CCMA commissioners' look at the LRA minefield

Can unions and employers cope with the complexity of the new dispute resolution provisions in the Labour Relations Act (LRA)? **Dr Hannelie Bendeman** asked commissioners at the Commission for Conciliation, Mediation and Arbitration (CCMA) and came up with disturbing findings.

The study was based on the following assertions:

- Dispute resolution has fallen prey to technicalisation. The very technical nature of the labour relations system is inappropriate for the SA scenario.
- Most of the parties (small employers and individual employees) do not have the capacity to successfully deal with the dispute resolution system in so far as individual disputes are concerned.
- The dispute resolution procedure is based on accepting there is conflict and using the process to deal with it as soon as possible. But many still view conflict as negative and try to avoid it, which makes it hard to apply the statutory dispute resolution procedures.

The very technical nature of dispute resolution prevents parties from seeking alternative options. Labour relations has been reduced to a process of following rules and regulations and other characteristics of a healthy relationship such as trust and loyalty, have become more or less irrelevant.

Even though the LRA (66 of 1995) has brought statutory dispute resolution mechanisms and processes within reach of the ordinary worker, it might actually have compounded problems. Parties to disputes are not equipped to function within a system that has grown complex although it was intended to solve labour disputes quickly and informally with little or no procedural technicalities at the CCMA.

SURVEY FINDINGS

The survey amongst a group of CCMA commissioners in Gauteng revealed:

- **High referral rate to the CCMA** – This could be caused by a number of factors including how easy it is to refer a matter to the CCMA; applicants who believe they will always get some kind of compensation irrespective of the merits of the case; lack of knowledge of the system by applicants who are poorly advised by trade unions, labour consultants and the Department of Labour, who lead them to believe that they have a good case. In the current climate of high unemployment and poverty, employees refer their cases to the CCMA in the hope that there might be some kind of financial compensation. Another factor is the employers' lack of knowledge of labour laws and total disregard for substantive and procedural requirements for fairness. It is also mentioned that employers are ignorant of their responsibilities and do not have, or do not use, their internal grievance and disciplinary procedures.
- **Relationship between internal mechanisms and procedures for handling conflict and high referral rates** – Commissioners thought both employers and employees saw conflict as negative and felt that internal mechanisms such as grievance and disciplinary procedures should be avoided. Employers still have a very paternalistic approach to internal procedures. They use the disciplinary and grievance procedures as a power play to re-establish their managerial prerogative. It was also found that it might not matter whether the employer has followed the correct internal procedures because, if these procedures are not perceived to be credible in the eyes of the employees, they will challenge them in any case.
- **Does the system suit small to medium sized employers?** – Small employers do not have the time, the resources or the will to familiarise themselves with the rules and requirements for fair labour practices. Assistance is obtained from consultants, labour lawyers and employer organisations. This creates a distance between

management and employees and has caused renewed animosity and adversarialism in the workplace at the individual level, similar to that previously found in the collective labour relationship.

- **Appropriateness of the system for individual employees** – Whilst the CCMA is accessible to individual employees, there is concern about the position of the unrepresented individual in a disciplinary hearing.
- **Low settlement rate** – Can be attributed to a number of factors including the non-attendance of parties at conciliation; the inability of the commissioners to resolve disputes due to a lack of training in conciliation skills; employees' expectations that they can get more money at arbitration and employers who do not want to settle at conciliation because there is a possibility that the applicant could lose interest or that there will be another opportunity to settle on the date of the arbitration. The respondents believe that conciliation has become obsolete.
- **Role of consultants and labour lawyers** – The perceptions is that there is a significant need for their services since most employers and employees do not have the capacity to deal with conflict and disputes in terms of the system as provided by the LRA. There seems to be a lot of support for a change in the system to allow representation by these parties provided the commissioner retains some discretion.
- **Needs and problems of parties with regard to conflict management and dispute resolution** – All parties need to know the LRA and other relevant labour legislation as well as internal and external mechanisms available for managing conflict and dealing with disputes. The main problem identified in relation to employers is that they are still very paternalistic and posture and threaten to deal with conflict. The key problem with employees is their high and unrealistic expectations. They are unsophisticated, don't understand the procedures, cannot articulate their problems and are unable to argue the merits of their case.
Problems identified with commissioners included that the parties are sceptical about the competence of the new CCMA commissioners and they feel aggrieved about the fact that arbitration awards are so late. The system was criticised as being unfair towards employers who do follow proper internal procedures. The employer has no option but to go through an internal process, then through conciliation and then through arbitration or the Labour Court. This is very costly in terms of time and money. Both parties are experiencing problems because they are not properly notified, resulting in a high non-attendance rate, low settlement rate, default awards, rescission applications and endless delays.
- **Changes to dispute resolution** – The system is experiencing strain and the respondents foresaw that the system would have to change. There was huge support for the pre-dismissal arbitration and the con-arb processes that have now been introduced. There is, however, a call for less regulation of internal processes that are becoming more and more adversarial and technical. The current system of dispute resolution has created a generation of employers, consultants, labour lawyers and trade unionists that turn internal processes into power games. Parties have become totally rights orientated and are focusing on their rights rather than looking for solutions. The role of consultants and lawyers will increase, with the consultants being more involved in the internal processes and lawyers in arbitration.

- **An over-sophisticated system in which most role-players are not able to operate effectively** – Respondents believed commissioners had failed to utilise Schedule 8 (of the Act) as only a guideline. They turned to the jurisprudence developed by the Industrial and Labour Courts for guidance and this led to a whole new set of rules and case law that made dispute resolution a highly technical process. The system was designed to bring justice to the majority of workers at the lowest level in the labour market. The irony, however, is that the largest part of the workforce often do not have the knowledge, skills and means to stand up to employers who might be determined to frustrate the process by refusing to give effect to awards, taking commissioners on review, not attending processes etc. It should also be remembered that it is a relative new system in a fast changing labour relations environment. Most employers only respond to the system after having been penalised for procedural or substantive unfairness. It is only then that they become aware of the emphasis placed on internal procedures and the strict application of Schedule 8 – usually in arbitration awards. This has made them very apprehensive and they turn to labour lawyers more and more to assist them. The more the lawyers become involved, the more technical the system becomes. The more technical the system, the more the emphasis placed on rights and obligations and the less on conciliation. The CCMA has recognised that the system is complex and took measures to assist parties by simplifying forms, making it more informative, rewriting the CCMA rules and making provision for pre-dismissal arbitration.
- **Alternative Dispute Resolution (ADR)** - The internal mechanisms for conflict management have become very technical and problematic. Hence, the introduction of pre-dismissal arbitration. Consideration could also be given to replacing the current rights-based approach with a conflict facilitation process. Another ADR initiative can be referred to as the pre-dismissal initiative (which should not be confused with 'pre-dismissal arbitration'). These processes are merely aimed at facilitating a move towards cooperation and building trust in organisations where employers and unions can work together. They can also be a way of making doubly sure that proper legal procedures are followed. The conciliation phase as implemented by the CCMA seems to have become obsolete and there is significant agreement among respondents that con-arb should replace the conciliation-then-arbitration system. However, the fact that the con-arb process is not popular in private processes could be an indication that con-arb is not necessarily a better process, but it is an alternative to address the problems that commissioners and parties currently experience.
- **Private dispute resolution** – This is an alternative to statutory dispute resolution but its utilisation is limited to the bigger and more sophisticated role-players who can afford it. Private dispute resolution could however, be one of the answers to the problems experienced at the CCMA and for dispute resolution in future.
- **The effect of Schedule 8 on labour relations** - It was found that dispute resolution is not bringing parties closer together. The high referral rate is seen as an indication of a '...pathology of conflict ...' in the workplace. It seems as if the adversarial nature, which in the past was because of collective issues, has now shifted to individual issues such as discipline and unfair dismissals. The recent changes to the LRA regarding the provision of pre-dismissal arbitration and the con-arb process could be seen as treating only the symptoms and not the causes of organisational conflict and an overburdened dispute resolution system.
- **Problems of commissioners** - The issues identified include problems with case management and administration within the CCMA; problems with CCMA processes and issues around capacity. The CCMA's administration was accused of not being service orientated with no customer service and poor attention to correspondence. Respondents argued that poor document management and appalling telephone skills of the administrative personnel have a negative impact on their work. They represent the CCMA and if the parties are upset with the CCMA because of endless administrative problems, they have no respect for the CCMA and show no respect for the commissioner.

  Problems with CCMA processes relate to whether the conciliation process has become almost obsolete (with low levels of attendance especially from employers) and whether there should be an increased focus on con-arb. Many respondents indicated that they do not have problems with the arbitration process. Poor quality of the representatives at arbitration was mentioned and this supports earlier findings that consultants and trade union representatives do not have the expertise to properly represent employees in arbitration. Capacity issues not only relate to the parties but to commissioners as well with calls for the need for more training of commissioners. It was mentioned that the non-legally trained commissioners do not have the knowledge to do arbitrations. There is a need for better conciliation, negotiation, and facilitation skills as well as telephone skills for those who do telephone conciliations. Other issues raised by commissioners included low morale; no incentives and career prospects, while CCMA management was criticised for not managing the system properly and not maintaining their human resources, specifically the commissioners.

The high referral rate is seen as an indication of a '...pathology of conflict ...' in the workplace. It seems as if the adversarial nature, which in the past was because of collective issues, has now shifted to individual issues such as discipline and unfair dis-missals.

RECOMMENDATIONS

The respondents made various recommendations:

Referral fee – The possibility of a small referral fee could be considered. This fee could cover some of the CCMA's administration costs but most importantly, it is intended to serve as a deterrent for the referral of frivolous and vexatious cases and also to ensure that the applicant has considered the merits of his/her case. The obvious disadvantage is that low-income employees, who are dismissed, might literally not be able to afford the fee, however small it might be. An option is to allow exemptions, have a fee only for employees earning above a certain amount, or to impose cost orders for frivolous and vexatious referrals.

Training and education – More emphasis should be placed on training and education of employers, employees and trade union representatives.

Advisory forums – More use should be made of advisory forums such as Legal Aid Centres. These advisory forums, including the CCMA help desk, should provide qualified reports on the merits of a case before it is referred.

Special tribunal for domestic workers and individual retrenchments - In an attempt to deal with the caseload, the establishment of a special tribunal by the Department of Labour or the Department of Justice could be explored, to deal specifically with domestic workers' cases and individual retrenchments.

Pre-CCMA telephone conciliations – This could form part of the pre-mediation screening process, in an attempt to reduce the high referral rate. Although this practice is, to some extent, already in existence, it seems as if the commissioner or case management staff, who have to do these telephone conciliations, have not been trained properly.

Raising public awareness – Powerful mass media such as *Yiso Yiso* or *Isidingo* should be used to increase public awareness of the CCMA. More should be done to inform people of the role and functions of the CCMA and the rights and responsibilities of the parties in terms of the labour relationship.

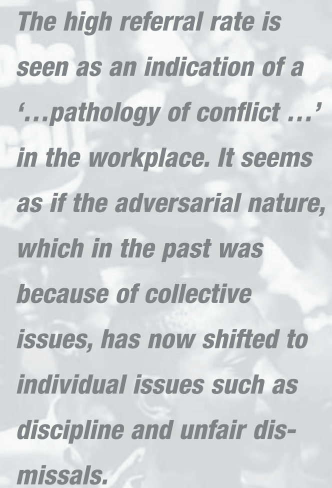
Offer of compensation – A drastic suggestion is to allow employers to dismiss employees at will, with or without just cause and without any procedures other than giving one month's notice, provided that the employer pays compensation equal to the amount of say, three months' salary. There are various reasons why this option should be considered seriously. The first is that, according to some respondents, the CCMA does not have a good track record of reinstatement or re-employment, whereas an expectation of monetary compensation has been created. Furthermore, because there are so many delays, by the time the dispute reaches arbitration, a lot of irreversible damage has been done to the relationship and reinstatement could make the situation for both the employer and employee intolerable.

Small Claims Labour Court – A different system, similar to the Small Claims Court, should be investigated to take care of most of the individual unfair dismissal cases that clog up the CCMA at present. The amount claimed should determine whether the Small Claims Labour Court has jurisdiction or not.

Conciliation and arbitration case rolls – More use should be made of this to deal with the high referral rate. At the moment, case rolls are used specifically to deal with a big backlog of cases, but before it becomes the norm, the perceptions of the employer and employee parties in this regard should be investigated.

Representation in disciplinary and grievance procedures – The constitutionality of denying an employee representation by a lawyer or consultant in the internal grievance and disciplinary processes should be considered, especially if he/she is not a union member.

Prominence of the employers' offer to settle – Due to high employee expectations and their lack of knowledge of the extent of the compensation that can be awarded, employer offers for compensation during conciliation are often not taken seriously. An alternative could be for employers to put offers in writing so as to be taken more seriously. If it is found that the offer was reasonable and that the applicant unnecessarily prolonged a dispute that could have been settled at conciliation, it should be taken into account in the awarding of costs against the applicant. Such a system would force applicants to consider the merits of their case more seriously, to be more realistic about their claims and to take conciliation seriously. It could also create an incentive for employers to attempt to settle instead of 'fighting it out in arbitration or Labour Court' if they know it might be worth their while to make a reasonable offer during conciliation.



The high referral rate is seen as an indication of a '…pathology of conflict …' in the workplace. It seems as if the adversarial nature, which in the past was because of collective issues, has now shifted to individual issues such as discipline and unfair dismissals.

Serving of documents and ensuring higher attendance rates – One of the reasons for the high rate of non-attendance is that parties claim they have not been properly notified. The whole process of serving documents and filing papers should be revisited

Consultants and lawyers – They should be enabled to play a bigger role in dispute settlement. The role they are playing in the labour relations system should be recognised instead of being vilified. A panel of consultants could be established that works with the CCMA or is accredited by the CCMA, in order to ensure that fly-by-nights and poor quality consultants are weeded out.

Registration at the Department of Labour - The system could be changed to require employers to register as such at the Department of Labour, possibly as part of their registration with the Unemployment Insurance Fund, and the Compensation Fund. This registration should set in motion a

process to ensure that they are aware of their obligations and have proper internal mechanisms to deal with conflict, such as disciplinary procedures. The department could ensure that all employers are equipped with a basic set of documents informing them of basic principles of fairness, workplace conduct and their rights and obligations.

Private dispute resolution – This should be encouraged amongst the parties who can afford it. Employers should include provisions for private dispute resolution in contracts of employment for more senior employees such as those in management and professionals. The statutory system should exclude senior managers and high-level employees, as they would be able to look after themselves.

CONCLUSION

The labour relations environment remains adversarial because the dispute resolution system has created an environment where the nature of the relationship is determined by rights, rules and procedures. The adversarialism that has characterised the collective labour relationship in the past now seems to have shifted to the individual labour relationship.

The drafters of the LRA attempted to create and institutionalise a set of values, whereby the behaviour of employers and employees could be structured, in an attempt to ensure a stable system of labour relations. But it could be a long time before both parties reach a point where their behaviour in the workplace is regulated by a generally accepted set of norms based on the principles of fairness as required by the LRA.

The drafters saw the need for proper dispute resolution mechanisms as one of the prerequisites for a successful labour relations system. However, instead of emphasising the prevention of disputes, they focused on rules and regulations for dealing with internal conflict, albeit in the form of guidelines. Because these guidelines have become the norm according to those implementing the LRA, complex and technical processes of dealing with disputes have developed. This has led to a new type of adversarialism in the individual employment relationship, which is based on rights, rules and power.

This study has revealed that the system will adapt in unintended ways to compensate for the strains experienced by the system, and to accommodate the needs of the parties.

Employees, for instance, are referring cases to the CCMA, often whether the case has merit or not. They are taking their chances at the CCMA partly due to this lack of credibility of the internal procedures and partly because they have nothing to lose – there is no cost involved in challenging a dismissal by referring a dispute to the CCMA. This behaviour leads to a high referral rate and the consequential case overload at the CCMA. This case overload places strain on the system and renders it less effective.

Employers, on the other hand, are showing their discontent with the system by not attending the conciliation phase. They are compelled to invest significant resources in ensuring that the internal requirements for procedural fairness have been met and consequently refuse to settle disputes at conciliation. They show their disregard for the conciliation process, and the dispute resolution process is forced back into a legalistic, litigious process where the employer has the upper hand.

The problem does not lie so much with the merits of the dispute resolution processes, the institutions, or the principles on which the system of dispute resolution has been based. It lies in the fact that a system has been imposed on the parties for which they were not prepared and for which they were not ready. The legislature should take heed of the needs of the parties, including CCMA commissioners, when effecting legislative changes to the system. LB

Bendeman is a lecturer in industrial sociology at the University of Pretoria. This is an edited version of a paper presented at the Irasa conference in July.