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# ***CCMA Arbitration Guidelines***

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# *Process of drafting*



- ❑ Drafting team
- ❑ Governing Body (GB)
- ❑ Commissioner input (Commissioner Indabas 2008 and 2009)
- ❑ Input of experts
- ❑ Re-drafting
- ❑ Consultation with users
- ❑ Final approval of GB
- ❑ Gazetting
- ❑ Commissioner familiarisation and incorporation in commissioner training
- ❑ Public awareness

# *Contents*



- ❑ The purpose and nature of the Guidelines
- ❑ How to conduct arbitration proceedings
- ❑ Assessing evidence and drafting an award
- ❑ How to approach procedural fairness
- ❑ How to approach substantive fairness
- ❑ How to approach remedies

# *Purpose of the Guidelines*



- ❑ Consistency among arbitrators
  - ❑ process
  - ❑ award writing / structure
  - ❑ remedy
- ❑ Best practice for users

# *Purpose and Nature of the Guidelines*



- ❑ Issued ito s115(2)(g) – The commissioner ***must*** take the Guidelines into account
- ❑ To promote consistent decision-making in misconduct dismissals
- ❑ Supplementary guidelines envisaged
- ❑ By their nature, Guidelines are vague
- ❑ Ultimate test is fair and reasonable decision-making in the circumstances
  - ❑ s33(1) of the Constitution - fair administrative action



# *How to conduct arbitration proceedings*



- ❑ Arbitrator's discretion – s138(1)
- ❑ Arbitrator should explain the procedure
- ❑ Arbitrator may depart from rules of evidence, eg hearsay
- ❑ Arbitration is a new hearing –
  - ❑ evidence to be heard afresh
  - ❑ not a review of the employer's decision
  - ❑ but arbitrator may draw an inference from record of the hearing.

# *How to conduct arbitration proceedings*



- Six stages of arbitration
  - Preparation & introduction
  - Preliminary issues
  - Narrowing of issues
  - Hearing of evidence
  - Concluding arguments
  - The award

# *Assessing evidence & drafting the award*



- ❑ Structure of the award
- ❑ Summary of evidence
- ❑ Analysis of evidence
  - ❑ Determination of the relevant facts for the purposes of coming to a decision
  - ❑ Findings of fact based on
    - ❑ credibility, reliability of witnesses
    - ❑ probabilities and
    - ❑ assessment of the applicable rules
    - ❑ application of the Code of Good Practice: Dismissal

# *How to approach procedural fairness*



- ❑ The Code of Good Practice & Workplace procedures
  - ❑ Preference for less formal procedures as contained in Schedule 8
  
- ❑ Disciplinary action against a trade union representative
  - ❑ Departures from the Code may be justified if no prejudice suffered
  - ❑ Regard to the purpose of the requirement to “inform and consult” with the trade union

# *How to approach substantive fairness*



- ❑ Arbitrators are required to take the Code of Good Practice into account
- ❑ Each aspect of substantive fairness requires a discrete factual enquiry (but sometimes interlinked)
  - ❑ Was a rule contravened?
  - ❑ Rule valid or reasonable?
  - ❑ Employee aware of the rule? Or could reasonably be expected to be aware?
  - ❑ Rule consistently applied?
  - ❑ Dismissal an appropriate sanction?

# *How to approach substantive fairness cont.*



- ❑ Existence of the rule
  - ❑ **In employer's code**
  - ❑ **Some rules obvious / generally known**
  - ❑ **Proved by witnesses**
  - ❑ **Sector-specific**
  
- ❑ Employee aware of the rule?
  - ❑ Rules should be made known
  - ❑ Some obvious / generally known
  
- ❑ Rule contravened?
  - ❑ Purely factual enquiry
  - ❑ May be several facts to decide – eg insubordination

# *How to approach substantive fairness cont.*



- ❑ Rule valid or reasonable?
  - ❑ **Valid – Unlawful or contrary to public policy?**
  - ❑ **Reasonable – Range of possibilities; dependent of the job, sector**
  
- ❑ Dismissal appropriate?
  - ❑ Continued employment intolerable
  - ❑ Repeated correction has failed
  - ❑ Prescribed sanction
  - ❑ Circumstances of the contravention

# *How to approach substantive fairness cont.*



- ❑ Rule consistently applied?
  - ❑ Two types of consistency – over time and as between two employees alleged to have committed the same misconduct
  - ❑ The employer should justify different treatment
  - ❑ Circumstances of the misconduct may justify different sanctions
  - ❑ Employer may change its approach provided it makes employees aware of the change

# *Reasons for not dismissing:*

## *Factors that may justify a different sanction*



- ❑ Term “mitigating factors” is misleading
- ❑ Sanction is a rational response to risk in the enterprise
- ❑ Factors that should be taken into account should be relevant to the risk of further incidents and of harm to the enterprise.
- ❑ Code of Good practice identifies:
  - ❑ employee circumstances
  - ❑ the nature of the job
  - ❑ the nature of the contravention

# *Reasons for not dismissing:*

## *Factors that may justify a different sanction*



- **Employee circumstances:**

- Length of service
- Previous disciplinary record
- Personal circumstances

Eg, long service, a clean disciplinary record and a disability caused by an accident at work may indicate that continued employment is not intolerable and weigh in favour of a less severe sanction.

- **The nature of the job**

- The nature of the job may be such that the harm caused by a further contravention makes the risk of continued employment intolerable.

Eg, the risk for the employer would be greater for an air traffic controller falling asleep on duty than a labourer.

# *Reasons for not dismissing:*

## *Factors that may justify a different sanction*



- Circumstances of the contravention
  - Remorse
  - Provocation
  - Coercion
  - Use of racist or insulting language
  - Lack of dishonesty

# *How to approach remedies*



- If dismissal unfair, the arbitrator must determine an appropriate remedy.
- Section 193 of the LRA permits an arbitrator to direct an employer
  - to 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 substantive unfairness*



- Arbitrator must consider whether to order the employer to reinstate, re-employ or compensate the employee.
- **Reinstatement or re-employment**
- Unless –
  - the employee does not wish to be reinstated or re-employed;
  - a continued employment relationship would be intolerable;
  - it is not reasonably practicable for the employer to reinstate or re-employ the employee.

# *Choosing a remedy for substantive unfairness cont.*



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

- An arbitrator must ensure that
  - that the employee has an opportunity to state whether reinstatement or re-employment is sought as a remedy.
  - If the employee does not want reinstatement, the arbitrator should
    - clarify
    - check that the employee has adopted this position with full knowledge of the employee's rights under the Act.
  - Once satisfied that the employee has made an informed decision, it is not appropriate for the arbitrator to interrogate the employee's reason.

# *Choosing a remedy for substantive unfairness cont.*



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

- An employer alleging this must present evidence.
  - (Eg evidence from co-employees, who testify that they could not work with the dismissed employee.)
- There should be no reasonable prospects of a good working relationship being restored.
- The conduct of the employee prior to or after the dismissal, including during any disciplinary or arbitration proceedings, may be relevant.
- For example:
  - position of trust where the employee has been found to have been dishonest in the arbitration proceedings
  - dismissal unfair only because of inconsistency.

# *Choosing a remedy for substantive unfairness cont.*



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

- Relates to factors other than the employment relationship
- if the employer can show that reinstatement or re-employment is not feasible
  - that it would cause disproportionate 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,
  - If reinstatement is not reasonably practicable, the arbitrator should consider whether ordering re-employment in other reasonably suitable work.

# *Choosing a remedy for substantive unfairness cont.*



## **The difference between reinstatement and re-employment**

### Reinstatement:

- Same position in which the employee was working prior to the unfair dismissal
- On the terms and conditions of employment that applied to the employee prior to dismissal
- Service is regarded as unbroken
- Contract of employment uninterrupted
- If fully retrospective the employee is placed in the same position he or she would have been in had there been no dismissal.
- Any changes in terms and conditions of employment, such as a general increase in wages, apply to the employee.

# *Choosing a remedy for substantive unfairness cont.*



## Re-employment:

- Arbitrators have a broad discretion to fashion an appropriate remedy
  - where reinstatement is not appropriate or feasible but
  - fairness dictates that the employee should return to work.
  - Often appropriate in incapacity cases or operational requirements.
  - May be an appropriate remedy for a misconduct dismissal.
  - Where circumstances prevent the employer taking the employee back in the position held prior to the dismissal
- Either previous work or in other reasonably suitable work.
- May be on different terms and conditions of employment

# *Choosing a remedy for substantive unfairness cont.*



- An arbitrator may only order re-employment into work that is reasonably suitable. Relevant factors:
  - The skills and experience required to perform the job;
  - The remuneration and benefits in the new position compared to those received in the previous position;
  - The status attached to the new position compared with the previous.
  
- Arbitrator must indicate precisely the terms and conditions of re-employment:
  - the extent to which terms and conditions of employment are changed
  - the extent to which the employee's service is to be regarded as continuous
  - what benefits, if any, the employee should receive for the period between dismissal and re-employment

# *Choosing a remedy for substantive unfairness cont.*



- Arbitrators must specify in an award –
  - the date from which reinstatement or re-employment is effective;
  - the date on which the employee must report for work
  - the date by or on which the employer must pay any amount of “back pay”
  - the actual amount of back pay (This amount is not compensation.)

# *Choosing a remedy for substantive unfairness cont.*



An arbitrator may make an award of reinstatement and re-employment effective from—

- the date of dismissal (**may** be more than 12 months prior to the date of arbitration)
  - any subsequent date, not later than the date on which the employer is required to reinstate or re-employ the employee.
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- If a subsequent date, no pay or benefits for the period between the dismissal and date of reinstatement or re-employment.
  - Later date may be appropriate
    - if the employee was to some extent to blame for the dismissal or
    - unduly delayed commencing or continuing the dispute proceedings.
  - May be subject to a warning
  - No compensation in addition to reinstatement or re-employment.

# *Awarding compensation*



## **Awarding compensation**

- The amount of compensation awarded to an unfairly dismissed employee –
  - just and equitable taking into account all the relevant circumstances of the case, and
  - may not exceed 12 months of the employee's remuneration
- There must be sufficient evidence to properly determine the amount of compensation.
- If not, the arbitrator should request the parties to provide additional evidence by way of oral or documentary evidence.

# *Awarding compensation*



- Different considerations for substantive and procedural unfairness.
- Determined with regard to the circumstances of both employer and employee.
- Compensation is primarily a payment to offset the financial loss resulting from the dismissal, not to punish employer.
- Employee not necessarily entitled to the full extent of losses suffered as a result of the unfair dismissal.
- Arbitrator must determine the extent of that loss.
- However, may have a punitive element to it.

# *Awarding compensation*



## **Compensation for substantively unfair dismissals**

- Relevant factors: (The parties should produce evidence of the factors)
  - the employee's remuneration and benefits at the time of dismissal;
  - the time that has elapsed since the dismissal;
  - whether the employee has secured alternative employment and, if so, when and at what rate of remuneration;
  - whether the employee has taken reasonable steps to attempt to mitigate his or her losses by, eg, finding alternative employment.
  - the patrimonial (financial) loss suffered by the employee.
  - the employee's prospects of future employment.
    - affected by factors such as age, experience, level of education, qualifications and the availability of suitable job opportunities;
  - whether the employee failed to use the opportunity to state a case at a disciplinary investigation or enquiry;

# *Awarding compensation*



## **Compensation for substantively unfair dismissals**

- whether an unreasonable delay, and which party caused the delay;
- whether the dismissal was both substantively and procedurally unfair;
- the extent of unfairness of the dismissal;
- payments received, other than amounts due in terms of any law, collective agreement or the contract of employment.
- whether the employee unreasonably refused an offer of reinstatement or re-employment;
- whether the employee unreasonably refused other redress;
- whether the conduct leading to the employee's dismissal caused the employer loss and, if so, the extent of that loss;
- the employer's financial position;
- whether compensation should be paid in instalments instead of a single lump sum.

# *Awarding compensation for procedural unfairness*



## **Compensation for procedurally unfair dismissals**

- Arbitrator must determine –
  - whether compensation is appropriate
  - if it is, the amount of compensation that is just and equitable in all the circumstances.
- Compensation in these circumstances is a *solatium* for the loss of the right to a fair pre-dismissal procedure. (punitive of the employer)
- Relevant factors:
  - the extent or severity of the procedural irregularity
  - the anxiety or hurt experienced as a result of the unfairness.
- May award **no compensation** because the procedural irregularity was minor and did not prejudice the employee.
- Not based on the employee's actual financial losses
- Length of service may be relevant in determining the extent of the anxiety or hurt suffered

# *Consolidation of proceedings*



## **Amounts payable in terms of s74 of the Basic Conditions of Employment Act 75 of 1997**

- CCMA arbitrators may determine, in conjunction with unfair dismissal disputes, BCEA claims for amounts owing. Eg, unpaid salary or wages, overtime or leave pay, provided:
  - the claim has been stated in the 7.11 or 7.13 referral form;
  - not owing to the employee for longer than a year prior to the date of the dismissal; and
  - no compliance order has been issued and no other legal proceedings have been instituted.