

COMPENSATION ORDERS AT THE CCMA

The following information may be useful to those of you who have to argue the question of compensation at the CCMA:

1. Compensation is different from backpay, i.e. if someone is reinstated with retrospective effect, the amount payable is not “compensation” but remuneration due in terms of the individual’s contract. This means that the considerations mentioned below do not apply.
2. If compensation is ordered in place of reinstatement, or for procedural unfairness, it should be borne in mind that
 - a. S 194 gives the arbitrator a discretion to award compensation equivalent to anything up to 12 months’ remuneration. This applies to unfair dismissal as well as unfair labour practice claims.
 - b. The arbitrator’s discretion must be exercised “judicially”. This means that the commissioner has a duty to give full reasons why he / she awards, e.g. 3, 7 or 12 months’ remuneration as compensation. If no reasons are provided in the award, the possibility of a review exists on the basis that the discretion was not exercised judicially but arbitrarily or “capriciously”. Factors that influence the amount awarded will include
 - i. Whether the dismissal is both substantively and procedurally unfair;
 - ii. Any unreasonable delay on the part of the employee in initiating or prosecuting the referral to the CCMA;
 - iii. Actual financial loss suffered by the employee as a result of the dismissal, e.g. salary;
 - iv. The employee’s length of service;
 - v. The employee’s prospects of finding alternative employment;
 - vi. The seriousness of the harm done to the employer by the employee’s misconduct;
 - vii. The amount already received from the employer by way of termination benefits;
 - viii. Whether the employer has already provided some kind of redress, e.g. a favourable reference, or alternative employment, or an unconditional offer of reinstatement, or an unconditional offer to conduct a fresh hearing;
 - ix. The degree to which the employer’s attempts to provide redress have been frustrated by the employer;

- x. The employer's financial position.
- c. The CCMA director will decline to certify awards (for execution purposes) that require compensation or other monies (e.g. arrear salary) to be paid if the award does not stipulate the actual date by which it must be paid, i.e. the award should not merely state that the money must be paid within 30 days but specify the date by which payment must be made, e.g. 1 December 2005. Although this does not constitute a ground for review, it does buy the employer time if it is considering a review.