One-Stop Shopping

Has the CCMA made dispute resolution any easier?

by Sarah Christie

How are we doing? It depends who you ask. The disenchanted may say that the Labour Relations Act (LRA) encourages people to declare disputes and that the CCMA settles them by persuading employers to pay money to make them go away. Settlement, they say, in turn encourages more disputes. In the first few months after the CCMA's establishment in November 1996, unions and individual employees were enthusiastic; now, however, informal feedback from some unions suggests they are a little less enamoured. Employers, initially nervous, were for the most part pleasantly surprised by CCMA staff's intelligence and consideration. But as the months have passed and case-load increased, case management officers and commissioners have become overwhelmed.

Public labour relations services need a range of appropriate services for the user to exploit appropriately and for the state to maintain. One of the criticisms of the old regime was that our poorest people, agricultural workers and domestic servants, had no protection against employer power to hire and fire. Another was that all disputes had to be channelled through the Department of Labour and then taken to the Industrial Court. As most employees couldn't afford legal services and court procedures were complex, access was effectively denied those who were not unionised or couldn't afford attorneys.

The CCMA, the one-stop dispute resolution agency, was designed to channel matters more appropriately – but the case-load was seriously underestimated. During the first 18 months 100 000 matters have been referred to the CCMA, meant to have been more than three years' work. Approximately 75 percent of these are individual dismissal disputes. The LRA prescribes that, "when a dispute is referred a commissioner must be appointed." The majority of commissioners are part-time, called in as and when they are needed; this necessarily means that alleged disputes are handled in formal meetings with commissioners.

We need to find ways of screening cases more firmly at point of entry. Under the LRA a dispute is what a person alleges it to be, and a referring party need do no more than say, "I was dismissed," add name and address of the worker and employer, date of dismissal and that he or she wants to be reinstated or seeks compensation. Trained case management officers screen cases to assess whether people have come to the right place, but in alleged dismissals the CCMA is to some extent stuck by the LRA's rigidity.

The following hypothetical dispute about the fairness of a dismissal case reflects current problems. Two days after starting his new job as a driver with African Big Trading, Thomas Myataza was fired. He did not belong to a union, and set out to look for work. Unable to find any, he went to the Department of Labour to claim
unemployment insurance. There he was told he was not eligible because he had not been a registered contributor for 13 weeks out of the previous 52. Myataza said he was unfairly dismissed because management never gave him a hearing. The Department of Labour official gave him a CCMA form. Myataza's form reached the CCMA 45 days after he was dismissed. Two days later a number was assigned. It was noted that the case should have been referred within 30 days of dismissal. As there was no explanation for the delay, it was put into a holding bay marked 'condonation required'. Ten days later a standard letter went to Myataza by ordinary post (with a copy sent to the employer), pointing out that the form was late and inviting him within 14 days to apply for condonation. A little more than two weeks later, Myataza appeared at the CCMA offices and after a certain amount of quarreling, established that he had received the CCMA's letter only two days before. He explained that he didn't belong to a union, that he was a first-time worker and was not given a hearing before he was dismissed. The lateness of the referral was condoned.

The CCMA had 30 days to conciliate the dispute; it appointed a commissioner and scheduled a hearing. No one from the employer side arrived. Apparently the employer had written a letter dismissing the dispute as a waste of time, but when the letter allegedly arrived the case hadn't yet been assigned a number, and the letter was never found.

The conciliating commissioner explained to Myataza that he could not effectively settle the dispute without the employer's presence. He issued a certificate stating that conciliation was not successful, giving a copy to Myataza and posting another to the employer. Within a few days, Myataza posted a request for arbitration to the employer. A couple of weeks later the CCMA received a letter from the employer complaining about the failure to acknowledge or reply to its earlier letter. That letter was put in the file. After some administrative delay occasioned by case-load pressure, the matter was set for arbitration seven months after the dismissal.

The arbitration hearing was scheduled to be completed within two hours. The commissioner examined the file and noted that as the employer had not appeared at the conciliation meeting, there had been no attempt to settle the matter. She advised both parties that, in terms of s.138(3) she could, with their consent, suspend the hearing and try to help them settle the dispute by conciliation. Myataza refused, and the commissioner asked the parties to state briefly what the case was about.

The employer's representative explained that their company was a small import-export business. Myataza had been hired as a driver, but could hardly drive. He was terminated after his first day at work when they discovered his incompetence – termination covered in their '24 hours' notice' probationary clause. Myataza had misrepresented his skills; from the employer's perspective, a hearing wasn't necessary.

Myataza said he was fired unfairly without a hearing. He admitted he had made some mistakes on his first day, but this was because he was nervous and management did not give him a chance.

After some discussion the commissioner framed the issues: Was Myataza incompetent and, if so, was the employer entitled to dismiss during the probationary period? Even if the employer was entitled to terminate, was Myataza entitled to a hearing? The employer presented its case first. The man who accompanied the company driver on his first day out said Myataza was not a good driver, and gave several examples. The general manager said he had observed Myataza returning to
the yard, nearly colliding with the main gate. He then exchanged heated words with Cindy Muller, the supervisor who had hired Myataza. Muller said that she was responsible for recruiting junior staff; they hired by word-of-mouth, and a long-serving staff member had recommended Myataza. After a short interview in which Myataza had said he was a good driver, and after he'd presented his I.D./driver's licence, Muller had hired him to start the following day. When she'd put the general manager's complaint to Myataza he'd admitted he was nervous but said he would be fine at the end of the month. Muller said in her opinion that was ridiculous. They were running a business not a driving school and could not risk an accident with an incompetent driver. They had no other work for him.

Myataza's case was that he was nervous because he had been out of work for a long time and needed a few weeks to settle in. He denied stalling the van and denied ever saying that he was a very experienced driver. He explained that the salary he was earning was so low that the company must have known he was not very experienced. If they wanted an experienced driver they would have to pay more. It was not fair to dismiss him before the month was out. He admitted seeing the 24-hour probationary period clause but didn't take it seriously.

The hearing lasted an hour and a half. The award found that the employer was entitled to rely on the employee's licence as a warranty of competence to drive. As the evidence showed he was not competent and although one day was rather a short period to test his competence, the commissioner found that the employee had not denied the 'mistakes' but sought to explain that these would disappear within the month. He ruled that where the employee warrants that he is competent, an employer is not obliged to train the recruit, nor is a probationer entitled to be retained in employment for the full probationary period – especially if there was a real possibility that the employee might be involved in an accident causing personal injury or physical damage. Although it would have been preferable if the employer had spent more time with the employee, and had allowed him to be represented by a fellow employee (perhaps the person who had introduced him), the failure to do so did not make the dismissal procedurally unfair.

The award was faxed to the employer and sent to the employee by registered post ten days after the hearing and a copy lodged with the Labour Court, in compliance with the provisions of the LRA.

Myataza's decision to refer the dispute to the CCMA was rational: he was unemployed and had nothing to lose. Had the employer come to conciliation, they might have been persuaded that it would be better to pay Myataza a little to avoid the risk of arbitration process and outcome cost. Had the arbitrator found the dismissal unfair only because Myataza was deprived of a hearing, he would have been obliged in terms of s.194 of the LRA to award Myataza his full salary from the date of dismissal to the last day of the arbitration hearing (although a little might have been deducted because Myataza had referred his dispute late). Myataza may not understand why he lost his case: all he thought he was entitled to was to be paid until the end of the probationary period. He thought he was entitled to be paid at least a month. He was not familiar with the Basic Conditions of Employment Act. Myataza needed an interpreter to testify, but received his award in English. Had he belonged to a union, his representative might have advised him not to take the case further and if there were full employment Myataza may have moved on.
Are the process costs for state and employer too high? The CCMA is a top-up for our inadequate social security system. Is it inappropriate? Has the LRA dictated one kind of rigidity, and the CCMA another? The CCMA has only one office in each province, although satellite offices are being set up in some of the large provinces. Full-time commissioners are linked to the provincial offices; some part-time commissioners live in the country but integration remains difficult.

Could the CCMA handle dismissal disputes more efficiently and fairly, by incorporating some or all of the following?

- Should employees and employers have to apply for a case number in all dismissal cases, so that case management officers can exercise discretion on whether to accept cases?
- Should more detail be included in documents referred to the CCMA, so that it has a basis to exercise discretion in accepting or rejecting and assigning a matter to a commissioner of appropriate seniority and to an appropriate process?
- Should employers be entitled to respond within a particular period of time before the CCMA decides to accept jurisdiction?
- Should the CCMA decline cases which seem frivolous or futile?
- Should there be qualifications before one is entitled to challenge termination disputes (as in the U.K. and Australia)? If so, should this be pegged at three or six months' service? Should there be exceptions in strike-related dismissals, alleged discrimination or victimisation, or in cases involving more than five workers?
- Should there be greater discretion to award compensation to reduce speculative claims?
- Should compensation be in nominal terms rather than linked to salary? As it is, very poor people are under-compensated in cases of procedural unfairness.
- Should the conciliating commissioner direct accelerated arbitration – for example, in cases affecting several people or where workers are particularly vulnerable (e.g. in farming disputes where people could face eviction)?
- Should the CCMA require a lodging fee, say a R100 revenue stamp, before arranging an arbitration hearing, as is done in Australia? Should this be in all cases, or only if there is little apparent merit to the claim?
- Should the CCMA have small depots electronically linked to a provincial secretariat so that at least disputes about dismissals can be handled as close to the workplace as possible?
- Should the CCMA be guided by the system of civil and criminal justice? Criminal matters are screened by issue: murder in one court, drunken driving in another. Traffic court would collapse if there were no provision for payment of an admission of guilt fine and every matter went to full trial. Civil disputes are channelled into different forums depending on the amount in dispute.

All is not doom. Collective disputes which could generate strikes are handled fairly expeditiously by the CCMA – it can take some satisfaction from steady change in strike patterns since the inception of the LRA. Dismissals no longer trigger wildcat strikes. Still, we have a long way to go.

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