

LATE REFERRALS - CONDONATION APPLICATIONS



WHAT IS A LATE REFERRAL?

The Labour Relations Act (LRA), states that unfair dismissal disputes need to be referred to the CCMA within thirty (30) days of the date of the dismissal. If the dispute is referred outside the 30-day period it is a late referral, and an application to condone (excuse or pardon) the late referral is required.

The LRA also requires an unfair labour practice dispute to be referred to the CCMA, within ninety (90) days of the act or omission that allegedly constitutes the unfair labour practice or, within 90 days of the date on which the employee became aware of the act or occurrence. If the unfair labour practice dispute is referred outside of this 90- day period, it is a late referral and condonation for the late referral is required.

Similarly, the LRA requires that a party seeking to refer a dispute to arbitration must do so within (ninety) 90 days after a commissioner has issued a certificate that the dispute remains unresolved, or within ninety (90) days after the 30-day conciliation period has ended. An application for referral outside of this period will require an applicant for condonation.

In terms of the Employment Equity Act (EEA), any party to a dispute may refer a dispute within six (6) months after the act or omission that allegedly constitutes unfair discrimination. If the alleged discrimination is referred outside of the six months period it is a late referral and condonation for the late referral is required.

Condonation may also be applied for a delay in following application proceedings in terms the time periods set out in the CCMA Rules.

HOW IS THE 30-DAY, 90-DAY AND SIX MONTH PERIOD COUNTED?

All days are counted, including weekends and public holidays. When counting, exclude the first day and include the last. For example if the employee is dismissed on 06 August, the calculation of the 30 days will start from 07 August and the last date by which the dispute must be referred to the CCMA is on 05 September.

If an employer terminates an employee's employment on notice, the date of dismissal will be the date on which the notice expires, if it is an earlier date, the date on which the employee is paid all outstanding salary.

If the same employee wants to refer an unfair practice dispute which occurred on 06 August, the calculation of the 90 day period will start on

07 August and the last date by which the dispute must be referred to the CCMA is 04 November.

If the same employee wants to refer a discrimination dispute which occurred on 06 August, the six month period is calculated in terms of months and will start in September and the last month for referring the dispute to the CCMA is February. Because of the first day is excluded and the last day is included, the last day for referring the matter to the CCMA is 05 February.

HOW TO APPLY FOR CONDONATION

The CCMA Rules require the applicant to bring an application, on affidavit (sworn statement), explaining why the referral is late and why the CCMA should allow the matter to continue. The LRA permits condonation to be granted on "good cause shown". The CCMA rules set out what the application should contain. These are the following:

- **The degree of lateness**
The applicant must indicate the number of days that the referral is late by explaining when the applications have been served. The applicant must show the number of days late by showing when the CCMA should have received the application.
- **The reason for the lateness**
The applicant needs to explain why the dispute was referred late by explaining the steps taken prior to referring the case to the CCMA. The applicant must account for the entire period of lateness, and where possible provide proof up until the date of submission. The applicant must account for the entire period of lateness and where possible, provide proof.
- **Prospects of success on the merits of the case**
The applicant needs to provide reasons why he/she believes that he/she has a strong case which should be heard, once condonation is granted. This will involve giving some background into the nature of the dispute and explaining why it is alleged to be unfair.
- **Any prejudice to the other party**
Finally, the applicant must consider what disadvantages will be suffered by the other party if condonation is not granted or granted.
- **Any other factor to be considered** including social justice considerations.

FURTHER STEPS TO FOLLOW

Once the statement is completed, a commissioner of oaths must sign and stamp the application e.g. a Police officer.

The applicant must serve a copy of the application on the other party by (fax, registered mail, e-mail or hand delivery) and return the application to the CCMA with proof that the copy has been served on the other party.

The other party has the opportunity to oppose the application in writing within five (5) days from date the application was served on that party.

The applicant has the opportunity to respond to the other parties' allegation within three (3) days, however no new issues can be raised at this stage.

The other party can also oppose the application orally on the day of the hearing.

NOTE: A commissioner will consider whether or not to grant condonation. This is done by either holding a hearing or considering the application on the basis of the sworn statements served. The commissioner will notify the parties in writing of the decision within fourteen (14) days and explain why condonation was granted or refused. Alternatively the commissioner may give a verbal ruling and follow this up with a written version thereof.

If condonation was granted, the dispute would proceed to the next process being either conciliation or con-arb. If condonation was refused, the CCMA cannot hear the dispute any further. The applicant may challenge the decision at the Labour Court.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995 as amended
- Rules for the Conduct of proceedings before the CCMA as amended
- Employment Equity Act 55 of 1998 as amended