

(1 April 2015 – to date)

## **LABOUR RELATIONS ACT 66 OF 1995**

*(Gazette No. 16861, Notice No. 1877, dated 13 December 1995 – Commencement date: 11 November 1996  
– unless otherwise indicated)*

### **GUIDELINES ON MISCONDUCT ARBITRATION**

*Government Notice R224 in Government Gazette 38573 dated 17 March 2015. Commencement date:  
1 April 2015.*

The Governing Body of the Commission for Conciliation, Mediation and Arbitration hereby repeal the Guidelines on Misconduct Arbitration published in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), as amended under the Government Notice No. R. 34573 of 2<sup>nd</sup> September 2011.

### **GUIDELINES ON MISCONDUCT ARBITRATION**

Under section 115(2)(G) [*sic*] of the Labour Relations Act 1995 (Act No. 66 of 1995), as amended the Commission for Conciliation, Mediation and Arbitration hereby publishes the Guidelines on Misconduct Arbitration as amended, effective from the 1<sup>st</sup> of April 2015.

### **GUIDELINES ON MISCONDUCT ARBITRATIONS**

**PUBLISHED BY THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION IN TERMS  
OF SECTION 115(2)(G) [*sic*] OF THE LABOUR RELATIONS ACT, 1995 (ACT NO. 66 OF 1995)**

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**A: PURPOSE AND NATURE OF GUIDELINES**

**Purpose**

- 1 These guidelines are issued by the CCMA in terms of section 115(2)(g) of the Labour Relations Act, 66 of 1995 ('the LRA'). In terms of section 138(6), a Commissioner conducting an arbitration must take

into account any code of good practice that has been issued by NEDLAC<sup>1</sup> and any guidelines published by the CCMA that are relevant to the matter being considered in the arbitration proceedings.

- 2 These guidelines deal with how an arbitrator should-
  - 2.1 conduct arbitration proceedings;
  - 2.2 evaluate evidence for the purpose of making an award.
  - 2.3 assess the procedural fairness of a dismissal;
  - 2.4 assess the substantive fairness of a dismissal;
  - 2.5 determine the remedy for an unfair dismissal.
- 3 The CCMA has issued these guidelines to promote consistent decision-making in arbitrations dealing with dismissals for misconduct. It is envisaged that the CCMA will issue additional supplementary guidelines dealing with issues that frequently arise in arbitrations.

#### **Interpretation of the law**

- 4 To the extent that these guidelines advance an interpretation of the law, that interpretation is the policy of the CCMA and should be applied unless the arbitrator has good reason for favouring a different interpretation.
- 5 An arbitrator who adopts a different approach must set out the reasons for doing so in the relevant award.
- 6 The CCMA and all its Commissioners are obliged to interpret and apply the Labour Relations Act and other legislation in accordance with judicial decisions of courts that are binding on it. These include the decisions of the Constitutional Court, the Supreme Court of Appeal, Labour Appeal Court, High Court and Labour Court.
- 7 Commissioners must follow the interpretation placed upon a provision by the most recent binding decision of the highest court dealing with that provision. If there are inconsistent decisions by the Labour Court interpreting a provision, and there is no relevant decision by a higher court, an arbitrator should consider the inconsistent decisions, decide which decision to follow, and give reasons for doing so.

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<sup>1</sup> In *Independent Municipal and Allied Trade Union obo Strydom v Witzenberg Municipality & Others (LAC)*, the Labour Appeal Court (at para 6) articulated the principle stated by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* that the Code of Good Practice: Dismissal is binding on all commissioners in deciding on the fairness of a dismissal.

- 8 Commissioners should be cautious when considering the decisions of the Industrial Court, the Labour Appeal Court and other courts interpreting the 1956 Labour Relations Act (Act 28 of 1956). When doing this, commissioners should compare the approaches of the current LRA and the 1956 Act on the topic under consideration and should consider whether the pre-1995 jurisprudence is consistent with the principles of interpretation set out in section 3 of the current LRA.
- 9 The CCMA has developed these guidelines in accordance with judgments that are binding on it. If any interpretation is reversed by a binding decision of a court, commissioners must apply that interpretation of the law.
- 10 These guidelines are by their nature general in their application and cannot cover the full range of issues that may confront arbitrators in dismissal arbitrations. An arbitrator must make decisions that are fair and reasonable in the light of the specific circumstances of the case. Section 33(1) of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Every decision by an arbitrator must comply with these three elements.

## **B: HOW TO CONDUCT ARBITRATION PROCEEDINGS**

### **Deciding on the manner of conducting an arbitration**

- 11 Arbitrators have a discretion to determine the form in which an arbitration is conducted; the LRA does not require arbitrators to act in the same manner as a court.<sup>2</sup> An arbitrator should ensure that the parties are aware of the arbitrator's powers and the procedure to be followed. This is particularly important if the parties or their representatives have little or no experience of CCMA proceedings.
- 12 In terms of section 138(1) of the LRA, an arbitrator must conduct an arbitration in a manner that the arbitrator considers appropriate to-

12.1 determine the dispute fairly and quickly; and

12.2 deal with the substantial merits of the dispute with the minimum of legal formalities. In order to deal with "the substantial merits" of a dispute an arbitrator should not allow technicalities to prevent the full picture of relevant events being placed before the arbitrator.<sup>3</sup>

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<sup>2</sup> *Naraindath v CCMA & Others (LC)* at paras 26-27.

<sup>3</sup> For example, in *Le Monde Luggage t/a Pakwells Petje v Dunn NO & other (LAC)*, the Labour Appeal Court (at paras 17 to 19) held that an arbitrator may ascertain any relevant fact in any manner that it deems fit provided that it is fair to the parties. In this judgment the arbitrator approved the approach articulated by the Labour Court in *Naraindath v CCMA & Others (LC)* at para 32 that arbitrators should adopt the same approach to evidence as that applied by the Small Claims Court. In *Naraindath* the Labour Court held that an arbitrator could admit hearsay evidence if satisfied on proper grounds that the evidence was reliable. When presented with hearsay evidence, including evidence on affidavit of a witness who is not present, the arbitrator must evaluate whether or not to admit the evidence in accordance with the requirements of section 3 of the Law of Evidence Amendment Act 45 of 1988 (see *Matsekoleng v Shoprite Checkers (Pty) Ltd (LAC)*). Hearsay evidence may be admitted if the party against whom the evidence is to be adduced agrees to the evidence being admitted or the person upon whose credibility the probative value of the evidence depends also testifies at the proceedings. If neither of these circumstances prevail, an arbitrator may decide whether or not to admit hearsay evidence after having regard to the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the probative value of the evidence; the reason why the evidence is not given by the person upon whose credibility the probative value of the evidence depends; any prejudice to a party which the admission of such evidence might entail; and any relevant other factor.

- 13 An arbitrator must decide on the form of an arbitration in terms of section 138(1) in every arbitration<sup>4</sup> and advise the parties of that decision. It is advisable that this decision is made after the parties have gone through the process of narrowing the issues which is described below. (The factors an arbitrator should consider when making this decision are set out in para 31.)
- 14 In terms of section 138(2), subject to the arbitrator's discretion as to the appropriate form of proceedings, each party to a dispute may –
- 14.1 give evidence;
  - 14.2 call witnesses;
  - 14.3 question witnesses; and
  - 14.4 address concluding arguments.
- 15 The parties are entitled to exercise these rights, irrespective of the form of proceedings. However the manner in which they exercise those rights will depend on how the arbitrator decides in terms of section 138(1) to conduct the arbitration.
- 16 An arbitrator must conduct the arbitration impartially. This means that an arbitrator must act in a manner that is fair to both parties and not engage in conduct that is biased or that might reasonably give rise to a party forming a perception that the arbitrator is biased. An arbitrator must not seek to expedite an arbitration in a manner that is unfair to a party or is unreasonable.

### **Nature of an arbitration**

- 17 An arbitration is a new hearing, which means that the evidence concerning the reason for dismissal is heard afresh before the arbitrator. The arbitrator must determine whether the dismissal is fair in the light of the evidence admitted at the arbitration. The arbitrator is not merely reviewing the evidence considered by the employer when it decided to dismiss to determine whether the employer acted fairly. This does not prevent the arbitrator from referring to an enquiry record insofar as it is admitted as evidence in the arbitration. An arbitrator may draw a positive inference if a witness' evidence is consistent with the record while an adverse inference may be drawn if a witness changes their version.
- 18 Arbitration typically involves six stages. The stages normally follow the sequence set out below but may occur differently in a particular case. The stages are –
- 18.1 preparation and introduction;

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<sup>4</sup> *Sondolo IT (Pty) Ltd v Howes & others (LC)* at paras 9-10.

- 18.2 the preliminary issues;
- 18.3 narrowing the issues;
- 18.4 the hearing of evidence;
- 18.5 the concluding arguments; and
- 18.6 the award

### **Preparation and introduction (stage 1)**

- 19 The purpose of stage 1 is to create confidence in the arbitrator and a climate that is conducive to the resolution of the dispute.
- 20 At the start of the arbitration, the arbitrator should welcome the parties and advise them of –
  - 20.1 the arbitrator's appointment to the case and that the proceedings will be recorded;
  - 20.2 any interest the arbitrator may have in the outcome of the case;<sup>5</sup>
  - 20.3 any contact the arbitrator may have with any of the parties before the arbitration which may give rise to a perception of bias or a potential conflict of interest in the matter;
  - 20.4 the language in which the proceedings are to be conducted and if there is a need for interpretation, ensure the presence of an interpreter;
  - 20.5 the rules of proceedings such as how to address the arbitrator, the rules against interruption and how and when to object;
  - 20.6 the role and powers of the arbitrator;
  - 20.7 the rights of the parties in terms of section 138(2);
  - 20.8 the procedure in terms of which documents are introduced into proceedings;
  - 20.9 the requirement that if evidence of a witness is disputed, the other party should, at the appropriate stage, question the witness in that regard and put its version to the witness so that the witness has an opportunity to respond;

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<sup>5</sup> Clause 3.1 of the Code of Conduct for Commissioners states that: "Commissioners should disclose any interest or relationship that is likely to affect their impartiality or which might create a perception of partiality. The duty to disclose rests on the commissioners."

20.10 the fact that the parties can at any stage during the arbitration agree to conciliate; and

20.11 any housekeeping arrangements.

21 The extent to which the arbitrator deals with any of these issues should be determined by the experience of the parties, or their representatives, and their knowledge of CCMA procedures. If it is evident at a subsequent stage that a party or their representative does not understand the nature of proceedings and that this is prejudicing the presentation of its case, the arbitrator should draw this to the attention of the party.<sup>6</sup> Circumstances in which it may be appropriate for the arbitrator to do this include if a party –

21.1 fails to lead evidence of its version under oath or affirmation;<sup>7</sup>

21.2 fails to cross-examine the witnesses of the other party or fails to put its version to those witnesses during cross-examination;

21.3 changes its version of events or puts a new version during proceedings.

### **Preliminary issues (stage 2)**

22 The purpose of stage 2 is to deal with any preliminary issues that may arise. These may include applications for condonation, objections to jurisdiction as well as applications dealing with issues such as legal representation,<sup>8</sup> the discovery of documents or the recusal of the arbitrator. The arbitrator does this by –

22.1 asking the parties if they have any preliminary issues to raise;

22.2 raising any preliminary concerns that the arbitrator may have as a result of reading the referral forms or other documents in the file;

22.3 explaining the preliminary point to any party who requests clarification;

22.4 giving the parties an opportunity to lead evidence, if necessary, on any preliminary point raised;

22.5 inviting each party to argue the preliminary point raised.

The arbitrator has a duty to confirm that the CCMA has the jurisdiction to hear the dispute, irrespective of whether this is raised by the parties.

<sup>6</sup> *Consolidated Wire Industries (Pty) Ltd v CCMA & Others (LC)* at para 42.

<sup>7</sup> *Klaasen v CCMA & others (LC)* at paras 27-29.

<sup>8</sup> In *CCMA & others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)*, *Commission for Conciliation, Mediation & Arbitration (SCA)*, the Supreme Court of Appeal held that rule 25 regulating the representation of parties by legal representatives in an arbitration was not unconstitutional.

- 23 In addition, and whether or not this is raised by either party as a preliminary issue, the arbitrator must check that the parties to the dispute have been properly identified, whether as a natural person, partnership, close corporation, company, or other legal person. If necessary, and after considering any relevant submissions by the parties, the arbitrator should correct the description of any party.<sup>9</sup>
- 24 The arbitrator should decide the preliminary point before proceeding with the arbitration, unless evidence is required to deal with the preliminary point and it is practicable to hear evidence on the merits at the same time. The arbitrator may make a ruling immediately and should adjourn only if the point raises complex issues that require additional consideration by the arbitrator. The arbitrator need not give reasons for the ruling at the time of the decision provided that the reasons are contained in the final award. However, if the preliminary point resolves the dispute, the arbitrator must issue an award reflecting the reasons for upholding the point and the relevant facts upon which the decision was based.
- 25 An application by any party to have legal representation or a request by the parties that the arbitrator consent to legal representation should be dealt with at this stage in terms of Rule 25 of the Rules for the Conduct of Proceedings before the CCMA. As such an application forms part of the arbitration proceedings, it must be initiated by the party making it. An arbitrator may permit legal representation for specific purposes, for example, to argue a specific preliminary point. A party who does not apply for representation at the outset is not prevented from making an application subsequently during the course of proceedings. An inquiry into whether a person qualifies to represent a party may be made at this stage or at any stage in which the issue arises during proceedings

### **Narrowing the issues in dispute (stage 3)**

- 26 The purpose of stage 3 is to narrow the issues in dispute by reaching agreement on the legal and factual issues involved in the case in order to expedite the hearing. In relatively simple cases, it may not be necessary to engage in this process. Narrowing the issues may already have been done as part of the conciliation process.
- 27 This is usually an appropriate time, if opening statements have not already been made, to invite the parties to make brief opening statements in which they set out their approach to the issues and the evidence in the arbitration.
- 28 During this stage, the arbitrator should ensure that the employee states whether the procedural fairness or the substantive fairness of the dismissal, or both, are being challenged; and identifies the grounds of the challenge. The arbitrator should ask the employee to specify the relief that is claimed and, if compensation is claimed, the amount of compensation and how it is calculated. The arbitrator should ask the employer to indicate the extent to which it admits or denies the employee's case. In this process of narrowing the issues, the arbitrator should deal with the question whether there was a fair

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<sup>9</sup> *Lambrecht v Pienaar Bros (Pty) Ltd (LC)* at paras 6-15.

reason for the dismissal by referring to each of the issues identified in item 7 of the Code of Good Practice: Dismissal (Schedule 8 to the LRA). The arbitrator should record whether or not the parties are in agreement by reference to each one of these issues.

29 Both parties should indicate –

29.1 what documents they will be using in support of their case and the witnesses they intend calling and summarise what their evidence will be;

29.2 the extent to which they admit the documents and evidence of the other party.

If the parties are represented, they should identify the legal principles and legal documents that they rely on in support of their case.

30 At the conclusion of this stage, the arbitrator should secure and record an agreement from the parties that identifies, by reference to the issue of procedural fairness and to each of the issues identified in item 7 of the Code of Good Practice: Dismissal –

30.1 the issues that are common cause;

30.2 the issues that are in dispute between the parties;

30.3 the issues that the arbitrator is required to decide in order to resolve the matter.

#### **Hearing of evidence (stage 4)**

31 The purpose of stage 4 is to record the evidence led by the witnesses and to give each party the opportunity to question the witnesses and to challenge their testimony.

32 At this stage the arbitrator should advise the parties how the evidence is to be presented and tested. When deciding on the form that proceedings are to take, the arbitrator should consider –

32.1 the complexity of the factual and legal matters involved in the case;

32.2 the attitude of the parties to the form of proceedings;

32.3 whether the parties are represented;

32.4 whether legal representation has been permitted; and

32.5 the experience of the parties or their representatives in appearing at arbitrations.

- 33 When an arbitrator adopts the role of finding the facts and determining the probabilities by questioning witnesses and requiring the parties to produce documentary and other forms of evidence, this approach is generally described as being investigative or "inquisitorial". When the parties are primarily responsible for calling witnesses and presenting their evidence and cross-examining the witnesses of the other parties this is generally described as being "adversarial". An inquisitorial approach will often be appropriate if one or both parties is unrepresented, or where a representative is not experienced. Arbitrators adopting an inquisitorial approach must be careful to ensure that the parties are aware of, and have the opportunity to exercise, their rights under section 138(2). An arbitrator may conduct an arbitration in a form that combines these two approaches provided this is done in a manner that is fair to both parties
- 34 In general it is preferable for witnesses who are still to give evidence to be excluded from the hearing room, unless a party specifically wants such a witness to be present. Arbitrators should advise parties that usually little weight can be attached to corroborating evidence from a witness who was present during the evidence of another witness called by the same party.<sup>10</sup>
- 35 The arbitrator must ask the witness to identify themselves on record and then swear in or, if requested, affirm the witness and advise the witness of the process of questioning.
- 36 The parties are entitled to question witnesses in a sequence determined by the arbitrator. The party who has called a witness should question the witness to obtain the evidence. (As indicated above, an arbitrator may decide to undertake the initial questioning of a witness.)
- 37 A party who has called a witness may not cross-examine that witness, even if the arbitrator has asked the initial questions.<sup>11</sup> A party who has questioned a witness may ask additional questions in order to clarify evidence given subsequently.
- 38 In any arbitration the arbitrator may, at the conclusion of questioning by the parties, question the witness to determine the probabilities of the different versions in the case and assess the reliability of the evidence.
- 39 When an arbitrator questions witnesses, whether in an inquisitorial or adversarial process, the arbitrator should explain to the parties the reason for seeking this information and must allow the parties to address questions to the witnesses on any issues raised by the additional evidence.
- 40 The arbitrator may suggest that the parties lead evidence on a particular issue relevant to the dismissal in order to gain a full understanding of the issues in dispute or call a witness for this purpose.

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<sup>10</sup> In *CIK Alliance (Pty) Ltd t/a Greenland v Mosala NO & others (LC)*, the Labour Court noted that a Commissioner has a duty to warn a party of the consequences of a witness sitting in the hearing during the testimony of other witnesses. While such a witness is not precluded from testifying, the testimony would carry little or no weight if it had been tailored to be consistent with the evidence of the other witnesses.

<sup>11</sup> This prevents a party from putting leading questions (questions that suggest the answer that the party is seeking) to a witness called by that party. This is subject to the limited exception that a party may cross-examine a witness who it has called if the arbitrator rules that the witness is a hostile witness.

- 41 The arbitrator may disallow questions or evidence not relevant to the issues in dispute between the parties.
- 42 The arbitrator must –
- 42.1 ensure that the testimony given by witnesses is recorded either electronically or digitally;
  - 42.2 take notes of the evidence given and keep these notes in a file.

### **Argument (stage 5)**

- 43 The purpose of stage 5 is to allow the parties to the dispute to argue in support of their version in the case. The parties should be invited to address the arbitrator on the following issues in their concluding arguments –
- 43.1 what facts they rely on in support of their cases;
  - 43.2 why those facts should be believed or why those facts should be accepted as the more probable version;
  - 43.3 what relief is sought or opposed; and
  - 43.4 what legal principles or authority they rely on in their cases.
- 44 In complex cases, the arbitrator may, in addition, allow the parties to file written arguments within seven days of the hearing.
- 45 If during the process of making an award, the arbitrator considers relying on a point not relied upon during the proceedings, the arbitrator must call upon the parties to make written or oral submissions before making an award based on that point.

### **The award (stage 6)**

- 46 The award is dealt with below in Part C of these guidelines.

## **C: ASSESSING EVIDENCE AND DRAFTING AN AWARD**

### **Assessing evidence and drafting an award**

- 47 The arbitrator must issue a written award, together with brief reasons, within a time period that allows the CCMA to hand down the award within 14 days after the end of the arbitration process.<sup>12</sup>
- 48 The arbitrator should organise the award along the following lines –
- 48.1 the facts concerning the referral of the dispute;
  - 48.2 any preliminary ruling and the reasons for the ruling;
  - 48.3 the nature of the dispute;
  - 48.4 background facts (dealt with in more detail from paragraph 50 of these guidelines);
  - 48.5 a summary of the evidence (dealt with in more detail from paragraph 52 of these guidelines);
  - 48.6 an analysis of the evidence (dealt with in more detail from paragraph 55 of these guidelines);
  - 48.7 a conclusion on the fairness of the dismissal based on the above analysis;
  - 48.8 an analysis and determination of the remedy, if necessary; and
  - 48.9 the order.

### **Assessing evidence**

- 49 There are three broad parts to the organisation and assessment of evidence in an award.

They are:

- 49.1 the background facts;
- 49.2 the summary of the evidence led; and
- 49.3 the analysis of that evidence.

### **Background facts**

- 50 Background facts should set the scene and contain undisputed facts that may be important in analysis later in the award such as length of service or the salary at time of dismissal.

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<sup>12</sup> The Labour Relations Act Amendment Act 6 of 2014 has amended section 138(7) to remove the requirement the original arbitration award be filed with the Labour Court.

Background facts should focus on the following aspects:

- 50.1 *The parties.* These facts describe the parties to the dispute. The question of whether a trade union is a party to the dispute or a representative of the employee in the dispute should be clarified.
- 50.2 *The workplace.* These facts should include the sector, the nature of the work, the size of the workplace and any special considerations that may flow from this. So, for example, a mine may have special requirements as to discipline and safety.
- 50.3 *Procedures and agreements.* These facts should include the facts concerning the regulation of conduct in the workplace such as disciplinary codes, disciplinary procedures and collective agreements.
- 50.4 *The employment relationship.* These facts are specific to the employee such as the contract of employment, length of service, salary at dismissal and disciplinary records.
- 50.5 *The history of the dispute.* These facts should summarise the events leading up to the dispute, the dispute itself, the pre-dismissal procedure, the referral to the CCMA and any relevant procedural history prior to the arbitration hearing into the merits including any delays.
- 50.6 *The relief sought.* This should simply set out the relief which the employee is seeking in the arbitration.
- 50.7 *The conduct of the arbitration.* These facts concern facts specific to the conduct of the arbitration itself. It should deal with representation, dates of the hearing, attendance, applications and rulings concerning the conduct of the arbitration. If representation is disputed or an application is opposed, those disputes may or may not raise factual issues. But if they do, then those issues are best summarised, analysed and decided under a preliminary point on, for example, representation.

- 51 The degree of detail will depend on the importance that any of these facts may have on analysis later in the assessment. Arbitrators must ensure that an award demonstrates that the decision that they have made is reasonable.<sup>13</sup>

## Summary of evidence

- 52 The summary of the evidence should record the relevant evidence led. Normally it is easiest to organise that evidence in the order that it is given, or chronologically. It need not contain all the detail that may be necessary for the purposes of analysis later in the award.

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<sup>13</sup> *Herholdt v Nedbank Ltd (SCA)* at para 25.

- 53 Documentary evidence should be summarised under this part of the factual enquiry. Any relevant parts of the contract of employment and disciplinary code should be quoted or summarised.
- 54 It is best not to deal with issues of credibility or probability at this stage of the award. The purpose of this part of the award is to record as accurately as possible the relevant parts of the evidence for the purposes of the analysis.

### Analysing evidence

- 55 This involves a determination of the relevant facts for the purpose of coming to a decision on the procedural and substantive fairness of the decision to dismiss. It involves findings of fact based on an assessment of credibility and the probabilities and an assessment of the applicable rules in the light of those findings.
- 56 An arbitrator must weigh the evidence as a whole taking account of the following factors:
- 56.1 *The probabilities.* This requires a formulation of the contending versions and a weighing up of those versions to determine which is the more probable. The factors for that determination have to be identified and justified.<sup>14</sup>
- 56.2 *The reliability of the witnesses.* This involves an assessment of the following:
- 56.2.1 the extent of the witness's first-hand knowledge of the events;
- 56.2.2 any interest or bias the witness may have;
- 56.2.3 any contradictions and inconsistencies;
- 56.2.4 corroboration by other witnesses;
- 56.2.5 the credibility of the witness, including demeanour.<sup>15</sup>
- 57 The organisation of this part of the factual enquiry should follow broadly –
- 57.1 in the case of a decision about the procedural fairness of a dismissal, item 4 of the Code of Good Practice: Dismissal as elaborated upon in Part D of these guidelines;

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<sup>14</sup> The standard of proof that an employee committed misconduct is that of a 'balance of probabilities, as stated by the Labour Court in *Avril Elizabeth Home v CCMA & Others (LC)*. As in *Clarence v National Commissioner of the South African Police Service (LAC)*, where a disciplinary code provides that an employee who commits a criminal offence will be guilty of misconduct, the burden of proof remains on a balance of probabilities.

<sup>15</sup> For example, in *Network Field Marketing (Pty) Ltd v Mngwezana NO & Others (LC)* it was pointed out that in resolving a dispute of fact, a commissioner should undertake a balanced assessment of the credibility, reliability and probability of the different versions given. Credibility should not be relied upon as the sole means of determining the probative value of evidence.

57.2 in the case of a decision about the substantive fairness of a dismissal, item 7 of the Code of Good Practice: Dismissal as elaborated upon in Part E of these guidelines;

57.3 in the case of a decision about the remedy, sections 193 to 195 of the LRA and Part F of these guidelines.

## **D: HOW TO APPROACH PROCEDURAL FAIRNESS**

### **Introduction**

58 When arbitrators decide whether a dismissal was procedurally fair, they must have regard to Item 4 of Schedule 8 to the LRA (the Code of Good Practice: Dismissal). If there is a workplace disciplinary procedure in place, an arbitrator must have regard to that procedure. The arbitrator's approach to the procedural fairness of a dismissal will be determined by the existence of a workplace procedure and the legal status of that procedure.

### **If there is no workplace disciplinary procedure**

59 If there is no workplace disciplinary procedure, the Code must be applied subject to any departures that may be justified by the circumstances.

60 Item 4 of the Code contemplates an investigation into the misconduct that includes an inquiry, which need not be formal. The Code does not contemplate a criminal justice model incorporating formal charge sheets,<sup>16</sup> formal procedures for the leading and cross examination of witnesses, formal rules of evidence, legal representation and independent decision-making. The Code contemplates a flexible, less onerous approach. The fairness of an inquiry conducted by an employer without workplace procedures must be tested against the five requirements for procedural fairness contained in Item 4.

61 In determining procedural fairness in the absence of workplace disciplinary procedures, the relevant facts should be summarised and analysed under the followings heads:<sup>17</sup>

61.1 *The employer must notify the employee of the allegations of misconduct using a form and a language that the employee can reasonably understand.* The notice must be clear and comprehensible to enable the employee to respond to it. The notification may be oral or in writing. The objective of this requirement is to ensure that the employee is reasonably able to state a case in response. The fairness of the notification should be tested against that objective.

61.2 *The employee should be allowed a reasonable time to prepare a response to the allegations.* Reasonableness will depend on the complexity of the allegations and the nature of the factual

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<sup>16</sup> *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & Others (LAC)* at para 41.

<sup>17</sup> See item 4 of Schedule 8 to the LRA (Code of Good Practice: Dismissal).

issues that need to be canvassed. Giving less than a day to prepare a response will in most cases not be reasonable.

61.3 *The employee should be allowed the assistance of a trade union representative or fellow employee in preparing a response and in stating a case in any enquiry.* The right to assistance by a trade union representative applies only if the trade union has been granted organisational rights to have elected representatives for this purpose. A trade union representative who does not satisfy this criterion may only assist an employee if he or she is a fellow employee.

61.4 *The employee should be given the opportunity to state a case in response to the allegations.* This can be done in writing or in a meeting and there is no requirement to hold a formal hearing.<sup>18</sup> If the employer holds a formal hearing, then it should be conducted in a manner that properly permits the employee to state a case. The determining factor in assessing the fairness of the hearing is whether the employee was given a proper opportunity to state a case. In some cases that will mean being given the opportunity to call and question witnesses, in others it may mean no more than giving an explanation. The duty to give an employee an opportunity to state a case is not affected by who hears the case. Accordingly, it is not unfair for an employer to use the services of a third party, such as an attorney or an arbitrator, to conduct the hearing. (The identification in the Code of the determining factor ('the opportunity to state a case') in respect of an inquiry means that the jurisprudence developed by the courts under the 1956 LRA has limited application in the assessment of procedural fairness of an inquiry in the form of a hearing under the Code.) .

61.5 The employer should communicate the decision taken, preferably in writing, furnish the employee with the reasons, and, if dismissed, remind the employee of the right to refer a dispute to the CCMA, a council with jurisdiction, or in terms of any dispute resolution procedure in a collective agreement.

62 The Code permits an employer to dispense with the procedures provided for in the Code in exceptional circumstances. These may include what have been termed 'crisis zone' cases, where the employer acts to protect lives and property. Procedures might also be dispensed with in cases such as a refusal or failure to state a case or absence without leave or explanation.<sup>19</sup> In these circumstances, the employer may make a decision on the merits of the allegation without the employee having stated a case in response.

63 Departures from the guidelines in the Code should be justified. For example, the opportunity to state a case in response to an employer's allegation of misconduct should ordinarily precede any decision to

<sup>18</sup> *Nitrophoska (Pty) Ltd v CCMA & Others (LC)* emphasises that the requirement for formal procedures is less significant in the case of senior managers (at paras 16-19).

<sup>19</sup> Where an employer has an effective means of communicating with an employee who is absent from work, the employer has an obligation to give effect to the audi alteram partem rule before the employer can take the decision to dismiss such an employee for his absence from work or for his failure to report for duty. *South African Broadcasting Authority v CCMA (LAC)* at para [15] This decision was followed in *Jammin Retail (Pty) Ltd v Mokwane & Others (LC)* in which it was held that the contracts of employees in the private sector may not be terminated by operation of law after an unauthorised absence of a pre-determined period; an employer is obliged to make a reasonable effort to give effect to the principle of *audi alteram partem*,

dismiss. If an employer, after making a decision on the merits without affording the employee the opportunity to state a case, offers an employee the opportunity to state a case afterwards but before someone who was not involved in the first decision, and who is independent, impartial and authorised to make a fresh decision, a departure from the norm may be justified.

- 64 If a commissioner finds that the procedure was defective, the arbitrator should determine whether the defect was material. The seriousness of the defect should be taken into account when determining compensation for procedural unfairness.

### **If there is a workplace disciplinary procedure**

- 65 If there is a workplace disciplinary procedure, its legal status will affect the arbitrator's approach when assessing the procedural fairness of a dismissal. There are three categories: those that are contained in a collective agreement; those that are contractually binding; and those that are unilaterally established by the employer.

#### *Collective agreements*

- 66 Item 1 of the Code makes it clear that the Code is not a substitute for a disciplinary code and procedure contained in a collective agreement. This means the procedural fairness of a dismissal must be tested against the agreed procedure and not the Code. It is only if an agreed procedure is silent on an issue required by the Code that the Code plays any role.
- 67 When deciding whether a disciplinary procedure conducted in terms of a collectively agreed procedure involves any procedural unfairness, the arbitrator should examine the actual procedure followed. Unless the actual procedure followed results in unfairness, the arbitrator should not make a finding of procedural unfairness in a dismissal case.<sup>20</sup>

#### *Contractually binding procedures*

- 68 This kind of agreed procedure does not have the status of a collective agreement. It must be tested against the Code and any conflict should be decided in favour of the Code unless the employer can justify the departure. If the contract imposes a more burdensome procedure than the one in the Code, the procedural fairness of a dismissal must be tested against the contractual procedure.
- 69 A departure from the agreed procedure should constitute procedural unfairness. But not every instance of procedural unfairness in these circumstances ought to give rise to an order of compensation. Like collective agreements, an arbitrator should weigh up the materiality of the breach and the prejudice to the employee in determining compensation, if any, for the procedural unfairness.

#### *Employer imposed procedures*

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<sup>20</sup> *Highveld District Council v CCMA & Others (LAC)* at paras 15 - 17.

- 70 An employer imposed procedure must be tested against the Code and if there is any conflict, the Code takes precedence unless the employer can justify the departure. A procedure that is not legally binding ought not to be strictly interpreted and applied. Ordinarily, departures from established policies and procedures, or from the Code, should not result in a finding of procedural unfairness unless there is material prejudice to the employee. Subject to the same qualification, if the employer amends or adjusts a policy or procedure to meet a particular exigency or to address circumstances that are not contemplated in the policy or procedure, a finding of procedural unfairness is not warranted.

### *Representation*

- 71 If a workplace procedure provides for a right to representation when an employee is called on to state a case in response to an allegation of misconduct, a disputed decision by an employer to admit or deny representation should be evaluated in terms of that procedure. When rights to representation are not regulated by a workplace procedure, the Code of Good Practice: Dismissal provides that the employee should be allowed the assistance of a trade union representative or a fellow employee. If a disciplinary code permits the right to legal representation, this should be afforded. However, neither the LRA nor the Code recognise an automatic right to legal representation.

### **Disciplinary action against a trade union representative**

- 72 If an employer intends to take disciplinary action against an employee who is a trade union representative or an office bearer or official of a trade union, the Code of Good Practice requires the employer to inform and consult with the union before doing so. Because the dismissal of a trade union representative may be perceived as an attack on the trade union, the object of the consultation is to advise and communicate with the union that the disciplinary action is not motivated by a desire to victimise and to deal with the possible impact of the disciplinary action on the ongoing relationship between the employer and the trade union. If there is no agreed procedure, a procedure should be adopted that employees and the trade union will perceive as fair and objective.
- 73 The norm applies to trade union representatives and office bearers or officials of a trade union only if the trade union is "recognised" in the sense that it has been granted the relevant organisational rights. The LRA defines a trade union representative (commonly referred to as a "shop steward") as a member of a trade union who is elected to represent employees in a workplace. A trade union representative appointed by an unrecognised trade union or one who is not elected to represent employees in the workplace is not a trade union representative for the purposes of the LRA. Accordingly it is not a departure from the norm not to inform and consult in these circumstances.<sup>21</sup>

<sup>21</sup> *BIAWU & another v Mutual & Federal Insurance Co Ltd (LC)* p 1043 G-J.

- 74 A departure from this requirement may be justified if the trade union and the trade union representative are not prejudiced by the failure to inform and consult and the employer has good reason not to do so.<sup>22</sup>

## E: HOW TO APPROACH SUBSTANTIVE FAIRNESS

### Introduction

- 75 Arbitrators are required to take the Code of Good Practice: Dismissal into account in determining the fairness of a dismissal for reasons relating to conduct. Item 7 of the Code provides guidelines for such dismissals. These guidelines impose constraints on the power of an arbitrator to determine fairness.<sup>23</sup>
- 76 The consideration of each of the issues outlined in item 7 involves discrete factual enquiries that the arbitrator must ensure are conducted. These factual enquiries themselves can often be broken down into more detailed factual enquiries. Sometimes they are interlinked. The purpose of these guidelines is to separate out the different factual enquiries normally found in a misconduct case and to order them so that they provide a checklist for the narrowing of issues before a hearing, the receipt of evidence in a hearing, and a template for organising and assessing the evidence in an award.

### Guidelines in cases of dismissal for misconduct: Item 7 of the Code

- 77 Any person who is determining whether a dismissal for misconduct is unfair should consider-
- 77.1 whether or not the employee contravened a rule or standard regulating conduct in, or relevant to, the workplace<sup>24</sup>
- 77.2 if a rule or standard was contravened, whether or not –
- 77.2.1 the rule was a valid or reasonable rule or standard
- 77.2.2 the employee was aware, or could reasonably be aware of the rule or standard;
- 77.2.3 the rule or standard has been consistently applied by the employer; and
- 77.2.4 dismissal was an appropriate sanction for the contravention of the rule or standard.<sup>25</sup>

<sup>22</sup> Although *NCBAWU v Masinga & others (LC)* refers only to prejudice, the Code also requires a justification for doing so. The decision does not prevent arbitrators from applying both factors, namely prejudice and justification. In any event, even if there is no justification, the arbitrator retains a discretion in respect of remedy.

<sup>23</sup> *Sidumo & others v Rustenberg Platinum Mines Ltd & others (CC)* at para 175.

<sup>24</sup> *Dolo v CCMA & Others (LC)*, at paras 19-21, citing *Hoechst (Pty) Ltd v CWIU & Another (LAC)*. Misconduct committed outside the workplace may justify dismissal if it has the consequence of destroying or seriously damaging the relationship between employer and employee, or placing the employee's trustworthiness in doubt.

<sup>25</sup> In *Samson v the Commission for Conciliation, Mediation and Arbitration and Others (LC)*, the employer had increased the relevant sanction from a final written warning to a dismissal. The test for permitting an increase is whether such increase was 'fair' in the circumstances. In this case, because it was the company practice for the senior manager to review disciplinary proceedings and change sanctions and such practice was not prohibited by the Employer's Code, the increase in severity of the sanction imposed was justified. An employer that is considering increasing the sanction must allow the employee an opportunity to make

- 78 The guidelines in item 7 of the Code can be broken down into the following factual enquiries that are normally associated with determining the substantive fairness of a dismissal.

*Is there a rule?*

- 79 The existence of the rule is the first and normally the easiest of the factual enquiries into substantive fairness.
- 80 A rule or standard contained in a disciplinary code, collective agreement, contract or policy is normally sufficient proof of its existence. If the employer has no disciplinary code, the existence of the rule may be proved by testimony or inferred from the contract of employment, legislation or practice in the sector or establishment. The arbitrator may accept as a rule any basic rule of conduct applicable in all workplaces and any special rules that may flow from the sector or the nature of the employer's operations. Many of the universal rules flow from the duties inherent in every contract of employment such as the duties relating to performance (for example the duties to work, to keep time, to comply with lawful and reasonable instructions) or relating to good order (for example the duties to cooperate or respect co-employees, not to assault or harass co-employees) or relating to trust (for example the duties not to engage in dishonest conduct or to undermine the employer's business or reputation).
- 81 Some rules arise from the duties imposed by legislation such as the Occupational Health and Safety Act 85 of 1993. Special rules flow from the nature of the sector or workplace. For example, there may be stricter standards of compliance in workplaces with a high risk to safety or security.
- 82 An arbitrator may rely on a rule or standard not contained in a disciplinary code, if the code does not specifically exclude it as a ground for discipline, where-
- 82.1 the employer proves, or the employee concedes, that the employee knew, or ought reasonably to have known, that the rule or standard was applicable; or
- 82.2 the arbitrator is able to draw an inference from the code, the contract of employment, legislation or practice in the sector or establishment workplace that the rule or standard was applicable.
- 83 If there is a dispute over the existence of the rule, the arbitrator may decide the dispute by taking judicial notice of the rule or decide it on the evidence. That evidence must be summarised and analysed and decided on credibility or the balance of probabilities.

*Was the employee aware of the rule?*

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representations before make [sic] the decision (*South African Revenue Services v CCMA and Others*). *Rennies Distribution Services v Bierman NO and Others (LC)*: while a more severe sanction *may* be imposed on an employee by the Commission, this is only permissible where the disciplinary code in question permits such an increase, and where the employee is warned of the possibility of an increased sanction.

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- 84 The determination of this factual issue is often not disputed because the rule or standard is frequently contained in the employer's disciplinary code.
- 85 If the employee disputes knowledge of the rule or standard, it will be necessary for the employer to demonstrate that the employer made the code 'available to employees in a manner that is easily understood' - see item 3(1) of the Code of Good Practice: Dismissal.
- 86 If there is no code, the factual issue can be more complicated. Unless there is evidence concerning past practice of which the employee was aware, the proper approach to this question is whether the employee could reasonably be expected to have known of the rule or standard. This is a question that can be based on evidence or on the arbitrator's expertise. So, for example, in respect of the basic rules found in all workplaces, the employee is reasonably expected to be aware of them. 'Some rules or standards may be so well established and known that it is not necessary to communicate them' - item 3(1) of the Code of Good Practice: Dismissal (Schedule 8 to the LRA).

*Did the employee contravene the rule?*

- 87 This is a purely factual question. Unless the employee concedes contravening the rule, evidence must be led from both points of view. That evidence must be carefully summarised, analysed and determined on credibility or on the balance of probabilities.
- 88 There may be more than one factual question and each needs to be treated separately with the different versions summarised, analysed and decided. So for example, a contravention of the rule that an employee is required to carry out the lawful and reasonable instructions of the employer may require a factual enquiry into whether the instruction was given, whether the employee understood the instruction, and whether the employee disobeyed the instruction. The fact that the employee has a justification in the particular circumstances for contravening a rule (or any instruction given in terms of the rule) is a fact that may be relevant either to the question whether the rule, properly interpreted, was contravened, or to the question whether the rule is valid and reasonable, or to the question whether dismissal was an appropriate sanction for contravention of the rule - steps in the analysis referred to in the following sections.

*Is the rule or standard a valid or reasonable rule or standard?*

- 89 It is the employer's responsibility to determine the rules and standards in the workplace.<sup>26</sup> It is not the arbitrator's role to second-guess those rules.<sup>27</sup> This does not constitute deference to the employer but compliance with the Code.<sup>28</sup> The arbitrator's role is to determine the validity and reasonableness of the rule as part of the general enquiry into the fairness of the dismissal.

<sup>26</sup> *County Fair Foods (Pty) Ltd v CCMA and others (LAC)* at para 11 confirmed in *Sidumo & others v Rustenberg Platinum Mines Ltd & others (CC)* at paras 67 and 176.

<sup>27</sup> *Sidumo & others v Rustenberg Platinum Mines Ltd & others (CC)* at paras 67 and 181.

<sup>28</sup> *Sidumo & others v Rustenberg Platinum Mines Ltd & others (CC)* at para 183.

*Validity.*

- 90 The arbitrator must consider the rule or standard and determine whether it is lawful or contrary to public policy. For example, an instruction to perform work in contravention of a safety standard is not a lawful instruction. An instruction to perform work that falls outside the scope of duties that the employee may reasonably be expected to perform is not a lawful instruction. An instruction to seduce clients or not to give evidence against one's employer is contrary to public policy.

*Reasonableness.*

- 91 The Code of Good Practice: Dismissal requires only that the rule (or any instruction made under such a rule) is reasonable. It is not for the arbitrator to decide what the appropriate rules or standards should be -- only that they are reasonable. Reasonableness admits of a range of possible rules. This may involve comparison with sectoral norms reflecting the approach of other employers. The further the rule or standard departs from the general standards of conduct expected from an employee, the greater the need for the employer to justify that departure.
- 92 The nature of the enquiry into the reasonableness of the rule or standard differs from that which must be adopted when assessing the sanction prescribed for the breach of the rule or standard. The rule or standard is subject to the test of reasonableness described in the preceding paragraph, the sanction for breach of the rule is subject to the test of fairness. This involves an individualised assessment that the arbitrator must make under the next step in the analysis, namely whether the contravention is sufficiently serious to justify dismissal.<sup>29</sup>

*Was dismissal an appropriate sanction?*

- 93 The test is whether the employer could fairly have imposed the sanction of dismissal in the circumstances, either because the misconduct on its own rendered the continued employment relationship intolerable,<sup>30</sup> or because of the cumulative effect of the misconduct when taken together with other instances of misconduct. The arbitrator must make a value judgment as to the fairness of the employer's decision, taking into account all relevant circumstances.<sup>31</sup> This must be a balanced and equitable assessment taking into account the interests of both the employer and the employee. In making this assessment, the arbitrator must give serious consideration to, and seek to understand the rationale for, the employer's rules and standards.<sup>32</sup> Other relevant factors include norms in the sector,

<sup>29</sup> *Afrox Healthcare v CCMA & Others* [2012] JOL 28779 (LAC): In assessing the appropriateness of dismissal as a sanction, the LAC took account of the employer's business (as a health services provider) and the public's expectation of zero tolerance towards negligence which may impact on the lives of patients. See also *National Commissioner, South African Police Service v Myers & Others* [2012] BLLR 688 (LAC) and *Metro Cash & Carry Ltd v Tshela* (LAC) p 1133 B-F.

<sup>30</sup> *Edcon Ltd v Pillimer NO & Others* (SCA) at paras 20 - 22: an employer that alleges that the employment relationship has been destroyed must lead evidence to show how the employee's conduct impacted on the relationship. However, conclusion of a broken employment relationship may be apparent from the nature of the offence and/or the circumstances of the dismissal. This was held to be the case where a senior employee had misrepresented his qualifications in a CV and during an interview (*Department of Home Affairs and Another v Ndlovu and Others* (LAC)).

<sup>31</sup> In *Miyambo v CCMA & Others* (LAC) the Labour Appeal Court emphasised the importance of the trust relationship. While all circumstances must be considered, the trust relationship is a primary consideration in determining the appropriateness of dismissal as a sanction.

<sup>32</sup> See *Sidumo & others v Rustenberg Platinum Mines Ltd & others* (CC) at paras 75-79 and 179-183.

the Code of Good Practice, these guidelines, and the arbitrator's expertise. To the extent that these sources do not accord with emerging jurisprudence in the courts since 1995, that jurisprudence should constitute a guide.

- 94 Determining whether dismissal was an appropriate sanction involves three enquiries: an enquiry into the gravity of the contravention of the rule; an enquiry into the consistency of application of the rule and sanction; and an enquiry into factors that may have justified a different sanction.

#### *Gravity of the contravention*

- 95 There are two enquiries involved in assessing the gravity of the contravention. The first concerns any sanction prescribed by the employer for the misconduct. The second concerns any aggravating factors that may make the contravention more serious, or mitigating factors that may make it less serious. The first is an enquiry into the sanction as a response to the contravention of the rule, and the second is one into the circumstances of that contravention.
- 96 Dismissal as a sanction is normally reserved for serious misconduct. To the extent that a disciplinary code accords with what is generally regarded as serious misconduct, a sanction for such misconduct in a code should generally be considered as appropriate (subject of course to the two further enquiries into consistency and mitigation). To the extent that the code is more severe in its prescribed sanction than generally accepted norms, the employer must give reasons for prescribing the sanction for the contravention of the rule. This is an enquiry into the reasons for the rule and the sanction prescribed in the code.
- 97 Because the Code of Good Practice: Dismissal promotes progressive discipline,<sup>33</sup> it distinguishes between single acts of misconduct that may justify the sanction of dismissal and those that may do so cumulatively. The Code identifies gross dishonesty, wilful damage to property, endangering the safety of others, assault and gross insubordination as examples of what may constitute serious misconduct that may justify dismissal as a result of a single contravention.<sup>34</sup> The Courts have also identified gross negligence and sexual or racial harassment as serious misconduct. This is not a closed list and in some workplaces there may be more severe sanctions for contraventions of rules and standards than in other workplaces.
- 98 The second enquiry is into the circumstances of the contravention. Those circumstances may aggravate or mitigate the gravity of the contravention. Aggravating factors may include wilfulness, lack of remorse, not admitting to a blatant contravention of a rule, dishonesty in the disciplinary hearing, the nature of the job, and damage and loss to the employer caused by the contravention. Aggravating circumstances may have the effect of justifying a more severe sanction than one prescribed in the code or normally imposed by employers either generally or in the sector, or may offset personal

<sup>33</sup> The idea of progressive discipline is to ensure that an employee can be reintegrated into the organisation in circumstances if the employment relationship can be restored to what it was prior to the misconduct in question (*Timothy v Nampak Corrugated Containers (Pty) Ltd (LAC)*).

<sup>34</sup> Persistent, deliberate and public insubordination would normally justify dismissal (*Motor Industry Staff Association & Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd & Others (LAC)* at paragraphs 46-49).

circumstances which may otherwise have justified a different sanction. Mitigating factors may include pleading guilty, remorse, a willingness to submit to a lesser sanction that may reduce the chance of future contraventions of the rule, and the absence of any damage or loss to the employer.

- 99 An employee's disciplinary record may be a relevant aspect of the enquiry into the gravity of the contravention if the employer relies upon the cumulative effect of repeated misconduct by the employee<sup>35</sup> or if the misconduct complained of is made up of previous incidents in respect of which warnings have been given.

*Reasons for not dismissing: Has the rule been consistently applied?*

- 100 There are two kinds of consistency required of an employer in the application of a rule and a sanction - consistency over time and consistency as between employees charged with the same contravention.
- 101 A party, must raise a claim of inconsistency at the outset of proceedings in concrete terms, identifying the persons who were treated differently and the basis upon which they ought not to have been treated differently.<sup>36</sup> If an employee leads evidence that another employee similarly placed was not dismissed for a contravention of the same rule, the employer must justify the difference of treatment. It may do so, for example, by producing the records contemplated in item 3(6) of the Code of Good Practice: Dismissal. Unless the employer can provide a legitimate basis for differentiating between two similarly placed employees, a disparity in treatment is unfair.<sup>37</sup> An employer may argue that the chairperson of a previous disciplinary inquiry had imposed too lenient a sanction; in such a case employees who commit similar offences are not entitled to assume that the same sanction will be imposed.<sup>38</sup>
- 102 It is not inconsistent to treat employees charged with the same misconduct differently if there is a fair and objective basis for doing so.<sup>39</sup> This may include mitigating factors, aggravating factors or relevant aspects of the employee's disciplinary record.<sup>40</sup> In collective misconduct, it is permissible to treat those who play a leadership role more severely than those who are simply involved.<sup>41</sup> However, it is not permissible to take warnings for individual misconduct into account in determining the sanction for collective misconduct.<sup>42</sup>

<sup>35</sup> *Gcwensha v CCMA & Others* (LAC) at para 32. Written warnings, that have lapsed, may be taken into account in determining the fairness of a dismissal if it is shown that the employee has a propensity to commit the misconduct in question (*NUM obo Selemela v Northam Platinum Ltd* (LAC)).

<sup>36</sup> *NUM obo Botsane v Anglo Platinum Mine (Rustenburg Section)* (JA2013/42) [2014] ZALAC 24 (15 May 2014) at para 39; *SACCAWU and Others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC).

<sup>37</sup> *Cape Town City Council v Masitho & others* (LAC) at para 14 and 18.

<sup>38</sup> *Absa Bank Limited v Naidu and Others* (LAC).

<sup>39</sup> *SA Transport & Allied Workers Union & others v Ikhwezi Bus Services (Pty) Ltd* (LC) at para 25.

<sup>40</sup> In *SACCAWU v Check One (Pty) Ltd* (LC), the employer was found to be justified in differentiating between employees who had peacefully participated in an unprocedural strike, and who received final written warnings for their conduct, and those who had committed acts of intimidation during the course of the strike and were dismissed for their conduct.

<sup>41</sup> *NUM v Council for Mineral Technology* (LAC) paras 19-23.) In collective misconduct, it is not unfair if an employer institutes disciplinary action only against those employees who it can identify as having taken part in the misconduct (*CEPPWAWU v NBCCI & Others* (LAC) at paras 20 - 23).

<sup>42</sup> *NUM & another v Amcoal Colliery t/a Arnot Colliery & another* (LAC) at para 25.

- 103 An employer may justify a change in its approach to disciplining employees for particular misconduct by showing that employees were made aware of the change of approach.<sup>43</sup>

*Reasons for not dismissing: Factors that may justify a different sanction*

- 104 Although these factors are often referred to as mitigating factors, this is misleading. Dismissal is not a punishment. It is a rational response to risk management in the affected enterprise.<sup>44</sup> Accordingly, the factors that should be taken into account under this heading must be relevant to the risk of further instances of misconduct in the future, and the risk of harm to the enterprise as a result.
- 105 The Code of Good Practice: Dismissal identifies three different factors that may weigh in favour of continuing the employment relationship rather than terminating it: the employee's circumstances, the nature of the job and the circumstances of the contravention.

*Employee's circumstances*

- 106 This includes length of service, previous disciplinary record and personal circumstances. Accordingly long service, a clean disciplinary record and a disability caused by an accident at work may indicate a likelihood that continued employment is not intolerable and so weigh in favour of a less severe sanction. Personal circumstances should be work related such as the effect of dismissal on an employee close to retirement.

*Nature of the job*

- 107 The nature of the job may be such that the damage or injury of any further infraction makes the risk of continued employment intolerable. For example, the risk for the employer would be greater for an air traffic controller falling asleep on duty than a labourer.

*Circumstances of the contravention*

- 108 The CCMA and the Courts have considered the following to constitute circumstances that may justify a different sanction: remorse, provocation, coercion, use of racist or insulting language, and the absence of dishonesty. This is not a closed list.

## **F: HOW TO APPROACH REMEDIES**

### **How to approach remedies**

- 109 When a dismissal is found to be unfair, the arbitrator must determine an appropriate remedy. Section 193 of the LRA permits an arbitrator to direct an employer who has unfairly dismissed an employee to

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<sup>43</sup> *Cape Town City Council v Masitho & others* (LAC) at para 14.

<sup>44</sup> *De Beers Consolidated Mines Ltd v CCMA & others* (LAC) at para 22.

reinstate the employee, re-employ the employee or pay compensation to the employee. An arbitrator must provide reasons in an award for the remedy that is awarded.

### **Choosing a remedy for substantively unfair dismissals**

- 110 An arbitrator who finds that a dismissal is substantively unfair must consider whether to order the employer to reinstate, re-employ or compensate the employee.

### **Reinstating an employee**

- 111 An arbitrator who finds that an employee's dismissal is substantively unfair must direct the employer to either reinstate or re-employ the employee unless –

111.1 the employee does not wish to be reinstated or re-employed;

111.2 a continued employment relationship would be intolerable;

111.3 it is not reasonably practicable for the employer to reinstate or re-employ the employee.

#### *The employee does not wish to be reinstated or re-employed*

- 112 An arbitrator must ensure that the employee has an opportunity to state during the arbitration whether reinstatement or re-employment is sought as a remedy. If the employee does not want either of these remedies, the arbitrator should clarify that the employee does not in fact wish to be reinstated or re-employed and that the employee has adopted this position with full knowledge of the employee's rights under the LRA. Once the arbitrator is satisfied that the employee has made an informed decision not to seek reinstatement or reemployment, it is not appropriate for the arbitrator to interrogate the employee's reason for not seeking this relief any further.

#### *The circumstances surrounding the dismissal would make a continued employment relationship intolerable*

- 113 An employer who alleges that a continued relationship would be intolerable must present evidence to the arbitration that demonstrates this on a balance of probabilities. This evidence should establish that there are no reasonable prospects of a good working relationship being restored. An employer may seek to satisfy this burden by leading credible evidence, for example from co-employees who testify that they could not work with the dismissed employee.
- 114 The conduct of the employee prior to or after the dismissal, including during any disciplinary or arbitration proceedings, may have the result that the employee's reinstatement or re-employment would cause significant disruption in the workplace. For example, it may be intolerable for the employer to reinstate or re-employ an employee in a position of trust where the employee has been

found to have been dishonest in the disciplinary enquiry,<sup>45</sup> or to reinstate or re-employee [sic] an employee if the dismissal which would otherwise have been fair, is found to have been unfair only because the employer acted inconsistently.

*It is not reasonably practicable for the employer to reinstate or re-employ the employee.*

- 115 This criterion relates to factors other than the employment relationship which would render reinstatement or re-employment an inappropriate remedy. This criterion will be satisfied if the employer can show that reinstatement or re-employment is not feasible or that it would cause a disproportionate level of disruption or financial burden for the employer. The fact that another employee has been appointed in place of the unfairly dismissed employee is not in itself a reason to deny reinstatement, as the reinstatement of an unfairly dismissed employee may constitute a ground for terminating the employment of the newly appointed employee on the grounds of the employer's operational requirements. If reinstatement is not reasonably practicable, the arbitrator should consider whether ordering re-employment in other reasonably suitable work would provide a fair outcome. The onus is on the employer to present evidence to show that a remedy of reinstatement or re-employment is not reasonably practicable or that reinstatement should not be from the date of dismissal.<sup>46</sup> If the arbitrator is satisfied that reinstatement and re-employment are not appropriate remedies, the arbitrator must direct the employer to compensate the employee in accordance with the provisions of the LRA. Whether the employee took reasonable steps to mitigate the losses caused by dismissal is not a relevant factor in determining either whether reinstatement should be granted or the date from which it should take effect.<sup>47</sup>
- 116 An employer who is ordered to reinstate an employee must place the employee back in employment in the same position and restore the contractual relationship that applied to the employee prior to dismissal.
- 117 A reinstated employee's service is regarded as unbroken and the contract of employment as uninterrupted. If reinstatement is made fully retrospective the employee is placed in the same position he or she would have been in had there been no dismissal.<sup>48</sup> If an employee is reinstated, any changes in terms and conditions of employment introduced between the dismissal and the order of reinstatement, apply to the employee.<sup>49</sup>

### Ordering re-employment

- 118 An arbitrator may order the re-employment of an employee if the employee's dismissal consists of a failure by the employer to re-employ the employee as contemplated by section 186(1). In addition, an arbitrator may order the re-employment of an employee if it is not appropriate for the employee to be reinstated. The arbitrator may order the employer to re-employ the employee in either the work in

<sup>45</sup> *Maepe v CCMA & others (LAC)* at para 14.

<sup>46</sup> *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others (CC)* at para 29.

<sup>47</sup> *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others (CC)* at paras 40-43.

<sup>48</sup> *Equity Aviation Services (Pty) Ltd v CCMA and others (CC)* at para 36.

<sup>49</sup> *Myers v National Commissioner of the South African Police Service and another (LC)* at para 21.

which the employee was employed prior to the dismissal or in other reasonably suitable work. The LRA contemplates two broad situations in which it is appropriate to order re-employment. These are –

118.1 the arbitrator directs the employer to re-employ the employee in the work the employee previously performed but an order of reinstatement is inappropriate because, for example, the evidence indicates that the employee should be employed on different terms and conditions of employment;

118.2 the arbitrator directs the employer to re-employ the employee in work which is reasonably suitable. An order of re-employment in reasonably suitable work is appropriate where there are circumstances which prevent the employer taking the employee back in the position held prior to the dismissal.

119 The power to order re-employment gives arbitrators a broad discretion to fashion an appropriate remedy in cases in which reinstatement is not appropriate or feasible but fairness dictates that the employee should return to work with the employer.<sup>50</sup>

120 An arbitrator may only order re-employment into work that is reasonably suitable. This should be ascertained with reference to all relevant factors including -

120.1 The skills and experience required to perform the job;

120.2 The remuneration and benefits in the new position compared to those received in the previous position;

120.3 The status attached to the new position when compared with the previous position.

121 An arbitrator who orders an employer to re-employ a dismissed employee must indicate precisely the terms and conditions under which the employee is to be employed. The arbitrator must stipulate in the order of re-employment –

121.1 the extent to which terms and conditions of employment are changed or remain the same;

121.2 the extent to which the employee's service is to be regarded as continuous or interrupted;

121.3 what benefits, if any, the employee should receive in respect of the period between dismissal and re-employment.

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<sup>50</sup> For a useful discussion, see the Namibian case *Transnamib Holdings Ltd v Engelbrecht (Nm)* at p 1403 C-F in which it is said that the principal difference between the two concepts is that reinstatement relates to the identical job, while re-employment relates to a similar job.

- 122 In general terms, an order of re-employment is more likely to be appropriate in cases in which the reason for dismissal was the employee's incapacity or the employer's operational requirements. However, there may be cases in which it is an appropriate remedy for a misconduct dismissal.

### **Issues to consider in ordering reinstatement or re-employment**

- 123 Arbitrators must specify in an award –

123.1 the date from which reinstatement or re-employment is effective;

123.2 the date on which the employee must report for work with the employer;

123.3 the date by or on which the employer must pay any amount of "back pay" for the period between the dismissal and the employee returning to work. The arbitrator should specify the amount of back pay that must be paid to the employee and not merely order the employer to pay a certain number of months' remuneration as back pay. This amount is not compensation.<sup>51</sup>

- 124 An arbitrator may make an award of reinstatement<sup>52</sup> and re-employment effective from-

124.1 the date of dismissal; or

124.2 any subsequent date, not later than the date on which the employer is required to reinstate or re-employ the employee.

- 125 An award of reinstatement or re-employment may be made effective from a date which is more than 12 months prior to the date of the arbitration award.<sup>53</sup>

- 126 If the arbitrator elects to order that the effective date of reinstatement or re-employment is later than the date of dismissal, the employee forfeits remuneration and benefits for the period between the dismissal and date of reinstatement or re-employment. An award of this type may be appropriate if, for example, the employee was to some extent to blame for the dismissal or unduly delayed commencing or continuing the dispute proceedings.

- 127 Before ordering reinstatement or re-employment that is not fully retrospective, the arbitrator should consider the effect of the order on the employee's membership of, and entitlement to benefits from, any medical, retirement or group life assurance fund, scheme or policy.

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<sup>51</sup> *Equity Aviation Services (Pty) Ltd v CCMA & others (CC)* at paras 47-53.

<sup>52</sup> This cannot be a date earlier than the date of dismissal. See *National Union of Metalworkers of SA & Others v Fibre Flair CC t/a Kango Canopies (LAC)* at p 1080H-1081A.

<sup>53</sup> *Equity Aviation Services (Pty) Ltd v CCMA & others (CC)* at paras 47-53.

- 128 In appropriate cases, arbitrators may order that the employee be reinstated or re-employed subject to a sanction such as a warning. In that event, the arbitrator must specify the period for which the sanction is effective. The arbitrator must take into account any applicable disciplinary code.
- 129 An arbitrator may not order an employer to either reinstate or re-employ an employee and, in addition, award compensation to that employee. This applies irrespective of whether the arbitrator finds that the dismissal was also procedurally unfair.

### **Awarding compensation**

- 130 The relevant factors to be considered when awarding compensation include:<sup>54</sup>

130.1 the nature and reason for the dismissal;

130.2 whether the dismissal was automatically unfair;

130.3 whether the dismissal was substantively or procedurally unfair, or both; and if the dismissal is only procedurally unfair, the nature and extent of the deviation from procedural requirements;

130.4 whether the employee was guilty or innocent of the misconduct;

130.5 the consequences to the parties if compensation were or were not to be awarded; and

130.6 any conduct of the parties that undermines the objects of the Act.

- 131 The amount of compensation awarded to an unfairly dismissed employee –

131.1 must be just and equitable taking into account all the relevant circumstances of the case, and

131.2 may not exceed 12 months of the employee's remuneration at the rate applicable at the time of the dismissal.

- 132 Arbitrators must ensure that they have sufficient evidence to properly determine the amount of compensation. If the parties do not present the necessary evidence, the arbitrator should request the parties to provide additional evidence by way of oral or documentary evidence. There are different considerations that are relevant when determining compensation for a dismissal that is substantively unfair as opposed to one that is procedurally unfair. Guidance on the exercise of the discretion to award compensation must be sought in the purposes of the LRA and its interpretive principles. The amount of compensation must be determined with regard to the circumstances of both employer and employee. An employee is not necessarily entitled to the full extent of losses suffered as a result of the unfair dismissal.

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<sup>54</sup> *Dr D.C. Kemp t/a Centralmed v Rawlins* (LAC).

- 133 Compensation for an unfairly dismissed employee must be determined with regard to the extent of the employee's financial loss and the nature of the unfair dismissal. While the purpose of the compensation is generally to make good the employee's loss and not to punish the employer,<sup>55</sup> a compensation award may be used to express the arbitrator's displeasure at a seriously unfair dismissal and to that extent may have a punitive element to it.<sup>56</sup>

### **Compensation for substantively unfair dismissals**

- 134 In determining compensation for a substantively unfair dismissal, an arbitrator should consider the following:

134.1 the employee's remuneration and benefits at the time of dismissal;

134.2 the time that has elapsed since the dismissal;

134.3 whether the employee has secured alternative employment and, if so, when and at what rate of remuneration;

134.4 what steps the employee has taken to attempt to mitigate his or her losses by, for example, finding alternative employment;<sup>57</sup>

134.5 the patrimonial (financial) loss suffered by the employee. While this is a relevant factor in determining compensation, the absence of loss does not prevent an award of compensation;<sup>58</sup>

134.6 the employee's prospects of future employment. The employee's chances of finding future employment may be affected by factors such as age, experience, level of education, qualifications and the availability of suitable job opportunities;

134.7 whether the employee failed to use the opportunity to state a case at a disciplinary investigation or enquiry;

134.8 whether the resolution of the dispute was unreasonably delayed, and if so whether the delay was caused by either the employer or the employee (or their representatives).<sup>59</sup> A delay in referral may be taken into account even though condonation for a late referral was granted;

134.9 whether the dismissal was both substantively and procedurally unfair;

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<sup>55</sup> *Le Monde Luggage t/a Pakwells Petje v Dunn NO & others* (LAC) at para 30.

<sup>56</sup> *CEPPWAWU & another v Glass & Aluminium* (LAC) at para 49.

<sup>57</sup> While mitigation is a relevant factor in determining the amount of compensation, it must be borne in mind that there is no legal onus on the employee to seek to mitigate their losses pending the hearing of a dismissal case (*Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* (CC) at paras 40-43). Accordingly, a failure by the employee to prove that they took reasonable steps to mitigate their loss subsequent to dismissal is not a bar to the employee being compensated.

<sup>58</sup> *HM Leibowitz t/a The Auto Industrial Centre Group of Companies v Fernandez* (LAC) at para 22.

<sup>59</sup> *Karan t/a Karan Beef Feedlot & another v Randall* (LC) at para 17.

134.10 the extent of unfairness of the dismissal. This involves considering the extent to which the employer transgressed the requirements for a fair dismissal. For example, the amount of compensation might be increased if the employee committed no misconduct, as opposed to an employee committing some misconduct for which dismissal was not a fair sanction;

134.11 payments received by the employee from the employer, other than amounts due in terms of any law, collective agreement or the contract of employment.<sup>60</sup> For example, the amount of compensation may not be reduced by what the employee has received as notice pay, severance pay, or from the Unemployment Insurance Fund, but it may be reduced to take into account amounts which the employer has voluntarily paid over and above its contractual or statutory obligations;

134.12 whether the employee unreasonably refused an offer of reinstatement. In general, employers should not be penalised if they have offered to reinstate an unfairly dismissed employee. However, an employee may refuse such an offer, and be entitled to appropriate compensation, if the offer is not made in good faith or if the trust relationship between the employee and the employer has broken down as a result of or following the dismissal. Similar considerations may come into play if the employee refuses a reasonable offer of re-employment in circumstances in which reinstatement is not feasible;

134.13 whether the employee unreasonably refused other attempts by the employer to make substantial redress for the unfair dismissal such as securing employment with another employer or making an offer of payment;

134.14 whether the conduct leading to the employee's dismissal caused the employer loss and, if so, the extent of that loss;

134.15 the employer's financial position. The courts have held that the purpose of compensation is generally not to punish employers and an appropriate amount of compensation must be determined with reference to the situation of both the employer and the employee.<sup>61</sup> So, for example, the amount of compensation may be reduced if any greater amount would disproportionately prejudice the employer rather than remedy the unfair dismissal. In appropriate circumstances Commissioners should consider ordering compensation to be paid in instalments instead of a single lump sum.

135 The onus is on the parties to produce suitable evidence of the factors relevant to compensation that support their submissions. Mere allegations are not sufficient.

## Compensation for procedurally unfair dismissals

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<sup>60</sup> Section 195 of the LRA.

<sup>61</sup> *Le Monde Luggage t/a Pakwells Petje v Dunn NO & others (LAC)* at para 30.

136 An arbitrator who finds that a dismissal is procedurally unfair must determine –

136.1 whether an award of compensation is appropriate in the light of the severity of the procedural unfairness;

136.2 if it is, determine an amount of compensation that is just and equitable in all the circumstances.

137 The courts have held that compensation in these circumstances is a *solatium*<sup>62</sup> for the loss of the right to a fair pre-dismissal procedure. It is punitive of the employer to the extent that the employer who has breached the right must pay a penalty for doing so.<sup>63</sup>

138 In order to determine the appropriate amount of compensation for a procedurally unfair dismissal, the arbitrator must take into account the extent or severity of the procedural irregularity together with the anxiety or hurt experienced by the employee as a result of the unfairness.

139 An arbitrator may find that a dismissal is procedurally unfair but award no compensation because the procedural irregularity was minor and did not prejudice or inconvenience the employee. When assessing the extent of the procedural irregularity, arbitrators may consider the employer's conduct prior to, and in the course of, dismissing the employee.

140 As the determination of compensation for procedural unfairness is not based on the employee's actual financial losses, it is not relevant whether the employee has found alternative employment or mitigated the losses caused by the dismissal in any other way. An employee's length of service may be relevant in determining the extent of the anxiety or hurt suffered by the employee.

141 An arbitrator who finds that a dismissal is procedurally unfair may charge the employer an arbitration fee. This may be done irrespective of the finding on substantive fairness.<sup>64</sup>

## Costs awards

142 An arbitrator must exercise the discretion whether or not to make a costs order in terms of the requirements of law and fairness in accordance with any rules made by the Commission<sup>65</sup> and taking

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<sup>62</sup> Compensation for injured feelings as distinct from financial loss or physical suffering.

<sup>63</sup> *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (LAC)* at para 41.

<sup>64</sup> Section 140(2) of the LRA. The amount of the arbitration fee is published by the CCMA in an information sheet which is available from the CCMA and is downloadable on the CCMA website at <http://www.ccma.org.za/>

<sup>65</sup> Rule 39(1) sets out the factors that an arbitrator should *[sic]* have regard to considering whether to award costs. These are:

(a) the measure of success that the parties achieved; (b) considerations of fairness that weigh in favour of or against granting a cost order; (c) any with prejudice offers made with a view to settling the dispute; (d) whether a party or the person who represented that party in the arbitration proceedings acted in a frivolous and vexatious manner by proceeding with or defending the dispute or in its conduct during the arbitration proceedings; (e) the effect that a cost order may have on a continued employment relationship; (f) any agreement concluded between the parties to the arbitration concerning the basis on which costs should be awarded; (g) the importance of the issues raised during the arbitration to the parties as well as to the labour community at large; (h) any other relevant factor.

into account any relevant Code of Good Practice issued by NEDLAC and any guidelines issues by the CCMA.<sup>66</sup>

- 143 The costs that may be awarded in terms of the rules include the actual costs incurred by a party that is unrepresented or is represented by an employee, a director or a member of a closed corporation, an office-bearer or official of a trade union or employers' organisation or a trade union representative.<sup>67</sup> A commissioner who makes an award in terms of this provision must specify clearly the items and amounts in respect of which costs are ordered.<sup>68</sup> However, this provision may not be used to order a party to recompense the costs incurred by the CCMA in respect of the arbitration of a dispute. A commissioner may only award costs in respect of the legal fees of a party that is represented in an arbitration by a legal practitioner, if the other parties to the arbitration were represented by a legal practitioner.<sup>69</sup> The amount of costs that may be awarded in respect of legal fees is set by Rule 25(4).<sup>70</sup>

### **Amounts payable in terms of section 74 of the Basic Conditions of Employment Act 75 of 1997**

- 144 Section 74 (2) of the Basic Conditions of Employment Act 75 of 1997 gives CCMA arbitrators the jurisdiction to determine, in conjunction with unfair dismissal disputes, claims for amounts that an employer owes an employee in terms of the Basic Conditions of Employment Act, provided that the claim has not prescribed.<sup>71</sup> Those amounts include claims for unpaid salary or wages, overtime or leave pay.
- 145 As a result, an arbitrator may exercise jurisdiction if the claim only emerges during an arbitration and has not been raised in the referral form. In such a case, the employer would be entitled to a postponement in order to respond to the claim. The fact that a compliance order has been issued or proceedings have been instituted in another forum, is not a bar to an arbitrator determining the issue. However, once an arbitrator has made a determination in respect of an amount owing in terms of the Basic Conditions of Employment Act, no compliance order may be issued or enforced and no other legal proceedings may be instituted in respect of the claim.<sup>72</sup>

<sup>66</sup> Section 138(10) of the LRA.

<sup>67</sup> See Rule 25(1) (a).

<sup>68</sup> Rule 39(2).

<sup>69</sup> Rule 25(3).

<sup>70</sup> The costs that may be awarded are: (a) for the first day of arbitration (or any arbitration concluded in a single hearing) -R 6000 (VAT inclusive); (b) for each additional day of arbitration -R 4000 (VAT inclusive).

<sup>71</sup> The Basic Conditions of Employment Amendment Act removed the requirements that for the CCMA to exercise jurisdiction a claim had to be referred in compliance with section 191 of the LRA; the amount could not have been owing for longer than one year and that no compliance or legal proceedings had been instituted to recover the amount

<sup>72</sup> Section 74(2A) of the Basic Conditions of Employment Act, 75 of 1997.

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2. *Afrox Healthcare v CCMA & Others* [2012] ZALAC 2; [2012] 7 BLLR 649 (LAC); (2012) 33 ILJ 1381 (LAC).
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22. *Highveld District Council v CCMA & Others* (2003) 24 ILJ 517; [2002] 12 BLLR 1158 (LAC).
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