



DIE VERANDERING IN ONDERWYS  
THE CHANGE IN EDUCATION



## *FORMAL DISPUTES IN EDUCATION*

A BASIC GUIDE ON STEPS IN THE PROCESS



## PURPOSE OF THIS PRESENTATION



- Just to give managers a basic idea of the process.
- Familiarize managers with the terms and timelines they will hear about.
- Give managers an idea of what the District might want from you in the case of an arbitration.
- Ensure that managers take a referral by an SGB employee seriously.
- Ensure that managers communicate with specialists at the union to assist should you need it.

## REFERRAL OF THE DISPUTE



- Existing dispute may be referred – not if premature.
- Includes “alleged” dispute
- Opportunity to settle matter
- Date on which dispute arose

### Who may refer dispute?

- Any party to a dispute -
- Employee(s), union(s)
- Employer(s), employer organisation(s)
- Representative

## REFERRAL OF THE DISPUTE



Dispute of  
interest

Dispute of  
right

Dismissal

(30 DAYS)

Promotion

(30 DAYS)

Unfair Labour  
Practice

(90 DAYS)

## WHERE IS A DISPUTE REFERRED TO?



- Department employed Educators - **E**ducation **L**abour **R**elations **C**ouncil
- Department employed OTHER STAFF – **P**ublic **S**ervice **C**o-ordinating **B**argaining **C**ouncil
- SGB Employed staff – CCMA. This includes the grade R practitioners, the ESSP patrollers and such.



*Snow White and the Wicked Queen submit the fairness question to binding arbitration.*

## WHAT TO DO WHEN A BC REFUSES JURISDICTION?



- When the PSCBC or the ELRC refuses to arbitrate a matter because it falls outside of their jurisdiction – they will send you documentation to say this. This documentation is crucial because of the date on it and the date it is sent to you.
- Do not waste time writing letters explaining why jurisdiction was wrongly refused – refer to CCMA with letter from BC. If late, automatically fill in Condonation form – attach letter. Ask for a senior commissioner with experience in the ELRC. (Form 7.15)
- The CCMA is legally obliged to arbitrate any case not under jurisdiction of other Bargaining councils – except for those things that Must go to Labour Court.

## APPLICABLE PROVISIONS



- ELRC Constitution - Part C: Dispute Resolution Procedures
- GPSSBC Constitution
- PSCBC Constitution
- Labour Relations Act, 1996 (Act 66 of 1995) as amended
- CCMA Rules

# AS A PRINCIPAL – WHEN WILL I BE INVOLVED?



- **When the Department is the Respondent in a case made by an employee.**
  - More than 90% of these are misconduct dismissal referrals (no automatic legal representation)
  - Promotional issues is second
  - You facilitate by ensuring that witnesses are available to be interviewed and that they can be transported to a venue.
  - You facilitate by making four copies of relevant documentation which District wants.
  - Sometimes the length of the process requires food for learners and transport money for a witness who has moved.
- **When you have an SGB employed employee who refers a case.**
  - Circular 1 of 2016 still puts you in charge of discipline – you will be the face at the dispute process who has to disprove what the employee says.
  - Be wary of using public funds to pay for a legal practitioner
  - Contact your union for assistance in preparing



## GATHERING INFORMATION



- Gather information relevant to the case
- Focus on solutions and facts
- Speak to witnesses who have relevant information and make notes
- Do an initial investigation on the issues involved
- Decide provisionally on key arguments
- Evaluate all the information and decide how to proceed
- Develop an opening statement to present at the conciliation

# STRATEGISING YOUR CASE



- Strategising a case means
  - to decide what one wants to achieve through the process
  - how to achieve it.
- Think about strategic issues such as
  - issues that should be dealt with during the conciliation
  - the order in which to deal with these issues
  - information to disclose in joint session
  - information to disclose in caucus (side meeting) with panelist
  - documents to be made available to assist settlement, refresh memory, or to refer to if required

## WHAT IS A DISPUTE?



- It is an argument or disagreement, especially an official one between employee and employer which was not resolved internally.
- It has two steps – conciliation and arbitration.
- **Before arbitration can happen parties must try and resolve the issue amicably - CONCILIATION**
- Conciliation is a facilitation process where the CCMA or bargaining council assists parties in their attempts to resolve their dispute.

# WHAT IS CONCILIATION?



Section 135(3) of LRA:

*“The commissioner must determine a process to attempt to resolve the dispute, which may include –*

*(a) mediating the dispute*

*(b) conducting a fact-finding exercise; and*

*(c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.”*

**THE PARTIES RESOLVE ISSUE THEMSELVES BY THEIR INPUTS,  
LED\FACILITATED BY A NEUTRAL THIRD PARTY**

# WHAT IS THE PURPOSE OF CONCILIATION?



## **In terms of act:**

- To settle as many disputes as possible through consensus.

## **For Practitioners:**

- To settle disputes on terms acceptable to you
- To elicit information to assess the strength of your case
- To weaken the other party's perception of their case and to strengthen their perception of your case
- To enhance the relationship between you and other parties
- To narrow down the issues in dispute

## WHO ATTENDS CONCILIATION?



- Parties must attend conciliation meeting
- Irrespective of whether or not party represented – NO **LEGAL REPRESENTATION AT CONCILIATION**
- If party fails attend in person, but representative is present, conciliator may
  - Adjourn proceedings to later date within prescribed period
  - Continue in absence of party who not in attendance
  - Conclude by issuing certificate - unresolved.
- **Legal representation at conciliation only in as far as -**
  - Condonation applications
  - Jurisdictional objections
  - Applications for legal representation to be allowed in arbitration
  - Rescissions
  - Not issues themselves

# WHAT IS ARBITRATION?



- Arbitration is a quasi- legal compulsory process by which an arbitrator who is an impartial third party hears both the employer's and employee's cases and after that makes a ruling – this award is in terms of settlement of the dispute and is final and binding.
- It is a quasi-legal process and should not be too legalistic although an arbitrator must ensure that both parties have a fair opportunity to present their cases.
- It can be described as non-legalistic resolution to a civic dispute between parties. Applicant generally bears the onus of proving on a balance of probability why it should succeed in its claim. Evidence is led under oath or affirmation and subject to cross-examination.



## How does arbitration differ from a civil or criminal trial?

- The South African Court system has various courts
- These courts have various jurisdictions
- All courts operate in terms of Rules which are formal and relatively rigid, somewhat relaxed in Small claims court.
- Arbitration shares some procedural aspects with civil court proceedings, such as application of the rules of evidence (*albeit*, not that strictly; allowing for closing arguments; etc but not as formal or as rigid and discretion of Arbitrator distinguish arbitrations from court procedures.



## DIFFERENCES BETWEEN THE TWO PROCESSES?



Conciliation	Arbitration
Parties decide on a settlement with the help from a commissioner	Commissioner makes the final decision based on evidence and arguments
Parties determine the outcome	Commissioner determines the outcome
Informal and without prejudice	More formal, on the record
No need to bring evidence	All evidence must be presented at the hearing
Voluntary outcome	Compulsory outcome

# ENFORCEMENT



- **Enforcement becomes applicable when a party fails to comply with the terms of the arbitration award.**
  - ❖ Party does not pay the money that was awarded
  - ❖ Party does not perform/reinstate as was awarded

# ENFORCEMENT



- In terms of the Labour Relations Act -**Section 143(1)** arbitration awards are binding and final and can be enforced as if they were orders of Labour Court. (other than advisory awards.)
- An award can be so enforced only if the **director of the CCMA** has certified the award in terms of **section 143(3)**, The power to certify awards has been delegated to the CSC's of the provincial offices. (Form 7.18)
- If an award sounds in money the amount ordered in the award earns interest from the date of the award at a rate prescribed in section 2 of the Prescribed Rate of Interest Act 55 of 1975 unless the award says otherwise. (**Section 143(2)**)
- Where an award orders performance of an act such as reinstatement the award can be enforced by way of contempt proceedings in the Labour Court. **Section 143(4)** and awards issued after 1 January 2015 need not be made orders of court before contempt proceedings can be instituted.
- A certified award for the payment of money (compensation, backpay or damages may be presented to the sheriff for execution if payment is not made. There is no need to first approach the court to issue a writ of attachment (in respect of awards issued after 1 January 2015) the award can be enforced as if an order from a Magistrate's Court and fees are Magistrate's Court scale.

## REVIEW



- There are specific reasons why a review would be successful.
- Review is not appeal.
- Review is extremely expensive and there should be very good reasons to go on review – such as precedent.



**THANK YOU**  
**DANKIE**