

# SECTION 73A OF THE BASIC CONDITIONS OF EMPLOYMENT (BCEA) ACT 75 of 1997 – CLAIMS FOR FAILURE TO PAY ANY AMOUNT OWING



## INTRODUCTION AND PURPOSE

All employees are entitled to be paid according to rights set out in a contract of employment or if there is no contract of employment or written particulars of employment, in terms of the requirements of the National Minimum Wage Act 9 of 2018, or a collective agreement, or a sectoral determination.

## EMPLOYER'S RESPONSIBILITY

Section 32 of the BCEA requires that

“(1) An employer must pay to an employee any remuneration that is paid in money— (a) in South African currency; (b) daily, weekly, fortnightly or monthly; and (c) in cash, by cheque or by direct deposit into an account designated by the employee.”

“(2) Any remuneration paid in cash or by cheque must be given to each employee— (a) at the workplace or at a place agreed to by the employee; (b) during the employee's working hours or within 15 minutes of the commencement or conclusion of those hours; and (c) in a sealed envelope which becomes the property of the employee.”

(3) An employer must pay remuneration not later than **seven days** after— (a) the completion of the period for which the remuneration is payable; or (b) the termination of the contract of employment.

(4) Subsection (3)(b) does not apply to any pension or provident fund payment to an employee that is made in terms of the rules of the fund”

When an employer does not have the funds to pay an amount due to an employee/worker at the time it is due, the employer's situation should be properly communicated to the employee/worker and supported by a formal letter.

While this does not absolve the employer from paying the employee/worker, the employer should commit to making payment on a particular date in line with the requirements of the BCEA.

Timeous communication may help to avoid unnecessary referrals of disputes to the CCMA, which cost both parties time and money.

The law provides protection where an employer owes an employee or worker money arising out of the employment relationship.

## LEGAL PROTECTION

In terms of Section 73A of the BCEA

“(1) ... any employee or worker, as defined in Section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination, or a collective agreement.

(2) Subsection (1) does not apply to employees or workers earning in excess of the threshold prescribed by the Minister in terms of Section 6(3).

(3) An employee or worker, other than the employee or worker referred to in subsection (1), may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either the Labour Court, the High Court, or subject to their jurisdiction, the Magistrates' Court, or the small claims court.”

A “worker” is defined in the National Minimum Wage as “any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind”.

## WHO QUALIFIES TO CLAIM UNDER SECTION 73A OF THE BCEA?

If the employee/worker is earning equal to or less than R261 748.45 per annum or R21 812.37 per month, s/he can lodge a claim at the CCMA for money owing. This threshold is set by regulation in terms of Section 6(3) of the BCEA and is amended from time to time. The current threshold is effective from 1 April 2025.

Applicants need to provide a copy of their latest payslip, written particulars of employment or contract of employment to prove that they earn either the same as or below the BCEA earnings threshold. In cases of money being due in terms of an employment contract, where an applicant does not receive a payslip and does not have either a contract of employment or written particulars of employment, the commissioner will provide guidance on how to proceed with the matter.

If employees/workers are paid weekly, the gross weekly amount (i.e., before any deductions) is multiplied by 4.33 to calculate the monthly salary.

# SECTION 73A OF THE BASIC CONDITIONS OF EMPLOYMENT (BCEA) ACT 75 of 1997 – CLAIMS FOR FAILURE TO PAY ANY AMOUNT OWING



For example, if the applicant earns R3 500 (before deductions) per week the calculation would be  $R3\ 500 \times 4.33 = R15\ 155$  which is below the threshold of R21 812.37 and therefore the applicant qualifies to lodge a claim at the CCMA. If an applicant earns above the threshold, that applicant may apply to the Labour Court, the High Court, the Magistrates Court or, depending on the amount, the Small Claims Court.

## TIME FRAME & PROCEDURE TO REFER THE MATTER TO THE CCMA

An employee or a worker can lodge a claim against their employer whilst they are still employed, or after termination of employment, but the claim must not have prescribed.

Claims for monies owing prescribe (become unenforceable) three years (36 months) after the amount was due for payment. Prescription will be interrupted by attempts made by the applicant to try to recover the money after it became due, but before the end of the 36-month period.

Applicants can open a separate case for this type of dispute, or the claim can be included in an unfair dismissal dispute, or a severance pay dispute by including this in the LRA 7.11 form.

The applicant may refer the matter by using the online LRA 7.11 form at <https://cmsonline.ccma.org.za>. Select S73A BCEA as the type of dispute and include the exact amount of what is owing and how it was calculated (see previous explanation).

With the online referral, a copy thereof will automatically be served on the employer provided that a correct e-mail address has been provided. The LRA 7.11 form can also

be downloaded from the CCMA Website (<https://www.ccma.org.za/advicecategories/ccma-referral-forms/>).

Where an applicant makes use of one of the other means of referral – e.g., e-mail or hand delivery – the referral form must be served on the employer before it will be processed by the CCMA (provide proof of service).

When referring a dispute, an applicant is required to set out clearly what money is outstanding.

- Period claimed for?
- Monthly / weekly / daily rate?
- If the claim is for outstanding leave – when last did the applicant take leave and which leave period is claimed for? What is the total number of days claimed?
- If the dispute concerns payment for public holidays / Sunday work – stipulate the days and/or hours the applicant has worked.
- If the dispute concerns payment for overtime worked - stipulate the days / hours of overtime worked.
- The applicant should also provide a summary of what s/he did to try to sort the matter out with the employer.

## THE DISPUTE RESOLUTION PROCESS

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION

Once the referral form has been accepted by the CCMA, the matter may be set down for a con-arb (conciliation followed by arbitration) hearing. In some instances, the CCMA may phone both parties to try to resolve the matter before it is scheduled for a hearing.

The CCMA Rules state that for matters of this nature, a party may not object to the con-arb hearing. This means that as a rule, the matter may be finalised on one day, either by

settlement between the parties, or by arbitration if the parties are unable to reach agreement. It is therefore most important that both parties should be prepared for arbitration, if it becomes necessary, by having all relevant evidence on hand to prove or disprove the claim.

## EXAMPLES OF EVIDENCE THAT MAY BE REQUIRED IN S73A CASES

It is important for applicants to provide documents on the day of the hearing at the CCMA to verify the amounts claimed. Examples, where applicable, include: the contract of employment, latest payslips (at least 3), bank statements, time sheets or attendance registers, collective agreement, letter from the employer, or information concerning the applicable sectoral agreement, etc.

Employers may wish to defend the claim by providing proof of payment, or other documentary proof showing that the amount claimed is not owing or was paid to the applicant. In the absence of (or in addition to) documentary proof, both parties can testify under oath and call witnesses to verify their respective claims.

## RELEVANT LEGISLATION

- Basic Conditions of Employment Act 75 of 1997, as amended.
- National Minimum Wage Act 9 of 2018, as amended.
- Labour Relations Act 66 of 1995, as amended.