An Analysis of Commission for Conciliation, Mediation and Arbitration Awards

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1. Introduction

The Commission for Conciliation, Mediation and Arbitration (CCMA) award project aims to analyse the operation of the CCMA in relation to the adjudication of the two major categories of rights and disputes, that is, disputes involving alleged unfair dismissals and unfair labour practices. Any of these kinds of disputes between employer and employee is first subjected to a process of conciliation. If the dispute is not settled, the applicant may refer to arbitration by a CCMA commissioner. The arbitration if final and binding.

The research involved the analysis of 873 arbitration awards sampled from unfair dismissal and unfair labour practice cases for the years 2003 to 2005. The project aims, in part, to test the availability of information to assess the operation of the CCMA as a dispute resolution institution.

The research was undertaken by the Community Agency for Social Enquiry (CASE) between July and October 2006. The report draws attention to the possible implications of the findings for debates concerning the future direction of the CCMA.

The policy brief leaves out references to the method used – that is, the structured questionnaire to capture information from CCMA awards. It also leaves out the sample detail. These omissions were made in order to concentrate on the findings of the research. The policy brief concentrates on the main findings and leaves out the breakdowns to be found in the many tables contained in the study.

2. Purpose of the Study

The purpose of this study is to analyse the operation of the CCMA in respect of rights disputes. Every year, there are 80 000 to 90 000 dismissal cases referred to the CCMA, constituting 80% of all referrals. The number that culminates in arbitration awards amount to about 11 000 per year. Unfair labour practice cases are far fewer, with about 300 resulting in arbitration awards. In undertaking a detailed analysis of arbitration awards, the study sought to highlight operational aspects of the CCMA and also qualitative aspects of the awards that are made by the CCMA. An analysis of trends in relation to unfair dismissal and unfair labour practice cases was possible.

By using the written documents prepared by the arbitrator for each case, the researchers were able to capture information about applicants that is not available in the CCMA Case Management System. This information could provide a more detailed picture of the workers that bring cases to the CCMA, as well as the respondents.

3. Arbitration Awards Background Information

The final set of arbitration awards used for drawing the sample included a large number of awards for KwaZulu Natal. Usually, the Gauteng office of the CCMA is the one with the highest case load, but due to a backlog that exists in the Gauteng office, this office is underrepresented in the study.

The majority of arbitration awards covered by the study were issued by part-time arbitrators. This demonstrates the CCMA's reliance on part-time commissioners to meet its case load.

4. Details of Applicants

Most of the applicants in arbitration cases are individuals and most are male (64 percent). Thirty six percent of applicants were female, compared with a female labour force participation rate of 49,6 percent. Group applications constitute a relatively small proportion of cases at just less than 10 percent.

The breakdown by population group shows that most applicants are African and the majority are in permanent employment. Less than one percent are employed by labour brokers or third parties.

Since 2003, there has been a slight increase in the number of permanently employed applicants bringing cases to the CCMA and a decline in the applicants that are in part-time, temporary or some other form of employment.

Applicants were classified into three skills levels: skilled, semi-skilled and low-skilled. Examples of skilled applicants in arbitration cases include managers, sales consultants, account managers and, in a few cases, prefessionals such as microbiologists. Examples of semi-skilled applicants include security guards, drivers, administrators, clerks, operators and artisans. Examples of low skilled applicants include domestic workers and gardeners, cleaners and general workers. Most applicants are low-skilled or semi-skilled. The mean average income for applicants was R2709,42, corresponding to the predominance of low-skilled applicants.

When it comes to a sectoral breakdown, it emerges that the majority of cases emanate from the retail sector, with the private security industry and the domestic sector being the second and third largest. The larger retailers, such as Pick ‘n Pay, Woolworths and Shoprite Checkers, comprise less than 10% of cases.

Looking at employment in a sector and the number of cases emanating from it, some interesting trends emerge. Although 10,6% of employees are employed in agriculture, forestry and fishing, this sector accounts for only 4,7 percent of referrals to the CCMA. This may be explained by the fact that farm workers are employed in rural areas with difficult access to the CCMA and may have

a low level of awareness of their rights. On the other hand, while domestic workers constitute 8,7 percent of the work force, they constitute 12,1 percent oif referrals. This indicates a high level of awareness of employment rights among domestic workers.

5. Representation During Arbitration

In the majority of cases, both parties had representation. Employees were represented in about 62 percent of cases. Representation by trade union is the most common form of third party representation with trade unions representing their members in 34 percent of cases. Attorneys and advocates represented employees in 14,6 percent of cases.

In the case of employers, most (12 percent) were represented by a human resources representative. The second most common form of representation was employers' organisations, which presumably provide representation for many of the smaller employers who appear in arbitration hearings.

6. Dispute Details

In 64 percent of cases, the process was conducted in terms of the conciliation/ arbitration provisions that allow the arbitration to commence immediately after the conciliation concludes. The holding of a preliminary hearing was reported in 22 percent of the awards that were studied.

The duration of arbitration is generally less than five days and in most cases lasts one day or less. The average number of days taken for arbitration hearings was 1,4 days.

If there was a disciplinary hearing before dismissal, the duration of the arbitration was less likely to take one day compared with cases where there was no hearing before the arbitration. The most likely explanation for this is that where there is a discipliary hearing and the employee challenges its fairness, evidence will have to be led about the conduct of the hearing.

Income levels also play a role in affecting the duration of arbitration. The higher the income category, the more likely it is that arbitration will take more than one day. This could reflect more complex and contested disputes for higher earning and presumably more skilled applicants.

Where there was self representation or representation by directors or managers within the company of employer respondents, the arbitration hearings were more likely to be resolved in a day. Conversely, almost half of all cases where respondents had legal representation took more than a day for the arbitration hearings.

7. Type of Dispute

The majority of arbitration awards analysed concerned unfair dismissal disputes with unfair labour practice disputes constituting less than 10% of cases.

Thirty-seven percent of awards in unfair dismissal applications made mention of there having been a disciplinary hearing. There may have been more hearings that weren't mentioned. Interestingly, reinstatement was claimed in only 23% of cases. The most common reason for dismissal was conduct, with capacity being the second most common.

In the case of unfair labour practice disputes, very few had a grievance procedure before termination. The most common basis for an alleged unfair labour practice was promotion cases, with suspension being the second most common.

8. Outcome of Dispute

The paper looks at information on whether the award was in favour of the employer or the employee, the outcome in relation to the determination contained in the award, what the award was and on what basis it was made.

Most awards are in favour of the employee or applicant and in most cases the awards concern procedural or ordinary grounds for finding a dismissal unfair. Awards were more likely to be in favour of the applicant where the applicant

was employed as a low-skilled worker. In the same vein, applicants earning less than R1 000 per month were more likely to win their arbitration cases. The findings may suggest that low-wage and low-skilled workers are more likely to be unfairly dismissed, or be the victims of unfair labour practices than skilled workers.

It would appear that representation in arbitrations improves the chances of an award in favour of either the employer or the employee. In 67% of cases where the employer was represented, the award was in favour of the employer, whereas in 58% of the cases where the employee was represented, the award was in his/her favour.

In looking at the effect of the type of dispute on the outcome contained in arbitration awards, it was found that the outcome was more likely to be in favour of employees in unfair dismissal cases.

Only a quarter of applicants who won their cases of unfair dismissal were reinstated. Over three quarters of applicants received compensation only. However, an arbitrator is only entitled to order reinstatement if there is a finding that the dismissal was substantively unfair, A further factor is the fact that reinstatement was only sought in 23% of cases.

In slightly more than three-quarters of dismissal cases in which there was a finding in favour of the employee, the arbitrator found that the dismissal was both substantively and procedurally unfair. This may tend to indicate that a high proportion of employers who are respondents in dismissal arbitrations have little knowledge of the requirements of fair dismissal.

It is uncommon for employers to be charged an arbitration fee and there is very seldom an award of costs.

9. Processing Arbitration Awards

In awards relating to claims of unfair dismissal, 25 percent made reference to the Code of Good Practice on Dismissals. This small number may be indicative of the fact that the Code has not been updated in the manner that was envisaged in the initial design of the Act.