UNIVERSITY OF CAPE TOWN
SCHOOL FOR ADVANCED LEGAL STUDIES

AND

COMMERCIAL LAW DEPARTMENT

2004

DISPUTE RESOLUTION

CLIVE SINCLAIR HENDRICKS

HNDCLI 004

"REPRESENTATION AT CCMA TRIBUNAL: STILL A VEXED ISSUE"

CONTENT PAGE

Alternative Dispute Resolution

TITLE

"Representation at CCMA tribunal: still a vexed issue."

> "When the Labour Relations Act was promulgated in November 1996, its stated aim was to simplify our law to allow workers and employers easy access to the CCMA to have their disputes resolved through conciliation or informal arbitration, without being represented by legal practitioners. Unfortunately the law is not yet as simple as it had been hoped nor are conciliation and arbitration processes straight forward" [1]

Aim of study

Legal representatives play a prominent role in most court proceedings. There are however, different perspectives on the role they should play in tribunals charged with the task of labour dispute resolution. With the enactment of the Labour Relations Act 66 of 1995 (hereinafter 'LRA') Minister Tito Mboweni, then the Minister of Labour, repeatedly commented that the Commission for Conciliation, Mediation and Arbitration (hereinafter 'CCMA') were structured in such a manner that it would not be necessary for employees and employers to be represented by legal representatives as they would be able to represent their cases themselves.[2] While the idea is that people should not need legal representation before tribunals because of their supposed informal atmosphere, in

practice many parties to tribunal hearings are ordinary citizens who are not skilled at presenting fact and argument and are often inarticulate. The absence of a requirement for formal pleadings and complicated referral procedures has, it seems, however ensured that literacy and a lack of skill and resources do not cause an entry barrier to the system.

According to the explanatory memorandum which accompanied the LRA, a key objective of the legislation was to address the perceived shortcomings of the previous system. In essence the system was considered to be: costly, time consuming, technical, complex, inaccessible, legalistic, illegitimate, and not delivering industrial justice.[3] With very little exceptions, a common theme in the explanatory memorandum and labour court judgments is that legal representatives have been responsible for tribunals operating in unnecessarily complex, time consuming, formal and costly ways.

The aim of the current study was to investigate the issue of legal representation of parties in unfair dismissal disputes, now the most common of employment disputes.[4] The paper evaluated the nature of representation and endeavoured to weigh up the pros and cons of allowing parties in dismissal disputes to be represented by legal practitioners or other categories of representatives. To that end, the author provided a review of the arguments for and against allowing legal representation in cases concerning dismissals. In investigating the aforementioned, the author also evaluated whether there is indeed substance in the criticisms leveled against legal representatives engaged in alternative dispute resolution (hereinafter 'ADR')[5].

Background

The core legislation in the Labour Minister's legislative reform program announced in 1994 was the LRA, passed in Parliament on 13 September 1995, after more than one year of drafting, negotiating among South Africa's social partners and mass economic and political action by unions.[6] Sharpe comments that one of the principal guarantees in the LRA is the protection of all South Africa's workers from unfair dismissals. The drafters of the Labour Relations Bill envisioned the processes of conciliation and arbitration would give effect to this guarantee. As alluded to above, the explanatory memorandum to the Bill make reference to the adoption of a final and binding arbitration process for the quick, simple, cheap and non-legalistic approach to the adjudication of unfair dismissals.[7] The commission[8] did however not deal with how these objectives of cheapness and informality would be obtained, neither did it explore in detail who would be entitled to have the right of representation before the court. However the commission did emphasize the need for less formal procedures than those used in the ordinary courts of law. The commission recommended that all persons, groups and organizations should have access to the court and that costs of litigation should be within the discretion of the court which should keep it as low as possible.

Discourse on the concepts of 'formalism' and 'legalism' is of particular relevance to this paper as it is argued that it constitutes part of the main criticism on the involvement of legal practitioners in ADR. In his article on employment tribunals in the United Kingdom (hereinafter "UK"), J MacMillan explored the tribunal's origins and as a result endeavoured to make some sense of the criticisms and misunderstandings relating to the tribunal's role and performance.[9] He sets out to investigate the recommendations of the Donovan Commission and in particular, what he calls 'the supposed axioms' of the Donovan Model: Easy accessibility, informality, speed and lack of expense.[10] According

to Donovan the most frequent criticism leveled at the modern employment tribunal is that it has become too legalistic. MacMillan is however not clear what the criticism means and what the critics would wish to see in place of the fault they perceive. While referring to the axiom of informality, he opined that the most innocent of children's playground games have rules, imposed not by adults but by the children themselves who instinctively recognize the need for a structure, known to all the participants, within which the game is to be played and without which it breaks down. His view is that any system which was supposed to be applying an Act of Parliament would very soon fall into disrepute and consequent disuse if employers and employees alike had no clear idea what their respective rights and obligations were in any given circumstance, and were unable to obtain guidance for the future because, in the name of informality, it might be deemed appropriate to apply the Act or, worse still, ignore it in a particular case in a way which was entirely unpredictable.[11] He alluded to the intention of the new Advisory, Conciliation and Arbitration Service (hereinafter 'ACAS') arbitration scheme which according to him, seems, is for the arbitrator to operate in a broad common sense industrial way and not set precedents. This, in addition with no right of appeal, he suggests confuses informality with license.

Often the terms 'formality' and 'legalism' are used interchangeably, reflecting the view that formalism is an inevitable consequence of the adoption of legal methodology in tribunals and the involvement of lawyers as tribunal members and party representatives. However, formality is a broader concept than legalism and the formality of tribunal procedures may be a consequence of factors other than the importation of legal values into tribunal proceedings.[12] Allers argues that these factors deserve closer scrutiny before an outright prohibition on legal representation may be considered.

With the aforementioned as a background, the author proceeded to look at the axiom, 'legalism' and investigated whether it has any *nexus* with involvement of legal representatives in ADR.

Theory and hypothesis

The issue of legal representation has for a long time been a controversial topic. This is the position not only in South Africa but in other jurisdictions where ADR is being practiced. The question of representation arose at least as far back as 1982, and arguably even earlier with the report of the Wiehahn Commission of Inquiry into labour legislation in 1979.[13] That study focused in part on the initial aims of alternative dispute resolution to promote quick and effective dispute resolution and examined whether extensive legal representation hinders, or contradicts these aims. It further looked at legislation and tribunal practices in a number of jurisdictions relating to representation and examined whether a legal practitioner's presence, would enhance or detract from the efficiency and fairness of proceedings. It was argued that there are a number of different factors which affect the initial aims of ADR institutions which *inter-alia* included; the approach used by the chairperson, the character of such chairperson, degree of legal complexity of certain matters, jurisdictional issues, procedures, legal representation etc. What needed to be ascertained was whether the abolition of the latter factor alone would necessarily lead to the ideal process envisaged by the Wiehahn Commission.

This study argues that legal representation is not an unnecessary appendage in the dispute resolution process and findings of research conducted in the UK, Australia and New Zealand show that there is a significant correlation between the outcome of a case and whether a party is represented. It was found that legal representation markedly

increased the chances of success. The author scrutinized findings of the research conducted in these countries in so as far as it was relevant to the issue of representation. The author also investigated the similarities between the South African system and that used in India, where their Government is a role player at most stages of their dispute resolution process. While the historical and political contexts of developments in the field of alternative dispute resolution in these countries are quite different, the underlying arguments for increased use of arbitration over a more court-like adjudication process are remarkably similar. It is submitted that although the aforementioned countries have set up different systems, sufficient similarities were found which made a comparison useful. Marked similarities in the substantive law on unfair dismissals mainly assisted the author in the investigation of the issues in this paper. Due consideration was also given to the changing balance between adversarial and inquisitorial approaches followed in these countries and how this elusive concepts are used to formulate change in a system.

The primary data collated included legislation, annual reports, official guidelines and documents, press statements and in-depth interviews which were designed to allow the author to gain understanding and to be able to interpret the reality of CCMA commissioner experiences. The focus of the study was narrowed down with a questionnaire[14] which was initially send by e-mail to CCMA commissioners and later followed up by the structured, in-depth interviews conducted with 17 commissioners at the offices of the CCMA (Western Cape) over a period of three days. The questionnaire mainly probed two main themes that related to, firstly, discerning the commissioner's views on the presence of legal representatives in the dispute resolution process, questioning whether the restriction on the right of representation by candidate attorneys and labour consultants should be retained or lifted and, secondly, examining the approaches, inquisitorial or adversarial, used by CCMA commissioners during

conciliation, arbitration and con-arb processes. Many initial questions were followed up with more probing questions such as 'why is that?' and branched into further unstructured questions. Extensive notes were taken during the interviews and written up afterwards. The paper draws findings from the analysis of commissioner interviews and these are presented in relation to the literature survey of debates on legal representation.

Policy makers in a number of jurisdictions have been persistently asserting that the informality, simplicity and accessibility of tribunals such as the CCMA, in South Africa, ACAS in the UK and the Employment Relations Authority (hereinafter 'ERA') in New Zealand, have made representation unnecessary. The author however argues that, while simplicity, informality and procedural flexibility are valuable qualities in the context of ADR, they should not be used as a justification for denying the contribution which legal representatives makes to the tribunal decision making processes. A further proposition which bears mentioning is that although most ADR activists' strive for a simplified procedure, the paradox is that the law which ADR institutions have to apply is often very complex. Lack of legal representation is sometimes said to ensure informality in proceedings, but while the ability to participate as an unrepresented party may lead to higher levels of satisfaction in the process, it may be at the expense of a favorable outcome. Genn and Genn in their report on the effects of representation in the UK made the following comments which support the aforementioned proposition;

> "The appearance of informality in tribunals may encourage applicants to assume they can simply tell their stories in their own way, but such accounts are all often of little legal relevance to a tribunal whose focus of interest is dictated by legislative criteria. ...Applicants who have told their stories, whether irrelevant or insufficient, may feel satisfied with the process, but lose their case"[15]

It is hoped that the end result will provide a good indication of the little proof and insufficient research conducted, if any, into the existence of a correlation between the presence of legal representatives at tribunals and an increase of formality or complexity of proceedings.

THE POSITION IN SOUTH AFRICA

History and legislative framework

From 1981 to 1996 the determination of alleged unfair dismissals was performed by the Industrial Court. In terms of sections 45(9) (c) and 46(5) of the Labour Relations Act 28 of 1956 an individual was entitled to present his case at the arbitration proceedings in person or be represented by any other individual who is a party to the dispute or by one or more members, office-bearers or officials of a trade union or employers' organization. Provided no other party made prior objection to other party's use of a legal representative and an agreement on the issue was reached, such representation was allowed.[16] The rational for the proviso was explained in the *Pep Stores (Pty) Ltd v Laka NO & others* [17] case where the court noted:

> "Legal representation in the Industrial Court also had its own problems. Technicalities became the order of the day. Prosecuting a dispute through the Industrial Court had become very expensive. Further the process eventually had to suit legal representatives and not parties involved. It was these problems that the drafters of the Act were acutely aware of, as well as the criticism that was leveled at that dispensation by the public in general."

Labour law consultants were also allowed to represent parties at the Industrial Court.[18]

The Industrial Court conducted its proceedings in a formal manner, along the lines of a court of law, and adopted a strictly adversarial approach to the hearing of cases. One of the aims of the LRA was to avoid prejudice caused to workers awaiting the outcome of litigation in the Industrial Courts, Labour Appeal Court and the Appellate Division of the Supreme Court (now the Supreme Court of Appeal). The LRA of 1956 allowed legal representation during conciliation board proceedings.[19] Section 37 (4) provided that parties were entitled to legal representation if all of them agreed.[20] If one party objected, legal practitioners were excluded. It has been argued that the involvement of legal practitioners at conciliation level resulted in a legalistic approach being adopted by the parties.[21] In an article on the Draft Labour Relations Bill, Buirski referred to the Explanatory Memorandum in which the following was said on the involvement of legal practitioners:[22]

> "Lawyers make the process legalistic and expensive. They are often responsible for delaying the proceedings due to their unavailability and the approach they adopt. Allowing legal representation places individual employees and small business at a disadvantage because of the cost."[23]

Bargaining Councils are also tasked with the function of dispute resolution between employees and employers. The overwhelming majority of disputes that are referred to private sector councils (76%) concern unfair dismissals.[24] Christie comments that the capacity of councils to resolve disputes by conciliation was uneven. She referred to a report by the Department of Labour which concluded that the councils settled only 22% of disputes that were formally referred for conciliation, whereas the CCMA settled close to 73%. The wide disparity in the settlement figures can be ascribed to a wide variety of factors and is still a matter of controversy.[25]

The provisions dealing with representation:

South African law does not recognize an absolute right to legal representation in arenas other than courts of law. The existence of any such absolute right was categorically denied some 80 years ago.[26] Our courts have consistently accepted the correctness of that view. There has also been a marked reluctance by of both legislators and the courts to embrace the proposition that the right to legal representation of one's choice is always a *sine quo non* of procedurally fair quasi-judicial proceedings.[27] Section 35 (3) of the final Constitution expressly spells out that a person has the right to choose or consult with a legal practitioner and that they may also be represented by such practitioner.[28] This right can however only be exercised in the context of arrest and exercising the right to a fair criminal trial by an accused or detained person. While the common law does not entitle a party before an administrative tribunal to legal representation as of right, it does provide that such a party be afforded a fair opportunity of presenting his or her case.[29] A comparable bestowal of the right to legal representation exists in the labour law context.[30] Representation by union officials or legal representatives has, however not always been recognized as an employee right.[31]

At the heart of the LRA is the CCMA. The CCMA is charged with dealing with labour disputes and was described in the explanatory memorandum to the draft LRA Bill as a 'one-stop-shop' for resolving such disputes. Where the parties adopted privately agreed procedures through collective bargaining they were not required to follow those set out under the statute. When the CCMA started to operate in November 1996 its annual caseload was projected to be around 33 100 but in 1997 it received nearly double the projected total.[32] From November 1996 to the end of December 1998, the CCMA closed 115 744 cases. In 1998 it received an average of 323 cases per working day.[33] A total of 81 397 disputes were referred to the CCMA in 1998 and of the 63 208 handled that year,

38 000 were conciliated and over 14 000 arbitrated.[34] In 2001 to 2002 the CCMA received 11 0639 disputes and during 2002 to 2003 the caseload increased with 7% to a total of 11 8051.[35] Approximately 82% of all disputes are about termination of employment involving one or two employees.[36] The CCMA's target turnaround time is three months from referral to award in the case of a rights dispute. However, Christie points out that in the forum's first completed year of service, 1997, it did not achieve target. A small scale study of CCMA arbitration of dismissal disputes in mid 1999 showed that the average time from date of dismissal to the last day of the arbitration had stretched to 6.6 months.[37] The 1998 CCMA Annual Report showed that only 2% of employer and employee parties respectively, were represented by legal practitioners at CCMA hearings for that year.[38]

Prior to the amendments to the Labour Relations Act in 2002, sections 135 (4), 138 (4) and 140 (1) of the LRA governed representation at the CCMA. In conciliation proceedings section 135 (4)[39] was applicable and it prohibited legal representation by persons, including consultants, other than the parties referred to in the section. Section 138 (4)[40] of the LRA provided that in arbitration proceedings a party to the dispute may appear in person or be represented only by a legal practitioner, a co-employee or a member, office bearer or official of that parties' trade union or employers organization and, if the party is a juristic person by a director or an employee. Section 140 (1) provided, however, that if the dispute being arbitrated relates to the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employees conduct or incapacity, the parties, despite section 138 (4) are not entitled to be represented by a legal practitioner in the arbitration proceedings. The latter position remains unless the commissioner and all other parties consent, or the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation. This

effectively requires a pre-arbitration trial within a trial and certainly prolongs hearings.[41]

The Commissioner therefore has discretion to allow legal representation based on:

- The nature of the questions of law raised by the dispute,
- The complexity of the dispute,
- The public interest, and
- The comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute

On the first factor regarding the nature of the questions of law, Van Dokkum submits that commissioners are often too busy to properly research the law and if an arbitrator fails to consider an essential aspect of the dispute, the award could be reviewed on the basis that the arbitrator did not apply his mind to the fact or the law or both as the case may be.[42]

The comparative ability factor is often the ground relied upon by commissioners to justify their decision to allow legal practitioners at arbitration hearings. It is has been emphasized that it is the comparative abilities of the parties, as opposed to their abilities per se, that needs to be considered by the arbitrator.[43] Section 140 (1) may partially explain the low incidence of legal representation referred to in the 1998 CCMA review, especially if one considers that cases concerning dismissals for misconduct and incapacity constitute the bulk of CCMA matters. The LRA also encourages private arbitration that takes place in terms of the Arbitration Act 42 of 1965. Arbitration under this Act does not operate wholly outside the LRA because review lies to the Labour Court and in non-labour issues, to the High Court. Whereas under the previous LRA parties could not contract out of the Act, the 1995 Act allows private procedures to supplant the statutory system, [Sections 64 (3) and 157 (4) read with s 24.] It is noteworthy that in private arbitration matters lawyers may represent the parties during proceedings. Section 15 of the Arbitration Act provides that a lawyer may represent a

party, even if the other party is not represented. If the parties want to exclude legal representation they need to do so expressly in their arbitration agreement.

The case for legal representation

Before examining legal representation at conciliation proceedings it is useful to look at a current pronouncement on representation at the level of disciplinary enquiries. In a recent case on the issue *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province & Another*[44] the applicant employee was called to attend a disciplinary enquiry on charges of theft, corruption, bribery and malicious damage to property. A retired magistrate presided over the enquiry and denied the employee's request for legal representation. The employee secured a High Court interdict prohibiting the employer from continuing with the inquiry pending a review of the magistrate's consideration to disallow legal representation. On review Patel J, noted that the magistrate refused legal representation as he was bound by provisions of a collective agreement. Clause 7.3 (e) of the collective agreement stated that:

> 'in a disciplinary hearing neither the employer nor the employee may be represented by a legal practitioner, unless the employee is a legal practitioner'

The presiding officer was of the opinion that he had no discretion to allow legal representation. The court relied on *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others*[45] and held that the disciplinary enquiry constituted administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[46] The court in *Schoon* also considered the provisions of section 33 of the Constitution and section 3 of PAJA. PAJA provides that in order to give effect to lawful and procedurally fair administrative action, an administrator

may in his discretion, give a person an opportunity to obtain assistance and, in serious or complex cases, legal representation. Patel J commented that clause 7.3 (e), compelling a disciplinary enquiry chairperson to deny legal representation irrespective of the circumstances of the case, constitutes a violation of the employee's constitutional right to lawful, reasonable and fair administrative action. The court held that 'flexibility' in this regard is now a constitutional imperative where an administrative body is faced with making decisions that cannot fairly be made without allowing legal representation. The magistrate accordingly had discretion to allow legal representation and he was obliged to exercise this discretion fairly. To determine whether a case is 'serious and complex' for the purposes of section 3 of the PAJA the court alluded to factors such as the nature of charges, the degree of factual and legal complexity, the availability of persons who may represent the applicant and the fact that a chairperson is legally trained which must be considered. The decision to disallow legal representation was set aside and the employee was accordingly entitled to be represented. The judgment laid down clear guidelines for presiding officers involved in conducting disciplinary hearings and serve as a valuable precedent for proponents of a more flexible approach in decision making at administrative bodies.[47] The labour court has also considered that there is no right to legal representation at disciplinary enquiries where the matters are not complex.[48] The court however cautioned that in certain circumstances the denial of legal representation could effectively be a denial of access to a court or tribunal.[49]

It has been submitted that legal representation should be permissible even at the conciliation stage of dispute proceedings. The following arguments that were highlighted at a seminar of the Industrial Relations Association of South Africa (Irasa) remain most pertinent in support of above submission;[50]

1) The inequity that may arise in the application of s 135 (4) if the co-employee, office bearer or director or employee of employer's organization is legally qualified and the other party is not and would therefore not be on equal footing.

It is also necessary to point out that when one considers the situation mentioned under item one above it may happen that the tables are turned. This is where an employee is a member of a trade union. Such trade union representative may be a legally qualified person and the company does not have an in-house lawyer or HR-staff to assist in conciliation. The employer might then appoint the services of a lawyer to which the union may object. This situation may more readily arise in small businesses.

2) Settling the terms of reference where most lay people are not familiar with this process also presents a problem. Lay people do not know the importance of it during arbitration proceedings and the consequences that flow once it has been recorded.

3) It was also submitted that legal representation at conciliation would speed up the arbitration process. At the conciliation stage the parties who cannot resolve the matter can at least agree on the documents to be used as evidence and even the narrowing of the issues.

On item two and three it is submitted that the conciliator can provide the necessary guidance to assist parties where parties they are unsure about the terms of reference and also advise them on narrowing the issues.

4) A legal representative can put up a good *prima facie* defence which research and authority substantiate and which could convince the opposing party not to proceed with the matter. The arbitration process can thus thereby be avoided.

The LRA also narrowed the scope to the right of representation by candidate attorneys as they are not admitted as legal practitioners in terms of section 213 and may therefore not represent clients in the Labour Court or CCMA.[51] A legal practitioner is defined in S 213

of the LRA as meaning 'any person admitted to practice as an advocate or an attorney in the Republic. The Attorneys Act provides that unless cause to the contrary to its satisfaction is shown, the court shall on application in accordance with the Act, 'admit and enroll' any person as an attorney if certain requirements are met. It follows that as a minimum, to fall within the ambit of S 213 and thus be able to represent a disputant in for example the Labour Court or the Labour Appeal Court, a person should be admitted to practice as an attorney be enrolled as such. The limitation on representation was extended to also exclude attorneys or advocates which were once practitioners, and who subsequently ceased to practice. They also do not fall within the scope of S 213.

Perhaps the strongest arguments for legal representation relate to arbitration proceedings. As was pointed out earlier, legal representation at arbitration level is permissible, but not in cases of dismissal for misconduct and incapacity. The Respondent in the *CCMA case No: 1487* made the following significant submissions in favor of the right to legal representation in cases of misconduct and incapacity. He argued that the effect of certain provisions in the Constitution[52] is that a commissioner presiding over the arbitration is required to have regard to the spirit, purport and objects of Chapter 2 of the Constitution when interpreting any provisions of the LRA. In this regard he referred to s 34 of the Constitution, which provides that:

> *"Everyone has the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal."*

The Respondent further argued that the right legal representation is implicit in this section because the use of legal representatives in court and tribunal proceedings is very

much a part of our legal system.[53] Reference was also made to section 33 (1) of the constitution that postulates;

> *"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."*

He contended that the words "procedurally fair" refer to the rules of natural justice in terms of which each party has a right to be heard. This entails the right to legal representation, if it is only by being so represented, parties will be properly heard. The court in the *Netherburn*[54] case investigated similar and additional constitutional infringements referred to *Case No.1487.* The court in *Netherburn* reviewed the CCMA commissioner's refusal to allow legal representation. The commissioners' exercise of his discretion in terms of s 140 (1) was challenged on the following grounds:

- S 23 (1), everyone has the right to fair labour practices,
- S 33 (1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair,
- S 9 (1) everyone is equal before the law and has the right to equal protection and benefit of the law,
- S 9 (3) the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The court considered that there had been no unjustifiable infringement of the Constitution.[55] With regard to section 23 (1), the court assumed, without deciding, that an employer's rights vis-à-vis his or her employees are embraced in s 23 (1). Procedures and institutions must be in place to enforce these rights should they be violated. The court cautioned however that it did not mean that the institutions to enforce the right, belong to

this class. It opted not to decide this point. Regarding section 33 (1) it noted that the CCMA is an organ of State and not a court of law. What had to be ascertained was whether the CCMA's arbitration function is an administrative act or function because only then would it fall within the framework of PAJA regulation.

The court referred to *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others*[56] and preferred the view expressed by Wallis AJ (as he then was) at paragraph 90 that arbitration under the auspices of the CCMA is not administrative action. The court held that there is no differentiation between claims of employers and employees as regards legal representation. Employers or employees who seek to be represented by a legal practitioner are treated on the same footing. Neither has an unqualified right to legal representation. Theoretically where the employer and employee apply to be legally represented, and this privilege is granted to one of them and not the other, it does not mean that s 140 (1) discriminates between them. In *Netherburn* Landman J found that the employer did not suffer discrimination. He alluded to the inconsistency and inherent illogicality in the LRA as regards the issue of legal representation. The court pointed out that where the inconsistent or irrational regulation does not infringe a particular Constitutional right, it does not permit a court to conclude that because one section of the LRA which is out of step with a more expanded or generous right, section 140 (1) is invalid in terms of the Constitution. *Netherburn* confirms the status quo regarding representation in dismissal cases.

Section 138 (1) of the LRA refers to the manner in which a commissioner must deal with a dispute. It states that;

*"The Commissioner may conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine the dispute **fairly** and **quickly**, but must deal with the substantial merits with the **minimum of legal formalities**"* (my emphasis).

This means that the Commissioner controls the process. Legal practitioners who acknowledge and conform to the CCMA's unique approach to litigation should not be obstructed to appear before it. Considering our country's low literacy levels and high scale of low skilled workers from various sectors, it is not surprising that most employees and even many employers in South Africa are not confident of their ability to represent themselves. They must deal with:

- an unfamiliar setting and different rules of procedure,
- the uncertainty of dealing with substantive issues and the strengths or weaknesses of a case, and
- the difficulty of dealing with the former employer directly.

Van Zyl and Rudd[57] in addition highlights at page the anomalous nature of the provisions of the 1995 LRA regarding legal representation. Although parties are generally not entitled to legal representation at unfair dismissal arbitration proceedings, they are permitted such representation during arbitrations relating to residual unfair labour practice matters. Why allow legal representation to an employee who challenges disciplinary action short of dismissal and exclude representation in challenges to dismissals which are more significant for both parties?

The same concern was raised in *Netherburn* where the court states that there are no rational reasons to deny a right to legal representation to an employee or his or her employer in arbitrations about dismissals allegedly occasioned by operational requirements, and not where the capacity or conduct of the employee is concerned. The

court considered that there is no rationality in permitting a right of legal representation in disputes about discipline falling short of dismissal, where job security is not in jeopardy, and not in conduct and capacity dismissals. The court pointed out that it is neither fair, nor does it encourage nor reward entrepreneurship and investment on the part of the employer if the employer is bound to keep in employment employees who do not abide by the rules of morality or who are unfit for the post. An employer too, may require legal representation to ensure that a fair and valid dismissal of such an employee is upheld.[58]

The case against legal representation.

Legal representation is discouraged by the LRA at CCMA hearings. This is based on the assumption that all legal practitioners are adversarial and technical 'point takers.'

Heever v Heilbron Nissan[59] confirmed the legislative view on legal representation. Moahloli C referred to the Explanatory Memorandum that accompanied the 1995 Labour Relations Bill, in determining if representation was permissible in misconduct arbitration. The memorandum, which summarizes the critique against legal representation, pointed out that:

- Lawyers are often responsible for delaying proceedings due to their unavailability and the approach they adopt.
- Individual employees and small business are at a disadvantage because of the legal costs.
- The legislature sought to ensure that the proceedings focused on practical settlements rather than legal technicalities.

These submissions have been echoed in many CCMA awards. The Commissioner in *Netherburn,*[60] considered that it is not an inherent requirement that a fair hearing can only

take place if a party is legally represented. Furthermore, although his task was to apply the law, he would do so in relation to the facts presented by the parties and he did not need to be guided by them on the law. He concluded that the intention of the LRA was that arbitration of disputes concerning the conduct or capacity of an employee should be handled by the parties themselves without legal formalities.

Other writers compared ADR to the formal legal system that has become too formal, rigid and legalistic. They warned that great care must be taken to avoid similar developments in the field of ADR.[61] Draft amendments to the LRA made provision for the unrestricted right of appearance for attorneys and candidate attorneys at conciliation and arbitration proceedings before the CCMA. The Law Society of South Africa (hereinafter 'LSSA') through its Standing Committee on Labour made strong representations to the Labour Department and the National Economic, Development and Labour Council (hereinafter 'NEDLAC')[62] that legal representation would assist in the speedy and efficient resolution of matters. However, with the Millennium Labour Council Agreement some social partners and particularly NEDLAC, favored the retention of the status quo. The 2002 Amendments[63] deleted the three sections dealing with representation. Section 115 (2A) (k) authorizes the Minister of Labour to promulgate rules regulating the right of a person to represent any party in any conciliation or arbitration proceedings. The Amendment Act in schedule 7 item 27(1) however provides that the sections on representation remain in force until the Minister together with NEDLAC and the CCMA regulate the matter by CCMA rules. Rule 25[64] of the CCMA rules currently provides for and regulates the issue of representation at the CCMA. Rule 17(6) & (7) deals with representation in the new con-arb process. The con-arb meeting is a two-way process in which arbitration commences immediately after conciliation in terms of s 191(c) of the Act. The conciliating commissioner will try and resolve the

dispute through conciliation and if this is not successful, the matter would proceed to arbitration. Both parties may request the assistance of a legal practitioner. Basically the same considerations regarding representation as referred to under section 138 (4) and section 140 (1) of the LRA, apply to the con-arb process. This procedure requires the legal representative to wait at the CCMA while the matter is being conciliated until, failing settlement, it is referred to arbitration where the representative will under certain conditions be allowed to appear. It could be argued that the restriction of legal representation in light of the amendments will be a further financial burden to a party, who as a result of his dismissal lost his salary, and in addition has to pay for the extra time his legal representative spends at the con-arb hearing.

After the enactment of the LRA there was a proliferation of trade unions and employers' organizations.[65] The structure of the legislation was such that labour consultants and, to a lesser extent practising attorneys and advocates were effectively denied the right of representation. The statutory restriction on legal representation has led to the following unwelcome situation:

- Spawning of bogus trade unions and employer organizations,[66]
- Some employers resort to appointing their industrial relations consultants as directors of their companies to allow them to represent them at the CCMA.[67]
- Labour consultants act in concert with attorneys to mislead the CCMA and the courts into believing they are proper representatives before it.[68]

The tendency of labour consultants and legal representatives to form trade unions or employers organizations solely to be able to appear in labour court proceedings has not always been readily accepted by our courts.[69] The Explanatory Memorandum to the Labour Relations Amendment Bill 2000 points out that labour consultancies registering as employers' organizations undermines effective dispute resolution. They are in *fraudem*

legis. In the *Smollan*[70] case the company appointed its industrial relations (IR) specialist as a director of the company for the sole purpose of representing the latter at CCMA conciliation and arbitration proceedings. The company applied to the Labour Court to review the senior commissioner's refusal to allow its IR consultant to represent them at the CCMA. The Labour Court held that the commissioner was not entitled to deny the IR consultant permission to appear as he was a bona fide director of the company. The court pointed out that it must be borne in mind that section 138 (4) limits representation of juristic persons considerably and that further restrictions would constitute an infringement of the right to representation.[71] These developments show that some parties are going to great lengths to secure representation of their choice and others even further to gain entry to the system. It is argued that this conduct, particularly where it involves legal practitioners, as in the *Beets*[72] case, is nothing short of being dishonourable and should not be tolerated by our courts.

Commissioner's views on legal representation

An analysis on the merits and demerits of allowing legal representatives an unrestricted right to represent parties in disputes conducted under the auspices of the CCMA would be incomplete if one does not reflect the views and experiences of CCMA commissioners. To that end, in-depth interviews were conducted over a period of 3 days with 17 CCMA commissioners based at their Western Cape offices. Their responses provide a good indicator of commissioner attitude towards the involvement of legal representatives in the arbitration and con-arb processes. Although it must be readily conceded that this was a small group, they represented a diversity of senior and junior commissioners, full and part-time and people with legal and industrial relations experience. As to whether the presence of legal representatives hinder the development of less formal or more speedy

dispute resolution, 58% of commissioners disagreed with this proposition. 40% indicated that the process would be less formal and quicker without of legal representatives and 2% were undecided. Of the 58% who disagreed most had particular comments in support of their stance:

- Legal representatives assist with identifying and narrowing the issues making it clear for all the parties from the beginning;
- They may also have had the benefit of thoroughly consulting with their clients and advising them if their claim or defence was unmeritorious;
- They conduct effective cross examining, thereby getting to the truth quicker;
- It is often time-consuming to deal with unrepresented parties where the commissioner must explain the rules and procedures, the rules relating to evidence and also question the parties without appearing bias. The absence of legal representatives therefore places greater demands on a commissioner's competence;
- Some commissioners also opined that in their experience they were unlikely to be reviewed where both parties were represented by legal representatives as opposed to cases where an unrepresented disputant may feel that a commissioner was biased where he or she did not decide in favour of the unrepresented party;
- without legal representation, the commissioner must take sole responsibility of knowing the law, applying and interpreting it effectively. This may be an easier task for commissioners with extensive experience in industrial relations or with a legal background, than for those without these attributes.
- 88% of the interviewees indicated that union representatives can also be obstructive and sometimes even more intransigent where they are not well

trained and where their primary focus are membership drives and not settlement of disputes in accordance with law.

Commissioners falling within the 40% category opined that:

- Legal representatives are technical point takers and frequently raise jurisdictional challenges;
- Some often do not understand the process and focus only on getting the best deal for their client, neglecting other avenues of possible settlement which could be mutually agreeable to both parties;
- Some are intentionally confrontational and often try to intimidate the other parties into settlement.

The undecided 2% indicated that their approach would depend on the issues of law raised during a matter and the legal representative's or the party's level of understanding of labour law. A total of 88% of the target group indicated that the restriction on legal representatives should not be extended to other types of disputes, ie to residual unfair labour practices, retrenchments, etcetera. In support of this they considered that there are potentially difficult questions of law that are raised in these other catogories of disputes.

On the issue of allowing candidate attorneys and labour consultants to represent parties, Nearly all commissioners considered that the ban on candidate attorneys should be lifted and all 17 commissioners considered that the status quo regarding labour consultants should remain. Those in favour of allowing candidate attorneys were of the view that:

- Candidate attorneys represent parties in both civil and criminal matters in magistrates courts;
- They belong to a professional body and are required to adhere to a ethical code;
- They have legal qualification;

- Their introduction into alternative dispute resolution early in their career may convince them to choose this less confrontational method of resolving disputes as opposed to the adversarial approaches used in other courts.

The strong stance against labour consultants was mainly due to the commissioners' views that the absence of a professional regulatory body, the lack of qualification standards and no known ethical code to govern consultant conduct and the lack of any protection of their clients or third parties militated against granting them rights of representation in the CCMA. Some commissioners opined that if a party obtains inaccurate advice from labour consultants it is very difficult to move them from their positions and the building of trust then also takes longer.

A SUMMARY OF THE UK EXPERIENCE:

> 'If we are not careful, we shall find the industrial tribunals bent down under the weight of the law books or, what is worse a sleep under them. Let principles be reported, but not particular instances' [73]

History and legislative framework

The United Kingdom (UK) law on dismissal dates back more than 30 years and is, in essence very much like SA's.[74] When exploring comparative procedures and institutions for resolving dismissal disputes, there are many similarities between the system of the UK and our own legal system. Both countries have Westminster forms of government, none a complete federal state and their economic policies are determined by laissez faire theories, with market disciplines being injected into the public services by privatization.[75] In common with the other countries investigated in this paper, Australia, India and New

Zealand, the demand for speedy and accessible systems of resolving disputes has been high on the agenda in the UK and South Africa for some time.[76]

Employment tribunals, formerly industrial tribunals, were established in the 1960s to allow lay people access to employment dispute resolution without the need to follow strict procedures or to become immersed in legal technicalities.[77] Sinclair, Botten and Cahill point out that the tribunals were intended to be "user friendly", so that the chairman and lay members would apply as much common sense as law to the issues before them, taking the approach of an industrial jury.[78] Similar views were expressed by the Donovan Commission which called for the creation of tribunals that would have the virtues of cheapness, accessibility, freedom from technicality, expedition and informality.[79] This Commission, under Lord Donovan, was appointed in the context of high levels of unofficial strikes during 1965 and 1968. One of its tasks was to consider relations between management and employees and the role of trade unions and employers' associations in promoting the interests of their members.

Under the original British Tribunal Act the parties were entitled to be represented by any representative except a lawyer. The rationale for this was that the presence of lawyers at administrative tribunals would over-judicialize and unduly lengthen the proceedings. In dismissal cases, the majority of applicants are unrepresented at the hearing though it seems that more then half consulted a solicitor or advisor about their case.[80] Although tribunals may control the way a representative conducts a case, they may not refuse to allow any person to act as a representative. The number of conflicts brought before the British industrial tribunals increased substantially over the past decade.[81] Schneider points out that in 1989 the tribunals worked through 29,000 complaints and ten years later their annual workload amounted to 74,000 finished cases, a growth of 150%. Some

cases clearly presented complex legal issues, whereas others such as claims for redundancy pay or unfair dismissals appeared to be relatively free of 'legal' debate, although it was submitted that the legal rules still played a significant subliminal role.[82] Of the 52,000 unfair dismissal claims referred to Advisory, Conciliation and Arbitration Service (ACAS) during 2001-2002 only about 10,000 went to arbitration with over 22,000 being settled and 12,000 withdrawn.[83] While this statistics revealed a settlement/withdrawal figure of almost 75%, I Manley opined that there is not enough information available to pinpoint the main causes for this high settlement rate. The Employment Rights (Dispute Resolution) Act was enacted on 8 April 1998 and one of its chief aims is to establish of an alternative method for dispute resolution in unfair dismissal cases. The origins of the legislation, however date back to the growing concern in the middle 1990s expressed by the Conservative government that delays caused by the dramatic increase in the case load of industrial tribunals and the growing complexity of the law meant that the original objectives of the tribunal system were no longer being met.[84] According to the Act, the scheme was designed for those cases which do not involve complex points of law. Even so, parties may still be legally represented.[85] The new ACAS arbitration procedure became operational in May 2001. It is entirely voluntary and is available only for unfair dismissal disputes. This arbitration alternative has been supported by both the Confederation of British Industry, as a means of reducing the number of tribunal cases, and the Trade Union Congress as a way of tackling undue 'legalism' in unfair dismissal cases.[86]

The Human Rights Act 1998, by incorporation into UK law of Article 6 of the European Convention on Human Rights, requires that every person has the right to a fair trial and this has been held to include representation in appropriate cases.[87] This view was

confirmed *Bache v Essex County Council.*[88] The Court of Appeal stated that the right under section 6(1)(c) is not overridden by the tribunal's general power under Rule 9 to Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993. These rules allow the tribunals to control the way in which a party or his representative conducts a case, but does not give the tribunal the power to dismiss the representative. Generally there is no legal aid available in employment disputes, although appeal to the Employment Appeal Tribunal is an exception. The *Bache* case and others which deals with the question of legal representation do however not serve as good reference points as these cases mainly deals with a disputant's right to legal aid. In compromise or settlement agreements regarding unfair dismissals, discrimination and equal pay, complainants are usually required to have received independent legal advice from a qualified solicitor or barrister as to the terms and effects of the agreement.[89] The 1998 Act[90] widened the range of persons who could validly give advice to a complainant. The writers point out that it is no longer necessary to receive "independent legal advice from a qualified lawyer", rather that the requirement is to receive advice from a "relevant independent adviser". The latter advisor was defined as one of the following;

- A qualified lawyer, solicitor or barrister;
- A trained union officer;
- Employee, or a
- Member who has been certified by the union as competent to give such advice;
- A worker at an advice centre who has been certified by the centre as competent to give such advice and is authorized to do so on behalf of the centre;
- or a person of a description specified in an order made by the Secretary of State.

Isabel Manley commented that the status quo with regard to representation is basically that "any one" can represent a complainant at tribunals.[91]

Legal Representation is in addition allowed at all stages and during any type of dispute. Apart from lawyers and union officials ACAS also offers legal advice. Workers also make use of the Citizens Advice Bureau who provides legal advice and assistance free of charge.[92]

The Research conducted and findings

The most frequent criticism leveled at the current employment tribunal is that it has become to legalistic. Schneider notes that the current practice of appeals from the Employment Tribunal to the Employment Appeal Tribunal and then the Court of Appeal, the House of Lords on points of law, are at odds with the idea of an informal and non-legalistic forum for worker complaints.[93] He points out that a substantial body of tribunal case law has accumulated over the years and is frequently cited in decisions. Hence, the statutes that the tribunals are supposed to administer have increasingly been subjected to "subtle lawyers' reasoning." He further opined that this development contradicts the philosophy of informality and easy accessibility of the tribunals, resulting in a large proportion of the parties being represented by lawyers or union officials at hearings. Representation by lawyers amounted to some 30% in 1998/1999. Significantly, research in Britain suggests that legal representation markedly increases the chances of success (Leonard, 1987; Genn and Genn, 1989; Genn, 1993). Research conducted by Adele Sinclair and others into tribunal work in the UK is instructive.[94] The authors reviewed statistical analysis into the value of legal representation on a win and loose basis. They examined employment tribunal decisions during 1992 and 1995 to assess whether legal representation contributes not only to the success of a case but also to the amount of

compensation awarded to a successful applicant. They argue that if legal representation is seen to have a significant impact on the outcome of cases it also follows that, without legal aid, or a satisfactory alternative, there are no adequate arrangements to guarantee individual procedural rights and that disparity of legal representation in tribunal proceedings amounts to a breach of individual human rights. Their study was based on three sources of information: by studying tribunal files, by observing cases and from interviews with applicants. Their survey concentrated on unfair dismissals and disputes concerning wages. The research showed that the respondent's lawyer increased his chance of success by 25% if the applicant had no lawyer and the applicant's lawyer improved his or her chances by 70% if the respondent also had a lawyer. The authors echoed the work of Genn and Genn, whose research findings also consistently showed a positive value for the legal representative ranging from 10 – 20%. They concluded that on average the legal representative improves respondent's chances of success by 15% and the applicant's by of 6.5%. The authors however warn that these results must be tempered by the likelihood that even those applicants who appear to have no representation have sometimes already received considerable help in the way of legal advice and assistance from legal representatives before filing their application to the tribunal. An ACAS opinion survey into parties' perceptions of representation in unfair dismissal disputes showed that:

> "... The general view of applicants and employers – both those who had acted for themselves and those with representatives – appeared to be that it is very difficult for an unrepresented party unfamiliar to the system to operate within it. This was underpinned by the view that tribunal procedures are, in fact, complex and legalistic and that an unrepresented party is at a distinct disadvantage at a hearing,

particularly of their opponent has professional representation...' (Lewis and Legard 1998, 40)"[95]

Sinclair was however doubtful whether the perceptions of the parties to unfair dismissals were sufficient to give an individual right to legal representation, but argued that the statistical evidence gives a more concrete basis for such a claim. It is clear from their findings is that the European Union and human rights law made aspects of dismissals claims more complex and the hearing process subject to scrutiny. Therefore they considered that access to legal representation will need to be addressed to ensure that the right to be compensated for unfair dismissal can be pursued in a way that dismissed employees rights become a reality in financial, as well as declaratory terms. In reviewing the aspect of representation at employment tribunals Macmillin argued that the involvement of lawyers is not in itself, a departure from the 'Donovan' ideals, although cases with legal representation on both sides frequently takes longer to come to trial, and longer to try, than cases without.[96] For him, it should be entirely a matter for the parties whether they are represented or not and for the legal profession to acknowledge and conform to the tribunals' unique approach to litigation.

DEVELOPMENTS IN NEW ZEALAND

History and legislative framework

A review of the developments in New Zealand is useful because the country's system and legislative framework on unfair dismissals, called unjustified dismissals is somewhat similar to South Africa. From 1894 to 1991 the country had a legal system which supported trade unionism and collectivism.[97] Colby and Newall points out that since 1936 union membership were compulsory for workers below managerial level in the private sector with industrial level agreements which applied to all workers in the industry and

until 1980 all unresolved disputes were resolved by compulsory arbitration. The Employment Contracts Act 1991 (hereinafter "ECA") heralded a fundamental paradigm shift in New Zealand's industrial relations. The Act scrapped compulsory union membership and employees now negotiate legally binding contracts which can be either individual or collective and in either case employees can now authorize someone to negotiate on their behalf, such as a lawyer or a trade union.[98] The country's unfair dismissal provisions have been in operation since the early 1970s. The New Zealand Industrial Relations Act 1973 required all arbitration awards and collective agreements to contain a personal grievance procedure to deal with disputes about unjustified dismissals and in essence this provision was retained. This Act did however not define dismissal or deal with it in any express way. Corby and Newall commented that this provision gave the appellate courts considerable scope in that the court now had to provide the guidelines on the question if a party was dismissed or not. Unjustified dismissal claims were handled by an employment tribunal established under the Act. As far as procedure under the ECA concerned the position was as follows;

- the grievant must notify the employer in writing of the grievance alleged, how it occurred and the remedy sought;
- if there is no resolution, grievants apply to the employment tribunal for mediation and/or adjudication;
- if grievants want adjudication, either with or without mediation, then as well as filling in form they have to make a statement of claim, which in practice is at least seven pages long, and they have to specify the precise remedy, ie the quantum if compensation is sought.[99]

Corby notes that for the period, 1996-1997, 59% of cases lodged with the New Zealand employment tribunal were settled through mediation, though the reasons for this

undoubtedly go beyond the effectiveness of the process itself. The rewards of continuing to an employment tribunal are potentially less, and the risks greater, than in the UK because not only are the levels of compensation fairly modest, but also legal representation is much more the norm and costs tend to follow the event.[100] The enactment of the Employment Relations Act 2000 (hereinafter "ERA") heralded the end for the employment tribunal. The new law's main focus is now on the enhancement and preservation of employment relationships and a more emphatic reliance on a range of mediation services to achieve those objectives.[101] Section 149 of the ERA however provides that the tribunal would remain in office continuing to deal with matters which fall within its jurisdiction for a specified transitional period, assisting the phasing in of the Employment Relations Authority. Section 159 of the ERA creates the expectation that the parties will undergo mediation and the Employment Relations Authority must also consider whether an attempt had been made to resolve the matter by the use of mediation. Parties therefore have access to mediation to resolve their disputes before it goes to the Employment Relations Authority and on to the Employment Court if no agreement is reached. While the Employment Court remains with a similar jurisdiction, the employment tribunal has been replaced with access to mediation through a free service provided throughout the country by the Department of Labour.[102] If the dispute is not resolved at this level then the matter maybe referred by the parties to the Employment Relations Authority. This institution is charged with investigating the matter in a non-adversarial manner and without technicalities, which basically means without lawyers having the right to cross examine the parties.[103] If this process does not produce an agreed outcome the matter may be referred to the Employment Court for a de novo hearing.[104,105] Here the normal adversarial processes apply. An appeal lies to the Court of Appeal but only on a point of law.

A frequently heard criticism is that there are lengthy delays. Carol Powel, referring to the role of counsel during mediation states that they must *inter-alia,* advise their clients on the legal issues and provide a baseline to compare what is currently on offer in negotiation with what might be available in another forum.[106] The strength of a party's legal rights and the time and cost of the litigation process are significant factors in this analysis. She commented that lawyers are also very useful in the option generation phase, as they understand their own client's needs and interests and have significantly less emotional interest in the overall outcome, enabling them to put forward useful options which address the needs of other parties as well.[107]

Before turning to a reflection into legal representation in mediation and that of investigation and determination under the auspices of the Employment Relations Authority, it is useful to look at the policy proposals which apparently inspired the New Zealand when the procedures were devised. The website of the Department of Labour expressly deal with the question of legal representation in its user guidelines. Under the heading 'Do I need to employ an advisor or legal representative during the mediation phase?' the proffered answer is;

> "A mediation meeting is not a court. People often represent themselves, so, if you feel confident, you can prepare for the meeting yourself and explain the facts. But if you feel unsure, you can employ an advisor, or ask a friend or family member for assistance and support. Engaging an advisor does not necessarily mean they will, or need to, represent you before or during mediation. You may need assistance at two stages: (1) preparing for the mediation meeting and (2) attending the meeting. You don't need any technical knowledge, but you need to be able to listen, respond and maintain enough distance from the problem to be open-minded

about the facts presented. An external advisor is often useful in that role. This can be a friend, experienced community leader, or a professional advisor."

A similar question was posted relating to a case in which a party proceeds to the Authority for investigation and a decision. The reply reads;

"The process used in an Authority investigation is designed to make it easy for the people directly involved to attend an investigation meeting without an advisor or representative. An investigation meeting is not like a court hearing. The Authority member decides how the investigation will be conducted and what information is needed, so there is less need for you to have representation. You can present your own case. All that is generally required for the statement is a description of the facts as you see them. You won't need to prepare an elaborate statement about law. The support officers at the Authority and the Authority member can explain what is involved and what you need to do. The Authority member will run the investigation so that no one is disadvantaged because they don't have representation. But if you feel unsure, you can ask a friend or family member for assistance and support, or use an advisor or representative, such as a union, an employers' association, a lawyer, a community law office, or an employment relations advocate."

The apparent policy considerations behind the aforementioned guidelines indicate that the Department of Labour envisage the process to be simple, without technicalities and user-friendly.

The research conducted and findings

Research into in New Zealand's employment tribunals conducted by Ian McAndrew on adjudication at tribunals shows that the most significant component of the tribunal's workload involves unjustified dismissal claims.[108] The Department of Labour's statistics

for 1992 to 1997 shows that tribunal decisions on misconduct dismissals accounted for 31.4% of case decisions. There was some decline during the period from 1997 to 1999 when dismissal cases accounted for 29.9% of the tribunal decisions.[109] McAndrew's research explored the role of representation of parties in employment tribunals. Parties are generally represented by lawyers or by lay persons or they represent themselves. The following table reflects party success rates by type of applicant representation for 1992-1997.

Table 1

Grievance Outcomes			
Grievant Representation		**Win**	**Lose**
Self Represented	**Count** **Percent**	**28** **(49.1%)**	**29** **(50.9%)**
By Lawyer	**Count** **Percent**	**678** **(66.2%)**	**346** **(33.8%)**
By Advocate	**Count** **Percent**	**459** **(64.3%)**	**255** **(35.7%)**
Unknown	**Count** **Percent**	**255** **(61.7%)**	**158** **(38.3%)**

Applicants in New Zealand were significantly less likely to be successful than those applicants who were represented by anyone. It is clear from table one that there is a substantial difference in success rates between applicants represented by lawyers and those represented by non lawyers. He comments that some would no doubt find this to be reason for regret given the tribunal's statutory aim to function as an informal and accessible adjudicatory body. It is also noteworthy that there is no substantial difference between applicants represented by lawyers and those represented by non-lawyers. McAndrew's research also explored the employer success.

Table 2

Grievance Outcomes			
Employer Representation		**Win**	**Lose**
Self Represented	**Count**	**88**	**17**
	Percent	**(83.8%)**	**(16.2%)**
By Lawyer	**Count**	**700**	**459**
	Percent	**(60.4%)**	**(39.6%)**
By Advocate	**Count**	**275**	**148**
	Percent	**(65.0%)**	**(35.0%)**
No Appearance	**Count**	**129**	**4**
	Percent	**(97.0%)**	**(3.0%)**
Unknown	**Count**	**228**	**160**
	Percent	**(58.8%)**	**(41.2%)**

Unsurprisingly, employers who fail to appear at a hearing, or do appear but without professional representation they are generally less likely to be successful than when they appear with professional representation. Table 2 bears out this proposition. McAndrew's research in 1999 and 2000 indicates that the variable that was the best predictor of the win-lose outcome was "the nature of the grievance". It follows that success rates also depends on the type of dispute before the tribunal. Beyond that, representation is the most significant variable in dismissal disputes. Employers were twice as likely to resist a claim based on personal grievance if they were represented by a lawyer (33% respondent success rate) than if represented by a non-lawyer (16%). McAndrew however cautions that these statistics do not denote a guarentee of 'representation effect' but the research does show that, whatever the cause, under the defined circumstances, parties were more or less likely to have been successful depending on their representation choices, and that the fact that that is so is statistically significant and a demonstrable reality, not mere chance.

As under the old Employment Contracts Act, legal representation is allowed at all the stages. Colby and Newall comment that legal representation is more common in New

Zealand, where 47% of employees were legally represented compared to the United Kingdom where the equivalent figure was 24% during 1998-1999.[110] This high figure may partly be contributed to the fact that legal aid is available for the parties at the Employment Tribunal. The Legal Services Agency is responsible for providing legal aid to disputants who have to undergo a means test, similar to that which is provided in South Africa in Criminal Courts. The difference difference in New Zealand however is that the legal aid provided by the Agency is not entirely free.

DEVELOPMENTS IN INDIA:

History and legislative framework

Notwithstanding the apparent differences in the legislation and particularly the State's involvement in the compulsory adjudication process, it is argued that in substance there are similarities in the manner in which the State ordered labour market in India and South Africa. The Constitution of India declared it to be a Welfare State, where equality, social justice and welfare of workers are secured. As in South Africa, social justice enjoins the State to eliminate inequality of income, status and standards of life and provide a decent standard of life to the working people.[111] India's legal system emphasizes judicial intervention in the resolution of labour disputes on the grounds that this approach would better serve the cause of social justice. It was felt that social justice would be best administered by a labour judiciary because it would keep in mind the power position and susceptibilities of workers.[112]

The Industrial Dispute Act 1947[113] (hereinafter "IDA") is the principal central industrial relations law in India and its objectives are investigation and settlement of industrial disputes.[114] It establishes compulsory adjudication of rights disputes between employers and workers as well as interests disputes by industrial tribunals.[115] If an employer intends

to dismiss a worker it must comply with the *The Industrial Employment (Standing Orders Act) 1946* (hereinafter "IE(SO)A"). The of IE(SO)A however only applies to establishments with more than 100 workers and to directing the procedures for dismissal of workers for misconduct – no other category is permitted.[116] If an employer wishes to terminate the services of a worker by notice, the IDA becomes applicable. The IDA establishes statutory labour courts and tribunals to adjudicate disputes.[117] The presiding officers are high court and district court judges who is empowered by the IDA to establish their own procedure but the tribunal rules require evidence to be taken and witnesses to be examined, cross-examined and re-examined. [118,119] While the powers of the industrial tribunal in some respects are different from those of an ordinary civil court, it is essentially working as a judicial body.[120] It has been held that the tribunal discharge similar functions to those of court although it is not a court.[121] The judgments and awards of labour courts and tribunals are final and not subject to appeal. As in South Africa, conciliation in India has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management.[122] Conciliation is encouraged through a variety of devices:

- conciliation is by an Government official of the Labour Department[123];
- the conciliation officer is required to make all efforts to settle the disputes by conciliation;
- the agreement reached in the process of conciliation is subject to certification as fair by conciliation officer;
- the settlement is a self executing document and a breach by management is a ground for recovery of dues under a simplified summary process.[124]

When a dispute exists between employer and employee it is referred to one or other of the authorities specified in the Act. The Labour Courts and tribunals are given wide powers

to determine disputes and, wherever necessary, to grant appropriate relief which the normal courts of the land cannot grant. [125] Section 18 provides that the parties may conclude settlements in conciliation or private agreements. Conciliation agreements are binding on all the workmen employed in a certain industry at the time of the agreement but private agreements are only binding on the parties to the settlement.[126] A settlement agreement, even if concluded in conciliation does not however have the same status as a court order. As a consequence it is widely considered that conciliation is formality.[127] About 90% of the Government's conciliatory intervention and references to the labour courts relates to dismissal of workers.[128]

The Industrial Law in India did not originally discourage legal representation and restrictions were first imposed in 1950.[129] At the time the parties and the Employment Tribunal could reach agreement on legal representatives. Section 36 of the IDA provides for representation of workers by the following category of persons:

It reads:

(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by-

(a) [any member of the executive or other office bearer] of a registered trade union of which he is a member;

(b) [any member of the executive or other office bearer] of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by [any member of the executive or other office bearer] of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorized in such manner as may be prescribed.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by-

(a) an officer of an association of employers of which he is a member;

(b) an officer of a federation of employers to which the association referred to in clause (a) is affiliated;

(c) Where the employer is not a member of any association of employers by an officer of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged and authorized in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court.

(4) In any proceeding [before a Labour Court, Tribunal or National Tribunal], a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and [with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be].

The policy behind the IDA was to expedite industrial dispute resolution and to avoid conferring a narrowly legal complexion to industrial differences.[130] According to Saini legal practitioners need more time for presenting cases with detailed opening and closing remarks. It has also been suggested that in India, as elsewhere, prolonging a matter might sometimes serve the pecuniary interest of the practitioner in terms of higher fees.

As in South Africa, there is an absolute prohibition to representation by a legal practitioner in statutory conciliation proceedings.[131] Representation by legal practitioners before the Labour Court or tribunals reflects the SA 1956 LRA in allowing representation with the consent of all the parties to the proceedings as well as leave from the court.[132]

The IDA reflects the early 20th Century English law definition of trade disputes as these

may not concern individuals unless it is taken up by his union or a considerable number of workmen.[133] A company or corporation can be represented by a director or their own officers. In the event that a legal practitioner under a company or corporation's control is not a practicing advocate or attorney, the fact that he was earlier a legal practitioner or has a legal degree, will not stand in the way of the company or the corporation being represented by him.[134] Parties can, as in South Africa, avoid the constraints on representation by having their legal representative becoming an officer of an association of employers or an office bearer of a trade union.[135] There is no scope for inquiry by the tribunal into the union or an employers association.[136] The IDA also provides in section 2A that an individual dispute relating to dismissal is deemed to be an industrial dispute. However the adjudication of such a dispute still requires a conciliation officer to refer the dispute to the tribunal.[137] Thus the ostensible extension of the statutory dispute resolution procedures remains subject the exercise of administrative discretion of state officials. The tribunal proceedings are traditionally adversarial and adjudication was intended to be procedurally more flexible than civil trials. Indeed, commentators suggest that labour courts and tribunals have come to follow very strict civil procedures and legal niceties and echo the Civil Procedure Code 1908.[138] Saini's 1994 study showed that presiding officers do not enquire into disputes and are passive civil court umpires of the evidence and argument put by the parties. He states that although legal terminology may be sometimes necessary for conveying the precise meaning of concepts, its frequent use makes it difficult for the parties to understand and participate during the proceedings. The IDA does allow for experts to assist labour tribunals and courts but this option is almost never exercised. Pai notes that labour courts and tribunals emphasize formal civil court procedure rather than working with a more flexible inquisitorial method which is more likely to bring out the essential issues in a dispute. Furthermore, since the judges are

transferred from civil courts to labour courts, they are frequently not well versed in the issues relevant in employment disputes. He argues that it is reasonable to suppose that the presence of legal practitioners in conciliation may divert attention to technical pleas and will detract from the informality of proceedings, thereby impeding smooth and expeditious settlement. However, legal practitioners cannot be blamed if they use their legal training and experience for the benefit of their clients. He acknowledges that Labour law operates in a field where there are two unequal contestants. An employee is therefore, under s 36(1) entitled to be represented in any proceedings under the act by the three classes of officers mentioned in this section, with the exception of conciliation proceedings. He points out that the consent of the opposite party mentioned in s 36 (4) is not an idle alternative, but a ruling factor. Studies based on a sample of cases brought forth for adjudication indicated that in proceedings before labour courts, management are normally represented by management consultants or lawyers, while workers rely on the outsider union leaders to represent them.[139]

Ordinarily, proceedings take three to four years for making an award.[140] Singh, former Chief Justice of India cited the following factors as the main contributors to the lengthy adjudication proceedings:

- The labour department's discretion to refer which it often delays to exercise;
- The raising of preliminary jurisdictional issues;
- The presiding officers' lack of training and understanding of industrial jurisprudence and there adversarial approach to proceedings;
- Labour laws that are badly drafted;
- adversarial approaches used by legal practitioners.[141]

In order to curb the delay in the finalization of dismissal disputes Justice D.A. Desai, former Supreme Court Judge, proposed that dismissal disputes be disposed of within 3

months, and that the workman should receive his salary during this period.[142] At the end of this period, if the presiding officer is satisfied that resolution of the dispute is delayed beyond the 3 months on account of a recalcitrant workman, his compensation may be reduced proportionate to his indifference or dilatory tactics. If on the other hand the employer is to blame for the delay, full compensation should be given until the disposal of the matter. In the opinion of Desai this will have an effective check on the maneuvering on either side in speedy disposal of the dispute. Commentators in India also considered that the possible delaying tactics can and must be curbed by presiding officers. It was submitted that presiding officers are in a position to restrain and educate the legal representatives thereby encouraging the formation of legal representatives who are sensitive to the uniqueness of labour tribunals and the issues before it.[143]

DEVELOPMENTS IN AUSTRALIA:

History and legislative framework

Historically the Australian Industrial Relations Commission dealt with collective disputes. In such disputes the parties were usually represented by a union on the one hand and an employer or employer association on the other. The first major piece of federal legislation to impose direct obligations on employers in relation to dismissals as part of the federal industrial relations system was the *Industrial Relations Reform Act 1993.*[144]

For the first time legislation provided statutory protection for employees against dismissal that was harsh, unjust or unreasonable, and dismissal that was not for valid reasons connected with the employee's capacity or the employer's operation.[145]

There are a number of important differences between the Commission's traditional jurisdiction and the new unfair dismissal regime. Parties to unfair dismissal proceedings

may appear in person or be represented by a union or employer organization. Section 42 of the Workplace Relations Act 1996 (hereinafter WR Act) provides that:

(1) A party to a proceeding before the Commission may appear in person.

(2) Subject to this and any other Act, a party to a proceeding before the Commission may be represented only as provided by this section.

(3) A party (including an employing authority) may be represented by counsel, solicitor or agent:

(a) by leave of the Commission and with the consent of all parties;

(b) by leave of the Commission, granted on application made by a party, if the Commission is satisfied that, having regard to the subject-matter of the proceeding, there are special circumstances that make it desirable that the parties may be so represented; or

(c) by leave of the Commission, granted on application made by the party, if the Commission is satisfied that the party can only adequately be represented by counsel, solicitor or agent.

(4) A party that is an organization may be represented by:

(a) a member, officer or employee of the organization; of

(b) an officer or employee of a peak council to which the organization is affiliated.

(5) An employing authority may be represented by a prescribed person.

(6) Regulations made for the purposes of subsection (5) may prescribe different classes of persons in relation to different classes of proceedings.

(7) A party other than an organization or employing authority may be represented by:

(a) an officer or employee of the party;

(b) a member, officer or employee of an organization of which the party is a member;

(c) an officer or employee of a peak council to which the party is affiliated; or

(d) an officer or employee of a peak council to which an organization or association of which the party is a member is affiliated.

(8) Where the Minister is a party (other than in the capacity of employing authority), another party (including an employing authority) may, with the leave of the Commission, be represented by counsel, solicitor or agent.

(9) In this section (other than paragraph (3) (a): *party* includes an intervener.

In addition to this provisions the parties may be legally represented by leave of the commission, but leave may only be granted if: all parties consent; on application by the party and if the Commission is satisfied that, having regard to the subject matter of the proceedings, there are special circumstances making it desirable that the party be so represented; or on application by the party, the commissioner is satisfied that the party can only be adequately represented by counsel, solicitor or agent. If the '*member, officer or employee'* chosen by a party to represent it is legally qualified then the party will have legal representation as of right. The restriction on legal representation only extends to legal representation by counsel or solicitor in their professional capacity.[146] However where employment by a party is a sham to overcome the restriction on legal representation the right of the '*employee'* to appear may be lost. [147] While as a matter of practice leave to appear by counsel or solicitor is generally granted it should never be assumed.[148] The legislative context within which the Commission operates is provided for in section 110(2). It postulates that in any proceedings before the Commission:

a) The procedure of the Commission is, subject to the Act and the Rules of the Commission, within the discretion of the Commission;

b) The Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just; and

c) The Commission shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.

Ross points out that a commissioner may intervene, to an appropriate extend, by asking questions of witnesses. Such a role is appropriate to clear up a point that has been overlooked or left obscure, obtain additional evidence and to exclude irrelevancies and discourage repetition. The role of the Commission in asking questions of a witness may be greater where a party is unrepresented or ineptly represented.[149] In Australia the success rate of conciliation is at about 80-90%.[150] Disputants are obliged to attempt to settle the matter via conciliation and if unsuccessful, the AIRC must issue a certificate indicating it's assessment of the merits and may recommend that the applicant should not pursue a particular ground.[151] The WR Act provides for two situations where costs may be ordered. The first is where the AIRC is satisfied that an application was lodged under section 170CE 'vexatiously or without reasonable cause and the second relates to the situation where parties behave 'unreasonably' post-lodgment.[152]

The Research conducted and findings

Unfair dismissal matters now account for about half of the Commission's overall workload.[153] Some 7 121 such applications were filed in 2002/2003. Ross requested the Australian Industrial Relations Commission (AIRC) Registry to prepare a table setting out the outcome of arbitrated unfair dismissal applications in 2001 by mode of representation.[154] The preliminary results showed the following developments in terms of

arbitrated results dealing with jurisdictional objections: the objections were upheld in 55% of all cases. Where both parties where represented 49% of objections are upheld and where only the employer is represented 79% of objections were upheld. Only 28% of objections were upheld where the employee is unrepresented and the applicant represented. Ross commented that a similar pattern, though not as dramatic, emerges in arbitrations on the merits. The study showed that applicants succeed in 65% of cases where both the parties are represented while for unrepresented applicants the success rate falls to 50%.

Represented applicants are successful in 86% of the cases where the employers are unrepresented. A significant proportion of the parties in these proceedings are self represented. The increasing incidence of self-represented parties has created particular challenges for the Commission as well as significant resource implications for its Registry. Similar issues have emerged across a wide range of courts and tribunals.

As Mason CJ observed in Cachia v Hanes:

"*While the right of litigant to appear in person is fundamental, it would disregarding the obvious to fail to recognize that the presence of litigants in person in increasing numbers is creating a problem for the courts.*"[155] Self represented litigants emerged as an issue within the Australian legal system some 30 years ago. According to Ross at that time the key the concern was in relation to criminal matters and the extent to which lack of representation prejudiced a fair trial.[156] It was not until the late 1980's that researchers and commentators began to consider the issue in the context of civil proceedings. The research generally suggests that self represented parties are less likely to be successful in their litigation than parties who are represented and that self represented parties tend to require greater registry resources. On the issue of unrepresented litigants and reforming the civil justice system, an Australian judge recently commented:

> "I believe that the question of how to cope with [the plight of the unrepresented litigant] is the greatest single challenge for the civil justice system at the present time...cases in which one or more of the litigants is self-represented generally take much longer both in preparation and court time and require considerable patience and interpersonal skills from registry staff and judges."[157]

The Australian Institute of Judicial Administration (AIJA) identified particular problems related to self represented litigants in their report published in 1998. These problems *inter alia* included:

- The lodgment of irrelevant material;
- The failure to understand procedural issues or follow advice in relation to them; and
- The failure to understand the distinction between legal advice and advice on progress and the problem of added stress on court staff .[158]

These problems were also identified in conciliation and arbitration proceedings before the AIRC. [159] Meredith's research into the resolution of unfair dismissal disputes examined the conciliation process in the South Australian jurisdiction.[160] She conducted interviews with employee applicants, lay advocates and solicitors to obtain empirical data for the identification of the factors associated with and assessment of fair process. Her evaluation of conciliation identifies four factors as important to employees in meeting the need for fairness: acknowledgement, being heard, addressing the issues and representation. She found that most employees are doubtful, to a greater or lesser extend, about their own ability to represent themselves. The unfamiliar setting, not knowing the rules of procedure and the general demands of the whole process were particularly stressful. The overriding issue was, however, the basic need for representation in part to correct the power imbalance between the employee and the former employer. She

concluded that all employees who were represented, even when they had not been entirely well represented, were unanimous in their view that representation is necessary. Her study showed that those applicants who were capable of representing themselves appeared to be a very small minority.

Late in 1998 the Australian Government reviewed the first twelve months of operation of the unfair dismissal provisions under the WR Act to assess the impact of the federal unfair dismissal arrangements which commenced on 31 December 1996, particularly on small business, and whether those arrangements had operated as intended.[161] The terms of reference for the review were The report also investigated the effects of section 42 of the WR Act. Submissions made by *inter-alia* the Australian Chamber of Commerce and Industry (ACCI), Industrial Relations Court of Australia (IRCA), Job Watch and AIRC included the following;

- The current process for lodging an unfair dismissal claim requires an applicant to seek legal advice in order to have a realistic chance at successfully challenging termination. The structure and language of the WR Act and the difficult process involved in electing to proceed past conciliation were blamed for creating a need for legal advice in this type of action.
- Proceedings can quickly cost out an applicant, particularly where the respondent challenges jurisdiction so that the applicant incurs legal fees upfront, prior to the merits of their case being heard.
- Lawyers engaged by applicants to appear in conciliation proceedings do not have either the appropriate attitude or adequate experience to facilitate a practical and speedy resolution to claims. It was argued that the unnecessary interference by some practitioners is brought about by a lack of familiarity with the system.

- Some solicitors were not adequately prepared for conciliation: they had not adequately research the issues or taken proper instructions from their clients. Furthermore, some solicitors sought to extract a settlement and did not take appropriate advantage of the conciliation process.
- Concerns were also expressed that settlement offers were higher than they should be to cater for legal costs during pre-arbitration. As a result, some businesses wanting to settle their matters on a commercial basis are dissuaded from doing so, because to proceed to arbitration and have a finding made against them, is a cheaper option.
- High applicant legal costs were identified as a hindrance to settlement because they inflate settlement amounts.[162]

These employer parties recommended limiting legal representation during conciliation to enhance access to legal services and reduce the 'topping-up-effect' with regards to settlement amounts. The Government rejected this on the grounds that decisions on legal representation should be a matter for each party, subject to the requirement for leave of the Commission. Government also noted concern of employers and small business about the increasing likelihood of inappropriate or speculative applications arising from legal practitioners operating on a 'pay if you win' basis, or lawyers or other service providers inappropriately advertising the ease of access to unfair dismissal jurisdiction.[163]

ADVERSARIAL VS INQUISITORIAL APPROACH

TOWARDS A MORE INQUISITORIAL APPROACH

> "Justice should not only be done but should manifestly and undoubtedly be seen to be done."[164]

Benjamin, writing on South Africa argues that the question of representation cannot be separated from the broader issue: whether a court should adopt the adversarial approach or whether a more inquisitorial approach would bear greater dividends.[165] This author is also inclined to proceed on the proposition that the decision to allow or disallow legal representation should be influenced by the approaches used at CCMA proceedings. In common law jurisdictions, the function of the courts is to listen to the cases as presented by the opposing sides and to decide at the end which of those cases the court prefers. There is little descending into the arena, no investigating the alleged facts or *mero moto* suggesting possible solutions for resolving the dispute.

The rules of natural justice preclude the Judge, or arbitrator, from discussing the respective cases separately with the parties. The presiding officer must,... be seen to be impartial. The underlying philosophy in civil jurisdictions differs from that in common law jurisdictions. The presiding officer may play a more investigative role, but sometimes at the expense of party control over their dispute. In both civil and common law jurisdictions the parties 'hand over' their dispute to the legal process and their control diminishes eventually to zero when the court reaches its conclusions. Adversarialism was defined as a system in which the parties, rather than the tribunal, are in control of the pre-hearing and hearing processes.[166] An adversarial system refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issue in dispute, investigating and advancing the dispute.

[167] The term 'inquisitorial' refers to civil code systems in which the judge has primary responsibility. 'Inquisitorial' also connotes an inquiry where the decision maker investigates a matter. Civil code proceedings represent, in procedural theory, 'judicial prosecution' of the dispute, as opposed to 'party prosecution' of the dispute under the common law system.[168] During inquisitorial proceedings the presiding officer plays a more active role, calling witnesses and interrogating them in order to ascertain the truth. The main differences in the role of the arbitrator during adversarial and inquisitorial proceedings were identified by John Brand in 1993 where he states that;

> "This model [the conventional adversarial model of procedure used in the courts] is based on the idea that the disputants are two adversaries fighting it out while a neutral third party acts as umpire. In its purest form this model requires the adjudicator to be seen as completely aloof from the fray. The adjudicator is required to avoid the impression of bias by refraining from intervening to comment or question too often. Nor should the adjudicator seek out evidence which he or she thinks is essential less the impression be created that the adjudicator is aiding one side or the other ...It is possible, [however], for an adjudicator to play a completely different role, namely that of an inquisitor who actively seeks out the facts by calling witnesses and questioning them ... This model is practiced very effectively in many European countries, and is sometimes used in South African arbitration. It places great demands on the competence and impartiality of arbitrators because they are required to dominate the hearing."[169]

The research conducted by J Clark during 1999 analysed adversarial and investigative approaches to dismissal arbitration proceedings in South Africa and the UK.[170] An analysis was done of the Justice Report and its main recommendations on the procedures in the UK industrial tribunals. The Justice Committee concentrated on a range of

procedural matters that it felt were responsible for much of the failure of the tribunals to meet their original objectives. Investigative procedures would allow tribunals a greater degree of control allowing them to initiate pre-hearing inquiries, clarify the issues in advance and to participate more proactively in the hearing process, which it was felt was dominated by the party's presentation of their cases, examination, cross-examination and sometimes re-examinations of witnesses.[171] The report indicated that there were major variations in the use and mix of adversarial and investigative approaches, depending on factors such as the personality of the chairperson, the representation of the parties, and the extend of the parties' preparation before the hearing. J Clark commented that it should be noted that neither the UK employment tribunals nor CCMA hearings in South Africa, adopt exclusively adversarial or investigative approaches in practice. He identified three factors which are central in evaluating the type of approaches;

- the underlying philosophy and structure informing the dispute resolution procedure, i.e. whether the process is defined in law or policy guidelines as predominantly adversarial or investigative;
- the mix in practice between the use of the two approaches; and
- the potential (in law, policy and practice) for shifting the balance between the two approaches.

According to Earnshaw and Hardy, Schedule 1, Rule 11 of the Employment Tribunals (Constitution and Rules of Procedure, 2001) requires a tribunal to 'seek to avoid formality in its proceedings' and enable it to conduct the hearing in such a manner as it considers most appropriate to the clarification of the issues before it. It would therefore appear that whereas the traditional adversarial approach is not permitted in arbitration proceedings, tribunals have the flexibility to move from adversarial to inquisitorial mode when the nature of the case and parties' representation requires it.[172] One of the main

recommendations made in the Justice Report was the need for the greater use of investigative approaches in more routine unfair dismissals. But as MacMillan notes, it is far from clear how any alternative system would operate in a way which equally maintains the delicate balance between informality and structure on the one hand and the need to be inquisitorial whilst remaining impartial, on the other.[173]

South Africa uses a mixed approach (See Table 3 below). During the 1980s and early 1990s most South African arbitration agreements reflected a mix of adversarial and investigative procedures. Lötter and Mosime argued that most arbitrators during that time preferred to use the adversarial approach. They were of the view that given the volatile industrial relations climate in South Africa, arbitrators were loath to be seen as partial. An investigative approach clearly assumes a relatively stable industrial relations climate, also placing a premium on the quality, legitimacy and self confidence of arbitrators. It is trite law that a commissioner must conduct proceedings before him in a fair, consistent and even-handed manner. Even though a commissioner has the power to conduct arbitration proceedings in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly under the provisions of s138 (1) of the Act, it does however not give him/her the power to depart from the principles of natural justice. In this regard, section 145 of the LRA provides for a review if there is a defect in the arbitration and such defect means that the commissioner committed misconduct in relation to his duties as arbitrator, committed a gross irregularity in the conduct of the arbitration proceedings, exceeded his powers or the award was improperly made. It is clear from the section that a distinction is made between review and appeal. It has been submitted that the grounds set out in section 145 (2) seem to be preoccupied with procedural problems which prevents the arbitration process from functioning as intended.[174] The section does not appear to

allow a review on the merits of an award. On considering the issue of review, section 158 (1) (g) has reference. The section postulates;

> (1) The Labour court may-
>
> (g) despite section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law.'

This section's broad terms have interpreted to override section 145 thereby furnishing a more generous basis of review that might include an assessment of the commissioner's decision on the merits.[175]

The judgment *County Fair Foods* serves as a reference point for looking at how the Labour Court applied the principle of review and it is also relevant to the issue of the approaches used in tribunals.[176] In an application to review an award of the CCMA, Stelzner AJ had to decide whether a commissioner's conduct of the proceedings had given rise to a reasonable apprehension of bias and that this constituted misconduct, alternatively, a gross irregularity in the conduct of the arbitration proceedings. The court pointed out that a commissioner must not assist, or be seen to assist, one party to the detriment of the other. It stated that although it clearly lies within the commissioner's powers to decide whether to adopt an inquisitorial or adversarial approach of fact finding, once this decision has been made it ought to be consistently applied to both parties. The court concluded that in so far the evidence concerns the commissioner overstepped the boundaries of fair procedure in the conduct of arbitration proceedings. The commissioner's descent into the arena gave rise to a reasonable apprehension on the part of the employer/company that he was not impartial. The Labour Court held that this was a reviewable defect and the award was accordingly set aside. This author holds serious reservations on the judgment in *County Fair Foods*. The obvious practice issue which

comes to the fore is the dilemma 'where the commissioner knows one side is misrepresenting facts or law to the other side or to the arbitrator. One may also consider that the Labour Court has held that arbitrating commissioners are required to assist lay litigants and not allow their errors to favour the other party unfairly.[177] In the study conducted by MacMillan it was found that lawyers who have represented both employers and employees opined that for the most part of their experience applicant/employees are for the most part quite straightforward in their account of the dismissal and have little rationale for embellishing it. On the other hand, employers are required to justify their actions and, feeling threatened, may recall or create some additional circumstances.[178] This author is of the opinion that a commissioner should be able to test the veracity of the evidence offered by a party, even if he has to do so in a robust manner and even more so where one party is not represented. The author agrees with De Villiers AJ where he refers to s138 (1) read with s192 (2) of the LRA and opined that these sections, not only allows, but *compels* a commissioner to delve into both the substantial and procedural aspects of a dismissal, (my emphasis). Some commissioners are, by personality and disposition, more inclined to intervene in proceedings than others. It is submitted that the appearance of justice and fair procedure does not impose a monochrome uniformity upon commissioner conduct, to the extent that only one style of conducting proceedings is permitted. It is erroneous to infer that "it is more important that justice should appear to be done than that it should in fact be done."[179] It is further submitted that, in the event that the powers of the commissioners are curtailed by the Labour Court, clearer guidelines on the ambit of their investigating powers should be in place. In South Africa it is not yet clear if a CCMA arbitrator may go beyond the evidence or submissions raised by the parties in the interest of truth-seeking (most CCMA arbitrators are unlikely to want to do this, partly to avoid the impression of bias, and they are reluctant to postpone

a matter, thereby increasing costs).[180] Currently guidance in this regard is lacking. Brand is of the view that, where disputants are not represented, justice is not likely to be done if the adjudicator fails to call vital witnesses or ask important questions not raised by the parties. Cases where an adjudicator finds that one party has failed to prove his case for lack of evidence (even though the evidence may be available) are simple providing technical justice.[181] In the investigative hearing, the arbitrator can intervene to try and ensure that all the relevant evidence is properly presented and tested, thus allowing a great likelihood that material justice (as well as technical justice) is done.[182] The schematic representation by Lötter and Mosime (1993) describes the main stages of a typical arbitration hearing and shows that the arbitrator plays an active, investigative role at Stage 3.

Table 3

Step	Person
1. Opening statement by company	**Company representative**
2. Open statement by union	**Union representative**
3. Enquiry by arbitrator	**Arbitrator**
4. 1st witness's evidence-in-chief for company	**Company representative**
5. Cross-examination of this witness	**Union representative**
6. Re-examination	**Company representative**
7. Evidence-in-chief of the union's witness	**Union representative**
8. Cross-examination of this witness	**Company representative**
9. Re-examination	**Union representative**
10. Argument	**Company representative**
11. Counter-argument	**Union representative**
12. Reply	**Company representative**
Award	**Arbitrator**

Once stage three is complete the procedure is predominantly adversarial with cross-examination by representatives of the parties at its core. The author submits that although these stages are currently basically the same, commissioner responses indicates that in

practice, they use investigating and probing techniques at more stages. The aforementioned responses will be investigated next.

The approach used by CCMA commissioners

The second theme of the questionnaire distributed to CCMA commissioners, questions 4, 5 and 6, focused on the approaches used by individual commissioners during conciliation, arbitration and con-arb processes.

During the conciliation stage it was found that 68% used an inquisitorial approach while 32% opted for a mixed approach depending on the type of matter and the issues raised therein. At arbitration 47% indicated that they will remain inquisitorial, 35% felt that a mixed approach would be appropriate and 18% preferred the adversarial approach.

The con-arb process showed a 59% mixed approach, 31% inquisitorial and 10% adversarial. In response to question 5, 59% of commissioners indicated that con-arb necessitates a shift in approach and 41% said that they do not change their approach during the con-arb process. Commissioners who favoured the inquisitorial approach in most types of disputes also commented that their approach would be less inquisitorial where both parties are equally well represented, be it by a legal or union representative or by employers' organization. Some commissioners opined that although there is generally big scope for the use of the inquisitorial approach, it is of little value where the commissioner has limited experience or no legal background. They would find it more difficult to avoid the trappings of inadvertent abuse, ie tilting a case in favour of a party or providing argument for one of them.

THE WAY FORWARD

A common theme discerned from this comparative study is that in all countries that were investigated legal representation at the conciliation stage is considered undesirable. Although little evidence was proffered for the causes of high settlement rates at the conciliation stage, it was concluded in the UK, New Zealand and Australia that various factors for the phenomena may play a role.

In order to encourage practitioners to adopt a more conciliatory approach and to demonstrate a willingness on the part of the legal profession to participate constructively, the LSSA's labour law committee drafted a code of conduct for attorneys involved in dispute resolution proceedings at the CCMA.[183] The draft code was being distributed to the CCMA regional offices and to bargaining councils. The salient features of the proposed code needs not detain us here, save to state that these are but some of the efforts proffered by the LSSA to guide legal practitioners in the field of ADR. While it could be argued that the code on its own would not be enough to re-engineer the perceived obstructive culture of lawyers, it is submitted that more attention be paid to investigating lawyers' views on how ADR activities do or do not play a role in shaping how they think of themselves as legal professionals.

An industrial adjudication process can be described as informal if all disputant parties feel comfortable while participating in it and are able to present their cases with the expectation of a reasonable degree of success. Informality also infers that parties understand the proceedings. It is argued that it is not possible to eschew formalism in the quasi-judicial exercise of power completely. It is submitted that formal procedures do have certain benefits. In particular, formality may encourage greater compliance with tribunal decisions by enhancing the authority of the tribunal as a dispute resolution mechanism. A level of formality may be required to satisfy applicants' expectations that

their matters will be seriously considered in a properly constituted forum, giving them their 'day in court.' Schneider noted that the practice of appeals to the Employment Appeal Tribunal and then to the Court of Appeal, the House of Lords, are allowed on points of law, are at odds with the idea of an informal and non-legalistic forum for worker complaints. Appeals to the New Zealand Employment Court and to the Court of Appeal are also allowed only on a point of law only. Review jurisprudence in South Africa show many forms of irregularity that have been held reviewable: hearings are required to be mechanically recorded, failure to swear in a witness is regarded as a gross irregularity, restrictive interpretations on approaches used by arbitrators as in the *County Foods* case, failure to inform a party of his/her right to make application for legal representation[184] etcetera. It is argued that these developments can also be regarded as obstacles on the road to informality.

In an attempt to reduce process costs and avoid an internal workplace enquiry followed by conciliation and the arbitration the LRA opted for the compulsory con-arb process for unfair dismissal disputes. Le Roux (as cited in Collier, 2003) observes that the rule that prohibits legal representation in conciliation proceedings is relaxed in the event that legal representation is permitted during con-arb. The CCMA confirms this, stating that if there is no objection to representation, the process will then follow the conciliation route directly into the arbitration.[185] The 2002 amended version of this process was intended to create a more expedited process for employees who are dismissed during a period of probation and the dismissal relates to performance or incapacity of the employee. In keeping with the idea of expediting the proceedings, no objection is allowed for disputes relating to probation. It is submitted that these attempts are however clouded by the Labour Courts review jurisprudence alluded above which impose increasing formality. Christie, rightly so in my opinion, commented on these developments that the arbitration

process has become more court-like and less like an informal tribunal.[186] A problem identified in most jurisdictions was the tribunal system's rules and procedures that are often still incomprehensible to the ordinary people. It is not difficult to comprehend that the problem is even more prevalent in the two so-called developing jurisdictions (South Africa and India). A survey done in New Zealand noted that the process of lodging an unfair dismissal claim requires an applicant to seek legal advice in order to have a realistic chance at successfully challenging the termination. The structure and language of the WRAct were cited as the cause for this development. The tendency to consult with legal professionals prior to the institution of dismissal claims were also identified in the UK.

Legal representation has a significant impact on the outcome of cases. This proposition was confirmed by research conducted in the UK, Australia and New Zealand. Authors in the latter country argued that in the absence of legal aid or a satisfactory alternative, adequate arrangements were not in place for the pursuance of rights and tribunal proceedings with an imbalance of legal representation could infringe principles of human rights.

It is noteworthy that Australia and the UK are increasingly referring to the problem of unrepresented parties.[187] Although it is submitted that this problem have been clearly identified in criminal, and to a lesser extent, civil proceedings, commentators warns that it is becoming a problem in other types of proceedings. Significantly, commentators in all four jurisdictions argues that the tribunal chairperson, being in control of the proceedings, have the power to curb legal representatives who frustrates the process. In all jurisdictions investigated legislation afford broad powers to commissioners. It is therefore equally important that one also considers this factor when investigating claims of informality and legality.

CONCLUSION:

If one considers the accessibility and cost arguments in the memorandum to the 1995 Act it is difficult to understand the ban on candidate attorneys. They are most likely to be less expensive than their admitted colleagues and could receive a great deal of useful experience and skill in the less formal setting of arbitration.[188] It is argued that attorneys who are drawn into the system early in their careers can get exposure to consensus-based processes and will hopefully become less inclined to follow adversarial approaches. CCMA commissioners and academics agrees that the ban on candidate attorneys to appear before the CCMA does not make sense, particularly so in the light of section 8 of the Attorneys Act.[189,190] In-depth interviews indicated that 94% of commissioners felt that candidate attorneys can contribute to the process and should be allowed to represent parties at the CCMA. It is submitted that the restriction on candidate attorneys would not survive constitutional scrutiny as it is currently infringing their right to equality and free economic activity. It is hoped that the CCMA will revisit the Rules governing representation and clearly define the term 'legal practitioner' to include candidate attorneys.[191]

Buirski opined that the basic rights to natural justice accorded to an accused facing a criminal trial are not unlike those facing an employee during dismissal. The prejudice that flows from a dismissal, which has often been described as the economic equivalent of the death penalty, is such that a criminal trial and hearing designed to finally pronounce upon the fairness of a dismissal, are not dissimilar proceedings.[192] Brand in turn opined that in practice they have learnt that all representatives have the capacity to be obstructive. Brand's opinion is supported by 88% of CCMA commissioners who indicated that union representatives and representatives from employers' organizations can also be

obstructive. The real problem for Brand is to deal with the obstructive representative and a skills imbalance, not lawyers per se.[193] Baxter reinforces the aforementioned with different phraseology where he comments that it is true that lawyers can be obstructive, but that the remedy lies in the hands of the tribunal's chairman. The chairman may rule on the undesirable behaviour and technical hair-splitting. He argued further that observing from an admittedly partisan point of view, the writer's experience is that a party's case before a tribunal is usually better organized and more efficiently presented when a lawyer represents him.[194] Similar comments were proffered by 58% of commissioners interviewed. Some commissioners who indicated that legal representatives do not assist the process pointed out that;

- Some attorneys often argues with commissioners on irrelevant issues;
- Some appears that some legal representatives show less respect for commissioners then for presiding officers in other forums;
- Commissioners do not always want to interrupt and correct legal representatives thereby embarrassing them in front of their clients.

It is submitted that provisions in the LRA that is often conceptually incoherent and poorly drafted aggravate the high incidence of technical arguments. Commentators in India also cited sections in their poorly drafted IDA as one of the causes for technical pleas and subsequent delays.

J Brand[195] commented that there might also have been an assumption that only employers can afford lawyers. The LLSA initiated a programme to provide 100 000 hours of free legal assistance to prison inmates in the Western Cape. Something similar could be embarked upon for the benefit indigent employees and employers small businesses.[196]

Commissioner responses showed that they are more inclined to follow inquisitorial approaches during proceedings and most considered that legal representatives can assist

with the speedy resolution of matters. It is submitted that although commissioner views on the question of representation, on its own, would not be sufficient to give an individual an unrestricted right to legal representation, their responses lay a basis for further research.

BIBLIOGRAPHY

- Dahnne J and Mosime K *" Dispute prevention as a core function of the CCMA"* in 13th Annual Labour Law Conference Proceedings, 2000 Butterworths,
- Amjad A (2001) *Labour Relations and Trade Unions in India and Pakistan,* Oxford University Press
- Bless C and Higson-Smith C (1995) 2nd ed, *Fundamentals of Social Research Methods an African Perspective* Juta and Co,Ltd
- Jordaan B and Stelzner S. (2002) *What you must know about Labour Arbitration,* Siber Ink
- Macken J. (1980) 2nd ed, A*ustralian Laws The Constitutional basis,* The Law Book Company Limited
- McCallum R and Pittard M (1990) *Australian Labour Law Cases and Materials,* Butterworths, Sydney Adelaide Brisbane Canberra Hobart Melbourne Perth
- Du Toit, Woolfrey et al. (2000) 3rd ed, *Labour Relations Law: A Comprehensive Guide* Butterworths
- Pai G. (2001) *Labour Law in India,* Butterworths India New Dehli
- Robertson M (1991) *Human Rights and Labour Law,* Oxford University Press Cape Town Centre for Social-Legal studies, Durban
- Smith I, Wood J et al. (1993) *Industrial Law Fith Edition,* Butterworths London, Edinburgh and Dublin
- Van den Berg J. (2000) *International arbitration and National Courts: The Never Ending Story,* Kluwer Law International The Hague/London/New York
- Basson, Christianson et al. (2000) 2nd ed *Essential Labour Law* (Vol 1) Labour Law Publications
- Grogan J. (2003) 7th ed *Workplace Law* Juta Law

ENDNOTES

[1] Jordaan B and Stelzner S, What you must know about Labour Arbitration, 2002 Siber Ink, Forward by Sarah Christie.

[2] Backer L *"Who may represent at the CCMA?"* Die Rapport, 23 August 1998, p13

[3] Brand J CCMA: 'Achievements and Challenges-Lessons from the First Three Years' (2000) 21 ILJ 78

[4] 13th Annual Labour Law Conference Proceedings, 2000 Butterworths Durban 2001at pg 213

[5] Steyn J et al *Alternative Dispute Resolution* South African Law Commission, Issue Paper 8, (1997) pg6

"ADR is the generally accepted acronym for alternative dispute resolution. Most simply put, ADR denotes all forms of dispute resolution other than litigation or adjudication through the courts. This definition of ADR, however, makes no mention of a vital consideration. This is that ADR provides an opportunity to resolve disputes and conflict through the utilization of a process that is best suited to the particular dispute or conflict. For this reason many ADR practitioners prefer to use the acronym to denote the words "appropriate dispute resolution".

ADR thus involves not only the application of new or different methods to resolve disputes, but also the selection or design of a process which is best suited to the particular dispute and to the parties in dispute. The field of ADR therefore covers a broad range of mechanisms and processes designed to assist parties in resolving disputes creatively and effectively. In so far as this may involve the selection or design of mechanisms and processes other than formal litigation, these mechanisms and processes are not intended to supplant court adjudication, but rather to supplement it. The most common types of ADR include negotiation, conciliation, mediation and arbitration."

[6] Sharpe C *Reviewing CCMA Arbitration Awards: Towards Clarity in the Labour Courts* ILJ 2000 pg 2160

[7] See *Explanatory Memorandum* at pg 318

[8] In July 1994 the Minister of Labour appointed a Ministerial Legal Task Team to overhaul the laws regulating labour relations and prepare a Draft Labour Relations Bill to initiate discussions amongst social partners.

[9] MacMillan J, *Employment Tribunals; Philosophies and Practicalities*, (ILJ) Vol 28, pg37

[10] Ibid

[11] Ibid

[12] Allers M *'Neutrality, the judicial paradigm and tribunal procedure'* (1991) 13 Sydney Law Review pg 377

[13] "Commission of Inquiry into Labour Legislation" *Wiehann Report* (1992).

[14] See Appendix "A"

[15] Genn H and Genn Y, *The Effectiveness of Representation at Tribunals*, Lord Chancellor's Department London 1989. 243

[16] Morali v President of the Industrial Court & Others (1986) 7 ILJ 690 (C)

Subject to the provisions of paragraph (b)...any party who does not consent to such representation shall in writing all other parties to the dispute thereof, as soon as practicable before the commencement of the proceedings.

[17] (1998) 19 ILJ 1534 (LC) at 1539

[18] Morali v President of the Industrial Courts (1996) 7 ILJ 690 (C)

[19] Benjamin P, *"Legal Representation in Labour Courts"* (1994) 15 ILJ 250 at 260

[20] Labour Relations Act, 1956

[21] Benjamin supra note 19 at pg 250

[22] Explanatory Memorandum pg 319

[23] Buirski P 'The Draft Labour Relations Bill 1995, The Case for Legal Representation at its Proposed Fora for Dispute Resolution' (1995) 16 ILJ 529 at 541

[24] Christie S and Manley I ' *Employment Dispute Resolution for unfair dismissal in the UK and South South Africa'* ILS, September 2002, pg 22

[25] Ibid at 23

[26] Dabner v South African Railways and Harbours 1920 AD 583 at 598

[27] Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others (2002)

[28] Act 108 of 1996

[29] Buirski Supra note 23 at p529

[30] 135 (4), 138 (4) and 140 (1) Labour Relations Act 66 of 1995

[31] National Union Mine Workers of South Africa v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd (1988) 9 ILJ 457 (IC)

[32] CCMA Annual Report 1997

[33] The 2002-2003 Annual Report indicates at pg7 that the CCMA received on average 470 referrals per day.

[34] CCMA *Annual Report*, 1998 at pg 11

[35] CCMA Annual Report 2002-2003 at pg7

[36] CCMA Annual Report 2002-2003 at pg8

[37] Christie S "Employment law in South Africa and Dispute Resolution" pg 26

[38] Brand J CCMA: 'Achievements and Challenges-Lessons from the First Three Years' (2000) 21 ILJ 77

[39] Labour Relations Act 66 of 1995

[40] Ibid

[41] Christie supra note 37 at p 7

[42] Van Dokkum N *'Legal Representation at the CCMA'* (2000) ILJ' at 843

[43] Ibid at pg844

[44] [2003] 9 BLLR 963 (T)

[45] Hamata Supra at note 26

[46] [2002] 5 SA 449 (SCA)

[47] See also *Cuppan v Cape Display Supply Chain Services* (1995) 16 ILJ 846 (D) for the position under the interim Constitution regards the right to a legal practitioner at disciplinary enquiries. In *Ibhayi City Council v Yantolo* the presiding officer commented:

> "Regulation 13(12)(a) provides that at the inquiry the employee or his representative shall have the right, inter alia, to cross-examine any person called as a witness in support of the charge, to inspect any documents produced in evidence, to give evidence himself or to call any other person as a

witness. This is the type of work an attorney is trained to do, and in the words of Lord Denning in the *Pett v Greyhound Racing Association Ltd* case the question may well be asked:

"If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task."

[48] Majola v MEC, Department of Public Works, Northern Province & others [2004] 1 BLLR 54 (LC)
[49] Bangindawo & others v Head of Nyanga Regional Authority & another [1998] 3 BCLR 314 (Tk)
[50] Finder and P Paul "Representation at the CCMA by lawyers and consultants" June 1998, pg 9
[51] Makhafola v Sunpac (Pty)Ltd [2000] 8 BLLR 838 (LC) See also Sethobsa v Kya-Sands Services Centre [2001] 7 BLLR 838 (LC)
[52] Act 108 of 1996, sections 33 and 34
[53] CCMA case NO:1487 www.suntimes.co.za/business/labour /guides/ccmacase11.asp Accessed on 24 April 2003
[54] Netherburn Engineering CC t/a Netherburn Ceramics v CCMA /Case No J 2953 *unreported*
[55] The Labour Court has jurisdiction in terms of section 172 (2) of the Constitution read with section 157 (1) of the LRA to make a order concerning the constitutional validity of an Act of Parliament.
[56] (2001) 22 ILJ 1603 (LAC)
[57] Van Zyl & Rudd "12th Bi-Annual Labour Seminar Paper" pg 227
[58] Netherburn supra note 52 at p 30
[59] (1996) 7 (6) SALLR 84 (CCMA)
[60] Ibid
[61] Jagwanth S "(Alternative) Dispute Resolution and State Justice" pg 235
[62] Established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994)
[63] Amendment Act 12 of 2002
[64] See Government Gazette R1448 (10/10/2003), as corrected by R1512 (17/09/2003) and by R1748 (5/12/2003)
[65] National Employer's Forum v Minister of Labour and Others [2003] 5 BLLR460 (LC) pg 436
[66] Vidar Rubber Products (Pty) Ltd v CCMA & Others (1998) 19 ILJ 1275 (LC)
[67] Smollan v Lebea NO and Others (1998) 19 ILJ 1252 (LC)
[68] Beets v Vessel Inspection Services (2002) 23 ILJ 1381 (LC)
[69] Vidar Rubber Products (Pty) Ltd v CCMA & Others and Taylor v Dando & Van Wyk Print (Pty) Ltd (1997) 18 ILJ 1059 (LC)
[70] Smollan Supra note 67
[71] See also Labournet Holdings (Pty) Ltd v Peter McDermott (Unreported Case No. J2793/02) "In this matter Landman J concluded that the business of Labournet and NEF was in fraus legem in that Labournet sought to use an employers' organization such as NEF to give it an unlawful and unfair advantage relating to representation in the labour law consulting industry"
[72] Beets Supra at note 68
[73] Walls Meat Co Ltd v Khan (1979) ICR 52 at 57, CA per Lord Denning MR
[74] Earnshaw J and Hardy S "Assessing an Arbitral Route for unfair Dismissal" Vol ILJ (UK) 2001, pg3
[75] Ibid at pg61
[76] Christie supra note 37 at p3
[77] Adele Sinclair et al "Unfair Dismissal, Representation and Compensation" Web Journal of current legal

issues (Blackstone Press) 2000 pg 2

[78] Ibid at pg2

[79] Donovan Commission (1968) Paras 568 and 578

[80] Manley I " Employment dispute resolution for unfair Dismissals in the United Kingdom and South Africa" September 2002, pg 3

[81] Martin Scheider "Employment litigation on the rise? Comparing British employment tribunals and German labor courts" at pg 261

[82] Ibid at pg2

[83] Isabel Manley (Referring to the ACAS Annual Report)

[84] Earnshaw supra note 74

[85] ACAS 1998, 9

[86] European Industrial Relations Observatory On-line < www.eiro.eurofound.eu.int./2001/09/feature >

[87] Adele Sinclair et al "Unfair Dismissal, Representation and Compensation" Web Journal of current legal issues (Black Stone Press) 2000 pg 2

[88] [2000] IRLR 251

[89] Earnshaw supra note 74 at p61

[90] Employment Rights (Dispute Resolution) Act

[91] I Manley is the chairperson of the UK Employment Tribunal: Presentation on Comparative Law, UCT 24 March 2003

[92] Abbot B "The Emergence of a new Industrial Relations Actor-The Role of CAB?" (1998) 29 Industrial Relations, pg 269

[93] Schneider supra note 75 at p261

[94] A Sinclair et al Web Journal of Legal Issues (2000) Blackstone Press Ltd at p3

[95] Lewis and Legard 1998, 40.

[96] MacMillan J "*Employment Tribunals; Philosophies and Practicalities*" (ILJ) Vol 28, pg42

[97] Corbel and Newall (1999) "Unfair Dismissal in South Africa: comparative perspectives from Great Brittian and New Zealand pg 3

[98] ibid at pg 3

[99] Corbel and Newall ibid at p5

[100] Earnshaw supra note 74 at p302

[101] McAndrew, I (1999) Research Report: Adjudication In The Employment Tribunal, *New Zealand Journal of Industrial Relation*, pg 1

[102] Anderson G, "Just a jump to the Left? New Zealand's Employment Relations Act (2000) AJLL 14 (2001) at pg 64

[103] Ibid at pg 82

[104] Anderson ibid at p80

[105] ECA s 79 (b)

[106] Powel C "*Contingency Fees*" New Zealand Law Journal, June 2001, pg193

[107] Ibid at p193

[108] McAndrew, I (1999) Research Report: Adjudication In The Employment Tribunal, *New Zealand Journal of Industrial Relation*, pg 3 *Research Report* www.commerce.otago.ac.nz Accessed 07/01/2004

[109] McAndrew ibid at p 2

[110] Ibid at pg7

[111] Singh K N "Industrial Adjudication and Social Justice in India" *South Asia Multidisciplinary Team,* ILO pg 49 www.icfai.org Accessed on 17/02/2004

[112] See *Western India Automobile Association 1949 ILLJ 245*

[113] For the Objects of IDA, See *Hindustan Antibiotics Ltd v The Workmen*, (1967) 1 LLJ, Supreme Court of India, 114

[114] Pai G B *Labour Law in India,* Vol 1, 2001, Butterworths, at pg 99

[115] Saini S "Labour Court Administration in India" *South Asia Multidisciplinary Team,* ILO pg2

[116] Singh J "The Law, Labour and Development in India" K.M College University of Delhi, 2002 http://wblnoo18.worldbank.org/eurrp/web.nsf/pages/Paper+by+Jaivar+Singh/$File/SINGH.PDF

[117] "A critique of the Industrial Dispute Act" www.icfai.org Accessed on 14/02/2004

[118] Ibid

[119] Industrial Disputes Act, section 11(1)

[120] Pai supra note 114 at p 751

[121] *Bharat Bank Ltd v Employees* [1950] SCR 459

[122] N Desai, *Conciliation and ADR India* (1997) pg 3

[123] Section 4 Industrial Disputes Act

[124] Industrial Disputes Central Rules, Rules 10B to 25

[125] Ibid, See Also, *Western India Automobile Association v The Industrial Tribunal Bombay and others 1949 IL.LJ 245, "* The issue raised in this case was whether an industrial tribunal can direct the employer to reinstate a worker. The judgment said that while a civil court could not reinstate an employee, an industrial tribunal most definitely could do so.... in settling the disputes between the employers and workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of the existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties."

[126] Ibid

[127] Ibid

[128] Saini supra note 115 at p11

[129] Saini supra note 115

[130] Saini supra note 115 at p24

[131] Pai supra note 114 at p1053

[132] Pai supra note 114

[133] Pai supra note 114 at p1053

[134] Pai supra note 114at p1055

[135] Paradip Port Trust v Workmen [1977] 1 SCR pg 537

[136] Ibid

[137] A Amjad *"Labour Legislation and Trade Unions in India and Pakistan"* 2001, pg 63, See however

Avtar Sharma & Others v The State of Haryana 1985 Lab.I.C.1001 "In this case the Government's discretionary power not to refer individual industrial disputes relating to termination has been so severely curbed as to have been virtually taken away."

[138] Ibid at pg 8

[139] Ibid at pg 9

[140] Ibid at pg 51

[141] Singh supra note 111 at 113

[142] Desai D A "Issues in Industrial Adjudication and Social Justice" *South Asia Multidisciplinary Team,* ILO pg 60 www.icfai.org Accessed on 17/02/2004

[143] Olney S " European Labour Court Experiences" *South Asia Multidisciplinary Team,* ILO pg 60 www.icfai.org Accessed on 17/02/2004

[144] Chapman A *"Termination of Employment Under the Workplace Relations Act 1996 (Cth)* Australian Journal of Labour Law Vol 10 (1997) pg99

[145] Pittard M *"Unfair Dismissal Laws: The Problem of Application to Small Businesses"* Australian Journal Labour Law Vol 15 (2002) pg154

[146] Ross "Seminar on federal unfair dismissal jurisdiction" 2001 www.fu-berlin.de Accessed on 17/01/2004

[147] Ibid at pg 2

[148] Re Nurses (Victorian Health Services) Award 1992, Print L7541, per Riordan SDP

[149] Ibid at pg 7

[150] Earnshaw supra note 74 at p302

[151] S 170 CF and 170 CJ *WR Act* 1996

[152] WR Act section 170CJ(2) and (3) postulates:
"-an applicant who has acted 'unreasonably' in failing to discontinue an application after arbitration has commenced"
-an applicant who has acted 'unreasonably' in failing to discontinue an application earlier; and
-an applicant or employer who has acted 'unreasonably' in failing to agree to the terms of settlement."

[153] Ross supra note 146

[154] Ross supra note 146

[155] (1994) 120 ALR 385 at 391

[156] Ibid pg 2

[157] G Davies," The reality of Civil Justice Reform: Why we must abandon the essential elements of our system" (2003) 12 JJA 155 at 168

[158] Parker, Courts and the Public, (AIJA 1998), pg 107

[159] Ibid at pg 824

[160] F Meredith *'Alternative Dispute Resolution in an Industrial Tribunal: Conciliation of Unfair Dismissal Disputes in South Australia'* Journal of Labour Law 2001, at pg 36

[161] Report by the Department of Employment, Workplace Relations and Small Business, December 1998

[162] Ibid

[163] Ibid at pg 18

[164] *R v Sussex; ex Parte McCarthy* [1924] 1 KB 256

[165] Benjamin supra note 19

[166] Industrial Tribunals a Report by Justice (London: Justice, 1997)

[167] Discussion Paper 62: Review of the Federal Justice System, 1999 *Australian Law Reform Commision*

www.austlii.edu.au Accessed on 05/01/2004.

[168] Ibid at pg2

[169] J Brand, *'How to Participate in the Arbitration Process'* in P. Pretorius (ed), *Dispute Resolution* (Cape Town: Juta, 1993) p 106.

[170] J Clark *"Adversarial Investigative Approaches to the Arbitral Resolution of Dismissal Disputes: A comparison of South Africa and the UK"* Industrial Law Journal, Vol. 28 No.4, December 1999.

[171] Ibid at 322

[172] Earnshaw supra note 74

[173] J MacMillan, *Employment Tribunals; Philosophies and Practicalities*, (ILJ) Vol 28, pg40

[174] C W Sharp *'Reviewing Arbitration Awards: Towards Clarity in the Labour Courts'* ILJ 2000 at pg 2162

[175] Ibid at 2162

[176] County Fair Foods (Pty) Ltd v Theron NO & OTHERS (2000) 21 ILJ 2649 (LC)

[177] Grogan J *"Workplace Law"* Seventh Edition, 2003 Juta Law, at pg 386 citing the cases of: Concildated Wire Industries (Pty) Ltd v CCMA & Others (1999) 20 ILJ 2602 and Dimbaza Foundries v CCMA & Others (1999) 20 ILJ 1763

[178] Ibid

[179] H S Saxena *"Tribunals and Natural Justice Principles"* Journal of the Indian Law Institute, Vol 38:3 (1996) pg 352

[180] Christie supra note 23 at p15

[181] Saxena supra note 179 at pg326

[182] Ibid

[183] J Stemmet, *De Rebus* February 2001

[184] Scholtz v Maseko NO & Others [2000] 9 BLLR 1111 (LC)

[185] Collier D 'The Right to Legal Representation under the LRA' (2003) 24 ILJ 763

[186] Ibid at p20

[187] Davies G, " The Reality of Civil Justice Reform: Why we must abandon the essential elements of our system" (2003) 12 JJA 155 at pg168

[188] Van Dokkum N 'Legal Representation at the CCMA' (????) ILJ' pg838

[189] This section allows a candidate attorney to appear in the Magistrates, District courts and tribunals, Act 53 of 1979

[190] Van Dokkum supra note 188 at p838

[191] The Rules do not define the meaning of legal practitioner.

[192] Buirski supra note 23 at p542

[193] Brand J supra note 3 at p85

[194] L Baxter "Administrative Law" (1984) at 252

[195] Brand supra note 3 at p85

[196] Smith A *"Prisoners get free legal services"* Die Burger, 27 March 2004, pg 6

Appendix "A"

CCMA COMMISSIONER QUESTIONNAIRE

1. **Does the presence of legal representation hinder the development of less formal or more speedy and effective dispute resolution?**

   YES (40%) NO (58%) Undecided (2%)

2. **Should the restriction on legal representation in cases relating to misconduct and capacity be extended to other disputes?**

   YES (12%) NO (88%)

3. **Should the ban on representation by Candidate attorneys and others, ie Labour consultants be retained or lifted?**

   Candidate attorneys: 94% indicated it should be lifted,

   Labour consultants: 100% indicated it should be retained.

4. **What approach, adversarial / inquisitorial, is mostly used during dismissal hearings at?;**

   Conciliation proceedings: (68%) inquisitorial, (32%) mixed approaches;

   Arbitration proceedings: (47%) inquisitorial, (35%) mixed and (18%) adversarial;

   Con-Arb proceedings: (59%) mixed, (31%) and (10%) adversarial.

5. **Would the Con-Arb process necessitate a shift in approach where the parties go from Conciliation straight into Arbitration?**

   (62%) indicated that a shift is necessary

   (29%) indicated that they would not change there initial inquisitorial approach

   (9%) indicated that their mixed approach would not warrant a shift

6. **Would your answers to 4 be dependent, and therefore differ, where parties are represented or not?**

   Conciliation: No representation are allowed at this stage,

   Arbitration: (59%) opted for a less inquisitorial approach

   Con-Arb: (50%) opted for a less inquisitorial approach at the arbitration stage.