

INQUIRY BY ARBITRATOR

INTRODUCTION

It often happens that an employee (usually a senior employee) and employer consent to a disciplinary inquiry relating to conduct or capacity being chaired by a neutral third party. Whatever the outcome, the decision reached by the third party is usually deemed to be that of the employer. The CCMA, an accredited agency or a bargaining council may act as such third party in terms of section 188A of the Labour Relations Act (LRA). Both the employer and the employee must agree to this process. This process was previously referred to as Pre-Dismissal Arbitration. However, in terms of the LRA amendments, it is now known as "Inquiry by arbitrator".

An Inquiry by arbitrator is an arbitration hearing that takes place before an employer has decided whether or not to dismiss an employee and is usually reserved for cases that have the potential to lead to dismissal. This differs from other dismissal arbitration hearings held by the CCMA or a bargaining council which take place after a dismissal has taken place and after the completion of an appeal hearing. The inquiry by arbitrator process is intended to take the place of a disciplinary inquiry and where it is used, the matter may not subsequently be referred to the CCMA or a Bargaining Council for conciliation/ arbitration afterwards.

REQUIREMENTS TO BE MET

The employer and the employee must consent to the inquiry, in writing, on the prescribed form. The employer must pay the prescribed fee to the CCMA or bargaining council or the accredited agency.

The employee may only consent to the inquiry by arbitrator once he or she has been advised of the allegations that the employer has made against him or her.

NOTE: (i) An employee who earns more than the amount determined in terms of the Basic Conditions of Employment Act – section 6(3), may consent to the holding of an inquiry by arbitrator in his/her contract of employment. This means that a clause to this effect may be contained in the employment contract at the outset when the employee is employed. The effect of this is that it is not required to first obtain the written consent of such an employee prior to applying for such arbitration as he/ she has already agreed to this process when he/she was employed.

(ii) A collective agreement may also provide for such inquiry to take place. The employee's consent is not required where the employee is bound by a collective agreement.

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

REPRESENTATION

Legal representation may be allowed by the arbitrator upon application by either party. The employee may be represented by a co-employee, a shop steward or an official or office bearer of a registered trade union. The employer may be represented by a director or employee, or an office bearer, official of a registered employer's organisation.

GENERAL PROVISIONS

The same provisions, which apply to arbitrations apply to an inquiry by an arbitrator and includes the following:

- The arbitrator may conduct the hearing in a manner considered appropriate to determine the dispute fairly and quickly, taking into account that the substantial merits of the dispute must be dealt with the minimum of legal formalities.
- The arbitrator has the discretion to determine the appropriate form of the hearing.
- A party may give evidence, call witnesses, question witnesses of the other party and address concluding arguments to the arbitrator.
- If the parties agree, the arbitrator may suspend the inquiry and try to resolve the dispute through conciliation.
- If the referring party fails to appear, the matter may be dismissed.
- If the non-referring party fails to attend, the arbitrator may proceed with the inquiry in his/ her absence or may adjourn the proceedings.

The arbitrator must furnish an award within 14 days after the hearing with brief reasons for the decision. The Director of the CCMA may extend the 14-day period on good cause shown. The holding of an inquiry in terms of section 188A and the suspension of the employee on full pay pending the outcome does not constitute an "occupational detriment" in terms of the Protected Disclosures Act.

If an employee in good faith alleges that the holding of a disciplinary inquiry by the employer contravenes the Protected Disclosures Act, either the employee or the employer may require that an inquiry by an arbitrator be held. In such cases, the requirement for consent is waived.

ARBITRATION AWARD

The arbitrator, must in light of the evidence and reference to the criteria of fairness in the LRA, rule as to what action, if any, may be taken against the employee.

COSTS

The arbitrator may make an order for costs according to the requirements of law and fairness. (Refer to information sheet: Costs)

THE EFFECT OF THE AWARD

The provisions in the LRA dealing with the effect of the award, variation and rescission, and review apply to arbitration awards issued in terms of section 188A.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995
- Protected Disclosures Act 26 of 2000
- Basic Conditions of Employment Act 75 of 1997