

# CON ARB



## THE CON – ARB PROCESS AND WHEN IT MAY BE USED

Section 191 now makes provision for the con-arb process, which is a speedier one-stop process of conciliation and arbitration for individual unfair labour practices and unfair dismissals. In effect, this process will allow for conciliation and arbitration to take place as a continuous process on the same day, if required.

The CCMA has in the past been flooded with unfair dismissal disputes and in many cases the parties failed to attend conciliations, which led to the settlement of the dispute being delayed and only dealt with at arbitration.

## APPLICATION OF THE SECTION

This section applies to cases where the dispute relates to the fairness of a dismissal or a dispute about an unfair labour practice. This encompasses cases of alleged misconduct, incapacity, constructive dismissal, retrenchment of a single employee and to dismissals where the reason is unknown.

Unfair dismissals: the dismissed employee must refer the matter to the CCMA or council within 30 days of the date of the dismissal. If the employer makes a final decision to dismiss, say for example, the outcome of an appeal hearing, the matter must be referred within 30 days of that final decision to dismiss.

Unfair labour practices: the employee must refer the matter to the CCMA or council within 90 days of the date of the act or omission, which allegedly constitutes an unfair labour practice. If an employee only became aware of the occurrence at a later date, the matter must be referred within 90 days of the employee becoming aware of such occurrence.

An employee whose contract of employment has been terminated by notice, may refer the matter to the CCMA or council upon receipt of that notice.

## CONCILIATION

The CCMA or the council must attempt to resolve the dispute through conciliation. If the dispute concerns one of the following:

- dismissal relating to the employee's conduct or capacity;
- the employee alleges constructive dismissal in that the continued employment relationship was made intolerable by the employer;
- the employee was offered substantially less favourable terms at work after a transfer of employment in terms of section 197 or 197A (which excludes automatically unfair dismissals);
- dismissal for an unknown reason;
- an unfair labour practice dispute;

The dispute **must** be arbitrated if the employee so requests.

If the reason for the dismissal concerns one of the following:

- it is automatically unfair;
- it is based on operational requirements;
- the employee's participation in an unprotected strike;
- the refusal of the employee to join, or was refused membership or was expelled from a trade union party to a closed shop agreement;

Then the employee may refer the matter directly to the Labour Court for adjudication.

## WHEN THE CON ARB PROCESS MAY BE USED

In certain instances, the commissioner or council **must** arbitrate the dispute at the request of the employee immediately, if unresolved. The types of disputes where this can occur are:

- when the dismissal of the employee is for any reason relating to probation;
- where it relates to any unfair labour practice relating to probation;
- when relating to any other dispute (conduct, capacity, continued employment intolerable, less favourable terms after a s197 or s197A transfer, reason for dismissal unknown, or an unfair labour practice) where neither party objects to the matter being proceeded with, on a con-arb basis.

This procedure will allow a commissioner or a council to revert back to conciliation during arbitration proceedings if it is foreseen that the dispute may be capable of settlement using conciliation. Also, it will be possible to immediately arbitrate the dispute if conciliation fails to resolve the dispute. This can take place on the same day.

## ISSUES TO BE CONSIDERED BY THE APPLICANT BEFORE REFERRING A DISPUTE TO THE CCMA

- **Condonation**  
If the employee fails to refer the matter within the prescribed time period, an application for condonation may be made. There must be a good reason as to why the referral was late before the Commissioner will grant the application for condonation.
- **Service**  
The employee must ensure that the referral is served on the employer.

## RELEVANT LEGISLATION

The Labour Relations Act, section 191.