What happens when an employee refers a dispute to the CCMA or a bargaining council?

How does an employee refer an unfair dismissal dispute to the CCMA or bargaining council?

The employee must fill in a **LRA 7.11** referral form and ensure that:

- the referral form is completed and signed;
- the referral form is served on the employer;
- the referral form is delivered to the CCMA with proof of service on the employer; and
- if the employee does not refer the matter within thirty (30) days of the date of dismissal, s/he must complete and attach an application for condonation form for late referral (see discussion below).

See LRA Form 7.11

What does it mean to serve a form on the employer?

The employee must provide a copy of the completed referral form (and condonation application form, where applicable), to the employer, either by hand delivery, e-mail, or registered post and be able to provide proof that this was done.

It is recommended that the employer should advise the CCMA or bargaining council of any changes to its contact details as provided in the referral form as this will assist in ensuring that the correct person at the employer will receive all future communication from the CCMA or bargaining council. It will also prevent the matter being heard in the absence of the employer. It is always useful to provide a cell phone contact number to the CCMA as they often provide details of scheduled cases by 'sms'.

What are the time frames for referring an unfair dismissal dispute?

An employee has thirty (30) days from dismissal to refer an unfair dismissal to the CCMA or bargaining council. The thirty (30) days run from the date of dismissal or the employer's final decision to dismiss or uphold the dismissal. All days must be counted including Saturdays, Sundays and public holidays and only if the last day falls on a Sunday or public holiday is it excluded. For example, employee X is dismissed on Friday, 1 September 2017. The 30-day referral period starts on Saturday, 2 September 2017 as you exclude the first day. As the 30th day falls on Sunday, 01 October 2017, that day is excluded because it is a Sunday and the 30th day will then fall on Monday, 02 October 2017.

See CCMA Information Sheet: CCMA Rules

What is the date of dismissal?

- **Dismissal without notice:** the date of dismissal is the earlier of the date on which the contract of employment terminated or the date on which the employee left the services of the employer.

- **Dismissal with notice:** If the employee was required to work out his/her notice, the date of dismissal would be the earlier of the date on which the notice period expired or the date on which the employee is paid all outstanding salary.

- **Fixed-term contracts**: the date of dismissal is the date on which the employer has offered to renew the contact on less favourable terms, or where the contract is not renewed – the date on which the employer notified the employee that the contract will not be renewed.

- **Failure or refusal to reinstate or re-employ**: the date of dismissal is the date on which the employer first refused to reinstate or re-employ the employee.

- **Failure to allow an employee to resume work:** the date of dismissal is the date on which the employer first refused to allow the employee to resume work.

What happens if the employee refers the dispute late?

When the employee has not managed to refer the dispute to the CCMA or bargaining council within thirty (30) days, the employee must apply for *condonation* for the late referral, in other words, to excuse or condone the late referral.

A condonation application must be completed by the employee, or his/her representative and a copy thereof must be served on the employer and returned to the CCMA or bargaining council with proof of service on the employer attached to the referral form. The employer has the right to respond to the condonation application by affidavit or written statement within five days of receiving it.

The condonation application should deal with the points listed below, with the employer being entitled to respond accordingly:

- degree of lateness;
- reason why the referral is late;
- prospects of success (the employer may explain why it is likely to succeed in defending the claim against it);
- prejudice the employer will suffer if the matter would proceed (for example, the employer would be prejudiced by a long delay if witnesses are no longer available);
- any other relevant factors.

The employee may then reply within three days to the response received from the employer.

The CCMA or bargaining council may decide whether or not to decide on the condonation application based on the written submissions only or may decide to rather invite both parties to a hearing where they may make verbal submissions on these factors. The commissioner will then issue a condonation ruling.

See CCMA Information Sheet: Late Referrals - Condonation Applications

When is the matter set down for conciliation or con-arb hearing and how is the employer notified?

The CCMA must notify the parties of the hearing fourteen (14) days before the scheduled date unless the parties agree to an earlier date. Notification may be made in various ways, including by e-mail and registered

mail. Where cell phone numbers are provided, it is common practice for a sms to be sent to the parties to notify them of the hearing.

See Information Sheet: What is Conciliation & Arbitration

What happens if the employer receives a notice that the matter is set down for con-arb hearing?

Con-arb is a process where if the matter remains unresolved after conciliation, the arbitration hearing will start immediately, usually by the same commissioner and as part of the same process. Note that the employer or employee may object to con-arb seven (7) days before the scheduled date so that the conciliation hearing will take place, and if unresolved, the matter will be separately set down for arbitration. This does not apply to unfair dismissals related to probation.

If the matter is scheduled for a con-arb hearing, the parties should make sure to have all documents and evidence on hand and ensure that witnesses are on stand-by, and in reasonably close proximity to the CCMA or bargaining council in the event that the matter proceeds straight into arbitration.

What type of disputes are set down for a con-arb hearing?

Unfair dismissal and unfair labour practice disputes may be set down for con-arb. If the dispute concerns probation, con-arb is compulsory and no objection is permitted.

What happens if the employee fails to attend the con-arb?

The commissioner may proceed with the matter and issue a certificate of non-resolution. However, if the employer has not objected to con-arb, the commissioner may proceed to the arbitration stage of the process and dismiss the matter.

What happens if the employer fails to attend the con-arb or an arbitration hearing?

A conciliation hearing cannot be postponed and if the employer cannot attend, it should object to con-arb. If the employer fails to attend the con-arb, and has not submitted an objection to the process, the commissioner will proceed with the conciliation and issue a certificate. The commissioner will then immediately start the arbitration proceedings and make a final and binding decision by way of a default arbitration award. This exposes the employer to considerable risk as the finding will be made on the version of the employee only.

If the employer discovers that a default arbitration award has been issued and can show that it was not aware of the scheduled date of the hearing either because the notice of the hearing was not served on the employer or for some other reason, the employer may, within fourteen (14) days of becoming aware of the award, apply to have the award rescinded.

An employee who fails to attend the con-arb hearing may find him/herself in a similar situation as the commissioner may dismiss the matter on the basis of non-attendance at the arbitration hearing. S/he may also apply to have the dismissal ruling rescinded within fourteen (14) days of becoming award of the ruling.

See CCMA Information Sheet: Rescission and Variation Applications

Who can represent the employer at the proceedings?

At conciliation the employer may be represented by a director or an employee. If the employer belongs to an employers' organisation it may be represented by any office bearer of the organisation. Legal representatives and labour consultants are not allowed in conciliation. A legal representative may, however, represent an employer or employee during condonation proceedings.

At arbitration, legal representation (including a candidate attorney) is allowed except in dismissal matters relating to misconduct or incapacity. In such cases, a party may apply for legal representation on the basis that the case -

- is legally or factually complicated;
- is in the public interest; and/or
- if the comparative ability of the parties to deal with the arbitration is skewed.

The parties and the commissioner may also consent to legal representation at arbitration.

What happens if the matter is resolved at conciliation?

In the event that the parties reach an agreement to settle the dispute at conciliation – or during arbitration proceedings – the terms of the settlement will be included in a signed settlement agreement.

That signals the end of the dispute that has been referred to the CCMA or bargaining council.

Should the employer fail to honour the agreement, the employee may apply to the CCMA to have the settlement agreement made into an arbitration award.

In the event that the settlement agreement states that the employer will pay the employee compensation, such agreement (now an arbitration award) may be enforced through the office of Sheriff of the Court. If it was agreed that the employee would be reinstated or re-employed, enforcement of the agreement (award) takes place through the Labour Court by way of contempt of court proceedings.

What happens if the matter is unresolved at conciliation and then is referred to arbitration?

The commissioner who conciliates the dispute will issue a certificate indicating that the dispute remains unresolved. Where the employee had not applied for a con-arb process, the employee must request arbitration within ninety (90) days of the certificate being issued, stating that the dispute remains unresolved after conciliation. This is done by filling out a form **LRA 7.13.** The form must be served on the employer and delivered to the CCMA with proof of service.

Arbitration is a process where a commissioner hears evidence and argument from both parties and makes a final and binding decision. The parties may bring relevant forms of evidence and witnesses to testify. Each party may cross-examine the other party's witnesses.

See LRA Form 7.13

See Information Sheet: What is Conciliation & Arbitration

When will the parties be notified of an arbitration hearing?

The CCMA must notify the parties of the date of the arbitration hearing at least twenty-one (21) days before the hearing.

May the parties request for a postponement of an arbitration hearing?

The employer and employee may agree in writing to postpone arbitration and submit such an agreement to the CCMA or bargaining council not less than seven (7) days before the hearing.
If there is no agreement either party may apply on affidavit for postponement, but a mere application does not guarantee that postponement will be granted.

What remedies can the CCMA or bargaining council award in an unfair dismissal dispute?

Remember that in an arbitration, the test is whether the employer has been able to prove on a balance of probabilities, that the dismissal was procedurally and substantively fair. The criminal proceedings test of 'beyond a reasonable doubt' does not apply to CCMA and bargaining proceedings.

If the employer fails to prove that the dismissal was procedurally (a fair procedure was followed) and substantively fair (for a fair reason), the commissioner may order:

- **Reinstatement**, which means that the employee will go back to work on the same terms and conditions that applied prior to dismissal. The reinstatement may be retrospective from the date of the dismissal or from a later date. Back-pay may be awarded from the date of reinstatement until the date that the employee is to return to work.
- **Re-employment**, which means that the employee will be employed on new terms and conditions.
- **Compensation**, meaning the employee must be paid an amount which is just and equitable to compensate him/her for the unfairness.

If the dismissal is found to be only procedurally unfair, the commissioner may decide whether or not to order compensation. An order of reinstatement or re-employment only applies to a dismissal that is substantively unfair.

When will the parties receive a decision from the CCMA or bargaining council?

The parties will receive a decision within fourteen (14) days of the hearing unless this period is extended by agreement of the CCMA Director.