LEGAL REPRESENTATION AT INTERNAL DISCIPLINARY ENQUIRIES, THE CCMA AND BARGAINING COUNCILS

by

BRANDON WEBB

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Supervisor: Mr T Qotoyi
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DECLARATION

I, BRANDON WEBB, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

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Brandon Webb

TABLE OF CONTENTS

SUMMARY

The right to legal representation at internal disciplinary hearings and arbitration proceedings at the Commission for Conciliation, Mediation and Arbitration (CCMA), and bargaining councils, where the reason for dismissal relates to misconduct or incapacity is a topic that is raised continuously and often debated. Despite no amendments to labour legislation pertaining to the issue at hand there was however a recent Supreme Court of Appeal judgment. This judgment alters one's view and clarifies the uncertainties that were created around Rule 25 of the CCMA rules, it also brings a different perspective to the matter, but it will however continue to ignite significant interest. There is no automatic right to legal representation at disciplinary hearings, at the CCMA, and at bargaining councils where disputes involve conduct or capacity and this is the very reason why it is a contentious matter for all parties to grapple with. The dismissal of an employee for misconduct may not be significant to the employer, but the employee's job is his major asset, and losing his employment is a serious matter to contend with. Lawyers are said to make the process legalistic and expensive, and are blamed for causing delays in the proceedings due to their unavailability and the approach that they adopt. Allowing legal representation places individual employees and small businesses on the back foot because of the costs. Section 23(1) of the Constitution of the Republic of South Africa, Act 108 of 1996, provides everyone with the right to fair labour practices, and section 185 of the Labour Relations Act 66 of 1995 gives effect to this right and specifies, amongst others, that an employee has the right not to be unfairly dismissed. At internal disciplinary hearings, the Labour Relations Act 66 of 1995 is silent as to what the employee's rights are with regards to legal representation and the general rule is that legal representation is not permitted, unless the employer's disciplinary code and procedure or the employee's contract allows for it, but usually an employee may only be represented by a fellow employee or trade union representative, but not by a legal representative. In *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani,* the Supreme Court of Appeal held that there exists no right in terms of the common law to legal representation in tribunals other than in courts of law. However, both the common law and PAJA concede that in certain situations it may be unfair to deny a party legal representation. Currently the position

in South Africa is that an employee facing disciplinary proceedings can put forward a request for legal representation and the chairperson of the disciplinary hearing will have the discretion to allow or refuse the request. In *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee,* the Supreme Court of Appeal found that the South African law does not recognise an absolute right to legal representation in fora other than courts of law, and a constitutional right to legal representation only arises in respect of criminal matters. The court had this to say:

> "There is no right to legal representation at conciliation proceedings, but a party may appear in person or be represented only by a director or another employee and, if the party is a close corporation, it may include a member thereof, or any member, office bearer or official of that party's registered trade union or registered employers' organisation. Legal representation is permitted in arbitration proceedings with the exception of when the dispute concerns an unfair dismissal and it is alleged by a party that the dismissal amounts to reasons relating to the employee's conduct or capacity. Legal representation may only be permitted at arbitration proceedings if the commissioner and all other parties consent, or if the commissioner decides that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering various factors. In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & Others,* the court differentiated between allowing legal representation of normal disputes at arbitration and those involving dismissals for reasons relating to conduct and capacity not being afforded any automatic right to legal representation because the majority of disputes referred to and arbitrated by the CCMA relate to misconduct and incapacity. It was also concluded that the majority of individual dismissal disputes were deemed uncomplicated and straightforward and that the exclusion of legal representation was intended to achieve the purpose of providing for a speedy, cheap and informal resolution of disputes."

In the latest judgment, *Commission for Conciliation, Mediation & Arbitration & Others v Law Society of the Northern Provinces (incorporated as the Law Society of the Transvaal)* the Supreme Court of Appeal overturned the High Court judgement of *Law Society of the Northern Provinces v Minister of Labour &* Others and found that Rule 25(1)(c) of the CCMA Rules, which deals with the right of appearance before the CCMA by a legal practitioner, and limits a party's right to legal representation in CCMA arbitration proceedings that concern the fairness of dismissals for misconduct and incapacity. It was not irrational or an infringement of a party's constitutional right.

If one compares the legal position in South Africa with Namibia, it appears that there are a few differences. At conciliation and arbitration stages in Namibia, it is

interesting that representation is limited to the parties authorised to appear at these proceedings. In South Africa, legal representatives and labour consultants are excluded from participating in conciliation proceedings, but in Namibia the situation is different, as legal representation and labour consultants are permitted based on the agreement of the parties to the dispute and at the discretion of the labour commissioner.

Legislation concerning legal representation in Zimbabwe is different as it is argued that parties have a fundamental right to be legally represented. Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.

There are many conflicting views and opinions on this subject matter that is factored in and considered, as well as comparing the advantages and disadvantages canvassed in this research in order to evaluate and substantiate the arguments put forward. One needs to also understand and appreciate the goals of the dispute resolution processes in South Africa as envisaged by the LRA, the purpose of the CCMA and the role of the commissioners when dealing with disputes pertaining to dismissals where the reason relates to misconduct or incapacity, and to be aware of the considerable latitude and discretion that is afforded to commissioners to permit legal representation after an application is made and the reasons submitted why legal representation is absolutely necessary. The reasons for restricting the right to representation by excluding legal practitioners, Rule 25(1)(c) of the CCMA rules, and case law needs to be explored and considered. As it stands the Supreme Court of Appeal had the final word on this subject matter and the Constitutional Court has subsequently refused the Law Society of the Northern Provinces leave to appeal the decision of the Supreme Court of Appeal as it bares no prospects of success. The door was not closed totally on this topic of legal representation, but left half open…

CHAPTER 1
INTRODUCTION

> "If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"[1]

There is no automatic right to legal representation at internal disciplinary hearings, at the Commission for Conciliation, Mediation and Arbitration[2] (CCMA), and at bargining councils, concerning matters relating to dismissals for misconduct and incapacity. The dismissal of an employee for misconduct may not be significant to the employer, but the loss of a job is a serious matter for the employee to face.[3] The question of legal representation is a topic, that is raised continuously and often debated, despite no recent changes to labour legislation that pertains to the issue at hand, it continues to spark significant interest and therefore I believe that it is necessary to re-visit this controversial subject, on which many articles have been published and case law developed over the years.[4]

A large number of employee's facing disciplinary action as a result of allegations of misconduct are laymen with regards to disciplinary procedures and processes and are not always capable of defending themselves.[5] It is for this reason that it should be foreseeable that they will turn to someone else to assist them.[6] In a disciplinary hearing a guilty finding may very well have severe consequences where the offences are serious in nature, and an example of where an employee steals a small article finds application.[7] If found guilty at a criminal trial he may receive a suspended sentence or a small fine, where on the other hand the same employee might also be charged with contravening the employer's disciplinary code and could be dismissed, leading to a loss of income and in many cases an entire family may suffer the

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1 Lord Denning in *Pett v Greyhound Racing Association Ltd* (1991) (3) SA 665 (E) 673J-674B.

2 Hereinafter referred to as "CCMA".

3 "High Court upholds challenge to CCMA's limitation on legal representation: loss of job important for Employee" (18 October 2012) http://www.labourguide.co.za (accessed 2014-01-30) 1.

4 "The right to representation" http://www.labourguide.co.za/discipline.../673-the-right-to-representation (accessed 2014-01-15).

5 Venter "Legal Representation" 2005 442 *De Rebus* 30.

6 *Ibid.*

7 *Ibid.*

consequences.[8] An offender is entitled to legal representation during criminal proceedings but the same right is not afforded to the employee at a disciplinary hearing, where the outcome could have a far greater effect on the employee's future and social independence.[9] This comparison highlights that one needs to understand the differences that exist, in disciplinary hearings there is no right to legal representation unless the employer's disciplinary code provides for this, as it is regarded as an internal matter and the process is informal.[10] In courts of law, magistrates and judges preside over proceedings and parties are represented by attorneys and advocates as the process is formal and can become technical.[11]

There are various reasons why employees request legal representation, but it is usually that the employee believes that a better chance of success would result if accompanied by a legal practitioner[12] and that the employee will be subjected to fair treatment, or plainly put that the employee does not trust the employer.[13] At disciplinary hearings, the general rule is that legal representation is not permitted, unless the employer's disciplinary code and procedure or the employee's contract allows for it, but usually an employee may only be represented by a fellow employee or trade union representative, but not by a legal representative.[14] The employer's disciplinary code must be accepted as a guideline and must not be departed from easily, but circumstances might prevail that would render it unfair not to allow legal representation.[15] Where complex issues are present, the courts have held that legal representation should be allowed, and where complex matters involving technical evidence and complicated points of law have surfaced, the refusal to grant legal representation may well result in disciplinary proceedings being viewed as unfair.[16] The chairperson of the disciplinary hearing has a discretion to allow legal

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8 Venter 2005 *De Rebus* 30.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 "Legal practitioner" means any person admitted to practice as an advocate or an attorney in the Republic in terms of the Labour Relations Act (66 of 1995).

13 http://www.labourguide.co.za.

14 "The right to legal representation at a disciplinary enquiry – a tricky issue for employer…" (8 December 2008) http://www.bowmangilfillan.co.za (accessed 2014-03-24) 1.

15 http://www.labourguide.co.za.

16 "The right to legal representation at a disciplinary enquiry – a tricky issue for employer…" (8 December 2008) http://www.bowmangilfillan.co.za (accessed 2014-03-24) 1.

representation in certain circumstances and the test to apply is whether or not the failure to do so would result in the disciplinary proceedings being rendered as procedurally unfair. Therefore, a proper evaluation will need to be considered involving the nature of the charges, degree of factual and legal complexity, potential seriousness of consequenses of an adverse finding, nature of prejudice to the employer and the legal capabilities of the employer in permitting legal representation as well as the nature of prejudice to the employee in refusing legal representation.[17] The chairperson of the disciplinary hearing needs to properly apply his mind and consider the facts presented as to why legal representation should be allowed, and cannot just dismiss the request out of hand, or use the defence that the company's disciplinary code and procedure does not permit legal representation.[18]

The present position in South Africa is that an employee facing disciplinary proceedings can put forward a request for legal representation and the chairperson of the disciplinary hearing will have to exercise a discretion to allow or refuse the request. No right to legal representation exists during arbitration stages, involving matters of dismissals for misconduct and incapacity, except where both parties and the commissioner of the CCMA or bargaining council consents.[19] It is this rule that continues to generate much debate, as it can be argued that it limits the rights of parties appearing before the CCMA or bargaining council, to be represented by a legal practitioner.[20] The commissioner at the CCMA or bargaining council exercises a discretion in allowing legal representation if an application is made, where the dispute referred concerns the dismissal of an employee for reasons relating to the employee's conduct or capacity.[21] Legal representation is automatically allowed in all other arbitration proceedings before the CCMA or bargaining council.[22] The law applicable to legal representation in labour disputes remains unchanged and there is no absolute right to legal representation at disciplinary hearings or at any stage of

17 "The right to representation" http://www.labourguide.co.za (accessed 2014-01-15).

18 http://www.labourguide.co.za 1.

19 Collier "The Right to Legal Representation under the LRA" 2003 24 *ILJ* 753 770.

20 "High Court upholds challenge to CCMA's limitation on legal representation: loss of job important for any employee" (18 October 2012) http://www.labourguide.co.za (accessed 2013-01-30) 1.

21 http://www.labourguide.co.za 1.

22 *Ibid*.

the proceedings at the CCMA or bargaining council on matters arising from misconduct and incapacity dismissals.[23]

Chapter 2 discusses the legal framework in South Africa dealing with legal representation and refers to relevant case law.

The dispute resolution forums are referred to in Chapter 3, focussing on internal disciplinary hearings, the Commission for Conciliation, Mediation and Arbitration (CCMA), bargaining councils and private arbitration.

Chapter 4 reveals the issues encountered when a request for legal representation is made by an employee at an internal disciplinary hearing. Contracts of employment, collective agreements, disciplinary codes and procedures, Schedule 8: Code of Good Practice: Dismissal are explored, and the importance of procedural fairness is acknowledged.

Legal representation at the CCMA and bargaining councils is covered in Chapter 5 and considers conciliation and arbitration phases, including Rule 25 of the CCMA rules and the limitations thereof. The latest case law and developments concerning Rule 25 will also be discussed.

A comparative analysis concerning legal representation at internal disciplinary hearings and tribunals in Namibia and Zimbabwe is presented in Chapter 6.

Chapter 7 explores the advantages and disadvantages of legal representation.

The conclusion and findings are debated in Chapter 8.

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23 *Ibid*.

CHAPTER 2
STATUTES IN SOUTH AFRICA: LEGAL FRAMEWORK

This chapter will give an introduction and an overview of the development of the legal framework in South Africa and the current legal position pertaining to legal representation in disciplinary matters. When dealing with this subject matter consideration must be given to the common law, the Constitution, the Labour Relations Act 66 of 1995, as well as the position before the amendments to the Labour Relations Act of 2002, the Labour Relations Act 28 of 1956, and including the Explanatory Memorandum to the draft Labour Relations Bill 1995. The right to legal representation at internal disciplinary hearings and at the CCMA will be discussed.

2.1 COMMON LAW

The rules of law inherited from Roman, Roman-Dutch and English law have been developed by our courts and became known as the common law and serve an important role in labour law.[24] There have been significant developments and extentions to the common law by the Constitutional Court and the Supreme Court of Appeal over the last few years to address the deficiencies and shortcomings pertaining to common law rights and duties that the contract of employment is based on, and bring it into line with the Constitution.[25] The common law did not recognise fairness as an essential element of the contract of employment except that a general duty of good faith was required.[26] The terms and conditions of the contract concluded by the parties, despite how inequitable and unfair they could be, compelled employees and employers to abide by the terms of the contract that they had agreed to.[27] The inherent inequality in bargaining power between the employer and employees and the unfairness associated with the employment relationship was not catered for by the common law.[28] Today, the Basic Conditions of Employment

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24 Le Roux, Strydom, (eds) Basson, Christianson, Dekker, Garbers and Mischke *Essential Labour Law* (2009) 17.

25 *Ibid*.

26 Grogan *Employment Rights* (2010) 5.

27 *Ibid*.

28 Grogan *Workplace Law* (2009) 3.

Act[29] regulates basic conditions that are incorporated into all contracts of employment and collective agreements by law.[30]

2.2 CASE LAW RELATING TO THE DEVELOPMENT OF THE COMMON LAW CONCERNING REPRESENTATION

In *Dabner v South African Railways and Harbours*[31] the case concerned an employee of the railway administration, who was charged with misconduct and applied to be legally represented before an administrative tribunal. The court was called upon to decide whether to allow legal representation before a statutory enquiry. Innes CJ, held that the employee was not entitled to be legally represented in such proceedings and commented this way:

> "That means that he must be given an opportunity of showing to that officer, reason why these penalties ought not to be imposed. But it gives him no right to appear by attorney or counsel at the enquiry. Now, clearly the statutory board with which we are concerned is not a judicial tribunal. Authorities and arguments, therefore, with regard to legal representation before courts of law are beside the mark, and there is no need to discuss them. For this is not a court of law, nor is this enquiry a judicial enquiry. True, the board must hear witnesses and record their evidence, but it cannot compel them to attend, nor can it force them to be sworn; and, most important of all, it has no power to make any order. It reports its finding, with the evidence, to an outside official, and he considers both and gives his decision. Nor can it properly be said that there are two parties to the proceedings. The charge is formulated by an officer who is no party to the enquiry. The board is a domestic tribunal constituted by statute to investigate a matter affecting the relations of employer and employee. And the fact that the enquiry may be concerned with misconduct so serious as to involve criminal consequences cannot change its real character. No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none."[32]

It was also considered that each case must be dealt with on its own particular circumstances, as the Act did not grant any right concerning legal representation and that tribunals established to manage disputes concerning administration or discipline were not compelled to adhere to the procedures followed by a court of law.[33] The

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29 Act 75 of 1997.

30 Grogan *Employment Rights* 5.

31 [1920] 1919-1920 SALR 583 (AD).

32 [1920] 1919-1920 SALR 598 (AD).

33 *Ibid.*

common law provides that parties must be given a fair chance to state their side of the story, and this principle is known as the *audi alteram partem* rule.[34]

In *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee &* Others[35] a student was charged with misconduct before an internal disciplinary committee, and was found guilty and expelled from the Technikon.[36] The student requested to be represented by his lawyer, but this was refused as the disciplinary committee considered itself bound by its rules and procedures.[37] A decision taken by the student to withdraw himself from the proceedings resulted in the hearing continuing in his absence, even though he could have been assisted by a student or staff member at the hearing.[38] The court began by observing that the entitlement as of right to legal representation in proceedings other than courts of law remain controversial and problematic.[39] It turned to the *Dabner v SA Railways & Harbours*[40] case for guidance and as the court *a quo* concluded more than 80 years ago, that there never existed any absolute right to legal representation.[41] South African courts have viewed this decision as being correct.[42] Marais, JA, explains that there may be cases that require legal representation as an essential requirement for a procedurally fair administrative proceeding and this must include quasi-judicial proceedings.[43]

In *Lace v Diack &* Others[44] the applicant was found guilty at a disciplinary hearing of allegations ranging from attempted fraud, a gross irregularity due to him instructing that an adjustment be made to his personal tax deduction, using abusive language and aggressive behaviour.[45] The applicant was informed that he was entitled to representation by a "salaried employee" of his choice from within the company, but

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34 *Ibid.*
35 (2002) 23 *ILJ* 1531 (SCA).
36 *Ibid.*
37 *Ibid.*
38 *Ibid.*
39 (2002) 23 *ILJ* 1533 [5].
40 [1920] 1919-1920 SALR 583.
41 (2002) 23 *ILJ* 1533 [5].
42 *Ibid*.
43 (2002) 23 *ILJ* 1536 [11].
44 (1992) 13 *ILJ* 860 (W).
45 *Ibid.*

this did not materialise as the person later refused and the applicant was not represented at his initial hearing.[46] At the appeal hearing, the applicant was refused the right to legal representation, and he chose not to attend the proceedings.[47] According to Van Zyl, J:

> "In the present matter the nature of the representation is clearly described as that of a co-employee and no salient reasons have been advanced why, in the circumstances of this case, such representation should prejudice the applicant. There is certainly no absolute right to legal representation in our law, to the best of my knowledge, although I am of the opinion that, where an employee faces the threat of a serious sanction such as dismissal, it may, in the circumstances, be advisable that he be permitted the representative of his choice. This approach may be considered in complex and difficult matters in which legal representation may be regarded as essential for a fair hearing. Our law has not, however, developed to the point where the right to legal representation should be regarded as a fundamental right required by the demands of natural justice and equity. It may well be that, in time to come, public policy may demand the recognition of such a right. In my view, however, that time has not yet arrived."[48]

The court held that the matter before the appeal hearing did not comprise issues of an unduly difficult and complex nature and were not persuaded that legal representation should have been allowed in this case as a *sine qua non* for a fair hearing.[49]

In *Ibhayi City Council v Yantolo*[50] the respondent was suspended for alleged misconduct and in a notice to attend a disciplinary hearing he was informed of his right to be heard at the hearing "either personally or through a representative", but the word "representative" was held not to incorporate an attorney or advocate.[51] At the hearing the respondent requested to be legally represented and this request was refused and the proceedings continued and the respondent was found guilty and his services were terminated.[52] The respondent brought an application for an order to set aside the decision.[53] The case turned on the crucial question which had to be decided and that was whether the applicant was correct in refusing the respondent

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46 (1992) 13 *ILJ* 862 [H].
47 (1992) 13 *ILJ* 865 [C].
48 (1992) 13 *ILJ* 865 [F].
49 (1992) 13 *ILJ* 865 [G].
50 (1991) 12 *ILJ* 1005 (EC).
51 (1991) 12 *ILJ* 1007 [A].
52 (1991) 12 *ILJ* 1007 [C].
53 (1991) 12 *ILJ* 1007 [D].

the assistance of legal representation at the disciplinary hearing.[54] Jansen, J stated that the disciplinary committee did not have the right to decline the respondent's request to be represented by his attorney at the hearing.[55] On further appeal the court pointed out that, if regulations only intended for lay representation at an internal disciplinary hearing then such regulations will be permitted.[56] Zietsman, AJP observed that, where no specific right to representation is afforded to a party before a tribunal by statute or regulations governing the proceedings of the tribunal, representation need not be permitted.[57] An exception may apply where the complexity of the issues at hand are such that a party could be negatively affected by an adverse finding and cannot be said to have received a fair hearing if he has been denied some type of representation.[58] Where the statute or regulations allow for representation, it can be limited by the terms of the statute or regulations to exclude, representation by an attorney or advocate or it can allow representation.[59] The court concluded that the appellant was not entitled to limit, in the way it did, the respondent's right to representation as contained in the staff regulations, and it had thus acted unlawfully.[60]

In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & Others*[61] the appellant's argument was that the common law permitted a party appearing before the CCMA or administrative body a right to legal representation.[62] Wallis, MJD disagreed and contended that the applicant's argument was fundamentally flawed as that was not the correct interpretation of the law.[63] According to Zondo, JP no general or absolute right to legal representation in proceedings before administrative bodies existed at the common law, but that if circumstances arise and the matter includes complex legal matters, a party may be entitled to legal representation.[64] Musi, JA reasoned that the common law position entailed a basic requirement of

54 *Ibid*.
55 (1991) 12 *ILJ* 1007 [E].
56 (1991) 12 *ILJ* 1009 [A] .
57 (1991) 12 *ILJ* 1013 [I].
58 (1991) 12 *ILJ* 1013 [J].
59 (1991) 12 *ILJ* 1014 [A].
60 (1991) 12 *ILJ* 1014 [I].
61 (2009) 30 *ILJ* 269 (LAC).
62 (2009) 30 *ILJ* 284 [C].
63 *Ibid.*
64 (2009) 30 *ILJ* 284 [D].

conformity with the principles of natural justice ensuring that procedural fairness is maintained before domestic tribunals and statutory bodies when proceedings are being conducted and that reference must be made to what the statute rules or regulations confirm, which allows or excludes legal representation.[65] The tribunal should in appropriate circumstances have a discretion to make an informed decision.[66]

In *Dladla & Others v Administrator, Natal & Others*[67] three employees faced disciplinary hearings. The employees' jobs and livelihoods were in jeopardy, as laymen they were handicapped in facing disciplinary matters and their destiny did not fall into the scope of an independent tribunal, but into the hands of officials of an organisation which charged them with misconduct and these officials that would hardly be inclined to show any sympathy for their version of events.[68] The court acknowledged that once the issue of legal representation is neither allowed nor disallowed by any statute, regulations or rules controlling the proceedings, and that a discretion needs to be exercised on the issue at hand.[69] Didcott J, held that due to the refusal to grant the employees legal representation at the disciplinary hearings the outcomes were in effect nullified by the fact that those responsible for the decisions failed to exercise a discretion freely and fairly in reaching their conclusions.[70]

2.3 LABOUR RELATIONS ACT 28 OF 1956

At conciliation proceedings, under the LRA of 1956, provision was made for the determining of disputes by industrial councils or the establishment of a conciliation board that would settle disputes between employees and employers.[71] A provision for representation was provided in the Act to a degree that each party would be permitted three representatives on the conciliation board, unless an alternative

65 (2009) 30 *ILJ* 284 [F].
66 *Ibid.*
67 (1994) 16 *ILJ* 1418 (NPD).
68 (1994) 16 *ILJ* 1425 [F].
69 (1994) 16 *ILJ* 1419 [F].
70 (1994) 16 *ILJ* 1425 [J].
71 Collier 2003 *ILJ* 754.

agreement was made, with the exception that, officials of unregistered trade unions or unregistered employers' organisations and legal practitioners[72] could not represent a party at the proceedings.[73] The right of lawyers to appear in compulsory and voluntary arbitrations and before Industrial Courts was regulated by the Act.[74] A legal practitioner could represent a party in the Industrial Court if all parties to the dispute consented, otherwise the party that does not consent must notify all parties in writing before the proceedings commence.[75] A consistent interpretation would mean that a common-law discretion permitting legal representation by the court is limited by statute in that the court may not decline an application for legal representation by a party if all other parties have agreed.[76]

According to Benjamin, despite the discretionary powers of the Industrial Court, lawyers had unrestricted access to the court, which was designed to be informal, and made decisions related mainly to fairness of dismissal disputes, and had now become a hunting ground for the legal profession.[77] The Industrial Court under the LRA of 1956 developed a fundamental departure from the "criminal justice" model and recognised that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the employers' decisions are found wanting.[78]

2.4 EXPLANATORY MEMORANDUM TO THE DRAFT LABOUR RELATIONS BILL 1995

Contrary to the original intentions, our system utilised for adjudicating unfair dismissals was extremely legalistic and expensive, as the Industrial Courts conducted its proceedings in a formal manner, similar to a court of law, adopting a

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72 "Legal practitioner" means any person admitted to practice as an advocate or an attorney in the Republic.

73 *Ibid.*

74 Collier 2003 *ILJ* 758.

75 Benjamin "Legal Representation in Labour Courts" 1994 15 *ILJ* 250 260.

76 Benjamin 1994 *ILJ* 254.

77 Benjamin 1994 *ILJ* 255.

78 (2006) 27 *ILJ* 1645.

strict adversarial approach.[79] The overall goals of the system were accessibility, informal, cheap and speedy resolution of disputes, but legalism undermined this.[80]

The draft Bill envisaged a fair, but brief, pre-dismissal procedure, and a swift arbitration process based on the merits of the case, and this required a more flexible, less onerous approach when dealing with procedural fairness, because many small employers were not always able to follow complex pre-dismissal procedures, and not all procedural flaws would cause substantial prejudice to the employee.[81] The draft Bill introduced a major change concerning the introduction of compulsory arbitration for determining disputes concerning dismissals for misconduct and incapacity.[82] These dismissal disputes need to be determined by a final and binding arbitration, that is simple, quick, cheap and non-legalistic.[83] The draft Bill regulated unfair dismissals and provides a Code of Good Practice which arbitrators need to consider.[84] During arbitration concerning matters involving conduct and capacity, legal representation is not automatically allowed, except when all the parties consent, as lawyers are said to make the process legalistic and expensive.[85] Lawyers are also accused of delaying the proceedings due to their unavailability and the approach that they adopt, and by allowing legal representation it places individual employees and small businesses on the back foot because of the costs.[86] The draft Bill also proposed the establishment of an independent Commission for Conciliation, Mediation and Arbitration that is state funded and governed by a tripartite board appointed by NEDLAC, that is designed as a one-stop shop for resolving labour disputes.[87] It is controlled by a director and a panel of commissioners who are responsible for resolving disputes by conciliation and arbitration.[88]

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79 Explanatory Memorandum to the Draft Labour Relations Bill 1995 (1995) 16 *ILJ* 278 336.
80 (1995) 16 *ILJ* 316.
81 (1995) 16 *ILJ* 317.
82 (1995) 16 *ILJ* 318.
83 *Ibid.*
84 (1995) 16 *ILJ* 319.
85 *Ibid.*
86 (1995) 16 *ILJ* 319.
87 (1995) 16 *ILJ* 327.
88 *Ibid.*

2.5 LABOUR RELATIONS ACT 66 OF 1995

Section 185 of the LRA of 1995, confirms that every employee has the right not to be unfairly dismissed.[89] Legal representation was regulated by sections 135(4), 138(4) and 140(1) of the LRA of 1995, but these sections were subsequently repealed.[90]

Section 135(4), dealt with resolution of disputes through conciliation, and read as follows:

> "(4) In the conciliation proceedings a party to the dispute may appear in person or be represented only by -
> (a) a director or employee of that party; or
> (b) any member, office-bearer or official of that party's registered trade union or registered employers' organisation."[91]

Section 138(4) contained the general provisions regarding legal representation at arbitration proceedings:

> "(4) In any arbitration proceedings, a party to the dispute may appear in person or be represented only by -
> (a) a legal practitioner;
> (b) a director or employee of the party; or
> (c) any member, office-bearer or official of that party's registered trade union or registered employers' organisation."[92]

Section 140(1) provided for special provisions for arbitration concerning dismissals for reasons relating to conduct or capacity.

> "(1) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal related to the employee's conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless –
> (a) the commissioner and all the other parties consent; or
> (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
> (i) the nature of the questions of law raised by the dispute;

89 66 of 1995.

90 Collier 2003 *ILJ* 755.

91 *Ibid.*

92 Collier 2003 *ILJ* 759.

(ii) the complexity of the dispute;
(iii) the public interest; and
(iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute."[93]

It could be argued, and it was indeed the case in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO &* Others[94] that a literal interpretation of section 138(4) provided an automatic right to legal representation in arbitration proceedings and that section 140(1) created an exception and therefore limits that right.[95] Zondo JP, concluded that any contention by the parties that a general or absolute right to legal representation existed when dealing with disputes concerning dismissals for misconduct or incapacity would be rejected as no such right existed and the court was satisfied that the exclusion or limitation in section 140(1) concerning dismissals for misconduct or incapacity in arbitration proceedings was justifiable.[96]

Where a party requests legal representation in terms of section 140(1)(b), the commissioner needs to be persuaded that the party concerned cannot reasonably deal with the dispute at hand without the assistance of legal representation, and the commissioner must then determine the matter.[97] The LRA is silent when dealing with the issue of legal representation at internal disciplinary hearings, and therefore when faced with the situation, reference has to be made to the common law and the Constitution to provide guidance on the matter.

2.6 LABOUR RELATIONS AMENDMENT ACT 12 OF 2002

One of the purposes of the amendments is to provide for the making of regulations by the Minister when dealing with representation before the CCMA.[98] It is important to consider that the Amendment Act 12 of 2002, came into effect on 1 August 2002, and the relevant amendments are referred to below:

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93 *Ibid.*
94 (2009) 30 *ILJ* 269 (LAC).
95 (2009) 30 *ILJ* 271 (LAC).
96 *Ibid.*
97 *Afrox LTD v Laka & Others* (1999) 20 *ILJ* 1732 (LC) 1733E.
98 Collier 2003 *ILJ* 756.

Section 115(2A) was applicable to the general provisions of proceedings in conciliation and arbitrations, and was amended to:

> "The Commission may make rules regulating -
> (k) the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings;
> (m) all other matters incidental to performing the functions of the Commission."[99]

Section 135 of the Act was amended by the deletion of subsection (4), thus meaning that the Commission would be responsible for the rules pertaining to conciliation and arbitration proceedings under the supervision of the CCMA.[100]

Sections 138(4) and 140(1) were repealed by the provisions of the Labour Relations Amendment Act 12 of 2002.[101] Item 27 to Schedule 7 of the LRA Amendment Act reads that until such time as the Commission had published rules that regulated proceedings in conciliation and arbitration matters the repealed provisions sections 135(4), 138(4) and 140(1) of the Act remain in force.[102] The CCMA published a set of rules in December 2003, and Rule 25 emerged which provides rules relating to representation before the Commission, but it also caters for the option of a party at arbitration that wishes to object to the representation of another party appearing before the Commission, but it did not set new rules for representation as was predicted.[103]

2.7 THE CONSTITUTION 1996

The Constitution of South Africa, 1996[104] is the supreme law of the country, and any law or conduct that is inconsistent with the Constitution will be invalid.[105] The Constitution and labour legislation was adopted to seek to redress the imbalance of

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99 *Ibid.*

100 *Ibid.*

101 Hereinafter referred to as the "LRA Amendment Act".

102 Collier 2003 *ILJ* 757.

103 Collier 2003 *ILJ* 756.

104 Act 108 of 1996.

105 Van der Walt, Le Roux, Govindjee (eds) *Labour Law in Context* (2012) 3.

power that existed between employers and employees.[106] South Africa's Constitution is unique in constitutionalising the right to fair labour practices.[107] The fair labour practice concept cannot be defined and is not capable of an exact definition.[108] Reference will be made to various sections relating to the constitutional challenge.

Section 9(1) (Equality):

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law -
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origen, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[109]

In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & Others*[110] consideration was given to the argument that the Act provides for a right to legal representation concerning arbitrations, but it excludes that very right when dealing with arbitrations pertaining to disputes concerning dismissals for misconduct, and this exclusion is deemed irrational.[111] The court considered whether there was a differentiation in treatment, whether the parties were treated differently, and it was satisfied that there was no differentiation as to a qualified right to legal representation between the parties.[112] The majority of cases referred that consumed public resources were dismissal disputes concerning misconduct, and the reason the government created a provision in the Act for compulsory arbitration was for a speedy, cheap and informal dispute resolution system, and that both employer and employee would be on an equal footing.[113] The court concludes that no inequality existed.[114]

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106 Van der Walt *et al Labour Law in Context* 3.
107 *Ibid.*
108 *Ibid.*
109 108 of 1996.
110 (2009) 30 *ILJ* 285 (LAC) [C].
111 *Ibid.*
112 *Ibid.*
113 (2009) 30 *ILJ* 285 (LAC) [F].
114 *Ibid.*

Section 23(1) (Labour Relations):

> "(1) Everyone has the right to fair labour practices."[115]

It is relevant to look at the wording in section 23(1) and specifically "everyone" having the right to fair labour practices, because of the wording it has stirred much debate as to whether this has indeed extended the scope of the right.[116] Employers and employees cannot rely directly on section 23 to justify labour and employment rights, unless the specific right has not been catered for by legislation.[117] Where a party wishing to rely directly on a fundamental right contained in the Constitution, and there is legislation that deals with that right, the party must initially attack the legislation as being inadequate or unconstitutional before relying on a fundamental right.[118] According to Landman J, in *Netherburn v Mudau & Others*[119] it embraces the right to job security which should not be terminated unfairly or unlawfully.[120]

Section 33(1) (Just Administrative Action):

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."[121]

The court found in *Netherburn v Mudau & others*[122] that arbitration proceedings do not constitute administrative action.

Section 34 (Access to Courts):

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."[123]

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115 108 of 1996.
116 Van Niekerk (ed), Christianson, McGregor, Smit and Van Eck *Law @ Work* 2nd ed (2011) 37.
117 Grogan *Labour Litigation and Dispute Resolution* (2010) 14.
118 Basson *et al Essential Labour Law* 14.
119 (2003) 24 *ILJ* 1726 (LC) [D].
120 *Ibid.*
121 108 of 1996.
122 (2009) (8) *BCLR* 779 (CC) [E].
123 108 of 1996.

It was argued in *Netherburn v Mudau & Others,* that the right to legal representation should be incorporated into the right to a fair trial.[124] Landman J, was of the opinion that in some circumstances legal representation may be suitable and this included certain tribunals but not in all.[125] No right to legal representation could be found in section 34 of the Constitution when appearing before an independent and impartial tribunal.[126]

Section 35(3) (Accused Persons):

> "(3) Every accused person has a right to a fair trial, which includes the right –
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;"[127]

This section deals with the right to a fair trial and confirms that the right to legal representation is important to any person accused of an offence before a court of law, but has no place in other tribunals.[128] The CCMA was recognised as a tribunal for resolving labour disputes, and an organ of state, but not a court of law, and a perception was created that section 35 is not applicable to disciplinary hearings or at CCMA arbitrations.[129] The right to choose and consult with a legal practitioner pertains only in the context of an arrest for allegedly committing an offence and when referring to the right to a fair trial, which every accused person is afforded.[130] In *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others*[131] it was held that, a constitutional right to legal representation arises only in respect of criminal matters, but the court acknowledged the need for flexibility in permitting legal representation in disciplinary matters where it may be necessary to ensure procedural fairness.[132]

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124 Collier "The Right to Legal Representation at the Commission for Conciliation, Mediation & Arbitration and at Disciplinary Enquiries" 2005 26 *ILJ* 1 16.

125 Collier 2005 26 *ILJ* 8.

126 (2009) (8) BCLR 779 (CC) [E].

127 108 of 1996.

128 Collier 2005 26 *ILJ* 8.

129 *Ibid.*

130 *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others* (2002) 23 *ILJ* 1531 1543 (SCA).

131 (2002) 23 *ILJ* 1531 (SCA).

132 (2002) 23 *ILJ* 1536 (SCA) par [C].

Section 36(1) (Limitation of Rights):

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors …"[133]

Zondo JP, in *Netherburn v Mudau & Others*[134] acknowledged that the court was satisfied that the exclusion or limitation in permitting legal representation in arbitration proceedings that relate to dismissals for misconduct was fully justifiable and indeed justified.[135]

Section 39 (Interpretation of Bill of Rights):

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum –
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[136]

It is clear that section 39(2) inflicts an obligation when developing the common law to promote the spirit, purport and objects of the Bill of Rights and this requires the presumption that conformity with the spirit, purport and objects of the Constitution was intended.

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133 108 of 1996.

134 (2009) 30 *ILJ* 286 (LAC) par [47].

135 *Ibid*.

136 108 of 1996.

CHAPTER 3
DISPUTE RESOLUTION FORUMS

3.1 INTERNAL DISCIPLINARY HEARING

One of the most dramatic events for any employee to experience in their working career is to be dismissed and even more so if the employee views the dismissal as unfair.[137] Section 185(a) of the LRA provides that every employee has the right not to be unfairly dismissed, and further reference to section 188(1)(a)-(b) expands on this protection against unfair dismissal by stating that a dismissal will be unfair if the employer fails to prove that the dismissal is for a fair reason and was effected in accordance with a fair procedure, and must also take into consideration the Code of Good Practice: Dismissal, contained in Schedule 8 of the LRA.[138] When an employer intends taking disciplinary action against an employee, an investigation needs to commence into the allegations of the misconduct that have been levelled against the employee, and whether there are grounds for dismissal.[139]

The *audi alteram partem* rule, which means, to hear the other side, applies in all forms of dismissal, but in the employment context it implies that employers cannot proceed with disciplinary action against employees unless they are afforded a fair hearing.[140] The employer must allow the accused party an opportunity to be heard and to state a case prior to the employee being dismissed for misconduct and should not be used for revenge or ulterior motives, but to serve as a process to enforce discipline in the workplace.[141] The purpose of a disciplinary hearing is to establish whether, on a balance of probabilities, the allegations lodged by the company against the employee are valid and if so, to determine what disciplinary action, if any, is appropriate. This determination must be made by the chairperson, after hearing all the parties, and all evidence has been presented by the parties to the hearing. An

137 Smit *Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995* (Doctoral thesis, University of Pretoria) 2010.

138 Smit *Disciplinary Enquiries.*

139 Jordaan, Kantor and Bosch *Labour Arbitration with a Commentary on the CCMA Rules* 2nd ed (2011) 25.

140 Grogan *Dismissal* (2010) 224.

141 Opperman *A Practical Guide to Disciplinary Hearings* (2011) 2.

important aspect to bear in mind when conducting a disciplinary hearing are the scales of justice: the evidence presented by both parties needs to be weighted correctly to arrive at an accurate and fair conclusion.[142]

The duty that is placed on a party appearing at a disciplinary hearing to either prove or disprove a fact, or facts is known as the burden of proof.[143] In disciplinary hearings the burden of proof is measured on a balance of probabilities and this means that consideration of all the evidence presented is required to reach a conclusion which is based on which version has the higher probability of being correct.[144] This simply means that on a balance of probabilities the version by the party bearing the onus of proof must be more probable than the other party's version.[145] The mechanism of the disciplinary hearing essentially entails the chairperson compiling all available evidence in order to make an educated decision with regards to whether the employee is guilty of the misconduct and what appropriate sanction, if any is applicable.[146]

3.2 THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

On 1 January 1996, the Commission was established and was classified a juristic person by the Act, and an organ of state as defined in the Constitution, but its decisions and actions are open to judicial review.[147] The CCMA is the centrepiece of the dispute resolution system created by the LRA and perfoms a key role in resolving disputes as it has jurisdiction throughout South Africa.[148] The CCMA has three essential duties:[149]

- To conciliate disputes referred to the CCMA in accordance with the Act;

142 Opperman *A Practical Guide to Disciplinary Hearings* 3.
143 *Ibid.*
144 *Ibid.*
145 *Ibid.*
146 Jordaan *et al Labour Arbitration* 30.
147 Grogan *Labour Litigation & Dispute Resolution* 41.
148 *Ibid.*
149 Van Niekerk *Law @ Work* 435.

- if the dispute is unresolved, the CCMA must arbitrate the dispute if the applicable legislation dictates, or at the request of a party to the dispute;
- providing advice on referrals and information about its activities.

3.3 BARGAINING COUNCILS

Bargaining councils are the successors of industrial councils of the previous dispensation and are established by registered trade unions and registered employers' organisations that have managed to reach a threshold of representivity in a defined sector.[150] No council may arbitrate disputes unless they are accredited by the CCMA, and certain disputes are expressly reserved for the CCMA to resolve.[151] The primary functions and powers of a bargaining council are to:[152]

- Conclude and enforce collective agreements;
- Prevention and resolution of disputes in that sector;
- To establish and administer pension and other funds and schemes that benefit its members;
- Establishing and administering funds to be utilised for resolving disputes;
- Promote and establish training and education schemes;
- Developing proposals to NEDLAC on policy and legislation that may have an effect on the sector.

Bargaining councils are permitted to establish dispute resolution procedures for disputes that fall within their jurisdiction by collective agreement, provided that they are consistent with the LRA.[153] Members of a bargaining council have a right to have their dispute heard and resolved expeditiously, and no additional cost is involved when using the council dispute resolution services, as all costs are covered by a members monthly council levy that is deducted by the employer. All employees who fall under the scope of a bargaining council can approach it for assistance in the resolution of a dispute, over which the council has jurisdiction. Bargaining councils

150 Van Niekerk *Law @ Work* 378.
151 Grogan *Labour Litigation and Dispute Resolution* 46.
152 Van Niekerk *Law @ Work* 381.
153 Grogan *Labour Litigation and Dispute Resolution* 46.

provide services that are similar to the CCMA such as conducting conciliations and arbitrations for employees in a specific sector.

3.4 PRIVATE ARBITRATION

Arbitration in South Africa serves an important fuction of dispute resolution and is an alternative to litigation in the civil courts.[154] The term "private" arbitration is explained as follows: it is an arbitration process which is conducted by agreement between the parties in dispute, and they have the choice of selecting their own arbitrator and by agreement also determine the terms of reference, payment of arbitrators fees and powers that be.[155] Due to the CCMA's huge case load, backlogs may occur which could result in delays in resolving disputes and parties requiring a speedy resolution of their dispute need to consider the option of private arbitration as an alternative that is available to employees and employers alike.[156] Private arbitration is regulated by the Arbitration Act 42 of 1965, whereas statutory arbitration under the auspices of the CCMA or bargaining councils is regulated by the LRA.[157] A point worth considering is that to have a dispute arbitrated within the framework of the LRA, it must first be referred to conciliation, but conciliation is not a requirement for a referral to private arbitration, but the parties can make use of private mediation if they so wish.[158] The arbitration award has the same effect, it is final and binding on the parties, and may not be appealed, but may be reviewed.[159]

154 Grogan *Labour Litigation and Dispute Resolution* 47.
155 Jordaan, Kantor and Bosch *Labour Arbitration* 5.
156 *Ibid.*
157 Grogan *Labour Litigation and Dispute Resolution* 47.
158 Jordaan, Kantor and Bosch *Labour Arbitration* 6.
159 *Ibid.*

CHAPTER 4
LEGAL REPRESENTATION AT INTERNAL DISCIPLINARY HEARINGS

4.1 DISCIPLINARY HEARINGS AND LEGAL REPRESENTATION

Employees facing charges of misconduct are entitled to be assisted at a disciplinary hearing.[160] Employees belonging to trade unions can be assisted and represented by a trade union representative (shop steward) and employees who are not union members may be represented by a fellow employee of their choice.[161] The right to be represented by a legal practitioner is, however a different matter altogether and in terms of the common law the courts took the view that employees do not have an absolute right to be legally represented when appearing at internal disciplinary hearings other than courts of law.[162] A restriction in most disciplinary codes is common practice and this excludes representation by any external person, labour consultant or lawyer at an internal disciplinary enquiry as employers believe that these are internal matters and need to be handled internally. In the absence of an agreed right an application is required for legal representation to be allowed at a disciplinary hearing, and in the context of internal disciplinary proceedings the courts have held that a refusal by a presiding officer or chairperson to even consider the application for legal representation will render the exclusion reviewable, even if the disciplinary code prohibits legal representation completely.[163] When a request for external representation is made the chairperson should always properly apply his mind as there may be complex issues involved, where the employee is unable to deal with the complexities, or unique circumstances may prevail that make such representation a necessity.[164] Although no general right exists at common law, it has been accepted that legal representation is crucial where complex legal matters arise, and the challenge is pegged on the vital question the chairperson needs to ask:

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160 Grogan *Dismissal* 238.

161 *Ibid.*

162 Grogan *Workplace Law* 240.

163 Grogan *Labour Litigation and Dispute Resolution* 137.

164 Jordaan, Kantor and Bosch *Labour Arbitration* 30.

"what is the nature of the hearing?".[165] When the chairperson makes a decision whether to allow or refuse legal representation, a discretion needs to be exercised as disciplinary hearings usually involve serious charges and the consequences could be severe.[166]

4.1.1 CASE LAW RELATING TO LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS

In *Dladla & Others v Administrator, Natal & Others,*[167] the applicants faced disciplinary hearings arising from their participation in a stay-away.[168] There were no statutory procedural mechanisms which regulated disciplinary proceedings against them, except that it was common cause that the procedure was regulated by the common law.[169] The legal representative for the applicants was not permitted to represent the applicants.[170] The reason why the applicants were denied legal representation was on the basis that it was generally recognised that legal representation was not usually allowed at in-house disciplinary hearings, but employees were entitled to representation by a fellow-employee.[171] The nature, scope or circumstances of the enquiries were not even considered, but the employer simply relied on a defence that legal representation was not usually allowed at in-house disciplinary hearings.[172] The applicants continued without their legal representative, they were also refused a postponement, and were found guilty of misconduct and dismissed.[173]

Didcott J, turned to examine an English case, *Pett v Greyhound Racing Association Ltd*[174] where a licensed trainer of Greyhound dogs was denied legal representation

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165 *Ibid*.
166 Burns and Beukes *Administrative Law* (2006) 232.
167 (1995) 16 *ILJ* 1418 (N).
168 (1995) 16 *ILJ* 1419 (N).
169 *Ibid.*
170 *Ibid.*
171 *Ibid.*
172 (1995) 16 *ILJ* 1422 par I.
173 (1995) 16 *ILJ* 1422 par E.
174 (1968) 2 All ER 545.

at a disciplinary hearing into his conduct, and according to Lord Denning MR, the following was observed[175]

> "Mr Pett is here facing a serious charge…If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an enquiry I think that he is entitled not only to appear by himself but also to appoint an agent to act for him…Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor…Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor."

The above remarks of Lord Denning MR, were not accepted in England, but they reveal the relevance and the necessity to exercise discretion, and once legal representation is neither allowed nor disallowed by any statute, the regulations and rules governing the proceedings and the circumstances come into effect and a discretionary decision on the point must be made, whether to permit legal representation.[176] The court concluded that the discretion of the chairperson must be properly exercised and it must not fetter its discretion and close its mind, by making inflexible rules from which it will not depart, concerning whether legal representation should be permitted or not.[177] Didcott J, in closing concluded that, the refusal to allow the applicants legal representation, when there were circumstances of the case that warranted legal representation, such as the employees' job and livelihood were at stake, the facts and complexities raised in this case, which involved issues of race, culture and language, and the failure to exercise a proper discretion on the matter, vitiated the proceedings and the dismissals were set aside.[178]

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175 Par 132A-133A (QB) 549C-I All ER.

176 (1995) 16 *ILJ* 1424 par E.

177 (1995) 16 *ILJ* 1424 par H.

178 (1995) 16 *ILJ* 1425 par J.

In *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others,*[179] a student was refused legal representation at a disciplinary enquiry for alleged misconduct. The Supreme Court of Appeal was called on to consider the extent of an individual's entitlement, as a matter of right, to be legally represented in a disciplinary enquiry performed by an administrative body. The court found that South African law does not recognise an absolute right to legal representation in fora other than courts of law, and a constitutional right to legal representation only arises in respect of criminal matters.[180] In this case an internal rule had been used as a defence to justify the denial of outside legal representation.[181] Any blanket rule which suggested or compelled a chairperson to refuse legal representation no matter what the circumstances are, and irrespective of the fairness of the matter, cannot pass muster in law.[182] The court however acknowledged the need for flexibility to allow legal representation in disciplinary matters where it is warranted in order to attain procedural fairness, and this flexibility is now regarded a constitutional imperative.[183] Marais JA, listed some important factors that need to be considered when exercising such a discretion.[184] These are:

- the nature of the charges brought;
- the degree of factual or legal complexity attendant upon considering the charges;
- the potential seriousness of the consequences of an adverse finding;
- the availability of suitably qualified lawyers amongst council staff;
- the nature of the prejudice to the employer in permitting legal representation;
- whether there is a legally trained initiator; and
- any other factor relevant to the fairness of restricting the alleged transgressor to the kind of representation mentioned in the notice to attend the disciplinary enquiry.

179 (2002) 23 *ILJ* 1531 (SCA).
180 (2002) 23 *ILJ* 1535 (SCA) par [8].
181 (2002) 23 *ILJ* 1533 (SCA) par [3].
182 (2002) 23 *ILJ* 1536 (SCA) par [12].
183 (2002) 23 *ILJ* 1536 (SCA) par [13].
184 (2002) 23 *ILJ* 1539 (SCA) par [21].

The judges concurred that no constitutional right to legal representation in administrative proceedings could be found, but the Constitution was flexible to allow legal representation where the circumstances permitted, in order to attain procedural fairness; but in this matter the disciplinary committee had failed to exercise its discretion.[185] The appeal was upheld and the disciplinary committee and court decisions were set aside.[186] The point of departure is that, the Act does not expressly confirm such a right to be legally represented at disciplinary proceedings but it leaves the chairperson or administrator with a discretion, and therefore an employee may be entitled to legal representation depending on the circumstances.

4.2 CONTRACTS OF EMPLOYMENT

The employment contract is an agreement between two parties and should be entered into freely and voluntarily and the terms and conditions need to be established and agreed upon, because once a contract of employment is concluded between the parties, a number of rights and obligations arise for both employee and the employer.[187] It becomes apparent that the employer and employee relationship is unequal, and historically, the unequal distribution of social and economic power is reflected in the contract of employment, which places employees in a vulnerable position.[188] An imbalance in bargaining power exists as the employer is usually in a better position when taking into consideration its financial and other resources, to dictate the contents of the employment contract, who they will employ, and what they are prepared to pay for labour, and there is not much that an employee can do to negotiate more favourable terms and conditions in its favour.[189] As a result, labour legislation was imposed to create fairness and equity into the employment relationship, to create minimum terms and conditions of employment, and to level the playing fields by balancing the interests of the employer and employee respectively.[190] It is important to note that the common law contract of employment fails to recognise this imbalance of power between the employer and employee, but

185 Collier 2005 26 *ILJ* 12.
186 *Ibid.*
187 Van der Walt *et al Labour Law in Context* 24.
188 Grogan *Workplace Law* 43.
189 Basson *et al Essential Labour Law* 41.
190 Van der Walt *et al Labour Law in Context* 17.

instead focuses on providing remedies for breaches of obligations by either party.[191] Employment contracts may incorporate the disciplinary rules and procedures of the employer, and may also be referred to in the written conditions of employment.[192] An employee's conduct, disciplinary action required, and sanctions proposed, when the rules are breached by an employee are provided for in these procedures.[193] An employee is presumed to be aware of the rules if they are incorporated into the contract.[194]

4.2.1 CASE LAW RELATING TO CONTRACTS OF EMPLOYMENT

In *Lamprecht & Another v* McNeillie[195] an interesting aspect is raised, in that under the common law it is accepted that a right to representation conferred by contract does not automatically extend to legal practitioners.[196] This case in essence concerned the contract of employment, the right to a fair hearing, the employee's right to legal representation, and whether the guidelines in the employer's disciplinary code actually forms part of the contract. The respondent had to prove that a contractual right to legal representation existed, and that the principles of natural justice had not been observed, as the respondent was denied legal representation at the disciplinary hearing.[197] It was the respondent's case that the employer's guidelines for "grievance and disciplinary handling" conferred these rights and that the guidelines formed part of the employment contract.[198] The guidelines purport to bestow upon an employee certain procedural rights, but did not create contractual rights.[199] The court acknowledged that the correct interpretation of the word "representative" read within the context of the employer's guidelines, did not imply legal representative.[200] It was made clear that the intent of the employer and its disciplinary guidelines were that the interpretation must mean employees could

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191 Basson *et al Essential Labour Law* 42.

192 Van der Walt *et al Labour Law in Context* 25.

193 *Ibid.*

194 *Ibid.*

195 (1994) 15 *ILJ* 998 (A).

196 (1994) 15 *ILJ* 999 (A) par [A].

197 (1994) 15 *ILJ* 998 (A) par [H].

198 *Ibid.*

199 (1994) 15 *ILJ* 1002 (A) par [A].

200 Nadasen and Shave "Legal Representation before Disciplinary Tribunals: Praxis in Need of Reappraisal?" 1996/97 7-8 *Stellenbosch Law Review* 351 359.

only be represented by laypersons, as the inquiry is a domestic matter.[201] If no general right to "representation" is conferred by a contract, consideration by the court will need to be observed whether any such right may have been conferred in terms of a disciplinary code and, if this is found to be the case, then such a code will bind the parties contractually.[202] However, the tribunal must still retain a discretion to allow legal representation when suitable cases arise, but the respondent never raised the question and the court was not called upon to determine this matter as there was no factual basis to rely on.[203]

Page, J in *Cuppan v Cape Display Supply Chain Services*[204] dealt with a matter where the applicant arrived at the disciplinary hearing with his attorney, but was informed that he was only entitled to be represented by a work colleague, and that the disciplinary code and contract of employment stated that discipline should be applied in accordance with natural justice.[205] The applicant's case was based on his alleged contractual right which reflected that natural justice be applied, but the court found that there was no general right to legal representation during disciplinary hearings and that legal representation may however be regarded as a *sine qua non* of a fair hearing in complex matters.[206] Natural justice does not, *per se*, include the right to legal representation, and where the relationship between the parties is administered by contract, any right to be legally represented at disciplinary hearings must be determined by the terms of the contract itself.[207] The court accepted that the presence in the employment contract of an express provision for a particular form of representation by a shop steward and the absence of a provision for any other form of representation or of any general right to representation, gives rise to the inference that no other right to representation was intended to be conferred upon the applicant in such an enquiry.[208] In conclusion, the court was satisfied that the

201 (1994) 15 *ILJ* 1003 (A) par [F].
202 Nadasen and Shave 1996/97 *Stellenbosch Law Review* 353.
203 (1994) 15 *ILJ* 1004 (A) par [H].
204 (1995) 16 *ILJ* 846 (D).
205 (1995) 16 *ILJ* 848 (D) par [D].
206 (1995) 16 *ILJ* 847 (D) par [F].
207 (1995) 16 *ILJ* 851 (D) par [B].
208 (1995) 16 *ILJ* 851 (D) par [H].

contract of employment did not create a right for the applicant to be legally represented.[209]

4.3 COLLECTIVE AGREEMENTS

A collective agreement is a written agreement that differs from an individual contract of employment.[210] It details terms and conditions of employment, wage agreements, the conduct of the employer in relation to its employees, grievance handling and disciplinary procedures, collective bargaining procedures, or any other matter of mutual interest, concluded by one or more registered trade unions on the one hand and, on the other hand, one or more employers, registered employers' organisations, or a combination of employers and employers' organisations.[211] A collective agreement is binding upon all parties to the agreement and varies any contract of employment that is in place between an employer and an employee.[212] Employers and employees may not conclude contracts of employment that purport to waive the provisions of collective agreements by which they would be bound, as collective agreements supersede contracts of employment.[213] Any dispute about the interpretation and application of collective agreements must be referred to the CCMA to be determined.[214]

4.3.1 CASE LAW RELATING TO COLLECTIVE AGREEMENTS

In *Majola v MEC, Department of Public Works, Northern Province &* Others[215] this matter turned on the right to legal representation at a disciplinary hearing, and the employer who sought to rely on the contract that was concluded between the parties in order to eliminate legal representation, and in this matter the contract took the form of a collective agreement, which is afforded primacy under the LRA.[216] The collective agreement prohibited legal representation, but the court said that

209 (1995) 16 *ILJ* 853 (D) par [H].
210 Grogan *Workplace Law* 356.
211 *Ibid*.
212 Van Niekerk *Work @ Law* 386.
213 Grogan *Collective Labour Law* (2010) 128.
214 Van Niekerk *Work @ Law* 389.
215 (2004) 25 *ILJ* 131 (LC).
216 Collier 2005 26 *ILJ* 12.

employers should not simply apply the collective agreement to deny legal representation.[217] According to Pillay J, employers have a general duty to ensure that employees have a fair hearing prior to disciplinary action being taken against them, and whether legal representation is an essential requirement to ensure a procedurally fair hearing is left to the discretion of the chairperson of the hearing to decide, but the chairperson must exercise such discretion judiciously having regard to all the circumstances of the particular case.[218] The court found that where a collective agreement prohibits or restricts the granting of legal representation, an adjudicator may consent to such representation provided that just cause exists not to apply the terms of the collective agreement.[219] As a result, the adjudicator should be slow to disregard or deviate from the terms of the collective agreement, but should balance the tension between the constitutional right of access to a court or tribunal, individual rights, the primacy of collective agreements and the freedom to contract.[220] The applicant did not advance any explanation as to why legal representation was necessary and therefore the court found that the chairperson had exercised his discretion adequately and fairly after exploring the seriousness and complexity of the matter, the application was dismissed.[221]

In another case *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province & Another*[222] an employee facing serious charges of theft, corruption, bribery and malicious damage to property was summoned to a disciplinary hearing.[223] It is common cause that an application was made by the applicant to be legally represented but the chairperson refused as he considered himself bound by the collective agreement and its provisions, in terms of which the applicant was not entitled to be legally represented, and he did not have a discretion to allow legal representation.[224] The decision of the presiding officer was reviewed and set aside by the High Court as the chairperson simply applied a fixed policy by adopting the stance that he had no discretion to allow legal representation to the

217 (2004) 25 *ILJ* 133 (LC) par [5].
218 (2004) 25 *ILJ* 133 (LC) [1].
219 (2004) 25 *ILJ* 133 (LC) [2].
220 *Ibid.*
221 (2004) 25 *ILJ* 134 (LC) [12].
222 [2003] 9 BLLR 963 (T).
223 [2003] 9 BLLR 965 (T) par [2].
224 [2003] 9 BLLR 965 (T) par [8].

applicant, and this refusal to permit the applicant legal representation at the disciplinary hearing was vitiated by the fact that the presiding officer failed to exercise a proper discretion and his decision was not procedurally fair, as the case involved serious and complex issues.[225]

> "… There may be administrative organs which are faced with issues, and whose decisions may entail consequences, which range from the relatively trivial to the most grave. Any rule purporting to compel such an organ to refuse legal representation no matter what the circumstances might be, and even if they are such that a refusal might very well impair the fairness of the administrative proceeding, cannot pass muster in law."[226]

The court agreed that if fairness demands it, then flexibility is required and a discretion must be exercised when serious cases arise, to allow legal representation and in this matter the applicant was entitled to be represented by a legal practitioner.[227]

4.4 DISCIPLINARY CODE AND PROCEDURES

The Code of Good Practice: Dismissal, which is contained in Schedule 8 of the LRA, contains a number of guidelines and references, when considering whether or not to discipline or dismiss an employee.[228] The employer's own disciplinary code and procedure should be scrutinised in conjunction with the Code of Good Practice in order to measure and ensure that discipline has been dealt with in a fair and consistent way.[229] The implementation of discipline remains the employer's prerogative, but should be exercised consistently and fairly, and taking into account all relevant circumstances.[230] Schedule 8 of the LRA, Code of Good Practice: Dismissal, stipulates the following in section 3:

> "All employer's should adopt disciplinary rules that establish the standard of conduct required of their employee's. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employee's in a manner that is easily

225 [2003] 9 BLLR 972 (T) par [32].
226 [2003] 9 BLLR 970 (T) par [24].
227 [2003] 9 BLLR 967 (T) par [14].
228 Jordaan, Kantor and Bosch *Labour Arbitration* 18.
229 *Ibid.*
230 *Ibid.*

> understood. Some rules or standards may be so well established and known that it is not necessary to communicate them."[231]

It is in the company's best interest to adopt a disciplinary code and procedure that clearly sets out the parameters within which the employee may or may not operate, including the rules and standards, and the way in which these standards will be applied by the company.[232] The purpose of a disciplinary code is to regulate and inform all employees, who may transgress the employer's rules and including those who will be responsible for implementing discipline in the workplace.[233] To maintain a consistent approach to discipline, and to understand exactly how the employer expects its employees to behave and what consequences are likely to flow as a result of misbehaviour.[234] A disciplinary code should set out a list of both the transgressions and the likely disciplinary action in the event of a breach of the code, and the code is generally accompanied by a procedure that spells out the processes that need to be followed when taking disciplinary action.[235] The employer's disciplinary code is the starting point of the inquiry when the procedural fairness aspects of a dismissal are analysed, and where there is found to be no disciplinary code, arbitrators and judges are directed by the Act to have regard to the Code of Good Practice: Dismissal.[236] Disciplinary action will be appropriate where a breach of the rule cannot be condoned and may take a number of forms depending on the severity of the transgression.

There are three categories of disciplinary procedures namely those contained in a collective agreement; those that are contractually binding; and those that an employer unilaterally establishes.[237] In certain circumstances the provisions of a disciplinary code may be incorporated into the contract of employment as an agreed term of employment, but this will be determined on the wording of the employment contract.[238] An employer should be alert to the provisions of its code and procedure

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231 Schedule 8 Code of Good Practice: Dismissal, s 3 of LRA 285.
232 Opperman *A Practical Guide to Disciplinary Hearings* 38.
233 *Ibid.*
234 Jordaan, Kantor and Bosch *Labour Arbitration* 21.
235 *Ibid*.
236 Grogan *Dismissal* 226.
237 Proc No 34573 in *GG* 602 of 2011-09-02.
238 Jordaan, Kantor and Bosch *Labour Arbitration* 21.

if these have been incorporated into an employee's contract of employment, because the employee will expect fair and consistent treatment from the employer on the basis that the employee has a contractual right that the employer should follow the disciplinary code.[239] A further implication of this is that the code may not be unilaterally amended as the disciplinary code is incorporated into the contract of employment and the same applies when a disciplinary code forms part of a recognition or other collective agreement.[240] An employer should always stick as closely as possible to the provisions of its disciplinary code and procedure, but also allow for sufficient flexibility to deal with special circumstances of a case, unless there are compelling reasons not to do so.[241] When refering to case law, it becomes apparent that compliance with a disciplinary code is not regarded as an independent test for the fairness of a dismissal, as the mere fact that a procedure is agreed upon, does not make it fair, and visa versa, if an agreed procedure was not followed it does not in itself infer that the procedure followed was unfair.[242] A tribunal judging the fairness of whether a particular procedure was fair or not, must examine the procedure that was actually followed, and must determine whether in the circumstances the procedure was fair.[243] Any departure or deviation from the disciplinary code is not *per se* unfair, as the code must still be measured against general fairness principals, as preserved in the Act and the Code of Good Practice: Dismissal, which applies to both employer and employee.[244] It is important to bear in mind that disciplinary codes are "merely guidelines" and cannot be used as a defence for contravening the requirements as set out in the Code of Good Practice.[245] Disciplinary codes should not be interpreted strictly, but consideration should be had to equity and fairness as a response to business efficiency.[246] Courts and arbitrators are not bound by disciplinary codes and procedures, as they may well conclude that a particular disciplinary code and procedure falls short of the required standard of fairness.[247]

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239 Jordaan, Kantor and Bosch *Labour Arbitration* 22.
240 *Ibid.*
241 *Ibid.*
242 Grogan *Dismissal* 227.
243 *Ibid.*
244 *Ibid.*
245 *Ibid.*
246 Grogan *Dismissal* 228.
247 *Ibid.*

4.4.1 CASE LAW RELATING TO DISCIPLINARY CODES AND PROCEDURES

In *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v* Mahumani[248] the appellant with leave of the High Court, appealed against the finding of that court that the respondent Mr Mahumani, was entitled to be legally represented at a disciplinary hearing.[249] The presiding officer refused the respondent's application to be legally represented at the hearing based on the fact that clause 7.3(e) of the disciplinary code and procedures for the Public Service (the code) embodied in Resolution 2 of 1999 of the Public Service Co-ordinating Bargaining Council, which followed that, neither the employer nor the employee may be represented in a disciplinary hearing by a legal practitioner, unless the employee is a legal practitioner.[250] It was the presiding officer's view that clause 7.3(e) of the disciplinary code did not afford him a discretion to allow legal representation.[251] It was argued by counsel for the appellant that clause 7.3(e) of the code in express terms excludes outside legal representation and it does not give rise to an interpretation conferring a discretion by the presiding officer to grant legal representation at a disciplinary hearing.[252]

Patel AJA, considered and concurred with the findings of Wallis AJ, in the case of *Mosena & Others v The Premier: Northern Province & Others*[253] and comments, that the code should not be construed as an absolute prohibition against legal representation at a disciplinary hearing, but seen as an injunction with regards to an employer's approach to discipline in the workplace but should not be interpreted to mean, allowing wholesale departures from the code and procedures.[254] A correct interpretation would mean that only departures from the code where it is deemed necessary would suffice.[255] It was also accepted that clause 7.3(e) was a fundamentally important provision of the agreement and it should not be lightly

248 (2004) 25 *ILJ* 2311 (SCA).
249 (2004) 25 *ILJ* 2312 (SCA) par [1].
250 (2004) 25 *ILJ* 2313 (SCA) par [3].
251 (2004) 25 *ILJ* 2313 (SCA) par [4].
252 (2004) 25 *ILJ* 2314 (SCA) par [7].
253 Unreported judgment of the Labour Court 1401/2000.
254 (2004) 25 *ILJ* 2314 (SCA) par [9].
255 *Ibid.*

departed from, but agreed that circumstances may prevail in which it would be unfair not to allow legal representation.[256] It was held that the presiding officer erred in coming to the conclusion that he had no discretion to permit legal representation and therefore the appeal was dismissed and referred back to the chairperson with certain guidelines to consider.[257]

Basson, J in *Fourie v Amatola Water Board*[258] the matter involved the Chief Executive Officer (applicant) who was facing charges of serious misconduct.[259] An urgent application was brought to interdict the disciplinary proceedings by postponing the hearing, pending the conclusion of a criminal case that was also pending against him and he also requested that he be allowed legal representation at the disciplinary hearing as he contended that his right not to incriminate himself would be infringed if this application was denied.[260] The applicant's request for postponement was denied, but the court decided that the applicant had made out a case that his right to a fair procedure will be infringed upon if he should not be permitted to be legally represented, and he was successful in obtaining an order allowing him legal representation at the disciplinary hearing.[261] The court held that legal representation would generally be allowed if the right to a fair procedure may be infringed and the employer will therefore have a discretion in such cases.[262]

4.4.2 DEVIATION BY THE EMPLOYER FROM ITS OWN DISCIPLINARY CODE

In *Khula Enterprise Finance Ltd v Madinane*[263] the court found that, where a disciplinary hearing was chaired by an outsider appointed contrary to the specified provisions of the disciplinary code of the employer, it did not render the proceedings automatically procedurally unfair, as the duty to afford an employee an opportunity to

256 (2004) 25 *ILJ* 2315 (SCA) par [10].
257 (2004) 25 *ILJ* 2315 (SCA) par [13].
258 (2001) 22 *ILJ* 694 (LC).
259 (2001) 22 *ILJ* 695 (LC) par [2].
260 (2001) 22 *ILJ* 695 (LC) par [5].
261 (2001) 22 *ILJ* 699 (LC) par [25].
262 (2001) 22 *ILJ* 699 (LC) par [20].
263 (2004) 4 BLLR 366 (LC).

state a case is not affected by who hears the case.[264] Sufficient reasons gave rise to the appointment of an outside advocate to chair the hearing, although the disciplinary code stated that a party from an appropriate level of management was required to chair the disciplinary hearings, but the court viewed this provision as merely a guideline.[265] The court referred the matter back to arbitration.[266]

4.5 PROCEDURAL FAIRNESS CHALLENGE

With reference to section 185(a) of the LRA, it clearly states that every employee has the right not to be unfairly dismissed, and this argument becomes apparent when an application for legal representation is raised at a disciplinary hearing. Procedural fairness is benchmarked by the way and manner in which the pre-dismissal actions are measured in the workplace, and has no bearing on the merits of the case, employees are entitled to a fair pre-dismissal procedure no matter how guilty they may appear to be.[267] A substantively fair dismissal may be ruled unfair when considering that the employer failed to follow a fair procedure, and the LRA endorses the concept that independent requirements need to be met when dealing with procedural and substantive fairness in order to render the dismissal fair.[268] These independent requirements are referred to in Section 188 of the LRA and provide that, to be fair, a dismissal that is not deemed automatically unfair must be for a fair reason and in line with a fair procedure.[269] The requirements for a fair pre-dismissal procedure for alleged misconduct are dealt with in the Code of Good Practice: Dismissal.[270] The manner in which the employer arrived at the decision to impose the sanction is referred to as procedural fairness and the Act provides that when an employee's dismissal is only regarded as procedurally unfair, the employee cannot be reinstated.[271] It is important that the principles of procedural fairness should not be applied or interpreted in a technical manner, and disciplinary

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264 Jordaan-Parkin "Deviation by the Employer from its own Disciplinary Code when Conducting Disciplinary Enquiries" 2005 26 3 *Obiter* 734 739

265 Jordaan-Parkin 2005 *Obiter* 735.

266 *Ibid.*

267 Grogan *Dismissal* 214.

268 *Ibid*.

269 Grogan *Dismissal* 215.

270 *Ibid.*

271 *Ibid.*

proceedings must not be conducted like the rigorous standards that are applied in courts of law.[272] The core purpose of a fair procedure is to investigate the charges or complaints lodged against the employee, to offer the employee a fair and reasonable opportunity to be heard, to put forward a defence against the charges, to advance argument in mitigation of sanction, and to determine whether a fair reason exists for terminating the employee's services.[273] That means essentially that even if the "facts speak for themselves" and the employee's conduct in the circumstances is so glaring and obvious as to give the impression that a hearing would be unnecessary, an employee is still entitled to a hearing to give effect to the meaning of the "*audi alteram partem*" principle.[274] It is explained by Cora Hoexter that, in the context of administrative decision making, which is equally relevant to workplace decision making, the weight attached to procedural fairness needs to be evaluated, in the following terms:[275]

> "Procedural fairness in the form of audi alteram partem is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of decision making and to enhance its legitimacy."[276]

Procedural fairness is a principle of good workplace governance, and not only is it morally correct to promote the observance of a fair hearing, it also achieves visible and transparent democracy in the workplace where employees understand the values of workplace rules and accept what consequences may flow if in breach of such rules.[277]

Section 188(1)(b) of the LRA provides that, dismissals for misconduct must be effected in accordance with a fair procedure, and that entails a fair disciplinary hearing where the employee will get the opportunity to state a case, and this is

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272 *Ibid*.

273 Gaibie "Disciplinary Proceedings – Rights, Limits and Dangers" 2010 31 *ILJ* 2247 2270.

274 Gaibie 2010 *ILJ* 2255.

275 Hoexter *Administrative Law in South Africa* (2007) 326 327.

276 *Ibid*.

277 Gaibie 2010 *ILJ* 2255.

referred to under the common law as *audi alteram partem* rule.[278] Procedural fairness is dealt with in the LRA in Schedule 8 Code of Good Practice: Dismissal Item 4, which provides a number of guidelines for a fair hearing, and an employer can measure its disciplinary procedure against this, and if there is any conflict, the Code will take precedence.[279] The Code requires that the following elements of procedural fairness are adheared to:[280]

- The employer should conduct an investigation to determine whether grounds exist for dismissal, if misconduct is identified during the investigation, then an enquiry into the alleged misconduct should be held.[281] The Code specifies that a formal enquiry is not always required but larger companies are expected to follow a more formal approach to discipline, as long as the fundamental approach to a fair hearing is established, the procedure followed may vary from one employer to another.[282]
- The employee should be notified and informed of the allegations using a form and language that the employee can reasonably understand.[283] The notice must be clear and comprehensible enabling the employee to understand the nature and severity of the allegations lodged against him or her and to enable the employee to prepare a response.[284]
- The employee should be entitled to a reasonable time to prepare a response to the allegations and to state a case.[285] Unless reasonable time is afforded to the employee to consider the allegations, to obtain assistance if necessary, and to prepare a defence, the employee will be denied the right to a fair procedure.[286] Reasonableness will depend on the complexity of the allegations concerned as well as the nature of the factual issues involved.[287] Failure to conduct disciplinary hearings within a reasonable time frame can be extremely

278 Basson *et al Essential Labour Law* 129.
279 *Ibid*.
280 Item 4 of the Code of Good Practice: Dismissal (Schedule 8 to the LRA).
281 Gaibie 2010 *ILJ* 2258.
282 *Ibid.*
283 Gaibie 2010 *ILJ* 2259.
284 Gaibie 2010 *ILJ* 2260.
285 *Ibid.*
286 *Ibid.*
287 *Ibid.*

prejudicial to an employee's case, as delays may result in the employee being unable to recall the incident accurately, to obtain documentation, and to find witnesses who can testify and support the employee's case, but it also gives rise to the assumption that the employer has lost interest in the matter, or that the employer does not regard the incident as that important, because the employee is allowed to remain in employment and the employment relationship is still intact.[288]

- The employee may be represented and assisted by a trade union representative or a fellow employee.[289] The right to assistance by a trade union representative will apply only if the trade union has been granted organisational rights and has elected representatives for this purpose.[290] The purpose of representation is twofold, to assist the employee prepare its case, and to be present and play an active role in the disciplinary hearing to ensure that fairness towards the employee prevails.[291] Where circumstances prevail where the employee is illiterate, unsophisticated, or uneducated, the requirement becomes even more acute to ensure that the employee is represented.[292] Where the right to legal representation is permitted in terms of a disciplinary code or collective agreement, then it should be allowed, however neither the LRA nor the Code recognise that any automatic right to legal representation exists.[293]

- A decision must be communicated after the enquiry and the employee should be advised of the decision taken, and the employer should furnish the employee with written notification of the decision or penalty, but if in the event of a dismissal, the employer is required to provide reasons for the dismissal.[294]

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288 Gaibie 2010 *ILJ* 2262.
289 Gaibie 2010 *ILJ* 2262.
290 *Ibid.*
291 *Ibid.*
292 *Ibid.*
293 *Ibid.*
294 Gaibie 2010 *ILJ* 2264.

- If the sanction is dismissal, Item 4(3) of the Code places a further duty on the employer to advise the dismissed employee of any rights to refer the matter to a bargaining council with jurisdiction or to the CCMA, or to any dispute resolution procedures brought about in terms of a collective agreement.[295]

- Item 4 of the Code makes no provision for an employee to appeal against the outcome of a disciplinary hearing unless there is a disciplinary code in existence that affords an employee this opportunity, otherwise if no appeal process is provided for, there is recourse for a referral for arbitration to the appropriate dispute resolution forum with jurisdiction to determine the matter.[296]

- Only in exceptional circumstances when an employer cannot reasonably be expected to comply with the requirements in Item 4(4) of the Code may the employer dispense with a disciplinary hearing.[297]

4.5.1 CASE LAW RELATING TO PROCEDURAL FAIRNESS

In *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration &* Others[298] the applicant, a facility caring for people with mental and physical disabilities, dismissed the respondent employee, a supervisor, after a disciplinary hearing revealed that she had been an accomplice to a theft that occurred at the nursing home.[299] An appeal hearing took place and the chairperson upheld the sanction, whereby the respondent referred a dispute to the CCMA for arbitration, and the commissioner found in favour of the employee, as the dismissal was substantively and procedurally unfair, and ordered that the applicant reinstate the employee.[300] The commissioner found that the evidence was not conclusive in proving the employee's involvement as an accomplice in this case, and that no conclusion could be drawn that theft had actually occurred.[301] The commissioner

295 Gaibie 2010 *ILJ* 2265.
296 Basson *et al Essential Labour Law* 132.
297 *Ibid.*
298 (2006) 27 *ILJ* 1644 (LC).
299 (2006) 27 *ILJ* 1645 (LC) par [D].
300 (2006) 27 *ILJ* 1648 (LC) par [F].
301 (2006) 27 *ILJ* 1649 (LC) par [E].

also found that a perception of bias was created as the chairperson of the disciplinary hearing was a subordinate to the initiator, and therefore found that the dismissal was procedurally unfair.[302] The applicant applied to the Labour Court to review and set aside the award.[303]

The court held that when determining whether an employee is guilty of misconduct the test to be used is based on a balance of probabilities, but in fact the commissioner erred by applying a stricter test and applied the test used in criminal matters of proof beyond reasonable doubt, and this was a ground for review.[304] Turning to the commissioner's conclusions regarding procedural unfairness, Van Niekerk AJ, observed that the mere fact that the chairperson was a subordinate to the initiator in the disciplinary hearing did not necessary give rise to an inference of bias, and it was submitted that a reasonable apprehension of bias had been demonstrated.[305] While the Act is silent on the contents of any right to procedural fairness, it simply places a requirement at the door of the employer to establish that a dismissal is effected in accordance with a fair procedure, the nature and extent of that right can be found in item 4 of the Code of Good Practice: Dismissal in Schedule 8 to the LRA.[306] The court found that there was no legal basis for the commissioner to apply the rule against bias which was drawn from the criminal justice model for procedural fairness, and the standards associated with it which constituted a material error of law.[307]

The commissioner failed to apply the test on a balance of probabilities when determining misconduct, and failed to apply the provisions of the Act read with the Code, and therefore did not meet the required standard of procedural fairness as established by the Act, and on that basis the court reviewed and set aside the commissioner's award.[308] This case serves as a reminder to commissioners that internal disciplinary hearings should not be evaluated in the same way as criminal

302 (2006) 27 *ILJ* 1651 (LC) par [A].
303 (2006) 27 *ILJ* 1645 (LC) par [F].
304 (2006) 27 *ILJ* 1650 (LC) par [C].
305 (2006) 27 *ILJ* 1651 (LC) par [A].
306 (2006) 27 *ILJ* 1651 (LC) par [D].
307 (2006) 27 *ILJ* 1654 (LC) par [I].
308 (2006) 27 *ILJ* 1655 (LC) par [D].

trials, and that any procedural irregularities which do not cause palpable or material prejudice to the employee, would not in themselves be sufficient to conclude that a dismissal is procedurally unfair, and this case takes the law no further than it was before.[309]

The issue of procedural fairness concerning legal representation occured in the case of *Police & Prisons Civil Rights Union & Others v Department of Correctional Services & Another.*[310] Reference is made only to the procedural aspects of the case. The matter involved five correctional officers who were employed by the Department of Correctional Services at Pollsmoor Prison.[311] The applicants failed to comply with instructions to cut their dreadlocks, which was prohibited in terms of the department's dress code, and were suspended and summoned to appear at a disciplinary hearing, which they walked out of, as they were denied their own choice of legal representation.[312] The applicants argued that the chairperson of the disciplinary hearing was biased as the matter involved constitutional issues and still they were refused legal representation.[313] The respondents case was that in terms of the collective agreement, Resolution 1 of 2006, the applicants were not entitled to their own choice of legal representation, but were entiled to be represented by an advocate who represents employees of the department.[314] The court found that the decision was reasonable and fair, but the applicants instead, chose to walk out of the disciplinary hearing knowing the consequences.[315] The proceedings continued in their absence and the applicants were found guilty of failing to comply with the dress code by wearing dreadlocks while on duty, and were dismissed.[316] Their claim of bias against the chairperson was found to have no merit, and the applicants failed to submit written grounds for appeal, their dismissals were found to be procedurally fair.[317]

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309 Grogan *Dismissal* 218.
310 (2010) 31 *ILJ* 2433 (LC).
311 (2010) 31 *ILJ* 2434 (LC) par [J].
312 *Ibid.*
313 (2010) 31 *ILJ* 2436 (LC) par [I].
314 (2010) 31 *ILJ* 2437 (LC) par [C].
315 (2010) 31 *ILJ* 2437 (LC) par [D].
316 (2010) 31 *ILJ* 2438 (LC) par [G].
317 (2010) 31 *ILJ* 2438 (LC) par [H].

In *Tiger Brands Field Services v Commission for Conciliation, Mediation and Arbitration*[318] the matter involved a Regional Manager (third respondent) who was found guilty at a disciplinary hearing on two counts of misconduct, in that he had misappropriated company funds and was dismissed.[319] At arbitration, the third respondent challenged both the substantial and procedural fairness of the dismissal.[320] Dealing with procedural fairness, the applicant was opposed to legal representation by the third respondent, in spite of a verbal agreement by the applicants Industrial Relations Officer and the third respondents legal representative.[321] The commissioner, after investigation made a finding that there was no legal obligation that any agreement concerning legal representation had to be reduced to writing, and a verbal agreement between the parties was acceptable.[322] The award found no evidence of procedural unfairness.[323]

The applicant company applied to have the arbitration award reviewed and set aside based on the grounds that the commissioner (second respondent) committed gross irregularities during the conducting of the proceedings and that he did not properly apply his mind to all the issues that were placed before him and the conclusions reached were not justifiable.[324] The applicant attacked the arbitration award based on the following points, by the commissioner permitting the third respondent to be legally represented at the arbitration hearing, that the commissioner did not apply his mind properly to the matter before him, he acted *ultra vires* with regards to his powers, and his decision to allow legal representation could not be justified based on the reasons given.[325] Cele AJ, considered whether the misconduct against the commissioner was so serious in nature that it denied the applicant a right to a fair hearing of the matter and if it amounted to a gross irregularity.[326] The court found that the case did not raise complex issues and was not of public interest, therefore the applicant's representative's ability to deal with the dispute without being

318 (P334/04) [2006] ZALC 45 (15 March 2006).
319 (P334/04) [2006] ZALC 45 par [16].
320 (P334/04) [2006] ZALC 45 par [17].
321 (P334/04) [2006] ZALC 45 par [50].
322 (P334/04) [2006] ZALC 45 par [51].
323 (P334/04) [2006] ZALC 45 par [52].
324 (P334/04) [2006] ZALC 45 par [53].
325 (P334/04) [2006] ZALC 45 par [54].
326 (P334/04) [2006] ZALC 45 par [58].

prejudiced was not a factor.[327] The error did not amount to gross irregularity due to the material nature, and dealing with the perceived impropriety of conduct complained of between the commissioner and the legal representative, nothing undesirable turned on this.[328] It was the applicant's case that the commissioner's portrayal of the charges indicates that he misunderstood the nature of the charges or he deliberately interpreted the charges to benefit the third respondent, which the court concluded that it was satisfied that the commissioner had correctly applied his mind to the issues at hand, and acquitted himself well in carrying out his duties as a commissioner.[329] The application was dismissed.[330]

In summary, there exists no absolute right to legal representation at internal disciplinary hearings as these are not courts of law. Despite an absence of an agreed right, parties may apply for legal representation and if a chairperson fails to even consider the application it may render the exclusion reviewable. The chairperson must properly apply his mind and be flexible in his approach as complex circumstances may be present that would allow legal representation and therefore a discretion needs to be exercised. Even if the employment contract or disciplinary code excludes legal representation, the chairperson must still ensure that a fair procedure is maintained and must consider and exercise a discretion when an application for legal representation is made.

327 (P334/04) [2006] ZALC 45 par [62].
328 (P334/04) [2006] ZALC 45 par [63].
329 (P334/04) [2006] ZALC 45 par [72].
330 (P334/04) [2006] ZALC 45 par [73].

CHAPTER 5
LEGAL REPRESENTATION AT THE CCMA AND BARGAINING COUNCILS

5.1 LEGAL REPRESENTATION AT CONCILIATION

There is no right to legal representation at conciliation stage, but a party may appear in person or be represented only by a director or another employee and, if the party is a close corporation, it may include a member thereof, or any member, office bearer or official of that party's registered trade union or registered employers' organisation.[331] The reasoning behind this is that conciliation is not coercive.[332] Parties have an opportunity to try resolve the dispute by agreement, with facilitation by a CCMA commissioner but there is no forced obligation on the parties to settle at conciliation.[333]

5.2 LEGAL REPRESENTATION AT ARBITRATION

Legal representation is permitted in arbitration proceedings on an unqualified basis with the exception of when the dispute concerns an unfair dismissal and it is alleged by a party that the dismissal amounts to reasons relating to the employee's conduct or capacity.[334] The logic behind this is because lawyers are believed to make the process legalistic and expensive, often causing delays due to their unavailability, and by allowing legal representation it would disadvantage individual employee's and small businesses because of the cost.[335] A speedy, cheap and non-legalistic procedure for adjudicating unfair dismissal cases is envisaged, as the bulk of cases involving dismissals for misconduct or incapacity are less serious and less complex and regulated by a code of conduct and should be dealt with swiftly and with the minimum of legal formalities.[336]

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331 CCMA Practice & Procedure Manual (2011) 803.
332 (2013) 34 *ILJ* 2779 (SCA) 2784A.
333 Jordaan, Kantor and Bosch *Labour Arbitration* 89.
334 Bosch, Molahlehi and Everett *The Conciliation and Arbitration Handbook* (2004) 274.
335 (2013) 34 *ILJ* 2787 (SCA) par [13].
336 (2013) 34 *ILJ* 2788 (SCA) par [15].

Commissioners are afforded a wide range of powers in arbitration proceedings, and this includes conducting the arbitration in a manner in which the commissioner deems appropriate in order to determine the dispute fairly and quickly, while dealing with the substantial merits of the dispute with the minimum of legal formalities.[337] The obligation placed on a commissioner is to uncover the substantial merits of a dispute, and this has been understood to mean that intervening in the proceedings by a commissioner will be required when a party to the proceedings, or both parties are unrepresented or inexperienced and unable to present their case adequately.[338] An inquisitorial approach is often adopted by the commissioner in these circumstances and will assume the role of finding the facts and determining the probabilities by putting questions to witnesses and requesting evidence to be produced from the parties.[339] Commissioners are trained to assist lay people and give clear directions to the parties and assist them every step of the way.[340] At the outset of the proceedings, commissioners need to detail how the arbitration will be conducted in order to prevent the perception of bias, explain the rights of parties to call and cross-examine witnesses, the consequences of their failure to do so, how narrowing of the issues in dispute takes place, what is required in leading evidence, admission of documents, and the importance of putting a version where versions differ.[341] The other approach that a commissioner can adopt is adversarial and this occurs when parties are experienced and responsible for calling witnesses, presenting evidence and cross-examining witnesses.[342] Commissioners may conduct an arbitration using an approach that includes a combination of these two methods, provided that this is done in a fair manner to both parties.[343]

Legal representation may be permitted if the commissioner and all other parties consent, or if the commissioner decides that it is unreasonable to expect a party to

337 Broodryk "Legal Representation at the CCMA" 2014 35 2 *Obiter* 393 405.

338 Benjamin "Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation & Arbitration" 2013 34 *ILJ* 2441 2465.

339 Benjamin 2013 *ILJ* 2458.

340 Benjamin 2013 *ILJ* 2459.

341 *Ibid*.

342 *Ibid.*

343 *Ibid.*

deal with the dispute without legal representation, after considering the following factors:[344]

- The nature of the questions of law raised by the dispute;
- The complexity of the dispute;
- The matter concerns public interest; and
- The comparative ability of the opposing parties or representatives to deal with the arbitration of the dispute.

5.3 LIMITATIONS

The right to legal representation at the CCMA is limited when the dispute concerns the fairness of a dismissal and when it is alleged by one of the parties that the reason for dismissal involves an employee's conduct or capacity.[345] The question of legal representation at the CCMA or at bargaining councils is a vexed and controversial one, involving the admissibility of who may, and who may not, qualify to have right of appearance before these tribunals.[346] It is important to clarify that a legal practitioner is classified as any person admitted to practice as an advocate or an attorney in the Republic of South Africa, but the Act automatically excludes persons who hold law degrees who are not admitted attorneys, and this remains a contentious issue for many labour consultants.[347] Labour consultants may not represent parties at CCMA or bargaining council arbitrations as they do not fall within the categories of representatives as specified in Rule 25 of the CCMA rules, unless he or she is a director of the company, or closed corporation, or member of the corporation.[348] The reason for excluding labour consultants is that there is no regulating body to monitor and regulate their practices.

The Act also excludes candidate attorneys, who may only practice after serving two years of articles and after successfully completing admission exams, which remains a mystery as they have the ability and knowledge and could gain useful experience

344 Bosch, Molahlehi and Everett *The Conciliation and Arbitration Handbook* 274.
345 Bosch, Molahlehi and Everett *The Conciliation and Arbitration Handbook* 278.
346 Van Dokkum "Legal Representation at the CCMA" 2000 21 *ILJ* 836 845.
347 Van Dokkum 2000 *ILJ* 837.
348 Bosch, Molahlehi and Everett *The Conciliation and Arbitration Handbook* 277.

dealing with arbitrations.[349] Candidate attorneys may appear in the Magistrate's Court in civil and criminal matters but are refused right of appearance at the CCMA for purposes of an arbitration, which is absurd.[350] It is important to consider that more than 80% of all matters referred to the CCMA comprise of dismissal disputes, and a large majority of these disputes relate to misconduct and incapacity.[351] The following points require close analysis:

- The commissioner and all the other parties consent – even where both parties are legally represented, a commissioner may ask to be addressed on the issue of legal representation in order to be convinced that it is absolutely necessary. The commissioner may not act on a mere whim when consenting to legal representation or the withdrawal of the right to legal representation, but a discretion must be properly exercised by the commissioner.[352]

- The nature of the questions of law raised by the dispute and the complexity of the dispute – whether the questions of law are technical and such that a party cannot reasonably be expected to deal with such questions without the assistance of legal representation.[353] The more difficult the questions of law appear, the more a commissioner should lean in favour of granting the parties legal representation.[354] A point to be raised may be that once legal practioners are permitted to appear at an arbitration they may justify their presence by using complex and legal jargon to create a technical approach to a rather straightforward dispute, and raise disputes of fact that previously were not apparent to the parties.[355] When weighing up whether the matter is deemed so complex that it is unreasonable to expect a party to deal with it without legal representation, a number of considerations need to be factored in - whether technical evidence needs to be led; if it is relevant to hear evidence of a long history; whether the circumstances that give rise to the dispute are indeed

349 Van Dokkum 2000 *ILJ* 837.
350 Van Dokkum 2000 *ILJ* 838.
351 (2013) 34 *ILJ* 2789.
352 Van Dokkum 2000 *ILJ* 842.
353 CCMA Practice & Procedure Manual (2011) 407.
354 *Ibid.*
355 Van Dokkum 2000 *ILJ* 843.

complex in nature; the number of witnesses that will be called and to what extent the versions of different witnesses are required to be put under cross-examination; the expected duration of the hearing; and to what extent the commissioner could assist the parties in leading their evidence and to ensure that versions are put during cross-examination.[356]

- The public policy needs to be considered that concerns the purpose behind the rules that limit the right to legal representation. It is perceived that lawyers make the arbitration process legalistic and expensive and they slow down the process by causing delays.[357] Evidence may be placed before a commissioner to show that a particular legal representative will not adopt a legalistic approach, and is readily available, with the assistance of a legal representative it would shorten the proceedings and lessen the costs.[358] This evidence could influence the commissioner to attach less weight to the public policy that led to the limitation.[359] Complex cases that may have dire consequences for the party concerned need to be considered as public policy requires that a party be afforded the right to legal representation in such cases, and a commissioner may attach more weight to other factors.[360]

- The public interest – a very vague concept, as it is not clear how an arbitration proceeding could affect public interest, as CCMA arbitration awards only bind the immediate parties to the dispute, and cannot be binding on anyone other than the parties involved, unless the number of parties involved in the dispute were sufficient and influential enough to create public interest.[361]

- The comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute – a ground very often relied on by commissioners to justify their decision to grant legal representation at an

356 CCMA Practice & Procedure Manual (2011) 408.
357 *Ibid*.
358 *Ibid.*
359 *Ibid.*
360 *Ibid.*
361 Van Dokkum 2000 *ILJ* 844.

arbitration.[362] This issue arises when an employee has to face up to a human resources manager or an industrial relations specialist, or where a small employer has to take on a highly experienced trade union official, or where an employer uses legally qualified employees to represent it.[363] These representatives may appear and the commissioner has no power to exclude them.[364] The pressure placed on an individual employee presenting his or her own case is far greater than on a representative party, and this added pressure may affect the ability of the individual to deal with the dispute and must be taken into account.[365] The only redress available to the commissioner is to grant the other party legal representation to level the playing fields and ensure comparative representation.[366]

The reason for differentiation according to Musi JA, in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & Others*[367] is that it differentiates between allowing legal representation of normal disputes at arbitration and those involving dismissals for reasons relating to conduct and capacity not being afforded any automatic right to legal representation because the majority of disputes referred to and arbitrated by the CCMA relate to misconduct and incapacity.[368] It was also concluded that the majority of individual dismissal disputes were uncomplicated and straightforward and that the exclusion of legal representation was intended to achieve the purpose of providing for a speedy, cheap and informal resolution of disputes.[369]

In *Smollan (Transvaal) (PTY) Ltd v Lebea NO & Others*[370] the matter concerned a review of an arbitration award where a labour consultant who was also a director of the company and whether he was entitled to represent the employer at arbitration

362 CCMA Practice & Procedure Manual (2011) 408.
363 *Ibid.*
364 Van Dokkum 2000 *ILJ* 844.
365 CCMA Practice & Procedure Manual (2011) 408.
366 *Ibid.*
367 (2009) 30 *ILJ* 269 (LAC).
368 (2009) 30 *ILJ* 299 (LAC) par [41].
369 (2009) 30 *ILJ* 300 (LAC) par [43].
370 (1998) 19 *ILJ* 1252 (LC).

proceedings before the CCMA.[371] The applicant was represented by a labour consultant at arbitration who had been appointed as a director of the company just 4 days prior to the arbitration hearing in order to allow him to represent the company before the CCMA.[372] The commissioner ruled that he was not permitted to represent the applicant in this matter, and the question that arose was whether the commissioner was entitled to find that, because the appointment of the labour consultant as a director seemed unscrupulous, the applicant was not allowed representation.[373] The court concluded that no provision in the Act could be found which prevents a director, who is also a labour consultant, from representing its company at arbitration.[374] The court found that the commissioner acted outside his powers and committed a gross irregularity, and the award was set aside and referred back to the CCMA.[375]

5.4 RULE 25 OF THE CCMA RULES

The much debated Rule 25 of the Rules for the Conduct of Proceedings Before the CCMA (the CCMA Rules) concerns representation before the CCMA at conciliation and arbitration stages and refers as follows:

> "(1) (a) In conciliation proceedings a party to the dispute may appear in person or be represented only by-
> (1) a *director* or *employee* of that party and if a close corporation also a member thereof; or
> (2) any *member*, *office- bearer* or *official* of that party's registered *trade union* or registered employer's organisation.
>
> (b) In any arbitration proceedings, a party to the *dispute* may appear in person or be represented only by:
> (1) a *legal practitioner,*
> (2) a *director* or *employee* of the party and if a close corporation also a member thereof; or
> (3) any *member*, *office-bearer* or *official* of that party's registered trade union or a registered *employers'* organisation.
>
> (c) If the *dispute* being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the *dismissal* relates to the

371 (1998) 19 *ILJ* 1253 (LC) par [A].
372 (1998) 19 *ILJ* 1253 (LC) par [B].
373 (1998) 19 *ILJ* 1254 (LC) par [F].
374 (1998) 19 *ILJ* 1256 (LC) par [F].
375 (1998) 19 *ILJ* 1257 (LC) par [I].

employee's conduct or capacity, the parties, despite subrule (1)(b), are not entitled to be represented by a *legal practitioner* in the proceedings unless -

(1) the commissioner and all the other parties consent;

(2) the commissioner concludes that it is unreasonable to expect a party to deal with the *dispute* without legal representation, after considering-

(a) the nature of the questions of law raised by the *dispute*;

(b) the complexity of the *dispute*;

(c) the public interest; and

(d) the comparative ability of the opposing parties or their representatives to deal with the *dispute*.

(2) If the party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of this rule, the commissioner must determine the issue.

(3) The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of this Rule.

(4) A representative must tender any documents requested by the commissioner in terms of subrule (2), including constitutions, payslips, contracts of employment, documents and forms, recognition agreements and proof of membership of a trade union or employers' organisation."[376]

In summary, no absolute right to legal representation exists in the majority of disputes referred to the CCMA concerning dismissals for misconduct and incapacity, although this right to legal representation exists for all other disputes that get referred.[377] In conciliation proceedings legal representation is not allowed at all, and the parties are not forced to agree, or coerced to arrive at a settlement.[378] An indisputable right to legal representation is triggered when parties appear at arbitration proceedings, with the exception of, in unfair dismissal disputes where the reason for the dismissal relates to misconduct or incapacity, and consent is required from the commissioner after an application is made whereby a discretion will be exercised by the commissioner.[379] This exclusion was justified on the basis that the system within which the CCMA functioned was the product of a particular social and legal context, that was negotiated by various social partners and the restrictions on legal representation was indeed part of this context and the product of these negotiations.[380] The inherent structure of adjudication of disputes by the CCMA for

376 Rules for the Conduct of Proceedings before the CCMA (25) Part Five of LRA 378.

377 Jordaan, Kantor and Bosch *Labour Arbitration* 257.

378 *Ibid.*

379 Jordaan, Kantor and Bosch *Labour Arbitration* 261.

380 Broodryk 2014 *Obiter* 397.

misconduct and incapacity disputes were less serious and should be arbitrated swiftly with the minimum of legal formalities.[381] The presence of lawyers at CCMA arbitration proceedings will result in obfuscation, time-wasting and delays.[382]

5.5 CASE LAW RELATING TO RULE 25(1)(c)

In *Commission for Conciliation, Mediation & Arbitration & Others v Law Society of the Northern Provinces (incorporated as the Law Society of the Transvaal)*[383] the Supreme Court of Appeal overturned the High Court judgement of *Law Society of the Northern Provinces v Minister of Labour &* Others[384] and found that Rule 25(1)(c) of the CCMA Rules, which deals with the right of appearance before the CCMA by a legal practitioner, and the limitations of a party's right to legal representation in CCMA arbitration proceedings concerning the fairness of dismissals for misconduct and incapacity was not irrational or an infringement of a party's constitutional right.[385]

The basis of the appeal concerned a High Court ruling which declared Rule 25(1)(c) of the CCMA Rules to be unconstitutional and invalid due to its irrationality, and thereby suspended a declaration of invalidity for 36 months to enable the parties to fully consider and promulgate a new rule.[386] The appeal also challenged the constitutionality of Rule 25(1)(c) of the CCMA Rules, a matter that was left exposed previously by the Constitutional Court in the 2009 *Netherburn*[387] case.[388] The High Court case will be discussed first.

5.6 ***LAW SOCIETY OF THE NORTHERN PROVINCES v MINISTER OF LABOUR & OTHERS***[389] (The High Court decision)

Tuchten J, found that Rule 25(1)(c) was irrational and arbitrary as the rule limits the rights of parties appearing before the CCMA to be represented by legal practitioners,

381 *Ibid*.
382 Broodryk 2014 *Obiter* 398.
383 (2013) 34 *ILJ* 2779 (SCA).
384 (2012) 33 *ILJ* 2798 (GNP).
385 (2013) 34 *ILJ* 2779 (SCA) par [G].
386 (2013) 34 *ILJ* 2782 (SCA) par [1].
387 (2009) (8) *BCLR* 779 (CC).
388 (2013) 34 *ILJ* 2782 (SCA) par [1].
389 (2012) 33 *ILJ* 2798 (GNP).

and did not accept any reasons put forward by the CCMA for excluding legal representation in cases of misconduct and incapacity.[390] The crux of the irrationality was rooted in the principle of legality and a perceived inconsistency with Rule 25(1)(c) and section 3(3) of the Promotion of Administrative Justice Act[391] 3 of 2000.[392] The court held that CCMA rules were subject to the standards set by PAJA and they must be rational.[393] Tuchten J, could find nothing rational about excluding lawyers from some arbitrations, but allowing them unrestricted right of appearance in others.[394] On behalf of its member attorneys, the Law Society of the Northern Province approached the court for an order on the grounds that Rule 25(1)(c) is unconstitutional and irrational.[395] It unfairly discriminates against legal practitioners, and violates section 9(3) of the Constitution concerning equality, as well as sections of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000,[396] it also overstepped the boundaries of section 22 of the Constitution, which confers the rights associated with freedom of trade, occupation and profession.[397]

Section 3(3)(a) of PAJA confers the discretion to allow legal representation in matters that could have serious implications for those affected.[398] The judge disagreed with the CCMA's submission that dismissals concerning misconduct and incapacity were not serious, and should be dealt with informally.[399] The court found that identifying categories of cases such as misconduct and incapacity dismissals that are given different treatment without considering the merits of the case to be the essence of arbitrariness.[400] Submissions by the CCMA were that a commissioner could determine at the outset of the matter whether it was complex and if it would require legal representation, this argument was also rejected as the judge stated that it frequently occurs that a case which appears straightforward at the start, turns out

390 (2013) 34 *ILJ* 2785 (SCA) par [6].
391 Hereinafter referred to as the "PAJA".
392 (2013) 34 *ILJ* 2785 (SCA) par [6].
393 Grogan 2013 29 *Employment Law* 20.
394 *Ibid.*
395 *Ibid.*
396 Hereinafter referred to as The Equality Act.
397 (2013) 34 *ILJ* 2782 (SCA) par [2].
398 *Ibid.*
399 *Ibid.*
400 (2013) 34 *ILJ* 2786 (SCA) par [9].

to be complex.[401] The court observed the key role played by the CCMA in resolving labour disputes, and the promulgation of its own rules, which symbolized the fruits of negotiations between social partners, and the wide powers granted to its commissioners to determine disputes.[402] It was argued by the CCMA, that dismissals due to misconduct and incapacity can be settled without relying on an automatic right to legal representation.[403] Disputes that concern whether individuals or groups of employees have breached company rules or are incapacitated to the extent that justifies their dismissal are less serious, and should be adjudicated swiftly with the minimum of legal formalities as these cases make up the bulk of the CCMA workload.[404] According to international research, the South African system shows that adjudication of unfair dismissals are one of the most lengthy and expensive in the world.[405] It was the CCMA's case that should an automatic right to legal representation be granted then the dispute resolution system would be negatively affected, which Tuchten J, dismissed along with suggestions that the presence of lawyers in the arbitration proceedings may cause obfuscation, unnecessary complication of the issues at hand, and time wasting.[406] The judge further dismissed the submissions as irrelevant concerning arguments that changes to permit legal representation in the subrule would cause a significant increase in workload to the already overloaded CCMA system and impair its ability to perform its key functions.[407] The appellants had not established that the limitation of the right to legal representation was reasonable and justifiable.[408] The CCMA rule 25(1)(c) was declared inconsistent with the Constitution and invalid, but the order was suspended for 36 months for the CCMA to promulgate a new sub-rule.[409]

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401 *Ibid.*

402 (2013) 34 *ILJ* 2784 (SCA) par [5].

403 "High Court upholds challenge to CCMA's limitation on legal representation: loss of job important for any employee" (8 December 2008) http://www.labourguide.co.za (accessed 2014-03-24) 1.

404 (2013) 34 *ILJ* 2787 (SCA) par [14].

405 (2013) 34 *ILJ* 2787 (SCA) par [13].

406 http://www.labourguide.co.za.

407 (2013) 34 *ILJ* 2786 (SCA) par [9].

408 *Ibid*.

409 Grogan 2013 29 *Employment Law* 20.

According to Selala[410] who re-examined the problems with the High Court judgement, and held that Tuchten, J failed to appreciate the implications of his judgement on the dispute resolution system as a whole and his view that all dismissals must be seen as serious matters and therefore the right to legal representation must be absolute in all unfair dismissal cases before the CCMA, clearly contradicts the objectives and vision of the drafters of the LRA, who envisaged making dispute resolution informal, quick and cost-effective.[411] Tuchten J, also ignorned the impact of the the commissioners wide-ranging discretion afforded by the subrule, to allow legal representation in certain circumstances.[412] This request for legal representation could be made at any stage of the arbitration proceedings and not necessary at the outset of the arbitration.[413] The subrule allows the commissioner considerable latitude in granting legal representation.[414]

5.7 ***COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS v LAW SOCIETY OF THE NORTHERN PROVINCES***[415] (The Supreme Court of Appeal decision)

On appeal, to the Supreme Court of Appeal, it became clear that a right to legal representation exists for the protection and benefit of litigants, and there was no legislation or case law that suggested that lawyers had any right to receive business.[416] Where lawyers receive business through the courts or other tribunals it occurs because their clients have a right to employ their services, not because they have a right to provide them.[417] It was also submitted by the Law Society that by excluding legal representation it infringed section 34 of the Constitution, which confirms the right to have any dispute that can be determined by our law, resolved by a fair public hearing before a court or an independent and impartial forum or tribunal.[418] It was argued that the basis for denying legal representation at CCMA

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410 Selala "Constitutionalising the right to legal representation at CCMA arbitration proceedings: Law Society of the Northern Provinces v Minister of Labour 2013 1 SA 468 (GNP)" 2013 (16) 4 *PER/PELJ* 398 484.

411 Selala 2013 *PER/PELJ* 415.

412 (2013) 34 *ILJ* 2791 (SCA) par [21].

413 *Ibid.*

414 *Ibid.*

415 (2013) 34 *ILJ* 2779 (SCA).

416 (2013) 34 *ILJ* 2783 (SCA) par [3].

417 *Ibid.*

418 (2013) 34 *ILJ* 2782 (SCA) par [2].

arbitrations was because it was administrative in nature and not a court of law, and there was no unqualified constitutional right to legal representation before administrative tribunals.[419]

The right to legal representation at CCMA arbitrations was considered at length and the court was urged not to fix things that were not broken, but the court supported the view that no right to legal representation exists in fora other than courts of law, and that PAJA was not relevant to this case.[420]

The judgment of the court below, failed to consider the effect of the discretion that is afforded to a commissioner based on Rule 25(1)(c), where considerable latitude in allowing legal representation is permitted but only where circumstances justified it and that a discretion lay with the commissioner to make a ruling.[421]

Turning to the finding that the rule was irrational as it identified one category of cases for different treatment regardless of the merits concerning the individual cases, the court acknowledged that even though the rule did differentiate between different types of cases, it did not render it irrational *per se*.[422] The court found that the reasons for limiting legal representation in the subrule was that the majority of cases involving dismissals for misconduct or incapacity are most common in the workplace and are deemed less serious, in a sense that it does not involve the entire workforce, they are essentially less complex in nature, and therefore these categories of cases were identified by the legislature and a need to exclude legal representation found application.[423] The limitations were further dealt with in the Explanatory Memorandum and refers as follows:[424]

> "Legal representation is not permitted during arbitration except with the consent of the parties. Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and

419 *Ibid.*
420 (2013) 34 *ILJ* 2785 (SCA) par [7].
421 (2013) 34 *ILJ* 2791 (SCA) par [21].
422 (2013) 34 *ILJ* 2792 (SCA) par [22].
423 (2013) 34 *ILJ* 2789 (SCA) par [16].
424 (2013) 34 *ILJ* 2787 (SCA) par [13].

> the approach they adopt. Allowing legal representation places individual employees and small businesses at a disadvantage because of the cost."[425]

The Law Society's argument that Rule 25(1)(c) unfairly discriminated against admitted attorneys and advocates based on section 9(3) of the Constitution was rejected by the court, as its members inherent dignity was not affected by the rule, nor that the alleged discrimination related to any listed grounds in the Equality Act.[426] The court averred that from previous jurisprudence handed down by the Constitutional Court, any infringements of equality rights need to be inextricably linked to infringements of a persons dignity, and this was fatal to its case, as there was none in this matter.[427] Dealing with section 22 of the Constitution, concerning freedom of trade, the court did not agree that Rule 25(1)(c) purports to control entry into the legal profession, nor that it affects the choices of lawyers to remain in the profession, the only impact involves a litigant's right to be represented in a forum such as at CCMA, therefore the subrule meets the standard of rationality.[428] No evidence was submitted by the Law Society that the subrule works hardship on the parties appearing at CCMA arbitrations or any instance where a party was refused legal representation causing prejudice to a party.[429] Turning to the reliance on section 34 of the Constitution it was also rejected by the court as no unqualified constitutional right to legal representation before administrative tribunals existed.[430] The appeal was upheld.[431]

The Constitutional Court has also subsequently refused the Law Society of the Northern Provinces leave to appeal the decision of the Supreme Court of Appeal on the basis that such an appeal bore no prospects of success.[432]

What the LRA seeks to establish is a labour-law dispensation that is premised partly on economy of costs and economy of scale, and thereby advancing the speedy and

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425 *Ibid.*
426 (2013) 34 *ILJ* 2793 (SCA) par [24].
427 (2013) 34 *ILJ* 2793 (SCA) par [24].
428 (2013) 34 *ILJ* 2794 (SCA) par [25].
429 (2013) 34 *ILJ* 2795 (SCA) par [26].
430 (2013) 34 *ILJ* 2794 (SCA) par [26].
431 (2013) 34 *ILJ* 2795 (SCA) par [27].
432 Broodryk 2014 *Obiter* 404.

efficient resolution of disputes adjudicated by the CCMA in a fair manner.[433] It is submitted that excessive legalism will not serve the interests of parties to disputes that are subject to CCMA arbitration proceedings.[434]

It is my view that the door has not been closed altogether on legal representation at CCMA arbitrations, but in fact the door was left half open by the Supreme Court of Appeal, because parties who refer unfair dismissal disputes to the CCMA where the reason relates to misconduct and incapacity can still apply for legal representation. There is no automatic right to legal representation in misconduct and incapacity dismissals.[435] Parties will need to convince the commissioner that it is unreasonable to expect the party to deal with the dispute without the assistance of a legal representative when taking into account the questions of law raised, the complexity of the dispute, public interest and the comparative ability of the parties to deal with the dispute.[436]

433 Broodryk 2014 *Obiter* 405.

434 *Ibid.*

435 (2013) 34 *ILJ* 2794 (SCA) par [26].

436 (2013) 34 *ILJ* 2779 (SCA) par [4].

CHAPTER 6
A COMPARATIVE ANALYSIS: LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS AND TRIBUNALS IN NAMIBIA AND ZIMBABWE

The purpose of this chapter is to compare and highlight the differences and similarities between these two respective countries' labour dispute resolution systems relating to legal representation at internal disciplinary hearings, conciliation and arbitration. The focus of the comparison is also to evaluate how successful these labour dispute resolutions systems are when comparing with South Africa's advanced Commission for Conciliation, Mediation and Arbitration (CCMA). A brief look at the United Kingdom and Australia systems is also included.

6.1 POSITION IN NAMIBIA

6.1.1 INTERNAL DISCIPLINARY HEARINGS

The alleged offender has the right to be assisted or represented by a shop steward or colleague, but no person is permitted from outside the company to represent a party at an internal disciplinary hearing.[437] Legal practitioners, consultants or trade union officials who are not employees of the company are excluded.[438] Only if the company utilises a legal practitioner or a labour consultant as an initiator due to the seriousness of the transgression, does the accused employee have the right to appoint a legal practitioner or a labour consultant at his or her own expense.[439]

6.1.2 DISPUTE RESOLUTION SYSTEM: A GENERAL OVERVIEW

The Labour Commissioner's office is Namibia's equivalent of the CCMA and this institution was created to promote and provide the framework for effectively resolving

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437 Namibia Law.com…"Procedural Fairness" http://www.namibia-law.com/content.php?enuid=775 (accessed 2014-04-08).

438 *Ibid.*

439 *Ibid*.

labour disputes.[440] Appointed by the Minister of Labour, the Labour Commissioner is a government employee or civil servant, who along with other competent commissioners, fulfil the function to conciliate and arbitrate disputes that are referred in terms of the Labour Act or statute.[441] Namibia followed South Africa's example with the enactment of the Labour Act, 2007.[442] It can be argued that the Namibian labour dispute resolution system has been "borrowed or transplanted" from South Africa, but some minor differences are however apparent, such as the criminal provisions that are still prevalent in Namibian labour law, whereas South Africa removed and decriminalised this branch of law.[443] A number of institutions and bodies were created by the Labour Act, 2007, to manage and perform dispute resolution functions.[444] These include the Labour Inspectorate, the Labour Commissioner, private arbitration and the Labour Court.[445] However, the statute establishes no specific private agencies, such as bargaining councils that are successfully utilised in South Africa.[446] In South Africa the bargaining council system compliments the work of the CCMA, relieving some of the burden of being overloaded with a backlog of cases, but in Namibia, there are no statutorily recognised bargaining council systems, except for industry bargaining forums, which operate voluntarily and have no statutory power to resolve labour disputes.[447] Namibia has no recognised private arbitration institutions as an alternative method of resolving disputes, and parties are faced with limited options but to utilise the services of practising labour consultants.[448] Conciliation is the first stage in the dispute resolution procedure, which seeks to encourage a consensus seeking process, thereafter by way of adjudication through arbitration or an application to the Labour Court.[449]

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440 Musukubili and Van der Walt "The Namibian Labour Dispute Resolution System: Some Lessons from South Africa" 2014 35 1 *Obiter* 126 135.

441 Musukubili and Van der Walt 2014 *Obiter* 128.

442 Act No 11 of 2007.

443 Fenwick *Labour Law in Namibia* (2007) 45.

444 Musukubili "A Comparison of the South African and Namibian Labour Dispute Resolution System" (LLM thesis, Nelson Mandela Metropolitan University) 2009 29.

445 *Ibid.*

446 *Ibid*.

447 Musukubili and Van der Walt 2014 *Obiter* 132.

448 *Ibid.*

449 Musukubili "A Comparison of the South African and Namibian Labour Dispute Resolution System" 8.

6.1.3 REPRESENTATION AT CONCILIATION

At conciliation stage it is interesting that representation is limited to the parties authorised to appear at the conciliation meeting, as specified in the LRA and the Labour Act, 2007.[450] In South Africa, legal representatives and labour consultants are excluded from participating in conciliation proceedings, but in Namibia the situation is somewhat different, as legal practitioners and labour consultants are permitted based on the agreement of the parties to the dispute and at the discretion of the conciliator.[451] Section 82 (13) of the Labour Act refers to some important points:[452]

- A conciliator may permit a legal practitioner to represent a party to a dispute in conciliation proceedings if –
  - The parties to the dispute agree; or
  - At the request of a party to the dispute, the conciliator is satisfied that the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; and
- The other party to the dispute will not be prejudiced; or
- "Any other individual" to represent a party to a dispute in conciliation proceedings if -
  - The parties to the dispute agree, or
  - Representation by that individual will facilitate the effective resolution of the dispute or the attainment of the objectives of this Act;
- The individual meets the prescribed requirements.

It is this provision "any other individual" in section 82 (13)(b) that makes it problematic as the Labour Act provides for a conciliator to permit "any other individual" which could include labour consultants or ordinary persons to represent a party to a dispute in conciliation proceedings after considering various factors.[453] This allows any person who may represent a party in conciliation or arbitration

450 Musikubili and Van der Walt 2014 *Obiter* 130.

451 *Ibid.*

452 S 82(13)(a) and (b) of the Labour Act, 2007 (Act No 11 of 2007).

453 Musukubili "A Comparison of the South African and Namibian Labour Dispute Resolution System" 50.

proceedings to refer a dispute to conciliation or arbitration on behalf of that party, but at CCMA proceedings it is restricted strictly to persons permitted to appear in conciliation and arbitration proceedings.[454] As it stands section 82 (13)(b) is open ended and lends itself to abuse while the Labour Advisory Council works on fine tuning its regulations and defining the category of any other individual.[455]

6.1.4 REPRESENTATION AT ARBITRATION

In Namibia representation at arbitration is regulated by the same principles that are applicable in conciliation.[456] Legal representation is by agreement of the parties and subject to the discretion of the arbitrator.[457] Section 86(12) and (13) of the Labour Act read with Rule 25 of the Labour Commissioner's Rules regulates representation at arbitration proceedings.[458] The arbitrator needs to be satisfied that the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; but such representation should not prejudice the other party to the dispute, and the arbitrator will also consider whether such representation will facilitate the effective resolution of the dispute.[459]

6.1.5 CONCLUSION

Disputes should be resolved quickly and informally, with little or no procedural technicalities, and without long delays, offering quick resolutions, but this is far from the reality of the current situation in Namibia.[460] While the Labour Act, 2007 and the LRA have managed to bring statutory dispute resolution within the grasp of the

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454 Musukubili "A Comparison of the South African and Namibian Labour Dispute Resolution System" 51.

455 *Ibid.*

456 Musukubili "Towards an Efficient Namibian Labour Dispute Resolution System: Compliance with International Labour Standards and a Comparison with the South African System" (LLD Doctoral Thesis, Nelson Mandela Metropolitan University) 2013 322.

457 *Ibid.*

458 Musukubili "A Comparison of the South African and Namibian Labour Dispute Resolution System" 73.

459 Musukubili "Towards an Efficient Namibian Labour Dispute Resolution System: Compliance with International Labour Standards and a Comparison with the South African System" 141.

460 Musikubili and Van der Walt 2014 *Obiter* 135.

ordinary worker, these Acts may have compounded the issues concerning dispute resolution in the respective countries.[461]

6.2 POSITION IN ZIMBABWE WITH AN OVERVIEW OF THE DISPUTE RESOLUTION SYSTEM

The dispute resolution system in Zimbabwe is fairly complex in comparison to Namibia and South Africa. An alternative labour dispute resolution system[462] is used in Zimbabwe as an alternative to adjudication by the courts, but this system is not applicable to state employment.[463] A two-tier labour law system exists in Zimbabwe, as the Labour Act[464] is not applicable to all workers, and some workers' conditions of employment, such as government service employees, are contained in the constitution.[465] The Ministry of Labour which is akin to the CCMA, is responsible for the protection of workers rights and maintaining the relationship that exists between management and workers and especially where groups of workers are represented by trade unions.[466] All labour relations and social welfare matters fall under the Ministry of Labour. The employer's disciplinary codes are required to meet the requirements of Section 101 of the Labour Act.[467] They also need to be registered with both the relevant National Employment Council for the specific sector, industry or workplace in which the employer is operating in, as well as with the Ministry of Labour who ensures that the code is compliant with the Act.[468] These disciplinary codes have become legally binding documents, and lay down the disciplinary process that must be followed to ensure a procedurally and substantively fair hearing, if an employer wishes to terminate the services of an employee relying on a code.[469] If a company does not have a disciplinary code and the National Employment Council also does not have one, or if a registered code applies only to workers and not managerial employees, then one has to fall back on the Labour

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461 *Ibid*.

462 Hereinafter referred to as ADR system.

463 Madhuku "The alternative labour dispute resolution system in Zimbabwe: Some comparative Perspectives" 2012 14 *University of Botswana Law Journal* 3 44.

464 Chap 28:01.

465 Madhuku 2012 *University of Botswana Law Journal* 4.

466 "Ministry of Labour" http:// www.labour.co.zw.

467 The Labour Act 2005 http://www.law.co.zw.

468 Makings *Employment Handbook* (2014) 34.

469 Makings *Employment Handbook* 30.

(National Employment Code of Conduct) Regulations 2006, as contained in the Statutory Instrument 15 of 2006.[470]

6.2.1 LABOUR LEGISLATION RELATING TO LEGAL REPRESENTATION AT DISCIPLINARY ENQUIRIES

Section 101 of the Labour Act (Chapter 28:01), is the section in which employment codes of conduct are registered, but it does not say in so many words that an employee is entitled to representation. What it says in section 101 (3) is the following:

> "(3) An employment code shall provide for –
>
> (a) the disciplinary rules to be observed in the undertaking, industry or workplace concerned, including the precise definition of those acts or omissions that constitute misconduct;
> (b) the procedures to be followed in the case of any breach of the employment code;
> (c) the penalties for any breach of the employment code, which may include oral or written warnings, fines, reductions in pay for a specified period, suspension with or without pay or on reduced pay, demotion and dismissal from employment;
> (d) the person, committee or authority that shall be responsible for implementing and enforcing the rules, procedures and penalties of the employment code;
> (e) the notification to any person who is alleged to have breached the employment code that proceedings are to be commenced against him in respect of the alleged breach;
> (f) the right of a person referred to in paragraph (e) to be heard by the appropriate person, committee or authority referred to in paragraph (d) before any decision in his case is made;
> (g) a written record or summary to be made of any proceedings or decisions taken in terms of the employment code, which record or summary shall be made at the time such proceedings and decisions are taken."[471]

A closer look at section 101(3)(f) indicates that there is no requirement that a code of conduct must have a provision that an employee is entitled to representation. The general rules applicable to administrative decisions, in particular the *audi alteram partem* rule, would thus apply.

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470 Hereinafter referred to as SI 15.

471 101 of 2005 (Chapter 28:01)

In *Chirenga v Delta Distribution*[472] it was held that if an employee who is facing a charge of misconduct which might lead to his dismissal wishes to have legal representation, and his request is refused, then the requirements of the *audi alteram partem* rule would not be met, and this is so even where the code of conduct makes no mention of a right to representation.[473] Where the rules governing the proceedings of a tribunal are silent on legal representation, the tribunal has a discretion to permit such representation, but a failure to exercise such a discretion properly could result in the decision being set aside.[474] Where the employer has no code of conduct in place, section 12B of the Labour Act provides that the employer shall comply with the model code of conduct, made in terms of section 101(9) of the Act. The model code is contained in the Labour (National Employment Code of Conduct) Regulations, 2006,[475] and provides specifically for representation at disciplinary hearings. Section 6(4) reads:

> "6(4) At a hearing in terms of subsection (2), an employee shall have the right to -
>
> (a) at least 3 working days notice of the proceedings against him or her and the charge he or she is facing;
> (b) appear in person before the employer or the employer's representative or disciplinary authority as the case may be and be represented by either a fellow employee, worker's committee member, trade union official/officer or a legal practitioner;
> (c) call witnesses and have them cross-examined;
> (d) be informed of the reasons for a decision;
> (e) address in mitigation before the ultimate penalty is imposed."[476]

Under the new Constitution[477] there appears to be a lacuna with regards to its provisions, and it is being challenged that the right to legal representation is a fundamental right, and even if a disciplinary code does not make a provision for legal representation it can be argued that these clauses are overridden by the new Constitution. The following sections of the new Constitution are contentious due to its wording and need to be considered:

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472 (2007) 28 *ILJ* 2909 (ZH).

473 (2007) 28 *ILJ* 2910 (ZH) par [G].

474 (2007) 28 *ILJ* 2910 (ZH) par [D].

475 SI 15 of 2006.

476 Chapter 28:01 Labour (National Employment Code of Conduct) Regulations, 2006, Statutory Instrument 15 of 2006.

477 The Constitution of Zimbabwe Amendment (No 20), 2013 (the Constitution).

Section 68 (Right to administrative justice):

> "(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."[478]

Section 69 (Right to a fair hearing):

> "(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum."[479]

Section 70 (Rights of accused persons):

> "(1) Any person accused of an offence has the following rights -
> (d) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner;"[480]

6.2.2 CONCILIATION

Conciliation has now become compulsory, when attempting to resolve disputes, and all disputes must be subjected to this process, whatever their nature, unless the parties have agreed to refer the dispute to voluntary arbitration, which finalises the matter by the issue of an award.[481] Labour Officer's have a wide discretion in order to try and reach a settlement and this may result in a variety of flexible methods being used.[482] A certificate of no settlement is issued by the Labour Officer if the dispute remains unresolved after a 30 days period, which then allows the parties to have the matter arbitrated, unless the parties decide to extend the period for conciliation which then in effect rules out any further steps such as arbitration.[483] A striking difference is that parties to conciliation may be represented by a legal practitioner of their choice.[484] Section 4 of Chapter 28:01 Labour (Settlement of

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478 68 of 2013.
479 69 of 2013.
480 70 of 2013.
481 Madhuku 2012 *University of Botswana Law Journal* 11.
482 Madhuku 2012 *University of Botswana Law Journal* 10.
483 Madhuku 2012 *University of Botswana Law Journal* 13.
484 Madhuku 2012 *University of Botswana Law Journal* 33.

Disputes) Regulations, 2003 dealing with representation before a labour officer refers as follows:

> "(4) A party to a matter before a labour officer may be represented bya fellow employee, an official of a registered trade union, employer's organization or a legal practitioner."[485]

6.2.3 ARBITRATION

Two forms of arbitration are provided for in Zimbabwe under the current labour laws, voluntary arbitration which is not regulated by the Labour Act and instead is governed by the Arbitration Act (Chapter 7:15), and the appointment of the arbitrator is determined by the parties.[486] The other form being compulsory arbitration, but this process only arises once conciliation fails and after the certificate of no settlement has been issued, and the parties agree to this process.[487] Legal representation is permitted in arbitration proceedings.[488] Arbitration awards that are issued by way of compulsory arbitration are final over matters of fact but may be appealed against in the Labour Court on a "question of law".[489] Awards issued under voluntary arbitration may not be appealed, and can only be set aside by application to the High Court on very restricted grounds of Model Law.[490]

6.3 POSITION IN OTHER COUNTRIES

6.3.1 POSITION IN THE UNITED KINGDOM

It is interesting to also consider the position in the United Kingdom, where a specialised system of employment tribunals has existed since the 1960's.[491] There are no restrictions in respect of legal representation at arbitration stages of labour

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485 SI 217 of 2003.

486 Madhuku 2012 *University of Botswana Law Journal* 13.

487 Madhuku 2012 *University of Botswana Law Journal* 14.

488 Madhuku 2012 *University of Botswana Law Journal* 33.

489 Madhuku 2012 *University of Botswana Law Journal* 19.

490 *Ibid.*

491 Van Eck "Representation during Arbitration Hearings: Spotlight on members of Bargaining Councils" 2012 4 *TSAR* 775 785.

disputes and parties may choose to represent themselves or by whomever they wish.[492]

6.3.2 POSITION IN AUSTRALIA

In Australia the position is different as strict limitations were introduced relating to the right to be represented at arbitration proceedings.[493] The Fair Work Act (2009) created an independent labour tribunal called Fair Work Australia, to regulate labour disputes.[494] The objective was to ensure that the public are afforded a streamlined, accessible, one-stop shop on workplace relations issues, which aims to promote and provide fair, efficient services to users.[495] A party may only be represented by a member, official or employee of a trade union or employers' association, but a "lawyer or paid agent" may not represent a party during arbitration unless explicit permission has been obtained from the Australian Labour Tribunal.[496] It was parliament's intention that parties dealing with the Fair Work Act would generally represent themselves.[497] The restriction placed on legal representatives and paid agents by Australian policy-makers to attain the goals of informal, expeditious and affordable labour tribunals has been successful.[498]

6.4 CONCLUSION

The Zimbabwean system shows some weaknesses, as for a long time there were no clear regulations in place governing conciliation and arbitration proceedings. This has changed somewhat since the promulgation of the Statutory Instrument 173 of 2012[499] as it introduced a set of regulations that now governs compulsory arbitrations and has also stipulated what fees may be charged for single party appearances, or for multiple parties, which normally the fee is split on a 50/50 basis

492 Van Eck 2012 *TSAR* 777.
493 Van Eck 2012 *TSAR* 778.
494 *Ibid.*
495 *Ibid.*
496 *Ibid.*
497 Van Eck 2012 *TSAR* 779.
498 *Ibid.*
499 SI 173 of 2012.

between the parties.[500] A Labour Officer referring the matter from conciliation to arbitration can decide what percentage each party is liable to pay.[501] Arbitrators are appointed from various sources such as the Ministry of Labour, private sector companies, municipalities, civil service and parastatals.[502] Training is currently being provided by the International Labour Organization[503] and standards are improving, but it is a process that will take some time before the fruits will be ready for the picking. Another problem that Zimbabwe faces is the lack of experienced arbitrators, because they are lured away to more lucrative fields. It is argued that parties have a fundamental right to be legally represented. Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.[504]

The point of departure is that South Africa does not stand alone in its quest to provide expeditious, affordable and informal dispute resolution processes available to parties involved in labour dispute arbitrations.[505] In South Africa, Namibia and Australia legal representation at arbitration is not an automatic right, where the reason for the dismissal relates to misconduct or incapacity. Parties must apply for legal representation and the commissioner has a discretion to either allow or refuse the application. In the United Kingdom and Zimbabwe, legal representation is permitted at arbitration proceedings.[506]

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500 Madhuku 2012 *University of Botswana Law Journal* 32.

501 *Ibid.*

502 *Ibid.*

503 Hereinafter referred to as "ILO".

504 The Constitution 69 of 2013.

505 Van Eck 2012 *TSAR* 782.

506 Madhuku 2012 *University of Botswana Law Journal* 33.

CHAPTER 7
ADVANTAGES AND DISADVANTAGES OF LEGAL REPRESENTATION AT DISCIPLINARY ENQUIRIES, CCMA AND BARGAINING COUNCILS

7.1 ADVANTAGES AND ARGUMENTS JUSTIFYING LEGAL REPRESENTATION

It may occur that a fellow employee who is not well versed in labour law is asked to assist and represent an employee at a disciplinary hearing, which could ultimately result in serious consequences or dismissal. It is my opinion that the employer may as well not even include this clause as an option in the disciplinary code, or in the notice to attend the disciplinary hearing, as it is largely a waste of time, as it serves no real purpose besides providing moral support to the employee. Where an employer is represented at arbitration proceedings by a Human Resource officer, who has experience in handling disputes, or an Industrial Relations specialist, and the employee is not represented at all, the playing fields cannot be level and the comparative ability of the employee to deal with the matter is highly questionable with no background in labour law. In this situation, I believe the employee should apply to the commissioner to be permitted legal representation based on the fact that it would be unreasonable to expect the employee party to deal with the dispute on his own when the other party has experience in arbitration proceedings.

Argument in favour of legal representation is well summarized by Geoffrey Flick in his response to criticism concerning lawyers attending administrative proceedings and making the event legalistic.[507]

> "The advantages of having a representative trained in law are too frequently ignored and consequently deserve recollection. Counsel can, inter alia, act as a deterrent to the summary dismissal of a party's case; bridge possible hostilities between the party and tribunal members; clear up vagaries and inconsistencies in testimony; and can focus the attention of tribunal members on elements of a party's claim…a lawyer has a rather unique ability to interpret relevant statutory provisions and to ensure consistency in administrative decision-making by marshalling whatever prior decisions of the tribunal or the courts serve as a guide to the exercise of administrative discretions. The ability of a lawyer to delineate

[507] Flick *Natural Justice, Principals and Practical Application* (1984) 2nd ed 180.

> what may otherwise be a complex legal and factual issue and his role in acting as a check upon the administrative process should never be underestimated."[508]

Buchner, in his dissertation, raises some valid points in favour of legal representation.[509] He states that a professional legal representative is best equipped to argue a party's case on purely legal issues as the lack of skill on the part of representatives other than legal representatives may cause them to be exposed in such proceedings.[510] The dire consequences of the affected party, if found guilty, need to be properly considered, and should be afforded the right to legal representation at the choice of the affected party.[511] Inadequate defenses are often used by lay persons when trying to fend for themselves, and the need for a proper well constructed defense presented by a qualified legal representative is imperitive.[512] Proper ventilation of the dispute would take place, with cross-examination and legal argument by a legal representative who is professionally trained to present the party's case thoroughly.[513] Preserving job security is the intention of the LRA and protection against unfair termination of the employment relationship is critical, as dismissals relating to misconduct hold serious social, financial and personal repercussions for employees and employers alike, and its consequences suggest that legal assistance would be desireable.[514]

Employers may on the other hand also seek legal representation to secure a fair dismissal of an employee.[515] The professional service that legal practitioners provide extends wider than their clients and involves ethical obligations towards the commissioner presiding over the matter and the other party.[516] According to Grogan[517] in the majority of cases before courts, lawyers assist with speedy and effective resolution of disputes by helping to narrow issues that are common cause

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508 Collier "The Right to Legal Representation under the LRA" 2003 24 *ILJ* 753 770.

509 Buchner "The Constitutional Right to Legal Representation during Disciplinary Hearings and Proceedings before the CCMA" (LLM Treatise, University of Port Elizabeth) 2003 39.

510 *Ibid.*

511 *Ibid.*

512 *Ibid*.

513 Grogan "No Obfuscation, please Legal Representation in the CCMA" 2013 29 *Employment Law* 14 17.

514 (2003) 24 *ILJ* 1712 (LC) par [E].

515 (2003) 24 *ILJ* 1726 (LC) par [A].

516 *Ibid.*

517 Grogan 2013 29 *Employment Law* 16.

and issues that are in dispute.[518] In an article by Buirski[519] he makes mention that there are very strong practical grounds that indicate that legal representation must be permitted at conciliation proceedings and especially at arbitration under the auspices of the Commission.[520] It makes no sense to exclude legal representation, but then allow representation by a fellow employee, or by an in-house human resource officer, or trade union representative who may have legal qualifications.[521]

Baxter comments that a lawyer can abuse the process but the remedy ultimately falls into the hands of the chairperson, arbitrator or commissioner, and they must make rulings to curb against undesirable behaviour and technical issues that may be out of order.[522] When represented by a lawyer the party's case is normally well organized and professionally presented, although this is never a guarantee.[523]

According to Grogan, the CCMA was in effect trying to have its cake and eat it by excluding lawyers from representing parties at arbitrations concerning dismissals for misconduct and incapacity, as the question arises, how can one acknowledge, in one breath, that parties are entitled to a fair hearing and, then in the next, refuse the party the right to appoint a legal representative who is experienced to present their case.[524] Legal representatives are permitted to appear in most categories of labour disputes, so it does not make sense to limit it and label it as "time wasting" "complicating matters" and "causing delays", as the LRA's most fundamental employment right is not to be unfairly dismissed.[525] It clearly states that the most significant objective of the LRA is to preserve jobs, and parties should be afforded the opportunity at their own cost, the choice to decide, as their future, career, and destiny hangs on a thread.[526] Grogan sums it up that about 80% of disputes that appear before the CCMA for arbitration involve misconduct dismissals, which

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518 *Ibid.*

519 Buirski "The Draft Labour Relations Bill 1995 – The Case for Legal Representation at its proposed Fora for Dispute Resolution" 1995 16 *ILJ* 529.

520 Buirski 1995 *ILJ* 543.

521 Buchner "The Constitutional Right to Legal Representation during Disciplinary Hearings and Proceedings before the CCMA" 60.

522 *Ibid.*

523 Buirski 1995 *ILJ* 543.

524 Grogan 2013 *Employment Law* 16.

525 S 185(a) of the LRA.

526 Grogan 2013 *Employment Law* 17.

therefore requires them to be dealt with quickly, but expedience can never be used as a basis for turning disputes concerning parties' livelihoods and careers into a sausage machine, because in fact there is no evidence which reveals that by permitting lawyers the right to appear in such disputes, that it causes any more delay than what the system allows for.[527]

7.2 DISADVANTAGES AND ARGUMENTS AGAINST LEGAL REPRESENTATION

An assumption exists that the presence of legal representatives complicates matters, creates technicalities, and generally hinders the swift and effective resolution of disputes.[528] Legal representation is limited in cases involving dismissals pertaining to misconduct and incapacity due to the fact that these cases make up by far the majority which get referred to the CCMA, and that is the reasoning behind setting them apart for special treatment.[529] Disputes relating to dismissals for misconduct or incapacity are regarded as "less serious", in the sense of being less complex, but regulated by the Code of Good Practice, and should be adjudicated quickly and with the minimum of legal formalities.[530] The Explanatory Memorandum to the draft Labour Relations Bill 1995, addressed the conditional exclusion of lawyers that predicated on a number of assumptions, which many, especially lawyers regarded as highly questionable.[531] Legal representation is not allowed at arbitration unless consent is given by all parties to the proceedings:

> "Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach they adopt. Allowing legal representation places individual employee's and small business at a disadvantage because of the cost."[532]

Arbitration proceedings conducted under the LRA are not court proceedings, the conducting of a CCMA arbitration by a commissioner is classified as performing an administrative function which is important because the law states that there is no

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527 *Ibid.*

528 Grogan 2013 *Employment Law* 14.

529 Grogan 2013 *Employment Law* 15.

530 *Ibid.*

531 Grogan 2013 *Employment Law* 14.

532 Explanatory Memorandum to the Draft Labour Relations Bill 1995 16 *ILJ* 278 336.

general right to legal representation in arenas in which disputes are resolved, with the exception of in courts.[533] It was explained by the CCMA Director that the system in which the Commission functions is by far and large a product of negotiation, concerning disputes around employees that have breached company rules and procedures or that are incapacitated to the degree that would justify their dismissals as "less serious".[534] Legal representatives in attendance would obfuscate and cause unnecessary delays in what should generally be regarded as simple matters, but the solution is not found in excluding lawyers altogether but by ensuring that persons who preside over these matters are equipped to recognise and deal appropriately with such conduct and use their discretion.[535] The argument that dismissals have "serious" consequences for employees is not the issue, the reason for the limitation of legal representation is not the gravity of the consequences of the dismissal on the employee.[536] The right afforded to CCMA users to fair and rational administrative action does not give rise to a right to be legally represented.[537]

In an article written by Paul Benjamin[538] he refers as follows:

> "The right of a party to a dispute to have his or her case argued by a skilled professional is broadly accepted. But in situations of unequal access to legal representation, this may itself be a cause of injustice. In addition, participation by lawyers may lead to dispute settlement procedures becoming more formal, time-consuming and expensive. There are strong indications that a high degree of legal representation in such a tribunal would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in the favour of employers."[539]

According to Collier[540] the main problem against legal representation is that trade unions will be disadvantaged if employers are granted legal representation at the CCMA, as it must be anticipated that their members will also insist on legal representation which unions cannot afford.[541]

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533 *Ibid.*

534 Grogan 2013 *Employment Law* 16.

535 *Ibid*.

536 Grogan "Case Roundup" 2013 29, Pt 6 *Employment Law* 18

537 Grogan 2013 *Employment Law* 18.

538 Benjamin "Legal Representation in Labour Courts" 1994 15 *ILJ* 250 260.

539 Benjamin 1994 *ILJ* 260.

540 Collier 2003 *ILJ* 763.

541 Collier 2003 *ILJ* 763.

Kruger in his dissertation, suggests that legal representation at disciplinary hearings should be avoided, and instead the use of pre-dismissal arbitration as set out in section 188A of the LRA should be utilised more frequently.[542] At the employers request and with the consent of the employee, a pre-dismissal arbitration hearing would then be facilitated by a commissioner, appointed by the CCMA or an accredited bargaining council, to make a final and binding decision, which may only be taken on review to the Labour Court if there are reasonable grounds.[543] Legal representation is subject to agreement between the parties, and the employer will be liable to pay a prescribed fee to cover the pre-dismissal arbitration costs.[544]

542 Kruger "Legal Representation at Disciplinary Hearings and before the CCMA" (LLM dissertation, University of Pretoria) 2013 61.

543 *Ibid.*

544 Jordaan, Kantor and Bosch *Labour Arbitration* 87.

CHAPTER 8
CONCLUSION AND FINDINGS

Some interesting statistics revealed that in approximately 40% of CCMA arbitration procedings, one or both parties used some form of representation.[545] In only 15% of dismissal arbitrations, employers and employees were legally represented.[546] Union officials represented employees in 34% of dismissal arbitrations and employers were represented by human resource officers in 35% of cases and by an official of an employer organization in 20% of disputes.[547] The above statistics indicate the low percentage of dismissal arbitration cases where legal representation was present. The question that arises is: whether employees are actually aware that in dismissal matters where the reason relates to conduct or incapacity there is no absolute right to legal representation but a party may apply to be legally represented based on relevant factors, including the complexity of the matter and the comparative ability of the parties to deal with the dispute. The commissioner must then exercise a discretion. An inquisitorial approach could be adopted by the commissioner when conducting an arbitration when the parties are unrepresented or not experienced, which entails assisting the parties, but this comes with an element of risk as a commissioner must still remain impartial and unbiased towards both parties. It begs the question as to what lengths can a commissioner assist a party who is struggling to keep his head above water in the proceedings before the point is reached where the commissioner is overstepping the boundaries of this impartiality?

The CCMA makes the distinction clear between legal representation, which could jeopardise the procedure in that it may become drawn out and formal, and other representatives meaning union officials, human resource personnel and officials from employer organisations who have an understanding of their particular industry, and have experience in negotiating and putting forward alternatives.[548] This raises a contentious point when turning to the definition in section 213 of the LRA, which

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545 Benjamin "Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation and Arbitration" 2013 34 *ILJ* 2441 2466.

546 Benjamin 2013 *ILJ* 2460.

547 *Ibid.*

548 *Ibid*.

defines a legal practitioner as meaning any person admitted to practise as an advocate or an attorney in the Republic.[549] It is important to consider that in many organisations and businesses, including government departments, there are legal practitioners with law degrees on their payrolls, and these legal practitioners may represent these organisations at disciplinary hearings and at CCMA proceedings.[550] These individuals are not admitted, practising advocates or attorneys and therefore are exempted from the LRA's definition of a legal practitioner, and may represent the employer at these proceedings.[551] It raises the question of equal protection by the law and administrative action that is reasonable and fair.[552] Can it be fair or reasonable for an employee who has no legal background to present and argue his case and put forward a defense whilst at the other end of the table an experienced in-house legal practitioner is sitting, where the ultimate sanction may result in a dismissal?[553] What sense does it make to exclude legal representation but then permit representation by a union representative or fellow employee where the above mentioned may have legal qualifications, but fall outside the ambit of section 213 of the LRA.[554] In this situation, where the employee party has no experience and feels out of his depth, he should apply to the commissioner, based on factors such as the party's comparative ability to deal with the dispute, and if the commissioner holds the view that it would be unreasonable to expect a party to proceed without legal representation after considering the factors put forward, there should be no reason why the application should be refused.[555] In disciplinary hearings the chairperson has a discretion to allow legal representation, but whether this is actually properly considered is a topic for another day.[556] It is my opinion that the playing fields are still uneven and remain tilted in favour of the employer to some degree, as the employer on most occasions has a human resource person who can assist, but the chances of an employee with an LLB degree or qualification in labour law up against an employer with no legal background will be a rare occurance.

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549 Buchner "The Constitutional Right to Legal Representation during Disciplinary Hearings and Proceedings before the CCMA" 60.

550 *Ibid*.

551 *Ibid.*

552 *Ibid*.

553 *Ibid*.

554 *Ibid.*

555 Broodryk 2014 *Obiter* 404.

556 Kruger "Legal Representation at Disciplinary Hearings and before the CCMA" 60.

Kruger's proposition is that if a party is represented by a trade union official or an employer's organisation at the CCMA, then legal representation should be permissible for the other party, because what do lawyers do that these officials don't do?[557] The defense used for refusing legal representation at the CCMA is that lawyers turn the proceedings into formal, time consuming, legalistic trials, and this makes it expensive, due to the approach that they adopt, while often being accused of causing delays in proceedings.[558] This defense cannot stand as there is no evidence to prove that lawyers cause any more delay than what the system allows for, and ultimately commissioners are responsible for conducting the proceedings in a manner that they consider appropriate.[559]

I now turn to the issue of costs, and the argument used that lawyers make the process expensive. One would need to weigh up one's options carefully at this point and consider the alternatives, because if an employee gets dismissed his/her income will be taken away and the career destroyed, and on the other side of the coin, an employer who deviates from the Act and dismisses an employee unfairly may be liable to pay compensation, or may be ordered to reinstate the employee.[560] A cost factor on the one hand may be a small price to pay, but it may save one's job, career and livelihood on the other, because a lawyer will be able to present and argue a well constructed case, cross examine, and contribute to the efficient resolution of the dispute.

It is accepted that an automatic right to legal representation in these cases would be inconsistent with the aim of an informal, expeditious and inexpensive process for the resolution of these type of disputes. Therefore, a limitation to this right to legal representation exists in these cases, but a party may still apply to be legally represented at any stage of the proceedings. Surely it should be left to the parties to decide at what lengths they would go to save their jobs or to argue their respective cases, not to be dismissed unfairly?

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557 *Ibid.*

558 Kruger "Legal Representation at Disciplinary Hearings and before the CCMA" 61.

559 Grogan 2013 *Employment Law* 17.

560 Kruger "Legal Representation at Disciplinary Hearings and before the CCMA" 62.

> "The truth is that, in this respect, one cannot have one's cake and eat it. Either one has disputes properly ventilated, or one does not. One cannot sensibly say that some disputes need proper ventilation, while others don't."[561]

While the decision of the Supreme Court of Appeal is acknowledged and accepted it is my view that, this judgement did not close the door completely on legal representation but has left the door slightly open. This does not mean that parties are not entitled to legal representation in misconduct and incapacity disputes, nor does it mean that legal practitioners are themselves not entitled to appear at these proceedings.[562] It simply requires that, in order to be legally represented, an application must be made to the commissioner and the parties need to agree, or the commissioner would need to construe that it is unreasonable to expect a party to deal with the dispute without legal representation after taking into account the nature of the questions of law raised by the dispute, the complexity of the dispute, the public interest and the comparative ability of the parties or their representatives to deal with the dispute.[563]

According to the Supreme Court of Appeal judgement, it appears that the factors mentioned above would include the seriousness of the consequence(s) of the dismissal.[564] Where the misconduct or incapacity of the dispute is of such a nature that legal representation is justified in the circumstances, there should be no reason why in such circumstances a party to the dispute should be prejudiced by not allowing him or her to be legally represented based on the application submitted.[565]

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561 Grogan 2013 *Employment Law* 17.
562 Broodryk 2014 *Obiter* 405.
563 *Ibid.*
564 Broodryk 2014 *Obiter* 405.
565 *Ibid.*

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