

# PRE-DISMISSAL ARBITRATIONS (DISCIPLINARY ENQUIRIES)

It often happens that an employee (more often a senior employee) and employer consent to a disciplinary enquiry relating to conduct or capacity being chaired by a neutral outside party. Whatever the outcome, the decision is deemed to be that of the employer. The CCMA, accredited agency or a council may act as such third person in terms of section 188A. Both the employer and the employee must agree to this process.

This is an arbitration done at a stage where there is not yet a dismissal. This is unlike a normal arbitration at the CCMA or council where a dismissal has already taken place. This process is intended to take the place of a disciplinary enquiry and the subsequent arbitration, which is heard at the CCMA or council.

## REQUIREMENTS

The employer and the employee must consent to the enquiry, in writing in the prescribed form.

The employer must pay the prescribed fee.

The employee may only consent to such pre-dismissal arbitration once he/she has been advised of the allegations relating to that specific arbitration.

**NOTE:** - an employee who earns above a specific amount as set out in the Basic Conditions of Employment Act – section 6(3), may consent to the holding of a pre-dismissal arbitration in his/her contract of employment. This means that a clause to this effect may be contained in the employment contract at the outset when the employee is employed. The effect of this is that it is not required to first obtain the written consent of such an employee prior to applying for such arbitration as he / she has already agreed to this procedure when he / she was first employed.

Once the above has been complied with, the CCMA, accredited agency or the council must appoint an arbitrator to hear the matter.

## REPRESENTATION

The employee may appear in person. He / she may only be represented by the following persons:

- A co-employee
- A director or employee – if the party is a juristic person
- Any member, office bearer or official of that party's registered trade union or registered employers' organisation
- A legal practitioner – only by agreement between the parties

## GENERAL PROVISIONS OF PRE-DISMISSAL ARBITRATIONS

The same provisions, which apply to arbitrations apply to pre-dismissal arbitrations. These are set out in section 138 of the LRA. Briefly, they are the following:

- The arbitrator may conduct the hearing in a manner considered appropriate to determine the dispute fairly and quickly, taking into account the substantial merits of the dispute must be dealt with the minimum of legal formalities.
- The arbitrator has the discretion to determine the appropriate form of the hearing.
- A party may give evidence, call witnesses, question witnesses of the other party and address concluding arguments to the arbitrator.
- If the parties agree, the arbitrator may suspend the pre-arbitration hearing and try to resolve the dispute through conciliation.
- If the referring party fails to appear, the matter may be dismissed
- If the non-referring party fails to attend, the arbitrator may proceed with the pre-dismissal arbitration in his / her absence or may adjourn the proceedings
- Any codes of good practice of NEDLAC or published CCMA guidelines must be taken into account if relevant to the dispute.
- The arbitrator must furnish a pre-arbitration award within 14 days after the hearing that contains reasons for the decision. A copy must be served on each party and the original award must be filed with the registrar of the Labour Court.
- The director of the CCMA may extend the 14 day period on good cause shown.

## PRE-DISMISSAL ARBITRATION AWARD

The arbitrator may make an appropriate award in terms of the LRA, which may include giving effect to any collective agreement, the provisions or primary objects of the LRA and / or a declaratory order. The arbitrator must in light of the evidence and reference to the criteria of fairness in the LRA direct what action should be taken against the employee.

## COSTS

The arbitrator may include an order for costs if a party acted in a frivolous or vexatious manner in the hearing or by proceeding with or defending the hearing. (Refer to information sheet: Costs) for further information.

## POWERS OF ARBITRATOR AND EFFECT OF THE AWARD

The arbitrator has all the powers conferred on commissioners in terms of the LRA . The provisions in the LRA dealing with the effect of the award, variation and rescission and review apply to pre-dismissal arbitration awards.

## RELEVANT LEGISLATION

Labour Relations Act, sections 188A, 138,142(1)(a) – (e), (2), (7) – (9), 143, 144, 145 and 146.