

# Change in BCEA can lead to claims against employers

By [Professor Paul Benjamin](#)

3 Nov 2014

A change to the Basic Conditions of Employment Act (BCEA), which came into effect on 1 September this year, could have a big effect on practice in the Commission for Conciliation, Mediation and Arbitration (CCMA) and on employers who face claims of underpayment.



© scusi – [za.fotolia.com](http://za.fotolia.com)

Section 74 of the BCEA gives the CCMA jurisdiction to hear claims under the BCEA together with unfair dismissal arbitrations. This includes claims for unpaid leave pay, notice pay, overtime and breaches of minimum wages set by a sectoral determination.

Previously, the scope of workers to raise these claims was restricted. The claim had to be mentioned in the referral form and the payment claimed could not have been outstanding for more than a year.

In addition, the CCMA could not deal with the matter if the labour inspectorate had issued a compliance order or other civil proceedings had been instituted to recover the money. If evidence that a worker had a claim for non-payment only emerged during evidence in a dismissal arbitration, this could not be dealt with in the arbitration. The worker would have to refer it to the labour inspectorate or sue in a civil court.

## One limitation

Now the arbitrator will be able to deal with these claims. The only limitation is that the claim has not prescribed. In other words, the claim should not be more than three years old at the time the worker alleges underpayment.

This could see potentially expensive claims emerging unexpectedly during arbitrations. Workers, who might harbour resentments about underpayments during employment, have nothing to lose by raising the issue after their dismissal. An example is disputes over the calculation of overtime rates, which can be very complicated. A small underpayment every week for several years can add up to a sizeable sum.

When this happens in the arbitration hearing, the employer will be entitled to a postponement to prepare to deal with the worker's new claim. Overall, the case will be resolved quicker without duplication of proceedings.

Once the arbitrator has determined the issue, the claim cannot be pursued by the inspectorate on behalf of the worker or in the Labour Court or other civil court. The arbitrator's decision on the claim can only be challenged by review proceedings in the Labour Court.

## **Compliance orders**

Many employers ignore compliance orders issued by labour inspectors because they are aware that these are seldom enforced through the Labour Court. A further change to the BCEA will speed up the process of issuing and enforcing compliance orders and remove some of the technicalities that employers and their lawyers have relied upon to resist underpayment orders. Inspectors will be able to request the Labour Court to confirm compliance orders as court orders.

Studies have shown that up to 30% of employers in sectors covered by sectoral determination do not comply with statutory minimum wages. These changes to the law have the potential to make non-compliance a much more hazardous strategy.

## **ABOUT PROFESSOR PAUL BENJAMIN**

Professor Paul Benjamin has been at the cutting edge of labour law practice and policy for over three decades. He has worked at the Legal Resources Centre and the Centre for Applied Legal Studies and has been a director of Cheadle Thompson & Haysom Inc. Attorneys since 1986.

- Change in BCEA can lead to claims against employers - 3 Nov 2014
- Labour Appeal Court almost doubles judgments - 3 Nov 2014

[View my profile and articles...](#)

For more, visit: <https://www.bizcommunity.com>