

# THE CON-ARB PROCESS (CONCILIATION FOLLOWED BY ARBITRATION)

## WHAT IS A CON-ARB?

The con-arb process allows an arbitration hearing to follow directly after a conciliation hearing on the same day. It thus provides the parties with an opportunity to try to resolve the dispute during the conciliation hearing, failing which an arbitrator can immediately thereafter decide the merits of the dispute during the arbitration hearing. This allows for matters to be heard and determined in a speedy and cost-effective manner.

All the provisions of the Labour Relations Act 66 of 1995 (LRA) and Rules for the Conduct of Proceedings before the CCMA that apply to conciliation and to arbitration proceedings, apply to the conciliation and arbitration parts of the con-arb process.

The conciliation part of the hearing remains confidential and will not be recorded by the Commissioner. The arbitration part will be recorded, and as with other arbitration hearings, the rules and statutory provisions pertaining to the arbitration process will apply. This includes that the Commissioner will have the power to make a finding in the form of an arbitration award after hearing evidence and argument as presented by the parties to the dispute.

Thus, parties should ensure that any witnesses or other evidence they will be relying upon in support of their case are available for the con-arb hearing.

In a con-arb process, it is not necessary for the same Commissioner who conciliated the dispute to arbitrate it. If the dispute is unresolved at the conciliation process, the Commission may thus provide that the arbitration be heard by either the same or a different Commissioner.

## APPLICATION OF SECTION 191(5)(A)

### What disputes can be determined by the con-arb process?

In terms of the LRA, there are disputes that *must* be resolved through con-arb, disputes that may be resolved through con-arb, and disputes that may not be resolved through con-arb.

The con-arb process **must** be followed if the dispute concerns –

- dismissal for any reason relating to probation;
- any unfair labour practice relating to probation;
- any other dispute covered by section 191(5) (a) where there is no objection to con-arb by either party;
- a dispute relating to a compliance order referred in terms of section 69(5) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), where an employer wishes to dispute a compliance order issued against that employer by the Department of Employment and Labour related to alleged non-compliance with aspects relating to the BCEA; the National Minimum Wage Act 9 of 2018 (NMWA); the Unemployment Insurance Act 63 of 2001 (UIA);

or the Unemployment Insurance Contributions Act 4 of 2002 (UICA); and

- claims for failure by an employer to pay any amount owing referred to in terms of section 73A of the BCEA (amount owing in terms of the NMWA, the BCEA, a contract of employment, a collective agreement, or a sectoral determination).

Disputes included in section 191(5)(a) are (the 'may' group) –

- dismissals relating to the employee's conduct or capacity;
- dismissals where the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A [except automatically unfair dismissals];
- dismissals where the reason for dismissal is unknown; and
- unfair labour practice disputes.

Although not specifically listed in section 191(5)(a), a dismissal in terms of section 198A (4) (a dismissal to avoid the employee being deemed to be the employee of the client of a temporary service provider and to be employed on an indefinite basis by the client) may be referred for a con-arb to the CCMA or a Bargaining Council.

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## The con-arb process may not be followed in disputes relating to –

- organisational rights;
- interpretation or application of collective agreements;
- workplace forums;
- non-renewal of fixed-term contracts or renewal on less favourable terms;
- automatically unfair dismissals;
- dismissals based on operational requirements;
- participation in an unprotected strike;
- reasons where the employee refused to join, was refused membership of, or was expelled from a trade union party to a closed shop agreement;
- entitlement to severance pay; and
- discrimination matters in terms of the Employment Equity Act.

## OBJECTION TO CON ARB

Parties have the right to object to the con-arb process unless the dispute falls within the category of disputes that *must* be scheduled for a con-arb process.

A party that objects to con-arb may do so by delivering a written notice of objection to the CCMA and the other party at least 7 days before the date of the hearing, failing which, the application must include an application for condonation (CCMA Rule 17 read with Rules 9, 31, and 35). In such circumstances, only the conciliation is conducted.

If unresolved, and it is a matter that the CCMA can arbitrate, the party must file a request for arbitration by delivering to the CCMA and the other party a request for arbitration using LRA form 7.13 (the form can be downloaded from the CCMA Website (<https://www.ccma.org.za/advicecategories/ccma-referral-forms/>)).

Where there is no objection and the matter is not resolved at conciliation, it must proceed to arbitration immediately thereafter. If there is insufficient time to arbitrate, then the arbitrator may commence the arbitration and then adjourn the matter to another date.

A Commissioner does not have the power to overturn a party's valid objection to con-arb, unless section 191(5A) of the LRA read with CCMA Rule 17(3) applies.

## RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995, as amended.
- Basic Conditions of Employment Act 75 of 1997, as amended.
- Rules for the Conduct of Proceedings before the CCMA, as amended.
- Employment Equity Act 55 of 1998, as amended.