) & another*,<sup>61</sup> for example, the old Industrial Court held that the employer's failure or refusal to take steps to amend the pension fund rules so that a retrenched employee is not unfairly penalized could give rise to an unfair labour practice, especially in circumstances where the employer enjoys strong representation on the board of trustees and is able to influence the board's decisions. Similarly in *Van Copenhagen*,<sup>62</sup> the Industrial Court was concerned with the employer's exercise of a discretion under the rules to grant or refuse an application for a deferred pension due to early retirement. The court accepted that an improper exercise of this discretion would be an unfair labour practice.

The changes to the unfair labour practice definition have not weakened the argument that an unfair labour practice can be committed by an employer exercising powers that are granted in terms of the rules, as opposed to the employment contract. The reason for this view is that the unfair labour practice provision is currently defined as an act or omission that arises 'between an employer and employee'. It is arguable that the provision contemplates conduct arising in the context of an employment relationship not necessarily in the context of the employment contract.

The exercise of powers under the rules, in relation to an employment benefit or any aspect of remuneration could, we submit, be an act or omission arising between employer and employee and could, therefore, be covered by the unfair labour practice provision. In terms of *HOSPERSA* the benefit would still be one arising as a consequence of law if one considers that the rules do give rise to legal entitlements.

(iii) *The duty of good faith applied to discretionary benefits under the employment contract*

The duty of good faith arguably governs the exercise of employer powers and discretion granted in terms of the rules. But to what extent does it govern the exercise of a contractual discretion?

In English law there is a clearly developed principle that the duty of good faith will apply to the exercise of a contractual discretion. The developments in this area of law have been mainly around discretionary bonus arrangements. In *Clark v Nomura International plc*,<sup>63</sup> for example, the High Court was dealing with a bonus arrangement described in the contract as

'discretionary' and as 'not being guaranteed in any way'. The court held that, apart from any explicit contractual constraints,<sup>64</sup> a contractual discretion is never unfettered for it

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is always subject to the implied term that the discretion be exercised in good faith. Drawing from, and consolidating the findings of a range of cases that had previously dealt with contractual discretion and the duty of good faith,<sup>65</sup> the court held that this duty requires that discretion should not be exercised capriciously, perversely or irrationally. The court specifically rejected the notion that the duty of good faith seeks merely to prevent the employer acting without reasonable or sufficient grounds, holding as follows:

'I do not consider right that there simply be a contractual obligation on the employer to act reasonably in the exercise of his discretion, which would suggest that the court can simply substitute its own view for that of the employer. My conclusion is that the right test is one of irrationality or perversity . . . ie that no reasonable employer would have exercised his discretion in this way.'<sup>66</sup>

In South African law, while the duty of good faith arguably governs an employer discretion granted in terms of the rules, it has not been made as clear that a contractual discretion would similarly be subject to the limits of the duty of good faith. However, there seems to be no reason why the duty of good faith should not apply similarly to a contractually derived discretion. This would seem to be logical given that there would be a more immediate connection between the duty of good faith, which is an implied term of the employment contract, and a contractual discretion.

The essence of the employer's duty of good faith is that nothing will be done to undermine the mutual trust and confidence between employer and employee. As discussed above, this duty was given a specific content by the adjudicator and the courts in the pension context. It is not clear to us that the duty would apply in the same form to employers' conduct generally under the employment contract. Our courts have tended to emphasize the duty in relation to employee conduct<sup>67</sup> but insufficient attention has been given to the duty in the context of employer conduct, and in particular to the extent to which the duty would govern the exercise of a contractual discretion.

Should our law develop along the same lines as English law in relation to this aspect of the duty, as it did in relation to pension matters, there seems to be no reason why the duty of good faith could not be used to govern the exercise of contractual discretion. Right now, however, the unfair labour practice seems to be the ideal mechanism to fulfil such a function and, as argued above, there is nothing in our law that would seem to exclude such an approach.

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#### **IV Conclusion**

The regulatory mechanisms discussed above are all premised on the notion that the dictates of fairness, rationality and accountability demand the effective monitoring and regulation of employer conduct in a pension context. The choice of mechanism depends largely on which framework one is operating within, namely no incorporation, full incorporation, or partial incorporation.

If the factual background locates the dispute within the framework of no incorporation, the amending power in the rules makes the benefits discretionary. To the extent that the employer will be granted powers or discretion under the rules to alter the benefits in any way, the exercise of such powers and discretion will be subject to the duty of good faith as the primary regulatory mechanism and possibly also the unfair labour practice, should a wide interpretation be taken of its intended scope.

When dealing with a situation of full incorporation, the effect on the benefits will be the same as in the case of no incorporation. Benefits will still be discretionary. However, the amending power no longer operates purely within the regime of the rules but would also be an implied term of the employment contract. This would then bring into play the unfair labour practice and possibly the contractual duty of good faith. While our law does not appear ready to accept that a contractual duty of good faith can govern a contractual discretion, the unfair labour practice certainly seems poised and ready to take on such a function.

Finally, one may be dealing with a case of partial incorporation. Precisely what will be incorporated is a delicate question and will be largely influenced by the evidence. The

contractual term could guarantee membership only, or the specific benefits initially set out in the rules, in which case the rights would be unconditional. Employers would be bound by ordinary contractual obligations and by the unfair labour practice provision as interpreted in *HOSPERSA*. Should the contractual term state expressly that the promised benefits are subject to the rules there may be grounds for interpreting the power of amendment as being part of the pension promise. This would make the benefit discretionary and the unfair labour practice could act as a primary regulatory mechanism in such circumstances. The duty of good faith may yet develop to fulfil such a function.

With respect to the regulatory mechanisms available, it seems that the major and material differences between the frameworks lies in the fact that with no incorporation, the duty of good faith is of central importance whereas with incorporation, it is the unfair labour practice and contractual remedies that are crucial. Many would argue that the employment and contractual remedies do not take the matter much further and the duty of good faith is sufficiently flexible and adaptable to fulfil the function of an effective regulatory mechanism.

Why then

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do we need to develop the theory that perhaps pension benefits are incorporated into the employment contract?

The duty of good faith, as it has been developed in the pension context, offers many benefits. It permits a holistic examination of the matter and requires the decision maker to consider a wide range of relevant factors, while at the same time requiring that the decision maker not be unduly influenced by irrelevant factors. It permits the employer to protect its own interests, financial or otherwise, when exercising its powers or discretion. However, for all its advantages the duty of good faith is limited in one key respect. Its concern is not with the outcome but with the decision-making process. Provided all the relevant checks and balances in this process have been met, the end result is really of little consequence.

However, an employee may argue for greater certainty regarding his or her pension destiny and in this regard there may be certain outcomes that the employee would want guaranteed. He or she may want the assurance, for example, that there would be an entitlement to the promised benefit or some benefit at the very least, that his or her membership of the specified pension fund would not be unilaterally changed, and that the employer would make regular payments of agreed contributions. These are hardly matters that the employee would readily agree ought to be subject to discretion. Rather, these are outcomes the employee may want and expect to be guaranteed - and the only way in which they can be guaranteed is if they are contractual terms.

Guaranteeing an outcome as a contractual term does not preclude change to that term. It merely precludes unilateral change by the employer. The contractual protection guarantees that the employee is drawn into the process of changing terms and conditions. The duty of good faith, however, offers no such immediate guarantee. There may be instances where the adjudicator or the courts could find that in a given set of circumstances the duty of good faith may require some level of consultation or negotiation with employees/members. However, this is not an obligation that may be immediately apparent and equally applicable in all situations. The result is that is the employee's ability to participate in the process of change is a right that will often derive after the fact and as a consequence of a legal challenge to the decision-making process. It need hardly be said that legal challenges are expensive, time-consuming, inconvenient and fraught with uncertainty. In many instances members may, for these reasons, choose to forego a challenge. The advantage of a contractual right is that the employee has an immediate and unconditional entitlement to be informed of, and to participate in, any proposed amendment. It is important to stress that contractual protection need not in any way oust the exercise of discretion. As seen above, the unfair labour practice provision offers an appropriate mechanism to test the exercise of discretion, within the bounds of the contractual terms.

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Pension law has for a long time remained a discrete area of law governed largely by fund rules and specialized pension legislation. However it is becoming increasingly apparent that pension law is not beyond the reach of influence of other areas of law. This is illustrated by the increasing interaction between pension law and constitutional law, administrative law and

employment law, for example. To be able effectively to manage the various levels of interaction between pension law and the various other branches of law requires a sound understanding of the basis upon which pension jurisprudence is being built. Until now the response to new challenges seems to have been ad hoc and it is sometimes difficult to get a coherent sense of where pension law is headed.

We submit that the challenge for pension lawyers at this stage is to start to consolidate the developments in our pension jurisprudence thus far, and to use this to build clear theoretical frameworks able to support development and change in this area of law. These articles have been written with the intention of contributing to this process.

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#### Footnote - \*

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#### Footnote - 1

1 [\(2003\) 24 ILJ 1.](#)

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#### Footnote - 2

2 See, for example, *Coetzee v Moreersburgse Koringboere Kooperatief Bpk* [\(1997\) 18 ILJ 1341 \(LC\)](#).

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#### Footnote - 3

3 See, for example, *Gumede v Hydraulic Steel Provident Fund & another* [2002] 10 BPLR 3913 (PFA).

3 See, for example, *Gumede v Hydraulic Steel Provident Fund & another* [2002] 10 BPLR 3913 (PFA).

#### Footnote - 4

4 See, for example, *Leak v Commercial Union of South Africa Staff Pension Fund & others* [2001] 9 BPLR 2486 (PFA).

4 See, for example, *Leak v Commercial Union of South Africa Staff Pension Fund & others* [2001] 9 BPLR 2486 (PFA).

#### Footnote - 5

5 For property rights see *Sebola v Johnson Tiles (Pty) Ltd & others* [2002] 3 BPLR 3242 (PFA); *Atkinson & others v Southern Field Staff Pension Fund* [2002] 4 BPLR 367 (PFA); *Olivier v Mine Employees Pension Fund & another* [2002] 11 BPLR 4068 (PFA); for access to information rights see *Caffin & another v African Oxygen Ltd Pension Fund* [1999] 10 BPLR 113 (PFA); for freedom of association rights see *Ndlovu v Vegmoflora Fund & another* [2002] 3 BPLR 3224 (PFA) and for equality rights see *Martin v Beka Provident Fund* [2002] 2 BPLR 196 (PFA); *Clarence v Independent Schools Pension Fund* [2000] 2 BPLR 132 (PFA); *Zolezzi v Mine Officials Pension Fund* [2000] 8 BPLR 937 (PFA); *Allie v Southern Life Staff Pension Fund* [2002] 5 BPLR 3402 (PFA); *Jarvis v AECI Pension Fund* [2001] 2 BPLR 158 (PFA).

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#### Footnote - 6

6 See *NEHAWU v University of Cape Town & others* [\(2003\) 24 ILJ 95 \(CC\)](#). The court gave no indication as to whether the right could be interpreted as applying to conduct by an employer who at the time was not acting in

its capacity as employer but whose conduct impacts on the employment relationship; or whether it would apply to third parties, such as a pension fund, whose conduct impacts on the employer-employee relationship, in a material way. These were not necessary findings to make in the case but it is not unlikely that the court will take such an approach in the future. This was the adjudicator's approach in his preliminary determination in *Olivier v Mine Employees Pension Fund & another* (note 7 above) in which the fund's conduct was scrutinized as a violation of the constitutional right to fair labour practices. In his final determination, however, the adjudicator accepted argument to the effect that s 157 of the LRA precludes his consideration of an alleged violation of the right to fair labour practices. The precise nature of these arguments were not canvassed in his determination.

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#### Footnote - 7

7 [Act 55 of 1998](#).

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#### Footnote - 8

8 In terms of s 16, the EEA applies to 'all employers and employees' and seems to encompass the wider employment relationship rather than being limited to the employment contract. It is certainly arguable that employer conduct under fund rules, to the extent that it impacts on the employment relationship, could also be regulated under the EEA.

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#### Footnote - 9

9 [Act 4 of 2000](#).

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#### Footnote - 10

10 Section 5(3) makes clear that the Equality Act will apply to any person to whom, and to the extent to which, the EEA applies. It is arguable, therefore, that even if employer conduct under the rules was not interpreted as falling within the ambit of the EEA, the Equality Act could still be used to challenge such conduct should it be alleged to be discriminatory. It seems that the Equality Act was also intended to apply to trustee conduct for s 29 read with item 6 of the schedule to the Act sets out an Illustrative List of Unfair Practices which includes the acts of:

- (a) Unfairly excluding any person from membership of a retirement fund or from receiving any benefits from the fund on one or more of the prohibited grounds.
- (b) Unfairly discriminating against members or beneficiaries of a retirement fund.'

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#### Footnote - 11

11 [1999 \(4\) SA 884 \(SCA\)](#) at 894; [\(1999\) 20 ILJ 2797 \(SCA\)](#).

11 [1999 \(4\) SA 884 \(SCA\)](#) at 894; [\(1999\) 20 ILJ 2797 \(SCA\)](#).

#### Footnote - 12

12 *IBM Pensioners Action Group v IBM SA (Pty) Ltd & another* [\(2000\) 21 ILJ 1467 \(PFA\)](#) at 1477.

12 *IBM Pensioners Action Group v IBM SA (Pty) Ltd & another* [\(2000\) 21 ILJ 1467 \(PFA\)](#) at 1477.

#### Footnote - 13

13 [1991] 2 All ER 597 (Ch) at 606-7.

13 [1991] 2 All ER 597 (Ch) at 606-7.

#### Footnote - 14

14 These functions may be formulated in a variety of ways. For example, the employer may be empowered to take certain actions in relation to the fund, such as termination, withdrawal or liquidation, or to make certain decisions such as those relating to pension increases or enhanced withdrawal benefits, or to consent to or veto certain decisions of the trustees. Sometimes these functions may be expressly stated as conferring a discretion on the employer and sometimes they may not. The case law does not appear to make any distinction between these for purposes of determining whether the duty of good faith applies. In other words, it is not only whether the employer's function is expressly stated as a discretionary one that the duty would apply. Rather the duty appears to apply in any circumstance where the employer has a choice as to how it will act in exercising a particular power or discretion. The duty of good faith would then be applied to regulate the making of that choice. It is in this context that we sometimes use the terms 'powers' and 'discretion' interchangeably. See *Wilson v Orion Fixed Benefit Pension Fund (1)* [1999] 9 BPLR 89 (PFA); *Group of Concerned Sapref Pensioners* [\(1999\) 20 ILJ 483 \(PFA\)](#) and *IBM Pensioners Action Group*, note 14 above.

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#### Footnote - 15

15 This approach has also been followed in English law. See, for example, *Mihlenstadt v Barclays Bank International Ltd and Barclays Bank plc* [1989] IRLR 531 at para 64.

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#### Footnote - 16

16 *Imperial*, note 15 above at 607.

16 *Imperial*, note 15 above at 607.

#### Footnote - 17

17 See, for example, *Ferguson v Sapref Pension Fund & others* [2002] 6 BPLR 3572 (PFA); *IBM Pensioners Action Group*, note 14 above; *Harris v AECI Pension Fund & another* [2000] 7 BPLR 737 (PFA); *Woodroffe v Tongaat-Hulett Pension Fund & another* [2000] 4 BPLR 454 (PFA).

17 See, for example, *Ferguson v Sapref Pension Fund & others* [2002] 6 BPLR 3572 (PFA); *IBM Pensioners Action Group*, note 14 above; *Harris v AECI Pension Fund & another* [2000] 7 BPLR 737 (PFA); *Woodroffe v Tongaat-Hulett Pension Fund & another* [2000] 4 BPLR 454 (PFA).

#### Footnote - 18

18 *IBM Pensioners Action Group*, note 14 above.

18 *IBM Pensioners Action Group*, note 14 above.

#### Footnote - 19

19 *Wilson*, note 16 above.

19 *Wilson*, note 16 above.

#### Footnote - 20

20 *ibid* at 104.

20 *ibid* at 104.

#### Footnote - 21

21 See note 14 above at 1478-9.

21 See note 14 above at 1478-9.

#### Footnote - 22

22 *IBM Pensioners Action Group*, note 14 above; *Aucamp & others v University of Stellenbosch* [2002] 6 BPLR 3497 (C).

22 *IBM Pensioners Action Group*, note 14 above; *Aucamp & others v University of Stellenbosch* [2002] 6 BPLR 3497 (C).

#### Footnote - 23

23 *IBM Pensioners Action Group*, note 14 above at 1478.

23 *IBM Pensioners Action Group*, note 14 above at 1478.

#### Footnote - 24

24 *ibid* at 1479.

24 *ibid* at 1479.

#### Footnote - 25

25 See note 16 above.

25 See note 16 above.

#### Footnote - 26

26 [2002] 6 BPLR 3582 (PFA) at 3586.

26 [2002] 6 BPLR 3582 (PFA) at 3586.

#### Footnote - 27

27 case no 02/3965 April 2002 as yet unreported at 7.

27 case no 02/3965 April 2002 as yet unreported at 7.

#### Footnote - 28

28 See note 24 above at 3507.

28 See note 24 above at 3507.

#### Footnote - 29

29 A similar approach has been taken in the UK. In *United Bank Ltd v Akhtar* [1989] IRLR 523 the Employment Appeal Tribunal, dealing with a mobility clause in an employment contract, found that the duty of good faith required the reasonable notice of such a move. On this basis such a term was implied into the contract.

29 A similar approach has been taken in the UK. In *United Bank Ltd v Akhtar* [1989] IRLR 523 the Employment Appeal Tribunal, dealing with a mobility clause in an employment contract, found that the duty of good faith required the reasonable notice of such a move. On this basis such a term was implied into the contract.

#### Footnote - 30

30 See note 19 above.

30 See note 19 above.

#### Footnote - 31

31 The legitimate expectation was held to have arisen as a correlative of the employer's duty of good faith, read with the constitutional right to fair labour practices. The adjudicator held that fairness requires some form of interactive process before decisions are taken impacting upon the proprietary interests of those affected. On this basis the members had a legitimate expectation to be engaged in negotiations regarding the distribution of the surplus.

31 The legitimate expectation was held to have arisen as a correlative of the employer's duty of good faith, read with the constitutional right to fair labour practices. The adjudicator held that fairness requires some form of interactive process before decisions are taken impacting upon the proprietary interests of those affected. On this basis the members had a legitimate expectation to be engaged in negotiations regarding the distribution of the surplus.

#### Footnote - 32

32 *Stead v Orion Money Purchase Pension Fund (SA) & another* [2002] 8 BPLR 3803 (PFA); *Van Dyk v Fedsure Life Assurance Ltd & others* [2002] 3 BPLR 3252 [PFA]; *Wilson* note 16 above.

32 *Stead v Orion Money Purchase Pension Fund (SA) & another* [2002] 8 BPLR 3803 (PFA); *Van Dyk v Fedsure Life Assurance Ltd & others* [2002] 3 BPLR 3252 [PFA]; *Wilson* note 16 above.

#### Footnote - 33

33 [2000 \(2\) SA 782 \(SCA\)](#).

33 [2000 \(2\) SA 782 \(SCA\)](#).

#### Footnote - 34

34 *ibid* at 788-9.

34 *ibid* at 788-9.

#### Footnote - 35

35 *Lawsa* para 84.

35 *Lawsa* para 84.

#### Footnote - 36

36 [Act 66 of 1995](#).

36 [Act 66 of 1995](#).

#### Footnote - 37

37 [1999] 9 BPLR 55 (PFA) at 68.

37 [1999] 9 BPLR 55 (PFA) at 68.

#### Footnote - 38

38 [\(1992\) 13 ILJ 252 \(IC\)](#).

38 [\(1992\) 13 ILJ 252 \(IC\)](#).

#### Footnote - 39

39 *ibid* at 260.

39 *ibid* at 260.

#### Footnote - 40

40 *Resa Pension Fund v Pension Fund Adjudicator & others* 2000 (2) SA 313 (C) at 322; [\(2000\) 21 ILJ 1947 \(C\)](#); *Younghusband v Decca Contractors (SA) Pension Fund and its Trustees* [\(1999\) 20 ILJ 1640 \(PFA\)](#) at 1658. See also the English cases of *Barber v The Guardian Royal Exchange Insurance Group* [1990] 2 All ER 660 (ECJ); *UNIFI v Union Bank of Nigeria plc* [2001] IRLR 712; *Thrells Ltd (in liquidation) v Lomas & another* [1993] 2 All ER 546 (Ch) and *Parry v Cleaver* [1979] AC 1 (HL) at 16.

40 *Resa Pension Fund v Pension Fund Adjudicator & others* 2000 (2) SA 313 (C) at 322; [\(2000\) 21 ILJ 1947 \(C\)](#); *Younghusband v Decca Contractors (SA) Pension Fund and its Trustees* [\(1999\) 20 ILJ 1640 \(PFA\)](#) at 1658. See also the English cases of *Barber v The Guardian Royal Exchange Insurance Group* [1990] 2 All ER 660 (ECJ); *UNIFI v Union Bank of Nigeria plc* [2001] IRLR 712; *Thrells Ltd (in liquidation) v Lomas & another* [1993] 2 All ER 546 (Ch) and *Parry v Cleaver* [1979] AC 1 (HL) at 16.

#### Footnote - 41

41 The other specified categories of an unfair labour practice are promotions, demotions, probations or training (s 186(2)(a)); unfair suspension or any other unfair disciplinary action short of dismissal (s 186(2)(b)); the failure or refusal to reinstate or re-employ a former employee in terms of any agreement (s 186(2)(c)) and an occupational detriment, other than dismissal, in contravention of the Protected Disclosures [Act 26 of 2000](#) in respect of an employee who has made such a disclosure (s 186(2)(d)). The latter is to be resolved by adjudication, all the others by arbitration.

41 The other specified categories of an unfair labour practice are promotions, demotions, probations or training (s 186(2)(a)); unfair suspension or any other unfair disciplinary action short of dismissal (s 186(2)(b)); the failure or refusal to reinstate or re-employ a former employee in terms of any agreement (s 186(2)(c)) and an occupational detriment, other than dismissal, in contravention of the Protected Disclosures [Act 26 of 2000](#) in respect of an employee who has made such a disclosure (s 186(2)(d)). The latter is to be resolved by adjudication, all the others by arbitration.

#### Footnote - 42

42 *Employment Law* vol 12 (4) April 1996 at 69.

42 *Employment Law* vol 12 (4) April 1996 at 69.

#### Footnote - 43

43 See, for example, Barker & Holtshausen in *SA Labour Glossary* (1996).

43 See, for example, Barker & Holtshausen in *SA Labour Glossary* (1996).

#### Footnote - 44

44 [\(1997\) 18 ILJ 1098 \(LC\)](#) at 1102. See also *Legal Aid Board v Dr John & others* [\(1998\) 19 ILJ 851 \(LC\)](#); *SA Chemical Workers Union v Longmile/Unitred* (1999) 20 ILJ 224 (CCMA).

44 [\(1997\) 18 ILJ 1098 \(LC\)](#) at 1102. See also *Legal Aid Board v Dr John & others* [\(1998\) 19 ILJ 851 \(LC\)](#); *SA Chemical Workers Union v Longmile/Unitred* (1999) 20 ILJ 224 (CCMA).

#### Footnote - 45

45 See R Le Roux 'The Impact of the 2002 Amendments on Residual Unfair Labour Practices' [\(2002\) 23 ILJ 1699](#) at 1708-9.

45 See R Le Roux 'The Impact of the 2002 Amendments on Residual Unfair Labour Practices' [\(2002\) 23 ILJ 1699](#) at 1708-9.

#### Footnote - 46

46 [\(1997\) 18 ILJ 374 \(LC\)](#). See also *Garland v British Railways Board* [1982] ECR 359 where the European Court of Justice reached a similar conclusion.

46 [\(1997\) 18 ILJ 374 \(LC\)](#). See also *Garland v British Railways Board* [1982] ECR 359 where the European Court of Justice reached a similar conclusion.

#### Footnote - 47

47 [\(2000\) 21 ILJ 1066 \(LAC\)](#).

47 [\(2000\) 21 ILJ 1066 \(LAC\)](#).

#### Footnote - 48

48 *HOSPERSA*, note 49 above at 1069-70. The reference to s 2(1)(b) is a reference to the unfair labour practice provision which, prior to the 2002 amendments to the LRA, were part of schedule 7, item 2 of the LRA. The unfair labour provision has now been moved to s 186.

48 *HOSPERSA*, note 49 above at 1069-70. The reference to s 2(1)(b) is a reference to the unfair labour practice provision which, prior to the 2002 amendments to the LRA, were part of schedule 7, item 2 of the LRA. The unfair labour provision has now been moved to s 186.

#### Footnote - 49

49 See note 47 above at 1708-9.

49 See note 47 above at 1708-9.

#### Footnote - 50

50 [1986] IRLR 133.

#### Footnote - 51

51 In *Mihlenstadt*, note 17 above, the English Court of Appeal, in formulating the relevant implied contractual term held that 'the bank became contractually bound, *so far as it lay within its power*, to procure for the plaintiff the benefits to which she was entitled under the scheme.' (emphasis added). This is an alternative formulation of the obligation not seen in our law. It sets out both the nature of the obligation and prescribes the extent of the performance required, ie to the extent possible. Formulating the obligation in this way is not the same as implying a power to amend as this formulation limits the extent to which a different benefit can be provided to that initially promised. In our view the duty of good faith could not be used to reach a similar interpretation on the required standard of compliance with a contractual obligation. The duty of good faith cannot reduce the level of compliance required. In other words, it cannot be used to transform a particular contractual obligation into a less onerous obligation.

51 In *Mihlenstadt*, note 17 above, the English Court of Appeal, in formulating the relevant implied contractual term held that 'the bank became contractually bound, *so far as it lay within its power*, to procure for the plaintiff the benefits to which she was entitled under the scheme.' (emphasis added). This is an alternative formulation of the obligation not seen in our law. It sets out both the nature of the obligation and prescribes the extent of the performance required, ie to the extent possible. Formulating the obligation in this way is not the same as implying a power to amend as this formulation limits the extent to which a different benefit can be provided to that initially promised. In our view the duty of good faith could not be used to reach a similar interpretation on the required standard of compliance with a contractual obligation. The duty of good faith cannot reduce the level of compliance required. In other words, it cannot be used to transform a particular contractual obligation into a less onerous obligation.

#### Footnote - 52

52 [\(2002\) 23 ILJ 2251 \(LC\)](#); [2003] 1 BLLR 12 (LC).

52 [\(2002\) 23 ILJ 2251 \(LC\)](#); [2003] 1 BLLR 12 (LC).

#### Footnote - 53

53 *ibid* at 17.

53 *ibid* at 17.

#### Footnote - 54

54 s 186(2)(a).

54 s 186(2)(a).

#### Footnote - 55

55 [\(2002\) 23 ILJ 2213 \(LAC\)](#); [2002] 11 BLLR 1023 (LAC).

55 [\(2002\) 23 ILJ 2213 \(LAC\)](#); [2002] 11 BLLR 1023 (LAC).

#### Footnote - 56

56 *MITUSA*, note 57 at 1050.

56 *MITUSA*, note 57 at 1050.

#### Footnote - 57

57 7 ed (1999) at 292.

57 7 ed (1999) at 292.

#### Footnote - 58

58 [\(1991\) 12 ILJ 620](#).

58 [\(1991\) 12 ILJ 620](#).

#### Footnote - 59

59 *ibid* at 626.

59 *ibid* at 626.

#### Footnote - 60

60 [\(2000\) 21 ILJ 213 \(LC\)](#) at 215.

60 [\(2000\) 21 ILJ 213 \(LC\)](#) at 215.

#### Footnote - 61

61 [\(1992\) 13 ILJ 1538 \(IC\)](#) at 1543.

61 [\(1992\) 13 ILJ 1538 \(IC\)](#) at 1543.

#### Footnote - 62

62 See note 60 above at 626.

62 See note 60 above at 626.

#### Footnote - 63

63 [2000] IRLR 775 at para 40.

63 [2000] IRLR 775 at para 40.

#### Footnote - 64

64 The contract stated that the bonus arrangement was to be based on the employee's work performance and on him remaining in employment on the payment date.

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#### Footnote - 65

65 United Bank Ltd, note 31 above; *White v Reflecting Roadstuds Ltd* [1993] IRLR 331 EAT; *McClory v Post Office* [1993] IRLR 159; *Harper v National Coal Board* [1980] IRLR 260; *Cheall v APEX* [1982] IRLR 362.

65 United Bank Ltd, note 31 above; *White v Reflecting Roadstuds Ltd* [1993] IRLR 331 EAT; *McClory v Post Office* [1993] IRLR 159; *Harper v National Coal Board* [1980] IRLR 260; *Cheall v APEX* [1982] IRLR 362.

#### Footnote - 66

66 note 65 above at para 40.

66 note 65 above at para 40.

#### Footnote - 67

67 See, for example, *Sappi Novaboard (Pty) Ltd v Bolleurs* [\(1998\) 19 ILJ 784 \(LAC\)](#); *Standard Bank of South Africa Ltd v CCMA & others* [1998] 6 BLLR 622 (LC); *Ntshange v Speciality Metals CC* [\(1998\) 19 ILJ 584 \(LC\)](#).

67 See, for example, *Sappi Novaboard (Pty) Ltd v Bolleurs* [\(1998\) 19 ILJ 784 \(LAC\)](#); *Standard Bank of South Africa Ltd v CCMA & others* [1998] 6 BLLR 622 (LC); *Ntshange v Speciality Metals CC* [\(1998\) 19 ILJ 584 \(LC\)](#).