



# An Analysis of the Problems of the Labour Dispute Resolution System in South Africa

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## **Abstract**

The labour dispute resolution system is currently under strain, as is evident from numerous reports about the problems experienced by the Commission for Conciliation, Mediation and Arbitration (CCMA). Even though the Labour Relations Act 66/95 (LRA) has brought statutory dispute resolution within reach of the ordinary worker, it might actually have compounded the problems relating to dispute resolution in the country. The high rate of individual unfair dismissal cases referred to the CCMA is an indication that the adversarialism that used to be found in the collective relationship has now manifested itself in the individual relationship.

This article focuses on the findings and recommendations of a study that was done to explore the perceptions of commissioners of the CCMA regarding

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the capacity of parties to effectively deal with labour conflict and disputes within the legal framework provided by the LRA. This includes an investigation into the reasons for the high referral rate of unfair dismissal cases to the CCMA and recommendations made by the commissioners on how to deal with the problems.

It was found that the LRA created a sophisticated system of dispute resolution in which most of the role players are not capacitated to operate. The guidelines in Schedule 8 of the LRA have become the norm for dealing with conflict within an enterprise, creating complex and technical processes for dealing with disputes. However, most of the employers and individual employees do not have the knowledge and skills to operate effectively in the system. This has led to a new type of adversarialism in the individual employment relationship, which is based on rights, rules and power. The very technical nature of the internal conflict resolution mechanisms, the incapacity of the parties and the adversarial nature of the labour relationship have resulted in the high referral rate and consequent problems that the CCMA is experiencing. Changes to the LRA regarding the pre-dismissal arbitration process and the conciliation-arbitration (con-arb) process could be seen as treating only the symptoms and not the causes of workplace conflict and an unhealthy labour dispute resolution system.

### **1. Introduction**

After ten years of democracy it is appropriate to reflect on some of the institutions that were created in the process of transformation in the South African labour relations system. The Commission for Conciliation, Mediation and Arbitration (CCMA) is one such institution that was created with high expectations.

The importance of the promotion of effective dispute resolution was emphasised as one of the four primary objectives of the Labour Relations Act 66/95 (LRA) (Gon 1997:23) and the CCMA was seen to be the pillar of the new dispute resolution dispensation that had been ushered in by the LRA (CCMA 1996:4). It was also anticipated that the LRA, the Basic Conditions of Employment Act (75/97) and the Employment Equity Act (55/98) would form the pillars upon which economic and social justice will prevail and that workers

will have their dignity restored (Moyane 2002:10).

However, it is clear that the dispute resolution system is currently under strain, as is evident from numerous reports about the problems experienced by the CCMA. Even though the LRA has brought statutory dispute resolution within reach of the ordinary worker, it might actually have compounded the problems relating to dispute resolution in the country (Le Roux et al 1997:12).

After having been exposed to the conciliation process at the CCMA since 1997, I came to the conclusion that the parties to the dispute resolution process are not equipped to effectively function within the system created by the LRA. The guidelines in Schedule 8 of the LRA have evolved into a yardstick used during conciliation, mediation and arbitration against which the actions of the parties are measured to determine substantive and procedural fairness. This has created a codified set of rights and obligations and has caused a thorough knowledge of the Schedule 8 requirements or the LRA and the CCMA rules (Republic of South Africa 2002) to be essential for the effective utilisation of the CCMA's dispute resolution processes (Daphne 2001:10). During the conciliation it often becomes clear that one of the parties has omitted one or more of the quite sophisticated rules or procedures while dealing with the conflict that gave rise to the dispute. Employers are, for example, then penalised for this oversight by having to reinstate the employee(s) or pay compensation. By the time the dispute gets to conciliation a lot of irreversible damage has been done to the relationship making reinstatement very difficult.

## **2. Aims of the Commission for Conciliation, Mediation and Arbitration (CCMA)**

To enable one to evaluate the dispute resolution system, it is necessary to reflect on the aims of the CCMA and ask the question as to whether the CCMA has achieved its objectives.

- **Establishing credibility:** One of the objectives of the labour reform of the 1990s was the establishment of credible institutions that have the support of business, labour and government (Nupen & Cheadle 2001:117).

- **Moving away from adversarialism:** The LRA encapsulated the new government's aims to reconstruct and democratise the economy and society in the labour relations arena. It therefore introduced new institutions with the intention of giving employers and workers an opportunity to break with the intense adversarialism that characterised labour relations in the past (Du Toit et al 1999:3).
- **Providing expeditiousness:** The new dispute resolution institutions aimed to provide a proactive and expeditious dispute resolution system available to all workers (Robertson 1995:67).
- **Providing cost effective services:** The main objective of the CCMA is to provide a cost effective dispute resolution service to the labour relations community. It was foreseen that the CCMA should also play a role in dispute prevention (Hobo 1999:28).
- **Ensuring resolution at conciliation:** It was intended that as many disputes as possible should be resolved through conciliation, resulting in a minority of disputes going to arbitration or the Labour Court.

The *intention* was to create a less adversarial labour relations system based on interests and alternative dispute resolution mechanisms and a relationship based on conflict competence, the effective management of conflict and the prevention of disputes.

### 3. Problems of the CCMA

As mentioned above, the guidelines contained in Schedule 8 of the LRA have assumed the character of a codified set of rights and obligations and have made the labour relationship more adversarial than before, not less (Mischke 1997b:101). However, the adversarialism that used to be found in the collective relationship has now manifested itself in the individual relationship. This can be deduced from the high rate of individual unfair dismissal cases which have been referred to the CCMA and which have caused the case overload.

The realities of the South African labour market are that a large percentage of employees have no, or little schooling and that the largest proportion of

employers are in small to medium sized business with practically no skills or training in labour relations and labour law (Landman 2001:76, Theron & Godfrey 2001:8). It could thus be assumed that most of the parties affected by the above-mentioned rules and regulations are not equipped to deal with and make proper use of this very sophisticated system that has been created (Healy 2002:4).

It has further become evident that the processes at the CCMA are not as expeditious as was hoped for and that many disputes are referred to arbitration and not settled at conciliation as was intended.

Although a system was created where anybody can pursue a labour dispute without any costs involved in bringing the dispute to the CCMA and without the necessity of legal representation, the question should, however, be asked if it is really achieving the above-mentioned objectives (Healy 2002:4).

Some of the theoretical assertions underlying this research need to be discussed.

#### **4. Theoretical Assertions**

The LRA created a sophisticated system of dispute resolution in which most of the role players are not capacitated to operate. This gave rise to an excessively high rate of referrals of individual unfair dismissal disputes to the CCMA, creating instability in the system. To compensate for this instability, and in particular the incapacity among employers and employees, a new phenomenon emerged in the form of labour consultants and labour lawyers being involved in dispute resolution. This is significant if viewed against the contrary intention of the LRA to simplify the process of dispute resolution.

It is against this background that the following assertions are made:

- Dispute resolution in South Africa has fallen prey to a process of technicalisation common to a post-industrial society. However, South Africa has been classified, by the International Finance Corporation and the World Bank, as an emerging market economy (SEI Investments 1997:4). The very technical nature of the labour relations system is thus inappropriate for the labour relationship in South Africa.

- The dispute resolution system is based on the acceptance of conflict and the utilisation of mechanisms and processes to deal with the conflict as soon as possible. However, the parties still view conflict as negative and attempt to avoid conflict rather than to deal with it as soon as possible. This belief makes the application of the statutory dispute resolution mechanisms and procedures very difficult.
- The very technical nature of dispute resolution prevents parties from seeking alternative dispute resolution options. The labour relationship has been reduced to a process of following rules and regulations, while other characteristics of a healthy relationship, such as trust and loyalty, have been made more or less irrelevant.
- Labour lawyers and labour consultants have assumed a very important position in the dispute resolution system of South Africa, especially where individual labour disputes are concerned. Their importance in the labour relations system has increased over the past few years despite legislative attempts to keep them out of the processes.

The open system approach to labour relations holds that any system will change in an effort to deal with structural strain and to maintain stability (Craig 1981:18). The problems that have plagued the CCMA over the past few years, such as the high referral rate, case overload, low settlement rate, capacity crises and bad management, have exerted strain on the dispute resolution system. The inability of parties to deal with conflict in their organisations has contributed to the high referral rate and has further increased the strain on the dispute resolution system (Israelstam 2003:2).

The next section focuses on perceptions of CCMA commissioners regarding some of the most pressing problems experienced by the CCMA.

### **5. Perceptions of CCMA Commissioners**

The CCMA commissioners are the representatives of the state tasked with the resolution of these disputes. They are trained and well aware of the sophisticated rules and technicalities involved in conflict resolution, and they

are caught up on a daily basis in having to deal with the incapacity of employer and employee parties.

A study was done during 2003 to explore the experiences and perceptions of CCMA commissioners regarding the problems with the dispute resolution system in an attempt to establish how the system tries to cope with the strain.

This study focused only on the problems in the Gauteng region of the CCMA. The reason for this was that the Gauteng region had the highest referral rate (36% of all cases referred to the CCMA during the 2001/2002 period were in Gauteng) and the lowest settlement rate (47% compared to more than 60% at the national level).

The data were collected through two methods: a structured personal interview (mostly the part-time commissioners) and an e-mail questionnaire (mostly full-time commissioners). The questions in the interview schedule covered the same issues that were dealt with in the questionnaire. Interviews were conducted with eleven commissioners and e-mail questionnaires were received from fifteen commissioners.

## **6. Reasons for the High Referral Rate**

Respondents were asked to provide reasons, from their perspectives, for the high referral rate. The reasons mentioned by them can be divided into five categories.

### **6.1 Reasons for the high referral rate**

The *first* category deals with the *ease of access* to the CCMA. It was mentioned that the CCMA is very accessible, that there are no costs involved in bringing a case to the CCMA, there are no consequences for referring a frivolous dispute, and that unions refer all cases and do not make a distinction between cases with merit and those without. This is in line with the CCMA's findings that there was less emphasis on dispute prevention in the past because the primary focus was on dispute resolution (CCMA 2002:2).

The *second* category involves the *high expectations* of applicants, specifically their perception that one will always get some kind of compensation irrespective

of the merits of the case. Some commissioners compare these perceptions of applicants to viewing the CCMA as ‘a one arm bandit’, ‘lottery’ or ‘an ATM machine’ where one has to press the right buttons and money will be thrown at them.

The *third* category refers to the fact that applicants do not have *knowledge* of the system or their rights and obligations, and are poorly advised by trade unions, labour consultants and the Department of Labour, who lead them to believe that they have a good case and that they should pursue the matter further at the CCMA. In this regard the CCMA had embarked on a project in the retail sector to prepare training material and present best practices workshops (CCMA 2000:9).

The *fourth* category encapsulates reasons pertaining to the poor *economic climate*, the high unemployment rate and poverty. It is argued that employees struggle to find employment and refer their case to the CCMA in the hope that there might be some kind of financial compensation forthcoming even if it is so-called ‘nuisance money’ that the employer is prepared to pay just to get rid of the dispute.

The *fifth* category deals with *employers’ lack of knowledge* of labour legislation, a disregard for substantive and procedural requirements for fairness and the fact that it is easy to replace dismissed workers. It is also mentioned that employers are ignorant of their responsibilities, and that they do not have, or do not use internal grievance and disciplinary procedures.

The high referral rate can be viewed as an indication of ‘a *pathology of conflict*’ in the labour relationship, which could be the result of a very paternalistic approach to human resources in the workplace. It should be kept in mind that the high case load is also the result of the *enormous jurisdiction* that was given to the CCMA by the inclusion of the former ‘homelands’, the extension of the LRA to the public service and various other pieces of new legislation adding to the responsibilities of the CCMA.

## **6.2 Solutions offered by Commissioners to the problem of high referral rates**

The respondents offered far-reaching solutions to the problem of the high referral rate of individual unfair dismissal cases. The *most* important solution



that was offered, involves the payment of some sort of a *referral fee*:

- The one option is that a *revenue stamp* should be required on the referral form: 'Each referral should have a R20.00 revenue stamp, same as a Magistrate's Court summons and reviewed on a similar basis to discourage frivolous claims and abuse of the system'.
- Another option is that both parties should pay an *initial fee* calculated as a percentage of the employee's salary. If the parties settle at conciliation, they both get their portion of the fee back. If not, then the party against whom the arbitration award is given, forfeits his or her portion of the fee.
- More *cost orders* should be made for frivolous and vexatious referrals and these costs must be enforced more strictly.
- There was a suggestion that employers must be fined for procedural unfairness.
- It was also suggested that all employees earning more than R8 000.00 per month should be charged a fee to use the CCMA's services.

Some commissioners were adamant that there should be *no costs* involved in referring a dispute to the CCMA: '[I]n our society with the high incidence of illiteracy and low level workers, unemployment and poverty, there is a need for a very accessible system ... I also do not think that so many of the cases are frivolous. Maybe from the employer's side but not for that employee who has to travel for miles by taxi to come and tell his or her sad story in the hope of a month's poverty wages.'

The *second* important solution to the problem of the high referral rate was the *training and education* of employers, employees and trade union representatives. Awareness levels should be increased and problematic sectors should be targeted for information sharing and training. This training should include requirements for substantive and procedural fairness in internal mechanisms and processes as well as training in the rights and obligations of employers, employees and trade unions.

- It was suggested that the CCMA compile a small booklet with basic information about what can be expected at the CCMA and what types of cases

do not have merits. These booklets should be available in all the official languages and should be handed out with the referral forms to prospective applicants, with the instruction that these booklets must be scrutinised before referring a dispute.’

The *third* category of solutions involved the use of *advisory forums* such as Legal Aid Centres where more professional advice can be given with regard to the merits of cases. It was suggested that prospective applicants should receive more realistic and professional advice on the merits of their cases.

- A suggestion was made that these advisory forums, including the CCMA help desk, should provide qualified reports on the merits of a case before it is referred. If it is found in arbitration that the case was pursued in spite of the fact that the report stated that the case had no merits, some sort of a penalty could be invoked – it is not clear if this is in addition to a cost order or not.
- Another suggestion was the appointment of a special tribunal by the Department of Labour to deal specifically with domestic workers’ cases as these cases are ‘clogging up the system’. The Department of Labour could institute a similar tribunal for individual retrenchments.

The respondents emphasised the benefits and successes of the conciliation and arbitration ‘*case rolls*’ to deal with the high referral rate. The ‘case roll’ refers to a practice where parties are informed that their cases will be heard on a specific day at nine, twelve or two o’clock. There is a group of commissioners that take the cases as they are called, and if parties are not there they call the next one. This is normally done to deal with the arbitration backlog. The commissioners suggested that this should be standard practice.

The merits of the *pre-mediation screening process* for reducing the high referral rate were emphasised. When an applicant comes to the CCMA to refer a dispute there is a practice where a commissioner will contact the respondent and attempt to do ‘telephone conciliation’. These commissioners should be specifically trained in telephone skills. Case management personnel should not do the screening of cases, as it requires the skill and knowledge of commissioners

to decide on the type of dispute, jurisdiction, complexity and time allocation of a dispute.

Another suggestion was that powerful mass media such as Yiso Yiso or Isidingo should be used to increase public awareness of the CCMA. 'It is amazing that one still finds, eight years down the line, people still do not know what the CCMA is doing....'

An option was mentioned where employers should be allowed to dismiss workers at will, with or without just cause, provided that he or she pays *compensation* equal to the amount of say, three months' salary. If the employer does not pay this compensation, the employee can challenge the dismissal and claim reinstatement. By doing this, the emphasis is on reinstatement and not on financial compensation.

A different system, similar to the *Small Claims Court* should be looked at, for small labour issues ('small' being determined by the monetary value of the claim). It needs to be a state run system but it does not mean that the state cannot outsource. This system would take care of most of the individual unfair dismissal cases that clog up the CCMA at present.

It should be remembered that the historical imbalances in the workplace resulted in employees questioning the motives and fairness of the employers. There is not enough communication and transparency to create *trust and credibility* that is needed in the labour relationship. 'Once employees start to view the internal procedures as credible, and buy into it, then the referral rates might come down....'

## **7. Impact of Ineffective Internal Conflict Resolution on the Referral Rate**

The way in which a grievance is dealt with internally will have an impact on the way in which a dispute is formulated and referred.

### **7.1 The importance of proper internal mechanisms to deal with conflict**

The mechanisms or tools for dealing with conflict in the workplace are the grievance and disciplinary procedures. If these mechanisms are used

effectively, it could mean that very few disputes would escalate to a level where they need to be referred to a third party for resolution. The tendency in the past has been to view conflict, from a unitarist perspective, as negative and destructive to the work relationship. The pluralist approach, however, is based on the acceptance and proper management of conflict by means of effective procedures and mechanisms to deal with conflict as soon as it manifests itself in the workplace, and to do so at the lowest level and as speedily as possible (Grossett & Venter 1998:294).

The fact that so many disputes are referred to the CCMA for conciliation could be an indication that the internal conflict resolution mechanisms are not used properly or fully understood in a specific organisation. The dispute resolution system should attempt to deal with conflict at a low level before it escalates and becomes highly formalised disputes (Mischke 1997a:11).

The more formalised the conflict, the more careful it should be dealt with as the damages to the parties increase. If the conflict is detected in a latent phase, that is, before it becomes visible, it can be dealt with through proper communication, motivation, and sensitivity training (Gerber et al 1998:331). Once it has reached the grievance phase, it usually involves company time and money to resolve the grievance since senior management is involved in the procedure and inquiries.

Once conflict has become visible in the workplace (manifest conflict) certain mechanisms and procedures must be available to deal with conflict in a simple and expeditious manner. Conflict between employers and employees has been institutionalised in modern industrial relations in terms of agreed upon sets of rules and procedures (Haralambos 1982:263). If the conflict can be resolved in terms of an agreed upon set of rules and procedures, and these mechanisms operate effectively, it would mean that the conflict can be resolved and the relationship can continue.

Both the disciplinary hearing and the grievance enquiry have certain prerequisites in terms of procedures to be followed, as spelled out in Schedule 8 of the LRA. It involves a lot of paper work with regard to notices that must be sent out timeously, minutes that must be typed and records that must be kept (Nel 1997:212-237).

If the conflict cannot be resolved through the available internal mechanisms and processes, it must be referred outside of the organisation to an institution

such as the CCMA, private dispute resolution bodies or bargaining councils, and there are a number of prerequisites that have to be met. The dispute must be formulated properly according to the LRA and referred in the manner and according to procedures stipulated in legislation.

It then becomes highly formalised in that a specific form must be used, particular information must be provided, certain time limits must be followed, etc. The process of dispute resolution then also becomes costly, since offering to pay compensation at the conciliation phase might be the only way of preventing the dispute from going to arbitration. The impression is then that the employer is being punished (Israelstam 2002:6).

These procedures usually also take time, and Mischke (1997a:13) has made it clear that the process becomes more formalised as time goes by and as conflict is left unresolved. By the time the conflict becomes a dispute, it has been intensified by aggravating factors (Mischke 1997a:13). Aggravating factors, according to Anstey (1991:43) are various intervening variables, which serve to aggravate (or moderate) the actions of the parties involved. In the absence of proper conflict regulation mechanisms, or if these mechanisms are insufficient to countervail the influence of aggravators, conflict can be expected to grow in intensity and size (Anstey 1991:51).

The way in which a grievance is dealt with internally will have an impact on the way in which a dispute is formulated and referred.

### **7.2 The views of commissioners regarding the ability of parties to deal with conflict**

The perceptions of the CCMA commissioners were obtained regarding the relationship between the internal management of conflict and the referring of disputes to the CCMA.

There was an overwhelming agreement that most small employers do not follow internal procedures before dismissing a worker, often because they do not have these procedures in place. There was also agreement that mechanisms (disciplinary and grievance procedures) might not be used properly because of *negative perceptions* that both the employer and employee have about conflict. This could be a contributing factor to the high rate of referrals to the CCMA.

The commissioners' perception was that there is still a *flagrant disregard*

for the law amongst some employers. Many employers remain ignorant of their responsibilities towards employees and in most of the individual unfair dismissal cases there are procedural unfairness on the side of the employers. Disciplining an employee is usually an unpleasant task and employers are reluctant to follow proper disciplinary procedures, with the result that more disputes land up at the CCMA. These responses support the fact that there are problems with the internal procedures in companies.

The ignorance of employers can be attributed to the fact that laws in the past have been written in a very *legalistic manner*. 'The LRA is also deceptive as it seems quite straightforward with simple language on the surface, but we know that it has all kinds of twists. People don't read it because they assume it is going to be difficult....'

However, several commissioners said that not only the employers are to blame. Employees of small employers are often not aware of the proper internal procedures to be followed and most trade union representatives are ill-prepared to represent their members in disciplinary and grievance procedures. There is a perception that there are problems with regard to the ability of individual employees and their trade union representatives to properly deal with internal conflict. Conflict is being viewed as destructive and employees fear being victimised if these procedures are being used, because they will be regarded as 'trouble makers'.

It was mentioned that the relationship between the use of internal mechanisms and the referral of a dispute to the CCMA is only *theoretical* since there is nothing preventing an employee from taking the case to the CCMA irrespective of how effective the conflict was handled in the organisation. Although employers should do much more to attempt to follow fair internal procedures, it will not deter employees from referring a dispute to the CCMA if they do not perceive the internal procedures as credible and have not bought into them. The most important prerequisite for successful handling of conflict is, therefore, *credibility* of the procedures.

It was pointed out that the disciplinary procedures in companies are usually well developed whereas the grievance procedures are not. This gives an indication of the paternalistic approach to the labour relationship that still exists in the workplace and highlights a specific problem regarding the use of

power. Small and medium sized employers perceive the grievance proceedings as a challenge to their power and in both the grievance and disciplinary hearings the employer tries to reaffirm his/her power. This allows conflict to escalate and makes the resolution of the dispute in conciliation very difficult.

To summarise, the commissioners were of the view that especially the *small employers* do not know the law and do not apply fair procedures in the workplace as these procedures are *complex*. Employers do not read the Act because they perceive it as being written in a *legalistic* manner. Both employers and employees perceive *conflict as negative* and think that the internal mechanisms should be avoided where possible. *Employees* do not have sufficient knowledge of the law, are not aware of their rights and are badly advised by their trade union representatives regarding how to deal with conflict.

### **8. Appropriateness of the Dispute Resolution System for Small to Medium-sized Employers**

The findings on this aspect of the study were contradictory. On the one hand, the commissioners perceived the system as simple and straight-forward and therefore appropriate for small to medium-sized employers, but on the other hand they agreed that these employers need the assistance of labour consultants. 'The small to medium sized employers do not have the ability to properly deal with conflict internally and they have specific need for assistance which they obtain from labour consultants and employer organisations...'

The overall impression was that the system was designed for big employers, and provided little flexibility for the small to medium-sized employers. 'It has high competence requirements and a highly knowledgeable person is required to work through the minefield of the LRA...' It was pointed out that the way in which the small employers deal with the difficulties they experience with the technical nature of the dispute resolution system is detrimental to the relationship between the employer and the employees. The small employers involve employer organisations and labour consultants to assist them with conflict, thereby creating a distance between themselves and their employees. 'Small employers are so scared of these procedures and the CCMA that they

processes. Bigger employers use industrial relations specialists and labour lawyers to ensure complete fairness in their internal processes. They have a policy of not settling in conciliation due to the effort and costs involved in getting the internal procedures right.

Some trade union and employer organisation representatives refuse to settle and turn the conciliation into *power play* and posturing to impress their members/clients. This could be ascribed to a lack of training in conciliation and negotiation skills of the parties. Such attitudes make settlement of the dispute a very difficult task for commissioners.

Applicants have *high expectations* partly because of a lack of knowledge or because they have been wrongly advised by unions and consultants to believe that they are entitled to huge amounts of money. Even if the offer made by the respondent is reasonable, they think they will do better at arbitration. One respondent offered the following suggestion to entice parties to settle in conciliation: 'If an offer was made to the employee at conciliation and it is not accepted, the employee must pay the cost of the arbitration if he or she does not get more at arbitration. The offer must be taken into account when compensation is decided on'.

It was also suggested in similar fashion that the offer that was made by the respondent in conciliation, should be taken into account in the arbitration award. If it is found that the offer was reasonable and that the applicant unnecessarily prolonged a dispute that could have been settled at conciliation, it should be taken into account in the awarding of costs against the applicant. Such a system would force applicants to consider the merits of their cases more seriously, to be more realistic about their claims and to take conciliation seriously. It could also create an incentive for employers to attempt to settle instead of 'fighting it out in arbitration or Labour Court' if they know there is a chance that a reasonable offer at conciliation will be accepted.

There is a further perception that there are *no costs* involved to refer a dispute to arbitration. Applicants are under the impression that they have nothing to lose, as they are not aware of the possibility of a cost order for frivolous and vexatious referrals. Although theoretically possible, such cost orders are uncommon and difficult to execute in practice.



Special skills are required to become a good conciliator, and commissioners are not properly trained to do successful conciliations. Even if you have very sophisticated parties who come to the conciliation with no intention to settle, a skilled commissioner would have a better chance to resolve such a dispute. It was suggested that non-legally trained commissioners should be used for conciliations and not for arbitrations since they are sometimes more successful in conciliations. A further point was made that ‘...the good conciliators do not work for R1 500.00 per day and have therefore left the CCMA’.

It was suggested that the conciliation-arbitration (con-arb) process should be made compulsory for all misconduct cases because ‘...if parties know the arbitration is in the next hour and not 6 months down the line, the chances are that the settlement rate will increase’. It was also suggested that the parties should be phoned a day or two before the hearing to find out if they are going to attend or not in an attempt to curb the problem of non-appearance. The possibility of some sort of penalty such as a fine for non-appearance at conciliation should be considered and this amount could be made part of the arbitration award. The attitude of many employers is, ‘Why should I pay now if I can do so 5 to 6 months down the line at arbitration?’ The future of the conciliation process is questioned as it has become obsolete and superfluous.

An unintended consequence of the system is that the issuing of the certificate, indicating that the dispute remains unresolved, is built into the negotiation process. In the past, the *certificate* was the last requirement before going on strike or referring the dispute to arbitration or Labour Court. Today the parties know that they will negotiate further once they have a certificate, or there would be another chance of settling the dispute just before arbitration. However, on the CCMA statistics, it reflects as a low settlement rate.

Other important reasons for the low settlement rate have to do with low levels of motivation of commissioners due to the high caseload, little support from management, bad administration and no incentive to get settlement. It should be kept in mind that the Gauteng office of the CCMA is a huge operation with all the characteristics of a bureaucracy and the associated problems.

## 11. The Role of Labour Lawyers and Consultants

The views of commissioners were obtained regarding the perceived role and function of labour lawyers and consultants. Should the system change to accommodate and legitimise them or will there be efforts to further eliminate them from processes?

The negative perceptions of *lawyers* in *conciliation* centred around the fact that they tend to be very legalistic, raise unnecessary points *in limine*, have a limited role to play in conciliation and can even be obtrusive since it is often not in their best interest to settle in conciliation. If the case remains unresolved there is the prospect of an arbitration, involving preparation of the case and representation, which means more money. The role of *lawyers* in the *arbitration* process on the other hand was perceived as very positive because they assist in defining the dispute, streamlining proceedings, and focusing on important issues, and because they have experience in litigation, do research and prepare for cases. They generally make the arbitrator's job easier. This is in line with Healy's argument that poor presentation of a case at the CCMA is often a reason for delay and frustration for all the parties involved (Healy 2001:3). It was mentioned, however, that they sometimes attempt to 'score points' by being very technical and arguing irrelevant issues.

The respondents did not indicate specific negative perceptions with regard to the *fees* charged by *lawyers* because they assumed that these are market-related and regulated by the Law Society. There was a concern that *consultants* are driven by money, that there is no regulation of their fees and that '...they work with clients' money without having a trust account to manage such funds...'

In terms of their future role, the respondents perceive one of the roles of consultants in the labour relations system as one of chairing *internal hearings*, advising the employer on what constitutes fair labour practices in the workplace and ensuring that the employer's 'house is in order'. Although the employer pays the consultant, he or she can act as a mediator between the employer and the employee, provided that he or she is seen as being objective and unbiased.

The prerequisite for the effective incorporation of consultants into the dispute resolution system is, however, that there should be a professional, regulatory body to oversee the conduct of consultants and to which they are

liable. Their role in future might *increase* because there are still many small and medium-sized employers who think that labour legislation is too complex. The fees of consultants are also lower than those of lawyers. Consultants will in any event attempt to gain access to the processes more and more, among others through the establishment of employer organisations for their clients.

The respondents in this study were predominantly *supporting the presence* of lawyers and consultants in processes and stated that ‘...the CCMA is absolutely paranoid about labour lawyers and consultants as they both have a very specific role to play’. The consultants have a preparatory role and the labour lawyers assist in arbitration. The fact that the LRA does not allow them in certain processes is problematic because ‘...there already exists a relationship of trust between them and their clients and they are usually more clued up than their clients.’ *Commissioners* should be able to deal with those ‘bad’ consultants and lawyers, ‘... but you cannot ban them from the system if there is such a huge need for their services among employers and employees’. It also *expedites* the hearing if they are inside the meeting rather than sitting outside, when the parties frequently request caucuses to consult. ‘I’d rather have the terrors inside than outside. If they are going to sabotage me, I want to see it and want to be able to stop it. I’d rather have them on board because in the room I find them quite helpful.’ In many instances the lawyers and consultants hear the other side’s story for the first time at conciliation and are only then able to consider the merits of the case and advise their clients accordingly.

Although it was pointed out that the assistance of lawyers and consultants is unnecessary in 70% of the individual dismissal cases, the perceptions were that both parties have a specific role to play in the dispute resolution system and will continue to play an important role. Consultants will be focusing more on the internal processes and preparation of the cases, and the labour lawyers focusing more on the legal technicalities in arbitration and Labour Court. The lawyers will focus on the hard issues (what you can and cannot do in terms of law) and the consultants will focus on the soft issues (what you may or may not do). There is a need for the services of both these parties in the dispute resolution system since most of the employers and employees do not have the capacity to deal with conflict and disputes in terms of the system as provided by the LRA.

It was interesting to find most of the participants admitting that they allow representation by lawyers and consultants with the consent of both parties and a firm warning that they will be sent out if they disrupt the process.

There is significant support for changes to the system to allow representation by these parties, provided that the commissioner retains the discretion. It will be interesting to see if these views will be reflected in future changes to the LRA and CCMA Rules.

## **12. Future of the CCMA and Possible Changes to the Current Dispute Resolution System**

The respondents recognised the fact that the system is experiencing strain and they foresaw that the system will have to change. Various possible solutions for the current problems were mentioned and suggestions were made for changes to the system.

### **Optimism regarding the future role of the CCMA**

The CCMA will still play an important role in dispute resolution in the future. The most important reason for the optimism was that it is a cheap and efficient way to access justice, while the alternatives are costly and only open for bigger employers and bigger cases, and it is seen as one of the best systems currently available.

### **Marginal impact of private dispute resolution bodies on the work of the CCMA**

The predominant perception confirmed the views of Brand (2001:7) that the impact of private dispute resolution bodies on the CCMA will be marginal: ‘...it remains and will probably remain for long an elite phenomenon for a minority...’ because most employees and small employers cannot afford to pay the costs involved in private dispute resolution. One respondent indicated that private dispute resolution would play a minimal role as some unions have indicated that they prefer the CCMA route.

### **Alleviating the strain on the system caused by high referral rates of individual unfair dismissal cases**

Most of the suggestions focused on the problem that there are no costs involved to refer a case to the CCMA and proposed that some sort of referral fee should be introduced for individual unfair dismissal cases. Other suggestions were: more bargaining councils should be accredited, incentives should be given by government to employers not falling in the high referrals sectors, a special telephone conciliation system should be provided, as well as better allocation and management of resources and arbitration awards – ‘...indicating that the CCMA is not a one-arm bandit that produces money when the claim form is entertained’.

### **Consistent application of the law with regard to individual unfair dismissal cases**

The predominant response to this question was that the legislation pertaining to individual unfair dismissal cases should not be relaxed because there has to be a consistent application of the law and employees need protection against arbitrary unfair treatment. The pre-dismissal arbitration and the con-arb processes that were introduced by the 2002 changes to the LRA are perceived in a positive light. There is, however, a call for less regulation in terms of internal processes in the organisation and another suggestion was that ‘Domestic worker cases should be handled by a special tribunal, appointed by the Department of Labour’.

### **Too much emphasis placed on procedural fairness**

The processes are becoming more and more adversarial and technical and more and more points *in limine* are being taken. The current system of dispute resolution that places so much emphasis on procedural fairness in the internal processes has created a generation of employers, consultants, labour lawyers and trade union representatives that turn internal processes into opportunities to show off their power or to score technical points. If the employee then takes the employer to the CCMA, the employer has to do everything possible to restore his or her power. ‘Things have become totally rights orientated and parties are focussing on their rights rather than looking for solutions.’

### **Increasing role of consultants and lawyers**

As stated in the previous section, it was mentioned that the role of consultants and lawyers would definitely increase, with the consultants more involved in the internal processes and the lawyers more involved in arbitration. The following interesting suggestion was made:

‘The labour consultants should be brought on board. Give them credibility and legitimacy in the eyes of the employers and employees and let them take care of the disciplinary and grievance hearings. There is a definite problem with internal procedures – so use them. Maybe a panel of consultants should be established that works with the CCMA or a panel accredited by the CCMA...’

### **Ensuring awareness of importance of proper internal mechanisms**

One commissioner suggested that the system should change to require employers to register as employers at the Department of Labour. This registration should set in motion a process to ensure that they are aware of their obligations and have proper internal mechanisms to deal with conflict such as disciplinary procedures.

### **Promoting the use of private dispute resolution**

The bigger parties – employers and trade unions – should be encouraged to make more use of private dispute resolution. This confirms Deale’s view that private dispute resolution will become increasingly attractive as the benefits of cost savings and preservation of workplace relationships become more apparent (Deale 2001:35). They should include provisions for private dispute resolution in contracts of employment for more senior employees such as those in management and professionals. ‘[T]he CCMA must get its act together and accredit more outside private dispute resolution bodies.’

### **Better utilisation of the con-arb process and case rolls**

Better use should be made of the con-arb process. There should be more conciliation and arbitration rolls to deal more effectively with the case load and make more efficient use of part-time commissioners. This means that cases are only set down for a certain date, and commissioners simply take the next case on the roll.

## **Allowing employers to dismiss at will, but at a price**

The test for a system dealing with such a high incidence of unfair dismissal cases is to see how many employees are reinstated and how many remain in their jobs. The CCMA currently does not achieve this.

An alternative system was proposed, namely that firstly, senior managers and high level employees should be excluded (as they would be able to look after themselves), and secondly, that employers should be allowed to dismiss at will provided they pay compensation to the employee. If the employer chooses not to compensate the employee, then the employee can challenge the dismissal. The current system does in any event not protect the employee and does not provide for lasting reinstatement, so the interests of the individual employee would be better served by such a change.

## **Re-designing the system**

Some commissioners were of the opinion that the system should change, by undertaking ‘...a full-scale Wiehahn commission style change going back to the drawing board...’.

## **Moving back to a judicial system**

One of the reasons for the low settlement rate was that the parties specifically want to get to *arbitration*. This could be an indication that there is a need for a shift in the aims and function of the dispute resolution system. Where the intention before was to have a less legalistic, simple and expeditious system with emphasis on conciliation, there is, according to one commissioner, now such a need for legal certainty that there is a gradual move back to a judicial system due to the problems experienced with the alternatives offered by the CCMA.

## **Serious consideration of reasonable offer of compensation in conciliation**

As mentioned earlier, the offer that was made by the respondent in conciliation should be taken into account in the arbitration award. If it is found that the offer was reasonable and that the applicant unnecessarily prolonged a dispute that could have been settled at conciliation, it should be taken into account in the awarding of costs against the applicant. Such a system would force applicants to consider the merits of their cases more seriously, to be more

realistic about their claims and to take conciliation seriously. It could also create an incentive for employers to attempt to settle instead of 'fighting it out in arbitration or Labour Court' if they know there is a chance that a reasonable offer at conciliation will be accepted.

### **Making the con-arb process compulsory and limiting non-appearance at conciliations**

The commissioners questioned the future of the conciliation process as it is seen to have become obsolete and superfluous. Therefore, it was suggested that the con-arb process should be made compulsory for all misconduct cases. In an attempt to curb the problem of non-appearance, it was suggested that the parties should be phoned a day or two before the hearing to find out if they are going to attend or not. The possibility of some sort of penalty such as a fine for non-appearance at conciliation should be considered and this amount could be made part of the arbitration award.

### **Motivating CCMA commissioners to settle disputes and provide good awards**

It was mentioned by commissioners that the calibre of commissioners doing private dispute resolution is better than that of the CCMA commissioners. 'Competent conciliators and arbitrators do not work for R1 500.00 per day...'. CCMA commissioners must provide an excellent service for the majority of individuals who cannot afford private processes. The private commissioners are doing dispute resolution for their own benefit and reputation and are therefore motivated to settle disputes and provide good awards. The problem is therefore, how to keep CCMA commissioners motivated and instil in them a passion for their work if they work under strenuous circumstances.

## **13. Exploring Alternative Dispute Resolution Processes**

### **Making use of Alternative Dispute Resolution (ADR)**

The definition of ADR has not changed and it is in essence any conciliatory process outside of the judicial system. ADR is also more than conciliation,



mediation and arbitration. It includes processes such as facilitation and third party intervention in problem solving. The prerequisites are that it should be voluntary and the third party must be seen as impartial and credible.

CCMA arbitration is a misnomer for state adjudication without a right to appeal. Arbitration is in essence a voluntary process, '...but at the CCMA the employers are forced into arbitration and they will do anything in their power to get out of it. The incidence of review for private arbitration is less than 1% but for CCMA arbitrations it is more than 30%'. The term 'alternative' is viewed as misleading and there should rather be a focus on 'appropriate' dispute resolution. There is an uncertainty amongst unions and bigger employers as to what ADR is and if it will be recognised by the courts.

### **Exploring more alternatives just before dismissal**

It seems as if certain bigger employers have devised their own internal systems of pre-dismissal alternatives such as *review committees or review panels* in the organisation, consisting of management and trade union representatives. This committee evaluates a case, even after appeal, and the dismissal would only be effected if the committee agrees. If the credibility of this committee is acknowledged by the workers and the union informs the employee that they will not represent him or her at the CCMA – because they are satisfied that justice had been done – then the chances of this employee referring the case to the CCMA are less. 'Such a committee can actually bring management and the union closer together.' This alternative applies mostly to bigger organisations where there is an established relationship between the employers and the union.

Such a system could, however, be criticised as attempts by employers to ensure that they have crossed the t's and dotted the i's to strengthen their case at arbitration.

### **Assistance with the technicalities of the internal procedures**

The pre-dismissal arbitration process has become available with the recent changes to the LRA and entails that a CCMA commissioner does the arbitration as part of the internal processes of the organisation. This, however, has not taken off so far because '...big companies invest a lot of money in training and

developing their personnel to do the internal processes 100% correctly and are not prepared to spend an additional R3 000.00 per day on a CCMA arbitrator to come and do something that they can do themselves?

### **Replacing the grievance and disciplinary procedures**

More attention should be given to a process called 'conflict resolution facilitation': 'People are scared to deal with conflict and need a facilitator to assist them'. This process requires management to arrange a meeting between the parties, on neutral ground, with a 'conflict resolution facilitator', who should be a highly skilled person, to assist parties to work through the issues and emotions underlying the conflict. 'At the CCMA there is no time to deal with emotions and if this could be handled internally the chances are firstly that conflict will not escalate to become disputes, and if it does, there will be a better chance of settling in conciliation. If not, the issues will be much clearer at arbitration making the commissioner's work much easier.'

An interesting suggestion was that the professional boards for psychologists and social workers should be approached to train their students in the field of workplace conflict facilitation and to allow them to do their practical courses at the CCMA or in companies.

### **Making more use of private dispute resolution**

The only true ADR is found in private dispute resolution. 'Employers think it is too expensive but after four or five appearances at the CCMA they begin to think differently.' If the parties are sophisticated enough, as in the case of professional and high level workers as well as unionised sectors of the economy, they should use private dispute resolution. The CCMA should thus be reserved for parties that are unsophisticated and highly adversarial, as in the majority of individual unfair dismissal cases involving small to medium-sized employers.

### **Retaining and emphasising the importance of the conciliation phase**

Most of the participants in this study have been very positive about the con-arb process as a cure for non-attendance, low settlement rate and tedious time delays. However, the con-arb process is not very popular in private dispute resolution because the process of conciliation only comes to fruition in a

voluntary system. A compulsory system eventually forces out the conciliation phase as a means of resolving disputes.

## 14. Conclusion

In the past, the labour relationship was in essence a human relationship. Even though many employers did not have a good (human) relationship with their employees, many others did. The labour relationship has now become a legal arrangement with many legalistic prerequisites, and the main focus of human resources departments is on being procedurally correct. The human resources departments of big companies consist of industrial relations specialists, appointed specifically to deal with CCMA cases. They know the system and make sure that cases are being dealt with 100% correctly.

Dealing with grievances and disputes has become a rights-based process where the parties prefer to focus on their differences and not on what they have in common. Employers use their power by having labour relations specialists or labour lawyers and consultants involved in the processes, whereas the employee is usually limited to representation by a union or a co-worker.

It can be concluded that the perceptions of the CCMA commissioners who have been involved in this study supported the assertions on which this study was based.

It was found that the dispute resolution system is not bringing the parties to the labour relationship closer together. People are much more aware of their rights and none of the respondents supported the possibility that the employment relationship is becoming less adversarial. The high referral rate is seen as an indication of 'pathology of conflict' in the labour relationship.

The reason for the adversarial nature of the labour relationship in the past was that collective issues such as exploitation of the masses, low wages, inequality and discrimination were based on race in the workplace. It seems as if the adversarial nature of the labour relationship has now moved away from these collective issues to individual issues such as discipline and unfair dismissals. It is not the 20% interest disputes putting the system of dispute resolution under strain, but rather the 80% individual unfair dismissal cases.

The findings certainly gave no indication of a growing emphasis on a more people-centred and healthy work environment. The recent changes to the LRA regarding the provision of the pre-dismissal arbitration process and the con-arb process could be seen as treating only the symptoms and not the causes of workplace conflict and an unhealthy dispute resolution system.

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