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Labour Dispute Resolution in Relation to Dismissals for

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CHAPTER 1

BACKGROUND TO THE RESEARCH

1.1 Introduction

Negotiations between labour and management do not always end in agreement:

> *…even where agreement is eventually achieved, fundamental disagreements may have occurred along the way. These disagreements give rise to a situation in which parties are said to be in dispute* (Bendix, 2001: 550).

In order to resolve such disputes, either party may resort to the use of coercive power. This is usually in a form of industrial action or a strike embarked upon by labour and to which management could respond by locking out its employees. These actions give rise to disruptions in workplaces.

Industrial action and lock-outs are detrimental to the parties involved and to the relationships between them. For this reason it is important to attempt settlement by other means before resorting to the use of coercive power. This can become possible with the use of dispute resolution institutions and also with the use of dispute settlement procedures that have been established in South Africa and elsewhere in the world. Parties have a choice of using dispute settlement procedures that may be agreed upon themselves or they can use those that have been provided by the State.

The South African Constitution makes provision for a range of institutions to promote democracy, including laws that enforce workplace rights. Section 23, which is in the chapter on fundamental rights in the Constitution entrenches the following rights:

(1) Every person shall have the right to fair labour practices.

(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33 (1).

Section 33 (1) entrenches the following right:

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

The State established labour dispute settlement procedures in 1995 with the aim of protecting the public interest and to promote economic activity by the maintenance of industrial peace.

The implementation of these dispute settlement procedures is also taken further by the LRA, which provided for the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA). The LRA sets out dispute resolution procedures to be followed by the parties in dispute: conciliation, arbitration and adjudication. The LRA also established other institutions to

perform related functions - namely, the Labour Court (LC) with High Court status and a specialised Labour Appeal Court (LAC).

Parties can also opt to settle certain disputes by privately agreed procedures or establish bargaining councils with dispute resolution functions. All these issues are embraced by one of the primary objectives of the LRA which is the effective resolution of labour disputes. This is done indirectly by promoting voluntary and orderly bargaining between labour and management with a view to reaching collective agreements. This is further done by democratising the workplace to infuse policy decisions with greater legitimacy and also by conferring rights that ensure individual and collective justice (Grogan, 2003).

South Africa seems to have a vast array of mechanisms for resolving labour disputes. Some of the successes and failures of these mechanisms become evident when one evaluates the dispute resolution system of the country. It is important to identify labour problems and develop ways of rectifying them or ways of preventing them before they give rise to disruptions in workplaces. The number and types of labour disputes that arise need to be identified, as well as their social and economic significance. The use of private agencies in resolving disputes may be used as a yardstick in determining whether labour and business view the machinery provided by the State to be effective or not.

It is against this background that this research aims to explore the concept of labour dispute resolution in relation to dismissals for misconduct in South Africa, specifically in the context of the CCMA. The reason for this is that most dismissal cases arise as a result of the conduct of the employees; for example, theft and sleeping on duty. The research will be pursued through an exploration of CCMA procedures and its success rate in resolving disputes. The fact that some of the unresolved disputes, specifically heard in the CCMA, are referred to the LC and the LAC will also determine the effectiveness of labour dispute resolution in the country.

1.2 The Research Question

The objective of this research is to assess how disputes in relation to dismissals for misconduct are resolved in the CCMA. The focus of the assessment is on the systems, procedures and operational policies set up to manage the process of dispute settlement that has been established by the CCMA. The results of the assessment will be a guide in determining how the users view the usefulness of the services provided by the CCMA. The results will also provide guidelines for improving the type of services being offered by the CCMA if the need for such improvement is proved.

The research seeks to answer the following questions, in relation to the sample size:

- What types of misconduct cases are referred to the CCMA?
- How many misconduct cases were settled between January and December 2004?
- What was the outcome of the processes?
- What was the average settlement amount?
- What was the cost to parties in resolving a dispute, for example, representation?
- If a party had an identical dispute again would it settle at conciliation or still prefer to go to arbitration? Reasons to be stated.
- How many awards went for review and the costs involved?

From the above enquiry, one hopes to learn the following in terms of the effectiveness of the system:

- Parties' degree of satisfaction with the outcome of the process;

- The most common reasons for settling at conciliation rather than proceeding to arbitration (comparing responses of both employers and the employees);
- Cost effectiveness of conciliation to arbitration from the CCMA's perspective; and
- How the experience of parties affect their attitude towards the preferred way of resolving disputes.

1.3 The Methodology

The research entails a comparative analysis of the different processes of dispute resolution in the CCMA for misconduct cases. The study adopts a qualitative approach. This is an approach that takes as its starting point specific theoretical and ontological frameworks to analyse identified phenomena in a systematic way. Norman and Lincoln (1998) argue that this approach to research is multimethod in focus, involving an interpretative, naturalistic approach to its subject matter. It studies things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them.

However, a qualitative approach is underlined by the principle of the new sensitivity, that is, no method or theory has a universal and general claim to authoritative knowledge. Hence, no single methodology can be preferred over another. While the qualitative approach does not restrict the study to a measurement and analysis of causal relationships between variables and processes, it accommodates the quantitative research techniques such as instrumentation and quantification, not as extreme security mechanisms for objectivity but for reinforcing research conclusions reached through interpretative means (Khosa, 2001).

The following methods of data collection and analysis were employed in the study: interviewing, document-, record- and textual analysis, and the gathering

and study of a sample of files in which disputes were resolved during conciliation, those that were resolved during arbitration, and those that were referred to the LC. The sample also includes files in which disputes were resolved before conciliation.

A case study methodology is used to organise and interpret qualitative data. In this research, a stratified purposive sample frame was used to decide on the number of interviewees. The sample population comprised the CCMA users who had already referred their cases or whose cases had already been heard. It was emphasised to the users that their identities would remain anonymous, that the study was for academic purposes only, and that their chances of resolving present and future disputes would not be prejudiced. The CCMA users were selected from the Case Management System (CMS), referred to as Esperant. The system is used to capture all parties that have referred cases to the CCMA.

Interviews were conducted with subjects representing employees, employers and CCMA staff. The sample comprises some of the dismissal cases for misconduct that were heard at the CCMA between January and December 2004. The sample was generated from the Gauteng province. The province is comprised of the Johannesburg and Pretoria CCMA offices. The Pretoria office only started operating in December 2004. Disputes that arose in Pretoria before December were transferred from Johannesburg to Pretoria when the office started to operate. See list of references for the categories of individuals who were interviewed.

Semi-structured questionnaires were administered to this sample population to collect the relevant information for this research. Telephonic and one-on-one interviews were also used as a means of gathering data. Telephone interviews were conducted with 40 employee parties and 40 employer parties who have referred disputes to the CCMA during the period understudy. One-on-one interviews were conducted with three commissioners and four registry staff. One-

on-one interview was also conducted with the call centre manager of the CCMA, based in the head office. Other informal interviews were conducted with staff members from the CCMA head office, specifically the operations and information department.

1.4 Limitations of the Research

Limited time and access to information restricted the depth of this research. The university provided a timeframe that was adequate for carrying out the actual research activities, given that the Master's programme and this research were carried out on a part-time basis.

The researcher did not interview all the subjects who could have made meaningful contribution to the findings. These include CCMA registry staff and commissioners from the Pretoria office. The reason for this was that the Pretoria office was still new when the research was conducted. As a result, it was not easy to get hold of the staff members because they were in a process of settling in the new premises. The fact that contact details of some of the users were not captured or were not available at all made it impossible to interview some of the users that were identified.

None of the parties that were interviewed were part of the same dispute. It could have been interesting to have interviewed both parties to a dispute in order to compare their responses in relation to their cases.

Generally, the interviewees were willing to respond to the questions that were put to them, but they were not comfortable to divulge issues such as their settlement amounts and the exact costs they incurred for referring the disputes to the CCMA.

Some of the interviewees were not comfortable in taking part in the interview process for fear of victimisation. The fact that the researcher was an employee of the CCMA also contributed to the resistance of some of the interviewees. All these obstacles were overcomed when the researcher assured the participants that the research was for study purposes.

1.5 Organisation of the Report

Following this chapter are three other chapters presenting detailed information on labour dispute resolution in relation to dismissals for misconduct heard in the CCMA.

Chapter 2: A Framework for Exploring Labour Dispute Resolution in Relation to Dismissals for Misconduct Heard in the CCMA

This chapter reviews literature related to the research topic. It reviews literature on the different perspectives of dispute resolution in South Africa, particularly regarding the CCMA's position as the country's central body for labour dispute resolution. The chapter briefly reviews literature on labour dispute resolution in Namibia. The reason being that Namibia inherited its labour legislation from South Africa.

The chapter presents the types of disputes that arise in workplaces, or specifically in employment relationships. It further outlines the processes of resolving these types of disputes and the necessity of doing that in order that a harmonious workplace can be maintained. The chapter specifically focuses on misconduct cases that gave rise to the dismissal of an employee and the processes that the CCMA uses in resolving such cases.

Chapter 3: Case Studies on Labour Dispute Resolution in Relation to Cases of Dismissal for Misconduct Heard in the CCMA

This chapter presents case studies of cases on labour dispute resolution on cases of dismissal for misconduct heard in the CCMA. The case studies were generated from an in-house CCMA Case Management System (CMS), referred to as Esperant and comprised cases that were referred to the CCMA from January to December 2004. The sample includes cases that were referred to the Gauteng provincial office of the CCMA. The province caters for cases that emanate mainly in the Johannesburg and Pretoria areas.

The chapter deals with the perceptions of the CCMA commissioners and the registry staff in Gauteng and the CCMA call centre on the dispute resolution processes of the CCMA, specifically on misconduct cases. Only commissioners from the Johannesburg office were interviewed because the Pretoria office was still new and in the process of organising itself. The views gathered were in reference to the following issues: most common problems experienced by CCMA users; hearings not proceeding on scheduled dates; and any other general comments concerning CCMA processes and its users. The chapter also sets out the views of CCMA users concerning their referrals, in relation to the following: the costs that they have incurred; their preference of either conciliation or arbitration; whether they have appealed to the LC; their views concerning the commissioners who were in charge of their cases; and the standard of assistance that was provided by the CCMA.

Chapter 4: Analysis of the Research Findings

This chapter presents an analysis of the data presented in Chapter Three against the theoretical framework and the research questions as presented in Chapters One and Two. The chapter discusses the usefulness of the information generated by the CMS, Esperant. The CMS made it possible to establish the

reasons for certain sectors having more or fewer referrals than others. The category of dispute outcome made it possible for one to understand the reasons, for example, cases being dismissed, cases being out of jurisdiction and the awards rendered.

The chapter further makes a comparison between the views of the commissioners and the registry staff of the CCMA. It also compares the views gathered from both employee parties and employer parties concerning their referrals. The views canvassed included those concerning their degree of satisfaction in the resolution of their cases, the costs that they had incurred when referring their disputes, their preference for either conciliation or arbitration in other disputes that they might be confronted with in future. The chapter also indicates whether users would refer their cases to the LC for review. The chapter established how both the employees and the employers viewed the commissioners that were in charge of their cases and how helpful the CCMA staff members were during the process of resolving the disputes.

Chapter 5: Conclusion

This research concludes by indicating that the management of labour dispute resolution in relation to dismissal for misconduct as heard in the CCMA requires a revision of the institutional provisions.

Aspects of the administrative process of dispute resolution are unduly cumbersome on the part of the CCMA. The institution is required to communicate with both the applicants and the respondents continuously. This is sometimes difficult because of administrative problems. The administrative problems include but are not limited to, failure to notify parties of the hearing dates on time and the hearings not taking place as per schedule. The parties could also be blamed because they sometimes change their contact details and fail to inform the CCMA.

It is argued that while the CCMA is aimed at resolving labour disputes, this cannot be possible without commitment from both employers and employees. Referrals should be made with a purpose of resolving disputes in a speedy manner since the parties have failed to resolve them internally. This is not always possible because one party could be reluctant to come to the CCMA. One of the reasons for being reluctant could be that the party knows that he or she does not have chance of success. For instance, an employer who has dismissed an employee without a hearing and without having given a fair reason might be reluctant to come to the CCMA.

The CCMA, both nationally and provincially, attempts to prevent disputes by providing education on labour legislation and conducting information sharing sessions with the workers and the employers.

All role players should play their part efficiently for disputes to be resolved quickly. CCMA officials argue that they are overburdened from additional responsibilities brought by non-attendance of parties, postponements, etc, because they have to start the process afresh when applications to hear the disputes are approved. The users argued that the CCMA should improve on its communication strategy but the users also contribute to the failure.

The State and the CCMA, in particular, need to find ways of improving the institution's administrative processes in a manner that ensures efficient and effective dispute resolution. Such development may require a realisation from the State that the amendments of the legislation should be ongoing. The State should work together with labour and business in amending the labour legislation where deemed necessary.

Recommendations are made to improve the dispute resolution processes in the CCMA.

CHAPTER 2

A FRAMEWORK FOR EXPLORING LABOUR DISPUTE RESOLUTION IN RELATION TO DISMISSALS FOR MISCONDUCT HEARD IN THE CCMA

2.1 Introduction

Much literature on labour dispute resolution deals with how labour and business can resolve disputes without resorting to industrial action or lock-out (Bendix, 2001; Grogan, 2001, 2003, and 2005; Pretorius, 1993; Finnemore and van Rensburg, 2002; Brand, Lötter, Mischke and Steadman, 1997; Bosch, Molahlehi and Everett, 2004; and Basson, Christianson, Garber and le Roux, 2000). Issues covered in this literature relate largely to how labour disputes get resolved by the use of machinery or institutions established by the State or private agencies. The literature discusses, amongst other things, issues on employee dismissal as a result of misconduct. It also discusses how the CCMA attempts to resolve such disputes in cases where the dispute has been referred. The literature further discusses how Namibia resolves labour disputes and the institutions or machineries that are used.

2.2 Brief History of Dispute Resolution in South Africa

The need for labour in South Africa, just like in most countries, has long been a pressing issue. This has been evident since the earliest days when the first settlers reached the Cape Colony in 1652. The need for labour led to the subordination of the indigenous population, as well as to the participation of the inhabitants of the Cape Colony in the slave trade (Milton, 2004). This labour practice had a direct influence on the fact that non-whites were forced into the unskilled and semi-skilled labour markets.

As years went by, trade unions were allowed to be formed, but they were racially divided and black people were not allowed to join them (Du Toit, Woolfrey, Murphy, Godfrey, Bosch and Christie, 1998).[1] Job reservations were introduced; that is, certain jobs were reserved for whites only. Later, black trade unions were formed and were encompassed in separate legislation from that relating to the white unions. This dualistic labour relation system lasted until the beginning of the 1980s, and came to an end as a result of the recommendations made by the Wiehahn commission. As a result, all races were allowed to be part of a trade union, as long as it was registered. The Wiehahn reforms extended equal rights to private sector workers but excluded domestic and farm labourers. Later, farm workers were covered by the Agricultural Labour Relations Act (Grogan, 2005).

Different labour disputes arose and were dealt with by the Industrial Court (IC) and also guided by the Labour Relations Act of 1956. The IC was seen to take a long time to resolve disputes (CCMA Accredited Commissioner Training Course, Substantive Law, 2003). As a result, an alternative dispute resolution system was established in 1983 - the Independent Mediation Services of South Africa (IMSSA).

Racially based labour law was eliminated in the early 1980s, and black unions were able to take advantage of these changes to build organisational strength. However, other laws such as the pass laws remained in force for longer than the others.

The State, organised business and organised labour recognised the need for new labour legislation. In 1995 and 1996 the “new” Labour Relations Act (LRA) was promulgated, with certain amendments made as years went by. The innovations included, but were not limited to, a clear distinction between

[1] The Industrial Conciliation Act 11 of 1924 was introduced as the first comprehensive piece of labour legislation. The statute provided for the registration of employers’ organisations and trade unions, introduced a framework for collective bargaining and a system for the settlement of disputes, and regulated strikes and lock-out.

dismissal disputes and residual unfair labour practice disputes, and rights and interest disputes were clearly defined. The new Act has been written in plain language for the benefit of all beneficiaries. An example of this is illustrated to in what the preamble states as the purpose of the LRA, that is, "to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act…" (LRA, 1995: 3). A new institution to deal with labour matters and also to speed up the process of resolving them was created: the Commission for Conciliation, Mediation and Arbitration (CCMA).

2.3 The Establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA)

The CCMA was established as a juristic person on 01 January 1996. It is an independent body responsible for labour dispute resolution, but it is funded by the State. It has jurisdiction in all the nine provinces of South Africa. The CCMA plays a central role in labour dispute resolution processes. All disputes not handled by private procedures or accredited bargaining councils or agencies must be referred to the CCMA for conciliation before they can be referred to arbitration or adjudication.

The CCMA is also charged with advisory functions, overseeing of union ballots where requested, the publication of guidelines, assisting employers and employees with establishing collective bargaining structures, internal disciplinary procedures, affirmative action programmes, dealing with sexual harassment, and workplace restructuring (Van Niekerk and Linström, 2006). The CCMA also publishes rules (CCMA Rules) regulating its own procedures.

The CCMA is governed by the governing body, which consists of a chairperson and nine other members nominated by the National Education Development Labour Council (NEDLAC). NEDLAC members are nominated from organised

labour, organised business, and the State. The members are appointed by the Minister of Labour to hold office for a period of three years. The director of the Commission is also a member of the governing body by virtue of having been appointed director and may not vote at meetings of the governing body.

Commissioners and senior commissioners are appointed to perform the functions of commissioners in terms of the LRA. Commissioners and senior commissioners are appointed on either a full-time or part-time basis. The CCMA also has administrative staff in all the provinces, including the head office. The director appoints administrative staff after consulting with the governing body.

2.4 Definition of a Labour Dispute

Countries define labour disputes in different ways but there is always a common element. The element involves a disagreement between an employer and his/her employees or their union. Bendix (2001: 552) defines a labour dispute as:

> *… continued disagreement between employers and employees or their unions as regards any matter of common interest, any work-related factor affecting their relationship or any processes and structures established to maintain such relationship*.

Disputes may be caused by a number of factors, such as, failure to agree on terms and conditions of employment or failure to agree to the establishment of a relationship, poor treatment of one party by the other or any other factor which could negatively influence the employment relationship. Disputes are generally declared after attempts at negotiation have failed. However, there are also instances where disputes may be declared without any prior negotiation having occurred between the parties involved. Thus one may agree that disputes may both precede and be followed by negotiation (Bendix, 1996).

2.5 Dispute Resolution for Dismissal Cases Heard in the CCMA

The root cause of disputes is underlying conflict between parties. Parties involved in a dispute benefit if they identify and understand the root cause of their conflict (Bosch *et al*., 2004). Conflict is inherent in every human relationship. No one can get rid of it, no matter how good the processes and techniques of dispute resolution are. Partial solutions are the best that can be hoped for. One partial solution is that conflict has to be managed to avoid disruptions in workplaces.

Dispute resolution plays an important role in the management of conflict (Brand *et al*., 1997). This means that certain issues will have to be investigated in order to find ways of managing a dispute in question; for instance, the manifestation and the intensity of a dispute. This means that the reasons that gave rise to the dispute and the parties involved will be investigated. This will assist in deciding who to involve during an attempt to resolve a dispute. These issues point to the fact that there is always a path from conflict to a dispute that has to be taken into consideration when managing a dispute.

Conflict can be managed, even successfully. The resolution of disputes is one method of managing conflict. At the same time, conflict can be managed in a manner that makes it possible to prevent the transformation of that conflict into grievances and disputes. This could happen as a result of, amongst other things, good working relations, open communication, etc.

The new LRA also addresses the importance of dispute resolution in workplaces. One of the purposes of the Act is:

To change the law governing labour relations and, for that purpose -

to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose.

The role of the CCMA has been discussed in previous sections of this chapter.

2.6 Misconduct

Schedule 8 of the LRA deals with The Code of Good Practice: Dismissal. The key principle in the Code is that employers and employees should treat one another with mutual respect. They should all strive to successfully achieve the goals of their businesses. Employees should be protected from arbitrary action and, employers are entitled to satisfactory conduct and work performance from their employees.

An employee that behaves in a manner that results in misconduct can be dismissed, depending on the severity of the action. Misconduct is one of the three grounds recognised by the LRA to justify the dismissal of an employee. There are two other grounds of dismissal: these are, incapacity or poor work performance and operational requirements. Employees who conduct themselves in an undesirable manner can be held accountable for their actions. Those that fall ill or are injured, or are overtaken by technological development, or become redundant to their employers' needs cannot be blamed for their predicament.

2.7 Dismissal

There are instances where disputes lead to a dismissal of an employee. A dismissal takes place when the contract is terminated at the instance of the employer and entails some communication by the employer to the employee that

the employer intends to terminate the contract. The intention to terminate the employment contract is communicated in words or by conduct. It should be noted that there are other forms of dismissal according to the LRA.

Dismissal is a severe penalty in terms of the concept of progressive discipline. It should only be imposed as a last measure in a series of penalties or in serious misconduct that does not warrant progressive discipline. This could include issuing a final written warning that could lead to dismissal as a last measure. In dismissal disputes, an employee must prove the existence of grounds for a dismissal; the employee has the task of proving that the employer's conduct was intolerable (constructive dismissal). The employer must then show that, given the harsh treatment of dismissal, his or her conduct was fair.

Section 185 of the LRA states that "*every employee has the right not to be unfairly dismissed*". The common law recognises only two forms of dismissal: that with notice and that without notice. The LRA has extended its notion of dismissal to include other forms of terminating the employment relationship. Dismissal is defined in section 186 (1) of the LRA to mean the following:

> *(a) an employer has terminated a contract of employment with or without notice;*
>
> *(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;*
>
> (c) *an employer refused to allow an employee to resume work after she-*
>
> *(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or*

(ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child.

(d) an employee who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;

(f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

Grogan (2003) argues that it is questionable whether these forms of dismissal are exhaustive or not or whether other forms of termination can be deemed to constitute dismissal.

2.8 Dismissal for Misconduct

A dismissal related to the conduct of an employee is called a dismissal for misconduct. If an employer dismisses an employee on the grounds of misconduct, the dismissal is motivated by the fact that the employee misbehaved in some way, or that the conduct of the employee is not acceptable to the employer (Brand *et al*., 1997). Dismissal for misconduct is one of the most

prevalent forms of dismissal. This is also confirmed by noting the types of dismissal for misconduct that are resolved by the CCMA.

The following is a list (Albertyn and Loveday, 2003: 108) that contains more frequent examples of misconduct resulting in dismissal. The list is not exhaustive. It includes the following:

- *Dishonesty,*
- *Theft,*
- *Fraud,*
- *Misrepresentation,*
- *Unauthorised possession of company property,*
- *Unauthorised use of company property,*
- *Corruption,*
- *Blackmail,*
- *Negligence (Gross or otherwise),*
- *Late-coming,*
- *Unauthorised absenteeism,*
- *Desertion,*
- *Sleeping on duty,*
- *Being under the influence or possessing illegal substances,*
- *Drunkenness,*
- *Insubordination (Gross or otherwise),*
- *Insolence,*
- *Failure/refusal to carry out a reasonable and lawful instruction,*
- *Assault,*
- *Intimidation,*
- *Participation in unlawful strike activity,*
- *Participation in unlawful refusal to do overtime,*
- *Discrimination,*

- *Racism,*
- *Sexism,*
- *Use of abusive language,*
- *Deliberate poor performance (i.e., **not** incapacity),*
- *Deliberate damage of company property or equipment,*
- *Incitement of other employees to commit an offence,*
- *Sexual harassment,*
- *Breaching health and safety standards, or*
- *Smoking (Non-smoking areas).*

The LRA does not confer on employees a right not to be dismissed, but only not to be unfairly dismissed. There are two requirements for a fair dismissal for misconduct; that is, any dismissal must be substantively and procedurally fair. Substantive fairness for a dismissal related to the conduct of an employee means that there must be a reason for dismissal - misconduct - and that the reason must be fair.

The following concerns must be addressed in order to determine the substantive fairness of a dismissal for misconduct:

- Was a rule or set standard contravened by the employee? It must be determined whether or not the rule existed. It must also be determined whether or not the employee contravened the rule in question. Rules or set standards are usually contained in disciplinary codes or other sources of workplace rules (employment contract, human resources manual or notices placed on notice boards in the workplace).

  Rules may also be derived from legislation, like the LRA or Occupational Health and Safety Act. Another important source for rules regulating the conduct of employees in the workplace is the common law. According to the common law, employees must act in good faith towards the employer.

There must be a relationship of trust between the employer and its employees for the business to run smoothly.

- If indeed the employee contravened the rule or set standard, was the rule or set standard valid or fair? A rule or set standard is valid or reasonable if it is lawful and can be justified with reference to the needs and circumstances of the business. The justification of the rule is determined by the nature of the business, circumstances of the business, type of work, and the inclusion of the rule in the disciplinary code of the workplace.

- Did the employee know of the rule or set standard or could he or she reasonably be expected to know of the rule or set standard? It is fair for an employee to be penalised for actions or omissions which he or she knew were not acceptable. The employee should have also known that a transgression of the rule in question may lead to dismissal.

- Has the rule or set standard been applied consistently? Employers should try as far as possible to treat employees the same if they have committed the same offence for the sake of fairness. There are two types of inconsistency, namely, historical inconsistency and contemporaneous inconsistency.

> *Historical inconsistency occurs when the employer has in the past not proceeded against employees when they have contravened a certain rule, but then suddenly decides to proceed against an employee for contravening that rule. The unfairness of this type of inconsistency is that the employer's failure to proceed against employees in the past has created the impression that contravention of the particular rule was not regarded as misconduct* (Basson *et al.*, 2000: 157).

A practical example of historical inconsistency could be a situation where an employee is dismissed for being found in possession of company goods in July and if another employee of the same employer had received only a written warning for a similar offence in March of the same year (Khosa, 2004). The fact that certain types of misconduct were condoned in the past does not mean that action cannot be taken against employees in the future for such misconduct. The change would have to be communicated to all employees in order for conflict to be avoided in the workplace.

Failure to have taken action in the past may also be an indication that the employer did not regard the rule as valid. In the CCMA case of Tshoke v Morgan Fashions, GA35649, the employee was permitted to '*borrow*' money from the employer's cash register with permission from the manager. This was in breach of the company rule and the employee was subsequently dismissed. The CCMA held that the dismissal was inconsistent because the manager had also 'borrowed' money before and had not disciplined the employee in question and other employees who committed the same offence. The dismissal was, accordingly, unfair and the applicant was reinstated retrospectively to the date of her dismissal.

Contemporaneous inconsistency is where employees who breach the same rule at roughly the same time are not all disciplined. An example of this form of inconsistency could be where one employee is dismissed while the others only receive warnings. This unfairness is based on the belief that similar cases should be treated similarly; if not, this will be regarded as some form of discrimination.

The case of SRV Mill Services (Pty) Ltd v CCMA & Others that was heard in the LC addressed the issue of the two forms of inconsistency. In this case, the employee who had a poor attendance record was dismissed for

absenteeism. He and two colleagues failed to report for a shift and did not inform management that they would be absent. Being on time for a shift was of considerable operational importance to the employer, as the company was subjected to strict delivery requirements that were enforced by grave penalties for late delivery. One of the employee's fellow workers was found not guilty. It was common cause that his hearing was held three months later than his colleagues', and for the CCMA commissioner, that warranted a conclusion that the dismissal was unfair. The employer could not lead evidence as to the reasons for the differential treatment between the culprits. The Court found no reason to set aside the award made by the CCMA. The applicant was ordered to pay the costs of the third respondent.

One should note that inconsistency would not always be unfair. It may be justified through certain factors, such as an employee's disciplinary records, length of service, seriousness of the offence, changed circumstances, or the employee's personal circumstances.

Consistency is not a rule unto itself. Arbitrators should not interfere with employers' decisions in regard to sanctions, especially where the misconduct is of a serious nature. "While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency, the proper course in such cases is to let it be known to all employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future" (Khosa, 2004: 19).

The case of NUM & Another v Amcoal Colliery t/a Arnot Colliery & Another (LAC), addressed the issue of differential disciplinary treatment by the employer as a result of different disciplinary records of employees. In this case, a group of employees was involved in insubordination actions but

only two were dismissed. Unlike the other employees, they were on final warnings for other misconduct cases. The dismissals were held to be fair. The Court observed that a final warning was a warning to those employees that were on the verge of dismissal and that the philosophy of progressive discipline justified dismissal in the event of further infringement. The application of some inconsistency is as a result of flexibility, which requires the exercise of discretion in each individual case.

- Was dismissal an appropriate sanction for the contravention of the rule or set standard? Item 3 (5) of the Code of Good Practice: Dismissal states that: when deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

  The seriousness of the misconduct determines whether dismissal will be the appropriate penalty to be imposed. Offences that constitute a serious breach of the trust relationship between the employer and employee are more serious than those that do not. Murder of a co-employee, for example, constitutes a serious breach of the trust relationship as compared to an employee that comes late at work. This does not mean than an employer cannot dismiss employees for late coming. However, it only means that a greater measure of progressive discipline will be expected from such an employer.

Procedural fairness for a dismissal related to the conduct of an employee means that the dismissal must be effected in accordance with a fair procedure. The following concerns must be addressed in order to determine the procedural fairness of a dismissal for misconduct; that is:

- There should be a fair disciplinary enquiry or investigation which must precede dismissal.

- The employee must be notified by the employer of the allegations made against him or her.

- The employee should be allowed to state a case in response to the allegations made by the employer.

- An employee is entitled to assistance; for example, from a trade union official.

- The employer must communicate any decision taken against the employee.

It is important to note that the above-mentioned guidelines are not hard and fast rules. This means that the employer's non-compliance with a particular guideline will not necessarily make the dismissal unfair (Basson, 2000). The question of whether or not compliance with a particular guideline is in order will depend on the facts of the matter.

In a situation where the employee disputes that he or she was unfairly dismissed by the employer, the onus shifts to the employer. The employer will have to prove, on a balance of probabilities, that the employee was actually guilty of misconduct and that the dismissal indeed happened. This involves proving that a rule existed, that was known by the employee, and that the employee actually broke the rule.

2.9 Referring and Resolving Disputes at the CCMA for Cases of Dismissal for Misconduct

There are time frames set in terms of referring a dispute to the CCMA. If there is a dispute about the fairness of a misconduct dismissal, the dismissed employee may refer the dispute in writing to the CCMA for conciliation within 30 days of the date of the dismissal or, if at a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal.

The employee must satisfy the CCMA that a copy of the referral has been served on the employer. The CCMA must attempt to resolve the dispute through conciliation. Unresolved disputes must be arbitrated by the CCMA at the request of the employee. Unresolved disputes at arbitration may be referred to the LC for adjudication and this should be made within 90 days after the CCMA has certified that the dispute remains unresolved. An order of the court is made at the LC.

Several dispute resolution processes on misconduct cases are discussed in this research report. It is only the conciliation and the arbitration processes that are reviewed in this survey.

2.9.1 Conciliation in Cases of Dismissal for Misconduct

Conciliation is a process by which a conciliator appointed by the CCMA helps the parties in dispute to reach a settlement. This can be done by any consensus-building process including mediation, fact-finding or by making recommendations. *It is generally a compulsory process by which one party refers the dispute to conciliation and the other party is compelled to attend. It may also be invoked by both parties* (Brand *et al*., 1997: 58).

Conciliation is a structured negotiation process that involves the services of an impartial third party. It is an informal process where decision making regarding

the outcome rests in the hands of the parties involved. For this reason, the conciliator does not impose a settlement on the parties, but tries to get the parties to agree to a settlement that satisfies them. Conciliation is a quick and an inexpensive way of settling disputes and what is said during the conciliation meeting is private and confidential.

The assigned commissioner may start the process by meeting jointly with the parties and asking them to share information about the dispute. Separate meetings between the commissioner and each party may also be held. Parties are allowed to bring any relevant documentation that might assist in clarifying issues. At this stage it is not necessary to call witnesses. Parties are encouraged to share information and to come forward with ideas on how their differences can be settled.

During conciliation, the assigned commissioner may determine which process the hearing could follow. The commissioner may subpoena persons and documents. The commissioner's role is to try to resolve the dispute within 30 days of it being referred to the CCMA. If the dispute is settled, the commissioner will draw up a settlement agreement, which has to be signed by both parties and issue a certificate recording that the dispute is settled. A settlement agreement is final and binding on both parties. If either party fails to uphold the agreement, it can be made an award and thereafter certified as an order of court.

If the dispute is not settled, the commissioner might issue a certificate of non-resolution and either party may apply for arbitration.

An unresolved dispute that relates to probation must continue as on "con-arb" (to be discussed in subsequent paragraphs). Matters that relate to dismissal (conduct) might continue as in "con-arb", but with the consent of both parties.

During conciliation parties may represent themselves, be represented by a union or employer's organisation, co-employee or director of a company, or an employee of the company. Legal representation is not allowed during conciliation.

2.9.2 Arbitration in Cases of Dismissal for Misconduct

Arbitration is a compulsory process by which an arbitrator appointed by the CCMA hears the parties' respective cases and then determines the dispute between them. Arbitration involves the intervention of a neutral third party in the dispute between the employer and the employee. The arbitrator controls not only the process but will also decide on the outcome by means of a final and binding award. Arbitration is more formal than conciliation but less formal and legalistic than a process in a court of law.

"*The arbitration process is subject to review in the Labour Court, but not to appeal*" (Brand *et al*., 1997: 58). During arbitration, the arbitrator listens to the cases put forward by the parties in dispute and then determines the matter. The object of arbitration is for the arbitrator to resolve the dispute between the parties in accordance with their legal rights (Williams, as quoted on the Business Report: 2004). It should be noted that legal representation is allowed during arbitration in cases arising from dismissals for misconduct, but with mutual consent.

The commissioner has the power to permit legal representation in a situation where the other party disputes that. This should be influenced by the nature of the questions of law raised by the dispute, its complexity, the public interest and the comparative ability of the opposing parties to deal with the arbitration (Grogan, 2003). Labour consultants who are not legal practitioners cannot represent parties in any conciliation or arbitration proceedings, unless they are *bona fide* officials of unions or employers' organisations.

During arbitration parties may represent themselves, be represented by a union or employer's organisation, co-employee or director of a company or an employee of the company. Legal representation is allowed depending on the discretion of the arbitrator in charge of hearing the case. The definition of a legal practitioner in section 213 of the LRA excludes persons with a law degree but not admitted to practice, as may be the case with many labour consultants. This also excludes candidate attorneys.

New dispute resolution processes that can be used to resolve dismissal cases as a result of misconduct came into effect with the amendments of the LRA (LRAA) in 2002. These include the conciliation/arbitration (con-arb) process, pre-dismissal arbitration, and the pre-conciliation process.

2.9.3 "Con-arb" in Cases of Dismissal for Misconduct

Section 191 (5A) of the LRAA now makes provision for the "con-arb" process, which can be explained as a one-stop process of conciliation and arbitration for individual unfair dismissals. It should be noted that the "con-arb*"* process is compulsory for dismissals that relate to probation. The CCMA can also direct that a dispute be resolved by way of a "con-arb" in respect of other dismissals or unfair labour practices disputes. However, in these circumstances the parties cannot be compelled to submit to the "con-arb" process (Jordan, Maserumule and Stelzner, 2002). On receipt of a notice of set down for a "con-arb" process in these latter instances, either party can object, in which case a normal conciliation will be held, followed at a later allocated date by arbitration, if the dispute remains unresolved during conciliation.

The "con-arb" process entails that the commissioner in charge of a particular case must commence the arbitration immediately after certifying that the dispute remains unresolved. In other matters, the consent of both parties is required before a commissioner can proceed directly from conciliation to arbitration

(Grogan, 2003). Rycroft (2003) argues that splitting the stages of the dispute resolution process is very costly, causes long delays, and is inefficient. This statement is further supported by Brand (2004), who argues that the value of an early settlement is now often seen as the ultimate victory for all.

The same person is thus both conciliator and arbitrator in "con-arb" proceedings. However, the LRAA allows a party to object to "con-arb", that is, to request that a different commissioner conducts the arbitration process in a case where conciliation could have failed. Brand *et al*., (1997) argue that there is a good reason for this. That is, the conciliator may become privy to confidential information from one party. This may influence the arbitrator's decision without the other party having had the opportunity to hear the information and, if necessary, challenge it. Another objection can also be made in a situation where the commissioner has showed some element of bias against another party. These objections clearly show that the "con-arb*"* process has to be chosen carefully when attempting to resolve disputes.

The flexibility in "con-arb" is seen to be an advantage. The conciliation phase may be revived at any stage during the arbitration if the arbitrator senses the possibility of assisting the parties to reach an agreement. "Con-arb" also gives the arbitrator flexibility to arbitrate only those issues that the parties cannot settle themselves, which keeps the determination of rights to a minimum and provides a built-in 'loop-back' negotiation (Rycroft, 2003).

There are also time frames set for this process. "*The commission must give both parties at least 14 days notice of the hearing date. In the instance where one of the party's intent to object to a dispute being dealt with in terms of "con-arb" process, the party must put its objection in writing and notify both the CCMA and the other party, at least seven days prior to the scheduled date. This, however, does not apply to employees that are on probation*" (Modise, 2002: 19). The Provisions of the LRA and the CCMA Rules that are applicable to the "usual"

conciliation and arbitration proceedings, respectively, also apply to “con-arb” proceedings.

2.9.4 Pre-dismissal Arbitration in Cases of Dismissal for Misconduct

Section 188A of the LRAA discusses pre-dismissal arbitration. The section stipulates that an employer may, with the consent of the employee, request the CCMA to conduct arbitration into allegations about the conduct of an employee. An employee earning more than the amount determined by the Minister of Labour in terms of section 6 (3) of the BCEA may consent in his or her contract of employment to holding pre-dismissal arbitration. Conversely, those earning less than that amount must give their consent to the specific arbitration proceedings after being informed of the allegations relating to their conduct (Bosch, 2002).

In pre-dismissal arbitration, a party to the dispute may appear in person or be represented only by:

- A co-employee;
- A director or employee, if the party is a juristic person;
- Any member or official of that party’s registered trade union or registered employers’ organisation; or
- A legal practitioner, on agreement between the parties.

The employer takes the responsibility of the costs involved since it made the request of the process to take place. The process usually takes place at the premises of the employer or any venue agreed upon. This is an advantage to both parties because the enquiry might be conducted in a familiar surrounding as opposed to the foreign terrain of the CCMA offices. The commissioner in charge will also be tasked with establishing the sanction to be applied in a situation

where the employee is found guilty. Such decision shall be final and binding and shall have the status of a CCMA award.

Pre-dismissal arbitration has certain advantages over traditional arbitration. Brand (2002) discusses the following as the advantages of pre-dismissal arbitration:

- Eliminating costly and time-consuming in-house disciplinary enquiries and appeals;
- Eradicating the cost of training chairpersons and presenters for in-house enquiries, and CCMA conciliations; and
- Cutting out the cost of employees attending those enquiries and appeals, and CCMA conciliations.

Brand (2003) and Bosch (2003) further discuss the drawbacks of pre-dismissal arbitration. These are: the process requires an employer to obtain the consent of the employee; the employer is required to pay a fixed fee simultaneously with lodging the request for pre-dismissal arbitration; and the employer is not in a position to choose the person that will be conducting the process, which might result in the parties being allocated a 'weak' arbitrator and the fixed fee might be seen to have been a waste.

Pre-dismissal arbitration is different from normal arbitration at the CCMA where, when conciliation has failed, a certificate is issued. It must be noted that the general provisions for arbitration proceedings set out in the Act are applicable to pre-dismissal arbitration and that the arbitrator has the same powers as a CCMA commissioner. The arbitrator is also directed to consider the evidence presented and have reference to the criteria of fairness in the LRA in deciding what action, if any, is to be taken against the employee (Jordan *et al*., 2002).

The process takes place in the form of a disciplinary enquiry and the award issued is final and binding and may be made an order of court. The LC may review the award. The LRA does not deprive employees who are "dismissed" by commissioners of the right to refer a dispute to the CCMA for arbitration. "*However, as the commissioner's directive is 'final and binding' it is arguably cannot be undone by another commissioner. A further referral would therefore probably be ruled res judicata*" (Grogan, 2003: 115).

The process of pre-dismissal arbitration often shortens the process of dismissal in a case where an employee is found guilty, because the process that could have taken place at the workplace is carried out straight away by the CCMA. This is somehow a positive element of the process. However, one can also argue that the negative part of the process is that employees are deemed to be guilty even before the finalisation of the investigation.

2.9.5 Pre-conciliation Meeting (Tele-conciliation) in Cases of Dismissal for Misconduct

A pre-conciliation meeting may be conducted to try and resolve disputes. The CCMA may contact parties by telephone or other means, prior to the commencement of conciliation, in order to resolve disputes. This contact is usually made soon after the referral is received. The process has been considered to be cost effective for the CCMA, since more information is gathered beforehand and, in most cases, disputes are resolved without a formal meeting being held. Pre-conciliation is only carried out with certain types of disputes, which are less complicated and do not involve a large number of applicants. Both parties also have to be readily contactable. The prescribed processes of conciliation and arbitration then follow in a case where there is no resolution of the dispute.

The success rate of these processes (conciliation and arbitration) will also be discussed in this report so as to establish the most cost-effective process and also to establish which one seems to be considered by CCMA users.

2.10 CCMA Jurisdiction on Misconduct Cases

A vitally important step in dealing with a dispute is to identify which institution has jurisdiction to hear it. The term "jurisdiction", for the purpose of the CCMA, means the CCMA's authority to conciliate or arbitrate disputes that are referred to it. The CCMA Operations Report (2004) has indicated that nationally, 35% of total referrals in December of that year had been screened as out of jurisdiction. It is, therefore, a vital issue to first check jurisdiction when referring a case to the CCMA. If it becomes apparent during conciliation or arbitration that the CCMA may not have jurisdiction, the referring party must prove that the CCMA has jurisdiction. The CCMA would then reject a case if a party fails to prove that the CCMA has jurisdiction. This result in an unnecessary waste of time and resources for all parties involved.

2.11 Labour Dispute Resolution in Namibia

Before independence, Namibia was regarded as one of the provinces of the then South African regime. It is not surprising that the country's pre-independence labour laws closely resembled those of South Africa (Fenwick, 2005). As a result black people were not referred to as workers, but they were helpers of workers, who were white people.

Namibia had no comprehensive labour legislation. It had a wide range of legislation that regulated labour relations. Similar to South Africa, the legislation excluded domestic and farm workers. The country gained independence in 1990 and promulgated the new Labour Act in 1992. The existence of the new Act was as a result of the recommendations that were made by the Wiehahn

Commission, that also contributed to the reform of the South African labour legislation. The Commission recommended compliance with international labour standards. In 2004, Namibia passed a new Labour Act to replace legislation dating back to 1992. Both the Acts were also significantly influenced by the International Labour Organisation (ILO), which plays an important role in efforts to improve labour law and labour relations in Namibia.

The Labour Act, 15 of 2004 regulates industrial relations between employers, employees and trade unions. It also regulates the prevention and settlement of labour disputes. Some of the main provisions of the Act are:

- The prevention and remedy of any unfair dismissals and unfair disciplinary actions against employees, and
- The regulation of termination of contracts of employment (http://www.mti.gov.na/econvnv_text/labour_environment.htm).

The Labour Act created new structures such as the Labour Commissioner, a Labour Advisory Commission, a Labour Court and district labour courts, and a Wage Commission as dispute resolution bodies. This report only focuses on the Labour Commissioner, which is similar to the CCMA in South Africa.

A dispute should be referred to the Labour Commissioner, who must appoint a conciliator who has powers (among other things) to subpoena evidence and to administer oaths. A dispute must be referred for resolution within 6 months in the case of dismissal from employment, or one year in other cases. Unlike in the past, employees may now only be dismissed for a valid reason and such dismissals must be carried out in compliance with a fair procedure.

The Labour Act of 2004 put greater emphasis on conciliation and arbitration. A key feature of conciliation under the 2004 Act is that the conciliator must try to resolve the dispute within 30 days, although the parties may agree to a longer

period (Fenwick, 2005). The 2004 Act also provides for private arbitration of labour disputes.

The Labour Court has power to review arbitrator's awards, and to review decisions of the Minister and other officials under the 2004 Act (http://www.larri.com.na/research/Labour%20Rights%20Report.doc).

2.12 Conclusion

Labour disputes in South Africa and in Namibia existed mainly in the days of the slave trade. Resolving those disputes could not be successful or fair because the country did not have dispute mechanisms that recognised all people as workers. White people were largely protected by labour legislation, which excluded most black people.

The Wiehahn reforms brought along changes, in 1979. They extended equal rights to private sector workers but excluded domestic and farm labourers. Later, farm workers were covered by the Agricultural Labour Relations Act. The same Commission also contributed to the reform of Labour legislation in Namibia. In both countries the reforms are in conformation to the international standards.

The 1995 reforms and subsequent amendments to the LRA brought along further changes. All workers; including domestic and farm workers, regardless of their colour, became recognised as workers with equal labour rights under labour legislation. For the first time, black people had an opportunity of organising themselves in workplaces on an equal basis. They were given a chance to lodge labour grievances and also the right to strike. As a result, new institutions were established to resolve disputes without incurring costs, related to those incurred in courts of law. An example of this is the CCMA that was established in terms of the LRA.

The CCMA resolves disputes that involve employment relationships. In other words, there should be an employee and an employer who have a dispute. The CCMA has set time frames for disputes to be referred. In the event of failure to adhere to the time frames, an application for condonation to hear the case would have to be made. According to the LRA, the CCMA can resolve disputes through conciliation, arbitration, and “con-arb”. There are also other processes that can be utilised to resolve disputes; these are pre-dismissal arbitration and pre-conciliation meetings.

CHAPTER 3

CASE STUDIES OF LABOUR DISPUTE RESOLUTION IN RELATION TO CASES OF DISMISSALS FOR MISCONDUCT HEARD IN THE CCMA

3.1 Introduction

This chapter presents case studies of labour dispute resolution of cases of dismissal for misconduct heard in the CCMA. The cases were generated from a Case Management System (CMS) referred to as “Esperant”. A sample of cases that were referred to the CCMA between January and December 2004 was identified. The sample includes cases that were referred to the Gauteng province only, this office being the largest CCMA office in the country. This province is divided into two regions - Johannesburg and Pretoria. It is important to highlight that all Gauteng cases were initially heard in Johannesburg. From December 2004 all cases that emanated from Pretoria were transferred to that region, the reason being that the Pretoria office started operating in that month.

The chapter provides the views of the CCMA commissioners, the registry staff in Gauteng, and the CCMA national call centre about labour dispute resolution of cases of dismissal for misconduct heard in the CCMA. The views were regarding the following issues: most common problems experienced by CCMA users, hearings not proceeding on scheduled dates and other general comments concerning the CCMA processes. Only commissioners from the Johannesburg office were interviewed, seeing that the Pretoria office was still new at the time of collating the data. The chapter also provides the views of CCMA users concerning their referrals to the CCMA on dismissal cases as a result of misconduct.

3.2 Information Generated by "Esperant" (CMS)

The information that was generated by the CMS included the following: region where the dispute originated, creation date, case number, party name (employee or employer / applicant or respondent), contact details of parties, sector, and outcome of the referred dispute. The sector is further divided into 54 categories and another category that does not have any specification. See Table 1.

3.2.1 Sectors Referring Disputes to the CCMA

Table 1 set out the sectors that referred disputes on dismissal for misconduct during the period understudy to the CCMA. From the table, one can identify the ten sectors that refer most frequently. It shows that the largest number of disputes that were referred to the CCMA were from the safety and security (private) sector. These referrals constituted 20% of the disputes that were referred in 2004. The retail sector was second, with 19% of the referrals. The business/professional sector comprised 9% of the disputes, followed by the domestic sector with 7% of the disputes. Only 6% of the disputes were referred from the building/construction sector, and 4% from the food/beverage sector (manufacturing and processing). The contracting cleaning sector referred 4% of the disputes and the same percentage applied to the distributing/warehousing sector. Only 3% of the disputes were referred from the mining sector, and the remaining 2% were referred from the transport (private) sector.

From the table, one can also identify the ten least referring sectors to the CCMA. The following sectors did not even constitute a percentage of the referrals: bargaining councils, consulate/embassy, hairdressing, non-educators (private), pharmaceutical (manufacture), and public health and welfare. These referrals do not reflect a sector like the others, but are simply cases of mistaken referrals. The public safety and security sector constituted 0, 01% of the referrals. This was

followed by 0, 02% from the public service (general). The motor (manufacture) sector constituted 0, 05% of the referrals, followed by animal care with 0, 08%.

Table 1: Sector Category

Sector	Number
1. Agriculture/Farming	111
2. Animal care	9
3. Banking/Finance	263
4. Bargaining Council	1
5. Building/Construction	629
6. Business/Professional Services	1012
7. Chemical	58
8. Cleaning/Laundry	30
9. Clothing/Textile (Manufacture)	24
10. Communications	27
11. Computing	77
12. Consulate/Embassy	1
13. Contract cleaning	402
14. Distribution/Warehousing	395
15. Domestic	764
16. Educators (Private)	108
17. Electrical	21
18. Electricity/Gas/Water	21
19. Entertainment/Leisure	118
20. Farming	19
21. Food/Beverage (Manufacture & Processing)	484
22. Furniture (Manufacture)	14
23. Hairdressing	1
24. Health (Private)	206
25. Hotel	129
26. Import/Export	22
27. Jewellery (Manufacture)	10
28. Leather	14
29. Legal/Paralegal	85
30. Marketing/Public Relations	44
31. Media (Parastatal)	10
32. Media (Private)	19
33. Metal	145
34. Mining	377
35. Motor	74

36. Motor (Manufacture)	6
37. Municipality/Local Government	20
38. Non-educators (Private)	1
39. Paper/Printing/Packaging	205
40. Parastatals	36
41. Pharmaceutical (Manufacture)	1
42. Post Office	74
43. Public Health & Welfare	1
44. Public Safety & Security	2
45. Public Service (General)	3
46. Religious/Community Service	71
47. Research	12
48. Retail	2125
49. Rubber/Tyre (Manufacture)	17
50. Safety/Security (Private)	2225
51. Telecommunications	80
52. Trade Union	19
53. Transport (Private)	230
54. Wholesale	224
55. Blank	1
TOTAL	**11077**

3.2.2 Outcome Category of Disputes

The outcomes of the disputes are also divided into 19 categories. See Table 2. The table shows that a total of 11 077 cases on dismissal as a result of misconduct were captured on the CMS as having originated from the Gauteng province; that is, within a period of 12 months (January to December 2004), irrespective of whether they were finalised or not. Table 2 illustrates the reasons for the different outcomes. The reasons are further discussed in the report. Out of the disputes that were referred, arbitration awards were rendered in 2 333 cases. This means that these cases were arbitrated and awards were issued.

A total of 2001 cases were dismissed because neither party attended, at either conciliation or arbitration. This means that the CCMA did not receive any communication from the parties, but could also mean that the CCMA is failing to

notify parties properly or timeously about the date of their attendance. The net effect is that in nearly 20% of the cases there was poor communication or that the parties had no real interest in pursuing matters. A total of 393 cases were withdrawn. This usually happens when parties, specifically applicants realise that they do not have good prospects for success. Certificates of non-resolution at conciliation were issued in 25 cases. Only three cases on dismissal based on misconduct were completed by the end of 2004. This means that the cases were only conciliated and not referred to arbitration. Only one case was settled during conciliation and parties settled 188 cases.

Default awards were issued to 711 cases. This usually happens as a result of the respondent (usually the employer party) not attending the hearing and the award then rendered in favour of the applicant (usually the employee). Some 314 cases were not rescinded,[2] but 71 cases were rescinded and only one ruling was rescinded. Only 400 cases were not settled and completed. This means that conciliation failed and none of the parties applied for arbitration. It was ruled that 1 617 cases were out of jurisdiction. This means that the CCMA did not have authority to resolve the disputes. The following could have been the reasons for these cases being out of jurisdiction: cases that were to be referred to a bargaining council; cases referred outside the prescribed time period; or cases not regarded as constituting South African disputes (for example, a dispute that involves a South African who works in another country). This last example of type of case was rare within the sample.

Labour Court (LC) reviews were pending for 16 cases. This means that the parties took the CCMA commissioner's decisions on review. Some 44 cases were postponed *sine die.*[3] One case was set aside.[4] Only three settlement

[2] A commissioner may rescind an award of his own accord or an application by the parties if the award was erroneously made in the absence of any party or granted as a result of a mistake common to the parties or to correct an ambiguity or obvious error.
[3] There was no appointed date for either conciliation or arbitration.
[3] The case was rejected or disregarded at either conciliation or arbitration.

agreements were made arbitration awards. The outcomes of 1 376 cases were not captured.

Table 2: Outcome Category

Outcome	Number
Arbitration Award Rendered	2 333
Case Dismissed: Non-attendance	2001
Case Withdrawn	393
Certificate Issued	25
Completed	3
Default Award	711
Not Rescinded	314
Not Settled and Completed	400
Not Settled and Completed: Non-attendance	75
Out of Jurisdiction	1 617
Pending Labour Court Reviews	16
Postponed Sine Die	44
Rescinded	71
Ruling Rescinded	1
Set Aside	1
Settled	1
Settled by Parties	188
Settlement Agreement made an Arbitration Award	3
Blanks (no information)	1 376
Total	**11 077**

3.3 Views of the CCMA Officials

Views of the CCMA officials on the dispute resolution processes used by the institution were gathered from both the registry staff and the commissioners from the Gauteng province, specifically the Johannesburg office and the CCMA national call centre.

3.3.1 Most Common Misconduct Cases Referred to the CCMA

The CCMA administers several misconduct cases that gave rise to a dismissal, but there are cases that are more frequently referred than others. These include cases that relate to theft, insubordination, abscondment, absenteeism, dishonesty, sleeping on duty, and drunkenness at work. From this list, misconduct cases as a result of insubordination, theft and abscondment seem to form the majority of the referred cases to the CCMA according to the views of the officials.

3.3.2 Most Common Reasons for Cases not heard on Specified Dates

There are instances where misconduct cases are not heard according to the schedule. These happen as a result of: non-attendance by the applicants; requested postponements in terms of the CCMA Rules; parties not properly notified of the hearing details; shortage of commissioners for the roll of cases; duplicates (where an issue has been captured more than once with different case numbers); or where the CCMA does not have jurisdiction. "*Lack of knowledge of procedures by the CCMA users is also one of the common problems*" (Official B, 23 August 2005).[5] From the views of the CCMA officials that were interviewed, it sounds as if the two most common reasons for matters not proceeding as scheduled are parties not being properly notified and where postponements have been granted.

3.3.3 Officials' Impression of Cases not proceeding on Scheduled Dates

Hearings on misconduct cases not proceeding as scheduled create a backlog, as some of them have to be rescheduled. Non-attendance by parties also creates a backlog in instances where rescission applications have been approved, as most

[5] The interviewees will be referred to as officials of the CCMA throughout the report.

of those are dismissed because of non-attendance by the applicant party.[6] *Hearings not proceeding on scheduled dates have the consequences of incurring unnecessary expenses on the part of both the CCMA and the respective parties. This constitutes wasted costs and duplicates work for CCMA staff* (Official G, 23 August 2005).

3.3.4 Other General Comments Concerning the CCMA Processes and the Users

The CCMA officials that were interviewed indicated that most CCMA users are not familiar with labour law, which leads to the incompetent handling of labour litigation. This factor, amongst others, is evidenced by the fact that some CCMA parties or users do not understand the importance and advantages of fully exhausting the conciliation process, but prefer to refer disputes to arbitration.

One of the CCMA officials mentioned that: "the good thing about arbitration is that it finally disposes of the matter and parties will eventually know their fate" (Official E, 23 August 2005). The official further stated that "if there are chances of settling the matter at conciliation, parties should fully utilise the opportunity".[7]

The officials emphasised that as an administrative body, the CCMA should become more sensitive to administrative justice. All employees need to be sensitised to this. Furthermore, the CCMA needs to look at the management of its employees. "*As the dispute resolution body, we must strive to resolve and manage our own in-house disputes in order to deal properly with outsiders or users*" (Official F, 23 August 2005). The CCMA processes are legislated and the institution should ensure that these processes are implemented according to the LRA and the CCMA Rules.

[6] S 138 (5)(a) of the LRA.
[7] The survey found that few cases were settled as conciliation.

The officials stated that in order for disputes to be resolved meaningfully, especially those on misconduct, users of the CCMA should gain better respect for the institution and its employees. This is only achievable if CCMA staff members conduct themselves in a respectful way, and are knowledgeable and professional in dealing with the users. The CCMA as a whole delivers an important function. “It is governed by a wonderful Act, namely the Labour Relations Act. There is still plenty room of improvement at the CCMA and in the Act itself” (Official F, 23 August 2005). The improvement at the CCMA and in the LRA was already evident with the 2002 amendments of the LRA and other pieces of legislation like the Basic Conditions of Employment Act (BCEA).

3.4 Views of the CCMA Users

Views from the CCMA users on the dispute resolution processes used to resolve dispute that are heard at the CCMA were gathered through conducting telephone interviews. The interviews were conducted with both applicants and respondents or with employee and employer parties where arbitration awards were rendered. This means that the survey only dealt with participants who had gone all the way to arbitration. Out of 11077 cases, only 2333 arbitration awards were rendered. The figure constituted 21% of the cases. The users that were interviewed were randomly selected, taking into consideration that the parties’ contact details were available. In some instances, both parties to a dispute were interviewed; in others, only one party was contacted.

3.4.1 Views Gathered from Employee Parties

A total of 40 telephone interviews were conducted with employee parties. The interviews were conducted with either the applicants themselves or their representatives (legal representation or union officials).

3.4.1.1 The Types of the Alleged Misconduct

The types of dismissals for alleged misconduct that were referred to the CCMA by the employees related to theft, sleeping on duty, threatening to kill co-employees and unlawful possession of company property. The majority of theft cases appeared to occur in the safety and security sector (private) and the domestic sector. Dismissals as a result of sleeping on duty were dominant in the safety and security sector (private).

3.4.1.2 The Outcome of the Process

Dismissal of the employees that were interviewed was upheld in the majority of the cases; that is 95%. In some instances, the employers were required to award compensation to the employees because they had not followed the correct procedure when instituting the dismissals.

3.4.1.3 The Settlement Amount

From the sample, few employees were compensated and they claimed not to remember the settlement amount. Those that were compensated stated that they were happy about the settlement amount because they had deserved it. The majority of the employees that were not compensated claimed that the awards would have been in their favour if they had had legal representation.

3.4.1.4 Costs Incurred in Resolving the Dispute

Only 38% of the employee parties that were interviewed stated that they had incurred costs in resolving the dispute in the CCMA because they had used the services of attorneys or labour consultants. The remaining 62% of the interviewees claimed not to have used legal representation because it would have been costly for them. Some of the respondents had received legal advice

but they represented themselves at the hearings, by choice or because legal representation was refused.

3.4.1.5 Preference between Conciliation and Arbitration as a method *of Dispute Resolution in Dismissals for Misconduct*

The interviews revealed that 97% of the employees would prefer to proceed to arbitration if conciliation could fail in other disputes that they might be party to in the future. They argued that arbitration is a formal process where commissioners not only try to assist parties in reaching a compromise but also attempt to assist the parties in solving the disputes fairly. Only three percent of the employees stated that they would prefer to settle at conciliation. These employees argued that proceeding to arbitration delays the process of speedy dispute resolution, which is one of the aims of the establishment of the CCMA. They further argued that during conciliation the CCMA should be allowed to inform parties of their prospect of success if they decide to refer cases to arbitration.

3.4.1.6 Labour Court Review

None of the unsuccessful employees that were interviewed stated that they had applied to review the CCMA decision in the LC. They stated that it was costly to refer disputes to the LC and that there was no guarantee of success. Attorneys that represented employees stated that their clients wanted to proceed to the LC but that they did not have money to pay the required fees.

3.4.1.7 Employees' Views of the Commissioner in Charge of their Cases

Generally, the employees stated that the commissioners that handled their cases were experienced and knowledgeable in labour law. They claimed that both parties had been given an equal chance to present their stories and relevant

questions had been asked. The commissioners played an important role in assisting the parties to reach a compromise. Most of the employees (90%) who were unsuccessful stated that the commissioners were biased because they had only given enough time to the employer party to present its case.

3.4.1.8 Assistance with the Processes from the CCMA

The majority of the employees that were interviewed seemed to be familiar with the CCMA processes. As a result it had not been necessary for them to request assistance from the institution. Few employees claimed to have requested assistance from the CCMA. Some claimed that the experience was bad because they were sent from one person to the next. Those that contacted the CCMA call centre claimed to have received assistance that was efficient and effective. This was supported by the CCMA director who indicated that the state of the art technology has been utilised in establishing the call centre with all the features of Computer Telephone Integration (CTI) system and contact management application software thereby facilitating multiple channels for communication. Over-and-above the existence of a standard database (call login system) which enables the call centre manager to have access to real-time statistics that can depict trends and efficiencies (Molahlehi, 2005)[8] on the calls made.

3.4.2 Views Gathered from Employer Parties

A total of 40 interviews were conducted with employer parties that dismissed employees for misconduct. The interviews were conducted with either the employers themselves or their representatives (legal representation, employers' organisations, or company representative, or owner of the business).

[8] The information was presented by the CCMA director at the 2005 18th Annual Labour Law Conference.

3.4.2.1 The Types of Alleged Misconduct

The types of alleged misconduct that were referred to the CCMA by the users ranged from theft, dishonesty, misappropriation of company resources and sleeping on duty. The majority of theft cases were reported from the safety and security sector (private) and the domestic sector. Dismissals as a result of sleeping on duty were also dominant in the safety and security sector (private). It should be noted that not all the employers that were interviewed were involved in the same disputes as the employees interviewed.

3.4.2.2 The Outcome of the Process

Dismissal of the employees was upheld in the majority of the cases. In some instances, the employers were required to award compensation to the employees because of procedural unfairness. In such instances, most employees prayed for compensation rather than re-instatement. The reason for this was that the working relationship after the dismissal was not likely to be a good one. It is interesting to note that a few employers were not in a position to state what the outcome of the process was because they claimed not to have received the arbitration awards from the CCMA. The claims could mean that the outcome of the awards were not in favour of the employers understudy.

3.4.2.3 The Settlement Amount

Most employers claimed not to remember the exact amount that was paid to the employees because the cases had been closed sometime ago. Those that were required to compensate their employees stated that they were happy about the settlement amount because they wanted to get rid of the 'bad' employees. Some employers mentioned that even though they had to compensate their employees, they felt that it was fair to do so because they had made errors when handling the dismissal. There were also employers (62%) that were not required to either

reinstate or compensate their employees because the dismissals were both substantively and procedurally fair.

3.4.2.4 Costs Incurred in Resolving the Dispute

Only 41% of the employers that were interviewed stated that they had incurred costs in resolving the dispute at the CCMA because they had used the services of attorneys and labour organisations. Some of the employers incurred costs when they called in witnesses. The costs included travelling and accommodation because some of the witnesses were from other provinces. The remaining 59% of the interviewees claimed not to have used legal representation because they were either familiar with the CCMA processes, or because they knew the law.

3.4.2.5 Preference between Conciliation and Arbitration as a Method of Dispute Resolution in Dismissals for Misconduct

The feeling of the employer parties was that it was better to resolve disputes at conciliation but that, where necessary, it is important to make application for arbitration. Employers that were interviewed stated that they would prefer to proceed to arbitration if conciliation failed in other disputes that they might be confronted with. They argued that it was better to proceed to arbitration for the sake of justice to prevail rather than accept the non-resolution of a case at conciliation. They mentioned that it was better to 'invest' in the CCMA processes rather than keep employees that are not reliable to work with.

3.4.2.6 Labour Court Review

None of the employers that were interviewed stated that they have applied to review an adverse CCMA award in the LC. They stated that, like the employee parties, it is costly to refer disputes to the LC and there was no guarantee that they were going to succeed. Employers that had used the services of attorneys

or labour organisations argued that they had already spent money on obtaining legal assistance and that they were going to incur more costs by referring their cases to the LC.

3.4.2.7 Employers' Views of the Commissioner in Charge of their Cases

Generally, the employers stated that the commissioners that handled their cases were experienced and knowledgeable in labour law. As a result, both parties had been given an equal chance to present their stories and relevant questions had been asked where necessary. Some employers, especially those that were required to compensate their employees, stated that the commissioners focused more on the stories provided by the applicants.

One particular employer stated that, even though the arbitration award was in his favour, the commissioner was in a position to point out certain loopholes in dealing with the implementation of discipline and, also reprimanded him for not following the correct procedure in disciplining its employees. Other employers pointed out that the commissioners in charge of their cases were biased because they only focused on the employee parties. One employer party claimed to be an attorney and stated that he was in a position to substantiate the claim that the commissioner had been biased.

3.4.2.8 Assistance with the Processes from the CCMA

The employers that were interviewed seemed to be familiar (like most employee parties) with CCMA processes. As a result, it had not been necessary for them to request assistance. Only one employer claimed to have requested assistance from the CCMA, which he described to have been excellent.

3.5 Conclusion

The information that was generated from the CMS was helpful in gathering the information required from the CCMA employees and CCMA users, that could make it possible to assess how the CCMA staff and the users that were interviewed viewed the services of the institution and how these services could be improved where necessary. The CCMA is confronted with a backlog of cases that slows down the dispute resolution process. The backlog has to be blamed on both the CCMA and the users. Administrative problems are sometimes encountered - for example, parties not receiving notification of hearings on time or not at all. This means that other hearing dates have to be scheduled. In other instances, parties delay referring their disputes and thereafter apply for condonation. If condonation approved, dates have to be scheduled for the hearing of cases.

The analysis of the referring sectors and the outcome category illustrates the frequency of dismissal referrals from different sectors to the CCMA, and whether the disputes are resolved or not and the reasons thereafter. There are a number of reasons for the non-resolution of disputes, such as, non-attendance and jurisdictional issues. In order to avoid all these problems, it is necessary for both the CCMA and its users to have ongoing communication.

CHAPTER 4

ANALYSIS OF THE RESEARCH FINDINGS

4.1 Introduction

This chapter presents an analysis of the data presented in Chapter Three seen against the theoretical framework and the research questions as presented in Chapters One and Two. The chapter discusses the usefulness of the information generated by the Case Management System (CMS), specifically on dismissal cases as a result of misconduct. The system made it possible for the research to only focus on the targeted cases and period in which the disputes arose. That is only dismissal cases for misconduct that were referred to the CCMA between January and December 2004. The system also made it possible for the researcher to establish the frequency of referrals per sector. The category of dispute outcomes assisted the researcher to understand how many cases were, for example, dismissed or out of jurisdiction, and where the awards were rendered.

This chapter compares the views (on dispute resolution processes for dismissal cases as a result of misconduct used at the CCMA) of the commissioners and the registry staff of the CCMA. It also compares the views gathered from both employee and employer parties concerning their referrals. These views included the CCMA users' degree of satisfaction in the resolution of cases; the costs that they had incurred when referring their disputes; their preference for conciliation and arbitration in other disputes that they might have; and whether they would prefer to refer their cases to the LC for review. The chapter established how both the employees and the employers viewed the commissioners that were in charge of their cases and how helpful the CCMA staff members were during the process of attempting to resolve their disputes.

4.2 Information Generated by "Esperant" (CMS)

The information generated by the CMS was useful in the sense that it provided the researcher with the information she required and made it possible to confirm the year of referrals, since the focus was on cases that were referred to the CCMA Gauteng province in 2004 only, in respect of dismissals for misconduct. The system provided party names and the case numbers. The information made it possible to confirm exactly who the parties to the disputes were. Some of the parties provided the CCMA with their contact details, specifically telephone and cell numbers, which made contacting them relatively easy. Slight difficulties were encountered in situations where the parties had changed their contact details or where these had been captured incorrectly by the CCMA registry staff.

The CMS also specified the outcome of the dispute after it had been referred to the CCMA. It was, therefore, possible to make a decision as to whom to contact for the gathering of data. For example, contacts were made with parties where arbitration wards were rendered as compared to cases that were out of CCMA jurisdiction.

4.2.1 Sectors Referring Disputes to the CCMA

The CMS specified that the safety and security (private) and the retail sectors accounted for the highest number of referrals concerning dismissals for misconduct in 2004. Referrals from these sectors constituted 20% and 19% of the referrals respectively. The information is substantiated by the 2004/2005 CCMA Annual Report.[9] These two sectors were followed by the business/professional sector, which made up 9% of the disputes.

The gap between the two highest referring sectors and the business/professional sector is large. There could be several reasons for this gap. One reason could be

[9] The breakdown of referrals by sector remained relatively consistent throughout the period.

an increase in the number of private security companies in the country, especially in Gauteng. Another reason could be the fact that the security sector is now regulated by the Minister of Labour or by labour laws. The security sector has standards that have been set by the Minister of Labour that relate to its functioning. These standards are referred to as “ministerial determinations” (BCEA, 1997). The sector has, for example, minimum hours of work and leave benefits. As a result, disputes tend to arise in situations where either employers or employees did not follow what the legislation specifies. For example, disputes could arise as a result of legislated working hours. Security staff used to work extensive hours and were not compensated for that. At present, the sector requires security to be paid for overtime that corresponds to the hours that they work.

The retail sector is also required to operate like other businesses in the country. Failure to do so leads to disputes between employers and employees. Therefore, referrals from the sector to the CCMA increase. Another reason that could have an influence on the high referrals in the safety and security (private) and the retail sectors could be theft. Theft is regarded as one of the dismissible offences, especially where there has been a pattern of stealing by employees. Employers have a right to dismiss employees who engage in theft. Businesses can close as a result of theft, especially where owners do not apply strict rules consistently. It happens that employers do not dismiss certain employees and at some point decide to dismiss ‘new’ offenders. Favouritism could be an influencing factor in this regard.

The business/professional sector includes the ‘traditional’ work, for example, duties that are performed in offices rather than in factories. It could be possible that both employers and employees in the sector are familiar with their rights in the workplace. This could be a reason for fewer referrals from this sector to the CCMA.

Domestic workers who are considered vulnerable workers, and were previously excluded from protection under labour legislation, are now treated as employees as in other sectors.[10] The domestic sector with 7% of the referrals to the CCMA has gained momentum in recent years. The sector now has sectoral determination where hours of work, wages and other related issues are regulated by the Minister of Labour, specifically by the BCEA of 1997. Employers are now required by law to register domestic workers with the Unemployment Insurance Fund (UIF). This makes it possible for domestic workers to enjoy, as in other sectors, the benefits of claiming from the UIF during unemployment and during maternity leave. The regulation of the sector makes it possible for the workers to lodge disputes as required by law, unlike in the past where such workers were not protected by any law. This also means that domestic workers, like other workers, can refer dismissal disputes as a result of misconduct to the CCMA.

The remaining highest sectors, from which disputes are referred to the CCMA, are building/construction, food/beverage, contracting cleaning, warehousing and transport (private), which account for a small percentage of the referrals. One reason for this could be that workers in these sectors are mostly employed by labour brokers and often on fixed-term contracts. Some of the workers are illegal immigrants, like in the building sector. These types of workers are exploited by employers but are afraid to lodge grievances because of them being illegal in the country. Therefore, such workers do not enjoy the protection of South African labour law. The percentage of the referrals might increase in the transport (private) sector in the years to come. This might be influenced by the implementation of the sectoral determination in the taxi industry.[11] The determination regulates, amongst other things, working hours, paid leave, and minimum wages.

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[10] A domestic worker "means an employee who performs domestic work in the home of his or her employer and includes –
(a) a gardener,
(b) a person employed by a household as driver of a motor vehicle, and
(c) a person who takes care of children, the aged, the sick, the frail or the disabled,
but does not include a farm worker" (BCEA, 1997: 9).

The following sectors constituted a small percentage of the referrals: bargaining council,[12] consulate/embassy, hairdressing, non-educators (private), pharmaceutical (manufacture) and public health and welfare. Bargaining councils are required by law to resolve their own disputes but with certain limitations.[13] Bargaining councils sometime request the CCMA to resolve its disputes, if agreed, and the CCMA charge a fee to the respective council.

Embassies in South Africa are exempt from the ordinary application of South African law. This is because of the provisions of the Foreign States Immunities Act, 87 of 1991. The CCMA can resolve disputes where a person who works for an embassy is in dispute with another person but not in his or her capacity as an embassy employee, but on private capacity. For example, personnel of an embassy who hired a gardener on his or her personal basis. This means that an employee of an embassy who has been dismissed as a result of misconduct can not refer a dispute to the CCMA. The CCMA can assist the grievant in referring the dispute to the relevant body for resolution.

The public safety and security, the public service (general) and the motor sectors (manufacture) could have referred their disputes to their respective bargaining councils rather than the CCMA. A sector like the animal care constituted 0, 08% of the referrals and that could have been influenced by its size. The sector is small as compared to the others; therefore, one is not in a position to compare it to the other large sectors. It might make some sense to consider certain sectors

[11] The sectoral determination for the taxi industry became operational in June 2005.
[12] These could have been mistaken referrals, not a sector as such.
[13] The following disputes may not be referred to a council: organisational rights, collective agreement where the agreement does not provide for a procedure or the procedure is inoperative or any party frustrates the resolution of the dispute, agency shops and closed shops, determinations made by the Minister in respect of proposals made by a statutory council, interpretation or application of collective agreements of a council whose registration has been cancelled, demarcation of sectors and areas of councils, interpretation or application of bargaining councils, bargaining councils in the public service, statutory councils and general provisions concerning councils, pickets, proposals that are subject of joint decision-making in workplace forums, disclosure of information to workplace forums, and the interpretation or application of the provisions of Chapter V which deals with workplace forums.

jointly for the sake of analysis. For instance, the agriculture/farming sector (with 1% of the referrals) could be clubbed together with the animal care sector.

The post office sector and the communications sector could also be joined considering the similarities of its functions. Clubbing together the sectors that are similar would give rise to a slightly different picture that could be useful in understanding the reasons of the differences in terms of referring of disputes to the CCMA. It was noted that there was only one case where the sector was not identified. That did not even constitute a percentage of the referrals. As a result, the omission did not have an impact on the data presented.

4.2.2 Outcome Category of Disputes

The CMS clearly illustrates the categories of dispute outcomes as a result of dismissals for misconduct that were referred to the Gauteng province in 2004. A total of 11 077 disputes were referred or captured on the system. From this figure, arbitration awards were rendered to 2 333 cases, or 21% of the disputes. The sample of the interviews that were conducted was identified from the 2 333 cases. These were the cases that went as far as arbitration.

Some of the cases were dismissed because of non-attendance. This is costly to both the users and the CCMA. The CCMA has to pay the commissioner that was scheduled to hear the case even though it was dismissed. This payment rule applies to part-time commissioners who bill the CCMA for the services rendered. The CCMA also incurs administrative costs in this regard because it would have to start the process of scheduling the case to another date in case there could be such requests.

Parties sometimes lodge disputes and afterwards withdraw them. This happens after the CCMA has incurred administrative costs - for example, sending correspondence to the parties. A total of 25 certificates were issued and three

cases were completed at the end of 2004. This figure is discouraging because this means that there are, at times, delays in issuing awards, even though, the CCMA is required to resolve disputes effectively and efficiently. Some interviewees claimed not to have received their awards at the time of conducting the interviews. This happens occasionally, as a result of parties having changed their contact details without informing the CCMA. This was not the case with the interviewees that were conducted because the parties stated that they had not changed their addresses. It could be possible that the awards were not in their favour and that they did not want to adhere to the rulings made by the commissioners.

Default awards are also rendered as a result of non-attendance by the employer parties. These practices are also costly to the CCMA because parties sometimes request another hearing date. If approved, it means another date would have to be scheduled for the hearing. Some rescission applications are turned down if they do not meet the requirements for approval. In this research, 314 cases were not rescinded. This means that the CCMA did not incur unnecessary costs associated with the approval of rescissions.

A total of 400 cases were not settled and, therefore, not completed. None of the parties applied for arbitration. There could be a number of reasons for this. For example, parties, especially employees, did not have enough resources to proceed with the cases after conciliation. Some of the employees that were interviewed stated that they were not properly prepared when they went to the CCMA. This reflects an ignorance of knowing where to get help and how to go about doing that because there are institutions, even the CCMA itself, that provide information on the processes to be followed when lodging a dispute. Some cases were not settled and completed because of non-attendance. This means that cases were referred to arbitration and parties decided afterwards not to attend. Again, this could have been for the reasons mentioned above.

The CCMA is confronted with a high number of disputes that it does not have jurisdiction to resolve. The jurisdictional issues sometimes come to light during conciliation or arbitration. At times these issues become obvious on the referral forms. In this research, 1 617 cases were out of jurisdiction. This is costly to the CCMA, in terms of its administrative burden and where a jurisdictional ruling has to be made.

In a few cases review applications were pending before the LC. This figure could be a result of effective dispute resolution at the CCMA. It could also be possible that parties did not have the necessary fees to appeal at the LC. The LC, unlike the CCMA, involves costs to applicants. At the LC parties usually have to engage lawyers to conduct proceedings in the court because these are more formal than at the CCMA. Some parties do, however, appear without legal representation in the LC.

The research showed that parties sometimes settle the disputes during conciliation, even before the formal process start. This is positive because it is important for parties to reach an agreement since they are the ones that know exactly what their problems are. This early settlement could be made possible if employers and unions could agree on realistic ways of resolving disputes internally. The CCMA encourages parties to first exhaust company - internal processes for resolving their disputes. The CCMA should be involved in situations where the parties were unable to resolve their disputes. Disputes that are settled by parties also relieve the CCMA of the burden that it has of resolving workplace disputes, being the only independent dispute resolution body in the country.

The outcome categories that were generated by the CMS were useful in identifying the different outcomes of the disputes on dismissal for misconduct that were referred to the Gauteng province. The data had some shortfalls in that 1 376 (constituted 9.12% of the referred cases) disputes were not assigned an

outcome. This was an administrative error, which the CCMA must address because the absence of information might distort the true reflection of the situation.

4.3 Views of the CCMA Officials

Both the registry staff and the commissioners from the Gauteng (Johannesburg office) province were interviewed in order to gather information for the research. These are the people that are confronted on a daily basis by the challenges that face the provincial office of the CCMA. One was able to learn from their experiences and also associate that with the information available - monthly reports produced by the Operations and Information department based at the CCMA head office.

The views were also gathered from the national call centre of the CCMA. The call centre provides information on both CCMA-related queries and all labour legislation. The call centre provides services in all the official languages, English being the language of choice for members of the public. This could have been influenced by the fact that some languages do not enjoy the same coverage as others. For instance, the call centre did not have agents that were fluent in languages like Xitsonga and Tshivenda and only a few agents spoke Sipedi. The Gauteng province, being the largest, has the highest percentage of calls made to the call centre. The percentage breakdown of calls per sector was fairly consistent with the percentage breakdown of the referrals by sector, with the business and professional services, domestic and retail sectors accounting for the highest number of calls.[14]

[14] The information is available from the CCMA Annual Report 2004/2005.

4.3.1 Most Common Misconduct Cases Referred to the CCMA

Both the registry staff and the commissioners that were interviewed stated that the most common misconduct cases referred to the CCMA include cases related to theft, insubordination, abscondment, absenteeism, dishonesty, sleeping on duty, and drunkenness at work. The CCMA call centre that is responsible for handling both substantive and procedural issues on labour also confirmed this pattern of misconduct dismissals.

These types of misconduct usually give rise to dismissals of employees by the employers, even if the offence was at the first instance. Some company policies require warnings to be issued to employees before dismissal. Grogan (2003: 154) confirms this principle:

> *dishonesty in the employment context can take various forms, including theft, fraud and other forms of devious conduct. Theft is regarded as one of the most serious forms of disciplinary offence, normally justifying dismissal at first instance, regardless of the value of the property involved, the employee's length of service, the absence of prior warning, or whether the employee subsequently returned the property*.

The CCMA has generally followed a strict approach in cases that involve theft and other forms of dishonesty, in that; it has confirmed the dismissals of employees where there was both procedural and substantive fairness. This is evident from the arbitration awards that have been issued. One could also say that it has been lenient in some cases that involved theft, and has deemed dismissal to have been a harsh sanction. The fact of the matter, though, is that the employee's dishonesty could destroy the trust upon which the employment relationship is founded.

4.3.2 Most Common Reasons for Cases not being heard on Specified Dates

Cases not heard on scheduled dates cause administrative costs in that it is highly likely for the parties to request another date for resolving the disputes. This means that notice would have to be given again and a commissioner reallocated cases not heard on scheduled days. Cases not heard on scheduled days cause delays in resolving disputes and contribute to the backlog that the CCMA is often faced with.

4.3.3 Officials' Impressions of Cases not Proceeding on Scheduled Dates

Officials interviewed took the view that it is true that cases not proceeding on scheduled dates create a backlog and, therefore, increase the administrative burden on the CCMA. They are also costly because of the administrative steps that have to be repeated to reschedule hearings. The time spent rescheduling the cases could have been utilised to perform other tasks within the institution.

4.3.4 Other General Comments Concerning the CCMA Processes and the Users

The CCMA has done a tremendous job of marketing itself since its inception. From the interviews, people seem to be aware of what the CCMA is, even though some think of it as a court of law and refer disputes that the institution has no jurisdiction to resolve. Apart from the jurisdictional issue, some users seem not to be familiar with South African labour law. The CCMA tries all means to educate South Africans about the country's labour legislation. This is usually done through radio and television talk shows, workshops in all the provinces, training provided to different sectors, the issuing of pamphlets in CCMA offices, and during road shows. The CCMA also makes contact with the users when amendments are made to any of the pieces of labour legislation.

An understanding of labour legislation by both employers and employees is necessary in order to reduce the number of labour disputes. Where disputes arise, parties should be willing to resolve them at conciliation, specifically dismissal disputes as a result of misconduct, in order to avoid delays that sometimes cause disruption in workplaces. Disputes are sometimes referred to arbitration because of non-resolution at conciliation or because of a certificate being issued. The research found these to be frequent. If that happens, it is the responsibly of the CCMA to further attempt to resolve the disputes. It is a pity that other parties to the disputes do not prepare themselves thoroughly at conciliation for the reason that a second chance for resolution exists during arbitration. This might not be the case if resolving disputes at the CCMA involved costs. Another relevant issue in this regard is that if every dispute goes through conciliation but only a fraction are settled, the administrative waste is enormous.

CCMA officials stated that the CCMA must become more sensitive to administrative justice. This means that it should apply what labour law specifies and also follow the rules accordingly. All employees need to be sensitised on this.

4.4 Views of the CCMA Users

The views from the users were gathered by conducting telephone interviews. The researcher was able to gather more information from the users because the questions were open-ended. Some of the interviewees also provided other relevant information that was not part of the questionnaire. The interviews were conducted only with parties where their disputes were arbitrated and awards had been rendered. The figure for arbitrated disputes constituted 21% of the disputes that were referred in 2004 concerning dismissals as a result of misconduct, in the Gauteng province.

4.4.1 Comparison of the Views Gathered from the Employee and Employer Parties

A total of 80 telephone interviews in equal numbers were conducted with both the employee parties and employer parties. The interviews were conducted with either the parties or their representatives (e.g., unions, employer organisations, or legal representation). In all instances, the parties that were interviewed had knowledge of the disputes under discussion.

4.4.1.1 The Types of Alleged Misconduct

As can be expected, both groups mentioned similar types of misconduct cases as being referred to the CCMA during the period under study, for example; theft, sleeping on duty, insubordination, abscondment, just to mention a few. Common reasons for dismissal in the safety and security sector are as a result of sleeping on duty and theft. In the domestic sector theft is a common reason for dismissal.

4.4.1.2 The Outcome of the Process

The dismissal of the employees in the sample was upheld in the majority of the cases that went to arbitration. One could conclude that parties tend to insist on their innocence or they misrepresent themselves during the in-house disciplinary processes, at conciliation, and also at arbitration. Another possible conclusion is that employees believe that the CCMA would see things differently or they do not understand the degree of proof an employer requires to justify a dismissal.

Some employees were compensated because of the procedural faults committed by their employers, even though they were found guilty. The CCMA requires employers to follow the correct procedure when dismissing employees. Those that do not do that are ‘punished’ by being requested to compensate employees.

The employee parties that were interviewed acknowledged receipt of the arbitration awards. This clearly demonstrates some efficiency on the part of the CCMA. It means that the CCMA succeeds in issuing awards according to the prescribed time frames.

On the other hand, some employers claimed not to have received the awards or any correspondence at all from the CCMA. There are some issues that could have influenced this. The employer parties may not have received the awards because of the administrative problems at the CCMA or the parties could have changed address without informing the institution. This is questionable because awards are sent out to all parties involved at the same time. It is possible that the parties could have made the claim in order to avoid compensating the employees or because they were not happy about the outcome of the process.

4.4.1.3 The Settlement Amount

The amendments to the LRA have narrowed down the settlement amount to 12 months as compared to where employees were compensated for a maximum of 24 months' salary (Grogan, 2003).[15] From the interviewees, the employees that were compensated claimed to be happy about the amount they had received.

Some employees seem to believe that it is automatic for one to be compensated when one refers a dispute to the CCMA. In order to substantiate this, it is important to quote one interviewee who stated that "I lost the case. I was at least expecting the CCMA to have requested my employer to compensate me*".* In determining the performance of the CCMA, Christie (NY) states that:

> *the disenchanted may say that the LRA encourages people to declare disputes and that the CCMA settles them by persuading*

[15] The award for procedural and substantive fairness was always capped at 12 months. Only for automatically unfair dismissals could an employee obtain 24 months' pay.

employers to pay money to make them go away. Settlement, they say, in turn encourages more disputes.

Employers must, therefore, guard themselves against employees who commit misconduct and take advantage of the fact that their employers do not follow the correct procedures for instituting dismissals.

4.4.1.4 Costs Incurred in Resolving the Dispute

The CCMA, generally, provides free services but there are instances where parties incur costs that they could have avoided. The parties in the study incurred costs because they used the services of attorneys, labour organisations, or labour consultants when they referred their disputes to the CCMA. The CCMA allows parties to use services of legal practitioners, at arbitration, but not labour consultants. This means that labour consultants only provide advice to the CCMA users but do not represent them at the hearings. In misconduct dismissal cases the parties are supposed to represent themselves, except in cases where certain conditions are met.

The research found that the employer parties incurred legal costs slightly more often than employee parties; that is 41% of the employers as compared to 38% of the employees. This could have been influenced by the fact that companies generally have more resources than individuals. Another issue could be that after a dismissal, people find themselves penniless and are unable to consult lawyers. Employers are sometimes refused legal representation. This, at times, puts the employees in an advantageous position because they might have fears facing people that they regard to be knowledgeable.

A total of 62% of the employee parties and 59% of the employer parties claimed not to have used legal representation. Both parties mentioned cost as a deterrent

to using legal representation. Some of the parties received legal advice prior to the hearing but they represented themselves at the hearings.

4.4.1.5 Preference between Conciliation and Arbitration as a method of Dispute Resolution in Dismissals for Misconduct

Disputes referred to the CCMA are first conciliated before they are arbitrated.

> *Conciliation is central to the resolution of labour disputes today. The LRA requires that parties in dispute with one another should try to find solutions among themselves, with the assistance of a skilled conciliator* (Bosch, *et al*., 2004: 46).

Both employers and employees prefer to settle at conciliation but they emphasised during the interviewees that they would prefer to refer their unresolved disputes to arbitration. Both parties acknowledged that the arbitration process delays the resolution of disputes because another date has to be set for the process if the initial hearing has failed, unless is a “con-arb”.

There was a feeling, among that parties, that the CCMA should be allowed to advise parties of their prospects of success when they decide to refer misconduct cases for arbitration. The reason for this is that parties tend not to take the conciliation process seriously, knowing that they have another chance to resolve the disputes, in the form of arbitration. The parties also felt that it was better to proceed to arbitration for the sake of justice to prevail rather than accept the non-resolution of a dispute at conciliation.

4.4.1.6 Labour Court Reviews

Bosch *et al*. (2004) state that any party to a dispute which alleges a defect in the arbitration proceedings of the CCMA may apply to the LC to review and set aside

the award. From the research conducted, none of the employees or the employers stated that they had applied for a review at the LC. The reason they gave was that it is costly to refer disputes to the LC and that there was no guarantee of success. Some of the parties argued that it was not necessary for them to incur other legal costs because they had already incurred costs when they referred their disputes to the CCMA. The implication here is that the LC might receive a high number of cases if there were no cost issues.

4.4.1.7 Employers' and Employees' Views of the Commissioners in Charge of their Cases

The recruitment process of CCMA commissioners is extensive. As a result, users expect that the commissioners that are appointed are qualified and experienced in dealing with labour disputes. Apart from this, commissioners are required to complete an accredited commissioner training course that is offered by the CCMA, with a pass mark of 60% for each module.

The research conducted found that both the employers and the employees viewed the CCMA commissioners that handled their cases to have been experienced and knowledgeable in labour law. A high number of parties claimed that they were given equal chance to present their cases. This behaviour from commissioners is what is expected because the CCMA is required to assist parties to resolve their disputes in an amicable manner. The CCMA commissioners should try all means to be neutral when dealing with disputes so that parties have faith in the CCMA and its employees. Parties that do not achieve awards in their favour should be able to understand where they went wrong and avoid repeating mistakes.

4.4.1.8 Assistance with the Processes from the CCMA

The CCMA, specifically the Dispute Management department, conducts continuous training, seminars and talk shows on the services provided by the CCMA. CCMA officials carry out interventions nationally. Contact is also made with shop stewards and employer forums because these are the people that refer disputes to the CCMA. These activities make it possible for the users to be aware of what is required of them as employers and employees in matters of dispute, including those that gave rise to dismissal as a result of misconduct.[16]

The majority of the users that were interviewed seemed to be familiar with the CCMA processes and, as a result, it was not necessary for them to request assistance from the institution. This positive finding could have been influenced by the fact that the CCMA invests heavily in training and conducting workshops/seminars for the public. None of the parties that were interviewed stated that they attended the workshops, but some of their colleagues did. Most users make use of the CCMA national call centre, which is manned by experienced agents.

The user that received bad service at the Gauteng office when referring his dispute mentioned that he was transferred from one person to the next on the telephone. In fact, most users claimed that the letters of correspondence that they had received from the CCMA had not mentioned specific people to contact. As a result, they had to contact the switchboard, from where they were transferred to other offices.

[16] The CCMA Research Unit was commissioned to conduct an impact assessment of the Dispute Management department's activities, the outcome of which was extremely positive. The findings of the research indicated that the majority of the learners, across all spectrums, claimed to have

4.5 Conclusion

The safety and security (private) and the retail sectors accounted for the most dispute referrals in the year under study. The CCMA Annual Report 2004/2005 confirmed this fact. The increase in a number of private security companies in the country could be one of the factors that influence the high number of referrals to the CCMA. Sectoral determinations that have been established by the Minister of Labour could also be a factor in the high number of referrals of disputes to the CCMA.

Sectors that do not have high number of referrals to the CCMA could be more familiar with their rights in the workplace. Another factor could be that the industries concerned are small as compared to the others.

The analysis of the research data points to a discrepancy between the aims of the establishment of the CCMA. The LRA established the CCMA for the purposes of resolving workplace disputes. Its establishment was not only for resolving disputes but also for resolving them speedily in order that workplaces remain harmonious.

The CCMA cannot be solely blamed for not resolving disputes in a speedy manner because users also contribute to this. The CCMA schedules hearing dates and sometimes parties do not attend and, thereafter, request another hearing date.

It emerges from the analysis of the data that the CCMA does not only resolve disputes; it also has strategies to prevent them. These include providing training to shop stewards, employers, employees and other people involved in employment relationships. The CCMA does not only provide training but also

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greatly benefited from attending the Dispute Management's Best Practice workshops (CCMA Annual Report, 2004/2005: 13).

conducts road shows, and television and radio shows. It also issues pamphlets and other related documents to the public. As a result, people in general seem to have an idea of what the CCMA is, even though some refer disputes that do not involve an employment relationship but the rendering of services instead. It is the responsibility of the CCMA to establish if it has authority to resolve disputes when are referred to the institution.

The analysis of the research data also pointed out that the CCMA also experiences administrative problems that have an influence in resolving disputes in a speedy manner. The main issue in this regard involves communication between the CCMA and the users. Some parties do not attend hearings and claim that they did not receive notification of set down, only to find out later that they did not change their mail or physical addresses. Change of mail or physical addresses by parties play a major role in communication breakdown because these addresses are most reliable means of communication. This is mentioned because contacting parties telephonically is sometimes impossible because they change their numbers or sometimes their cell phones get lost. The CCMA administration also can be slightly blamed as far as contact details are concerned because of the incorrect capturing of the contact details of the parties.

CHAPTER 5

CONCLUSION

The management of labour dispute resolution in relation to dismissals for misconduct heard in the CCMA requires revision.

The literature review carried out as part of this research points to the complexity of dispute resolution management - in particular, the fact that dispute resolution implies additional administrative burden on the part of the CCMA. The institution is required to communicate with both the applicants and the respondents continuously. This is sometimes difficult because of administrative failures. The administrative failures, for instance, include failure to notify parties of the hearing dates on time and this contribute to the hearings not taking place.

The parties could also be blamed in some instances because they change their contact details and fail to inform the CCMA of these changes. It is argued that while the CCMA is aimed at resolving labour disputes, this is not possible without commitment from both employers and employees. Referrals should be made with the purpose of resolving disputes in a speedy manner since the parties failed to resolve them on their own. One has to bear in mind that the CCMA processes are compulsory – they provide an opportunity for an aggrieved employee to compel an employer to defend the fairness of having dismissed that employee.

The CCMA, both nationally and provincially, attempts to prevent disputes by providing education on labour legislation and conducting information-sharing sessions with workers and employers. It also engages shop stewards who play a major role in dispute resolution. The CCMA also popularise its services by means of print media, pamphlets, and other related documents that are easy to read. It also provides those that do not understand the English language an opportunity to read about or listen to labour issues in their own languages. This is done

through the national call centre, written documents in African languages, and talk shows in the dominant languages as assessed according to the demographics of the different provinces. Where disputes have arisen, interpreters are provided, accordingly, to avoid claims of prejudice.

The interviews conducted with both users and CCMA officials pointed out the necessity of resolving or attempting to resolve disputes internally before referring them to the CCMA. Unresolved disputes must be referred to the CCMA and they should be resolved speedily. This is sometimes impossible because of faults on the part of the CCMA and/or the parties. Therefore, all role players should play their part efficiently and effectively for disputes to be resolved quickly, which is one of the aims of the LRA. CCMA officials who took part in this research argued that they were overburdened from additional responsibilities brought about by non-attendance of parties, postponements, etc. The users argued that the CCMA should improve on its communication strategy even though they also contribute to the failure themselves.

The State and the CCMA need to find ways of improving the CCMA administrative processes in a manner that ensures efficient and effective dispute resolution. The two role players should also ensure that the processes are sustainable. Such development may require a realisation from the State that amendments to the legislation should be ongoing. The State should work together with labour and business, since the two are also major role players in issues related to employment relations.

The following actions are recommended for improving the institutional capacity of the CCMA dispute resolution processes for dismissal cases as a result of misconduct:

1. There should be an improvement in communication between the CCMA and its users. There should be ongoing communication the moment a

dispute is lodged until its resolution. This means that the users should try all means to provide as many contact details as they can on their referral forms. Any change in their contact details should be communicated to the CCMA. The CCMA should also make sure that the information is captured correctly because there are times where digits of a contact number are missing. The CCMA should follow-up with phone calls to remind parties of set downs. This could be time consuming, but would be less time consuming if carried out randomly.

2. Some parties do not take the CCMA processes seriously. For this reason, they sometimes refer disputes and decide not to attend the hearing. To make matters worse they do not inform the CCMA of their cancellations. The LRA allow an employee who did not attend a hearing to request the matter to be set down again (because it is merely dismissed), whereas if the employee attends but the employer does not an award can be issued. There seems to be inconsistency with the practices. Therefore, a request that the matter be set down again should apply to both employee parties and employer parties, but reasons have to be provided and the CCMA should verify the authenticity of these.

   The conciliation process should also be regarded as a 'formal' process, more or less the same as in arbitration, given the statistics of non-resolution of disputes at conciliation of misconduct cases as a result of dismissal.

3. The CCMA finds itself dealing with cases that are outside its jurisdiction. This is costly, financially and in terms of the time spent handling the files. The CCMA should be given authority to screen cases before they are captured to avoid dealing with non-jurisdictional issues. Telephone calls to the parties before a matter is set down might clarify the jurisdictional problems beforehand.

4. The CCMA should provide an ongoing training to both the registry staff and the commissioners on labour-related issues so that the desired of standards of dispute prevention and resolution can be maintained. This will also contribute to the prevention of disputes since parties would have been informed of their rights before disputes could arise. By doing this, the CCMA would have increased a pool of officials that will make both employees and employers aware of what is required of them in the employment relationship.

5. Ongoing education and training on labour law and related issues should be provided to the users by the CCMA. These can include emphasis on following the correct disciplinary procedures and fair dismissal where necessary. There should be an emphasis on the importance and advantages of fully exhausting internal processes of resolving disputes before referring them to conciliation. Parties should also be encouraged to resolve disputes during conciliation, rather than taking them to arbitration, in order to resolve them speedily. The CCMA conducts training to shop stewards and information officers on an ongoing basis. The importance of fully exhausting internal processes should be emphasised all the time. The CCMA should encourage organisations to allow officials that have been trained by the CCMA to 'impart' knowledge to its colleagues in different forums.

6. Registry staff that are responsible for the CMS should receive ongoing training on how to utilise the system in order to avoid errors, such as not capturing the outcome of the cases.

7. The national call centre should have an equal distribution of agents that speak the 11 official South African languages. All users would, therefore, be able to phone in for advice in the language they understand. That could decrease the number of misconduct cases because employees would be

informed as to what is acceptable conduct at work. Printed documents such as pamphlets should be available in all the official languages. The CCMA should increase the awareness of the call centre. The CCMA should arrange with all radio stations and newspapers to advertise the institution and its services on a daily basis.

All these improvements will in one way or another contribute to more effective and efficient dispute resolution in the CCMA, specifically on dismissal as a result of misconduct.

The research has attempted to broaden the scope of debates on the CCMA as a dispute resolution institution by highlighting the complexities of dispute resolution processes. It is hoped that it has contributed to the formation of knowledge by presenting a basis for further questions and research.

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