

# ARBITRATION

## WHAT IS AN ARBITRATION?

Statutory Arbitration is a formal hearing during which the parties to a dispute will lead evidence and present argument to the arbitrator. The arbitrator will then consider this evidence and argument and apply the appropriate legal principles towards making a finding in the form of an arbitration award. Thus, unlike conciliation, where it is the parties that decide on how they are going to resolve the dispute, arbitration gives those powers to the arbitrator. The hearing is recorded and a digital recording of the arbitration is available upon request at a fee.

Section 138 of the Labour Relations Act (LRA) allows commissioners to decide how the hearing will be conducted. The commissioner, when hearing misconduct disputes, will take into account the CCMA Guidelines on Misconduct Arbitrations.

Although a commissioner is required to deal with the substantive merits of the dispute with a minimum of legal formalities, there is still a requirement to allow parties to give evidence, call witnesses, question the witness of any other party and address closing arguments to the commissioner.

## POSTPONEMENTS

Postponements of arbitration hearings are costly. CCMA Rule 23 regulates postponements. Sub-rule 23(2) provides that where both parties to the dispute agree in writing to the postponement and the written agreement for the postponement is received by the Commission at least seven (7) days prior to the scheduled date of the arbitration, the CCMA must postpone the hearing.

In the absence of an agreement reached by the parties to postpone the arbitration hearing, the party requesting postponement must make such an application to the Commission in accordance with CCMA Rule 31. Rule 31 requires the delivery of an application to the other parties to the dispute and filing a copy with the Commission 14 days before the scheduled date of the arbitration hearing.

The commissioner will decide whether to grant the request on the papers or to do so by means of oral representations made at a hearing, including an online hearing. In exceptional circumstances a party may apply for a postponement on the day of the hearing. Despite making an application for postponement in this manner, parties should still come prepared to proceed with the arbitration in case the request for postponement is denied.

## REPRESENTATION AT ARBITRATION

In terms of Rule 25 (1) (b) a party to the dispute may appear in person or be represented only by:

- a legal practitioner or a candidate attorney;

- if the party is an employer, a director or employee of the party and in addition, if it is a close corporation, a member of that close corporation; or
- any member of that party's registered trade union or registered employers' organization or an office bearer or official as defined in the LRA; or
- if the party is a registered trade union, any member of that trade union or any office bearer or official as defined in the LRA and authorised to represent that party; or
- if the party is a registered employers' organisation, any director or employee of an employer that is a member of the employers' organisation or any official or office bearer as defined in the LRA and authorised to represent that party; or
- if the party is the Department of Employment and Labour, any employee or official of the Department of Employment and Labour.

If the *dispute* being arbitrated is referred in terms of section 69(5), 73 or 73A of the BCEA or is *about the fairness of a dismissal* and a party has alleged that the reason for the dismissal relates to the *employee's* conduct or capacity, a party is not entitled to be represented by a *legal practitioner* or a *candidate attorney* in the proceedings unless:

- (i) the commissioner and all the other parties consent;
- (ii) the commissioner concludes that it is unreasonable to expect a party to deal with the *dispute* without legal representation, after considering -
  - (a) the nature of the questions of law raised by the *dispute*;
  - (b) the complexity of the *dispute*;
  - (c) the public interest; and
  - (d) the comparative ability of the opposing parties.

**Note: In terms of CCMA Rule 25(1)(d), no person representing a party in proceedings before the Commission in a capacity contemplated above, other than a legal practitioner or candidate attorney, may charge a fee or receive a financial benefit in consideration for agreeing to represent that party.**

Failure to attend the hearing might lead to the commissioner dismissing the case or the commissioner hearing only one side of the dispute.

## PRE-ARBITRATION CONFERENCE

The parties to an arbitration must hold a pre-arbitration conference dealing with the matters referred to in Sub-rule 20(2), if directed to do so by the Provincial Senior Commissioner or the Regional Senior Commissioner, or the presiding Commissioner. The parties may also hold a pre-arbitration conference by agreement. Rule 20(2) sets out the items that parties need to try to reach consensus on. These include, but are not limited to, facts in

dispute, facts agreed upon and the issues that the Commission is required to decide.

## PREPARING FOR AN ARBITRATION HEARING

It is important for the parties to prepare the evidence to be presented at the hearing before the time and to ensure that the submissions they want to make are clear and concise.

If there are documents to be submitted as evidence, copies for the commissioner, the other party and where applicable, the witness must be made. The pages must be numbered and bound together.

Witnesses need to be prepared in advance and need to be available to attend the hearing. Parties should also be open to conciliation and prepared to try to resolve the matter.

## OUTCOME OF THE ARBITRATION HEARING

An arbitration award must be issued within fourteen (14) days of the date of the hearing. On good cause shown, the CCMA Director may extend this period. The arbitration award is final and binding unless set aside by a competent Court.

## FAILURE TO COMPLY WITH THE AWARD

An arbitration award issued by a commissioner is final and binding. Should the employer fail to comply with the award, the employee may apply to have the award certified by the CCMA Director by completing a form LRA 7.18 (LRA 7.18A for bargaining council awards). A certified award for payment of money may be presented to the Sheriff for execution if payment is not made. The party must provide the physical address of the party at fault, for execution by the Sheriff.

An award ordering performance of an act, e.g. re-instatement, or re-employment may be enforced by way of contempt proceedings instituted in the Labour Court. It does not need to be made an order of court before contempt of proceedings can be instituted.

This procedure applies only to awards issued after the amended LRA came into operation i.e. 01 January 2015.

## RELEVANT LEGISLATION

- Rules for the Conduct of Proceedings before the CCMA as amended
- Labour Relations Act 66 of 1995 as amended
- CCMA Guidelines on Misconduct Arbitration