What is a con-arb process?

The con-arb process is governed by the provisions of section 191(5A) of the Labour Relations Act 66 of 1995 (LRA). Con-arb simply means that the arbitration hearing is scheduled to take place straight after the conciliation hearing, on the same day, in the event that the parties are not able to settle the conciliation hearing.

The purpose of the process is to save time and costs for the parties and to reduce the demands on the limited and over-stretched resources of the CCMA or a bargaining council. It also assists parties to avoid problems associated with the fading memories of witnesses, losing contact with witnesses or other interested parties and/or documentary evidence going missing.

The nature and procedural steps of conciliation and arbitration are the same as those used in a con-arb hearing. Therefore, parties must come to con-arb hearing ready and prepared for arbitration in the event that they do not manage to resolve their dispute at conciliation. This includes ensuring that witnesses, relevant documents, and any other required evidence that they may want to present to an arbitrator should be available for the arbitration hearing.

When is con-arb process used?

The con-arb process is only aimed at unfair dismissal and unfair labour practice (ULP) disputes. However, not all dismissal and ULP disputes are necessarily subject to con-arb.

When is con-arb process compulsory?

The con-arb process is only compulsory for the following disputes:

- Dismissal related to probation.
- An unfair labour practice related to probation.

When is a con-arb process not permitted?

The con-arb process is excluded in dismissal and ULP disputes which are subject to Labour Court adjudication rather than arbitration. Disputes where con-arb is not applicable are:

- Dismissal in breach of freedom of association principles.
- All automatically unfair dismissals, i.e., where the reason for dismissal falls within one of the seven reasons stated in section 187 of the LRA.
- Dismissals based on the operational requirements of the employer (retrenchment), where the employees do not have the option of referring the dispute for arbitration.
- An unfair labour practice where the unfair labour practice resulted from an employee having made a protected disclosure as set out in the Protected Disclosures Act 26 of 2000.

See Information Sheet: What is an automatically unfair dismissal

See How to Guide: How to end employment fairly by retrenchment

When is a con-arb process optional?

In all other dismissal and unfair labour practices disputes mentioned in section 191(5) (a), the parties have a choice either to have the dispute resolved by con-arb or by conciliation and arbitration as two distinct processes. If either party objects to con-arb, the processes will be separated.

These disputes include:

- Dismissal related to the employee's conduct or capacity.
- Constructive dismissal.
- Operational requirements (retrenchment) of only one employee (or more than one if the employer employs less than 10 people).
- Where the employee does not know the reason for dismissal.
- An unfair labour practice as described in section 186(2) (a) to (c) of the LRA.

The LRA form 7.11 refers a dispute to conciliation and, if necessary, to arbitration at the same time. If an employee wants to avoid the con-arb, the employee must indicate clearly on the referral form that s/he does not want the dispute to be processed as a con-arb. This will mean that the dispute will be conciliated on the date scheduled, but if unresolved, the employee will have ninety (90) days in which to complete and submit an LRA form 7.13 referral of the dispute to arbitration.

See LRA form 7.11

See LRA form 7.13

The employer also has a choice to use con-arb or not (except in disputes related to probation disputes related to s69(5) and s73A of the Basic Condition of Employment Act). Once the 7.11 form has been served on the employer party to the dispute, the employer may object to con-arb as the dispute resolution process. This must be done at least seven (7) days before the scheduled date of the hearing. If the employer objects to con-arb in disputes other than those where objection is not an option, the CCMA / bargaining council will schedule a conciliation hearing only.

Objecting to con-arb

Con-arb has significant time and cost-saving advantages for the employer, the employee, and the CCMA or bargaining council. More importantly, it brings finality and legal certainty to the dispute much more quickly than two separated processes. This is an important consideration.

It is advisable that an employer should not object to con-arb if it is fully aware of the facts of the matter and the employee’s allegations and is able to prepare in advance and bring witnesses and evidence to the con-arb.

It may be appropriate to object to con-arb if the employer is uncertain what allegations the employee will raise, and is therefore not able to prepare fully for arbitration or where the cost of bringing witnesses is very high and the possibility for settlement is good. In these circumstances it would be better for the employer to attend the conciliation in order to attempt to reach a settlement, and if not, to determine what issues are being raised by the employee, and (if the dispute is not settled) to prepare for arbitration accordingly.

Objection to con-arb must take place at least seven (7) days before the scheduled con-arb hearing, and must be served on the other party. Proof of service of the objection must be filed with the CCMA or bargaining council. If a party does not object within the required timeframe, an application for condonation must be submitted as well.