



SiMODiSA Research: Labour law

14 May 2014



The challenge & current status quo



Overview

- Overly restrictive environment, making employers reticent to hire due to the risk
- Perception of rigidity also leads to poor investor perception & avoidance
- Disciplinary procedures are more costly & complex than they need to be
- Interpretation & application of the law is unclear & inconsistent leading to abuse & over-burdening of the system



Probation Period: Overview

- Probation period in contract of employment to assess employee performance & suitability
- Unfair dismissal laws apply from start of contract
- Employer has obligation to provide training, instruction & opportunity to improve
- The standard of fairness is lower for a performance-related dismissal but not consistently applied by the CCMA
- Key challenges:
 - Employer risk in hiring because (1) probation period still includes onerous dismissal procedures & obligations & (2) ability to fire after is even more difficult
 - Obstructive to economic growth & job creation



Fair Dismissal Procedures: Overview

- Every employee has the right not to be unfairly dismissed
- The Codes of Good Practice must be considered by CCMA & Labour Courts when determining “fairness” of dismissals.
- The Codes of Good practice require giving the employee an opportunity to state his / her case on dismissal
- Interpretation by lawyers & the CCMA introduce overly complex & formal procedures on dismissal
- Key Challenges:
 - Disciplinary procedures are more complex & costly than necessary so employers are put off hiring



CCMA Dispute Resolution: Overview

- Role of the CCMA is to mediate & / arbitrate disputes, providing free dispute resolution prior to labour court action
- If a dismissal is considered unfair, it can be taken to the CCMA where it is mediated. If not settled, arbitration is the next step. Applies across the board irrespective of level of skill or what salary indicates capacity should be
- Key challenges:
 - There are no laws that discourage frivolous referrals
 - The CCMA is overburdened leading to lengthy delays in resolving disputes
 - Small business does not have the resources to carry these costs and loss to productivity



FUTURE AHEAD

Proposed Solution



Parameters of suggested reform

- Balance measures in the interests of employers with protection of core labour standards & right to work security for employees
- Consistent with SA's membership of the International Labour Organisation (ILO), our ratification of its core Conventions & international practice
- Consistent with the Constitution of South Africa



Introducing a Qualifying Period

- Recommendation:
 - Introduce a qualifying period of 12 months during which employees have no claim for unfair dismissal, excluding discrimination
 - For businesses of 50 paid full-time equivalent (FTE) employees or less
- Precedent:
 - Australia, Ireland & Canada have 12 month qualifying period. UK recently extended this from 12 months to 24 months.
 - Spain & Australia limit this concession to small businesses and define based on number of FTE employees
 - South African National Small Business Act = 50 full-time paid employees or less = small business



Fair Dismissal Procedure

- Recommendation:
 - Maintain the requirement for employers to give the employee an opportunity to state his / her case on dismissal
 - Provide guidelines & interpretation notes on the dismissal laws
 - Train CCMA Commissioners to re-introduce simple industrial justice
- Precedent:
 - There is no requirement in international standards & SA labour legislation for an in-house ‘court’ hearing
 - Code of Good Practice - “does not have to be a formal enquiry” by the employer; employee “should be allowed an opportunity to state a case”
 - Few countries require a hearing



Reduce burden on CCMA Dispute Resolution

- Recommendation
 - The CCMA can exercise its power to make rules introducing adverse costs orders for frivolous claims in arbitrations
 - Provide guidelines & interpretation notes to be followed by CCMA commissioners in giving these costs orders
 - Train CCMA Commissioners in use & importance of adverse cost orders
- Precedent
 - In SA civil courts an adverse costs order can apply
 - The CCMA has power in terms of the Act to make rules for costs orders in arbitration



Thank you

CONTACT

Jason Goldberg

t. +27 10 001 3715

c. +27 83 675 5358

e. jgoldberg@edgegrowth.com

Gabrielle Habberton

t. +27 10 001 3715

c. +27 72 746 9467

e. gabrielle@impacttrust.org.za

impacttrust

*Brought to
you by*



OMIDYAR NETWORK™



SiMODISA
START-UP