

New arbitration guidelines for 2012

The main purpose of these new guidelines is to promote consistency in the decision-making of commissioners in arbitrations dealing with dismissals for misconduct.

The guidelines are intended to show arbitrators on how to deal with misconduct arbitrations, but they will also be of great assistance to users in preparing for and presenting a case at arbitration.

The guidelines emphasise the narrowing of issues in dispute at the commencement of the hearing. Parties can expect commissioners to be more robust in this regard. Essentially, taking time at the beginning of an arbitration to identify what is in dispute and what is not assists the parties, because it is only necessary to lead evidence on issues that are in dispute.

The guidelines also cover the factors that are taken into account when an arbitrator assesses substantive and procedural fairness, as well as remedies. This is not only

The Commission for Conciliation, Mediation and Arbitration (CCMA) will introduce new arbitration guidelines from January 1 2012.

useful for the arbitrator making the decision, but also for users in presenting evidence.

The procedures followed by employers in misconduct disciplinary hearings still tend to be very formal and legalistic. The guidelines stress that procedural fairness entails only five key aspects:

- 1 The employer must notify the employee of the allegations of misconduct.
- 2 The employee should be allowed reasonable time to prepare a response to the allegations.
- 3 The employee should be allowed the assistance of a trade union representative or fellow employee.
- 4 The employee should be given an opportunity to state a case by giving

an explanation and calling witnesses.

- 5 The employer should communicate the decision in writing and advise the employee of the right to refer the matter to the CCMA or bargaining council.

More broadly, the new arbitration guidelines will assist to create some certainty as they:

- Clearly set out how arbitrators must deal with misconduct dismissal arbitrations;

- Effectively become CCMA policy and all CCMA arbitrators have to comply with the guidelines;

- Require that the decisions of CCMA arbitrators be aligned to labour and other court judgments wherever this may be applicable and pro-

vide guidance on how to deal with matters in which there may be conflicting court precedents;

- Will guide and assist arbitrators in ensuring that their awards are reasonable and insulate decisions against review by the courts;

- Clearly set out the requirement for an arbitration hearing to be con-

ducted as a new and fresh process and to not be a mere repeat of the original disciplinary hearing;

- Clearly set out the various stages of the arbitration process and give guidance to arbitrators on the narrowing of issues and when and how to deal with preliminary matters and rulings related thereto.