

SCHEDULE 2

**DISPUTE RESOLUTION PROCEDURE
IN THE
NATIONAL BARGAINING COUNCIL FOR THE WOOD
AND PAPER SECTOR (“THE COUNCIL”)**

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Introduction

1. This summary is designed to assist parties to refer a dispute to the National Bargaining Council for the Wood and Paper Sector (“the Council”). Please read it carefully and if you need help phone the Council at.....
2. This summary focuses on dispute resolution in the Council and gives an overview of the most common disputes resolved by councils, and the CCMA or adjudicated in the Labour Court, to make sure that if you have a dispute you refer it to the appropriate body.
3. This summary tells you what type of disputes you may refer-
 - 3.1. to the Council for conciliation;
 - 3.2. to the Council for arbitration after conciliation by the council; or
 - 3.3. to the Labour Court for adjudication after conciliation by the council
4. This pamphlet sets out the relevant time periods and describes the conciliation process, the arbitration process and the powers of the Council’s conciliators and arbitrators.

5. Definition of some terms outlined below:

Automatically unfair dismissal: A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to Section 5¹⁰ or, if the reason for the dismissal is:

- (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter V¹¹
- (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- (c) to compel an employee to accept a demand in respect of any matter of mutual interest between the employer and the employee;
- (d) that the employee took action, or indicated an intention to take action, against the employer by-
 - i) exercising any right conferred by this Act; or
 - ii) participating in any proceedings in terms of this Act;
- (e) the employees’ pregnancy, intended pregnancy, or any reason related to pregnancy;
- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

Constructive Dismissal: means that an employee resigned but the reason for the resignation was that the employer made the employees’ working life intolerable.

Unfair discrimination: No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

Part 1: An overview of the dispute resolution process

This chart shows you the route to follow to resolve a particular dispute. The types of disputes are organized alphabetically

Disputes	Referral for conciliation		Referral for arbitration		Referral to the Labour Court.
	Council	CCMA	Council	CCMA	
Agency Shop agreement (interpretation or application)		✓		✓	✓
Allocation of representatives to the Council	✓		✓		
Automatically unfair dismissals	✓		✓		
Benefits	✓		✓		
Closed shop agreement (if the matter concerns admission of a union to a closed shop agreement then)		✓			✓
Collective Agreement (interpretation or application)		✓		✓	
Collective Bargaining: Organizational Rights		✓		✓	
Constructive dismissal	✓		✓		
Council's Constitution (interpretation or application)	✓		✓		
Demarcation dispute (of sectors and areas of council)		✓		✓	
Demotion	✓		✓		
Disciplinary action	✓		✓		
Disclosure of information		✓		✓	
Essential Services dispute	✓		✓		
Formula for determining representatives to council	✓		✓		
Freedom of association	✓				✓
Leave for union activities		✓		✓	
Matter of mutual interest	✓				
Misconduct	✓		✓		
Participation in union activities	✓				✓
Picketing		✓			✓
Poor work Performance	✓		✓		
Promotion	✓		✓		
Protest Action					✓
Registration of unions and employer organizations (appeals)					✓
Re-instatement or re-employment	✓		✓		
Retrenchment	✓				✓
Secondary Strike					✓
Severance pay	✓		✓		✓
Strikes	✓				✓
Suspension	✓		✓		

Disputes	Council	CCMA	Council	CCMA	Referral to the Labour Court
Terms and conditions of employment	✓				
Training	✓		✓		
Unfair Conduct (unfair labour practice) regarding promotion, demotion, training and benefits, suspension (or disciplinary action short of dismissal), reinstatement	✓		✓		
Unfair discrimination	✓ (if the dispute concerns dismissal)	✓ (if the dispute does not concern dismissal)			✓
Unilateral to terms and conditions of employment	✓				
Wages	✓				
Workplace Forums		✓		✓	

Part 2: Disputes to be referred to the council for conciliation

Categories of Disputes.

6. This chart sets out the categories of disputes that may be referred to the Council for conciliation. Examples of disputes are provided in each category. For further information you may refer to the relevant sections in legislation listed below.

Category of Disputes	Examples	Reference
Disputes about the interpretation or application of the provisions of Chapter II of the LRA called freedom of Association and general protection.	Participation in union activities	Section 9 of the LRA
Disputes that form the subject matter of a proposed strike	Benefits Matters of mutual interest Terms and conditions of employment Wages	S 64(1) of the LRA.
Disputes about a unilateral change to terms and conditions of employment	Benefits Matters of mutual interest Terms and conditions of employment Wages	S 64 (4) of the LRA
Disputes in essential services	Benefits Matters of mutual interest Terms and conditions of employment Wages	S 74 of the LRA

Category of Disputes	Examples	Reference
Disputes about unfair dismissals	<p>Automatically unfair dismissals</p> <p>Misconduct</p> <p>Poor work performance</p> <p>Retrenchment</p>	S 187, 189, 190, 191 of the LRA.
Disputes about unfair labour practice (ULP)	<p>Benefits</p> <p>Demotion</p> <p>Disciplinary Action</p> <p>Promotion</p> <p>Reinstatement or re-employment</p> <p>Suspension</p> <p>Training</p>	Items 2(1)(b), (c) and (d) in Schedule 7 of the LRA.
Disputes about unfair discrimination	Unfair discrimination (if the dispute concerns dismissal)	Sections 6 and 10 of the Employment Equity Act.
A Dispute concerning the determination or allocation of representatives of the number of persons representing either the employer's organizations or trade unions.	Allocation of representatives to the Council	Clause 5 (2) read with 5 (10) of the Council Constitution
A Dispute about the interpretation or application of the Council's constitution.	Council's Constitution is ambiguous	Clause 13 (1) of the Council's constitution.

The referral for conciliation to the Council.

7. The employee must refer the disputes in subclause 6.1 – 6.5 in writing to the Council’s secretary within a reasonable time (recommend 30 days of the dispute arising)
 - 7.1. dispute about the interpretation or application of the provisions of Chapter II of the LRA (Freedom of association and general protection)
 - 7.2. disputes that form the subject matter of a proposed strike or locjout.
 - 7.3. disputes in essential service;
disputes about severance pay;
 - 7.4. disputes about unfair labour practices

8. The employee must refer the disputes in sbclause 7.1 – 7.2 in writing to the Council’s secretary within thirty (30) days of dismissal-
 - 8.1. disputes about unfair dismissals
 - 8.2. disputes about unfair discrimination, if the discrimination concerns dismissal ⁵

9. The employee must refer the disputes in subclause 8.1 – 8.2 in writing to the Councils secretary within 30 days of a dispute arising or within anytime period in any other relevant statute or collective agreement
 - 9.1. a dispute concerning the determination or allocation of representatives of the number of persons representing either an employers’ organization or a trade union or;
 - 9.2. a dispute about the interpretation or application of the Council’s constitution

10. The Council may condone the late referral of a dispute for conciliation on good cause shown ⁶

11. The party who refers the dispute must satisfy the council’s secretary that a copy of the referral has been served on all other parties to the dispute.

⁵ If the dispute does not concern a dismissal then it must be referred to the CCMA within 6 months after the act or omission that allegedly constitutes unfair discrimination

⁶ In a condonation application the employee must motivate the reasons why the council should condone the late referral. The condonation application must address the length of the delay the reason for the delay, any prejudice both parties might suffer and the prospects of success.

12. Proof of service may be by way of a fax transmission slip, a post office registered slip, a copy of a signed receipt if hand delivered or an affidavit/
13. If the secretary is satisfied that there has been proper service and that the parties to the dispute fall within the registered scope of the Council, the secretary must process the dispute.

The conciliation process at the Council.

14. The conciliator will attempt to resolve the dispute between the parties.
15. The conciliator may;
 - 15.1 mediate the dispute
 - 15.2. conduct a fact finding exercise
 - 15.3. make a recommendation to the parties, which may be in the form of an advisory arbitration award.

Part 3:Disputes to be referred to the Council for arbitration.

16. If the parties have not resolved the dispute at conciliation conducted by the Council then the following disputes may be referred for arbitration by the Council.

Category of disputes	Example	Referenmce
Disputese in essential service	Benefits Matters of mutual interest Terms and conditions of employment Wages	S 74 of the LRA
Disputes about unfair dismissals	Misconduct Poor work performance	S 190, 191 of the LRA.
Disputes about severance pay	Severance pay (unless the Labour Court is adjudicating a dispute about a dismissal based on operational requirements.)	S 41 of the BCEA.

Categories of disputes	Example	Reference
Disputes about unfair labour practice (ULP)	Benefits Demotion Disciplinary action Promotion Reinstatement or re-employment Suspension Training	Item 2 (1)(b), (c) and (d) in Schedule 7 of the LRA.
A dispute concerning the determination or allocation of representatives of the number of persons representing either the employers' organizations or trade unions.	Allocation of representatives to the Council Formula for determining representatives	Clause 5 (2) read with 5 (10) of the Council's constitution
A dispute about the interpretation or application of the Council's constitution	Council's Constitution	Clause 13 (1) of the Council's constitution.

The referral for arbitration to the Council.

17. The employee must request the secretary of the Council to arrange for the dispute to be resolved through arbitration. ⁷
18. The employee must refer the dispute for arbitration to the secretary of the Council within 30 days of making the request.
19. The Council may condone the late referral of a dispute for arbitration for a good reason ⁸
20. The party who refers the dispute must satisfy the Council's secretary that a copy of the referral has been served on all other parties to the dispute.
21. Proof of service may be by way of a fax transmission slip, a post office registered slip, a copy of a signed receipt if hand delivered or an affidavit
22. If the secretary is satisfied that there has been proper service and that the parties to the dispute fall within the registered scope of the Council, the secretary must process the dispute.

⁷ There is no time period stipulated in the Council's constitution, and an amendment to this effect may be desirable. ⁸ Refer to footnote ⁶

The arbitration process at the Council

23. The arbitrator may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
24. The arbitration proceedings must be conducted in accordance with the provisions of section 138 and 142 and, if applicable, sections 139, 140 and 141 of the Act read with the changes required by the context. These sections have been summarized in this pamphlet for convenience.
25. Subject to the discretion of the arbitrator, a party to the dispute may;
 - a. give evidence
 - b. call witnesses
 - c. question the witnesses of any other party, and
 - d. address concluding arguments to the arbitrator
26. If all the parties consent, the arbitrator may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.
27. In any arbitration proceedings , a party to the dispute may appear in person or be represented only by-
 - 27.1.a legal practitioner;
 - 27.2.a director or employee of the party; or
 - 27.3.any member, office-bearer or official of that party's registered trade union or registered employer's organisation.
28. If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties (despite clause 26.1) are not entitled to be represented by a legal practitioner in the arbitration proceedings unless-
 - 28.1.the arbitrator and all the parties consent, or
 - 28.2.the arbitrator concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering

- 28.2.1. the nature of the questions of law raised by the dispute
- 28.2.2. the complexity of the dispute
- 28.2.3. the public interest; and
- 28.2.4. the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute.

29. If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party had referred the dispute to the Council, the arbitrator may-
- a. continue with the arbitration proceedings in the absence of that party; or
 - b. adjourn the arbitration proceedings to a later date.
30. The arbitrator must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of the LRA that is relevant to a matter being considered in the arbitration proceedings.
31. Within 14 days of the conclusion of the arbitration proceedings-
- a. the arbitrator must issue the arbitration award with the brief reasons, signed by the arbitrator;
 - b. the Council must serve a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceedings.
32. On good cause shown, the Executive Committee⁹ may extend the period within which the arbitration award and the reasons are to be served and filed.
33. The arbitrator may make any appropriate arbitration award in terms of the LRA including, but not limited to, an award-
- a. that gives effect to any collective agreement;
 - b. that gives effect to the Council's constitution; or
 - c. that gives effect to the provisions and primary objects of the LRA.
34. The arbitrator may make an order for costs in the arbitration award if a party or the person who represented that party in the arbitration proceedings, acted in a frivolous or vexatious manner.
- 34.1 by proceeding with or defending the dispute in the arbitration proceedings; or
 - 34.2 in his or her conduct during the arbitration proceedings

⁹ To be checked

Part 4: Disputes to be referred to the Labour Court after conciliation at the Council.

Categories of disputes

35. If the parties have not resolved the dispute at conciliation conducted by the Council then you may refer the following disputes for adjudication by the Labour Court.

Category of dispute	Example	Reference
Disputes about the interpretation or application of the provisions of Chapter II of the LRA called “Freedom of Association and general protection	Participation in union activities	Section 9 of the LRA.
Disputes about unfair dismissals	Automatically unfair dismissals. Retrenchments	S 187, 189 and 191 of the LRA.
Disputes about severance pay	Severance pay (if the Labour Court is adjudicating a dispute about a dismissal based on an employer’s operational requirements	Section 41 of the BCEA
Disputes about unfair discrimination	Unfair discrimination	Section 6 and 10 of the Employment Equity Act.

The referral for adjudication to the Labour Court.

36. If the Council has certified that the unfair dismissal dispute remains unresolved or if 30 days have expired since the Council received the referral and the dispute remains unresolved, the employee may refer the dispute to the Labour Court for adjudication

37. The referral must be made within 90 days after the Council has certified that the dispute remains unresolved or if 30 days have expired since the Council received the referral and the dispute remains unresolved.

38. The Labour Court may grant condonation for a late referral on good cause shown.

39. The LRA does not stipulate a time period within which a referral must be made to the Labour Court concerning a dispute about Chapter II (Freedom of Association) It is recommended that the referral is made is made within 90 days as discussed in clause in 37 above

40. The referral to the Labour Court must comply with the rules of the Labour Court.

The adjudication process at the Labour Court.

41. The process begins with an application for a case number.
42. The employee or union official may then draft a statement of case or a notice of motion and a founding affidavit to launch either an action or an application
43. The process is set out in Rules of the Labour Court.

Part 5: General

Powers of the Council's conciliators and arbitrators.

44. A conciliator or arbitrator who has been appointed to attempt to resolve a dispute may-
 - 44.1.subpoena any relevant person (including an expert) for questioning, or to produce documents
 - 44.2.call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out this section, to be questioned about any matter relevant to the dispute;
 - 44.3.may administer an oath or accept an affirmation from any person called to give evidence or be questioned;
 - 44.4.at any given time, but only after obtaining the necessary written authorisation enter and inspect any relevant premises.

Disputes to be referred to the CCMA for conciliation.

45. The following disputes must be referred for conciliation to the CCMA and not to the Council-
 - 45.1. disputes about organisational rights: Sections 16, 21 and 22 of the LRA.
 - 45.2. disputes about collective agreements where the agreement does not provide for a procedure or the procedure is inoperative or any party frustrates the resolution of the dispute: S 24(2) to (5) of the LRA.
 - 45.3. disputes about agency shops and closed shops: S 24(6) and (7) and 26(11) of the LRA
 - 45.4. disputes about determinations made by the Minister in respect of proposals made by a statutory council; S 45 of the LRA.
 - 45.5. disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled: S 61(5) to (8) of the LRA.
 - 45.6. disputes about the demarcation of sectors and areas of councils: S 62 of the LRA
 - 45.7. disputes about bargaining councils (including those in, the public sector), and statutory councils: S 63 of the LRA.
 - 45.8. disputes concerning pickets: S 69(8) to (10) of the LRA
 - 45.9. disputes about proposals that are the subject of decision- making in workplace forums : S 86 of the LRA
 - 45.10. disputes about the disclosure of information to workplace forums : S 89 of the LRA.
 - 45.11. disputes about the interpretation or application of the provisions of Chapter V which deals with workplace forums : S 94 of the LRA.

Private dispute resolution procedure

46. If there is a collective agreement binding on the parties to the dispute that provides for an alternative procedure for resolving the dispute, then the parties must follow the procedure in the collective agreement.
47. The party to the dispute must notify the Council's secretary in writing of-
 - 47.1 its intention to refer the dispute for conciliation in terms of that collective agreement within 30 days of the dispute arising; and
 - 47.2 and the outcome of the conciliation and / or the consequential dispute resolution process.
48. If there is no collective agreement setting out a private dispute resolution procedure then the parties may request the executive committee to allow them to follow a dispute resolution procedure conducted outside the auspices of the Council
49. The parties must notify the secretary of the Council in writing of the outcome of that process.
50. The provisions of this clause do not prevent an official or employee of the Council investigating the dispute or attempting to conciliate the dispute.

¹⁰ Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

¹¹ Chapter IV deals with industrial action and conduct in support of industrial action. S 67(4) and (5) provide-

“(4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.

(5) Subsection (4) does not preclude an employer from fairly dismissing an employee in compliance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements”