What is CON-ARB?

Employers and employees need to look very carefully at notices to attend the CCMA in order to see what type of process has been set down. No party wants to arrive at CCMA thinking that they will only be facing only a mediation process and then find that the court case (arbitration hearing) occurs on the same day.

The CCMA is constantly overloaded with cases hearing up to 200 000 cases a year. This can result in backlogs and delays in resolution of disputes. As a consequence the Labour Relations Act (LRA) as amended in 2002 provides for a speedier dispute resolution process called con-arb which stands for conciliation-arbitration. This hybrid process is most frequently used and the old system of conciliation now and arbitration later is seldom applied in the normal course of events.

Regardless of whether the old or the new system is applied the process always begins with conciliation. This is a peace-making process whereby a CCMA or bargaining council (BC) mediator tries to assist the employer and employee to reach an out-of-court agreement. It is an exercise that is intended to end in a settlement agreement. The commissioner has no authority to make an award (judgement).

On the other hand, Arbitration is a judicial-type process that usually occurs if a conciliated settlement is not achieved. That is, it is Step 2 in the process if Step 1 (conciliation) fails to resolve the matter. At arbitration the employer and employee do not negotiate an agreement. Instead, they bring and present evidence as in any court case. Then the arbitrator, after hearing all the evidence, makes a finding as to which party was in the wrong.

Con arb is when, instead of scheduling the arbitration for a later date, it is held on the same day, the very MINUTE that conciliation fails! The employee is not required to apply for arbitration; it occurs automatically the very moment the conciliator declares that conciliation has failed. Thus, the parties have no time after the conciliation meeting to prepare their evidence and arguments for the arbitration!

Con-arb is not compulsory for all types of dispute. It is compulsory when the dispute concerns:

The dismissal of an employee for any reason relating to probation
Any unfair labour practice relating to probation.

In addition, if neither party objects to con-arb then con-arb is likely to take place even if probation is not involved, provided that the dispute concerns:

A non-strike dismissal for conduct or capacity
Constructive dismissal
The employer's failure to substantially preserve the employment conditions of employees when transferring them in terms of section 197 of the LRA
An employee who does not know the reason for the dismissal
An unfair labour practice.

Therefore, on receiving any con-arb notice a party who does not want con-arb must lodge a formal objection at least 7 days in advance of the set hearing date. However, such an objection will not be valid if the dispute concerns an unfair dismissal relating to probation or an unfair labour practice relating to probation.

It is essential for employers and employees who receive con-arb notices to:

Realise straight away that it is a con-arb that has been scheduled
Understand what con-arb means for them in practice
Begin immediately with preparations for the con-arb.

This is particularly so because the parties seldom get more than 14 days advance notice of a con-arb. The parties need to enter into intensive preparations the moment they receive a con-arb notification because 14 days is very little for purposes of preparation. Included in these preparations should be:

The preparation of the witnesses of truthful, relevant and accurate testimonies
Collecting and preparing documentary and other evidence
Responses to anticipated evidence that the opposing party could bring
Preparation of case arguments and case law.

To book for our 12 March webinar on Retrenchments In the Covid Environment please contact Ronni on ronni@labourlawadvice.co.za or 0845217492.