



22nd Annual Labour Law Conference
August 2009

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
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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

Purpose & Nature cont.



- Interpretation of the law
 - Guidelines are CCMA policy and should be applied unless the commissioner has good reason for deviating, and should then give reasons
 - Commissioners to interpret and apply Court decisions (CC, SCA, LAC. LC)
 - Comms to follow most recent and binding, but...
 - Apply interpretation preferred in Guidelines (give reasons for departure)
 - If CCMA interpretation is reversed, to be followed (pending amendment to the Guidelines)

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.