



Contact Labour
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LABOUR NEWS

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The "Stay Out of the CCMA" Masterclass:

SOUND ADVICE & FAIR LABOUR PRACTICE

- ✓ HR Solutions
- ✓ Labour Relations
- ✓ Disciplinary Hearings
- ✓ CCMA Disputes
- ✓ Labour Law Practitioners
- ✓ EE & SDL Submissions



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1. THE GOLDEN RULE: THE "TWO-LEGGED" FAIRNESS TEST

Under Section 188(1) of the Labour Relations Act (LRA), for a dismissal to be legally "bulletproof," it must stand on two legs:
Substantive and Procedural fairness.

- **Substantive Fairness (The "Why") — LRA s 188(1)(a):**

You must have a valid and fair reason for the dismissal.
The law only recognizes three categories:

- a. Misconduct: The employee broke a clear, reasonable, and known workplace rule.
- b. Incapacity: This covers both Poor Work Performance (can't do the job) and Ill Health/Injury.
- c. Operational Requirements: Business-based reasons, commonly known as retrenchment.

- **Procedural Fairness (The "How") — LRA s 188(1)(b):**

You must follow a fair process as guided by the Code of Good Practice: Dismissal (Schedule 8).

Pro-Tip: The standard for procedural fairness has evolved. The courts, specifically in the Avril Elizabeth Home case, have rejected the old "criminal justice model" (formal trials) in favour of a "process of dialogue and reflection". Even if you catch someone red-handed, the law still requires a fair opportunity for the employee to respond.

2. THE 2025/2026 REGULATORY WAVE: WHAT'S NEW?

**LABOUR LAW IS NOT STATIC.
HERE ARE THE CRITICAL UPDATES FOR THIS YEAR:**

1. The New Earnings Threshold:

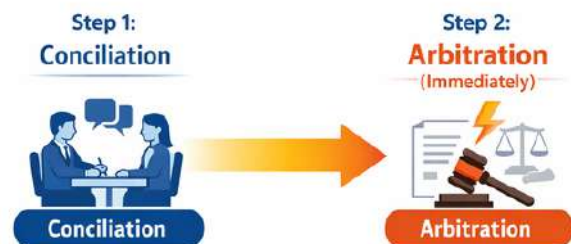
As of 1 April 2025, the ministerial earnings threshold is R261 748.45 per annum. Employees earning below this amount have significantly higher protections regarding "deemed" employment for TES workers and fixed-term contracts.



3. Con-Arb Fusion:

Under LRA Section 191(5A), certain disputes (like those involving probation) must go through "Con-Arb," where arbitration happens immediately if conciliation fails.

2. The "Usually" Flexibility:
Recent draft reforms (Item 11) now use the word "usually" when describing procedural requirements like written notification of allegations. This is designed to assist small businesses—defined by experts as those with 10 or fewer employees—who may lack a dedicated HR department.



3. COMMON MISTAKES: THE "HALL OF SHAME"

AVOID THESE FREQUENT BLUNDERS THAT MAKE CCMA COMMISSIONERS REACH FOR THEIR PENS:

- **The Inconsistency Trap (Schedule 8, Item 3(6)):** You must apply discipline consistently with how you've handled similar cases in the past and between different employees involved in the same misconduct.
- **The Probation Pitfall (Schedule 8, Item 8):** Probation is an evaluation period for both performance and overall suitability. While you can rely on "less compelling" reasons to dismiss a probationer (Item 8j), you still must provide reasonable evaluation, instruction, training, and counseling first.
- **The "Surprise" Dismissal:** Discipline should be corrective and progressive (warnings/counseling). Dismissal is a "last resort" reserved for misconduct so serious it makes the relationship intolerable.



4. PAPERWORK: IF IT'S NOT WRITTEN, IT DIDN'T HAPPEN!



THE CCMA LOVES A PAPER TRAIL, AND THE BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA) DEMANDS IT:

- **Written Particulars (BCEA s 29):** You must supply every employee with written particulars of employment upon commencement.
- **Disciplinary Records (Schedule 8, Item 5):** Employers must keep records for each employee specifying the nature of transgressions, the actions taken, and the reasons for those actions.
- **Certificate of Service (BCEA s 42):** Upon termination, you are legally required to provide this document, stating full names, dates of service, and job description.
- **Record Retention:** Most employment records, including time worked and remuneration paid, must be kept for three years after the date of the last entry or termination.

BONUS: TIPS & TRICKS



1. The 30-Day Clock:

An employee has exactly 30 days from the date of dismissal to refer a case to the CCMA. If they miss this, they must apply for condonation (legal forgiveness).

2. Representation Rights:

Under the LRA, an employee is entitled to assistance from a fellow employee or a trade union representative during the inquiry. You generally don't have to allow external lawyers for internal hearings unless the case is exceptionally complex.



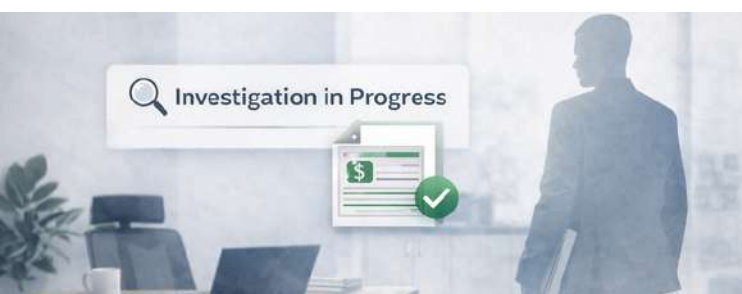
3. The Notice Pay Nuance:

For employees with more than one year of service, the statutory minimum notice is four weeks. If your contract says 60 days, that is a contractual enhancement you must honour unless the employee is still in an unsuccessful probation phase where "confirmation" hasn't happened.



4. Suspension Strategy:

If you need to remove someone during an investigation, it must be a precautionary suspension with full pay.



HORROR STORY: THE "TRAGEDY OF ERRORS" THAT FORCED AN EMPLOYER TO PAY A RACIST TO GO AWAY.

In the landmark case of South African Revenue Service v CCMA and Others, an anti-smuggling officer was charged with gross misconduct for using the "k-word" against his supervisor. He pleaded guilty at his internal disciplinary hearing, and a sanction of a final written warning and 10 days' suspension without pay was negotiated and imposed by the chairperson.

The "horror" for the employer began when the SARS Commissioner unilaterally converted the warning into a dismissal without affording the employee any opportunity to contest the higher and terminal sanction. Because the employer failed to follow a fair procedure—effectively renegeing on their own negotiated deal—the employee challenged the dismissal as both substantively and procedurally unfair.

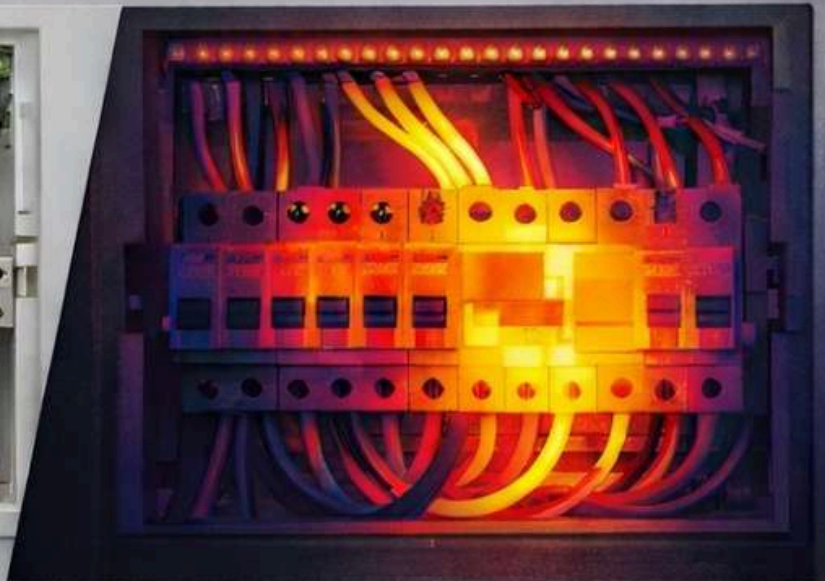
The matter served before the CCMA, the Labour Court, and the Labour Appeal Court, all of which originally ordered the employee's reinstatement. The case eventually reached the Constitutional Court, which agreed that the employee's conduct was "repugnant" and that reinstating him would be like "recklessly leaving a ticking time-bomb unattended".

However, the Court highlighted that the employer had committed a "tragedy of errors" by ignoring its own disciplinary code and collective agreements. Consequently, although the Court set aside the reinstatement, the employer was still ordered to pay six months' compensation to the guilty employee as a "just and equitable" remedy for their procedural blunders.

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