

# SECTION 73A OF THE BASIC CONDITIONS OF EMPLOYMENT (BCEA) ACT 75 of 1997 – CLAIMS FOR FAILURE TO PAY ANY AMOUNT OWING



## INTRODUCTION AND PURPOSE

All employees are entitled to be paid according to rights set out in a contract of employment, the National Minimum Wage Act 9 of 2018, a collective agreement, sectoral determination and rights as set out in the Basic Conditions of Employment Act 75 of 1997 (BCEA).

Payment of salaries, wages, leave pay, bonuses, payment for sick leave taken and overtime are all statutory or contractual monies that are rightfully due to an employee when they have provided their services to the employer.

The law provides protection to an employee where an employer owes that employee money arising out of the employment relationship.

## LEGAL PROTECTION

In terms of Section 73A of the Basic Conditions of Employment Act (the BCEA) -

“(1) ... any employee or worker, as defined in Section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination, or a collective agreement.

(2) Subsection (1) does not apply to employees or workers earning in excess of the threshold prescribed by the Minister in terms of Section 6(3).

(3) An employee or worker, other than the employee or worker referred to in subsection (1), may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either

the Labour Court, the High Court, or subject to their jurisdiction, the Magistrates' Court or the small claims court.”

A “worker”, is defined in the National Minimum Wage Act 9 of 2018 (the NMWA) as “any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind”. This is a wider definition than that of an employee, and can in certain circumstances include an independent contractor.

## WHO QUALIFIES TO CLAIM UNDER SECTION 73A OF THE BCEA?

If the employee/worker is earning equal to or less than R211 596.30 per annum or R17 633.03 per month, s/he can lodge a claim at the CCMA for money owing. This threshold is set by regulation in terms of Section 6(3) of the BCEA and is amended from time to time. The current threshold is effective from 1 March 2021.

Applicants need to provide a copy of their latest payslip, written particulars of employment or contract of employment to prove that they earn either the same as or below the BCEA earnings threshold. In cases of money being due in terms of an employment contract, where an applicant does not receive a payslip and does not have either a contract of employment or written particulars of employment, the commissioner will provide guidance on how to proceed with the matter.

If employees/workers are paid weekly, the gross weekly amount (i.e. before any deductions) is multiplied by 4.33 to calculate the monthly salary.

For example, if the applicant earns R3 500 (before deductions) per week the calculation would be  $R3\ 500 \times 4.33 = R15\ 155$  which is

below the threshold of R17 633.03 and therefore the applicant qualifies to lodge a claim at the CCMA.

However, if the weekly wage is R4 500, then that applicant would not qualify to claim, using section 73A of the BCEA, at the CCMA ( $R4\ 500 \times 4.33 = R19\ 485$ ) as that amount is more than the monthly threshold of R17 633.03.

## TIME FRAME & PROCEDURE TO LODGE A REFERRAL TO THE CCMA

Claims in terms of section 73A cannot be made in respect of amounts that were owing before 01 January 2019 (the effective date of the amendments to the BCEA conferring jurisdiction on the CCMA to process such disputes), since legislation generally does not have retrospective effect.

Employees (and workers in so far as it relates to amounts owing in terms of the national minimum wage) can lodge a claim against their employer whilst they are still employed, or after termination of employment, but the claim must not have prescribed. Claims for monies owing prescribe (become unenforceable) three years after the amount was due for payment.

The CCMA Rules do not stipulate a time limit for referring this type of dispute therefore the claim can be lodged at any reasonable time, taking into account any efforts made by the employee/worker to resolve the dispute internally.

Applicants can open a separate case for this type of dispute, or the claim can be combined with another dispute referral, such as an unfair dismissal dispute (more than one type of dispute can be selected on the LRA7.11 form).

The applicant may refer the matter by using the online LRA 7.11 form at <https://cmsonline.ccma.org.za>. Select S73A BCEA as the

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type of dispute, and include the exact amount of what is owing and how it was calculated (see previous explanation).

With the online referral, a copy thereof will automatically be served on the employer provided that a correct e-mail address has been provided.

Where an applicant makes use of one of the other means of referral – e.g. e-mail, registered mail, hand delivery or facsimile – the referral form must be served on the employer before it will be processed by the CCMA (provide proof of service).

When referring a dispute, an applicant is required to set out clearly what money is outstanding.

- Period claimed for?
- Monthly / weekly / daily rate?
- If the claim is for outstanding leave – when last did the applicant take leave and which leave period is claimed for? What is the total number of days claimed?
- If the dispute concerns payment for public holidays / Sunday work – stipulate the days and/or hours the applicant has worked – quantify the claim.
- If the dispute concerns payment for overtime worked - stipulate the days / hours of overtime worked – quantify the claim.

The applicant should also provide a brief summary of what s/he did to pursue the claim with the employer.

## THE DISPUTE RESOLUTION PROCESS

Once the referral form has been accepted by the CCMA, the matter may be set down for a con-arb hearing. In some instances, the CCMA may phone both parties in order to try to resolve the matter in this way before it is scheduled for a hearing.

The CCMA Rules state that for matters of this nature, a party may not object to the con-arb hearing. This means that as a general rule, the matter will be finalised on one day, either by settlement between the parties, or by arbitration if the parties are unable to reach agreement. It is therefore most important that both parties should be prepared for arbitration, if it becomes necessary, by having all relevant evidence on hand to prove or disprove the claim.

## EXAMPLES OF EVIDENCE THAT MAY BE REQUIRED IN S73A CASES

It is important for applicants to provide documents on the day of the hearing at the CCMA in order to verify the amounts claimed.

Examples, where applicable, include: the contract of employment, latest payslips (at least 3), time sheet or attendance register, collective agreement, letter from the employer, or information concerning the applicable sectoral agreement, etc.

If none of these are available, a copy of the employee's bank statements which clearly show the amounts received (or not received) from the employer will help to substantiate a claim.

Employers may wish to defend the claim by providing proof of payment, or other documentary proof showing that the amount claimed is not owing. In the absence of (or in addition to) documentary proof, both parties can testify under oath and call witnesses to verify their respective claims.

## EMPLOYER'S RESPONSIBILITY

Section 32 of the BCEA provides that an employer must pay remuneration not later than seven days after-

- (a) the completion of the period for which the remuneration is payable; or
- (b) the termination of the contract of employment.

When an employer does not have the funds to pay an amount due to an employee/worker at the time it is due, the employer's situation should be properly communicated to the employee/worker and supported by a formal letter. While this does not absolve the employer from paying the employee/worker, the employer should commit to making payment on a particular date in line with the requirements of the BCEA.

Timeous communication may help to avoid unnecessary referrals to the CCMA, which cost both parties time and money.

## RELEVANT LEGISLATION

- Basic Conditions of Employment Act 75 of 1997, as amended.
- National Minimum Wage Act 9 of 2018.
- Labour Relations Act 66 of 1995, as amended.