

INQUIRY BY ARBITRATOR – SECTION 188A OF THE LRA

INTRODUCTION

The Labour Relations Act (LRA) provides that an employer (and an employee in circumstances discussed below) may request that the CCMA, or a Bargaining Council, or an Accredited Agency appoints an arbitrator to conduct an inquiry into allegations about the conduct or capacity of an employee. This is known as an Inquiry by Arbitrator.

This means that instead of the employer conducting the inquiry itself, the inquiry is conducted by a neutral third party arbitrator by way of an arbitration hearing. Although not a legal requirement, the Inquiry by Arbitrator process is usually requested in circumstances where the allegations about the conduct or capacity of the employee are more serious and could potentially result in dismissal.

If an employee alleges in good faith that the holding of a disciplinary or incapacity (e.g. for poor work performance or ill health) inquiry by the employer contravenes the Protected Disclosures Act (PDA), either that employee or the employer may request that an Inquiry by Arbitrator process be followed. The holding of an inquiry in terms of section 188A and the suspension of the employee on full pay pending the outcome does not constitute an “occupational detriment” in terms of the Protected Disclosures Act.

The Inquiry by Arbitrator naturally takes place before the employer has made a decision on the sanction. The arbitrator will decide on an appropriate sanction should the employee be found guilty of misconduct, based on the evidence presented at the Inquiry.

CONSENT

The employer is required to obtain the employee’s written consent for the Inquiry by Arbitrator, unless one of the following is in place:

- The Inquiry by Arbitrator process forms part of a collective agreement.
- The employee earns above the earnings threshold determined by the Minister of Employment and Labour in terms of section 6(3) of the Basic Conditions of Employment Act (BCEA) and the Inquiry by Arbitrator process forms part of the contract of employment.
- The employee requests the process on the basis that she or he believes that the allegations against him or her contravene the PDA.
- The employee may only consent to the Inquiry by Arbitrator once he or she has been advised of the allegations that the employer has made against him or her.

HOW TO LODGE A REQUEST FOR AN INQUIRY BY ARBITRATOR

The employer, or employee in the case of an employee claiming contravention of a protected disclosure, may submit the request using the LRA 7.19 referral form.

The CCMA, Bargaining Council or Accredited Agency may only appoint an arbitrator on receipt of-

- The LRA 7.19 referral form; and
- payment of the prescribed fee by the employer; and
- proof of written consent (or a copy of the employment contract or collective agreement where applicable).

REPRESENTATION

Representation at an Inquiry by Arbitrator is dealt with in terms of section 188A (5) of the LRA. An employee may be represented by a co-employee, a shop steward or an official or office bearer of that employee’s registered trade union. The employer may be represented by a director or employee, or an office bearer, official of that employer’s registered employers’ organisation.

Legal representation may be allowed by the arbitrator upon application by either party or if permitted by the arbitrator in accordance with the CCMA Rules.

GENERAL PROVISIONS

The powers of the arbitrator when attempting to resolve the matter are set out in section 138 and section 142(1)(a) to (e), (2) and (7) to (9) of the LRA. Key provisions include, but are not limited to the following:

- The arbitrator may conduct the hearing in a manner considered appropriate to determine the dispute fairly and quickly, taking into account that the substantial merits of the dispute must be dealt with the minimum of legal formalities.
- The arbitrator has the discretion to determine the appropriate form of the hearing.
- The arbitrator may issue subpoenas; may administer an oath or accept an affirmation from any person called to give evidence or be questioned; and may make a finding that a party is in contempt of the Commission for reasons set out in section 142(8) of the LRA.
- A party may give evidence, call witnesses, question witnesses of the other party and address concluding arguments to the arbitrator.

- If the parties agree, the arbitrator may suspend the Inquiry and try to resolve the dispute through conciliation.

RULING

The arbitrator must issue a ruling within 14 days after the hearing with brief reasons as to what action, if any, may be taken against the employee. The ruling has the same status as an arbitration award issued in terms of the LRA. The Director of the CCMA may extend the 14-day period on good cause shown.

The arbitrator may make an order for costs according to the requirements of law and fairness. (Refer to information sheet: Costs)

THE EFFECT OF THE RULING

The ruling is final and binding. An employee may not challenge the fairness of the finding through subsequent conciliation / arbitration at the CCMA or Council or Accredited Agency. Where grounds exist, a party may apply to the relevant statutory dispute resolution institution to have the ruling varied or rescinded. A party may also apply to the Labour Court to have the ruling reviewed in terms of section 145 of the LRA.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995
- Protected Disclosures Act 26 of 2000
- Basic Conditions of Employment Act 75 of 1997
- Rules for the Conduct of Proceedings before the CCMA (2023)