

CONCILIATION

WHAT IS CONCILIATION?

Conciliation is a process before the CCMA, a Bargaining Council or an accredited agency, where a conciliator will try to assist parties, usually an employer and an employee, to resolve a workplace dispute.

It is a compulsory process by law, however the outcome is voluntary as it is the right of parties to decide whether they wish to settle the dispute and on what terms. The process is private and confidential, off the record and “without prejudice” meaning that nothing the parties say during the process can be held against them in another process unless by agreement or by an order of a court. Discussion about the nature or categorisation of the dispute is not subject to confidentiality.

WHAT HAPPENS AT THE HEARING?

The conciliator is there to assist the parties and will decide the best and correct approach to follow in conciliating the dispute.

The conciliator may start the process by meeting jointly with the parties and asking them to share information about the dispute. Parties are allowed to bring any relevant documents that might assist in explaining their case.

The parties will be given an opportunity to negotiate with each other and share ideas on how to resolve the dispute under the guidance of the conciliator.

The conciliator may also talk to the parties separately in order to explore possible ways of resolving the dispute and to point out the possible strong and weak points in a case when considering the applicable law.

The conciliator can only make suggestions to parties during the conciliation hearing and will not force them to resolve the dispute.

MAKING FINDINGS

The conciliator will not make any findings on the substantive or procedural merits of the case, but may make findings on factors such as the following -

- whether the dispute was referred late;
- whether the CCMA or bargaining council has jurisdiction;

- whether the dispute should have been referred for private dispute resolution;
- whether the dispute is one covered by labour legislation; and
- whether the referral was made in accordance with the rules for the conduct of Proceedings before the CCMA.

The CCMA must conciliate the dispute within 30 days of receipt of the referral. The parties may consent in writing to extend the 30-day period.

WHAT HAPPENS IF THE DISPUTE IS RESOLVED?

The conciliator will assist the parties to draw up a settlement agreement which is to be signed by both parties. Where the matter is heard tele-phonically or via an online platform, the parties may sign the agreement by means of an electronic signature or the conciliator may record the agreement and save a copy thereof for future use. A certificate of outcome will then be issued recording that the dispute is resolved.

A conciliation agreement is final and binding on both parties. If either party fails to adhere to the content of the agreement, the agreement can be made an arbitration award and thereafter certified giving it the same status or effect as an order of court. For an award sounding in money, the aggrieved party may then apply to have the award enforced. Where the award directs the employer to e.g. reinstate or re-employ the employee, the applicant may apply for contempt proceedings at the Labour Court.

WHAT HAPPENS IF THE DISPUTE IS NOT RESOLVED?

The conciliator must issue a certificate of outcome that shows that the dispute remains unresolved. The conciliator will advise the parties on the course of action that may be followed should the employee wish to continue with his or her dispute. This may include arbitration by the CCMA or a Bargaining Council, or in certain instances, it may include adjudication by the Labour Court. Some unresolved disputes may also lead to industrial action (strike or a lockout) for example, matters related to collective bargaining. The conciliating conciliator will advise both parties accordingly.

APPLYING FOR CONCILIATION

An employee may apply for conciliation using a LRA 7.11 referral form within –

- 30 days of the date of dismissal;
- 90 days of the date of an unfair labour practice;
- 6 months of the date of an act of unfair discrimination; or
- 6 months after the act or omission referred to in section 198D(1) of the LRA.

A late referral will require an application for condonation.

The referral for conciliation and the condonation application may be made using the CCMA's online application platform. <https://cmsonline.ccma.org.za>.

ADVANTAGES OF CONCILIATION

Conciliation is a free process that provides for the quick and fair resolution of disputes. It provides an opportunity for the parties to listen to one another and to attempt to agree on an outcome that will bring closure to the dispute. Furthermore, because it is a confidential process, parties may feel free to openly explore different ways to resolve their disputes before a skilled conciliator.

PRE-CONCILIATION

The Commission or a conciliator may contact parties by telephone or other means, prior to the commencement of the conciliation in order to seek ways to resolve the dispute. If the dispute is resolved, the outcome is also binding.

RELEVANT LEGISLATION

- Rules for the Conduct of Proceedings before the CCMA.
- Labour Relations Act 66 of 1995 as amended, section 135
- Employment Equity Act 55 of 1998 as amended, section 10.