

# Cutting hassle and upping social justice

## CCMA pre-conciliation

Those who have suffered a workplace injustice may know that taking a complaint to the CCMA can at times be a long and frustrating process. **Glen Cormack** tells of the CCMA's telephonic pre-conciliation process which can be speedy and effective and could make a major contribution to dispute-resolution in South Africa.

**A** semi-literate rural worker travels to the CCMA (Commission for Conciliation Mediation and Arbitration), and explains that she has been dismissed by her employer and has been waiting for her appeal to be heard. As there has been no response from her employer in a small retail shop, she decided to come to the CCMA for help. The CCMA tells the worker that her referral is out of jurisdiction as more than 30 days had lapsed since she was dismissed so she now needs to apply for condonation for the late referral.

An analysis of a four-year (2006-2010) period shows the contribution that pre-conciliation has made in resolving workplace disputes. Can pre-conciliations be increased to the benefit of speedy, low-cost resolution of labour disputes as well as the deepening of social justice in the South African labour market?

### BACKGROUND

The concept of pre-conciliation (pre-con) or telephonic conciliation was incorporated into the Labour Relations Act (LRA) with 2002 amendments. Rule 12 of the

CCMA states: 'The Commission or commissioner may contact the parties by telephone or other means, prior to the commencement of conciliation, in order to seek to resolve the dispute.'

Telephonic conciliation was more firmly established in law in the *Giwusa obo PG Heynecke v Klein Karoo Kooperasie Bpk* (2005), 'It is frequent practice in the CCMA to conduct telephonic conciliations and this practice does not contravene any provision of the Act... The Act does not prescribe that a meeting between the parties be convened for that purpose.'

### CCMA PRE-CONCILIATION 2006/7 – 2009/10

Pre-cons completed	% Jurisdictional referrals	Pre-cons settled	% Jurisdictional referrals
2006/07 13,472	16%	6 364	7%
2007/08 12,256	13%	5 988	7%
2008/09 14,084	13%	6 777	6%
2009/10 16,283	14%	7 256	6%

Research shows that these percentages vary regionally from a high of 68% of jurisdictional cases subjected to pre-con processes with settlement rates of 31%, to lows of between 10% and 4%.

*Data from CCMA national case management database*

### PRE-CON PROCESS

The achievements in 2009/10 translate into 14 512 parties having their disputes resolved telephonically. This was an average of 72 hours of referral to the CCMA, without incurring the delays and costs of serving notices and attending set downs.

As a benchmark, the average turnaround times for cases in the CCMA are 26 days for conciliation and 69 days for arbitration. Whilst the CCMA does not measure the rate of reinstatements achieved through pre-conciliation which is the LRA's primary remedy in unfair dismissals, regional records show it can be as high as 27% versus the national reinstatement norm of 12% across all CCMA processes.

A typical pre-conciliation consists of the applicant calling at a CCMA front desk with an alleged unfair dismissal which is 80% of the CCMA's caseload. The staff member assisting the applicant then phones the respondent to hear their side of the story. Through a telephonic conciliation process the matter may be resolved with a settlement agreement achieved between the parties. This is immediately followed with the paperwork to record the agreement reached.

Other pre-cons are conducted a day or two after the dispute is received by the CCMA by fax or mail from the applicant, then allocated to a commissioner to conduct a pre-con. Most often this is where a domestic worker or other extremely vulnerable worker is the applicant. The commissioner contacts both parties telephonically and goes through a similar process to that described above.

### SOCIAL JUSTICE AND CCMA

The CCMA has adopted a social justice position which states that 'Social justice for employees

and employers within the CCMA context includes:

- Knowing your rights relating to fair labour practices.
- Understanding what constitutes fairness in terms of labour relations practices.
- Knowing how to access the law and the CCMA.
- Being assisted by the CCMA staff in a manner that respects your rights to dignity and/or the restoration thereof.
- Being addressed in a language you understand.
- Being assisted to understand and complete the necessary forms and procedures.
- Fair administration, including user-friendly services.
- Low cost, speedy resolution of disputes.
- Equal access to the law and the CCMA.
- Respect for your right to be heard, for your side of the story to be told, ie expeditious, fair and impartial.
- Receiving an outcome of a process which is expeditious, fair and correct in law.
- Being assisted in enforcing any agreements or award arising from the resolution of a dispute'.

The pre-con process addresses a number of these social justice issues, most importantly low cost, speedy resolution of disputes whilst allowing for both sides of the story to be told and heard.

CCMA experience shows that numerous disputes arise from misunderstandings in the workplace. It stands to reason that the sooner issues are addressed in order to overcome misunderstanding, the more likely agreements will be reached and shortcomings redressed such as reinstatement. Conversely, the possibility of redress by agreement between the parties is reduced once significant time has lapsed where a dismissed worker may be replaced by a new appointee.

### PRE-CON BENEFITS: WORKER

Benefits for the applicant/employee includes

- A speedy, low-cost resolution which for an unemployed, often poor person, is of paramount importance.
- A user-friendly, respectful service without the bureaucratic hurdles in referring a dispute and seeing it to final resolution. An example includes incorrectly referred disputes that require corrections, causing delays that in turn lead to the need for condonation applications; the serving of documents and proof thereof; receiving set-down notifications; finding witnesses who are most often still working for the employer; travel costs because of distant venues; objections from the employer to conciliation and arbitration (con-arb) processes that in itself means a two-step process; enforcement of awards and payment of deposits to the sheriff to secure execution of writs; rescissions and Labour Court reviews and delays often stretching for years.
- The possibility of reinstatement by agreement, including retaining service and other benefit contributions. In these times of shockingly high levels of unemployment, the value of this aspect cannot be over-emphasised.

### PRE-CON BENEFITS: BOSSES

Benefits for the respondents/employers includes

- Low-cost and speedy resolution which is in the business interests of most employers.
- The time saved from preparing for, and attending CCMA set downs is of critical importance to employers, and even more so for small employers.

- Improved workplace relations where misunderstandings and/or emotion driven actions get an opportunity to be corrected and goodwill re-established while justice is seen to be done.

#### CCMA USERS AND STAKEHOLDERS

Pre-cons greatly reduce taxpayer funds allocated to the resolution of disputes. Agreements reached in pre-cons avoid the need for spending on case work scheduling of set downs, serving notifications and outcomes, commissioners and interpreters, travel, accommodation and venue hire outside of regional CCMA offices, post, fax and follow-up phone calls.

Pre-con resolutions allow for uncluttered case rolls for cases that cannot be resolved through pre-conciliation. Rescheduling of matters because of administrative shortcomings (currently at 10% of case work) is reduced. Matters resolved at pre-con eliminate the possibility of process delays in taking the matter to final resolution.

Feedback from people experiencing successful pre-cons includes appreciation for the 'hassle free' service which raises the image of the CCMA in the eyes of users and stakeholders especially unrepresented employees, and small employers and their representatives.

#### CONCLUSION

Experience shows that the pre-conciliation telephonic processes contribute positively to the resolution of labour disputes. The expansion of this service to cover all dispute referrals that could be set down for con-arb, ie 85% of CCMA caseload, could greatly enhance the effectiveness and efficiencies of the CCMA dispute resolution services.

It would be possible to see as many as 45 000 matters resolved

without the need for formal CCMA set downs. This would mean 90 000 parties benefiting from this speedy, low-cost resolution of disputes. ACAS (Arbitration and Conciliation Advisory Services) in the UK, for example, settles 75% of its disputes without the need for formal hearings.

Significant direct and indirect cost savings for the CCMA could

be redeployed to dispute prevention initiatives, again reducing the number of labour disputes that occur in the South African labour market. This would be in everyone's interest other than those that make a living from disputes occurring. ■

*Glen Cormack is a part-time senior commissioner for the CCMA.*

## CCMA Eastern Cape Louterwater outreach

In April the CCMA was invited by the local ANC constituency office to address the community in the rural town of Louterwater near Joubertina in the Eastern Cape. The main economic activity in the area is agriculture.

As part of the CCMA's dispute management team I was given 20 minutes to address a packed community hall. The members of the audience were advised about their right to fair labour practices in the workplace and what these rights entailed. They were also informed on how the CCMA works and copies of the 7.11 referral form were made available to those present.

After my presentation, I was approached by a farm worker who had been dismissed a week earlier. He showed me a copy of his dismissal letter and I took him through the referral form. I undertook to telephone his employer on the following Monday to see whether the matter could be resolved informally.

After I spoke to the farmer, he agreed that the worker could return to work and that he would issue him with a final written warning. The worker was extremely thankful to return to work and accepted the written warning. This case reminded me of how a small initiative in the form of a brief phone call can make a massive difference in the life of a worker and his family.

The CCMA is well established in the main city centres across the country. The users in these centres are generally aware of their rights and know that they can approach their local CCMA or Department of Labour Office for advice and assistance. However the situation in far flung rural communities is very different. People are not organised and not aware of their rights.

It is for this reason that the national dispute management department has decided to target the agricultural sector on a national basis, in the current year. Dispute management in the Eastern Cape is committed to carrying through on this national mandate by empowering and training farm workers in the Louterwater-Joubertina area and we will be doing regular follow-ups in this area and other rural areas in the Eastern Cape.

*Chez Milani, governing body member CCMA*